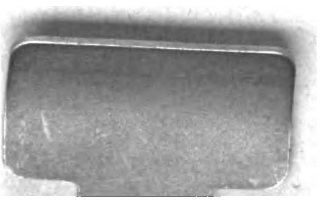

Ernst A Dreyschock
Oct 16. 1835

COMMENTARIES

ON

The Laws of England:

IN FOUR BOOKS;

WITH

AN ANALYSIS OF THE WORK.

BY

SIR WILLIAM BLACKSTONE, KNT.

ONE OF THE

JUSTICES OF THE COURT OF COMMON PLEAS.

IN TWO VOLUMES.

FROM THE

EIGHTEENTH LONDON EDITION.

WITH A LIFE OF THE AUTHOR, AND NOTES:

BY

CHRISTIAN, CHITTY, LEE, HOVENDEN, AND RYLAND:

AND ALSO

REFERENCES TO AMERICAN CASES,

BY

A MEMBER

OF THE NEW-YORK BAR.

VOL. I.—BOOK I. & II.

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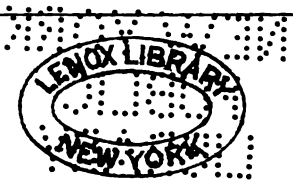

PREFACE

BY THE AMERICAN EDITOR.

THE COMMENTARIES OF BLACKSTONE continue to be the text book of the student and of the man of general reading, notwithstanding the great alterations in the law since the time of their author. The great principles of law which they unfold remain the same, and are explained in so simple and clear a style, that, however much the details of the law may be changed, they will always be read with interest. It is no small commendation of Blackstone, that many of the modern improvements adopted in England and in the United States were suggested by him: and that the arrangement which he used in treating the different subjects, has been followed in a great degree by the Revisers of the Statutes of New-York.

This edition shows the late alterations of the law in England, as furnished by the notes of Lee, Hovenden, and Ryland, in the last London edition. Notes have also been added, briefly explaining the difference between the law of England and of New-York. Those not engaged in the practice of law find it difficult, while reading the Commentaries, to make this distinction: this difficulty, it is hoped, is now in some degree removed. It was deemed inconsistent with the original object of the work to introduce any other than brief notes. The American notes are therefore generally short, leaving those who wish an extended knowledge of the subject, to the statutes and authorities. But as the English statutes or authorities may not be accessible to the general reader, the English notes are generally retained without any abbreviation. This is done, because it is considered that the readers of Blackstone generally wish to know, not only what the law of England was, but also what it is.

New-York, April 8, 1832.

PREFACE.

THE following sheets contain the substance of a course of lectures on the Laws of England, which were read by the author in the university of OXFORD. His original plan took its rise in the year 1753; and, notwithstanding the novelty of such an attempt in this age and country, and the prejudices usually conceived against any innovations in the established mode of education, he had the satisfaction to find, and he acknowledges it with a mixture of pride and gratitude, that his endeavours were encouraged and patronised by those, both in the university and out of it, whose good opinion and esteem he was principally desirous to obtain.

The death of Mr. VINER in 1756, and his ample benefaction to the university, for promoting the study of the law, produced about two years afterwards a regular and public establishment of what the author had privately undertaken. The knowledge of our laws and constitution was adopted as a liberal science by general academical authority; competent endowments were decreed for the support of a lecturer, and the perpetual encouragement of students; and the compiler of the ensuing Commentaries had the honour to be elected the first Vinerian professor.

In this situation he was led, both by duty and inclination, to investigate the elements of the law, and the grounds of our civil polity, with greater assiduity and attention than many have thought it necessary to do. And yet all, who of late years have attended the public administration of justice, must be sensible that a masterly acquaintance with the general spirit of laws and principles of universal jurisprudence, combined with an accurate knowledge of our own municipal constitutions, their original, reason, and history, hath given a beauty and energy to many modern judicial decisions, with which our ancestors were wholly unacquainted. If, in the pursuit of these inquiries, the author hath been able to rectify any errors which either himself or others may have heretofore imbibed, his pains will be sufficiently answered: and if in some points he is still mistaken, the candid and judicious reader will make due allowances for the difficulties of a search so new, so extensive, and so laborious.

Nov. 2, 1765.

POSTSCRIPT.

NOTWITHSTANDING the diffidence expressed in the foregoing Preface, no sooner was the work completed, but many of its positions were vehemently attacked by zealots of all (even opposite) denominations, religious as well as civil; by some with a greater, by others with a less degree of acrimony. To such of these animadverters as have fallen within the author's notice, (for he doubts not but some have escaped it), he owes at least this obligation: that they have occasioned him from time to time to revise his work, in respect to the particulars objected to; to retract or expunge from it what appeared to be really erroneous; to amend or supply it when inaccurate or defective; to illustrate and explain it when obscure. But, where he thought the objections ill-founded, he hath left and shall leave the book to defend itself: being fully of opinion, that, if his principles be false and his doctrines unwarrantable, no apology from himself can make them right; if founded in truth and rectitude, no censure from others can make them wrong.

LIFE OF THE AUTHOR.

SIR WILLIAM BLACKSTONE was born on the 10th of July, 1723, in Cheapside, in the parish of St. Michael le Querne, at the house of his father, Mr. Charles Blackstone, a silk-man, and citizen and bowyer of London; who was the third son of Mr. John Blackstone, an eminent apothecary in Newgate-street, descended from a family of that name in the west of England, at or near Salisbury, and who died some months previous to the birth of William, the author of these justly esteemed Commentaries. His mother was Mary, eldest daughter of Lovelace Bigg, Esquire, of Chilton Foliot, in Wiltshire; she died before the learned commentator attained his twelfth year.

Sir William had three brothers, Charles, John, and Henry. John died an infant, Charles and Henry were educated at Winchester, under the care of their uncle Dr. Bigg, who was warden of that society, and were afterwards both fellows of New College, Oxford; Charles became a fellow of Winchester, and vicar of Wimering in Hampshire: Henry, after having practised physic some years, went into holy orders, and died in 1778, vicar of Adderbury in Oxfordshire, a living in the gift of New College.

The being early in life deprived of both parents proved, in its consequences, the reverse of misfortune to our author: to that circumstance probably he was indebted for his future advancement, and that high literary character and reputation in his profession, which he has left behind him; to that circumstance the public too is probably indebted for the benefit it has received, and will receive, as long as the law of England remains, from the labours of his pen. For, had his father lived, it is most likely, that the third son of a London tradesman, not of great affluence, would have been bred in the same line of life, and those parts, which have so much signalized the possessor of them, would have been lost in a warehouse or behind a counter.

But, even from his birth, the care both of his education and fortune was kindly undertaken by his maternal uncle, Mr. Thomas Bigg, an eminent surgeon in London, and afterwards, on the death of his elder brothers, owner of the Chilton estate, which is still enjoyed by that family.

The affectionate, it may be said the parental, care this worthy man took of all his nephews, particularly in giving them liberal educations, supplied the great loss they had so early sustained, and compensated in a great degree for their want of more ample fortunes. And it was always remembered, and often mentioned by them all, with the sincerest gratitude.

In 1730, being about seven years old, William was put to school at the Charter-House; and in 1735 was, by the nomination of Sir Robert Walpole, on the recommendation of Charles Wither, of Hall, in Hampshire, Esquire, his cousin by the mother's side, admitted upon the foundation there.

In this excellent seminary he applied himself to every branch of youthful education, with the same assiduity which accompanied his studies through life. His talents and industry rendered him the favourite of his masters, who encouraged and assisted him with the utmost attention; at

the age of fifteen he was at the head of the school, and, although so young, was thought well qualified to be removed to the University; and he was accordingly entered a commoner at Pembroke College in Oxford, on the 30th of November, 1736, and was the next day matriculated.

At this time he was elected to one of the Charter-House exhibitions by the Governors of that foundation, to commence from the Michaelmas preceding, but was permitted to continue a scholar there till after the 12th of December, being the anniversary commemoration of the founder, to give him an opportunity of speaking the customary oration, which he had prepared, and which did him much credit.

About this time also he obtained Mr. Benson's gold prize medal of Milton, for verses on that poet.

Thus, before he quitted school, did his genius begin to appear, and receive public marks of approbation and reward. And so well pleased was the Society of Pembroke College with their young pupil, that, in the February following, they unanimously elected him to one of Lady Holford's exhibitions for Charter-House scholars in that house.

Here he prosecuted his studies with unremitting ardour; and although the classics, and particularly the Greek and Roman poets, were his favourites, they did not entirely engross his attention: logic, mathematics, and the other sciences were not neglected; from the first of these (studied rationally, abstracted from the jargon of the schools,) he laid the foundation of that close method of reasoning he was so remarkable for: and from the mathematics he not only reaped the benefit of using his mind to a close investigation of every subject that occurred to him, till he arrived at the degree of demonstration the nature of it would admit; but he converted that dry study, as it is usually thought, into an amusement, by pursuing the branch of it which relates to architecture.

This science he was particularly fond of, and made himself so far master of it, that, at the early age of twenty, he compiled a treatise, entitled *Elements of Architecture*, intended for his own use only, and not for publication, but esteemed by those judges who have perused it, in no respect unworthy his maturer judgment and more exercised pen.

Having determined on his future plan of life, and made choice of the law for his profession, he was entered in the Middle Temple on the 20th of November, 1741. He now found it necessary to quit the more amusing pursuits of his youth, for the severer studies to which he had dedicated himself, and betook himself seriously to reading law.

How disagreeable a change this must have been to a young man of brilliant parts, and a fine imagination, glowing with all the classical and poetical beauties he had stored his mind with, is easier conceived than expressed: he alone, who felt, could describe his sensations on that occasion; which he did in a copy of verses, since published by Dodsley, in the 4th volume of his Miscellanies, intituled, *The Lawyer's Farewell to his Muse;* in which the struggle of his mind is expressed so strongly, so naturally, with such elegance of sense and language, and harmony of versification, as must convince every reader, that his passion for the Muses was too deeply rooted to be laid aside without much reluctance, and that, if he had pursued that flowery path, he would not perhaps have proved inferior to the best of our English poets.

Several little fugitive pieces, besides this, have at times been communicated by him to his friends, and he has left (but not with a view of publi-

cation) a small collection of juvenile pieces, both originals and translations, which do him no discredit, inscribed with this line from Horace,

"Nec lusisse pudet, sed non incidere ludum."

Some notes on Shakespeare, which, just before his death, he communicated to Mr. Steevens, and which that gentleman inserted in his last edition of that author, shew how well he understood the meaning, as well as the beauties of his favourite among the English poets.*

In November, 1743, he was elected into the Society of All-Souls College; and, in the November following, he spoke the Anniversary Speech in commemoration of Archbishop Chichele, the founder, and the other benefactors to that house of learning, and was admitted actual fellow.

From this period he divided his time between the University and the Temple, where he took chambers, in order to attend the courts. In the former he pursued his academical studies, and on the 12th of June, 1745, commenced Bachelor of Civil Law; in the latter he applied himself closely to his profession, both in the Hall and in his private studies, and, on the 28th of November, 1746, was called to the Bar.

The first year of a counsel's attendance on the Courts afford little matter worthy to be inserted in a narrative of this kind; and Mr. Blackstone, not possessing either a graceful delivery or a flow of elocution (both which he much wanted) nor having any powerful friends or connexions to recommend him, made his way very slowly, attracting little notice and still less practice: he, however, availed himself of the leisure thus left him in storing his mind with that knowledge of the law, which he has since communicated to the world, and contracted an acquaintance with several of the most eminent men in that profession, who saw, through the then intervening cloud, that great genius, which afterwards broke forth with so much splendour.

At Oxford, his active mind had more room to display itself, and, being elected into the office of Bursar soon after he had taken his degree, and finding the muniments of the College in a confused irregular state, he undertook and completed a thorough search, and a new arrangement, from whence that Society reaped great advantage. He found also, in the execution of this office, the method of keeping accounts, in use among the older Colleges, though very exact, yet rather tedious and perplexed; he, therefore, drew up a dissertation on the subject, in which he entered minutely into the theory, and elucidated every intricacy that might occur. A copy of this tract is still preserved for the benefit of his successors in the Bursarship.

But it was not merely the estates, muniments, and accounts of the College, in which he was so usefully employed during his residence in that Society. The Codrington Library had for many years remained an un-

* The verses, published in the name of J. Clitherow (the editor of Sir W. B.'s Reports,) in the Oxford Collection, on the death of the Prince of Wales, in 1751, and which were justly esteemed one of the best compositions in that collection, were written by Mr. Blackstone, who at that time exacted a promise of secrecy; which promise Mr. Clitherow considering himself absolved from by the death of the learned judge, felt a sensible satisfaction in restoring to the right owner that applause he had so long received without any pretensions: and in making this acknowledgement, Mr. Clitherow also, in a note in his edition of Sir W. B.'s Reports, expressed a hope that it might atone for his having so long permitted it to have remained generally unknown, particularly as, on those occasions, it was by no means unusual, or reckoned a discredit to a young man, to have his name prefixed to the production of another person.

finished building. He hastened its completion, rectified several mistakes in the architecture, and formed a new arrangement of the books under their respective classes.

The late Duke of Wharton, who had engaged himself by bond to defray the expense of building the apartments between the Library and Common Room, being obliged soon after to leave his country, and dying in very distressed circumstances, the discharge of this obligation was long despaired of. It happened, however, in a course of years, that his Grace's executors were enabled to pay his debts, when, by the care and activity of Mr. Blackstone, the building was completed, the College thereby enabled to make its demand, and the whole benefaction recovered.

In May, 1749, as a small reward for his services, and to give him further opportunities of advancing the interests of the College, he was appointed Steward of their Manors. And, in the same year, on the resignation of his uncle, Seymour Richmond, Esq., he was elected Recorder of the borough of Wallingford, in Berkshire, and received the King's approbation on the 30th of May.

The 26th of April, 1750, he commenced Doctor of Civil Law, and thereby became a member of the Convocation, which enabled him to extend his views, beyond the narrow circle of his own society, to the general benefit of the University at large.

In this year he published *An Essay on Collateral Consanguinity*, relative to the claim made by those who, by a pedigree, proved themselves of kin to the founder of All-Souls College, of being elected, in preference to all others, into that society.

Those claims became now so numerous, that the college, with reason, complained of being frequently precluded from making choice of the most ingenious and deserving candidates.

In this treatise, being his first publication, he endeavoured to prove, that, as the kindred to the founder, a popish ecclesiastic, could not but be collateral, the length of time elapsed since his death must, according to the rules both of the civil and canon law, have extinguished consanguinity; or that the whole race of mankind were equally the founder's kinsmen.

This work, although it did not answer the end proposed, or convince the then Visitor, yet did the author great credit, and shewed he had read much, and well digested what he had read. And, most probably, the arguments contained in it had some weight with his Grace who succeeded to the see of Canterbury, and who, a few years afterwards, on application to him as Visitor of the College, formed a new regulation, which gave great satisfaction, limiting the number of founder's kin, whereby the inconvenience complained of was in a great measure removed, without annihilating a claim founded on the express words of the college statutes. And it must be observed, that, in forming this new regulation, his Grace made choice of Mr. Justice Blackstone, as his common-law assessor, together with that eminent civilian, Dr. Hay, well knowing how much he was master of the subject then under consideration.

After having attended the Courts in Westminster-hall for seven years, and finding the profits of his profession very inadequate to the expense, in the summer of the year 1753, he determined to retire to his fellowship and an academical life, still continuing the practice of his profession, as a provincial counsel. He had previously planned, what he now began to execute, his Lectures on the Laws of England; a work which has so justly signalized his name, and rewarded his labours.

In the ensuing Michaelmas Term he entered on his new province of reading these lectures; which, even at their commencement, such were the expectations formed from the acknowledged abilities of the lecturer, were attended by a very crowded class of young men of the first families, characters, and hopes.

In July, 1755, he was appointed one of the Delegates of the Clarendon Press. Upon his entering on the duties of this office, he discovered many abuses, which required correction; much mismanagement, which demanded new and important regulations. In order to obtain a thorough insight into the nature of both, he made himself master of the mechanical part of printing; and to promote and complete a reform, he printed a letter on the subject, addressed to Dr. Randolph, at that time Vice-Chancellor.

This and his other endeavours produced the desired effect, and he had the pleasure of seeing, within the course of a year, the reform he had proposed carried into execution, much to the honour, as well as the emolument of the University, and the satisfaction of all its friends. While engaged in these pursuits, he drew up a small tract relative to the management of the University press. This he left for the use of his successors in that office: and it was held in high esteem, and regarded by them as the ground-work, not only of the improvements then made, but of those also which were in contemplation.

About a year before this he published *An Analysis of the Laws of England*, as a guide to those gentlemen who attended his lectures, on their first introduction to that study; in which he introduced that intricate science to a clear method, intelligible to the youngest student.

In the year 1757, on the Death of Dr. Coxed, Warden of Winchester, he was elected by the surviving visitors of Michel's new foundation in Queen's College into that body. This new situation afforded fresh matter for his active genius to exercise itself in; and it was chiefly by his means that this donation, which had been for some years matter of contention only, became a very valuable acquisition to the college, as well as an ornament to the University, by completing that handsome pile of building towards the High-street, which, for many years, had been little better than a confused heap of ruins.

The engrafting a new set of fellows and scholars into an old established society could not be an easy task, and, in the present instance, was become more difficult, from the many unsuccessful attempts that had been made, all of which had only terminated in disputes between the members of the old, and the visitors of the new foundation; yet, under these circumstances, Dr. Blackstone was not disheartened, but formed and pursued a plan, calculated to improve Mr. Michel's original donation, without departing from his intention; and had the pleasure to see it completed, entirely to the satisfaction of the members of the old foundation, and confirmed, together with a body of statutes he drew for the purpose, by act of Parliament, in the year 1769.

Being engaged as counsel in the great contest for knights of the shire for the county of Oxford, in 1764, he very accurately considered a question then much agitated, Whether copyholders of a certain nature had a right to vote in county elections.

He afterwards reduced his thoughts on that subject into a small treatise; and was prevailed upon by Sir Charles Mordaunt, and other members of Parliament, who had brought in a bill to decide that controverted point,

to publish it in March, 1758, under the title of *Considerations on Copyholders*. And the bill soon after, receiving the sanction of the Legislature, passed into a law.

Mr. Viner having by his will left not only the copyright of his *Abridgment*, but other property to a considerable amount, to the University of Oxford, to found a professorship, fellowships, and scholarships of common law, Dr. Blackstone was, on the 20th of October, 1758, unanimously elected Vinerian Professor. In this situation he was (he informs us in his introduction to the Commentaries) led, both by duty and inclination, to investigate the elements of law, and the grounds of our civil polity, with greater assiduity and attention than many have thought it necessary to do; and, on the 25th of the same month, read his first introductory lecture; one of the most elegant and admired compositions which any age or country ever produced: this he published at the request of the Vice-Chancellor and Heads of Houses, and afterwards prefixed to the first volume of his Commentaries.

His lectures had now gained such universal applause, that he was requested by a noble personage, who superintended the education of our late Sovereign, then Prince of Wales, to read them to his Royal Highness: but, being at that time engaged to a numerous class of pupils in the University, he thought he could not, consistently with that engagement, comply with this request, and therefore declined it. But he transmitted copies of many of them for the perusal of his Royal Highness; who, far from being offended at an excuse grounded on so honourable a motive, was pleased to order a handsome gratuity to be presented to him.

It is more than probable that this early knowledge of the character and abilities of the Professor laid the foundation in his late Majesty's royal breast of that good opinion and esteem, which afterwards promoted him to the Bench; and, when he was no more, occasioned the extension of the Royal bounty, in the earliest hours of her heavy loss, (unthought of and unsolicited,) to his widow and his numerous family.

In the year 1759, he published two small pieces merely relative to the University: the one intituled *Reflections on the Opinions of Messrs. Pratt, Morton, and Wilbraham, relating to Lord Litchfield's Disqualification*, who was then a candidate for the Chancellorship; the other, *a Case for the Opinion of Counsel on the Right of the University to make new Statutes*.

Having now established a reputation by his Lectures, which he justly thought might entitle him to some particular notice at the Bar, in June, 1759, he bought chambers in the Temple, resigned the office of Assessor of the Vice-Chancellor's Court, which he had held for about six years, and, soon after, the Stewardship of All-Souls College: and, in Michaelmas Term, 1759, resumed his attendance at Westminster; still continuing to pass some part of the year at Oxford, and to read his lectures there, at such times as did not interfere with the London Law Terms. The year before this he declined the honour of the Coif, which he was pressed to accept of by Lord Chief Justice Willes, and Mr. Justice (afterwards Earl) Bathurst.

In November, 1759, he published a new edition of the Great Charter and Charter of the Forest; which added much to his former reputation, not only as a great lawyer, but as an accurate antiquarian and an able historian. It must also be added, that the external beauties in the printing types, &c., reflected no small honour on him, as the principal reformer of

the Clarendon Press, from whence no work had ever before issued equal, in those particulars, to this.

This publication drew him into a short controversy with the late Dr. Lyttelton, then Dean of Exeter, and afterwards Bishop of Carlisle.—The Dean, to assist Mr. Blackstone in his publication, had favoured him with the collation of a very curious ancient Roll, containing both the Great Charter and that of the Forest, of the 9th of Henry the 3d, which he and many of his friends judged to be an original. The Editor of the Charters, however, thought otherwise, and excused himself (in a note in his Introduction) for having made no use of its various readings, "as the plan of "his edition was confined to Charters which had passed the Great Seal, "or else to authentic entries and enrolments of record, under neither of "which classes the Roll in question could be ranked."

The Dean upon this, concerned for the credit of his Roll, presented to the Antiquarian Society a vindication of its authenticity, dated June the 8th, 1761; and Mr. Blackstone delivered in an answer to the same learned body, dated May the 28th, 1762, alleging as an excuse for the trouble he gave them, "that he should think himself wanting in that respect which "he owed to the Society and Dr. Lyttelton, if he did not either own and "correct his mistake, in the octavo edition then preparing for the press, or "submit to the Society's judgment the reasons at large, upon which his "suspicions were founded." These reasons, we may suppose, were convincing, for here the dispute ended.*

About the same time, he also published a small treatise on *The Law of Descents in Fee Simple.*

A dissolution of Parliament having taken place, he was, in March, 1761, returned burgess for Hindon, in Wiltshire; and, on the 6th of May following, had a patent of precedence granted him to rank as King's Counsel, having a few months before declined the office of Chief Justice of the Court of Common Pleas, in Ireland.

Finding himself not deceived in his expectations in respect to an increase of business in his profession, he now determined to settle in life, and, on the 5th of May, 1761, he married Sarah, the eldest surviving daughter of the late James Clitherow, of Boston House, in the county of Middlesex, Esquire; with whom he passed near nineteen years, in the enjoyment of the purest domestic and conjugal felicity, (for which no man was better calculated,) and which, he used often to declare, was the happiest part of his life. By her he had nine children, the eldest and youngest of whom died infants; seven survived him, viz. Henry, James, William, Charles, Sarah, Mary, and Philippa; the eldest was not much above the age of sixteen at his death.

His marriage having vacated his fellowship at All-Souls, he was, on the 28th of July, 1761, appointed by the Earl of Westmorland, at that time Chancellor of Oxford, Principal of New Inn Hall. This was an

* It may be here mentioned, that, as an Antiquarian, and a member of this Society, into which he was admitted February the 5th, 1761, he wrote "A Letter to the Honourable Daines "Barrington, describing an antique seal, with "some observations on its original, and the "two successive Controversies which the dis-"use of it afterwards occasioned."

This Seal, having the royal arms of England on it, was one of those which all persons having the exercise of ecclesiastical jurisdiction, were obliged by the statute of the 1 Edw. VI. ch. 2, to make use of. This letter is printed in the 3rd volume of the Archæologia; but his discussion of the merits of the Lyttelton Roll, though containing much good antiquarian criticism, has not yet been made public.

agreeable residence during the time his lectures required him to be in Oxford, and was attended with this additional pleasing circumstance, that it gave him rank as the head of a house in the University, and enabled him, by that means, to continue to promote whatever occurred to him, that might be useful and beneficial to that learned body.

An attempt being made about this time to restrain the power given him, as Professor, by the Vinerian statutes, to nominate a deputy to read the solemn lectures, he published a state of the case, for the perusal of the Members of Convocation, upn which it was dropped.

In the following year, 1762, he collected and republished several of his pieces under the title of *Law Tracts*, in two volumes, octavo.

In 1763, on the establishment of the Queen's family, he was appointed Solicitor-General to her Majesty; and was chosen about the same time a Bencher in the Middle Temple.

Many imperfect and incorrect copies of his lectures having by this time got abroad, and a pirated edition of them being either published, or preparing for publication in Ireland, he found it necessary to print a correct edition himself; and accordingly, in November, 1765, the first volume appeared, under the title of *Commentaries on the Laws of England*, and in the course of the four succeeding years the other three volumes; which completed a Work, that will transmit his name to posterity among the first class of English authors, and will be universally read and admired, as long as the laws, the constitution, and the language of this country remain.

In the year 1766, he resigned the Vinerian Professorship, and the Principality of New Inn Hall; finding he could not discharge the personal duties of the former, consistently with his professional attendance in London, or the delicacy of his feelings as an honest man.

Thus was he detached from Oxford, to the inexpressible loss of that University, and the great regret of all those who wished well to the establishment of the study of the law therein. When he first turned his views towards the Vinerian Professorship, he had formed a design of settling in Oxford for life: he had flattered himself, that, by annexing the office of Professor to the Principality of one of the Halls (and perhaps converting it into a college), and placing Mr. Viner's fellows and scholars under their Professor, a society might be established for students of the common law, similar to that of Trinity-Hall in Cambridge, for civilians.

Mr. Viner's will very much favoured this plan. He leaves to the University "all his personal estate, books, &c., for the constituting, *esta-* "*blishing*, and endowing one or more Fellowship or Fellowships, and Scho- "larship or Scholarships, *in any College or Hall* in the said University, as "to the Convocation shall be thought most proper for Students of the "Common Law." But, notwithstanding this plain direction to establish them in *some* College or Hall, the clause from the Delegates which ratified this designation, had the fate to be rejected by a negative in convocation.

By this unexpected, and, as was assumed by his friends, unmerited rejection, Mr. Blackstone's prospects in Oxford had no longer the same allurement to make him think of a lasting settlement there. His views of an established society for the study of the common law were at an end, and no room left him for exerting, in this instance, that ardour for improvement which constituted a distinguishing part of his character.

In the new Parliament, chosen in 1768, he was returned burgess for Westbury in Wiltshire.

In the course of this Parliament, the question, "whether a member expelled was or was not eligible in the same Parliament," was frequently agitated in the House with much warmth, and what fell from him in a debate being deemed by some persons contradictory to what he had advanced on the same subject in his Commentaries, he was attacked with much asperity in a pamphlet supposed to be written by a baronet, a member of that House*. To this charge he gave an early reply in print†.

In the same year, Dr. Priestly animadverted on some positions in the same work, relative to offences against the doctrine of the Established Church, to which he published an answer.

The Compiler of this memoir, desirous of avoiding all controversy, contents himself with the bare mentioning these two publications, without giving any opinion concerning their respective merits. As the works of the author whose life he is writing, it is his duty not to omit the mention of them: but how far the charges of his antagonists were founded in reason, and supported by argument; or whether he by his answers sufficiently exculpated himself from those charges, must be left to the determination of those who have been, or may become readers of them. The Compiler's only intent is to write a faithful narrative, not a professed panegyric.

Mr. Blackstone's reputation as a great and able lawyer was now so thoroughly established, that, had he been possessed of a constitution equal to the fatigues attending the most extensive business of the profession, he might probably have obtained its most lucrative emoluments and highest offices. The offer of the Solicitor-Generalship, on the resignation of Mr. Dunning in January, 1770, opened the most flattering prospects to his view. But the attendance on its complicated duties at the Bar, and in the House of Commons, induced him to refuse it.

But though he declined this path, which so certainly, with abilities like Mr. Blackstone's, leads to the highest dignities in the law, yet he readily accepted the office of Judge of the Common Pleas, when offered to him on the resignation of Mr. Justice Clive, and kissed his Majesty's hand on that appointment, February 9th, 1770; and was called to the degree of a Serjeant at Law on the 12th of the same month, being the last day of Hilary Term, 10 Geo. 3, and chose for a motto on the rings distributed on that occasion, "*Secundis debiisq. rectus.*" Previous, however, to the passing his patent, Mr. Justice Yates expressed an earnest wish to retire from the King's Bench into the Court of Common Pleas. To this wish Sir W. Blackstone, from motives of personal esteem, consented; and, on the 16th February, kissed his Majesty's hand on being appointed a Judge of the Court of King's Bench, and also received the honour of knighthood; and was on the evening of the same day sworn into office before the Lords Commissioners Smythe and Aston, at the house of the former, in Bloomsbury Square. But, upon the death of Mr. Justice Yates, which happened on the 7th of June following, Sir William was appointed to his original seat in the Court of Common Pleas, and on Friday the 22nd kissed his Majesty's hand on the appointment. On the 25th he executed a resignation of his office of Judge of the King's Bench; his patent was sealed, and he was sworn in before the Lords Commissioners Smythe, Bathurst, and

* Sir William Meredith.

† *A Letter to the Author of The Question Stated: by another Member of Parliament.* Small 8vo. 1s. 1769. This pamphlet drew from Junius several letters addressed to the learned Commentator. See *Junius*, Vol. i. Letter 25, &c.

Aston, at the house of the former. He was succeeded in the King's Bench by Sir W. H. Ashhurst.

On his promotion to the Bench he resigned the Recordership of Wallingford.

As it has been before remarked, that this is not intended as a panegyric, but purely as a faithful, though unadorned, narrative, nothing is here said of his conduct as a Judge. The lawyer will, no doubt, duly appreciate his worth in that character whenever he has occasion to consult his Reports, the second volume of which is composed entirely of cases determined whilst he sat on the Bench.

He seemed now arrived at the point he always wished for, and might justly be said to enjoy *otium cum dignitate.* Freed from the attendance at the Bar, and what he had still a greater aversion to, in the Senate, "where," to use his own expression, "amid the rage of contending parties, a man of "moderation must expect to meet with no quarter from any side," although he diligently and conscientiously attended the duties of the high office he was placed in, yet the leisure afforded by the legal vacations he dedicated to the private duties of this life, which, as the father of a numerous family, he found himself called upon to exercise; or to literary retirement, and the society of his friends, at his villa called Priory Place, in Wallingford, which he purchased soon after his marriage, though he had for some years before occasionally resided at it.

His connection with this town, both from his office of Recorder, and his more or less frequent residence there from about the year 1750, led him to form and promote every plan which could contribute to its benefit or improvement. To his activity it stands indebted for two new turnpike roads through the town, the one opening a communication, by means of a new bridge over the Thames at Shillingford, between Oxford and Reading, the other to Wantage, through the vale of Berkshire*. What substantial advantage the town of Wallingford derived from hence will be best evidenced from the gradual increase of its malt trade between the years 1749 and 1779, extracted from the entries of the Excise-Office during that period, as contained in the note below†.

To his architectural talents, his liberal disposition, his judicious zeal, and his numerous friends, Wallingford likewise owes the rebuilding that handsome fabric, St. Peter's church.

These were his employments in retirement. In London his active mind was never idle, and when not occupied in the duties of his station, he was ever engaged in some scheme of public utility. The last of this kind in which he was concerned, was the act of Parliament for providing detached houses of hard labour for convicts, as a substitute for transportation.

Whether the plan did, or did not succeed to the extent of his wishes and expectations, it is yet an indisputable proof of the goodness of his heart, his humanity, and his desire of effecting reformation, by means more bene-

* He was ever a great promoter of the improvement of public roads. The new western road from Oxford over Botely Causeway was projected, and the plan of it chiefly conducted by him. He was the more earnest in this design, not merely as a work of general utility and ornament, but as a solid improvement to the estate of a nobleman, in settling whose affairs he had been most laboriously and beneficially employed.

† An average account of the number of net bushels of malt made in Wallingford, from Midsummer 1749 to Midsummer 1779, inclusive:

Average of 5 yrs. ending Mid.	1754	49,172
Do. . . . of do.	1759	58,676
Do. . . . of do.	1764	97,370
Do. . . . of do.	1769	101,086
Do. . . . of do.	1774	113,135
Do. . . . of do.	1779	107,254

ficial to the criminal and the community, than severity of punishment. All human schemes, like all mechanical inventions, generally in practice fall short of the theory; and although this may have failed, yet who can read the following quotation from one of his charges to a country grand jury relative to that act, without applauding the intention, and reverencing the public virtue of those who planned it:—

"In these houses," says he, "the convicts are to be separately confined "during the intervals of their labour, debarred from all incentives to de- "bauchery—instructed in religion and morality—and forced to work for "the benefit of the public. Imagination cannot figure to itself a species of "punishment in which terror, benevolence, and reformation are more hap- "pily blended together. What can be more dreadful to the riotous, the "libertine, the voluptuous, the idle delinquent, than solitude, confinement, "sobriety, and constant labour? Yet, what can be more truly beneficial? "Solitude will awaken reflection; confinement will banish temptation; so- "briety will restore vigour; and labour will beget a habit of honest indus- "try: while the aid of a religious instructor may implant new principles "in his heart; and, when the date of his punishment is expired, will con- "duce to both his temporal and eternal welfare. Such a prospect as this "is surely well worth the trouble of an experiment."

It ought not to be omitted, that the last augmentation of the Judges' salaries, calculated to make up the deficiencies occasioned by the heavy taxes they are subject to, and thereby render them more independent, was obtained in a great measure by his industry and attention.

In this useful and agreeable manner he passed the last ten years of his life, but not without many interruptions by illness. His constitution, hurt by the studious midnight labours of his younger days, and an unhappy aversion he always had to exercise, grew daily worse: not only the gout, with which he was frequently, though not very severely, visited from the year 1759, but a nervous disorder also, that frequently brought on a giddiness or vertigo, added to a corpulency of body, rendered him still more unactive than he used to be, and contributed to the breaking up of his constitution at an early period of life.

About Christmas, 1779, he was seized with a violent shortness of breath, which the Faculty apprehended was occasioned by a dropsical habit, and water on the chest. By the application of proper remedies, that effect of his disorder was soon removed, but the cause was not eradicated; for, on his coming up to town to attend Hilary Term, he was seized with a fresh attack, chiefly in his head, which brought on a drowsiness and stupor, and baffled all the art of medicine; the disorder increasing so rapidly, that he became at last for some days almost totally insensible, and expired on the 14th of February, 1780, in the 57th year of his age. To the public his loss was great; to his family and friends irreparable.

A few weeks before he died, he was applied to by the trustees for executing the will of the late Sir George Downing, Baronet, who had bequeathed a large estate for the endowing a new College in Cambridge, to give his assistance in forming a proper plan for this society, and framing a body of statutes for its regulation.

This was a task to which his abilities were peculiarly adapted; and it may be difficult to determine whether the application reflected more honour on the trustees or on him. He had mentioned to some of his most intimate friends his undertaking this business with great pleasure, and seem-

ed to promise himself much satisfaction in the amusement it would afford him: but alas! his disorder was then coming on with such hasty strides, that, before any thing could be done in it, death put an end to this, and all his labours, and left the University of Cambridge, as well as that of Oxford, to lament the loss of Mr. Justice Blackstone.

He was buried by his own direction in a vault he had built for his family in his parish church of St. Peter's in Wallingford. His neighbour and friend Dr. Barrington, Bishop of Llandaff, at his own particular request, performed the funeral service, as a public testimony of his personal regard, and highest esteem.

Having now given a faithful, and it is hoped not too prolix, detail of the life of this great man, from his cradle to his grave, it will be expected that it should be followed by the outlines, at least, of his character. To do justice to the merit of such a character, without incurring the imputation of flattery, is as difficult as to touch on its imperfections (and such the most perfect human characters have), with truth and delicacy.

In his public line of life he approved himself an able, upright, impartial Judge; perfectly acquainted with the laws of his country, and making them the invariable rule of his conduct. As a Senator, he was averse to party violence, and moderate in his sentiments. Not only in Parliament, but at all times, and on all occasions, he was a firm supporter of the true principles of our happy Constitution, in Church and State; on the real merits of which few men were so well qualified to decide. He was ever an active and judicious promoter of whatever he thought useful or advantageous to the public in general, or to any particular society or neighbourhood he was connected with; and having not only a sound judgment, but the clearest ideas, and the most analytical head that any man, perhaps, was ever blessed with, these qualifications, joined to an unremitting perseverance in pursuing whatever he thought right, enabled him to carry many beneficial plans into execution, which probably would have failed, if they had been attempted by other men.

He was a believer in the great truths of Christianity, from a thorough investigation of its evidence; attached to the Church of England from conviction of its excellence, his principles were those of its genuine members, enlarged and tolerant. His religion was pure and unaffected, and his attendance on its public duties regular, and those duties always performed with seriousness and devotion.

His professional abilities need not be dwelt upon. They will be universally acknowledged and admired, as long as his works shall be read, or, in other words, as long as the municipal laws of this country shall remain an object of study and practice. And though his works will only hold forth to future generations his knowledge of the law, and his talents as a writer, there was hardly any branch of literature he was unacquainted with. He ever employed much time in reading; and whatever he had read, and digested, he never forgot.

He was an excellent manager of his time, and though so much of it was spent in an application to books, and the employment of his pen, yet this was done without the parade or ostentation of being a hard student. It was observed of him, during his residence at college, that his studies never appeared to break in upon the common business of life, or the innocent amusements of society; for the latter of which few men were better calculated, being possessed of the happy faculty of making his own com-

pany agreeable and instructive, whilst he enjoyed without reserve the society of others.

Melancthon himself could not have been more rigid in observing the hour and minute of an appointment; during the years in which he read his lectures at Oxford, it could not be remembered, that he had ever kept his audience waiting for him, even for a few minutes. As he valued his own time, he was extremely careful not to be instrumental in squandering or trifling away that of others, who, he hoped, might have as much regard for theirs, as he had for his. Indeed, punctuality was in his opinion so much a virtue, that he could not bring himself to think perfectly well of any who were notoriously defective in it.

The virtues of his private character, less conspicuous in their nature, and consequently less generally known, endeared him to those he was more intimately connected with, and who saw him in the more retired scenes of life. He was, notwithstanding his contracted brow (owing in a great measure to his being very near-sighted,) a cheerful, agreeable, and facetious companion. He was a faithful friend; an affectionate husband and parent; and a charitable benefactor to the poor; possessed of generosity, without affectation, bounded by prudence and œconomy. The constant accurate knowledge he had of his income and expenses (the consequence of uncommon regularity in his accounts) enabled him to avoid the opposite extremes of meanness and profusion.

Being himself strict in the exercise of every public and private duty, he expected the same attention to both in others; and, when disappointed in his expectation, was apt to animadvert with some degree of severity, on those who, in his estimate of duty, seemed to deserve it. This rigid sense of obligation, added to a certain irritability of temper, derived from nature, and increased in his latter years by a strong nervous affection, together with his countenance and figure, conveyed an idea of sternness, which occasioned the heavy, but unmerited, imputation, among those who did not know him, of ill-nature; but he had a heart as benevolent and as feeling as man ever possessed.*

A natural reserve and diffidence, which accompanied him from his earliest youth, and which he could never shake off, appeared to a casual observer, though it was only appearance, like pride; especially after he became a Judge, when he thought it his duty to keep strictly up to forms, (which, as he was wont to observe, are now too much laid aside,) and not to lessen the respect due to the dignity and gravity of his office, by any outward levity of behaviour.

In short, it may be said of him, as the noble historian† said of Mr. Selden: "If he had some infirmities with other men, they were weighed down with wonderful and prodigious abilities and excellences in the other scale."

His Reports, in two volumes, reach down to the end of Michaelmas Term, 1779, the last in which he regularly attended his Court; his illness

* The author of The Biographical History of Sir Wm. Blackstone relates the following anecdote of the learned Commentator: "I was perfectly well acquainted with a certain bookseller, who told me, that upon hearing Mr. Blackstone had commenced Doctor of Civil Law, the next time he did him the honour of a visit, he (the bookseller) in the course of conversation, and out of pure respect, called the new made Civilian 'Doctor.' This *familiar* manner of accosting him (as he was pleased to term it) put him in such a passion, and had such an instantaneous and violent effect, and operated on him to so alarming a degree that the poor bookseller thought he should have been obliged to send for a doctor from St. Luke's.

† The Earl of Clarendon.

confining him at home the greatest part of Hilary Term, 1780. And as there is no doubt of their being genuine, neither can there be any of his intention that they should be published; for, by a clause in his will he directs, "That his Manuscript Reports of Cases determined in Westminster Hall, taken by himself, and contained in several large Note-books, be published after his decease.—And that the produce thereof be carried to, and considered as part of, his personal estate."

The reader must not expect in the first book a regular series of reports of the determinations of any one Court, or without breaks and interruptions in respect to time. They seem to be only such, as he had selected out of many from his rough notes, either as being of a more interesting nature, or containing some essential point of law or practice, or perhaps, such only (particularly for the first few years) as he had taken the most accurate notes of. Far the greatest part of those contained in the first book, are of the Court of King's Bench, but there are some of the Courts of Chancery, Exchequer, and Exchequer Chamber on appeal.

They begin with Michaelmas Term, 1746, in which he was called to the Bar; and there are some of every Term, except two, to Michaelmas, 1750, from whence there is an interval to Michaelmas, 1756, without one. The reason of this, most probably, is, that during that period he resided chiefly at Oxford, and had much of his time taken up in composing his Lectures, which he began to read in 1753, and in preparing for which he had been for some years before principally employed. This accounts for his want of leisure to revise such rough notes as he might have taken during that period, and to fit them for publication, while they were fresh in his memory. In the three following years he attended the Bar only in Michaelmas and Hilary Terms, on account of his Lectures; consequently there are, among his Reports, none of the Easter and Trinity Terms of those years; but from thence they continue in a regular series, except one Term, when he was indisposed, and the two Terms immediately preceding his being promoted to the Bench, when he attended the Court of Exchequer only. Which circumstances sufficiently evince that those Reports were all (except one) taken by himself. That one is of the arguments of Sir Thomas Clarke, Master of the Rolls; Lord Mansfield, Chief Justice of the King's Bench; and the Lord Keeper Henley; delivered in the Court of Chancery, in Hilary Term, 1759, on determining the interesting cause of *Burgess* v. *Wheate*, and which, as appears by a remark subjoined to it, was communicated to him by that great and able lawyer, Mr. Fazakerly; but was all transcribed in his own hand.

Mr. Malone, in an Advertisement to a Supplement to his edition of Shakespeare, says, "Sir W. Blackstone is one of the most eminent literary characters that the present age has produced;" and, in the preface to a *Fragment on Government*, we find the following:—"He it is, in short, who first of all institutional writers, has taught jurisprudence to speak the language of the scholar and the gentleman; put a polish upon that rugged science; cleansed her from the dust and cobwebs of the office; and if he has not enriched her with that precision that is drawn only from the sterling treasury of the sciences, has decked her out, however, to advantage from the toilette of classical erudition, enlivened her with metaphors and allusions, and sent her abroad in some measure to instruct, and in still greater to entertain, the most miscellaneous, and even the most fastidious societies."

CONTENTS

OF

THE ANALYSIS OF BOOK I.

Introduction.
Of the study of the law . . . . . Section I
The nature of laws in general II
The grounds and foundation of the laws of England III
The countries subject to those laws IV
The objects of the laws of England, viz.
I. THE RIGHTS OF PERSONS; which are
1. Natural persons; whose rights are
1. Absolute; viz. the enjoyment of
1. Personal security,
2. Personal liberty,
3. Private property . . . . . Chapter I
2. Relative; as they stand in relations
1. Public; as
1. Magistrates; who are
1. Supreme:
1. Legislative; viz. the parliament . . . II
2. Executive; viz. the king, wherein of his
1. Title III
2. Royal family IV
3. Councils V
4. Duties VI
5. Prerogative VII
6. Revenue:
1. Ordinary; viz.
1. Ecclesiastical,
2. Temporal,
2. Extraordinary VIII
2. Subordinate IX
2. People; who are
1. Aliens X
2. Natives; who are
1. Clergy XI
2. Laity; who are in a state
1. Civil XII
2. Military,
3. Maritime XIII
2. Private; as,
1. Master and servant XIV
2. Husband and wife XV
3. Parent and child XVI
4. Guardian and ward XVII
2. Bodies politic, or corporations XVIII
II. THE RIGHTS OF THINGS . . . . . Book II
III. PRIVATE WRONGS III
IV. PUBLIC WRONGS IV

ANALYSIS.

INTRODUCTION.

Page

OF THE STUDY, NATURE, AND EXTENT, OF THE LAWS OF ENGLAND.

SECTION I.

OF THE STUDY OF THE LAW 6 to 31

1. The general utility of the study of the English common law will principally appear from considering the peculiar situations of, I. Gentlemen of fortune. II. The nobility. III. Persons in liberal professions 6–17

2. The causes of its neglect were, chiefly, the revival of the study of the Roman laws in the twelfth century, their adoption by the clergy and universi-

Page

ties, and the illiberal jealousy that subsisted between the patrons and students of each 17–20
3. The establishment of the court of Common Pleas at Westminster preserved the common law, and promoted its study in that neighbourhood, exclusive of the two Universities 22
4. But the Universities are now the most eligible places for laying the foundations of this, as of every other liberal accomplishment; by tracing out the principles and grounds of the law, even to their original elements 31

SECTION II.

OF THE NATURE OF LAWS IN GENERAL 38 to 61
1. Law is a rule of action, prescribed by a superior power 38
2. Natural law is the rule of human action, prescribed by the Creator, and discoverable by the light of reason 39
3. The divine or revealed law (considered as a rule of action) is also the law of nature, imparted by God himself 41
4. The law of nations is that which regulates the conduct and mutual intercourse of independent states with each other, by reason and natural justice 43
5. Municipal or civil law is the rule of civil conduct prescribed by the supreme power in a state, commanding what is right, and prohibiting what is wrong 44
6. Society is formed for the protection of individuals; and states or government, for the preservation of society 47
7. In all states there is an absolute supreme power, to which the right of legislation belongs; and which, by the singular constitution of these kingdoms, is vested in the king, lords, and commons 48–51
8. The parts of a law are, I. The declaratory; which defines what is right and wrong. II. The directory; which consists in commanding the observation of right, or prohibiting the commission of wrong. III. The remedial; or method of recovering private rights, and redressing private wrongs. IV. The vindicatory sanction of punishments for public wrongs; wherein consists the most forcible obligation of human laws 53–4
9. To interpret a law, we must enquire after the will of the maker: which may be collected either from the words, the context, the subject-matter, the effects and consequence, or the spirit and reason of the law 59–61
10. From the latter method of interpretation arises equity, or the correction of that wherein the law (by reason of its universality) is deficient 61

SECTION III.

OF THE LAWS OF ENGLAND 63 to 91
1. The laws of England are of two kinds: the unwritten or common law, and the written or statute law 63
2. The unwritten law includes, I. General customs. II. Particular customs. III. Particular laws 67
3. General customs, or the common law properly so called, are founded upon immemorial universal usage, whereof judicial decisions are the evidence; which decisions are preserved in the public records, explained in the year-books and reports, and digested by writers of approved authority 68
4. Particular customs are those which are only in use within some peculiar districts; as gavel-kind, the customs of London, &c. 74
5. These—I. must be proved to exist; —II. must appear to be legal; that is, immemorial, continued, peaceable, reasonable, certain, compulsory, and consistent;—III. must, when allowed, receive a strict construction 76–79
6. Particular laws are such as, by special custom, are adopted and used only in certain peculiar courts, under the superintendence and control of the common and statute law; namely, the Roman civil and canon laws 79
7. The written or statute laws are the acts which are made by the king, lords, and commons, in parliament; to supply the defects, or amend what is amiss, of the unwritten law 85
8. In order to give a more specific relief than can sometimes be had, through the generality of both the unwritten and written law, in matters of private right, it is the office of equity to interpose 91

SECTION IV.

OF THE COUNTRIES SUBJECT TO THE LAWS OF ENGLAND 93 to 113
1. The laws of England are not received in their full extent in any other territories besides the kingdom of England, and the dominion of Wales; which have, in most respects, an entire communion of laws 93
2. Scotland, notwithstanding the union, retains its own municipal laws; though subject to regulation by the British parliament 95
3. Berwick is governed by its own local usages, derived from the Scots law, but bound by all acts of parliament 98
4. Ireland is a distinct subordinate kingdom, governed by the common law of England; but not bound by modern acts of the British parliament, unless particularly named 99
5. The isle of Man, the Norman isles (as Guernsey, &c.), and our plantations abroad, are governed by their own laws; but are bound by acts of the British parliament, if specially named therein 104–109
6. The territory of England is divided, ecclesiastically, into provinces, dio-

Page
ceses, archdeaconries, rural deanries, and parishes 110–113
7. The civil division is, first, into counties, of which some are palatine; then, sometimes, into rapes, lathes, or trithings; next into hundreds, or wapentakes; and lastly, into towns, villa, or tithings 113

BOOK I.—OF THE RIGHTS OF PERSONS.

CHAPTER I.

Page
OF THE ABSOLUTE RIGHTS OF INDIVIDUALS 122 to 144
1. The objects of the laws of England are, I. Rights. II. Wrongs 122
2. Rights are, the rights of persons, or the rights of things 122
3. The rights of persons are such as concern, and are annexed to, the persons of men: and, when the person to whom they are due is regarded, they are called (simply) rights; but, when we consider the person from whom they are due, they are then denominated duties 123
4. Persons are either natural, that is, such as they are formed by nature; or artificial, that is, created by human policy, as bodies politic or corporations 123
5. The rights of natural persons are, I. Absolute, or such as belong to individuals. II. Relative, or such as regard members of society 123
6. The absolute rights of individuals, regarded by the municipal laws (which pay no attention to duties of the absolute kind), compose what is called political or civil liberty 123
7. Political or civil liberty is the natural liberty of mankind, so far restrained by human laws as is necessary for the good of society 125
8. The absolute rights, or civil liberties, of Englishmen, as frequently declared in Parliament, are principally three: the right of personal security, of personal liberty, and of private property 129
9. The right of personal security consists in the legal enjoyment of life, limb, body, health, and reputation 129
10. The right of personal liberty consists in the free power of loco-motion, without illegal restraint or banishment 133
11. The right of private property consists in every man's free use and disposal of his own lawful acquisitions, without injury or illegal diminution 138
12. Besides these three primary rights, there are others which are secondary and subordinate; viz. (to preserve the former from unlawful attacks) I. The constitution and power of Parliaments: II. The limitation of the king's prerogative:—and (to vindicate them when actually violated): III. The regular administration of public justice: IV. The right of petitioning for redress of grievances: V. The right of having and using arms for self-defence 140–144

CHAPTER II.

Page
OF THE PARLIAMENT 146 to 189
1. The relations of persons are, I. Public. II. Private. The public relations are those of magistrates and people. Magistrates are supreme, or subordinate. And of supreme magistrates, in England, the Parliament is the supreme executive 146
2. Parliaments, in some shape, are of as high antiquity as the Saxon government in this island; and have subsisted, in their present form, at least five hundred years 147
3. The parliament is assembled by the king's writs, and its sitting must not be intermitted above three years 150
4. Its constituent parts are the king's majesty, the lords spiritual and temporal, and the commons represented by their members: each of which parts has a negative, or necessary, voice in making laws 153–160
5. With regard to the general law of parliament;—its power is absolute: each house is the judge of its own privileges: and all the members of either house are entitled to the privilege of speech, of person, of their domestics, and of their lands and goods 160–167
6. The peculiar privileges of the lords (besides their judicial capacity) are to hunt in the king's forests; to be attended by the sages of the law; to make proxies; to enter protests; and to regulate the election of the sixteen peers of North-Britain 167
7. The peculiar privileges of the commons are to frame taxes for the subject; and to determine the merits of their own elections, with regard to the qualifications of the electors and elected, and the proceedings at elections themselves 169–180
8. Bills are usually twice read in each house, committed, engrossed, and then read a third time; and when they have obtained the concurrence of both houses, and received the royal assent, they become acts of Parliament 182–185
9. The houses may adjourn themselves; but the king only can prorogue the Parliament 185–187
10. Parliaments are dissolved, I. At the king's will. II. By the demise of the crown; that is, within six months after. III. By length of time, or having sat for the space of seven years 187–189

CHAPTER III.

Page

OF THE KING, AND HIS TITLE 190 to 215

1. The supreme executive power of this kingdom is lodged in a single person: the king or queen 190
2. This royal person may be considered with regard to, I. His title. II. His royal family. III. His councils. IV. His duties. V. His prerogative. VI. His revenue 190
3. With regard to his title; the crown of England, by the positive constitution of the kingdom, hath ever been descendible, and so continues 190
4. The crown is descendible in a course peculiar to itself 193
5. This course of descent is subject to limitation by Parliament 195
6. Notwithstanding such limitations, the crown retains its descendible quality, and becomes hereditary in the prince to whom it is limited 196
7. King Egbert, king Canute, and king William I., have been successively constituted the common stocks, or ancestors, of this descent 198
8. At the revolution, the convention of estates, or representative body of the nation, declared, that the misconduct of king James II. amounted to an abdication of the government, and that the throne was thereby vacant 213
9. In consequence of this vacancy, and from a regard to the antient line, the convention appointed the next protestant heirs of the blood-royal of king Charles I. to fill the vacant throne, in the old order of succession; with a temporary exception, or preference, to the person of king William III. 214
10. On the impending failure of the protestant line of king Charles I., (whereby the throne might again have become vacant), the Parliament extended the settlement of the crown to the protestant line of king James I. viz. to the princess Sophia of Hanover, and the heirs of her body, being protestants: and she is now the common stock, from whom the heirs of the crown must descend 215

CHAPTER IV.

OF THE KING'S ROYAL FAMILY 218 to 224

1. The king's royal family consists, first, of the queen: who is either regnant, consort, or dowager 218
2. The queen consort is a public person; and hath many personal prerogatives and distinct revenues 218
3. The prince and princess of Wales, and the princess-royal, are peculiarly regarded by the law 223
4. The other princes of the blood-royal are only entitled to precedence 224

CHAPTER V.

OF THE COUNCILS BELONGING TO THE KING 227 to 232

Page

1. The king's councils are, I. The Parliament. II. The great council of peers. III. The judges, for matters of law. IV. The privy council 227–230
2. In privy counsellors may be considered, I. Their creation. II. Their qualifications. III. Their duties. IV. Their powers. V. Their privileges. VI. Their dissolution 230–232

CHAPTER VI.

OF THE KING'S DUTIES 233 to 235

1. The king's duties are to govern his people according to law, to execute judgment in mercy, and to maintain the established religion 233
2. These are his part of the original contract between himself and the people; founded in the nature of society, and expressed in his oath at the coronation 235

CHAPTER VII.

OF THE KING'S PREROGATIVE 237 to 278

1. Prerogative is that special power and pre-eminence, which the king hath above other persons, and out of the ordinary course of law, in right of his regal dignity 237–239
2. Such prerogatives are either direct, or incidental. The incidental, arising out of other matters, are considered as they arise: we now treat only of the direct 239
3. The direct prerogatives regard, I. The king's dignity, or royal character: II. His authority, or regal power: III. His revenue, or royal income 240
4. The king's dignity consists in the legal attributes of, I. Personal sovereignty. II. Absolute perfection. III. Political perpetuity 241–249
5. In the king's authority, or regal power, consists the executive part of government 250
6. In foreign concerns; the king, as the representative of the nation, has the right or prerogative, I. Of sending and receiving embassadors. II. Of making treaties. III. Of proclaiming war or peace. IV. Of issuing reprisals. V. Of granting safe-conducts 253–261
7. In domestic affairs; the king is, first, a constituent part of the supreme legislative power; hath a negative upon all new laws; and is bound by no statute, unless specially named therein 261
8. He is also considered as the general of the kingdom, and may raise fleets and armies, build forts, appoint havens, erect beacons, prohibit the exportation of arms and ammunition, and confine his subjects within the realm, or recall them from foreign parts 262–266
9. The king is also the fountain of justice, and general conservator of the peace; and therefore may erect courts (wherein he hath a legal ubiquity), prosecute offenders, pardon crimes, and issue proclamations 266

Page

10. He is likewise the fountain of honour, of office, and of privilege 271
11. He is also the arbiter of domestic commerce (not of foreign, which is regulated by the law of merchants); and is therefore entitled to the erection of public marts, the regulation of weights and measures, and the coinage or legitimation of money 273
12. The king is, lastly, the supreme head of the church; and, as such, convenes, regulates, and dissolves synods, nominates bishops, and receives appeals in all ecclesiastical causes 278

CHAPTER VIII.

Of the King's Revenue 281 to 330
1. The king's revenue is either ordinary or extraordinary. And the ordinary is, I. Ecclesiastical. II. Temporal 281
2. The king's ecclesiastical revenue consists in, I. The custody of the temporalities of vacant bishopricks. II. Corodies and pensions. III. Extraparochial tithes. IV. The first fruits and tenths of benefices 282–286
3. The king's ordinary temporal revenue consists in, I. The demesne lands of the crown. II. The hereditary excise; being part of the consideration for the purchase of his feodal profits, and the prerogatives of purveyance and pre-emption. III. An annual sum issuing from the duty on wine licences; being the residue of the same consideration. IV. His forests. V. His courts of justice. VI. Royal fish VII. Wrecks, and things jetsam, flotsam, and ligan. VIII. Royal mines. IX. Treasure trove. X. Waifs. XI. Estrays. XII. Forfeitures for offences, and deodands. XIII. Escheats of lands. XIV. The custody of idiots and lunatics 286–306
4. The king's extraordinary revenue consists in aids, subsidies, and supplies, granted to him by the commons in parliament 306
5. Heretofore these were usually raised by grants of the (nominal) tenth or fifteenth part of the moveables in every township; or by scutages, hydages, and talliages; which were succeeded by subsidies assessed upon individuals, with respect to their lands and goods 308
6. A new system of taxation took place about the time of the revolution; our modern taxes are therefore, I. Annual. II. Perpetual 308
7. The annual taxes are, I. The land tax, or the antient subsidy raised upon a new assessment. II. The malt tax, being an annual excise on malt, mum, cyder, and perry 308–313
8. The perpetual taxes are, I. The customs, or tonnage and poundage of all merchandize exported or imported. II. The excise duty, or inland imposition, on a great variety of commodities. III. The salt duty, or excise on salt. IV. The post office, or duty for the carriage of letters. V. The stamp duty on paper, parchment, &c. VI. The duty on houses and windows. VII. The duty on licences for hackney coaches and chairs. VIII. The duty on offices and pensions 313–326
9. Part of this revenue is applied to pay the interest of the national debt, till the principal is discharged by parliament 326
10. The produce of these several taxes were originally separate and specific funds, to answer specific loans upon their respective credits; but are now consolidated by parliament into three principal funds, the aggregate, general, and south-sea funds, to answer all the debts of the nation: the public faith being also superadded, to supply deficiencies, and strengthen the security of the whole 329
11. The surpluses of these funds, after paying the interest of the national debt, are carried together, and denominated the sinking fund; which, unless otherwise appropriated by parliament, is annually to be applied towards paying off some part of the principal 330
12. But, previous to this, the aggregate fund is now charged with an annual sum for the civil list; which is the immediate proper revenue of the crown, settled by parliament on the king at his accession, for defraying the charges of civil government 330

CHAPTER IX.

Of Subordinate Magistrates 338 to 365
1. Subordinate magistrates, of the most general use and authority, are, I. Sheriffs. II. Coroners. III. Justices of the peace. IV. Constables. V. Surveyors of the highways. VI. Overseers of the poor 338–9
2. The sheriff is the keeper of each county, annually nominated in due form by the king; and is (within his county) a judge, a conservator of the peace, a ministerial officer, and the king's bailiff 329
3. Coroners are permanent officers of the crown in each county, elected by the freeholders; whose office it is to make enquiry concerning the death of the king's subjects, and certain revenues of the crown; and also, in particular cases, to supply the office of sheriff 346
4. Justices of the peace are magistrates in each county, statutably qualified, and commissioned by the king's majesty; with authority to conserve the peace; to hear and determine felonies, and other misdemesnors; and to do many other acts, committed to their charge by particular statutes 349
5. Constables are officers of hundreds and townships, appointed at the leet, and empowered to preserve the peace,

Page

to keep watch and ward, and to apprehend offenders 355
6. Surveyors of the highways are officers appointed annually in every parish; to remove annoyances in, and to direct the reparation of, the public roads 357
7. Overseers of the poor are officers appointed annually in every parish; to relieve such impotent, and employ such sturdy poor, as are settled in each parish,—by birth;—by parentage;—by marriage;—or by forty days' residence, accompanied with, I. Notice. II. Renting a tenement of ten pounds annual value. III. Paying their assessed taxations. IV. Serving an annual office. V. Hiring and service for a year. VI. Apprenticeship for seven years. VII. Having a sufficient estate in the parish 359–365

CHAPTER X.

Of the People, whether Aliens, Denizens, or Natives 366 to 375
1. The people are either aliens, that is, born out of the dominions, or allegiance, of the crown of Great Britain; or natives, that is, born within it 366
2. Allegiance is the duty of all subjects; being the reciprocal tie of the people to the prince, in return for the protection he affords them; and, in natives, this duty of allegiance is natural and perpetual; in aliens, is local and temporary only 366–371
3. The rights of natives are also natural and perpetual: those of aliens local and temporary only; unless they be made denizens by the king, or naturalized by parliament 371–375

CHAPTER XI.

Of the Clergy 376 to 395
1. The people, whether aliens, denizens, or natives, are also either clergy, that is, all persons in holy orders, or in ecclesiastical offices; or laity, which comprehends the rest of the nation 376
2. The clerical part of the nation, thus defined, are, I. Archbishops and bishops; who are elected by their several chapters, at the nomination of the crown, and afterwards confirmed and consecrated by each other. II. Deans and chapters. III. Archdeacons. IV. Rural deans. V. Parsons, (under whom are included appropriators) and vicars; to whom there are generally requisite, holy orders, presentation, institution, and induction. VI. Curates. To which may be added, VII. Churchwardens. VIII. Parish clerks and sextons 377–395

CHAPTER XII.

Of the Civil State 396 to 407
1. The laity are divisible into three states; civil, military, and maritime. 396

Page

2. The civil state, which includes all the nation except the clergy, the army, and the navy; (and many individuals among them also); may be divided into the nobility, and the commonalty 396
3. The nobility are dukes, marquesses, earls, viscounts, and barons. These had antiently duties annexed to their respective honours: they are created either by writ, that is, by summons to parliament; or by the king's letters patent, that is, by royal grant: and they enjoy many privileges, exclusive of their senatorial capacity 396–402
4. The commonalty consist of knights of the garter, knights bannerets, baronets, knights of the bath, knights bachelors, esquires, gentlemen, yeomen, tradesmen, artificers, and labourers 403–407

CHAPTER XIII.

Of the Military and Maritime States 408 to 417
1. The military state, by the standing constitutional law, consists of the militia of each county, raised from among the people by lot, officered by the principal landholders, and commanded by the lord lieutenant 408
2. The more disciplined occasional troops of the kingdom are kept on foot only from year to year, by parliament; and, during that period, are governed by martial law, or arbitrary articles of war, formed at the pleasure of the crown 412
3. The maritime state consists of the officers and mariners of the British navy; who are governed by express and permanent laws, or the articles of the navy, established by act of parliament 417

CHAPTER XIV.

Of Master and Servant 422 to 431
1. The private, œconomical, relations of persons are those of, I. Master and servant. II. Husband and wife. III. Parent and child. IV. Guardian and ward 422
2. The first relation may subsist between a master and four species of servants (for slavery is unknown to our laws): viz. I. Menial servants, who are hired. II. Apprentices, who are bound by indentures. III. Labourers, who are casually employed. IV. Stewards, bailiffs, and factors; who are rather in a ministerial state 423
3. From this relation result divers powers to the master, and emoluments to the servant 427
4. The master hath a property in the service of his servant; and must be answerable for such acts as the servant does by his express, or implied command 431

Page

CHAPTER XV.

Of Husband and Wife 433 to 442

1. The second private relation is that of marriage; which includes the reciprocal rights and duties of husband and wife 433
2. Marriage is duly contracted between persons, I. Consenting. II. Free from canonical impediments, which make it voidable. III. Free also from the civil impediments,—of prior marriage;—of want of age;—of non-consent of parents or guardians, where requisite;—and of want of reason; either of which make it totally void. And it must be celebrated by a clergyman, in due form and place 433–440
3. Marriage is dissolved, I. By death. II. By divorce in the spiritual court; not *a mensa et thoro* only, but *a vinculo matrimonii*, for canonical cause existing previous to the contract. III. By act of parliament, as, for adultery 440
4. By marriage the husband and wife become one person in law; which unity is the principal foundation of their respective rights, duties, and disabilities 442

CHAPTER XVI.

Of Parent and Child 446 to 459

1. The third, and most universal, private relation is that of parent and child 446
2. Children are, I. Legitimate; being those who are born in lawful wedlock, or within a competent time after. II. Bastards, being those who are not so. 446
3. The duties of parents to legitimate children are, I. Maintenance. II. Protection. III. Education 447
4. The power of parents consists principally in correction, and consent to marriage. Both may, after death, be delegated by will to a guardian; and the former also, living the parent, to a tutor or master 452
5. The duties of legitimate children to parents are obedience, protection, and maintenance 453
6. The duty of parents to bastards is only that of maintenance 458
7. The rights of a bastard are such only as he can acquire; for he is incapable of inheriting any thing 459

CHAPTER XVII.

Of Guardian and Ward 460 to 464

1. The fourth private relation is that of guardian and ward, which is plainly derived from the preceding; these being, during the continuance of their relation, reciprocally subject to the same rights and duties 460
2. Guardians are of divers sorts: I. Guardians by nature, or the parents. II. Guardians for nurture, assigned by the ordinary. III. Guardians in socage, assigned by the common law. IV. Guardians by statute, assigned by the father's will. All subject to the superintendence of the Court of Chancery 461
3. Full age in male or female, for all purposes, is the age of twenty-one years (different ages being allowed for different purposes); till which age the person is an infant 463
4. An infant, in respect of his tender years, hath various privileges, and various disabilities in law; chiefly with regard to suits, crimes, estates, and contracts 464

CHAPTER XVIII.

Of Corporations 467 to 484

1. Bodies politic, or corporations, which are artificial persons, are established for preserving in perpetual succession certain rights; which, being conferred on natural persons only, would fail in process of time 467
2. Corporations are, I. Aggregate, consisting of many members. II. Sole, consisting of one person only 469
3. Corporations are also either spiritual, erected to perpetuate the rights of the church; or lay. And the lay are, I. Civil: erected for many temporal purposes. II. Eleemosynary; erected to perpetuate the charity of the founder 470–1
4. Corporations are usually erected, and named, by virtue of the king's royal charter; but may be created by act of parliament 472
5. The powers incident to all corporations are, I. To maintain perpetual succession. II. To act in their corporate capacity like an individual. III. To hold lands, subject to the statutes of mortmain. IV. To have a common seal. V. To make by-laws. Which last power, in spiritual, or eleemosynary corporations, may be executed by the king or the founder 475
6. The duty of corporations is to answer the ends of their institution 479
7. To enforce this duty, all corporations may be visited: spiritual corporations by the ordinary; lay corporations by the founder, or his representatives; viz. the civil by the king (who is the *fundator incipiens* of all) represented in his court of King's Bench; the eleemosynary by the endower (who is the *fundator perficiens* of such), or by his heirs or assigns 480
8. Corporations may be dissolved, I. By act of parliament. II. By the natural death of all their members. III. By surrender of their franchises. IV. By forfeiture of their charter 484

CONTENTS

OF

THE ANALYSIS OF BOOK II.

THE RIGHTS OF THINGS.

Which consist in dominion over — Chapter I

- I. Things real; in which are considered
  - 1. Their several kinds; viz.
    - 1. Corporeal — II
    - 2. Incorporeal — III
  - 2. The tenures by which they may be holden; viz. — IV
    - 1. Antient — V
    - 2. Modern — VI
  - 3. Estates therein; with respect to
    - 1. Quantity of interest; viz.
      - 1. Freehold,
        - 1. Of inheritance — VII
        - 2. Not of inheritance — VIII
      - 2. Less than freehold — IX
      - 3. On condition — X
    - 2. Time of enjoyment; in
      - 1. Possession,
      - 2. Remainder,
      - 3. Reversion — XI
    - 3. Number and connexions of the tenants; who may hold in
      - 1. Severalty,
      - 2. Joint-tenancy,
      - 3. Coparcenary,
      - 4. Common — XII
  - 4. Title to them; which may be gained or lost by — XIII
    - 1. Descent — XIV
    - 2. Purchase; which includes
      - 1. Escheat — XV
      - 2. Occupancy — XVI
      - 3. Prescription — XVII
      - 4. Forfeiture — XVIII
      - 5. Alienation, by common assurances; which are — XIX
        - 1. Deed, or matter *in pais*; wherein of its
          - 1. General nature,
          - 2. Several species — XX
        - 2. Matter of record — XXI
        - 3. Special custom — XXII
        - 4. Devise — XXIII
- II. Things personal, or chattels; in which are considered
  - 1. Their distribution — XXIV
  - 2. Property therein — XXV
  - 3. Title to them; which may be gained or lost by
    - 1. Occupancy — XXVI
    - 2. Prerogative,
    - 3. Forfeiture — XXVII
    - 4. Custom — XXVIII
    - 5. Succession,
    - 6. Marriage,
    - 7. Judgment — XXIX
    - 8. Grant,
    - 9. Contract — XXX
    - 10. Bankruptcy — XXXI
    - 11. Testament,
    - 12. Administration — XXXII

ANALYSIS.

BOOK II.—OF THE RIGHTS OF THINGS.

CHAPTER I.

Page

OF PROPERTY, IN GENERAL 2 to 14

1. All dominion over external objects has its original from the gift of the Creator to man in general 2
2. The substance of things was, at first, common to all mankind; yet a temporary property in the use of them might even then be acquired and continued by occupancy 3
3. In process of time a permanent property was established in the substance, as well as the use of things; which was also originally acquired by occupancy only 4, 5
4. Lest this property should determine by the owner's dereliction, or death, whereby the thing would again become common, societies have established conveyances, wills, and heirships, in order to continue the property of the first occupant: and, where by accident such property becomes discontinued or unknown, the thing usually results to the sovereign of the state, by virtue of the municipal law 9–11
5. But of some things, which are incapable of permanent substantial dominion, there still subsists only the same transient usufructuary property, which originally subsisted in all things 14

CHAPTER II.

OF REAL PROPERTY; AND,

1st, OF CORPOREAL HEREDITAMENTS 16 to 18

1. In this property, or exclusive dominion, consist the rights of things; which are, I. Things real. II. Things personal 16
2. In things real may be considered, I. Their several kinds. II. The tenures by which they may be holden. III. The estates which may be acquired therein. IV. Their title, or the means of acquiring and losing them 16
3. All the several kinds of things real are reducible to one of these three, viz. lands, tenements, or hereditaments; whereof the second includes the first, and the third includes the first and second 16
4. Hereditaments, therefore, or whatever may come to be inherited (being the most comprehensive denomination of things real), are either corporeal or incorporeal 17
5. Corporeal hereditaments consist wholly of lands, in their largest legal sense; wherein they include not only the face of the earth, but every other object of sense adjoining thereto, and subsisting either above or beneath it 17, 18

CHAPTER III.

OF INCORPOREAL HEREDITAMENTS 20 to 42

1. Incorporeal hereditaments are rights issuing out of things corporeal, or concerning, or annexed to, or exercisable within, the same 20
2. Incorporeal hereditaments are, I. Advowsons. II. Tithes. III. Commons. IV. Ways. V. Offices. VI. Dignities. VII. Franchises. VIII. Corodies or pensions. IX. Annuities. X. Rents 21–41
3. An advowson is a right of presentation to an ecclesiastical benefice; either appendant, or in gross. This may be, I. Presentative. II. Collative. III. Donative. 21–23
4. Tithes are the tenth part of the increase yearly arising from the profits and stock of lands, and the personal industry of mankind. These, by the antient and positive law of the land, are due of common right to the parson, or (by endowment) to the vicar; unless specially discharged. I. By real composition. II. By prescription, either *de modo decimandi*, or *de non decimando* 24–31
5. Common is a profit which a man hath in the lands of another; being, I. Common of pasture; which is either appendant, appurtenant, because of vicinage, or in gross. II. Common of piscary. III. Common of turbary. IV. Common of estovers, or botes 32–35
6. Ways are a right of passing over another man's ground 35
7. Offices are the right to exercise a public, or private, employment 36
8. For dignities, which are titles of honour, see Book I. Ch. XII.
9. Franchises are a royal privilege, or branch of the king's prerogative, subsisting in the hands of a subject 37
10. Corodies are allotments for one's sustenance; which may be converted into pensions. (See Book I. Ch. VIII) 40
11. An annuity is a yearly sum of money, charged upon the person, and not upon the lands, of the grantor 40
12. Rents are a certain profit issuing yearly out of lands and tenements; and are reducible to, I. Rent-service. II. Rent-charge. III. Rent-seck 41–2

CHAPTER IV.

OF THE FEODAL SYSTEM 44 to 53

1. The doctrine of tenures is derived from the feodal law; which was planted in Europe by its northern conquerors, at the dissolution of the Roman empire 44–5
2. Pure and proper feuds were parcels of land, allotted by a chief to his followers; to be held on the condition of personally rendering due military service to their lord 54
3. These were granted by investiture; were held under the bond of fealty; were inheritable only by descendants;

Page

and could not be transferred without the mutual consent of the lord and vassal 53–57

4. Improper feuds were derived from the other; but differed from them in their original, their services and renders, their descent, and other circumstances 58

5. The lands of England were converted into feuds, of the improper kind, soon after the Norman conquest: which gave rise to the grand maxim of tenure; viz. that all lands in the kingdom are holden, mediately or immediately, of the king 48–53

CHAPTER V.

Of the Antient English Tenures 61 to 77

1. The distinction of tenures consisted in the nature of their services: as, I. Chivalry, or knight-service; where the service was free, but uncertain. II. Free socage; where the service was free, and certain. III. Pure villenage; where the service was base, and uncertain. IV. Privileged villenage, or villein socage; where the service was base, but certain 61–78

2. The most universal antient tenure was that in chivalry, or by knight-service; in which the tenant of every knight's fee was bound, if called upon, to attend his lord to the wars. This was granted by livery, and perfected by homage and fealty; which usually drew after them suit of court 62

3. The other fruits and consequences of the tenure by knight-service were, I. Aid. II. Relief. III. Primer seisin. IV. Wardship. V. Marriage. VI. Fines upon alienation. VII. Escheat 63–72

4. Grand serjeanty differed from chivalry principally in its render, or service; and not in its fruits and consequences 73

5. The personal service in chivalry was at length gradually changed into pecuniary assessments, which were called scutage or escuage 74

6. These military tenures (except the services of grand serjeanty) were, at the restoration of king Charles, totally abolished, and reduced to free socage, by act of parliament 77

CHAPTER VI.

Of the Modern English Tenures 78 to 101

1. Free socage is a tenure by any free, certain, and determinate service 78

2. This tenure, the relic of Saxon liberty, includes petit serjeanty, tenure in burgage, and gavel-kind 81

3. Free socage lands partake strongly of the feodal nature, as well as those in chivalry: being holden; subject to some service,—at the least, to fealty and suit of court; subject to relief, to wardship, and to escheat, but not to marriage; subject also formerly to

Page

aids, primer seisin, and fines for alienation 86–89

4. Pure villenage was a precarious and slavish tenure, at the absolute will of the lord, upon uncertain services of the basest nature 93

5. From hence, by tacit consent or encroachment, have arisen the modern copyholds, or tenure by copy of court roll; in which lands may be still held at the (nominal) will of the lord, (but regulated) according to the custom of the manor 95

6. These are subject, like socage lands, to services, relief, and escheat; and also to heriots, wardship, and fines upon descent and alienation 97

7. Privileged villenage, or villein socage, is an exalted species of copyhold tenure, upon base, but certain, services; subsisting only in the antient demesnes of the crown; whence the tenure is denominated the tenure in antient demesne 99

8. These copyholds, of antient demesne, have divers immunities annexed to their tenure; but are still held by copy of court roll, according to the custom of the manor, though not at the will of the lord 100

9. Frankalmoign is a tenure by spiritual services at large; whereby many ecclesiastical and eleemosynary corporations now hold their lands and tenements: being of a nature distinct from tenure by divine service in certain 101

CHAPTER VII.

Of Freehold Estates of Inheritance 103 to 117

1. Estates in lands, tenements, and hereditaments, are such interest as the tenant hath therein; to ascertain which, may be considered, I. The quantity of interest. II. The time of enjoyment. III. The number and connexions of the tenants 103 to 119

2. Estates, with respect to their quantity of interest, or duration, are either freehold, or less than freehold 104

3. A freehold estate, in lands, is such as is created by livery of seisin at common law; or, in tenements of an incorporeal nature, by what is equivalent thereto 104

4. Freehold estates are either estates of inheritance, or not of inheritance, viz. for life only: and inheritances are, I. Absolute, or fee-simple. II. Limited fees 104

5. Tenant in fee-simple is he that hath lands, tenements, or hereditaments, to hold to him and his heirs for ever 104

6. Limited fees are, I. Qualified, or base, fees. II. Fees conditional at the common law 109

7. Qualified, or base, fees are those which, having a qualification subjoined thereto, are liable to be defeated when that qualification is at an end 109

Page

8. Conditional fees, at the common law, were such as were granted to the donee, and the heirs of his body, in exclusion of collateral heirs 110
9. These were held to be fees, granted on condition that the donee had issue of his body; which condition being once performed by the birth of issue, the donee might immediately aliene the land: but, the statute *de donis* being made to prevent such alienation, thereupon, from the division of the fee (by construction of this statute) into a particular estate and a reversion, the conditional fees began to be called fees-tail 111, 112
10. All tenements real, or savouring of the realty, are subject to entails 113
11. Estates-tail may be—I. general, or special; II. male, or female; III. given in frank-marriage 113–115
12. Incident to estates-tail are, I. Waste. II. Dower. III. Curtesy. IV. Bar—by fine, recovery, or lineal warranty with assets 115
13. Estates-tail are now, by many statutes and resolutions of the courts, almost brought back to the state of conditional fees at the common law 117

CHAPTER VIII.

OF FREEHOLDS NOT OF INHERITANCE 120 to 136

1. Freeholds, not of inheritance, or for life only, are, I. Conventional, or created by the act of the parties. II. Legal, or created by operation of law 120
2. Conventional estates for life are created by an express grant for term of one's own life, or *pur auter vie*; or by a general grant, without expressing any term at all 120
3. Incident to this, and all other estates for life, are estovers, and emblements: and to estates *pur auter vie* general occupancy was also incident; as special occupancy still is, if *cestuy que vie* survives the tenant 122
4. Legal estates for life are, I. Tenancy in tail, after possibility of issue extinct. II. Tenancy by the curtesy of England. III. Tenancy in dower 124–128
5. Tenancy in tail, after possibility of issue extinct, is where an estate is given in special tail, and, before issue had, a person dies from whose body the issue was to spring; whereupon the tenant (if surviving) becomes tenant in tail, after possibility of issue extinct 124
6. This estate partakes both of the incidents to an estate-tail, and those of an estate for life 125
7. Tenancy by the curtesy of England is where a man's wife is seised of an estate of inheritance; and he by her has issue, born alive, which was capable of inheriting her estate: in which case, he shall, upon her death, hold the tenements for his own life, as tenant by the curtesy 126

Page

8. Tenancy in dower is where a woman's husband is seised of an estate of inheritance, of which her issue might by any possibility have been heir; and the husband dies: the woman is hereupon entitled to dower, or one third part of the lands and tenements, to hold for her natural life 126
9. Dower is either by the common law; by special custom; *ad ostium ecclesiæ*; or, *ex assensu patris* 132–3
10. Dower may be forfeited, or barred; particularly by an estate in jointure 136

CHAPTER IX.

OF ESTATES LESS THAN FREEHOLD 140 to 150

1. Estates less than freehold are, I. Estates for years. II. Estates at will. III. Estates at sufferance 140–150
2. An estate for years is where a man, seised of lands and tenements, letteth them to another for a certain period of time, which transfers the interest of the term; and the lessee enters thereon, which gives him possession of the term, but not legal seisin of the land 140
3. Incident to this estate are estovers; and also emblements, if it determines before the full end of the term 144–5
4. An estate at will is where lands are let by one man to another, to hold at the will of both parties; and the lessee enters thereon 145
5. Copyholds are estates held at the will of the lord, (regulated) according to the custom of the manor 147
6. An estate at sufferance is where one comes into possession of land by lawful title, but keeps it afterwards without any title at all 150

CHAPTER X.

OF ESTATES UPON CONDITION 152 to 161

1. Estates (whether freehold or otherwise) may also be held upon condition; in which case their existence depends on the happening, or not happening, of some uncertain event 152
2. These estates are, I. On condition implied. II. On condition expressed. III. Estates in gage. IV. Estates by statute, merchant or staple. V. Estates by *elegit* 152
3. Estates on condition implied, are where a grant of an estate has, from its essence and constitution, a condition inseparably annexed to it; though none be expressed in words 152
4. Estates on condition expressed, are where an express qualification or provision is annexed to the grant of an estate 154
5. On the performance of these conditions either expressed or implied (if precedent), the estate may be vested or enlarged: or, on the breach of them (if subsequent), an estate already vested may be defeated 154–5

Page

6. Estates in gage, *in vadio*, or in pledge, are estates granted as a security for money lent; being, I. *In vivo vadio*, or living gage; where the profits of land are granted till a debt be paid, upon which payment the grantor's estate will revive. II. *In mortuo vadio*, in dead, or mort gage; where an estate is granted, on condition to be void at a day certain, if the grantor then repays the money borrowed; on failure of which, the estate becomes absolutely dead to the grantor 157
7. Estates by statute merchant, or statute staple, are also estates conveyed to creditors, in pursuance of certain statutes, till their profits shall discharge the debt 160
8. Estates by *elegit* are where, in consequence of a judicial writ so called, lands are delivered by the sheriff to a plaintiff, till their profits shall satisfy a debt adjudged to be due by law 161

CHAPTER XI.

OF ESTATES IN POSSESSION, REMAINDER, AND REVERSION 163 to 177

1. Estates, with respect to their time of enjoyment, are either in immediate possession, or in expectancy: which estates in expectancy are created at the same time, and are parcel of the same estates, as those upon which they are expectant. These are I. Remainders. II. Reversions. 163
2. A remainder is an estate limited to take effect, and be enjoyed, after another particular estate is determined 164
3. Therefore, I. There must be a precedent particular estate, in order to support a remainder. II. The remainder must pass out of the grantor, at the creation of the particular estate. III. The remainder must vest in the grantee, during the continuance, or at the determination, of the particular estate 165–168
4. Remainders are, I. Vested—where the estate is fixed to remain to a certain person, after the particular estate is spent. II. Contingent—where the estate is limited to take effect, either to an uncertain person, or upon an uncertain event 168–9
5. An executory devise is such a disposition of lands, by will, that an estate shall not vest thereby at the death of the devisor, but only upon some future contingency; and without any precedent particular estate to support it 172
6. A reversion is the residue of an estate left in the grantor, to commence in possession after the determination of some particular estate granted: to which are incident—fealty, and rent 176
7. Where two estates, the one less, the other greater, the one in possession, the other in expectancy, meet together in one and the same person, and in one and the same right, the less is merged in the greater 177

Page

CHAPTER XII.

OF ESTATES IN SEVERALTY, JOINT-TENANCY, COPARCENARY, AND COMMON 179 to 195

1. Estates, with respect to the number and connexions of their tenants, may be held, I. In severalty. II. In joint-tenancy. III. In coparcenary. IV. In common 179
2. An estate in severalty, is where one tenant holds it in his own sole right, without any other person being joined with him 179
3. An estate in joint-tenancy, is where an estate is granted to two or more persons; in which case the law construes them to be joint-tenants, unless the words of the grant expressly exclude such construction 180
4. Joint-tenants have an unity of interest, of title, of time, and of possession: they are seised *per my et per tout*: and therefore, upon the decease of one joint-tenant, the whole interest remains to the survivor 182
5. Joint-tenancy may be dissolved, by destroying one of its four constituent unities 185
6. An estate in coparcenary, is where an estate of inheritance descends from the ancestor to two or more persons; who are called parceners, and all together make but one heir 187
7. Parceners have an unity of interest, title, and possession; but are only seised *per my*, and not *per tout*: wherefore there is no survivorship among parceners 188
8. Incident to this estate is the law of hotchpot 190
9. Coparcenary may also be dissolved, by destroying any of its three constituent unities 191
10. An estate in common, is where two or more persons hold lands, possibly by distinct titles, and for distinct interests; but by unity of possession, because none knoweth his own severalty 191
11. Tenants in common have therefore an unity of possession (without survivorship; being seised *per my*, and not *per tout*); but no necessary unity of title, time, or interest 191
12. This estate may be created, I. By dissolving the constituent unities of the two former; II. By express limitation in a grant: and may be destroyed, I. By uniting the several titles in one tenant; II. By partition of the land 195

CHAPTER XIII.

OF THE TITLE TO THINGS REAL, IN GENERAL 195 to 199

1. A title to things real, is the means whereby a man cometh to the just possession of his property 195
2. Herein may be considered, I. A mere

Page

or naked possession. II. The right of possession; which is, 1st, an apparent, 2ndly, an actual, right. III. The mere right of property. IV. The conjunction of actual possession with both these rights; which constitutes a perfect title 195–199

CHAPTER XIV.

Of Title by Descent 200 to 234

1. The title to things real may be reciprocally acquired or lost, I. By descent. II. By purchase 200

2. Descent is the means whereby a man, on the death of his ancestor, acquires a title to his estate, in right of representation, as his heir-at-law 201

3. To understand the doctrine of descents, we must form a clear notion of consanguinity; which is the connection or relation of persons descended from the same stock or common ancestor; and it is, I. Lineal, where one of the kinsmen is lineally descended from the other. II. Collateral, where they are lineally descended, not one from the other, but both from the same common ancestor 203–4

4. The rules of descent, or canons of inheritance, observed by the laws of England, are these:

Inheritances shall lineally descend, to the issue of the person last actually seised, *in infinitum*; but shall never lineally ascend 208

The male issue shall be admitted before the female 212

Where there are two or more males in equal degree, the eldest only shall inherit; but the females all together 214

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 216

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.—To evidence which blood, the two following rules are established 220

The collateral heir of the person last seised must be his next collateral kinsman, of the whole blood 224

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 234

CHAPTER XV.

Of Title by Purchase; and, first, by Escheat 241 to 257

1. Purchase, or perquisition, is the possession of an estate which a man hath by his own act or agreement; and not by the mere act of law, or descent from any of his ancestors. This includes, I. Escheat. II. Occupancy. III. Prescription. IV. Forfeiture. V. Alienation 241–244

2. Escheat is where, upon deficiency of the tenant's inheritable blood, the estate falls to the lord of the fee 244

3. Inheritable blood is wanting to, I. Such as are not related to the person last seised. II. His maternal relations in paternal inheritances, and *vice versâ*. III. His kindred of the half blood. IV. Monsters. V. Bastards. VI. Aliens, and their issue. VII. Persons attainted of treason or felony. VIII. Papists, in respect of themselves only, by the statute law 246–257

CHAPTER XVI.

Of Title by Occupancy 258 to 261

1. Occupancy is the taking possession of those things, which before had no owner 258

2. Thus, at the common law, where tenant *per autre vie* died during the life of *cestuy que vie*, he who could first enter might lawfully retain the possession; unless by the original grant the heir was made a special occupant 259

3. The law of derelictions and alluvions has narrowed the title by occupancy 261

CHAPTER XVII.

Of Title by Prescription 263

1. Prescription (as distinguished from custom) is a personal immemorial usage of enjoying a right in some incorporeal hereditament, by a man, and either his ancestors or those whose estate of inheritance he hath: of which the first is called prescribing in his ancestors, the latter, in a *que estate* 263

CHAPTER XVIII.

Of Title by Forfeiture 267 to 286

1. Forfeiture is a punishment annexed by law to some illegal act, or negligence, in the owner of things real; whereby the estate is transferred to another, who is usually the party injured 267

2. Forfeitures are occasioned, I. By crimes. II. By alienation, contrary to law. III. By lapse. IV. By simony. V. By non-performance of conditions. VI. By waste. VII. By breach of copyhold customs. VIII. By bankruptcy 267

3. Forfeitures for crimes, or misdemesnors, are for, I. Treason. II. Felony. III. Misprision of treason. IV. *Præmunire*. V. Assaults on a judge, and batteries, sitting the courts. VI. Popish recusancy, &c. 267

4. Alienations, or conveyances, which induce a forfeiture, are I. Those in mortmain, made to corporations con-

Page

trary to the statute law. II. Those made to aliens. III. Those made by particular tenants, when larger than their estates will warrant 268–274
5. Lapse is a forfeiture of the right of presentation to a vacant church, by neglect of the patron to present within six calendar months 276
6. Simony is the corrupt presentation of any one to an ecclesiastical benefice, whereby that turn becomes forfeited to the crown 278
7. For forfeiture by non-performance of conditions, see Ch. X.
8. Waste is a spoil, or destruction, in any corporeal hereditaments, to the prejudice of him that hath the inheritance 281
9. Copyhold estates may have also other peculiar causes of forfeiture, according to the custom of the manor 284
10. Bankruptcy is the act of becoming a bankrupt; that is, a trader who secretes himself, or does certain other acts, tending to defraud his creditors. (See Ch. XXII.) 285
11. By bankruptcy, all the estates of the bankrupt are transferred to the assignees of his commissioners, to be sold for the benefit of his creditors 286

CHAPTER XIX.

OF TITLE BY ALIENATION 287 to 294
1. Alienation, conveyance, or purchase in its more limited sense, is a means of transferring real estates, wherein they are voluntarily resigned by one man, and accepted by another 287
2. This formerly could not be done by a tenant, without licence from his lord; nor by a lord, without attornment of his tenant 287
3. All persons are capable of purchasing; and all, that are in possession of any estates, are capable of conveying them;—unless under peculiar disabilities by law: as being attainted, *non compotes*, infants, under duress, femecoverts, aliens, or papists 288–293
4. Alienations are made by common assurances; which are, I. By deed, or matter in *pais*. II. By matter of record. III. By special custom. IV. By devise 293–4

CHAPTER XX.

OF ALIENATION BY DEED 295 to 342
1. In assurances by deed may be considered, I. Its general nature. II. Its several species 295
2. A deed, in general, is the solemn act of the parties: being, usually, a writing sealed and delivered; and it may be, I. A deed indented, or indenture. II. A deed poll. 295–6
3. The requisites of a deed are, I. Sufficient parties, and proper subject-matter. II. A good and sufficient consideration. III. Writing on paper, or

Page

parchment, duly stamped. IV. Legal and orderly parts (which are usually, 1st, the premises; 2ndly, the *habendum*; 3rdly, the *tenendum*; 4thly, the *reddendum*; 5thly, the conditions; 6thly, the warranty (which is either lineal or collateral); 7thly, the covenants; 8thly, the conclusion (which includes the date). V. Reading it, if desired. VI. Sealing, and, in many cases, signing it also. VII. Delivery. VIII. Attestation 296–307
4. A deed may be avoided. I. By the want of any of the requisites before mentioned. II. By subsequent matter: as, 1st, rasure, or alteration; 2ndly, defacing its seal; 3rdly, cancelling it; 4thly, disagreement of those whose consent is necessary; 5thly, judgment of a court of justice 308
5. Of the several species of deeds, some serve to convey real property, some only to charge and discharge it 309
6. Deeds which serve to convey real property, or conveyances, are either by common law, or by statute. And, of conveyances by common law, some are original or primary, others derivative or secondary 309
7. Original conveyances are, I. Feoffments. II. Gifts. III. Grants. IV. Leases. V. Exchanges. VI. Partitions.—Derivative are, VII. Releases. VIII. Confirmations. IX. Surrenders. X. Assignments. XI. Defeazances. 310
8. A feoffment is the transfer of any corporeal hereditament to another, perfected by livery of seisin, or delivery of bodily possession from the feoffor to the feoffee; without which no freehold estate therein can be created at common law 310
9. A gift is properly the conveyance of lands in tail 316
10. A grant is the regular method, by common law, of conveying incorporeal hereditaments 317
11. A lease is the demise, granting, or letting to farm of any tenement, usually for a less term than the lessor hath therein; yet sometimes possibly for a greater; according to the regulations of the restraining and enabling statutes 317
12. An exchange is the mutual conveyance of equal interests, the one in consideration of the other 323
13. A partition is the division of an estate held in joint-tenancy, in co-parcenary, or in common, between the respective tenants; so that each may hold his distinct part in severalty 323
14. A release is the discharge or conveyance of a man's right, in lands and tenements, to another that hath some former estate in possession therein 324
15. A confirmation is the conveyance of an estate or right *in esse*, whereby a voidable estate is made sure, or a particular estate is increased 325
16. A surrender is the yielding up of an

Page

estate for life, or years, to him that hath the immediate remainder or reversion; wherein the particular estate may merge 326

17. An assignment is the transfer, or making over to another, of the whole right one has in any estate: but usually in a lease, for life or years 326

18. A defeazance is a collateral deed, made at the same time with the original conveyance; containing some condition upon which the estate may be defeated 327

19. Conveyances by statute depend much on the doctrine of uses and trusts: which are a confidence reposed in the *terre-tenant*, or tenant of the land, that he shall permit the profits to be enjoyed, according to the directions of *cestuy que use*, or *cestuy que trust* 327

20. The statute of uses, having transferred all uses into actual possession (or, rather, having drawn the possession to the use), has given birth to divers other species of conveyance: I. A covenant to stand seised to uses. II. A bargain and sale, enrolled. III. A lease and release. IV. A deed to lead or declare the use of other more direct conveyances. V. A revocation of uses; being the execution of a power, reserved at the creation of the use, of recalling at a future time the use or estate so creating. All which owe their present operation principally to the statute of uses 337–339

21. Deeds which do not convey, but only charge real property, and discharge it, are, I. Obligations. II. Recognizances. III. Defeazances upon both 340–342

CHAPTER XXI.

OF ALIENATION BY MATTER OF RECORD 344 to 363

1. Assurances by matter of record are, where the sanction of some court of record is called in, to substantiate and witness the transfer of real property. These are, I. Private acts of Parliament. II. The king's grants. III. Fines. IV. Common recoveries 344

2. Private acts of Parliament are a species of assurances, calculated to give (by the transcendent authority of parliament) such reasonable powers or relief, as are beyond the reach of the ordinary course of law 344

3. The king's grants, contained in charters or letters patent, are all entered on record, for the dignity of the royal person, and security of the royal revenue 346

4. A fine (sometimes said to be a feoffment of record) is an amicable composition and agreement of an actual or fictitious, suit; whereby the estate in question is acknowledged to be the right of one of the parties 348

5. The parts of a fine are, I. The writ of covenant. II. The licence to agree. III. The concord. IV. The note. V. The foot. To which the statute hath added, VI. Proclamations 350–352

6. Fines are of four kinds: I. *Sur cognizance de droit, come ceo que il ad de son done.* II. *Sur cognizance de droit tantum.* III. *Sur concessit.* IV. *Sur done, grant, et render;* which is a double fine 353

7. The force and effect of fines (when levied by such as have themselves any interest in the estate) are to assure the lands in question to the cognizee, by barring the respective rights of parties, privies, and strangers 354

8. A common recovery is by an actual, or fictitious, suit or action for land, brought against the tenant of the freehold; who thereupon vouches another, who undertakes to warrant the tenant's title: but, upon such vouchee's making default, the land is recovered by judgment at law against the tenant; who, in return, obtains judgment against the vouchee to recover lands of equal value in recompense 357–359

9. The force and effect of a recovery are to assure lands to the recoveror, by barring estates tail, and all remainders and reversions expectant thereon: provided the tenant in tail either suffers, or is vouched in, such recovery 361

10. The uses of a fine or recovery may be directed by, I. Deeds to lead such uses; which are made previous to the levying or suffering them. II. Deeds to declare the uses; which are made subsequent 363

CHAPTER XXII.

OF ALIENATION BY SPECIAL CUSTOM 365 to 371

1. Assurances by special custom are confined to the transfer of copyhold estates 365

2. This is effected by, I. Surrender by the tenant into the hands of the lord to the use of another, according to the custom of the manor. II. Presentment, by the tenants, or homage, of such surrender. III. Admittance of the surrenderee by the lord, according to the uses expressed in such surrender 368–370

3. Admittance may also be had upon orinal grants to the tenant from the lord, and upon descents to the heir from the ancestor 371

CHAPTER XXIII.

OF ALIENATION BY DEVISE 373 to 381

1. Devise is a disposition of lands and tenements, contained in the last will and testament of the owner 373

2. This was not permitted by the common law, as it stood since the conquest; but was introduced by the statute law, under Hen. VIII.; since

Page

made more universal by the statute of tenures under Charles II., with the introduction of additional solemnities by the statute of frauds and perjuries in the same reign 375–6

3. The construction of all common assurances should be, I. Agreeable to the intention, II. to the words, of the parties. III. Made upon the entire deed. IV. Bearing strongest against the contractor. V. Conformable to law. VI. Rejecting the latter of two totally repugnant clauses in a deed, and the former in a will. VII. Most favourable in case of a devise 379–381

CHAPTER XXIV.

Of Things Personal 384 to 387

1. Things personal are comprehended under the general name of chattels; which include whatever wants either the duration, or the immobility, attending things real 384

2. In these are to be considered, I. Their distribution. II. The property of them. III. The title to that property 384–387

3. As to the distribution of chattels, they are, 1. Chattels real. 2. Chattels personal 386

4. Chattels real are such quantities of interest, in things immoveable, as are short of the duration of freeholds; being limited to a time certain, beyond which they cannot subsist. (See ch. 9) 386

5. Chattels personal are things moveable; which may be transferred from place to place, together with the person of the owner 387

CHAPTER XXV.

Of Property in Things Personal 389 to 396

1. Property in chattels personal is either in possession, or in action 389

2. Property in possession, where a man has the actual enjoyment of the thing, is, I. Absolute. II. Qualified 389

3. Absolute property is where a man has such an exclusive right in the thing, that it cannot cease to be his, without his own act or default 389

4. Qualified property is such as is not, in its nature, permanent; but may sometimes subsist, and at other times not subsist 391

5. This may arise, I. Where the subject is incapable of absolute ownership. II. From the peculiar circumstances of the owners 391–396

6. Property in action, is where a man hath not the actual occupation of the thing; but only a right to it, arising upon some contract, and recoverable by an action at law 396

7. The property of chattels personal is liable to remainders, expectant on estates for life; to joint-tenancy; and to tenancy in common 398

Page

CHAPTER XXVI.

Of Title to Things Personal by Occupancy 400 to 407

1. The title to things personal may be acquired or lost by, I. Occupancy. II. Prerogative. III. Forfeiture. IV. Custom. V. Succession. VI. Marriage. VII. Judgment. VIII. Gift, or grant. IX. Contract. X. Bankruptcy. XI. Testament. XII. Administration 400

2. Occupancy still gives the first occupant a right to those few things which have no legal owner, or which are incapable of permanent ownership. Such as, I. Goods of alien enemies. II. Things found. III. The benefit of the elements. IV. Animals *feræ naturæ*. V. Emblements. VI. Things gained by accession;—or, VII. By confusion. VIII. Literary property 400–407

CHAPTER XXVII.

Of Title by Prerogative, and Forfeiture 408 to 421

1. By prerogative is vested in the crown, or its grantees, the property of the royal revenue; (See book I. ch. 8); and also the property of all game in the kingdom, with the right of pursuing and taking it 408–419

2. By forfeiture, for crimes and misdemesnors, the right of goods and chattels may be transferred from one man to another; either in part or totally 420

3. Total forfeitures of goods arise from conviction of, I. Treason, and misprision thereof. II. Felony. III. Excusable homicide. IV. Outlawry for treason or felony. V. Flight. VI. Standing mute. VII. Assaults on a judge; and batteries, sitting the courts. VIII. *Præmunire*. IX. Pretended prophecies. X. Owling. XI. Residing abroad of artificers. XII. Challenges to fight for debts at play 421

CHAPTER XXVIII.

Of Title by Custom 422 to 427

1. By custom, obtaining in particular places, a right may be acquired in chattels: the most usual of which customs are those relating to, I. Heriots. II. Mortuaries. III. Heir-looms 422

2. Heriots are either heriot-service, which differs little from a rent; or heriot-custom, which is a customary tribute, of goods and chattels, payable to the lord of the fee, on the decease of the owner of lands 422

3. Mortuaries are a customary gift, due to the minister in many parishes, on the death of his parishioners 425

4. Heir-looms are such personal chattels, as descend by special custom to the heir, along with the inheritance of his ancestor 427

Page

CHAPTER XXIX.

OF TITLE BY SUCCESSION, MARRIAGE, AND JUDGMENT 430 to 439

1. By succession the right of chattels is vested in corporations aggregate; and likewise in such corporations sole as are the heads and representatives of bodies aggregate 430
2. By marriage the chattels real and personal of the wife are vested in the husband, in the same degree of property, and with the same powers, as the wife when sole had over them; provided he reduces them to possession 433
3. The wife also acquires, by marriage, a property in her *paraphernalia* 435
4. By judgment, consequent on a suit at law, a man may, in some cases, not only recover, but originally acquire, a right to personal property. As, I. To penalties recoverable by action popular. II. To damages. III. To costs of suit 436–439

CHAPTER XXX.

OF TITLE BY GIFT, GRANT, AND CONTRACT 440 to 470

1. A gift, or grant, is a voluntary conveyance of a chattel personal in possession, without any consideration or equivalent 440
2. A contract is an agreement, upon sufficient consideration, to do or not to do a particular thing: and, by such contract, any personal property (either in possession, or in action) may be transferred 442
3. Contracts may be either express, or implied;—either executed, or executory 443
4. The consideration of contracts is, I. A good consideration. II. A valuable consideration; which is, 1. *Do, ut des.* 2. *Facio, ut facias.* 3. *Facio ut des.* 4. *Do, ut facias* 444–5
5. The most usual species of personal contracts are, I. Sale or exchange. II. Bailment. III. Hiring or borrowing. IV. Debt. 446
6. Sale or exchange is a transmutation of property from one man to another, in consideration of some recompense in value 446
7. Bailment is the delivery of goods in trust; upon a contract, express or implied, that the trust shall be faithfully performed by the bailee 451
8. Hiring or borrowing is a contract, whereby the possession of chattels is transferred for a particular time, on condition that the identical goods (or, sometimes, their value) be restored at the time appointed; together with (in case of hiring) a stipend or price for the use 453
9. This price, being calculated to answer the hazard, as well as inconvenience, of lending, gives birth to the doctrine of interest, or usury, upon loans; and, consequently, to the doctrine of bottomry or *respondentia*, and insurance 453–464
10. Debt is any contract, whereby a certain sum of money becomes due to the creditor. This is, I. A debt of record. II. A debt upon special contract. III. A debt upon simple contract; which last includes paper credit, or bills of exchange, and promissory notes 464–470

CHAPTER XXXI.

OF TITLE BY BANKRUPTCY 471 to 488

1. Bankruptcy (as defined in ch. 18) is the act of becoming a bankrupt 471
2. Herein may be considered, I. Who may become a bankrupt. II. The acts, whereby he may become a bankrupt. III. The proceedings on a commission of bankrupt. IV. How his property is transferred thereby 471
3. Persons of full age, using the trade of merchandize, by buying, and selling, and seeking their livelihood thereby, are liable to become bankrupts; for debts of a sufficient amount 473
4. A trader who endeavours to avoid his creditors, or evade their just demands, by any of the ways specified in the several statutes of bankruptcy, doth thereby commit a bankruptcy 478
5. The proceedings on a commission of bankrupt, so far as they affect the bankrupt himself, are principally by, I. Petition. II. Commission. III. Declaration of bankruptcy. IV. Choice of assignees. V. The bankrupt's surrender. VI. His examination. VII. His discovery. VIII. His certificate. IX. His allowance. X. His indemnity 479–485
6. The property of a bankrupt's personal estate is, immediately upon the act of bankruptcy, vested by construction of law in the assignees: and they, when they have collected, distribute the whole by equal dividends among all the creditors 485–488

CHAPTER XXXII.

OF TITLE BY TESTAMENT, AND ADMINISTRATION 489 to 520

1. Concerning testaments and administrations, considered jointly, are to be observed, I. Their original and antiquity. II. Who may take a testament. III. Its nature and incidents. IV. What are executors and administrators. V. Their office and duty 489
2. Testaments have subsisted in England immemorially; whereby the deceased was at liberty to dispose of his personal estate, reserving antiently to his wife and children their reasonable part of his effects 491
3. The goods of intestates belonged antiently to the king; who granted them to the prelates to be disposed in pious uses: but, on their abuse of this trust, in the times of popery, the legislature

Page

compelled them to delegate their power to administrators expressly provided by law. 493

4. All persons may make a testament, unless disabled by, I. Want of discretion. II. Want of free will. III. Criminal conduct 496–7

5. Testaments are the legal declaration of a man's intentions, which he wills to be performed after his death. These are, I. Written. II. Nuncupative. 499–500

6. An executor is he, to whom a man by his will commits the execution thereof. 502

7. Administrators are, I. *Durante minore ætate* of an infant executor or administrator; or *durante absentia*; or *pendente lite*. II. *Cum testamento annexo*; when no executor is named, or the executor refuses to act. III. General administrators; in pursuance of the statutes of Edward III. and Henry VIII. IV. Administrators *de bonis non*; when a former executor or administrator dies without completing his trust 503–507

8. The office and duty of executors (and, in many points, of administrators also) are, I. To bury the deceased. II. To prove the will, or take out administration. III. To make an inventory. IV. To collect the goods and chattels. V. To pay debts; observing the rules of priority. VI. To pay legacies, either general or specific; if they be vested, and not lapsed. VII. To distribute the undevised surplus, according to the statute of distributions 508–520

INTRODUCTION.

SECTION I.

ON THE STUDY OF THE LAW.*

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 benefac- [*4] tor. 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.

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

* Read in Oxford at the opening of the Vinerian lectures; 25th of October, 1758. The author had been elected first Vinerian professor the 20th of October previously.

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.

[*5] *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 prætor, 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

[*6] *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 (*a*), 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 constitution of their country.

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 considera-

(*a*) *De Legg.* 2. 23.

ble 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 reflections 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 (1) of doing whatever the laws permit (*c*); 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. 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 condi- [*7] tion, 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.

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 (*d*) as a strange absurdity. It is their landed property, with its 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.

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

(*b*) Montesq. *Esp. L. l.* 11. *c.* 5.
(*c*) *Facultas ejus, quod cuique facere libet, nisi quid vi, aut jure prohibetur.* *Inst.* 1. 3. 1.
(*d*) Education, Sec. 187.

(1) See the Editor's reasons for his disapprobation of this definition of liberty in the note to p. 126.—CH.

meaning of the testator, or sometimes in discovering any meaning
[*8] 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 have frequently a right 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
[*9] 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 its 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 withhold 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 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 perfectly amazing that there should be no other state of life, no other occupation, art, or science, in which some method of instruc-

tion 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 (e) "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 reflection; without which no senator can possibly be fit for his office." [*10]

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 its symmetry has been destroyed, its proportions distorted, and its 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) (f) 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. [*11]

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-sub-

(e) *De Legg.* 3. 18. *Est senatori necessarium scire rempublicam; idque late patet:—genus hoc omne scientiæ, diligentiæ, memoriæ est; sine quo paratus esse senator nullo pacto potest.*

(f) 2 Rep. pref.

jects, 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 [*12] 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 truth 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 birth-right to decide (2).

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 Scævola, the then 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 Scævola could not forbear to upbraid him with this memorable reproof,(g) "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." This reproach made so deep an impression on Sulpicius, that he immediately applied himself to the study of the law,

(g) *Ff.* 1. 2. 2. § 43. *Turpe esse patricio, et nobili, et causas oranti, jus in quo versaretur ignorare.*

(2) As a peer of parliament, when that body is sitting judicially, a nobleman's pledge of honour is considered equal to another's oath. The ordinary courts of common law know no distinction of this kind; there, wherever an ordinary subject must swear to speak the truth, a peer must equally be sworn. In courts of equity, peers, peeresses, and lords of parliament, answer on their honour only; though persons of inferior degree are required, in like case, to answer on oath, 1 Jacob and Walker's Reports, 524. And the first step to obtain an answer from a peer, &c. is, after the bill is filed, to petition the lord chancellor for his letter missive, which *requests* the defendant to appear and answer; which if he disregards, he may then be served with a subpœna, in the same manner as any other person. Newland, Cha. prac. 9. Mitford's Pleading, 30. 1 Harrison, Cha. prac. 201.

wherein he arrived to that *proficiency, that he left behind him about an hundred and four-score volumes of his own compiling upon the subject; and became, in the opinion of Cicero (*h*), a much more complete lawyer than even Mutius Scævola himself. [*13]

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 its 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. [*14] Such are the laws relating to advowsons, institutions, and inductions; to simony, and simoniacal 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 (3).

(*h*) *Brut.* 41.

(3) At the period when the Commentaries were published, forensic medicine had not been publicly recognized as a new or necessary branch of legal study; nor had the converse been at all acknowledged, namely, the propriety of medical men being somewhat in-

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 [*15] our *notions: for even in Holland, where the imperial law is much cultivated, and its decisions pretty generally followed, we are informed by Van Leeuwen (*i*), that "it receives its 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 antient nations." 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: (*k*) 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. 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 inquiry the university of Oxford has for more than a century so thoroughly seen, that in her statutes (*l*) 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, [*16] "*quia juris civilis studiosos decet haud imperitos esse *juris municipalis, et differentias exteri patriique juris notas habere.*" And the statutes (*m*) of the university of Cambridge speak expressly to the same effect.

(*i*) *Dedicatio corporis juris civilis. Edit.* 1663.
(*k*) Hale Hist. C. L. c. 2. Selden *in Fletam.* 5 Rep. Caudrey's case. 2 Inst. 599.
(*l*) *Tit. VII. Sect.* 2. § 2.
(*m*) *Doctor legum meus a doctoratu debit operam legibus Angliæ, ut non sit imperitus earum legum*

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formed as to what the law may require shall be proved or adjudged upon their testimony. The elaborate works of Dr. Paris and of Dr. Smith, and of others treating forensic medicine at length, sufficiently show that the faculty of physic may not unusefully apply themselves to the study of the law applicable to cases of death by apparently doubtful or suspicious means; to cases of unsound mind; or to those where want of sufficient disposing power in a last illness might be evident or presumed.—LEE.

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 inquire.

Sir John Fortescue, in his panegyric on the laws of England, (which was written in the reign of Henry the Sixth,) puts (*n*) 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?" In answer to which he gives (*o*) 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." 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.

[*17] *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 (*p*), 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) (*q*), 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 (*r*). The judges therefore were usually created out of the sacred order (*s*), as was likewise the case among the Normans; (*t*) 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

quas habet sua patria, et differentias exteri patriique juris noscat. Stat. Eliz. *R.* c. 14. Cowell. *Institut. in procemio.*

(*n*) C. 47.
(*o*) C. 48.
(*p*) *In Fletam.* 7. 7.
(*q*) *Cæsar de bello Gal.* 6. 12.
(*r*) *De Gest. Reg. l.* 4.
(*s*) Dugdale *Orig. Jurid.* c. 8.
(*t*) *Les juges sont sages personnes et autentiques, —sicome les archevesques, evesques, les chanoines des eglises cathedraulx, et les autres personnes qui ont dignitez in saincte eglise; les abbez, les prieurs conventaulx, et les gouverneurs des eglises, &c. Grand Coustumier, ch.* 9.

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 [*18] pandects, being newly (*u*) discovered at Amalfi, *soon brought the civil law into vogue all over the west of Europe, where before it was quite laid aside (*w*), and in a manner forgotten, though some traces of its authority remained in Italy (*x*) and the eastern provinces of the empire. (*y*) 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*).

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 (*a*), 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 (*b*), to teach it to the people of this country. 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 the common law. [*19] King Stephen immediately *published a proclamation (*c*), forbidding the study of the laws, then newly imported from Italy, which was treated by the monks (*d*) 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.

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

(*u*) *Circ. A. D.* 1130.
(*w*) *LL. Wisigoth.* 2. 1, 9.
(*x*) *Capitular. Hludov. Pii.* 4. 102.
(*y*) Selden *in Fletam.* 5. 5.
(*z*) Domat's Treatise of Law, *c.* 13. § 9. *Epistol. Innocent IV. in M. Paris ad A. D.* 1254.
(*a*) *A. D.* 1138.
(*b*) Gervas. Dorobern. *Act. Pontif. Cantuar. col.* 1665.
(*c*) Rog. Bacon *citat. per* Selden *in Fletam.* 7. 6. *in Fortesc. c.* 33. and 8 Rep. Pref.
(*d*) Joan. Sarisburiens. *Polycrat.* 8. 22.

to be found in each (4). This appears, on the one hand, from the spleen with which the monastic writers (*e*) 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) (*f*) with one voice answered, that they would not change the laws of England, which had hitherto been used and approved." And we find the same jealousy prevailing above a century afterwards (*g*), 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"(*h*). [*20] And of this temper between the clergy and laity many more instances might be given.

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 (*i*), forbidding all ecclesiastics to appear as advocates *in foro sæculari*:(5) nor did they long continue to act as judges there, not caring to take the oath of office which was then found necessary to be administered, that they should in all things determine according to the law and custom of this realm (*k*), though they still kept possession of the high office of chancellor, an office then of little juridical power; and afterwards, as its business increased by degrees, they modelled the process of the court at their own discretion.

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 (*l*) the very reading

(*e*) *Idem, ibid.* 5. 16. Polydor. Virgil. *Hist. l.* 9.
(*f*) *Stat. Merton.* 20 *Hen. III. c.* 9. *Et omnes comites et barones una voce responderunt, quod nolunt leges Angliæ mutare, quæ hucusque usitatæ sunt et approbatæ.*
(*g*) 11 Ric. II.
(*h*) Selden, *Jan. Anglor, l.* 2. § 43. *in Fortesc. c.* 33.
(*i*) Spelman, *Concil. A. D.* 1217. Wilkins, *vol.* 1. *p.* 574. 599.
(*k*) Selden, *in Fletam.* 9. 2.
(*l*) M. Paris, *ad A. D.* 1254.

(4) Though the civil law, in matters of contract and the general commerce of life, may be founded in principles of natural and universal justice, yet the arbitrary and despotic maxims, which recommended it as a favourite to the pope and the Romish clergy, rendered it deservedly odious to the people of England. *Quod principi placuit legis habet vigorem*, (Inst. 1. 2. 6.) the *magna charta* of the civil law, could never be reconciled with the *judicium parium vel lex terræ*.—CH.

(5) The interdict of the canon law against clerical candidates entering the legal profession, has been recognised and enforced in a recent instance, wherein the party applied for admission as an advocate into the spiritual courts, and was rejected because he had been in deacon's orders. The court of King's Bench refused an application for a mandamus, 8 East Rep. 213. But it must not thereby be inferred, that no one who has been in holy orders can be admitted to practice in the temporal courts. The degree of barrister is conferred at the will of the inn of court to which the candidate belongs, and no such ground of exclusion has been insisted on.

of it by the clergy, because its decisions were not founded on the imperial constitutions, but merely on the customs of the laity. 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 [*21] 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 (*m*) pursued with such alacrity in these seats of learning; and why the common law was entirely despised, and esteemed little better than heretical.

And, since the reformation, many causes have conspired to prevent its 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 its 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 channel, and has hitherto been wholly cultivated in another place. But, as the long usage and established custom of ignorance of the laws of the land, begin now to be thought unreasonable; and as by these means the merit of those [*22] *laws will probably be more generally known; we may hope that the method of studying them will soon revert to its ancient course, and the foundations at least of that science will be laid in the two universities; without being exclusively confined to the channel which it fell into at the times I have just been 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 (*n*), and made no scruple to profess their contempt, nay even their ignorance (*o*) of it, in the most public manner. But still as the balance 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 gra-

(*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 christiferæ virginis* (*divinum magis quam humanum opus*) *qu.* 23. § 5. "*Item quod jura civilia, et leges, et decreta scivit in summo, probatur hoc modo: sapientia advocati manifestatur in tribus; unum, quod obtineat omnia contra judicem justum et sapientem; secundo, quod contra adversarium astutum et 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 Andreæ glossatoris, quod tantam peritiam in utroque jure habuit, ut publice in scholis legere ausa sit.*"

(*n*) Fortesc. *de Laud. LL. c.* 25.

(*o*) This remarkably appeared in the case of the Abbot of Torun, *M.* 22 *Edw. III.* 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 flat nonsense; "*in ceux paroles*, contra inhibitionem novi operis, *ny ad pas entendement*:" and Justice Schardelow mends the matter but little by informing him, that they signify a restitution *in their law*: for which reason he very sagely resolves to pay no sort of regard to them. "*Ceo n'est que un restitution en lour ley, pur que a ceo n'avomus regard, &c.*"

dually 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 its support.

The incident which 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, [*23] 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 (*p*), 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 (*q*) 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 (*r*). 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 styled apprentices (*s*) from *apprendre*, to *learn) who answered to our bachelors: as the state and degree [*24] of a serjeant (*t*), *servientis ad legem*, did to that of doctor.

The crown seems to have soon taken under its 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

(*p*) C. 11.
(*q*) *Glossar.* 331.
(*r*) Fortesc. c. 48.
(*s*) 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.)
(*t*) The first mention which I have met with in our law books of serjeants or countors, is in the statute of Westm. I. 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 Henry 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 mal-practices, claimed the benefit of his orders or clergy, which till then remained an entire secret; and to that end *volvit ligamenta coifæ suæ solvere, ut palam monstraret se tonsuram habere clericalem; sed non est permissus.*——*Satelles vero cum arripiens, non per coifæ ligamina sed per guttur eum apprehendens, traxit ad carcerem.* 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.

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 (*u*). 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 (*w*) 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 (*x*) 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.

[*25] *In this juridical university (for such it is insisted to have been by Fortescue (*y*) and Sir Edward Coke) (*z*) 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,) (*a*) the originals, and, as it were, the elements of the law; who, profiting therein, as they grew to ripeness, so were 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 its 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 (*b*) 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, are neither commodious nor proper for the resort of gentlemen of any rank or figure; so that there are very rarely (6) 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

(*u*) *Ne aliquis scholas regens de legibus in eadem civitate de cætero ibidem leges doceat.*
(*w*) *In Flet.* 8. 2.
(*x*) 2 Inst. proœm.
(*y*) C. 49.
(*z*) 3 Rep. pref.
(*a*) C. 49.
(*b*) 3 Rep. pref.

(6) The inns of court are, the Inner Temple, Middle Temple, Lincoln's Inn, and Gray's Inn, from which societies alone, students are called to the bar. The inns of chancery are, Clifford's Inn, Clement's Inn, Lion's Inn, New Inn, Furnival's Inn,(7) Thavies' Inn, Staple's Inn, and Barnard's Inn. These are subordinate to the inns of court; the three first belong to the Inner Temple, the fourth to the Middle Temple, the two next to Lincoln's Inn, and the two last to Gray's Inn. (Dug. *Orig. Jurid.* 320 *et Passim.*) Admission to the inns of chancery, with an intention of being called to the bar, is now of no avail with regard to the time and attendance required by the inns of court.—CH.

(7) Furnival's Inn has ceased to exist as a law society. The buildings becoming much dilapidated and out of repair, the whole were pulled down; and, with the garden, have given place to modern structures, erected under a lease of the site from the Society of Lincoln's Inn.

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 re- [*26] solution 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.

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 now 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 its 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 [*27] 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 (*c*), and very lately by the whole university (*d*), 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 its theory the noblest faculties of the soul, and exerts in its practice the cardinal virtues of the heart; a science, which is universal in its use and extent, accommodated to each individual, yet comprehending the whole community; that a science like this should ever have been deemed unnecessary to be studied in an university, is matter of astonishment and concern.

(*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 its publication to the establishment of a *manege* in the university.

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 its 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*).

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 [*28] 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" (*f*), he was sensible he could not perform his resolution 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 (*g*); from their alacrity and unexampled dispatch in carrying it into execution (*h*); 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 (*i*). We have seen an universal emula-

(*e*) Τελεια μαλιστα αρετη, ὁτι της τελειας αρετης χρησις εστι. *Ethic. ad Nicomach. l. 5. c. 3.*

(*f*) See the Preface to the 18th 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 October following, and two scholars on the succeeding day. And, lastly, it was agreed at the annual audit in 1761, to establish a fellowship; and a fellow was accordingly elected 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.

(*i*) 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 a bachelor of civil law, and a member of some college or hall in the university of Oxford; the scholars of this foundation,

tion 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 [*30] station, their learning, or their experience, have appeared the most zealous to promote the success of Mr. Viner's establishment.

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 (*k*), for improving its method, retrenching its 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 *pomœria* of university learning, and adopt a new tribe of citizens within these philosophical walls, we interest a very *numerous [*31] and very powerful profession in the preservation of our rights and revenues.

For I think it 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 transplanted on a sudden into the midst of allurements to pleasure, without any restraint or check but what his own prudence can suggest;

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 to 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.—*Chitty.*

The professorship has, I am told, long sunk into the inglorious duty of receiving the stipend.—*Lee.*

(*k*) See Lord Bacon's proposals and offer of a digest.—*Chitty.*

with no public direction in what course to pursue his inquiries; no private assistance to remove the distresses and difficulties which will always embarrass 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 (8). 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 (*l*), 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.

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
[*32] be general, must have proved of extremely *pernicious consequence. I mean the custom, by some so very warmly recommended, of dropping all liberal education, as of no use to students in the law, and placing them, in its stead, at 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 spite of this method of education, have shone in the foremost ranks of the bar, afforded some kind of sanction to this illiberal path to the profession, and biassed many parents, of shortsighted judgment, in its 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 lines in favour of university learning (*m*): but in these, all who hear me, I know, have already prevented me.

Making, therefore, due allowance for one or two shining exceptions, experience may teach us to foretel that a lawyer, thus educated to the bar, in subservience to attorneys and solicitors (*n*), will find he has begun at the wrong end. 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:

(*l*) Sir Henry Spelman, in the preface to his glossary, has given 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 limen peregrinum, dialectum barbaram, methodum inconcinnam, molem non ingentem solum sed perpetuis humeris sustinendam, excidit mihi (fatear) animus, &c.*"

(*m*) The four highest judicial offices 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.*

(*n*) See Kennet's Life of Somner, p. 67.

(8) Barristers and special pleaders are now accustomed to receive pupils for the purposes of affording them instruction in the principles and practice of the law, so much so as to raise a doubt as to the use of the Vinerian foundation for those, at least, who assume the study of the law as a profession.

* The two first were, Lord Northington and Lord Chief Justice Willes; the third, Lord Mansfield; and the fourth, Sir Thomas Sewell, Master of the Rolls.—CH.

ubi lex scripta est (*o*) 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.

*Nor is this all; for (as few persons of birth or fortune, or even [*33] 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 (9).

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

(*o*) *Ff.* 40. 9. 12.

(9) The learning, which of late years has distinguished the bar, leaves little reason to apprehend that such will speedily be the degraded state of the laws of England. Our author's labours and example have contributed in no inconsiderable degree to rescue the profession from the reproaches of Lord Bolingbroke, whose sentiments upon the education of a barrister correspond so fully with those of the learned judge, that they deserve to be annexed to this elegant dissertation on the study of the law:—

"I might instance (says he), in other professions, the obligation men lie under of applying to certain parts of history; and I can hardly forbear doing it in that of the law, in its nature the noblest and most beneficial to mankind, in its abuse and debasement the most sordid and the most pernicious. A lawyer now is nothing more, I speak of ninety-nine in a hundred at least, to use some of Tully's words, *nisi leguleius quidem cautus, et acutus præco actionum, cantor formularum, auceps syllabarum.* But there have been lawyers that were orators, philosophers, historians: there have been Bacons and Clarendons. There will be none such any more, till, in some better age, true ambition, or the love of fame, prevails over avarice; and till men find leisure and encouragement to prepare themselves for the exercise of this profession, by climbing up to the *vantage ground*, so my Lord Bacon calls it, of science, instead of grovelling all their lives below, in a mean but gainful application to all the little arts of chicane. Till this happen, the profession of the law will scarce deserve to be ranked among the learned professions; and whenever it happens one of the vantage grounds to which men must climb is metaphysical, and the other historical, knowledge.

"They must pry into the secret recesses of the human heart, and become well acquainted with the whole moral world, that they may discover the abstract reason of all laws; and they must trace the laws of particular states, especially of their own, from the first rough sketches to the more perfect draughts; from the first causes or occasions that produced them, through all the effects, good and bad, that they produced." (Stud. of Hist. p. 353, quarto edition.)—Ch.

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 conclu-
[*34] sion, 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,) (*p*) 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;
[*35] and, till a better is proposed, I *shall take the liberty to follow the same that I have already submitted to the public (*q*). 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.

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 (*r*) has observed, the tender

(*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.

(*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 et infirmum animum studiosi multitudine ac varietate rerum oneravimus, duorum alterum, aut desertorem studiorum efficiemus, aut cum magno labore, sæpe etiam cum diffidentia (quæ plerumque juvenes*

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. 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 Cæsar 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 [*36] inexhaustible reservoir of legal antiquities and learning, the feodal law, or, as Spelman (*s*) has entitled it, the law of nations in our western orb. 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.

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 (*t*) has observed upon a similar occasion, the learner "will be considerably disappointed, if he looks for entertainment without the expence of attention." An attention, however, not greater than is usually bestowed in mastering the rudiments of other sciences, or sometimes in pursuing a favourite 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 subtle 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 (*u*) when first his royal pupil determines to engage in this study: "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 [*37] 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."

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 aukward in-

avertit) serius ad id perducemur, ad quod, leviore via ductus, sine magno labore, et sine ulla diffidentia maturius perduci potuisset. Inst. l. 1. 2.

(*s*) Of parliaments. 57.
(*t*) Dr. Taylor's Pref. to Elem. of Civil Law.
(*u*) *De Laud. Leg.* c. 8.

terval 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 ingenuous 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 reflections 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 inspire them with a desire to be still better acquainted with the laws and constitution of their country (10).

(10) It will be observed, that in this chapter, the learned commentator has principally endeavoured to enforce the importance of the study of the law, without attempting to describe the means by which the knowledge of it may be attained. It is difficult to supply this desideratum in a note, but the editor feels that in presenting a general and concise outline of study, he may perform an acceptable service, and enhance the practical utility of this first work on the science of English Jurisprudence.

Assuming that the student has received a competent general education, and which should be more comprehensive and complete than is deemed essential to the candidate in most of the learned professions, the first point to determine is, to what department of the law he will devote himself: he must be prepared for a sedulous application of the greatest part of his time to the study of that branch; for the law is a jealous science, and requires the most undivided attention. Each of the departments is sufficiently copious and extensive to employ the whole time and energies of its peculiar disciples; and therefore it has been wisely recommended, that the student should not bestow more attention upon the arcana of the other departments than may conduce to the perfection of his knowledge in his own.

It has been a disputed point, whether it is desirable that a young man who is destined for the bar, should employ any part of his time in an attorney's office. Admitting the propriety and importance of adopting the most expeditious mode of acquiring the mere practical knowledge of the profession, it must be conceded that an attorney's office affords peculiar advantages. The increasing respectability of that class of practitioners, obviates many of the objections which were formerly urged against such a plan; and as offices may now be readily found, where neither the principles nor the manners of a gentleman would be endangered, there is no reason why a year's attendance in an eminent solicitor's office should not be given at the close of the course of study, after the student has fully been informed of the nature of rights and wrongs, and their appropriate remedies; but it would be a waste of time to attempt to learn the practical mode of conducting a suit before the more substantial points have been well understood.

The most splendid powers of intellect will scarcely dispense with the necessity for entering in the first instance into a barrister's, conveyancer's, or special pleader's chambers, according as the student may have made his choice, if he would sufficiently qualify himself for his profession. Two or three years, sedulously devoted to the acquisition of practical knowledge, and the various modes of its application, in such an office, may suffice, if a judicious system be deliberately chosen and resolutely pursued. The details of this system will principally be left to the direction of the preceptor. They will consist, in the first place, of the perusal of the cases for opinions, and instructions for pleadings, conveyances, and proceedings in Equity, as they come from the hands of the preceptor, carefully noting the principles of law or of practice which they disclose, and investigating the authorities referred to, for the purpose of better understanding the extent of their application, and impressing them upon the memory.

In the next place, the pupil having become in some measure familiar with the forms and the technical language of the law, which will be facilitated by copying, in addition to reading the specimens which come before him, he should begin to draw, as it is professionally called, that is, to write out, according to the rules of the science, the documentary parts, or the pleadings, in legal proceedings. He should carefully read the statement of facts, consider the nature of the right affected, and the injury to that right; the form of the remedy to be adopted, the proper parties to the suit, and the evidence to be adduced; always bearing in mind that it is better to frame one declaration, plea, or deed, with a perfect understanding of its several parts, and the rationale of the whole, than to draw a hundred in the usual hasty manner from a written or a printed precedent without considering the law connected therewith. It is also desirable that the student should copy, in a book kept for the purpose, at least one precedent applicable to each class of action or proceeding, and the primary varieties under those respective classes. This, in addition to its securing a valuable set of pre-

cedents for future use, will greatly accelerate his progress in the art, and strengthen his confidence in his professional attainments. To heighten the value of this branch of his studies, the pupil would do well to subjoin a succinct statement of the facts on which each draught is founded, with the result of his investigation into those cases to which his preceptor may have referred, as authoritative illustrations of the law, and the language of the precedent.

Next to a clear perception of the principles of law, a distinct recollection of the instances in which those principles have been developed or confirmed, is indispensable to that readiness and ability which is the only sure foundation of future success. It is a maxim of metaphysics well understood, but not sufficiently regarded, that the faculty of the human mind called *memory*, finds the best auxiliary to the competent discharge of its functions in the association of ideas. The business of *common-placing*, therefore, is not alone to be recommended as a means of amassing extensive information within accessible and convenient limits, but it is still further valuable to the law student, inasmuch as the operation of reading, forming an abstract of what is read, and then recording it, in his own language, supplies a series of associations which will do much towards preventing the escape of the principles from the mind. This then is a species of study which should be diligently pursued, and will not be relinquished even after the days of pupilage are past by those who have learned to appreciate its importance.

It is obvious, that *reading*, to some considerable extent, is incident to the modes of study already pointed out; but it must be pursued for its own sake, and form part of the general system. The modern library is amply stored with elementary works upon every branch of the law, but the pupil must guard himself against an indiscriminate and desultory perusal of the most popular books; and bear in mind the observation of the elegant author of Eunomus, that "knowledge is not so much increased by a continued accession of *new* ideas, as by accurately comparing the relations of those ideas which we have already received." He must select, under the advice of his preceptor, and with reference more particularly to the line of practice in which he intends to engage, the best productions in which the principles, the maxims, and the decisions upon that branch of the law of which he is pursuing, are most faithfully recorded, and most ably expounded. Here top the *common-place book* must become the depository of the student's labours. The knowledge of the principles of the law will enable the student to argue scientifically, but he will be required to support his arguments by referring to legal authorities, and therefore he should have ready access to them, which is greatly facilitated by the use of a common-place book. Upon this part of the subject the preface to Roll's Abridgment may be quoted to advantage. The writer says,— "Touching the method of the study of the common law, I must in general say thus much to the student thereof. It is necessary for him to observe a method in his reading and study; for let him assure himself, though his memory be never so good, he shall never be able to carry on a distinct serviceable memory of all, or the greatest part he reads, to the end of seven years, nor a much shorter time, without help of use or method; yea, what he hath read seven years since, will, without the help of method, or reiterated use, be as new to him as if he had scarce ever read it. What he reads in the course of his reading, let him enter the abstract or substance thereof, especially of cases or points resolved into his common-place book under their proper titles; and if one case falls aptly under several titles, and it can be conveniently broken, let him enter each part under its proper title; if it cannot well be broken, let him enter the abstract of the entire case under the title most proper for it, and make references from the other titles unto it. It is true a student will waste much paper this way, and possibly in two or three years will see many errors and impertinences in what he hath formerly done, and much irregularity and disorder in the disposing of his matter under improper heads; but he will have these infallible advantages attending his course:—first, in process of time he will be more perfect and dexterous in this business; secondly, those first imperfect and disordered essays will, by frequent returns upon them, be intelligible, at least to himself, and refresh his memory; thirdly, he will by this means keep together, under apt titles, whatsoever he hath read; fourthly, by often returning upon every title as occasion of search or new insertions require, he will strangely revive and imprint in his memory what he hath formerly read; fifthly, he will be able at one view to see the substance of whatsoever he hath read concerning any one subject, without turning to every book (only when he hath particular occasion of advice or argument, then it will be necessary to look upon that book at large which he finds useful to his purpose); sixthly, he will be able upon any occasion suddenly to find any thing he hath read, without recoursing to tables or other repertories, which are oftentimes short, and give a lame account of the subject sought for."

If further argument were necessary to enforce the importance of common-placing, the example of lord keeper Guildford might be cited. In the very amusing and instructive life of that noble and learned personage, by his relation the Hon. Roger North, it is said,* that "it was his lordship's constant practice to common-place as he read. He had no bad memory, but was diffident and would not trust it. His writing in his common-places was not by way of index, but epitome; because, as he used to say, the looking over the common-place book on any occasion, gave him a sort of survey of what he had read about matters not then inquisited, which refreshed them somewhat in his memory, the great art of common-placing lying in the judicious, but very contracted note of the matter."

But however vast his acquisitions, unless the owner has learnt the art of using them, he

* North's Life of Lord Keeper Guildford, 1 vol. 20.

may still be poor, and perplexed with apparent privations, in the midst of his abundance. In order, therefore, that the student may learn to avail himself to the utmost, of the legal lore which he has amassed, he should accustom himself to the use of it in *oral discussion*. A prejudice exists against debating societies, and it is not intended to deny that some of the institutions so called, are in some respects exceptionable. Admitting an almost boundless range of subjects, the sober habit of mind induced by the studies of the office and the closet is invaded, and its energies let loose to wander through the tempting regions of general literature, taste, politics, and metaphysics. Not that these things are obnoxious in themselves, but when their claim to paramount attention is listened to with a willing and an approving ear, the mind becomes distracted, and its best powers weakened by the multiplicity of demands upon it. True, the practised debater may acquire a facility of speech and a rhetorical diction, by putting forth his strength upon all occasions and upon every theme; but the precision and force of reasoning, which is the primary distinction of the sound lawyer, and the modes of expression best calculated to convey the thoughts of the advocate to the court, can only be secured by confining these exercises within the limits of legal investigation. It may be thought a hard condition, and scarcely worth the reward which is promised for its observance, to divorce himself from those intellectual indulgences which were the delight of his leisure before scholastic duties had given place to professional employments, but such *is* the condition, and must rarely be departed from, and then only as a temporary relaxation from protracted study.

In addition to the practice of regular and formal discussion at appointed times, and upon questions previously propounded, the pupil may, if he is disposed to blend professional improvement with the enjoyments of social intercourse, derive considerable advantage by *conversations* upon points and principles of law, presuming that his companions will be chosen from among those who are treading the same path with himself. Such was the habit of mind indulged by lord keeper North, whose example has before been referred to. "He fell into the way of putting cases (as they call it), which much improved him, and he was most sensible of the benefit of discourse; for I have observed him often say, that (after his day's reading) at his night's congress with his professional friends, whatever the subject was, he made it the subject of discourse in the company; for (said he) I read many things which I am sensible I forgot, but I found withal that if I had once talked over what I had read, I never forgot it."*

It is a prevailing notion, that an *attendance upon the courts* during the sittings in term and at nisi prius, is indispensable to the complete education of the law student; but this may be very safely postponed till he is well acquainted with the general principles and practice of the law, especially as unless he is singularly fortunate, he will have sufficient time for this mode of improvement after he is called to the bar. However, it will be proper that he should attend a short time before he becomes a member of the court, to familiarize his mind with the mode of conducting business. On these occasions he should take notes, not only of the points of law and practice, but also of the facts and evidence in the trial of causes at nisi prius. A careful attention to these points will teach him the art of examining witnesses, and extorting the truth from the reluctant lips of a dishonest partizan. It will also enable him to estimate the value of evidence, trace its bearings upon the question at issue, and give him efficiency and facility in business.

The plan of study, of which the outline has thus been sketched, though designed to comprehend the extensive range of the common law, will be found to include every other department of the profession. The mere conveyancer will not think it necessary to attend the courts, nor perhaps, expedient to participate in the exercise of oral discussion, but all that the scheme contains besides, is applicable to this use, and may be adopted with advantage. The doctors of civil law, whose fitness to practice is ostensibly completed at the university, and nominally ratified by the title of honour attached to their names, will enter the ecclesiastical or admiralty courts with more confidence, if their general acquirements are strengthened by the practical knowledge, to be obtained by the mode of self-education recommended; and the business of the equity barrister assimilates itself so closely to that of the common law barrister, that the preparation for either need differ only in the detail.

The student will probably be aware, that it will be difficult to apportion his time to the different species of study, and adhere to that apportionment rigidly; because there must be occasions when the fluctuating business of the office will produce considerable irregularity of employment. This however must be avoided, as far as it can be, consistently with a due attention to that business; for the progress in any art or science is greatly accelerated by a well-regulated system of pursuit. This, pursued with undeviating assiduity, must lead to that proficiency which can alone enable the student to assume and maintain that station in his profession, which will ensure a gratifying return for all his previous labours; and, having attained which, he may rationally indulge the hope, that the same industry and perseverance continued thenceforward, will realize those anticipations of future honour and distinction which cheered and stimulated him in the outset of his career.

The object of this note being not only to point out how the study of the law should be conducted so as to ensure the most beneficial results, but also to recommend an unremitting attention on the part of the student, any thing which tends to remove the prejudice which still prevails to some extent against the science of special pleading, may greatly assist that recommendation. The testimony of sir William Jones, therefore, who, though known as a law-

* See further North's Life of Lord Keeper Guildford, p. 19—27.

yer, was still more distinguished as a scholar, statesman, and philosopher, must have considerable weight on such a subject. His prefatory discourse to his translation of the speeches of Isæus has the following passage. (4 vol. quarto ed. p. 34. 9 vol. octavo ed. p. 50.)

"I shall not easily be induced to wish for a change in our present forms, how intricate soever they may seem to those who are ignorant of their utility. Our science of special pleading is an excellent logic; it is admirably calculated for the purposes of analysing a cause, of extracting, like the roots of an equation, the true points in dispute, and referring them, with all imaginable simplicity, to the court or the jury; it is reducible to the strictest rules of pure dialectics, and if it were scientifically taught in our public seminaries of learning, would fix the attention, give a habit of reasoning closely, quicken the apprehension, and invigorate the understanding, as effectually as the famed peripatetic system; which, how ingenious and subtile soever, is not so honourable, so laudable, or so profitable, as the science in which Littleton exhorts his sons to employ their courage and care. It may unquestionably be perverted to very bad purposes, but so may the noblest arts; and even eloquence itself, which many virtuous men have for that reason decried. There is no fear, however, that either the contracted fist, as Zeno used to call it, or expanded palm, can do any real mischief, while their blows are directed and restrained by the superintending power of a court."

SECTION II.

OF THE NATURE OF LAWS IN GENERAL.

LAW, in its most general and comprehensive sense, signifies a rule of action; and is applied indiscriminately to all kinds of action, whether animate or inanimate, rational or irrational. Thus we say, the laws of motion, of gravitation, of optics, or mechanics, as well as the 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 its 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 its 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 [*39] 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 its existence depends on that obedience. But

laws, in their more confined sense (1), 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 dependence 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 dependence consists. This principle, therefore, has more or less extent and effect, in proportion as the superiority of the one and the dependence 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 endued it with a principle of mobility, established certain rules for the perpetual direction of that motion, so, when he created man, and endued him with freewill to conduct himself in all parts [*40] 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 rela-

(1) This, perhaps, is the only sense in which the word *law* can be strictly used; for, in all cases where it is not applied to human conduct, it may be considered as a metaphor, and in every instance a more appropriate term may be found. When it is used to express the operations of the Deity or Creator, it comprehends ideas very different from those which are included in its signification when it is applied to man, or his other creatures. The volitions of the Almighty are his laws: he had only to will, *φως γενεσθω και εγενετο*. When we apply the word *law* to motion, matter, or the works of nature or of art, we shall find in every case, that with equal or greater propriety and perspicuity we might have used the words *quality*, *property*, or *peculiarity*.—We say that it is a law of motion, that a body put in motion *in vacuo* must for ever go forward in a straight line with the same velocity; that it is a law of nature, that particles of matter shall attract each other with a force that varies inversely as the square of the distance from each other; and mathematicians say, that a series of numbers observes a certain law, when each subsequent term bears a certain relation or proportion to the preceding term: but, in all these instances, we might as well have used the word *property* or *quality*, it being as much the property of all matter to move in a straight line, or to gravitate, as it is to be solid or extended; and when we say that it is the law of a series that each term is the square or square-root of the preceding term, we mean nothing more than that such is its property or peculiarity. And the word *law* is used in this sense in those cases only which are sanctioned by usage; as it would be thought a harsh expression to say, that it is a law that snow should be white, or that fire should burn. When a mechanic forms a clock, he establishes a model of it either in fact or in his mind, according to his pleasure; but if he should resolve that the wheels of his clock should move contrary to the usual rotation of similar pieces of mechanism, we could hardly with any propriety established by usage apply the term *law* to his scheme. When *law* is applied to any other object than man, it ceases to contain two of its essential ingredient ideas, viz. disobedience and punishment.

Hooker, in the beginning of his Ecclesiastical polity, like the learned judge, has with incomparable eloquence interpreted *law* in its most general and comprehensive sense. And most writers who treat *law* as a science begin with such an explanation. But the editor, though it may seem presumptuous to question such authority, has thought it his duty to suggest these few observations upon the signification of the word *law*.—CH.

tions 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 (2), should hurt nobody, and should render to every one his due; to which three general precepts Justinian (*a*) has reduced the whole doctrine of law.

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 obtained 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 its 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 inquire 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 connexion of justice and human felicity, he *has not perplexed the [*41] 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 true and substantial 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 coeval 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 (3); and such of them as are valid derive all

(*a*) *Juris præcepta sunt hæc, honeste vivere, alterum non ladere, suum cuique tribuere. Inst. 1. 1. 3.*

(2) It is rather remarkable, that both Harris, in his translation of Justinian's Institutes, and the learned Commentator, whose profound learning and elegant taste in the classics no one will question, should render in English, *honeste vivere*, to live honestly. The language of the Institutes is far too pure to admit of that interpretation; and besides, our idea of honesty is fully conveyed by the words *suum cuique tribuere*. I should presume to think that *honeste vivere* signifies to live honourably, or with decorum, or *bienseance*; and that this precept was intended to comprise that class of duties, of which the violations are ruinous to society, not by immediate but remote consequences, as drunkenness, debauchery, profaneness, extravagance, gaming, &c.—CHRISTIAN.

(3) Lord Chief Justice Hobart has also advanced, that even an act of parliament made against natural justice, as to make a man a judge in his own cause, is void in itself, for *jura naturæ sunt immutabilia*, and they are *leges legum*. (Hob. 87.) With deference to these high authorities, I should conceive that in no case whatever can a judge oppose his own opinion and authority to the clear will and declaration of the legislature. His province is to interpret and obey the mandates of the supreme power of the state. And if an act of parliament, if we could suppose such a case, should, like the edict of Herod, command 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 compassion to the frailty, the imperfection, [*42] and the blindness of human reason, *hath been pleased, at sundry times and in divers manners, to discover and enforce its 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 its 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 of infinitely more authenticity than that moral system which is framed by ethical writers, and denominated 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 are, 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 its [*43] moral guilt, or *superadd any fresh obligation, *in foro conscientiæ*, to abstain from its perpetration. Nay, if any human law should allow or injoin us to commit it, we are bound to transgress that human law,

the children of a certain age to be slain, the judge ought to resign his office rather than be auxiliary to its execution; but it could only be declared void by the high authority by which it was ordained. The learned judge himself is also of this opinion in p. 91.—CH.

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 (4), 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 (*b*), is neither capable of living alone, nor indeed has the courage to do it. However, 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 any, 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 all the communities are equally subject: and therefore the civil law (*c*) very justly observes, that *quod naturalis ratio inter omnes homines constituit, vocatur jus gentium.*

*Thus much I thought it necessary to premise concerning the [*44] 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, (*d*) "*jus civile est quod quisque sibi populus constituit.*" I call it *municipal* law, in compliance with common speech; for, though 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.

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." (5) Let us endeavour to explain

(*b*) Puffendorf, l. 7, c. 1, compared with Barbeyrac's Commentary.

(*c*) *Ff.* 1. 1, 9.

(*d*) *Inst.* 1. 2. 1.

(4) The law of nature, or morality, which teaches the duty towards one's neighbour, would scarce be wanted in a solitary state, where man is unconnected with man. A state of nature, to which the laws of nature, or of morals, more particularly refer, must signify the state of men, when they associate together previous to, or independent of, the institutions of regular government. The ideal equality of men in such a state no more precludes the idea of a law, than the supposed equality of subjects in a republic. The superior, who would prescribe and enforce the law in a state of nature, would be the collective force of the wise and good, as the superior in a perfect republic is a majority of the people, or the power to which the majority delegate their authority. —Ch.

(5) Though the learned judge treats this as a favourite definition; yet, when it is examined, it will not perhaps appear so satisfactory as the definition of civil or municipal law, or the law of the land, cited above from Justinian's Institutes, viz. *Quod quisque populus ipse sibi jus constituit, id ipsius proprium civitatis est, vocaturque jus civile, quasi jus proprium ipsius civitatis.*

A municipal law is completely expressed by

its 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 attaint 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.

[*45] *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 any thing 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

the first branch of the definition: "A rule of civil conduct prescribed by the supreme power in a state." And the latter branch, "commanding what is right and prohibiting what is wrong," must either be superfluous, or convey a defective idea of a municipal law; for if right and wrong are referred to the municipal law itself, then whatever it commands is right, and what it prohibits is wrong, and the clause would be insignificant tautology. But if right and wrong are to be referred to the law of nature, then the definition will become deficient or erroneous; for though the municipal law may seldom or never command what is wrong, yet in ten thousand instances it forbids what is right.—It forbids an unqualified person to kill a hare or a partridge; it forbids a man to exercise a trade without having served seven years as an apprentice; it forbids a man to keep a horse or a servant without paying the tax. Now all these acts were perfectly right before the prohibition of the municipal law. The latter clause of this definition seems to have been taken from Cicero's definition of a law of nature, though perhaps it is there free from the objections here suggested: *Lex est summa ratio insita à naturâ quæ jubet ea, quæ facienda sunt prohibetque contraria.*—Cic. de Leg. lib. i. c. 6.

The description of law given by Demosthenes is perhaps the most perfect and satisfactory that can either be found or conceived: Οἱ δὲ νόμοι τὸ δίκαιον καὶ τὸ καλὸν καὶ τὸ συμφέρον βούλονται, καὶ τοῦτο ζητοῦσι. καὶ ἐπειδὰν εὑρεθῇ, κοινὸν τοῦτο πρόσταγμα ἀπεδείχθη, πᾶσιν ἴσον καὶ ὅμοιον· καὶ τοῦτ' ἔστι νόμος, ᾧ πάντας προσήκει πείθεσθαι διὰ πολλὰ καὶ μάλιστ', ὅτι πᾶς ἐστι νόμος εὕρημα μὲν καὶ δῶρον θεῶν, δόγμα δ' ἀνθρώπων φρονίμων, ἐπανόρθωμα δὲ τῶν ἑκουσίων καὶ ἀκουσίων ἁμαρτημάτων, πόλεως δὲ συνθήκη κοινή· καθ' ἣν πᾶσι προσήκει ζῆν τοῖς ἐν τῇ πόλει. "The design and object of laws is to ascertain what is just, honourable, and expedient; and, when that is discovered, it is proclaimed as a general ordinance, equal and impartial to all. This is the origin of law, which, for various reasons, all are under an obligation to obey, but especially because all law is the invention and gift of heaven, the sentiment of wise men, the correction of every offence, and the general compact of the state; to live in conformity with which is the duty of every individual in society." *Orat.* 1. *cont. Aristogit.*—CH.

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 [*46] 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 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 (indifferent in itself) 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 (6).

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.

(*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 sacratæ, vetant duodecim tabulæ, leges privatis hominibus irrogari; id enim est privilegium. Nemo unquam tulit, nihil est crudelius, nihil perniciosius, nihil quod minus hæc civitas ferre possit.*"

* An *ex post facto* law may be either of a public or of a private nature; and when we speak generally of an *ex post facto* law, we perhaps always mean a law which comprehends the whole community.

The Roman *privilegia* seem to correspond to our bills of attainder, and bills of pains and penalties, which, though in their nature they are *ex post facto* laws, yet are never called so.—*Ch.*

(6) Many instances formerly occurred of acts of parliament taking effect prior to the passing thereof, by legal relation from the first day of the session, sec. 1. Lev. 91. 4 T. R. 660; but this is remedied by 33 Geo. 3. c. 13. and frequently it is provided, that the act shall commence at a future named day.

In New-York, every law, unless a different time is prescribed therein, takes effect on the twentieth day after the day of its final passage. 1 R. S. 157.

The statutes of the United States take effect from their date. 1 Kent's Com. 426—1 Gallis. 62—7 Wheat. 164. The constitution of the United States prevents *Congress* from passing any *ex post facto* law: article 1. sect. 2. § 3—so article 1. sect. 10. § 1. prevents any *state* from passing any *ex post facto* law, or law impairing the obligation of *contracts*. By *ex post facto* laws, is only meant, laws relating to *criminal* not civil matters. 7 Johns. R. 477. 3 Dallas 386. See, however, 2 Peters 681, Mr. Justice Johnson's opinion.

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.

[*47] *This will naturally lead us into a short inquiry 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 either natural or civil; 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 natural society, among themselves; which, every day extending its limits, laid the first though imperfect rudiments of civil or political society: 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, reunited again; sometimes by compulsion and conquest, sometimes by accident, and sometimes perhaps by compact. But though society had not its 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 civil 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

[*48] in nature and reason must always be understood and implied, *in the very act of associating together: namely, that the whole should protect all its 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 civil society is once formed, government at the same time results of course, as necessary to preserve and to keep that society in order. Unless some superior be 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 which compose this society were 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 ge-

neral, 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 is among the attributes of him who is emphatically styled 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 sub- [*49] sist, 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 free 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 styled 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; by constituting one, or a few, or many executive magistrates: and all the other powers of the state must obey the legislative power in the discharge 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 [*50] 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; for, by the entire conjunction of the legislative and executive powers, all the sinews of government are knitted 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 antients, as was observed, had in general no idea of any other permanent form of government but these three: for though Cicero (*f*) declares himself of opinion, "*esse optime constitutam rempublicam, quæ 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 (*g*).

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 [*51] 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 every thing; 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 [*52] to the views of either of the other two, there would *soon be an

(*f*) In his fragments *de rep. l. 2.*

(*g*) "*Cunctas nationes et urbes populus aut primores, aut singuli regunt; delecta ex his et constituta reipublicæ forma laudari facilius quam evenire, vel, si evenit, haud diuturna esse potest.*" *Ann. l. 4.*

end of our constitution. The legislature would be changed from that, which (upon the supposition of an original contract, either actual or implied) is presumed to have been originally set up by the general consent and fundamental act of the society: and such a change, however effected, is, according to Mr. Locke, (*h*) (who perhaps carries his theory too far) at once an entire dissolution of the bands of government; and the people are thereby reduced to a state of anarchy, with liberty to constitute to themselves a new legislative power.

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 assemblies 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 its *duty* likewise. For since the *respective members are bound to conform themselves to the will of the state, it is [*53] expedient that they receive directions from the state declaratory of that its will. But, as it is impossible, in so great a multitude, to give injunctions to every particular man, relative to each particular action, it is therefore incumbent on the state to establish 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.

(*h*) On government, part 2. § 212.

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
[*54] 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 misdemesnors, that are forbidden by the superior laws, and therefore styled *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.

[*55] *But, with regard to things in themselves indifferent, the case is entirely altered. These become either right or wrong, just or unjust, duties or misdemesnors, 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 its 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 circum-

stances, or to what degrees they shall be obeyed, it 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 seizing another's cattle shall amount to a trespass or a theft; 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 (*i*) that, in things naturally indifferent, the very essence of right and wrong depends upon the direction of the laws to do or to omit them.

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 its office; will make Gaius restore the possession to Titius, and also pay him damages for the invasion. [*56]

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 (*k*). 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.

*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 non-compliance." 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. [*57]

Legislators and their laws are said to *compel* and *oblige*: not that by any

(*i*) See page 42.

(*k*) Locke, Hum. Und. b. 2. c. 21.

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 true, it hath been holden, and very justly, by the principal of our ethical writers, that human laws are binding upon men's 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, without any intermixture of moral guilt, [*58] *annexing a penalty to non-compliance (*l*), 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, which ever 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, and against every person who possesses a partridge in August. And so too, by other statutes, pecuniary penalties are inflicted for exercising trades without serving an apprenticeship thereto, (7), for not burying the dead in woollen, for not performing the statute-work on the public roads, and for innumerable other positive misdemesnors. Now these prohibitory laws do not make the transgression a moral offence, or sin: the only obligation in conscience is to submit to the penalty, if levied. It must however be observed, that we are here speaking of laws that are simply and purely penal, where the thing forbidden or enjoined is wholly a matter of indifference, and where the penalty inflicted is an adequate compensation for the civil inconvenience supposed to arise from the offence (8). But where disobedience to the law

(*) See Book II. page 420.

(7) By stat. 54 G. III. c. 96, this law, and, by stat. 54 G. III. c. 108, that for not burying in woollen, are repealed.

(8) This is a doctrine to which the Editor cannot subscribe. It is an important question, and deserves a more extensive discussion than can conveniently be introduced into a note. The solution of it may not only affect the quiet of the minds of conscientious men, but may be the foundation of arguments and decisions in every branch of the law. To form a true judgment upon this subject, it is necessary to take into consideration the nature of moral and positive laws. The principle of both is the same, viz. utility, or the general happiness and true interests of mankind,

Atque ipsa utilitas justi prope mater et æqui.

But the necessity of one set of laws is seen

involves in it also any degree of public mischief or private injury, there it falls within our former distinction, and is also an offence against conscience (*m*).

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

(m) *Lex pure poenalis obligat tantum ad poenam, non item ad culpam: lex poenalis mista et ad culpam obligat, et ad poenam.* (Sanderson *de conscient. obligat. prael.* viii. § 17. 24.)

prior to experience; of the other, posterior. A moral rule is such, that every man's reason (if not perverted) dictates it to him as soon as he associates with other men. It is universal, and must be the same in every part of the world. Do not kill, do not steal, do not violate promises, must be equally obligatory in England, Lapland, Turkey, and China. But a positive law is discovered by experience to be useful and necessary only to men in certain districts, or under peculiar circumstances. It is said that it is a capital crime in Holland to kill a stork, because that animal destroys the vermin which would undermine the dykes or banks, upon which the existence of the country depends. This may be a wise law in Holland; but the life of a stork in England would be of no more value than that of a sparrow, and such a law would be useless and cruel in this country.

By the laws of nature and reason, every man is permitted to build his house in any manner he pleases; but from the experience of the destructive effects of fire in London, the legislature with great wisdom enacted that all party-walls should be of a certain thickness; and it is somewhat surprising that they did not extend this provident act to all other great towns. (14 Geo. III. c. 78.)

It was also discovered by experience, that dreadful consequences ensued, when sea-faring people, who returned from distant countries infected with the plague, were permitted immediately to come on shore, and mix with the healthy inhabitants; it was therefore a wise and merciful law, though restrictive of natural right and liberty, which compelled such persons to be purified from all contagion by performing quarantine. (4 book, 161.)

He who, by the breach of these positive laws, introduces conflagration and pestilence, is surely guilty of a much greater crime than he is who deprives another of his purse or his horse.

The laws against smuggling are entirely *juris positivi*; but the criminality of actions can only be measured by their consequences; and he who saves a sum of money by evading the payment of a tax, does exactly the same injury to society as he who steals so much from the treasury; and is therefore guilty of as great immorality, or as great an act of dishonesty. Or smuggling has been compared to that species of fraud which a man would practice who should join with his friends in ordering a dinner at a tavern; and, after the festivity and gratifications of the day, should steal away, and leave his companions to pay his share of the reckoning.

Punishment or penalties are never intended as an equivalent or a composition for the commission of the offence; but they are that degree of pain or inconvenience, which are supposed to be sufficient to deter men from introducing that greater degree of inconvenience, which would result to the community from the general permission of that act, which the law prohibits. It is no recompence to a man's country for the consequences of an illegal act, that he should afterwards be whipped, or should stand in the pillory, or lie in a gaol. But in positive laws, as in moral rules, it is equally false that *omnia peccata paria sunt*. If there are laws such as the game-laws, which in the public opinion produce little benefit or no salutary effect to society, a conscientious man will feel perhaps no further regard for the observance of them, than from the consideration that his example may encourage others to violate those laws which are certainly beneficial to the community. Indeed, the last sentence of the learned judge upon this subject, is an answer to his own doctrine; for the disobedience of any law in existence, must be presumed to involve in it either public mischief or private injury. It is related of Socrates, that he made a promise with himself to observe the laws of his country; but this is nothing more than what every good man ought both to promise and perform; and he ought to promise still farther, that he will exert all his power to compel others to obey them. As the chief design of established government is the prevention of crimes and the enforcement of the moral duties of man, obedience to that government necessarily becomes one of the highest of moral obligations; and the principle of moral and positive laws being precisely the same, they become so blended, that the discrimination between them is frequently difficult or impracticable, or as the author of the Doctor and Student has expressed it with beautiful simplicity, "In every law positive well-made, is somewhat of the law of reason and of the law of God; and to discern the law of God and the law of reason from the law positive, is very hard." 1 *Dial. c.* 4.—CH.

In 2 Bos. & Pull. 375. Mr. Justice Rooke says, "I perfectly agree with my brother Heath in reprobating any distinction between *malum prohibitum* and *malum in se*, and consider it as pregnant with mischief. Every moral man is as much bound to obey the civil law of the land as the law of nature." See 5 Bar. & Ald. 341.

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 [*59] 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 (*n*), 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 (*o*) 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. (9) 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, comprise only certain of her lineal descendants. (10)

[*60] *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. (11) 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. (12) Thus, when the law of England declares mur-

(n) *Inst.* 1. 2. 6.

(o) L. of N. and N. 5. 12. 3.

(9) See 7 Cowen, 202.

(10) If words or expressions have acquired a definite meaning in law, they must be so expounded. 2 M. and Sel. 230. 1 Term. Rep. 723.

(11) But a positive enactment is not to be considered restrained by the preamble, 1 Term Rep. 44. 4 Term Rep. 790. 3 M. and Sel. 66. Lofft's Rep. 783.

(12) It is an established rule of construction that statutes *in pari materiâ*, or upon the same subject, must be construed with a reference to each other; that is, that what is clear in one statute shall be called in aid to explain what

der 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 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, that 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 (*p*), 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.

*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. (13) 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 treatise inscribed to Herennius (*q*). There was a law, that those who in a storm forsook the ship should forfeit all property therein; and that 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 its preservation (14). [*61]

(*p*) *l.* 5. *c.* 12. § 2.

(*q*) *l.* 1. *c.* 11.

is obscure and ambiguous in another. Thus the last qualification act to kill game (22 and 23 Car. II. c. 25,) enacts, "that every person not having lands and tenements, or some other estate of inheritance, of the clear yearly value of 100*l.* or for life, or having lease or leases of ninety-nine years of the clear yearly value of 150*l.*" (except certain persons,) shall not be allowed to kill game. Upon this statute a doubt arose whether the words *or for life* should be referred to the 100*l.* or to the 150*l. per annum*. The court of king's bench having looked into the former qualification acts, and having found that it was clear by the first qualification act (13 R. I. st. 1, c. 13,) that a layman should have 40*s.* a year, and a priest 10*l.* a year, and that, by the 1 Ja. c. 27, the qualifications were clearly an estate of inheritance of 10*l.* a year, and an estate for life of 30*l.* a year, they presumed that it still was the intention of the legislature to make the yearly value of an estate for life greater than that of an estate of inheritance, though the same proportions were not preserved; and thereupon decided that clergymen, and all others possessed of a life estate only must have 150*l.* a year to be qualified to kill game. *Lowndes* v. *Lewis*, *E. T.* 22 *Geo. III.*

The same rule to discover the intention of a testator is applied to wills, viz. the whole of a will shall be taken under consideration, in order to decipher the meaning of an obscure passage in it.—CH. See 5 Cowen 421.

(13) The ends contemplated are to be considered, and general words may be thereby restrained. 3 Maule and Selwyn, 510.

(14) See a very sensible chapter upon the interpretation of laws in general, in Rutherforth's Institutes of Natural Law, b. ii. c. 7. —CH.

From this method of interpreting laws, by the reason of them, arises what we call *equity*, which is thus defined by Grotius (*r*): "the correction of that wherein the law (by reason of its universality), is deficient." 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 defining those circumstances, which (had they been foreseen) the legislator himself would have expressed. And these are the cases which, according to Grotius, "*lex non exacte definit, sed arbitrio boni viri permittit* (15).

Equity thus depending, essentially, upon the particular circum-
[*62] stances of each individual case, there can be no established *rules and fixed precepts of equity laid down, without destroying its 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, though 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 III.

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 (1).

(*r*) *De Æquitate*, § 3.

(15) The only *equity*, according to this description, which exists in our government, either resides in the king, who can prevent the *summum jus* from becoming *summa injuria*, by an absolute or a conditional pardon, or in juries, who determine whether any, or to what extent, damages shall be rendered. But *equity*, as here explained, is by no means applicable to the court of chancery; for the learned judge has elsewhere truly said, that "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." Book iii. 432.—CH. See 1 Wm. Bl. rep. 152. Mitf. Pl. 4.

(1) In the State of New-York, such parts of the common law as were in force in the colony on the 19th April, 1775, were retained by the new Const. Art. 7. Sect. 13; so generally in the other States, the common law was adopted as it existed at the revolution. In the U. S. the written law consists, 1st. of the Constitution of the U. S., the Acts of Congress made in pursuance of it, and all treaties made under the authority of the U. S.: these are the supreme law of the land. Const. Art. 6. § 2. 2nd. The Constitution and Acts of each State. In the State of New-York its statutes have been revised, and went into operation on 1st January, 1830.

The colonists have been considered as bringing with them only such parts of the law of the mother country as were suited to their situation, see p. 107: the particular laws and customs of special districts of England were therefore never adopted by them.

When I call these parts of our law *leges non scriptæ*, 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, because 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 (*a*); and it is said of the primitive Saxons here, as well as their brethren on the continent, that *leges sola memoria et usu retinebant* (*b*). 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, [*64] 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 style these parts of our law *leges non scriptæ*, 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.*"

Our ancient lawyers, and particularly Fortescue (*c*), 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. 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 (*d*), are mixed as our language; and, as our language is so much the richer, the laws are the more complete.

And indeed our antiquaries and early 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 [*65] 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 kind Edward the elder, the son of Alfred (*e*). "*Omnibus qui reipublicæ præsunt etiam atque etiam mando, ut omnibus æquos se præbeant judices, perinde ac in judiciali libro* (*Saxonice*, dom-boc) *scriptum habetur: nec quicquam formident quin jus commune* (*Saxonice*, folcrihte) *audacter libereque dicant.*"

(*a*) Cæs. de b. G. lib. 6. c. 13.
(*b*) Speim. Gl. 362.
(*c*) C. 17.
(*d*) See his proposals for a digest.
(*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 above mentioned, 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 its original and composition. This was principally maintained in the rest of the midland counties, and also on the eastern coast, the part most exposed to the visits of that piratical people. As for the very northern provinces, they were at that time under a distinct government (*f*).

[*66] *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. And indeed a general digest of the same nature has been constantly found expedient, and therefore put in practice by other great nations, which were 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 *Les Partidas* (*l*). And in Sweden, about the same æra, when a universal body of common law was compiled out of the particular customs established by the laghman of every province, and entitled the *land's lagh*, being analogous to the *common law* of England (*m*), (2).

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 a half had suggested; for Alfred is generally styled 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

(*f*) Hal. Hist. 55.
(*g*) *In Hen. II.*
(*h*) *In Edw. Confessor.*
(*i*) *In Seld. ad Eadmer*, 6.
(*k*) Mod. Un. Hist. xxii. 135.
(*l*) *Ibid*, xx. 211.
(*m*) *Ibid.* xxxiii. 21, 58.

(2) The commentators on the old French law cite Littleton for illustration; and, for the same reason, the antiquarian lawyer will cite Les Coutumes de Beavoisis, collected by Beaumanoir, first printed at Bourges, 1690, for the purpose of illustrating Littleton. Beaumanoir's compilation was made long antecedent to our venerable author, or, as he has been called, father of our law.—LEE.

princes of the Norman line; and which subsequent princes so frequently promised to keep and 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 [*67] the civil law; which established in the twelfth century a new Roman empire over most of the states of 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 before mentioned (3).

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 (4): 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 its 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 (5). This it is that gives it its 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.

*1. As to general customs, or the common law, properly so [*68] 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

(3) The student who may be desirous of pursuing this investigation further, may add to his own conjectures those of Dr. Wilkins, in his code of ancient laws; of Selden, in his Notes on Eadmer; and of Garberon, editor of the works of Anselm.—LEE.

(4) What Lord Hale says is undoubtedly true, that "the original of the common law is as undiscoverable as the head of the Nile." Hist. Com. Law, 55.—CH.*

(5) See note 15, p. 76.—CH.

* This comparison, like that of the black swan of the ancients, must now be disused.

acquired and transferred by writing;—that a deed is of no validity unless sealed and delivered;—that wills shall be construed more favourably, 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.

[*69] *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 depositaries 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. The knowledge of that law is derived from experience and study; from the "*viginti annorum lucubrationes*," which Fortescue (*n*) 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 public 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 "*præteritorum memoria eventorum*" reckoned up as one of the chief qualifications of those, who were held to be "*legibus patriæ optime instituti* (*o*)." 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 rea-

[*70] son; *much more if it be clearly 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

(*n*) *Cap.* 8. (*o*) Seld. Review of Tith. c. 2.

be found that the former decision is manifestly absurd or unjust (6), 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 it always intends to conform thereto, and 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 (*p*). 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 broken in upon by statutes or new resolutions, the wisdom of the rule hath in the end appeared from the inconveniencies that have followed the innovation.

The doctrine of the law then is this: that precedents and rules must be followed, unless flatly absurd or unjust (7): for though their reason be not

(*p*) Herein agreeing with the civil law, *Ff.* 1. 3. 20, 21. "*Non omnium, quæ a majoribus nostris constituta sunt, ratio reddi potest. Et ideo rationes eorum, quæ constituuntur, inquiri non oportet: alioquin multa ex his, quæ certa sunt, subvertuntur.*"

(6) But it cannot be dissembled, that both in our law, and in all other laws, there are decisions drawn from established principles and maxims, which are good law, though such decisions may be both manifestly absurd and unjust. But notwithstanding this, they must be religiously adhered to by the judges in all courts, who are not to assume the characters of legislators. It is their province *jus dicere*, and not *jus dare*. Lord Coke, in his enthusiastic fondness for the common law, goes farther than the learned commentator; he lays down, that *argumentum ab inconvenienti plurimum valet in lege*, because *nihil quod est inconveniens est licitum*. Mr. Hargrave's note upon this is well conceived and expressed: "Arguments from inconvenience certainly deserve the greatest attention, and where the weight of other reasoning is nearly on an equipoise, ought to turn the scale. But if the rule of law is clear and explicit, it is in vain to insist upon inconveniencies; nor can it be true that nothing, which is inconvenient, is lawful, for that supposes in those who make laws a perfection, which the most exalted human wisdom is incapable of attaining, and would be an invincible argument against ever changing the law." *Harg. Co. Litt.* 66.—CH.

(7) Professor Christian maintains, that precedents and rules must be followed, even when they are flatly absurd and unjust, *if they are agreeable to ancient principles*; a condition which, it is apprehended, extracts the whole negation with which he would reverse the maxim in the text. Mr. Sedgwick contends, on the other hand, that sir William Blackstone urges the doctrine too far, and sets up a distinction between legal precedents and laws, which, however sound in itself, does not aid the argument it is intended to enforce. "A law (he says) is a public statute, solemnly framed by the legislative, and confirmed by the executive, power. The decrees and determinations of the magistrates are not, rigorously speaking, laws: legal precedents ought therefore not despotically to govern, but discreetly to guide. With laws it is otherwise; to them the judge in his adjudications must conform, &c." Now it is evident that our author is speaking of the common law, and his commentators must so understand him; which common law is as absolute as the parliamentary statutes, and must be as rigidly observed by the judicature. Assuming that the legal precedent, or the statute, is absurd and unjust, the only question is, by what authority shall it be abrogated. Mr. Sedgwick points to the judges on the bench; and professor Christian maintains the sole and supreme right to exercise this function. The spirit and practice of the constitution is with him, and it is well for the interests of public justice that they are so. In the multitude of counsels there is wisdom; and the business of legislation, even upon the substitution of a wholesome law in the place of an absurd or unjust precedent, may well employ the highest wisdom in the state. There may be a difference of opinion as to what is absurd and unjust. For instance, the law of primogeniture has fallen under that censure from the lips of men, whose station in society recommend even their hasty notions to the respect of their contemporaries. It would be difficult to reconcile the preference of the first-born to the exclusion of all the other offspring of the same family, with the law of nature, or the law of God; yet no judge would dare to treat this rule of law as absurd or unjust, and substitute an equal division of the patrimony among all the children, upon the question being brought before him. Had he such power given him by the constitution, his fellows might

obvious at first view, yet we owe such a deference to former times as not to suppose that 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 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 [*71] *the law. For herein there is nothing repugnant to natural justice (8); though the artificial reason of it, drawn from the feodal law, may not be quite obvious to every body (9). And therefore, though a modern judge, on account of a supposed hardship upon the half brother, 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 seize 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*).

The decisions therefore of courts are held in the highest regard, and are

(q) "*Si imperialis majestas omnem cognitionem aliter examinaverit, et partibus, coram constitutis sententiam dixerit, omnes omnino judices, qui sub nostro imperio sunt, sciant hanc esse legem, non solum illi causæ pro qua producta est, sed et in omnibus similibus.*" C. 1. 14. 12.

exercise it also; and it is no overstrained conjecture to say, that fluctuating and conflicting adjudications would be the consequence, producing much more mischief than can ensue from the enforcement of any precedent or rule of law, however absurd or unjust, till the legislature provides the proper remedy.

If an act of parliament had been brought in at the close of a session, and passed on the last day, which made an innocent act criminal, or even a capital crime; and if no day was fixed for the commencement of its operation, it had the same efficacy as if it had been passed on the first day of the session, and all who, during a long session, had been doing an act, which at the time was legal and inoffensive, were liable to suffer the punishment prescribed by the statute. (4 Inst. 25. 4 Term Rep. 660.) This was both flatly absurd and unjust: but it was the clear law of England, and could only be abrogated by the united authority of the king, lords, and commons, in parliament assembled; who by the 33 Geo. III. c. 13. enacted, that when the operation of an act of parliament is not directed to commence from any time specified within it, the clerk of the parliaments shall endorse upon it the day upon which it receives the royal assent, and that day shall be the date of its commencement.

So it being a rule of law, that a person born in England owes a natural allegiance, from which he cannot release himself, it was held, that a person born in England, of French parents, but removed out of England immediately after his birth, and educated in France, was guilty of treason in joining the French in war against England. Foster, Cr. L. 59. See note 6, p. 46.

(8) But it is certainly repugnant to natural reason, where a father leaves two sons by two different mothers, and dies intestate, and a large estate descends to his eldest son, who dies a minor or intestate, that this estate should go to the lord of the manor, or to the king, rather than to the younger son. When such a case happens in the family of a nobleman, or a man of great property, this law will then appear so absurd and unreasonable, that it will not be suffered to remain long afterwards to disgrace our books. See book ii. p. 231.—CH.

(9) The more advanced student may consult Mr. Humphrey's "Observations on the Actual State of the English Laws of Real Property, with the Outline of a Code;" a production indicative of great mental vigour. He states the evil with perspicuity; whether it be fundamental, or whether it be one merely of inconvenient anomaly; and, with equal clearness, and, to many, with irresistible reason on his side, suggests the antidote.

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 its judgment; taken down in short notes by persons present at the determination. And these serve as indexes to, and also to explain, the records; which always, in matters of consequence and nicety, the judges direct to be searched. 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 [*72] prothonotaries, or chief scribes of the court, at the expence 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 (*r*) 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 contemporary 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 (*s*).

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, Hengham and Littleton, Statham, Brooke, Fitzherbert, and Staundforde (10), 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

(*r*) *Pat.* 15 *Jac. I. p.* 18. 17 Rym. 26.

(*s*) His reports, for instance, are styled κατ' ἐξοχήν, *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 names of those princes, in whose reigns the cases reported in his three volumes were determined; *viz.* Queen Elizabeth, King James, and King 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.

(10) The works of these authors are distinguished by the following titles:—"Glanvil's Treatise of the Laws and Customs of England," written in the time of Hen. II. edit. 1780; "Bracton's Treatise of the Laws and Customs of England," written in the reign of Hen. III. edit. 1569; "Britton, corrected by Wingate," edit. 1640; "Fleta, or a Commentary upon the English law," written by an anonymous author (a prisoner in the Fleet), in the time of Edw. I. with a small Treatise, called "Fet Assavoir" annexed, and Mr. Selden's "Dissertation," edit. 1685; "Hengham, (Chief-Justice of the King's-Bench in the time of Edw. I.) Summa Magna and Parva, treating of Essoigns and Defaults in Writs of Right, Writs of Assize and Dower, &c." which is printed with "Fortesque de Laudibus legum Angliæ," edit. 1775; "Littleton's Tenures," various edit. "Statham's Abridgment, containing the Cases down to the End of Hen. VI." only one edit. without date; "Brooke's Grand Abridgment of the Law," 1573; "Fitzherbert's Grand Abridgment of the Law," 1565; "Staundforde's Pleas of the Crown," to which is added, an "Exposition of the King's Prerogative," 1607.

any intrinsic authority in the courts of justice, and do not entirely depend on the strength of their quotations from older authors, is the [*73] *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 (*s*). 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 (*t*).

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 its liberty, paid also a great regard to custom; but not so much as our law: it only then adopting it, when the written law was deficient. Though the reasons alleged in the digest (*u*) 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 have approved without writing ought also to bind every body. For where is the difference, whether the people declare their [*74] *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* (11) *legis habet vigorem, cum populus ei et in eum omne suum imperium et potestatem conferat*," says Ulpian (*w*). "*Imperator solus et conditor et interpres legis existimatur*," says the code (*x*). And again, "*sacrilegii instar est rescripto principis obviari* (*y*)." And indeed it is one of the characteristic marks of English liberty, that our common law depends upon custom;

(*s*) It is usually cited either by the name of Co. Litt. or as 1 Inst.

(*t*) These are cited as 2, 3, or 4 Inst. without any author's name. An honorary distinction, which, we observed, is 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.

(*u*) *Ff.* 1. 3. 32.

(*w*) *Ff.* 1. 4. 1.

(*x*) *C.* 1. 14. 12.

(*y*) *C.* 1. 23. 5.

(11) This is the first sentence of the definition of a constitution in the beginning of the Institutes. It ought to be cited at length, that it may receive the execration it deserves. It is no wonder from this specimen, that the civil law should have experienced such protection and patronage from all the despotic governments of Europe, and such opposition and detestation from the sturdy English barons.

CONSTITUTIO.

Sed et quod principi placuit, legis habet vigorem: quum lege regia, quæ de ejus imperio lata est, populus ei, et in eum omne imperium suum et potestatem concedat. Quodcunque ergo imperator per epistolam constituit; vel cognoscens decrevit, vel edicto præcepit, legem esse constat; hæc sunt, quæ constitutiones appellantur. Plane ex his quædam sunt personales, quæ nec ad exemplum trahuntur, quoniam non hoc princeps vult, nam quod alicui ob meritum indulsit, vel si quam pœnam irrogavit, vel si cui sine exemplo subvenit, personam non transgreditur. Aliæ autem, quam generales sint, omnes procul dubio tenent. Inst. 1. 2. 6.—CH.

which carries this internal evidence of freedom along with it, that it probably was introduced by the voluntary consent of the people (12).

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. (z).

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 [*75] 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 entitled, for her dower, to all her husband's lands;

(z) *Mag. Cart.* 9 Hen. III. c. 9.—1 Edw. III. st. 2. c. 9.—14 Edw. III. st. 1. c. 1.—and 2 Hen. IV. c. 1.

(12) Lord Chief-Justice Wilmot has said, that "the statute law is the will of the legislature in writing; the common law is nothing else but statutes worn out by time. All our law began by consent of the legislature, and whether it is now law by usage or writing is the same thing. (2 *Wils.* 348.) And statute law, and common law, both originally flowed from the same fountain." (*Ib.* 350.) And to the same effect Lord Hale declares, "that many of those things that we now take for common law, were undoubtedly acts of parliament, though now not to be found of record." (*Hist. Com. Law*, 66.) Though this is the probable origin of the greatest part of the common law, yet much of it certainly has been introduced by usage, even of modern date, which general convenience has adopted. As in the civil law, *sine scripto jus venit, quod usus approbavit, nam diuturni mores consensu utentium comprobati legem imitantur.* (Inst. 1, 2. 9.) Of this nature in this country is the law of the road, viz. that horses and carriages should pass each other on the whip hand.* This law has not been enacted by statute, and is so modern, that perhaps this is the first time that it has been noticed in a book of law. But general convenience discovered the necessity of it, and our judges have so far confirmed it, as to declare frequently at nisi prius, that he who disregards this salutary rule is answerable in damages for all the consequences.—Ch.

* It has been frequently adjudged, that a driver upon the wrong side of a road, met by another who will of course be upon his own right side, is not upon that account to be injured with impunity. Which the proper side is, is conventional between those who frequent the public roads or streets; but it is not yet noted as a custom to guide or direct a decision in our courts of law against him who has not observed it. 1 R. S. 695, requires the driver of a carriage to turn to the right when meeting another carriage; so also 1 R. S. 683, steam-boats meeting must pass to the right. The owner of a vessel navigating a river, having it in his power to avoid a collision with another vessel, yet neglecting to exercise that power, is liable for the damage sustained by the other vessel, though that vessel has the wind. It was so adjudged against the owners of a steam-boat in 2 Wendell, 452, the steam-boat being more manageable than a sloop with a light favourable wind. The same principle must apply to carriages. Judge Best, L.C.J. C.P. in Rougemont v. Smith, tried at London Sittings after Trinity Term, 6 G. IV. observed, "That admitting a party's mare to be ridden on the wrong side of the road, as it is called, she was not therefore to be run against and killed." The question may always be sensibly put, "Was there road-room enough for both parties to pass? if there were, through whose incautious riding or driving was the injury done?"

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 and customary 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. All these are contrary to the general law of the land, and are good only by special usage; though the customs of London are also confirmed by act of parliament (*a*).

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 general rules of the common law, is yet ingrafted into it, and made a part of it (*b*); being allowed, for the benefit of trade, to be of the utmost validity in all commercial transactions: for it is a maxim of law, that "*cuilibet in sua arte credendum est* (13)."

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*.

[*76] *As to gavelkind, and borough-English, the law takes particular notice of them (*c*), and there is no occasion to prove that such customs actually exist, but only that the lands in question are subject thereto. All other private customs must be particularly pleaded (*d*), and as well the existence of such customs must be shewn, as that the thing in dispute is within the custom alleged. 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

(*a*) 2 Rep. 126. Cro. Car. 347.
(*b*) Winch. 24.
(*c*) Co. Litt. 175.
(*d*) Litt. § 265.

(13) The *lex mercatoria*, or the custom of merchants, like the *lex et consuetudo parliamenti*, describes only a great division of the law of England. The laws relating to bills of exchange, insurance, and all mercantile contracts, are as much the general law of the land, as the laws relating to marriage or murder. But the expression has very unfortunately led merchants to suppose, that all their crude and new-fangled fashions and devices immediately become the law of the land: a notion which, perhaps, has been too much encouraged by our courts. Merchants ought to take their law from the courts, and not the courts from merchants: and when the law is found inconvenient for the purposes of extended commerce, application ought to be made to parliament for redress. Merchants ought to be considered in no higher degree their own legislators or judges upon subjects of commerce, than farmers or sportsmen in questions upon leases or the game laws. For the position of Lord Coke ought never to be forgotten: "That the common law hath no controller in any part of it, but the high court of parliament; and if it be not abrogated or altered by parliament, it remains still, as Littleton saith." (*Co. Litt.* 115.) This is agreeable to the opinion of Mr. Justice Foster, who maintains, that "the custom of merchants is the general law of the kingdom, and therefore ought not to be left to a jury after it has been settled by judicial determinations." 2 *Bur.* 1226.—CH.*

* The right of lien in a particular trade; as, for instance, a packer; ex parte Deeze, 1 Atkins, 228, could never have been part of the common law; and yet, as a usage found in the particular trade, our courts have sanctioned it. Thus a banker, for the general amount of a balance due to him from a customer, has a lien upon his cheques and bills paid in in the course of business, 15 East, 428; so of a wharfinger on goods actually on his wharf, Naylor v. Mangles, 4 Esp. R. 109, recognized as authority by Lord Eldon, and C. J. C. P. Shears, Hartley, 3 Esp. Id. 81. Lien, both general and particular, has been well treated by Mr. Whitaker. And see 6 East, 519; 7 Id. 224; 9 Id. 428, and 3 M. c. S. 167, also mentioned above.

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 (*e*).

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 (14) of their recorder (*f*); 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 (*g*).

When a custom is actually proved to exist, the next inquiry 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 (*h*). 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 (15). 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 (16), since the statute itself [*77] is a proof of a time when such a custom did not exist (*i*).

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 (*j*). As if the inhabitants of a parish have a customary right of watering their cattle at a certain pool, the custom is not destroyed, though they do not use it for ten years; it only becomes more difficult to prove: but if the *right* be any how discontinued for a day, the custom is quite at an end.

3. It must have been *peaceable*, and acquiesced in; not subject to contention and dispute (*k*). 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* (*l*); or rather, taken negatively, they must not be unreasonable. Which is not always, as Sir Edward Coke says (*m*), to be understood of every unlearned man's reason, but of artificial and legal reason, warranted by authority of law. Upon which ac.

(*e*) Dr. and St. 1. 10.
(*f*) Cro. Car. 516.
(*g*) Hob. 85.
(*h*) Litt. § 212. 4 Inst. 274.
(*i*) Co. Litt. 114.
(*j*) Co. Litt. 114.
(*k*) *Ibid.*
(*l*) Litt. § 212.
(*m*) 1 Inst. 62.

(14) As to proof of the customs of London, see 1 Burr. 248.

(15) It seems that a custom beginning within any time after the first year of the reign of King Richard the First, is bad.

(16) Therefore a custom that every pound of butter sold in a certain market should weigh eighteen ounces is bad, because it is directly contrary to 13 and 14 Car. II. c. 26, which directs, that every pound, throughout the kingdom, should contain sixteen ounces. (3 *T. R.* 271.) But there could be no doubt, I conceive, but it would be a good custom to sell lumps of butter containing eighteen ounces; for if it is lawful to sell a pound, it must be so to sell a pound and any aliquot part of one. The inconvenience and deception arise from calling that a pound in one place which is not a pound in another.—CH. Therefore, where a contract is made to sell specified goods by quantities of weight or measure—this must mean *statute* weight or measure. As, if a plaintiff declares for breach of contract, in not delivering "four hundred bushels of oats," and it is proved the agreement was for four hundred bushels in *some particular measure other than the Winchester bushel*, which is the statute measure, this is a fatal variance, and the plaintiff would be nonsuited. See 4 T. R. 314. 6 T. R. 338. 4 Taunton, 102. 11 East, 300.

count 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 (*n*).

[*78] *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 (*o*). A custom to pay two-pence an acre in lieu of tithes, is good; but to pay sometimes two-pence, and sometimes three-pence, as the occupier of the land pleases, is bad for its 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* (17).

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 (*p*).

Next, as to the *allowance* of special customs. Customs, in derogation of the common law, must be construed strictly (18). Thus, by the [*79] 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 impower him to use any other conveyance, or even to lease them for seven years: for the custom must be strictly pursued (*q*). And, moreover, all special cus-

(*n*) Co. Copyh. § 33.
(*o*) 1 Roll. Abr. 565.
(*p*) 9 Rep. 58.
(*q*) Co. Cop. § 33.

(17) A custom, that poor house-keepers shall carry away rotten wood in a chase is bad, being too vague and uncertain. 2 *T. R.* 758.—A right to glean in the harvest-field cannot be claimed at common law; neither have the poor of a parish legally settled such right within the parish, 1 H. Bl. 51, 52. So a custom for every inhabitant of an ancient messuage within a parish to take a profit *a prendre* in the land of an individual, is bad. But such a right may be enjoyed by prescription or grant. 4 Term Rep. 717, 718.—2 H. Bl. 393.—1 Ld. Raym. 407.—1 Saund. 341, n. 3; 346, n. 3.—CH.

(18) This rule is founded upon the consideration, that a variety of customs in different places upon the same subject is a general inconvenience; the courts therefore will not admit such customs but upon the clearest proof. So where there is a custom that lands shall descend to the eldest sister, the courts will not extend this custom to the eldest niece, or to any other eldest female relation. 1 *T. R.* 466.

toms 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 (*r*). And thus much for the second part of the *leges non scriptæ*, 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 (*s*).

It may seem a little improper at first view to rank these laws under the head of *leges non scriptæ*, or unwritten laws, seeing they are set forth by authority in their pandects, their codes, and their institutions; their councils, decrees, and decretals; 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 (*s*), 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 its subjects. But all the *strength that either the papal or imperial laws have obtained in [*80] 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 scriptæ*, or customary laws; or else because they are in some other cases introduced by consent of parliament, and then they owe their validity to the *leges scriptæ*, 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 comprized in the institute, 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.

(*r*) Co. Litt. 15.
(*s*) Hist. C. L. c. 2.
(*s*) Hist. C. L. c. 2.

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 prætor, and the *responsa prudentum*, or opinions of learned lawyers, and
[*81] lastly upon the *imperial decrees, or constitutions of successive emperors,) had grown to so great a bulk, or, as Livy expresses it (*t*), "*tam immensus aliarum super alias acervatarum legum cumulus*," that they were computed to be many camels' load by an author who preceded Justinian (*u*). 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, in twelve books; 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 Roman ecclesiastics (*w*), suddenly gave new vogue and authority to the civil law, introduced it into several na-
[*82] tions, and *occasioned that mighty inundation of voluminous comments, with which this system of law, more than any other, is now loaded.

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, and 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, reduced the ecclesiastical constitutions also 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

(*t*) L. 3. c. 34.
(*u*) Taylor's Elements of Civil Law, 17.
(*w*) See § 1, page 18.

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 eccle- [*83] siastical laws, enacted in national synods, held under the cardinals Otho and Othobon, legates from pope Gregory IX. and pope Clement 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.

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 (19).

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 archbishops and bishops, and their derivative officers, usually called in our law courts Christian, *curiæ 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 [*84] charters which confirm the customary law of the universities. The more minute consideration of these will fall properly under that part

(*x*) Burn's Eccl. Law, pref. viii.
(*y*) Statute 25 Hen. VIII. c. 19, revived and confirmed by 1 Eliz. c. 1.
(*z*) Stra. 1057.

(19) Lord Hardwicke cites the opinion of Lord Holt, and declares it is not denied by any one, that it is very plain all the clergy are bound by the canons confirmed by the king only, but they must be confirmed by the parliament to bind the laity. (2 *Atk.* 605.) Hence, if the archbishop of Canterbury grants a dispensation to hold two livings distant from each other more than thirty miles, no advantage can be taken of it by lapse or otherwise in the temporal courts, for the restriction to thirty miles was introduced by a canon made since the 25 Hen. VIII. 2 *Bl. Rep.* 968.—CH.

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*).

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 (20).

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.

[*85] *Let us next proceed to the *leges scriptæ*, the written laws of the kingdom, which are statutes, acts, or edicts, made by the king's majesty, by and with the advice and consent of the lords spiritual and temporal, and commons in parliament assembled (*b*). The oldest of these now extant, and printed in our statute books, is the famous *magna charta*, 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 (*c*).

(*a*) Hale, Hist. c. 2.
(*b*) 8 Rep. 20.
(*c*) 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 Marleberge, of Westminster, Gloucester, and Winchester. Others are denominated entirely from their subject, as the statutes of Wales and Ireland, the *articuli cleri*, and the *prærogativa 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

(20) See 2 Stra. 1067. 1 Dowl. and R. 460. 1 Bar. and C. 655. An action on the case may be maintained against a judge of the ecclesiastical court who excommunicates a party for refusing to obey an order which the court has no authority to make; or where the party has not been previously served with a citation or monition, nor had due notice of the order. 3 Campb. Rep. 388. 16 Ves. Jun. 346. 2 Inst. 623. 3 Bl. Com. 101.

First, as to their several kinds. Statutes are either *general* or *special*, *public* or *private*. A general or public act is an *universal [*86] rule, that regards the whole community; and of this the courts of law are bound to take notice judicially and *ex officio*; without the statute being particularly pleaded, or formally set forth by the party who claims an advantage under it. Special or private acts are rather exceptions than rules, being those which only operate upon particular persons, and private concerns; such as the Romans entitled *senatus-decreta*, in contradistinction to the *senatus consulta*, which regarded the whole community (*d*); and of these (which are not promulgated with the same notoriety as the former,) 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 (21).

Statutes also are either *declaratory* of the common law, or *remedial* of some defects therein (22). Declaratory, where the old custom of the kingdom is almost fallen into disuse, or become disputable; in which case

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 its 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. and 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 session of parliament, in the first year of king William and queen Mary.

(*d*) Gravin. *Orig.* i. § 24.

(21) See other cases upon the distinction between public and private acts, Bac. Ab statute F. The distinction between public and private acts is marked with admirable precision by Mr. Abbot (the present lord Colchester), in the following note, in the printed report from the committee for the promulgation of the statutes:—PUBLIC AND PRIVATE ACTS.—IN LEGAL LANGUAGE, 1. Acts are deemed to be *public* and *general* acts which the judges will take notice of without pleading, viz. acts concerning the king, the queen, and the prince; those concerning all prelates, nobles, and great officers; those concerning the whole spirituality, and those which concern all officers in general, such as all sheriffs, &c. Acts concerning trade in general, or any specific trade; acts concerning all persons generally, though it be a special or particular thing, such as a statute concerning assizes, or woods in forests, chases, &c. &c. Com. Dig. tit. Parliament. (R. 6.) Bac. Ab statute F. 2. *Private* acts are those which concern only a particular species, thing, or person, of which the judges will not take notice without pleading of them, viz. acts relating to the bishops only; acts for toleration of dissenters; acts relating to any particular place, or to divers particular towns, or to one or divers particular counties, or to the colleges only in the universities. Com. Dig. tit. Parliament. (R. 7.) 3. In a *general* act there may be a *private* clause, ibid. and a *private* act, if recognized by a *public* act, must afterwards be noticed by the courts as such. 2 Term Rep. 569. 2. IN PARLIAMENTARY LANGUAGE, 1. The distinction between *public* and *private* bills stands upon different grounds as to *fees*. All bills whatever from which private persons, corporations, &c. derive benefit, are subject to the payment of *fees*, and such bills are in this respect denominated *private* bills. Instances of bills within this description, are enumerated in the second volume of Mr. Hatsel's Precedents of Proceedings in the House of Commons, edit. 1796, p. 267, &c. 2. In parliamentary language, another sort of distinction is also used; and some acts are called *public general acts*, others *public local acts*, viz. church acts, canal acts, &c. To this class may also be added some acts, which though public are merely personal, viz. acts of attainder, and patent acts, &c. Others are called *private* acts, of which latter class some are local, viz. enclosure acts, &c. and some personal, viz. such as relate to names, estates, divorces, &c.

In many statutes which would otherwise have been private, there are clauses by which they are declared to be public statutes. Bac. Ab statutes F.

(22) This division is generally expressed by declaratory statutes, and statutes introductory of a new law. Remedial statutes are generally mentioned in contradistinction to penal statutes. See note 19, p. 88.—CH.

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 (23). 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 (or even learned) 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 re-
[*87] straining it* where it was too lax and luxuriant, hath 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 (24). At common law also spiritual corporations might lease out their estates for any term of years, till prevented by the statute 13 Eliz. before mentioned: this was, therefore, a *restraining* statute (25).

Secondly, the rules to be observed with regard to the construction of statutes are principally these which follow (26):

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 13 Eliz. c. 10: 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;

(*e*) 3 Rep. 7. Co. Litt. 11. 42.

(23) So the statute 46 Geo. III. c. 37. *declares*, that a witness cannot *by law* refuse to answer a question relevant to the matter in issue, the answering which has no tendency to accuse himself, or expose him to penalty or forfeiture, though his answer may subject him to a civil action. This statute does not profess to introduce a *new* law, but only *declares* what is the existing law, in consequence of the contrariety of opinions delivered by the judges. So also 2 R. S. 405, § 71.

(24) This statute against clipping the coin hardly corresponds with the general notion either of a remedial or an enlarging statute. In ordinary legal language remedial statutes are contradistinguished to penal statutes. An enlarging or an enabling statute is one which increases, not restrains, the power of action, as the 32 Hen. VIII. c. 28, which gave bishops, and all other sole ecclesiastical corporations, except parsons and vicars, a power of making leases, which they did not possess before, is always called an enabling statute. The 13 Eliz. c. 10, which afterwards limited that power, is, on the contrary, styled a restraining or disabling statute. See this fully explained by the learned commentator, 2 Book, p. 319.—CH.

(25) In legal language a remedial statute has a further signification, viz. a statute giving a party a mode of remedy for a wrong where he had none or a different one before.

(26) Where there are conflicting decisions upon the construction of a statute, the court must refer to that which ought to be the source of all such decisions, that is, the words of the statute itself, per lord Ellenborough. 16 East, 122.

The power of construing a statute is in the judges of the temporal courts, who, in cases of doubtful construction, are to mould them according to reason and convenience, to the best use. Hob. 346. Plowd. 109. 3 Co. 7.

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 continuance in his see; or, if made by a dean and chapter, they are not void during the continuance 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 determination of the interest of the *grantors; but the leases, during their continuance, being not within the mischief, are not within the remedy. [*88]

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 (27), and bishops being of a still higher order (*g*).

3. Penal statutes must be construed strictly. Thus the statute 1 Edw. VI. c. 12 having enacted that those who are convicted of stealing *horses* should not have the benefit of clergy, the judges conceived that this should not extend to him that should steal but one *horse* (28), 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 (29).

4. Statutes against frauds (30) are to be liberally and beneficially ex-

(*f*) Co. Litt. 45. 3 Rep. 60. 10 Rep. 58.
(*g*) 2 Rep. 46.
(*h*) 2 and 3 Edw. VI. c. 33. Bac. Elem. c. 12.

(27) This construction must be presumed to be most conformable to the intention of the legislature.—CH.

(28) Lord Hale thinks that the scruple of the judges did not merely depend upon the words being in the plural number, because no doubt had ever occurred respecting former statutes in the plural number; as, for instance, it was enacted by the 32 Hen. VIII. c. 1, that no person convicted of burning *any dwelling houses* should be admitted to clergy. But the reason of the difficulty in this case was, because the statute of 37 Hen. VIII. c. 8, was expressly penned in the singular number, *If any man do steal any horse, mare, or filly*; and then this statute, thus varying the number, and at the same time expressly repealing all other exclusions of clergy introduced since the beginning of Hen. VIII. it raised a doubt whether it were not intended by the legislature to restore clergy where only one horse was stolen. 2 *H. P. C.* 365.

It has since been decided, that where statutes use the plural number, a single instance will be comprehended. The 2 Geo. II. c. 25. enacts, that it shall be felony to steal any bank notes; and it has been determined, that the offence is complete by stealing *one* bank note. Hassel's Case. Leach, Cr. L. 1.

(29) Though penal laws are to be construed strictly, they are not to be construed so strictly as to defeat the obvious intention of the legislature. The words of a statute are not to be narrowed to the exclusion of cases, which those words in their ordinary acceptation, or in that sense in which the legislature had obviously used them, would comprehend. 5 Wheat. 76, 94.

(30) These are generally called remedial statutes; and it is a fundamental rule of construction that penal statutes shall be construed strictly, and remedial statutes shall be construed liberally. It was one of the laws of the twelve tables of Rome, that whenever there was a question between liberty and slavery, the presumption should be on the side of liberty. This excellent principle our law has adopted in the construction of penal statutes; for whenever any ambiguity arises in a statute introducing a new penalty or punishment, the decision shall be on the side of lenity and mercy; or in favour of natural right and liberty; or, in other words, the decision shall be according to the strict letter in favour of the subject. And though the judges in such cases may frequently raise and solve difficulties contrary to the intention of the legislature, yet no

pounded. 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 (31), 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 [*89] 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*).

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*).

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 a general principle of universal law, that "*leges posteriores priores contrarias abrogant:*" consonant to which it was laid down by a law of the twelve tables at Rome, that "*quod populus postremum jussit, id jus ratum esto.*" But this is to be understood, only when the latter statute is couched in negative terms, or where its matter is so clearly repugnant, that it 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 afterwards enacts, that 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

(*i*) 3 Rep. 82. (*k*) 1 Rep. 47.

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further inconvenience can result, than that the law remains as it was before the statute. And it is more consonant to principles of liberty that the judge should acquit whom the legislator intended to punish, than that he should punish whom the legislator intended to discharge with impunity. But remedial statutes must be construed according to the spirit; for, in giving relief against fraud, or in the furtherance and extension of natural right and justice, the judge may safely go beyond even that which existed in the minds of those who framed the law.—CH.

(31) And therefore it has been held that the same words in a statute will bear different interpretations, according to the nature of the suit or prosecution instituted upon them. As by the 9 Ann, c. 14, the statute against gaming, if any person shall lose at any time or sitting 10*l.* and shall pay it to the winner, he may recover it back within three months; and if the loser does not within that time, any other person may sue for it, and treble the value besides. So where an action was brought to recover back fourteen guineas, which had been won and paid after a continuance at play, except an interruption during dinner, the court held the statute was remedial, as far as it prevented the effects of gaming, without inflicting a penalty, and therefore, in this action, they considered it one time or sitting; but they said if an action had been brought by a common informer for the penalty, they would have construed it strictly in favour of the defendant, and would have held that the money had been lost at two sittings. 2 *Bl. Rep.* 1226.

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 assizes; 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 assizes, *and not elsewhere* (*m*). [*90]

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 and 2 Philip 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*).

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 its ordinances could bind a subsequent 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*)." [*91]

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 (32). 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 in the ordinary forms of the constitution that is vested with authority to 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

(*l*) Jenk. Cent. 2. 73.
(*m*) 11 Rep. 63.
(*n*) 4 Inst. 325.
(*o*) 4 Inst. 43.
(*p*) *Cum lex abrogatur, illud ipsum abrogatur, quo non eam abrogari oportet.* l. 3. ep. 23.

(32) If an act of parliament is clearly and unequivocally expressed, with all deference to the learned commentator, I conceive it is neither void in its direct nor collateral consequences, however absurd and unreasonable they may appear. If the expression will admit of doubt, it will not then be presumed that the construction can be agreeable to the intention of the legislature, the consequences of which are unreasonable; but where the signification of a statute is manifest, no authority less than that of parliament can restrain its operation.—CH.

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.

[*92] 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 them. 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 (besides the liberality of sentiment with which our common law judges interpret acts of parliament, and such rules of the unwritten law as are not of a positive kind, there are also peculiar courts of equity established for the benefit of the subject: to detect latent frauds and concealments, which the process of the courts of law is not adapted to reach; to enforce the execution of such matters of trust and confidence, as are binding in conscience, though not cognizable in a court of law; to deliver from such dangers as are owing to misfortune or oversight; and to give a more specific relief, and more adapted to the circumstances of the case, than can always be obtained by the generality of the rules of the positive or common law. 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 IV.

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

(*q*) 8 Rep. 118.

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 Cæsar 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 styled the conqueror of *Wales, the line of their ancient princes [*94] was abolished, and the King of England's eldest son became, as a matter of course (1), their titular prince; the territory of Wales being then entirely re-annexed, (by a kind of feodal resumption) to the dominion of the crown of England (*a*); or, as the statute (2) of Rhudhlan (*b*) expresses it, "*Terra Walliæ 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 coronæ regni Angliæ tanquam pars corporis ejusdem annexa et unita.*" By the statute also of Wales (*c*) 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. By other subsequent statutes their provincial immunities were still farther abridged: but the finishing stroke to their independency was given by the statue 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

(*a*) Vaugh. 400.
(*b*) 10 Edw. I.
(*c*) Terra. 12 Edw. I.—"The territory of Wales, before subjected with its inhabitants to the king by the feudal law, is erected into a principality; and as an integral part of England, annexed to and united with the crown.

(1) It cannot be said that the king's eldest son became Prince of Wales by any necessary or natural consequence; but, for the origin and creation of his title, see page 224.—CH.

(2) The learned judge has made a mistake in referring to the statute, which is called the statute of Rutland, in the 10 Ed. I., which does not at all relate to Wales. But the statute of Rutland, as it is called in *Vaughan* (p. 400.) is the same as the *Statutum Walliæ*. Mr. Barrington, in his Observations on the Ancient Statutes, (p. 74.) tells us, that the *Statutum Walliæ* bears date *apud Rothelanum*, what is now called Rhuydland in Flintshire. Though Edward says, that *terra Walliæ prius regi jure feodali subjecta*, yet Mr. Barrington assures us, that the feudal law was then unknown in Wales, and that "there are at present in North Wales, and it is believed in South Wales, no copyhold tenures, and scarcely an instance of what we call manerial rights; but the property is entirely free and allodial. Edward, however, was a conqueror, and he had a right to make use of his own words in the preamble to his law." *Ib.* 75.—CH.

practised with great success; till she reduced all Italy to her obedience, by admitting the vanquished states to partake of the Roman privileges.

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 Welshmen 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 [*95] other, shall *be used in Wales: besides many other regulations of the police of this principality. And the statute 34 and 35 Hen. VIII., c. 26. confirms the same, adds farther regulations, divides it into twelve shires (3), 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 more, 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 (*d*), 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. 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 to 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 (4).

(*d*) 4 Inst. 345.

(3) By this union of Wales with England, twenty-seven members were added to the English House of Commons. No county or town in Wales sends more than one member, except the county of Monmouth, which returns two.—CH.

(4) The laws in Scotland concerning the tenures of land, and of consequence the constitution of parliaments and the royal prerogatives, were founded upon the same feudal principles as the laws respecting the subjects in England. It is said, that the feudal polity was established first in England; and was afterwards introduced into Scotland, in imitation of the English government. But it continued in its original form much longer in Scotland than it did in England, and the changes in the Scotch government, probably owing to the circumstance that they are more recent, are far more distinctly marked and defined than they are in the history of the English constitution. And perhaps the progress of the Scotch parliaments affords a clearer elucidation of the obscure and ambiguous points in the history of the representation and constitution of our country, than any arguments or authorities that have yet been adduced. But a particular discussion of this subject would far exceed the limits of a note, and will be reserved for a future occasion. But for an account of the parliament of Scotland before the union, and the laws relative to the election of the representa-

*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, 6 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: [*96]

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 (5).

9. When England raises 2,000,000*l.* by a land tax, Scotland shall raise 48,000*l.*

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; though 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 right 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 [*97] of Scotland in parliament, and forty-five members to sit in the House of Commons (6).

tive peers and commoners of Scotland, I shall refer the studious reader to Mr. Wight's valuable *Inquiry into the Rise and Progress of Parliaments chiefly in Scotland.* (Quarto ed.) It is supposed, that we owe the lower house of parliament in England to the accidental circumstance that the barons and the representatives of the counties and boroughs had not a room large enough to contain them all; but in Scotland, the three estates assembled always in one house, had one common president, and deliberated jointly upon all matters that came before them, whether of a judicial or of a legislative nature. (*Wight*, 82.) In England the lords spiritual were always styled one of the three estates of the realm; but there is no authority that they ever voted in a body distinct from the lords temporal. In the Scotch parliament the three estates were, 1. The bishops, abbots, and other prelates who had a seat in parliament, as in England, on account of their benefices, or rather lands, which they held *in capite*, i. e. immediately of the crown: 2. The barons, and the commissioners of shires, who were the representatives of the smaller barons, or the free tenants of the king: 3. The burgesses, or the representatives of the royal boroughs. Craig assures us, *nihil ratum esse, nihil legis vim habere, nisi quod omnium, trium ordinum consensu conjuncto constitutum est; ita tamen ut unius cujusque ordinis per se major pars consentiens pro toto ordine sufficiat. Scio hodie controverti, an duo ordines dissentiente tertio, quasi major pars leges condere possint; cujus partem negantem boni omnes, et quicunque de hac re scripserunt pertinacissimè tuentur, alioqui quo ordines in eversionem tertii possint consentire.* (De Feudis, lib. i. Dieg. 7. s. 11.) But some writers have since presumed to controvert this doctrine.—(*Wight*, 83.) It is strange that a great fundamental point, which was likely to occur frequently, should remain a subject of doubt and controversy. But we should now be inclined to think, that a majority of one of the estates could not have resisted a majority of each of the other two, as it cannot easily be supposed that a majority of the spiritual lords would have consented to those statutes, which, from the year 1587 to the year 1690, were enacted for their impoverishment, and finally for their annihilation. At the time of the union, the Scotch parliament consisted only of the other two estates. With regard to laws concerning contracts and commerce, and perhaps also crimes, the law of Scotland is in a great degree conformable to the civil law; and this, probably, was owing to their frequent alliances and connections with France and the continent, where the civil law chiefly prevailed.—CHRISTIAN.

(5) The 4th, 6th, and 18th sections communicate the same rights as to trade throughout the whole united kingdom; therefore it was held that a Scots pedlar may sell Scots manufactures by wholesale in England without license, under 3 & 4 Anne, c. 4. s. 16. 1 Bla. R. 271. 363.

(6) By the 25th article it is agreed, that all

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 (7).

laws and statutes in either kingdom, so far as they are contrary to these articles, shall cease and become void. From the time of Edw. IV. till the reign of Ch. II. both inclusive, our kings used frequently to grant, by their charter only, a right to unrepresented towns of sending members to parliament. The last time this prerogative was exercised, was in the 29 Ch. II. who gave this privilege to Newark; and it is remarkable, that it was also the first time that the legality of this power was questioned in the house of commons, but it was then acknowledged by a majority of 125 to 73. (*Comm. Jour.* 21 *March* 1676–7.) But notwithstanding it is a general rule in our law, that the king can never be deprived of his prerogatives, but by the clear and express words of an act of parliament; yet it has been thought, from this last article in the act of union, that this prerogative of the crown is virtually abrogated, as the exercise of it would necessarily destroy the proportion of the representatives for the two kingdoms. (See 1 *Doug. El. Cases*, 70. *The Preface to Glanv. Rep. and Simeon's Law of Elect.* 91.) It was also agreed, that the mode of the election of the peers and the commons should be settled by an act passed in the parliament of Scotland, which was afterwards recited, ratified, and made part of the act of union. And by that statute it was enacted, that of the 45 commoners, 30 should be elected by the shires, and 15 by the boroughs; that the city of Edinburgh should elect one, and that the other royal boroughs should be divided into fourteen districts, and that each district should return one. It was also provided, that no person should elect or be elected one of the 45, but who would have been capable of electing, or of being elected, a representative of a shire or a borough to the parliament of Scotland. Hence the eldest son of any Scotch peer cannot be elected one of the 45 representatives; for by the law of Scotland, prior to the union, the eldest son of a Scotch peer was incapable of sitting in the Scotch parliament. (*Wight*, 269.) There seems to be no satisfactory reason for this restriction, which would not equally extend to the exclusion of all the other sons of a peer. Neither can such eldest son be entitled to be enrolled and vote as a freeholder for any commissioner of a shire, though otherwise qualified, as was lately determined by the house of lords in the case of lord Daer, March 26, 1793. But the eldest sons of Scotch peers may represent any place in England, as many do. (2 *Hats. Prec.* 12.) The two statutes, 9 Ann. c. 5. and 33 Geo. II. c. 20. requiring knights of shires and members for boroughs to have respectively 600*l.* and 300*l.* a year, are expressly confined to England. But a commissioner of a shire must be a freeholder, and it is a general rule that none can be elected, but those who can elect. (*Wight*, 289.) And till the contrary was determined by a committee of the house of commons in the case of Wigtown in 1775, (2 *Doug.* 181.) it was supposed that it was necessary that every representative of a borough should be admitted a burgess of one of the boroughs which he represented. (*Wight*, 404.) It still holds generally true in shires in Scotland, that the qualifications of the electors and elected are the same; or that eligibility and a right to elect are convertible terms. Upon some future occasion I shall endeavour to prove, that, in the origin of representation, they were universally the same in England.

(7) Since the union, the following orders have been made in the house of Lords respecting the peerage of Scotland. Queen Anne, in the seventh year of her reign, had created James duke of Queensbury, duke of Dover, with remainder in tail to his second son, then earl of Solway in Scotland; and upon the 21st of January 1708–9, it was resolved by the lords, that a peer of Scotland claiming to sit in the house of peers by virtue of a patent passed under the great seal of Great Britain, and who now sits in the parliament of Great Britain, had no right to vote in the election of the sixteen peers who are to represent the peers of Scotland in parliament.

The duke of Hamilton having been created duke of Brandon, it was resolved by the lords on the 20th of December 1711, that no patent of honour granted to any peer of Great Britain, who was a peer of Scotland at the time of the union, should entitle him to sit in parliament. Notwithstanding this resolution gave great offence to the Scotch peerage, and to the queen and her ministry, yet a few years afterwards, when the duke of Dover died, leaving the earl of Solway, the next in remainder, an infant, who, upon his coming of age, petitioned the king for a writ of summons as duke of Dover; the question was again argued on the 18th December 1719, and the claim as before disallowed. (See the argument, 1 *P. Wms.* 582.) But in 1782 the duke of Hamilton claimed to sit as duke of Brandon, and the question being referred to the judges, they were unanimously of opinion, that the peers of Scotland are not disabled from receiving, subsequently to the union, a patent of peerage of Great Britain, with all the privileges incident thereto. Upon which the lords certified to the king, that the writ of summons ought to be allowed to the Duke of Brandon, who now enjoys a seat as a British peer. (6th June 1782.) But there never was any objection to an English peer's taking a Scotch peerage by descent; and therefore, before the last decision, when it was wished to confer an English title upon a noble family of Scotland, the eldest son of the Scotch peer was created in his father's life-time an English peer, and the creation was not affected by the annexation by

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, except the mutual consent of both, or the successful resistance of either, upon apprehending 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"(e). 2. That whatever else may be deemed "fundamental [*98] *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 constitution of either of those churches, or in the liturgy of the church of England, (unless with the consent of the respective churches, collectively or representatively given,) would be an infringe-

(e) It may justly be doubted whether even such an infringement (though a manifest breach of good faith, unless done upon the most pressing necessity) would of itself dissolve the union: for the bare idea of a state, without a power somewhere vested to alter every part of its laws, is the height of political absurdity. The truth seems to be, that in such an *incorporate union* (which is well distinguished by a very learned prelate from a *federate alliance*, where such an infringement would certainly rescind the compact) the two contracting states are totally annihilated, without any power of a revival; and a third arises from their conjunction, in which all the rights of sovereignty, and particularly that of legislation, must of necessity reside. (See Warburton's Alliance, 195.) But the wanton or imprudent exertion of this right would probably raise a very alarming ferment in the minds of individuals; and therefore it is hinted above that such an attempt might *endanger* (though by no means *destroy*) the union.

To illustrate this matter a little farther, an act of parliament to repeal or alter the act of uniformity in England, or to establish episcopacy in Scotland, would doubtless in point of authority be sufficiently valid and binding; and, notwithstanding such an act, the union would continue unbroken. Nay, each of these measures might be safely and honourably pursued, if respectively agreeable to the sentiments of the English church, or the kirk in Scotland. But it should seem neither prudent, nor perhaps consistent with good faith, to venture upon either of those steps, by a spontaneous exertion of the inherent powers of parliament, or at the instance of mere individuals.*

* So sacred indeed are the laws above mentioned (for protecting each church and the English liturgy) esteemed, that in the regency acts both of 1751 and 1765 the regents are expressly disabled from assenting to the repeal or alteration of either these or the act of settlement.

inheritance of the Scotch peerage. On the 13th February 1787, it was resolved, that the earl of Abercorn and the duke of Queensbury, who had been chosen of the number of the sixteen peers of Scotland, having been created peers of Great Britain, thereby ceased to sit in that house as representatives of the peerage. See the argument in *Ann. Reg.* for 1787, p. 95. At the election occasioned by the last resolution, the dukes of Queensbury and Gordon had given their votes as peers of Scotland, contrary to the resolution of 1709; in consequence of which it was resolved 18th May 1787, that a copy of that resolution should be transmitted to the lord register of Scotland as a rule for his future proceeding in cases of election.

The duke of Queensbury and marquis of Abercorn had tendered their votes at the last general election, and their votes were rejected; but notwithstanding the former resolutions, on 23d May 1793, it was resolved, that if duly tendered they ought to have been counted.

ment 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 (8), 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 (9); and of consequence, in the ensuing Commentaries, we shall have very little occasion to mention, any further than sometimes by way of illustration, the municipal laws of that part of the united kingdoms.

[*99] The town of Berwick upon Tweed was originally part of the kingdom of Scotland; and, as such, was for a time reduced *by king Edward I. into the possession of the crown of England: and during such, its subjection, it received from that prince a charter, which (after its subsequent cession by Edward Balliol, to be for ever united to the crown and realm of England,) was confirmed by king Edward III. with some additions; particularly that it should be governed by the laws and usages which it enjoyed during the time of king Alexander, that is, before its reduction by Edward I. Its constitution was new modelled, and put upon an English footing, by a charter of king James I.: and all its liberties, franchises, and customs, were confirmed in parliament by the statutes 22 Edward IV. c. 8, and 2 Jac. I. c. 28. Though, therefore, it hath some local peculiarities, derived from the ancient laws of Scotland (*f*), yet it is clearly part of the realm of England, being represented by burgesses in the house of Commons, and bound by all Acts of the British parliament, whether specially named or otherwise. And therefore it was, perhaps superfluously, declared, by statute 20 Geo. II. c. 42, that, where England only is mentioned in any Act of parliament, the same, notwithstanding, hath and shall be deemed to comprehend the dominion of Wales and town of Berwick upon Tweed. And though certain of the king's writs or processes of the courts of Westminster do not usually run into Berwick, any more than the principality of Wales, yet it hath been solemnly adjudged (*g*) that all prerogative writs, as those of *mandamus*, prohibition, *habeas corpus*, *certiorari*, &c., may issue to Berwick as well as to every other of the dominions of the crown of England, and that indictments and other local matters arising in the town of Berwick may be tried by a jury of the county of Northumberland (10).

As to Ireland, that is still a distinct kingdom, though a dependent subordinate kingdom. It was only entitled the dominion or lordship of Ireland (*h*), and the king's style was no other than *dominus Hiberniæ*, lord of Ireland, till the thirty-third year of king Henry the Eighth, when he assum-

(*f*) Hale, Hist. C. L. 183. 1 Sid. 382, 462. 2 Show. 365.
(*g*) Cro. Jac. 543. 2 Roll. abr. 292. Stat. 11 Geo. I. c. 4. 4 Burr. 834.
(*h*) *Stat. Hibernia*, 14 Hen. III.

(8) By stat. 54 G. III. c. 67, verdicts in criminal cases before the high court of justiciary and circuit courts are allowed to be returned *viva voce*, instead of in writing, according to the ancient custom. By stats. 55 Geo. III. c. 42, 59 Geo. III. c. 35, the trial by jury in civil causes was by the first established, and by the last regulated.

(9) Acts of parliament passed since the union extend in general to Scotland; but where a statute is only applicable to England, and where Scotland is not intended to be included, the bill expressly provides that it does not extend to Scotland. See 3 *Burr.* 853.

(10) See the case of the King v. Cowle, in 2 *Burr*, 834, where the constitution of the town of Berwick upon Tweed, and indeed the prerogative as to dominion extra Great Britain, is very elaborately discussed.

ed (11) the *title of king, which is recognized by act of parliament [*100] 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; and the laws of England were then received and sworn to by the Irish nation, assembled at the council of Lismore (*i*). 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 styled from the Irish name of judges, who were denominated Brehons (*k*). 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 (*l*): which letters patent sir Edward Coke (*m*) 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 (*n*) and Edward the First (*o*) 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. And yet, even in the reign of queen Elizabeth, the *wild natives [*101] still kept and preserved their Brehon law, which is described (*p*) 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 laws and man's." The latter part of this character is alone ascribed to it, by the laws before cited of Edward the first and his grandson.

But as Ireland was a distinct dominion, and had parliaments of its 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 books (*q*): "a tax granted by the parliament of England shall not bind those of Ireland, because they are not summoned to our parliament;" and again, Ireland hath a parliament of its own, and maketh and altereth laws; and our statutes do not

(*i*) Pryn. on 4 Inst. 349.
(*k*) 4 Inst. 358. Edm. Spenser's State of Ireland, p. 1513. edit. Hughes.
(*l*) Vaugh. 394. 2 Pryn. Rec. 85. 7 Rep. 23.
(*m*) 1 Inst. 141.
(*n*) *A. R.* 30. 1 Rym. *Fœd.* 442.
(*o*) *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 expedire, eisdem utendas concedere leges Anglicanas.* 3 Pryn. Rec. 1218.
(*p*) Edm. Spenser, Ibid.
(*q*) 20 Hen. VI. 8. 2 Ric. III. 12.

(11) The title of king was conferred upon him and his successors; and it was made treason for any inhabitant of Ireland to deny it, by 33 Hen. VIII. c. 1, Irish stat.

bind them (12), because they do not send knights to our parliament, but their persons are the king's subjects, like as the inhabitants of Calais, Gascoigne, and Guienne, while they continued under the king's subjection." The general run of laws, enacted by the superior state, are supposed to be calculated for its own internal government, and do not extend to its distant dependent countries, which, bearing no part in the legislature, are not therefore in its ordinary and daily contemplation. But, when the sovereign legislative power sees it necessary to extend its care to any of its subordinate dominions, and mentions them expressly by name, or includes them under general words, there can be no doubt but then they are bound by its laws (*r*).

[*102] *The original method of passing statutes in Ireland was nearly the same as in England, the chief governor holding parliaments at his pleasure, which enacted such laws as they thought proper (*s*). But an ill use being made of this liberty, particularly by lord Gormanstown, deputy-lieutenant in the reign of Edward IV. (*t*), a set of statutes were then enacted in the 10 Hen. VII. (sir Edward Poynings being then lord deputy, whence they are called Poynings' laws) one of which (*u*), in order to restrain the power as well of the deputy as the Irish parliament, provides, 1. That, before any parliament be summoned or holden, the chief governor and council of Ireland shall certify to the king, under the great seal of Ireland, the considerations and causes thereof, and the articles of the acts proposed to be passed therein. 2. That after the king, in his council of England, shall have considered, approved, or altered the said acts or any of them, and certified them back under the great seal of England, and shall have given licence to summon and hold a parliament, then the same shall be summoned and held; and therein the said acts so certified, and no other, shall be proposed, received, or rejected (*w*). But as this precluded any law from being proposed, but such as were pre-conceived before the parliament was in being, which occasioned many inconveniences and made frequent dissolutions necessary, it was provided by the statute of Philip and Mary, before cited, that any new propositions might be certified to England in the usual forms, even after the summons and during the session of parliament. By this means, however, there was nothing left to the parliament in Ireland but a bare negative or power of rejecting, not of proposing or altering, any law. But the usage now is, that bills are often framed in either house, under the denomination of "heads for a bill or bills:" and in that shape they are offered to the consideration of the lord lieutenant and privy council, who, upon such parliamentary intimation, or otherwise upon the appli-

[*103] cation of private persons, receive and transmit such *heads, or reject them without any transmission to England. And with regard to Poynings' law in particular, it cannot be repealed or suspended, unless the bill for that purpose, before it be certified to England, be approved by both the houses (*x*) (13).

But the Irish nation, being excluded from the benefit of the English

(*r*) Yearbook 1 Hen. VII. 3. 7. Rep. 22. Calvin's case.
(*s*) Irish stat. 11 Eliz. st. 3. c. 8.
(*t*) Ibid. 10 Hen. VII. c. 22.
(*u*) Cap. 4. expounded by 3 and 4 Ph. and M. c. 4.
(*w*) 4 Inst. 353.
(*x*) Irish stat. 11 Eliz. st. 3. c. 38.

(12) Lord Coke, citing this in Calvin's case, 7 Co. 22, inserts this parenthesis, viz. "(which is to be understood unless specially named.)"

(13) See the history of the Proceedings of the Irish parliament, by Lord Mountmorres.

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 thence no longer uniform, it was therefore enacted by another of Poynings' laws (*y*), that all acts of parliament before made in England should be of force within the realm of Ireland (*z*). 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 (*a*). 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, in the present case, is what we usually call, though somewhat improperly, the right of conquest: a right allowed by the law of nations, if not by that of nature; but which in reason and civil policy can mean nothing more, than that, in order to put an end to hostilities, a compact is 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 (*b*).

*But this state of dependence being almost forgotten and ready [*104] 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 (14).

Thus we see how extensively the laws of Ireland conmunicate 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 (*c*), as the appeal from the Chancery 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. The propriety, and even necessity, in all inferior dominions, of this constitution, "that, though justice be in general admi-

(*y*) Cap. 2.
(*z*) 4 Inst. 351.
(*a*) 12. Rep. 112.
(*b*) Puff. L. of N. viii. 6. 24. "Grot. de Jus. B. and P. 3. 8."
(*c*) This was law in the time of Hen. VIII.; as appears by the ancient book, entituled, *diversity of courts, c. banc le roy.*

(14) Prynne, in his learned argument, has enumerated several statutes made in England from the time of King John, by which Ireland was bound. (3 *St. Tr.* 343.) That was an argument to prove, that Lord Connor Maguire, Baron of Inneskillin in Ireland, who had committed treason in that country, by being the principal contriver and instigator of the Irish rebellion and massacre in the time of Car. I. and who had been brought to England against his will, could be lawfully tried for it in the King's Bench at Westminster by a Middlesex jury, and be ousted of his trial by his peers in Ireland, by force of the statute of 35 Hen. VIII. c. 2.

The prisoner having pleaded to the jurisdiction, the court, after hearing this argument, overruled the plea, and the decision was approved of by a resolution of the two houses of parliament, and Lord Maguire was found guilty, and was afterwards executed at Tyburn as a traitor.

nistered 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 (*d*) (15).

(*d*) Vaugh. 402.

(15) The following statement of that great and most important event, the union of Great Britain and Ireland, is extracted from the 39 and 40 Geo. III. c. 77.

In pursuance of his Majesty's most gracious recommendation to the two houses of parliament in Great Britain and Ireland respectively, to consider of such measures as might best tend to strengthen and consolidate the connection between the two kingdoms, the two houses of parliament in each country resolved, that, in order to promote and secure the essential interests of Great Britain and Ireland, and to consolidate the strength, power, and resources of the British Empire, it was adviseable to concur in such measures as should best tend to unite the two kingdoms into one kingdom, on such terms and conditions as should be established by the acts of the respective parliaments in the two countries. And, in furtherance of that resolution, the two houses of each parliament agreed upon eight articles, which, by an address of the respective houses of parliament, were laid before his Majesty for his consideration; and his Majesty having approved of the same, and having recommended it to his Parliaments in Great Britain and Ireland to give full effect to them, they were ratified by an act passed in the parliament of Great Britain on the 2d of July 1800.

Art. I. That the kingdoms of Great Britain and Ireland shall, on the first day of January 1801, and for ever after, be united into one kingdom, by the name of The United Kingdom of Great Britain and Ireland; and that the royal style and titles of the imperial crown, and the ensigns, armorial flags, and banners, shall be such as should be appointed by his Majesty's royal proclamation.

Art. II. That the succession to the imperial crown shall continue settled in the same manner as the succession to the crown of Great Britain and Ireland stood before limited.

Art. III. That there shall be one parliament, styled, The Parliament of the United Kingdom of Great Britain and Ireland.

Art. IV. That four lords spiritual of Ireland, by rotation of sessions, and 28 lords temporal of Ireland, elected for life by the Peers of Ireland, shall sit in the house of Lords; and 100 commoners, two for each county, two for the city of Dublin, and two for the city of Cork, one for Trinity College, and one for each of the 31 most considerable cities and boroughs, shall be the number to sit in the House of Commons on the part of Ireland.

That questions respecting the rotation or election of the spiritual or temporal peers shall be decided by the House of Lords, and in the case of an equality of votes in the election of a temporal peer, the clerk of the parliament shall determine the election by drawing one of the names from a glass.

That a peer of Ireland, not elected one of the 28, may sit in the House of Commons; but whilst he continues a member of the House of Commons, he shall not be entitled to the privilege of peerage, nor capable of being elected one of the 28, nor of voting at such election, and he shall be sued and indicted for any offence as a commoner.

That as often as three of the peerages of Ireland, existing at the time of the Union, shall become extinct, the king may create one peer of Ireland; and when the peers of Ireland are reduced to 100 by extinction or otherwise, exclusive of those who shall hold any peerage of Great Britain subsisting at the time of the union, or created of the united kingdom since the union, the king may then create one peer of Ireland for every peerage that becomes extinct, or as often as any one of them is created a peer of the united kingdom, so that the king may always keep up the number of 100 Irish peers, over and above those who have an hereditary seat in the House of Lords.

That questions respecting the election of the members of the House of Commons returned for Ireland, shall be tried in the same manner, as questions respecting the elections for places in Great Britain, subject to such particular regulations as the parliament afterwards shall deem expedient.

That the qualifications by property of the representatives in Ireland, shall be the same respectively as those for counties, cities, and boroughs in England, unless some other provision be afterwards made.

Until an act shall be passed in the parliament of the united kingdom, providing in what cases persons holding offices and places of profit under the crown of Ireland, shall be incapable of sitting in the House of Commons, not more than 20 such persons shall be capable of sitting; and if more than 20 such persons shall be returned from Ireland, then the seats of those above 20 shall be vacated, who have last accepted their offices or places.

That all the lords of parliament on the part of Ireland, spiritual and temporal, sitting in the House of Lords, shall have the same rights and privileges respectively as the peers of Great Britain; and that all the lords spiritual and temporal of Ireland shall have rank and precedency next and immediately after all the persons holding peerages of the like order and degree in Great Britain, subsisting at the time of the union; and that all peerages hereafter

With regard to the other adjacent islands which are subject to the crown of Great Britain, some of them (as the isle of *Wight, [*105] 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 (*e*). It was formerly a subordinate feudatory kingdom, subject to the kings of Norway; then to King John and Henry III. of England; afterward 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 Henry IV. (*f*). 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 (*g*), the island was seized 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

(*e*) 4 Inst. 284. 2 And. 116.
(*f*) Selden tit. hon. 1. 3.
(*g*) Camden. Eliz. A. D. 1594.

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created of Ireland, or of the united kingdom, of the same degree, shall have precedency according to the dates of their creations; and that all the peers of Ireland, except those who are members of the House of Commons, shall have all the privileges of peers as fully as the peers of Great Britain, the right and privileges of sitting in the House of Lords, and upon the trial of peers only excepted.

Art. V. That the churches of England and Ireland be united into one protestant episcopal church, to be called The United Church of England and Ireland; that the doctrine and worship shall be the same; and that the continuance and preservation of the united church as the established church of England and Ireland, shall be deemed an essential and fundamental part of the union; and that, in like manner, the church of Scotland shall remain the same as is now established by law, and by the acts of union of England and Scotland.

Art. VI. The subjects of Great Britain and Ireland shall be entitled to the same privileges with regard to trade and navigation, and also in respect of all treaties with foreign powers.

That all prohibitions and bounties upon the importation of merchandise from one country to the other shall cease.

But that the importation of certain articles therein enumerated shall be subject to such countervailing duties as are specified in the act.

Art. VII. The sinking funds, and the interest of the national debt, of each country, shall be defrayed by each separately. And, for the space of 20 years after the union, the contribution of Great Britain and Ireland towards the public expenditure in each year, shall be in the proportion of fifteen to two, subject to future regulations.

Art. VIII. All the laws and courts of each kingdom shall remain the same as they are now established, subject to such alterations by the united parliament as circumstances may require; but that all writs of error and appeals shall be decided by the House of Lords of the united kingdom, except appeals from the court of admiralty in Ireland, which shall be decided by a court of delegates appointed by the court of chancery in Ireland.

The statute then recites an act passed in the parliament of Ireland, by which the rotation of the four spiritual lords for each sessions is fixed; and it also directs the time and mode of electing the 28 temporal peers for life; and it provides that 64 county members, two for each county, two for the city of Dublin, two for the city of Cork, one for Trinity College, Dublin, and one for each of 31 cities and towns which are there specified, which are the only places in Ireland to be represented in future. One of the two members of each of those places was chosen by lot, unless the other withdrew his name to sit in the first parliament, but at the next elections, one member only will be returned.

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 [*106] 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 (*h*). 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 commodious 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 was at length completed in the year 1765, and confirmed by statutes 5 Geo. III. c. 26 and 39, (16) 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 (*i*) and other ecclesiastical benefices,) are unalienably vested in the crown, and subjected to the regulations of the British excise and customs.

The islands of Jersey, Guernsey, Sark, Alderney, and their appendages, were parcel of the duchy of Normandy, and were united to the crown of England by the first princes of the Norman line. They are governed by their own laws, which are for the most part the ducal customs of Normandy, being collected in an ancient book of very great authority, entitled, *le grand Coustumier* (17). The king's writ, or process from the courts of Westminster, is there of no force; but his commission is. They are not bound by common Acts of our parliaments, unless particularly named (*k*). 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 and council, in the last resort (18).

Besides these adjacent islands, our more distant plantations in America, and elsewhere, are also in some respect subject to the English [*107] laws. Plantations or colonies, in distant *countries, are either such where the lands are claimed by right of occupancy only, by finding them desert and uncultivated, and peopling them from the mother-country; or where, when already cultivated, they have been either gained by conquest, or ceded to us by treaties. And both these rights are found-

(*h*) 1 P. Wms. 329.

(*i*) The bishoprick of Man, or Sodor, or Sodor and Man, was formerly within the province of Canterbury, but annexed to that of York, by statute 33 Hen. VIII. c. 31.

(*k*) 4 Inst. 286.

(16) c. 26. is called the vesting act, and c. 39. the regulating act. The 45 Geo. III. c. 123, settles an annuity equal to one fourth of the revenue of customs arising within the isle of Man, to be paid to the duke of Atholl, and the heirs general of the seventh earl of Derby.

This island still affords the same protection and asylum for debtors and outlaws, as before the purchase of it by the crown of England. The revenue only has been regarded by the legislature in the several statutes. The internal laws of the island, with respect to debtors and outlaws, still remain unaltered. An appeal lies to the king from a judgment of a court in this island. Com. Dig. Navigation, F. 2.

(17) See the observation of lord Hale, Hist. of Com. Law, c. 6, upon this book. It contains those laws and customs which were in use here in the time of king Hen. II., Rich. I., and king John.

(18) Of these islands the crown is proprietary; but, like the demesne lands, they are subject to the occasional interference of parliament. With reference to these islands, the exercise of the executive power is regulated by customs and known laws; the people themselves have no voice, but subject to these.

ed 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 hath been held (*l*), that if an uninhabited country be discovered and planted by English subjects, all the English laws then in being, which are the birthright of every subject (*m*), are immediately there in force. But this must be understood with very many and very great restrictions. Such colonists carry with them only so much of the English law as is applicable to their own situation and the condition of an infant colony; such, for instance, as the general rules of inheritance, and of protection from personal injuries. The artificial refinements and distinctions incident to the property of a great and commercial people, the laws of police and revenue, (such especially as are enforced by penalties,) the mode of maintenance for the established clergy, the jurisdiction of spiritual courts, and a multitude of other provisions, are neither necessary nor convenient for them, and therefore are not in force (19). What shall be admitted and what rejected, at what times, and under what restrictions, must, in case of dispute, be decided in the first instance by their own provincial judicature, subject to the revision and control of the king in council: the whole of their constitution being also liable to be new-modelled and reformed by the general superintending power of the legislature in the mother-country. But in conquered or ceded countries, that have already laws of their own, the king may indeed alter and change those laws (20); 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 (*n*). 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 inquire), *or by treaties. [*108] 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.

With respect to their interior polity, our colonies are properly of three sorts. 1. Provincial establishments, the constitutions of which depend on the respective commissions issued by the crown to the governors, and the instructions which usually accompany those commissions; under the authority of which, provincial assemblies are constituted, with the power of making local ordinances, not repugnant to the laws of England. 2. Proprietary governments, granted out by the crown to individuals, in the nature of feudatory principalities, with all the inferior regalities, and subordinate powers of legislation, which formerly belonged to the owners of coun-

(*l*) Salk. 411, 666. (*n*) 7 Rep. 17, Calvin's case. Show. Parl. C. 31.
(*m*) 2 P. Wms. 75.

(19) A statute passed in England after the establishment of a colony, will not affect it unless it be particularly named; and therefore the requisites of the statute against frauds, in executing wills, &c. have no influence in Barbadoes: (see cases collected 1 Chitty's Com. Law, 638.) so the 5 & 6 Ed. VI. c. 16. as to sale of offices do not extend to Jamaica. 4 Mod. 222.

(20) See an elaborate and learned argument by lord Mansfield, to prove the king's legislative authority by his prerogative alone over a ceded conquered country. *Comp.* 204.* *

* What the king may or may not do, by virtue of his prerogative, with reference to a conquered or ceded country, is very elaborately discussed, (Chalm. Opin. 169.)

ties-palatine: yet still with these express conditions, that the ends for which the grant was made be substantially pursued, and that nothing be attempted which may derogate from the sovereignty of the mother-country. 3. Charter governments, in the nature of civil corporations, with the power of making bye-laws for their own interior regulations, not contrary to the laws of England; and with such rights and authorities as are specially given them in their several charters of incorporation. 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 and 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 de-
[*109] clared by statute 7 and 8 W. III. c. 22. that *all laws, bye-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. And, because several of the colonies had claimed a sole and exclusive right of imposing taxes upon themselves, the statute 6 Geo. III. c. 12. expressly declares, that all his majesty's colonies and plantations in America have been, are, and of right ought to be, subordinate to and dependent upon the imperial crown and parliament of Great Britain; who have full power and authority to make laws and statutes of sufficient validity to bind the colonies and people of America, subjects of the crown of Great Britain, in all cases whatsoever. And this authority has been since very forcibly exemplified, and carried into act, by the statute 7 Geo. III. c. 59. for suspending the legislation of New-York; and by several subsequent statutes, (21).

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 its 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
[*110] the *English throne; and from Anjou, and its appendages, which fell to Henry the Second by hereditary descent. They had seen

(21) By 22 Geo. III. c. 46. his majesty was empowered to conclude a truce or peace with the colonies or plantations in America; and, by his letters patent, to suspend or repeal any acts of parliament which related to those colonies. And by the first article of the definitive treaty of peace and friendship between his Britannic majesty and the United States of America, signed at Paris the 3d day of September, 1783, his Britannic majesty acknowledges the United States of America to be free, sovereign, and independent states. (*Ann. Regist.* 1783, *State Papers.*)—And 23 Geo. III. c. 39. gives his majesty certain powers for the better carrying on trade and commerce between England and the United States.

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 councils distracted by foreign interests. This experience, and these considerations, gave birth to a conditional clause in the act (*o*) 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."

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 and Berwick, 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 (*p*). 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 (*q*).

*The territory of England is liable to two divisions; the one [*111] 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 archbishop'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 deanery is divided into parishes (*r*).

A parish is that circuit of ground which is committed to the charge of one parson, or vicar, or other minister having cure of souls therein. These districts are computed to be near ten thousand in number (*s*). 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 (22). 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

(*o*) Stat. 12 and 13 Will. III. c. 3.
(*p*) Co. Litt. 260.
(*q*) Finch. L. 78.
(*r*) Co. Litt. 94.
(*s*) Gibson's *Britain*.

(22) When the *dioichia*, or the district over which the bishop exercised his spiritual functions, was divided into lesser portions for the superintendence of his clergy, a word of similar import was adopted, *paroichia*. And in ancient times, Mr. Selden thinks, the words were used indiscriminately. Vol. 2. Burn Ec. L. 59. Com. Dig. Parish, A.

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 (*t*).

Mr. Camden (*u*) says, England was divided into parishes by Archbishop Honorius about the year 630. Sir Henry Hobart (*w*) lays it down, that parishes were first erected by the council of Lateran, which was held A. D. 1179. Each widely differing *from the other, and both [*112] of them perhaps from the truth; which will probably be found in the medium between the two extremes. For Mr. Selden has clearly shewn (*x*), 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.

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 (*y*), that "*dentur omnes decimæ primariæ ecclesiæ 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 cœmetery 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 cœmetery, 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 *primariæ ecclesiæ* or mother-church (*z*).

This proves that the kingdom was then generally 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, [*113] though there are often many manors in one parish (23). *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 natu-

(*t*) Seld. of tith. 9. 4. 2 Inst. 646. Hob. 296.
(*u*) In his *Britannia*.
(*w*) Hob. 296.
(*x*) Of tithes, c. 9.
(*y*) C. 1.
(*z*) *Ibid.* c. 2. See also the laws of King Canute, c. 11. about the year 1030.

(23) But at present, the boundaries of the one afford no evidence or inference whatever of the boundaries of the other.

ral 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 outlying 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 desert places, or for other now unsearchable reasons, were never united to any parish, and therefore continue to this day extra-parochial; 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 (*a*): yet extraparochial wastes and marsh-lands, when improved and drained, are by the statute 17 Geo. II. c. 37. to be assessed to all parochial rates in the parish next adjoining. And thus much for the ecclesiastical division of this kingdom.

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 its original to king Alfred (24), who, to prevent *the rapines and disorders which formerly [*114] 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 was committed in their district, they were bound to have the offender forthcoming (*b*). And therefore anciently no man was suffered to abide in England above forty days, unless he were enrolled in some tithing or decennary (*c*). 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 (*d*).

Tithings, towns, or vills (25), are of the same signification in law; and are said to have had, each of them, originally a church and celebration of divine service, sacraments, and burials (*e*): though that seems to be rather an ecclesiastical, than a civil, distinction. The word *town* or *vill* is

(*a*) 2 Inst. 647. 2 Rep. 44. Cro. Eliz. 512.
(*b*) *Flet.* 1. 47. This the laws of King Edward the Confessor, *c.* 20. very justly entitled "*summa et maxima securitas, per quam omnes statu firmissimo sustinentur;—quæ hoc modo fiebat, quod sub decennali fidejussione debebant esse universi, &c.*"
(*c*) Mirr. c. 1. § 3.
(*d*) Finch. L. 8.
(*e*) 1 Inst. 115.

(24) Modern researches into the more remote periods of antiquity, have led to the discovery, that the learned commentator was incorrect in ascribing the institution of these civil divisions of the kingdom to Alfred. In the reign of Ina, king of the West Saxons, towards the end of the seventh century, the tithing and shire are both mentioned. And no doubt they were brought from the continent by some of the first Saxon settlers in this island; for the tithing, hundred, and shire, are noticed in the capitularies of the Franks, before the year 630, whence it is reasonably inferred, they were known in France at least two centuries before the reign of Alfred. It may therefore be concluded, that, among the people of this country, they were part of those general customs which Alfred collected, arranged, and improved into an uniform system of jurisprudence. See Whitaker's History of Manchester; Montesquieu Esprit des Lois, tom. 2. p. 376; Stuart's Diss. on the English Constitution, 254; and Henry's History of Great Britain.

(25) In the 13 and 14 Car. II. c. 12, which provides that when a parish is so large that it cannot have the benefit of the overseers and provision for the poor appointed by the 43 Eliz. c. 2, two overseers may be appointed for every township or village in such parish. In this statute the words *township* and *village* have always been thought synonimous. But it has been held that wherever there is a constable there is a township. (1 *T. R.* 376.) Parishes in some counties, as in part of Bedfordshire, are divided into tithings. (2 *Luders*, 511.)

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 bishopric be dissolved, as at Westminster, (26), yet still it remaineth a city (*f*). A borough is now understood to be a town, either corporate or not, that sendeth burgesses to parliament (*g*). Other towns there are, to the number, sir Edward Coke says (*h*), 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. To several of these towns there are small appendages belonging, called [*115] *hamlets, which are taken notice of in the statute of Exeter (*i*), which makes frequent mention of entire vills, demi-vills, and hamlets. Entire vills Sir Henry Spelman (*k*) conjectures to have consisted of ten freemen, or frank-pledges, demi-vills of five, and hamlets of less than five. These little collections of houses are sometimes under the same administration as the town itself, sometimes governed by separate officers; in which last case they are, to some purposes in law, looked upon as distinct townships. These towns, as was before hinted, contained each originally but one parish, and one tithing; though many of them now, by the increase of inhabitants, are divided into several parishes and tithings; and sometimes, where there is but one parish, there are two or more vills or tithings.

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

(*f*) Co. Litt. 109.
(*g*) Litt. § 164.
(*h*) 1 Inst. 116.
(*i*) 14 Edw. I.
(*k*) Gloss. 274.

(26) Westminster was one of the new bishoprics created by Henry VIII. out of the revenues of the dissolved monasteries. (2 *Burn, E. L.* 78.) Thomas Thirlby was the only bishop that ever filled that see: (*Godw. Com. de Præs.* 570.) he surrendered the bishopric to Ed. VI. 30th March, 1550, and on the same day it was dissolved and added again to the bishopric of London. (*Rym. Fœd.* 15 tom. p. 222.) Queen Mary afterwards filled the church with Benedictine monks, and Eliz. by authority of parliament, turned it into a collegiate church subject to a dean; but it retained the name of city, not perhaps because it had been a bishop's see, but because, in the letters patent erecting it into a bishopric, king Henry declared, *volumus itaque et per præsentes ordinamus quod ecclesia cathedralis et sedes episcopalis, ac quod tota villa nostra Westmonasterii sit civitas, ipsamque civitatem Westmonasterii vocari et nominari volumus et decernimus.* There was a similar clause in favour of the other five new-created cities, viz. Chester, Peterborough, Oxford, Gloucester, and Bristol. The charter for Chester is in *Gibs. Cod.* 1449, and that for Oxford in *Rym. Fœd.* 14 tom. 754. Lord Coke seems anxious to rank Cambridge among the cities, because he finds it called *civitas* in an ancient record, which he "thought it good to mention in remembrance of his love and duty, *almæ matri academiæ Cantabrigiæ.*" (*Co. Litt.* 109.) The present learned Vinerian professor of Oxford has produced a decisive authority that cities and bishops' sees had not originally any necessary connection with each other. It is that of Ingulphus, who relates that, at the great council assembled in 1072, to settle the claim of precedence between two archbishops, it was decreed that bishops' sees should be transferred from towns to cities. (1 *Woodd.* 302.) In *Will. Malm. Scrip. Ang.* p. 214, it is *concessum est episcopis de villis transire in civitates.*

The accidental coincidence of the same number of bishops and cities would naturally produce the supposition that they were connected together as a necessary cause and effect. It is certainly (as Mr. Wooddeson observes) a strong confirmation of this authority, that the same distinction is not paid to bishops' sees in Ireland. Mr. Hargrave, in his notes to Co. Litt. 110, proves, that, although Westminster is a city, and has sent citizens to parliament since the time of Ed. VI. it never was incorporated; and this is a striking instance in contradiction of the learned opinions there referred to, viz. that the king could not grant within time of memory to any place the right of sending members to parliament without first creating that place a corporation.

of causes, though now fallen into disuse. In some of the more northern counties these hundreds are called wapentakes (*l*) (27).

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 (*m*): 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 its 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* (*n*). And indeed something like this institution of hundreds may be traced [*116] 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 both the thing and the name, as a territorial assemblage of persons, from which afterwards the territory itself might probably receive its denomination, 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*" (*o*).

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 *vice-comes*, 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 (*p*), 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 they are forty in England, and twelve in Wales.

Three of these counties, Chester, Durham, and Lancaster, are called counties palatine. The two former are such by prescription, or immemorial custom, or at least as old as the Norman conquest [*117] (*q*): the latter was created by King Edward III. in favour of Henry Plantagenet, first earl and then duke of Lancaster (*r*), whose heiress being married to John of Gaunt, the king's son, the franchise was greatly enlarged and confirmed in parliament (*s*), to honour John of Gaunt him-

(*l*) Seld. *in Fortesc.* c. 24.
(*m*) Seld. tit. of honour, 2, 5, 3.
(*n*) Montesq. Sp. L. 30, 17.
(*o*) Tacit. *de morib. German.* 6.
(*p*) *LL. Edw.* c. 34.
(*q*) Seld. tit. hon. 2, 5, 8.
(*r*) *Pat.* 25 *Edw. III. p.* 1, *m.* 18. Seld. ibid. Sandford's Gen. Hist. 112. 4 Inst. 204.
(*s*) *Cart.* 36 *Edw. III. n.* 9.

(27) *Et quod Angli vocant hundredum, comitatus Yorkshire, Lincolnshire, Nottinghamshire, Leicestershire, et Northamptonshire, vocant wapentachium.* (*Ll. Edw.* c. 33.) And it proceeds to explain why they are called so, *viz.* because the people at a public meeting confirmed their union with the governor by touching his weapon or lance.

self, whom, on the death of his father-in-law, the king had also created duke of Lancaster (*t*). 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 countries *jura regalia*, as fully as the king hath in his palace; *regalem potestatem in omnibus*, as Bracton expresses it (*u*). 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* (*w*). 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* (*x*). These palatine privileges (so similar to the regal independent jurisdictions usurped by the great barons on the continent, during the weak and infant state of the first fœdal kingdoms in Europe) (*y*), were, in all probability, originally granted to the counties of Chester and Durham, because they bordered upon inimical countries, Wales and Scotland, in order that the inhabitants, having justice administered at home, might not be obliged to go out of the county, and leave it open to the enemy's incursions; and that the owners, being encouraged by so large an authority, might be the more watchful in its defence. And upon this account also there were formerly two other counties [*118] palatine, *Pembrokeshire and Hexhamshire, 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 before mentioned 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 (*z*).

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 Bolingbroke, the son of John of Gaunt, at the time when he wrested the crown from king Richard II. and assumed the title of king 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 (*a*) and sir Edward Coke (*b*) 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 Gaunt, 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, ordaining that the duchy of Lancaster, and all other his hereditary estates, with all their royalties and franchises, should remain to him and his heirs for ever; and should remain, descend, be administered, and governed, in like manner as if he never had attained the regal dignity: and

(*t*) *Pat.* 51 *Edw. III. m.* 33. Plowd. 215. 7 Rym. 138.
(*u*) *l.* 3. *c.* 8. § 4.—"Regal power over all things."
(*w*) 4 Inst. 204.
(*x*) Seld. in *Heng. Magn. c.* 2.
(*y*) Robertson, Cha. V. i. 60.
(*z*) 4 Inst. 205.
(*a*) 215.
(*b*) 4 Inst. 205.

thus they descended to his son and grandson, Henry V. and Henry VI., many new territories and privileges being annexed to the duchy by the former (*c*). Henry VI. being attainted in 1 Edw. IV. this duchy was declared in parliament *to have become forfeited to the crown (*d*), [*119] and at the same time an act was made to incorporate the duchy of Lancaster, to continue the county palatine, (which might otherwise have determined by the attainder) (*e*), and to make the same parcel of the duchy; and farther, to vest the whole in King Edward IV. and his heirs, *kings of England*, for ever; but under a separate guiding and governance from the other inheritances of the crown. And in 1 Hen. VII. another act was made, to resume such parts of the duchy lands as had been dismembered from it in the reign of Edward IV. and to vest the inheritance of the whole in the king and his heirs for ever, as amply and largely, and in like manner, form, and condition, separate from the crown of England and possession of the same, as the three Henries and Edward IV., or any of them, had and held the same (*f*).

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, whereby he exercises a jurisdiction over all causes, as well criminal as civil (*g*) (28).

*There are also counties *corporate*, which are certain cities and towns, some with more, some with less territory annexed to them; [*120] to which, out of special grace and favour, the kings of England have granted the privilege 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 (29).

(*c*) *Parl.* 2 *Hen. V.* n. 30. 3 *Hen. V.* n. 15.
(*d*) 1 Ventr. 155.
(*e*) 1 Ventr. 157.
(*f*) Some have entertained an opinion (Plowd. 220, 1, 2. Lamb. *Archeion.* 233. 4 Inst. 206,) that by this act the right of the duchy vested only in the *natural*, and not in the *political* person of king Henry VII. as formerly in that of Henry IV. and was descendible to his natural heirs, independent of the succession to the crown. And, if this notion were 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, and previous to the attainder of the pretended prince of Wales. But it is observable, that in the same act the duchy of Cornwall is also vested in King Henry VII. and his heirs; which could never be intended in any event to be separated from the inheritance of the crown. And indeed it seems to have been understood very early after the statute of Henry VII. that the duchy of Lancaster was by no means thereby made a separate inheritance from the rest of the royal patrimony, since it descended with the crown to the half-blood in the instances of queen Mary and queen Elizabeth, which it could not have done as the estate of a mere duke of Lancaster, in the common course of legal descent. The better opinion, therefore, seems to be that of those judges, who held (Plowd. 221,) that notwithstanding the statute of Hen. VII. (which was only an act of resumption) the duchy still remained as established by the act of Edward IV. separate from the other possessions of the crown in order and government, but united in point of inheritance.
(*g*) 4 Inst. 220.

(28) The court of the royal franchise of the isle of Ely is a superior court, and has cognizance in all personal actions, though the cause thereof does not arise within its jurisdiction. Pegge v. Gardner. 1 Lev. 208. The court of the bishop of Durham was also in the same term held to be a superior court. 1 Saund. 73. An historical account of the constitution of the court of Ely may be found in Grant v. Bagge. 3 East, 128.

(29) Twelve cities and five towns are enumerated in the 3 Geo. I. c. 5. as counties of themselves. The cities are, London, York, Chester, Bristol, Coventry, Canterbury, Exeter, Gloucester, Lichfield, Lincoln, Norwich, Worcester; the towns are, Kingston-upon-Hull, Nottingham, Newcastle-upon-Tyne, Pool, Southampton.

As the exclusive jurisdiction given to these small districts was found by experience not to conduce to the ends of justice, the 38 Geo. III. c. 52. directs that actions may be tried and indictments preferred and tried in the adjoining county: see also 51 Geo. III. c. 100. From this regulation, however, London and Westminster, Bristol, Chester, Exeter, and the borough of Southwark, are expressly exempted; and yet upon a suggestion that an impartial

trial cannot be had in the county of the city of Chester, &c. the court will award a trial to be had in the adjoining county palatine. 7 T. R. 735. 3 B. & A. 441. 2 Chitty's Rep. 130. 217.*

* The question as to the period when, and by whom, the several divisions, territorial and personal, here mentioned or enumerated, were made, is of little import to the practising lawyer: the division is fully recognized. Mr. Hallam has conferred upon it an amusing and something of an instructive interest, particularly as to the signification of the site of habitations called a borough; to our constitution now an ill-omened word. See Hist. of Midd. Ages, c. 8. But as to the companies of boroughs, consisting of ten families, "combined to be one another's pledge," some conjectures will be found, Bract. l. iii. tract 2. Lamb. Duty of Const. p. 8, Verstegan, an inveterate Saxon etymologist, will afford grounds for most conjectures as to the origin and meaning of the word. The present liability of the hundred to make losses or damage, in certain cases, good to the loser or injured party, is unquestionably traceable to the law of frank pledge. See Hall. *Loc. Cit.* Also, 4 Tur. Hist. of the Anglo-Saxons, 320.

COMMENTARIES

ON

THE LAWS OF ENGLAND.

BOOK THE FIRST.

OF THE RIGHTS OF PERSONS.

CHAPTER I.

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 [*122] after him our Bracton (b), have 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.

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 rerum*, or 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 misdemeanors.

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* (1), with the means also

(a) 11 *Philipp.* 12. (b) *l.* 1. c. 3.

(1) In using the expression *rights of things*, the commentator probably intended that the word *of* should be taken in the legal sense of the preposition "of," namely, concerning.

of acquiring and losing them. 3. *Private wrongs*, or civil injuries; with the means of redressing them by law. 4. *Public wrongs*, or crimes and misdemesnors; with the means of prevention and punishment (2).

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

[123] 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 comprised 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 are 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 entitled to enjoy, whether out of society or in it. But with regard to the absolute *duties*,

[*124] which man is bound *to perform considered as a mere individual, it is not to be expected that any human municipal law 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 socie-

Yet see Rex v. Horne, 2 Cowp. 672, and Diversions of Purley, vol. I, pa. 79. If he entertained this notion of the force of the word "of," Mr. Christian's objection becomes answered.

(2) The distinction between *private wrongs* and *public wrongs* is more intelligible, and more accurately limited by the nature of the subjects, than the distinction between *the rights of things*, and *the rights of persons*; for all rights whatever must be the rights of certain persons to certain things. Every right is annexed to a certain character or relation, which each individual bears in society. The rights of kings, lords, judges, husbands, fathers, heirs, purchasers, and occupants, are all dependent upon the respective characters of the claimants. These rights might again be divided into rights to possess certain things, and the rights to do certain actions. This latter class of rights constitute powers and authority. But the distinction of *rights of persons* and *rights of things*, in the first two books of the Commentaries, seems to have no other difference than the antithesis of the expression, and that too resting upon a solecism; for the expression rights of things, or a right *of* a horse, is contrary to the idiom of the English language: we say, invariably, a right *to* a thing. The distinction intended by the learned judge, in the first two books, appears, in a great degree, to be that of the rights of persons in public stations, and the rights of persons in private relations. But, as the order of legal subjects is, in a great measure, arbitrary, and does not admit of that mathematical arrangement where one proposition generates another, it perhaps would be difficult to discover any method more satisfactory than that which the learned judge has pursued, and which was first suggested by Lord C. J. Hale. See *Hale's Analysis of the Law*.

ty, and stand in various relations to each other, they have consequently no concern with any other 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 (3). But, with respect to *rights*, the case is different. Human laws define and enforce as well those rights which belong to a man considered as an individual, as those which belong to him considered as related to others.

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 *them- [*125] selves 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

(3) This distinction seems to convey a doctrine that can hardly bear examination, or be reconciled with sound law and morality. The circumstance of publication as evidence of shameless profligacy and hardened depravity, may alter the nature of the punishment, but cannot alter the intrinsic criminality of the vicious act. Whatever is pernicious to society as an example, must necessarily be vicious and destructive in itself. What is ruinous and criminal to repeat and follow, must also be ruinous and criminal to commence. Human laws prohibit every where the guilty action, but punishment can only be the consequence of detection.

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 uncontrolled 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 (*c*).

Hence we may collect that the law, which restrains a man from [*126] doing *mischief to his fellow-citizens, though it diminishes the natural, increases the civil liberty of mankind; but that every wanton and causeless restraint of the will of the subject, whether practised 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 regulations 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. (*d*), 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. (*e*), (4), which prescribes a thing seemingly as indifferent, (a dress for the dead, who are all ordered to be buried in woollen) 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, (*f*) 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 (5).

(*c*) *Facultas ejus, quod cuique facere libet, nisi quid jure prohibetur. Inst.* 1. 3. 1.
(*d*) 3 Edw. IV. c. 5.
(*e*) 30 Car. II. st. 1. c. 3.
(*f*) On Gov. p. 2. § 57.

(4) Repealed by stat. 54 G. III. c. 108.

(5) This section is one of the very few intelligible descriptions of liberty, which have hitherto been communicated to the world. Though declamation and eloquence in all ages have exhausted their stores upon this favourite theme, yet reason has made so little progress in ascertaining the nature and boundaries of liberty, that there are very few authors indeed, either of this or of any other country, which can furnish the studious and serious reader with a clear and consistent account of this idol of mankind. I shall here briefly subjoin the different notions conveyed by the word *liberty*, which even by the most eminent writers and orators are generally confounded together.

The *libertas quidlibet faciendi*, or the liberty of doing every thing which a man's passions urge him to attempt, or his strength enables him to effect, is savage ferocity; it is the liberty of a tyger, and not the liberty of a man.

"Moral or natural liberty (in the words of Burlamaqui, ch. 3. § 15.) is the right which nature gives to all mankind of disposing of their persons and property after the manner they judge most consonant to their happiness, on condition of their acting within the limits of

The idea and practice of this political or civil liberty flourish in their highest vigour in these kingdoms, where it falls *little [*127] short of perfection, and can only be lost or destroyed by the folly

the law of nature, and that they do not any way abuse it to the prejudice of any other men."

This is frequently confounded, and even by the learned judge in this very section, with savage liberty.

Civil liberty is well defined by our author to be "that of a member of society, and 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."

Mr. Paley begins his excellent chapter upon civil liberty with the following definition: "Civil liberty is the not being restrained by any law, but what conduces in a greater degree to the public welfare." B. vi. c. 5.

The Archbishop of York has defined "civil or legal liberty to be that which consists in a freedom from all restraints except such as established law imposes for the good of the community, to which the partial good of each individual is obliged to give place."—(A sermon preached Feb. 21, 1777, p. 19.)

All these three definitions of civil liberty are clear, distinct, and rational, and it is probable they were intended to convey exactly the same ideas; but I am inclined to think that the definition given by the learned judge is the most perfect, as there are many restraints by natural law, which, though the established law does not enforce, yet it does not vacate and remove.

In the definition of civil liberty it ought to be understood, or rather expressed, that the restraints introduced by the law should be equal to all, or as much so as the nature of things will admit.

Political liberty may be defined to be the security with which, from the constitution, form, and nature of the established government, the subjects enjoy civil liberty. No ideas or definitions are more distinguishable than those of civil and political liberty; yet they are generally confounded; and the latter cannot yet claim an appropriate name. The learned judge uses political and civil liberty indiscriminately; but it would perhaps be convenient uniformly to use those terms in the respective senses here suggested, or to have some fixed specific denominations of ideas, which in their nature are so widely different. The last species of liberty has probably more than the rest engaged the attention of mankind, and particularly of the people of England. Civil liberty, which is nothing more than the impartial administration of equal and expedient laws, they have long enjoyed nearly to as great an extent as can be expected under any human establishment.

But some who are zealous to perpetuate these inestimable blessings of civil liberty, fancy that our political liberty may be augmented by reforms, or what they deem improvements in the constitution of the government. Men of such opinions and dispositions there will be, and perhaps it is to be wished that there should be, in all times. But before any serious experiment is made, we ought to be convinced, by little less than mathematical demonstration, that we shall not sacrifice substance to form, the end to the means, or exchange present possession for future prospects. It is true, that civil liberty may exist in perfection under an absolute monarch, according to the well-known verse:

Fallitur egregio quisquis sub principe credit
Servitium. Nunquam libertas gratior extat
Quam sub rege pio. CLAUD.

But what security can the subjects have for the virtues of his successor? Civil liberty can only be secure where the king has no power to do wrong, yet all the prerogatives to do good. Under such a king, with two houses of parliament, the people of England have a firm reliance that they will retain and transmit the blessings of civil and political liberty to the latest posterity.

There is another common notion of liberty, which is nothing more than a freedom from confinement. This is a part of civil liberty, but it being the most important part, as a man in a gaol can have the exercise and enjoyment of few rights, it is *κατ' εξοχην* called liberty.

But, where imprisonment is necessary for the ends of public justice, or the safety of the community, it is perfectly consistent with civil liberty. For Mr. Paley has well observed that, "it is not the rigour, but the inexpediency of laws and acts of authority, which makes them tyrannical." (B. vi. c. 5.)

This is agreeable to that notion of civil liberty entertained by Tacitus, one who was well acquainted with the principles of human nature and human governments, when he says, *Gothones regnantur paulò jam adductius, quam cæteræ Germanorum gentes, nondum tamen supra libertatem.* De Mor. Ger. c. 43.

It is very surprising that the learned commentator should cite with approbation (p. 6. and 125.) and that Montesquieu should adopt (b. xi. c. 13.) that absurd definition of liberty given in Justinian's Institutes: *Facultas ejus, quod cuique facere libet, nisi quid vi, aut jure prohibetur.* The liberty here defined implies that *every one* is permitted to do whatever is not forbidden by an *existing* law, and perhaps whatever is not forbidden to all. The word *vi* seems to refer to a restraint against law. In every country, and under all circumstances, the subjects possess the liberty described by this definition.

When an innocent negro is seized and chained, or is driven to his daily toil by a merciless master, he still retains this species of liberty, or that little power of action, of which force and barbarous laws have not bereft him. But we must not have recourse to a system of laws, in which it is a fundamental principle, *quod principi placuit, legis habet vigorem*, for correct notions of liberty.

So far the editor thought it proper to sug-

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 so far becomes a freeman (*g*); though the master's right to his service may *possibly* still continue (6), (7).

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 (8). But the vigour 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.

(*g*) Salk. 666. See ch. 14.

gest to the student the different significations of the word *liberty*; a word which it is of the utmost importance to mankind that they should clearly comprehend; for, though a genuine spirit of liberty is the noblest principle that can animate the heart of man, yet liberty, in all times, has been the clamour of men of profligate lives and desperate fortunes: *Falsò libertatis vocabulum obtendi ab iis, qui privatim degeneres, in publicum exitiosi nihil spei, nisi per discordias habeant.* (Tac. 11 Ann. c. 17.) And the first sentence of our Hooker's Ecclesiastical Polity contains not less truth and eloquence: "He that goeth about to persuade a multitude, that they are not so well governed as they ought to be, shall never want attentive and favourable hearers."

The editor cannot but cherish even a confident hope, that they who acquire the most intimate acquaintance with the laws and the constitution, will always be the most convinced, that to be free, is to live in a country where the laws are just, expedient, and impartially administered, and where the subjects have perfect security that they will ever continue so; and, allowing for some slight, and perhaps inevitable imperfections, that to be free, is to be born and to live under the English constitution. *Hanc retinete, quæso, Quirites, quam vobis tanquam hæreditatem, majores vestri reliquerunt.* Cic. 4 Phil.

(6) It is not to the soil, or to the air of England, that negroes are indebted for their liberty, but to the efficacy of the writ of *habeas corpus*, which can only be executed by the sheriff in an English county. I do not see how the master's right to the service can *possibly* continue; it can only arise from a contract, which the negro in a state of slavery is incapable of entering into with his master. See page 425.

(7) The reader may peruse the case of Forbes v. Cochrane, 2 B. and C. 448. 3 D. and R. 679 S. C. The judgments in which are "luminous, profound, and eloquent." The placitum of the case is: "Where negroes in a state of slavery, in a colony of Spain, escaped from their master's plantation, and took refuge, and were received on-board a British vessel of war, whilst she was stationed at an island captured by his Majesty's arms from the United States in time of war; and, after notice given to the officers commanding on the station, that they were runaway slaves, the officer carried them to, and left them at a British colony;—held that case would not lie in this country against the officers for harbouring and detaining such negroes, even though by the *lex loci*, whence they escaped, slavery was permitted."

(8) Lord Camden concluded his judgment in the case of general warrants in the same words: "One word more for ourselves; we are no advocates for libels; all governments must set their faces against them, and whenever they come before us and a jury, we shall set our faces against them; and if juries do not prevent them, they may prove fatal to liberty, destroy government, and introduce anarchy; but tyranny is better than anarchy, and the worst government better than none at all." 2 *Wils.* 292.

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 (9). Afterwards by the statute called [*128] *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, 13th of 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 was limited to his present majesty's illustrious house: and some new provisions were added, at the same fortunate æra, 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*).

*Thus much for the *declaration* of our rights and liberties. The [*129] 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

(*h*) 2 Inst. proem.
(*i*) 25 Edw. I.
(*k*) 2 Inst. proem.
(*l*) 1 W. and M. st. 2, c. 2.
(*m*) 12 and 13 W. III. c. 2.
(*n*) Plowd. 55.

(9) See a fuller account of Magna Charta, 4 book, p. 424.

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 (10), was by the ancient law homi-
[*130] cide or manslaughter (*o*). But the modern law doth not look *upon this offence in quite so atrocious a light (11), but merely as a heinous misdemesnor (*p*).

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*), (12), (13). And in this point the civil law agrees with ours (*s*).

2. A man's limbs (by which for the present we only understand those members which may be useful to him in fight, and the loss of which alone amounts to mayhem by the common law) are also the gift of the wise Creator, to enable him to protect himself from external injuries in a state of nature. To these therefore he has a natural inherent right; and they

(*o*) *Si aliquis mulierem pregnantem percusserit, vel si venenum dederit, per quod fecerit abortivum; si puerperium jam formatum fuerit, et maxime si fuerit animatum, facit homicidium.* Bracton. *l.* 3. *c.* 21.

(*p*) 3 Inst. 50.

(*q*) Stat. 12 Car. II. c. 24.

(*r*) Stat. 10 and 11 W. III. c. 16.

(*s*) *Qui in utero sunt, in jure civili intelliguntur in rerum natura esse, jam de eorum commodo agitur.* *Ff.* 1. 5. 26.

(10) The distinction between murder and manslaughter, or felonious homicide, in the time of Bracton, was in a great degree nominal. The punishment of both was the same; for murder as well as manslaughter, by the common law, had the benefit of clergy. *Fost.* 302.

(11) But if the child be born alive, and afterwards die in consequence of the potion or beating, it will be murder (3 *Inst.* 50. 1 *P. Wms.* 245.); and of course those who, with a wicked intent, administered the potion, or advised the woman to take it, will be accessaries before the fact, and subject to the same punishment as the principal.

(12) See Book 2. p. 169.

(13) Every legitimate infant in *ventre de sa mere* is considered as born for all beneficial purposes. Co. Lit. 36. 1 P. Wm. 329. Thus if lands be devised to B. for life, remainder to such child or children as shall be *living* at the time of his decease, a posthumous child will take equally with those who were born before B.'s death. Doe v. Clark. 2 Hen. Bla. 399. But the presumptive heir may enter and receive the profits to his own use, till the birth of the child, who takes land by descent. 3 Wils. 526. See 1 Ves. 81. 85. 2 Atk. 117. 1 Freem. 244. 293.; also 2 Book, 169. post. Such infant, &c. may have a distributive share of intestate property even with the half-blood (1 Ves. 81.): it is capable of taking a devise of land (2 Atk. 117. 1 Freem. 244. 293.): it takes, under a marriage settlement, a provision made for children living at the death of the father. (1 Ves. 85.) And it has lately been decided, that marriage and the birth of a posthumous child, amount to a revocation of a will executed previous to the marriage. (5 T. R. 49.) So in executory devises it is considered as a life in being. (7 T. R. 100.) "But as it respects the rights of others claiming through the child, if it is born dead, or in such an early stage of pregnancy as to be incapable of living, it is to be considered as if it never had been born or conceived. 2 Parjes C. R. 35."

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, may be afterwards avoided, if forced upon him by a well-grounded apprehension of losing his life, or even his limbs, in case of his non-compliance (*t*). And the same is also a sufficient excuse for the commission of many misdemesnors, as will appear in the fourth book. The constraint a man is under in these circumstances is called in law *duress*, from the Latin *duritia*, of which there are two *sorts; duress of imprison- [*131]
ment, 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 vitæ periculum, aut corporis cruciatum* (*u*). A fear of battery, or being beaten, though never so well grounded, is no duress; neither is the fear of having one's house burned, 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 (*x*): but no suitable atonement can be made for the loss of life, or limb (14). 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 redemptum voluit.*

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 (*y*), were rejected in Justinian's collection.

*These rights, of life and member, can only be determined by the [*132]
death of the person; which was formerly accounted to be either a civil or natural death. The civil death commenced, if any man was banished or abjured the realm (*z*) by the process of the common law, or enter-

(*t*) 2 Inst. 483.
(*u*) *l.* 2. *c.* 5.
(*x*) 2 Inst. 483.
(*y*) *L.* 11. *c.* 27.
(*z*) Co. Litt. 133.

(14) See 4 Book, 30.

ed into religion; that is, went into a monastery, and became there a monk professed: in which cases he was absolutely dead in law, and his next heir should have his estate. For such banished man was entirely cut off from society; and such a monk, upon his profession, renounced 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 laws 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 was therefore accounted *civiliter mortuus*, and when he entered into religion might, like other dying men, make his testament and executors; or, if he made none, the ordinary might grant administration to his next of kin, as if he were actually dead intestate. And such executors and administrators had the same power, and might bring the same actions for debts due *to* the religious, and were 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 was so effectually dead in law, that a lease made even to a third person, during the life (generally) of one who afterwards became a monk, determined by such his entry into religion: for which reason leases, and other conveyances for life, were usually made to have and to hold for the term of one's [*133] *natural* life (*d*). But, *even in the times of popery, the law of England took no cognizance of *profession* in any foreign country, because the fact could not be tried in our courts (*e*); and therefore, since the reformation, this disability is held to be abolished (*f*): as is also the disability of banishment, consequent upon abjuration, by statute 21 Jac. I. c. 28. (15).

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 inquire in the concluding book of these commentaries. At present, I shall only observe, that whenever the *constitution* of

(*a*) This was also a rule in the feodal law, *l.* 2. *c.* 21. *desiit esse miles seculi, qui factus est miles Christi; nec beneficium pertinet ad eum qui non debet genere officium.*
(*b*) Litt. § 200.
(*c*) Co. Litt. 132.
(*d*) 2 Rep. 48. Co. Litt. 132.
(*e*) Co. Litt. 132.
(*f*) 1 Salk. 162.

(15) One species of civil death may still exist in this country; that is, where a man by act of parliament is attainted of treason or felony, and saving his life, is banished for ever; this Lord Coke declares to be a civil death. But he says, a temporary exile is not a civil death. *Co. Litt.* 133. And for the same reason where a man receives judgment of death, and afterwards leaves the kingdom for life, upon a conditional pardon, this seems to amount to a civil death: this practice did not exist in the time of Lord Coke, who says, that a man can only lose his country by authority of parliament. *Ib.* "A person sentenced to imprisonment in a state prison for *life*, shall thereafter be deemed civilly dead. 2 R. S. 701, § 20. This was not so at common law. 6 Johns. C. R. 118.; his person is still under the full protection of the law. 2 R. S. 701, § 21."

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 (16); 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 (*g*), "*aliquo modo destruatur, nisi per legale judicium parium suorum aut per legem terræ.*" Which words, "*aliquo modo destruatur*," according to Sir Edward Coke (*h*), 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 Edw. III. c. 3, that no man shall be put to death, without being brought to answer by due process of law. [*134]

3. Besides those limbs and members that may be necessary to a 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 entitled, 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 moving 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 (*i*) is, that no freeman shall be taken or imprisoned but [*135]

(*g*) c. 29.
(*h*) 2 Inst. 48.
(*i*) c. 29.

(16) This is a compliment which, I fear, the common law does not deserve; for although it did not punish with death any person who could read, even for any number of murders or other felonies, yet it inflicted death upon every felon who could not read, though his crime was the stealing only of twelve pence farthing.

by the lawful judgment of his equals, or by the law of the land. And many subsequent old statutes (*j*) 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 shown, 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 (17). And, lest this act should be evaded by demanding unreasonable bail, or sureties for the prisoner's appearance, it is declared by 1 W. and M. st. 2, c. 2, that excessive bail ought not to be required.

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 practised by the crown) (*k*), 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 ma-
[*136] gistrate, *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 it is the parliament only, or legislative power, that, 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

(*j*) 5 Edw. III. c. 9. 25 Edw. III. st. 5. c. 4. 28 Edw. III. c. 3.

(*k*) I have been assured, upon good authority, that, during the mild administration of Cardinal Fleury, above 54,000 *lettres de cachet* were issued, upon the single ground of the famous bulle *unigenitus*.

(17) Amended and enforced by 56 Geo. III. c. 100. See the construction on these acts, 1 Chitty's Crim. Law, 123. The writ of habeas corpus at common law, although a writ of right, is not grantable of course, but on motion in term time, stating a probable cause for the application; and it is doubtful whether under the 31 Car. II. c. 2. which only applies to cases where the application is made to a judge in vacation, the writ be grantable of course. Hobhouse's case, 3 Bar. & Ald. 420.

The allowance of the writ of habeas corpus in term time, is a matter of sound and legal discretion. Ferguson's case, 9 John. Rep. 239.

Whether a State Court can award a habeas corpus to bring a soldier enlisted into the army under the laws of the United States, Quere. Same case.

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, ne quid respublica detrimenti capiat*," was called the *senatus consultum ultimæ 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 awhile, 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 (*l*). 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 allege this duresse, and avoid the extorted bond. But if a man be lawfully imprisoned, and, either to procure his [*137] 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 (*m*). 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 cause 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 (*n*): 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.

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 (*o*). 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 and transportation are punishments at present unknown to the common law; and, wherever the latter 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 (18). To this purpose the great charter (*p*) 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,

(*l*) 2 Inst. 589.
(*m*) 2 Inst. 482.
(*n*) Ibid. 52, 53.
(*o*) F. N. B. 85.
(*p*) C. 29.

(18) It is said that exile was first introduced as a punishment by the legislature in the 39th year of Eliz. when a statute enacted that "such rogues as were dangerous to the inferior people should be banished the realm," (39 *Eliz. c.* 4. See *Barr. Ant. Stat.* 269;) and that the first statute in which the word transportation is used, is the 18 C. II. c. 3, which gives a power to the judges at their discretion either to execute or transport to America for life, the Moss-troopers of Cumberland and Northumberland, (2 *Woodd.* 498.) To persons capitally convicted, the king frequently offers a pardon, upon condition of their being transported for life.

Wales, or Berwick, shall be sent prisoner into Scotland, Ireland,
[*138] Jersey, Guernsey, or places beyond the seas, (where *they cannot have the full 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 *præmunire*, 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.

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 liegemen, yet he cannot send any man *out of* the realm, even upon the public service; excepting sailors and soldiers, the nature of whose employment necessarily implies an exception: he cannot even constitute a man lord deputy or lieutenant of Ireland against his will, nor make him a foreign ambassador (*q*). For this might, in reality, be no more than an honourable exile.

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 honour and justice, extremely watchful in ascertaining and protecting this right. Upon this principle the great charter (*r*) has declared
that no freeman shall be disseised, or divested, of his freehold, or
[*139] 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 (*s*) it is enacted, that no man's lands or goods shall be seized 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.

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 pri-

(*q*) 2 Inst. 46.
(*r*) C. 29.
(*s*) 5 Edw. III. c. 9. 25 Edw. III. st. 5. c. 4. 28 Edw. III. c. 3.

vate 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 (19).

*Nor is this the only instance in which the law of the land has [*140] 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. c. 1. which (*t*) enacts, that no talliage or aid shall be taken without the assent of the archbishops, 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

(*t*) See the introduction to the great charter, (*edit. Oxon.*) *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.

(19) These observations must be taken with considerable qualification, for, as observed by Buller, J., there are many cases in which individuals sustain an injury, for which the law gives no action: for instance, pulling down houses or raising bulwarks for the preservation and defence of the kingdom against the king's enemies. The civil law writers indeed say that the individuals who suffer have a right to resort to the public for a satisfaction, but no one ever thought that the common law gave an action against the individual who pulled down the house, &c. And where the acts of commissioners appointed by a paving act occasion a damage to an individual, without any excess of jurisdiction on their part, the commissioners or paviors acting under them, are not liable to an action. 4 Term Rep. 794. 6, 7. 3 Wils. 461. 6 Taunton, 29. In general, however, a power of this nature must be created by statute, and which usually provides compensation to the individual. Thus by the highway act (13 Geo. III. c. 78. and 3 Geo. IV. c. 126. sec. 84, 5.) two justices may either widen or divert any highway through or over any person's soil, even without his consent, so that the new way shall not be more than thirty feet wide, and that they pull down no building, nor take away the ground of any garden, park, or yard. But the surveyor shall offer the owner of the soil, over which the new way is carried, a reasonable compensation, which if he refuses to accept, the justices shall certify their proceedings to some general quarter sessions; and the surveyor shall give fourteen days' notice to the owner of the soil of an intention to apply to the sessions; and the justices of the sessions shall impanel a jury, who shall assess the damages which the owner of the soil has sustained, provided that they do not amount to more than forty years' purchase. And the owner of the soil shall still be entitled to all the mines within the soil, which can be got without breaking the surface of the highway. Many other acts for local improvements, recently passed, contain similar compensation clauses.

"By the constitution of the U. S. private property shall not be taken for public use without just compensation. (Amendments, art. 5.) A similar provision is contained in the constitutions of the several states, or recognized as a principle of law. The necessity of making new roads has caused private property to be considered with us of little importance, in comparison with the public good, provided compensation be made."

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. and 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.

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 [*141] 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 outworks or 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 either mistake or legally 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 vigour, 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* (*u*), spoken in the person of the king, who in judgment of law (says Sir Edward Coke) (*w*), 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 [*142] 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* (*x*), 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

(*u*) C. 29.
(*w*) 2 Inst. 55.
(*x*) c. 29.

law; or to disturb or delay common right: and, though such commandments should come, the judges shall not cease to do right; which is also made a part of their oath by statute 18 Edw. III. st. 4. And by 1 W. and 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.

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 an 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 before mentioned, 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 (y) 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 alteration in church or state, shall be signed by above twenty persons, unless the matter thereof be approved by three justices of the peace, or the major part of the grand jury (20) in the [*143]

(y) Montesq. Sp. L. xii. 26.

(20) Which the grand jury may do either at the assizes or sessions. The punishment for an offence against this act, is a fine to any amount not exceeding 100*l.* and imprisonment for three months. At the trial of lord George Gordon, the whole court, including lord Mansfield, declared that this statute was not affected by the bill of rights. 1 Wm. & M. st. 2. c. 2. (see Douglas, 571.) But Mr. Dunning, in the house of commons, contended, "that it was a clear and fundamental point in the constitution of this country, that the people had a right to petition their representatives in parliament, and that it was by no means true that the number of names signed to any such petition was limited. To argue that the act of Charles was now in force, would be as absurd as to pretend that the prerogative of the crown still remained in its full extent, notwithstanding the declaration in the bill of rights." See New An. Reg. 1781. V. 2. And the acknowledged practice has been consistent with this opinion.

The state of disturbance and political excite-

country; and in London by the lord mayor, aldermen, and common council: nor shall any petition be presented by more than ten persons at a time. But, under these regulations, it is declared by the statute 1 W. and M. st. 2, c. 2, that the subject hath a right to petition; and that all commitments and prosecutions for such petitioning are illegal (21).

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 [*144] to their condition and degree, and such as are *allowed by law. Which is also declared by the same statute, 1 W. and 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 and property, lest his ignorance of the points whereon they are 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 parliament be supported in its full vigour; 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

ment in which this kingdom was involved several years, after the peace of 1815, produced further regulations and restrictions of the right of petitioning. The people in the manufacturing districts having little employment, from the general stagnation of trade, devoted themselves with intense ardour to political discussions, and in some places the partizans of reform, presuming that their demands would not be conceded to their petitions, were preparing for the alternative of open force. In these circumstances the legislature thought fit to forbid all public meetings (except county meetings called by the lord-lieutenant or the sheriff), which consisted of more than fifty persons, unless in separate townships or parishes, by the inhabitants thereof, of which six days' previous notice must be given to a justice of the peace, signed by seven resident householders. See 60 Geo. III. c. 6. The act also provides for the dissolution of any public meeting by proclamation of a chief civil officer of the place, and persons refusing to depart, are liable to seven years' transportation. Persons attending such meetings with arms, bludgeons, flags, banners, &c. are subject to fine and imprisonment for any term not exceeding two years.

But as the mischief was temporary, the restrictions upon the right of meeting to deliberate upon public measures were limited in their duration, and have mostly expired. Those enactments which were designed to prevent such meetings from being perverted to objects manifestly dangerous to the peace of the community, only continuing in force.

(21) Sir William Blackstone here implies, that the clause in the bill of rights did not repeal the 13 Car. II. This doctrine has been denied by some, and doubted by many; but I think without reason. The statute of Car. II. did not take from the subject his right of petitioning, but only regulated the manner in which such petitions should be signed and presented; therefore, before the bill of rights passed, the subject had already the liberty of petitioning, and the bill of rights only acted as a declaration of this right, and a confirmation of the law as it then stood; for if the bill or declaration of rights was intended to have altered the law as it then stood, it should not only have declared the right of the subject to petition, (for that was already established by law;) but also have enacted, that the number of signatures to such petition, and the number of persons presenting it, which before were limited, should thereafter be unlimited.

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 inquiry, 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 [*145] the observation of a learned French author, who indeed generally both thought and wrote in the spirit of genuine freedom (z), 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 II.

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 or governed; or, in other words, as magistrates and people. Of magistrates, some also 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 of both *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, consist- [*147] ing 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.

(z) Montesq. Sp. L. 5.

The original or first institution of parliament is one of those matters which lie so far hidden in the dark ages of antiquity, that the tracing of it out is a thing equally difficult and uncertain (1). The word *parliament* itself, (*parlement* or *colloquium*, as some of our historians translate it,) is comparatively of modern date; derived from the French, and signifying an assembly that 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 (*c*); for what is there now called the parliament is only the supreme court of justice, consisting of the peers, certain dignified ecclesiastics, and judges, which neither is in practice, nor is supposed to be in theory, a general council of the realm.

With us in England this general council hath been held immemorially, under the several names of *michel-synoth* or great council, *michel-*

(*a*) Mod. Un. Hist. xxiii. 307. The first mention of it in our statute law is in the preamble to the statute of Westm. I. 3 Edw. I. A. D. 1272.
(*b*) *De minoribus rebus principes consultant, de majoribus omnes.* Tac. de mor. Germ. c. 11.
(*c*) These were assembled for the last time, A. D. 1561. (See Whitelocke of Parl. c. 72.) or according to Robertson, A. D. 1614. (Hist. Cha. V. I. 369.)

(1) The word *parliamentum* was not used in England till the reign of Hen. III. (*Prynne on* 4 *Inst.* 2.) Sir Henry Spelman, in his Glossary, (*voc. Parl.*) says, *Johannes rex haud dicam parliamentum, nam hoc nomen non tum emicuit, sed communis concilii regni formam et coactionem perspicuam dedit.*

It was from the use of the word *parliamentum* that Prynne discovered Lord Coke's manuscript, *Modus tenendi parliamentum tempore regis Edwardi, filii regis Etheldredi, &c.* to be spurious. Lord Coke sets a high value upon it, and has assured us, "that certain it is, this *modus* was rehearsed and declared before the conqueror at the conquest, and by him approved. (4 *Inst.* 12.) But for many reigns after this word was introduced, it was indiscriminately applied to a session, and to the duration of the writ of summons: we now confine it to the latter, viz. to the period between the meeting after the return of the writ of summons and the dissolution. Etymology is not always frivolous pedantry; it sometimes may afford an useful comment upon the original signification of a word. No inconsiderable pains have been bestowed by learned men in analysing the word *parliament*; though the following specimens will serve rather to amuse than to instruct: "The word parliament," saith one, "is compounded of *parium lamentum*, because (as he thinks,) "the peers of the realm did at these assemblies lament and complain each to the other of the enormities of the country, and thereupon provided redress for the same." (*Lamb. Arch.* 235.) Whitelock, in his notes (174) declares, "that this derivation of parliament is a sad etymology." Lord Coke, and many others, say, that "it is called parliament, because every member of that court should sincerely and discreetly *parler la ment*, speak his mind for the general good of the commonwealth." (*Co. Litt.* 110.) Mr. Lambard informs us, that "Lawrence Vallo misliketh this derivation." (*Arch.* 236.) And Lawrence Vallo is not singular: for Mr. Barrington assures us, that "lord Coke's etymology of the word parliament, from speaking one's mind, has been long exploded. If one might presume (adds he,) to substitute another in its room after so many guesses by others, I should suppose it was a compound of the two Celtic words *parly* and *ment*, or *mend*. Both these words are to be found in Bullet's Celtic Dictionary, published at Besançon in 1754, 3d vol. fol. He renders *parly* by the French infinitive *parler*; and we use the word in England as a substantive, viz. *parley*; *ment* or *mend* is rendered *quantité, abondance.* The word parliament, therefore, being resolved into its constituent syllables, may not improperly be said to signify what the Indians of North America call a Great Talk." I shall leave it to the reader to determine which of these derivations is most descriptive of a parliament; and perhaps, after so much recondite learning, it may appear presumptuous in me to observe, that parliament imported originally nothing more than a council or conference, and that *ment* in parliament has no more signification than it has in impeachment, engagement, imprisonment, hereditament, and ten thousand others of the same nature, though the civilians have adopted a similar derivation, viz. testament from *testari mentem.* Tay. Civ. Law, 70.

gemote or great meeting, and more *frequently *witten-a-gemote*, or [*148] 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 Angliæ* (*d*). We have instances of its meeting to order the affairs of the kingdom, to make new laws, and to mend the old, or, as Fleta (*e*) expresses it, "*novis injuriis emersis nova constituere remedia*," 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 (*f*) 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 witten-a-gemote, or wise men, as, *hæc sunt instituta, quæ Edgarus rex consilio sapientum suorum instituit;*" or to be enacted by those sages with the advice of the king, as, "*hæc sunt judicia, quæ sapientes consilio regis Ethelstani instituerunt;*" or lastly, to be enacted by them both together, as, "*hæc sunt institutiones, quas rex Edmundus et episcopi sui cum sapientibus suis instituerunt.*"

There is also no doubt but these great councils were occasionally held 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 been yet ascertained by the general assize, or assembly, but was left to the custom of particular counties (*g*). Here the general assise is spoken of as a meeting well known, and its statutes or decisions are put in *a manifest contra- [*149] distinction to custom, 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 (*h*).

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 antiquaries; 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 archbishops, 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

(*d*) Glanvil. *l.* 13. *c.* 32. *l.* 9. *c.* 10.—Pref. 9 Rep.—2 Inst. 526.
(*e*) *L.* 2. *c.* 2.
(*f*) C. 1. § 3.
(*g*) *Quanta esse debeat per nullam assisam generalem determinatum est, sed pro consuetudine singulorum comitatuum debetur. l.* 9. *c.* 10.
(*h*) Year book, 21 Edw. III. 60.

to inquire wherein consists this constitution of parliament, as it now stands, and has stood for the space of at least five hundred years. And in the prosecution of this inquiry, 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.

[*150] *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 (2), (3). 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 (*i*). 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 it is to sit again for six months, unless dissolved by the successor: for this revived parliament must have been originally summoned by the crown.

[*151] *It is true, that by a statute, 16 Car. I. c. 1, it was enacted, that,

(*i*) 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 convoke the great council when separated. (Mod. Un. Hist. xxvii. 15.)

(2) Now, it is enacted by 37 Geo. III. c. 127, that his majesty may issue his proclamation for the meeting of parliament, in fourteen days from the date thereof; (notwithstanding a previous adjournment to a longer day. 39 and 40 Geo. III. c. 14.) And in case of the king's demise after the dissolution of a parliament, and before the assembling of a new one, the last preceding parliament shall meet and sit. The same also, if the successor to the crown die within six months, without having dissolved the parliament, or after the same shall have been dissolved, and before a new one shall have met. It is also enacted, that in case of the king's demise, on, or after the day appointed for assembling a new parliament, such new parliament shall meet and sit.

(3) This is a provision of the magna charta of King John: *faciemus summoneri, &c. ad certum diem scilicet ad terminum quadraginta dierum ad minus et ad certum locum.* (Black. Mag. Ch. Joh. 14.) It is enforced by 7 and 8 W. c. 25, which enacts that there shall be forty days between the teste and the return of the writ of summons; and this time is by the uniform practice since the union extended to fifty days. (2 *Hats.* 235.) This practice was introduced by the 22d article of the act of union, which required that time between the teste and the return of the writ of summons for the first parliament of Great Britain.

if the king neglected to call a parliament for three years, the peers might assemble and issue out writs for 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 (*k*). 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 (*l*), 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 (4). And yet, out of abundant caution, it was thought necessary to confirm its acts in the next parliament, by statute 13 Car. II. c. 7, and c. 14.

*It is likewise true, that at the time of the revolution, A.D. 1688, [*152] 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 a full conviction that King James the Second had abdicated the government, and that the throne was thereby vacant: which supposition of the individual members 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

(*k*) Stat. 12 Car. II. c. 1. (*l*) 1 Sid. 1.

(4) William Drake, a merchant of London, was impeached for writing a pamphlet, entitled *The Long Parliament revived*, in which he maintained, that there could be no legislative authority till that was legally and regularly dissolved by the king and the two houses of parliament, according to the 16 Car. I. c. 7. *Com. Jour.* 20 Nov. 1660.

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. and 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 convoke a parliament.

[*153] *And this by the ancient statutes of the realm (*m*) 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* (5). These last words are so loose and vague, that such of our monarchs as were inclined 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. and 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. and 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 (*n*) after the determination of the former (6).

II. The constituent parts of a parliament are the next objects of our

(*m*) 4 Edw. III. c. 14. 36 Edw. III. c. 10.
(*n*) This is the same period, that is allowed in Sweden for intermitting their general diets, or parliamentary assemblies. Mod. Un. Hist. xxxiii. 15.

(5) Mr. Granville Sharp, in a treatise published some years ago, argued ingeniously against this construction of the 4 Ed. III. and maintained that the words, *if need be*, referred only to the preceding words, *oftener*. So that the true signification was, that a parliament should be held once every year at all events; and if there should be any need to hold it oftener, then more than once. (See his Declaration, &c. p. 166.) The cotemporary records of parliament, in some of which it is so expressed without any ambiguity, prove beyond all controversy that this is the true construction. In ancient times many favourite laws were frequently re-enacted. In the 50 Edw. III. it is expressly and absolutely declared, that a parliament should be held once a year. *Rot. Parl.* No. 186. In the 1 R. II. we find again another petition from the commons, that a parliament should be held once a year *at the least*: "*Que please a nre dit Sr de tenir parlement un foetz par an ou meynz, et ceo en lieu convenable.*" The king's answer is, "As to that parliament shall be held every year, let the statutes thereupon be kept and preserved; but as to the place where the parliament shall be held, the king will therein do his pleasure." (*Rot. Parl.* No. 95.) And in the next year, the king declared he had summoned the parliament, because it was ordained that parliament should be held once a year. (*Rot. Parl.* 2 R. II. No. 4.)

(6) This part of the statute 6 W. and M. c. 2, confirms the statute 16 Car. II. c. 1, in declaring, that there shall not be a longer interval than three years after a dissolution; but the 16 Car. II. seems to be more extensive in its operation, by providing that there shall not be an intermission of more than three years after any sitting of parliament, which will extend also to a prorogation. But as the mutiny act, and the land-tax and malt tax acts are passed for one year only, these two statutes are now of little avail, for the parliament must necessarily be summoned for the dispatch of business once every year.

"The congress of the U. S. meets at least once a year, and may be convened oftener by the President. (Const. Art. 1, Sect. 4; and Art. 2, Sect. 3.) The constitutions of the several states have similar provisions as to the convening of the state legislatures."

inquiry. 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 (*o*), 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 (*p*); and he also has alone the power of dissolving them.

It is highly necessary for preserving the balance of the constitu- [*154] tion, that the executive power should be a branch, though not the whole, of the legislative. 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 legislative 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 (*q*). 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 [*155] 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 inquiring into, impeaching, and punishing the conduct (not indeed of the king (*r*), 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

(*o*) 4 Inst. 1, 2. Stat. 1 Eliz. c. 3. Hale of Parl. 1.
(*p*) 4 Inst. 6.
(*q*) *Sulla—tribunis plebis sua lege injuriæ faciendæ potestatem ademit, auxilii ferendi reliquit. De L.L.* 3. 9.
(*r*) Stat. 12 Car. II. c. 30.

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 itself, 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 (7).

(7) These observations have been termed by Mr. Reeve, in his fourth letter, entitled, *Thoughts on the English Government*, "a fabulous invention, contrived in order to round and finish more completely his mythological account of three coequal and co-ordinate powers in the legislature." But the truth and propriety of the learned commentator's doctrine is admirably elucidated by the following extract from a work of considerable merit.

"This security is sometimes called *the balance of the constitution*; and the political equilibrium, which this phrase denotes, consists in two contrivances, A BALANCE OF POWER and A BALANCE OF INTEREST. By *a balance of power* is meant, that there is no power possessed by *one* part of the legislature, the *abuse* or *excess* of which is not *checked* by some *antagonist power*, residing in *another* part. Thus the *power* of the *two houses* of parliament to frame laws is *checked* by the *king's negative*; that if laws subversive of real government should obtain the consent of parliament, the reigning prince, by interposing his prerogative, may save the necessary rights and authority of his station. On the other hand, the *arbitrary application* of this *negative* is *checked* by the privilege which parliament possesses, of *refusing supplies of money* to the exigencies of the king's administration. The constitutional maxim, *that the king can do no wrong*, is *balanced* by another maxim, not less constitutional, *that the illegal commands of the king do not justify those who assist or concur in carrying them into execution*; and by a second rule, subsidiary to this, *that the acts of the crown acquire not any legal force, until authenticated by the subscription of some of its great officers*. The wisdom of this contrivance is worthy of observation. As the king could not be punished without a civil war, the constitution exempts his person from trial or account; but, lest this impunity should encourage a licentious exercise of dominion, *various obstacles* are opposed to the private will of the sovereign, when directed to illegal objects. *The pleasure of the crown must be announced with certain solemnities, and attended by certain officers of state*. In some cases, the *royal order* must be *signified* by a *secretary of state*; in others it must pass under the *privy-seal*, and in many, under the *great seal*. And when the king's command is regularly published, *no mischief can be achieved by it*, without *the ministry* and *compliance of those* to whom it is directed. *Now, all who either concur in an illegal order, by authenticating its publication with their seal or subscription, or who in any manner assist in carrying it into execution, subject themselves to prosecution and punishment, for the part they have taken; and are not permitted to plead, or produce the command of the king, in justification of their obedience*. But further; the *power* of the *crown to direct the military force* of the kingdom, is *balanced* by the annual necessity of resorting to parliament for the maintenance and government of that force. *The power of the king to declare war* is *checked* by the privilege of the house of commons to grant or withhold the supplies by which the war must be carried on. The *king's choice* of his ministers is *controlled* by the obligation he is under of appointing those men to offices in the state, who are found capable of managing the affairs of his government with the two houses of parliament. This consideration imposes such a necessity upon the crown, as hath, in a great measure, subdued the idea of favouritism; insomuch, that it is become no uncommon spectacle in this country, to see men promoted by the king to the highest offices, and richest preferments which he has in his power to bestow, who have been distinguished by their opposition to his personal inclinations.

"By the *balance of interest*, which accompanies and gives efficacy to the *balance of power*, is meant this, that the *respective interests* of the *three* estates of the empire are *so disposed* and *adjusted*, that which ever of the *three* shall attempt any *encroachment*, the other *two* will unite in resisting it. If the *king* should endeavour to extend his authority, by contracting the power and privileges of the *commons*, the *house of lords* would see their own dignity endangered by every advance which the crown made to independency upon the resolutions of parliament. The admission of arbitrary power is no less formidable to the grandeur of the *aristocracy*, than it is fatal to the liberty of the republic; that is, it would reduce the nobility, from the hereditary share they possess in the national councils, in which their real greatness consists, to the being made a part of the empty pageantry of a despotic court. On the other hand, if the *house of commons* should intrench upon the distinct province, or usurp the established prerogative of the *crown*, the *house of lords* would receive an instant alarm from every new stretch of popular power. In every contest in which the *king* may be engaged with the *representative body*, in defence of his established share of authority, he will find a sure ally in the collective power of the *nobility*. An attachment to the monarchy, from which they derive their own distinction; the allurement of a court, in the habits, and with

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 (8), and, at the dissolution of monasteries by Henry VIII. consisted likewise of twenty-six mitred abbots, and two priors (*s*): a very considerable body, and in those times equal in number to the temporal nobility (*t*) (9). All these hold, or are supposed to hold, *certain ancient baronies under the king; for William the [*156] 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 fœdal or Norman tenure by barony, which subjected their estates to all civil charges and assessments, from which they were before exempt (*u*): and, in right of succession to those baronies, which were unalienable from their respective dignities, the bishops and abbots were allowed their seats in the house of lords (*x*) (10). But though these lords spiritual are, in the eye of the law, a distinct estate from the lords temporal, and are so distinguished in most of 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 joins both estates. And from this want of a separate assembly and separate negative of the prelates, some writers have argued (*y*) very cogently, that the lords temporal and spiritual are now, in reality, only one estate (*z*), which is unquestionably true in every effectual sense, though the ancient distinction between them still nominally continues. For if a bill should pass their house, there is no doubt of its validity, though every lord spiritual should vote against it; of which Selden (*a*), and Sir Edward

(*s*) Seld. tit. hon. 2. 5. 27.
(*t*) Co Litt. 97.
(*u*) Gilb. Hist. Exch. 55. Spelm. W. I. 291.
(*x*) Glanv. 7. 1. Co. Litt. 97. Seld. tit. hon. 2. 5. 19.
(*y*) Whitelock on Parliam. c. 72. Warburt. Alliance, b. 2, c. 3.
(*z*) Dyer, 60.
(*a*) Baronage, p. 1, c. 6. The act of uniformity, 1 Eliz. c. 2, was passed with the dissent of all the bishops, (Gibs. codex. 236,) and therefore the style of *lords spiritual* is omitted throughout the whole.*

* No rational or ancient principle can perhaps be suggested why the bishops should not have exactly the same legislative functions as the other peers of parliament. Unless precedents could be found to the sentiments of which they have been brought up; their hatred of equality, and of all levelling pretensions, which may ultimately affect the privileges, or even the existence of their order: in short, every principle, and every prejudice which are wont to actuate human conduct, will determine their choice to the side and support of the crown. Lastly, if the *nobles* themselves should attempt to revive the superiorities which their ancestors exercised, under the feudal constitution, the *king* and *the people* would alike remember, how the *one had been* insulted and the other enslaved, by that barbarous tyranny. They would forget the natural opposition of their views and inclinations, when they saw themselves threatened with a return of a *domination* which was *odious and intolerable to both*." "The President of the U. S. has a limited veto on the laws passed by congress: if he disapproves a bill it cannot become a law, unless, on being reconsidered, two thirds of each house agree to it. Const. Art. 1. Sect. 7. So also generally, a similar power is vested in the governors of the several states."

(8) On the union with Ireland, stat. 39 and 40 G. III. c. 67, an addition of four representative spiritual peers, one archbishop, and three supreme bishops, was made for Ireland, to sit by rotation of sessions.

(9) In the place referred to, Lord Coke says, there were twenty-seven abbots and two priors, and he is there silent respecting the number of the temporal peers; but, in the first page of the 4th Institute, he says their number, when he is then writing, is 106, and the number of the commons 493.

(10) The right by which these spiritual lords sit, whether derived under their alleged baronies, or from usage, is discussed, Hargr. Co. Litt. 134. b. n. 1. Mr. H. inclines to adopt lord Hale's position, namely, that they sit by usage. Mr. Hallam has also adverted to the question, Midd. Ages, c. viii. and rendered it accessible to the general reader; but the student, if he have a turn for conjectural investigation, may consult Lord Hale's MS. Jura Coronæ, and bishop Warburton's Alliance between Church and State, 4th edit. pa. 149.

Coke (*b*), 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 Sir Edward Coke seems to doubt (*c*) whether this would not be an *ordinance*, rather than an act, of parliament.

[157*] *The lords temporal consist of all the peers of the realm (11) (the bishops not being in strictness held to be such, but merely lords of parliament) (*d*) 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 (12). Their number is indefinite, and may be increased 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 (13).

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

the contrary, there seems to be no reason to doubt, but that any act at this day would be valid, though all the temporal lords or all the spiritual lords were absent.

In the 1 Eliz. c. 2, the style of the parliament is, the lords and commons in parliament assembled; but there is the same style used also in 1 Eliz. c. 11, a revenue act. Lord Mountmorres informs us, that on the 18th Feb. 1461, a motion was made in the Irish house of lords, "That as all the bishops were against a representation about certain grievances, the lords spiritual should not be named: upon which the judges were consulted; and their opinion was, that in any act or order which passed, it must be entered by the lords spiritual and temporal." 1 Book, 344.

(*b*) 2 Inst. 585, 6, 7. See Keilw. 184, where it is holden by the judges, 7 Hen. VIII. that the king may hold a parliament without any spiritual lords. This was also exemplified in fact in the two first parliaments of Charles II wherein no bishops were summoned, till after the repeal of the statute 16 Car. I. c. 27, by statute 13 Car. II. stat. 1, c. 2.

(*c*) 4 Inst. 25.

(*d*) Staunford, P. C. 153.

(11) By stat. 39 and 40 G. III. c. 67, art. 4, twenty-eight lords temporal of Ireland, elected for life by the peers of Ireland, shall sit and vote, on the part of Ireland, in the house of lords. The same article prescribes the mode of election, and refers the decision of any question arising thereon to the house of lords, where, if the votes be equal, the names of the candidates are to be put into a glass, and one drawn out by the clerk of the parliament during the sitting of the house. Until the peerage of Ireland be reduced to one hundred, the prerogative is limited to create one peer upon three extinctions; and, on the peerage being reduced to one hundred, the prerogative is limited to keeping up that number.

(12) The Scots nobility sit one parliament only: the Irish for life.

(13) Upon the sharp controvesy originating with this bill, Mr. Addison and Sir Richard Steele were opposed to each other out of the house as well as within it; Mr. Addison for, and Sir Rich. Steele against, the measure.

excesses may be continually restrained by that superior power, from which all honour is derived. Such a spirit, when nationally diffused, gives life and vigour to the community; it sets all the wheels of government in motion, *which, under a wise regulator, may be directed [*158] 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 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 collec- [*159] tive 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 increased. 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 Cæsar, 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 citizens 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 (*e*). The number of English representatives is 513, and of Scots 45; in all 558 (14). 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) (*f*) "*de communi consilio super negotiis quibusdam arduis et urgentibus, regem, statum, defensionem regni Angliæ et ecclesiæ Anglicanæ 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.

[*160] *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 (*g*), "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 *præmunire*.

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 (*h*), 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 jurisdictionem, est capacissima.*" It hath sovereign and uncontrollable authority in the 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 intrusted by

[*161] 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

(*e*) Mod. Un. Hist. xxxiii. 18.
(*f*) 4 Inst. 14.
(*g*) 4 Jan. 1643.
(*h*) 4 Inst. 36.

(14) By stat. 39 and 40 G. III. c. 67, one hundred representatives of Ireland must be added to these.

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 (15). True it is, that what the parliament doth, 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 apophthegm of the great lord treasurer Burleigh, "that England could never be ruined but by a parliament;" and, as Sir Matthew Hale observes (*i*), "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 (*k*) 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.

It must be owned that Mr. Locke (*l*), 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 [*162] abused, it is thereby forfeited, and devolves to those who gave it." But however just this conclusion may be in theory, we cannot practically adopt it, nor take any *legal* steps for carrying it into execution, 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 (*m*). So long therefore as the English constitution lasts, we may venture to affirm, that the power of parliament is absolute and without control.

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 by the custom and law of parliament (*n*), that no one shall sit or vote in either house, unless he be twenty-one years of age. This is also expressly declared by statute 7 and 8 W. III. c. 25, with regard to the House of Commons; doubts having arisen from some contradictory adjudications, whether or no a minor was incapacitated from sitting in that

(*i*) Of parliaments, 49.
(*k*) Sp. L. 11. 6.
(*l*) On Gov. p. 2. § 149, 227.
(*m*) See page 244.
(*n*) Whitelocke, c. 50, 4 Inst. 47.

(15) De Lolme has improved upon this, and has, I think, unwarrantably asserted, that "it is a fundamental principle with the English lawyers, that parliament can do every thing but make a woman a man, and a man a woman." (p. 134.) The omnipotence of parliament signifies nothing more than the supreme sovereign power of the state, or a power of action uncontrolled by any superior. In this sense, the king, in the exercise of his prerogatives, and the house of Lords, in the interpretation of laws, are also omnipotent; that is, free from the control of any superior provided by the constitution.

house (*o*) (16). It is also enacted by statute 7 Jac. I. c. 6, that no member be permitted to enter into the House of Commons, till he hath taken the oath of allegiance before the lord steward or his deputy; and, by 30 Car. II. st. 2, and 1 Geo. I. c. 13, (17) that no member shall vote or sit in either house, till he hath in the presence of the house taken the oath of allegiance, supremacy, and abjuration, and subscribed and repeated the declaration against transubstantiation, and invocation of saints, and the sacrifice of the mass. Aliens, unless naturalized, were likewise by the law of parliament incapable to serve therein (*p*): and now it is enacted, [*163] by statute 12 and 13 W. III. c. 2, that no alien, *even though he be naturalized, shall be capable of being a member of either house of parliament. And there are not only these standing incapacities; but if any person is made a peer by the king, or elected to serve in the House of Commons by the people, yet may the respective houses upon complaint of any crime in such person, and proof thereof, adjudge him disabled and incapable to sit as a member (*q*): and this by the law and custom of parliament (18).

For, as every court of justice hath laws and customs for its direction,

(*o*) Com. Journ. 16 Dec. 1606.
(*p*) 1 Com. Journ. 10 Mar. 1623, 18 Feb. 1625.
(*q*) Whitelocke of Parl. c. 102. See Lord's Journ. 8 May, 1620. 13 May, 1624. 26 May, 1725. Com. Journ. 14 Feb. 1580. 21 Jan. 1628. 9 Nov. 21 Jan. 1640. 6 Mar. 1676. 6 Mar. 1711. 17 Feb. 1769.

(16) According to ancient principles, minors, unless actually knighted, must have been disqualified; for, in general, no one was capable of performing the feudal services till he had attained the age of twenty-one. And one of the most important of these services was, attendance on the lord's court. But if the king had conferred the honour of knighthood upon a minor, then it was held that the imbecility of minority ceased. See note to p. 68, 2d book.

(17) The oath of abjuration was altered by 6 Geo. III. c. 53, upon the death of the pretender.

(18) This sentence was not in the first editions, but was added, no doubt, by the learned Judge, with an allusion to the Middlesex election. The circumstances of that case were briefly these: On the 19 Jan. 1764, Mr. Wilkes was expelled the house of commons, for being the author of a paper called the North Briton, No. 45. At the next election, in 1768, he was elected for the county of Middlesex; and on 3 Feb. 1769, it was resolved that John Wilkes, Esq. having published several libels specified in the Journals, *be expelled this house;* and a new writ having been ordered for the county of Middlesex, Mr. Wilkes was re-elected without opposition; and on the 17 Feb. 1769, it was resolved, that "John Wilkes, Esq. having been in this session of parliament expelled this house, was and is incapable of being elected a member to serve in this present parliament;" and the election was declared void, and a new writ ordered. He was a second time re-elected without opposition, and on 17 March, 1769, the house again declared the election void, and ordered a new writ. At the next election, Mr. Luttrel, who had vacated his seat by accepting the Chiltern Hundreds, offered himself as a candidate against Mr. Wilkes. Mr. Wilkes had 1143 votes, and Mr. Luttrel 296. Mr. Wilkes was again returned by the sheriff. On the 15 April 1769, the house resolved, that Mr. Luttrel ought to have been returned and ordered the return to be amended. On the 29 April, a petition was presented by certain freeholders of Middlesex, against the return of Mr. Luttrel; and on the 8 May, the house resolved that Mr. Luttrel was duly elected. On the 3 May, 1783, it was resolved, that the resolution of the 17 Feb. 1769, should be expunged from the Journals of the house, as being subversive of the rights of the whole body of electors of this kingdom. And at the same time it was ordered, that all the declarations, orders, and resolutions respecting the election of John Wilkes, Esq. should be expunged. The history of England furnishes many instances of important constitutional questions that have deeply agitated the minds of the people of this country, which can raise little or no doubt in the minds of those who view them at a distance uninfluenced by interest or passion. It might perhaps be a violent measure in the house of commons to expel a member for the libels which he had published; but that the subsequent proceedings were agreeable to the law of parliament, that is, to the law of the land, the authorities here referred to by the learned Judge, I conceive, do most unanswerably prove. It is supposed that the resolution of the 17 Feb. 1769, was considered to be subversive of the rights of electors, because it assigned expulsion alone, without stating the criminality of the member to be the cause of his incapacity during that parliament. But as his offences were particularly described in the resolution by which he was expelled on the 3d of the same month, no one could possibly doubt but the latter resolution had as clear a reference to the former, as if it had been repeated in it word for word.

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 (*r*) observes, is "*ab omnibus quærenda, a multis ignorata* (19), *a paucis cognita* (*s*)." 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 (*t*), 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 (*u*)." Hence, for instance, the lords will not suffer the commons to interfere in settling the election of a peer of Scotland; the commons will not allow the lords to judge of the election of a burgess; nor will either house permit the subordinate courts of law to examine the merits of either case (20). But the maxims upon which they proceed, together with the method of proceeding, rest entirely in the breast of the parliament itself; and are not defined and ascertained by any particular stated laws (21).

*The *privileges* of parliament are likewise very large and indefinite. And therefore when in 31 Hen. VI. the House of Lords [*164]

(*r*) 1 Inst. 11.
(*s*) "To be sought by all, unknown by many, and known by few."
(*t*) 4 Inst. 50.
(*u*) 4 Inst. 15.

(19) Lord Holt has observed, that "as to what my Lord Coke says, that the *lex parliamenti est a multis ignorata*, is only because they will not apply themselves to understand it." 2 *Ld. Ray.* 1114.

(20) The house of commons merely avails itself, when thus sitting judicially, of the maxim, that all courts are final judges of contempts against themselves. (See the case of Brass Crosby, 3 Wils. 188. Bl. Rep. 754. and 7 State Trials, 437. 11 State Trials, 317. 2 Hawkins, ch. 14. s. 72, 73, 74.) And in conformity with this principle, it was determined in the cases of the King v. Flower, 8 T. R. 314. and Burdett v. Abbott, 14 East, 1. Boudell v. Colman, id. 163. 4 Taunt. 401. S. C. that the privileges of parliament, whether in punishing a person, not one of their members, or in punishing one of their own body, are not amenable in a court of common law, that their adjudication of any offence is a sufficient judgment, the warrant of the speaker a sufficient commitment, and that outer doors may be broken open to have execution of their process. It is doubtless within the spirit of the constitution that parliament should have ample means within itself of enforcing its privileges; but that those privileges should be indefinite, presents an anomaly in our limited government, theoretically absurd, if not practically dangerous, to true liberty. Ex post facto laws are the resource of despotism, anxious to clothe itself with the semblance of legislative justice; and the operation of these indefinite privileges must sometimes partake of the same character. For a man may be convicted by the house for the infraction of a privilege, from which there was nothing to warn him, not even the declaration of its existence; and surely this is contrary both to the spirit and the practice of the constitution.

The courts at Westminster, however, may judge of the privilege of parliament, when it is incident to a suit of which the court is possessed, and may proceed to execution between the sessions, notwithstanding appeals lodged, &c. 2 St. Tr. 66. 209.

(21) This sentence seems to imply a discretionary power in the two houses of parliament, which surely is repugnant to the spirit of our constitution. The law of parliament is part of the general law of the land, and must be discovered and construed like all other laws. The members of the respective houses of parliament are in most instances the judges of that law; and, like the judges of the realm, when they are deciding upon past laws, they are under the most sacred obligation to enquire and decide what the law actually is, and not what, in their will and pleasure, or even in their reason and wisdom, it ought to be. When they are declaring what is the law of parliament, their character is totally different from that with which, as legislators, they are invested when they are framing new laws; and they ought never to forget the admonition of that great and patriotic Chief Justice Lord Holt, viz. "that the authority of the parliament is from the law, and as it is circumscribed by law, so it may be exceeded; and if they do exceed those legal bounds and authority, their acts are wrongful, and cannot be justified any more than the acts of private men." 1 *Salk.* 505.

propounded a question to the judges concerning them, the chief justice, Sir John Fortescue, 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 its 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 (*x*)." 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 (22). 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 (23). As to the first, privilege of speech, it is declared by the statute 1 W. and 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 (24). So likewise are the other privileges, of persons, servants, lands, and goods: which are immunities as ancient [*165] as Edward the Confessor; in whose laws (*z*) *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 hæc pax et securitas ad quatuordecim dies, convocato regni senatu* (*a*)." This included formerly not only privilege from illegal violence, but also from legal arrests, and seizures by process from the courts of law. And still, 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, unless

(*x*) Sold. Baronage, part. 1. c. 4.
(*z*) *Cap.* 3.
(*a*) Stiernh. *de jure Goth. l.* 3, c. 3.

(22) In the observations above, upon the privileges of parliament, the editor is obliged to differ from the learned judge; he cannot but think that clearness and certainty are essentially necessary to the liberty of Englishmen. Mystery and ignorance are the natural parents of superstition and slavery. How can rights and privileges be claimed and asserted, unless they are ascertained and defined? The privileges of parliament, like the prerogatives of the crown, are the rights and privileges of the people. They ought all to be limited by those boundaries which afford the greatest share of security to the subject and constituent, who may be equally injured by their extension as their diminution. The privileges of the two houses ought certainly to be such as will best preserve the dignity and independence of their debates and councils without endangering the general liberty. But if they are left uncertain and indefinite, may it not be replied with equal force, that, under the pretence thereof, the refractory members may harass the executive power, and violate the freedom of the people?

(23) The privileges of domestics, lands, and goods, are taken away by 10 Geo. III. c. 50.

(24) But this privilege does not extend to publication of the speech, 1 Sand. 133. The king *v.* Creery, 1 M. and S. 273. The king *v.* Lord Abingdon, 1 Esp. R. 226.

for some indictable offence, without a breach of the privilege of parliament (25).

But all other privileges which derogate from the common law in matters of civil right are now at an end, save only as to the freedom of the member's person: which in a peer (by the privilege of peerage) is for ever sacred and inviolable; and in a commoner (by the privilege of parliament) for forty days after every prorogation, and forty days before the next appointed meeting (*b*); which is now in effect as long as the parliament subsists, it seldom being prorogued for more than fourscore days at a time. As to all other privileges, which obstruct the ordinary course of justice, they were restrained by the statutes 12 W. III. c. 3, 2 and 3 Ann, c. 18, and 11 Geo. II. c. 24, and are now totally abolished by statute 10 Geo. III. c. 50, which enacts, that any suit may at any time be brought against any peer or member of parliament, their servants, or any other person entitled to privilege of parliament; which shall not be impeached or delayed by pretence of any such privilege; except that the person of a member of the house of commons shall not thereby be subjected to any arrest of imprisonment. 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 [*166] 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 (26).

The only way by which courts of justice could anciently take cogni-

(b) 2 Lev. 72.

(25) By the common law, peers of the realm of England (6 Co. 52. 9 Co. 49. a. 68. a. Hob. 61. Sty. Rep. 222. 2 Salk. 512. 2 H. Blac. 272. 3 East, 127.) and peeresses, whether by birth or marriage (6 Co. 52. Sty. Rep. 252. 1 Vent. 298. 2 Chan. Cas. 224.) are constantly privileged from arrests in civil suits, on account of their dignity, and because they are supposed to have sufficient property, by which they may be compelled to appear; which privilege is extended by the act of union with Scotland (5 Ann. c. 8. art. 23. and see Fort. 165. 2 Str. 990.) to Scotch peers and peeresses; and by the act of union with Ireland (39 & 40 Geo. III. c. 67. art. 4. see 7 Taunt. 679. 1 Moore, 410. S. C.) to Irish peers and peeresses. And they are not liable to be attached for the non-payment of money, pursuant to an order of nisi prius, which has been made a rule of court. (Ld. Falkland's case, E. 36 Geo. III. K. B. 7 Durnf. & East, 171. and see id. 448.) But this privilege will not exempt them from attachments for not obeying the process of the courts, (1 Wils. 332. Say. Rep. 50. S. C. 1 Bur. 631.) nor does it extend to peeresses by marriage, if they afterwards intermarry with commoners. (Co. Lit. 16. 2 Inst. 50. 4 Co. 118. Dyer, 79.)

Where a capias issues against a peer, the court will set aside the proceedings for irregularity. (4 Taunt. 668.) But it seems that the sheriff is not a trespasser for executing it. (Dough. 671.) However, all persons concerned in the arrest are liable to punishment by the respective houses of parliament. (Fortescue, 165. ante.)

By the law and custom of parliament, members of the house of commons are privileged from arrest, not only during the actual sitting of parliament, but for a convenient time, sufficient to enable them to come from and return to any part of the kingdom before the first meeting and after the final dissolution of it. (Stat. 10 Geo. III. c. 50. 2 Str. 983. Fort. 159. Com. Rep. 444. S. C. 1 Kenyon, 125.) and also for forty days (2 Lev. 72. 1 Chan. Cases, 221. S. C. but see 1 Sid. 29.) after every prorogation, and before the next appointed meeting; which is now in effect as long as the parliament exists, it being seldom prorogued for more than fourscore days at a time. (1 Blac. Com. 165.) And the courts will not grant an attachment against a member of the house of commons for non-payment of money pursuant to an award. (7 Durnf. & East. 448.)

Mr. Christian has observed, that it does not appear that the privilege from arrest is limited to any precise time after a dissolution; but it has been determined by all the judges that it extends to a convenient time. (Col. Pit's case, 2 Str. 988.) Prynne is of opinion that it continued for the number of days the member received wages after a dissolution, which were in proportion to the distance between his home and the place where the parliament was held. 4 Parl. Writs, 68.

(26) And see stat. 6 Geo. IV. c. 16, ss. 10, 11.

zance of privilege of parliament was by writ of privilege, in the nature of a *supersedeas*, to deliver the party out of custody when arrested in a civil suit (*c*). For when a letter was written by the speaker to the judges, to stay proceedings against a privileged person, they rejected it as contrary to their oath of office (*d*). But since the statute 12 W. III. c. 3, which enacts that no privileged person shall be subject to arrest or imprisonment, it hath been held that such arrest is irregular *ab initio*, and that the party may be discharged upon motion (*e*). It is to be observed, that there is no precedent of any such writ of privilege, but only in civil suits; and that the statute of 1 Jac. I. c. 13, and that of King William (which remedy some inconveniences arising from privilege of parliament,) speak only of civil actions. And therefore the claim of privilege hath been usually guarded with an exception as to the case of indictable crimes (*f*); or, as it has been frequently expressed, of treason, felony, and breach (or surety) of the peace (*g*). Whereby it seems to have been understood that no privilege was allowable to the members, their families, or servants, in any *crime* whatsoever, for all crimes are treated by the law as being *contra pacem domini regis*. And instances have not been wanting wherein privileged persons have been convicted of misdemesnors, and committed, or prosecuted to outlawry, even in the middle of a session (*h*); which proceeding has afterwards received the sanction and approbation of parlia-
[*167] ment (*i*). *To which may be added, that a few years ago the case of writing and publishing seditious libels was resolved by both houses (*k*) not to be intitled to privilege (27); and that the reasons upon which that case proceeded (*l*), extended equally to every indictable offence (28). So that the chief, if not the only, privilege of parliament, in such cases, seems to be the right of receiving immediate information of the imprisonment or detention of any member, with the reason for which he is detained; a practice that is daily used upon the slightest military accusations, preparatory to a trial by a court martial (*m*); and which is recognized by the several temporary statutes for suspending the *habeas corpus* act (*n*); whereby it is provided, that no member of either house shall be detained till the matter of which he stands suspected be first communicated to the house of which he is a member, and the consent of the said house obtained for his commitment or detaining. But yet the usage has uniformly been, ever since the revolution, that the communication has been subsequent to the arrest.

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

(*c*) Dyer 59. 4 Pryn. *Brev. Parl.* 757.
(*d*) Latch. 48. Noy. 83.
(*e*) Stra. 989.
(*f*) Com. Journ. 17 Aug. 1641.
(*g*) 4 Inst. 25. Com. Journ. 20 May, 1675.
(*h*) *Mich.* 16 *Edw. IV. in Scacch.*—Lord Raym. 1461.
(*i*) Com. Journ. 16 May, 1726.
(*k*) Com. Journ. 24 Nov. Lords' Journ. 29 Nov. 1763.
(*l*) Lords' Protest. *Ibid.*
(*m*) Com. Journ. 20 Apr. 1762.
(*n*) Particularly 17 Geo. II. c. 6.

(27) The contrary had been determined a short time before in the case of Mr. Wilkes by the unanimous judgment of Lord Camden and the court of common pleas. 2 *Wils.* 251.

(28) The language of the protest upon this occasion is remarkably nervous; and the arguments in favour of privilege, even in the case of libel, are highly applicable to cases of libel generally. See the extract from the protest, p. 19, Howel's St. Tr. 994.

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 (*o*), 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 [*168] blowing a horn if he be absent; that he may not seem to take the king's venison by stealth.

In the next place they have a right to be attended, and constantly are, by the judges of the court of King's Bench and Common Pleas, and such of the barons of the Exchequer as are of the degree of the coif, or have been made serjeants at law; as likewise by the king's learned counsel, being serjeants, and by the masters of the court of chancery; for their advice in point of law, and for the greater dignity of their proceedings. The secretaries of state, with the attorney and solicitor general, were also used to attend the house of peers, and have to this day (together with the judges, &c.) their regular writs of summons issued out at the beginning of every parliament (*p*), *ad tractandum et consilium impendendum*, though not *ad consentiendum*; but, whenever of late years they have been members of the House of Commons (*q*), their attendance here hath fallen into disuse (29).

Another privilege is, that every peer, by licence obtained from the king (30), (31), 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*).

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 (32).

All bills likewise, that may in their consequences any way affect the

(*o*) C. 11.
(*p*) Stat. 31 Hen. VIII. c. 10. Smith's commonw. b. 2, c. 3. Moor, 551. 4 Inst. 4. Hale of Parl. 140.
(*q*) See Com. Journ. 11 Apr. 1614. 8 Feb. 1620. 10 Feb. 1625. 4 Inst. 48.
(*r*) Seld. Baronage, p. 1, c. 1.
(*s*) 4 Inst. 12.

(29) On account of this attendance there are several resolutions before the restoration, declaring the attorney general incapable of sitting among the commons. Sir Heneage Finch, member for the university of Oxford, afterwards Lord Nottingham and chancellor, was the first attorney general who enjoyed that privilege. *Sim.* 28.

(30) And which the king has sometimes refused, 6, 27, 39, E. III.

(31) The proxies in the English House of Lords are still entered in Latin *ex licentiâ regis*: this created a doubt in Nov. 1788, whether the proxies in that parliament were legal on account of the king's illness? (1 *Ld. Mountm.* 342.) But this I conceive is now so much a mere form, that the licence may be presumed. Proxies cannot be used in a committee. *Ib.* 106. (2 *Ib.* 191.)

The order that no lord should have more than two proxies was made 2 Car. I. because the Duke of Buckingham had no less than fourteen. (1 *Rushw.* 269.)

A similar order was made in Ireland during Lord Strafford's lieutenancy to correct a like abuse.

There is an instance in Wight, 50, where a proxy is called *litera attornatûs ad parliamentum*, which it is in effect. The peer who has the proxy is always called in Latin *procurator*. If a peer, after appointing a proxy, appears personally in parliament, his proxy is revoked and annulled. 4 *Inst.* 13. By the orders of the house, no proxy shall vote upon a question of guilty or not guilty; and a spiritual lord shall only be a proxy for a spiritual lord, and a temporal lord for a temporal. Two or more peers may be proxy to one absent peer; but Lord Coke is of opinion (4 *Inst.* 12.) that they cannot vote unless they all concur. *1 *Woodd.* 41.

(32) Lord Clarendon relates, that the first instances of protests with reasons in England were in 1641, before which time they usually only set down their names as dissentient to a vote: the first regular protest in Ireland was in 1662. 1 *Ld. Mountm.* 402.

right 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.

[*169] *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 *præmunire*.

V. The peculiar laws and customs of the House of Commons relate principally to the raising of taxes, and the election 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

[*170] elective body, freely *nominated by the people. It would therefore be extremely dangerous, to give the lords 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 (33). Yet Sir Matthew

(*t*) 4 Inst. 29.

(33) This rule is now extended to all bills for canals, paving, provision for the poor, and to every bill in which tolls, rates, or duties, are ordered to be collected; and also to all bills in which pecuniary penalties and fines are imposed for offences. (3 *Hats.* 110.) But it should seem it is carried beyond its original spirit and intent, when the money raised is not granted to the crown.

Upon the application of this rule, there have been many warm contests between the lords and commons, in which the latter seem always to have prevailed. See many conferences collected by Mr. Hatsel, in his App. to the 3d vol.

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.

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. [*171] 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, with us, than either of the methods of voting, by centuries or by tribes, among the Romans. In the method *by centuries, instituted by [*172]

(*u*) On Parliaments, 65, 66.
(*w*) Year book, 33 Hen. VI. 17. But see the answer to this case by Sir Heneage Finch. Com. Journ. 22 Apr. 1671.

In Appendix D., the conference of 20 and 22 April 1671, the general question is debated with infinite ability on both sides, but particularly on the part of the commons in an argument drawn up by Sir Heneage Finch, then attorney general.

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 are entirely excluded, as can have no will of their own: there is hardly a free agent to be found, who is not 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 is 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 (*x*) 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, (amended by (34) 14 Geo. III. c. 58,) the knights of the shire shall be chosen of people 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 (35), (36). 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 lords; this freehold must be of forty shillings annual value; because that sum would then, with proper in-
[*173] dustry, furnish all the *necessaries of life, and render the freeholder, if he pleased, an independent man. For Bishop Fleetwood, in his *chronicon preciosum*, written at the beginning of the present

(*x*) The candid and intelligent reader will apply this observation to many other parts of the work before him, wherein the constitution of our laws and government are represented as nearly approaching to perfection; without descending to the invidious task of pointing out such deviations and corruptions, as length of time and a loose state of national morals have too great a tendency to produce. The incurvations of practice are then the most notorious when compared with the rectitude of the rule; and to elucidate the clearness of the spring, conveys the strongest satire on those who have polluted or disturbed it.

(34) The 14 Geo. III. c. 58, made the residence of the electors and the elected in their respective counties, cities, and boroughs, no longer necessary. It had been required from both by a statute passed in the 1 Hen. V.

(35) In Ashby v. White, 2 Ld. Raym. 950, Lord Holt intimated, that, before these statutes, to have freehold in the county, was necessary.

(36) The voter's evidence of the value must be received at the poll; but it is not conclusive, and may be contradicted by other evidence, upon a scrutiny, or before a committee. The 7 and 8 W. III. c. 25, expressly declares, that public taxes are not to be deemed charges payable out of the estate; and therefore one would think, that the plain and obvious construction would be, that wherever a freeholder has an estate which would yield him 40*s.* before these taxes are paid, or for which he would receive a rent of 40*s.* if he paid the taxes himself, he would have a right to vote; yet a committee has decided, that when a tenant paid a rent less than 40*s.*, but paid parochial taxes, which, added to the rent, amounted to more than 40*s.*, the landlord had no right to vote. A strange decision! 2 *Lud.* 475.

Two committees have held that the interest of a mortgage is a charge which, if it reduces the value under 40*s.*, takes away the vote, though there is an intermediate decision of a committee, in which the contrary was held. *Ib.* 467.

century, 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 (*y*), 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 (37). 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 rent-charge, unless registered with the clerk of the peace twelve calendar months before (38). 7. That in mortgaged or trust estates, the person in possession, under the above-mentioned 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 (39). 9. That no

(*y*) 7 and 8 W. III. c. 25. 10 Ann. c. 23. 31 Geo. II. c. 14. 3 Geo. III. c. 24. 2 Geo. II. c. 21. 13 Geo. II. c. 18.

(37) And every person preparing, executing, or voting under it, shall forfeit 40*l*. 10 Ann. c. 23. s. 1. By the 12 Ann. stat. 1. c. 5. it is enacted, that the 10 Ann. shall not extend to persons voting in respect of tithes, rents, or other incorporeal inheritances, or of any messuages or lands in extraparochial places, or of any chambers in the inns of court or chancery, or of places or offices not usually charged to the public taxes. The committee, in construing the 7 & 8 W. III. c. 25. must say from all the circumstances whether, if the conveyance was made several years or only one day before the election, it was the intention of the party to multiply votes; for length of time neither protects nor invalidates the transaction. (See Heyw. County Elect. Law, 100.)

(38) It must be an annuity or rent-charge issuing out of a freehold estate; and, if it accrue or devolve by operation of law* within a year of the election, a certificate of it must be entered with the clerk of the peace before the first day of the election. 3 *Geo.* III. c. 24. *Heyw.* 145.

(39) This is true only when a freehold estate is split and divided by the grantor in order to multiply votes, and for election purposes. It would be highly unreasonable and absurd to suppose (though it has been so contended) that it extends to every case, where a person fairly and without any particular view to an election, purchases a part of a greater estate. It is part of the freeholder's oath that the estate has not been granted to him fraudulently on purpose to qualify him to give his vote. The one vote, I presume, was intended for the part retained by the grantor; for if the whole had been granted out thus fraudulently, no vote at all could have been given for it. See this subject treated fully in Mr. Heywood's Law of Elect. 99. It cannot, I should think, be considered a fraudulent grant under any statute if a person should purchase an estate merely for the sake of the vote, if he buys it absolutely, and without any reservation, or secret agreement between the grantor and himself.

But it never has been supposed that this statute extends to cases which arise from operation of law, as devises, descents, &c. as if an estate should descend to any number of females, the husband of each would have a right to vote, if his interest amounted to 40*s*. a year.

A husband may vote for his wife's right of dower, without an actual assignment of it by metes and bounds. 20 *Geo.* III. c. 17, § 12.

Two or more votes may be given successively for the same estate or interest at the same election; as where a freeholder votes

* [e. g. descent, marriage, marriage-settlement; devise; presentation to a benefice; or promotion to an office.]

estate shall qualify a voter, unless the estate has been assessed to some land tax aid, at least twelve months before the election (40). 10.

[*174] That no tenant by copy of court roll shall *be permitted to vote as a freeholder. Thus much for the electors in counties (41).

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

and dies, his heir or devisee may afterwards vote at the same election. And it seems to be generally true, that where no length of possession is required by any act of parliament, the elector may be admitted to vote, though his right accrued since the commencement of the election. 1 *Doug.* 272. 2 *Lud.* 427.

(40) This is altered by 20 Geo. III. c. 17. The estate shall be assessed to the land-tax six months before the election, either in the name of the voter or his tenant; but, if he has acquired it by marriage, descent, or other operation of law, in that case it must have been assessed to the land-tax within two years before the election, either in the name of the predecessor, or person through whom the voter derives his title, or in the name of the tenant of such person.

This requisite of assessment was intended to prevent fraud and confusion, by having a ready proof of the existence of the estate of the voter, and some measure of its value; but it is itself perhaps a greater evil than it was intended to remove; for an omission or irregularity in the assessment operates as a disfranchisement. Every freeholder, who wishes to preserve the important privilege of voting, must carefully examine every year the assessment, when it is stuck upon the church door, to see that he is duly assessed; and if he is not, he may appeal to the commissioners, and he may any time afterwards apply to the clerk of the peace, and, upon payment of 1*s.* may examine the duplicate returned to the sessions; but it seems that he is then too late to correct an error, unless he has previously appealed to the commissioners; but from the judgment of the commissioners an appeal lies to the next quarter sessions.

(41) By 22 Geo. III. c. 41. no person employed in managing or collecting the duties of excise, customs, stamps, salt, windows, or houses, or the revenue of the post-office, or in conveying of mails, shall vote at any election, under a penalty of 100*l.* This act does not extend to commissioners of land-tax, or persons acting under them, nor to freehold offices held or granted by letters patent. By the 43 Geo. III. c. 25. no officer of revenue in Ireland shall vote at elections, under penalty of 100*l.* and be incapacitated, unless he hold by patent.

Any person receiving alms or parish relief within a year before the election, is thereby disqualified from voting, except he be a qualified freeholder. Sim. Elect. Law, 102. But charity donations, by will annually distributed, or otherwise, do not disqualify. 1 Peck. Elect. Law, 510. Heyw. County Elect. Law, 186. And militia-men, if otherwise qualified, are not disqualified by their families receiving parish relief while they are on actual service. 18 Geo. III. c. 59. s. 25.

By the 51 Geo. III. c. 119. justices of the peace, and all other persons employed under the police act 51 Geo. III. c. 119. are incapacitated from voting, or within six months after they have quitted office.

Elections for cities and towns, which are counties of themselves, are under nearly the same regulations as elections for other counties. By the 19 Geo. II. c. 28. the voter must have been in the actual possession or receipt of the rents of 40*s.*, or higher, freehold twelve calendar months next before the election, except such freehold came to him by descent, marriage, devise, presentation, or promotion, on pain of suffering the penalties ordained by the 10 Ann. c. 23. But this act does not extend to persons voting in right of any rents, messuages, or seats, belonging to any office, not usually charged to the land-tax. The statutes of W. III. and 10 Ann. respecting the splitting and multiplication of freeholds and fraudulent conveyances, extend to cities and towns which are counties of themselves. And all corrupt practices to carry such elections by means of grants of annuities and rent charges issuing out of freeholds, have been put upon the same footing as if carried on to procure elections for counties.

Women, deaf, dumb, and blind persons, lunatics, peers, papists refusing the oaths of allegiance and abjuration, outlaws, persons excommunicated, guilty of felony, or bribery, (2 Geo. II. c. 24.) and copyholders under 50*l.* a year (31 Geo. III. c. 14.) are entirely excluded from the right to vote. But the Gloucestershire committee determined, that customary freeholders are entitled to vote. (Heyw. Elect. Law, 41.)

rate of wages established in the reign of Edward III. (*z*) (42). Hence the members for boroughs now bear above a quadruple proportion to those for

(*z*) 4 Inst. 16.

Aliens become denizens by letters patent, or naturalized by act of parliament, if qualified in other respects, may enjoy the elective franchise. So by the 13 Geo. II. c. 3. foreign seamen serving two years in an English ship in time of war, by virtue of the king's proclamation, and all foreign Protestants and Jews residing seven years in any of our American colonies without being absent two months at a time, and all foreign Protestants serving there two years in a military capacity, or being three years employed in the whale fishery without afterwards absenting themselves from the king's dominions for more than one year (except those disabled by the 4 Geo. II. c. 21.) are *ipso facto* naturalized, and consequently may acquire the right to vote at elections of members of parliament in the same manner as natural-born subjects. See farther as to the qualification of electors, Com. Dig. Parliament, D. 5 to 10.

(42) Lord Coke, in the page referred to by the learned judge, says, that this rate of wages hath been time out of mind, and that it is expressed in many records; and, for example, refers to one in 46 Ed. III., where this allowance is made to one of the knights for the county of Middlesex. But Mr. Prynne's fourth Register of Parliamentary Writs is confined almost entirely to the investigation of this subject, and contains a very particular chronological history of the writ *de expensis militum, civium, et burgensium*, which was framed to enforce the payment of these wages. Mr. Prynne is of opinion that these wages had no other origin than that principle of natural equity and justice *qui sentit commodum, debet sentire et onus*. (p. 5.)

And Mr. Prynne further informs us, "that the first writs of this kind extant in our records are coeval with our king's first writs of summons to elect and send knights, citizens, and burgesses, to parliament, both of them being first invented, issued, and recorded together in 49 H. III. before which there are no memorials nor evidences of either of those writs in our historians or records," (p. 2.) The first writs direct the sheriff to levy from the community, i. e. the electors of the county, and to pay the knights, *rationabiles expensas suas in veniendo ad dictum parliamentum, ibidem morando, et exinde ad propria redeundo*. And when the writs of summons were renewed, in the 23d of Ed. I., these writs issued again in the same form at the end of the parliament, and were continued in the same manner till the 16 Ed. II. when Mr. Prynne finds the "*memorable writs*," which first reduced the expence of the representatives to a certain sum by the day, viz. 4*s*. a day for every knight, and 2*s*. for every citizen and burgess; and they specified also the number of days for which this allowance was to be made, being more or less according to the distance between the place of meeting in parliament and the member's residence. When this sum was first ascertained in the writ, the parliament was held at York, and therefore the members for Yorkshire were only allowed their wages for the number of days the parliament actually sat, being supposed to incur no expence in returning to their respective homes; but, at the same time, the members for the distant counties had a proportionate allowance in addition. Though, from this time, the number of days and a certain sum are specifically expressed in the writ, yet Mr. Prynne finds a few instances after this where the allowance is a less sum; and, in one, where one of the county members had but 3*s*. a day, because he was not, in fact, a knight. But, with those few exceptions, the sum and form continued with little or no variation. Mr. Prynne conjectures, with great appearance of reason, that the members at that time enjoyed the privilege of parliament only for the number of days for which they were allowed wages, that being considered a sufficient time for their return to their respective dwellings. (p. 68.) But this allowance, from its nature and origin, did not preclude any other specific engagement or contract between the member and his constituents; and the editor of Glanville's Reports has given in the preface, p. 23, the copy of a curious agreement between John Strange, the member for Dunwich, and his electors, in the 3 Ed. IV. 1463, in which the member covenants "whether the parliament hold long time or short, or whether it fortune to be prorogued, that he will take for his wages only a cade and half a barrel of herrings, to be delivered by Christmas."

In Scotland the representation of the shires was introduced or confirmed by the authority of the legislature, in the seventh parliament of James I., anno 1427, and there it is at the same time expressly provided, that "the commissares sall have costage of them of ilk schire, that awe compeirance in parliament." —*Murray's Stat.*

It is said, that Andrew Marvell, who was member for Hull in the parliament after the restoration, was the last person in this country that received wages from his constituents. Two shillings a day, the allowance to a burgess, was so considerable a sum in ancient times, that there are many instances where boroughs petitioned to be excused from sending members to parliament, representing that they were engaged in building bridges, or other public works, and therefore unable to bear such an extraordinary expence. (*Pryn. on 4 Inst.* 32.) And it is somewhat remarkable, that from the 33 Ed. III. and uniformly through the five succeeding reigns, the sheriff of Lancashire returned, *non sunt aliquæ civitates seu burgi infra comitatum Lancastriæ, de quibus aliqui cives vel burgenses ad dictum parliamentum venire debent seu solent, nec possunt propter eorum debilitatem et paupertatem*. But, from these exemptions in ancient times, and the new creations by the king's charter, which commenced in the reign of Ed. IV. (who, in the seventeenth year of his reign, granted to the borough of Wenlock the right of sending one burgess to parliament, (*Sim.* 97.) the num-

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 (*a*). 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, where 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 [*175] 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 (43). 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 admitted to vote therein, unless he hath been admitted to his freedom twelve calendar months before (44).

(*a*) Prynne, Parl. Writs, i. 345.

ber of the members of the house of commons perpetually varied till the 29 Car. II. who in that year granted, by his charter, to Newark, the privilege of sending representatives to parliament, which was the last time that this prerogative of the crown was exercised. (1 *Doug. El.* 69.) Since the beginning of the reign of Hen. VIII. the number of the representatives of the commons is nearly doubled; for, in his first parliament, the house consisted only of 298 members: 260 have since been added by act of parliament, or by the king's charter, either creating new or reviving old boroughs. The legislature added twenty-seven for Wales by 27 Hen. VIII. c. 26; four for the city and county of Chester, by 34 Hen. VIII. c. 13; four for the county and city of Durham, by 25 Car. II. c. 9; and forty-five for Scotland, by the act of union: in all 80; and 180 have been added by charter.

Hen. VIII. created or restored by charter	4	See. *Pref* to *Glanv. Rep.*
Ed. VI.	48	
Mary	21	
Elizabeth	60	
Ja. I.	27	
Ch. I.	18	
Ch. II.	2	
	180	
Parliament has created	80	
In the first parl. of Hen. VIII.	298	
In all 558 the present number.*†		

* To which must be added the 100 Irish members by stat 39 and 40 Geo. III. c. 67.

† Parliament has, indeed, deemed it expedient to disfranchise some boroughs; and, in a few instances of delinquency, to extend the right of voting to inhabitants of the surrounding district.

To the first parliament of James I. the members of the upper house were 78, of the lower 470. 5 *Parl. Hist.* 11.

(43) That statute was merely retrospective, or only made the last determination of the right prior to the statute conclusive, without having any influence over decisions subsequent to the 2 Geo. II. And this provision was omitted in Mr. Grenville's excellent act, so that the same question, respecting the right of election in some places, was tried over again every new parliament; but, to supply this defect, it was enacted by the 28 Geo. III. c. 52, that whenever a committee shall be of opinion that the merits of a petition depend upon a question respecting the right of election, or the appointment of the returning officer, they shall require the counsel of the respective parties, to deliver a statement of the right for which they contend, and the committee shall then report to the house those statements, with their judgment thereupon; and, if no person petition within a twelvemonth, or within fourteen days after the commencement of the next session, to oppose such judgment, it is final and conclusive for ever. But, if such a petition be presented, then, before the day appointed for the consideration of it, any other person, upon his petition, may be admitted to defend the judgment; and a second committee shall be appointed, exactly in the same manner as the first, and the decision of that committee puts an end to all future litigation upon the point in question

(44) This is called the Durham act, and it was occasioned by the corporation of Durham having, upon the eve of an election, in order

2. Next, as to the qualifications of persons to be *elected* members of the house of commons (45). Some of these depend upon the law and custom of parliament, declared by the house of commons (*b*); others upon certain statutes. And from these it appears, 1. That they must not be aliens born (*c*), or minors (*d*). 2. That they must not be any of the twelve judges (*e*), because they sit in the lords' house; nor of the clergy (*f*), for they sit in the convocation (46); nor persons attainted of treason or felony (*g*), for they are unfit to sit any where. 3. That sheriffs of counties, and mayors and bailiffs of boroughs, are not eligible in their respective jurisdictions, as being returning officers (*h*); but that sheriffs of one county are eligible to be knights of another (*i*) (47). 4. That, in strict-

(*b*) 4 Inst. 47, 48.
(*c*) See page 102.
(*d*) Ibid.
(*e*) Com. Journ. 9 Nov. 1605.
(*f*) Com. Journ. 13 Oct. 1553, 9 Feb. 1620, 17 Jan. 1661.
(*g*) Com. Journ. 21 Jan. 1660. 4 Inst. 47.
(*h*) Bro. *Abr. t. Parliament*, 7. Com. Journ. 25 June, 1604; 14 Apr. 1614; 22 Mar. 1620; 2, 4, 15 June, 17 Nov. 1625; Hal. of Parl. 114.
(*i*) 4 Inst. 48. Whitelocke of Parl. ch. 99, 100, 101.

to serve one of the candidates, admitted 215 honorary freemen. Some corporations have the power of admitting honorary freemen, viz. persons who, without any previous claim or pretension, are admitted to all the franchises of the corporation. The Durham act is confined to persons of that description solely. It has frequently been contended, that if honorary freemen are created for the *occasion*, that is, merely for an election purpose, it is a fraud upon the rights of election; and that by the common law, as in other cases of fraud, the admission and all the consequences would be null and void; that within the year, by the statute, fraud was presumed; but that, after that time, the statute left the necessity of proving it upon those who imputed it. But, in the Bedford case (2 *Doug.* 91), the committee were clearly of opinion, that the objection of occasionality did not lie against freemen made above a year before the election.

No length of possession is required from voters in burgage-tenure boroughs. There are about twenty-nine burgage-tenure boroughs in England. (1 *Doug.* 224.) In these the right of voting is annexed to some tenement, house, or spot of ground, upon which a house in ancient times has stood. Any number of these burgage-tenure estates may be purchased by one person, which, at any time before a contested election, may be conveyed to so many of his friends, who would each, in consequence, have a right to vote.

By the 26 Geo. III. c. 100, in boroughs, where the householders or inhabitants of any description claim to elect, no person shall have a right to vote as such inhabitant, unless he has actually been resident in the borough six months previous to the day on which he tenders his vote.

(45) See Com. Dig. Parliament, D. 9. The elected must not be denizens or naturalized aliens, (12 & 13 Will. III. c. 2. 1 Geo. I. st. 2. c. 4.) traitors, prisoners in execution for debt, (Sim. Elect. Law, 33.) felons, outlaws in criminal prosecutions, idiots and madmen, deaf and dumb persons, nor peers. (Com. Journ. 1623. 1625.) But by the act of union, 39 & 40 Geo. III. c. 67. a peer of Ireland, not elected to sit in the house of peers, may be returned a member of the house of commons, but shall not have the privilege of peerage.

(46) In 1785, a committee of the house of commons decided that a person who had regularly been admitted to a deacon's orders, was capable of being a member of that house. (See 2 Lud. 269.) The celebrated case of Mr. Horne Tooke, who had taken priest's orders early in life, but who had long given up the clerical character, brought this question fully before the house, and produced a legislative decision which sets it finally at rest. This gentleman having been returned for Old Sarum, and taken his seat, a committee was appointed to search for precedents respecting the eligibility of the clergy for admission into the house of commons, who reported that there are few instances of returns with particular additions till the 8th of Hen. IV.; for then the practice of returning citizens and burgesses by indentures annexed to the writs first prevailed, yet they find five with the addition of *clericus*. In the course of the discussion on the question, the prime minister proposed that a bill should be brought in to declare the clergy ineligible, and by that means to remove all doubts in future. The statute 41 Geo. III. c. 73. was accordingly passed, by which it is enacted that no person having been ordained to the office of priest or deacon, is or shall be capable of being elected to serve in parliament as a member of the house of commons, and if any such person shall sit in the house he shall forfeit 500*l.* a day, and become incapable of holding any preferment or office under his majesty. But the statute was not to extend to members during that parliament.

(47) Two decisions of committees are agreeable to what is advanced in the text. In the first it was determined, that the sheriff of Berkshire could not be elected for Abingdon, a borough within that county, (1 *Doug.* 419): in the second, that the sheriff of Hampshire could be elected for the town of Southampton, within that county, because Southampton is a county of itself, and is as independent of Hampshire as of any other county. 4 *Doug.* 87.

ness, all members ought to have been inhabitants of the places for which they are chosen (*k*): but this, having been long disregarded, was at length entirely repealed by statute 14 Geo. III. c. 58. 5. That no persons concerned in the management of any duties or taxes created since 1692, except the commissioners of the treasury (*l*), nor any of the officers following (48) (*m*), (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; [*176] 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 offices under the crown created since 1705 (*n*), are capable of being elected or sitting as members (49). 6. That no person having a pension under the crown during pleasure, or for any term of years, is capable of being elected or sitting (*o*). 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 (*p*). 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 (*q*). 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 (50) 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 (*r*): 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 mem-

(*k*) Stat. 1 Hen. V. c. 1. 23 Hen. VI. c. 15.
(*l*) Stat. 5 and 6 W. and M. c. 7.
(*m*) Stat. 11 and 12 W. III. c. 2. 12 and 13 W. III. c. 10. 6 Ann. c. 7. 15 Geo. II. c. 22.
(*n*) Stat. 6 Ann. c. 7.
(*o*) Stat. 6 Ann. c. 7. 1 Geo. c. 56.
(*p*) Stat. 6 Ann. c. 7.
(*q*) Stat. 23 Hen. VI. c. 15.
(*r*) Stat. 9 Ann. c. 5.

(48) The treasurer or comptroller of the navy, secretaries of the treasury, the secretary of the chancellor of the exchequer, the secretary of the admiralty, the under secretary of state, and the deputy paymaster of the army, are excepted by stat. 15 Geo. III.

(49) That is, while they hold those offices. Persons holding contracts for the public service, (22 Geo. III. c. 45.) and commissioners for auditing public accounts (25 Geo. III. c. 53.) are ineligible. But the former statute does not extend to corporations or companies, existing at the passing of the act, of ten partners, or to members of the house upon whom public contracts may devolve by descent, marriage, or will, until they have been in possession of the same for twelve months. The law is similar with regard to Ireland.

By the 51 Geo. III. c. 119. police magistrates appointed under that act, are ineligible during the continuance of their office.

By the 52 Geo. III. c. 144. if a member of the house of commons become bankrupt, he is during twelve calendar months from the issuing of the commission, unless it be superseded, or he pay his creditors, incapable of exercising his parliamentary functions.

By the 6 Ann. c. 7. s. 26. if a member accept any office of profit from the crown (in existence prior to 1705), he thereby vacates his seat, but he may be re-elected.

A member cannot resign; the only way therefore of withdrawing from parliament is to obtain from the crown (which is a matter of course), the stewardship of the Chiltern Hundreds. This being considered an office of profit for this purpose, is a convenient expedient for the vacating of seats.

(50) Or mortgage if the mortgagee has been seven years in possession. By the statute 1 Edw. II. 20*l.* a year was the estate necessary to qualify as a knight. (See p. 404.)

The property required may be situated either in England, Wales, Berwick, or Ireland, for a member serving for any county or place in England or Ireland. 41 Geo. III. c. 101. Or in Scotland by the 59 Geo. III. c. 37.

ber must make oath, and give in the particulars in writing, at the time of his taking his seat (*s*) (51). But, subject to these standing restrictions and disqualifications, every subject of the realm is eligible of common right: though there are instances wherein persons in particular circumstances have forfeited that common right, and have been declared ineligible *for that parliament* by a vote of the house of commons (*t*), or *for ever* by an act of the legislature (*u*) (52). But it was an unconstitutional prohibition, which was grounded on an ordinance of the house of *lords* (*w*), and inserted in the *king's* writs for the parliament holden at Coventry, 6 Hen. IV., that no apprentice or *other man of the law [*177] should be elected a knight of the shire therein (*x*): in return for which, our law books and historians (*y*) have branded this parliament with the name of *parliamentum indoctum*, or the lack-learning parliament; and Sir Edward Coke observes, with some spleen (*z*), that there was never a good law made thereat.

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 (*a*); all which I shall blend together, and extract out of them a summary account of the method of proceeding to elections.

As soon as the parliament is summoned, the lord chancellor (or if a vacancy happens during the sitting of parliament, the speaker, by order of the house, and without such order, if a vacancy happens by death, or the member's becoming a peer (53), in the time of a recess for upwards of

(*s*) Stat. 33 Geo. II. c. 20.
(*t*) See page 163.
(*u*) Stat. 7 Geo. I. c. 22.
(*w*) 4 Inst. 10, 48. Pryn. Plea for Lords, 379. 2 Whitelocke, 359, 368.
(*x*) Pryn. on 4 Inst. 13.
(*y*) Walsingh. A. D. 1405.
(*z*) 4 Inst. 48.
(*a*) 7 Hen. IV. c. 15. 8 Hen. VI. c. 7. 23 Hen. VI. c. 14. 1 W. and M. st. 1, c. 2. 2 W. and M. st. 1, c. 7. 5 and 6 W. and M. c. 20. 7 W. III. c. 4. 7 and 8 W. III. c. 7, and c. 25. 10 and 11 W. III. c. 7. 12 and 13 W. III. c. 10. 6 Ann, c. 23. 9 Ann, c. 5. 10 Ann, c. 19, and c. 33. 2 Geo. II. c. 24. 8 Geo. II. c. 30. 18 Geo. II. c. 18. 19 Geo. II. c. 28. 30 Geo. III. c. 16. 11 Geo. III. c. 42. 14 Geo. III. c. 15. 15 Geo. III. c. 36. 28 Geo. III. c. 52.*

*32 G. III. c. 1. 36 G. III. c. 59. 42 G. III. c. 34. 47 G. III. c. 1, and 53 G. III. c. 71. Other statutes have been passed as to elections, the whole of which are enumerated in Mr. Shepherd's "Summary of Election Law," lately published. But the latest is 7 and 8 G. IV. c. 37.

By sect. 1 of this statute, persons employed by candidates at elections are disqualified from voting.

By sect. 5, voters are exempt from serving as constables during elections.

(51) By 22 Geo. III. c. 45, no contractor with the officers of government, or with any other person for the service of the public, shall be capable of being elected, or of sitting in the house, as long as he holds any such contract, or derives any benefit from it. But this does not extend to contracts with corporations, or with companies, which then consisted of ten partners, or to any person to whom the interest of such a contract shall accrue by marriage or operation of law for the first twelve months. And if any person disqualified by such a contract shall sit in the house, he shall forfeit 500*l.* for every day; and if any person who engages in a contract with government admits any member of parliament to a share of it, he shall forfeit 500*l.* to the prosecutor.

(52) This clause from the word (*though*) has been added since 1769, the time when the Middlesex election was discussed in the house of commons. The learned judge, upon that occasion, maintained the incapacity of Mr. Wilkes to be re-elected that parliament, in consequence of his expulsion; and, as he had not mentioned expulsion as one of the disqualifications of a candidate, the preceding sentence was cited against him in the house of commons, and he was afterwards attacked upon the same ground by Junius, (let. 18,) and, as I conceive, undeservedly; for hard would be the fate of authors, if, whilst they are labouring to remove the errors of others, they should for ever be condemned to retain their own.

(53) By stat. 24 Geo. II. s. 2, c. 26, if during any recess any two members give notice to the speaker by a certificate under their hands, that there is a vacancy by death, or that a writ of summons has issued under the great seal to call up any member to the House of Lords, the speaker shall forthwith give notice of it to be inserted in the Gazette, and at the end of fourteen days after such insertion, he shall issue his warrant to the clerk of the crown, commanding him to make out a new writ for the election of another member. But this

twenty days) 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 (54), 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 (*b*); and to return the persons chosen, together with the precept, to the sheriff.

[*178] 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 (55).

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 (56). For Mr. Locke (*c*) ranks it

(*b*) In the borough of New Shoreham, in Sussex, wherein certain freeholders of the county are entitled to vote by statute 11 Geo. III. c. 55, the election must be within *twelve* days, with *eight* days' notice of the same.

(*c*) On Gov. p. 2, § 222.

shall not extend to any case where there is a petition depending concerning such vacant seat, or where the writ for the election of the member so vacating had not been returned fifteen days before the end of the last sitting of the house, or where the new writ cannot issue before the next meeting of the house for the dispatch of business. And to prevent any impediment in the execution of this act by the speaker's absence from the kingdom, or by the vacancy of his seat, at the beginning of every parliament he shall appoint any number of members, from three to seven inclusive, and shall publish the appointment in the Gazette. These members, in the absence of the speaker, shall have the same authority as is given to him by this statute. These are the only cases provided for by act of parliament; so, for any other species of vacancy, no writ can issue during a recess.

(54) [So for Crichlade and Aylesbury; and] the officer of the cinque ports has six days by 10 and 11 W. III. c. 7.

(55) By stat. 25 G. III. c. 84, in every county, the sheriff having indorsed on the back of the writ the day on which he receives it, shall, within two days after the receipt thereof, cause proclamation to be made at the place where the ensuing election ought by law to be held, of a special county court to be there held, for the purpose of such election only, on any day, Sunday excepted, not later from the day of making such proclamation than the 16th day, nor sooner than the 10th; and shall proceed in such election at such special county court, in the same manner as if the said election had been held at a county court, or at an adjourned county court, according to the former laws.

(56) By the ancient common law of the land, and by the declaration of rights, 1 W. & M. st. 2. c. 2. The 3d Ed. I. c. 5. is also cited, but Mr. Christian observes that it related to the election of sheriffs, coroners, &c. for parliamentary representation was then unknown. It has been decided that a wager between two electors upon the success of their respective candidates is illegal, because, if permitted, it would manifestly corrupt the freedom of elections. 1 T. R. 55.

The house of commons has also passed resolutions on the subject to the following effect. "The sending of warrants or letters to constables or other officers to be communicated to electors when a member is to be chosen to serve in parliament, or threatening the electors, is unparliamentary, and a violation of the right of election." 9 Journals, 191.

"It is highly criminal in any minister or servant under the crown, directly or indirectly, to use the powers of office to influence the election of representatives; and any attempt at such influence will always be resented by this

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 pre-engage 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 to 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 [*179] certain other branches of the revenue, presume to intermeddle in elections, by persuading any voter or dissuading him, he forfeits 100*l.*, 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 (57), 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 (58). And if any

house, as aimed at its own honour, dignity, and independence, as an infringement of the dearest rights of every subject throughout the empire, and tending to sap the basis of this free and happy constitution." 17 Journ. 507.

"It is a high infringement of the liberties and privileges of the house of commons, for any lord of parliament, or lord lieutenant of any county, to concern himself in the election of any member of parliament." This is passed at the commencement of every session.

(57) Or after the ordering of the writs; that is, after signing the warrant to the chancellor for issuing the writs. Sim. 165. But entertainment at an antecedent time, though in contemplation of the election, seems not to be illegal. 1 Bos. and Pul. 264.

(58) This incapacity arises from the 7 W. III. c. 4. commonly called the Treating Act, and the 49 Geo. III. c. 118, passed for the better securing the independence and purity of parliament. These acts enact, that the candidate offending against these statutes shall be disabled and incapacitated to serve in *that* parliament for *such* county, &c. The obvious meaning of these words and of the rest of the statutes is, that treating vacates that election only, and that the candidate is no way disqualified from being re-elected, and sitting upon a second return. See the second case of Norwich, 1787, 3 Lud. 455. Though the contrary was determined in the case of Honiton, 1782, ib. 162.

But after the general election in 1796, the return of one of the members for the borough of Southwark was declared void by a committee, because it was proved that he had treated during the election. Upon that vacancy he offered himself again a candidate, and having a majority of votes was returned as duly elected; but upon the petition of the other candidate, the next committee determined that the sitting member was ineligible, and that the petitioner ought to have been returned. And he took his seat accordingly.

It has been supposed, that the payment of travelling expenses, and a compensation for loss of time, were not treating or bribery within this or any other statute: and a bill passed the house of commons to subject such cases to the penalties imposed by 2 Geo. II. c. 24, upon persons guilty of bribery. But this bill was rejected in the house of lords by the opposition of lord Mansfield, who strenuously maintained that the bill was superfluous; that such conduct, by the laws in being, was clearly illegal, and subject, in a court of law, to the penalties of bribery. (2 Lud. 67.) Mr. Christian has observed, "that it is so repugnant both to the letter and spirit of these statutes, that it is surprising that such a notion and practice should ever have prevailed; and that

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, as well he that takes as he that offers such bribe, forfeits 500*l.*, and is for ever disabled from voting and holding any office in any corporation; unless, before conviction (59), he will discover some other offender of the same kind (60), and then he is indemnified for his own offence (*d*), (61). 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 for which he was chosen, four pounds to be returned member, and was for that premium elected. But for this offence the borough was amerced (62), the member was removed, and the officer fined and imprisoned (*e*). But, as this practice hath since taken

(*d*) In like manner the Julian law *de ambitu* inflicted 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.

(*e*) 4 Inst. 23, Hale of Parl. 112. Com. Journ. 10 and 11 May, 1571.

though it is certainly to be regretted that any elector should be prevented by his poverty from exercising a valuable privilege; yet it probably would be a much greater injury to the country at large if it were deprived of the services of all gentlemen of moderate fortune, by the legalizing of such a practice, even with the most equitable restrictions, not to mention the door that it might open to the grossest impurity and corruption." However the 49 Geo. III. c. 118. s. 2. provides that nothing in that act contained shall extend or be construed to extend to any money paid or agreed to be paid to or by any person for any legal expense bona fide incurred at or concerning any election. And lord Ellenborough and Mr. Baron Thompson have held at nisi prius, that a reasonable compensation for the loss of time and travelling expenses is not illegal. 2 Peckw. 162.

In the sessions of 1806, Mr. Tierney brought in a bill to prevent the candidates from conveying the electors at their expense. That excellent bill was opposed by Mr. Fox, who argued that it would be injurious to the popular part of the government by reducing the number of electors.

But, as observed by Mr. Christian, surely the popular part of the government sustains an infinitely greater loss from the diminution of the number of the eligible; for many, by the present practice, are totally precluded from serving their country in parliament, whom the resident electors, those who are best acquainted with their merits, would think the fittest objects of their choice.

If an innkeeper furnishes provisions to the voters, contrary to the 7 W. III. c. 4. though at the express request or order of one of the candidates, he cannot afterwards maintain an action against that candidate, as courts of justice will not enforce the performance of a contract made in direct violation of the general law of the country. 1 Bos. & Pull. 264. And according to the judgment of Eyre, Ch. J., in that case and the decision in Lofhouse v. Wharton, 1 Camb. 550. the acts made no difference between resident and non-resident voters, and the candidate cannot legally defray the travelling or other expenses of voters.

(59) And within twelve months after election.

(60) And he be convicted.

(61) This is enacted by 2 Geo. II. c. 24. explained and enlarged by 9 Geo. II. c. 38. and 16 Geo. II. c. 11; but these statutes do not create any incapacity of sitting in the house, that depends solely upon the treating act mentioned in the note ante 179. n. 57.

It has been held that it is bribery if a candidate gives an elector money to vote for him, though he afterwards votes for another. (3 Burr. 1235.) And it has been decided that such vote will not be available to the person to whom it may afterwards be given gratuitously. But the propriety of that decision has been questioned by respectable authority. (2 Doug. 416) Besides the penalties imposed by the legislature, bribery is a crime at common law, and punishable by indictment or information, though the court of king's bench will not in ordinary cases grant an information within two years, the time within which an action may be brought for the penalties under the statute. (3 Burr. 1335. 1359.) But this rule does not affect a prosecution by an indictment, or by an information by the attorney-general, who in one case was ordered by the house to prosecute two gentlemen who had procured themselves to be returned by bribery; they were convicted, and sentenced by the court of king's bench to pay each a fine of 1000 marks, and to be imprisoned six months. 4 Doug. 292. In an action for bribery, a person may be a witness to prove the bribery, although he admits that he intends to avail himself of the conviction in that action to protect himself as the first discoverer, in an action brought against him for the same offence. 4 East, 180.

(62) Lord Mansfield observed upon this, that there could be no fine set in the House of Commons; it must have been in the star chamber (3 *Burr.* 1336;) but the journals of the commons on the day referred to by the learned judge expressly state, that it is ordered by this house that a fine of twenty pounds be assessed upon the corporation for their said lewd and slanderous attempt.

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.

*Undue influence being thus (I wish the depravity of mankind [*180] 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 (63), 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 (64), (65).

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 500*l.* If the sheriff does not return such knights only as are duly elected, he forfeits, by the old statutes of Hen. VI. 100*l.* and the returning officer in boroughs for a like false return 40*l.*; and they are besides liable to an action, in which double damages shall be recovered, by the latter statutes of king William: and any person bribing the returning officer shall also forfeit 300*l.* But the members returned by him are the sitting

(63) If any candidate, upon a reasonable request from another candidate, or by two of the electors, either at the election, or at any time before the return of the writ, shall refuse to swear to his qualification, his election shall be void. (9 *Ann.* c. 5.)

(64) A later statute, viz. 49 G. III. c. 118, imposes three penalties in relation to gift, or promise of any gift or reward to procure an election, viz. 1000*l.* on the party giving or promising; 2, Disability to sit; 3, 500*l.* on the party accepting the gift or promise. And if the reward promised be an office or employment, the member returned loses his seat; the promiser, or giver, forfeits 1000*l.*, and the receiver of the office loses it; becomes incapable of public employment in any office, &c. and forfeits 500*l.*

(65) All electors are compellable before they vote to take the oaths of allegiance and supremacy, 7 and 8 W. III. c. 27. And by the 25 *Geo. III.* c. 84, all electors for cities and boroughs shall swear to their name, condition, or profession, and place of abode; and also, like freeholders in counties, that they believe they are of the age of twenty-one, and that they have not been polled before at that election. And by the same statute it is enacted, that if a poll is demanded at any election for any county or place in England or Wales, it shall commence either that day, or at the farthest upon the next, and shall be continued from day to day (Sundays excepted) until it be finished; and it shall be kept open seven hours at the least each day, between eight in the morning and eight at night; but if it should be continued till the 15th day, then the returning officer shall close the poll at or before three in the afternoon, and shall immediately, or on the next day, publicly declare the names of the persons who have a majority of votes; and he shall forthwith* make a return accordingly, unless a scrutiny is demanded by any candidate, or by two or more of the electors, and he shall deem it necessary to grant the same, in which case it shall be lawful for him to proceed thereupon; but so as that, in all cases of a general election, if he has the return of the writ, he shall cause a return of the members to be filed in the crown office on or before the day on which the writ is returnable.† If he is a returning officer acting under a precept, he shall make a return of the members at least six days before the day of the return of the writ; but if it is not a general election, then, in case of a scrutiny, a return of the member shall be made within thirty days after the close of the poll. Upon a scrutiny, the returning officer cannot compel any witness to be sworn, though the statute gives him power to administer an oath to those who *consent* to take it.

* Or on the day after the close of the poll.

† It is usual to file the return as early as convenience will admit.

members, until the house of commons, upon petition, shall adjudge the return to be false and illegal. The form and manner of proceeding upon such petition are now regulated by statute (66) 10 Geo. III. c. 10, (amended by 11 Geo. III. c. 42, and made perpetual by 14 Geo. III. c. 15,) which directs the method of choosing by lot a select committee of fifteen members, who are sworn well and truly to try the same, and a true judgment to give according to the evidence (67). And this abstract of the proceedings at elections of knights, citizens, and burgesses, concludes

(66) This statute is better known by the name of Grenville's act, and it has justly conferred immortal honour upon its author. The select committees appointed pursuant to this statute, have examined and decided the important rights of election with a degree of purity and judicial discrimination highly honourable to themselves; and which were still more satisfactory to the public, from the recollection of the very different manner in which these questions, prior to 1770, had been treated by the house at large.

But this act has been much improved by 25 Geo. III. c. 84. and 28 Geo. III. c. 52. 32 Geo. III. c. 1. 36 Geo. III. c. 59. 42 Geo. III. c. 84, all which provisions are made perpetual by 47 Geo. III. stat. 1. c. 1. By these statutes any person may present a petition complaining of an undue election; but one subscriber of the petitioner must enter into a recognizance, himself in 200*l.* with two sureties in 100*l.* each, to appear and support his petition; and then the house shall appoint some day beyond fourteen days after the commencement of the session, or the return of the writ, and shall give notice to the petitioner and the sitting members to attend the bar of the house on that day by themselves, their counsel or agents; this day, however, may be altered, but notice shall be given of the new day appointed. On the day fixed, if 100 members do not attend, the house shall adjourn from day to day, except over Sundays, and for any number of days over Christmasday, Whitsunday, and Good Friday; and when 100 or more members are present, the house shall proceed to no other business except swearing in members, receiving reports from committees, amending a return, or attending his majesty or commissioners in the house of lords. And by the 32 Geo. III. c. 1. the house is enabled to receive a message from the lords, and to proceed to any business that may be necessary for the prosecution of an impeachment on the days appointed for the trial. Then the names of all the members belonging to the house are put into six boxes or glasses in equal numbers, and the clerk shall draw a name from each of the glasses in rotation, which name shall be read by the speaker, and if the person is present, and not disqualified, it is put down: and in this manner they proceed, till forty-nine such names are collected. But besides these forty-nine, each party shall select, out of the whole number present, one person, who shall be the nominee of that party. Members who have voted at that election, or who are petitioners, or are petitioned against, cannot serve; and persons who are sixty years of age, or who have served before, are excused if they require it; and others who can shew any material reason may also be excused by the indulgence of the house. After 49 names are so drawn, lists of them shall be given to the respective parties, who shall withdraw, and shall alternately strike off one (the petitioners beginning) till they are reduced to 13; and these 13, with the two nominees, constitute the select committee. If there are three parties, they shall alternately strike off one; and in that case the 13 shall choose the two nominees.

The members of the committee shall then be ordered by the house to meet within 24 hours, and they cannot adjourn for more than 24 hours, except over Sunday, Christmasday, and Good Friday, without leave of the house; and no member of the committee shall absent himself without the permission of the house. The committee shall not in any case proceed to business with fewer than 13 members; and they are dissolved if for three successive days of sitting their number is less than that, unless they have sat 14 days, and then they may proceed, though reduced to 12; and if 25 days to 11; and they continue to sit notwithstanding a prorogation of the parliament. All the fifteen members of the committee take a solemn oath in the house, that they will give a true judgment according to the evidence, and every question is determined by a majority.

The committee may send for witnesses and examine them upon oath, a power which the house of commons does not possess; and if they report that the petition or defence is frivolous or vexatious, the party aggrieved shall recover costs.

By the 11 Geo. III. c. 52. if 100 or more members are present, but if, upon the drawing by lot, 49 not set aside nor excused cannot be completed, the house shall then adjourn, as if 100 had not attended. And to prevent the public business being delayed by the want of a sufficient attendance to form a select committee, the 36 Geo. III. c. 59. has provided, that when a sufficient number of members are not present for that purpose, the house, before they adjourn, may proceed to the order for the call of the house, if it has been previously fixed for that day, or they may adjourn such call, or they may order it to be called on any future day, and may make such order relative thereto as they think fit for enforcing a sufficient attendance of the members.

(67) Before this statute, questions of return were examinable by the house at large, and not by select committees.

our inquiries into the laws and customs more peculiarly relative to the house of commons.

*VI. I proceed now, sixthly, to the method of making laws, [*181] 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 (68). The speaker of the house of lords, whose office it is to preside there, and manage the formality of business, is the lord chancellor, or keeper of the king's great seal, or any other appointed by the king's commission: and, if none be so appointed, the house of lords (it is said) may elect (69). The speaker of the house of commons is chosen by the house (70); but must be approved by the king (71). 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, if a lord of parliament, may (72). In each house the act of the

(68) As to the choice of the speaker, and proceedings, see Com. Dig. Parliament, E. 5. By the 30 Geo. III. c. 10. the salary of the speaker of the house of commons, including his fees and former allowances, is fixed at the clear yearly sum of 6000*l*. And by the same statute he is disqualified from holding any office of profit under the crown during pleasure.

(69) See an instance in the Irish house of lords mentioned by lord Mountmorres, 2 book 108.

(70) Mr. Hume is mistaken, who says that Peter de la Mere, chosen in the first parliament of R. II. was the first speaker of the commons (3 vol. 3); for we find in the rolls of parliament, (51 Ed. III. No. 87,) that Sir Thomas Hungerford, *chivalier, qui avoit les parolles des communes en cest parlement*, addressed the king in the name of the commons, in that jubilee year, to pray that he would pardon several persons who had been convicted in impeachments. And there he is not mentioned, as if his office was a novelty.

(71) Sir Edward Coke, upon being elected speaker in 1592, in his address to the throne, declared, "this is only as yet a nomination, and no election, until your majesty giveth allowance and approbation." (2 *Hats.* 154.) But the house of commons at present would scarce admit their speaker to hold such language. Till Sir Fletcher Norton was elected speaker, 29th Nov. 1774, every gentleman who was proposed to fill that honourable office affected great modesty, and, if elected, was almost forced into the chair, and at the same time he requested permission to plead, in another place, his excuses and inability to discharge the office, which he used to do upon being presented to the king. But Sir Fletcher Norton was the first who disregarded this ceremony both in the one house and in the other. His successors, Mr. Cornewall and Mr. Addington, requested to make excuses to the throne, but were refused by the house, though Mr. Addington, in the beginning of the present parliament, 26th Nov. 1790, followed the example of Sir Fletcher Norton, and intimated no wish to be excused. (See 1 *Woodd.* 59.) Sir John Cust was the last speaker who addressed the throne in the language of diffidence, of which the following sentence may serve as a specimen: "I can now be an humble suitor to your majesty, that you would give your faithful commons an opportunity of rectifying this the only inadvertent step which they can ever take, and be graciously pleased to direct them to present some other to your majesty, whom they may not hereafter be sorry to have chosen, nor your majesty to have approved." (6 Nov. 1761.) The chancellor used to reply in a handsome speech of compliment and encouragement, but now he shortly informs the commons that his majesty approves of their speaker, who claims the ancient privileges of the commons, and then they return to their own house.*

Some speakers upon this occasion have acquired great honour and distinction, particularly Thomas Nevile, *germanus frater domini Burgavenny, qui electus prolocutor per communes sacræ regiæ majestati est præsentatus, et ita egregiè, eleganter, prudenter, et diserte in negotio sibi commisso se gessit, ut omnium præsentium plausu et lætitiâ, maximam sibi laudem comparavit, cujus laudi sacra regia majestas non modicum eximium honoris cumulum adjecit, nam præsentibus et videntibus dominis spiritualibus et temporalibus et regni communibus eum equitis aurati honore et dignitate ad laudem Dei et sancti Georgii insignivit, quod nemini mortalium per ulla ante sæcula contigisse audivimus.* 6 Hen. VIII. 1 Lords' Journ. 20.

(72) But when the house resolves itself into a committee, the chairman regularly ap-

* It has been often observed, that whether the court or house were to nominate the speaker was not settled till 1679. See Burnet's *Hist. sub anno* 1679. But, although then the question was much debated, nothing of the right appears to have been resolved either for or against it. The court named Meres, and the house elected Seymour; the commons persevered, but another was chosen speaker. The court gave up the contest; but the conduct of the persons mentioned in the note shews that neither party had given up the ground as no longer debateable.

majority (73) 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 it is impossible to be practised 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 (74), which were entered upon the *parliament rolls*, with the king's answer thereunto [*182] subjoined; not in any settled forms of words, but *as the circumstances of the case required (*f*): and, at the end of each parlia-

(*f*) See, among numberless other instances, the *articuli cleri*, 9 Edw. II.

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pointed every new parliament (and whose salary is 1200*l.* a year), presides at the table, and the speaker may then speak and vote as any one of the other members for the time.

(73) In the house of commons the speaker never votes but when there is an equality without his casting vote, which in that case creates a majority; but the speaker of the house of lords has no casting vote, but his vote is counted with the rest of the house; and in the case of an equality, the non-contents or negative voices have the same effect and operation as if they were in fact a majority. (Lords' Journ. 25 June, 1661.) Lord Mountmorres says, that the house of lords in Ireland observes the same rule: and that in cases of equality, *semper præsumitur pro negante*. (1 Book, 105.) Hence the order in putting the question in appeals and writs of error is this, "Is it your lordships' pleasure that this decree or judgment shall be reversed?" for if the votes are equal, the judgment of the court below is affirmed. (*Ib.* 2 Book, 81.) Here it may not be improper to observe that there is no casting voice in courts of justice; but in the superior courts, if the judges are equally divided, there is no decision, and the cause is continued in court till a majority concur. At the sessions the justices, in case of equality, ought to respite the matter till the next sessions: but if they are equal one day, and the matter is duly brought before them on another day in the same sessions, and if there is then an inequality, it will amount to a judgment; for all the time of the sessions is considered but as one day. A casting vote sometimes signifies the single vote of a person, who never votes but in the case of an equality; sometimes the double vote of a person, who first votes with the rest, and then, upon an equality, creates a majority by giving a second vote.

A casting vote neither exists in corporations nor elsewhere, unless it is expressly given by statute or charter, or, what is equivalent, exists by immemorial usage; and in such cases it cannot be created by a by-law. 6 *T. R.* 732.

(74) The commons for near two centuries continued the style of very humble petitioners. Their petitions frequently began with "your poor commons beg and pray," and concluded with "for God's sake, and as an act of charity:"—*Vos poveres communes prient et supplient, pur Dieu et en œuvre de charité.* (Rot. Parl. passim.) It appears that, prior to the reign of Hen. V. it had been the practice of the kings to add and enact more than the commons petitioned for. In consequence of this there is a very memorable petition from the commons, in 2 Hen. V. which states that it is the liberty and freedom of the commons that there should be no statute without their assent, considering that they have ever been as well *assenters* as *petitioners*, and therefore they pray that, for the future, there may be no additions or diminutions to their petitions. And in answer to this, the king granted that from henceforth they should be bound in no instance without their assent, saving his royal prerogative to grant and deny what he pleased of their petitions. (*Ruff. Pref.* xv. *Rot. Parl.* 2 *Hen. V.* No. 22.) It was long after its creation, or rather separation from the barons, before the house of commons was conscious of its own strength and dignity; and such was their modesty and diffidence, that they used to request the lords to send them some of their members to instruct them in their duty, "on account of the arduousness of their charge, and the feebleness of their own powers and understandings:"—*pur l'arduité de lour charge, et le feeblesce de lour poiars et sens.* (Rot. Parl. I R. II. No. 4.)

ment, 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 customs, were first introduced.

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) referred to two of the judges, to examine and report the state of the facts alleged, to see that all necessary parties consent, and to settle all points of technical propriety. This is read a first time, and at a convenient distance a second time; and, after each reading, the speaker opens to the house the substance of the bill, and puts the question whether it shall proceed any 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 dropped for that session; as it must also if opposed with success in any of the subsequent stages.

After the second reading it is committed, that is, referred to a committee; which is either selected by the house in matters of small importance, or else, upon a bill of consequence, the house resolves itself into a committee of the whole house. A committee of the whole house is composed of every member; and, to form it, the speaker quits the chair, (another member being appointed chairman,) and may sit and debate as a private member. In these committees the bill is debated clause by clause, amendments made, the blanks filled up, and sometimes the bill entirely new modelled. After it *has gone through the committee, the [*183] chairman reports it to the house, with such amendments as the committee have made; and then the house reconsiders the whole bill again, and the question is repeatedly put upon every clause and amendment. When the house hath agreed or disagreed to the amendments of the committee, and sometimes added new amendments of its own, the bill is then ordered to be engrossed, or written in a strong gross hand, on one or more long rolls (or presses) of parchment sewed together. When this is finished, it is read a third time, and amendments are sometimes then made to it; and, if a new clause be added, it is done by tacking a separate piece of parchment on the bill, which is called a rider (*g*). The speaker then again opens the contents; and, holding it up in his hands, puts the question whether the bill shall pass. If this is agreed to, the title to it is then settled, which used to be a general one for all the acts passed in the session, till, in the first year of Henry VIII. distinct titles were introduced for each chapter. After this, one of the members is directed to carry it to the lords, and desire their concurrence; who, attended by several more, carries it to the bar of the house of peers, and there delivers it to their speaker, who comes down from his woolsack to receive it.

It there passes through the same forms as in the other house, (except engrossing, which is already done,) and, if rejected, no more notice is taken, but it passes *sub silentio*, to prevent unbecoming altercations. But, if it is

(g) Nov. 84.

agreed to, the lords send a message, by two masters in chancery, (or, upon matters of high dignity or importance, by 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 amend-
[*184] ments, the bill is sent back to the lords by one of the members, *with a message to acquaint them therewith. The same forms are observed, *mutatis mutandis*, when the bill begins in the house of lords. But, when an act of grace or pardon is passed, it is first signed by his majesty, and then read once only in each of the houses, without any new engrossing or amendment (*h*). And when both houses have done with any bill, it always is deposited in the house of peers, to wait the royal assent; except in the case of a bill of supply, which, after receiving the concurrence of the lords, is sent back to the house of commons (*i*).

The royal assent 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 (75): 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 comme il est desiré*, be it as it is desired." If the king refuses his assent, it is in the gentle language of "*le roy s'avisera* (76), the king will advise upon it." When a bill of supply is passed, it is carried up and presented to the king by the speaker of the house of commons (*k*); and the royal assent is thus expressed, "*le roy remercie ses loyal subjects, accepte lour benevolence, et ausi le veut*, the king thanks his loyal subjects, accepts their benevolence, and wills it so to be." In case of an act of grace, which originally proceeds from the crown, and has the royal assent in the first stage of it, the clerk of the parliament thus pro-

(*h*) D'Ewes' Journ. 20, 73. Com. Journ. 17 June, 1747.

(*i*) Com. Journ. 24 Jul. 1660.

(*k*) *Rot. Parl.* 9 *Hen. IV.* in Pryn. 4 Inst. 30, 31.

(75) Until the reign of Richard III. all the statutes are either in French or Latin, but generally in French. I have never seen any reason assigned for this change in the language of the statutes.

(76) The words *le roi s'avisera* correspond to the phrase formerly used by courts of justice, when they required time to consider of their judgment, viz. *curia advisare vult*. And there can be little doubt but originally these words implied a serious intent to take the subject under consideration, and they only became in effect a negative when the bill or petition was annulled by a dissolution, before the king communicated the result of his deliberation; for, in the rolls of parliament, the king sometimes answers, that the petition is unreasonable, and cannot be granted: sometimes he answers, that he and his council will consider of it; as in 37 Ed. III. No. 33. *Quant au ceste article, il demande grand avisement, et partant le roi se ent avisera par son conseil.*

This prerogative of rejecting bills was exercised to such an extent in ancient times, that D'Ewes informs us, that queen Elizabeth, at the close of one session, gave her assent to twenty-four public, and nineteen private bills; and at the same time, rejected forty-eight, which had passed the two houses of parliament. (*Journ.* 596.) But the last time it was exerted was in the year 1692, by William III. who at first refused his assent to the bill for triennial parliaments, but was prevailed upon to permit it to be enacted two years afterwards. *De Lolme*, 404.

nounces the gratitude of the subject: "*les prelats, seigneurs, et commons, en ce present parliament assemblees, au nom de touts vous autres subjects, remercient tres humblement votre majeste, et prient a Dieu vous donner* [*185] *en sante bone vie et longue;* the prelates, lords, and commons, in this present parliament assembled, in the name of all your other subjects, most humbly thank your majesty, and pray to God to grant you in health and wealth long to live" (*l*). 2. By the 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 (77).

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 emperor's 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 (*m*), (78).

(*l*) D'Ewes' Journ. 35. (*m*) 3 Inst. 41. 4 Inst. 25.

(77) The 33 Geo. III. c. 13. directs the clerk of parliament to endorse on every act the time it receives the royal assent, from which day it becomes operative, if no other is specified. And by 48 Geo. III. c. 106. when a bill for continuing expiring acts shall not have passed before such acts expire, the bill, when passed into a law, shall have effect from the date of the expiration of the act intended to be continued.

(78) See Com. Dig. Parliament, G. 22, 23. On 3d June, 1801, an address was agreed to by both houses, and presented with a series of resolutions to his majesty, respecting the promulgation of the statutes; and on the 9th of the same month his majesty's answer was reported, that he would give directions accordingly. The resolutions were in substance as follows:—

1. That it is expedient for the more speedy and general promulgation of the laws of the united kingdom, that his majesty's printer should be authorized and directed to print not less than 5500 copies of every public general statute, and 300 of every public, local, and personal statute.

2. That he be authorized to deliver or transmit, by post or otherwise, immediately after each bill has received the royal assent, the aforesaid number of 5500 copies of each general public statute.

3. The like with respect to the 300 copies of each public, local, and personal statute.

4. That every chief magistrate and head officer of any city, borough, or town corporate in England and Ireland, and of every royal burgh in Scotland, and every clerk of the peace and town-clerk receiving the same, shall preserve them for the public use, and transmit them to his successor in office.

5. That for the purpose of effectuating the promulgation of private statutes (if the parties interested therein shall think proper), and also for making compensation to the clerk of the parliaments and officers of the house of lords (in lieu of their annual average emoluments arising from the office copies of such statutes), without bringing any new charge upon the public, the parties interested in every such statute shall make good such expense and compensation; and that thereupon such printed copies of every such statute shall be made judicially admissible in evidence, by adding thereto a clause declaring the same to be a public act.

6. That his majesty's printer shall also be authorized and directed to class the general statutes and the public, local, and personal statutes of each session in separate volumes, and to number the chapters of each class separately, and also to print one general title to each volume, together with a general table of all the acts passed in that session.

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 [*186] 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 (*n*): but now, by statute 1 W. and 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 (*o*). 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 (*p*). 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 (79).

A prorogation is the continuance of the parliament from one [*187] session to another, as an adjournment is a *continuation 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 (80). Both houses are necessarily prorogued at the same time; it not being a prorogation of the

(*n*) Finch. L. 81, 234. Bacon. Elem. c. 19.
(*o*) 4 Inst. 26.
(*p*) Com. Journ. *passim*; e. g. 11 June, 1572; 5 Apr. 1604; 4 June, 14 Nov. 18 Dec. 1621; 11 Jul. 1625; 13 Sept. 1660; 25 Jul. 1667; 4 Aug. 1685; 24 Feb. 1691; 21 June, 1712; 16 Apr. 1717; 3 Feb. 1741; 10 Dec. 1745; 21 May, 1763.

(79) Orders of parliament also determine by prorogation, consequently all persons taken into custody under such orders may, after prorogation of parliament as well as after dissolution, be discharged on a *habeas corpus*; generally, however, that form is not observed, as the power of either house to hold in imprisonment expires, and the party may at once walk forth on the prorogation or dissolution of the parliament. Com. Dig. Parliament, O. 1. The state of an impeachment is not affected by the session terminating either one way or the other (Raym. 120. 1 Lev. 384.), and appeals and writs of error remain, and are to be proceeded in, as they stood at the last session. 2 Lev. 93. Com. Dig. Parliament, O. 1.

(80) At the beginning of a new parliament, when it is not intended that the parliament should meet at the return of the writ of summons for the dispatch of business, the practice is to prorogue it by a writ of prorogation, as the parliament in 1790 was prorogued twice by writ: *Com. Journ.* 26th Nov. 1790: and the first parliament in this reign was prorogued by four writs. *Ib.* 3 Nov. 1761. On the day upon which the writ of summons is returnable, the members of the house of commons who attend do not enter their own house, or wait for a message from the lords, but go immediately up to the house of lords, where the chancellor reads the writ of prorogation. *Ib.* And when it is intended that they should meet upon the day to which the parliament is prorogued for dispatch of business, notice is given by a proclamation.

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 (*q*). 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 (*r*); 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 (*s*), 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 reign of Charles II. we find a proviso frequently tacked to a bill (*t*), 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 (*u*) to call them together by proclamation, with fourteen days' notice of the time appointed for their reassembling (81).

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 [*188] 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

(*q*) 4 Inst. 28. Hale of Parl. 32. Hut. 61.
(*r*) Com. Journ. 21 Oct. 1553.
(*s*) Ibid. 21 Nov. 1554.
(*t*) Stat. 12 Car. II. c. 1. 22 and 23 Car. II. c. 1.
(*u*) Stat. 30 Geo. II. c. 25.

(81) By statutes 37 G. III. c. 127, and 39, 40, G. III. c. 14, the king may at any time, by proclamation, appoint parliament to meet at the expiration of fourteen days from the date of the proclamation; and this without regard to the period to which parliament may stand prorogued or adjourned.

from having no parliament in being in case of a disputed succession, it was enacted by the statutes 7 and 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 (82).

[*189] *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. and 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 expences 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 (83). 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 III.

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.

(82) See note 2. page 150.

(83) This has been thought by many an unconstitutional exertion of their authority; and the reason given is, that those who had a power delegated to them for three years only, could have no right to extend that term to seven years. But this has always appeared to me to be a fallacious mode of considerng the subject. Before the triennial act, 6 W. and M. the duration of parliament was only limited by the pleasure or death of the king; and it never can be supposed that the next, or any succeeding parliament, had not the power of repealing the triennial act; and if that had been done, then, as before, they might have sat seventeen or seventy years. It is certainly true, that the simple repeal of a former statute would have extended their continuance much beyond what was done by the septennial act.

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: [*191] 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 coronæ*, 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 [*192] 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 throne 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 the 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 unbiassed majority would be [*193] 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 estates, 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 generations. As in common descents, 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 lands or tenements, the crown, on failure of the male line, descends to the issue female; according to the ancient British custom remarked by Tacitus (a); "*solent fœminarum 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 that from whose veins the blood royal is communicated to each. Thus Mary I. inherited to Edward VI., and Elizabeth inherited to Mary; all children 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.

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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

(a) *In vit. Agricolæ.*

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 broken 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 idiot, 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 par-
[*196] liament, 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 may be 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. For the right of the crown vests, *eo instanti*, upon his heir; either the *hæres natus*, if the course of descent remains unimpeached, or the *hæres factus*, if the inheritance be under any particular settlement. So that there can be no *interregnum* (1); 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 heir 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.

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,

(*b*) 1 Hist. P. C. 61.

(1) Hence the statutes passed in the first year after the restoration of Car. II. are always called the acts in the twelfth year of his reign; and all the other legal proceedings of that reign are reckoned from the year 1648, and not from 1660.

to create, to declare, to confirm, to limit, or to bar, the hereditary, *title to the throne. And in the pursuit of this inquiry we shall [*197] 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, the 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 generally 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 inquire; and is indeed a point of such high antiquity, as must render all inquiries 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 with or is melted down in the former, and must adopt its laws and customs (*c*). 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 [*198] 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 the sons of King Ethelwolf succeeded to each other in the kingdom, without regard to the children of the elder branches, according to the rule of succession prescribed by their father, and confirmed by the wittena-gemote, in the heat of the Danish invasions; and also 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 (2).

King Edmund Ironside was obliged, by the hostile irruption of the Danes, at first to divide his kingdom with Canute King of Denmark; and Canute, after his death, seized the whole of it, Edmund's sons being dri-

(*c*) Puff. L. of N. and N, b. 8, c. 12, § 6.

(2) But Edmund, the son of Edward the elder, was put aside to make way for Athelstan, his bastard brother; and Edmund, his brother, succeeded him.

ven 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, sirnamed (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, sirnamed Atheling, (which signifies in the Saxon language *illustrious*, or of royal blood,) who was the son of Edward the Outlaw,
[*199] 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 debebatur regnum Anglorum.*"

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.

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
[*200] still the **dernier resort* of kings) a strong and undisputed title to the inheritable crown of England.

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

(*d*) A. D. 1066.
(*e*) William of Malmsb. *l.* 3.
(*f*) Hale, Hist. C. L. c. 5. Seld. Review of Tithes, c. 8.

the arts and violence of his brethren; who perhaps might proceed upon a notion, which prevailed for some time in the law of descents, (though never adopted as the rule of public successions) (*g*), 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, excepting his elder brother Theobald; who was Earl of Blois, and therefore seems to have waved, as he certainly never insisted on, so troublesome and precarious a claim. 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 therefore he rather chose to rely on a title by election (*h*), while the Empress Maud did not fail to assert her hereditary right by the sword: which dispute was attended with various success, and ended at last in the compromise made at Wallingford, 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 (next after his mother Matilda) the undoubted heir of William the Conqueror; but he had also another connexion in blood, which endeared *him still farther to [*201] 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, seized the throne; claiming, as appears from his charters, the crown by hereditary right (*i*): 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 flimsey 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

(*g*) See Lord Lyttleton's Life of Henry II. vol. 1, p. 407.

(*h*) "*Ego Stephanus Dei gratia assensu cleri et populi in regem Anglorum electus, &c.*" (*Cart. A. D.* 1136. Ric. de Hagustald. 314. Hearne *ad Guil. Neubr.* 711.)

(*i*) "—*Regni Angliæ; quod nobis jure competit hæreditario.*" Spelm. *Hist. R. Joh. apud* Wilkins, 354.

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 (*k*), 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 (*l*). However, on the
[*202] 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 (*m*) 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."

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 (*n*). 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 (*o*), 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 (*p*),) but as a successor, descended by right line of the blood royal; as appears from the rolls of parliament in those times. And, in
[*203] 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 entitled 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 un-

(*k*) Glanv. l. 7, c. 3.
(*l*) Mod. Un. Hist. xxx. 512.
(*m*) Stat. 25 Edw. III. st. 2.
(*n*) Standford's Geneal. Hist. 246.
(*o*) Hist. C. L. c. 5.
(*p*) Seld. Tit. Hon. 1, 3.

fortunate prince, if the crown could descend through a female, while an entire male line was existing.

However, as in Edward the Third's time we find the parliament approving and affirming the law 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* (*q*) 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 the 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 also 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 (*r*), that at the time of *passing this act the right of [*204] the crown was in the descent from Philippa, daughter and heir of Lionel duke of Clarence.

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 honours 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

(*q*) *Soit mys et demeerge.* (*r*) 4 Inst. 37, 205.

title was now exploded, the claim, (such as it was) was through
[*205] 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* (*s*)."

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 (*t*), in Elizabeth, eldest daughter of Edward IV.; and his possession was established by parliament, holden 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 ordnance, 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 (*u*) 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.

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,
[*206] 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 male 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 Anne 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 Sey-

(*s*) 4 Inst. 36.
(*t*) *Ibid.* 37.
(*u*) *Ibid.* 37.

mour, 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. st. 2, c. 1, Queen Mary's *hereditary right to the throne [*207] 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 (*x*), 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.

On Queen Elizabeth's accession, her right is recognized in still stronger terms than her sister's; the parliament acknowledging (*y*), "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 [*208] after her decease shall be guilty of a misdemesnor, and forfeit his goods and chattels."

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

(*x*) 1 Mar. st. 2, c. 2. (*y*) Stat. 1 Eliz. c. 3.

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 grand-daughter 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 [*209] 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 (z).

But, wild and absurd as the doctrine of divine right most undoubtedly is, it is still more astonishing, that when so many 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 (a), they declared, "that according to their duty and allegiance they did heartily, joyfully, and unanimously acknowledge and proclaim, that im-

(z) 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 Llewellin ap Jorwerth the great, had the true right to the principality of Wales. Hist. Eng. iii. 705.

(a) Com. Journ. 8 May, 1660.

mediately upon the *decease of our late sovereign lord King [*210]
Charles, the imperial crown of these realms did by inherent birth-
right and lawful and undoubted succession descend and come to his most
excellent majesty Charles the second, as being lineally, justly, and law-
fully, 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 (3). 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 [*211]
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 defeasance 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 a conviction that there was no king in being. For, in a full assembly of the lords and commons, met in a convention upon the supposition of this vacancy, both houses (*b*) 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

(b) Com. Journ. 7 Feb. 1688.

(3) The foregoing and subsequently related facts are evidence of the power of a legislature, and it is not easy to extract from them that any settled course of descent fundamentally regulated or controuled that power; and it is finally seen that a legislature, viz. a convention, not a parliament, recalled King Charles II.; it will as soon also be seen that another convention thought it expedient to elect, in the dry meaning of the word elect, another king and queen to replace the pertinacious, but conscientious, brother of King Charles II.

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 endeavour 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 (4). 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 [*212] 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 inquiry further than merely for instruction or amusement (5). 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 chuse to consider this great political measure upon the solid footing of authority, than to reason in its favour from its justice, moderation, and expedience: because that might imply a right of dissenting or revolting from it, in case we should think it to have been 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 (6).

(4) The convention in Scotland drew the same conclusion, viz. the vacancy of the throne, from premises and in language much more bold and intelligible. The mystery of the declaration of the English convention betrays that timidity which it was intended to conceal. "The estates of the kingdom of Scotland find and declare, that King James seventh, being a professed papist, did assume the royal power, and acted as a king, without ever taking the oath required by law; and had, by the advice of evil and wicked counsellors, invaded the fundamental constitution of this kingdom, and altered it from a legal and limited monarchy to an arbitrary despotic power; and had governed the same to the subversion of the protestant religion and violation of the laws and liberties of the nation, inverting all the ends of government, whereby he had *forefaulted* the crown, and the throne was become vacant." *Tyndal*, 71 *Fol. Com. of Rapin.*

(5) What amusement may be found in viewing the ruins of a great political machine thus broken up, disjointed, and scattered, may be matter of taste; but, of the deep and awful instruction to be derived by both king and people from such view, there cannot exist a reasonable doubt. The commentator rightly mentions "powers originally delegated by society," and recognizes "the voice of that society" as the only tribunal competent to decide upon a question arising between society at large and the delegate; and it is somewhat remarkable, therefore, that he did not finish these memorable and honest sentences in the same manly breath. It was in the rugged school for political instruction, just and wise in the main, the long parliament, temp. Cha. I., that many of the men who assisted in finally driving this weak though conscientious sovereign from his throne, became deeply imbued with the principles of legal resistance, and with the duty of applying them whenever circumstances should appear to justify their application.

(6) This is not the only instance in which the learned commentator's abstract love of li-

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) (*c*), 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 æra 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 [*213] 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 (*d*): 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 (*e*). 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.

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 blood royal 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 representa-

(*c*) See chap. 7.
(*d*) On Gov. p. 2, c. 19.
(*e*) Law of forfeit. 118, 119.

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berty, coupled with his reverence for the constitution, as it is established, has involved him in a political fallacy. By what process of reasoning it can be demonstrated, that it is *our* duty to acquiesce in the determinations of our ancestors, though *they* were bound by no such obligation with regard to theirs, is not easily to be conceived. Yet such is by plain and natural inference a proposition of our author. The principle that a people have the right to choose and to regulate their own form of government, if true in 1688, does not become false, by the lapse of time, in 1825; and reasoning *a priori*, it may be more safely exercised now than at any antecedent period, because the science of government is better understood. The respect and attachment due to the institutions of a free state, like ours, so far from being compromised, are included and avowed in this sentiment. And the learned commentator might have better urged the improbability of the nation again having occasion to exercise this power over the constitution, than have enforced the obligation to maintain the constitution because we are born under it.

tves of the nation (7). 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 [*214] 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 (*f*), 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."

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 of King James the second, being the son of Mary his eldest 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.

These three princes, therefore, King William, Queen Mary, and Queen Anne, did not take the crown by hereditary right or *descent*, but [*215] 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

(*f*) Com. Journ. 12 Feb. 1688.

(7) The preamble to the Bill of Rights expressly declares, "that the lords spiritual and temporal, and commons, assembled at Westminster, lawfully, fully, and freely represent all the estates of the people of this realm." The lords are not less the trustees and guardians of their country, than the members of the House of Commons. It was justly said, when the royal prerogatives were suspended during his majesty's illness, "that the two houses of parliament were the organs by which the people expressed their will."

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 personally 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 descents.

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 Queen Mary, Queen Anne, and King William. The parliament had previously, by the statute of 1 W. and 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 be 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 [*216] 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 (g). 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 youngest daughter of Elizabeth queen of Bohemia, who was the 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 and 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.

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 *præmunire*.

(g) 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.

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.

[*217] 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 IV.

OF THE KING'S 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, (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*).

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 æra (*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 em- [*219] peror (2). The queen of England hath separate courts and offices distinct from the king's, not only in matters of ceremony, but even of law; and her attorney and solicitor general are entitled to a place within the bar of his majesty's courts, together with the king's counsel (*e*). She may likewise sue and be sued alone, without joining her husband (3). She may also have a separate property in goods, as well as lands, and has a right to dispose of them by will (4). 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.

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*).

The queen hath also some pecuniary advantages, which form her a dis-

(*a*) Finch. L. 86.
(*b*) 4 Rep. 23.
(*c*) Seld. *Jan. Angl.* 1, 42.*
* The instance meant, loc. citat, is where Æthelswith, wife to Burghred, king of the Merclans, granted a patent to Cuthwals.
(*d*) Cod. 5, 16, 26.
(*e*) Seld. tit. hon. 1, 6, 7.
(*f*) Finch, L. 86. Co. Litt. 133.
(*g*) Co. Litt. 133.
(*h*) Finch, L. 185.
(*i*) *Ff.* i. 3, 31.

(1) Mary being the first queen that had sat upon the English throne, this statute was passed, as it declares, for "the extinguishment of the doubt and folly of malicious and ignorant persons," who might be induced to think that a queen could not exercise all the prerogatives of a king.

(2) So our kings may settle lands in jointure on their queen, who may accept the same, and dispose of the profits. Stat. 32 Hen. VIII. c. 51. Statutes of the Realm, printed by authority, not in the ordinary edition of the statutes. If the existence of this statute had been better known, the stat. 39, 40, G. III. c. 88, § 6, 9, might not have been deemed expedient. And acts of parliament relating to her need not be pleaded, she being a public person, 8 Rep. 28; and, by various modern statutes, the king is enabled to make grants for her benefit. Stat. 2 G. III. c. 1; 15 G. III. c. 33; 47 G. III. st. 2, c. 45.

(3) Same statutes.

(4) Which, if she omit to do, or otherwise dispose of them in her lifetime, both her real and personal estate go to the king after her death. 60 Litt. 3, 31, 133. Finch 86. 1 Roll. Abr. 912.

tinct revenue: as, in the first place, she is entitled to an ancient perquisite called queen-gold, or *aurum reginæ*, 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, *[220] 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 of 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 entitled to ten marks in silver, or (what was formerly an equivalent denomination) to one mark in gold, by the name of queen-gold, or *aurum reginæ* (*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*).

The original 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 wood 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 [*221] 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 (*s*). 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

(*k*) Fryn. *Aur. Reg.* 2.
(*l*) 12 Rep. 21. 4 Inst. 358.
(*m*) Ibid. Fryn. 6. Madox, Hist. Exch. 242.
(*n*) *Bedefordscire. Maner. Lestone redd. per annum xxii lib. &c.; ad opus reginæ ii uncias auri.—Herefordscire. In Lene, &c. consuetud. ut præpositus manerii veniente domina sua (reginâ) in manerio præsentaret ei xviiii oras denar. ut esset ipsa lete animo* Fryn. Append. to *Aur. Reg.* 2, 3.
(*o*) *Causa coadunandi lanam reginæ.* Domesd. ibid.
(*p*) *Civitas Lundon. Pro oleo ad lampad. reginæ.* (*Mag. rot. pip. temp. Hen. II.* ibid.)
(*q*) *Vicecomes Berkescire, xvi l. pro cappa reginæ.* (*Mag. rot. pip.* 19.—22 *Hen. II.* ibid.) *Civitas Lund cordubanario reginæ xx s.* (*Mag. rot.* 2 *Hen. II.* Madox, Hist. Exch. 419.)
(*r*) *Pro robâ ad opus reginæ, quater xx l. et vi s. viii. d.* (*Mag. rot.* 5 *Hen. II.* ibid. 250.)
(*s*) *Solere aiunt barbaros reges Persiarum ac Syrorum—uxoribus civitates attribuere, hoc modo; hæc civitas muliebri redimiculum præbeat, hæc in collum, hæc in crines, &c.* (*Cic. in Verrem, lib.* 3, *cap.* 33.)
(*t*) See Madox, *Disceptat. Epistolar.* 74. Fryn. *Aur. Reg.* Append. 5.
(*u*) *Lib.* 2, c. 26.

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 the chief justices and chief baron, their report of it was so very unfavourable (*v*), that his consort 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 (*w*) 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 [*222] 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 antiquary, endeavour to excite Queen Catherine to revive this antiquated claim.

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 (5), (6).

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 (*z*) 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 (7), 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 peers of parliament, as Queen Ann Boleyn was in 28 Hen. VIII. (8).

(*v*) Mr. Prynne, with some appearance of reason, insinuates that their researches were very superficial. (*Aur. Reg.* 125.)
(*w*) 19 Rym. *Fed.* 721.
(*x*) Bracton, l. 3, c. 3. Britton, c. 17. Flet. 1. 1, c. 45 et 46.
(*y*) Pryn. *Aur. Reg.* 127.
(*z*) Stat. 33 Hen. VIII. c. 21.

(5) The reason is more whimsical than the division, for the whalebone lies entirely in the head.

(6) The late dowager queen's revenue was settled at 100,000*l.*

(7) This was a clause in the act, which attainted Queen Catherine Howard, and her accomplices, for her incontinence; but it was not repealed till the 1 Ed. VI. c. 12, which abrogated all treasons created since the memorable statute in the 25 Ed. III.

(8) Ann Boleyn was convicted of high treason in the court of the lord high-steward. One of the charges against this unhappy queen was, that she had said, "that the king never had had her heart;" a declaration, if made, in which there was probably more truth than discretion; but this was adjudged to be a slander of her own issue, and therefore high treason, according to a statute which had been passed about two years before for her honour and protection. *Harg. St. Tr.* 11 vol. p. 10.

Articles of impeachment were prepared against Queen Catherine Parr for heresy, in

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 infidelity, he is not subjected [*223] 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 (*a*) tells us, was enacted in parliament in 6 Hen. VI. though the statute be not in print (9). But she, though an alien born, shall still be entitled to dower after the king's demise, which no other alien is (*b*). 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 Catherine, 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 Catherine queen of England, maintained an action against the Bishop of Carlisle. And so, the queen dowager of Navarre, marrying with Edmond earl of Lancaster, brother to King Edward the first, maintained an action of dower (after the death of her second husband) by the name of queen of Navarre (*c*).

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 [*224] the *crown, on failure of issue male, and therefore more respected by the laws than any of her younger sisters (10), 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

(*a*) 2 Inst. 18. See Riley's Plac. Parl. 72.
(*b*) Co. Litt. 31.
(*c*) Inst. 50.

presuming to controvert the theological doctrines of the king; but, by her dexterity and address, she baffled the designs of her enemies, and regained the affections of that capricious monarch. 4 *Hume*, 259.

Articles of impeachment for high treason were exhibited against Henrietta, queen of Car. I. from which she saved herself by an escape to France. 7 *Hume*, 10.

(9) Mr. Hargrave, in a note to Co. Litt. 133, says, that no such statute can be found. Lord Coke there refers to it by 8 Hen. VI. No. 7, in 2 Inst. 18; by 6 Hen. VI. No. 41. In Riley's Plac. Parl. it is called 2 Hen. VI.

(10) This statute perhaps was not meant to be extended to the princess royal when she had younger brothers living, for the issue of their wives must inherit the crown before the issue of the princess royal, yet their chastity is not protected by the statute.

prince of Wales (11) and earl of Chester (12) by special creation, and investiture (13); but, being the king's eldest son (14), he is by inheritance duke of Cornwall, without any new creation (*d*) (15).

(*d*) 8 Rep. 1. Seld. Tit. of Hon. 2, 5.

(11) This creation has not been confined to the heir-apparent, for both queen Mary and queen Elizabeth were created by their father Henry VIII. princesses of Wales, each of them at the time (the latter after the illegitimation of Mary) being heir presumptive to the crown. 4 *Hume*, 113.

Edward II. was the first prince of Wales. When his father had subdued the kingdom of Wales, he promised the people of that country, upon condition of their submission, to give them a prince who had been born among them, and who could speak no other language.

Upon their acquiescence with this deceitful offer, he conferred the principality of Wales upon his second son Edward, then an infant. Edward, by the death of his eldest brother Alfonso, became heir to the crown, and from that time, this honor has been appropriated only to the eldest sons or eldest daughters of the kings of England. 2 *Hume*, 243.

(12) The earldom of Chester was once also a principality, erected into that title by parliament in 21 Rich. II., wherein it was also ordained that it should be given to the king's eldest son. But that whole parliament was repealed in the first of Hen. IV., although the earldom hath usually been since given with the principality of Wales. *Seld. Tit. of Hon.* 2, 5, § 1.

(13) That is, by letters patent under the great seal of England.

(14) Lord Coke, in the Prince's case, in the 8th Report, has expressly advanced, that the duchy of Cornwall cannot descend, upon the death of the king's first-born son, to the eldest then living. But this position is beyond all controversy erroneous. Lord Hardwicke, in Lomax *v.* Holmden, 1 Ves. 294. has observed, "That the eldest son of the king of England takes the duchy of Cornwall as *primogenitus*; although lord Coke at the end of the Prince's case says otherwise. But this was not the point there, being only an observation of his own, and has ever since been held a mistake of that great man. He was also mistaken in the fact, in saying that Henry VIII, was not duke of Cornwall, because not *primogenitus*; for lord Bacon in his history of Henry VII. affirms the contrary, that the dukedom devolved to him upon the death of Arthur; and this is by a great lawyer, and who must have looked into it, as he was then attorney or solicitor general." But this point was solemnly determined in 1613, upon the death of prince Henry the eldest son of James I. in the case of the duchy of Cornwall, the report of which is inserted at length in Collins's Proceedings on Baronies, p. 148. In which it was resolved that prince Charles, the king's second son, was duke of Cornwall by inheritance.

It is more strange that lord Coke should have fallen into this mistake, as the contrary appears from almost every record upon the subject.

In the 5th Henry IV. the second reign after the creation of the duchy, there is a record, in which prince Henry makes a grant of part of the duchy lands to the countess of Huntingdon, and the record states, that because the prince is within age, so that in law his grant is not effectual to give a sure estate, he shall pledge his faith before the king and all the lords of parliament, that when he attains his full age, he shall grant a sure estate against himself and his heirs; and that his three brothers, Thomas, John, and Humphrey, shall in like manner pledge their faith to confirm the same estate, *si issint aveigne, que Dieux defende, que le dit Duche unques devient en lours mains*, if it should so happen, which God forbid, that the said duchy should ever come into their hands, and thereupon they all made a promise and took an oath to that effect. Rot. Parl. 5 Hen. IV. No. 4.

But the second son would not succeed to the dukedom, if his elder brother left issue; in that case it would revert to the crown. The duke of Cornwall must be both the king's eldest son and heir apparent to the crown; this appears from a great variety of records, *que les fitz eisnes des rois d'Engleterre, c'est assavoir, ceux qui serroient heirs prosheins des roialme d'Engleterre, fuissent duez de Cornewaile.* Rot. Parl. 9 Hen. V. No. 20.

In a charter of livery of the duchy by Ed. IV. to his eldest son prince Edward, recited in the rolls of parliament, the following sentence is part of the preamble: *Filii primogeniti regum Angliæ primo nativitatis suæ die majoris atque perfectæ præsumuntur ætatis, sic quod liberationem dicti ducatûs eo tunc à nobis petere valeant atque de jure obtinere debeant ac si viginti et unius annorum ætatis plenæ fuissent.* Rot. Parl. 12 Ed. IV. No. 14. From this and from other authorities it follows, that a Duke of Cornwall is born of full age, or is subject to no minority with respect to his enjoyment of the possessions annexed to the dukedom.

This is a strange species of inheritance, and perhaps is the only mode of descent which depends upon the authority of a statute. In the Prince's case, reported by lord Coke, the question was, whether the original grant to Edward the Black Prince, who was created in the 11th of Ed. III. duke of Cornwall, and who was the first duke in England after the duke of Normandy, had the authority of parliament, or was an honour conferred by the king's charter alone? If the latter, the limitation would have been void, as nothing less than the power of parliament can alter the established rules of descent. But notwithstanding it is in the form of a charter, it was held to be an act of the legislature. It concludes, *per ipsum regem et totum concilium in parliamento.*

(15) The king's eldest living son and heir-

The rest of the royal family may be considered in two different lights, according to the different senses in which the term *royal family* is used. The larger sense includes all those who are by any possibility inheritable to the crown. Such, before the revolution, were all the descendants of William the Conqueror, who had branched into an amazing extent, by intermarriages with the ancient nobility. Since the revolution and act of settlement, it means the protestant issue of the Princess Sophia; now comparatively few in number, but which, in process of time, may possibly be as largely diffused. The more confined sense includes only those, who are within a certain degree of propinquity to the reigning prince, and to whom, therefore, the law pays an extraordinary regard and respect; but, after that degree is past, they fall into the rank of ordinary subjects, and are seldom considered any farther, unless called to the succession upon failure of the nearer lines. For, though collateral consanguinity is regarded indefinitely, with respect to inheritance or succession, yet it is and can only be regarded within some certain limits, in any other respect, by the natural constitution of things and the dictates of positive law (*e*).

The younger sons and daughters of the king, and other branches of the royal family, who are not in the immediate line of succession, were therefore little farther regarded by the ancient law, than to give them to a certain degree precedence before all peers and public officers, as well ecclesiastical as temporal. This is done by the statute 31 Hen. VIII. [*225] 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 (*f*) explains to signify grandson or *nepos*), or brother's or sister's son. Therefore, after these degrees are past, peers or others of the *blood royal* are entitled to no place or precedence except what belongs to them by their personal rank or dignity: which made Sir Edward Walker complain (*g*), that by the hasty creation of Prince Rupert to be duke of Cumberland, and of the Earl of Lenox to be duke of that name, previous to the creation of King Charles's second son, James, to be duke of York, it might happen that their grandsons would have precedence of the grandsons of the duke of York.

Indeed under the description of the king's *children* his *grandsons* are held to be included, without having recourse to Sir Edward Coke's interpretation of *nephew*; and therefore when his late majesty King George II. created his grandson Edward, the second son of Frederick prince of Wales

(*e*) See *Essay on Collateral Consanguinity*, in Law Tracts, 4to. *Oxon.* 1771.

(*f*) 4 Inst. 362.

(*g*) Tracts, p. 301.

apparent takes, under the grant ann. 11 E. III. the dukedom of Cornwall, and retains it during the king his father's life: on the accession of such duke to the crown, the duchy vests in the king's eldest son living, and heir-apparent. But, if there be no eldest son and heir-apparent, the dukedom remains with the king, the heir-presumptive in no case being entitled to the dukedom. See 1 Ves. 294. Collin's Bar. 148. The rule may be shortly stated: until a prince be born, the king is seized; but when born, the prince becomes seized in fee of the possessions; and, except as to presentations to benefices, leases generally made by the king are voidable by *scire facias*, sued at the instance of the prince. See Com. Dig. Tit. Roy. G. 5. Id. 280, 281. Ca. Ch. 215. But, as to what leases or grants made by the king shall be good, see stat. 33 G. II. c. 10. If the eldest son die, and leave a son, such son would not take; but the duchy reverts to the crown. And there is no minority with reference to the possessions of a duke of Cornwall.

deceased, duke of York, and referred it to the house of lords to settle his place and precedence, they certified (*h*) that he ought to have place next to the late duke of Cumberland, the then king's youngest son; and that he might have a seat on the left hand of the cloth of estate. But when, on the accession of his present majesty, those royal personages ceased to take place as the *children*, and ranked only as the *brother* and *uncle*, of the king; they also left their seats on the side of the cloth of estate: so that when the duke of Gloucester, his majesty's second brother, took his seat in the house of peers (*i*), he was placed on the upper end of the earl's bench (on which the dukes usually sit) next to his royal highness the duke of York. 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 did belong of right to his majesty, as king of this realm, even during their father's life (*k*) (16). But they all agreed, that the care and approbation of their marriages, when grown up, belonged to the king their grandfather. And the judges have more recently concurred in opinion (*l*), that this care and approbation extend also to the presumptive heir of the crown; though to what other branches of the royal family the same did extend, they did not find precisely determined. The most frequent instances of the crown's interposition go no *farther than ne- [*226] phews and nieces (*m*); but examples are not wanting of its reaching to more distant collaterals (*n*). And the statute 6 Henry VI. before mentioned, which prohibits the marriage of a queen dowager without the consent of the king, assigns this reason for it (17): "because the disparagement of the queen shall give greater comfort and example to other ladies of estate, who are of the *blood-royal*, more lightly to disparage themselves(*o*)." Therefore by the statute 28 Hen. VIII. c. 18, (repealed, among other statutes of treasons, by 1 Edw. VI. c. 12,) it was made high treason for any man to contract marriage with the king's children or reputed children, his sisters or aunts *ex parte paterna*, or the children of his brethren or sisters; being exactly the same degrees to which precedence is allowed by the statute 31 Hen. VIII. before mentioned. And now, by statute 12 Geo. III. c. 11, no descendant of the body of King George II. (other than the issue of princesses married into foreign families) is capable of contracting matrimony, without the previous consent of the king signified under the great seal; and any marriage contracted without such consent is void. Provided, that such of the said descendants as are above the age

(*h*) Lords' Journ. 24 Apr. 1760.
(*i*) Lords' Journ. 10 Jan. 1765.
(*k*) Fortesc. Al. 401—440.
(*l*) Lords' Journ. 28 Feb. 1772.
(*m*) See (besides the instances cited in Fortescue Aland) for *brothers* and *sisters*; under King Edward III. 4 Rym. 392, 403, 411, 501, 508, 512, 549, 683:—under Henry V. 9 Rym. 710, 711, 741:—under Edward IV. 11 Rym. 564, 565, 590, 601:—under Henry VIII. 13 Rym. 249, 423:—under Edward VI. 7 St. Tr. 3, 8. For *nephews and nieces*; under Henry III. 1 Rym. 852:—under Edward I. 2 Rym. 489:—under Edward III. 5 Rym. 561:—under Richard II. 7 Rym. 264:—under Richard III. 12 Rym. 232, 244:—under Henry VIII. 15 Rym. 26, 31.
(*n*) To *great nieces*; under Edward II. 3 Rym. 575, 614. To *first cousins*; under Edward III. 5 Rym. 177. To *second* and *third cousins*; under Edward III. 5 Rym. 729:—under Richard II. 7 Rym. 225:—under Henry VI. 10 Rym. 322:—under Henry VII. 12 Rym. 329:—under Queen Elizabeth, Camd. Ann. A. D. 1562. To *fourth cousins*; under Henry VII. 12 Rym. 329. To the *blood-royal* in general; under Richard II. 7 Rym. 707.
(*o*) Ril. Plac. Parl. 672.

(16) The authorities and arguments of the two dissenting judges, Price and Eyre, are so full and cogent, that if this question had arisen before the judges were independent of the crown, one would have been inclined to have suspected the sincerity of the other ten, and the authority of the decision. See *Harg. St. Tr.* 11 vol. 295.

(17) The occasion of this statute was the marriage of Catharine, mother to Henry VI. with Owen Tudor, a private gentleman. See p. 223.

of twenty-five may, after a twelvemonth's notice given to the king's privy council, contract and solemnize marriage without the consent of the crown; unless both houses of parliament shall, before the expiration of the said year, expressly declare their disapprobation of such intended marriage. And all persons solemnizing, assisting, or being present at, any such prohibited marriage, shall incur the penalties of the statute of *præmunire*.

CHAPTER V.

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 probably 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*: on which account the law gives them certain great and high privileges; such as freedom from arrests, &c. even when no parliament is sitting: because it 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.

[*228] *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 Saint 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 practised in some hun-

(*a*) Co. Litt. 110.
(*b*) L. 1, c. 8.
(*c*) 7 Rep. 34, 9 Rep. 49, 12 Rep. 96.
(*d*) 1 Inst. 110.
(*e*) Hist. b. 2.

dreds 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.

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 [*229] 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*)."

3. A third council belonging to 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 Edw. 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 stat. 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 the 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*) (1).

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, honourable, 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 limit- [*230] ed 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 con-

(*f*) 4 Inst. 58.
(*g*) 1 Inst. 110.
(*h*) 3 Inst. 155.
(*i*) 4 Inst. 53.
(*k*) Temple's Mem. Part 3.

(1) A well founded doubt has been cast upon this interpretation of the word by Mr. Coleridge, who appears to apprehend it to mean a court of very extensive jurisdiction, and out of which subsequently grew the court of chancery and star chamber.

tinues indefinite (2). At the same time, also, the ancient office of lord president of the council was revived in the person of Anthony earl of Shaftsbury (3); an officer that, by the statute of 31 Hen. VIII. c. 10, has precedence next after the lord chancellor and lord treasurer.

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.

As to *qualifications* of members to sit at 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 (*l*), 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 *duty* of a privy counsellor appears from the oath of office (*m*), 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 [*231] *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.

The *power* of the privy council is to inquire into all offences against the government, and to commit the offenders to safe custody, in order to take their trial in some of the courts of law. But their jurisdiction herein is only to inquire, and not to punish; and the persons committed by them are intitled 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

(*l*) Stat. 12 and 13 Will. III. c. 2. (*m*) 4 Inst. 54.

(2) No inconvenience arises from the extension of their numbers, as those only attend who are specially summoned for that particular occasion upon which their advice and assistance are required. The cabinet council, as it is called, consists of those ministers of state who are more immediately honoured with his majesty's confidence, and who are summoned to consult upon the important and arduous discharge of the executive authority; their number and selection depend only upon the king's pleasure, and each member of that council receives a summons or message for every attendance.*

(3) It appears from the 4 Inst. 55, that this office existed in the time of James I.; for Lord Coke says, there is, and of ancient time hath been, a president of the council. This office was never granted but by letters patent under the great seal *durante beneplacito*, and is very ancient; for John, bishop of Norwich, was president of the council in *anno* 7 *regis Johannis. Dormivit tamen hoc officium regnante magnâ Elizabethâ.*"

* The nomination of particular persons to hold offices of state is virtually to constitute them members of the cabinet or cabinet ministers, that is to say, the administration. Thus by "The Cabinet," or "Administration," is generally understood the lord president of the council, the lord high chancellor, the lord privy seal, the first lord of the treasury, the chancellor and under treasurer of the exchequer, the first lord of the admiralty, the master general of the ordnance, the secretaries of state for the home department, colonies, and foreign affairs, the president of the board of controul for the affairs of India, the chancellor of the duchy of Lancaster, and the president of the board of trade. But even of these great officers the attendance of all of them is not, I believe, always required, but only *secundum subjectam materiam* to be agitated.

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 (4), which arise out of the jurisdiction of this kingdom; and in matters of lunacy or idiocy (*n*), 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 cases, or rather the appeal lies to the king's majesty himself in council (5). Whenever also a question arises between two provinces in America or elsewhere, as concerning the extent of their charters and the like, the king in his council exercises *original* jurisdiction therein, upon the principles of feodal sovereignty. And so likewise when any person claims an island or a province, in the nature of a feodal principality, by grant from the king or his ancestors, the determination of that right belongs to his majesty in council: as was the case of the earl of Derby with regard to the Isle of Man in the reign of Queen Elizabeth; and the earl of Cardigan and others, as representatives of the duke of Montague, with relation to the Island of St. Vincent in 1764. But from all the dominions of the crown, excepting Great Britain and Ireland, an *appellate* jurisdiction *(in the last resort) is vested in the same tribunal; which [*232] usually exercises its judicial authority in a committee of the whole privy council, who hear the allegations and proofs, and make their report to his majesty in council, by whom the judgment is finally given (6).

The *privileges* of privy counsellors, as such, (abstracted from their honorary precedence (*o*),) 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. The reason of making this statute, Sir Edward Coke (*p*) tells us, was because 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 person* 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 a felon without benefit of clergy. 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.

(*n*) 3 P. Wms. 108.
(*o*) See page 405.
(*p*) 3 Inst. 38.

(4) No longer in Admiralty causes, these being left to the Admiralty courts. See Attorney-General v. Norstedt, 3 Price, 110.

(5) This is, in fact, a court of justice, which must consist of at least three privy counsellors.

(6) The court of privy council cannot decree *in personam* in England, unless in certain criminal matters; and the court of chancery cannot decree *in rem* out of the kingdom. See Lord Hardwicke's Arg. in Penn *v.* Baltimore, 1 Ves. 444, where the jurisdiction of the council and chancery, upon questions arising upon subject matter abroad, is largely discussed. The master of the rolls and the judge of the admiralty court are usually members of this committee.

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 VI.

OF THE KING'S 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 (*a*). 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 hath 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 (*b*). And this is not only consonant to [*234] 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 (*c*), 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 (*d*), the king also hath a superior, namely God, and also the law, by which he was made a king (1)." Thus Bracton: and Fortescue also (*e*), having first well distinguished between a monarchy absolutely and despotically regal, which is in-

(*a*) 7 Rep. 6.
(*b*) Tac. *de Mor. Germ.* c. 7.
(*c*) *L.* 1, *c.* 8.
(*d*) *L.* 2, *c.* 16, § 3.
(*e*) *C.* 9, *f.* 34.

(1) This is also well and strongly expressed in the year-books: *La ley est le plus haute inhéritance que le roy ad; car par la ley il même et toute ses sujets sont rulés, et si le ley ne fuit, nul roi, et nul inheritance sera.*—19 Hen. VI. 63. In English: The law is the highest inheritance which the king has; for by the law he himself and all his subjects are governed, and if there were no law, there would be neither king nor inheritance.

troduced 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 and 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 ratified and confirmed accordingly."

And, as to the terms of the original contract between king and people, these I apprehend to be now couched in the *coronation [*235] oath, which by the statute 1 W. and 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* (2).

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 [*236] and expressions, with relation to ancient laws and constitutions at this time unknown (*h*). However, in what form soever it be conceived,

(*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

(2) And it is required both by the Bill of Rights, 1 W. and M. st. 2. c. 2, and the Act of Settlement, 12 and 13 W. III. c. 2, that every king and queen of the age of twelve years, either at their coronation, or on the first day of the first parliament upon the throne in the house of peers, (which shall first happen,) shall repeat and subscribe the declaration against popery according to the 30 Car. II. st. 2, c. 1.

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. And, with respect to the latter of these three branches, we may further remark, that by the Act of union, 5 Ann. c. 8, two preceding statutes are recited and confirmed; the one of the parliament of Scotland, the other of the parliament of England: which enact; the former, that every king at his accession shall take and subscribe an oath, to preserve the protestant religion and presbyterian church government in Scotland; the latter, that at his coronation he shall take and subscribe a similar oath to preserve the settlement of the church of England within England, Ireland, Wales, and Berwick, and the territories thereunto belonging.

CHAPTER VII.

OF THE KING'S 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* (1).

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 eglise grauntez auncienment dez droitez roys Christiens d Engletere, et quil gardera toutez sez terrez honoures et dignitees droiturelx et franks del coron du roialme d Engletere en tout maner dentierte 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 eglise et al clergie et al people de bon accorde, et quil face faire en toutez sez jugementez owel et droit justice ous discrecion et misericorde, et quil grauntera a tenure lez leyes et custumez du roialme, et a soun poiair lez face garder et affirmer que lez gentez du people avont faitez et eslies, et les malveys leyz et custumes de tout oustera, et farme peas et establie al people de soun roialme en ceo garde esgardera a soun poiair: come Diru luy aide. (Tit. sacramentum regis. fol. m. ij.)* Prynne has also given us a copy of the coronation oaths of Richard II. (Signal Loyalty, ii. 246:) Edward VI. (*ibid.* 251:) James I. and Charles I. (*ibid.* 269.)

(*a*) Chap. 1, page 141.

(1) The splendour, rights, and powers of the crown, were attached to it for the benefit of the people, and not for the private gratification of the sovereign. They are therefore to

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 [*238] 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 inspection of a rational and sober inquiry. 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 favourite 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

(*b*) Dewes, 479. (*c*) *Ibid.* 645.

be guarded on account of the public: they are not to be extended farther than the laws and constitution of the country have allowed them; but within these bounds they are entitled to every protection, per lord Kenyon. Rooke v. Daysell. 4 Term Rep. 410. and 3 Atk. 171.

The theory of our government is sketched with admirable spirit and correctness by the attorney-general, in his address to the jury upon Hardy's trial: "The power of the state, by which I mean the power of making laws and enforcing the execution of them when made, is vested in the king: *enacting* laws, in the one case, that is in his *legislative* character, by and with the advice and consent of the lords spiritual and temporal and of the commons in parliament assembled, according to the law and constitutional custom of England; in the other case, *executing* the laws when made in subservience to the laws so made, and with the advice which the law and the constitution hath assigned to him in almost every instance in which it hath called upon him to act for the benefit of the subject." Hardy's Trial, by Gurney, page 32. Again, in a subsequent passage, after having stated the *royal duties*, he goes on thus: "To that king upon whom these duties attach, the laws and constitution, for the better execution of them, have assigned various counsellors and responsible advisers; it has clothed him under various constitutional checks and restrictions with various attributes and *prerogatives*, as necessary for the support and maintenance of the civil liberties of the people; it ascribes to him *sovereignty*, *imperial dignity*, and *perfection*; and because the rule and government, as established in this kingdom, cannot exist for *a moment* without a person filling that office, and able to execute all the duties from time to time which I have now stated, it ascribes to him also that he never ceases to exist. In *foreign* affairs, the delegate and representative of his people, he makes war and peace, leagues and treaties: in *domestic* concerns, he has prerogatives; as a constituent part of the supreme legislature, the prerogative of raising fleets and armies; he is the fountain of justice, bound to administer it to his people, because it is due to them; the great conservator of public peace, bound to maintain and vindicate it; every where present, that these duties may no where fail of being discharged; the fountain of honour, office, and privilege; the arbiter of domestic commerce; the head of the national church." Id. 35. And in the conclusion of this brilliant sketch, he closes the whole with these emphatical words: "Gentlemen, I hope I shall not be thought to mispend your time in stating thus much, because it appears to me that the fact that such is the character, that such are the duties, that such are the attributes and prerogatives of the king in this country (all existing for the protection, security, and happiness of the people in an established form of government), accounts for the just anxiety, bordering upon jealousy, with which the law watches over his person—accounts for the fact, that in every indictment, the compassing or imagining his destruction or deposition, seems to be considered as necessarily co-existing with an intention to subvert the rule and government established in the country; it is a purpose to destroy and depose him, in whom the supreme power, rule, and government, under constitutional checks and limitations, is vested, and by whom, with consent and advice in some cases, and with advice in all cases, the exercise of this constitutional power is to be carried on." Id. 36.

In modern times, in practice, the exercise of many branches of the king's prerogative are from time to time delegated by statute to the privy council, as the granting licences, &c. and acts are passed regulating foreign and domestic concerns, weights, measures, &c.

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*)."

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 [*239] wrong (*e*)." *Nihil enim 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 subjecit* (*g*)." 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* (*h*)." This is at once laying down the principle of despotic power, and at the same time acknowledging its absurdity.

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 *præ* 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.

Prerogatives are either *direct* or *incidental*. The *direct* are such [*240] 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 embassadors, of creating peers, and of

(*d*) King James's Works, 537, 531.
(*e*) Finch, L. 84, 85.
(*f*) Bracton, *l.* 3. *tr.* 1, *c.* 9.
(*g*) *Nov.* 105, § 2.
(*h*) *Ff.* 32, 1, 28.
(*i*) Finch, L. 85.

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 expences of government; without all of which it is impossible to maintain the executive power in due independence and vigour. 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 governments it is,) spreads havoc and destruction among all the inferior movements: but, when balanced and regulated (as with us) by its proper counterpoise, timely and judiciously applied, its operations are then equable and certain, 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 [*241] *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 præ-eminentiam spectant; minora vero ad commodum pecuniarum immediate attinent; et hæc proprie fiscalia sunt, et ad jus fisci pertinent* (*k*)."

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

(*k*) *Peregrin, de jure fisc. l.* 1, *c.* 1. *num.* 9.

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* [*242] *Dei in terra: omnis quidem sub eo est, et ipse* *sub nullo, nisi tantum *sub Deo* (2)." 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 (*n*); 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 and crown 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 (*o*); 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 (*p*), 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 [*243] *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.

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 in-

(*l*) *L.* 1, c. 8.
(*m*) Seld. Tit. of Hon. I. 2.
(*n*) See also 24 Geo. II. c. 24. 5 Geo. III. c. 27.
(*o*) *Rex allegavit, quod ipse omnes libertates haberet in regno suo, quas imperator vindicabat in imperio.* (M. Paris, A. D. 1093.)
(*p*) Finch, L. 83.

(2) What Bracton adds in the same chapter ought never to be forgotten: *Ipse autem rex non debet esse sub homine, sed sub Deo et sub lege, quia lex facit regem. Attribuat igitur rex legi, quod lex attribuit ei, videlicet dominationem et potestatem, non est enim rex, ubi dominatur voluntas et non lex.*

Nothing was ever better conceived and expressed respecting the prerogatives of a king, and the just exercise of them, than the advice bequeathed in his last will by the unfortunate Louis XVI. to his son, if he had succeeded to the throne of France; viz. "to recollect, that he cannot promote the welfare of the people, but by reigning according to the laws; but to consider, at the same time, that a king cannot make the laws respected, nor do the good he meditates, but in proportion as he has the necessary authority; and that where this is wanting, he is obstructed in his measures, he is incapable of inspiring respect, and is, consequently, more detrimental than useful."

juries, 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 (*q*) (3). And this is entirely consonant to what is laid down by the writers on natural law. "A subject," says Puffendorf (*r*), "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 (*s*), "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."

*Next, as to cases of ordinary public oppression, where the [*244] 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 (*t*). For, wherever the law expresses its distrust of abuse of power, it

(*q*) Finch, L. 255. See b. III. c. 17.
(*r*) Law of N. and N. b. 8, c. 10.
(*s*) On Gov. p. 2, § 205.
(*t*) See these points more fully discussed in the *Considerations of the Law of Forfeiture*, 3d edit. page 109—126, wherein the very learned author has thrown many new and important lights on the texture of our happy constitution.

(3) The same rule extends to an agent of the crown, whether contracting by deed or parol; he cannot be sued, but the creditor must proceed by petition. Macbeath v. Haldimand, 1 Term. R. 172. Unwin v. Wolseley, id. 674.

"A consul is not personally liable on a contract made in his official capacity on account of his government. 3 Dall. 364. A public agent contracting for the use of government, in the line of his duty and by legal authority, is not personally responsible though the contract is under his seal. 1 Cranch. 345. But he may, perhaps, be liable if the credit be given to him. 15 Johns. R. 1. See 3 Caine's R. 69. 12 Johns. R. 444, 385. 13 Johns. 313. 17 Johns. 46."

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 incapa-
[*245] ble 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 the precedent leads, and no further, 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.

[*246] *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 (*u*) (4).

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 intrusts 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 (5).

*Yet still, notwithstanding this personal perfection, which the [*247] 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 consigned 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 (*v*) 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 (*w*), for saying that a part of the king's speech "seemed rather to be calculated for the meridian of Germany than Great Britain, and that the king was a stranger to our language and constitution" (6).

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

(*u*) Plowd. 487.
(*v*) Com. Journ. 13 Nov. 1685.
(*w*) Ibid. 4 Dec. 1717.

(4) Or perhaps it means that, although the king is subject to the passions and infirmities of other men, the constitution has prescribed no mode by which he can be made personally amenable for any wrong which he may actually commit. The law will therefore presume no wrong where it has provided no remedy.

The inviolability of the king is essentially necessary to the free exercise of those high prerogatives, which are vested in him, not for his own private splendour and gratification, as the vulgar and ignorant are too apt to imagine, but for the security and preservation of the real happiness and liberty of his subjects.

(5) Could an act of a state legislature be declared void by a court, if procured by corruption? See 6 Cranch 130. The question will not be examined incidentally in a suit between two private individuals. The state legislature cannot of itself declare it void, so as to devest a right conferred by it on others. *Ib.*

(6) That out of parliament the matter of the king's speech may be temperately discussed, is not, practically at least, now denied.

right. *Nullum tempus occurrit regi* has been the standing maxim upon all occasions (7); 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 (*y*). In the king also can be no stain or [*248] 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* (*z*). 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 (*a*). 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 (*b*).

(*y*) Finch. L. 82; Co. Litt. 90.
(*z*) Finch, L. 82.
(*a*) Co. Litt. 43. 2 Inst. proëm. 3.
(*b*) The methods of appointing this guardian or regent have been so various, and the duration of his power so uncertain, that from hence 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 Hen. 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 pupilage 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 Gloucester, 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 government of his or her natural mother, (if approved by the king,) and such other counsel-

(7) This rule is now subject to various exceptions, both at common law and by statute. See Thomas's Co. Lit. 1 vol. 74, note 16. After fifty-five years' possession a grant from the crown may be presumed, unless a statute has prohibited such a grant. Goodtitle v. Baldwin. East. 488.

In civil actions relating to landed property, by the 9 Geo. III. c. 16. the king like a subject is limited to sixty years. See 3 Book, 307.* This maxim applies also to criminal prosecutions, which are brought in the name of the king, and therefore by the common law there is no limitation in treasons, felonies, or misdemesnors. 3 Campb. 227. 7 East, 199. By the 7 W. III. c. 7. an indictment for treason, except for an attempt to assassinate the king, must be found within three years after the commission of the treasonable act. 4 Book, 351. But where the legislature has fixed no limit, *nullum tempus occurrit regi* holds true: thus a man may be convicted of murder at any distance of time within his life after the commission of the crime. This maxim remains still in force in Ireland. 1 Ld. Mountm. 365.

* The occasion of this statute related to Inglewood Forest, to which the crown in 1779 set up against the duke of Portland, the then proprietor, a title long unasserted. Much discussion took place at the time, and opinion, both in and out of parliament, was against the application of the maxim. I need not add that the proceeding against the duke originated in party feeling.

*III. A third attribute of the king's majesty is his *perpetuity*. The [*249] 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; demissio regis, vel coronae:* an expression which signifies merely a transfer of property; for, as is observed in Plowden (*c*), when we say the demise of the crown, we mean only that, in consequence of the disunion of the king's natural body 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 (*d*).

*We are next to consider those branches of the royal preroga- [*250] tive, which invest thus 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 concentrated in the new emperor: so that, as Gravina (*e*) expresses it, "*in ejus unius persona veteris reipublicae vis atque majestas per cumulatas magistratuum potestates exprimebatur.*"

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

lors as his majesty should by will or otherwise appoint; and he accordingly appointed his sixteen executors to have the government of his son Edw. 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, appointed 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."

(*c*) Plowd. 177, 234.

(*d*) M. 49 Hen. VI. pl. 1-8.

(*e*) Orig. 1, § 103.

* A late occasion demanded a regency. Mental aberration incapacitated his late majesty from fulfilling the executive functions. On the part of his present majesty, then prince of Wales, the right to assume the regency, independently of the authority of the two houses, was vehemently urged and insisted upon by the whigs; they were met by the tories, who asserted the right of the two houses to interfere; and, most justly prevailing, the prince was about to become regent, invested with powers short of royal, but the king's then recovery ended the question at this time. A second more recent occasion unhappily presented itself, and, under limitations framed by the two houses, his present majesty became regent, and so continued until the demise of the crown.

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 [*251] I do not *now speak of those *extraordinary* resources 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 law-books, 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, 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 [*252] his advisers *to a just and severe account. For prerogative consisting (as Mr. Locke (*f*) 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.

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

(*f*) On Gov. 2, § 166.

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 centre, 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 engagement 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 (*g*), 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 [*253] 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 digression, by way of inquiry, 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 (*h*); who is bound either to do justice upon him, or avow himself the accomplice of his crimes (*i*). 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 prohibita*, as coining, and not to those that are *mala in se*, as murder (*k*). 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 [*254] and civilians (*l*), 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 (*m*); and that therefore, if

(*g*) 4 Inst. 152.
(*h*) As was done with Count Gyllenberg the Swedish minister to Great Britain, A. D. 1716.
(*i*) Sp. L. 26, 21.
(*k*) Van Leeuwen *in Fy.* 5^a, 7, 17. Barbeyrac's Puff. l. 8, c. 9, § 9, and 17. Van Bynkershoek *de foro legator*, c. 17, 18, 19.
(*l*) 1 Roll. Rep. 175. 3 Bulstr. 27.
(*m*) 4 Inst. 153.

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 (*n*). 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 (*o*). But, however these principles might formerly obtain, the general practice of this country, as well as of the rest of Europe, seems now to pursue the sentiments of the learned Grotius, that the security of ambassadors is of more importance than the punishment of a particular crime (*p*). 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 (8).

In respect to civil suits, all the foreign jurists agree that neither an ambassador, or 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 (*q*). But the truth is, so few cases (if any) had arisen, wherein the privilege was either claimed or disputed, even with regard to civil suits, that our law-books [*255] are (in general) quite silent upon it 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 (*r*), for a debt of fifty pounds which he had there contracted. Instead of ap-

(*n*) 1 Roll. Rep. 185.
(*o*) Forster's Reports, 183.
(*p*) *Securitas legatorum utilitati quae ex poena est praeponderat.* (*De jure b. & p.* lib. 4, c. 4.)
(*q*) 4 Inst. 153.
(*r*) 21 July, 1708. Boyer's Annals of Queen Anne.

(8) In the year 1654, during the protectorate of Cromwell, Don Pataleon Sa, the brother of the Portuguese ambassador, who had been joined with him in the same commission, was tried, convicted, and executed, for an atrocious murder. Lord Hale, 1 P. C. 99, approves of the proceeding; and Mr. J. Foster, p. 188, though a modern writer of law, lays it down, that "for murder and other offences of great enormity, which are against the light of nature and the fundamental laws of all society, ambassadors are certainly liable to answer in the ordinary course of justice, as other persons offending in the like manner are;" but Mr. Hume observes upon this case, that "the laws of nations were here plainly violated," 7 vol. 237. And Vattel, with irresistible ability, contends that the universal inviolability of an ambassador is an object of much greater importance to the world than their punishment for crimes, however contrary to natural justice. "A minister," says that profound writer, "is often charged with a commission disagreeable to the prince to whom he is sent. If this prince has any power over him, and especially if his authority be sovereign, how is it to be expected that the minister can execute his master's orders with a proper freedom of mind, fidelity, and firmness? It is necessary he should have no snares to fear, that he cannot be diverted from his functions by any chicanery. He must have nothing to hope, and nothing to fear, from the sovereign to whom he is sent. Therefore, in order to the success of his ministry, he must be independent of the sovereign's authority, and of the jurisdiction of the country both civil and criminal:" B. 4, c. 7, § 92, where this subject is discussed in a most luminous manner. The Romans, in the infancy of their state, acknowledged the expediency of the independence of ambassadors; for when they had received ambassadors from the Tarquin princes, whom they had dethroned, and had afterwards detected those ambassadors in secretly committing acts which might have been considered as treason against their state, they sent them back unpunished; upon which Livy observes, *et quanquam visi sunt commisisse, ut hostium loco essent, jus tamen gentium valuit.* Lib. 2, c. 4. When Bomilcar, *qui Romam fide publicâ venerat*, was prosecuted as an accomplice in the assassination of Massiva, Sallust declares, *fit reus magis ex æquo bonoque quam ex jure gentium.* Bell. Jug. c. 35.

plying to be discharged upon his privilege, he gave bail to the action, and the next day complained to the queen. The persons who were concerned in the arrest were examined before the privy council (of which the Lord Chief Justice Holt was at the same time sworn a member (*s*),) and seventeen were committed to prison (*t*); most of whom were prosecuted by information in the court of queen's bench, at the suit of the attorney general (*u*), and at their trial before the lord chief justice were convicted of the facts by the jury (*v*), reserving the question of law, how far those facts were criminal, to be afterwards argued before the judges; which question was never determined (9). In the mean time the czar resented this affront very highly, and demanded that the sheriff of Middlesex and all others concerned in the arrest should be punished with instant death (*w*). But the queen (to the amazement of that despotic court) directed her secretary to inform him, "that she could inflict no punishment upon any, the meanest, of her subjects, unless warranted by the law of the land; and therefore was persuaded that he would not insist upon impossibilities (*x*)." 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 bill was brought into parliament (*y*), and afterwards passed into a law (*z*), to prevent and punish such outrageous insolence for the future. And with a copy of this act, elegantly engrossed and illuminated, accompanied by a letter from the queen, an ambassador extraordinary (*a*) was commissioned to appear at Moscow (*b*), who declared "that though her majesty could not inflict such a punishment as was required, *because of the defect [*256] in that particular of the former established constitutions of her kingdom, yet, with the unanimous consent of the parliament, she had caused a new act to be passed, to serve as a law for the future." This humiliating step was accepted as a full satisfaction by the czar; and the offenders, at his request, were discharged from all farther prosecution. (10)

This statute (*c*) recites 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 distrained or seised, shall be utterly null and void; and the persons prosecuting, soliciting, or

(*s*) 25 July, 1708. Boyer's Annals of Queen Anne.
(*t*) 25, 29 July, 1708. *Ibid.*
(*u*) 23 Oct. 1708. *Ibid.*
(*v*) 14 Feb. 1708. *Ibid.*
(*w*) 17 Sept. 1708. *Ibid.*
(*x*) 11 Jan. 1709. *Ibid.* Mod. Un. Hist. xxxv. 454.
(*y*) Com. Journ. 23 Dec. 1708.
(*z*) 21 Apr. 1709. Boyer, *ibid.*
(*a*) Mr. Whitworth.
(*b*) 8 Jan. 1709. Boyer, *ibid.*
(*c*) 7 Ann. c. 12.

(9) In 3 Burr. 1480, Lord Mansfield declares, that "the statute of Queen Anne was not occasioned by any doubt whether the law of nations, particularly the part relative to public ministers, was not part of the law of England, and the infraction criminal, nor intended to vary an iota of it." And he proceeds to say, that Lord Talbot, Lord Hardwicke, and Lord Holt, were clearly of the same opinion. But the infraction of the law of nations can only be a misdemeanor, punishable at the discretion of the court by fine, imprisonment, and pillory; and therefore Lord Mansfield says the persons convicted were never brought up to receive judgment, for "no punishment would have been thought by the czar an adequate reparation. Such a sentence as the court would have given, he would have thought a fresh insult."

(10) A secretary of legation is privileged against any civil or criminal prosecution. 1 Wash. C. C. R. 232. An assault on a foreign minister, committed in self-defence, is excusable; and an assault on such minister, if he is not known as such, is not a violation of the law of nations. 2 Id. 205.

executing such process, shall be deemed violaters of the law of nations, and disturbers of the public repose; and shall (11) 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 (12), 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 registered 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 (*d*), as observed in the most civilized countries (13). And, in consequence of this statute, thus declaring and enforcing the law of nations, these privileges are [*257] *now held to be part of the law of the land, and are constantly allowed in the courts of common law (*e*).

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 (*f*); 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

(d) Sæpe quæsitum est an comitum numero et jure habendi sunt, qui legatum comitantur, non ut instructior fiat legatio, sed unice ut hujus vel illius consulant, institores forte et mercatores. Et, quamvis hos sæpe 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, optime exemplo in quibusdam aulis olim receptum fuit, ut legatus teneretur exhibere nomenclaturam comitum suorum. Van Bynkersh. c. 15, *prope finem.*

(*e*) Fitzg. 200. Stra. 797.

(*f*) Puff. L. of N. b. 8, c. 9, § 6.

(11) They may be imprisoned not more than three years, and fined at the discretion of of the court. Story's laws U. S. 89.

(12) Citizens, or inhabitants of the U. S. who contract debts before entering into the service of a foreign minister, are not exempted from arrest for those debts by the laws of the U. S.; but there is no exception against other bankrupts or insolvents. *Ib.*

(13) And the exceptions are said to be agreeably to, and taken from, the law of nations. Lockwood v. Coysgarne, 3 Burr. 1676, cited in Mr. Christian's note.

A person claiming the benefit of the 7 Ann. c. 12. as domestic servant to a public minister, must be really and bona fide his servant at the time of the arrest, and must clearly shew by affidavit the general nature of his service, and the actual performance of it, and that he was not a trader or object of the bankrupt laws. (2 Stra. 797. 2 Ld. Raym. 1524. Fitzg. 200. S. C. 1 Wils. 20. 78. 1 Bla. Rep. 471. S. C. 3 Burr. 1676, 1731. 3 Wils. 33. and 3 Campb. 47.)

For by the law of nations, a public minister cannot protect a person who is not bona fide his servant. It is the law that gives the protection: and though the process of the law shall not take a bona fide servant out of the service of a public minister, yet on the other hand a public minister shall not take a person who is not bona fide his servant, out of the custody of the law, or screen him from the payment of his just debts, (4 Burr. 2016, 17.)

This privilege however has been long settled to extend to the servants of a public minister, being natives of the country where he resides, as well as to his foreign servants (3 Bur. 1676.), and not only to servants lying in his house; for many houses are not large enough to contain and lodge all the servants of some public ministers, but also to real and actual servants lying out of his house. (2 Str. 797. 3 Wils. 35. 1 Bar. and Cres. 5623.) Nor is it necessary to entitle them to the privilege that their names should have been registered in the secretary of state's office, and transmitted to the sheriff's office (4 Bur. 2017. 3 Term. Rep. 79.) though, unless they have been so registered and transmitted, the sheriff or his officers cannot be proceeded against for arresting them. (See the statute, § 5. 1 Wils. 20. and a modern order.) And it is not to be expected, that every particular act of service should be specified. It is enough if an actual bona fide service be proved, and if such a service be sufficiently made out by affidavit, the court will not upon bare suspicion, suppose it to have been merely colourable and collusive. (3 Bur. 1481.) Where the servant of an ambassador did not reside in his master's house, but rented and lived in another, part of which he let in lodgings, it was held that his goods in that house, not being necessary for the convenience of the ambassador, were liable to be distrained for poor rates. Novello v. Toogood, 1 Bar. and Cres. 554. This act does not extend to *consuls*, who are therefore liable to arrest. Viveart v. Becker, 3 Maule v. Sel. 284. See 1 Chitty's Com. L. 69, 70.

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 from criminal motives 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 (14). 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 (*g*): 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 volunteers in violence are not ranked among open enemies, but are treated like pirates and robbers: according to that rule of the civil law (*h*); *hostes hi sunt qui nobis, aut quibus nos, publice bellum decrevimus: cæteri latrones aut *prædones sunt.* And the reason which is given by [*258] Grotius (*i*), 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.

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 respects 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 declaration of war. These letters are grantable by

(*g*) Puff. b. 8, c. 6, § 8, and Barbeyr. *in loc.*
(*h*) *Ff.* 50, 16, 118.
(*i*) *De jure b. & p. l.* 3, c. 3, § 11.

(14) The President of the U. S. with the consent of two thirds of the senators present, makes treaties. (*Const. Art.* 2. *Sect.* 2. § 2.) But it requires an act of congress to declare war, or to grant letters of marque and reprisal. *Art.* 1. *Sect.* 8. § 10. Congress, in time of war, authorizes the President to issue such letters. Story's laws, 1260.

the law of nations (*k*), 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 used as synonymous; and signifying, the latter a taking in return, the former the passing the frontiers in order to such taking) (*l*), may be obtained, in order to seize the bodies or goods of the subjects of [*259] the offending state, until satisfaction *be made, wherever they happen to be found. And indeed this custom of reprisals seems dictated by nature herself; for which reason we find in the most ancient times very notable instances of it (*m*). 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. In pursuance of which principle, it is with us declared by the statute 4 Hen. V. c. 7, that, if any subjects of the realm are oppressed in the 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 seize the property of the aggressor nation, without hazard of being condemned as a robber or pirate (15).

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 (*n*), 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

(*k*) *Ibid. l.* 3, *c.* 2, § 4 & 5.
(*l*) Dufresne, tit. *Marca.*
(*m*) 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 Pylean 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.
(*n*) Law of N. and N. b. 3, c. 3, § 9.

(15) The statute of Hen. V. is confined to the time of a truce wherein there is no express mention that all marques and reprisals shall cease. This manner of granting letters of marque I conceive has long been disused, and according to the statute of Hen. V. could only be granted to persons actually grieved. —But if, during a war, a subject without any commission from the king should take an enemy's ship, the prize would not be the property of the captor, but would be one of the *droits* of admiralty, and would belong to the king, or his grantee the admiral. *Carth.* 399. 2 *Woodd.* 433. Therefore, to encourage merchants and others to fit out privateers or armed ships in time of war, by various acts of parliament, the lord high admiral, or the commissioners of the admiralty, are empowered to grant commissions to the owners of such ships; and the prizes captured shall be divided according to a contract entered into between the owners and the captain and crew of the privateer.—But the owners, before the commission is granted, shall give security to the admiralty to make compensation for any violation of treaties between those powers with whom the nation is at peace. And by the 24 Geo. III. c. 47, they shall also give security that such armed ship shall not be employed in smuggling. These commissions in the statutes, and upon all occasions, are now called letters of marque. 29 *Geo.* II. *c.* 34. 19 *Geo.* III. *c.* 67. *Molloy, c.* 3, *s.* 8. Or sometimes the lords of the admiralty have this authority by a proclamation from the king in council, as was the case in Dec. 1780, to empower them to grant letters of marque to seize the ships of the Dutch.

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 [*260] 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 merchandize from one place to another, without danger of being seized by our subjects, unless he has letters of safe-conduct; which by divers ancient statutes (*o*) 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. But passports under the king's sign-manual, or licences from his ambassadors abroad, are now more usually obtained, and are allowed to be of equal validity (16), (17).

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* (*p*) it is provided, that all merchants (unless publicly prohibited before-hand) 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 (*q*), 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 [*261] articles of their *national* liberty (*r*)." But indeed it well justifies another observation which he has made (*s*), "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 dishonourable employment, and prohibited the exercise thereof to persons of birth, or rank, or fortune (*t*): and equally different from the bigotry of the canonists, who looked on trade as inconsistent with Christianity (*u*), 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 (*w*).

(*o*) 15 Hen. VI. c. 3. 18 Hen. VI. c. 8. 20 Hen. VI. c. 1.
(*p*) C. 30.
(*q*) *De jure Sueon. l.* 3. c. 4.
(*r*) Sp. L. 20, 13.
(*s*) *Ibid.* 20, 6.
(*t*) *Nobilitores natalibus, et honorum luce conspicuos, et patrimonio ditiores, perniciosum urbibus mercimonium exercere prohibemus. C.* 4. §9. 3.
(*u*) *Homo mercator vix aut nunquam potest Deo placere: et ideo nullus Christianus debet esse mercator; aut si voluerit esse, projiciatur de ecclesia Dei. Decret.* 1. 88. 11.
(*w*) *Falsa fit penitentia [laici] cum penitus ab*

(16) In order to prevent foreigners from arriving and continuing in England, an act was passed 33 Geo. III. c. 4, which was to continue in force till 1st January 1794, in which various restraints are imposed upon all aliens whatever.

(17) The President may, by proclamation, restrain or expel alien enemies in time of war. Story's laws, 521.

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 (*x*). 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.") [*262] affect not him in the least, if *they may tend to restrain or diminish any of his rights or interests (*y*). 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 (*z*): and, likewise, the king may take the benefit of any particular act, though he be not especially named (*a*).

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 [*263] forts 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 (18).

This statute, it is obvious to observe, extends not only to fleets and armies, but also to forts, and other places of strength, within the realm; the sole prerogative as well of erecting, as manning and governing of which,

officio curiali vel negotiali non recedit, quæ sine peccatis agi ulla ratione non prævalet. Act. Concil. apud Baron, c. 16.
(*s*) Ch. 2, page 154.

(*y*) 11 Rep. 74.
(*z*) *Ibid.* 71.
(*a*) 7 Rep. 32.

(18) The President is commander in chief of the army and navy of the U. S., and of the militia of the several states, when called into the actual service of the U. S. Const. Art. 2. Sect. 2. § 1.

belongs to the king in his capacity of general of the kingdom (*b*): 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* (*c*). And this they were called upon to do so often, that, as Sir Edward Coke from M. Paris assures us (*d*), there were, in the time of Henry II., 1115 castles subsisting in England. The inconveniences of which, when granted out to private subjects, the lordly barons of those times, were severely felt by the whole kingdom; for, as William of Newburgh 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 (*e*), that no subject can build a castle, or house of strength embattled, or other fortress defensible, without the licence of the king; for the danger which might ensue, if every man at his pleasure might do it.

It is partly upon the same, and partly upon a fiscal foundation, to secure his marine revenue, that the king has the *prerogative [*264] of appointing *ports* and *havens*, or such places only, for persons and merchandise to pass into and out of the realm, as he in his wisdom sees proper. By the feodal law all navigable rivers and havens were computed among the *regalia* (*f*), and were subject to the sovereign of the state. And in England it hath always been holden, that the king is lord of the whole shore (*g*), and particularly is the guardian of the ports and havens, which are the inlets and gates of the realm (*h*); and therefore, so early as the reign of King John, we find ships seized by the king's officers for putting in at a place that was not a legal port (*i*). These legal ports were undoubtedly at first assigned by the crown; since to each of them a court of portmote is incident (*j*), the jurisdiction of which must flow from the royal authority: the *great ports* of the sea are also referred to, as well known and established, by statute 4 Hen. IV. c. 20, which prohibits the landing elsewhere under pain of confiscation: and the statute 1 Eliz. c. 11. recites, that the franchise of lading and discharging had been frequently granted by the crown.

But though the king had a power of granting the franchise of havens and ports, yet he had not the power of resumption, or of narrowing and confining their limits when once established; but any person had a right to load or discharge his merchandize in any part of the haven: whereby the revenue of the customs was much impaired and diminished, by fraudulent landings in obscure and private corners. This occasioned the statutes of 1 Eliz. c. 11, and 13 and 14 Car. II. c. 11, § 14, which enable the crown by commission to ascertain the limits of all ports, and to assign proper wharfs and quays in each port, for the exclusive landing and loading of merchandize.

(*b*) 2 Inst. 30.
(*c*) Cowel's Interpr. *tit. castellorum operatio.* Seld. *Jan. Angl.* 1, 42.
(*d*) 2 Inst. 31.
(*e*) 1 Inst. 5.
(*f*) 2 *Feud. t.* 56. Crag. 1, 15, 15.
(*g*) F. N. B. 113.
(*h*) Dav. 9, 56.
(*i*) Madox, Hist. Exch. 530.
(*j*) 4 Inst. 148.

The erection of beacons, light-houses, and sea-marks, is also [*265] a branch of the royal prerogative: whereof the first was *anciently used in order to alarm the country, in case of the approach of an enemy; and all of them are signally useful in guiding and preserving vessels at sea by night as well as by day. For this purpose the king hath the exclusive power, by commission under his great seal (*k*), to cause them to be erected in fit and convenient places (*l*), as well upon the lands of the subject as upon the demesnes of the crown: which power is usually vested by letters patent in the office of lord high admiral (*m*). And by statute 8 Eliz. c. 13, the corporation of the trinity-house are impowered to set up any beacons or sea-marks wherever they shall think them necessary; and if the owner of the land or any other person shall destroy them, or shall take down any steeple, tree, or other known sea-mark, he shall forfeit 100*l*., or in case of inability to pay it, shall be *ipso facto* outlawed (19).

To this branch of the prerogative may also 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 (*n*), 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 [*266] *the crown; all knights, who were bound to defend the kingdom from invasions; all ecclesiastics, who were expressly confined by the fourth chapter 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 (*o*), who wrote in the reign of Edward I: and Sir Edward Coke (*p*) 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 (*q*), 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.

(*k*) 3. Inst. 204. 4 Inst. 148.
(*l*) *Rot. Claus.* 1 *Ric. II.* m. 42. Pryn. on 4 Inst. 138.
(*m*) Hid. 158. 4 Inst. 149.
(*n*) F. N. B. 85.
(*o*) C. 123.
(*p*) 3 Inst. 175.
(*q*) 5 Ric. II. c. 2.

(19) Congress has the power to regulate commerce, *Const. Art.* 1. *Sect.* 8. § 3; and, as incident thereto, appoints ports of entry, and directs the erection of light-houses.

Yet undoubtedly if the king, by writ of *ne exeat regnum* (20), 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 (21); 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 seized till he return; and then he is liable to fine and imprisonment (*r*).

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* (*s*). 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, [*267] 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 intrusted 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

(*r*) 1 Hawk. P. C. 22.

(*s*) *Ad hoc autem creatus est et electus, ut justitiam faciat universis.* Bract. l. 3, tr. 1, c. 9.

(20) It is said in Lord Bacon's Ordinances, No. 89, that "towards the latter end of the reign of King James the first, this writ was thought proper to be granted, not only in respect of attempts prejudicial to the king and state, (in which case the lord chancellor granted it on application from any of the principal secretaries, without shewing cause, or upon such information as his lordship should think of weight,) but also in the case of interlopers in trade, great bankrupts, in whose estates many subjects might be interested, in duels, and in other cases that did concern multitudes of the king's subjects."

But in the year 1734, Lord Chancellor Talbot declared that "in his experience he never knew this writ of *ne exeat regnum* granted or taken out, without a bill first filed.—It is true, it was originally a state writ, but for some time, though not very long, it has been made use of in aid of the subjects for the helping of them to justice; but it ought not to be made use of where the demand is entirely at law, for there the plaintiff has bail, and he ought not to have double bail, both in law and equity." 3 *P. Wms.* 312.

The use and object of this writ of *ne exeat regno* in chancery at present is exactly the same as an arrest at law in the commencement of an action, viz. to prevent the party from withdrawing his person and property beyond the jurisdiction of the court, before a judgment could be obtained and carried into execution; so where there is a suit in equity for a demand, for which the defendant cannot be arrested in an action at law, upon an affidavit made that there is reason to apprehend* that he will leave the kingdom before the conclusion of the suit, the chancellor by this writ will stop him, and will commit him to prison, unless he produces sufficient sureties that he will abide the event of the suit. See 2 *Com. Dig.* 312.

(21) The exercise of this prerogative has been long disused, and it is probable that it will never be resumed. For the ancient learning upon it, see 3 Inst. c. 84, against fugitives.

* Such an affidavit would be insufficient; it must, I believe, positively state the fact of the defendant's intention to depart the realm. See further, Mr. Beames's work upon this writ, and Mr. Eden's volumes on equity.

crown, their proceedings run generally in the king's name, they pass under his seal, and are executed by his officers.

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 depositaries 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 (*t*). 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* (*u*), 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 re-
[*268] commendation 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 (*w*) immediately to vacate their seats (22),) 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 (*x*)."

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

(*t*) 2 Hawk. P. C. 2.
(*u*) During pleasure; as long as they shall conduct themselves properly.
(*w*) Lord Raym. 747.
(*x*) Com. Journ. 3 Mar. 1761

(22) All their commissions became vacant upon the demise of the crown, till they were continued for six months longer by 1 Ann. stat. 1, c. 8. When his majesty was pleased to make the memorable declaration in the text, he introduced it by observing, "Upon granting new commissions to the judges, the present state of their offices fell naturally under consideration. In consequence of the late act, passed in the reign of my late glorious predecessor William the third, for settling the succession to the crown in my family, their commissions have been made during their good behaviour; but, notwithstanding that wise provision, their offices have determined upon the demise of the crown, or at the expiration of six months afterwards, in every instance of that nature which has happened."

was accused of a kind of perjury, in having violated the king's coronation oath, *dicebatur fregisse juramentum regis juratum* (*y*). And hence also arises another *branch of the prerogative, that of *pardoning* [*269] offences; for it is reasonable that he only who is injured should have the power of forgiving (23). 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.

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 overbalance 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

(*y*) Stiernh. *de jure Goth.* l. 3, c. 3. A notion somewhat similar to this may be found in the Mirror, c. 1. § 5. And so also, when the Chief Justice Thorpe was condemned to be hanged for bribery, he was said *sacramentum domini regis fregisse. Rot. Parl. 25 Edw. III.*

(23) "This high prerogative is inseparably incident to the crown, and the king is intrusted with it upon especial confidence that he will spare those only whose case, could it have been foreseen, the law itself may be presumed willing to have excepted out of its general rules, which the wisdom of man cannot possibly make so perfect as to suit every particular case." Co. Lit. 114. b. Hal. P. C. 104. 3 Inst. 233. Show, 284. The power of the crown to pardon a forfeiture and to grant restitution, can only be exercised where things remain in statu quo, but not so as to affect legal rights vested in third persons. Rex v. Amery, 2 Term Rep. 569. This is a personal trust and prerogative in the king for a fountain of bounty and grace to his subjects as he observes them deserving or useful to the public, which he can neither by grant or otherwise extinguish, per Holt C. J. Ld. Raym. 214. As he cannot but have the administration of public revenge, so he cannot but have a power to remit it by his pardon when he judges proper. Idem. De Lolme in his treatise on the English Constitution says, that "the reason the king is deemed to be directly concerned in all public offences, and therefore that prosecutions for them are to be carried on in his name, arises from the circumstance of the king's being considered the universal proprietor of the kingdom. (Bk. 1. c. 5.) This principle reduces the people in theory from that state of freedom and independence which they practically enjoy, to the degraded level of a Turkish despotism, where in truth the monarch acts as though he were proprietor of the kingdom, and indulges in the capricious enjoyment of his assumed property, whether it be the products of his subjects' industry, the natural privileges of man, or even life itself, with as little remorse as the gambler stakes his hundreds upon the hazard of the die. But this is not the true principle, for the king cannot in this country dispose of a single rood of land, or suspend the liberty of any one of his lieges for an hour, without due process of law. It is in his character of representative of the public, that offences are indicted at his suit, and not as the avenger of injuries committed against himself, that criminal proceedings are said to be at his suit.

The President has power to grant reprieves and pardons for offences against the U. S. except in cases of impeachment. Const. Art. 2, Sect. 2, § 1. He appoints, with the consent of the senate, the judges, as well as all other judicial and executive officers of the U. S. § 2. The judges hold their offices during good behavior, and their salaries cannot be diminished during their continuance in office. Art. 3, Sect. 1.

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, [*270] 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 (*z*). 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 (*a*); for a nonsuit is the desertion of the suit or action by the non-appearance of the plaintiff in court (24). 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 in contemplation of law he is always present in court (*b*).

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 (*c*),) 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 [*271] *an embargo upon all shipping in time of war (*d*), will be equally binding as an act of parliament, because founded upon a prior law. But a proclamation to lay an embargo in time of peace upon all vessels laden with wheat (though in the time of a public scarcity) being contrary to law, and particularly to statute 22 Car. II. c. 13, the advisers of such a proclamation, and all persons acting under it, found it necessary to be indemnified by a special act of parliament, 7 Geo. III. c. 7. 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

(*z*) Fortesc. c. 8, 2 Inst. 186.
(*a*) Co. Litt. 139.
(*b*) Finch. 1. 81.
(*c*) 3 Inst. 162.
(*d*) 4 Mod. 177, 179.

(24) But the attorney-general may enter a *non vult prosequi*, which has the effect of a nonsuit. Co. Litt. 139.

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 (e) (25).

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 [*272] 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 (f). 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.

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 (26), as shall seem good to his royal wis-

(e) Stat. 1. Edw. VI. c. 12. (f) 2 Inst. 533.

(25) Proclamations, and, what are often equivalent to them, orders of the privy council, in respect of subjects of revenue, sometimes issue upon public grounds; but as these are always examinable in parliament, their abuse for any continued period can hardly occur; yet, being the assumption of a dispensing power, vigilance on their promulgation cannot be too strict.

(26) The king by the common law could have created a duke, earl, &c. and could have given him precedence before all others of the same rank, a prerogative not unfrequently exercised in ancient times; but it was restrained by the 31 Hen. VIII. c. 10, which settles the place or precedence of all the nobility and great officers of state. This statute does not extend to Ireland, where the king still retains his prerogative without any restriction.

dom (*g*) : or such as converting aliens, or persons born out of the king's dominions, into denizens (27) ; 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, [*273] and immunities in their politic *capacity, which they were utterly incapable of in their natural (28). 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 (*h*).

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 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 or *lex mercatoria*, which all nations agree in, and take notice of. And in particular it is held to be part of the law of England, which decides the causes of merchants by the general rules which obtain in all commercial countries ; and that often even in matters relating to domestic trade, as, for instance, with regard to the drawing, the acceptance, and the transfer, of inland bills of exchange (*i*).

[*274] *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 (*k*). 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

(*g*) 4 Inst. 361.

(*h*) *Disputare de principali judicio non oportet ; sacrilegii enim instar est, dubitare an is dignus sit, quem elegerit imperator.* C. 9, 29, 3.

(*i*) Co. Lit. 172. Ld. Raym. 181. 1542.

(*k*) 2 Inst. 220.

(27) Congress has power to establish uniform rules of naturalization, (Const. Art. 1. Sect. 8, § 4.) and has passed several acts for that purpose. Story's laws, title Naturalization. Whether the state legislatures could pass laws on this subject, see 2 Dall. 394, 370. 12 Wheat. 213. 9 Wh. 209.

(28) This is a power enjoyed only by Congress or the state legislatures.

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.

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 (*l*). This standard was originally kept at Winchester; and we find in the laws of King Edgar (*m*), 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 [*275] 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 dimension in men of different proportions, our ancient historians (*n*) inform 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 called *compositio ulnarum et perticarum*, five yards and a 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 should be only one weight and one measure throughout the kingdom, and that the custody of the assize, or standard of weights and measures, should be committed to certain persons in every city and borough (*o*); 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 and 12 W. III. c. 20. In King John's time, this ordinance of King Richard was *frequently dispensed with for money (*p*), which occa- [*276] sioned a provision to be made for enforcing it, in the great charters

(*l*) *Gr. Coustum.* c. 16.
(*m*) Cap. 8.
(*n*) Will. Malmsb. *in vita Hen. I.* Spelm. *Hen. I. apud* Wilkins, 299.
(*o*) Hoved. Matth. Paris.
(*p*) Hoved. A. D. 1201.

of King John and his son (*q*). These original standards were called *pondus regis* (*r*), and *mensura domini regis* (*s*); 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 (*t*). But, as Sir Edward Coke observes (*u*), though this hath so often by authority of parliament been enacted, yet it could never be effected; so forcible is custom with the multitude (29).

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 increas-
[*277] ing. *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 were 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

(*q*) 9 Hen. III. c. 25.
(*r*) *Plac.* 35 *Edw. I. apud* Cowel's Interpr. *tit. pondus regis.*—"The king's weight; measure of our Lord the king."
(*s*) *Flet.* 2, 12.
(*t*) 14 Edw. III. st. 1, c. 12. 25 Edw. III. st. 5, c. 10. 16 Ric. II. c. 3. 8 Hen. VI. c. 5. 11 Hen. VI. c. 8. 11 Hen. VII. c. 4. 22 Car. II. c. 8.
(*u*) 2 Inst. 41.

(29) The regulation of weights and measures cannot with propriety be referred to the king's prerogative; for from *magna charta* to the present time there are above twenty acts of parliament to fix and establish the standard and uniformity of weights and measures. Two important cases upon this subject have lately been determined by the court of king's bench; one was, that although there had been a custom in a town to sell butter by eighteen ounces to the pound, yet the jury of the court-leet were not justified in seising the butter of a person who sold pounds less than that, but more than sixteen ounces each, the statutable weight. 3 *T. R.* 271. In the other it was determined, that no practice or usage could countervail the statutes 22 Car. II. c. 8. and 22 and 23 Car. II. c. 12. which enact, that if any person shall either sell or buy grain or salt by any other measure than the Winchester bushel, he shall forfeit forty shillings, and also the value of the grain or salt so sold or bought; one half to the poor, the other to the informer. *The King and Major*, 4 *T. R.* 750. 5 *T. R.* 353.

"By stat. 5 Geo. IV. c. 74, other weights and measures have been substituted."

"In the U. S., Congress has the right to regulate commerce with foreign nations, and among the several states, and with the Indian tribes: (Const. Art. 1. Sect. 8. § 3:) but each state legislature regulates the internal trade that is confined within its own territories. 9 Wh. 194. Congress has also power to coin money, to regulate the value thereof and of foreign coin, and to fix the standard of weights and measures; same sect. § 5: but not having exercised the power as to weights and measures, the states still retain the right to legislate on that subject (12 Wh. 213), and have done so. 1 R. S. 606, &c. laws, 1829, chap. 297. But Congress has regulated the value of our own and of foreign coins. (See Story's laws, titles Coins, Tenders). It has not made, and no *state* can make, any thing but gold and silver coin a legal tender. Const. Art. 1. Sect. 10.

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 (30).

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 (*v*), 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 sixpence, 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 (31). And, as to the silver coin, it is enacted by statute 14 Geo. III. c. 42, that no tender of payment in silver money, exceeding twenty-five pounds at one time, shall be a sufficient tender in law for more than its value by weight, at the rate of 5s. 2d. an ounce (32).

As to the impression, the stamping thereof is the unquestionable prerogative of the crown: for, though divers bishops and monasteries had for-

(*v*) 2 Inst. 577.

(30) In considering the prices of articles in ncient times, regard must always be had to e weight of the shilling, or the quantity of lver which it contained at different periods. om the conquest till the 20th year of Edw. . a pound sterling was actually a pound troyight of silver, which was divided into twenshillings; so if ten pounds at that time were price of a horse, the same quantity of silwas paid for it as is now given, if its price hirty pounds.

his therefore is one great cause of the apnt difference in the prices of commodities ncient and modern times. About the year , Edward III. coined twenty-two shillings of a pound; and five years afterwards he d twenty-five shillings out of the same tity. Henry V., in the beginning of his , divided the pound into thirty shillings, hen of consequence the shilling was e the weight of a shilling at present. r VII, increased the number to forty, was the standard number till the beginf the reign of Elizabeth. She then coinpound sterling of silver into sixty-two gs. And now by 56 Geo. III. c. 68. the troy of standard silver, eleven ounces nnyweights fine, &c., may be coined xty-six shillings. (See Money in the o Hume's Hist.) Dr. Adam Smith, at of his first volume, has given tables ng the average prices of wheat for five and fifty years back, and has reduced year the money of that time into the f the present day. But in his calcuhas called the pound since Elizae sixty shillings. Taking it at that nay easily find the equivalent in moy of any sum in ancient time, if we number of shillings which weighed by this simple rule: As the number s in a pound at that time is to sixty, so is any sum at that time to its equivalent at present; as for instance, in the time of Henry V, as thirty shillings are to sixty shillings now, so ten pounds then were equal to twenty pounds of present money. The increase in the quantity of the precious metals does not necessarily increase the price of articles of commerce: for if the quantities of these articles are augmented in the same proportion as the quantity of money, it is clear there will be the same use, demand, or price for money as before, and no effect will be produced in the price of commodities.

If gold and silver could have been kept in the country, the immense increase of paper currency, or substitution of paper for coin, would have diminished its value, and have increased the prices of labour and commodities far beyond the effect that has been produced by the discovery of the mines in America. The effect they have produced is general, and extended to the whole world: but the increase of our paper has only a tendency to lessen the value of money at home, which never can take place to any great degree, as it will naturally seek a better market, or be carried where more will be given for it; and by the substitution of a cheaper medium of commerce, the difference in value is added to the capital or to the real strength of the nation. Gold and silver form an insignificant part of the real wealth of a commercial country. The whole quantity of specie in the country has been estimated at about twenty millions only, much less than what is raised in one year for the support of government.

(31) It is felony to counterfeit any coin of the U. S., or any foreign gold or silver coin that is made current. Story's laws, 2005.

(32) This was a clause in a temporary act, which was continued till 1783, since which time I do not find that it has been revived.

merly the privilege of coining money, yet, as Sir Matthew Hale observes (*w*), 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 [*278] 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.

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 (*x*), and called esterling or sterling metal; a name for which there are various reasons given (*y*), but none of them entirely satisfactory. And of this sterling or esterling 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 enhancing the value of the coin, below or above the sterling value (*z*), though Sir Matthew Hale (*a*) appears to be of another opinion (33). 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 (*b*). 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 (*c*).

V. 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

(*w*) 1 Hist. P. C. 191.

(*x*) This standard hath been frequently varied in former times; but hath for many years past been thus invariably settled. The pound troy of gold, consisting of twenty-two carats (or twenty-fourth parts) fine, and two of alloy, is divided into forty-four guineas and a half of the present value of 21*s.* each. And the pound troy of silver, consisting of eleven ounces and two pennyweights pure and eighteen pennyweights alloy, is divided into sixty-two shillings. (See Folkes on English Coins.) Smith's Wealth of Nations. 1 vol. 39. "The English pound sterling, in the time of Edward I., contained a pound Tower-weight of silver of a known fineness. The Tower pound seems to have been something more than the Roman pound, and something less than the Troyes pound. This last was not introduced into the mint of England till the 18th of Hen. VIII. The French livre contained in the time of Charlemagne a pound Troyes weight of silver of a known fineness. The fair of Troyes, in Champaign was at that time frequented by all the nations of Europe, and the weights and measures of so famous a market were generally known and esteemed."

(*y*) Spelm. Gloss. 203. Dufresne, III. 165. The most plausible opinion seems to be that adopted by those two etymologists, that the name was derived from the *Esterlingi*, or Easterlings; as those Saxons were anciently called, who inhabited that district of Germany, now occupied by the Hanse Towns and their appendages; the earliest traders in modern Europe.

(*z*) 2 Inst. 577.

(*a*) 1 Hal. P. C. 194.

(*b*) Ibid. 197.

(*c*) 1 Hal. P. C. 197.

(33) Lord Hale refers to the case of mixed money in Davies's Reports, 48. in support of his opinion. A person in Ireland had borrowed 100*l.* of sterling money, and had given a bond to repay it on a certain future day. In the mean time queen Eliz. for the purpose of paying her armies and creditors in Ireland, had coined mixed or base money, and by her proclamation had ordered it to pass current, and had cried down the former coin. The debtor on the appointed day tendered 100*l.* in this base coin; and it was determined upon great consideration that it was a legal tender, and that the lender was obliged to receive it: natural equity would have given a different decision.

This act of queen Elizabeth does but ill correspond with the flattering inscription upon her tomb: *Religio reformata, pax fundata, moneta ad suum valorem reducta*, &c. 2 Inst. 578.

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 [*279] 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 title and style thereof, as all jurisdictions, authorities, and commodities, to the said dignity of the supreme head of the church appertaining. And another statute to the same purport was made, 1 Eliz. c. 1 (34).

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 (*d*). 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 (*e*): 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 (*f*) (35). 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 privileges of forming *ecclesiastical canons, (which before they had not,) and also [*280] introduced a method of taxing ecclesiastical benefices, by consent of convocation (*g*) (36).

(*d*) 4 Inst. 322, 323.
(*e*) 12 Rep. 72.
(*f*) In the diet of Sweden, where the ecclesiastic form one of the branches of the legislature, the number of the clergy resembles the convocation of England. It is composed of the bishops and superintendents; and also of deputies, one of which is chosen by every ten parishes or rural deanry. Mod. Un. Hist. xxxiii. 18.
(*g*) Gilb. Hist. of Exch. c. 4.

(34) This statute revived the statutes passed temp. H. VIII. which had been repealed by stat. 1 and 2 P. and M. c. 8.

(35) And, by stat. 8 H. VI. c. 1, the clergy in attendance upon the convocation are privileged from arrest. If not at the period specified, as head of the church, (presuming the statute, temp. Ed. I., to have arrogated that elevated dignity,) yet, as king of England, we have a remarkable exercise of power delegated from him to the bishops:—"And the kynge hath sayd to all bysshoppys that twyse in a yere they may curse all men doying against these statutes." *The grete Abregement of the Statutes of Englond untyll the xxij yere of Kyng Henry the VIII.* 257. This clause is in effect inserted in the statute, or rather charter, *Statutum tallagio non concedendo.* 34 *Ed. I. c.*

From the learned commentator's text, the student would perhaps be apt to suppose that there is only one convocation at a time. But the king, before the meeting of every new parliament, directs his writ to each archbishop, to summon a convocation in his peculiar province.

Godolphin says, that the convocation of the province of York constantly corresponds, debates, and concludes the same matters with the provincial synod of Canterbury. *God.* 99. But they are certainly distinct and independent of each other; and, when they used to tax the clergy, the different convocations sometimes granted different subsidies. In the 22 Hen. VIII. the convocation of Canterbury had granted the king one hundred thousand pounds; in consideration of which an act of parliament was passed, granting a free pardon to the clergy for all spiritual offences, but with a proviso that it should not extend to the province of York, unless its convocation would grant a subsidy in proportion, or unless its clergy

From this prerogative also, of being the head of the church, arises the king's right of nomination to vacant bishoprics, and certain other ecclesiastical preferments; which will more properly 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 (37), (38).

CHAPTER VIII.

OF THE KING'S 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

would bind themselves individually to contribute as bountifully. This statute is recited at large in *Gib. Cod.* 77.

All deans and archdeacons are members of the convocation of their province; each chapter sends one proctor or representative, and the parochial clergy in each diocese in Canterbury two proctors; but, on account of the small number of dioceses in the province of York, each archdeaconry elects two proctors. In York the convocation consists only of one house; but in Canterbury there are two houses, of which the twenty-two bishops form the upper house; and, before the reformation, abbots, priors, and other mitred prelates, sat with the bishops. The lower house of convocation in the province of Canterbury consists of twenty-two deans, fifty-three archdeacons, twenty-four proctors for the chapters, and forty-four proctors for the parochial clergy. By 8 Hen. VI. c. 1, the clergy in their attendance upon the convocation have the same privilege in freedom from arrest as the members of the house of commons in their attendance upon parliament. *Burn. Conv.* 1 *Bac. Abr.* 610.

(37) By that statute it is declared, that for the future no appeals from the ecclesiastical courts of this realm should be made to the pope, but that an appeal from the archbishop's courts should lie to the king in chancery; upon which the king, as in appeals from the admiral's court, should by a commission appoint certain judges or delegates finally to determine such appeals. 3 book, 66.

(38) Congress can make no law respecting an establishment of religion, or prohibiting the free exercise thereof. Amend. to Const. Art. 1. And in the States generally, there is no interference on the subject, further than in some of them to require each person to contribute to the support of such church as he may approve.

l must be obliged to recount, as part of the royal revenue, what ords of manors and other subjects *frequently look upon to be [*282] heir own absolute inherent rights; because they are and have ieen vested in them and their ancestors for ages, though in reality origi- ally derived from the grants of our ancient princes.

I. The first of the king's ordinary revenues, which I shall take notice f, is of an ecclesiastical kind; (as are also the three succeeding ones) viz. ie custody of the temporalities of bishops: by which are meant all the y revenues, lands, and tenements, (in which is included his barony,) hich belong to an archbishop's or bishop's see. And these upon the va- ncy of the bishopric are immediately the right of the king, as a conse- ience of his prerogative in church matters; whereby he is considered the founder of all archbishoprics and bishoprics, to whom during the cancy they revert. And for the same reason, before the dissolution of beys, the king had the custody of the temporalties of all such abbeys l priories as were of royal foundation (but not of those founded by sub- s) on the death of the abbot or prior (*a*). Another reason may also given, why the policy of the law hath vested this custody in the king; iuse as the successor is not known, the lands and possessions of the would be liable to spoil and devastation, if no one had a property ein. Therefore the law has given the king, not the temporalties them- es, but the *custody* of the temporalties, till such time as a successor is ointed; with power of taking to himself all the intermediate profits, out any account of the successor; and with the right of presenting ch the crown very frequently exercises) to such benefices and other rments as fall within the time of vacation (*b*). This revenue is of so a nature, that it could not be granted out to a subject, before, or even it accrued: but now by the statute 15 Edw. III. st. 4, c. 4 and 5, the may, after the vacancy, lease the temporalties to the dean and chap- saving to himself all advowsons, escheats, and the like. Our ancient , and particularly William Rufus, were not only remarkable eping the bishoprics a long time *vacant, for the sake of en- [*283] the temporalties, but also committed horrible waste on the and other parts of the estate; and to crown all, would never, when e was filled up, restore to the bishop his temporalties again, unless rchased them at an exorbitant price. To remedy which, King the first (*c*) granted a charter at the beginning of his reign, promis- ther to sell, nor let to farm, nor take any thing from, the domains of urch, till the successor was installed(1). And it was made one of the of the great charter (*d*), that no waste should be committed in the alties of bishoprics, neither should the custody of them be sold. me is ordained by the statute of Westminster the 1st. (*e*); and the 14 Edw. III. st. 4, c. 4, (which permits, as we have seen, a lease to the id chapter,) is still more explicit in prohibiting the other exactions. also a frequent abuse, that the king would for trifling, or no causes, e temporalties of bishops, even during their lives, into his own but this is guarded against by statute 1 Edw. III. st. 2, c. 2.

15.
7 Edw. II. c. 14. F. N. B. 32.
Paris.

(*d*) 9 Hen. III. c. 5.
(*e*) 3 Edw. I. c. 21.

Queen Elizabeth kept the see of Ely vacant nineteen years, in order to retain the *Stryps*, vol. 4, 351.

This revenue of the king, which was formerly very considerable, is now by a customary indulgence almost reduced to nothing: for, at present, as soon as the new bishop is consecrated and confirmed, he usually receives the restitution of his temporalties quite entire, and untouched, from the king; and at the same time does homage to his sovereign: and then, and not sooner, he has a fee simple in his bishopric, and may maintain an action for the profits (*f*).

II. The king is entitled to a corody, as the law calls it, out of every bishopric, 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 acknowledgment 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 (2). It is,
[*284] I *apprehend, now fallen into total disuse; though Sir Matthew Hale says (*h*), that it is due of common right (3), 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, *primitiæ*, 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 III. A. D. 1292, 20 Edw. I. (*l*); which valuation of Pope Nicholas is still preserved in the exchequer (*m*). The tenths, or *decimæ*, 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
[*285] Levites "should offer the tenth part of their tithes as a heave-offering to the Lord, and give it to Aaron the *high* priest." But *this claim of the pope met with a vigorous resistance from the English

(*f*) Co. Litt. 67, 341.
(*g*) F. N. B. 230.
(*h*) Notes on F. N. B. above cited.
(*i*) Page 113.
(*k*) 2 Inst. 647.
(*l*) F. N. B. 176.
(*m*) 3 Inst. 154.
(*n*) Numb. xviii. 26.

(2) So where the foundation was not royal, it was usual for the founder to give their heirs a corody, viz. a charge upon the particular monastery or abbey sufficient to prevent them from starving. And those persons, disinherited of the lands by their relations, were there subsisted during life. See a form of corody, Barr. stat. 80, n. (9). Sparke's Coll. 157.

(3) The right to a corody does not seem peculiar to the prerogative, and it might be not only for life or years, but in fee, 2d Inst. 630; assize lay for it, stat. Westm. 2, c. 25. The text would appear to indicate, that only persons ecclesiastical could enjoy corody; but, by the older books, any servant of the king may be entitled to corody. A pension is proper to an ecclesiastic. See F. N. B. 250. Also the previous note.

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 800,000 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 (4).

By these last-mentioned 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 a half, three quarters; and if two years, then the whole; and not otherwise (5). 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 (6).

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 re- [*286] mitting 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 (*o*) (7).

(*o*) 5 Ann. c. 24. 6 Ann. c. 27. 1 Geo. I. st. 2, c. 10. 3 Geo. I. c. 10.

(4) When the first-fruits and tenths were transferred to the crown of England, by 26 Hen. VIII. c. 3, at the same time it was enacted, that commissioners should be appointed in every diocese, who should certify the value of every ecclesiastical benefice and preferment in the respective dioceses; and according to this valuation, the first-fruits and tenths were to be collected and paid in future. This *valor beneficiorum* is what is commonly called the King's Books; a transcript of which is given in Ecton's Thesaurus, and Bacon's Liber Regis.

(5) The archbishops and bishops have four years allowed for the payment, and shall pay one quarter every year, if they live so long upon the bishopric; but other dignitaries in the church pay theirs in the same manner as rectors and vicars.

(6) After Queen Anne had appropriated the revenue arising from the payment of first-fruits and tenths to the augmentation of small livings, it was considered a proper extension of this principle to exempt the smaller livings from the incumbrance of those demands; and, for that end, the bishops of every diocese were directed to inquire and certify into the exchequer what livings did not exceed 50*l.* a year according to the improved value at that time; and it was further provided, that such livings should be *discharged* from those dues in future.

(7) These trustees were erected into a corporation, and have authority to make rules and

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, *terræ 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; comprising 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 (*p*), 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

(*p*) 1 Ann. st. 1, c. 7.

orders for the distribution of this fund. The principal rules they have established are, that the sum to be allowed for each augmentation, shall be 200*l.* to be laid out in land, which shall be annexed for ever to the living; and they shall make this donation, first, to all livings not exceeding 10*l.* a year; then to all livings not above 20*l.*; and so in order, whilst any remain under 50*l.* a year. But when any private benefactor will advance 200*l.*, the trustees will give another 200*l.* for the advancement of any living not above 45*l.* a year, though it should not belong to that class of livings which are then augmenting, 2 *Burn. Ec. L.* 260.

Though this was a splendid instance of royal munificence, yet its operation is slow and inconsiderable; for the number of livings certified to be under 50*l.* a year, was no less than 5597, of which 2538 did not exceed 20*l.* a year each, and 1933 between 30*l.* and 50*l.* a year, and the rest between 20*l.* and 30*l.*; so that there were 5597 benefices in this country, which had less than 23*l.* a year each, upon an average. Dr. Burn calculates that from the fund alone, it will require 339 years from the year 1714, when it commenced, before all these livings can be raised to 50*l.* And if private benefactors should contribute half as much as the fund, (which is very improbable,) it will require 226 years. But even taking this supposition to have been true ever since the establishment, it will follow, that the wretched pittance from each of 5597 livings, both from the royal bounty and private benefaction, cannot, upon an average, have yet been augmented 9*l.* a year. 2 *Burn. E. L.* 268. Dr. Burn, in this calculation, computes the clear amount of the bounty to make fifty-five augmentations daily, that is, at 11,000*l.* a year; but Sir John Sinclair, Hist. Rev. 3 part, 198, says that "this branch of the revenue amounted to about 14,000*l. per annum;* and on the 1st of January, 1735, the governors of that charity possessed, besides from savings and private benefactions, the sum of 152,500*l.* of old South Sea annuities, and 4857*l.* of cash, in the hands of their treasurer: the state of that fund has of late years been carefully concealed; but it probably yields, at present, from forty to fifty thousand pounds *per annum.*" This conjecture must certainly be very wide of the truth of the case; for the source of this fund is fixed and permanent, except the variation depending upon the contingency of vacancies, which will be more or fewer in different years. And what object can the commissioners have in the accumulation of this fund? For that accumulation can only arise by depriving the poor clergy of the assistance which was intended them, and to enrich the successor at the expense of the wretched incumbent of the present day. The condition of the poor clergy in this country certainly requires some further national provision. Neither learning, religion, nor good morals, can secure poverty from contempt in the minds of the vulgar. The immense inequality in the revenues of the ministers of the gospel, not always resulting from piety and merit, naturally excite discontent and prejudices against the present establishment of the church. If the whole of the profits and emoluments of every benefice for one year were appropriated to this purpose, an effect would be produced in twenty or thirty years, which will require 300 by the present plan. This was what was originally understood by the first-fruits, and what actually, within the last 300 years, was paid and carried out of the kingdom to support the superstition and folly of popery. If upon any promotion to a benefice it was provided that there should be no vacancy or cession of former preferment till the end of the year, who could complain? It would certainly soon yield a supply which would communicate both comfort and respectability to the indigent clergy.

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 (*q*). 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 some benefit to posterity, when those leases come to expire (8). [*287]

VI. Hither might have been referred the advantages which 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 postponed 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 (*r*). 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 before mentioned 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, towards the beginning of the last century (*s*). 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: and the parliament, in part of recompense, settled on him, his heirs and successors, for ever, the [*288]

(*q*) In like manner by the civil law, the inheritance or *fundi patrimoniales* of the imperial crown could not be alienated, but only let to farm. Cod. l. 11, t. 61.

(*r*) 4 Inst. 273.

(*s*) Mod. Un. Hist. xxxiii. 220.

(8) By the 26 Geo. III. c. 87, amended by 30 Geo. III. c. 50, commissioners were appointed to inquire into the state and condition of the woods, forests, and land revenues belonging to the crown, and to sell fee-farm and other unimprovable rents.

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.

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 preemption and purveyance: but this revenue was abolished by the statute 30 Geo. II. c. 19, and an annual sum of upwards of 7000*l. per annum*, issuing out of the new stamp duties imposed on wine licences, was settled on the crown in its stead.

[*289] *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 offices 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 (*t*) have been held since 1632, 8 Car. I. (9), and as, from the accounts given of the proceedings in that court by our histories and law books (*u*), nobody would now wish to see them again revived, it is needless, at least in this place, to pursue this inquiry any farther.

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 forensic 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 recompence 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

[*290] 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. 1, c. 7, are to endure for no longer time than the prince's life who grants them.

(*t*) Roger North, in his life of Lord Keeper North (43, 44,) mentions an eyre, or *iter*, to have been held south of Trent soon after the restoration; but I have met with no report of its proceedings.

(*u*) 1 Jones, 267, 298.

(9) This was one of the odious modes adopted by Car. I. to raise a revenue without the aid of parliament.

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 coast, are the property of the king, on account (*v*) 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 (*w*); and from one of these it was probably derived to our princes. It is expressly claimed and allowed in the statute *de prærogativa regis* (*w*): and the most ancient treatises of law now extant make mention of it (*x*), though they seem to have made a distinction between whale and sturgeon, as was incidentally observed in a former chapter (*y*).

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 17 Edw. II. c. 11, and were so, long before, at the common law. It is worthy observation, how greatly the law of wrecks has been altered, and the rigour 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 (*z*). But this was undoubtedly adding sorrow to sorrow, and was consonant neither to reason nor humanity. Wherefore it was first *ordained by King [*291] Henry I. that if any person escaped alive out of the ship, it should be no wreck (*a*); and afterwards King Henry II. by his charter (*b*) 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*" (*d*), 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 (*e*). And the law, as laid down by Bracton in the reign of Henry III. seems still to have improved in its equity. For then, if not only a dog, for instance, escaped, by which the owner might be discovered, but if any certain mark were set on the goods, by which they might be known again, it was held to be no wreck (*f*). 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. Afterwards, in the statute of

(*v*) Flowd. 315.
(*w*) Stiernh. *de jure Sueonum. l.* 2, *c.* 8. *Gr. Constum. exp.* 17.
(*x*) 17 Edw. II. c. 11.
(*y*) Bracton, l. 3, c. 3. Britton, c. 17. Fleta, l. 1, c. 45 and 46. *Memorand. Scacch. H.* 21 *Edw.* I. 57, prefixed to Maynard's Year Book of Edward II.
(*y*) Ch. 4, page 223.
(*z*) Dr. and St. d. 2, c. 51.
(*a*) Sprim. *Cod. apud* Wilkins, 305.
(*b*) 26 May, A. D. 1174. 1 Rym. *Fœd.* 36.
(*c*) Rog. Hoved. *in Ric* I.
(*d*) "Should have all his goods freed and undisturbed."
(*e*) 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?*"
(*f*) Bract. l. 3, c. 3.

Westminster, the first (*g*), the time of limitation of claims, given by the charter of Henry II. is extended to a year and a day, according to the usage of Normandy (*h*); and it enacts, that if a man, a dog, or a cat escape alive, the vessel shall not be adjudged a wreck. These animals, as in Bracton, are only put for examples (*i*); for it is now held (*j*), that not only if any live thing escape, but if proof can be made of
[*292] the *property of any of the goods or lading which come to shore, they shall not be forfeited as wreck. The statute further ordains, that the sheriff of the county shall be bound to keep the goods a year and a day, (as in France for one year, agreeably to the maritime laws of Oleron (*k*), and in Holland for a year and a half,) that if any man can prove a property in them, either in his own right or by right of representation (*l*), 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 (*m*). 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 (*n*).

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 (*o*). 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 (*p*); 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
[*293] *king's grant to a man of wrecks, things jetsam, flotsam, and ligan will not pass (*q*).

Wrecks, in their legal acceptation, are at present not very frequent; for, if any goods come to land, it rarely happens, since the improvement of commerce, navigation, and correspondence, that the owner is not 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 said 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 prædam currere* (*r*)." For by the statute 27 Edw. III. c. 13, if any ship be lost

(*g*) 3 Edw. I. c. 4.
(*h*) *Gr. Coustum.* c. 17.
(*i*) Flet. l. 1, c. 44. 2 Inst. 167. 5 Rep. 107.
(*j*) Hamilton v. Davies. *Trin.* 1 *Geo. III. B. R.*
(*k*) § 28.
(*l*) 2 Inst. 168.
(*m*) Plowd. 166.
(*n*) 2 Inst. 168. Bro. *Abr. tit.* Wreck.
(*o*) 5 Rep. 106.
(*p*) *Quæ enim res in tempestate, levandæ navis causa, ejiciuntur, hæ dominorum permanent. Quia palam est, eas non eo animo ejici, quod quis habere nolit.* Inst. 2, 1, § 48.
(*q*) 5 Rep. 108.
(*r*) Stiernh. *de jure Sueon.* l. 3, c. 5.

on the shore, and the goods come to land, (which cannot, says the statute, be called wreck,) they shall be presently delivered to the merchants, paying only a reasonable reward to those that saved and preserved them, which is entitled *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 inquire and find them out, and compel them to make restitution (*s*). 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 seacoasts, (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 100*l*., 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 [*294] 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 endeavours 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 of trees, steeples, or other stated seamarks, is punished by the statute 8 Eliz. c. 13, with a forfeiture of 100*l*. or outlawry. 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 (*t*) (10).

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 (*u*). 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,

(*s*) F. N. B. 119.

(*t*) 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. (Lindenbrug. *Cod. LL. an. tit.* 146, 715.)

(*u*) 2 Inst. 577.

(10) Property cast by sea *upon the land*, may be recovered by the apparent owner on paying salvage not exceeding one half of the value, and reasonable expenses, and giving bonds conditioned for the payment of all damages that may be recovered against him within two years by the true owner. It is the special duty of the wreck-masters, with the aid of such citizens as they may require, to give all possible assistance to vessels stranded, and to those on board. Any one having in his possession goods from a stranded vessel, is to deliver them in 48 hours to the sheriff, coroner, or wreck-master, or is guilty of a misdemeanor. The fraudulent defacing of marks on goods, or destruction or suppression of any document showing the ownership of wrecked property, is also a misdemeanor. 1 R. S. 690, &c. Salvage on ships or goods found at sea is determined by the U. S. courts. The stealing or destruction of goods lost *upon the sea*, or on any other place within the admiralty and maritime jurisdiction of the U. S., or the obstruction of any person endeavouring to save his life from a ship in distress, or the showing of false lights, is punished by the laws of the U. S. by fine not exceeding 5000 dollars, and imprisonment not exceeding 10 years. Story's laws, 2001.

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 (*u*) (11). But now by the statutes 1 W. and M. st. 1, c. 30, and 5 W. and 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 [*295] 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 landowner is by reason and law entitled (12).

XIII. To the same original may in part be referred the revenue of treasure-trove (derive from the French word *trover*, 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 (13), 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 (*v*). 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*, and 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 pecuniæ*." 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 (14), unless [*296] 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.

Formerly all treasure-trove belonged to the finder (*y*); as was also the

(*u*) Plowd. 336.
(*v*) 3 Inst. 132. Dalt. of Sheriffs, c. 16.
(*w*) Britt. c. 17. Finch, L. 177.
(*x*) L. 3, c. 3, § 4.
(*y*) Bracton, *l.* 3, *c.* 3. 3 Inst. 133.

(11) And it is said, that though the king grants lands in which mines are, and all mines in them, yet royal mines do not pass. *Plowd.* 336. The arguments used in this case appear quite metaphysical.

(12) The state of N. Y. reserves to itself all gold and silver mines: also all mines of other metals on lands belonging to persons not citizens of the U. S.: also all mines of other metals on lands owned by citizens, if the ore of these last contains less than two thirds in value of copper, tin, iron, or lead. But the owner of any gold or silver mine may enjoy its produce for 21 years if he give notice of his discovery. 1 R. S. 281. See also 1 R. L. 124: law of 1789.

(13) Not *upon* the land. *Staunf. Pl. Cor.* 39.—But it is not said to be treasure-trove if it be other metal than gold or silver. 3 *Inst.* 132.

(14) This certainly is true, though it cannot be reconciled with the learned judge's doctrine, that all *bona vacantia* belong to the king. See pa. 299.

rule of the civil law (*z*) (15). 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 (*a*), "*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 irruption should be over, and the invaders driven back to their deserts. 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 (*b*), 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 (*c*).

XIV. Waifs, *bona waviata*, are goods stolen, and waved or thrown away by the thief in his flight, for fear of being apprehended (16). 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 (*d*). And therefore *if the party robbed do his diligence immediately [*297] 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*). Waved goods do also not belong to the king, till seized by somebody for his use; for if the party robbed can seize 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 flight; 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 flight, 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.

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 para-

(*z*) *Ff.* 41, 1, 31.
(*a*) *De jur. b. & p. l.* 2, *c.* 8, § 7.
(*b*) Glanv. *l.* 1, *c.* 2. Crag. 1, 16, 40.
(*c*) 3 Inst. 133.
(*d*) Cro. Eliz. 694.
(*e*) Finch. L. 212.
(*f*) *Ibid.*
(*g*) 5 Rep. 109.
(*h*) Fitz. *Abr. tit. Estray*, 1, 3 Bulstr. 19.

(15) And he who finds treasure ought to give notice immediately to the king's bailiff, &c, or coroner. Stamf. P. C. 40, *a*.

(16) And this though left by him at a common inn. 2 Rol. 809, C. 15. [If so left to ease him of his flight.] For if he leave a stolen horse at a common inn for his meal, it is no waife. Id. C. 10.

mount of the soil, in recompence for the damage which they may have done therein (17): 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* [*298] *villa vel pago, postremo 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*), (18). 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 beasts may be estrays, that are 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 (*o*) defines them, *pecus vagans, quod nullus petit, sequitur, vel advocat.* For animals upon which the law sets no value, as a dog or cat, and animals *feræ naturæ*, as a bear or wolf, cannot be considered as estrays. So swans may be estrays, but not any other fowl (*p*); 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

(*i*) Mirr. c. 2, § 19.
(*k*) 5 Rep. 106. Bro. *Abr. tit. Estray.* Cro. Eliz. 716.
(*l*) Stiernh. *de jur. Gothor. l.* 3, c. 5.
(*m*) Dalt 8h. 79.
(*n*) Finch. L. 177.
(*o*) *L.* 1, c. 43.
(*p*) 7 Rep. 17. (19)

(17) This reason is not very satisfactory; for the king being the *ultimus hæres* of all the land in the kingdom, they must do the same injury to his interest, whether they are grazing in one place or another out of the king's domains. But the law is probably founded upon general policy; for by giving the estray to the king, or his grantee, and not to the finder, the owner has the best chance of having his property restored to him; and it lessens the temptation to commit thefts, as it prevents a man from pretending that he had found, as an estray, what he had actually stolen; or according to the vulgar phrase, that he had found what was never lost.

(18) But if any other person finds and takes care of another's property, not being entitled to it as an estray (nor being saved at sea, or in other cases where the law of salvage applies), the owner may recover it or its value, without being obliged to pay the expenses of keeping. 2 Bl. Rep. 1117.* 2 Hen. Bl. 254.

(19) This in some editions is 7 Rep. 89: where the page is 17, Calvin's case must be excluded from computation, and the numbering regulated by the folio, not by the page. As to estrays, see 1 R. S. 350. 10 Johns. R. 102: may not any *tamed* fowl be an estray notwithstanding the above authority?

*The law, as it stands, is not without its policy; but equity seems to demand, even on the part of a loser, that a *bonâ fide* finder should be recompensed for the labour he may have bestowed, and the care he may have taken in preserving property actually lost. The general law seems calculated to prevent surreptitious appropriation of another's property under the pretence, if detected, of its having been found. It is said, that much property in timber, and other comparatively light goods, is annually irrecoverably lost by drifting, no one caring to stay it. By the Thames regulations, watermen are enjoined to convey all timber, &c. found by them loosely floating, to certain places of deposit, appointed by the water bailiff; but, as no recompense is made, either the property is secreted; or, if that be hazardous, the article is left to drift away to sea.

bound, so long as he keeps it, to find it in provisions and preserve it from damage (*q*); and may not use it by way of labour, but is liable to an action for so doing (*r*). Yet he may milk a cow, or the like; for that tends to the preservation, and is for the benefit, of the animal (*s*).

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 *impe- [*299] rial 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 burthensome 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 (*t*), *hæc quæ nullius in bonis sunt, et olim fuerunt inventoris de jure naturali, jam efficiuntur principis de jure gentium* (*u*), (20).

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 confisca-

(*q*) 1 Roll. Abr. 889.
(*r*) Cro. Jac. 147.
(*s*) Cro. Jac. 148. Noy. 119.
(*t*) *L.* 1, *c.* 12.

(*u*) "These things, for which no owner appears, by natural law formerly belonged to the finder, but are now, by the law of nations, appointed to the prince."

(20) This cannot be reconciled with what the learned judge has advanced in p. 295, viz. that if "any thing be found in the sea, or upon the earth, it doth not belong to the king but the finder, if no owner appears." That certainly is the law of England; and which, with deference to the learned judge, is the general rule with regard to all *bona vacantia*, except in particular instances in which the law has given them to the king. Those instances are exceptions, which prove the rule, for *expressio unius est exclusio alterius*. See the case of Armory, *v.* Delamirie, in Strange, 505, where a chimney-sweeper's boy recovered from a goldsmith, who detained from him a diamond which he had found, the value of the finest diamond which would fit the socket from which it was taken. And it was clearly held, that the boy had a right to it against all the world, except the owner, who did not appear. And I cannot but think that the learned judge has misconceived the sentence in Bracton, which is this: *Item de hiis, quæ pro wayvio habentur, sicut de averiis, ubi non apparet dominus, et quæ olim fuerunt inventoris de jure naturali, jam efficiuntur principis de jure gentium.* Here the *quæ* refers only to the two antecedents *wayvia* and *averia*, or perhaps to *averia* only; by which construction the sentence is consistent, and the whole correct. But if it had been intended that it should be understood as if *omnia* had preceded *quæ*, it would have been superflous to have instanced *averia*, and the sentence would certainly have been erroneous.

The finder of a *share* of a lottery ticket that has drawn a prize cannot recover the share of the prize from the seller of the share. 5 Wend. 404.

tion 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 misdemesnors. I [*300] 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* (21).

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 (*v*); 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 (*w*): 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 age of discretion is killed by a fall *from* a cart, or horse, or the like, not being in motion (*x*); 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 have been, that the child, by reason of its want of discretion, was presumed incapable of actual sin, and therefore needed no deodand to purchase propitiatory masses: but every adult, who died in actual sin, stood in need of such atonement, according to the humane superstition of the founders of the English law.

Thus stands the law if a person be killed by a fall from a thing [*301] 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 (22). Where a

(*v*) 1 Hal. P. C. 419. Fleta, *l.* 1, c. 25.
(*w*) Fitzh. *Abr. tit. Enditement, pl.* 27. Staunf. P. C. 20, 21.
(*x*) 3 Inst. 57. 1 Hal. P. C. 422.
(*y*) *Omnia, quæ movent ad mortem, sunt Deo data.* Bracton, *l.* 3, c. 5. "All things which while in motion cause death, are to be offered to God."
(*z*) Exod. xxi. 28.
(*a*) Æschin. *cont. Ctesiph.* Thus too by our ancient law, a well in which a person was drowned, was ordered to be filled up, under the inspection of the coroner. Flet. *l.* 1, c. 25, § 10. Fitzh. *Abr. t. corone*, 416.

(21) All forfeitures in nature of deodands, or for any offences except treason, are abolished. 2 R. S. 701, 656.

(22) This was one of Draco's laws; and perhaps we may think the judgment, that a statue should be thrown into the sea for inv-

thing not in motion, is the occasion of a man's death, that part only which is the immediate cause is forfeited; as if a man be climbing up the wheel of a cart, and is killed by falling from it, the wheel alone is a deodand (*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 by a certain penknife, value sixpence,) that the king or his grantee may claim the deodand: for it is no deodand, unless it be presented as such by a jury of 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 [*302] falls from a boat or ship in fresh water, and is drowned, it hath been said, that the vessel and cargo are in strictness of law a deodand (*g*). But juries have of late very frequently taken upon themselves to mitigate these forfeitures, by finding only some trifling thing, or part of an entire thing, to have been the occasion of the death. And in such cases, although the finding by the jury be hardly warrantable by law, the court of king's bench hath generally refused to interfere on behalf of the lord of the franchise, to assist so unequitable a claim (*h*) (23).

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.

(*b*) 1 Hal. P. C. 422.
(*c*) 1 Hawk. P. C. c. 26.
(*d*) A similar rule obtained among the ancient Goths. *Si quis, me nesciente, quocunque meo telo vel instrumento in perniciem suam abutatur; vel ex ædibus meis cadat, vel incidat in puteum meum, quantumvis tectum et munitum, vel in cataractam, et sub molendino meo confringatur, ipse aliqua mulcta plectar; ut in parte infelicitatis meæ numeretur, habuisse vel ædificasse aliquod quo homo periret.* Stiernhook *de jure Goth. l.* 3, *c.* 4.
(*e*) Dr. and St. d. 2, c. 51.
(*f*) 3 Inst. 57.
(*g*) 3 Inst. 58. 1 Hal. P. C. 423, Molloy, *de Jur. Maritim.* 2, 225.
(*h*) Foster of Homicide, 266.

ing fallen upon a man, less absurd, when we reflect that there may be sound policy in teaching the mind to contemplate with horror the privation of human life, and that our familiarity even with an insensible object which has been the occasion of death, may lessen that sentiment. Though there may be wisdom in withdrawing such a thing from public view, yet there can be none in treating it as if it was capable of understanding the ends of punishment.

(23) But would it not be much better that a law should be abolished, the policy of which has long ceased, and at which the understandings of mankind so strongly revolt, that juries are inclined to trifle with their oaths, and judges to encourage ridiculous distinctions, which tend to bring the general administration of justice into contempt?

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 [*303] any. For which reason the custody of *him and of his lands was formerly vested in the lord of the fee (*h*); (and therefore still, by special custom, in some manors the lord shall have the ordering of idiot and lunatic copyholders) (*i*), but, by reason of the manifold 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 (*k*). 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) (*l*), 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 disinherited (24).

By the old common law there is a writ *de idiota inquirendo*, to inquire 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 fate 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.

[*304] *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 any understanding, as wanting all those senses which furnish the human mind with ideas.

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 (*r*). A lunatic is indeed properly one that hath lucid intervals; sometimes enjoying his senses, and sometimes not, and that frequently depending upon the

(*h*) Flet. *l.* 1. *c.* 11, § 10.
(*i*) Dyer. 302. Hutt. 17. Noy. 27.
(*k*) F. N. B. 232.
(*l*) 4 Rep. 126. *Memorand' Scacc'* 20 *Edw. I.* (prefixed to Maynard's Year-Book of Edw. II.) fol. 20, 24.
(*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.
(*o*) 4 Inst. 203. Com. Journ. 1610.
(*p*) F. N. B. 233.
(*q*) Co. Litt. 42. Fleta, *l.* 6, *c.* 40.
(*r*) *Idiota a casu et infirmitate.* (*Mem. Scacc.* 20 *Edw. I.* in Maynard's Year-Book of Edw. II. 20.)

(24) The jurisdiction which the chancellor has generally, or perhaps always, exercised over the persons and estates of lunatics and idiots, is not necessarily annexed to the custody of the great seal; for it has been declared by the house of lords, "that the custody of idiots and lunatics was in the power of the king, who might delegate the same to such person as he should think fit." And upon every change of the great seal, a special authority under his majesty's royal sign manual is granted to the new chancellor for that purpose. Hence no appeal lies from the chancellor's orders upon this subject to the house of lords, but to the king in council. *Dom. Proc.* 14 Feb. 1726. 3 *P. Wms.* 108.

change of the moon (25). But under the general name of *non compos mentis* (which, Sir Edward Coke says, is the most legal name) (*s*), are comprised 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 judged by the court of chancery incapable of conducting their own affairs. To these also, as well as idiots, the king is guardian, but to a very different pupose. 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 administration,) shall now go to their executors or administrators.

*On the first attack of lunacy, or other occasional insanity, while [*305] there may be hope of a speedy restitution of reason, it is usual to confine the unhappy objects in private custody under the direction of their nearest friends and relations; and the legislature, to prevent all abuses incident to such private custody, hath thought proper to interpose its authority by statute 14 Geo. III. c. 49, (continued by 19 Geo. III. c. 15), for regulating private madhouses. But, when the disorder is grown permanent, and the circumstances of the party will bear such additional expense, it is proper to apply to the royal authority to warrant a lasting confinement (26).

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 entrusted (*t*), upon petition or information, grants a commission in nature of the writ *de idiota inquirendo*, to inquire 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 seldom 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 (*u*). The heir is generally made the manager or committee of the estate, it be-

(*s*) 1 Inst. 246.
(*t*) 3 P. Wms. 108.
(*u*) 2 P. Wms. 638.

(25) The influence of the moon upon the human mind, or rather the dependence of any state of the human mind upon the changes of the moon, is doubted or denied by the best practical writers upon mental disorders.

(26) And made perpetual by 26 Geo. III. c. 91. By that statute no person shall confine more than one lunatic in a house kept for the reception of lunatics, without an annual licence from the college of physicians or the justices in sessions, under a penalty of 500*l*. And if the keeper of a licensed house receive any person as a lunatic, without a certificate from a physician, surgeon, or apothecary, that he is a fit person to be received as a lunatic, he shall forfeit 100*l*.*

* See act 9 Geo. IV. c. 41. § 41. vol. 3. p. 427.

ing 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 (27).

In this case 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 prætor (*v*). And, by the laws of Solon, such prodigals were branded with perpetual infamy (*w*).

[*306] But with us, when a man on an inquest of idiocy hath been *returned an *unthrift*, and not an *idiot* (*x*), 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 lædas*," 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 vigour.

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

[*307] 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

(*v*) *Solent prætores, 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, recuperit. Ff.* 27, 10, 1.

(*w*) Potter, Antiq. b. 1, c. 26.

(*x*) Bro. *Abr. tit. Idiot*, 4.

(27) The custody of a lunatic's person and estate, real and personal, may be committed to his next of kin, though his heirs at law. 1 Johns. C. R. 436. See 7 Ves. Jr. 591. If no one will accept the office of committee, a receiver is appointed, who must give proper security. 10 Ves. Jr. 622. The Revised Statutes (2 vol. p. 52,) give the chancellor the custody of all idiots, lunatics, and habitual drunkards, and point out the mode of appointing committees of their estate and persons. 1 R. S. 633, direct the mode of confining those who are furiously mad or dangerous.

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 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 (*y*), some part of his property, in order to enjoy the rest.

These extraordinary grants are usually called by the synonimous names of aids, subsidies, and supplies; and are granted, we have formerly seen (*z*), 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 the ways and means of raising the supply so voted. And in this committee every *member, (though it is [*308] looked upon as the peculiar province of the chancellor of the exchequer,) may propose such scheme of taxation as he thinks will be least detrimental to the public. The resolutions of this committee, when approved by a vote of the house, are in general esteemed to be, as it were, final and conclusive. For, though the supply cannot be actually raised upon the subject till directed by an act of the whole parliament, yet no monied man will scruple to advance to the government any quantity of ready cash, on the credit of a bare vote of the house of commons, though no law be yet passed to establish it.

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

1. 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, however, 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.

(*y*) Page 282.
(*z*) Page 169.
(*a*) 2 Inst. 77. 4 Inst. 34.

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. [*309] Originally the amount of these taxes were *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 year of Edward 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 29,000*l.* 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 Edward III.; and then raised it by a rate among themselves, and returned it into the royal exchequer.

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 (*d*); when every tenant of a knight's fee was bound, if called upon, to attend the king in his army for forty days in every year. But this personal attendance 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, (in levying scutages on the landholders by [*310] the royal authority only, whenever our kings went to war, in *order to hire mercenary troops and pay their contingent expenses) it became thereupon a matter of national complaint; and King John was obliged to promise in his *magna carta* (*e*), 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 (*f*) we only find it stipulated, that scutages should be taken as they were used to be in the time of King Henry the second. Yet afterwards, by a variety of statutes under Edward I. and his grandson (*g*), 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.

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 (*h*). But they all gradually fell into disuse upon the introduction

(*b*) Hoved. A. D. 1188. Carte. i, 719. Hume, i. 32.
(*c*) A. D. 1232.
(*d*) See the second book of these Commentaries.
(*e*) Cap. 14.
(*f*) 9 Hen. III. c. 37.
(*g*) 25 Edw. I. c. 5 and 6. 34 Edw. I. st. 4, c. 1. 14 Ed. III. st. 2, c. 1.
(*h*) Madox, Hist. Exch. 480.

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. 8d. 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 (*i*), amount to more than 70,000*l.* whereas a modern land-tax, at the same rate, produces two millions. It was anciently the rule never to grant more than one subsidy, and two fifteenths at a time; but this rule was broken through for the first time on a very pressing occasion, the Spanish invasion in 1588; when the parliament gave Queen Elizabeth two subsidies and four 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 [*311] years; which was looked upon as a startling proposal: though Lord Clarendon says (*k*), that the speaker, Serjeant Glanville, 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 himself; 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.

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, which 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, as Sir Edward Coke tells us (*l*), to about 2000*l.* 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 recompence for which the beneficed clergy have from that period been allowed to vote at the election of knights of the shire (*m*); and thenceforward also the practice of giving ecclesiastical subsidies hath fallen into total disuse (28).

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, [*312] the latter having no other sufficient revenue to support themselves and their measures, introduced the practice of laying weekly and monthly

(*i*) 4 Inst. 33.
(*k*) Hist. b. 2.
(*l*) 4 Inst. 33.
(*m*) Dalt. of Sheriffs, 418. Gilb. Hist. of Exch. c. 4.

(28) Sir John Sinclair has given the proportions to be levied upon each county of an assessment of 70,000*l.* a month in the year 1660, in his History of the Public Revenue, 1 part, 189.

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 120,000*l.* 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 800,000*l.* was raised by way of subsidy, which was the last time of raising supplies in that manner (29). 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 500,000*l.* was equal to 1*s.* 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 fourscore years, the land-tax has continued an annual charge upon the subject; above half the time at 4*s.* in the pound, sometimes at 3*s.* sometimes at 2*s.* twice (*q*) at 1*s.* but without any total intermission.

The medium has been 3*s.* 3*d.* in the pound, being equivalent with [*313] twenty-three ancient subsidies, and amounting annually to *more than a million and a 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 (30).

II. The other annual tax is the malt-tax; which is a sum of 750,000*l.* raised every year by parliament, ever since 1697, by a duty of 6*d.* in the bushel on malt, and a proportionable sum on certain liquors, such as cider and perry, which might otherwise prevent the consumption of malt. This is under the management of the commissioners of the excise; and is,

(*n*) 29 Nov., 4 Mar. 1642.
(*o*) One of these bills of assessment, in 1656, is preserved in Scobell's Collection, 400.
(*p*) Com. Journ. 25 June, 9 Dec. 1678.
(*q*) In the years 1732 and 1733.

(29) No subsidies were granted either by the laity or clergy after 1663, 15 Car. II. c. 9 and 10. The learned judge has been misled by the title to the act of the 22 and 23 Car. II. c. 3, in the year 1670, when he declares it was the last time of raising supplies by way of subsidy; for the title of it is, "An act to grant a subsidy to his majesty for supply of his extraordinary occasions." All the material clauses of which are copied *verbatim* in that of the 4 W. and M. c. 1 (the land-tax act); the act of Charles is not printed in the common edition of the Statutes at Large, but it is given at length in Keble's edition. The scheme of taxing landed property was not a novelty, for it was first introduced in the time of the commonwealth. The substance of this plan may be seen in an act for an assessment to raise 60,000*l.* a month in Scobell's Acts, 1656, c. 12.

(30) The commissioners are appointed annually in the renewed act; but they cannot execute the office in any county, except in Wales, under a penalty of 50*l.* unless they have some estate or interest in land within the county, of the clear value of 100*l.* a year, and which was taxed for that sum at the least the year before. The assessors and collectors are principal inhabitants appointed by the commissioners.

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 3*d.* per bushel was laid upon malt; to the produce of which a duty of 15 per cent. or nearly an additional halfpenny per bushel, was added in 1779 (31); and that in 1763 a proportionable excise was laid upon cider and perry, but so new-modelled in 1766, as scarce to be worth collecting (32).

The perpetual taxes are,

I. The customs; or the duties, toll, tribute, or tariff, payable upon merchandize 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 [*314] of parliament 3 Edw. I. though the record thereof is not now extant (33). 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 wool, skins, and leather, formerly granted to us by the commonalty aforesaid." These were formerly called the hereditary

(*r*) Dyer, 165.
(*s*) Dyer, 43, pl. 24.
(*t*) 2 Inst. 58, 59.

(31) And in the next year a further additional duty of 6*d.* a bushel was laid upon malt. But by the consolidation act, 27 Geo. III. c. 13, these duties are repealed; and, in lieu of them, 9$\frac{1}{2}$*d.* is laid upon every bushel of malt in England, and half as much in Scotland. Sir John Sinclair states, that from Michaelmas 1787 to Michaelmas 1788, the net produce of the perpetual excise upon malt was 724,786*l.*; the annual excise 603,317*l.*; the duties upon beer 1,666,152*l.*; upon British spirits 509,167*l.*: so that barley yielded a clear revenue of 3,503,422*l.* 3 *Sinc.* 125.

(32) Though the land-tax is supposed, and stated in the annual act, to raise, at 4*s.* in the pound, an income of 1,989,673*l.* 7*s.* 10$\frac{1}{2}$*d.* for England; and 47,954*l.* 1*s.* 2*d.* for Scotland; making in all 2,037,627*l.* 9*s.* 0$\frac{1}{2}$*d.*: yet Sir John Sinclair shews, with great appearance of accuracy, that it is so uniformly deficient, that, upon an average, the whole amount ought not to be estimated at more than 1,900,000*l.* and that the annual malt-tax, after two very favourable years, ending at Michaelmas 1788, did not average more than 600,000*l.* 3 Part, 108, 117.

(33) Sir Edward Coke cites a letter patent of Edw. I. in which the king recites, that the parliament had granted to him and his heirs *quædam nova consuetudo* upon wool, skins, and leather; but that merchants paid duties and customs long before, appears from the memorable clause in *magna charta*, upon which Sir Edward Coke is there commenting; that clause provides, that all merchants shall have safe conduct throughout England, *ad emendum & vendendum sine omnibus malis tolnetis, per antiquas & rectas consuetudines*; and he says these are subsidies or customs granted by common consent *pro bono publico*. 2 *Inst.* 58. They seem to have been called customs, from having been paid from time immemorial; and a memorable statute in the 21 Edw. I. c. 5, makes that distinction. It states, that several people are apprehensive that the aids, tasks, and prizes, which they had granted for the king's wars, and other occasions, might be turned upon them and their heirs (*en servage*) into an act of slavery; the king therefore declares and grants, that he will not draw such temporary aids and taxes into a *custom*.

This is a striking and a noble instance of a jealous spirit of liberty in our ancestors, and that they were anxious to preserve those rights which by *magna charta* they had successfully vindicated.

Lord Coke, both in 2 Inst. 58, and in 4 Inst. 29, 30, shews from the authorities he cites, that customs or duties were called in old legal Latin *custuma* and *consuetudines* indiscriminately. But he seems very desirous of inculcating the doctrine, that all customs or duties owe their origin to the authority of parliament; a doctrine which, both before and after his time, the crown was inclined to controvert.

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* (*v*), not *consuetudines*, which is the language of our law whenever it means merely usages. The duties on wool, sheepskins, 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 nova* were an impost of 3*d.* in the pound, due from merchant strangers only, for all commodities, as well imported as exported; which was usually called the alien's duty, and was first granted in 31 Edw. I. (*w*). But these ancient hereditary customs, especially those on wool and woolfells, came to be of little account, when the nation became sensible of the advantage of a home manufacture, and prohibited the exportation of wool by statute 11 Edw. III. c. 1.

There is also another very ancient hereditary duty belonging to the crown, called the *prisage* or *butlerage* of wines, which is considerably older than the customs, being taken notice of in the great roll of the exchequer, 8 Ric. I. still extant (*x*). Prisage was a right of *taking* two tons [*315] of wine from *every ship (English or foreign) importing into England twenty tons or more, one before and one behind the mast; which by charter of Edward I. was exchanged into a duty of 2*s.* for every ton imported by merchant strangers, and called butlerage, because paid to the king's butler (*y*).

Other customs payable upon exports and imports were distinguished into subsidies, tonnage, poundage, and other imposts. Subsidies were 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 12*d.* in the pound, on all other merchandize whatsoever; and the other imposts 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.

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 the same. They were at first usually granted only for a stated term of

(*u*) Dav. 9.

(*v*) 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*.

(*w*) 4 Inst. 29.

(*x*) Madox, Hist. Exch. 528, 532.

(*y*) Dav. 8. 2 Bulst. 254. Stat. Estr. 16 Edw. II. Com. Journ. 27 April, 1689.

(*z*) Dav. 11, 12.

ars: as, for two years in 5 Ric. II. (*a*); but in Henry the sixth's time ey were granted him for life by a statute in the thirty-first year of his gn; and again to Edward IV. for the term of his life also: since which ıe they were regularly granted to all his successors for life, sometimes the first, sometimes at other subsequent parliaments, till the gn of Charles the *first; when, as the noble historian ex- [*316] sses it (*b*), his ministers were not sufficiently solicitous for a re- wal of this legal grant. And yet these imposts were imprudently and constitutionally levied and taken, without consent of parliament, for fifn years together; which was one of the causes of those unhappy disıtents, justifiable at first in too many instances, but which degenerated last into causeless rebellion (34) and murder. For as in every other, so his particular case, the king (previous to the commencement of hostili-) gave the nation ample satisfaction for the errors of his former conduct, passing an act (*c*), whereby he renounced all power in the crown of leıg the duty of tonnage and poundage without the express consent of liament; and also all power of imposition upon any merchandizes whatr.* Upon the restoration, this duty was granted to King Charles the ınd for life, and so it was to his two immediate successors; but now by :e several statutes, 9 Ann. c. 6, 1 Geo. I. c. 12, and 3 Geo. I. c. 7, it is le perpetual, and mortgaged for the debt of the public. The customs s imposed by parliament are chiefly contained in two books of rates, forth by parliamentary authority (*d*); one signed by Sir Harbottle nston, speaker of the house of commons in Charles the second's time; the other an additional one signed by Sir Spenser Compton, speaker ıe reign of George the first; to which also subsequent additions have

Dav. 12.
Hist. Rebell. b. 3.

(*c*) 16 Car. I. c. 8.
(*d*) Stat. 12 Car. II. c. 4, 11 Geo. I. c. 7.

:) The causes of resistance were numeand to the last hour of the pending treaty tbridge some of them existed. Not one e supposed prerogatives, against the fu- :xertion of which security was sought by reaty, but had operated some grievance the subject. The king, at a meeting on :casion of that treaty, had actually agreed n it; but, as the discussion of its several had been long and late, the mere signas adjourned to eight o'clock the next ing. The unfortunate king appeared to with the commissioners in excellent temıd with seeming good-will towards them; anticipating nothing else than the comn of the treaty. But the event shewed hey were not justified in placing any re- upon the monarch, who, it appears, not rely upon himself. In the night he ed letters from the queen, announcing h aid at hand; and, at the time appointthe morning for that purpose, the king d to sign the treaty. The house was when the news of the refusal arrived; ointment and regret clouded every brow. vent is too well known. The king lost e, but he was not murdered. It became stion of self-preservation and of power, Cromwell and his supporters prevailed. be conceded that the death of the first es shall rightly be called a murder, how e deaths of Lord Stafford, in the subsequent reign, and those of Sir Henry Vane and others, to be designated? That the king, a papist, might not *seem* to favour popery, he allowed the poor old peer to be murdered; and, in violation of his word that the life of Vane should be spared, the king permitted him to be judicially destroyed. His noble reply, when he was urged to become a suppliant to the restored monarch, deserves to be remembered: "If the king do not think himself more concerned for his honour and his word, than I do for my life, they may take it." None of these judicial acts are excusable on any ground of justice, policy, or expediency; but Charles, had he survived and resumed his power, would have immolated more martyrs to liberty than its champions sacrificed of those to royalty. Let the student look at the facts; not through Hume's glazing, or Lord Clarendon's beautiful apology, but through the public events, state papers, and proceedings of the period. Then let him turn to the recorded deeds of the profligacy of one son, and to those indicating the fatuity of the other; and he will not fail to perceive that the subsequent revolution became necessary to the preservation of the state and people; and, if it was so necessary, then a justification for the resistance, rebellion, if that word be thought more appropriate, opposed to this family, beginning with the father, will be read.

been made (35). 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 parliaments for acts of naturalization (36).

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 [*317] 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 of 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 penderet juberetur, in partem pretii emptoribus accrescebat* (e)." 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

(e) Hist. l. 13.

(35) In the year 1787, by the 27 Geo. III. c. 13, called the consolidation act, all the former statutes imposing duties of customs and excise were repealed with regard to the *quantum* of the duty; and the two books of rates mentioned by the learned judge were declared to be of no avail for the future; but all the former duties were consolidated, and were ordered to be paid according to a new book of rates annexed to that statute. Before this act was passed, it could not be supposed that many persons, beside excisemen and custom-house officers, could be acquainted with the duties payable upon the different articles of commerce. Sir John Sinclair says that French wine was liable to fifteen, and French paper to fourteen, different duties, which, of course, lay widely dispersed in so many acts of parliament But now, by this excellent improvement, we can immediately find the duty upon the importation or exportation of any article, or what excise duty any commodity is subject to, in an alphabetical table. Bullion, wool, and some few other commodities, may be imported duty free. All the articles enumerated in the tables or book of rates, pay, upon importation or exportation, the sum therein specified, according to their weight, number, or measure. And all other goods and merchandize, not being particularly enumerated or described, and permitted to be imported and used in Great Britain, shall pay upon importation 27*l.* 10*s.* *per cent. ad valorem*, or for every 100*l.* of the value thereof; but subject to a drawback of 25*l.* *per cent.* upon exportation. Very few commodities pay a duty upon exportation; but where that duty is not specified in the tables, and the exportation is not prohibited, all articles may be exported without payment of duty, provided they are regularly entered and shipped; but, on failure thereof, they are subject to a duty of 5*l.* 10*s.* *per cent. ad valorem*. And, to prevent frauds in the representation of the value, a very simple and equitable regulation is prescribed by the act, viz. the proprietor shall himself declare the value, and, if this should appear not to be a fair and true estimate, the goods may be seized by the proper officer; and four of the commissioners of the customs may direct that the owner shall be paid the price which he himself fixed upon them, with an advance of 10 *per cent.* besides all the duty which he may have paid; and they may then order the goods to be publicly sold, and, if they raise any sum beyond what was paid to the owner and the subsequent expenses, one half of the overplus shall be paid to the officer who made the seizure, and the other half to the public revenue. This statute is of infinite consequence to the commercial part of the world; it has reduced an important subject from a perfect chaos to such a plain and simple form, as to induce every friend to his country to wish that similar experiments were made upon other confused and entangled branches of our statute law.*

(36) By the 24 Geo. III. sess. 2, c. 16, the petty custom, or additional duty on all the goods of aliens or strangers, shall cease, except those which had been granted to the city of London. The city of London still retains a trifling duty, called scavage, on the goods of aliens. It is an odious and impolitic tax; and it would be honourable to the city of London to adopt the liberality of the legislature, and to relinquish it.

* Mr. Christian would, if living, be gratified on observing the spirit of useful consolidation now abroad, not a little perhaps excited by himself. Not the revenue laws only very much partake of its influence, but also the bankrupt and criminal laws. The multifarious statutes relative to larceny are repealed; and one statute now comprises all worth preserving that was scattered through many.

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.

There is also another ill consequence attending high imposts on merchandize, not frequently considered, but indisputably certain; that the earlier 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 [*318] pays at the custom-house, 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 other branches of the revenue (37). 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 rigour 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 exciseable commodities at any hour of the day, and, in many cases, of the night likewise. And the proceedings in case of transgres-

(*f*) Montesq. Sp. L. b. 13, c. 8.

(37) Sir John Sinclair has calculated that the expense of collecting the duties of excise is 5½ *per cent.* the customs 10½, stamps 3½, salt 6½, and the land-tax less than 3 *per cent.* and that the average expense of collecting the whole revenue is 7½ *per cent.* *Hist. Rev.* 3 part, 162.

sions 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 (38). For which reason, though Lord
[*319] *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*)." However, its original (*i*) establishment was in 1643, and its progress was gradual; 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, cider, 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
[*320] 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 nation 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 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 12 Car. II. by way of purchase (as was before observed) for the feodal tenures and other oppres-

(*g*) Hist. b. 3.
(*h*) Com. Journ. 8 Oct. 1642.
(*i*) The translator and continuator of Petavius's Chronological History (Lond. 1659, fol.) 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.
(*k*) Com. Journ. 17 May, 1643.
(*l*) Lord Clar. b. 7.
(*m*) 30 May, 1643. Dugdale, of the Troubles, 120.
(*n*) Ord. 14 Aug. 1649, c. 50. Scobel, 72. Stat. 1656, c. 19. Scobel, 453.

(38) See the jurisdiction of the commissioners and justices of the peace in cases of excise in Burn's Justice, title *Excise*. The grievances of the excise, perhaps, exist more in apprehension than in reality. Actions and prosecutions against officers, commissioners, and justices, for misconduct in excise cases, are very rarely heard of in courts of law. It is certainly an evil that a fair dealer cannot have the benefit of any secret improvement in the management of his trade or manufactory; yet perhaps it is more than an equivalent to the public at large, that, by the survey of the excise, the commodity is preserved from many shameful adulterations, as experience has fully proved since wine was made subject to the excise laws.

e parts of the hereditary revenue. But, from its first original to the pre- it time, its very name has been odious to the people of England. It has vertheless been imposed on abundance of other commodities in the gns of King William III. and every succeeding prince, to support the ormous expenses occasioned by our wars on the continent. Thus brandies d other spirits are now excised at the distillery; printed silks and linens, the printer's; starch and hair powder, at the maker's; gold and silver ire, at the wiredrawer's; plate in the hands of the vendor, who pays arly for a licence to sell it; lands and goods sold by auction, for which a ound-rate is payable by the auctioneer, who also is charged with an annu- duty for his licence; and coaches and other wheel carriages, for which ie occupier is excised, though not with the same circumstances of arbi- ary strictness, as in most of the other instances. To these we may add offee and tea, chocolate and cocoa paste, for which the duty is paid by ie retailer; all artificial wines, commonly called sweets; paper and paste- oard, first when made, and again if stained or printed; malt, as before ientioned; vinegars; and the manufacture of glass; for all which the uty is paid by the manufacturer: hops, for which the person that gathers hem is answerable; candles and soap, which are paid for at the maker's; nalt liquors brewed for sale, which are excised at the brewery; cider and perry, at the vendor's; and leather and skins, at the tanner's. A list, which no friend to his country would wish to see farther increased.

*III. I proceed therefore to a third duty, namely, that upon salt; [*321] which is another distinct branch of his majesty's extraordinary revenue, and consists in an excise of 3*s.* 4*d.* *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 regula- tions, as those of other excises. This tax had usually been only tempo- rary; but by statute 26 Geo. II. c. 3 was made perpetual (39), (40).

IV. Another very considerable branch of the revenue is levied with greater cheerfulness, as, instead of being a burden, it is a manifest advan- tage to the public (41). 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 first legislative establishment to the same assembly. It is true, there

(39) The duty is now almost nominal. A notion as to its value in some agricultural pro- cesses, tended much to facilitate the great re- duction of this duty; but its use in this res- pect is amongst the dreams of science not per- fectly realized.

(40) The constitution of the U. S. (Art. 1. Sect. 8, § 1,) gives Congress power to lay and collect taxes, duties, imposts, and excises; also to borrow money on the credit of the U. S. (§ 2.): but it requires that all duties, imposts, and excises be uniform throughout the U. S. (§ 1.); that no capitation or other direct tax be laid, unless in proportion to the census of popula- tion of the several States (Sect. 9, § 4,); and that no tax or duty be laid on articles exported from any state (§ 5). At present the U. S. impose no taxes, but duties on imported goods and on shipping. These, together with the proceeds of the sales of lands, constitute near- ly the whole revenue of the U. S., and seem sufficient soon to pay off the national debt. In New-York all estates real and personal are taxed for the benefit of the states, of the coun- ties and towns. Specific taxes are also im- posed; such as taxes on incorporated compa- nies, goods sold at auction, licenses, &c. The state and county taxes in the city of New- York amount to about a half of one per cent. The property of clergymen to the amount of 1500 *dolls.* is exempt from taxation: persons of colour also are exempt, unless they are seised of real estate of the value of 250 *dolls.* over and above all debts and incumbrances.

(41) Although postage be much increased since the period at which the commentator wrote, yet the distant postages cannot be deemed immoderate. The postage upon the letters of soldiers and sailors on service, is almost nominal.

existed postmasters in much earlier times: but I apprehend their business was confined to the furnishing of post-horses to persons who were desirous to travel expeditiously, and to the dispatching of extraordinary pacquets upon special occasions. King James I. originally erected a post-office under the control of one Matthew De Quester or De l'Equester for the conveyance of letters to and from foreign parts; which office was afterwards claimed by Lord Stanhope (*o*), but was confirmed and continued to William Frizell and Thomas Witherings by King Charles I. A. D. 1632, for the better accommodation of the English merchants (*p*). In 1635, the same prince erected a letter-office for England and Scotland, under the direction of the same Thomas Witherings, and settled certain rates of postage (*q*): but this extended only to a few of the principal roads, the times of carriage were uncertain, and the postmasters on each road were required to furnish the mail with horses at the rate of 2½*d.* a mile.

[*322] *Witherings was superseded, for abuses in the exertion of both his offices, in 1640; and they were sequestered into the hands of Philip Burlamachy, to be exercised under the care and oversight of the king's principal secretary of state (*r*). On the breaking out of the civil war, great confusions and interruptions were necessarily occasioned in the conduct of the letter-office. And, about that time, the outline of the present more extended and regular plan seems to have been conceived by Mr. Edmond Prideaux, who was appointed attorney-general to the commonwealth after the murder of King Charles. He was chairman of a committee in 1642 for considering what rates should be set upon inland letters (*s*); and afterwards appointed postmaster by an ordinance of both the houses (*t*), in the execution of which office he first established a *weekly* conveyance of letters into *all* parts of the nation (*u*); thereby saving to the public the charge of maintaining postmasters to the amount of 7000*l. per annum*. And, his own emoluments being probably very considerable, the common council of London endeavoured to erect another post-office in opposition to his; till checked by a resolution of the house of commons (*w*), 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 (*x*). But, in 1657, a regular post-office was erected by the authority of the protector and his parliament (42), upon nearly the same model as has been ever since adopted, and with the same rates of postage as continued till the reign of Queen Anne (*y*). 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.

(*o*) Latch. Rep. 87.
(*p*) 19 Rym. Feed. 825.
(*q*) *Ibid.* 660. 20 Rym. 192.
(*r*) 20 Rym. 429.
(*s*) Com. Journ. 28 Mar. 1642.
(*t*) *Ibid.* 7 Sept. 1644.
(*u*) *Ibid.* 21 Mar. 1649.
(*w*) *Ibid.* 21 Mar. 1649.
(*x*) Scobell, 359.
(*y*) Com. Journ. 9 June 1657. Scobell, 511.

(42) The preamble of the ordinance states, that the establishing one general post-office, besides the benefit to commerce and the convenience of conveying public dispatches, "will be the best means to discover and prevent many dangerous and wicked designs against the commonwealth."

The policy of having the correspondence of the kingdom under the inspection of government is still continued; for, by a warrant from one of the principal secretaries of state, letters may be detained and opened; but if any person shall wilfully detain or open a letter delivered to the post-office without such authority, he shall forfeit 20*l.*, and be incapable of having any future employment in the post-office. 9 *Ann.* c. 10, *s.* 40. But it has been decided, that no person is subject to this penalty but those who are employed in the post-office. 5 *T. R.* 101.

s. 12, 5 Geo. III c. 25, and 7 Geo. III. c. 50 (43), and penalties were
cted, in order to confine the carriage of letters to the public office only,
ept in some few cases: a provision which is absolutely neces-
r; for nothing but *an exclusive right can support an office [*323]
his sort: many rival independent offices would only serve to
one another. The privilege of letters coming free of postage, to and
n members of parliament, was claimed by the house of commons
1660, when the first legal settlement of the present post-office was
de (z); but afterwards dropped (a) upon a private assurance from the
wn, that this privilege should be allowed the members (b) (44). And
ordingly a warrant was constantly issued to the post-master-general (c),
ecting the allowance thereof, to the extent of two ounces in weight:
at length it was expressly confirmed by statute 4 Geo. III. c. 24;
hich adds many new regulations, rendered necessary by the great abuses
pt into the practice of franking (45); whereby the annual amount of
nked letters had gradually increased, from 23,600*l.* in the year 1715, to
0,700*l.* in the year 1763 (d). There cannot be devised a more eligible
thod than this, of raising money upon the subject: for therein both the
vernment and the people find a mutual benefit. The government ac-
ires a large revenue; and the people do their business with greater ease,
pedition, and cheapness, than they would be able to do if no such tax
nd of course no such office) existed (46).

(z) Comm. Journ. 17 Dec. 1660.
(a) *Ibid.* 22 Dec. 1660.
(b) *Ibid.* 16 Apr. 1735.
(c) *Ibid.* 26 Feb. 1734.
(d) *Ibid.* 28 Mar. 1764.

(43) The later statutes for regulating the tes of inland postage, are 41 G. III. c. 7. G. III. c. 92.

(44) The following account of it in the 23 l. Parl. Hist. p. 56, is curious, and proves hat originally were the sentiments of the wo houses respecting this privilege. "Colonel Titus reported the bill for the settlement f the post-office, with the amendments: Sir Valter Carle delivered a proviso for the letrs of all members of parliament to go free, uring their sitting: Sir Heneage Finch said, t was a *poor mendicant proviso, and below the onour of the house.* Mr. Prynn spoke also gainst the proviso: Mr. Buncklcy, Mr. Boawen, Sir George Downing, and Serjeant harlton, for it; the latter saying, 'The counil's letters went free.' The question being alled for, the speaker, Sir Harbottle Grimtone, was unwilling to put it; saying, *he was ashamed of it;* nevertheless, the proviso was carried, and made part of the bill, which was ordered to be ingrossed." This proviso the lords disagreed to, and left it out of the bill; and the commons agreed to their amendment. 3 *Hats.* 82.

(45) And that the great loss to the public revenue by the exercise of this privilege might be farther diminished, the 24 Geo. III. sess. 2, c. 37, provides, that no letter shall go free, unless the member shall write the whole of the superscription, and shall add his own name, and that of the post-town from which the letter is intended to be sent, and the day of the month in words at length, besides the year, which may be in figures; and unless the letter shall be put into the post-office of the place, so that it may be sent on the day upon which it is dated. And no letter shall go free directed to a member of either house, unless it is directed to him where he shall actually be at the delivery thereof; or to his residence in London, or to the lobby of his house of parliament. And if any person shall fraudulently counterfeit or alter such superscription, he shall be guilty of felony, and shall be transported for seven years.

(46) It was determined so long ago as the 13 W. III. by three of the judges of the court of King's Bench, though contrary to the pertinacious opinion of Lord C. J. Holt, that no action could be maintained against the postmaster-general, for the loss of bills or articles sent in letters by the post. 1 *Ld. Raym.* 646. *Comyns*, 100, &c. A similar action was brought against Lord Le Despencer and Mr. Carteret, postmasters-general, in 1778, and the non-liability of these officers seems as fully established as if it had been declared by the full authority of parliament. *Coup.* 754.

For this reason it is recommended, by the secretary of the post-office, to cut banknotes, and to send one half at a time. This is the only safe mode of sending bank-notes, as the bank would never pay the holder of that half which had been fraudulently obtained.

Postmasters are bound to deliver the letters to the inhabitants of a country town, within the usual and established limits of the town, without any addition to the rate of

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, letting horses to hire (48), and for certain other purposes; and 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 expense of all mercantile as well as legal proceedings (49), yet, if moderately imposed, is of service to the pub-
[*324] lic 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; (as, with us too, besides the stamps on the indentures, a tax is laid by statute 8 Ann. c. 9, of 6*d.* in the pound, upon every apprentice-fee, if it be 50*l.* or under; and 1*s.* in the pound, if it be a greater sum;) but this tends to draw 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 as sure to have the advantage (*e*) (50). Our general 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 and 6 W. and M. c. 21, and they have since in many instances been increased to ten 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 fumage 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 (*f*). But the first parliamentary establishment of it in England was

(*e*) Sp. of L. b xiii. c. 9. (*f*) Mod. Un. Hist. xxiii. 463. Spelm. Gloss. *tit.* Fuagr.

postage. 5 *Burr.* 2709. 2 *Bl. Rep.* 906. *Coup.* 182.* (47)

(47) Two cents on each letter are allowed to letter-carriers. Story's Laws, 1996. Franking is allowed, with some limitations, to the President of the U. S., and members of the Senate and of the House of Representatives during their attendance at Congress, and for 60 days before and afterwards: to the clerks and presiding officers of those houses; to the heads of the departments, to postmasters, and some others. Printers of newspapers may send one newspaper to any other printer free of postage. No stage or other vehicle that regularly performs trips on a post road, or road parallel to it, can convey letters; nor can vessels plying regularly on a water declared to be a post route, except letters relating to the cargo; nor can there be any private foot or horse post on a post road. *Id.* 1990, &c. and 2066.

(48) And for carrying on the business of a country banker, auctioneer, horse-dealer.

(49) It is highly to the credit of the late administration, that stamps upon legal proceedings are no longer necessary; but yet the receipt tax is suffered to remain; one, more vexatious, and oftener converted to fraudulent purposes, is not to be found in the stamp act.

(50) It is considered a rule of construction of revenue acts, in ambiguous cases, to lean in favour of the revenue. This rule is agreeable to good policy and the public interests; but, beyond that, which may be regarded as established law, no one can ever be said to have an undue advantage in our courts.

* But additional postage is now legally charged, where the receiver resides without such limits.

statute 13 and 14 Car. II. c. 10, whereby an hereditary revenue of 2*s.* every hearth, in all houses paying to church and poor, was granted to king for ever. And, by subsequent statutes for the more regular assment of this tax, the constable and two other substantial inhabitants of parish, to be appointed yearly, (or the surveyor, appointed by the wn, together with such constable or other public officer,) were, e in every *year, empowered to view the inside of every house [*325] the parish. But, upon the revolution, by statute 1 W. and M. 1, c. 10, hearth-money was declared to be "not only a great oppression the poorer sort, but a badge of slavery upon the whole people, exposing ery man's house to be entered into, and searched at pleasure, by persons known to him; and therefore, to erect a lasting monument of their masties' goodness in every house in the kingdom, the duty of hearth-money as taken away and abolished." This monument of goodness remains nong us to this day: but the prospect of it was somewhat darkened, hen in six years afterwards, by statute 7 W. III. c. 18, a tax was laid pon all houses (except cottages) of 2*s.* now advanced to 3*s.* *per annum*, nd a tax also upon all windows, if they exceeded nine, in such house. Which rates have been from time to time (*g*) varied, being now extended all windows exceeding six: and power is given to surveyors, appointed y the crown, to inspect the outside of houses, and also to pass through ny house two days in the year, into any court or yard, to inspect the winows there. A new duty from 6*d.* to 1*s.* in the pound, was also imposed y statutes 18 Geo. III. c. 26, and 19 Geo. III. c. 59, on every dwellingouse inhabited, together with the offices and gardens therewith occupid: which duty, as well as the former, is under the direction of the commissioners of the land-tax (51).

VII. The seventh branch of the extraordinary perpetual revenue is a duty of 21*s.* *per annum* for every male servant retained or employed in the several capacities specifically mentioned in the act of parliament, and which almost amount to an universality, except such as are employed in husbandry, trade, or manufactures. This was imposed by statute 17 Geo. III. c. 39, amended by 19 Geo. III. c. 59, and is under the management of the commissioners of the land and window tax (52).

VIII. An eighth branch 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 (*h*). By statute 13 and 14 Car. II. c. 2, four hundred were licensed; and the money arising thereby was applied to repairing the streets (*i*). This number was increased to seven hundred by statute 5 W. and M. c. 22, and the duties

(*g*) Stat. 20 Geo. II. c. 3. 31 Geo. II. c. 22. 2 Geo. III. c. 3. 6 Geo. III. c. 38.

(*h*) Scobell, 313.
(*i*) Com. Journ. 14 Feb. 1661.

(51) These taxes are now much reduced; but, to what extent, may scarcely admit of detail here.

(52) By the 25 Geo. III. c. 43, the former taxes upon servants were repealed, and the following were enacted:

	l.	*s.*	
For 1 male servant	1	5	*per annum*
2	1	5	each.
For 3 or 4 male servants	1	10	*per annum*
5, 6, or 7	1	15	each.
8, 9, or 10 . . .	2	0	
11 or more . . .	3	0	

And every bachelor above the age of 21 shall pay *l.* 5*s.* for each male servant he keeps in addition to the above taxes.*

* By a late statute, these duties are reduced a moiety.

vested in the crown: and by the statute 9 Ann. c. 23, and other subsequent statutes for their government (*j*), there are now a thousand licensed coaches and four hundred chairs (53). This revenue is governed [*326] 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 (54).

IX. The ninth and last branch of the king's extraordinary perpetual revenue is the duty upon offices and pensions; consisting in an annual payment of 1*s.* in the pound (over and above all other duties) (*k*), out of all salaries, fees, and perquisites, of offices and pensions payable by the crown, exceeding the value of 100*l. per annum.* 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 at present annually to about seven millions and three quarters sterling; besides more than two millions and a quarter raised by the land and malt tax (55). 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 connexions 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 [*327] interest of the sums so borrowed: by this means converting *the principal debt into a new species of property, transferable 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 60,000*l.* sterling: and, being unable to pay it, formed the principal into an aggregate sum, called metaphorically a *mount* or *bank*, the shares whereof were transferable like our stocks, with interest at five *per cent.* the prices varying according to the exigencies of the state (*l*).

(*j*) 10 Ann. c. 19, § 158. 12 Geo. I. c. 15. 7 Geo. III. c. 44. 10 Geo. III. c. 44. 11 Geo. III. c. 24, 28. 12 Geo. III. c. 49.

(*k*) Previous to this, a deduction of 6*d.* in the pound was charged on all pensions and annuities; and all salaries, fees, and wages of all offices of profit granted by or derived from the crown; in order to pay the interest at the rate of three *per cent.* on one million, which was raised for discharging the debts on the civil list, by statutes 7 Geo. I. st. 1, c. 27. 11 Geo. I. c. 17. and 12 Geo. I. c. 2. This million, being charged on this particular fund, is not considered as any part of the national debt.

(*l*) *Pro tempore, pro spe, pro commodo, minuitur eorum pretium atque augescit.* Aretin. See Mod. Un. Hist. xxxvi. 116.

(53) And, subsequently, chariots and cabriolets have been licensed.

(54) In the year 1770 one thousand hackney coaches were licensed, for each of which the proprietors paid a tax of 5*s.* a week.

(55) Since this was written by the author, that immense sum has been greatly augmented.

This policy of the English parliament 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, at the close of the session in June 1777, to about an hundred and thirty-six millions (56): to pay the interest of which, together with certain annuities for lives and years, and the charges of management, amounting annually to upwards of four millions and three quarters, the extraordinary revenues just now enumerated (excepting only the land-tax and annual malt-tax,) 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 increased 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 [*328] 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 100*l. per annum*; and he is so far indebted to B. that he pays him 50*l. 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 (57).

(56) The national debt in 1755, previous to the French war, was 72,289,000*l.*; interest, 2,654,000*l.*

In January 1776, before the American war, it was 123,964,000*l.*; interest, 4,411,000*l.*

In 1786, previous to which the whole debt of the last war was not funded, it was 239,154,000*l.*; interest, 9,275,000*l.* Exclusive of a capital of 1,991,000*l.* granted by parliament to the American loyalists, as a compensation for their loss of property. *Brief Exam.* 10.*

(57) It is a very erroneous notion indeed to suppose that the property of the kingdom is increased by national debts, contracted in consequence of the expenses of the war. On the contrary, the principal of the debt is the exact amount of the property which the nation has lost from its capital for ever. The American war cost the nation 116 millions sterling, and the effect is precisely the same as if so much of its wealth and treasure in corn, cattle, cloth, ammunition, coin, &c. had been collected together, and thrown into the sea, besides the loss accruing from the destruction of many of its most productive hands. When this property is consumed, it never can be retrieved, though industry and care may acquire and accumulate new stores. Such a supply by no mode of taxation that has yet been devised could be collected at once, without exhausting the patience and endurance of the people. But by the method of funding, the subjects are induced to suppose that their suffering consists only in the payment of the yearly interest of this immense waste. The ruin is completed before the interest commences, and that is paid by the nation to the nation, and returns back to its former channel and circulation: like the balls in a tennis court, however they may be tossed from one side to the other, their sum and quantity within the court continue the same. The extravagance of individuals na-

* The amount of the debt now existing is said to exceed 800,000,000*l.*

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 currency, assignable at any time and in any quantity; always therefore ready to be employed in any beneficial undertaking, by means of this its transferable quality, and yet producing 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. Nay, the very increase of paper-circulation itself, when extended beyond what is requisite for commerce or foreign exchange, has a natural tendency to increase the price of provisions as well as of all other merchandize. For, as its effect is to multiply the cash of the kingdom, and this to such an extent [*329] that much must remain unemployed, that cash (which is the *universal measure of the respective values of all other commodities) must necessarily sink in its own value (*m*), and every thing grow comparatively dearer. 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 (58). The interest

(*m*) See page 276.

turally suggested the system of funding public debts. When a man cannot satisfy the immediate demands of his creditor, it is an obvious expedient to give him a promissory note to pay him at a future day, with interest for the time; and, if this is an assignable note, so that the creditor may be enabled to persuade another to advance him the principal, and to stand in his place, it is exactly similar to the debts or securities of government, except that in general they are not payable at any definite time. All debts, when no effects remain, both in public and private, are certain evidence of the waste and consumption of so much property, which nothing can restore, though frugality and industry may alleviate the future consequences. When a debt is contracted, a man is not richer for paying it; if he owes one hundred pounds, and pays interest for it, he is in no degree richer by calling in one hundred pounds from which he receives the same interest, and therewith discharges the debt; but probably, if he does so, he will feel himself more comfortable and independent, and will find his credit higher if his occasions should oblige him to borrow in future. So it is with governments: when the debt is contracted, and the money spent, the mischief is done, the discharge of the debt can add nothing (or little comparatively) immediately to the stock or capital of the nation. But yet these important consequences may be expected from it, viz. from the abolition of taxes upon candles,* soap, salt, beer, and upon a melancholy catalogue of the necessary articles of life, taxes which take from those who have nothing to spare, the price of labour would be lowered, manufactures would flourish with renewed vigour, the minds of the people would be cheered, and the nation would again have credit and spirit to meet its most formidable enemies, and to repel and resent both injury and insult. All the nations of Europe have learnt from such dear-bought experience, that poverty and misery are the inevitable consequences of war, as to give us reason to hope that the lives and property of mankind will not in future be dissipated with the profusion and wantonness of former times.

(58) The last is certainly a serious and un-

* The tax upon candles and salt has been lately much diminished.

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 exigencies 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 respective produces of the several taxes before mentioned 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 interst of such part of the national debt as was advanced by that company and its annuitants. Whereby the separate funds, which were thus united, are become mutual securities for each other; and the whole produce of them, thus aggregated, liable to pay such interest or annuities as were *formerly charged upon [*330] each distinct fund; the faith of the legislature being moreover engaged to supply any casual deficiencies.

The customs, excises, and other taxes, which are to support these funds, depending upon contingencies, upon exports, imports, and consumptions, must necessarily be of a very uncertain amount; but though some of them have proved unproductive, and others deficient, the sum total hath always been considerably more than was sufficient to answer the charge upon them. The surpluses 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

answerable objection to the increase of the national debt; but the three first objections made by the learned judge do not seem to be very satisfactory. It is not clear that it is an evil that things should grow nominally dear in proportion to the increase of specie, or the medium of commerce; for they will still retain their relative or comparative values with each other. Dr. Adam Smith has ably shewn the benefit which a country derives from substituting any cheap article for gold and silver. The consequence is, that the precious metals do not become of less value; or, if so, it is but in a small degree; but they are carried to a foreign market, and bring back an increase of capital to the country. If one million pounds' worth of paper, or shells, would answer as well to settle accounts, go to market, and would serve all the purposes of gold and silver, whilst these preserved their price abroad; and, if the coin of this country at present amount to thirty millions, we should gain what was equivalent to twenty-nine millions by the substitution. But the paper security, created by the national debt, is little used in payments, or as a medium of commerce, like bills of exchange.

As to the second objection, foreigners can only take away the interest of money which they have actually brought into the country, and which, it must be presumed, our merchants are deriving as great a benefit from, and probably much greater.

With regard to the third objection, I cannot think it sound discretion ever to raise an invidious distinction between those who pay and those who receive the taxes, and to treat the latter with contempt. It cannot be supposed that property will ever be accumulated by idleness and indolence; and he surely deserves the best of his country who, in disposing of the fruits of his industry, prefers the funds to any other security; for, without such confidence, the nation would soon be reduced to a state of bankruptcy and ruin.

of the sums borrowed on their respective credits is charged on and payable out of the produce of the sinking fund. However, the neat surpluses and savings, after all deductions paid, amount annually to a very considerable sum. 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 came at length to be extremely large. This sinking fund is the last resort of the nation; its only domestic resource on which must chiefly depend all the hopes we can entertain of ever discharging or moderating our incumbrance. And therefore the prudent and steady 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 was thereby enabled, in the year 1765, to reduce above two millions sterling of the public debt; and several additional millions in several succeeding years (59).

[*331] But, before any part of the aggregate fund (the surpluses where- of 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

(59) By the 26 Geo. III. c. 21. parliament vested one million annually in commissioners for the reduction of the national debt, and the act provided that when the annual million should be increased by the interest of the stock purchased, to four millions, the dividends should no longer be paid upon the redeemed stock, and that the sinking fund should no longer accumulate. And by the 32 Geo. III. c. 55. when the dividends should amount to three millions, exclusive of the annual grant, there should be no further accumulation. And it was provided, that upon all future loans, which were not to be paid off within forty-five years, one per cent. should be annually appropriated to their reduction. By the 33 Geo. III. c. 22. an additional grant of 200,000*l.* was made for the same purpose, which has since been annually renewed.

The 42 Geo. III. c. 71. repeals so much of the 26 Geo. III. and 32 Geo. III. as fixed a limit to the accumulation of the sinking fund, and consolidates the funds provided by each act, and states, that by the accumulation of that joint fund, the whole national debt may be redeemed in forty-five years.

On the 1st of February 1808, the commissioners, by these funds, had redeemed of the national debt 127,937,102*l.*

And from the dividends and the annual allowance from the statutes above referred to, they had an annual income for the further reduction of 9,312,392*l.*

Such was the state of the sinking fund in 1809, when Mr. Christian published his edition of Blackstone's Commentaries. There is a fallacy, however, in the history of this fund, which must not pass unnoticed. In the absence of information to the contrary, it would be presumed, that this fund was a real surplus annually paid into the treasury, beyond the amount necessary for the public expenditure. That while the nation, like an honest man, was paying off its old debts, like a prudent one, it was not involving itself still deeper in new ones, to meet these arrangements. But such has not been the fact: for, during the whole of the late war, a larger sum of money than the amount of the sinking fund was borrowed annually to meet the public expenses, at a much higher rate of interest than the sinking fund produced. Hence it has been contended, that this much commended financial expedient has been detrimental, instead of beneficial, to the public, inasmuch as the national debt is now larger, notwithstanding the amount redeemed, than it would have been, had the sinking fund been annually applied to the public service; by which means, the amount of the yearly loans might have been reduced to the extent of the sum thus applied. Without attempting to deny the truth of this reasoning, its force may be in some measure obviated by the considerations, that the sinking fund enabled the commissioners, to a certain extent, to keep up the price of the stocks, by purchasing largely whenever they were depressed, and thus preserving the credit of the country, which enabled the government to negotiate their loans upon better terms than they could otherwise have obtained; besides, it preserved the assurance which was given when the sinking fund was first established, that means would be prosecuted for the ultimate liquidation of the debt. Since the peace of 1815, those means have not been diverted or rendered ineffectual as they were before, and we may now look to a real reduction, from year to year, in the national debt, by the operation of the sinking fund.

profits arising from courts of justice, (which articles include all the hereditary revenues of the crown,) and also a clear annuity of 120,000*l.* 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 computed to have sometimes raised almost a million,) if they did not arise annually to 800,000*l.* 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 800,000*l. per annum* for the support of his civil list, the said hereditary and other revenues were carried into and made a part of the aggregate fund, and the agregate fund was charged (*n*) with the payment of the whole annuity to the crown of 800,000*l.* which, being found insufficient, was increased in 1777 to 900,000*l. per annum.* Hereby the revenues themselves, being put under the same care and management as the other branches of the public patrimony, produced more, and are better collected, than heretofore; and the public is still a gainer of near 100,000*l. per annum* by this disinterested conduct of his majesty. The civil list, thus liquidated, together with the four millions and three quarters interest of the national debt, and more than two millions 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 [*332] 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, amount to about ten millions sterling (60).

The expenses defrayed by the civil list are those that in any shape relate to civil government; as, the expenses of the royal household; the revenues allotted to the judges, previous to the year 1758; all salaries to officers of state, and every of the king's servants; the appointments to foreign ambassadors; the maintenance of the queen and 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 (*n*) was granted for that purpose by the statute 11 Geo. I. c. 17, and in 1769 and 1777, when half a million and 600,000*l.* were appropriated to the like uses by the statutes 9 Geo. III. c. 34, and 17 Geo. III. c. 47 (61).

(n) Stat. 1 Geo. III. c. 1. (n) See page 327.

(60) The number of officers employed in collecting the revenue, sir John Sinclair estimated at 12,500. see 3 part, 157; but the number must have been much greater, as the amount of taxation gradually increased up to the peace of 1815; but since that period, the repeal of many of the taxes must of course have again reduced the number of persons so employed. In France the revenue officers amount to 250,000. Sir John Sinc. 3 part, 156.

The present annual receipt is 55,672,312*l.* 17*s.* 9½*d.*

(61) The revenue of the commonwealth was upwards of 1,500,000*l.* (*Sinc. Hist. Rev.* 2 *vol.* xiv.) This is a striking instance to prove that

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 increased. The whole revenue of Queen Elizabeth did not amount to more than 600,000*l.* a year (*o*): that of King Charles I., was (*p*) 800,002*l.*, and the revenue voted for King Charles II. was (*q*) 1,200,000*l.* though complaints were made (in the first years at least) that it did not amount to so much (*r*). 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 [*333] 800,000*l.* which was ten times *more than before the former troubles (*s*). The same revenue, subject to the same charges, was settled on King James II. (*t*): but, by the increase of trade and more frugal management, it amounted on an average to a million and a half *per annum*, (besides other additional customs, granted by parliament (*u*), which produced an annual revenue of 400,000*l.*) out of which his fleet and army were maintained at the yearly expense of (*w*) 1,100,000*l.* 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 700,000*l. per annum* (*x*); and the same was continued to Queen Anne and King George I. (*y*). That of King George II. we have seen, was nominally augmented to (*z*) 800,000*l.* and in fact was considerably more; and that of his present majesty is avowedly increased to the limited sum of 900,000*l.* 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 feodal 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, the numerous branches of the present royal family, and, above all, the diminution of the value of

(*o*) Lord Clar. Continuation, 163.
(*p*) Com. Journ. 4 Sept. 1660.
(*q*) *Ibid.*
(*r*) Com. Journ. 4 Jun. 1663. Lord Clar. Continuation, 163.
(*s*) Lord Clar. 165.
(*t*) Stat. 1 Jac II. c. 1.
(*u*) *Ibid.* c. 3 and 4.
(*w*) Com. Journ. 1 Mar. 20 Mar. 1688.
(*x*) *Ibid.* 14 Mar. 1701.
(*y*) *Ibid.* 17 Mar 1701, 11 Aug. 1714.
(*z*) Stat. 1 Geo. II. c. 1.

the burthens of the people are not necessarily lightened by a change in the government.*

* The mere money burthens upon the people were not exclusively alleged as the ground for a change of the government, to which allusion is made in the note. The people complained not that they were obliged to pay taxes, but that the taxes were enforced, and the money expended by the king alone, without obtaining their consent through their representatives in parliament. England by that change was first made to assume rank in Europe as a nation, which it is not unreasonable to desire she may ever sustain. An Englishman may look back to the legal institutions and to the foreign policy of Cromwell with respect, with pride, nay with exultation; to that of the king who succeeded him, too often, with feelings of abasement and regret. I will not enter into the character of Cromwell and his successor; I can feel no pleasure in traversing the details which would be necessary to establish the grounds upon which I must be compelled to decide in favour of the friend and patron of Milton.

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 (62).

*This finishes our inquiries into the fiscal prerogatives of the king, or his revenue, both ordinary and extraordinary. We have [*234] 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 pre-emption, 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 liberal and independent; and by restraining the king's pardon from obstructing parliamentary impeachments. Besides all this, if we consider how the crown is impoverished and stripped of all ancient revenues, so that it must greatly rely 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, [*235] 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

(62) The civil list now (1827) amounts to 845,727*l.* for England, to 207,000*l.* for Ireland. Of the sum for England, the amount of 60,000*l.* appears to be assigned to his majesty's privy purse, and 209,000*l.* as the expense, except salaries, of his majesty's household. The remainder is appropriated to the payment of allowances to the lord chancellor, judges, and speaker of the house of commons, viz. 32,000*l.*; of salaries to ambassadors on mission, and of pensions to those and to ministers retired, of consuls and other ministers, viz. 226,950*l.*; of salaries in the department of the household, 140,720*l.*; of the pension list, viz. 95,000*l.*; of other salaries, viz. 55,322*l.*; and of occasional payments, viz. 26,000*l.* See *Stat.* 1 *Geo. IV. c.* 1.

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 removable 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 dependants on the customs, in every port of the kingdom; the commissioners of excise, and their numerous subalterns, in every inland district; the post-masters, 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 (63), [*336] and the commissioners of hackney coaches; all which *are either mediately or immediately appointed by the crown, and removable 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 increase 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 give 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

(63) Lotteries have very recently been abolished.

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 almost seven millions sterling, which is annually paid to the creditors of the public, or carried to the sinking *fund, is first deposited in the [*337] 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 IX.

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 inquire into the rights and duties of the principal subordinate magistrates.

And herein we are not to investigate the powers and duties of his ma-

(*a*) Ch. ii. p. 146.

jesty'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 (*b*). 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 disquisi-
[*339] tions, 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 inquire 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.

I. The sheriff is an officer of very great antiquity in this kingdom, his name being derived from two Saxon words, reine geneta, the reeve, 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(*c*): 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 (1). In confirmation of which it was ordained by statute 28 Edw. I.

(*b*) 1 Leon. 73. 2 Leon. 175. Comb. 143. 5 Mod. 84. Salk. 347. Carth. 291.

(*c*) Dalton of Sheriffs, c. 1.

(1) The 13 & 14 Car. II. c. 21. s. 7. enacts, that no person shall be assigned to be sheriff of any county unless he have lands within the same sufficient to answer the king and his people; and no steward or bailiff to a great lord shall be made sheriff. 9 Edw. II. st. 2. 2 Edw. II. s. 2. 4 Edw. III. c. 9. 5 Edw. III. c. 4. No person is exempt from the office of sheriff, unless by act of parliament or letters patent, Sav. 43. 9. Co. 46. b. 1. Lord Raym. 29. 2 Mod. 299; but militia officers are exempt by 42 Geo. III. c. 90. s. 172; so are protestant dissenters, Harrison v. Evans, 2 Burn Eccl. Law, Dissenter. Bro. P. C. 181; barristers and attornies, 4 Burr. 2109; and prisoners for debt, 2 Mod. 299; persons disabled by judgment in law, as outlawry, &c. 1 Salk. 166. 4 Mod. 273. 2 Mod. 299. are not to be appointed. But a person cannot avail himself of his own misconduct, as an excuse for not serving; and therefore an information may be supported against an excommunicated person for refusing to act. 2 Mod. 299. Persons having served the office are exempt for three years, if there be other sufficient persons in the county. 1 Rich. II. c. 11.

But the payment of the fine fixed by 9 Geo. I. c. 9. s. 3. to be discharged from serving the office of sheriff of Norwich, does not exempt the person paying it for more than one year, unless the corporation agree that he shall be discharged for a longer time. 2 T. R. 731.

In New-York, sheriffs are chosen by the electors of the respective counties once in every three years, and as often as vacancies happen. They can hold no other office, and are ineligible for the next three years after the termination of their offices. They may be re-

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 the sheriffs were hereditary; as I apprehend they were in Scotland (2) till the statute 20 Geo. II. c. 43; and still continue in the county of Westmoreland to this day (3): *the city of London having also [*340] the inheritance of the shrievalty of Middlesex vested in their body by charter (*d*) (4). 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 (*e*). 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 the 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 *incolæ territorii*, chose *twelve* electors, and they nominated *three* persons, *ex quibus rex unum confirmabat* (*f*). 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 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, 23 Hen. VI. c. 8, and 21 Hen. VIII. c. 20 (5), the chancellor, treasurer, president of the king's council, *chief* justices, and *chief* baron, are to make this election; and that on the morrow of All Souls in the exchequer. And the king's letters patent, appointing the new sheriffs, used commonly to bear date the 6th day of November (*g*). The statute of Cambridge, 12

(*d*) 3 Rep. 72.
(*e*) Montesq. Sp. L. b. 2, c. 2.
(*f*) Stiernh. *de jure Goth. l.* 1, c. 3.
(*g*) Stat. 12 Edw. IV. c. 1.

quired to renew their securities from time to time, or forfeit their offices. But the county cannot be made responsible for the acts of the sheriff. The governor may remove them, first giving them a copy of the charges and an opportunity of being heard in their defence. They must reside in the county for which they are chosen. Const. Art. 4. Sect. 8. 1 R. S. 102, § 15.

(2) The *Scotch sheriff* differs very considerably from the English sheriff. The *Scotch sheriff* is properly a judge, and by statute 20 Geo. II. c. 43. he must be a lawyer of three years standing, and is declared incapable of acting in any cause for the county of which he is sheriff. He is called sheriff-depute; he must reside within the county four months in the year; he holds his office at vitam aut culpam. He may appoint substitutes, who, as well as himself, receive stated salaries. The king may appoint a high sheriff for the term of one year only. The civil jurisdiction of the sheriff-depute extends to all personal actions on contract, bond, or obligation, to the greatest extent; and generally in all civil matters, not especially committed to other courts. His criminal jurisdiction extends to the trial of murder, though the regular circuits of the court of justiciary prevent such trials occurring before him. He takes cognizance of theft, and other felonies, and all offences against the police. His ministerial duties are similar to those of sheriffs in England.

(3) The earl of Thanet is hereditary sheriff of Westmoreland. This office may descend to, and be executed by, a female; for "Ann countess of Pembroke had the office of hereditary sheriff of Westmoreland, and exercised it in person. At the assizes at Appleby she sat with the judges on the bench." *Harg. Co. Litt.* 326.

(4) The election of the sheriffs of London and Middlesex was granted to the citizens of London for ever in very ancient times, upon condition of their paying 300*l.* a year to the king's exchequer. In consequence of this grant, they have always elected two sheriffs, though these constitute together but one officer; and if one die, the other cannot act till another is elected. (4 *Bac. Abr.* 447.) In the year 1748, the corporation of London made a bye-law, imposing a fine of 600*l.* upon every person, who being elected, should refuse to serve the office of sheriff. See the case of Evans, esq. and the chamberlain of London, 2 *Burn, E. L.* 185.

(5) This statute associates the president of the council in the execution of stat. 3 Hen. VII. c. 1, and the stat. last specified invests the court of Star Chamber with authority to punish divers misdemeanors; but this statute was repealed by stat. 16 C. I. c. 10.

Ric. II. c. 2, ordains, that the chancellor, treasurer, keeper of the privy seal, steward of the king's house, the king's chamberlain, clerk of the rolls, the justices of the one bench and the other, barons of the exchequer, and all other that shall be called to ordain, name, or make justices of the peace, *sheriffs*, and other officers of the king, shall be sworn to act indifferently, and to appoint no man that sueth either privily or openly to be put in office, but such only as they shall judge to be the best and most [*341] sufficient. And the custom now is (and has been at least *ever since the time of Fortescue (*h*), who was chief juctice and chancellor to Henry the sixth) that all the judges, together with the other great officers and privy counsellors, meet in the exchequer on the morrow of All Souls yearly, (which day is now altered to the morrow of St. Martin by the last act for abbreviating Michaelmas term,) and then and there the judges propose three persons, to be reported (if approved of) to the king, who afterwards appoints one of them to be sheriff (6).

This custom, of the *twelve* judges proposing *three* persons, seems borrowed from the Gothic constitution before mentioned; 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 direction of all the statutes before mentioned: 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 (*i*), he transcribed from the council book of 3 March, 34 Henry VI. and which is in substance as follows (7). The

(*h*) *De L. L.* c. 24. (*i*) 2 Inst. 559.

(6) The following is the present mode of nominating sheriffs in the exchequer on the morrow of St. Martin:

The chancellor, chancellor of the exchequer, the judges, and several of the privy council assemble, and an officer of the court administers an oath to them in old French, that they will nominate no one from favour, partiality, or any improper motive: this done, the same officer having the list of the counties in alphabetical order, and of those who were nominated the year preceding, reads over the three names, and the last of the three he pronounces to be the present sheriff; but where there has been a pocket-sheriff,* he reads the three names upon the list, and then declares who is the present sheriff. If any of the ministry or judges has an objection to the names, he then mentions it, and another gentleman is nominated in his room; if no objection is made, some one rises and says, "to the two gentlemen I know no objection, and I recommend A. B. esq. in the room of the present sheriff."

Another officer has a paper with a number of names given him by the clerk of assize for each county, which paper generally contains the names of the gentlemen upon the former list, and also of gentlemen who are likely to be nominated, and whilst the three are nominated, he prefixes 1, 2, or 3, to their names, according to the order in which they are placed, which, for greater certainty, he afterwards reads over twice. Several objections are made to gentlemen; some, perhaps, at their own request; such as, that they are abroad, that their estates are small and incumbered, that they have no equipage, that they are practising barristers, or officers in the militia, &c.

The new sheriff is generally appointed about the end of the following Hilary term; this extension of the time was, probably, in consequence of the 17 Edw. IV. c. 7, which enables the old sheriff to hold his office over Michaelmas and Hilary terms.

(7) I am inclined to disagree with the learned judge's conjecture, that the present practice originated from a statute which cannot now be found; because if such a statute ever existed, it must have been passed between the date of this record, the 34 Henry VI. and the statute 23 Henry VI. c. 8, referred to by the learned commentator in the preceding page; for that statute recites and ratifies the 14 Edw. III. c. 7. which provides only for the nomination of one person to fill the office when vacant; yet the former statute 9 Edw. II. st. 2, leaves the number indefinite, *viz.* sheriffs shall be assigned by the chancellor, &c.: and if such a statute had passed in the course of those eleven years, it is probable that it would

* See Mr. Christian's note, post.

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*, (8); 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 entreated 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, and [*342] the statute 34 and 35 Hen. VIII. c. 26, § 61, which expressly recognizes this to be the law of the land, some of our writers (*j*) 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 (*k*). And this case, thus circumstanced, is the only authority 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. However, it must be acknowledged, that the practice of occasionally naming what are called pocket-sheriffs, by the sole authority of the crown, hath uniformly continued to the reign of his present majesty; in which, I believe, few (if any) compulsory instances have occurred (9), (10).

(*j*) Jenkins, 229. (*k*) Dyer, 225.

have been referred to by subsequent statutes. I should conceive that the practice originated from the consideration that, as the king was to confirm the nomination by his patent, it was more convenient and respectful to present three to him than only one; and though this proceeding did not exactly correspond with the directions of the statute, yet it was not contrary to its spirit, or in strictness to its letter; and therefore the judges might, perhaps, think themselves warranted in saying, that the three persons were chosen according to the tenor of the statute.

(8) In The King v. Woodrow, 2 T. R. 731, an information was granted against a person so refusing, and the reason assigned was, "because the vacancy of the office occasioned a stop of public justice." It should also seem, that indictment would properly have lain, but that the information was granted because the year would be nearly expired before the indictment could be tried.

(9) When the king appoints a person sheriff, who is not one of the three nominated in the exchequer, he is called a pocket-sheriff. It is probable, that no compulsory instance of the appointment of a pocket-sheriff ever occurred; and the unanimous opinion of the judges, preserved in the record cited by the learned commentator from 2 Inst. 559, precludes the possibility of such a case. This is an ungracious prerogative; and whenever it is exercised, unless the occasion is manifest, the whole administration of justice throughout one county for a twelvemonth, if not corrupted, is certainly suspected. The cause ought to be urgent or inevitable, when recourse is had to this prerogative.*

(10) The sheriff, after nomination to his office, and before delivery to him of his patent,

* If it be one. The right to nominate the sheriff was, we have seen, vested in, and ex-

Sheriffs, by virtue of several old statutes, are to continue in their office no longer than one year: and yet it hath been said (*l*) that a sheriff may be appointed *durante bene placito*, or during the king's pleasure; and so is the form of the royal writ (*m*). Therefore, till a new sheriff be named, his office cannot be determined, unless by his own death, or the demise of

(*l*) 4 Rep. 32.

(*m*) Dalt. of Sheriffs, 8.

must enter into a recognizance in the exchequer, under pain of 100*l*., for payment of his proffers and all other profits of the sheriffwick, to make account and appoint a sufficient under-sheriff for execution of process. See Com. Dig. tit. Viscount, A. (2.) Dalt. Sh. 7. 2 & 3 Edw. VI. c. 34. How to do this, see Impey's Off. of Sheriff, 11. Dalt. Sheriff, 291. See form of recognizance, Impey, 18. So he must find surety for performing his office, if the king please. Mad. 642.

After such recognizance given, he must procure out of chancery the patent of office, the patent of assistance, and the writ for discharge of the old sheriff. Crompt. Off. of Sher. 202, 203. Vide County (B. 1, &c.) See form of patent, Impey, 18. form of patent of assistance, 19. See also form of writ of discharge, Impey, 19. Also, before the sheriff acts in his office, he must by 3 Geo. I. c. 15, take an oath that he will truly serve the king in the office of sheriff, &c.; truly keep the king's rights, and all that belongeth to the crown, &c.; not respite the king's debts for gift or favour; where it may be done without great grievance, rightfully treat the people in his bailiwick, &c.; truly acquit at the exchequer all those of whom he shall receive any thing of the king's debts; nothing take whereby the king may lose, or his right be letted, &c. truly return and serve the king's writs, &c.; take no bailiffs but such as he will answer for, &c.; return reasonable issues, &c.; make due pannels, &c.; hath not nor will not let to farm, &c. his sheriffwick, or any office belonging to it; truly execute the laws, and in all things behave himself for the honour of the king, and good of his subjects, and discharge his office to the best of his skill and power. Crompt. Off. Sh. 202. Vide for his oath the st. 3 Geo. I. c. 15. s. 18. Mad. 640. and Burn J. 24 ed. by Chetwynd, tit. Sheriff. The breach of this oath, though a high offence, is not perjury. 11 Co. 98. but see Dy. 61. a.

The sheriff (except of Wales, London, Middlesex, counties palatine, or of any city or town being a county within itself), within six months after his election, must take and subscribe the oaths of allegiance, supremacy, and adjuration, in one of the courts at Westminster, or the general or quarter session where he resides, between nine and twelve in forenoon. 1 Geo. stat. 2. c. 13. s. 2. 2 Geo. II. c. 31. s. 3, 4. 9 Geo. II. c. 26. s. 3, and must, within six months after admittance and receiving his authority (16 Geo. II. c. 30. s. 3.) receive the sacrament, and subscribe the declaration against transubstantiation. 25 Car. II. c. 2. s. 2, 3, 9.

The new sheriff being appointed and sworn, he ought at or before the next county court to deliver a writ of discharge to the old sheriff, who is set over all the prisoners in the gaol severally by their names (together with all the writs) precisely, by view and indenture between the two sheriffs, wherein must be comprehended all the actions which the old sheriff hath against every prisoner, though the executions are of record. And till the delivery of the prisoners to the new sheriff, they remain in the custody of the old sheriff, notwithstanding the letters patent of appointment, the writ of discharge, and the writ of delivery; neither is the new sheriff obliged to receive the prisoners but at the gaol only. But the office of the old sheriff ceases when the writ of discharge cometh to him. Wood's Inst. b. 1. c. 7.

By stat. 20 Geo. II. c. 37. the old sheriff must turn over to his successor, by indenture and schedule, all such writs and process as remain unexecuted, and the new sheriff must execute and return the same.

When a sheriff quits his office, the custody of the county gaol can only belong to his successor. The county gaol is the prison for malefactors, and the sheriff ought to keep them there; but prisoners for debt, &c., where action lies against the sheriff for their escape, may be kept in what place the sheriff pleases. 1 Ld. Raym, 136.

The new sheriff, at the first county court after his election and the discharge of the old sheriff, must read or cause to be read his patent and writ of assistance, and also nominate his under-sheriff, or county clerk, and depute, appoint, and proclaim four deputies at the least in that county, to make replevins, for the ease of the county (the deputies not to be twelve miles distant one from another, in every quarter of the county, one to grant replevins in the sheriff's name, and to make deliverance of distresses), and the sheriff, for every month he shall lack such deputies, shall forfeit 5*l*.; and within two months next after he hath received his patent, he may appoint such deputies, &c. Dalt. 19.

Formerly, if a person refused to take upon him the office of sheriff, he was punished in the star-chamber; but now, if he refuses to take the office, or the oaths, or officiates as sheriff before he has qualified himself, he may be proceeded against by information in the king's bench, Carth. 307. 3 Lev. 116. 2 Mod. 300. Dyer, 167.; and this though he was excommunicated, whereby he cannot take the test to qualify himself, R. 2 Mod. 300. or was not qualified by taking the sacrament within a year preceding. (Vide 4 Mod. 269. Salk. 167. 1 Ld. Raym. 29. 2 Vent. 248.)

ercised by, the people, or by those who, although not the people at large, were then so called, until the stat. 9 E. II. st. 2.

the king; in which last case it was usual for the successor to send a new writ to the old sheriff (*n*): but now by statute 1 Ann. st. 1, c. 8, all officers appointed by the *preceding king may hold their offices [*343] 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 (11).

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 a judicial power in divers other civil cases (*o*). 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 (*p*). 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 (12). 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 (*q*): and this summons every person above fifteen years old, and under the degree of a peer, is bound to attend upon warning (*r*), *under [*344] 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.

(*n*) Dalt. of Sheriffs, 7.
(*o*) Dalt. c. 4.
(*p*) 1 Roll. Rep. 237.
(*q*) Dalt. c. 95.
(*r*) Lamb. Eiren. 315.
(*s*) Stat. 2 Hen. V. c. 8.
(*t*) Cap. 17.

(11) If there be other sufficient within the county.* Until a different regulation was made by 8 Eliz. c. 16, in a great many instances two counties had one and the same sheriff: this is still the case in the counties of Cambridge and Huntingdon.

(12) If resisted in execution of his office, he may imprison the party until he be carried before a magistrate. 1 Saund. 81. So if at a county court held for the election of knights of the shire, a freeholder interrupt the proceedings by making a disturbance, the sheriff may order him to be taken into custody and taken before a justice of the peace. 1 Taunt. 146.

* And, it should seem, that the having served the preceding year in one county, operates no exemption from serving in another. In 1826-7, a gentleman, who had served the office the preceding year for a Welch county, alleged that fact against being nominated to serve the office in this, for an English county; but he was not excused.

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.

In his ministerial capacity the sheriff is bound to execute all process issuing from the king's courts of justice (13). 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 seize to the king's use all lands devolved to the crown by attainder or escheat; must levy all fines and forfeitures; must seize 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 the bailiwick, if commanded by process from the exchequer (*x*).

[*345] *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 500*l.* (*y*) (14).

(*u*) Stat. 1 Mar. st. 2, c. 8.
(*w*) Fortesc. de L. L. c. 24.
(*x*) Dalt. c. 9.
(*y*) Stat. 3 Geo. I. c. 15.

(13) By the common law sheriffs are to some purposes considered as officers of the courts, as the constable is to the justices of the peace. Salk. 175. 2 Lord Ray. 1195. Fortes. 129. Tidd. 8 ed. 52. As writs and process are directed to the sheriff, neither he nor his officers are to dispute the authority of the court out of which they issue, but he and his officers are at their peril truly to execute the same, and that according to the command of the said writs, and hereunto they are sworn, Dalt, 104; and he must do the duty of his office and shew no favour, nor be guilty of oppression. Dalt. 109. But the sheriff ought to be favoured before any private person. 4 Co. 33.

The statutes relating to the sheriff's accounts are the 27 Edw. I. s. 1. c. 2. 4 Hen. V. c. 2. 2 & 3 Ed. VI. c. 4. 13 & 14 Car. II. c. 21. 3 Geo. I. c. 15. and see Com. Dig. tit. Viscount, G.

In New-York, the inspectors of elections in the towns are the supervisors, assessors, and town clerks: in the cities they are specially appointed by the common councils. 1 R. S. 129. The sheriff does not therefore preside at elections: he is also restricted from holding any court, except to execute writs of inquiry, and such special writs as may be directed to him pursuant to any statute, and in the cases provided by law to inquire into any claim to property seised or levied on, 2 R. S. 286, § 58. The process of inferior courts, such as ward courts, justices' courts, courts martial, &c. is executed by constables, marshals, or special deputies.

(14) As to under-sheriffs in general, see Bac. Ab. Sheriff, H. Com. Dig. Viscount, B.

The sheriff is not bound to make an under-sheriff, Hob. 13. sed vid. 1 & 2 P. & M. c. 12. and the sheriff may remove him when he pleases, and this though he makes him irremovable, id. The under-sheriff is appointed by deed, which is afterwards filed in the king's remembrancer's office in the exchequer. Hob. 12. By the 27 Eliz. c. 12. the under-sheriff, except of counties in Wales and county palatine of Chester, must take an oath which is now prescribed by the 3 Geo. I. c. 15. He must also take the oaths of allegiance, &c. in the same manner as the high-sheriff, and within the same time; see supra note; and he must not intermeddle with the office before such oath is taken on pain of forfeiting 40*l.* 27 Eliz. c. 12.

For security to the sheriff, the under-sheriff usually gives a bond of indemnity to save the sheriff harmless; to make account in the exchequer, and procure the high-sheriff's discharge, to return juries with the privity of the sheriff, to execute no process of weight without the sheriff's privity, to account to the sheriff and attend him, to be ready to attend the sheriff; for his good behaviour in his office, to take or use no extortion to give attendance at the king's court. See Dalt. c. 2. p. 20. To indemnify him from escapes. Hob. 14. But a bond or covenant that the under-sheriff shall not execute process, &c. without the sheriff's consent, is void; for when the sheriff appoints his under-sheriff, he ex consequenti gives him authority to exercise

The under-sheriff usually performs all the duties of the office (15); 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 200*l*., a very large penalty in those early days. And no under-sheriff or sheriff's officer shall practise 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 well be feared that many of them do deceive, both the king, the high-sheriff, and the county.

Bailiffs, or sheriff's officers, are either bailiffs of hundreds, or special bailiffs (16). Bailiffs of hundreds are officers appointed over those respective

(*z*) Stat. 42. Ed. III. c. 9.
(*a*) Stat. 1 Hen. V. c. 4.
(*b*) Of Sheriffs, c. 115.

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all the ordinary office of the sheriff himself. Hob. 13.

The under-sheriff may do all that the sheriff himself can do except that which the sheriff himself ought to do in person, as to execute a writ of waste, redisseisin, partition, dower, &c. 6 Co. 12. Hob. 13. Dalt. 34. Jenk. 181; for in all cases where the writ commands the sheriff to go in person, there the writ is his commission, from which he cannot deviate. Dalt. 34. The under-sheriff hath not, nor ought to have, any interest in the office itself, neither may he do any thing in his own name, Salk. 96, but only in the name of the high-sheriff, who is answerable for him, because the writs are directed to the high-sheriff. If the sheriff dies before his office is expired, his under-sheriff or deputy shall continue in office, and execute the same in the deceased sheriff's name until a new sheriff be sworn, and he shall be answerable, and the security given by the under-sheriff to the deceased sheriff is to continue during the interval. 3 Geo. I. c. 15. s. 8.

By 3 Geo. I. c. 15. none shall sell, buy, let, or take to farm the office of under-sheriff, &c. or other office belonging to the office of high-sheriff, nor contract for the same for money or other consideration directly or indirectly, &c. on pain of 500*l*. a moiety to the king and a moiety to him who shall sue, provided the suit be in two years, provided that nothing in that act shall prevent the sheriff, under-sheriff, &c. from taking the just fees and perquisites of his office, or for accounting for them to the sheriff, or giving security to do so, or from giving, taking, or securing a salary or recompense to the under-sheriff, or from the under-sheriff in case of sheriff's death from constituting a deputy. Dalt. 3. 514. Hob. 13. 2 Brownl. 281.

If an action is brought for a breach of duty in the office of sheriff, it should be against the high-sheriff, as for an act done by him, and not against the under-sheriff; and if it proceeds from a fault of the under-sheriff or bailiff, that is matter to be settled between them and the high-sheriff. Cowp. Rep. 403. In Ireland however, this is otherwise, except the wrong complained of was the immediate act or default of the high-sheriff. 57 Geo. III. c. 68. s. 9.

If the attorney for the defendant was under-sheriff, that would be ground of challenge to the array, but not for a motion for a new trial. 1 Smith's Rep. 304.

(15) In Laicock's case, 9 R. 49, Latch. 187, s. c. the action was brought against the under-sheriff for a false return of *non est inventus*. It appeared that whilst the writ was pending, and before the return, the under-sheriff had sight of the defendant; but ruled, that the action did not lie against the under-sheriff, for the high-sheriff only is chargeable, and not the under-sheriff.

(16) The sheriff's bailiffs are to take the oaths appointed by stat. 27 Eliz. c. 12; they are to be sworn to the supremacy and for the exercise of their office, under 40*l*.; and if they commit any act contrary to their oath, they shall lose treble damages. See Impey Off. of Sh. 43.

By 1 & 5. c. 4. R. M. 1654. K. B. no sheriff's bailiff shall be attorney in the king's courts during the time he is in office.

No sheriff's officer, bailiff, or other person, can be bail in any action. R. M. 14 Geo. II. 2 Strange, 890. 2 Bla. Rep. 799. Loft. 155. See Tidd. 8 ed. 79. nor take any warrant of attorney. R. E. 15 Car. II.

Of the duties of bailiffs, see Impey Off. of Sheriff, 43. Hawk. P. C. Index, tit. Bailiff.

By 23 Hen. VI. c. 10. judges of assize shall inquire into the conduct of bailiffs, and punish them for any misdeed in office. They are liable to be proceeded against summarily for extortion under 32 Geo. II. c. 28. s. 11. 2 Bos. & Pul. 88.

If sheriff appoint a special bailiff to arrest defendant at request of plaintiff, he cannot be ruled to return the writ. 4 T. R. 119. 1 Chitty's Rep. 613. but he is notwithstanding responsible for the safe custody of defendant after arrested. 8 Term. Rep. 505.

districts by the sheriffs, to collect fines therein; to summon juries; to attend the judges and justices at the assizes, and quarter sessions; and also to execute writs and process in the several hundreds. But, as these are generally plain men, and not thoroughly skilful 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 [*346] dexterity in hunting and seizing their prey. The sheriff being *answerable for the misdemesnors (17) of these bailiffs, they are therefore usually bound in an obligation with sureties 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 (18). Their business is to keep safely all such persons as

(17) See Drake v. Sykes, 7 T. R. 113. Doe d. James v. Brawn, 5 B. and A. 243. These cases discuss the question of the civil ability of the sheriff for the acts of these men. It thence appears, that it is not every obnoxious deed committed by them, while holding the office of sheriff's bailiffs, that subjects the sheriff to the consequences of such deeds; but, it must appear that he employed them in the particular instance.

(18) The gaol itself is the king's pro bono publico. 2 Inst. 589; but by 14 Edw. III. c. 10. the sheriffs are to have the custody of gaols, &c.; and see 13 R. II. c. 15. except gaols whereof any persons or body corporate have the keeping of estate of inheritance, or by succession, 19 Hen. VII. c. 10. Therefore the sheriffs shall put in such keepers for whom they will answer. But by 3 Geo. I. c. 15. s. 10. the office of gaoler cannot be bought or farmed, under 500*l.* penalty.

By 4 Geo. IV. c. 64. s. 10. the gaoler must not be an under-sheriff or bailiff, nor shall be concerned in any occupation or trade soever.

When a sheriff quits his office, the custody of the county gaol can only belong to his successor. 1 Lord Ray. 136.

As the gaoler is but the sheriff's servant, he may be discharged at the sheriff's pleasure; and if he refuse to surrender up or quit possession of the gaol, the sheriff may turn him out by force, as he may any private person. Also, they are each of them so far under the regulation of the court of king's bench, that they will compel the sheriffs to assign prisoners, &c. and gaolers to surrender up gaols, &c. and for any abuse of office the gaoler forfeits it. See Co. Lit. 233. 9. Co. 5. 3 Mod. 143.

The gaoler must reside within the prison; he must not, nor must any person in trust for him, or employed by him, sell, or have any benefit or advantage from the sale of, any article to any prisoner, nor supply the prison. 4 Geo. IV. c. 64. s. 10. As far as practicable he must see every, and at least inspect every, cell once in every 24 hours; and in visiting females he must be attended by matron or other female officer, id. He must keep a journal recording as to punishments, &c. and other occurrences of importance, &c. to be laid before justices at sessions, to be signed by chairman, id.

The keeper must not put prisoners in irons, unless in case of necessity, id.; and see as to this 1 Hale, 601. 2 Hawk. c. 22. s. 32. 2 Inst. 381.

By the 4 Geo. IV. c. 64. s. 40. a penalty is imposed on a gaoler permitting the sale of spirituous liquors.

In some cases gross cruelty on the part of the gaoler causing death, would amount even to murder. See Fost. 322. 17. How. St. Tri. 398. 2 Stra. 856. 1 East, P. C. 331. Fost 321. Hale, 432. 2 Hale, 57. 1 Russel on Crimes, 667.

By 4 Geo. IV. c. 64. sect. 41. a power is given to the keeper to examine into, and punish, certain offences therein specified; and by sec. 14. gaolers shall attend quarter sessions, to report actual state of prisons; s. 19. returns are to be made at the several assizes, by keepers of prisons, of the persons sentenced to hard labour. By s. 20. lists of prisoners tried for felony, are to be transmitted to the secretary of state, by the keeper, under penalty of 20*l.* By s. 21. the keeper shall deliver to court of quarter sessions, a certificate as to how far the rules have been observed, under penalty of 20*l.* and see id. s. 22. By s. 24. books are to be kept, in which the visits, &c. of the chaplain, &c. shall be entered, and keeper must take care of it.

In criminal cases, if a gaoler assist a felon in making an actual escape, it is felony at common law, 2 Leach, 671; and in some cases, it is an escape to suffer a prisoner to have greater liberty than can be by law allowed him, as to admit him to bail at law, or suffer him to go beyond the limits of the prison. Hawk. B. 2. c. 19. s. 5.

A *voluntary* escape amounts to the same kind of crime, and is punishable in the same way as the original offender, whether he be attainted, indicted, or only in custody on suspicion. 1 Hale, 234. 2 Hawk. c. 19. s. 22. And a person who wrongfully takes on himself the office of gaoler, is as much liable as if he were duly appointed. 1 Hale, 594.

But no one can be punishable in this degree for the default of a deputy. 1 Salk. 272. note.

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 (19). The abuses of gaolers and sheriff's officers, toward the unfortunate persons in their custody, are well restrained and guarded against by statute 32 Geo. II. c. 28, and by statute 14 Geo. III. c. 59, provisions are made for better preserving the health of prisoners, and preventing the gaol distemper (20).

The vast expence, which custom had introduced in serving the office of high-sheriff, was grown such a burthen to the subject, that it was enacted, by statute 13 and 14 Car. II. c. 21, that no sheriff (except of London, Westmoreland, and towns which are counties of themselves) should keep any table at the assizes, 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

(*c*) Dalt. c. 118. 4 Rep. 34.
(*d*) Stat. 9 Edw. II. st. 2. 2 Edw. III. c. 4. 4 Edw. III. c. 9. 5 Edw. III. c. 4. 13 and 14 Car. II. c. 21, § 7.

Nor can any gaoler be a felon, in respect of a voluntary escape, unless at the time the offence of his prisoner was felony, and cannot be made so by its becoming so afterwards. 1 Hale, 591. Neither can he be thus indicted till after the attainder of the principal. Hawk. b. 2. c. 19. s. 26. though he may be fined for the misprision, id.

A *negligent* escape may be punished by fine at common law, 2 Hawk. c. 19. s. 31. and a sheriff is thus liable for the default of his duty, id. One instance of such negligence does not amount to a forfeiture of the gaoler's office, though a repetition of such misfeasance will enable the court to oust him in their discretion. Hawk. b. 2. c. 19. s. 30. See 5 Edw. III. c. 8. as to punishment for marshal's negligent escape. When a gaol is broken by thieves the gaoler is answerable, not so if broken by king's enemies. 3 Inst. 52. The king may pardon a voluntary escape before it is committed. 2 Hawk. c. 19. s. 32. and see further as to prison breach and rescue, post 4 book, 130, 131.

In *civil* cases, if the sheriff's gaoler suffer a prisoner to escape, the action must be brought against the sheriff, not against the gaoler; for an escape out of the gaoler's custody is, by intendment of law, out of the sheriff's custody. 2 Lev. 159. 2 Jones, b. 2. 2 Mod. 124, 5. Mod. 414. 416. But an action lies against a gaoler for a voluntary escape, as well as against the sheriff, it being in the nature of a rescue. 2 Salk. 441. 3 Salk. 18. and see further as to the action for escape, post 3 book, 165.

With respect to the gaoler's *fees*, by 55 Geo. III. c. 50. s. 2. the quarter sessions are to make allowances to gaolers, &c. and by s. 3. the allowances are to be paid out of the county rates. The sec. 11. points out how allowances are to be raised for places which do not contribute to county rates, and by s. 12. allowances in particular places are to be paid. The 54 Geo. III. c. 97. directs how allowances to the gaoler of Dover castle prison, &c. are to be paid. The 55 Geo. III. c. 50. s. 13. inflicts a punishment on gaolers exacting any fee or gratuity from prisoners. And by s. 1. of same act, all fees or gratuities paid at gaols and bridewells are abolished, with exception of the King's Bench prison, Fleet, Marshalsea, and palace courts, id. s. 14.

(19) This is the only qualification required from a sheriff. That it was the intention of our ancestors that the lands of a sheriff should be considerable, abundantly appears from their having this provision so frequently repeated, and at the same time that they obtained a confirmation of *magna charta* and their most valuable liberties. As the sheriff, both in criminal and civil cases, may have the custody of men of the greatest property in the country; his own estate ought certainly to be large, that he may be above all temptation to permit them to escape, or to join them in their flight. In ancient times this office was frequently executed by the nobility and persons of the highest rank in the kingdom. *Eligebantur olim ad hoc officium potentissimi sæpe numero totius regni proceres, barones, comites, duces, interdum et regum filii.* Spel. Gloss. *Vicecom.* Bishops also were not unfrequently sheriffs. Richard duke of Gloucester (afterwards Richard the third) was sheriff of Cumberland five years together. (*Burn, Hist. Cumb.* 570.) It does not appear that there is any express law to exclude the nobility from the execution of this office, though it has been long appropriated to commoners.*

(20) [By statute 24 Geo. III. sess. 2, c. 54, § 22, no gaoler is to suffer tippling or gaming in the prison, or to sell any liquors therein, under the penalty of 10*l.* to be recovered by distress upon conviction.]

* Save when the shrievalty is hereditary, as in the case of Westmoreland, mentioned p. 340, ante.

in England and twelve in Wales; upon forfeiture, in any of these cases, of 200*l.* (21).

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 (*e*). 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 [*347] jurisdiction of a coroner in any part of the realm (*f*). But *there are also particular coroners for every county of England, usually four, but sometimes six, and sometimes fewer (*g*). This office (*h*) 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 (22), 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 (*i*); and as verderors of the forest 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* (*k*); 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 (*l*) of Westm. 1, that none but lawful and discreet knights should be chosen: and there was an instance in the 5 Edw. III. of a man being removed from this office, because he was only a merchant (*m*), (23). But it seems it is now sufficient if a man hath lands enough to be made a knight (24), whether he be really knighted or not (*n*): for the coroner ought to have an 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 hath not enough to answer, his fine shall be levied on the county, as the punishment for electing an insufficient officer (*p*). Now indeed, through

(*e*) 2 Inst. 31. 4 Inst. 271.
(*f*) 4 Rep. 57.
(*g*) F. N. B. 163.
(*h*) Mirror, c. 1, § 3.
(*i*) 2 Inst. 558.
(*k*) F. N. B. 163.
(*l*) 3 Edw. I. c. 10.
(*m*) 2 Inst. 32.
(*n*) F. N. B. 163, 164.
(*o*) *Ibid.*
(*p*) Mirr. c. 1, § 3. 2 Inst. 175.

(21) The sheriff appoints an under-sheriff, who holds during his pleasure, and who, in case of a vacancy in the office of sheriff, executes the duties of that office until a successor is appointed or chosen, and qualified. The sheriff also appoints deputies under his hand and seal; who must take the oath of office, and whose appointment must be recorded in the county clerk's office. He may also appoint deputies to do particular acts, and gaolers. 2 R. S. 379, &c.

(22) Stat. 28 E. I. c. 3, recognizes the coroner of the king's house, and consequently, he is not so chosen. Coroners so chosen, are called coroners *virtute cartæ sive commissionis*. The king claims the power of appointing his own coroner by prescription, but the subject cannot claim it except by grant from the crown. Similar, therefore, to the coroner of the king's household, is the coroner for the city and liberties of Westminster, who is appointed by the dean and chapter; coroners in the isle of Ely, who are appointed by the bishop; the coroner of the King's Bench prison and the Marshalsea, who is the Master of the crown office; and the coroner of London, which office is vested in the Lord Mayor, by charter. (For the most ample information on this subject, see "Jervis on the Office and Duties of Coroners.")

(23) That this was an office of high dignity in ancient times, appears from Chaucer's description of the Frankelein:

At sessions ther was he lord and sire,
Ful often time he was knight of the shire,
A shereve hadde he ben, and a coronour,
Was no wher swiche a worthy vavasour.

Selden, tit. Hon. 2 and 3, § 4, observes, that some copies have it *coronour*; others *countour*. But the office of an accountant is perfectly inconsistent with the character described.

(24) Which, by the *statutum de militibus*, 1 Edw. II., were lands to the amount of 20*l. per annum*.

the culpable neglect of gentlemen of property, this office has been suffered to fall into disrepute, and get into low and indigent hands (25): so that, although formerly no coroners would condescend to be paid for serving their country, and they were, by the aforesaid statute of Westm. 1, expressly forbidden to take a *reward, under pain of a great [*348] 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 (*p*); though since his time those fees have been much enlarged (*q*), (26).

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 (*r*). And by the statute 25 Geo. II. c. 29, extortion, neglect, or misbehaviour, are also made causes of removal.

The office and power of a coroner are also, like those of the 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 inquiring, when any person is slain, or dies suddenly, or in prison, concerning the manner of his death. And this must be "*super visum corporis*" (*s*) (27); for, if the body be not found, the coroner cannot sit (*t*)

(*p*) 2 Inst. 210.
(*q*) Stat. 25 Geo. II. c. 29.
(*r*) F. N. B. 163, 164.
(*s*) 4 Inst. 271.
(*t*) 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 cæsum. Potest enim homo etiam ex aliis causis subito mori.*" Stiernhook *de Jure Gothor.* l. 3, c. 4.

(25) Although, at the time the commentator wrote, this were the fact, it is not so at present, the office being held by men whose respectability, generally, is unimpeachable.

(26) Some cases, as to the right to fees, will be found 7 T. R. 52; 2 B. and A. 203. By the first, it may appear, that coroners for a franchise cannot be paid out of the county provided by this statute. By the second case, he is not entitled to expences of return from taking an inquisition. And it also appears that, where the taking the inquisition was wholly unnecessary, he has no legal claim for fees; see 11 East, 229. Nor, where several inquisitions are taken at the same place, and upon one journey, can he claim milage for his travelling expences for more than one inquisition. 8 D. and R. 147. And at an inquest taken upon a dead body, under stat. 25 G. II. c. 29, the inquest must, in order to entitle the coroner to his fee, be signed by all the jurors. The King *v.* Norfolk Justices, *Nol.* 141.

(27) When an unnatural death happens, the township are bound under pain of amerciament to give notice to the coroner. 1 Burn J. 25 ed. 786. Indeed it seems indictable to bury a party who died an unnatural death, without a coroner's inquest, id.; and if the township suffer the body to putrify, without sending for the coroner, they shall be amerced, id. When notice is given to the coroner, he should issue a precept to the constable of the four, five, or six next townships, to return a competent number of good and lawful men of their townships, to appear before him in such a place, to make an inquisition touching that matter; or he may send his precept to the constable of the hundred. 2 Hale, 59. 4 Edw. I. st. 2. Wood. Inst. b. 4. c. 1. As to form of inquisition, see 2 Lord Ray. 1305. Burn J. 1 vol. 25 ed. 787. 9. If the constables make no return, or the jurors returned appear not, they may be amerced. 2 Hale, 59. It seems that a coroner ought to execute his office in person, and not by deputy, for he is a judicial officer. 2 Hale, 58. Wood. Inst. b. 4. c. 1. 1 Burn J. 24 ed. 787. 789. 3 Bar. & Ald. 260. The jury appearing, is to be sworn, and charged by the coroner to inquire, upon the view of the body, how the party came by his death. 2 Hale, 60. See form of charge, 4 Edw. I. st. 2. called the statute de officio coronatoris. 1 Burn J. 24 ed. 789.

The coroner must hear evidence on all hands, if offered to them, and that upon oath. 2 Hale, 157. 1 Leach, 43.

When the inquest is determined, the body may be buried. 4 Edw. I. st. 2.

As to the manner of holding inquests, &c. on parties dying in prisons, see Umfreville's Coron. 212. 2 Hale, 61. 1 Burn J. 24 ed. 789. 3 B. & A. 260. If the body be interred before the coroner come, he must dig it up; which may be done lawfully within any convenient time, as in fourteen days. 2 Hawk. c. 9. s. 23. 1 Burn J. 24 ed. 787. If the body

(28). He must also sit at the very place where the death happened; and his inquiry 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 or other homicide, he is to commit them to prison for farther trial, and is also to inquire concerning their lands, goods, and chattels, which are forfeited thereby: but, whether it be homicide or not, he must in-
[*349] quire 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 (under his own seal and the seals of his jurors) (*u*), together with the evidence thereon, to the court of king's bench, or the next assizes. Another branch of his office is to inquire concerning shipwrecks; and certify whether wreck or not, and who is in possession of the goods. Concerning treasure-trove, he is also to inquire 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.

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 (*v*) (29).

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 *custodes*, or *conservatores pacis*. Those that were so, *virtute officii*, still continue: but the latter sort are superseded by the modern justices.

The king's majesty (*w*) is, by his office and dignity royal, the
[*350] 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

(*u*) Stat. 33 Hen. VIII. c. 12. 1 and 2 P. and M. c. 13. 2 West. Symbol. § 310. Crompt. 254. Tremain P. C. 621.

(*v*) 4 Inst. 271.

(*w*) Lambard, Eirenarch, 12.

cannot be viewed, the coroner can do nothing: but the justices of the peace, or of oyer and terminer, may inquire of it. 1 East, P. C. 379. Hawk. b. 1. c. 27. s. 12, 13. 1 Burr. 17.

But it is not necessary that the inquisition be taken at the same place where the body was viewed; but they may adjourn to a place more convenient. 2 Hawk. c. 9. s. 25.

(28) But, under a special commission, he may inquire, and also justices of the peace, and of oyer and terminer. 2 H. P. C. by Curwood, c. 9, § 25.

(29) One coroner in the city of New-York, and four in every other county, are elected in the same manner as sheriffs, and at the same general election; and hold their offices for the same term, and are removable in like manner. 1 R. S. 112. When the offices of sheriff and under-sheriff are vacant, one of the coroners is appointed by the first judge of the county to act as sheriff; if no coroner can give the requisite bonds, another person is appointed by the first judge: id. 380. The statute (2 R. S. 742) does not require the coroner to hold an inquest over those who die in prison: but if a convict dies in the state prison from any other cause than ordinary sickness, the coroner must be called in. 2 R. S. 770.

:ngland, the lord mareschal, the lord high constable of England, (when ny such officers are in being,) and all the justices of the court of king's ench (by virtue of their offices) and the master of the rolls (by prescrip-on) are general conservators of the peace throughout the whole kingdom, nd may commit all breakers of it, or bind them in recognizances to keep : (*x*): the other judges are only so in their own courts. The coroner is lso a conservator of the peace within his own county (*y*); as is also the heriff (*z*); and both of them may take a recognizance or security for the eace. Constables, tything-men, and the like, are also conservators of the eace within their own jurisdictions; and may apprehend all breakers of he peace and commit them, till they find sureties for their keeping it (*a*) (30).

Those that were, without any office, simply and merely conservators of he peace, either claimed that power by prescription (*b*); or were bound to exercise it by the tenure of their lands (*c*); or, lastly, 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 potentioribus comitatus sui in custodes pacis*" (*d*). 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 (*e*), giving a plausible account of the man- [*351] ner 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 disinheritance, and loss of life and limb. And in a few weeks after the date of these writs, it was ordained in parliament (*f*), 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 (*g*); this assignment being construed to be by the king's permis-

(*a*) Lamb. 12.
(*y*) Britton, 3.
(*z*) F. N. B 81.
(*a*) Lamb. 14.
(*b*) Lamb. 15.
(*c*) Lamb. 17.
(*d*) Lamb. 16.
(*e*) Hist. A. D. 1327.
(*f*) Stat. 1 Edw. III. c. 16.
(*g*) Lamb. 20.

(30) Any court of record may require security to keep the peace from persons threatening, in presence of the court, to commit any offence against the person or property of another: but in other cases, the following persons alone have power to require such security, viz: the chancellor, justices of the Supreme court, circuit judges, judges of the Superior court of the city of New-York; the special justices and assistant justices of said city, judges of county courts: mayors, recorders, and aldermen of cities: supreme court commissioners, and justices of the peace. These officers are all appointed by the governor with the consent of the senate, except the special justices and assistant justices of the city of New-York, and mayors of cities, who are appointed by the common councils of their respective cities, and except justices of the peace, who are elected by the electors of their own town. 2 R. S. 704, 5. Const. Art. 47. § 7. 10. 14. 1 R. S. 107. There are at least four justices of the peace in each town: in the cities the numbers vary. 1 R. S. 97. They hold their offices in the country for four years. They must reside in the town for which they were chosen, 1 R. S. 102, and may be removed on conviction of an infamous crime, or of any offence involving a violation of their oath of office. *Id.* 122.

sion (*h*). But still they were only called 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 honourable appellation of justices (*i*).

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 (*j*). This appoints them all (*k*), jointly and severally, to keep the peace, and any two or more of them to inquire of and determine felonies and other misdemesnors: 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, [*352] for not expressing in the form of warrants, &c. that the justice who issued them is of the *quorum* (*l*). When any justice intends to act under this commission, he sues out a writ of *dedimus potestatem*, from the clerk of the crown in chancery, empowering certain persons therein named to administer the usual oaths to him; which done, he is at liberty to act.

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) (*m*), 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 increase 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. 7, 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 (31). And because, contrary to these statutes, men of small

(*h*) Stat. 4 Edw. III. c. 2. 18 Edw. III. st. 2, c. 2.
(*i*) Lamb. 23.
(*j*) Lamb. 43.
(*k*) See the form itself, Lamb. 35. Burn. tit. Justices, § 1.
(*l*) Stat. 26 Geo. II. c. 27. See also stat. 7 Geo. III. c. 21.
(*m*) Lamb. 34.

(31) But the 28 Geo. III. c. 49, empowers any justice of the peace for two or more adjoining counties, to act in any of them, if resident in one; but such residence must appear in the proceeding. And a justice acting for a county at large, may act within a city or precinct, being a county of itself, situate or adjoining the county at large, provided the matter do not arise within such city, &c. And the 1 & 2 Geo. IV. c. 63, empowers justices of counties, ridings, or divisions, to act within any city, town, or other precinct, having exclusive jurisdiction, but not being counties themselves within such counties.

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 20*l. per annum*. And, the rate of money being greatly altered since that time, it is now enacted by statute 5 Geo. II. c. 18, that every justice, except *as is therein excepted, shall have 100*l. per annum* [*353] clear of all deductions (32); and, if he acts without such qualification, he shall forfeit 100*l*. This qualification (*n*) is almost an equivalent to the 20*l. per annum* required in Henry the sixth's time; and of this (*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 (33).

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*). But if the same justice is put in commission by the successor, he shall not be obliged to sue out a new *dedimus*, or to swear to his qualification afresh (*q*): nor, by reason of any new commission, to take the oaths more than once in the same reign (*r*). 2. By express writ under the great seal (*s*), 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 (*t*) (34). 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 (*u*) it is provided, that, notwithstanding a new title of dignity, the justice on whom it is conferred shall still continue a justice.

(*n*) See Bishop Fleetwood's calculations in his *chronicon pretiosum*.
(*o*) Stat. 18 Geo. II. c. 20.
(*p*) Stat. 1 Ann. c. 8.
(*q*) Stat. 1 Geo. III. c. 13.
(*r*) Stat. 7 Geo. III. c. 9.
(*s*) Lamb. 67.
(*t*) Stat. 1 Mar. st. 1, c. 8.
(*u*) Stat. 1 Edw. VI. c. 7.

(32) By the 18 Geo. II. c. 20, a party to become a justice of the peace, must have in possession, either on law or equity for his own use and benefit, a freehold, copyhold, or customary estate for life, or for some greater estate, or an estate for some long term of years, determinable upon one or more life or lives, or for a certain term originally created for twenty-one years, or more, in lands, tenements, or hereditaments, in England, or Wales, of the clear yearly value of 100*l*. above all incumbrances, &c. or else must be entitled to the immediate reversion or remainder of, and in such lands, &c. leased for one or more lives, or for a term determinable on the death of one or more lives, upon reserved rents of the yearly value of 300*l*. and he must take the oath thereby prescribed of his being so qualified, and if he be not so qualified, he forfeits 100*l*. for acting. But by sec. 13, 14, 15, there is a proviso, that this act does not extend to corporation justices, to peers, &c. or the eldest son or heir apparent of any peer or person qualified to serve as a knight of the shire, or to officers of the board of green cloth, &c. or to the principal officers of the navy, under-secretaries of state, heads of colleges, or to the mayors of Cambridge and Oxford.

It has been decided that a person to be qualified for the office, must have a clear estate of 100*l*. per annum in law or equity, for his own use, in possession. Holt. C. N. P. 458.

The acts of a justice of the peace, who has not duly qualified, are not absolutely void; and therefore, persons seizing goods under a warrant of distress, signed by a justice who had not taken the oaths at the general sessions, nor delivered in the certificate required, are not trespassers, though the magistrate be liable to the penalty, and to be indicted. 3 B. & A. 266.

(33) For any county.

(34) A sheriff cannot act as a justice during the year of his office: but neither the statutes referred to, nor, I apprehend, any other statute, disqualifies a coroner from acting as a justice of the peace; nor do the two offices in their nature seem incompatible.

[*354] 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 to hear and determine all felonies and other offences; which is the ground of their jurisdiction at sessions (35), of which more will be said in its proper place. And as to the powers given to one, two (36), or more justices by the several statutes, which 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 are shewn to him in the courts of law; and there are many statutes made to protect him in the upright discharge of his office (*w*); which, among other privileges, prohibit such justices from being sued for any oversights without notice beforehand (37); and stop all suits begun, on tender made of sufficient

(*w*) Stat. 7 Jac. I. c. 5; 21 Jac. I. c. 12; 24 Geo. II. c. 44.

(35) The sessions cannot be held without the presence of two justices.

(36) Where a statute requires any act to be done by two justices, it is an established rule, that if the act is of a judicial nature, or is the result of discretion, the two justices must be present to concur and join in it, otherwise it will be void; as in orders of removal and filiation, the appointment of overseers, and the allowance of the indenture of a parish apprentice; but where the act is merely ministerial, they may act separately, as in the allowance of a poor rate. This is the only act of two justices which has yet been construed to be ministerial; and the propriety of this construction has been justly questioned. 4 *T. Rep.* 380.

(37) A justice of the peace acts ministerially or judicially. *Ministerially*, in preserving the peace, hearing charges against offenders, issuing summons or warrants thereon, examining the informant and his witnesses and taking their examinations, binding over the parties and witnesses to prosecute and give evidence, bailing the supposed offender, or committing him for trial, &c. See the conduct to be observed, 1 Chitty's Crim. L. 31 to 116. In cases where a magistrate proceeds ministerially, rather than judicially, if he acts illegally he is liable to an action at the suit of the party injured; as if he maliciously issues a warrant for felony, without previous oath of a felony having been committed. 2 T. R. 225. 1 East, 64. Sir W. Jones. 178. Hob. 63. 1 Bulst. 64. So if he refuse an examination on the statute hue and cry. 1 Leon. 323. *Judicially*, as when he convicts for an offence. His conviction, drawn up in due form, and unappealed against, is conclusive, and cannot be disputed in an action, 1 Brod. & Bing. 432. 3 Moore, 294. 16 East. 13. 7 T. R. 633. n. a.; though if the commitment thereon was illegal, trespass lies, Wicks v. Clutterbuck. M. T. 1824. J. B. Moore's Rep. C. P.; and if he corruptly and maliciously without due ground, convict a party, Rex v. Price Caldecot, 305, or refuse a licence, he is punishable by information or indictment, though not by action. 1 Burr. 556. 2 Burr. 653. 3 Burr. 1317. 1716. Bac. Ab. Justices of the Peace, F. 1 Chitty's Crim. L. 873 to 877. So an information will be granted for improperly *granting* an ale licence. See 1 T. R. 692. 1 Burn J. 24 ed. 48. tit. Alehouses. 4 T. R. 451. In some cases a mere improper interference appears to be thus punishable: thus, where two sets of magistrates have a concurrent jurisdiction, and one set appoint a meeting to license alehouses, their jurisdiction attaches so as to exclude the others, though they may all meet together on the first day; and if, after such appointment, two other set meet, and grant licences on a subsequent day, the proceeding is illegal, and subjects them to an indictment. 4 Term. Rep. 451.

Where a criminal information is applied for against a magistrate, the question for the court is not whether the act done be fond on investigation to be strictly right or not, but whether it proceeded from an unjust, oppresive, or corrupt motive, (amongst which fear and favour are generally included), or from mistake or error only. In the latter case, the court will not grant the rule. 3 B. & A. 432, and see 1 Burr. 556. 2 Burr. 1162. 3 Burr. 1317. 1716. 1 Wils. 7. 1 Term. Rep. 692.

In general the court will not grant a criminal information, unless an application for it is made within the second term after the offence committed, there being no intervening assizes, and notice of the application be previously

amends (38). But, on the other hand, any malicious or tyrannical abuse of their office is usually severely punished; and all persons who recover a verdict against a justice, for any wilful or malicious injury, are intitled to double costs (39).

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 part of these Commentaries, as will in their turns comprise 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 [*355] 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, konung-ȝeapa, 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 Henry 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 constable of England, he was to regulate all matters of chivalry, tilts, tournaments, and feats of arms, which were performed on horseback (40). 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. (*x*): but from his office, says Lambard (*y*), this lower constableship was first drawn and fetched, and is, as it were, a very finger of that hand. For the statute of Winchester (*z*), which first ap-

(*x*) Phillipe's Life of Pole, ii. 111.
(*y*) of Constables, 5.
(*z*) 13 Edw. I. c. 6.

given to the justice. 13 East, 270. And the court will not grant a rule nisi for a criminal information against a magistrate, so late in the second term after the imputed offence, as to preclude him from the opportunity of shewing cause against it in the same term. 13 East. 322. And in a case where the facts tending to criminate a magistrate, took place twelve months before the application to the court, they refused to grant a criminal information, though the prosecutor, in order to excuse the delay, stated, that the facts had not come to his knowledge till very shortly previous to the application. 5 B. & A. 612.

In an action against a magistrate for a malicious conviction, it is not sufficient for the plaintiff to shew that he was innocent of the offence of which he was convicted, but he must also prove, from what passed before the magistrate, that there was a want of probable cause for the magistrate to convict. 1 Marsh. 220.

(38) Any defendant before trial may tender amends for an involuntary or casual trespass, and costs to that time: and then, if the tender is sufficient, and the plaintiff proceeds further, he shall pay costs to the defendant. 2 R. S. 553—554. Public officers appointed under the authority of the state, or elected by the people, and those acting under them, if successful in a suit brought against them for an act done by virtue of their offices, are entitled to taxed costs and one half thereof in addition. 2 R. S. 617.

(39) That is, where the judge certifies in court that the injury was wilful and malicious.

(40) We may form a judgment of his power, and the condition of the people of this country in the fifteenth century, from the following clause in a commission in the 7 Edw. IV. to Richard earl Rivers: *Plenam potestatem et auctoritatem damus et committimus ad cognoscendum et procedendum in omnibus et singulis causis et negotiis de et super crimine lesæ majestatis, seu ipsius occasione, cæteris quæ causis quibuscunque, summarie et de plano, sine strepitu et figurâ judicii, solâ facti veritate inspectâ.* Rym. Foed. tom. xi. p. 582.

points 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* (41).

Constables are of two sorts, high constables and petty constables. The former were first ordained by the statute of Winchester, as before mentioned; 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 [*356] *appoints them (*a*) (42). 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 Edw. III. (*b*). These petty constables have two offices united in them; the one ancient, the other

(*a*) Salk. 150.

(*b*) Spelm. Gloss. 148.

(41) Constables had been known as most efficient public officers long before the stat. of Westm. 13 Ed. I. st. 2, c. 6, A. D. 1285. This is evident from a writ or mandate preserved in the adversaria to Watts's edition of Matthew Paris, and from which cc. 4, 6, of the stat. of Westminster are evidently taken; though it has, says Sir Thomas Tomlins, "*hitherto escaped the notice of every writer or speaker upon the subject.*" See Tomlins' Law Dictionary, title CONSTABLE.

(42) It should seem that a constable cannot, in case of an affray, arrest without a warrant from a magistrate, unless an actual breach of the peace be committed in his presence, or in other words, *flagrante delicto*. He cannot arrest of his own authority, after the affray is over. 2 Camp. 367. 371. 2 Lord Ray. 1296. 1 Russell, book 3, c. 3. on manslaughter, to sec. 4. and see 2 Bar. & Cres. 699. and see further as to the powers and duties of constables acting without warrants, or otherwise, post 4 book, 292. 1 Chit. Crim. Law, 20 to 24.

A constable executing his warrant out of his district was formerly a trespasser, 1 H. Bla. 15. and in a late case it was held, that where a warrant was directed "to A. B. to constables of W. and to all other his majesty's officers," the constables of W. (their names not being inserted in the warrant) could not execute it out of that district. 1 Bar. & C. 288. But now, by five 5 Geo. IV. c. 18. constables may execute warrants out of their precincts, provided it be within the jurisdiction of the justice granting or backing the same.

It is the duty of a constable to present a highway within his district for non-repair, and he is entitled to the costs of the prosecution. 3 M. & S. 465.

By 32 Geo. III. c. 55. any constable or parish officer may, upon complaint upon oath before two justices, be convicted of neglect of duty, or disobedience of any lawful warrant or order, and may be fined any sum not exceeding 40*s*. but he may appeal to the sessions. And by 5 Geo. IV. c. 83. s. 11. constables or peace officers neglecting their duty, are liable to the penalty of 5*l*.

With respect to the *indemnity* and protection extended to constables in their office, the 7 Ja. I. c. 5. (made perpetual by 21 Ja. I. c. 12.) permits them to plead the general issue only in an action brought against them for any thing done concerning their office, and gives double costs, if a verdict be given for them; and sec. 5. requires such action to be brought in the county where the fact was committed.

Formerly the constable was bound to take notice of the jurisdiction of the justice, insomuch that if the justice issued a warrant in any matter wherein he had no jurisdiction, the constable was punishable for the execution of it. But now, by 24 Geo. II. c. 44. s. 6. no action shall be brought against any constable, &c. acting in obedience to a justice's warrant, until demand in writing signed by the party or his agent, &c. intending to bring such action, of the perusal and copy of such warrant, and the same hath been refused or neglected within six days after such demand. And in case the constable complies with the demand, by shewing the warrant to, and permitting a copy to be taken, then, on action brought, on production and proof of the warrant, a verdict shall be given for the constable, &c. notwithstanding a defect in the justice's jurisdiction; and the same protection is given where the constable is sued jointly with the justice. And by sect. 8. no action shall be brought against any constable acting as aforesaid, but within six months after the act committed.

The intent of these provisions was to prevent the constable, or other officer, when acting in *obedience* to his warrant, from being answerable on account of any defect of jurisdiction in the justice, 3 Burr. 1742. 1 Bla. Rep. 555. S. C. 3 Esp. 226. 2 M. & S. 259. and for cases, &c. on this act, see Tidd. 8 ed. 31, 32. 1 Chit. Crim. Law, 68, 9.

By 1 & 2 Geo. IV. c. 88. a severe punishment is to be inflicted on persons assaulting constables to prevent the apprehension or detainer of persons charged with felony.

The statutes 27 Geo. II. c. 20. s. 2. 3 Jac. I. c. 10. s. 1. 27 Geo. II. c. 3. s. 1. 4. 41 Geo. III. U. K. c. 78. s. 1, 2. 1 Geo. IV. c. 37. s. 3. and 18 Geo. III. c. 19. s. 4. relate to the expenses of the constable in his office, and see cases 2 B. & A. 522. 5 B. & A. 180. 755. on the 18 Geo. III. c. 19. s. 4.

By 12 Geo. II. c. 29. s. 8. and 55 Geo. III. c. 51. s. 12. high constables are to account at sessions.

modern. Their ancient office is that of headborough, tithing-man, or borsholder, of whom we formerly spoke (*c*), 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 (*d*). 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 (*e*).

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 into these offices, it is perhaps very well that they are generally kept in ignorance (43). 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 applied to the daytime, 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 (*f*): the hundred being, however, answerable for all robberies committed therein, by daylight, for having kept negligent guard. Watch is properly applicable to the night only, (being called among our Teutonic ancestors *wacht* or *wacta*) (*g*), and it *begins [*357] 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 powers and duties belong to the constable or tithing-man indifferently, and what to the constable only: for the constable may do whatever the tithing-man may; but it does not hold *e converso*, the tithing-man not having an equal power with the constable (44).

(*c*) Page 115.
(*d*) Lamb. 8.
(*e*) Stat. 14 and 15 Car. II. c. 12.
(*f*) Dalt. Just. c. 104.
(*g*) *Excubias et explorationes quas wactas vocant.* *Capitular. Hludov. Pii, cap.* 1. A. D. 815.

(43) Every one who reflects upon the subject, must surely dissent from the proposition in the text; which contains, by implication, a censure both upon the legislature and the executive. It is manifestly absurd to presume, that a man who is ignorant of the extent of his authority is less likely to abuse it than he who clearly understands its due limit. Admitting that the ignorant officer from fear, or from a more laudable motive, restricts himself within bounds much more contracted than the law has prescribed, it is clear he must sometimes fail in the discharge of his duty, to the great detriment of public justice. How much better would it be that the duty of these officers should be accurately defined, and that they should be chosen from among men of intelligence, who would have the good sense to know the extent of their power, and the good feeling not to exceed it.

(44) In New-York, constables, commissioners, and overseers of highways, overseers of the poor, and other town officers, are chosen by the electors of the towns. 1 R. S. 340. They hold their offices for a year, and until their successors are appointed or chosen, and qualified. Id. 347.

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 burthen 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* (*h*). 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 [*358] 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 and 3 Ph. and M. c. 8, surveyors of the highways were ordered to be chosen in every parish (*i*).

These surveyors were originally, according to the statute of Philip and Mary, to be appointed by the constable and church-wardens of the parish; but now they are constituted by two neighbouring justices, out of such inhabitants or others, as are described in statute 13 Geo. III. c. 78, and may have salaries allotted them for their trouble.

Their office and duty consists in putting in execution a variety of laws for the repairs of the public highways; that is, of ways leading from one town to another: all which are now reduced into one act by statute 13 Geo. III. c. 78, which enacts, 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 non-compliance. 2. They are to call together all the inhabitants and occupiers of lands, tenements, and hereditaments within the parish, six days in every year, to labour in fetching materials, or repairing the highways: all persons keeping draughts, (of three horses, &c.) or occupying lands, being obliged to send a team for every draught, and for every 50*l.* a year which they keep or occupy: persons keeping less than a draught, or occupying less than 50*l.* a year, to contribute in a less proportion; and all other persons chargeable, between the ages of eighteen and sixty-five, to work or find a labourer. But they may compound with the surveyors, at certain easy rates established by the act. And every cartway leading to any market-town must be made twenty feet wide at the least, if the fences will permit; and may be increased by two justices, at the expence of the parish, to the breadth of thirty feet (45). 3. The sur-

(*h*) C. 11. 74, 4.

(*i*) This office, Mr. Dalton (Just. cap. 50,) says, exactly answers that of the *curatores viarum* of the Romans; but it should seem 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 Cæsar. (*Cic. ad Attic. l.* 1. *ep.* 1.)

(45) Two justices, where they think it will render the road more commodious, may order it to be diverted; the power to enlarge does not extend to pull down any building, or to take in the ground of any garden, park, paddock, court, or yard.

No tree or bush shall be permitted to grow in any highway, within fifteen feet from the centre of it, except for ornament or shelter to a house; and the owners of the adjoining lands may be compelled to cut their hedges, so as not to exclude the sun and wind from the

veyors may lay out their own money in purchasing materials for repairs, in erecting guide-posts, and making drains, 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 on the parish, in aid of the personal duty, not exceeding, in any one year, together with the other highway rates, the sum of 9*d.* in the pound; for the due application of which they are to account upon oath. As for turnpikes, which are now pretty generally introduced in aid of such rates, and the law relating to them, these depend principally on the particular powers granted in the several road acts, and upon some general provisions which are extended to all turnpike roads in the kingdom, by statute 13 Geo. III. c. 84, amended by many subsequent acts (*k*) (46).

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 well disposed Christians (47). For, though it appears, by the mirror (*l*), that by the common law the poor were to be "sustained by parsons, rectors of the church, and the parishioners, so that none of them die 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 abide 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. 25, 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 [*360] 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 and his children, for providing for the poor and impotent; which, the preambles to some of them recite, had of late years greatly increased. 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

(*k*) Stat. 14 Geo. III. c. 14. 38. 57. 32. 16 Geo. III. c. 39. 18 Geo. III. c. 28.

(*l*) C. 1. § 3.

highway. Fines awarded by the court for not repairing a highway shall not be returned into the exchequer, but shall be applied to the repair of the highways, as the court shall direct.*

(46) Commissioners of highways have power to repair bridges and roads, also to alter and regulate roads already laid out; they may also, under certain restrictions, lay out new and discontinue old roads. 1 R. S. 501, 515.

(47) The poor in Ireland, to this day, have no relief but from private charity. 2 *Ld. Mountm.* 118.

* The statutes bearing upon Highways are, 13 G. III. c. 78. 34 G. III. cc. 64, 74. 44 G. III. c. 52. 54 G. III. c. 109. and 55 G. III. c. 68. Consult the recent statute at large, 3 Geo. IV. c. 126, the general Turnpike Road Act, consolidating the provisions contained in former acts; and the title *Highway*, in Sir Geo. Chetwynde's Burn's Justice, where it is fully stated.

measure for both of these, in and about the metropolis, 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 (48).

By virtue of the statute last mentioned, these overseers are to be nominated yearly in Easter-week, or within one month after, (though a subsequent nomination will be valid) (*m*), by two justices dwelling near the parish (49). They must be substantial householders, and so expressed to be in the appointment of the justices (*n*) (50).

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

(*m*) Stra. 1123. (*n*) 2 Lord Raym. 1394.

(48) By this statute, a parish was the only district bound or entitled to the separate maintenance of its poor, but townships and villages, whether parochial or extra-parochial, are now brought within the same system, by the construction put upon the statute 13 & 14 Car. II. c. 12. s. 21. 1 Term. Rep. 374.

(49) By 43 Eliz. c. 2. s. 8. officers of corporate towns, and aldermen of London, have the authority of justices of the peace for the purpose of appointing overseers.

(50) In a late case, where A. B. & C., carrying on trade in partnership, had a dwelling-house, yard, and premises, in a parish in London, all the partners were in the habit of frequenting the premises daily, for the purpose of business, but none of them resided there, the dwelling-house was inhabited by a clerk, who managed the business for them, but the rent, rates, and taxes, were paid by the firm, it was held that each of the partners was a householder, within the 43 Eliz. c. 2. and liable to serve the office of overseer. 1 B. & Cres. 178. 4 Burn J. 24th ed. 10, 11.

In another case, two day-labourers, with some land annexed to their cottages, of whom only one was a proprietor, and the other a farmer's servant, were held to be competent overseers, although the appointment of such men might be improper in a place where there were a great many opulent farmers. 2 T. R. 406. 1 Bott, 5. And a woman may be appointed, where the necessity of the case requires it. 2 T. R. 395. The justices are to determine what is a case of necessity. 2 T. R. 395. 1 Bott, 11. 1 Burr. 245. 1 Nol. 50. The court of K. B. will quash an appointment of persons not substantial householders. 2 Stra. 1261. 1 Nol. P. L. 53. 1 B. & C. 131. notis.

The appointment is no longer limited of necessity to householders living in the parish or township, for by 59 Geo. III. c. 12, a power is given for the appointment of *non-resident* overseers; and by the 7th section of that act, *assistant* overseers may be appointed, and security taken.

As to the manner of enforcing an appointment of overseers to be made, this may be done by mandamus from the court of K. B. 1 Nol. P. L. 44. If an appointment has been already made, then the overseers may be compelled to take the office by indictment, 2 Stra. 1146. 2 Sess. Ca. 187. 1 Nol. 38, or generally by obtaining a confirmation of the appointment from the court of King's Bench. 1 Bott, 68. 4 Burn J. 24 ed. 26.

On the other hand, when the object is to avoid the appointment, that object may be obtained, by defending an indictment for refusal of the office, or by bringing an action of trespass or replevin for taking a distress under a rate made by illegal officers; and the appointment may be directly impeached, either by the overseers themselves, or by any of the parishioners, (Cro. Car. 92. 1 Bott, 32. 7 East, 1, &c. 4 Burn J. 24 ed. 26.) by appeal to the general quarter sessions (see 15 East, 207. 1 B. & A. 210.) against the appointment itself, (43 Eliz. c. 2. s. 6. 17 Geo. II. c. 38. s. 4.) or incidentally on an appeal against an order of removal made to an extra-parochial place having no officers, or to a township or other minor district, when the overseers ought to have been appointed for the parish at large, or when, having been appointed for the parish at large, they ought to have been appointed for a township, (Burr. 35. Fost. 219. 1 Bott, 35. 45. Cald. 28. 248. 2 Bott, 690.) or by an appeal against an order of removal made from a wrong district. 2 Salk. 487. And an appointment by two justices may be removed into the court of K. B. by certiorari, without appealing against it to the quarter sessions; and the court will go into the question, upon affidavit whether the place for which the appointment is made be a township or vill; and if it appear by the affidavit that it is not, and be not stated as such, or that it is reputed to be such, the court will quash the appointment. 4 M. & S. 378. 3 T. R. 38. 2 East, 244.

Also the propriety of an appointment may be questioned on a mandamus to the justices, commanding them to appoint proper overseers. 8 Mod. 39. 1 Nol. P. L. 37. n. 4. and 4 Burn J. 24 ed. 28.

condly, to provide work for such as are able, and cannot otherwise get
nployment: but this latter part of their duty, which, according to the
ise regulations of that salutary statute, should go hand in hand with the
her, is now most shamefully neglected. However, for these
nt purposes, they are impowered to *make and levy rates upon [*361]
e several inhabitants of the parish, by the same act of parlia-
ent; which has been farther explained and enforced by several subse-
ient statutes.

The two great objects of this statute seem to have been, 1, To relieve
e impotent poor, and them only. 2, To find employment for such as are
le to work; and this principally, by providing stocks of raw materials
be worked up at their separate homes, instead of accumulating all the
or in one common workhouse; a practice which puts the sober and dili-
nt upon a level (in point of their earnings) with those who are dissolute
d idle; depresses the laudable emulation of domestic industry and neat-
ss, and destroys all endearing family connections, the only felicity of the
igent. Whereas, if none were relieved but those who are incapable to
their livings, and that in proportion to their incapacity; if no children
re removed from their parents, but such as are brought up in rags and
ness; and if every poor man and his family were regularly furnished
h employment, and allowed the whole profits of their labour;—a spirit
usy cheerfulness would soon diffuse itself through every cottage; work
uld become easy and habitual, when absolutely necessary for daily sub-
ence; and the peasant would go through his task without a murmur, if
ured that he and his children, when incapable of work through infancy,
, or infirmity, would then, and then only, be entitled to support from his
lent neighbours.

This appears to have been the plan of the statute of Queen Elizabeth;
which the only defect was confining the management of the poor to
all, parochial, districts; which are frequently incapable of furnishing
per work, or providing an able director. However, the laborious poor
re then at liberty to seek employment wherever it was to be had: none
ig obliged to reside in the places of their settlement, but such as were
ble or unwilling to work; and those places of settlement be-
only such where they *were *born*, or had made their *abode*, [*362]
inally for three years (*o*), and afterwards (in the case of vaga-
ds) for one year only (*p*).

After the restoration, a very different plan was adopted, which has ren-
ed the employment of the poor more difficult, by authorizing the sub-
sion of parishes; has greatly increased their number, by confining
n all to their respective districts; has given birth to the intricacy of
poor-laws, by multiplying and rendering more easy the methods of
ing settlements; and, in consequence, has created an infinity of ex-
sive law-suits between contending neighbourhoods, concerning those
lements and removals. By the statute 13 and 14 Car. II. c. 12, a legal
lement was declared to be gained by *birth*, or by *inhabitancy*, *apprentice-*
, or *service*, for forty days: within which period all intruders were made
oveable from any parish by two justices of the peace, unless they set-
in a tenement of the annual value of 10*l*. The frauds, naturally
sequent upon this provision, which gave a settlement by so short a re-

(*o*) Stat. 19 Hen. VII. c. 12. 1 Edw. VI. c. 3. (*p*) Stat. 39 Eliz. c. 4.
7. VI. c. 16. 14 Eliz. c. 5.

sidence, 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 (51).

The law of settlements may be therefore now reduced to the following general heads; or, a settlement in a parish may be acquired (52),

[*363] 1, By *birth*; for, wherever a child is first known *to be, that is always *prima facie* the place of settlement, until some other can be shewn (*q*). This is also generally the place of settlement of a bastard child (*r*); for a bastard having in the eye of the law no father, cannot be referred to *his* settlement, as other children may (*s*). 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 legitimate children being really settled in the parish where their parents are settled, until they get a new settlement for themselves (*t*) (53). A new settlement may be acquired

(*q*) Carth. 433. Comb. 384. Salk. 485. 1 Lord Raym. 567.
(*r*) See p. 459.
(*s*) Salk. 427.
(*t*) Salk. 528. 2 Lord Raym. 1473.

(51) The use and application of the doctrine has virtually ceased. By stat. 35 Geo. III. c. 101, no person shall be removed by an order of removal till he becomes actually chargeable, except, 1. Unmarried women with child. The reason for this exception is, the child would acquire a settlement in the parish where born. 2. Convicts and vagrants are deemed chargeable, and, as such, are removeable. The same statute, in case of sickness, or the infirmity of the pauper, authorizes the justices to suspend an order for removal, or a vagrant pass. The expences of removal, and those incurred where the order for such removal shall, in the cases mentioned, have been suspended, are to be borne by the parish to which the pauper is removed. The statute further provides that the child born during such suspension shall belong to the parish which, at the time of the birth, was the settlement of the mother. Stat. 49 G. III. c. 124, extends the power of suspension to any two justices; and also provides against the enforcing, under the original order for the removal, the removal of any other member of the pauper's family, named in such order, during the order of suspension.

(52) It may be as well here to notice a statute affecting settlements in general, viz. the 54 Geo. III. c. 171. By sec. 1. all enactments and provisions in respect of gaining settlements contained in any local acts are repealed; sec. 2. persons born in prisons, or houses licensed for the reception of pregnant women, cannot gain a settlement thereby; sec. 3. a provision is made respecting settlements by reason of birth in any poor-house or house of industry belonging to united parishes; sec. 4. prisoners for debt or contempt cannot gain settlements whilst in custody; sec. 5. no toll-gate-keeper, or person residing in any toll-house, can gain a settlement thereby; sec. 6. no person maintained in any charitable institution can gain any settlement by any residence therein.

By 59 Geo. III. c. 12. a building purchased or hired under the authority of that act shall be taken to be in the parish, &c. hiring it in questions of settlement.

(53) If the parents acquire a new settlement, the children also follow, and belong to the last settlement of the father, or, after the death of the father, to the last settlement of the mother,* till they are emancipated or become independent of their father's or mother's family, and in that case they have that settlement which their parents had at the time of emancipation.

This is a very indefinite word, and it is no wonder that several cases have arisen upon the interpretation of it. Lord Kenyon seems to have given as full and as just an explanation of it as it will admit, in observing, that "the cases of emancipation have always been decided on the circumstances either of the

* Previously to her marriage. See the King v. St. Botolph's parish. Burr. Sett. Ca. 367.

several ways; as, 3, By *marriage* (54). For a woman marrying a man that is settled in another parish changes her own settlement: the law not permitting the separation of husband and wife (*t*). But if the man has no settlement, hers is suspended during his life, if he remains in England and is able to maintain her; but in his absence, or after his death, or during, perhaps, his inability, she may be removed to her old settlement (*u*) (55). 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 made notorious by one or other of the following concomitant circumstances. The next method therefore of gaining a settlement is, 4, By forty days' residence, and *notice* (56). 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 unmolested for forty days after such notice, he is legally settled thereby (*w*). 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, [*364] and residing forty days in the parish, gains a settlement without notice (*x*); upon the principle of having substance enough to gain credit for such a house (57). 6, Being charged to and paying the public *taxes* and levies of the parish (58); excepting those for scavengers, highways, (*y*), and the duties on houses and windows (*z*) (59): and, 7, Executing, when legally appointed, any public parochial *office* for a whole year in the parish, as churchwarden, &c. are both of them equivalent to notice, and gain a settlement (*a*), if coupled with a residence of forty days (60). 8,

(*t*) Stra. 544.
(*u*) Foley, 249, 251, 252. Bur. Set. C. 370.
(*w*) Stat. 13 and 14 Car. II. c. 12. 1 Jac. II. c. 17. 3 and 4 W. and Mar. c. 11.
(*x*) Stat. 13 and 14 Car. II. c. 12.
(*y*) Stat. 9 Geo. I. c. 7, § 6.
(*z*) Stat. 21 Geo. II. c. 10. 18 Geo. III. c. 26.
(*a*) Stat. 3 and 4 W. and M. c. 11.

son's being twenty-one, or married, or having contracted a relation, which was inconsistent with the idea of his being in a subordinate situation in his father's family." 2 *T. R.* 356.

(54) For the purposes of the poor laws, a marriage is, it seems, held valid, although the man shall not have been married by his real name. See the King v. Billinghust parish, 3 M. and S. 250. Same as Burton-upon-Trent parish. Id. 537. So in the absence of proof that a first husband was alive at the time of a second marriage, the sessions was held to have decided rightly, on the presumption that the first husband was dead. The King v. Twyning parish, in Gloucestershire. 2 B. and A. 386.

(55) In the absence or after the death of the husband, in that case the wife and her children may be removed to her maiden settlement; but it seems fully determined that they cannot be separated or removed from the husband. (*Bur. S. C.* 813. 1 *Stra.* 544.) The consequence is, that the whole family must be supported as casual poor in the parish where they may happen to want relief. In the removal of a wife or a widow, it is sufficient, in the first instance, to prove her maiden settlement. *Cald.* 39, 236.

(56) Nullified by stat. 25 Geo. III. c. 101, § 3.

(57) By stat. 59 Geo. III. c. 50, amended by stat. 6 G. IV. c. 57, the tenement must be, 1, a separate and distinct house; 2, or a building; 3, or land; 4, or both; 5, in the parish or township; 6, the hiring must have been at 10*l.* per annum; 7, and *bona fide* for one whole year; 8, actually occupied during that period; 9, and the full rent for that period also paid. But it is further provided, that it shall in no case be necessary to prove the actual *value* of such tenement. See the last-mentioned statute.

(58) If the poor rate have been paid, the settlement shall be gained, although the occupation have not been for a year. The King v. St. Pancras parish. 3 D. and R. 343; s. c. 2 B. and C. 122.

(59) Also assessed taxes, under stat. 43 G. III. c. 161, § 59.

(60) A widower or widow with children emancipated is considered as childless, for

Being *hired* for a year, when unmarried and childless, and *serving* a year in the same service; and 9, Being bound an *apprentice*, give the servant and apprentice a settlement, without notice (*b*), 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 (61), &c. is a sufficient settlement (*c*): but if a man acquire it by his own act, as by purchase, (in its popular sense, in consideration of money paid,) then unless the consideration advanced, *bona fide*, be 30*l.* (62), it is no settlement for any longer time than the person shall inhabit thereon (*d*). He is in no case removable from his own property; but he shall not, by any trifling or fraudulent purchase of his own, acquire a permanent and lasting settlement.

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 10*l.* per annum, or living in an [*365] *annual service; for then they are not removable (*e*). 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 (*f*). But such certificated person can gain no settlement by any of the means above mentioned, unless by renting a tenement of 10*l.* *per annum*, or by serving an annual office in the parish, being legally placed therein: neither can an apprentice or servant to such certificated person gain a settlement by such their service (*g*).

(*b*) Stat. 3 and 4 W. and M. c. 11. 8 and 9 W. III. c. 30. 30 Geo. II. c. 11.
(*c*) Salk. 524.
(*d*) Stat. 9 Geo. I. c. 7.
(*e*) Salk. 472.
(*f*) Stat. 8 and 9 W. III. c. 30.
(*g*) Stat. 12 Ann. c. 18.

such children cannot follow the settlement gained by their parent's service. 3 *Burn.* 445. If an unmarried man is hired for a year, but before he enters upon the service, or during the service, marries, he may gain a settlement. 3 *T. R.* 382. But this will not extend to the continuance in the service a second year; for he was married when this new contract was expressly or impliedly entered into. *Cald.* 54. Hiring for any time certainly less than a year will not be sufficient; but from Whitsuntide to Whitsuntide is considered a year, though it will frequently happen to be a period less than 365 days. To gain a settlement as a servant there must be a hiring for a year, and a continued service for a year; but it is not necessary that the service should be subsequent to the hiring; for if there is a continued service for eleven months or any other part of a year, by any number or modes of hirings, or with any difference of wages, and afterwards a hiring for a year and a service to complete the year, a settlement is gained. *Cald.* 179. There seemed to be great reason to think that the service subsequent to the hiring for a year should at least be 40 days; but it is now decided that that is not necessary. (5 *T. R.* 98.) The settlement of a servant and an apprentice is where they last reside 40 days in their master's employ; and where they do not reside 40 days successively at one place, but alternately in two or more parishes, and more than 40 days upon the whole in each in the course of a year, the settlement is in that parish in which they sleep the last night. *Doug.* 633.

(61) A remarkably nice distinction was made in the King v. Eatington parish, 4 T. R. 177, where it was held that a purchase of a house of A. by B. in consideration of 36*l.* *bona fide* paid by him to A. with liberty to A. to use and occupy the house, as he had been accustomed, for his life, did not give B. an interest in the estate sufficient to enable him, by residence thereon, to gain a settlement. The word "occupy," said the court, reserved to A. the whole estate.

(62) And it seems that "natural love and affection," as between father and son, is not a purchase within the stat. 9 Geo. I. c. 7. The King v. Ufton parish, 3 T. R. 251; and a settlement is said to have been gained by residence on such a property. Purchase, in that statute, means a pecuniary consideration of 30*l.* Id. ib.

These are the general heads of the laws relating to the poor, which, by he resolutions of the courts of justice thereon within a century past, are ranched into a great variety (63). And yet, notwithstanding the pains hat have been taken about them, they still remain very imperfect, and in-dequate to the purposes they are designed for: a fate that has generally ttended most of our statute laws, where they have not the foundation of he common law to build on. When the shires, the hundreds, and the ithings, were kept in the same admirable order in which they were dis-osed by the great Alfred, there were no persons idle, consequently none ut the impotent that needed relief: and the statute of 43 Eliz. seems en-irely founded on the same principle. But when this excellent scheme vas neglected and departed from, we cannot but observe with concern vhat miserable shifts and lame expedients have from time to time been dopted, in order to patch up the flaws occasioned by this neglect. There s not a more necessary or more certain maxim in the frame and constitu-on of society, than that every individual must contribute his share in rder to the well-being of the community: and surely they must be very efficient in sound policy, who suffer one half of a parish to continue idle, bsolute, and unemployed; and at length are amazed to find, that the dustry of the other half is not able to maintain the whole (64).

CHAPTER X.

F THE PEOPLE, WHETHER ALIENS, DENIZENS, OR NATIVES.

HAVING, in the eight preceding chapters, treated of persons as they and in the public relations of *magistrates*, I now proceed to consider such rsons as fall under the denomination of the *people*. And herein all the ferior and subordinate magistrates treated of in the last chapter are in-ded.

The first and most obvious division of the people is into aliens and na-al-born subjects (1). Natural-born subjects are such as are born within

63) For a full and complete knowledge of s extensive subject, recourse must be had to rn's Justice, by Chitty, and Mr. Const's uable edition of Bott, and the reporters re referred to.

64) In New-York, where special provision not made, each town supports its own poor; the supervisors of any county may make expense of supporting the poor of all the nty a county charge. 1 *R. S.* 620—1. Every person of full age, who has been an abitant and resident of any town for one r, and the members of his family, who have gained a separate settlement, are deemed led in that town. A minor may be eman-ated from his or her father and gain a set-ement:

1. If a female, by being married, and living one year with her husband, in which case husband's settlement determines that of the e.

2. If a male, by being married, and residing for one year separately from the family of his father.

3. By being bound as an apprentice, and serving one year by virtue of such indentures.

4. By being hired, and actually serving for one year, for wages to be paid to such minor. A woman of full age, by marrying, shall acquire the settlement of her husband if he have any. Id. 621.

The poor are not to be removed, but are to be supported in the town or county where they may be, at the expense of the place in which they have gained a settlement. Id. 622, § 31.

(1) Natural-born subjects are persons born within the allegiance, power, or protection of the crown of England, which terms embrace not only persons born within the dominions of his majesty, or of his homagers, and the children of subjects in the *service* of the king abroad, and the king's children, and the heirs of the crown, all of whom are natural-born subjects

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 subjection to some superior or lord, from whom or whose ancestors the tenant or vassal had received them; and there was a mutual trust or confidence subsisting between the lord and vassal, that the lord should protect the vassal in the enjoyment of the territory he had [*367] granted him, and, on the *other hand, that the vassal should be faithful to the lord, and defend him against all his enemies. This obligation on the part of the vassal was called *fidelitas*, 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 vassal. But when the acknowledgment was made to the absolute superior himself, who was vassal 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 fidelitatem fecit* (*b*)." Land held by this exalted species of fealty was called *feudum ligium*, a liege fee; the vassals *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 acknowledgment of tenure (*c*); and *liege* homage, which included the fealty before-mentioned, and the services consequent upon it. Thus when our 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*). But 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 con-

(*a*) 2 Feud. 5, 6, 7.
(*b*) 2 Feud. 99.
(*c*) 7 Rep. Calvin's case, 7.
(*d*) 2 Cart. 401. Mod. Un. Hist. xxiii. 420.

by the *common law*; but also under various statutes, all persons, though born abroad, whose fathers or grandfathers by the *father's* side, were natural-born subjects at common law, unless the father or paternal grandfather, through whom the claim is made, was at the time of the birth of such children liable, in case of his return into this country, to the penalties of treason or felony, or was in the actual service of any foreign prince then at enmity with the crown of England, excepting always from the benefit both of the common law and of the statutes, those artificers and manufacturers who are declared aliens by 5 Geo. I. c. 27. See 1 Chit. Com. Law, 117. 119. 130; but artificers may now go abroad. 5 Geo. IV. c. 97.

Persons born in transmarine territories belonging to the king of England, in any other right than that of the *English crown*, as, for instance, the Hanoverians and persons doing service to the king, as officers of such transmarine territories, are not natural-born subjects. See Vaughan, 286.

A child born out of the allegiance of the crown of England, is not entitled to be deemed a natural-born subject, unless the father be at the time of the birth of the child, not a subject only, but a subject by birth. Therefore, children born in the United States of America, since the recognition of their independence, of parents born there before that time, and continuing to reside there afterwards, are aliens, and cannot inherit lands here. 2 Bar. & Crea. 779. 4 D. & R. 394. S. C.

ned to the person of the king alone. By an easy analogy, the term of llegiance was soon brought to signify all other engagements which are ue from subjects to their prince, as well as those duties which were sim- ly and merely territorial. And the oath of allegiance, as adminis- red for *upwards of six hundred years (*e*), contained a promise [*368] to be true and faithful to the king and his heirs, and truth and ith to bear of life and limb and terrene honour, and not to know or hear of ıy ill or damage intended him, without defending him therefrom." Upon hich Sir Matthew Hale (*f*) makes this remark, that it was short and ain, not entangled with long or intricate clauses or declarations, and yet comprehensive of the whole duty from the subject to his sovereign. But the revolution, the terms of this oath being thought perhaps to favour) much the notion of non-resistance, the present form was introduced by ; convention parliament, which is more general and indeterminate than ; former; the subject only promising "that he will be faithful and bear e allegiance to the king," without mentioning "his heirs," or specifying the least wherein that allegiance consists. The oath of supremacy is ıcipally calculated as a renunciation of the pope's pretended authority; l the oath of abjuration, introduced in the reign of King William (*g*), y amply supplies the loose and general texture of the oath of allegi- :e; it recognizing the right of his majesty, derived under the act of :lement; engaging to support him to the utmost of the juror's power; mising to disclose all traitorous conspiracies against him; and express- enouncing any claim of the descendants of the late pretender, in as ır and explicit terms as the English language can furnish. This oath ıt be taken by all persons in any office, trust, or employment; and may tendered by two justices of the peace to any person whom they shall)ect of disaffection (*h*). And the oath of allegiance may be tendered (*i*) ıll persons above the age of twelve years, whether natives, denizens, liens, either in the court-leet of the manor, or in the sheriff's tourn, ch is the court-leet of the county.

ut, besides these express engagements, the law also holds that e is an implied, original, and virtual allegiance, *owing from [*369] y subject to his sovereign, antecedently to any express pro- ; and although the subject never swore any faith or allegiance in . For as the king, by the very descent of the crown, is fully invested all the rights, and bound to all the duties of sovereignty, before his ıation; so the subject is bound to his prince by an intrinsic allegiance, 'e the superinduction of those outward bonds of oath, homage, and y; which were only instituted to remind the subject of this his pre- ; duty, and for the better securing its performance (*k*). The formal ssion, therefore, or oath of subjection, is nothing more than a declara- n words of what was before implied in law. Which occasions Sir Ed- Coke very justly to observe (*l*), that "all subjects are equally bound- their allegiance as if they had taken the oath; because it is written e finger of the law in their hearts, and the taking of the corporal is but an outward declaration of the same." The sanction of an it is true, in case of violation of duty, makes the guilt still more nulated, by superadding perjury to treason: but it does not increase

lrror, c. 3, § 35. Fleta, 3, 16. Britton, c. ep. Calvin's case, 6. Hal. P. C. 63. at. 13 W. III. c. 6.

(*h*) Stat. 1 Geo. I. c. 13. 6 Geo. III. c. 53.
(*i*) 2 Inst. 121. 1 Hal. P. C. 64.
(*k*) 1 Hal. P. C. 61.
(*l*) 2 Inst. 121.

the civil obligation to loyalty; it only strengthens the *social* tie by uniting it with that of *religion*.

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 (2). Natural allegiance is such as is due from all men born within the king's dominions immediately upon their birth (*m*). 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 (*n*). An Englishman who removes to France, or [*370] 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 (*o*), 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 (3). 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 (4).

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 (*p*): and it ceases the instant such stranger transfers himself from this kingdom to another (5). Natural allegiance is therefore perpetual, and local tem-

(*m*) 7 Rep. 7.
(*n*) 2 P. Wms. 124.
(*o*) 1 Hal. P. C. 68.
(*p*) 7 Rep. 6.

(2) A person naturalized in the U. S. cannot become an alien by merely taking the oath of allegiance to a foreign power, without *changing his domicil*. Fish v. Stoughton. 2 John. cas. 407.

A native of one of the U. S. who continued under the protection of the British from the commencement of the war of the Revolution to its close, is an alien. Palmer v. Downer. 2 Mass. Rep. 179. in nota.

Secus, if he returned to this country before the treaty of peace of 1783. Killam v. Ward. 2 do. 236.

(3) And this seems to have guided the courts both of England and America, since the peace between these powers, which ended in the declaration and acknowledgment of the independence of America. It has been determined that the effect of the concurrent acts of the two governments was to devest a natural-born subject of the British king, adhering to the United States of America, of his right to inherit land in England; and so, in K. B., it has been determined that the treaty virtually prevented Americans adhering to the crown from inheriting lands in America. See the English case, Doe *d.* Thomas *v.* Acklam, 2 *B. and C.* 729, which cites 7 *Wheaton's R.* 535. See also 1 Peter's C. C. R. 159.

(4) Sir Michael Foster observes, that "the well-known maxim, which the writers upon our law have adopted and applied to this case, *nemo potest exuere patriam*, comprehendeth the whole doctrine of natural allegiance." *Fost.* 184. And this is exemplified by a strong instance in the report which that learned judge has given of Æneas Macdonald's case. He was a native of Great Britain, but had received his education from his early infancy in France, had spent his riper years in a profitable employment in that kingdom, and had accepted a commission in the service of the French king; acting under that commission, he was taken in arms against the king of England, for which he was indicted and convicted of high treason; but was pardoned upon condition of his leaving the kingdom, and continuing abroad during his life. *Ib.* 59.

This is certainly an extreme case; and we should have reason to think our law deficient in justice and humanity if we could discover any intermediate general limit, to which the law could be relaxed consistently with sound policy or the public safety.

(5) Mr. J. Foster informs us that it was laid down in a meeting of all the judges, that

porary 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 *practise any thing against his crown and dignity: wherefore, although the true prince regain the sovereignty, [*371] 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.

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 (6).

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

(*q*) 1 Hal. P. C. 60. (*r*) 1 Hal. P. C. 67.

"if an alien, seeking the protection of the crown, and having a family and effects here, should, during a war with his native country, go thither, and there adhere to the king's enemies *for purposes of hostility*, he may be dealt with as a traitor." *Fost.* 185.*

(6) Sir William Wyndham said, that were he to find the crown dangling in a bush he would stand by and defend it to the last. How much matter of regret would it be that the spirit of an expression of service and loyalty, so fine, so just, and so exalted, should ever be wasted upon a sovereign who might be unacquainted with his people's wrongs until he should hear of them in their remonstrances.

*The question might at this day probably well admit of re-argument. The text appears to me to be the better doctrine. For suppose that, on his return to the dominions of his sovereign to whom was owing his natural allegiance, such sovereign should compel his taking arms, can it be justly argued that either way he must be punished; by his natural sovereign, if he disobey; and, by the adopted sovereign, put to death for appearing or taking arms against him. But Lord Stowel has, I believe, lately determined conformably with the authority mentioned by Mr. J. Foster.

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 [*372] 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 (*s*) (6), (7). 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 (8). Wherefore by the civil

(*s*) Co. Litt. 2.

(6) A woman alien cannot be endowed, unless she marries by the licence of the king; and then she shall be endowed by 8 Hen. V. *No.* 15, *Rot. Parl. Harg. Co. Litt.* 31, *a.* n. 9. Neither can a husband alien be tenant by the courtesy. 7 *Co.* 25.

(7) As to an alien's disability respecting lands, see 1 Chitty's Comm. L. 162. and 2 Bar. & Cres. 779. 4 D. & L. 394. The common law of this country has always been jealous of foreigners; from the conquest till upwards of two hundred years afterwards, it does not appear that strangers were permitted to reside in England even on account of commerce beyond a limited time, except by a special warrant, for they were considered only as sojourners coming to a fair or market, and were obliged to employ their landlords as brokers to buy and sell their commodities; and we find that one stranger was often arrested for the debt, or punished for the misdemeanor of another, as if all strangers were to be looked upon as a people with whom the English were in a state of perpetual war, and therefore might make reprisals on the first they could lay hands on. Tucker's Remarks on Naturalization Bill, 2, 3. 13. 15. 2 Inst. 204. Rymer's Fœdera, vols. 1, 2, 3, 4. 1 Anderson's History of Commerce, 237. 242. At this day by the 56 Geo. III. c. 86. continued in force by 5 Geo. IV. c. 37. for two years after passing of that act, aliens may by proclamation, &c. be compelled to depart this realm under pain of heavy penalties for neglecting to do so; and by sec. 9. aliens, except domestic servants, must, within a week after their arrival here, produce their certificates to the chief magistrate of the place, or to a justice, or where certificate is lost, deliver an account of the particulars under a penalty for neglecting to do so; and by sec. 10. mayors, &c. may detain aliens suspected of being dangerous persons, and transmit to the secretary of state an account of their proceedings; by sec. 15. no ambassadors or other public ministers duly authorized, nor their domestic servants registered or actually attendant on them, shall be deemed aliens within the act, and the act shall not extend to aliens not more than fourteen years old; by sec. 19. aliens having quitted France on account of the late troubles are not liable to be arrested for debts contracted beyond seas, other than the dominions of his majesty. The 5 Geo. IV. c. 37. enacts that the above act shall not extend to aliens having been continually resident here seven years.

The privileges and disabilities to which aliens are entitled or subject, are so numerous, both as respects the statute as the common law, that it would be utterly impracticable to give a concise view of them; and the reader must be referred to Tucker's Remarks on the Naturalization Bill, and 1 Chit. Com. Law, 131 to 168. See also post, 2 book, 249. 126.

(8) A political reason may be given for this, which I think stronger than any here adduced. If aliens were admitted to purchase and hold lands in this country, it might at any time be in the power of a foreign state to raise a powerful party amongst us; for power is ever the concomitant of property.

This may more easily be illustrated, by briefly stating the measures taken by Russia prior to the dismemberment of Poland. For a considerable time previous to this act—(an act which has certainly cast an indelible stain upon the powers concerned in it) the czarina sent several of her subjects with large sums of money into Poland, to purchase all the estates that offered for sale; at the same time professing publicly the greatest attachment to the interests of that devoted kingdom. This had a double effect; for it not only raised in that country a powerful party completely devoted to her interest, but it at the same time, and in the same ratio, devested a large proportion of power and influence from the nobles. This proved a solid foundation for her subsequent acts; for afterwards, when she laid aside the veil which covered her designs, the country was so enfeebled by the measures she had taken, that notwithstanding the glorious and persevering struggles of a Kosiusko, it fell an easy prey to her rapacity.

.w such contracts were also made void (*t*): but the prince had no such ıdvantage of forfeiture thereby, as with us in England. Among other ıasons which might be given for our constitution, it seems to be intended y way of punishment for the alien's presumption, in attempting to acquire ıy landed property; for the vendor is not affected by it, he having re-gned his right, and received an equivalent in exchange. Yet an alien ay acquire a property in goods, money, and other personal estate, or ay hire a house for his habitation (*u*) (9): for personal estate is of a tran-tory and moveable nature; and, besides, this indulgence to strangers is ıecessary for the advancement of trade. Aliens also may trade as freely other people, only they are subject to certain higher duties at the cus-m-house (10); and there are also some obsolete statutes of Henry VIII. ohibiting alien artificers to work for themselves in this kingdom; but it generally held that they were virtually repealed by statute 5 Eliz. c. 7 1). Also an alien may bring an action concerning personal property, d may make a will, and dispose of his personal estate (*w*): not as it is France, where the king at the death of an alien is entitled to all he is ırth, by the *droit d'aubaine* or *jus albinatus* (*x*), unless he has a peculiar emption (12). When I mention these rights of an alien, I must be derstood of alien friends only, or such whose countries are in ace with ours; for alien enemies have no *rights, no privileges, [*373] less by the king's special favour, during the time of war (13), 4).

When I say, that an alien is one who is born out of the king's domi-ıns, or allegiance, this also must be understood with some restrictions. .e common law, indeed, stood absolutely so, with only a very few ıeptions; so that a particular act of parliament became necessary after restoration (*y*), "for the naturalization of children of his majesty's ıglish subjects, born in foreign countries during the late troubles." And s maxim of the law proceeded upon a general principle, that every man es natural allegiance where he is born, and cannot owe two such alle-ınces, or serve two masters, at once. Yet the children of the king's bassadors born abroad were always held to be natural subjects (*z*): for

) Cod. l. 11, tit. 55.
) 7 Rep. 17.
) Lutw. 34.
) A word derived from *alibi natus*. Spelm. Gl. 24.
(*y*) Stat. 29 Car. II. c. 6.
(*z*) 7 Rep. 18.

)) But a lease of lands will be forfeited to king. *Co. Litt.* 2.
0) Repealed, except as to some city du-by stat. 24 G. II. st. 2, c. 16.
1) Mr. Hargrave says, the statute 32 Hen. . c. 16, however contrary it may seem to l policy and the spirit of commerce, still ıins unrepealed. *Co. Litt.* 2, n. 7. See 1 *Woodd.* 373.
2) But by the *Code Civile* the *droit d'au-* does not exist against natives of coun-wherein such right is not enforced against ıchmen.
3) Until all ransoms of captured ships property were prohibited by 22 Geo. III. , an alien enemy could sue in our courts ı a ransom bill. Lord Mansfield in a case ıat kind declared, that "it was sound po-as well as good morality, to keep faith an enemy in time of war. This is a con-tract which arises out of a state of hostility, and is to be governed by the law of nations, and the eternal rules of justice." *Doug.* 626.

(14) When an alien dies in the U. S. during a war with his native country, leaving personal property, his relations abroad, though next of kin, being aliens, are not entitled to a distributive share of the property. Bradwell v. Weeks. 13 John. Rep. 1. see, however, 15 John. 74. 7 Cranch. 603, 619.

An alien enemy, *flagrante bello*, can maintain no action, either real or personal; but his right is suspended only during the war. Hutchinson v. Brook, 11 Mass. Rep. 119. Bell v. Chapman, 10 John. 183.

But aliens residing in the U. S. at the commencement of a war between their native country and the U. S., may sue and be sued as in time of peace. Clark v. Morey, 10 John. 69.

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 his 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 (*a*). But by several more modern statutes (*b*) these restrictions are still farther taken off: so that all children, born out of the king's legiance, whose *fathers* (or *grandfathers* by the father's side) were natural-born subjects, are now deemed to be natural-born subjects themselves to all intents and purposes; unless their said ancestors were attainted, or banished beyond sea, for high treason; or were at the birth of such children in the service of a prince at enmity with Great Britain (15). Yet the grandchildren of such ancestors shall not be privileged in respect of the alien's duty, except they be protestants, and actually reside within the realm; nor shall be enabled to claim any estate or interest, unless the claim be made within five years after the same shall accrue.

The children of aliens, born here in England, are, generally [*374] speaking, natural-born subjects (16), 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 (*c*) (17), (18).

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 (*d*). 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 (*e*): for his parent, through whom he must claim, being an alien, had no inheritable blood; and therefore could convey none to the son (19). And, upon a like defect of hereditary

(*a*) Cro. Car. 601. Mar. 91. Jenk. Cent. 3.
(*b*) 7 Ann. c. 5. 4 Geo. II. c. 21. and 13 Geo. III. c. 21.
(*c*) Jenk. Cent. 3, cites *Treasure François*, 312.
(*d*) 7 Rep. Calvin's case, 25.
(*e*) 11 Rep. 67.

(15) All these exceptions to the common law, introduced by the legislature, are in cases where the father or grandfather is a natural-born subject; but there is no provision made for the children born abroad of a mother, a natural-born subject, married to an alien. See Count Duroure *v.* Jones, 4 *T. R.* 300.

(16) Unless the alien parents are acting in the realm as enemies; for my Lord Coke says, it is not *coelum nec solum*, but their being born within the allegiance, and under the protection of the king. 7 *Co.* 18, *a.*

(17) "In this respect there is not any difference between our laws and those of France. In each country birth confers the right of naturalization." 1 *Woodd.* 386.

(18) By the *Code Civile*, 1, 1, 9, a child born of foreign parents in France may, within a year after attaining the age of twenty-one, claim the rights of a Frenchman, declaring, if not then domiciled in France, his intention to fix there, and actually fixing there within a month from such declaration.

(19) By the 11 and 12 W. III. c. 6, natural-born subjects may derive a title by descent through their parents or any ancestor, though they are aliens. But by 25 Geo. II. c. 39, this restriction is superadded, *viz.* that no natural-born subject shall derive a title through an alien parent or ancestor, unless he be born at the time of the death of the ancestor who dies seised of the estate which he claims by descent, with this exception, that if a descent shall be cast upon a daughter of an alien, it shall be divested in favour of an after-born son; and in case of an after-born daughter or daughters only, all the sisters shall be coparceners. This exception, as it should seem, would have been quite superfluous, if Lord Coke had not held that a son of an alien could not inherit from his brother, though the contrary had been since determined. *Harg. Co. Litt.* 8. *a.*

ıd, the issue of a denizen, born *before* denization, cannot inherit to him; his issue born *after* may (*f*). A denizen is not excused (*g*) from pay- the alien's duty, and some other mercantile burthens. And no denizen be of the privy council, or either house of parliament, or have any of- of trust, civil or military, or be capable of any grant of lands, &c. ı the crown (*h*) (20).

aturalization cannot be performed but by act of parliament: for by an alien is put in exactly the same state as if he had been born in the 's ligeance; except only that he is incapable, as well as a denizen, of g a member of the privy council, or parliament, holding offices, grants, (*i*) (21). No bill for naturalization can be received in either house of ament without such disabling clause in it (*j*): nor without a clause ling the person from obtaining any immunity in trade thereby in any gn country, unless he shall have resided in Britain for seven years next the commencement of the session in which he is naturalized (*k*). ıer can any person be naturalized or restored in blood unless he hath ved the sacrament of the Lord's supper within one month before the ing in of the bill; and unless he also takes the oaths of allegiance supremacy in the presence of the parliament (*l*). But these provi- have been usually dispensed with by special acts of parliament, pre- to bills of naturalization of any foreign princes or princesses (*m*).

o. Litt. 8. Vaugh. 285.
at. 32 Hen. VIII. c. 8.
at. 12 W. III. c. 2.
id.
at. 1 Geo. I. c. 4.

(*k*) Stat. 14 Geo. III. c. 84.
(*l*) Stat. 7 Jac. I. c. 2.
(*m*) Stat. 4 Ann. c. 1. 7 Geo. II. c. 3. 9 Geo. II. c. 24. 4 Geo. III. c. 4.

As to denization in general, see 1 Chitmm. L. 120. The right of making s is not exclusively vested in the king, y be by parliament; but it is scarcely ercised by any but the royal power. It effected by conquest, 7 Co. 6. a. 2 Com. Dig. Aliens. D. 1. The king elegate this right to another. 7 Co. 25. Dig. Aliens, D. 1. See form of Let- Denization, 2 Chitty's Comm. L. ap- 327.

British law protects denizens made so ountry, but also respects the rights of ho have been declared denizens of states; thus a natural-born subject of having been admitted a denizen of ed States of America, is entitled as nizen to the benefit of the treaty be- England and the United States, which es the trade of Americans to the ter- of the British East India Company, s an English subject he would not n permitted to carry on such a com- T. R. 31. 1 B. & P. 430.

herefore a person naturalized is not ible to the office of constable. 5 Burr.

naturalization in general, see Chal- l. Op. 382. Com. Dig. Aliens, B. 2. Com. Law, 123 to 130. and see form f naturalization, 2 Chitty's Com. L. 324 to 327.

n may become naturalized ipso facto ring with the conditions pointed out general statutes.

ization cancels all defects, and is al- ave a retrospective energy, which simple denization has not, Co. Lit. 129. a. post 2 book, 250; and if a man take an alien to wife, and afterwards sell his land, and his wife be naturalized, she shall be endowed of the lands sold before her naturalization, Co. Lit. 33. a; and if a man be naturalized, his brother and his son born before shall inherit. Co. Lit. 129. a. 1 Vent. 419. 2 Rol. 93.

Naturalization is not, as denization may be, merely for a time, but is absolutely for ever; and not for life only, or to him and the heirs of his body, or upon condition. Cro. Jac. 539. Co. Lit. 129. a. 2.

This practice of naturalizing foreigners is not peculiar to the English constitution; and though the stranger thus adopted becomes a subject of the state which welcomes him, yet he does not release himself from his natural allegiance to the government under which he was born. See 1 Bos. & P. 443. Bac. Ab. Aliens, a. 1 Woodeson, 382. Naturalizations in a foreign country, without licence, will not discharge a natural-born subject from his allegiance. 2 Chalm. Col. Op. 363.

But though a natural-born subject cannot voluntarily emancipate himself from his natural allegiance, so as to exempt himself from the *duties* incident thereto, yet he may, by his violation of law, forfeit many of the advantages of a natural-born subject, and place himself in the situation of an alien. Thus it has been enacted, that if an English subject go beyond the seas, and there become a sworn subject to any foreign prince or state, he shall, while abroad, pay such impositions as aliens do. 14 & 15 Hen. VIII. c. 4.

[*375] *These are the principal distinctions between aliens, denizens, and natives: distinctions, which it hath been frequently endeavoured 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, by virtue of the king's proclamation, is *ipso facto* naturalized under the like restrictions as in statute 12 W. III. c. 2 (*n*); 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, and all foreign protestants serving two years in a military capacity there, or being three years employed in the whale fishery, without afterward absenting themselves from the king's dominions for more than one year, and none of them falling within the incapacities declared by statute 4 Geo. II. c. 21, shall be (upon taking the oaths of allegiance and abjuration, or in some cases, an affirmation to the same effect) naturalized to all intents and purposes, as if they had been born in this kingdom; except as to sitting in parliament or in the privy council, and holding offices or grants of lands, &c. from the crown within the kingdoms of Great Britain or Ireland (*o*). They therefore are admissible to all other privileges, which protestants or Jews born in this kingdom are entitled to. What those privileges are, with respect to Jews (*p*) in particular, was the subject of very high debates about the time of the famous Jew-bill (*q*); which enables all Jews to prefer bills of naturalization in parliament, without receiving the sacrament, as ordained by satute 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 (*r*): therefore peace be now to its *manes* (22), (23).

(*n*) Stat. 13 Geo. II. c. 3.
(*o*) Stat. 13 Geo. II. c. 7. 20 Geo. II. c. 44. 22 Geo. II. c. 45. 2 Geo. III. c. 25. 13 Geo. III. c. 25.
(*p*) A pretty accurate account of the Jews till their banishment in 8 Edward I. may be found in Prynne's *Demurrer*, and in Molloy *de Jure Maritimo*, b. 3, c. 6.
(*q*) Stat. 26 Geo. II. c. 26.
(*r*) Stat. 27 Geo. II. c. 1.

(22) If an alien be naturalized, he shall be to all intents, as a natural subject, and shall inherit as if born in this country. Ainsley v. Martin. 9 Mass. Rep. 454.

Naturalization has relation back, and confirms the title of the purchaser of lands granted during alienage. Jackson v. Beach. 1 John. Cas. 399.

(23) Any free white alien, not a subject of a country at war with the U. S. may become a citizen of the U. S. on declaring on oath, before the proper courts, his intention to become such citizen, and to renounce his foreign allegiance two years before his admission; and at the time of his admission, also declaring on oath that he will support the Constitution of the U. S.; and that he renounces all foreign allegiance: provided the court be satisfied that he has resided five years within the U. S. and one year in the state where the court is held; also that he is of good moral character and attached to the Constitution.

The children under 21 years of persons naturalized, if dwelling in the U. S., and the children of citizens of the U. S. though born out of the U. S., are considered as citizens, unless their father has never resided in the U. S.

If an alien, who has declared his intention as above, and has obtained the certificate of the time of his arrival, age, name, &c. as required by the second section of the act of 1802, die before he is naturalized, his widow and children will be considered as citizens, and enjoy the rights of citizenship on taking the oaths required by law. Story's Laws, U. S. 850, 853, 1974.

In New-York aliens cannot hold offices, nor can they *take* lands by descent or devise unless they have taken the steps required by statute 1 R. S. 116. 720. 2 id. 57. The widow of an alien may be endowed of lands owned by her husband if at his death she were an inhabitant of the state. 1 R. S. 740.

CHAPTER XI.

OF THE CLERGY (1).

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*), (2). 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 (3): in both which particulars he is distinguished from a lay- [*377]

(*a*) 2 Inst. 4.
(*b*) F. N. B. 160. 2 Inst. 4.
(*c*) 4 Leon. 190.
(*d*) Finch. L. 82.
(*e*) Stat. 50 Edw. III. c. 5. 1 Ric. II. c. 16.

(1) As to the law affecting the clergy in general, see Burn's Ecc. L. per tot. Com. Dig. tit. Esglise.

As there is no established religion in the U. S. much of the law contained in this chapter is inapplicable here.

In New-York, the Constitution forbids any clergyman holding any civil or military office or place within the state. Art. 7, Sect. 4. As the Constitution of the U. S. has no such prohibition, they may be officers of the U. S. They are exempt from military duty, and from working on roads; their property also to the amount of 1500 *dolls.* is exempt from taxation. 1 R. S. 285, 506, 388. In most other respects the law makes no distinction between them and other citizens: and most of the states make no provision for their support.

(2) That is, for a reasonable time, *eundo, redeundo, et morando*, to perform divine service. 12 *Co.* 100.

(3) 2 Hale, 374, 375. 389. This is a peculiar privilege of the clergy, that sentence of death can never be passed upon them for any number of manslaughters, bigamies, simple larcenies, or other clergyable offences; but a layman, even a peer, may be ousted of clergy, and will be subject to the judgment of death upon a second conviction of a clergyable offence; for if a layman has once been convicted of manslaughter, upon production of the conviction he may afterwards suffer death for a felony, within clergy, or which would not be a capital crime in another person not so circumstanced. But for the honour of the clergy, there are few or no instances in which they have had occasion to claim the benefit of this privilege. See Book 4, c. 28.

man (*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, in general, allowed to take any lands or tenements to farm, upon pain of 10*l. per* month, and total avoidance of the lease (4); nor upon like pain to keep any tanhouse or brewhouse (5); nor shall engage in any manner of trade, nor sell any merchandize, under forfeiture of the treble value (6): which prohibition is consonant to the canon law.

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 the clergy 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 (*h*): till at length it becoming tumultuous, the [*378] *emperors and other sovereigns of the respective kingdoms of Europe took the appointment, 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 (*i*), 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 (*k*) (as well as other

(*f*) 2 Inst. 637, stat. 4 Hen. VII. c. 13, and 1 Edw. VI. c. 12.
(*g*) Page 175.
(*h*) *Per Clerum et populum.* Palm. 25. 2 Roll. Rep. 102. M. Paris, A. D. 1095.
(*i*) *Decret.* 1 *Dist.* 63, c. 22.
(*k*) Palm. 23.

(4) By stat. 57 G. III. c. 99, § 2, all beneficed or dignified clergymen, and all curates or lecturers, are restrained from taking to farm more than eighty acres without the written consent of the bishop; and which consent, it also thereby appears, must specify the number of years for which it was taken, and which may not exceed seven, for which the certificate was granted. The penalty is 40*s.* per acre for every acre above eighty acres.

And some very gross cases of trading by clergymen having reached the ears of the framers of this statute, a prohibitory clause was therein inserted, § 3, by which carrying on trade, or buying and selling for lucre, causes a forfeiture of the goods bought or sold, and the contracts entered into in any such trade or dealing are declared void. The avoidance of the contracts, and the forfeiture of the goods sold by clergymen, may seem to bear particularly severe upon a vendee who may be ignorant of the character or disability of the person with whom he was dealing.

(5) One sees some reason why a poor clergyman should be tempted to sell ale; but the singular prohibition to keep a tanhouse probably originated from a practice peculiar to the time.

(6) See note 4, supra.

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 (*l*). 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 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 bull of excommunication against all princes who should dare to confer investitures, and all prelates who should venture to receive them (*m*). This was a bold step towards effecting the plan then adopted by *the Roman see, of rendering the clergy [*379] entirely independent of the civil authority: and long and eager were the contests occasioned by this papal claim. 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 temporalties, instead of investing them by the ring and crosier; the court of Rome found it prudent to suspend for a while its other pretensions (*n*).

This concession was obtained from King Henry the first in England, by means of that obstinate and arrogant prelate, Archbishop Anselm (*o*): but King John, about a century afterwards, in order to obtain the protection of the pope against his discontented barons, was also 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 temporalties 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 (*p*). 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.

But by statute 25 Hen. VIII. c. 20, the ancient right of nomination was, in effect, restored to the crown (7); 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 accompa-

(*l*) "*Nulla electio prælatorum (sunt verba Ingulphi) erat mere libera et canonica; sed omnes dignitates tam episcoporum, quam abbatum, per annulum et baculum regis curia pro sua complacentia conferebat.*" *Penes clericos et monachos fuit electio, sed electum a rege postulabant.* Selden, *Jan. Ang. L.* 1, § 39.

(*m*) *Decret.* 2 *caus.* 16. *qu.* 7. *c.* 12 and 13.

(*n*) Mod. Un. Hist. xxv. 363, xxix. 115.

(*o*) M. Paris, A. D. 1107.

(*p*) M. Paris, A. D. 1214. 1 Rym. *Fœd.* 198.

(*q*) *Cap.* 1. *Edit. Oxon.* 1759.

(7) This statute was afterwards repealed by 1 Edw. VI. c. 2, which enacted that all bishopricks should be donative as formerly. It states in the preamble that these elections are in very deed no elections; but only by a writ of *conge d'elire* have colours, shadows, or pretences of election, 1 *Burn's Ec. L.* 183. This is certainly good sense. For the permission to elect where there is no power to reject, can hardly be reconciled with the freedom of election.* But this statute was afterwards repealed by 1 Ma. st. 2, c. 20, and other statutes. 12 *Co.* 7. But the bishopricks of the new foundation were always donative. *Harg. Co. Litt.* 134. As also are all the Irish bishopricks by the 2 Eliz. c. 4. *Irish Statutes.*

* See Dr. Johnson's strong illustration of the effect of a *conge d'elire*, 4 Bosw. 246. Ed. 12mo. 1819.

nied 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 [*380] 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 archbishop of the province; if it be of an archbishop, to the other archbishop and two bishops, or to four bishops; requiring them to confirm, invest, and consecrate the person so elected: 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 temporalties, 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 archbishop or bishop do refuse to confirm, invest, and consecrate such bishop elect, they shall incur all the penalties of a *præmunire* (8), (9).

(8) It is directed in the form of consecrating bishops, confirmed by various statutes since the reformation, that a bishop when consecrated must be full thirty years of age. There seems to have been no restriction of this kind in ancient times; for Bishop Godwin informs us, that George Nevile, the brother of the earl of Warwick the king-maker, was chancellor of Oxford, *et in episcopum Exoniensem consecratus est anno* 1455, *nondum annos natus viginti. Anno deinde* 1460 (*id quod jure mirere*) *summus Angliæ factus est cancellarius.* A few years afterwards he was translated to the archbishoprick of York. *Hoc sedente episcopus Sancti Andreæ in Scotiâ, archiepiscopus per Sixtum quartum creatus est, jussis illi duodecim episcopis illius gentis subesse, qui hactenus archiepiscopi Eboracensis suffraganei censebantur. Reclamante quidem Eboracensi, sed frustra; asserente pontifice, minimè convenire, ut ille Scotiæ sit metropolitanus, qui propter crebra inter Scotos ac Anglos bella, Scotis plerumque hostis sit capitalis.* Godw. Comm. de Præsul. 693.

(9) A bishop when consecrated must be full thirty years of age. Four things are necessary to constitute a bishop or archbishop, as well as a parson: first, election, which resembles presentation; the next is confirmation, and this resembles admission; next consecration, which resembles institution; and the last is installation, resembled to induction. 3 Salk. 72. An archbishop is however said to be inthroned, not installed.

In ancient times, the *archbishop* was bishop over all England, as Austin was, who is said to be the first archbishop here; but before the Saxon conquest, the Britons had only one bishop, and not any archbishop. 1 Roll. Rep. 328. 2 Roll. 440.

But at this day the ecclesiastical state of England and Wales, as we have before seen, (ante 155,) is divided into two provinces or archbishopricks, to wit, Canterbury and York, and twenty-four bishopricks (besides the bishoprick of Sodor and Man, the bishop of which is not a lord of parliament). Each archbishop has within his province bishops of several dioceses. The archbishop of Canterbury hath under him within his province, of ancient foundations, Rochester, London, Winchester, Norwich, Lincoln, Ely, Chichester, Salisbury, Exeter, Bath and Wells, Worcester, Coventry and Lichfield, Hereford, Llandaff, St. David's, Bangor, and St. Asaph, and four founded by king Hen. VIII., erected out of the ruins of dissolved monasteries, viz. Gloucester, Bristol, Peterborough, and Oxford. The archbishop of York hath under him four, viz. the bishop of the county palatine of Chester, newly created by king Hen. VIII., and annexed by him to the archbishop of York, the county palatine of Durham, Carlisle, and the Isle of Man, annexed to the province of York by king Hen. VIII.; but a greater number this archbishop anciently had, which time has taken away. Co. Lit. 94.

Westminster was one of the new bishopricks created by Hen. VIII. in England out of the revenues of the dissolved monasteries. 2 Burn E. L. 78.

The archbishop of Canterbury is now styled *metropolitanus et primus totius Angliæ;* and the archbishop of York styled, *primus et metropolitanus Angliæ.* They are called archbishops, in respect of the bishops under them; and metropolitans, because they were consecrated at first in the metropolis of the province. 4 Inst. 94.

The archbishops have the titles and style of *grace, and most reverend father in God by divine providence;* the bishops, *lord,* and *most reverend father in God by divine permission.* The former are *inthroned,* the latter *installed.*

In Ireland there are four archbishops, and eighteen bishops.

By the Irish act 17 & 18 Car. II. c. 10. a bishoprick in Ireland is declared incompatible with any ecclesiastical dignity or benefice in England or Wales.

In Scotland, after the Reformation, the titles of archbishop and bishop were introduced in 1572, and bestowed on clergymen ordained members of cathedral churches. By act of 1592, c. 116, presbyterian church government was established by kirk sessions, presbyteries, provincial synods, and general assemblies. By act 1606, c. 2, bishops were restored; but in 1638, presbytery was a second time introduced. By act 1662, c. 1, presbytery was

An archbishop is the chief of the clergy in a whole province (10); 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*) (11). The archbishop has also his own diocese, wherein he exercises episcopal jurisdiction; as in his province he exercises archiepiscopal. As archbishop 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 spiritualities thereof, as the king is of the temporalties; 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 archbishop is entitled to present by lapse to all the ecclesiastical livings in the disposal of his *diocesan bishops, if not filled [*381] within six months. And the archbishop has a customary prerogative, when a bishop is consecrated by him, to name a clerk or chaplain of his own to be provided for by such suffragan bishop; in lieu of which it is now usual for the bishop to make over by deed to the archbishop, his executors and assigns, the next presentation of such dignity or benefice in the bishop's disposal within that see, as the archbishop himself shall choose; which is therefore called his *option* (*u*): which options are only binding on the bishop himself who grants them, and not on his successors (12). 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

(*r*) Lord Raym. 541.
(*s*) 4 Inst. 322, 323.
(*t*) 2 Roll. Abr. 22.
(*u*) Cowell's Interp. tit. *option*.
(*w*) Sherlock of Options, 1.

again displaced by prelacy; and finally, by acts 1689, c. 3, and 1690. c. 5. 29, presbytery was re-established, and has since continued.

(10) The archbishop of Canterbury hath the precedency of all the clergy; next to him the archbishop of York; next to him the bishop of London; next to him the bishop of Durham; next to him the bishop of Winchester; and then all the other bishops of both provinces after the seniority of their consecration; but if any of them be a privy counsellor he takes place after the bishop of Durham. Stat. 31 Hen. VIII. c. 10. Co. Lit. 94. 1 Ought. Ord. Jud. 496.

The archbishop of Canterbury is the first peer of the realm, and hath precedence not only before all the other clergy, but also (next and immediately after the blood-royal) before all the nobility of the realm, and as he hath the precedence of all the nobility, so also of all the great officers of state. Godw. 13.

The archbishop of York hath precedence over all dukes not being of the royal blood, as also before all the great officers of state except the lord chancellor. Godw. 14.

(11) In the 11 W. III. the bishop of St. David's was deprived for simony, and other offences, in a court held at Lambeth before the archbishop, who called to his assistance six other bishops. The bishop of St. David's appealed to the delegates, who affirmed the sentence of the archbishop; and, after several fruitless applications to the court of king's bench and the house of lords, he was at last obliged to submit to the judgment. *Lord Ray.* 541. 1 *Burn's Ec. L.* 212.

(12) The consequence is, that the archbishop never can have more than one option at once from the same diocese. These options become the private patronage of the archbishop, and upon his death are transmitted to his personal representatives; or the archbishop may direct by his will, whom, upon a vacancy, his executor shall present; which direction, according to a decision in the house of lords, his executor is compellable to observe. 1 *Burn's Ec. L.* 226. If a bishop dies during the vacancy of any benefice within his patronage, the presentation devolves to the crown; so likewise if a bishop dies after an option becomes vacant, and before the archbishop or his representative has presented, and the clerk is instituted, the crown *pro hac vice* will be entitled to present to that dignity or benefice. *Amb.* 101. For the grant of the option by the bishop to the archbishop has no efficacy beyond the life of the bishop.

of that encroaching see) was probably set up in imitation of the imperial prerogative called *primæ* or *primariæ 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 likewise the privilege, by custom, of the archbishop of Canterbury, to crown the kings and queens of this kingdom (13). 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 (14); and on this also is founded the right he exercises of conferring degrees (15), in prejudice of the two universities (*b*).

[382*] *The power and authority of a bishop, besides the administration of certain holy ordinances peculiar to that sacred order, consist principally in inspecting the manners of the people and clergy, and punishing them in order to reformation, by ecclesiastical censures (16). 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 (17); 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

(*x*) Goldast *Constit. Imper. tom.* 3, *page* 406.
(*y*) Dufresne V. 906. Mod. Univ. Hist. xxix. 5.
(*z*) *Rex, &c. salutem. Scribatis Episcopo Karl quod—Roberto de Icard pensionem suam, quam ad præsens regis prædicto Roberto concessit, de tritare solvat; et de proxima ecclesia vacatura de collatione prædicti episcopi, quam ipse Robertus acceptaverit, respiciat. Brev.* 11 Edw. I. 3 Pryn. 1284.
(*a*) Ch. viii. page 284.
(*b*) See the bishop of Chester's case, Oxon. 1721.
(*c*) Stat. 37 Hen. VIII. c. 17.
(*d*) Gibs. Cod. 822.

(13) It is said that the archbishop of York has the privilege to crown the queen consort, and to be her perpetual chaplain. 1 *Burn's Ec. L.* 178.

(14) When the dominion of the pope was overturned in this country, this prerogative of dispensing with the canons of the church was transferred by that statute to the archbishop of Canterbury in all cases in which dispensations were accustomed to be obtained at Rome; but in cases unaccustomed, the matter shall be referred to the king and council. The pope could have dispensed with every ecclesiastical canon and ordinance. But in some of the cases where the archbishop alone has authority to dispense, his dispensation with the canon, as to hold two livings, must be confirmed under the great seal.

(15) But although the archbishop can confer all the degrees which are taken in the universities, yet the graduates of the two universities, by various acts of parliament and other regulations, are entitled to many privileges which are not extended to what is called a Lambeth degree; as, for instance, those degrees which are a qualification for a dispensation to hold two livings, are confined by 21 Hen. VIII. c. 13, § 23, to the two universities.

(16) A bishop has three powers:—1st. Of ordination, which he acquires on his consecration, and thereby he may confer orders, &c. in any place throughout the world. 2nd. Of jurisdiction, which is limited and confined to his see. 3rd. Of administration and government of the revenues, both which last powers he gains by his confirmation, and some are of opinion that the bishop's jurisdiction, as to ministerial acts, commences on his election. Palm. 473. 475. The bishop consecrates churches, ordains, admits, and institutes priests; confirms, suspends, excommunicates, grants licences for marriage, makes probates of wills, &c. Co. Lit. 96. 2 Rol. Ab. 230. Powers and duties invested in bishops in appointing curates, &c. by 57 Geo. III. c. 99.

(17) Besides his chancellor, the bishop has his archdeacon, dean and chapter, and vicar general to assist him. Every bishop may retain four chaplains. 21 Hen. VIII. c. 13. s. 16. 8 Eliz. c. 1.

resign to his metropolitan; but the archbishop 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 (18): but in those chapters, that were founded by Henry VIII. out of the spoils of the dissolved monasteries (19), the deanery is donative, and the installation *merely by the king's letters patent (*g*). [*383] The chapter, consisting of canons or prebendaries, are sometimes appointed by the king, sometimes by the bishop, and sometimes elected by each other (20).

The dean and chapter are, as was before observed, the nominal electors of a bishop. The bishop is their ordinary (21) 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*).

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

III. An archdeacon hath an ecclesiastical jurisdiction, immediately subordinate to the bishop, throughout the whole of his diocese, or in some particular part of it (22). He is usually appointed by the bishop himself;

(*e*) 3 Rep. 75. Co. Lit. 103, 300.
(*f*) Page 113, 114.
(*g*) Gibs. Cod. 173.
(*h*) Co. Lit. 103.
(*i*) Plowd. 493.
(*j*) Bro. *Abr. t. presentation*, 3, 81. Cro. Eliz. 547, 790. 2 Roll. Abr. 352. 4 Mod. 200. Salk. 137.

(18) See a very learned note, containing a full history of the election, presentation, or donation to deaneries, by Mr. Hargrave, in Co. Lit. 95.

(19) The new deaneries and chapters to old bishopricks are eight, viz. Canterbury, Norwich, Winchester, Durham, Ely, Rochester, Worcester, and Carlisle; and five new bishopricks, with new deaneries and chapters annexed, were created, viz. Peterborough, Chester, Gloucester, Bristol, and Oxford. *Harg. Co. Lit.* 95, n. 3.*

(20) A dean who is solely seised of a distinct possession, hath an absolute fee in him as well as a bishop. 1 Inst. 125. A deanery is a spiritual promotion and not a temporal one, though the dean be appointed by the king, and the dean and chapter may be in part secular and part regular. Palm. 500. As a deanery is a spiritual dignity, a man cannot be a dean and prebendary in the same church. Dyer, 273.

(21) The bishop is generally called the ordinary, but *the ordinary* has a more extensive signification, as it includes every ecclesiastical judge who has the regular *ordinary* jurisdiction independent of another. 1 *Burn's Ec. L.* 22. *Co. Litt.* 344.

(22) If an archdeaconry be in the gift of a layman, the patron presents to the bishop, who institutes in like manner as to another benefice, and then the dean and chapter induct him; that is, after some ceremonies, place him in a stall in the cathedral church to which

* The bishop.

and hath a kind of episcopal authority, originally derived from the bishop, but now independent and distinct from his (*k*) (23). 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.

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 [*384] to have been deputies of the *bishop, planted all round his diocese, the better to inspect the conduct of the parochial clergy, to inquire into and report dilapidations, and to examine the candidates for confirmation; and armed, in minuter matters, with an inferior degree of judicial and coercive authority (*m*) (24).

V. The next, and indeed the most numerous, order of men in the system of ecclesiastical polity, are the parsons and vicars of churches: 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 ecclesiæ*, 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 ecclesiæ 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; which 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

(*k*) 1 Burn, Eccl. Law, 68, 69.
(*l*) Kennet, Par. Antiq. 633.
(*m*) Gibs. Cod. 972, 1550.
(*n*) Co. Litt. 300.

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he belongs, whereby he is said to have a place in the choir. Wats. c. 15.

Before archdeacons are admitted and inducted by stat. 13 and 14 Car. II. c. 4, they are to read the common-prayer, and declare their assent thereto as other persons admitted to ecclesiastical benefices, and they must subscribe the same before the ordinary; but they are not obliged by 13 Eliz. c. 12, to subscribe and read the 39 articles. Wats. c. 15.

An archdeacon is a ministerial officer, and cannot refuse to swear a churchwarden elected by the parish. Lord Ray. 138. The King v. Bishop Winchester. K. B. T. T. 1825.

(23) Where the archdeacon hath a peculiar jurisdiction, he is totally exempt from the power of the bishop, and the bishop cannot enter there and hold court; and in such case, if the party who lives within the peculiar be sued in the bishop's court, a prohibition shall be granted, but if the archdeacon hath not a peculiar, then the bishop and he have a concurrent jurisdiction, and the party may commence his suit either in the archdeacon's or the bishop's court. Lord Ray. 123.

(24) But this office, *decanus ruralis*, is wholly extinguished, if it ever had separate existence; and now the archdeacon, and chancellor of the diocese, executes the authority formerly attached to it. See 1 Nels. Abr. 506-7.

distributed in a fourfold division: one, for the use of the bishop; another, for maintaining *the fabric of the church; a third, for [*385] 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 burthen 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 some time 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 (*o*). 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*).

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 incum- [*386] bent 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 (25) is distinct from the vicar, the rectory thus vested in him becomes what is called a *sinecure* (26); 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.

In this manner, and subject to these conditions, may appropriations be

(*o*) Plowd. 496—500.
(*p*) Hob. 307.
(*q*) Co. Litt. 46.
(*r*) Sinecures might also be created by other means. 2 Burn's Eccl. Law, 347.

(25) The editor conceives that there is no authority or reason to suppose, that the appropriator can thus create a sinecure rector. But if the appropriator or impropriator should, either by design or mistake, present his clerk to the parsonage, it is held, that the vicarage will ever afterwards be dissolved, and the incumbent will be entitled to all the tithes and dues of the church as rector. *Wats. c.* 17. 2 *R. Ab.* 338.

(26) Wherever a rector and vicar are presented and instituted to the same benefice, the rector is excused all duty, and has what is properly called a sinecure. But where there is only one incumbent, the benefice is not in law a sinecure, though there should be neither a church nor any inhabitants within the parish.

made at this day (27): 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*).

[*387] *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 vice-gerent 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* (*w*) (28). 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 pur-

(*s*) Seld. Review of Tith. c. 2, Spelm. Apology, 35.
(*t*) 2 Inst. 634.
(*u*) Sir H. Spelman (of tithes, c. 29,) says, these are now called impropriations, as being *improperly* in the hands of laymen.
(*w*) Seld. Tith. c. 11, 1.

(27) It surely may be questioned whether such a power any longer exists; it cannot be supposed that, at this day, the inhabitants of a parish, who had been accustomed to pay their tithes to their officiating minister, could be compelled to transfer them to an ecclesiastical corporation, to which they might perhaps be perfect strangers. Appropriations are said to have originated from an opinion inculcated by the monks, that tithes and oblations, though payable to some church, yet were an arbitrary disposition of the donor, who might give them, as the reward of religious service done to him, to any person whatever from whom he received that service. 1 *Burn's Ec. L.* 63. And till they had got complete possession of the revenues of the church, they spared no pains to recommend themselves as the most deserving objects of the gratitude and benefaction of the parish. There probably have been no new appropriations since the dissolution of monasteries.

(28) A vicar (qui vicem alterius gerit) was a name not known till the reign of Henry the Third, before which the rector provided a curate and maintained him by an arbitrary stipend. (Seld. c. 12. s. 1. 1 Hen. Bla. 423. Cro. Jac. 518.) Besides the provision for the vicarage, by way of charge issuing out of a religious house, there were two other modes by which it might be endowed, first, with lands by way of agreement; secondly, with a parcel of the parsonage, generally the small, and sometimes particular parts of the great tithes. (Gwillim, 1090.) The vicarage being thus derived out of the parsonage, no tithes can *de jure*, belong to the vicar except that portion which is described in his endowment, or what his predecessors have immemorially enjoyed. Mirehouse on Tithes, 11.

poses, 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 removable 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 (29). 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 or small tithes; the [*396] greater, or predial, tithes being still reserved 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 the tithes of many things, as wood in particular, are in some parishes rectorial, and in some vicarial tithes.

The distinction therefore of a parson and vicar is this: 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 (30). 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

(29) From this act we may date the origin of the present vicarages; for before this time the vicar was nothing more than a temporary curate, and when the church was appropriated to a monastery, he was generally one of their own body, that is, one of the regular clergy; for the monks who lived *secundum regulas* of their respective houses or societies, were denominated regular clergy, in contradistinction to the parochial clergy, who performed their ministry in the world *in seculo*, and who from thence were called secular clergy. All the tithes or dues of the church of common right belong to the rector, or to the appropriator or impropriator, who have the same rights as the rector; and the vicar is entitled only to that portion which is expressed in his endowment, or what his predecessors have immemorially enjoyed by prescription, which is equivalent to a grant or endowment. And where there is an endowment he may recover all that is contained in it; and he may still retain what he and his predecessors have enjoyed by prescription though not expressed in it; for such a prescription amounts to evidence of another consistent endowment. These endowments frequently invest the vicar with some part of the great tithes; therefore the words rectorial and vicarial tithes have no definite signification. But great and small tithes are technical terms, and which are, or ought to be, accurately defined and distinguished by the law.

(30) A vicar, from what has been advanced in the preceding page and note, must necessarily have an appropriator over him, or a sinecure rector, who in some books is considered and called an appropriator. Of benefices, some have never been appropriated; consequently in those there can be no vicar, and the incumbent is rector, and entitled to all the dues of the church. Some were appropriated to secular ecclesiastical corporations, which appropriations still exist, except perhaps some few which may have been dissolved; others were appropriated to the houses of the regular clergy; all which appropriations, at the dissolution of monasteries, were transferred to the crown, and in the hands of the king or his grantees are now called impropriations: but in some appropriated churches no perpetual vicar has ever been endowed; in that case the officiating minister is appointed by the appropriator, and is called a perpetual curate.

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 and 14 Car. II. c. 4, no person is capable to be admitted to any benefice, unless he hath been first ordained a priest (31); and then he is, in the language of the law, a clerk in orders. But if he obtains orders, or a licence
[*389] *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*) 40*l*., and the person receiving 10*l*., and is incapable of any ecclesiastical preferment for seven years afterwards.

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 (32), 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*).

[*390] *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

(*x*) See 2 Burn, Eccl. Law, 103.
(*y*) Stat. 31 Eliz. c. 6.
(*z*) A layman may also be presented; but he must take priest's 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. 59.
(*e*) 2 Inst. 632.

(31) By canon 34, no one shall be admitted to the order of a deacon till he be twenty-three years old; and by that canon, and also by 13 Eliz. c. 12, no one can take the order of a priest till he be full four and twenty years old. 3 *Burn's Ec. L.* 27.

(32) There is no inquiry made, I believe, as to the legitimacy of the candidate for holy orders.

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 re-examine him, and certify his qualifications; which certificate of the archbishop is final (*h*).

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 (33); 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 [*391] 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 (*i*). Upon institution, also, the clerk may enter on the parsonage-house and glebe, and take the tithes; but he cannot grant or let them, or bring an action for them, till induction.

Induction is performed by a mandate from the bishop to the archdeacon, who usually issues out a precept to other clergymen to perform it for him. It is done by giving the clerk corporal possession of the church, as by holding the ring of the door, tolling a bell, or the like; and is a form required by law, with intent to give all the parishioners due notice, 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 imparsonee (*k*).

The rights of a parson or vicar, in his tithes and ecclesiastical dues, fall

(*f*) 2 Inst. 632.
(*g*) 5 Rep. 58. 3 Lev. 313.
(*h*) 2 Inst. 632.
(*i*) Co. Litt. 344.
(*k*) Co. Litt. 300.

(33) Non-residence and residence are now regulated by stat. 57 G. III. c. 99; and this oath is no longer required.

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 [*392] they *arise in the progress of our inquiries; 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 (34), 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 5*l.* to the king, and 5*l.* 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 (35): and also except (*n*) all heads of houses, magistrates (36), and professors in the universities, and all students under forty years of age residing there, *bona fide*, for study. Legal residence is not only in the parish, but also in the parsonage house, if there be one: 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: and, if there be no parsonage house, it hath been holden that the incumbent is bound to hire one, in the same or some neighbouring parish, to answer for the purposes of residence. For the more effectual promotion of which important duty among the parochial clergy, a provision is made by the statute 17 Geo. III. c. 53, for raising money upon ecclesiastical benefices, to be paid off by annually decreasing instalments, and to be expended in rebuilding or repairing the houses belonging to such benefices (37).

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 8*l. per annum*, or upwards (according to the present valuation in the king's books) (*p*), accepts any other, the first shall be adjudged void, unless he obtains a dispensation (38), which no one is entitled to have, but the chaplains of the

(*l*) These are very numerous: but there are few which can be relied on with certainty. Among these are Bishop Gibson's *Codex*, Dr. Burn's *Ecclesiastical Law*, and the earlier editions of the *Clergyman's Law*, published under the name of Dr. Watson, but compiled by Mr. Place, a barrister.

(*m*) Stat. 25 Hen. VIII. c. 16. 33 Hen. VIII. c. 28.

(*n*) Stat. 28 Hen. VIII. c. 13.

(*o*) 6 Rep. 21.

(*p*) Cro. Car. 456.

(34) Statute 57 G. III. c. 99, which statute does not extend to Ireland, relates, amongst other things, to enforcing the residence of spiritual persons on their benefices.

(35) The king can give a licence to his chaplains for non-residence, even whilst they do not attend his household; but the chaplains of noblemen are only excused during their actual attendance upon their lords or ladies. 3 *Burn's Ec. L.* 290.

(36) Viz.: the chancellor, vice-chancellor, commissary, doctors of the chair, (*i. e.* doctors who used to preside in the public schools,) and readers of lectures; and under this description only, can professors claim an exemption from residence.

(37) The statute 57 G. III. c. 99, also provides at great length, and in detail, for building, re-building, or repairing parsonage houses in the cases mentioned.

(38) But both the livings must have cure of souls; and the statute expressly excepts deaneries, archdeaconries, chancellorships, treasurerships, chanterships, prebends, and sinecure rectories; a dispensation in this case can only be granted to hold one benefice more, except to clerks, who are of the privy-council, who may hold three by dispensation. By the canon law, no person can hold a second incompatible benefice without a dispensation; and in that case, if the first is under 8*l. per annum*, it is so far void that the patron may pre-

king (39) and others therein mentioned, the brethren and the sons of lords and knights (40), and doctors and bachelors of divinity and law (41), *admitted by the universities* of this realm. And a vacancy thus made, for want of a dispensation, is called cession (42). 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 [*393] 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* (43). There is also a *commenda 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*) (44). 5. By depriva-

(*q*) Hob. 144. (*r*) Cro. Jac. 198.

sent another clerk, or the bishop may deprive; but till deprivation, no advantage can be taken by lapse. But, independent of the statute, a clergyman by dispensations may hold any number of benefices, if they are all under 8*l. per ann.* except the last, and then, by a dispensation under the statute, he may hold one more.

By the 41st canon of 1603, the two benefices must not be farther distant from each other than thirty miles, and the person obtaining the dispensation, must at least be a master of arts in one of the universities. But the provisions of this canon are not enforced or regarded in the temporal courts. 2 *Bl. R.* 968. See note 14, p. 83.

(39) The number of the chaplains of the king and royal family, who may have dispensations, is unlimited. An archbishop may have eight, a duke and bishop six, a marquis and earl five, a viscount four. The chancellor, a baron, and knight of the garter, three; a duchess, marchioness, countess, and baroness, being widows, two. The king's treasurer, comptroller, secretary, dean of the chapel, amner, and the master of the rolls, two. The chief justice of king's bench, and warden of cinque ports, one. These chaplains only can obtain a dispensation under the statute.

If one person has two or more of these titles or characters united in himself, he can only retain the number of chaplains limited to his highest degree; and if a nobleman retain his full number of chaplains, no one of them can be discharged, so that another shall be appointed in his room during his life. 4 *Co.* 90. The king may present his own chaplains, *i. e.* waiting chaplains in ordinary, to any number of livings in the gift of the crown, and even in addition to what they hold upon the presentation of a subject without dispensation; but a king's chaplain being beneficed by the king, cannot afterwards take a living from a subject, but by a dispensation according to the statute. *S.* 29. 1 *Salk.* 161.

(40) This privilege is not enjoyed by the brother and son of a baronet, for the rank of baronet did not then exist.

(41) The words of the statute are, "all doctors and bachelors of divinity, doctors of laws, and bachelors of the law canon." Before the reformation, degrees were as frequent in the canon law as in the civil law. Many were graduates *in utroque jure*, or *utriusque juris*. J. U. D. or *juris utriusque doctor*, is still common in foreign universities. But Hen. VIII. in the 27th year of his reign, when he had renounced the authority of the pope, issued a mandate to the university of Cambridge, *ut nulla legatur palam et publice lectio in jure canonico sive pontificio, nec aliquis cujuscunque conditionis homo gradum aliquem in studio illius juris pontificii suscipiat, aut in eodem in posterum promoveatur quovis modo.* Stat. Acad. Cant. p. 137. It is probable, that, at the same time, Oxford received a similar prohibition, and that degrees in canon law have ever since been discontinued in England.

(42) In the case of a cession under the statute, the church is so far void upon institution to the second living, that the patron may take notice of it, and present if he pleases; but there is great reason to think, that lapse will not incur from the time of institution against the patron, unless notice be given him; but lapse will incur from the time of induction without notice. 2 *Wils.* 200. 3 *Burr.* 1504.

(43) These commendams are now seldom or never granted to any but bishops; and in that case, the bishop is made commendatory of the benefice, while he continues bishop of such a diocese, as the object is to make it an addition to a small bishoprick; and it would be unreasonable to grant it to a bishop for his life, who might be translated afterwards to one of the richest sees. See an account of the proceedings in the great case of commendams, *Hob.* 140, and *Collier's Ec. Hist.* 2 vol. p. 710.

(44) It seems to be clear, that the bishop may refuse to accept a resignation, upon a sufficient cause for his refusal; but whether he can merely at his will and pleasure refuse to accept a resignation without any cause, and

tion; either, 1st, by sentence declaratory in the ecclesiastical courts, for fit and sufficient causes allowed by the common law; such as attainder of treason or felony (*s*), or conviction of other infamous crime in the king's courts; for heresy, infidelity (*t*), gross immorality, and the like: or, 2dly, in pursuance of divers penal statutes, which declare the benefice void, for some nonfeasance or neglect, or else some malefeasance or crime: as, for simony (*u*); for maintaining any doctrine in derogation of the king's supremacy, or of the thirty-nine articles, or of the book of common-prayer (*v*); for neglecting after institution to read the liturgy and articles in the church, or make the declarations against popery, or take the abjuration oath (*w*); for using any other form of prayer than the liturgy of the church of England (*x*); 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 (*y*); in all which, and similar cases (*z*), the benefice is *ipso facto* void, without any formal sentence of deprivation.

VI. A curate is the lowest degree in the church; being in the same state that a vicar was formerly, an officiating temporary minister, [*394] instead of the proper incumbent. Though *there are what are called *perpetual* curacies, where all the tithes are appropriated, and no vicarage endowed, (being for some particular reasons (*a*) 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 (*b*): and that, if any rector or vicar nominates a curate to the ordinary to be licensed to serve the cure in his absence, the ordinary shall settle his stipend under his hand and seal, not exceeding 50*l. per annum*, nor less than 20*l.* and on failure of payment may sequester the profits of the benefice (*c*) (45.)

(*s*) Dyer, 103. Jenk. 210.
(*t*) Fitz. Abr. tit. Trial, 54.
(*u*) Stat. 31 Eliz. c. 6. 12 Ann. c. 12.
(*v*) Stat. 1 Eliz. c. 1 and 2. 13 Eliz. c. 12.
(*w*) Stat. 13 Eliz. c. 12. 14 Car. II. c. 4. 1 Geo. I. c. 6.
(*x*) Stat. 1 Eliz. c. 2.
(*y*) Stat. 1 W. and M. c. 26.
(*z*) 6 Rep. 29, 30.
(*a*) 1 Burn's Eccl. Law, 427.
(*b*) Stat. 28 Hen. VIII. c. 11.
(*c*) Stat. 12 Ann. st. 2, c. 12.†

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who shall finally judge of the sufficiency of the cause, and by what mode he may be compelled to accept, are questions undecided. In the case of the Bishop of London and Fytche, the judges in general declined to answer whether a bishop was compellable to accept a resignation: one thought he was compellable by *mandamus*, if he did not shew sufficient cause; and another observed, if he could not be compelled, he might prevent any incumbent from accepting an Irish bishoprick, as no one can accept a bishoprick in Ireland till he has resigned all his benefices in England. But Lord Thurlow seemed to be of opinion that he could not be compelled, particularly by *mandamus*, from which there is no appeal, or writ of error.* See 3 *Burn*, 304, and the opinions of the judges in *Cunningham's Law of Simony*, though ill reported.

(45) It was provided in 1603, by canon 33, that if a bishop ordains any person not provided with some ecclesiastical preferment, except a fellow or chaplain of a college, or a master of arts of five years' standing, who lives in the university at his own expense, he shall support him till he shall prefer him to a living. 3

* This is stated somewhat too broadly; by proceeding in mandamus, the party is not in all cases necessarily excluded from bringing error. See 1 *P. Wms.* 351, and 3 *Comm.* 265. Error would lie on the judgment given by the court on the validity or invalidity of the return.

† The stipend of the curate is now regulated by stat. 57 Geo. III. c. 99. The provisions are very numerous, the scope of them being to give the curate a right to compensation, by way of stipend, out of the profits of the benefice, proportioned to their amount, and increasing in a ratio with the duties to be performed.

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*) (46). They are sometimes appointed by the minister, sometimes by the parish, sometimes by both together, as custom directs (47). 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 (48), for the use and profit of the parish (49). 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, churchyard, &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 (50). They are also joined with the overseers in the care and maintenance of the poor (51). [*395]

(*c*) In Sweden they have similar officers, whom they call *kiorckiowariandes*. Stiernhook, L. 3, c. 7.

Burn's Ec. L. 28. And the bishops, before they confer orders, require either proof of such a title as is described by the canon, or a certificate from some rector or vicar, promising to employ the candidate for orders *bonâ fide* as a curate, and to grant him a certain allowance till he obtains some ecclesiastical preferment, or shall be removed for some fault. And in a case where the rector of St. Ann's, Westminster, gave such a title, and afterwards dismissed his curate without assigning any cause, the curate recovered, in an action of assumpsit, the same salary for the time after his dismission which he had received before. *Cowp.* 437. And when the rector had vacated St. Ann's, by accepting the living of Rochdale, the curate brought another action to recover his salary since the rector left St. Ann's; but Lord Mansfield and the court held, that that action could not be maintained, and that these titles are only binding upon those who give them while they continue incumbents in the church for which such curate is appointed. *Doug.* 137.

No curate or minister ought to perform the duties of any church before he has obtained a licence from the bishop. 2 *Burn*, 58.

(46) Their duties were originally confined to the care of the ecclesiastical property of the parish, over which they exercised discretionary power for specific purposes. 1 Hagg. 173. With respect to who are exempt from serving the office, all peers of the realm are, Gibs. 215; so are all clergymen, 6 Mod. 140; members of parliament, Gibs. Cod. 215; practising barristers and attornies, Com. Dig. tit. Attorney (B. 16.); clerks in court, 1 Ro. Rep. 368, but see Mar. 30; physicians, surgeons, apothecaries, aldermen, dissenting teachers, prosecutors of felons, militia men, ante 355, as to constables. No person *living out of the parish* can be chosen churchwarden, Gibs. 215. 1 Hagg. Rep. 10; but semble a non-resident partner in a house of trade is not exempt, if the house of business be in the parish. 1 Hagg. Rep. 379. 1 B. & Cres. 178. 123. 2 B. & C. 322. Aliens, Papists, Jews, infants, and persons convicted of felony, are disqualified. 1 Hagg. Rep. 10.

(47) 2 Atk. 650. 2 Stra. 1246. 1 Vent. 267. But where there is no such custom, the election must be according to the directions of the canons of the church, can. 89, 90, which direct, that all churchwardens or questmen in every parish shall be chosen by the joint consent of the minister and the parishioners, if it may be; but if they cannot agree upon such choice, then the minister is to choose one, and the parishioners another; and without such joint or several choice, none shall take upon themselves to be churchwardens. Gibs. Cod. 241. 1 Stra. 145. 2 Stra. 1246.

If the parson or vicar who has by custom a right to choose *one* churchwarden be under sentence of deprivation, the right of choosing both results to the parishioners. Carth. 118. The parson cannot intermeddle in the choice of that churchwarden which it is the right of the parishioners by custom to elect. 2 Stra. 1045. Under the word parson a curate is included. 2 Stra. 1246.

(48) See Cro. Eliz. 145, 179.

(49) See Withnell *v.* Gartham, 6 *T. R.* 396, where Lord Kenyon denies that in legal language churchwardens are a corporation.

(50) But now by stat. 53 G. III. ◊ 7, c. 127, arrears under 10*l.* are recoverable before two justices.

(51) They are appointed overseers by 43

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*).

VIII. Parish clerks, and sextons (52), 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*) (53). The parish clerk was formerly very frequently in holy orders, and some are so to this day. He is generally appointed by the incumbent (54), but by custom may be chosen by the inhabitants (55); and, if such custom appears, the court of king's bench will grant a *mandamus* to the archdeacon to swear him in, for the establishment of the custom turns it into a temporal or civil right (*h*) (56).

(*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, Visitations.*
(*g*) 2 Roll. Abr. 234.
(*h*) Cro. Car. 589.

Eliz. c. 2. They were anciently the sole overseers of the poor. 1 Nol. 4 ed. 2. note. The 55 Geo. III. c. 137. s. 6. prohibits churchwardens, overseers, and persons having the management of the poor, from being concerned in contracts, &c. for the supplying for their own profits goods, &c. for the use of the poor or workhouse, &c. under the heavy penalty of 100*l*., unless a certificate of two justices be obtained, &c. See the cases on this act, 2 Moore, 186. 8 Taunt. 239. S. C. 5 B. & A. 328. 1 B. & C. 77. S. C. 3 B. & A. 145.

As to contracts by the churchwardens and overseers, for lodging or employing of the poor, see 45 Geo. III. c. 54. s. 1, 2. By 9 Geo. III. c. 37. churchwardens, for paying the poor otherwise than in lawful money, are to forfeit to the poor not less than 10*s*. nor more than 20*s*.

(52) From the old words *segsten*, *segcrstane*, the keeper of holy things. It must be shewn that they are elected for life; then, and not till shewn, *Str.* 115, mandamus goes to restore them. 3 *Bac. Abr.* And women may be sextons. See *Str.* 1114, where it was adjudged. Many instances were cited of offices being held by females. Lady Broughton was keeper of the gatehouse; and Lady Peckington, the supposed authoress of "The Whole Duty of Man," was therein said to be the returning officer for Ailesbury. And it will be obvious that a female may be sheriff: Anne, countess of Pembroke, Dorset, and Montgomery, sat as hereditary sheriff of Westmoreland at the assizes with the judges on the bench. *Harg. Co. Litt.* 326.

(53) In *Strange*, 776, it had been determined otherwise; but in the same book, 942, the court, when pressed with their own authority, said it was a hasty opinion, into which they were transported by the enormity of the case.

(54) By stat. 59 G. III. c. 134, § 29. The clerk in every church and chapel built under statutes 58 G. III. c. 45, 59 G. III. c. 134, shall be annually appointed by the minister. By Car. 91, it seems that he is chosen by the parson, vicar, or minister, for the time being; the choice to be signified to the parishioners the Sunday following such choice. And his appointment needs not be in writing. *Lofft.* 434.

(55) See Cro. Jac. 670. Also Hughes, 275; 13 Rep. 70, s. c. And see the King *v.* Erasmus Warren, Cowp. 370.

(56) The parish clerks of London are a very ancient fraternity, formerly incorporated by the name of the Fraternity of St. Nicholas. They were reincorporated by charter 9 Ja. I. 1611, and some years after had a licence, by a decree of the Star Chamber, for keeping a printing press, for the purpose of printing the bills of mortality. The charter enjoins the reporting weekly, on every Tuesday, by four, afterwards changed to two o'clock, all the weekly christenings and burials in the respective parishes. This company is called the Master Wardens and Fellowship of the Parish Clerks of the Cities of London, Westminster, Borough of Southwark, and fifteen out-parishes. For more concerning parish clerks in general, consult Mr. Tyrwhitt's edition of Dr. Burn's Ecclesiastical Law.

CHAPTER XII.

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 (1). Hence it is that all degrees of nobility are not of equal antiquity. Those now in use are dukes, marquesses, earls, viscounts, and barons (*b*) (2).

*1. A *duke*, though he be with us, in respect of his title of no- [*397] bility, inferior in point of antiquity to many others, yet is superior to all of them in rank; his 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 heretoga (*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 the title of duke, till the time of Edward III., who claiming to be king of France, and thereby losing the ducal in the royal dignity (3), 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

(*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*.

(*c*) Camden, Britan. *tit. Ordines*.

(*d*) This is apparently derived from the same root as the German *hertzogen*, the ancient appellation of dukes in that country. Seld. tit. Hon. 2, 1, 12.

(1) No title of nobility can be granted by the U. S. Const. Art. 1, Sect. 7; nor by any state. Id. § 10.

(2) A superior degree of nobility does not extinguish the inferior. 2 Inst. 6. Com. Dig. Dignity, B. 6.

(3) Com. Dig. Dignity, B. 2. 9 Co. 49. a. This order of nobility was created before Edward assumed the title of king of France. Dr. Henry, in his excellent history of England, informs us, that "about a year before Edward III. assumed the title of king of France, he introduced a new order of nobility, to inflame the military ardour and ambition of his earls and barons, by creating his eldest son prince Edward duke of Cornwall. This was done with great solemnity in full parliament at Westminster, March 17, A. D. 1337." Hen. Hist. 8 vol. 135. 8vo. edition.

like 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.

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: such as, in particular, were the marches of Wales and Scotland, while each continued to be an enemy's country. 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*).

[*398] *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 as *senior* 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 irruption 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. The name of *earls* or *comites* 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 writs and commissions, and other formal instruments, the king, when he mentions any peer of the degree of an earl, usually 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 then 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.

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*) (4).

5. A *baron's* is the most general and universal title of nobility; [*399] for originally every one of the peers of superior rank *had also

(*e*) Camden, Britan. *tit. Ordines.* Spelman, *Gloss.* 194.
(*f*) 2 Inst. 5.
(*g*) Britan. *tit. Ordines.*
(*h*) Bracton, *l.* 1, *c.* 8. Flet. *l.* 1, *c.* 5.
(*i*) 2 Inst. 5.

(4) But this peer, if so he might be deemed, never sat in parliament, by reason that his creation was never recognized there. The experiment made to create him a peer without such assent failed, and it was not repeated; for the next patent creation was of Sir John Cornwall, in whose patent occurs these remarkable words: "—— ejusdem parliamenti de gratia sua speciali et ex certa scientia sua, ac de *advisamento et consensu* ducis Gloucester et cardinalis Winton ac cæterorum dominorum spiritualium et temporalium in parliamento." Rot. Par. 11 H. VI. p. 1, m. 16.

a barony annexed to his other titles (*k*) (5). 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 doth not hold universally, that all peers are barons. The original and antiquity of baronies have occasioned great inquiries among our English antiquaries. 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 (6). It may be collected from King John's

(*k*) 2 Inst. 5, 6.

(5) Mr. Christian gives the following interesting note:—At the time of the conquest, the temporal nobility consisted only of earls and barons; and by whatever right the earls and the mitred clergy before that time might have attended the great council of the nation, it abundantly appears that they afterwards sat in the feudal parliament in the character of barons. It has been truly said, that for some time after the conquest, wealth was the only nobility, as there was little personal property at that time, and a right to a seat in parliament was entirely territorial, or depended upon the tenure of landed property. Ever since the conquest, it is true, that all land is held either immediately or mediately of the king; that is, either of the king himself, or of a tenant of the king, or it might be after two or more subinfeudations. And it was also a general principle in the feudal system, that every tenant of land, or land owner, had both a right and obligation to attend the court of his immediate superior. Hence every tenant *in capite*, i. e. the tenant of the king, was at the same time entitled and bound to attend the king's court or parliament, being the great court baron of the nation.

It will not be necessary here to enlarge farther upon the original principles of the feudal system, and upon the origin of peerage; but we will briefly abridge the account which Selden has given in the second part of his Titles of Honour, c. 5. beginning at the 17th section, being perhaps the clearest and most satisfactory that can be found. He divides the time from the conquest into three periods: 1. From the conquest to the latter end of the reign of king John. 2. From that time to the 11th of Richard II. 3. From that period to the time he is writing, which may now be extended to the present time. In the first period, all, who held any quantity of land of the king, had, without distinction, a right to be summoned to parliament; and this right being confined solely to the king's tenants, of consequence all the peers of parliament during that period sat by virtue of tenure and a writ of summons.

In the beginning of the second period, that is, in the last year of the reign of king John, a distinction, very important in its consequences (for it eventually produced the lower house of parliament), was introduced, viz. a division of these tenants into greater and lesser barons: for king John, in his *magna charta*, declares, *faciemus summoneri archiepiscopos, episcopos, abbates, comites et majores barones regni sigillatim per literas nostras, et præterea faciemus summoneri in generali per vicecomites et ballivos nostros omnes alios, qui in capite tenent de nobis ad certum diem, &c.* See Bl. Mag. Ch. Joh. p. 14. It does not appear that it ever was ascertained what constituted a greater baron, and it probably was left to the king's discretion to determine; and no great inconvenience could have resulted from its remaining indefinite, for those who had not the honour of the king's letter would have what in effect was equivalent, a general summons from the sheriff. But in this second period tenure began to be disregarded, and persons were summoned to the parliament by writ, who held no lands of the king. This continued to be the case till the 11th of Rich. II., when the practice of creating peers by letters patent first commenced.

In that year John de Beauchamp, steward of the household to Rich. II., was created by patent lord Beauchamp baron of Kidderminster in tail *male*; and since that time peerages have been created both by writ and patent, without any regard to tenure or estate.

The king's prerogative of creating peers by patent, may seem a great innovation, or a violation of the original principles of the system; yet it is one of those great changes which are produced at the first by a gentle deviation from the former practice. For though this prerogative was not granted to the king by the express authority of parliament, yet it was obtained by its acquiescence: for I have been assured by Mr. Townshend, the Windsor herald, a gentleman well acquainted with this subject, that patents of nobility in ancient times generally stated, either that the patent was granted by the assent of parliament, or, if granted in the vacation, they stated such special reasons why the peer was created, as it might be presumed would afterwards meet with the approbation of the parliament. See further Comyn's Dig. Dignity, C. 4.

(6) Lords of manors, who had granted to others by subinfeudation part of that estate

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 honour, by conferring it on divers persons by his letters patent (*n*).

Having made this short inquiry 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, honours, castles, manors, and the like, the proprietors and possessors of which were, in right of those estates, allowed [*400] 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 him or his ancestors was admitted as a sufficient evidence of the tenure.

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 take his seat in the house of lords; and some are of opinion that there must be at least two writs of summons, and a sitting in two distinct parliaments, to evidence an hereditary barony (*q*) (7): and

(*l*) Cap. 14.
(*m*) Gilb. Hist. of Exch. c. 3. Seld. Tit. of Hon. 2, 5, 21.
(*n*) 1 Inst. 9 Seld. *Jan. Angl.* 2, § 66.
(*o*) Glan. l. 7, c. 1.
(*p*) Seld. Tit. of Hon. b. 2, c. 9, § 5.
(*q*) Whitelocke of Parl. ch. 114.

which they held of the king, would necessarily be barons; but it does not follow conversely that a baron was of necessity a lord of a manor: for the king's tenant, who retained all the estate granted him, and alienated no part of it, would certainly be as complete a baron as a lord of a manor.

(7) Lord Coke, Co. Lit. 16. (b) is of opinion, that if a man summoned to parliament by writ, once sit in the house of peers, though there be no words of inheritance in the writ, he gains a barony to him and his heirs. See this subject discussed in Sullivan's Lectures, 190; and see Com. Dig. Dignity, C. 3. But in Mr. Christian's ed. and 1 Woodd. 37. it is said, that this doctrine of lord Coke is now understood to be erroneous, and that a creation by writ does not confer a fee simple in the title, but only an estate tail general.

When a lord is newly created, he is introduced into the house of peers by two lords of the same rank, in their robes, garter king at arms going before; and his lordship is to present his writ of summons, &c. to the chancellor, which, being read, he is conducted to his place: and lords by descent, where nobility

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 (*r*). 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 grand-father (8). 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* (9), without any words [*401] to that purport in the writ; but in letters patent there must be words to direct the inheritance, else the dignity inures only to the grantee for life (*s*). 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 (10).

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 (11). The great are always obnoxious to popular en-

(*r*) Co. Litt. 16. (*s*) Co. Litt. 9, 16.

comes down from the ancestors, and is enjoyed by right of blood, are introduced with the same ceremony, the presenting of the writ excepted. Lex Constitutionis, 79.

(8) And where the father's barony is limited by patent to him and the heirs male of his body, and his eldest son is called up to the house of lords by writ with the title of this barony, the writ in this case will not create a fee or a general estate tail, so as to make a female capable of inheriting the title, but upon the death of the father the two titles unite, or become one and the same. Case of the claim to the barony of Sidney of Penshurst disallowed. *Doun. Proc.* 17 *June*, 1782.

(9) But every claimant of the title must be descended from the person first ennobled. See 1 Woodd. 37, where the opinion of Lord Coke is controverted and shown to be erroneous; and Mr. Wooddeson observes further, that a creation by writ confers only an estate tail general, there being in English law no peerages in fee simple. But Lord Coke differs from himself; for, although he certainly states the law to be that a peerage descends to other than lineal heirs, Co. Litt. 9, yet, in the same book, 16, he adds, that the writ has no operation until the person named in it sits in parliament, and that thereby his blood is ennobled to him and his heirs lineal.

(10) Peerage may be gained for life by act of law, as if a duke take a wife, she is a duchess in law by the intermarriage, so of a marquess, earl, &c. Co. Lit. 16. b. Also the dignity of an earl may descend to a daughter, if there be no son, who shall be a countess; and if there are many daughters, it is said the king shall dispose of the dignity to which daughter he pleases. Co. Lit. 165. a. If a person has been summoned as a baron to parliament by writ, and after sitting die, leaving two or more daughters, who all die, one of them only leaving issue a son, such issue has a right to demand a seat in the house of peers. Skin. 441.

Though dignities of peerage are granted from the crown, yet they cannot be surrendered to the crown, except it be in order to new and greater honours, nor are they transferable unless they relate to an office; and notwithstanding there are instances of earldoms being transferred, and wherein one branch of a family sat in the house of peers by virtue of a grant from the other branch, particularly in the reigns of Henry III. and Edw. II., these precedents have been disallowed. Lex Const. 85, 6, 7. And it seems now settled, that a peerage cannot be transferred (unless we consider the summoning of the eldest son of a peer by writ as a transfer of one of his father's baronies), without the concurrence of parliament, at least in those cases where the noble personage has no barony to remain in himself, as otherwise, on the transfer, he would himself be deprived of his peerage, and be made ignoble by his own act. See Watkins's Notes on Gilbert's Tenures, note xi. on p. 11. and p. 361.

(11) But this is only in treason, felony, and misprision of the same. See magna charta, 9 Hen. III. 29. 2 Inst. 49. And a peer, it seems, cannot waive the trial by his peers. Kel. 56. 1 Stat. Trial, 265. 2 Rush. 61. And if he refuse to put himself on his peers, he may be dealt with as one who stands mute; yet if one who has a title to peerage, be indicted and arraigned as a commoner, and plead not guilty, and put himself upon the country, he cannot afterwards suggest he is a peer, and pray trial by his peers. 2 Hawk. P. C. c. 44. s. 19; and see further, post 4 book, 260.

In all misdemeanors, as libels, riots, perjury, conspiracies, &c. a peer is tried like a

vy: 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 ecclesiæ*, yet are not ennobled in blood, and consequently not peers with the nobility (*s*) (12). As to peeresses, there was no precedent for their trial when accused of treason or felony, till after Eleanor duchess of Gloucester, wife to the lord protector, was accused of treason, and found guilty of witchcraft, in an established synod, through the intrigues of Cardinal Beaufort. This very extraordinary trial gave occasion to a special statute, 20 Hen. VI. c. 9, which declares (*t*) the law to be, that peeresses, either in their own right or by marriage, shall be tried before the same judicature as other peers of the realm (13). If a woman, noble in her own right, marries a commoner, she still remains noble (14), 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 (*u*) (15). Yet if a duchess dowager marries a baron, she

(*s*) 3 Inst. 30, 31.
(*t*) Moor, 769. 2 Inst. 60. 6 Rep. 52. Staundf. P. C. 152.
(*u*) Dyer, 79. Co. Litt. 16.

commoner by a jury. 3 Inst. 30. Hawk. P. C. b. 2. ch. 44. sect. 13, 14. So in case of an appeal of felony, he is to be tried by a jury. 9 Co. Rep. 30. 2 Inst. 49; and the indictments of peers for treason or felony, are to be found by freeholders of the county, and then the peers are to plead before the high steward, &c. 1 Inst. 156. 3 Inst. 28.

Peers (Fortesc. 359.) and members of parliament have no exemption from arrest in case of treason, felony, or actual breach of the peace. 4 Inst. 24, 5. 2 Wils. 159, 160. 11 Hargr. St. Tr. 305; but a peer menacing another person, whereby the latter fears his life is in danger, no writ of supplicavit, but a subpœna issues, and when the peer appears, instead of surety, he only promises to keep the peace. 35 Hen. VI.

The privilege of peers does not extend to foreign noblemen, who have no more privileges here than commoners. Co. Lit. 156. 2 Inst. 48. Lex. Const. 80, 81.

The peers of Scotland or Ireland had no privilege in this kingdom before the union; but by clauses in the respective articles of union, the elected peers have all the privileges of peers of parliament; also all the rest of the peers of Scotland and Ireland have all the privileges of the peerage of England, excepting only that of sitting and voting in parliament; and Irish peers, who are members of the house of commons, are not entitled to the privilege of peerage. See the act of union, 39 & 40 Geo. III. c. 67. An Irish peer ought not to serve upon a grand jury, unless he is a member of the house of commons. Russell & Ryl. Cro. C. 117. A Roman catholic peer has not the privilege of franking letters. 2 B. & P. 139.

(12) The bishops being summoned to parliament as peers might thereby have become entitled to trial by peers; but, unless bishops were to try bishops, none others are properly peers of bishops. These peers of lords are peculiarly designated spiritual. It may be observed that, although lords of parliament, they never sit upon matters of treason or of blood; and it would be a strange anomaly, that upon a bishop all other lords of parliament, save bishops, who are also lords, might, in capital cases, pass judgment of death. Bishops Cranmer and Fisher were tried by jury. It is to the honour of this high order of men, that, through a long succession of its members, few, comparatively, have been exposed to public trial. Laud, who had miscalculated his times, and mistaken the men whom he had goaded into enmity, was, indeed, impeached.

(13) The last peeress tried was the late duchess of Kingston for bigamy. See 20 H. St. Tr. 355.

(14) But she communicates no rank or title to her husband. *Harg. Co. Litt.* 326, b. There have been claims, and these are supported by authorities, by a husband after issue to assume the title of his wife's dignity, and after her death to retain the same as tenant by the curtesy; but, from Mr. Hargrave's statement of this subject, in *Co. Litt.* 29, b. n. 1, there is no probability that such a claim would now be allowed.

(15) Yet she is commonly called and addressed by the style and title which she bore before her second marriage, but this is only by courtesy; as the daughters of dukes, marquesses, and earls, are usually addressed by the title of lady, though in law they are commoners. In a writ of partition brought by Ralph Haward and lady Anne Powes his wife, the court held that it was a misnomer, and that it ought to have been by Ralph Haward and Anne his wife, late wife of lord Powis deceased. *Dyer*. 79.

continues a duchess still; for all the *nobility are *pares*, and [*402] therefore it is no degradation (*u*). A peer, or peeress, either in her own right or by marriage, cannot be arrested in civil cases (*v*): and they have also many peculiar privileges annexed to their peerage in the course of judicial proceedings (16). A peer, sitting in judgment, gives not his verdict upon oath, like an ordinary juryman, but upon his honour (*w*): he answers also to bills in chancery upon his honour, and not upon his oath (*x*); but, when he is examined as a witness either in civil or criminal cases, he must be sworn (*y*) (17): for the respect which the law shows 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 punishments by divers ancient statutes (*a*).

A peer cannot lose his nobility, but by death or attainder; though 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 wastes 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*.

*The commonalty, like the nobility, are divided into several [*403] 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

(*u*) 2 Inst. 50.
(*v*) Finch, L. 355. 1 Ventr. 296.
(*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.
(*b*) 4 Inst. 355.
(*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 competent livelyhood 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*) Moor, 678.
(*e*) 12 Rep. 107. 12 Mod. 56.

(16) See Tidd. 8 ed. 194. This privilege is extended, by the act of union with Scotland, to Scotch peers and peeresses. 5 Ann. c. 8. art. 23. and see Fort. 165. 2 Stra. 990. And, by the act of union with Ireland, to Irish peers and peeresses. 39 & 40 Geo. III. c. 67. art. 4; but see 7 Taunt. 679. 1 Moore, 410. S. C. But this privilege does not protect them from attachments for not obeying the process of the courts, 1 Wils. 332; nor does it extend to peeresses by marriage, if they afterwards intermarry with commoners. Co. Lit. 16. The servants of peers are liable to arrest, 10 Geo. III. c. 50. and see 1 Chit. Rep. 83. Peers of the realm cannot be bail. 2 Marsh. 232, and see 1 D. & R. 126.

A subpœna is not in the first instance awarded out of chancery in a suit, but a letter from the lord chancellor, or lord keeper in lieu thereof, which, if he does not answer, then a subpœna issues, then an order to shew cause why a sequestration should not go; and if he still stands out, then a sequestration; and the reason is, because there is no process of contempt against his person. 2 Vent. 342.

(17) If he is examined as a witness in the high court of parliament, he must be sworn. The Bishop of Oxford was sworn in the impeachment of Lord Macclesfield, and Lord Mansfield (then Lord Stormont) in that of Mr. Hastings.*

* And, on a late trial at nisi prius, cor. Gaselee J. C. P. London, Lord Grantley gave his testimony sitting upon the bench with the judge. His lordship appeared solicitous to be sworn sitting, but little hesitated to rise on the intimation of the officer.

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* (*g*): who are mentioned by our ancient lawyers (*h*) as *viri magnæ dignitatis*; and Sir Edward Coke (*i*) speaks highly of them. Yet they are now quite out of use; and our legal antiquaries are not agreed upon even their original or ancient office.

Now therefore the first personal 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 (*j*). Next (but not till after certain *official* dignities, as privy-counsellors, the chancellors of the exchequer and duchy of Lancaster, the chief justice of the king's bench, the master of the rolls, and the other English judges,) 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 his precedence before the younger sons of viscounts was confirmed to him by order of King James I., in the tenth year of his reign (*k*). But, in order to entitle 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 (*l*). 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 (18); for which reason all baronets have the arms of Ulster superadded to their family coat (19). Next follow *knights of the* [*404] *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 (20). The last of these inferior nobility are *knights bachelors* (21); the most ancient, though the lowest, order of knighthood amongst us (22): for we have an instance (*m*) 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 community (*n*).

(*f*) 2 Inst. 29.
(*g*) Camden, *Britan. t. Ordines.*
(*h*) Bracton, *l.* 1, c. 8.
(*i*) 2 Inst. 667.
(*j*) Seld. Tit. of Hon. 2, 5, 41.
(*k*) *Ibid.* 2, 11, 3.
(*l*) 4 Inst. 6.
(*m*) Will. Malmsb. *lib.* 2.
(*n*) Tac. *de Morib. Germ.* 13.

(18) One hundred gentlemen advanced each one thousand pounds; for which this title was conferred upon them. 2 *Rap.* 185 *fo.*

(19) The arms of Ulster are, a hand *gules*, or a bloody hand in a field *argent*.*

(20) Upon the conclusion of the continental war, the original constitution of this order became so modified and extended, as to admit of naval or military members bearing a grand cross, and the name, or title, of military knight grand cross.

(21) The most probable derivation of the word bachelor is from *bas* and *chevalier*, an inferior knight; and thence latinized into the barbarous word *baccalaureus*. *Ducange*, *Bac.* The lowest graduates in the universities are styled *bachelors*, and were, till lately, addressed with sir before their surname; as in Latin they are still called *domini*. It is somewhat remarkable, that whilst this feudal word has long been appropriated to single men, another feudal term of higher dignity, *viz.* baron, should, in legal language, be applied to those who are married.

(22) There are also other orders of knights; as knights of the chamber; knights of the order of St. John of Jerusalem; knights of Malta; the knight marshal; knights of the Rhodes; knights of the shire; knights templars; knights of the thistle, and knights of St. Patrick.

* There is something very ridiculous in a bought honour; an unbought grace of life has an elevation about it; but to buy honour, at so much for the penny paid down, seems to mow at honour.

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 (*o*), that almost all nations call their knights by some appellation derived from an horse (23). They are also called in our law *milites*, because they formed a part of the royal army, in virtue of their feodal tenures; one condition of which was, that every one who held a knight's fee immediately under the crown, which in Edward the second's time (*p*) amounted to 20*l*. *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 (24): but it was by the statute 16 Car. I. c. 16, abolished; and this kind of knighthood has, since that time, fallen into great disregard.

These, Sir Edward Coke says (*q*), are all the names of *dignity* in this kingdom, esquires and gentlemen being only names of *worship*. But before these last (*r*) the heralds rank all *colonels, serjeants [*405] at law, and doctors in the three learned professions.

(*o*) Camd. *ibid.* Co. Litt. 74.
(*p*) Stat. *de Milit.* 1 Ed. II.
(*q*) 2 Inst. 667.
(*r*) The rules of precedence in England may be reduced to the following table: in which those marked * are entitled to the rank here allotted them, by statute 31 Hen. VIII. c. 10; marked †, by statute 1 W. and M. c. 21; marked ‖, by letters patent, 9, 10, and 14 Jac. I., which see in Seld. Tit. of Hon. ii. 5, 46, and ii. 11, 3; marked ‡, by ancient usage and established custom; for which see, among others, Camden's Britannia, *Tit. Ordines.* Milles's Catalogue of Honour, *edit.* 1610; and Chamberlayne's Present State of England, b. 3, ch. 3.

TABLE OF PRECEDENCE.

* The king's children and grandchildren.
* ——— brethren.
* ——— uncles.
* ——— nephews.
* Archbishop of Canterbury (25).
* Lord Chancellor or Keeper, if a baron.
* Archbishop of York.
* Lord Treasurer,
* Lord President of the Council,
* Lord Privy Seal,
} if barons.
* Lord Great Chamberlain. But see private stat. 1 Geo. I. c. 3.
* Lord High Constable,
* Lord Marshal,
* Lord Admiral,
* Lord Steward of the Household,
* Lord Chamberlain of the Household,
} above all peers of their own degree.
* Dukes.
* Marquesses.

(23) It does not appear that the English word *knight* has any reference to a horse; for knight, or cnihc in the Saxon, signified *puer, servus*, or attendant. 2 *Seld. Tit. Hon. c.* 5, § 33.

(24) Considerable fees accrued to the king upon the performance of the ceremony. Edward VI. and Queen Elizabeth had appointed commissioners to compound with all persons, who had lands to the amount of 40*l*. a year, and who declined the honour and expence of knighthood. Charles the first followed their example; upon which Mr. Hume artfully remarks, that "nothing proves more plainly, how ill-disposed the people were to the measures of government, than to observe, that they loudly complained of an expedient, founded on positive statute, and warranted by such recent precedents." 6 vol. 296.

(25) It is said, that before the conquest, by a constitution of Pope Gregory, the two archbishops were equal in dignity, and in the number of bishops subject to their authority; and that William the conqueror thought it prudent to give precedence and superiority to the Archbishop of Canterbury; but Thomas, archbishop of York, was unwilling to acknowledge his inferiority to Lanfranc, archbishop of Canterbury, and appealed to the pope, who referred the matter to the king and barons; and in a council held at Windsor-castle, they decided in favour of the Archbishop of Canterbury. *Godw. Comm. de Præsul.* 665.

But the archbishops of York long afterwards refused to acquiesce in this decision, for Bishop Godwin relates a curious and ludicrous struggle, which took place in the reign of Hen. II. above one hundred years afterwards, between Roger archbishop of York, and Richard archbishop of Canterbury, for the chair on the right hand of the pope's legate. *Ib.* 79. Perhaps to this decision, and their former equality, we may refer the present distinction between them; *viz.* that the Archbishop of Canterbury is primate of all England, and the Archbishop of York is primate of England.

[*406] *Esquires and gentlemen are confounded together by Sir Edward Coke, who observes (*s*), 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 (*t*): 1. The eldest sons of knights, and their eldest sons, in perpetual succession (*u*): 2. The eldest sons of younger sons of peers, and their eldest sons in like perpetual succession: both which species of esquires Sir Henry Spelman entitles *armigeri natalitii* (*v*). 3. Esquires created by the king's letters patent, or other investiture (27); 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 (28). To these may be added, the esquires of knights of the bath, each of whom constitutes three at his installation: and all foreign, nay, Irish peers; for not only these, but the eldest sons of peers of Great Britain, though frequently titular lords, are only esquires in the law, and must be so named in all legal proceedings (*w*) (29). As for *gentlemen*, says Sir Thomas Smith (*x*), they be made good cheap in this kingdom: for whosoever

‡ Dukes' eldest sons.
* Earls.
‡ Marquesses' eldest sons.
‡ Dukes' younger sons.
* Viscounts.
‡ Earls' eldest sons.
‡ Marquesses' younger sons.
* Secretary of State, if a bishop.
* Bishop of London.
* ——— Durham.
* ——— Winchester.
* Bishops.
* Secretary of State, if a baron.
* Barons.
† Speaker of the House of Commons.
† Lords Commissioners of the Great Seal.
‡ Viscounts' eldest sons.
‡ Earls' younger sons.
‡ Barons' eldest sons.
‖ Knights of the Garter.
‖ Privy Counsellors.
‖ Chancellor of the Exchequer.
‖ Chancellor of the Duchy.
‖ (26) Chief Justice of the King's Bench.
‖ Master of the Rolls.
‖ Chief Justice of the Common Pleas.
‖ Chief Baron of the Exchequer.
‖ Judges, and Barons of the Coif.
‖ Knights Bannerets, royal.
‖ Viscounts' younger sons.
‖ Barons' younger sons.
‖ Baronets.
‖ Knights Bannerets.
‡ Knights of the Bath.
‡ Knights Bachelors.
‖ Baronets' eldest sons.
‖ Knights' eldest sons.
‖ Baronets' younger sons.
‖ Knights' younger sons.
‡ Colonels.
‡ Serjeants-at-law.
‡ Doctors.
‡ Esquires.
‡ Gentlemen.
‡ Yeomen.
‡ Tradesmen.
‡ Artificers.
‡ Labourers.

N. B. Married women and widows are entitled to the same rank among each other, as their husbands would respectively have borne between themselves, except such rank is merely professional or official: and unmarried women, to the same rank as their eldest brothers would bear among men, during the lives of their fathers.

(*s*) 2 Inst. 668.
(*t*) 2 Inst. 668.
(*u*) 2 Inst. 667.
(*v*) Gloss. 48.
(*w*) 3 Inst. 30. 2 Inst. 667.
(*x*) Commonw. of Eng. b. 1, c. 20.

(26) Vice-chancellor, by stat. 53 G. III. c. 24.

(27) This creation has long been disused. Esquires thus created were invested *calcaribus argentatis*, to distinguish them from the *equites aurati*. In the life of Chaucer, we are told that he was created scutifer to Edward III. Scutifer is the same as armiger; and our word esquire is derived from *scutum*, or the French *escu* a shield.

(28) I cannot but think that this is too extensive a description of an esquire, for it would bestow that honour upon every exciseman and custom-house officer; it probably ought to be limited to those only who bear an office of trust under the crown, and who are styled esquires by the king in their commissions and appointments; and all, I conceive, who are once honoured by the king with the title of esquire, have a right to that distinction for life.

(29) It is rather remarkable, that the learn-

studieth the laws of the realm, who studieth in the universities, who professeth the 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 (30). A *yeoman* is he that hath free land of forty shillings by the year; who was anciently thereby qualified to serve on juries, vote for knights of the *shire, and do any other act, where the law requires one [*407] that is *probus et legalis homo* (y).

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, and the place to which they belong, or where they have been conversant, in all original writs of actions personal, appeals, and indictments, upon which process of outlawry may be awarded (31); in order, as it should seem, to prevent any clandestine or mistaken outlawry, by reducing to a specific certainty the person who is the object of its process (32).

(y) 2 Inst. 668.

ed judge should have forgotten to mention another class of esquires, who, upon all occasions, assume that distinction with a peculiar and an ostentatious degree of confidence, I mean our profession, or the gentlemen at the bar. This arises, perhaps, from an anxiety to retain what they know originally to have been an usurpation; for Sir Henry Spelman, with some spleen, informs us, *certè altero hinc sæculo nominatissimus in patriâ jurisconsultus, ætate provectior, etiam munere gaudens publico et prædiis amplissimis, generosi titulo bene se habuit; fortè, quod togatæ genti magis tunc conveniret civilis illa appellatio quam castrensis altera. Gloss. voc.* Arm. But this length of enjoyment has established such a right to this distinction, that the court of common pleas refused to hear an affidavit read, because a barrister named in it was not called an esquire. 1 *Wils.* 244.*

(30) The eldest son has no prior claim to the degree of gentleman; for it is the text of Littleton, that "every son is as great a gentleman as the eldest." *Sect.* 210.

(31) Informations in the nature of *quo warranto*, are not within the statute of additions. 1 *Wils.* 244.

(32) These are the ranks and degrees into which the people of England are divided, and which were created, and are preserved, for the reciprocal protection and support of each other. But in order to excite discontent, and to stir up rebellion against all good order and peaceful government, a proposition has lately been industriously propagated, *viz.* that all men are by nature equal. If this subject is considered even for a moment, the very reverse will appear to be the truth, and that all men are by nature unequal. For though children come into the world equally helpless, yet in a few years, as soon as their bodies acquire vigour, and their minds and passions are expanded and developed, we perceive an infinite difference in their natural powers, capacities, and propensities; and this inequality is still further increased by the instruction which they happen to receive.

Independent of any positive regulations, the unequal industry and virtues of men must necessarily create unequal rights. But it is said that all men are equal because they have an equal right to justice, or to the possession of their rights. This is an insignificant self-evident truth, which no one ever denied, and it amounts to nothing more than to the identical proposition, that all men have equal rights to their rights; for when different men have perfect and absolute rights to unequal things, they are certainly equal with regard to the perfection of their rights, or the justice that is due to their respective claims. This is the only sense in which equality can be applied to mankind. In the most perfect republic that can be conceived in theory, the proposition is false and mischievous; the father and child, the master and servant, the judge and prisoner, the general and common soldier, the representative and constituent, must be eternally unequal, and have unequal rights.

And where every office is elective, the most virtuous and the best qualified to discharge the duties of any office, have rights and claims superior to others.

One celebrated philosopher has endeavoured to prove the natural equality of mankind, by observing, that "the weakest has strength enough to kill the strongest, either by secret machinations, or by confederacy with others, that are in the same danger with himself." *Hobbes's Lev.* c. xiii.

From such a doctrine, supported by such reasons, we cannot be surprised at the consequences, when an attempt is made to reduce it to practice.

Subordination in every society is the bond of its existence; the highest and the lowest

* It was mentioned at the time, that the late Mr. Justice Heath refused knighthood, saying, "I am John Heath, esquire, one of his majesty's justices of the Court of Common Bench, and so will die."

CHAPTER XIII.

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, fideles, et animosi.*" Their duty was to lead and regulate the English armies, with a very [*409] unlimited power; "*prout eis visum fuerit, ad honorem* *coronæ 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,

(*a*) *C. de Heretochiis.*

(*b*) "*Isti vero viri eligantur per commune consilium, pro communi utilitate regni, per provincias et patrias universas, et per singulos comitatus, in pleno folkmote, sicut et vicecomites, provinciarum et comitatuum eligi debent.*" *L. Ed. Confess. ibid.* See also Bede, *Eccl. Hist. l. 5, c. 10.*

individuals derive their strength and security from their mutual assistance and dependence; as in the natural body, *the eye cannot say to the hand, I have no need of thee; nor again, the head to the feet, I have no need of you.* Milton, though a favourer of a republic, was so convinced of the necessity of subordination and degrees, that he makes Satan, even when warring against heaven's King, address his legions thus:

> If not equal all, yet free,
> Equally free; for orders and degrees
> Jar not with liberty, but well consist.
> *B. 5, l. 790.*

True liberty results from making every higher degree accessible to those who are in a lower, if virtue and talents are there found to deserve advancement.

In this happy country, the son of the lowest peasant may rise by his merit and abilities to the head of the church, law, army, navy, and every department of the state. The doctrine, that all men are, or ought, to be equal, is little less contrary to nature, and destructive of their happiness, than the invention of Procrustes, who attempted to make men equal by stretching the limbs of some, and lopping off those of others.

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 Cæsar 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 ill use made of it by Edric duke of Mercia, in the reign of King Edmund 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.

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 [*410] 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 rigour, 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 knights' fees, in number above sixty thousand (1); 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 (2); 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 adfuerit, secundum quod debent de feodis et tenementis suis de jure nobis facere.*" This personal service in process of time degenerated into

(*c*) *De Morib. Germ.* 7.

(*d*) "*Quum bellum civitas aut illatum, defendit aut infert, magistratus qui ei bello præsint deliguntur.*" *De Bell. Gall. l.* 6, c. 22.

(*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. Un. Hist. xxxiv. 12.

(*f*) C. 58. See Co. Litt. 75, 76.

(1) 60,215.*

(2) We frequently read of half a knight, or other aliquot part, as for so much land three knights and a half, &c. were to be returned; the fraction of a knight was performed by a whole knight who served half the time, or other due proportion of it.

* Of which 28,115 belonged to the church.

pecuniary commutations or aids, and at last the military part (3) of the feodal system was abolished at the restoration, by statute 12 Car. II c. 24.

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, first the assize of [*411] arms, enacted 27 Hen. *II. (*h*), and afterwards the statute of Winchester (*i*), under Edward I. 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 by the latter statute, to see that such arms were provided. These weapons were changed, by the statute 4 and 5 Ph. and M. c. 2, into others of more modern service: but both this and the former provisions were repealed in the reign of James I. (*k*). 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. so as to prevent the insertion therein of any new penal clauses. (*l*) But it was provided (*m*) 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, or his children, lieutenants began to be introduced (*n*), 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 and 5 Ph. and M. c. 3, though they had not been then long in use, for Camden speaks of them (*o*) in the time of Queen Elizabeth, as extraordinary magistrates constituted only in times of difficulty and danger. But the introduction of these commissions of lieutenancy, which contained in substance the same powers as the old commissions of array, caused the latter to fall into disuse.

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 expedition, 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 re- [*412] sentment 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 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.

(*h*) Hoved. A. D. 1181.
(*i*) 13 Edw. I. c. 6.
(*k*) Stat. 1 Jac. I. c. 25. 21 Jac. I. c. 28.
(*l*) Rushworth, part 3, pages 662, 667. See 8 Rym. 374, &c.
(*m*) Stat. 1 Edw. III. st. 2, c. 5 and 7. 25 Edw. III. st. 5, c. 8.
(*n*) 15 Rym. 75.
(*o*) Brit. 103. Edit. 1594.

(3) The military or warlike part of the feudal system was abolished, when personal service was dispensed with for a pecuniary commutation, as early as the reign of Henry II. But the military tenures still remained till 12 Car. II. c. 24. See 2 book, p. 77.

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 (*p*): 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 (4), 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 within the realm (or any of its dominions or territories), (*q*) nor in any case compellable to march out of the kingdom. They are to be exercised at stated times; and their discipline in general is liberal and easy; but when drawn out into actual service, they are subject to the rigours of martial law, as necessary to keep them in order. This is the constitutional security which our laws (*r*) have provided for the public peace, and for protecting the realm against foreign or domestic violence.

When the nation was engaged in war, more veteran troops and more regular discipline were esteemed to be necessary than could be expected from a mere militia. And therefore at such times more rigorous methods were put in use for the *raising of armies, and the due [*413] 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 (*s*), in truth and reality no law, but something indulged rather than allowed as a law (5). 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, Thomas

(*p*) 13 Car. II. c. 6. 14 Car. II. c. 3. 15 Car. II. c. 4.
(*q*) Stat. 16 Geo. III. c. 3.
(*r*) 2 Geo. III. c. 20. 9 Geo. III. c. 42. 16 Geo. III. c. 3. 18 Geo. III. c. 14 and 59. 19 G. III. c. 72.
(*s*) Hist. C. L. c. 2.

(4) Like all laws for modifying and regulating the public force, the militia law has frequently much occupied the legislature; but its general spirit has remained unchanged. Yet see the next note. For details consult Sir G. Chetwynde's Burn, Tit. Militia. The last general statutes appear to be 55 G. III. c. 65, 57 G. III. c. 57. The annual mutiny act is applicable to the militia when permanently embodied; but the yearly embodying them, for the purpose of mere training, does not subject them to punishment in life or limb.

(5) This censure upon our military jurisprudence is by no means merited at the present day, whatever may have been the fact when Sir Matthew Hale wrote. The long continued wars in which the nation was engaged until the peace of 1815, improved every part of our military system, and among the rest, the laws for the government of soldiers, their support, and punishment, when guilty of offences, have been frequently the subject of amelioration. Still the praise bestowed upon them by Mr. Tytler has more of the spirit of a partizan than of an impartial critic. He says, "the principles of military law are as certain, determinate, and immutable, as are the principles of the common and statute law, which regulate the civil classes of society." The mutiny act and the articles of war which contain the rules of discipline are framed by the legislature, and enforced by penalties appropriated to every offence; or the penalties are left, in certain cases where the offence is either mitigated or aggravated beyond its ordinary standard by attendant circumstances, to the decision of a court martial.

earl of Lancaster being condemned at Pontefract, 15 Edw. II. by martial law, his attainder was reversed 1 Edw. III. because it was done in time of peace (*t*). And it is laid down (*u*), 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* (*v*). The petition of right (*w*) moreover enacts, that no soldier shall be quartered on the subject without his own consent, (*x*) 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 (*y*), 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.

But, as the fashion of keeping standing armies, which was first introduced by Charles VII. in France, A. D. 1445 (*z*), has of late years [*414] universally prevailed over Europe, (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. And it was enacted by statute 10 W. III. c. 1, that not more than twelve thousand regular forces should be kept on foot in Ireland, though paid at the charge of that kingdom; which permission is extended by statute 8 Geo. III. c. 13, to 16,235 men, in time of peace.

To prevent the executive power from being able to oppress, says Baron Montesquieu (*a*), 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, 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 [*415] likewise passes, "to punish mutiny and desertion, *and for the better payment of the army and their quarters." This regulates

(*t*) 2 Brad. Append. 59.
(*u*) 3 Inst. 52.
(*v*) Cap. 29.
(*w*) 3 Car. I. See also stat. 31 Car. II. c. 1.
(*x*) Thus in Poland no soldier can be quartered upon the gentry, the only freemen in that republic. Mod. Univ. Hist. xxxiv. 23.
(*y*) Stat. 1 W. and M. st. 2, c. 2.
(*z*) Robertson, Cha. V. i. 94.
(*a*) Sp. L. 11, 6.

the manner in which they are to be dispersed among the several innkeepers and victuallers throughout the kingdom (6); and establishes a law martial for their government. By this, among other things, it is enacted, that if any officer or soldier shall excite, or join any mutiny, or, knowing of it, shall not give notice to the commanding officer: or shall desert, 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 (7).

However expedient the most strict regulations may be in time of actual war, yet in times of profound peace a little relaxation of military rigour would not, one should hope, be productive of much inconvenience. And upon this principle, though by our standing laws (*b*) (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 justices at the common law; yet, by our militia laws before mentioned, 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 tranquillity (*c*). But our mutiny act makes no such distinction: for any of the faults above 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 (*d*). "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 penalties by sentence or judgment of the same." 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 [*416] 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

(*b*) Stat. 18 Hen. VI. c. 19. 2 and 3 Edw. VI. c. 2.
(*c*) Ff. 49, 16, 5.
(*d*) A like power over the marines is given to the lords of the admiralty, by another annual act "for the regulation of his majesty's marine forces while on shore."

(6) There is a standing act relating to the billeting of soldiers, by the 31 Car. II. c. 1. s. 54. by which no officer or other person shall place or billet any soldier on any subject or inhabitant of this realm without his consent, and every such inhabitant, &c. may refuse to billet a soldier; but this seems in effect done away with by these annual acts. See 7 T. R. 624. 2 T. R. 96.

(7) The provisions of this annual act are so numerous that they cannot be here given in detail; they will be found for the most part fully set forth and arranged in Burn's J. tit. Military Law.

There are also standing acts affecting and regulating the soldiery, thus the 8 Geo. II. c. 30. requires soldiers to remove in time of elections two miles or more from the place of election, at least one day before the election, and not to make nearer approach thereto until one day at least after the poll is taken; but this does not extend to Westminster or other place of residence of the royal family, or fortified places, or any officer or soldier having a right to vote at such election.

their country as militia officers, are annually subjected to the same arbitrary rule during their time of exercise (8).

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 (*e*), 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 (9). For the greater the general liberty is which any state enjoys, the more cautious has it usually been in introducing slavery in any particular order or profession. These men, as Baron Montesquieu observes (*f*), seeing the liberty which others possess, and which they themselves are excluded from, are apt (like eunuchs in the eastern seraglios) 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 [*417] their slaves; while in absolute and despotic governments, where 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 (10.)

(*e*) 4 Inst. 352. (*f*) Sp. L. 15, 12.

(8) The virtual protection always afforded to superior officers against accusations, howsoever true and just they may be, brought against them by inferior officers, is highly objectionable; by such virtual protection, I mean the dismission from the service of a subaltern who shall have succeeded in establishing charges of moment against his superior officer, which dismission in general takes place. Thus a Colonel Beaufoy was, after a trial by a general court martial, or after a court of inquiry held upon him, upon charges preferred against him by a subaltern officer, dismissed. The subaltern was in no wise an accessory to the offences comprised in the charges preferred against Colonel Beaufoy, and was otherwise a meritorious officer; yet at the moment of the promulgation of the sentence of dismissal against his colonel, it was intimated to the subaltern that his majesty had no further occasion for his services. This, it was said at the time, was as it should be, looking at the good of the service.

(9) This regret of the learned Commentator is somewhat gratuitous in its object and mistaken in its source. The servitude to which the soldier is reduced in this country has most, if not all, of the alleviations which are compatible with good discipline and due subordination; and although the binding obligations of the military law are renewed every year, yet the regulations are neither so complex or numerous, as to render an observance of them difficult, while the annual revision of the legislature is a guarantee against their being capricious or unjust. In one respect it would seem that the soldier has the advantage of the citizen with regard to the laws which he is required to obey; for a municipal law may remain entirely unknown to the subject till he is called upon to answer for the infraction of it; but every individual of the military profession is regularly informed of the laws and regulations by which he is to be governed, for the articles of war, which are the substance of the military code, must be read at the head of every regiment once every two months.

(10) It would be perhaps useful here to take some notice of the laws of courts martial, as to which in general see Adye's Treatise on Courts Martial, M'Arthur's Treatise, Delafon's Treatise, and Toml. L. Dic. tit. Court

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 (11). And soldiers in actual military service may make nuncupative wills, and dispose of their goods, wages, and other personal chattels, without those forms, solemnities, and expenses, which the law requires in other cases (*g*). 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 (*h*). And thus much for the military state, as acknowledged by the laws of England (12).

The *maritime* state is nearly related to the former, though much more agreeable to the principles of our free constitution. *The [*418] royal navy of England hath ever been it 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 substruction of all their maritime 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 (*i*) (13). And yet, so vastly inferior were our an-

(*g*) Stat. 29 Car. II. c. 3; 5 W. III. c. 21, § 6.

(*h*) *Similitèr quid in clypeo literis sanguine suo rutilantibus adnotaverint, aut in pulvere inscripserint gladio suo, ipso tempore quo, in prælio, vitæ sortem derelinquunt, hujusmodi voluntatem stabilem esse oportet.* Cod. 6, 21, 15.

(*i*) 4 Inst. 144. *Coutumes de la Mer*, 2.

Martial. As to courts of inquiry, see Home v. Ld. Bentick, 2 Brod. & B. 130. As to naval courts martial, see post.

(11) By the 24 Geo. III. sess. 2, c. 6, all officers, soldiers, and mariners, who have been employed in the king's service since 1763, and have not deserted, and their wives, and children, may exercise any trade in any town in the kingdom, without exception, and shall not be removed till they are actually chargeable.* The same privilege is extended to all officers and soldiers who have been drawn by ballot, and have been honourably discharged, after three years' actual service in the militia.

(12) It is now fully established, that both the full pay and half pay of an officer, or any person in a military or naval character, cannot in any instance be assigned before it is due; as the object of such pay is to enable those who receive it always to be ready to serve their country with that decency and dignity which their respective characters and stations require. 4 *T. R.* 258. *H. Bl.* 628.†

(13) The French writers attribute these

* This is now the case with paupers generally.

† Military, and of course naval persons, are not always the most provident sort of people; and, it has been seen, that some corporate rights and privileges as against them are suspended; and in money matters it also appears, that, whatever the consideration was which shall have been received by such persons, the creditors' common law right, to resort to the property of his debtor wherever found, was also suspended. But see Stuart v. Tucker, 2 W. Bl. 1137, where, it is held, that the use of half pay may be assigned in equity. And now the insolvent Act provides for apportioning a part of the half pay of an insolvent officer amongst his creditors.

cestors in this point to the present age, that, even in the maritime reign of Queen Elizabeth, Sir Edward Coke (*k*) 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 (14); 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 merchandise 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 (*l*), with a narrow partial view: being intended to mortify our own 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 (*m*); 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 [*419] English plantations *without licence from the council of state.

In 1651 (*n*) 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 (15), (16).

(*k*) 4 Inst. 50.
(*l*) Scobell, 132.
(*m*) Mod. Un. Hist. xli. 289.
(*n*) Scobell, 176.

laws to Eleanor, duchess of Guienne, the king's mother. She had previously been the wife of Louis VII. king of France; but divorced from that monarch, she married Prince Henry, afterwards Henry II., Richard's father. She was a woman of considerable talent, and Oleron was a part of Guienne. The probability is, that these laws were compiled under the joint auspices of her husband and her son; at all events, the promulgating them was the act of Richard. For the learning upon this curious question, see Seld. Mare Cl. 2 and 24; and how oppugned by the French writers, see Mr. Justice Park's System of Marine Insurance, Introduction, p. xxviii.

(14) The present legislature has ceased to recognize the strict observance of the navigation Acts, not deeming them necessary to the preservation of our marine. Recent statutes, viz. 4 G. IV. cc. 42, 43, 44, 45, indirectly oppugn the doctrine in the text. If our marine shall suffer from these last-mentioned statutes, the old ones may re-enacted. The evil cannot be lastingly extensive; but, I must confess my own blindness if I am called upon to see in the distance dangers to our marine, from a steady but tempered pursuit of the modern policy. The colonies will doubtless benefit by the relaxation of their trading ties, and in colonial prosperity this country must necessarily find its own. It was a foolish as well as unjust prohibition that compelled a colonist to send his produce only to this market.

(15) Under forfeiture of the ship, and all the goods imported or exported.

(16) See note 13, supra. Stat. 4 G. IV. c. 41, is the new ship registry act, repealing the former enactments as to registries, and declares that no ship can be deemed a British vessel, and entitled to the privileges of one, that shall not be registered conformably with its provisions. And, to be entitled to be so registered, she must be wholly of the build of the United Kingdom, the Isle of Man, Guernsey, Jersey, or some of the colonies, plantations, islands, or territories of the empire, unless a prize condemned for illegal slave-trading; in either case the vessel is to belong wholly to his majesty's subjects entitled to be owners of such vessel. The act permits those who may afterwards be naturalized, or become denizens, to be owners; but excludes all persons usually residing out of his majesty's dominions, unless a member of a British factory, or a partner in some house carrying on trade in Great Britain or Ireland.

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 seafaring 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 (*o*), that the practice of impressing, and granting powers to the admiralty for that purpose, is of very ancient date, and hath been uniformly continued by a regular series of precedents to the present time; whence he concludes it to be part of the common law (*p*). 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 (*q*), 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 (*r*), 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 seacoast where the mariners are to be taken, to the intent that the justices may *chuse out and return such a number of able-bodied men, as in the commission are contained, to serve her majesty. And by others (*s*) especial protections are allowed to seamen in particular circumstances, to prevent them from being impressed. And ferrymen are also said to be privileged from being impressed at common law (*t*). 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 (17). [*420]

(*o*) Rep. 154.
(*p*) See also Comb. 245. Barr. 344.
(*q*) Stat. 2 and 3 Ph. and M. c. 16.
(*r*) Stat. 5 Eliz. c. 5.
(*s*) See stat. 7 and 8 W. III. c. 21. 2 Ann. c. 6. 4 and 5 Ann. c. 19. 13 Geo. II. c. 17. 2 Geo. III. c. 15. 11 Geo. III. c. 38. 19 Geo. III. c. 75, &c.
(*t*) Sav. 14.

(17) The legality of pressing is so fully established, that it will not now admit of a doubt in any court of justice. In the case of the King v. Jubbs, lord Mansfield says, "the power of pressing is founded upon immemorial usage, allowed for ages. If it be so founded and allowed for ages, it can have no ground to stand upon, nor can it be vindicated or justified by any reason, but the safety of the state. And the practice is deduced from that trite maxim of the constitutional law of England, 'that private mischief had better be submitted to, than public detriment and inconvenience should ensue.' And though it be a legal power, it may, like many others, be abused in the exercise of it." Cowp. 517. In that case the defendant was brought up by *habeas corpus*, upon the ground that he was entitled to an exemption; but the court held that the exemption was not made out, and he was remanded to the ship from which he had been brought.

Lord Kenyon has also declared in a similar case, that the right of pressing is founded on the common law, and extends to all persons exercising employments in the seafaring line. Any exemptions, therefore, which such persons may claim, must depend upon the positive provisions of statutes. 5 T. R. 276.

In addition to these authorities, many more are collected by Barrington (in his Observations on Ancient Statutes, p. 334. 5 ed.), who shews, that the crown anciently exercised a similar power of impressing men for the land service, not only for the army, but for the king's pleasure; and instances are given in the case of Goldsmith's (Aurifrabros) impress pro apparatibus personæ regis. 14 Edw. IV.

The freemen and livery of London are not exempted from being impressed for the service, if in other respects fit subjects for the service, 9 East. 466; nor are seamen serving in the merchant service, though a freeholder, 3 East, 477; nor is the master of any vessel, merely as such, exempt, especially if his appointment appear to be collusive. 14 East, 346. If a sailor on board a merchant-ship be pressed by a king's ship, he is not entitled to any proportion of wages from the former, unless she complete her voyage. 2 Campb. 320.

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 (*u*); great advantages in point of wages are given to volunteer seamen in order to induce them to enter into his majesty's service (*v*); and every foreign seaman, who during a war shall serve two years in any man of war, merchantman, or privateer, is naturalized *ipso facto* (*w*). About the middle of King William's reign, a scheme was set on foot (*x*) 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 ineffectual as well as oppressive, was abolished by statute 9 Ann. 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 [*421] restoration (*y*); but since *new-modelled and altered, after the peace of Aix-la-Chapelle (*z*), 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 (18), 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.

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 superannuated, either by county rates, or

(*u*) Stat. 2 Ann. c. 6.
(*v*) Stat. 31 Geo. II. c. 10.
(*w*) Stat. 13 Geo. II. c. 3.
(*x*) Stat. 7 and 8 W. III. c. 21.
(*y*) Stat. 13 Car. II. st. 1. c. 9.
(*z*) Stat. 22 Geo. II. c. 23, amended by 19 Geo. III. c. 17.

(18) A case is now depending (1828), which, amongst others, involves this very important question; namely, whether, where these articles specify an offence, and also the persons by whom committed, and annex the punishment, and where, by a following and final article, *offences not previously specified* are directed to be tried in the usual manner, a court martial has jurisdiction to try a naval person whose rank is not specified in the former articles for an offence already before mentioned and specified in them? The case, if reported, will probably appear under the names of Man *v.* Owen, bart., and others.

the royal hospital at Greenwich; with regard also to the exercise of trades, and the power of making nuncupative testaments; and, farther (*w*), 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 (19), (20).

(*a*) Stat. 31 Geo. II. c. 10.

(19) But, by the late mutiny acts, a soldier, like a seaman, cannot be arrested or taken in execution for any debt less than 20*l*. The statutes except any criminal matter, and thereupon it has been decided, that a soldier may be committed for refusing to indemnify the parish against a bastard child; or for disobeying an order of justices to pay a weekly allowance for it. 5 T. R. 156. 2 T. R. 270.

The 44 Geo. III. c. 13, enacts, that if any petty officer or seaman, belonging to his majesty's navy, shall be arrested or apprehended for any debt or criminal charge, after he shall be entitled to his discharge, he shall be re-conveyed by the sheriff, gaoler, or other officer, to some officer of his majesty's fleet empowered to receive seamen. And if he wilfully or negligently permits him to escape, he shall forfeit 100*l*.

It may not be improper to add in this place, that, since the reign of queen Anne, the legislature has encouraged attempts to discover the *longitude at sea*, and a northern passage between the Atlantic and Pacific oceans, by the offer of various rewards. The former acts on the subject were repealed by the 58 Geo. III. c. 20, and their principal provisions re-enacted and amended, which last statute has been still further amended by the 1 & 2 Geo. IV. c. 2. These acts appoint commissioners, who shall propose from time to time, by memorial to his majesty in council, to establish three scales of proportionate rewards, to be paid to persons who shall by any principle not already made public ascertain the longitude within three corresponding scales of limit and condition, such rewards not exceeding 5000*l*., 7500*l*., and 10,000*l*.; and, if approved, the same shall be published in the London Gazette; and if, on reasonable experiment, to be certified by such commissioners, it shall be found that the longitude has been so ascertained, they may then pay the proportionate reward assigned to the scale. 58 Geo. III. c. 20. s. 5.

They may also expend 1000*l*. in making and publishing experiments for the improvement of navigation, s. 6.

By the 10 sect. of the same act, 20,000*l*. may be given to the British ship which first finds out and sails through a passage between the Atlantic and Pacific oceans in the northern hemisphere.

By the 11 sect. 5000*l*. is to be given to any British ship which shall approach within one degree of the north pole.

And his majesty in council may order any proportion of the above sums to be paid for attempts to accomplish either of these objects, so that the whole sum to be paid for the final discoveries do not exceed the sums stated in the acts.

(20) The amendments to the Constitution of the U. S. provide that the right of the people to keep and bear arms shall not be infringed, a well regulated militia being necessary for the security of a free state: also that no soldier shall in time of peace be quartered in any house without the consent of the owner: nor in time of war, but in a manner to be prescribed by law. Art. 2, 3. There are similar provisions in the Constitution of the State of New-York, Art. 7, sect. 7, and in 1 R. S. 92, 93. By 1 R. S. 92, § 4, it is further provided that no citizen of this State can be constrained to arm himself, or to go out of this State, or to find soldiers or men of arms, without a law of the State, except in cases specially provided for by the Constitution of the U. S.

The Constitution of the U. S. Art. 1, Sect. 8, gives Congress power to raise and support armies: to provide and maintain a navy, and make rules for their government; also to provide for calling forth the militia to execute the laws of the Union, suppress insurrections and repel invasions. Also to provide for organizing, arming and disciplining the militia, and for governing such part of them as may be employed in the service of the U. S., reserving to the states respectively the appointment of the officers and the authority of training the militia according to the discipline prescribed by Congress. Under these provisions a small standing army is kept up by the authority of Congress: and the militia are trained in the several states, for a few days, principally with the view of ascertaining their number and the state of their equipments, and of keeping up a system by which an army might be organized when wanted. Rules and articles for the government of the army of the U. S. and of the militia when in pay of the U. S., have been adopted by Congress (Story's laws, 992, 1005,) and are not materially different from the English rules cited by Blackstone. See Rules for the government of the Navy. Story's laws, 761.

CHAPTER XIV.

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 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.

[*423] *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 effect 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 principles of natural law, that such a state should subsist any where. The three origins of the right of slavery, assigned by Justinian (*b*), are all of them built upon false foundations (*c*). As, first, slavery is held to arise "*jure gentium*," from a state of captivity in war; whence slaves are called *mancipia, quasi manu capti*. The conqueror, say the civilians, had a right to the life of his captive; and, having spared that, has a right to deal with him as he pleases. But it is an untrue position, when taken generally, that by the law of nature, or nations, a man may kill his enemy: he has only a right to kill him, in particular cases; in cases of absolute necessity, for self-defence; and it is plain this absolute necessity did not subsist, since the victor did not actually kill him, but made him prisoner. War is itself justifiable only on principles of self-preservation; and therefore it gives no other right over prisoners but merely to disable them from doing harm to us, by confining their persons: much less can it give a right

(*a*) Pa. 127.

(*b*) *Servi aut sunt, aut nascuntur: sunt jure gentium, aut jure civili: nascuntur ex ancillis nostris. Inst.* 1, 3, 4.

(*c*) Montesq. Sp. L. xv. 2.

to kill, torture, abuse, plunder, or even to enslave, an enemy, when the war is over. Since therefore the right of *making* slaves by captivity depends on a supposed right of slaughter, that foundation failing, the consequence drawn from it must fail likewise. But, secondly, it is said that slavery may begin "*jure civili*;" when one man sells himself to another. This, if only meant of contracts to serve or work for another, is very *just: but when applied to strict slavery, in the sense of the [*424] laws of old Rome or modern Barbary, is also impossible. Every sale implies a price, a *quid pro quo*, an equivalent given to the seller in lieu of what he transfers to the buyer: but what equivalent can be given for life, and liberty, both of which, in absolute slavery, are held to be in the master's disposal? His property also, the very price he seems to receive, devolves *ipso facto* to his master, the instant he 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 hereditary: "*servi nascuntur*;" the children of acquired slaves are *jure naturæ*, 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 one's self, can by the law of nature and reason reduce the parent to slavery, much less can they reduce the offspring.

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 and 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 (*d*). And now it is laid down (*e*), 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, and his property (1). Yet, with regard to any right which the master may have lawfully acquired 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 sub- [*425] jection for life, which every apprentice submits to for the space of seven years, or sometimes for a longer term (2). Hence too it follows, that

(*d*) Stat. 3 and 4 Edw. VI. c. 16. (*e*) Salk. 666.

(1) So if a slave escape to any island belonging to England, or to an English ship not lying within those parts where slavery is allowed, as in our West India islands, East Florida, &c. he becomes a freeman, and no action is sustainable by the person to whom he belonged against the person who harbours him. 2 B. & Cres. 448. 3 B. & A. 353. and see post, next note.

(2) Mr. Christian, in his note, observes, "the meaning of this sentence is not very intelligible. If a right to perpetual service can be acquired lawfully at all, it must be acquired by a contract with one who is free, who is *sui juris*, and competent to contract. Such a hiring may not perhaps be illegal and void. If a man can contract to serve for one year, there seems to be no reason to prevent his contracting to serve for one hundred years, if he should so long live: though, in general, the courts would be inclined to consider it an improvident engagement, and would not be very strict in enforcing it. But there could be no doubt but such a contract with a person in a state of slavery would be absolutely null and void."

It has however been decided, that a contract by a slave with a person to serve him, in consideration of his purchasing his freedom, is binding.

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 obligation between master and servant, on account of the alteration of faith in either of the parties: but the slave is entitled to the same protection in England before, as after, baptism; and, whatever service the heathen negro owed of right to his American master, by general not by local law, the same, whatever it be, is he bound to render when brought to England and made a Christian (3,) (4).

(3) We might have been surprised, that the learned commentator should condescend to treat this ridiculous notion and practice with so much seriousness, if we were not apprized, that the Court of Common Pleas, so late as the 5 W. and M. held, that a man might have a property in a negro boy, and might bring an action of trover for him, *because negroes are heathens*. 1 *Ld. Ray.* 147. A strange principle to found a right of property upon!

But it was decided in 1772, in the celebrated case of James Somersett, that a heathen negro, when brought to England, owes no service to an American or any other master. James Somersett had been made a slave in Africa, and was sold there; from thence he was carried to Virginia, where he was bought, and brought by his master to England; here he ran away from his master, who seized him, and carried him on board a ship, where he was confined, in order to be sent to Jamaica to be sold as a slave. Whilst he was thus confined, Lord Mansfield granted a *habeas corpus*, ordering the captain of the ship to bring up the body of James Somersett, with the cause of his detainer. The above-mentioned circumstances being stated upon the return to the writ, after much learned discussion in the Court of King's Bench, the court were unanimously of opinion, that the return was insufficient, and that Somersett ought to be discharged. See Mr. Hargrave's learned argument for the negro in 11 *St. Tr.* 340; and the case reported in *Lofft's Reports*, 1. In consequence of this decision, if a ship loaden with slaves was obliged to put into an English harbour, all the slaves on board might and ought to be set at liberty. Though there are acts of parliament which recognize and regulate the slavery of negroes, yet it exists not in the contemplation of the common law; and the reason that they are not declared free before they reach an English harbour, is only because their complaints cannot sooner be heard and redressed by the process of an English court of justice.

Liberty by the English law depends not upon the complexion; and what was said even in the time of Queen Elizabeth, is now substantially true, that the air of England is too pure for a slave to breathe in. 2 *Rushw.* 468.

(4) The traffic in slaves was formerly a principal branch of commerce between our colonies and the coast of Africa, but was made illegal and abolished by the 47 Geo. III. sess. 1. c. 36. which imposed severe penalties on those concerned in it; viz. a penalty of 100*l.* for every slave purchased, besides the forfeiture of the ship. This act not having the desired effect, the statute 51 Geo. III. c. 23. was afterwards passed, which makes it a felony for any subject of the realm, or a person being within any of his majesty's territories, to be concerned in the slave trade after the 1st June, 1811; the punishment being either for a term not exceeding fourteen years, or confinement and hard labour for a term not exceeding five years, nor less than three, at the discretion of the court before which the offender should be convicted.

By the 54 Geo. III. c. 59. vessels condemned for breach of laws relating to the slave trade, are entitled to the privilege of prize ships, and to be registered accordingly.

By the statute 55 Geo. III. c. 172. provision is made for the support of captured slaves during the period of adjudication.

By the 58 Geo. III. c. 59. some regulations are made as to importing slaves into certain British territories in South America from the Bahamas, &c.

By the 59 Geo. III. c. 120. sess. 1. provisions are made for the establishing a registry of colonial slaves in Great Britain; and besides these acts, there are various others connected with treaties for the suppression of the slave trade carried on by foreign nations, viz. the 58 Geo. III. c. 36. 58 Geo. III. c. 85. (rep. as to sess. 10, 11. and amended by and to be construed as one act by the 59 Geo. III. c. 17.) 59 Geo. III. c. 16. 1 & 2 Geo. IV. c. 99. All the prior statutes were repealed, and the law consolidated, by 5 Geo. IV. c. 113.

It is to be observed, that in the West India islands, and parts of the South American settlements, slavery is still allowed, and the right of property in such slaves is recognized by the laws of this country, see Dodson, 81. 91; and if a party detain or harbour a slave in a country where slavery is lawful, an action may be brought in this country for such detainer, 2 Lord Raym. 1274. 3 B. & A. 353; and where a British subject wrongfully seized a cargo of slaves, the property of a foreigner on board a ship then employed by him in carrying on the African slave trade, it was held the foreigner might sue here for such wrongful seizure. 3 B. & A. 353. It lies upon the plaintiff to prove in such actions, that at the

I. The first sort of servants, therefore, acknowledged by the laws of England, are *menial servants*; so called from being *intra mœnia*, 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 (*f*); 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 (*g*) (5): but the contract may be made for any

(*f*) Co. Litt. 42. (*g*) E. N. B. 168.

time when the injury was committed, the slaves were his by the positive law of the place where they then were. 2 Salk. 666. 3 B. & A. 353. 2 B. & C. 448.

On the other hand, if a master brings his slave or the slave escape to a place where slavery is unlawful, no action is maintainable against another person for detaining or harbouring the slave, because the slave is not obliged to return to the service from which he has escaped, see Salk. 666; and where certain persons who had been slaves in a foreign country where slavery was tolerated, escaped thence, and got on board a British ship of war on the high seas, it was held, that a British subject resident in that country, who claimed the slaves as his property, could not maintain an action against the commander of the ship for harbouring the slaves after notice. 2 B. & C. 448.

Though a person ceases to be a slave the instant he arrives in England, yet a servant who comes over from the West Indies, where he has been a slave, and continues in the service of his master in England without any agreement for wages, is not entitled to any on any implied promise. 3 Esp. Rep. 3.

So where an infant slave in the West Indies executed an indenture, by which he covenanted to serve B. for a certain time as his servant, and B. covenanted to do certain things on his part, and B. then came to England with the slave, it was held, that a third person was liable to an action for seducing such servant from his master's employ. 2 Hen. Bla. 511.

Lord Stowell held, that though a slave could not be held in subjection while in England, his protection ceased as soon as he returned to a colony where slavery was allowed. Slavery is allowed in some of the U. S., in others it is prohibited; but in all it is considered an evil which the people would gladly remove if a safe and practicable mode of doing it could be adopted. It was abolished in New-York, 5 July, 1827. (Laws of 1817, p. 144.) A slave fleeing from a state which permits slavery to one that prohibits it, must be delivered up on the claim of his master. Const. U. S. Art. 4. Sect. 2. § 3. Story's laws, 285. By a law of the U. S., passed in 1820, it is made piracy in any *citizen* of the U. S. to be engaged in the slave-trade on board a foreign ship, or for *any* one to be so engaged in a ship belonging in whole or in part to citizens of the U. S.

(5) This doctrine does not apply to *domestic* servants in general. On the hiring of a menial servant, no particular time is limited for his remaining in the service, though there is an express contract to pay at the rate of a certain sum per annum; and yet, notwithstanding this, we find instances of servants engaged under such a hiring, recovering for wages before the expiration of the year, which could not be the case if the hiring was for an entire year; for if the contract were for a year's service, the year's service must be completed before the servant could sue for his wages See 2 Stark. 257. 3 Mod. 153. Salk. 65. S. C. 6 T. R. 320. S. P. also the case of Writh v. Viner, in Vin. Abr. vol. 3. p. 8. tit. Apportionment, per Ashurst J. in Cutter v. Powell. 6 T. R. 326. "With regard to the common case of an hired servant, such a servant, though hired in a general way, is considered to be hired with reference to the general understanding upon the subject, that the servant shall be entitled to his wages for the time he serves, though he do not continue in the service during the whole year." Where there is an express contract that a month's warning shall be given, or a month's wages paid, such agreement is binding; and unless the master misconduct himself, or the servant be disobedient, must be observed. But where the hiring is general, there is no implication that *any warning* shall be given, and either party may determine the service at any time. It is however reported to have been decided by lord Kenyon at nisi prius, that if a servant be hired generally, and the master turn him away without warning, or previous notice, and there is no fault or misconduct in the servant to warrant it, he ought to have the allowance of a month's wages. 3 Esp. Rep. 235.

"In 12 J. 135, it was held that one who was employed to work at spinning for a year, and was to be paid a certain price per run, and who left the service before the year, was not entitled to any wages. So also, 13 Johns. 390, a sailor deserting the ship, contrary to the shipping articles, after the arrival, but before the discharge of her cargo, was held to have forfeited his claim to wages. The same rule would probably be applied in this state to domestic servants, the contract being considered entire, and they not entitled to wages unless they served out the time agreed on." Mr. Lee, however, in his note says, "Yet the observation of Ashurst, in Cattes v. Powell, 6 T. R. 326, seems more within the reason of the law, viz. that a common servant, hired in the general way, shall be entitled to wages for the time he serves, though he do not continue in the service for the whole year. Still the law appears to be, that a *domestic* servant, at a

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 in husbandry or certain specific trades, for the promotion of honest industry (6); and no master can put away his servant, or servant leave his master, after being so retained, either before or at the end of his term, without a quarter's warning; unless upon
[*426] *reasonable cause, to be allowed by a justice of the peace (*h*) (7): 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. 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 (*i*) children of poor persons may be apprenticed out by the overseers, with consent of two justices, till twenty-one 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 (*k*) (8); for which purposes our statutes have made the indentures obligatory, even though such parish-apprentice be a minor (*l*). Apprentices to trades may be discharged on reasonable cause, either at the request of themselves or masters, at the quarter-sessions, or by one justice, with appeal to the sessions (*m*), 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 (*n*): and parish-apprentices may be discharged in the same manner, by two justices (*o*). But if an apprentice, with whom less than ten pounds hath been given, runs away from his master, he is compellable to serve out his time of absence, or make satisfaction for the same, at any time

(*h*) Stat. 5 Eliz. c. 4.
(*i*) Stat. 5 Eliz. c. 4. 43 Eliz. c. 2. 1 Jac. I. c. 25. 7 Jac. I. c. 3. 8 and 9 W. and M. c. 30. 2 and 3 Ann. c. 6. 4 Ann. c. 19. 17 G. II. c. 5. 18 G. III. c. 47.*
(*k*) Salk. 57, 491.
(*l*) Stat. 5 Eliz. c. 4. 43 Eliz. c. 2. Cro. Car. 179.
(*m*) Stat. 5 Eliz. c. 4.
(*n*) Salk. 67.
(*o*) Stat. 20 Geo. II. c. 19.

* Apprentices enter into the enactments of numerous other statutes. The 32, c. 57; 33, c. 55; 42, cc. 46 and 73; 51, c. 30; 54, cc. 96 and 107; 56, c. 139; all G. III.: and 1 and 2, c. 42; and 4, c. 34; statutes of his present majesty's reign. These, together with the cases, are amply abridged in Chetwynde's Burn's Justice.

yearly hiring, is entitled to a month's notice or wages, if discharged without cause. See Beeston *v.* Collyer, 2 C. and P. 607. The master is not liable for medical or surgical treatment of his domestic servant. See Wennall *v.* Adney, 3 B. P. 247; Newby *v.* Wiltshire, 2 Esp. 739; also Atkins *v.* Banwell, 2 East. 505; also stat. 35 G. III. c. 100, s. 2.

(6) There is no such provision in New-York.

(7) Servants in husbandry are frequently hired by the year from Michaelmas, and this is an entire hiring. 2 Stark. 257.

It should seem the master is justified in dismissing a servant of this description, if he disobey his orders, or be guilty of other misconduct, without going before a justice of the peace; 2 Stark. 256. Cald. 14; as if the master, just before the servant's usual hour of dinner, order the servant to take his horses to a small distance before he dines, and the servant refuse, and afterwards does not submit; and such servant cannot recover any proportion of his wages. 2 Stark. 256. So if a single female, yearly servant, at any time during the year appear with child, the master may turn her away. Cald. 11. 14. So if a servant repeatedly sleep out at night without leave. 3 Esp. R. 235.

(8) The parish officers, with the assent of two justices, may bind a parish apprentice to a person who resides out of their parish, if he occupies an estate in the parish. 3 T. R. 107. Or to partners, who reside out of the parish, though some of the partners are resident upon the partnership property within the parish. 7 T. R. 33.

within seven years after the expiration of his original contract (*p*) (9), (10).

3. A third species of servants are *labourers*, who are only hired by the day or the week, and do not live *intra mœnia*, as *part of the family; concerning whom the statutes before cited (*q*) have 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 in 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 (11). [*427]

4. 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 (*r*) (12). In the next place persons serving seven years as apprentices to any trade, have an exclusive right to exercise that trade in any part of England (*s*). 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 (13). 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 allege, that unskilfulness in trade 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 (14); but that no one would be induced to undergo a seven years' servitude, if others, though equally skilful, were allowed the same advantages without having undergone the same discipline: and [*428]

(*p*) Stat. 6 Geo. III. c. 26.
(*q*) Stat. 5 Eliz. c. 4. 6 Geo. III. c. 26,
(*r*) See page 364.
(*s*) Stat. 5 Eliz. c. 4, § 31.

(9) For the particular points, and much in detail, see the title Apprentice, in Sir Geo. Chetwynde's Burn.

(10) The 2 R. S. p. 154, provides for the voluntary binding to trades of males till 21 years of age, and of females till 18, with the consent of parent or guardian, or of the overseers of the poor and other officers. The county superintendents of the poor, or the overseers of the poor of a town or city, with the consent of two justices, or of other officers named, may, it would seem, without the assent of the child, bind out any child under those ages, who may be chargeable, or whose parents may be chargeable to the county or town; but it is presumed that no one could be compelled to receive such child.

(11) There is no such provision in New-York.

(12) See the text and notes as to settlement, p. 364, ante.

(13) They at last succeeded; and the statute is now repealed, in this respect, by stat. 54 G. III. c. 96.

(14) This statute was not enacted only that workmen should be skilful, but also that youth should not be nourished in idleness, but brought up and educated in lawful sciences and trades. 11 *Co.* 54.

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 (*t*): for trading in a country village, apprenticeships are not requisite (*u*): and following the trade seven years without any effectual prosecution, either as a master or a servant, is sufficient without an actual apprenticeship (*w*).

A master may by law correct his apprentice for negligence or other misbehaviour, so it be done with moderation (*x*): though, if the master or master's wife beats any other servant of full age, it is good cause of departure (*y*) (15). 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 (*z*) (16).

(*t*) Lord Raym. 514.
(*u*) 1 Ventr. 51. 2 Keb. 583.
(*w*) Lord Raym. 1179. Wallen *qui tam* v. Holton. Tr. 33 Geo. II. (by all the Judges.)
(*x*) 1 Hawk. P. C. 130. Lamb. Eiren. 127. Cro. Car. 179. 2 Show. 289.
(*y*) F. N. B. 168. Bro. *Abr. t. Labourers*, 51. *Trespass*, 349.
(*z*) Stat. 5 Eliz. c. 4.

(15) But he cannot delegate that authority to another. 9 Co. 76. Where a master in correcting his servant causes his death, it shall be deemed homicide by misadventure; yet if in his correction he be so barbarous as to exceed all bounds of moderation, and thereby occasion the servant's death, it is manslaughter at least, and if he make use of an instrument improper for correction, and apparently endangering the servant's life, it is murder. Hawk. b. 1. c. 29. s. 5. And if the servant depart out of his master's service, and the master happen to lay hold of him, yet the master in this case may not beat or forcibly compel his servant against his will to retain or tarry with him or do his service, but either he must complain to the justices of his servant's departure, or he may have an action of covenant against the third person who covenanted for his faithful services. Dalt. c. 121. p. 281, 282. These observations do not apply to domestic servants. It is an indictable offence in a master to neglect supplying necessaries to an infant servant, or apprentice, unable to provide for itself. Russell & R. Cro. C. 20. 2 Camp. 650. 1 Leach, 137.

(16) Servants murdering their masters are ousted of the benefit of clergy, 12 Hen. VII. c. 7. s. 21, and the same is deemed petty treason, 25 Ed. III. st. 5. c. 2. s. 2.

To prevent masters being imposed upon by the giving of false characters, the 32 Geo. III. c. 56. was passed to punish servants and others obtaining and giving such characters. By this act a penalty is imposed on a person falsely personating his master or mistress, or his or her agent, or falsely asserting a servant to have been retained for other than the actual period or capacity, or falsely asserting that a servant left or was discharged from any service at other than the actual time, or falsely asserting that he had not been hired in any previous service, or offering as servant pretending to have served in any service in which he has not served, or offering as servant with a forged certificate of character, or falsely pretending not to have been hired in any previous service. See post 428. n. 14.

We have already considered what time a servant is compelled to stay in service. See ante 425, 6. notes 5 & 7; and the amount of the wages payable for such service will be found treated of in note 18 post.

As a general rule, a servant *who receives reward* for his services, is bound to observe with care and diligence the interests of his master, and must exert the same vigilance and attention his master would have done. 5 B. & A. 820. 5 Rep. 14. 1 Leon. 88. Moore, 244. He must adhere to the reasonable orders and instructions of his master, and the neglect so to do will render him responsible for the consequence, and the mere intention of doing a benefit for his master will furnish him no excuse for any injury that may arise from a deviation from his specific instructions. Dyer. 161. 1 Hen. Bla. 159. Malyne, 154. 4 Camp. 183. A servant acting without reward is bound only to take the same care in the management of his master's concerns as a reasonable attention to his own affairs would dictate to him in the management thereof; and a gratuitous servant without reward is not liable for a mere nonfeazance. 2 Lord Ray. 909. 5 T. R. 143. 1 Esp. Rep. 74. A servant is not liable for the loss of goods by robbery, if without his fault. 1 Inst. 9.

At common law where goods are delivered to a servant for a specific purpose, he may commit larceny by appropriating them to his own use, for his possession is still in law that of his master. See 1 Leach, 251. 2 Leach, 699, 870. Besides this, by the 21 Hen. VIII. c. 7, servants withdrawing with goods of their master's, worth 40*s.*, are deemed felons, if such goods have been intrusted with them to keep. In the 2d section there is a saving for apprentices during apprenticeship, and offenders not eighteen years old. Clergy is taken away from this offence by the 27 Hen. VIII. c. 17, and both these acts are made perpetual by the 28 Hen. VIII. c. 2, repealed by 1 Mary, sess. 1. c. 1. s. 5, and the 21 Hen. VIII. c. 7. is revised and made perpetual by the 5 Eliz. c. 10. s. 3; so that at this day the offence is a clergyable felony. The defendant

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 (*a*); it being impossible for any magistrate to be a judge of the employment of menial servants, or of course to assess their wages (17), (18).

(*a*) 2 Jones, 47.

must be a servant at the time of delivery and running away, to render them offenders within the meaning of this act. Dyer, 5. Hawk. b. 1. c. 33. s. 12. East. P. C. 562. Dalt. J. c. 58.

But these laws only apply where the goods were intrusted to a servant by his master, and not where the servant does not so obtain them. Thus at common law a cashier of the bank could not be guilty of felony in embezzling an India bond which he had received from the court of chancery, and was in his actual as well as constructive possession. 1 Leach, 28. So if a clerk received money of a customer, and, without at all putting it in the till, converted it to his own use, he was guilty only of a breach of trust; though had he once deposited it, and then taken it again, he would have been guilty of felony. 2 Leach, 835. This doctrine occasioned the 39 Geo. III. c. 85, which declared embezzlement by every kind of servant in the course of their particular employment, to be felonious stealing, and punished it with transportation for seven years.

Workmen in particular trades specified in the 22 Geo. II. c. 27. purloining, secreting, selling, pawning, exchanging, &c. materials, &c. of manufacturer; or tools, &c. (17 Geo. III. c. 56.) are by the former act liable to punishment: so by 22 Geo. II. c. 27. s. 7. and 17 Geo. III. c. 56. s. 7. 16. such workmen, not returning materials not used up in eight days, if required, or (by sec. 8.) neglecting to work up materials for eight days successively, or taking fresh materials, or employ eight days before work completed, are liable to punishment.

On account of the higher importance of property under the care of great public companies, it has been protected by yet severer provisions. The 53 Geo. III. c. 59. s. 1. inflicts a punishment on servants embezzling money issued for public services, or for fraudulently applying it to other than public services, or on revenue officers making a false statement of sums collected by them as such, (id. sec. 2.); so by 52 Geo. III. c. 63. s. 1 and 2. embezzling securities for money or stock, or orders for payment of money, or other effects deposited with bankers or agents, or of money so deposited for investment in the funds, or other special purpose, is punished.

At common law, persons employed in the *post-office* have no special property in the letters committed to their charge, which may prevent their stealing them from amounting to larceny. 1 Leach, 1. But now the offence of stealing letters or their contents, or buying or receiving the latter, is provided against by the 52 Geo. III. c. 143. s. 2. 4.

(17) The statutes authorizing the interference of the magistrate in such matters, are repealed by stat. 53 G. III. c. 40.

(18) The amount of wages to menial servants must depend on the contract between them and the master. In general a contract to pay a sum certain per annum, in consideration of services to be performed, is an entire contract, and without a full year's service, or readiness to perform such service, no part of the salary can be demanded; but in the case of a servant hired in the general way, though hired expressly at so much per annum, he is considered to be hired with reference to the general understanding on the subject, viz. that he shall be entitled to his wages for the time he shall serve, though he do not continue in the service during the whole year, and if he die before the end of the year his personal representatives will be entitled to a proportionable part of the wages due to him at the time of his death. See 6 T. R. 320. Worth v. Vines, in Vin. Ab. vol. 3. p. 8. tit. Apportionment. 3 Mod. 153. Salk. 65. S. C. 2 Stark. 257, But if the contract be expressly for a year's service, and not at so much per annum, the year must be completed before the servant is entitled to be paid, 2 Stark. 257; though indeed the servant might sue the master for refusing to continue him in his service. By the late bankrupt act, 6 Geo. IV. c. 16. s. 48. a servant is to be paid six months' wages in full under the commission, and may prove for the residue.

It is a general rule that if there has been no beneficial service there shall be no pay; but if some benefit, however slight, has been derived, though not to the extent expected, this shall go to the amount of the plaintiff's demand, leaving the defendant to his action for negligence. 3 Stark. 6. 1 Camp. 39, 190. 7 East, 484. But if an auctioneer employed to sell an estate is guilty of negligence, whereby the sale becomes nugatory, he is not entitled to any compensation for his services, 3 Camp. 451; and a factor or agent is not entitled to any salary where he acts against the interest of his principal, or with misconduct. 1 Com. on Contr. 271. 4. s. 8. Bro. P. C. 399. 8vo. edition. 8 Ves. 371. 11 Ves. 355. 3 Camp. 451. 3 Taunt. 32; but it has lately been decided that a spirit broker is entitled to a commission, though the sale he made be ineffectual. 3 Stark. 161.

A servant cannot maintain an action against his master for not giving him a character. 3 Esp. 201. If the master gives a character which is false and slanderous, the servant might sue the master for it; but a master who

III. Let us, lastly, see how strangers may be affected by this [*429] 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 (*b*). 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 (*c*). A master likewise may justify an assault in defence of his servant, and a servant in defence of his master (*d*): 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 (*e*) (19). 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 (*f*). 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 (20).

(*b*) 2 Roll. Abr. 115.
(*c*) 9 Rep. 113.
(*d*) 2 Roll. Abr. 546.
(*e*) 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.
(*f*) F. N. B. 167, 168.

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honestly and fairly gives the real and true character of a servant to one who asks his character under pretence of hiring him, is not liable to an action for so doing, (Bull. N. P. 8. 1 T. R. 110.); but if done maliciously, and with an intent to injure a servant, it is otherwise. 3 B. & P. 587. The law will in general presume that a servant has, in the ordinary course of his business, performed his duty, and therefore a servant in the habit of daily or weekly accounting for money received for his master, will be presumed to have paid over money received. 3 Campb. 10. 1 Stark. 136.

(19) The case of Tickell v. Read, Lofft R. 215, obviated all previous doubts upon these positions.

(20) In addition to these observations of the learned Commentator, it may be as well here to observe, that in general all contracts entered into by a party through the intervention of a servant or agent properly authorized, may be taken advantage of by him, Paley, 225; and though in point of law the master and servant, or principal and agent, are considered as one and the same person, yet the master or principal is the person who should be regarded in the entering into, and execution of, such contracts; but though a servant depart from his authority so as to discharge the master, or the servant does not disclose his master's name, yet the latter may in general adopt the contract, if he think fit, and sue for any breach of it, 3 M. & S. 362. 7 T. R. 359. 2 Stark. 443; but there must in all cases exist some degree of authority. Bull. N. P. 130. 1 Moore, 155. 1 Burr. 489.

If an apprentice earn any thing, the master is entitled to it. 1 Salk. 68. 6 Mod. 69. Co. Lit. 117. a. n. & see Cro. Eliz. 638. 661. 746. And an owner of a ship is entitled to all the earnings of his captain, however irregularly obtained. 3 Campb. 43. And see Gilb. Evid. 94. ed. 1761. 1 Stra. 595. S. C. 2 Stra. 944. S. P. A master may also sue in trespass or case for the consequential damages of seducing his servant. Peake C. N. P. 55. 2 T. R. 167. 6 East, 390. 3 Wils. 18. 2 N. R. 476. Slight evidence of acts of service will be sufficient. 2 T. R. 168. Peake N. P. 55. It is not essential to support this action that the defendant knew of the party seduced being plaintiff's servant. Peake N. P. 55. Peake Law of Ev. 334. Willes, 577. See post, as to seducing daughters. So an action on the case may be maintained against a person who continues to employ the master's servant after notice, though the defendant did not procure the servant to leave his master, or know when he employed him that he was the servant of another. 6 T. R. 221. 5 East, 39. n. A master may bring an action on the case for enticing away his servant or apprentice, knowing him to be such, 6 Mod. 182. Peake C. N. P. 55. Peake Law Evid. 334. Bac. Ab. tit. Master and Servant, O. 3. Bla. Rep. 142.

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* (*g*). Therefore, if the *servant commit a trespass by the command or encouragement of his master, the master shall be guilty of it: though the servant is not thereby 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 (*h*): 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 (21); *nam, qui non prohibet, cum prohibere possit, jubet* (22). 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 (*i*): 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. [*430]

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

(*g*) 4 Inst. 109.
(*h*) Noy's Max. c. 43.
(*i*) 1 Roll. Abr. 95.

Cowp. 54; and, the defendant cannot avail himself of any objection to the indenture of apprenticeship or contract of hiring. 2 H. Bla. 511. 7 T. R. 310, 1, 4. 1 Anst. 256. But no action can be maintained for harbouring an apprentice as such, if the master to whom he was bound was then not a housekeeper, and of the age of twenty-four years. 4 Taunt. 876. And a master cannot maintain an action for seducing his servant after the servant has paid him the penalty stipulated by his articles for leaving him. 3 Burr. 1345. 1 Bla. Rep. 387. The master may, in these cases, waive his action for the tort, and sue in assumpsit for the work and labour done by his apprentice or servant, against the person who tortiously employed him. 1 Taunt. 112. 3 M. & S. 191. S. P.

If an injury be committed to goods in the possession of a mere servant, yet if the master have the right of immediate possession he may sue. 2 Saund. 47. 7 T. R. 12.

In general a mere servant with whom a contract is made on the behalf of another, cannot support an action thereon, 2 M. & S. 485. 490. 3 B. & P. 147. 1 H. Bla. 84. Owen, 52. 2 New Rep. 411. a. 2 Taunt. 374. 3 B. & A. 47. 5 Moore, 270; but when a servant has any beneficial interest in the performance of the contract for commission, &c. as in the case of a factor, auctioneer, &c. 1 T. R. 112. 1 M. & S. 147. 1 H. Bla. 81. 7 Taunt. 237. 2 Marsh. 497. S. C. 6 Taunt. 65. 4 Taunt. 189, or where the contract is in terms made with him (3 Camp. 320.) he may sustain an action in his own name, in each of which cases however the master might sue, 1 H. Bla. 81. 7 T. R. 359. unless where there is an express contract under seal with the servant to pay him, when he alone can sue. 1 M. & S. 575.

In general a mere servant, having only the custody of goods, and not responsible over, cannot sue for an injury thereto, Owen, 52. 2 Saund. 47. a. b. c. d; but if the servant have a special property in the goods, as a factor, carrier, &c. for commission, he may. 2 Saund. 47. b. c. d. 2 Vin. Ab. 49. 1 Ves. Sen. 359. 1 B. & A. 59.

(21) An innkeeper is bound to restitution if the guest is robbed in his house *by any person* whatever; unless it appear that the guest was robbed by his own servant, or by a companion whom he brought with him. 8 *Co.* 33.*

(22) See post 3 book, 165; as to innkeepers' liabilities in general, Bac. Ab. Inns. An hotel keeper in London is liable as an innkeeper. 2 Chit. R. 484. 3 B. & A. 283. It has been long established law, that the innkeeper is bound to restitution if the guest is robbed in his house by any person whatever; unless it should appear that he was robbed by his own servant, or by a companion whom he brought with him. 8 Co. 33. And where an innkeeper had refused to take the charge of goods because his house was full; yet he was held liable for the loss, the owner having stopped as a guest, and the goods being stolen during his stay. 5 T. R. 273. But the inkeeper may be discharged of this general liability by the guest taking upon himself the care of his goods, or, having noticed circumstances of suspicion, neglects to exercise ordinary care in securing his property. 4 M. & S. 306. Holt. C. N. P. 209. 1 Bar. & A. 59.

* Taven, hotel, and coffee-house keepers, are deemed innkeepers. See Thompson *v.* Lacy, 3 B. and A. 283; James *v.* Osborn, 2 Chit. 484. But where the guest has the exclusive keeping and occupancy of the room or apartment, the innkeeper is not liable in case of loss. Burgess *v.* Clements, 4 M. and S. 306; and see Rooth *v.* Wilson, 1 B. and A. 59. See Tarnworth *v.* Packwood, 1 Stack. 249; and Holt. 211, cited in the above case.

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 (*k*) (23).

(*k*) Dr. and Stud. d. 2, c. 42. Noy's Max. c. 44.

(23) It is a general rule of law, that all contracts made by a servant within the scope of his authority, either express or implied, bind the master; and this liability of the master is not founded on the ground of the master being *pater familiæ*, but merely in respect of the authority delegated to the servant. See 3 Wils. 341. 2 Bla. Rep. 845. Com. Dig. tit. Merchant, B. C. Bac. Ab. tit. Master and Servant, 3 Esp. Rep. 235.

Much difficulty is experienced in practice in the application of this rule, on the question as to what amounts to a servant's acting within the authority delegated to him. The main point to be attended to in the decision of this, is to consider whether the servant was acting under a *special* or a *general* authority. A *special* agent or servant is one who is authorized to act for his master only in some particular instance; his power is limited and circumscribed. A *general* servant or agent is one who is expressly or impliedly authorized by his master to transact all his business, either universally or in a particular department or course of business. A master is not liable for any acts of a *special* agent or servant unconnected with the object of the employment, but he is liable for all the acts of a *general* agent or servant within the scope of his employment, and this even though the master may have expressly forbidden the particular act for which he is sought to be rendered liable. Thus, if a master engage a servant to take care of goods, and the servant sell them, the selling of the goods being totally unconnected with the object for which the servant had them, the sale would not bind the master. So where the chaise of the master had been broken by the negligence of his servant, and the servant desired the coachmaker, who had never been employed by the master to repair it, it was held that the master was not liable for such repairs. 4 Esp. 174. So when the master is in the habit of paying ready money for articles furnished in certain quantities to his family, if the tradesman delivers other goods of the same sort to the servant upon credit without informing the master of it, and the latter goods do not come to the master's use, he is not liable. 3 Esp. 214. 1 Show, 95. Peake N. P. C. 47. 5 Esp. 76. But, on the other hand, if a servant is employed to sell a horse, and he sells it with a warranty, the master would be liable for a breach of the warranty, because the act of warranty was connected with the act of sale, and within the scope of the servant's authority, even though he had received express directions not to make the warranty. See 3 T. R. 757. 5 Esp. 75. 1 Camp. 258. 3 Esp. 65. 3 B. & C. 38. 4 D. & R. 648. S. C. 15 East, 38. If a servant usually buys for his master on credit, and the servant buys some things without the master's order, the master will be liable; for the tradesman cannot possibly distinguish when the servant comes by order for him or not. Stra. 506. 3 Esp. N. P. Rep. 85. 114. 1 Esp. Rep. 350. 4 Esp. 174. Peake. C. N. P. 47.

In general if a party acting in the capacity of a servant or agent, discloses that circumstance, or it be known to the person with whom he contracted, such servant or agent is not liable for a breach of the contract, (12 Ves. 352. 15 East, 62. 66. Paley Princ. and Agent, 246.) even for a deceitful warranty (3 P. Wms. 278.) if he had authority from his principal to make the contract. (3 P. Wms. 279.) and see 1 Chit. on Pleading, 4 ed. 24. But if a servant or agent covenant under seal, or otherwise engage for the act of another, though he describe himself in the deed as contracting for, and on the behalf of, such other person (5 East. 148.), or he contract as if he were principal (Stra. 995. 1 B. & P. 368. 3 B. & A. 47. 2 D. & R. 307. 1 B. & C. 160. S. C. 1 Gow. 117. 1 Stark. 14. 2 East, 142.) he is personally liable, and may be sued, unless in the case of a servant contracting on behalf of government, (1 T. R. 172. 674. 1 East, 135. 582); so if a servant does not pursue the principal's authority so as to discharge the principal, he will be personally liable, 1 Eg. Ab. 308. 3 T. R. 361; or where he acts under an authority which he knows the master cannot give,

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 shoeing him, an action lies against the master, and not against the servant (24). But in these cases the damage [431]

Cowp. 565. 6; so where a servant has been authorized by his master to do an act for a third party, and he is put in possession of every thing that will enable him to complete it, and he neglects so to do, he will be personally liable to the third person; as if a servant receives money from his master to pay A, and expressly or impliedly engages to pay him, the latter may sue him on his neglect to pay it, for the servant is considered to hold it on the party's account. 14 East, 590. 2 Rol. Rep. 441. 1 B. & A. 36. 1 J. B. Moore, 74. 3 Price, 58. 16 Vesey, 443. 5 Esp. 247. 4 Taunt. 24. 1 Stark. 123. 143. 150. 372. 1 H. Bla. 218. But if the third party by his conduct shews he does not consider the servant as holding the money on his account, the agent will be discharged on properly appropriating the money to other purposes before he is called upon again by the third party to pay it over. (Holt N. P. 372.) There is a material distinction between an action against a servant for the recovery of damages for the nonperformance of the contract, and an action to recover back a specific sum of money received by him; for when a contract has been rescinded, or a person has received money as servant of another who had no right thereto, and has not paid it over, an action may be sustained against the servant to recover the money; and the mere passing of such money in account with his master, or making a rest without any new credit given to him, fresh bills accepted, or further sums advanced to the master in consequence of it, is not equivalent to the payment of the money to the principal, (3 M. & S. 344. Cowper, 565. Stra. 480); but in general, if the money be paid over before notice to retain it, the servant is not liable (Cowp. 565. Bur. 1986. Lord Raym. 1210. 4 T. R. 553. Stra. 480. Bul. N. P. 133. 10 Mod. 23. 2 Esp. Rep. 507. 5 J. B. Moore, 105. 8 Taunt. 737), unless his receipt of the money was obviously illegal, or his authority wholly void, (1 Camp. 396. 564. 3 Esp. Rep. 153. 1 Stra. 480. Cowp. 69. 1 Taunt. 359); where persons received money for the express purpose of taking up a bill of exchange two days after it became due, and upon tendering it to the holders and demanding the bill, find that they have sent it back protested for non-acceptance to the persons who indorsed it to them, it was held that such persons having received fresh orders not to pay the bill, were not liable to an action by the holders for money had and received, when upon the bill's being procured and tendered to them, they refused to pay the money. (1 J. B. Moore, 74. and 14 East, 582. 590.) A person who as a banker receives money from A to be paid to B, and to other different persons, cannot in general be sued by B for his share, (1 Marsh. Rep. 132); and an action does not lie against a mere collector, trustee, or receiver, for the purpose of trying a right in the principal, even though he has not paid over the money. (4 Burr. 1985. Paley, 261. and cases there cited. 1 Selw. N. P. 3 ed. 78. 1 Campb. 396. 1 Marsh. 132. Holt C. N. P. 641.) An auctioneer and stakeholder, who are considered as trustees for both parties, are bound to retain the money till one of them be clearly entitled to receive it, and if he unduly pay it over to either party not entitled to it, he will be liable to repay the deposit or stake. (5 Burr. 2639.) But in a late case it has been held, that whilst the stake remains in the hands of the stakeholders, either party may recover back from him his share of the deposit. 7 Price, 54.

Servants of government are not in general personally liable, and an officer appointed by government avowedly treating as an agent for the public, is not liable to be sued upon any contract made by him in that capacity, whether under seal or by parol, unless he make an absolute and unqualified undertaking to be personally responsible (1 T. Rep. 172. 674. 1 East. 135. 3 B. & A. 47. 2 J. B. Moore, 627), and the public money actually passes through his hands or that of his agent, for the purpose, or with the intent, that it should be applied to the fulfilment of his fiduciary undertakings, he is not personally liable. (3 B. & B. 275. 3 Meriv. 758. 1 East, 135. 583.) The bank of England are the servants of the public, and liable as a private servant for any breach of duty. 1 R. & M. 52. 2 Bingham. 393.

In some cases where there is no responsible or apparent principal to resort to, the agent will be liable; as where the commissioners of a navigation act entered into an agreement with the engineer they were held liable, (Pal. 251. 1 Bro. Ch. Rep. 101. Hardr. 205); and commissioners of highways are personally liable for work thereon, though the surveyor is not, (1 Bla. Rep. 670. Amb. 770); and in some cases the agent alone can be sued, as where a seller chooses to give a distinct credit to a person known to him to be acting as agent for another, (15 East, 62); and a sub-agent cannot sue the principal with whom he had no privity. (6 Taunt. 147. 1 Marsh. 500.)

(24) This general doctrine is also found, 1 Roll. Abr. 95, but no confirmation appears in the modern books. That case would lie against the master is undoubted, and that the master would be entitled to recover the damages paid by him against his servant, is also undoubted; but there is less reason for denying the primary liability of the servant for *crassa negligentia*, since circuity of action would thereby be avoided. The ground of presumed non-liability of the servant might be this, namely, that between the stranger and the servant there was no contract, express or implied, to perform the work skilfully, but between the master and him there was. This view of the question might, perhaps, obviate in some degree the doubt expressed by a judicious editor of the Commentaries. See n. 14, p. 431, vol. i. Coleridge's edition.

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 (*l*), 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 servant's carelessness. But if such fire happens through negligence of any servant, whose loss is commonly very little, such servant shall forfeit 100*l.* to be distributed among the sufferers; and, in default of payment, shall be committed to some workhouse, and there kept to hard labour for eighteen months (*m*) (25). 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 (*n*): for the master hath the superintendence and charge of all his household. And this also agrees with the civil law (*o*); which holds that the *pater familias*, in this and similar cases, "*ob alterius culpam tenetur, sive servi, sive liberi* (26)."

(*l*) Noy's Max. c. 41.

(*m*) 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.

(*n*) Noy's Max. c 44.

(*o*) *Ff.* 9, 3, 1. *Inst.* 4, 5, 1.

(25) Repealed by stat 14 G. III., which re-enacted the provision found in stat. 6 Ann. c. 3.

(26) A master is liable to be sued for the injuries occasioned by the neglect or unskilfulness of his servant whilst in the course of his employment, though the act was obviously tortious and against the master's consent; as for fraud, deceit, or any other wrongful act. 1 Salk. 289. Cro. Jac. 473. 1 Stra. 653. Roll. Ab. 95. l. 15. 1 East, 106. 2 H. Bla. 442. 3 Wils. 313. 2 Bla. Rep. 845. sed vid. Com. Dig. tit. Action on the case for deceit, B. A master is liable for the servant's negligent driving of a carriage or navigating a ship, 1 East, 105, or for a libel inserted in a newspaper of which the defendant was a proprietor. 1 B. & P. 409. The master is also liable not only for the acts of those immediately employed by him, but even for the act of a sub-agent, however remote, if committed in the course of his service, 1 B. & P. 404. 6 T. R. 411; and a corporate company are liable to be sued for the wrongful act of their servants, 3 Camp. 403; when not, see 4 M. & S. 27. But the wrongful or unlawful acts must be committed in the course of the servant's employment, and whilst the servant is acting as such; therefore a person who hires a post-chaise is not liable for the negligence of the driver, but the action must be against the driver or owner of the chaise and horses, 5 Esp. 35. Laugher v. Pointer, 4 B. & C. (sed vid. 1 B. & P. 409.) and it should seem he would be liable if the chaise and not the coachman or horses were hired. 4 B. & A. 590. A master is not in general liable for the criminal acts of his servant wilfully committed by him. 2 Stra. 885. 29 Hen. VI. 34; neither is he liable if the servant *wilfully* commit an injury to another; as if a servant wilfully drive his master's carriage against another's,* or ride or beat, a distress taken damage feasant. 1 East, 106. Rep. T. H. 87. 3 Wils. 217. 1 Salk. 282. 2 Rol. Ab. 553. 4 B. & A. 590. In some cases, however, where it is the duty of the master to see that the servant acts correctly, he may be liable criminally for what the servant has done; as where a baker's servant introduced noxious materials in his bread. 3 M. & S. 11. 1 Ld. Raym. 264. 4 Campb. 12. However, on principles of public policy, a sheriff is liable civilly for the trespass, extortion, or other wilful misconduct of his bailiff. 2 T. R. 154. 3 Wils. 317. 8 T. R. 431.

A servant cannot in general be sued by a third person for any neglect or nonfeasance which he is guilty of when it is committed on behalf of, and under the express or implied authority of, his master; thus if a coachman lose a parcel, his master is liable, and not himself. 12 Mod. 488. Say. 41. Roll. Ab. 94. pl. 5. Cowp. 403. 6 Moore, 47. So a servant is not liable for deceit in the sale of goods, done to any persons by the act of the driver, whether such act were wilful, negligent, or otherwise. 1 R. S. 696. § 6.

* In New-York the owners of carriages for the conveyance of passengers on a turnpike or public highway, are liable for all injuries

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 [432] 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 XV.

OF HUSBAND AND WIFE (1).

THE second private relation of persons is that of marriage, which includes the reciprocal rights and 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 inquire, 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 (2). The *holiness* of the matrimonial state is left entirely to the eccle-

or for a false warranty. Com. Dig. Action sur case for deceit, B. 3 P. W. 379. Roll. Ab. 95. But he is liable for all tortious acts and wilful trespasses, whether done by the authority of the master or not. 12 Mod. 448. 1 Wils. 328. Say. 41. 2 Mod. 242. 6 Mod. 212. 6 East, 540. 4 M. & S. 259. 5 Burr. 2687. 6 T. R. 300. 3 Wils. 146. And in every case where a master has not power to do a thing, whoever does it by his command is a trespasser, Roll. Ab. 90; and this though the servant acted in total ignorance of his master's right. 12 Mod. 448. and supra. 2 Roll. Ab. 431. And an action may in some cases be supported against a servant for a misfeasance or malfeasance; thus if a bailiff *voluntarily* suffer a prisoner to escape, he would be liable. 12 Mod. 488. 1 Mod. 209. 1 Salk. 18. 1 Lord Ray. 655.

It is a general rule that no action is sustainable against an intermediate agent for damage occasioned by the negligence of a sub-agent, unless such intermediate agent personally interfered and caused the injury. 6 T. R. 411. 1 B. & P. 405. 411. Cowp. 406. 2 B. &. P. 438. 6 Moore, 47. 2 P. & R. 33.

See Johnson's Digest, title Master and Servant. Reeve's Domestic Relations, tit. Master and Servant.

(1) See in general Bac. Ab. Marriage; Com. Dig. Baron and Feme; Burn Ecc. L. Marriage; Dr. Haggard's Rep.; Phillimore's Eccles. Cases; Selwyn N. P. tit. Adultery.

No formality is made necessary to the validity of a marriage by the laws of New-York; but if a certificate be furnished by the officiating minister or magistrate, in the form prescribed by 2 R. S. 140, it is presumptive evidence of marriage. The only relationship that avoids a marriage is that between a person and his or her lineal ancestor or descendants, and also between brothers and sisters of the whole or half-blood: such marriages being declared incestuous and absolutely void, though the relatives be illegitimate. 2 R. S. 139. There is no ecclesiastical court here to compel the performance of an agreement to marry: pre-contract, therefore, it is presumed, is no impediment to a marriage with another.

(2) Therefore an *action* is sustainable for a breach of *promise to marry*, where the contract to marry was mutual, 1 Rol. Ab. 22. l. 5. 1 Sid. 180. 1 Lev. 147. Carth. 467. Freem. 95; and though one of the parties be an infant, yet the contract will be binding on the other. 2 Stra. 937. The action is sustainable by a man against a woman, Carth. 467. 1 Salk. 24. 5 Mod. 511; but an executor cannot sue or be sued. 2 M. & S. 408.

A promise to marry is not within the statute of frauds, and need not be in writing, 1 Stra. 34. 1 Lord Ray. 316. Bul. N. P. 280; nor when in writing need it be stamped. 2 Stark. 351.

With respect to the evidence to prove the contract of marriage, it has been held in a case where the promise of the man was proved, and no actual promise of the woman, that evidence of her carrying herself as consenting and approving his promise was sufficient. 3 Salk. 16. 1 Salk. 24. n. b.

And where A stated to the father of the

siastical law: the temporal courts not having jurisdiction to consider unlawful marriage as a sin, but merely as a civil inconvenience. The punishment therefore, or annulling, of incestuous or other unscriptural marriages, is the province of the spiritual courts; which act *pro salute animæ* (*a*). 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.

[*434] *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.

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 be here our business to inquire.

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 precontract; 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 of-

(*a*) Salk. 121.
(*b*) *Ff.* 50, 17, 30.
(*c*) Co. Litt. 33.

plaintiff that he had pledged himself to marry his daughter in six months, or in a month after Christmas, it was considered evidence from which a jury might infer a promise to marry generally, the proof varying from the statement in the declarations of a more particular promise. 1 Stark. 82.

A bill in equity lies to compel the defendant to disclose whether he promised to marry. Forrest Rep. 42.

If either party give to the other something, as money, &c. which is accepted in satisfaction of the promise, it is a good discharge of the contract. 6 Mod. 156.

If the intended husband or wife turns out on inquiry to be of bad character, it is a sufficient defence for rescinding the engagement; but a mere suspicion of such fact is not. Holt C. N. P. 151. 4 Esp. Rep. 256.

No bill in equity, or other proceeding, is sustainable to compel the specific performance of a promise to marry; and the 4 Geo. IV. c. 76. s. 27. enacts, that marriage shall not be compelled in any ecclesiastical court, in performance of any contract; consequently, the only legal remedy is an action at law to recover damages for the breach of contract.

It may be as well here to observe, that our law favours and encourages lawful marriages, and every contract in restraint of marriage is illegal, as being against the sound policy of the law.

Hence a wager that the plaintiff would not marry within six years was holden to be void. 10 East, 22. For although the restraint was partial, yet the immediate tendency of such contract, as far as it went, was to discourage marriage, and no circumstances appeared to shew that the restraint in the particular instance was prudent and proper; and see further 4 Burr. 2225. 2 Vern. 102. 215. 2 Eq. Ca. Ab. 248. 1 Atk. 287. 2 Atk. 538. 540. 10 Ves. 429. 1 P. Wms. 181. 3 M. & S. 463.

On the other hand, contracts in procuration of marriage are void, at least in equity. 1 Ch. Rep. 47. 3 Ch. Rep. 18. 3 Lev. 411. 2 Ohan. Ca. 176. 1 Vern. 412. 1 Ves. 503. 3 Atk. 566. Show P. C. 76. 4 Bro. P. C. 144. 8vo. ed. Co. Lit. 206. (b.) Forrest Rep. 142. and semble it would be so at law. 2 Wils. 347. 1 Salk. 156. acc. Hob. 10. cont. Persons conspiring to procure the marriage of a ward in chancery by undue means, are liable not only to be committed, but to be indicted for a conspiracy. 3 Ves. & B. 173.

fence, *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 (3). For, after the death of either of them, the courts of common law will not suffer the spiritual courts 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 (4); and that all marriages contracted by lawful persons in the face of the church, and consummated 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 (5); the farthest of which is that between uncle and niece (*f*). By the same statute all impediments arising from precontracts to other [*435]

(*d*) Co. Litt. 33.
(*e*) Salk. 548.
(*f*) Gilb. Rep. 158.

(3) Elliot v. Gurr. 2 Phil. Ecc. C. 16. And the wife is entitled to dower. 1 Moore, 225. 228. Noy. 29. Cro. Car. 352. 1 Roper, 332, 3.

(4) This act does not specify what these prohibitions are, but by the 25 Hen. VIII. c. 22. s. 3, these prohibitory degrees are stated, and it is enacted, "that no subjects of this realm, or in any of his majesty's dominions, *shall* marry within the following degrees, and the children of such unlawful marriages are illegitimate, *viz.* a man may not marry his mother or stepmother, his sister, his son's or daughter's daughter, his father's daughter by his stepmother, his aunt, his uncle's wife, his son's wife, his brother's wife, his wife's daughter, his wife's son's daughter, his wife's daughter's daughter, his wife's sister;" and by sec. 14, this provision shall be interpreted of such marriages where marriages were solemnized, and carnal knowledge had; and see the 28 Hen. VIII. c. 7. It is doubtful whether the 25 Hen. VIII. c. 22. was repealed by 28 Hen. VIII. c. 7. s. 3. and 1 Mar. sess. 2. c. 1. See Burn Ecc. L. Marriage, I.

(5) See table of Levitical degrees, Burn. Ecc. L. tit. Marriage, I. The prohibited degrees are all those which are under the 4th degree of the civil law, except in the ascending and descending line, and by the course of nature it is scarcely a possible case, that any one should ever marry his issue in the 4th degree; but between collaterals it is universally true, that all who are in the 4th or any higher degree are permitted to marry; as first-cousins are in the 4th degree, and therefore may marry, and nephew and great-aunt, or niece and great-uncle, are also in the 4th degree, and may intermarry; and though a man may not marry his grandmother, it is certainly true that he may marry her sister. Gibs. Cod. 413. See the computation of degrees by the civil law, 2 book, p. 207. The same degrees by affinity are prohibited. Affinity always arises by the marriage of one of the parties so related; as a husband is related by affinity to all the *consanguinei* of his wife; and *vice versa*, the wife to the husband's *consanguinei*: for the husband and wife being considered one flesh, those who are related to the one by blood, are related to the other by affinity. Gibs. Cod. 412. Therefore a man after his wife's death cannot marry her sister, aunt, or niece, or daughter, by a former husband. 2 Phil. Ecc. C. 359. So a woman cannot marry her nephew by affinity, such as her former husband's sister's son. 2 Phil. Ecc. C. 18. So a niece of a wife cannot after her death marry the husband. Noy. Rep. 29. But the *consanguinei* of the husband are not at all related to the *consanguinei* of the wife. Hence two brothers may marry two sisters, or father and son a mother and daughter; or if a brother and sister marry two persons not related, and the brother and sister die, the widow and widower may intermarry; for though a man is related to his wife's brother by affinity, he is not so to his wife's brother's wife, whom, if circumstances would admit, it would not be unlawful for him to marry.

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 and 3 Edw. VI. c. 23. How far the act of 26 Geo. II. c. 33 (6), 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 precontract, I leave to be considered by the canonists (7).

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 drew after them. These civil disabilities make the [*436] 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 (8). 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 (9), the second marriage is to all intents and purposes void (*g*): 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 (*h*), that "*duas uxores eodem tempore habere non licet*" (10).

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 (11); and,

(*g*) Bro. *Abr. tit. Bastardy*, pl. 8.

(*h*) *Inst.* 1, 10, 6.

(6) The statute is repealed by subsequent acts; but the last statute, repealing a very unadvised and objectionable intermediate act passed 3 G. IV. c. 75, is stat. 4 G. IV. c. 76: see pa. 436, post.

(7) A contract *per verba de præsenti tempore* used to be considered in the ecclesiastical courts *ipsum matrimonium*, and if either party had afterwards married, this, as a second marriage, would have been annulled in the spiritual courts, and the first contract enforced. See an instance of it 4 *Co.* 29. But, as this pre-engagement can no longer be carried into effect as a marriage, I think we may now be assured that it will never more be an impediment to a subsequent marriage actually solemnized and consummated.

(8) The ecclesiastical court will, on suit instituted, annul the second marriage, although it is absolutely void. 2 Phil. E. C. 321. It is so absolutely void that the second wife, however innocent, is not entitled to dower. Moore, 226. 1 Roper, 332.

(9) See the exceptions, 4 book, 164.

(10) The marriage of a husband during the life of a former wife is void, unless he had been previously divorced from his former wife on account of her adultery, or she has been sentenced to the state prison for life. But if the wife has been absent for five successive years, without the husband's knowing that she was alive, the marriage becomes void only from the time that it shall be so declared by a competent court. A similar rule applies to the wife. 2 R. S. 139.

(11) The ecclesiastical court will annul the marriage by *licence* of a minor without consent of parents or guardians. 2 Phil. Ecc. C. 92. 285. 365. 327. 328. 341. 343. 347; but a marriage of an infant by *banns* is binding unless there be fraud in publication, as by a false name, &c. 2 Phil. Ecc. C. 365.

But if either party be under seven years of age, the marriage is absolutely void; but marriages of princes made by the state in their behalf at any age are held good, though many of these contracts have been broken through. Swinb. Mat. Contr. See Ward's Law of Nations. The age of consent within the 1 Jac. I. c. 11. s. 3, is fourteen in males and twelve years in females. Russell & R. Cro. C. 48.

hen either of them comes to the age of consent aforesaid, they may dis-gree and declare the marriage void, without any divorce or sentence in ıe spiritual court. This is founded on the civil law (*i*). But the canon .w pays a greater regard to the constitution, than the age, of the par-es (*j*); for if they are *habiles ad matrimonium*, it is a good marriage, what-ver their age may be. And in our law it is so far a marriage, that, if at ıe age of consent they agree to continue together, they need not be mar-ed again (*k*). If the husband be of years of discretion, and the wife nder twelve, when she comes to years of discretion he may disagree as ell as she may: for in contracts the obligation must be mutual; both ıust be bound, or neither (12): and so it is, *vice versâ*, when the wife is f years of discretion, and the husband under (*l*).

3. Another incapacity arises from want of consent of parents or guar-ians (13). By the common law, if the parties themselves were of the ge of consent, there wanted no other concurrence to make the marriage alid: and this was agreeable to the canon law. But, by several sta-utes (*m*), penalties of 100*l.* are laid on every clergyman who marries a ouple either without publication of banns, which may give notice to pa-ents or guardians, or without a licence, to obtain which the consent of ıarents or guardians must be sworn to. And by the statute 4 and 5 Ph. ınd M. c. 8, whosoever marries any woman child under the age of sixteen ears, without consent of parents or guardians, shall be subject to fine, or ive years' imprisonment: and her estate during the husband's life shall go o and be enjoyed by the next heir (14). The civil law indeed required he consent of the parent or tutor at all ages, unless the children were ımancipated, or out of the parents' power (*n*): and if such consent from

(*i*) *Leon. Constit.* 109.
(*j*) *Decretal. l.* 4, *tit.* 2, *qu.* 3.
(*k*) Co. Litt. 79.
(*l*) *Ibid.*
(*m*) 6 and 7 Will. III. c. 6. 7 and 8 W. III. c. 35. 10 Ann. c. 19.
(*n*) *Ff.* 23, 2, 2, and 18.

(12) This proposition is too generally expressed; for there are various contracts between a person of full age and a minor, in which the former is bound and the latter is not. The authorities seem decisive that it is true with regard to the contract of marriage referred to the ages of fourteen and twelve; but it has also long been clearly settled that it is not true with regard to contracts of marriage referred to the minority under twenty-one.

For where there are mutual promises to marry between two persons, one of the age of twenty-one and the other under that age, the first is bound by the contract, and on the side of the minor it is voidable; or for a breach of the promise on the part of the person of full age, the minor may maintain an action and recover damages, but no action can be maintained for a similar breach of the contract on the side of the minor. Holt v. Ward Clarencieux, *Str.* 937. *S. C. Fitzg.* 175, 275.*

(13) If either of the parties to a marriage is incapable, for want of age or understanding, or from physical causes, or if the consent of either was obtained by force or fraud, the marriage becomes void from the time that it is declared to be so by a competent court. 2 R. S. 139.

The consent of parents is not made requisite, except that to marry a female under 14 without consent of parents, &c. is punishable by fine and imprisonment; see 2 R. S. 664. § 26. The age of legal consent is with males 14, and females 12, according to the common law, which was restored by the act of April 20, 1830, § 24. A marriage entered into under these ages may be dissolved only on the application of the party under age, or of his or her guardian, and not then if the parties have freely cohabited after attaining the age of legal consent.

Children of persons who ignorantly married during the lifetime of a former husband or wife of one of the parties, are entitled to succeed to the estate of the parent who was competent to contract matrimony. So children of a marriage declared void on account of the lunacy of one of the parties succeed to the estate of the other parent. If a marriage be annulled on the ground of force or fraud, the innocent party has the custody of the issue.

(14) The construction of the statute seems to be, that it shall also go to the next heir during the life of the wife, even after the death of the husband. 1 *Brown. Cha. Rep.* 23. But the contrary has been decided in the exchequer. *Amb.* 73.

* But see p. 437, n. (17), post.

the father was wanting, the marriage was null, and the children illegitimate (*o*); 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 (*p*): and if the father was *non compos*, a similar remedy was given (*q*). 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 (*r*) (15); and in Holland, the sons are at their own disposal at twenty-five, and the daughters at twenty (*s*) (16). Thus hath stood, and thus at present stands, the law in other neighbouring countries. And it has lately been thought proper to introduce somewhat of the same policy into our laws, by statute 26 Geo. II. c. 33 (17), whereby it is enacted, that all marriages celebrated by licence (for banns suppose notice) [*438] 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 (18), or, if he be not living, of the mother or guardians, shall be absolutely void (19). 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 (20). Much may be, and much has

(*o*) *Ff.* 1, 5, 11.
(*p*) *Cod.* 5, 4, 1, and 20.
(*q*) *Inst.* 1, 10, 1.
(*r*) Domat, of Dowries, § 2, Montesq. Sp. L. 23, 7.
(*s*) *Vinnius in Inst. l.* 1, *t.* 10.

(15) This is now altered to 25 in sons and 21 in daughters, and the consent of the father suffices. After those ages the parties may marry after three respectful, but ineffectual, endeavours to obtain consent of parents. Code Civil. Livre 1. Title 5.

(16) But even in Holland, and of course in countries subjected to the Dutch civil law, the marriage of sons after twenty-five, and daughters after twenty, years of age, without consent of parents, may, upon causes enumerated in the books, be prevented.

(17) This act is repealed by the 4 Geo. IV. c. 76. but the 16th section re-enacts the like provisions, viz. "that the father, if living, of a party under 21 years of age, such party not being a widower or widow; or if the father be dead, the guardian of the person so under age lawfully appointed; or in case of no guardian, then the mother of such party, if unmarried; or if there be no mother unmarried, then the guardian of the person appointed by the court of chancery, if any shall have authority to give consent to the marriage, and such consent is thereby required for the marriage, unless there be no person authorized to give such consent."

It has been held that all marriages, whether of legitimate or illegitimate children, are within the general provisions of the marriage act, 26 Geo. II. c. 33, which requires all marriages to be by banns or licence; and, by three judges, a marriage of an illegitimate minor, had by *licence* with the consent of her mother, is void by the 11th section. The words father and mother in that section meaning legitimate parents. Priestly v. Hughes, 11 East, 1. In the case of Horner v. Liddiard, reported by Dr. Croke, it was decided by Sir William Scott, that bastards were bound by the 11th section of 26 Geo. II. c. 33. It follows that a marriage by licence, with the consent of either the putative father or mother, will not be a compliance with the marriage act, and therefore void; and the only methods by which the marriage of a natural child can be legally solemnized, are either after the publication of banns, or after the appointment of a guardian for the child by the court of chancery, and then the marriage may be performed under a licence with the consent of such guardian. 1 Roper, 340.

(18) The court presumes consent, unless dissent be proved, 2 Phil. 222; what sufficient evidence of consent, 1 Phil. 299.

(19) Mr. Christian has the following note:— A matter of such importance deserves to be more particularly stated; the party under age marrying by *licence*, if a minor, and not having been married before, must have the consent of a father, if living; if he be dead, of a guardian of his *person lawfully appointed*; if there be no such guardian, then of the mother if she is unmarried; if there be no mother unmarried, then of a guardian appointed by the court of chancery. Mr. Christian suggests that the words *lawfully appointed* comprehend not only a guardian appointed by the father, and a guardian appointed by the court of chancery, but also, where such guardian can exist, a socage guardian, he being a guardian of the person of the ward appointed by the law itself. A guardian appointed by the will of a putative father is not within the act. 2 Bro. C. C. 583. Horner v. Liddiard, Dr. Croke's Rep. 180.

(20) But a provision for this will be found

ın, said both for and against this innovation upon our ancient laws and ıstitution. On the one hand, it prevents the clandestine marriages of nors, which are often a terrible inconvenience to those private families ıerein they happen. On the other hand, restraints upon marriages, eıcially among the lower class, are evidently detrimental to the public, by ıdering the increase of the people; and to religion and morality, by enıraging licentiousness and debauchery among the single of both sexes; d thereby destroying one end of society and government, which is *ıcubitu prohibere vago*. And of this last inconvenience the Roman ws were so sensible, that at the same time that they forbad marriage thout the consent of parents or guardians, they were less rigorous upon at very account with regard to other restraints: for, if a parent did not ovide a husband for his daughter, by the time she arrived at the age of enty-five, and she afterwards made a slip in her conduct, he was not alwed to disinherit her upon that account; "*quia non sua culpa, sed parenn, id commisisse cognoscitur* (*l*) (21)."

4. A fourth incapacity is want of reason; without a competent share which, as no other, so neither can the matrimonial contract, be valid (*u*). was formerly adjudged, that the issue of an idiot was legitimate, and ınsequently that his marriage was valid. A strange determination! since ınsent is absolutely requisite to matrimony, and neither idiots nor lunatics e capable of consenting to any thing. And therefore the civil law dged much more sensibly when it made such deprivations of ason a previous impediment; *though not a cause of divorce, [*439] they happened after marriage (*v*). And modern resolutions ıve adhered to the reason of the civil law, by determining (*w*) that the arriage of a lunatic, not being in a lucid interval, was absolutely void. ut as it might be difficult to prove the exact state of the party's mind at ıe actual celebration of the nuptials, upon this account, concurring with ome private family (*x*) reasons, the statute 15 Geo. II. c. 30 (22), has proided that the marriage of lunatics and persons under phrenzies, if found ınatics under a commission, or committed to the care of trustees by any ct of parliament, before they are declared of sound mind by the lord chanellor or the majority of such trustees, shall be totally void (23).

(*t*) *Nov.* 115, § 11.
(*u*) 1 Roll. Abr. 357.
(*v*) *Ff.* 23, *tit.* 1, *l.* 8, and *tit.* 2, *l.* 16.
(*w*) Morrison's case, *coram Delegat.*
(*x*) See private acts, 23 Geo. II. c. 6.

n the 4 Geo. IV. c. 76. sec. 17, by which it is ınacted, that in case the father of the party ınder age be non compos mentis, or the guarlian or mother, or any of them whose consent s made necessary, in the 16th section menioned, to the marriage of such party, be non compos mentis, or in parts beyond the seas, or shall unreasonably, or from undue motives, withhold consent to a proper marriage, then the party may apply by petition to the lord chancellor, lord keeper, or the lords commissioners of the great seal of Great Britain for the time being, master of the rolls, or vice-chancellor of England; and if it appear proper, they shall declare the same to be so, and such declaration shall be taken to be as effectual as if the father, guardian or guardians, or mother of the person so petitioning, had consented to such marriage.

(21) The commentator's profound observation as to this effect of those restraints put upon marriage, has been, and is, amply confirmed; but stat. 3 G. IV. c. 75, imposed still greater restraints, and the immediate consequence was, a very general disregard indeed of the marriage rite altogether. Within a year the act was given up, and the present statute substituted, leaving publication by banns nearly upon the former footing.

(22) Extended to Ireland, by 51 G. III. c. 37.

(23) Till the 2 and 3 Edw. VI. c. 21, the clergy in this country were prohibited to marry, by various laws and canons; a statute in the 31 Hen. VIII. c. 14, having even made it felony. But the legislature by 2 and 3 Edw. VI. c. 21, repealed the laws and canons which imposed that severe restriction upon the clergy, and granted them the same indulgence that the laity enjoyed. But this statute, like

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 (24). Any contract made, *per verba de presenti*, 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 ecclesiæ*. 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 (25), unless by dispensation from the Archbishop 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 ordain-
[*440] ed 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 stat. 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

(*y*) Stat. 26 Geo. II. c. 33.
(*z*) Salk. 119.
(*a*) Moor, 170.

all the other reforms in the church, was repealed by Queen Mary, and it was not revived again till the 1 Ja. I. c. 25, though the thirty-nine articles had been passed in convocation in the fifth year of the reign of Queen Elizabeth; the 32d of which declares, that it is lawful for the bishops, priests, and deacons, as for all other Christian men, to marry at their own discretion.

The clerks in chancery, though laymen, were not allowed to marry till stat. 14 and 15 Hen. VIII. c. 8. And no lay doctor of civil law, if he was married, could exercise any ecclesiastical jurisdiction till 37 Hen. VIII. c. 7. 2 *Burn's Ec. L.* 418.

(24) Fraud will sometimes be a ground for annulling the marriage; as on account of banns having been published, or licence obtained, under false names. 1 Phil. Ecc. C. 133. 298. 224. 230. 375. 2 Phil. 14. 104. 365; but unless the name was assumed for the purpose of defrauding the other party, or the parents, the circumstance of the marriage being in a fictitious name will not invalidate it. 3 Maule & S. 250. 538. 1 Phil. 147. 2 Phil. 12. Error about the family or fortune of the individual, though produced by disingenuous representations, will not at all affect the validity of a marriage. 1 Phil. E. C. 137.

(25) The former marriage act required that the marriage should be celebrated in some parish church or public chapel, where banns had been usually published; *i. e.* before the 25th March, 1754. In consequence of this construction, the Court of King's Bench were obliged to declare a marriage void, which had been solemnized in a chapel erected in 1765. (*Doug.* 659.) And as there were many marriages equally defective, an act of parliament was immediately passed, which legalized all marriages celebrated in such churches or chapels, since the passing of the former marriage act; and it also indemnified the clergymen from the penalties they had incurred. 21 *Geo. III. c.* 53.*

* Or it must be a public chapel, having a chapelry thereto annexed, or a chapel situate in an extra-parochial place duly licensed for the publication of banns and the solemnization of marriage. And where a church or chapel shall be under repair or rebuilding, and the bishop shall have licensed any place within the parish or chapelry for divine service during such repair, banns and solemnization of marriages then shall be good. See the statutes 4 G. IV. c. 76. § 13, and 5 G. IV. c. 32.

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 precontract, if that indeed still exists; of consanguinity; and of affinity, or corporal imbecility, subsisting previous to their marriage (26).

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* (*b*), 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 (27). 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 (28). The issue of such marriage as is thus entirely dissolved, are bastards (*c*) (29).

(*b*) "From the bands of matrimony."

(*c*) Co. Litt. 235.

(26) The 26 Geo. II. c. 33. was repealed by 3 Geo. IV. c. 75. The present marriage act is the 4 Geo. IV. c. 76. which contains many regulations calculated to ensure a due solemnization of marriage without fraud. A marriage is void where persons *knowingly* and *wilfully* marry in any other place than a church or chapel wherein banns may be lawfully published, unless by special licence; or *knowingly* and *wilfully* intermarry without due publication of banns, or licence from a person having authority to grant the same, or *knowingly* and *wilfully* consent to solemnization of marriage by a person not being in holy orders. But in all other cases of fraud, or false swearing, or other irregularity, the *marriage itself is valid*, though the parties offending are liable to *punishment*, and a forfeiture of property.

The marriage act extends only to marriages in England. Marriages on elopements to Scotland seem to be valid, Bul. N. P. 113. and Dodson's Rep. of sir. Wm. Scott's judgment on Dalrymple v. Dalrymple, and 1 Ves. & B. 112. 114. 2 Haggard, 54. 1 Roper, 334. Selwyn N. P. Adultery, 3. 14. Marriages of British subjects in *foreign countries* are valid if made according to the laws of those countries. Herbert v. Herbert, 30 April 1819, in Consistory Court, 1 Roper, 337. The King v. Inhabitants of Brampton. 10 East, 282. Lawtoor & P. v. Teesdale & Aor. 2 Marsh. 243. Lacon v. Higgins and Aor. 1 Dowl. & R. Ni. Pri. Rep. 38. So a marriage in Ireland, performed by a clergyman of the church of England, in a private house, was held valid, although no evidence was given that any licence had been granted to the parties. Smith v. Maxwell, Ryan & M.'s Ni. Pri. Rep. 80. As to the evidence to be adduced of a foreign marriage, see the same cases, and 1 Roper, 333.

(27) The impotency of the husband at the time of the marriage to consummate it, and still continuing, is ground for annulling it, though the husband was ignorant of his constitutional defects. 2 Phil. Ec. C. 10. Corporal imbecility may arise after the marriage, which will not then vacate the marriage, because there was no fraud in the original contract; and one of the ends of marriage, viz. the legitimate procreation of children, may have been answered: but no kindred by affinity can happen subsequently to the marriage; for as affinity always depends upon the previous marriage of one of the parties so related, if a husband and wife are not so related at the time of the marriage, they never can become so afterwards.

(28) But a sentence of divorce may be repealed in the spiritual court after the death of the parties. Co. Lit. 33. 244. 7 Co. 44. 5 Co. 98. but see Cro. J. 186, 7 Co. 43.

(29) In these divorces the wife, it is said, shall receive all again that she brought with her; because the nullity of the marriage arises through some impediment; and the goods of the wife were given for her advancement in marriage, which now ceaseth: but this is where the goods are not spent; and if the husband give them away during the coverture without any collusion, it shall bind her: if she knows her goods are unspent, she may bring an action of detinue for them; but, as to money, &c. which cannot be known, she must sue in the spiritual court. Dyer, 62.

This divorce enables the parties to marry again, and to do all other acts as if they had never been married. Com. Dig. Bar. and Feme, C. 1. and C. 7. Moore Rep. 666. Ca. 9, 10. 1 Salk. 115, 6. Cro. Eliz. 908. 3 Mod. 71. Cro. Car. 463. And after this divorce, the liability of the husband for the debts of the woman does not continue. Gow. C. N. P. 10.

A sentence of divorce stands in force till reversed on appeal. 1 And. 185. 2 Lev. 169. 5 Co. 98. b. So a sentence for nullity of a marriage in causa jactitationis maritagii. Carth.

Divorce *a mensa et thoro* is when the marriage is just and lawful [*441] *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 (31), 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 (32). 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 (*d*). 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 (*e*); but among them adultery is the principal, and with reason named the first (*f*). But with us in England adultery is only a cause of separation from bed and board (*g*): 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 of 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 (*h*), which is now prohibited by the canons (*i*) (33). However, di-

(*d*) Matt. xix. 9.
(*e*) *Nov.* 117.
(*f*) *Cod.* 5, 17, 8.
(*g*) Moor, 683.
(*h*) 2 Mod. 314.*
(*i*) Can. 1603, c. 105.

* But now, confessions, if not made collusively, are not rejected, see 1 Hagg. R. 304, 2 Id. 189, 316. They appear to weigh with the court, as in cases where the grounds of objection to competency of a witness go rather to his credibility, in the temporal courts.

225. And if the parties die, an examination will not be allowed to prove an heir contrary. Cro. J. 186. 7 Co. 43.

Choses in action, not reduced to possession during coverture, remain the property of the wife on a dissolution of the marriage, either by the death of the husband or a divorce a vinculo matrimonii. Legg v. Legg, 8 Mass. Rep. 99. Sodge v. Hamilton, 2 Serg. & Rawl. 491 (30).

(30) Divorces are obtained on application by bill to the court of chancery. For adultery they are *a vinculo matrimonii*. But the confessions of the parties are not admissible without other evidence. Divorces *a mensa et thoro* are granted, on the application of the wife, for cruel and inhuman treatment on the part of the husband, or such conduct on his part as renders it unsafe and improper for her to cohabit with him; or on account of his abandonment of her, and his refusal or neglect to provide for her.

It would seem to have been the *intention* of the Revised Statutes not to give relief to the husband against the ill treatment of the wife, but in 2 Paige, 501. Perry v. Perry, Chancellor Walworth held that the former law giving such relief is still in force.

If the wife is guilty, she has nothing allowed to her, and her husband receives the rents and profits of her real estate, and her whole personal estate, as if the marriage still continued. If the husband is guilty, he must allow a support to the wife and children, and restore to the wife all the estate that he received from her that still remains undisposed of. 2 R. S. 145, &c.

(31) Ill temper alone seems not a sufficient cause for divorce. See the admirable observations of sir William Scott, in Evans v. Evans, 1 Haggard's Rep. 36.

(32) But the husband and wife may live separate by agreement between themselves and a trustee; and such agreement is valid and binding, and may be sued upon, if it be not prospective in its nature as for a future separation, to be adopted at the sole pleasure of the wife, the parties being, at the time of making the agreement, living together in a state of amity. See Jee v. Thurlow, 2 Bar. & C. 547. 4 Dowl. & R. 11. 2 East, 283. 6 East, 244. 7 Price, 577. 11 Ves. 529.

If after this agreement to live separate, they appear to have cohabited, equity will consider the agreement as waived, by such subsequent cohabitation. (1 Dowes Rep. 235. Moore, 874. 2 Peere W. 82. 1 Fonbl. 106. as notes, 2 Cox. Rep. 100. Bunb. 187. 11 Ves. 526. 537.) Or if the agreement, being in consequence of the wife's elopement, the husband offer to take her again. (1 Vern. 52.)

But at law, the wife being guilty of adultery, is no bar to a claim made by her trustee, under a separation deed, for arrears of annuity, there being no clause that deed should be void on that account. 2 Bar. and Cres. 547. 4 D. & R. 11. S. C.

(33) This is provided to prevent collusion. 2 Phil. 168, 9. 1 Haggard's Rep. 304. 2 Id. 189. 316. A husband cannot obtain a divorce

:cos *a vinculo matrimonii*, for adultery, have of late years been frequently ınted by act of parliament (34).

In case of divorce *a mensa et thoro*, the law allows alimony to the wife: ıich is that allowance which is made to a woman for her support out of) husband's estate: being settled at the discretion of the ecclesiastical lge, on consideration of all the circumstances of the case. This is netimes called her *estovers* (35), for which, if he refuses payment, there besides the ordinary process of excommunication, a writ at common v *de estoveriis habendis*, in order to recover it (*j*). It is generally)portioned to the rank and quality of *the parties. But in case [*442] elopement, and living with an adulterer, the law allows her no mony (*k*) (36).

III. Having thus shewn how marriages may be made, or dissolved, I me now, lastly, to speak of the legal consequences of such making, or solution.

(37) By marriage, the husband and wife are one person in law (*l*): ıt is, the very being or legal existence of the woman is suspended during) marriage, or at least is incorporated and consolidated into that of the sband; under whose wing, protection, and *cover*, she performs every ng; and is therefore called in our law-french a *feme-covert*, *fœmina viro operta*; is said to be *covert-baron*, or under the protection and influence of r husband, her *baron*, or lord; and her condition during her marriage is led her *coverture* (38). Upon this principle, of an union of person in

) 1 Lev. 6.
) Cowel, tit. Allmony.

(*l*) Co. Litt. 112.

ne ecclesiastical courts for the adultery of wife if she recriminates, and can prove he also has been unfaithful to the mar- ge vow. 1 Ought. 317. Burn Ecc. L. Mar- ge, xi. And if after the injured party has wledge that the crime has been committed ıave cohabitation with his wife, he cannot ain a divorce. Id. ibid.

34) For the purpose of obtaining this di- ce by a bill in parliament, it is necessary on the petition for the bill to the house of s (where such bill usually originates), that official copy of the proceedings and defini- sentence of divorce, a mensa et thoro in ecclesiastical courts, at the suit of the pe- ıner, shall be delivered at the bar on oath. on the second reading of the bill, the peti- er must attend the house to be examined he bar, if the house think fit, whether there ay collusion respecting the act of adultery, he divorce, or any action for crim. con.; whether the wife was living apart from husband under articles of separation. In divorce bills must be contained a clause, ibiting the offending parties from inter- rying with each other (but this clause is erally struck out in the committee and the passed without it), and evidence must be n in the committee of the house of com- s on the bill, that an action for damages been brought against the seducer, and gment for the plaintiff had thereon, or a suf- nt reason given why such action was not ght, or judgment obtained. See the stand- orders of the two houses. The proof of a ict at law may be dispensed with, where the circumstances are such that the adultery of the wife can be proved by satisfactory evi- dence, and where at the same time it is impos- sible for the husband to obtain a verdict in an action at law. It was dispensed with in the case of a naval officer, whose wife had been brought to bed of one child, in his absence up- on duty abroad; and upon his return was far advanced in her pregnancy with the second, and where he could not discover the father. So in another case, where a married woman had gone to France, was divorced there, and had married a Frenchman. It would also be dispensed with, if the adulterer should die be- fore the husband could obtain a verdict.

In case of divorce for the adultery of the wife, the legislature always interferes to make her an allowance out of the husband's estate, and for this most just, humane, and moral rea- son, that she may not be driven by want to continue in a course of vice. Per Best, J. 4 D. & R. 17.

(35) A word used by Bracton to signify any kind of aliment. And stat. 6 E. I. c. 3, puts it as an allowance for meat or cloth. The modern acceptation of the word, if one it have, refers to house-bote, hay-bote, and plough- bote.

(36) See book iii. p. 94.

(37) See book ii. p. 433.

(38) Whatever may be the origin of *feme-covert*, it is not perhaps unworthy of observa- tion, that it nearly corresponds in its signifi- cation to the Latin word *nupta*; for that is de- rived *a nubendo*, i. e. *tegendo*, because the mo- desty of the bride, it is said, was so much con-

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 (*m*): for the grant would be to suppose her separate existence; and to covenant with her, would be only to covenant with himself (39): and therefore it is also generally true, that all compacts made between husband and wife, when single, are voided by the intermarriage (*n*) (40). A woman indeed may be attorney for her husband (*o*); 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 (*p*) (41). The husband is bound to provide his wife with necessaries by law, as much as himself; and, if she

(*m*) Co Litt. 112.
(*n*) Cro. Car. 551.
(*o*) F. N. B. 27.
(*p*) Co. Litt. 112.

sulted by the Romans upon that delicate occasion, that she was led to her husband's home *covered* with a veil.

(39) The husband and wife being one person in law, the former cannot, after marriage, by any conveyance at common law, give an estate to the wife. Co. Lit. 112. a. 187. b. Nor the wife to the husband. Co. Lit. 187. b. But the husband may grant to the wife, by the intervention of trustees, Co. Lit. 30; and he may surrender a copyhold to her use. A husband cannot covenant or contract with his wife, Co. Lit. 112, a. though he may render his contract binding, if entered into with trustees; for unless by particular custom, as the custom of York, (Fitz. Prescription, 61. Bro. Custom, 56.) a feme covert is incapable of taking any thing of the gift of her husband, Co. Lit. 3. except by will. Lit. s. 168. 2 Vern. 385. 3 Atk. 72. Fonblauge on Eq. vol. 1, 103.

But in equity, gifts between husband and wife are supported, 1 Atk. 270. 2 Ves. 666. 1 Fonb. on Eq. 103. 3 P. Wms. 334. unless in fraud of creditors, &c. or where the gift is of the whole of the husband's estate. 3 Atk. 72. 2 Ves. 498.

But though in equity the wife may take a separate estate from her husband in respect of a gift, and even have a decree against her husband in respect of such estate, 1 Atk. 278, or avail herself of a charge for payment of his debts, Prec. Ch. 26, yet if she do not demand the produce during his life, and he maintains her, an account of such separate estate shall not be carried back beyond the year. 2 P. Wms. 82. 341. 3 P. Wms. 355. 2 Ves. 7. 190. 716. 16 Ves. 126. 11 Ves. 225. 1 Fonbl. on Eq. 104. 1 Atk. 269. 1 Equ. Ca. Ab. 140. pl. 7.

By 27 Hen. VIII. the husband may make an estate to his wife; as if he make a feoffment to the use of his wife for life in tail or in fee, the estate will be executed by the 27 Hen. VIII. and the wife will be seised. Co. Lit. 112. a. So if the husband covenant to stand seised to the use of his wife. Id. a. b. And this where by custom he might devise at common law. Lit. s. 168. So where the husband or wife act en auter droit, the one may make an estate to the other; as if the wife has an authority by will to sell, she may sell to her husband. Co. Lit. 112. a.

(40) At law, if a man make a bond or contract to a woman before marriage, and they afterwards intermarry, the bond or contract is discharged. Cro. Car. 551. 1 Lord Ray. 515.

So if two men make a bond or contract to a woman, or e contra, and one of them marries with her, the bond, &c. is discharged. Cro. Car. 551.

Though if it be intended for the advantage of the wife during the coverture, as that she shall have such rents, &c. at her disposal. Ca. Ch. 21. 117.

But a covenant or contract by a man with a woman is not destroyed by their marriage where the act to be performed is future, to be done after the marriage is determined, as to leave his wife so much after his death. Hut. 17. Hob. 216. 2 Cro. 571. Cro. Car. 376. 1 Ch. Ca. 21. 1 Salk. 326. Palm. 99. Carth. 512. Com. Dig. B. & F. D. 5 T. Rep. 381. So the marriage does not defeat a breach before. Skin. 409. And the courts of equity admit a debt in præsenti, or which might arise during coverture, to be extinguished at law by the marriage, upon the notion that husband and wife are but one person in law, and cannot sue each other; yet as they may sue each other in equity, a bond or other security, though void at law, shall be sustained in equity, at least as evidence of an agreement. 2 P. Wms. 243. 2 Vern. 480, 1. 2 Atk. 97. Prec. Ch. 41. Dick. 140. And an agreement to make a marriage settlement shall be decreed in equity after the marriage, though it was to be made before the marriage. 2 Vent. 343. So an agreement to permit the wife to dispose of so much money during her coverture. Dub. 1 Ver. 409. And if a wife charge her estate with payment of her husband's debts, or apply her separate estate to such purpose, and it does not appear to have been intended by her as a gift to her husband, equity will decree the husband's assets to be applied in exoneration of her estate, or in repayment of the money advanced. 2 Vern. 347. 689. 1 Bro. P. C. 1. 2 Vern. 604. 1 P. Wms. 264. 2 Atk. 384. 1 Fonbl. on Eq. 102, 3.

(41) A donatio causa mortis by a husband to his wife, may also be good, as it is in the nature of a legacy. 1 P. Wms. 441.

contracts debts for them, he is obliged to pay them (*q*); but for any thing besides necessaries he is not chargeable (*r*) (42). Also if a wife

(*q*) Salk. 118. (*r*) 1 Sid. 120.

(42) Every agreement of any nature entered into by a married woman, without the express or implied consent of her husband, is absolutely void. 1 Sid. 120. 1 Lev. 4. 1 Mod. 128. S. C. 2 Ak. 453. 2 Wils. 3. 8 T. R. 545. 2 B. & P. 105. Palm. 312. 1 Taunt. 217. except indeed in the instance of the queen consort, Co. Lit. 133. a. or of a deed inrolled or covenant on the warranty of a fine, or on a covenant running with the land of the wife, demised by her during coverture, 2 Saund. 180. n. 9. and contracts binding her by special custom, Hob. 225. 34 & 35 Hen. VIII. c. 88; and this rule prevails so strongly that a feme may avail herself of her coverture to defeat a contract, though she have been guilty of fraud, 4 Camp. 26. nor can a married woman even state an account of a debt contracted before marriage. 2 Esp. 716. 1 Taunt. 212. If the wife sell, or dispose of the money or goods of the husband without his assent, the sale is void, and the husband may have trover for the goods; and if she lose money at cards, the husband may bring an action for the money, Com. Dig. Bar. & F. As a consequence of the same doctrine, a married woman cannot in general be made a bankrupt. 1 Mont. on B. L. 4. In equity, the same rule as to the husband's liability for the wife's contract applies, Prec. Ch. 255. 2 Vern. 118. Sel. Ca. Ch. 19. 3 Mod. 186; and a court of equity cannot make the husband liable in respect of the fortune he may have had with his wife for her debts contracted before marriage, 1 P. Wms. 461. 3 P. Wms. 410. Forrester, 173. but see 2 Freem. 231. Though indeed if he take out administration to her, he will be liable to the extent of what he receives as her assets. Forrester, 172. and see post as to enforcing in equity the wife's contract.

But notwithstanding the wife is thus in general incapable of making a valid contract, so as to bind her husband, yet in some cases he will be rendered liable when his assent to her contract can be presumed, or was expressly given. Thus, *during cohabitation* the law will, from that circumstance, presume the assent of the husband to all contracts made by the wife for *necessaries*, which are suitable to the husband's degree and estate, and the misconduct short of the adultery of the wife, will not destroy this presumption. 2 Lord Raym. 1006. 1 Salk. 118. And this liability for necessaries is not confined to cases where they are supplied to, or for the use of, the *lawful* wife of the party to be charged. A man cohabiting with a woman, and allowing her to assume his name, and appearing to the world as his wife, and in that character to contract debts for necessaries, will be liable, though indeed the tradesman knew the circumstances. 2 Esp. 637. 4 Camp. 215. and though the man be married to another woman, 1 Camp. 245. 249; but this rule only holds during cohabitation. 4 Camp. 215. Where a man marries a widow, and receives her children into his family, although he was not bound by the act of marriage to maintain the children, 4 T. R. 118. 4 East. 76. yet, having treated them as part of his family, he is liable for contracts made by the wife in his absence for the education of the children, 3 Esp. Rep. 1. If the husband be an infant, yet he is liable for necessaries furnished to his wife and children, their interests being considered as identified with his own. 1 Stra. 169. Bul. N. P. 155. This legal presumption of assent may in particular cases be rebutted; as for instance, in an action brought for the price of dresses supplied for the wife by her order, evidence may be given that she was not in want of articles of this kind, or that the husband had given notice to the tradesman not to trust her upon credit, 2 Lord Ray. 1006. 1 Salk. 118. So where in an action of assumpsit for goods sold, it appeared that the plaintiff, a jeweller, in the course of two months delivered articles of jewelry to the wife of the defendant, amounting in value to 83*l.*, and that the defendant was a certificated special pleader, and lived in a ready furnished house, of which the annual rent was 200*l.*, that he kept no manservant, that his wife's fortune upon her marriage was less than 4000*l.*, that she had at the time of her marriage jewelry suitable to her condition, and that she had never worn in her husband's presence any articles furnished her by the plaintiff, and it appeared also that the plaintiff, when he went to the defendant's house to ask for payment, always inquired for the wife and not for the defendant, it was held that the goods so furnished were not necessaries, and that as there was no evidence to go to the jury of any assent of the husband to the contract made by his wife, the action could not be maintained. 3 B. & C. 631.

And where a husband makes an allowance to the wife for the supply of herself and family with necessaries during his temporary absence, and a tradesman with notice of this supplies her with goods, the husband is not liable. 4 B. & A. 252. Money lent to a married woman cannot be recovered against the husband, 1 Salk. 387. 1 P. Wms. 482. Prec. Ch. 502. even though the money be laid out in the purchase of necessaries; though indeed in a court of equity the lender would, in such case, be entitled to stand in the place of the tradesman by whom the goods were supplied. Id. Where a married woman buys materials for clothing, and pawns them before they are made up, the husband is not liable, for they never came to his use, though it would be otherwise if the clothes were made up and used by the wife, although they may be afterwards pawned by her. 1 Salk. 118. Com. Dig. B. & F. Where a party contracts solely with, and gives credit to the wife, he cannot sue the husband, though for necessaries; and this, although the wife lives with him, and he sees her in possession of some of the goods, unless indeed the husband by any act shew that he

[*443] elopes, and lives with another man, the husband is *not chargeable even for necessaries (s); at least if the person who furnishes

(s) Stra. 647.

considered himself the debtor. 5 Taunt. 356. 1 Carr. Rep. 16. 3 Camp. 22. 4 Camp. 70. 2 Stra. 706. 4 B. & A. 255.

The husband is liable to pay the wages of a servant hired by the wife, after the servant had performed the service with the knowledge of the husband. 1 Esp. 200. 6 T. R. 176.

Where the husband and wife *are separated* and live apart from each other, still the husband will be liable upon a contract for *necessaries* made with her where his assent can be implied. Thus, where the husband deserts his wife, or turns her away without any reasonable ground, or refuses to admit her into his house, or compels her by ill usage, indecency of demeanor, or severity, to leave him, in all these cases he gives the wife a general credit, and is liable to be sued for necessaries furnished her. 1 Esp. 441. Lord Raym. 444. 4 Esp. 42. 3 Esp. 251, 2. 2 Stra. 1214. 3 Taunt. 421. 2 Stark. 87. And this although he has given a general notice to all persons, or even a particular one to the individual, supplying her with necessaries, not to give credit to her. 4 Esp. 42. 1 Selw. N. P. 5 ed. 275. And a husband who, without cause, turns away his wife, is liable for costs she incurs in articles of the peace against him. 3 Camp. 326. But the husband would not be liable at law for money lent to his wife, though laid out in the purchase of necessaries; but he would be liable in equity. 1 Salk. 387. 1 P. Wms. 482. Prec. Ch. 502. And a person paying the debts of a wife, contracted while so separated, cannot sue the husband at law. 1 H. Bla. 92. Though when a husband goes abroad and leaves his wife, who dies in his absence, and the wife's father pays the expenses of her funeral in a manner suitable to the husband's rank and fortune, the amount may be recovered back from the husband, though expended without his knowledge or consent. 1 H. Bla. 92.

This liability for necessaries does not arise where the wife voluntarily leaves her husband without his consent, and where he gave her no sufficient cause for her leaving, provided the tradesman has notice of her husband's dissent to her absence. 2 Stra. 1214. in notes. 2 Ld. Raym. 1006. 1 Sid. 109. 1 Lev. 4. 2 Stark. 87. Stra. 875. So where the wife has a separate maintenance from the husband suitable to the husband's station, and is actually paid, and the tradesman has notice of this, or the means of knowing it by its being notorious in the neighbourhood, the husband will not be liable even for necessaries furnished to her. 4 Camp. 70. 4 B. & A. 254. 2 New. Rep. 144. 8 Taunt. 343. 3 Esp. 250. Salk. 116. Lord Ray. 444. 2 Stark. 88. But a promise by the husband to pay the amount of a debt contracted by the wife, though she was allowed a separate maintenance, and this was known, is binding. 2 Stark. 177.

Where the wife has been guilty of the crime of adultery, either during cohabitation with her husband, or in a state of separation from him, her claims for maintenance and protection are forfeited by her misconduct. Stra. 875. 6 T. R. 603. 1 Selw. N. P. 5 ed. 273. And where the wife eloped with an adulterer, it was held that the husband should not be charged for necessaries, although the tradesman who supplied them had no notice of the criminality. Stra. 647. 706. But in these cases, the husband should take due measures to prevent the wife gaining credit in his name; and where the wife having committed adultery, was left by the husband in his house with two children, bearing his name, but without making any provision for her in consequence of the separation, it was held, that although she continued in a state of adultery, the husband was liable for necessaries furnished to her, on the ground that it did not appear that the tradesman knew the facts of the case. 1 Bos. & P. 226. 6 T. R. 603. And if after the wife's criminality, the husband again receives her into his house, his liability for necessaries revives; and if he afterwards expel her from his house, he will be liable, although due caution be given not to trust her. 11 Ves. 536. 4 Esp. 41, 2. 1 Salk. 19. 6 Mod. 172.

Although the wife's capacity to contract is put an end to by the marriage, and her property falls in general under the disposal of her husband, yet it frequently happens that either by a settlement made with trustees, with the consent of the husband before marriage, or where they separate, and a separate maintenance is allowed, or from some other source, the wife is entitled to separate property, over which, in a court of equity, the husband has no control. Her having such separate property does not indeed remove her incapacity to contract, but she has a power of charging or disposing of it, subject of course to the conditions and limitations with which the property was clothed on her becoming entitled; and it has been decided in the court of chancery, that a general personal engagement of the wife, as for instance, a bond given by a feme covert as surety, 15 Ves. 596. or a bond given, or promissory note given as a security for money borrowed by her, 17 Ves. 365. 2 P. Wms. 144. or given jointly with the husband as a security for his debt, 1 Bro. Ch. c. 16. 9 Ves. 188. 486. 2 Ves. Jun. 138. 2 Peere Wms. 144. 2 Atk. 68. 11 Ves. 202. 1 Ves. & Beame, 121, 2, 3. although the instrument is void as a contract both in law and equity, and although it contains no reference to her separate estate, will be regarded as evidence of an intention on her part to charge her own separate property, and will accordingly operate as a lien upon it, in respect of which she is liable to be proceeded against in that court; where her discretion is freely exercised, the contract will be obligatory. 16 Vesey, Junr. 116. 3 Mad. 387. and see 3 Chitty's Com. Law, 39, 40; and it may be taken as a general rule, that when it appears, or can be inferred,

iem is sufficiently apprized of her elopement (*t*). If the wife be indebted efore marriage, the husband is bound afterwards to pay the debt; for he as adopted her and her circumstances together (*u*) (43). If the wife be ijured in her person or her property, she can bring no action for redress ithout her husband's concurrence, and in his name, as well as her

(*t*) 1 Lev. 5. (*u*) 3 Mod. 186.

iat the wife intends to charge her separate aintenance with a debt incurred for necessa- es, the creditor is entitled to receive his debt ut of the fund provided for her separate aintenance, 3 Mad. 387; and as we have be- ore seen, although at law a wife cannot bor- ow money to lay out in necessaries, but at ie peril of the lender, who must lay it out r her, Salk. 387, yet in equity it is sufficient charge the husband, if the money be actu- lly applied to the purpose for which it was orrowed, though the lender neglect to see the application. 1 P. Wms. 483. Prec. h. 502.

If a married woman has derived any bene- t from the contract she has entered into, here arises a moral obligation on her part to erform it; and if after her coverture has eased she expressly promise so to do, she will e liable on such promise. And where a feme overt having an estate settled to her separate se, gave a bond for repayment by her exe- utors, of money advanced at her request to er son-in-law on the security of that bond, nd after her husband's decease she wrote romising that her executors should settle the ond, it was held that assumpsit was main- ainable against her executors on this promise. Taunt. 36. 2 Atk. 245. sed vid. 1 Stra. 94. If a woman, after the death of her husband, redeliver a deed delivered by her during co- verture, this will be sufficient to render her liable on it. Perkins, s. 154. and see Cowp. 201. 2 P. Wms. 127.

After a divorce a vinculo matrimonii, the parties are competent to contract, and may marry again the same as if they had never been married. Com. Dig. B. & F. c. 1. & c. 7. Moore. Rep. 666. 1 Salk. 115, 6. Cro. Eliz. 908. 3 Mod. 71. Cro. Car. 463. 1 Gow. 10. ante 440. n. 37. A wife may acquire a separate character and contract accordingly, by the civil death of her husband by exile, 2 H. 4. 7. a. 1 H. 4. 1. a. and formerly by pro- fession and abjuration of the realm, 1 Inst. 133. a. 130. a. Thus, if the husband be trans- ported or banished for life, the wife may con- tract as a feme sole. Co. Litt. 133. a. 2 B. & P. 231. n. a. 3 Camp. 125. And though the husband be transported for a time only, yet it should seem that during the limited period, the effect of his absence is the same to the wife as if it had been perpetual. 2 Bla. Rep. 1197. 1 T. R. 7. 2 B. & P. 231. Co. Lit. 133. a. n. 3. 1 B. & P. 358. and see 4 Esp. 27. Where the husband is an alien who has deserted this kingdom, leaving his wife to act here as a feme sole, the wife may be charged as a feme sole after such desertion, 2 Esp. Rep. 551. 587. 1 B. & P. 357. 2 B. & P. 226. 1 N. R. 80. 11 East, 301; so where the hus- band is an alien, and has never been in this country. 3 Camp. 123. Indeed it has been considered that the preceding doctrine is con- fined to the case where the husband has never been in this country. Id. ibid. sed quære. At all events it is confined to cases only where the husband was an alien, 11 East, 301. 1 N. R. 80; and where the husband resided in the West Indies and allowed his wife a week- ly sum for her subsistence, it was held that she could not contract as a feme sole. 3 Esp. 18. 1 N. R. 80. 5 T. R. 679. 682. And where an Englishman employed in the service of the British government residing in a foreign country, and having lands there, upon the cess- ation of his employment in consequence of war between the two countries, sent his wife and family to this country, but continued to reside abroad himself, it was held the wife could not contract as a feme sole. 2 B. & P. 226.

By the custom of London, where a feme covert of a husband useth any craft in such city on her sole account, whereof the husband meddleth nothing, such a woman shall be charged as a feme sole, concerning every thing which toucheth the craft; and if the husband and wife be impleaded in such case, the wife shall plead as a feme sole, and if she be con- demned, she shall be committed to prison till she hath made satisfaction, and the husband and his goods shall not in such case be charged or impeached. See 3 Burr. 1776. Cro. Car. 67. 10 Mod. 6. 2 B. & P. 93. 101. 3 Chit. Com. Law, 37. This custom must be construed with strictness. See 1 Roll. Ab. 567. 2 Leon. 109. The trade must be carried on within the city, and on the wife's sole account, and if the husband had any concern in it, the case will not be protected by the custom. See Cro. Car. 68. 3 Burr. 1782. 1785. A feme covert, sole trader, cannot by this custom exe- cute a bond, but only make herself liable to simple contract debts. 4 T. R. 363. A person so trading within the city, is however liable to be made a bankrupt, though a married woman. 1 Ak. 206. 3 Burr. 1783. 1 Mont. B. L. 4.

(43) But though the husband has had a great fortune with his wife, if she dies before him, he is not liable to pay her debts contract- ed before marriage, either at law or in equity, unless there be some part of her personal pro- perty which he did not reduce into his posses- sion before her death, which he must after- wards recover as her administrator; and to the extent of the value of that property, he will be liable to pay his wife's debts, dum sola, which remained undischarged during the co- verture. 1 P. Wms. 468. 3 P. Wms. 409. Rep. T. Talb. 173.

own (*v*): neither can she be sued without making the husband a defendant (*w*). 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 (*x*), 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 (44). In criminal prosecutions,

(*v*) Salk. 119. 1 Roll. Abr. 347.
(*w*) Bro. *Error*, 173. 1 Leon. 312. 1 Sid. 120. This was also the practice in the courts of Athens. (Pott. Antiqu. b. 1, c. 21.)
(*x*) Co. Litt. 133.

(44) This leads us to inquire in what manner actions should be brought by and against husband and wife; and herein,

I. Of actions by husband and wife.
1. Where they must join.
2. Where husband must sue alone.
3. Where wife may sue alone.
4. Where they may join or not, at their election.
5. Who to sue in case of death of husband or wife.

II. Of actions against husband and wife.
1. Where they must be joined.
2. Where the husband must be sued alone.
3. Where the wife may be sued alone.
4. Where they may be joined or not at the election of plaintiff in action.
5. Who to be sued in the case of death of husband or wife.

1. *Where they must join.*—As choses in action of the wife do not vest by marriage absolutely in the husband until he reduce them into possession, in general he cannot sue alone, but must join with his wife in all actions upon bonds and other personal contracts made with the wife before the marriage, whether the breach were before or during coverture, and also for rent, or any other cause of action, accruing before marriage, in respect of the real estate of the wife; and it may be taken as a general rule, that they must join when the cause of action would necessarily survive to her. 3 T. R. 627, 8. 631. 1 M. & S. 180, 1. Com. Dig. B. & F. V. Bac. Ab. B. & F. K. 7 T. R. 348. 1 B & A. 222, 3. 1 Chit. on P. 4 ed. 18. and cases there cited. And when the wife is executrix or administratrix, as her interest is in autre droit, they must in general join in the action. Vin. Ab. B. & F. 22. Com. Dig. B. & F. V. 2 Mont. 129. So for torts to the person, personal or real property of the wife, committed before the marriage, when the cause of action would survive to the wife, she must join in the action, and if she die before judgment therein, it will abate. 3 T. R. 627, 631. 7. T. R. 348, 9. Com. Dig. B. & F. V. Rol. Ab. 347. R. pl. 3. In real actions for the recovery of land of the wife, the husband and wife must join, 1 Bulst 21. Plowd. 18. So in an action for waste, committed on the land of the wife. 7 Hen. IV. 55. a. and 3 Hen. VI. 34. So in detinue for charters of the wife's inheritance. 1 Rol. Ab. 347. R. pl. 1. Bac. Ab. Detinue, B. sed quære if they *must* join. When an injury is committed to the *person* of the wife during coverture, by battery, slander, &c. if the action be brought for the personal suffering or injury to the wife, they should sue jointly, 1 Sid. 387. 346. Lord Raym. 1208. Com. Dig. B. & F. V. Pleader, 2 A. 1.

2. *Where the husband must sue alone.*—In general, the wife cannot join in any action upon a contract made during coverture, as for her work and labour, goods sold, or money lent by her during that time, 2 Bla. Rep. 1239. 1 Salk. 114. Com. Dig. B. & F. W. 2 Wils. 424. 9 East. 472; and husband and wife, partners in trade abroad, cannot join in an action here for breach of a contract made during coverture, though by foreign law they might do so. Ryl. & M. Ni. Pri. Rep. 102. 1 Stra. 612.

And if the debt of a wife before coverture be merged by a specialty given to the husband alone after coverture, he alone should sue. 1 M. & S. 180. 4 T. R. 616. 1 Salk. 117. 3 Lev. 403. Carth. 462. Lord Ray. 368. Alleyn. 36. Cro. Eliz. 61. The wife having no legal interest in the person or property of her husband, cannot in general join with him in any action for an injury thereto. Post, 3 book, 143. Lord Raym. 1208. 2 Wils. 424. 1 Lev. 140. 1 Salk. 119. n. b. Sir Wm. Jones, 440. 1. Chit. on Pl. 4 ed. 61. In detinue to recover personal chattels of the wife, in the possession of the defendant before the marriage, it is said that the husband must sue alone, because the law transfers the property to him, and the wife has no interest, Bac. Ab. tit. Detinue, A. Bul. N. P. 50. 1 Salk. 114. sed vid. Rep. Temp. Hardw. 120; though in detinue for charters of the wife's inheritance they may join. 1 Rol. Ab. 347. R. pl. 1. Bac. Ab. Detinue, B. With respect to injuries to personal property, when the cause of action has its inception as well as completion after the marriage, the husband must sue alone, the legal interest in personalty being vested by the marriage in him, Rep. T. Hard. 119. 2 Saund. 47. Cro. Eliz. 133. Salk. 114. 119. 2 Bla. Rep. 1236. 1 Selw. 6 ed. 293; and therefore a demand for the conversion of personal property, as corn or grass when severed from the land, ought to be sued for in the name of the husband only. 1 Salk. 119. n. b. 2 Wils. 424. 1 Selw. N. P. 6 ed. 294. In an action for words not actionable in themselves, spoken of the wife, whereby the husband sustains special damage, the husband must sue alone. 1 Sid. 346. 1 Lev. 140. 2 Keb. 387. pl. 63. 3 Mod. 120. 1 Salk. 119.

3. *When the wife may sue alone.*—A married woman cannot in any case sue alone while the relation of marriage subsists, and she and her husband are living in this kingdom, notwithstanding she lives separate from her husband and has a separate maintenance secured

it is true, the wife may be indicted and punished separately (y); for the union is only a civil union (45). But in trials of any sort they are not

(y) 1 Hawk. P. C. 3.

(45) In many inferior misdemeanors the law holds the wife responsible for her own conduct. For instance, if she receives stolen goods of her own separate act without the privity of her husband. (Hale P. C. 516.) A feme covert may be indicted alone for a riot, (Dalt. 447.) or for selling gin against the statute 9 Geo. II. c. 23. (Stra. 1120.) or for being a common scold, (6 Mod. Rep. 213. 239.) for assault and battery, (Salk. 384.) for keeping a gaming house, (10 Mod. Rep. 335.) for slander or trespass, (Roll. Abr. 251.) for keeping a bawdy house without the concurrence of her husband, (10 Mod. Rep. 63.) and though she has obtained his consent she is still punishable. (1 Hawk. P. C. c. 1. s. 12.) Lord Mansfield says, "a feme covert is liable to be prosecuted for *crimes* committed by her;" and Mr. Justice Wilmot, in the same case, observed, "The husband is not liable for the criminal conduct of his wife." See Rex v. Taylor, 3 Burr. 1681. Where a wife, by her husband's order and procuration, but in his absence, knowingly uttered a forged order and certificate for the payment of prize money, it was held, that the presumption of coercion at the time of uttering did not arise, as the husband was absent, and the wife was properly convicted. Russell & R. Cro. C. 210.

to her by deed. 8 T. R. 545. And a woman who has even declared herself to be a feme sole, and as such has executed deeds and maintained actions, if herself sued as a feme sole, is not thereby estopped from setting up a defence of coverture. 4 Camp. 26. And a woman divorced *a mensa et thoro* for adultery, and living separate and apart from her husband, cannot sue as a feme sole. 3 Bar. & Cres. 291. A feme covert, who by the custom of London may trade as a feme sole in that city, though she may sue in the city courts as a feme sole, yet the husband must be joined for conformity, and so in the courts at Westminster, 4 T. R. 361. 2 Bos. & P. 93. See ante 443, note (48), as to this custom; and even the death of her husband before action brought, will not entitle her to sue in respect of her contract. 4 T. R. 361.

But there are some exceptions to this rule, as it appears from the learned commentator's text, and where the husband can be considered as *civiliter mortuus*, the wife may sue alone, Lord Coke in Co. Lit. 132. b. says, that a deportation for ever into a foreign land, like to a profession, is a civil death, and that is the reason that the wife may bring an action, or may be impleaded during the natural life of her husband; and so if by an act of parliament the husband be attainted of treason or felony, and saving his life is banished for *ever*, this is a civil death, and the wife may sue as a feme sole; but if the husband have judgment to be exiled but *for a time*, which some call a relegation, this is no civil death. Every person who is attainted of high treason, petit treason, or felony, is disabled to bring any action, for he is extra legem positus, and is accounted in law civiliter mortuus. See 4 T. R. 361. 2 B. & P. 165. 4 Esp. Rep. 27. 1 Selw. N. P. 6 ed. 286. Cro. Car. 519. 145. Bac. Ab. tit. B. & F. M. 9 East, 472. Where the husband is an alien and left this kingdom, or has never been in this country, the wife may sue alone on her contracts during such absence. 2 Esp. 554. 587. 1 B. & P. 357. 2 B. & P. 226. 1 N. R. 80. 11 East, 301. 3 Camp. 123. 5 T. R. 679. 682. But in general the absence of the husband affords no ground for a wife's proceeding separately. 11 East, 301.

4. *Where the husband and wife may join or not at their election.*—The husband and wife may in all cases join when the cause of action would survive to her, or when she is the meritorious cause of action, and there has been an express contract with her, or the husband might sue alone. 1 Wils. 224. 2 Mod. 270. and cases infra. If in respect of a contract made to the wife whilst sole, the party thereto after the marriage give a bond to the husband and wife, or in respect of some new consideration, as forbearance, &c. make a parol promise to the husband and wife, they may join, or the husband may sue alone on such new contract, 1 M. & S. 180. 4 T. R. 616. 1 Salk. 117. 3 Lev. 403. Carth. 462. Lord Raym. 368; but if such bond or promise were made to the husband only, he alone should sue. 1 M. & S. 180. Cro. Jac. 110. Yelv. 84. If a bond or other contract under seal be made to her separately, or with her husband, 1 Stra. 230. 4 T. R. 616. Co. Lit. 351. a. n. 1. 1 Wils. 224. Alleyn. 36. Bac. Ab. Bar. & F. pl. 23. Cro. Jac. 399. Buls. 163. S. C. or in the case of her personal labour, &c. if there be an *express* promise to her, or to her and her husband, she may join with the husband, or the husband may sue alone. 2 M. & S. 393. 396. 4 T. R. 616. Al. 36. Cro. Eliz. 61. 1 Selw. N. P. 296. 6 ed. 1 Chit. on Pl. 20. 4 ed. For rent, or other cause of action accruing during the marriage on a lease or demise, or other contract relating to the land or other real property of the wife, whether such contract were made before or during the coverture, the husband and wife may join, or he may sue alone. Stra. 230. 1 Wils. 224. 2 Lev. 107. Com. Dig. Bar. & F. X. Y. And when a lease for years has been granted to husband and wife, and the lessor evicts them, they may join, or the husband may sue alone. Bro. Ab. Bar. & F. pl. 25. 2 Mod. 217. Cro. Jac. 399. Bulst. 163. 1 Chit. on Pl. 4 ed. 20. And in all actions for a profit, &c. accruing during coverture in right of the real estate of the wife, they may join, or the husband may sue alone, as in debt for not setting out tithes payable to the wife. Com. Dig. Bar. & F. X. 2 Wils. 423, 4. Cro. Jac. 399. But the interest of the wife must always in these cases ex-

allowed to be evidence for, or against, each other (*z*): partly because it is impossible their testimony should be indifferent, but principally because of

(*z*) 2 Hawk. P. C. 431.

pressly appear in the pleadings, 2 Bla. Rep. 1236. 1 H. Bla. 106. Where the husband and wife have recovered judgment on a bond made to wife dum sola, the husband and wife may join in an action on such judgment, or husband may sue alone. 1 Selw. N. P. 297. 6 ed.

In an action for a joint malicious prosecution of husband and wife, they may join in respect of the injury to both, or the husband may sue alone. Cro. Jac. 553. Com. Dig. tit. B. & F. X. For injuries to personal property of wife when the cause of action had its inception before marriage, but its completion afterwards, as in the case of trover before marriage and conversion during it, or of rent due before marriage and a rescue afterwards, the husband and wife may join or husband sue alone in trover or trespass, 2 Saund. 47. g. Salk. 114. 1 Chit. on Pl. 4 ed. 62. though not in detinue. 1 Rol. Ab. 347, R. pl. 1. Bac. Ab. Detinue, B. Bul. N. P. 53. And though produce of wife's labour is the husband's property, yet in respect of her being the meritorious cause of action she may in some cases be joined, as in the case of the Dippers at Tunbridge Wells. 2 Wils. 414. 424. Com. Dig. Bar. & F. X. In actions for the recovery of damages to the land or the real property of the wife during the coverture, or for a tort, which prejudices a remedy by husband and wife, as in the case of quare impedit or rescue, &c. the husband may sue alone, Bro. Bar. & F. pl. 28. 41. 16. 1 Selw. N. P. 298. 6 ed. Com. Dig. Bar. & F. X. or the wife may be joined. Id. 2 Wils. 423. 2 Bla. Rep. 1236. Cro. Car. 418. 437. The effect of joining the wife in an action when the husband may sue alone, is that if the husband die whilst it is pending or after judgment, and before it is satisfied, the interest in the cause of action will survive to the wife, and not to the executors of the husband; though if he sued alone, she would have no interest. Co. Lit. 351. a. note 1. Cro. Jac. 77. 205. 2 Bla. Rep. 1236.

5. *As to who should sue when the husband or wife is dead.*—If a feme covert die and the husband survive, he may sue for any thing he became entitled to during coverture; as for rent incurred to the wife during coverture. 1 Rol. 352. pl. 5. Com. Dig. Bar. & F. Z. Co. Lit. 351. a. n. 1. post 2 book, 434. So the husband may sue for chattels given to the wife during the coverture in her own right, id. though not for her rights in autre droit. Id. 4 T. R. 616. 1 Rol. Ab. 889. pl. 10. Dyer, 331. a. And he cannot sue for arrears of rent accruing after the death of the wife on a lease of her land by himself and wife during coverture, the lessee covenanting to pay the wife's heirs, the rent in such case going to the heirs. 2 Bing. 112. The husband cannot sue except as administrator upon choses in action, or contracts made with the wife before coverture, except arrears of rent, 32 Hen. VIII. c. 37. s. 3. Com. Dig. Bar. & F. E. 3. post 2 book, 435. 3 Mod. 186. 2 Ves. Sen. 676. R. T. Talb. 173. Co. Lit. 351. n.; and he may sue as administrator on a bond to his wife during coverture. 2 M. & S. 396, 7. If the wife has judgment dum sola, and thereupon the husband and wife sue out a scire facias and have judgment, but before execution the wife dies, the husband may have a scire facias or an action of debt on it. 1 Salk. 116. Skin. 682. If pending an action by husband and wife the wife die, the suit abates, but if they obtain judgment he may, notwithstanding her subsequent death, issue execution, or support an action of debt on such judgment. 3 Mod. 189. n. g. h. If the husband survive, he may support an action of trepass, &c. for any injury to the land of the wife committed during coverture, Com. Dig. tit. Bar. & F. Z.; but not an action merely for the battery of the wife without stating special damage to himself, and in the latter case, if the wife die pending the action, it will abate. Freem. 225. Selw. 89.

Upon the death of the husband, the wife, if she survive him, may sue in respect of all chattels real which her husband had in her right, and which he did not dispose of, and to arrears of rent, &c. which became due during the coverture, upon her antecedent, or their joint demise, (2 Taunt. 181. 1 Rol. Ab. 350. d.) during coverture to which she assents after his death, and to all arrears of rent, and other choses in action to which she was entitled before the coverture, and which the husband did not reduce into actual possession. 1 Roll. Ab. 350. Co. Lit. 351. a. Com. Dig. Bar. & F. F. 1. 1 Chit. on Pl. 4 ed. 21, 2. post 2 book, 434. 2 Ves. Sen. 676. 1 Vern. 396. 1 M. & S. 178. 2 Bla. Rep. 1239. Cro. Jac. 77. 205. Co. Lit. 351. a. n. 1. 2 P. Wms. 496. 2 M. & S. 396. The wife may also sue upon all rights of action in autre droit as executrix and administratrix. 4 T. R. 616. Com. Dig. Bar. & F. F. 1. When a feme executrix marries a debtor to the testator, the right of action is only suspended during the coverture; and if she survive she may, in the character of executrix, sue the executors of the husband. Cro. Eliz. 114. 3 Atk. 726. But if the husband made a separate demise of the wife's land, his executor will be entitled to the rent which became due before his death, and not his surviving wife. 2 Taunt. 181. Any action for a tort committed to her or to her personal or real property before marriage, or to her personal or real property during the coverture, will survive to her, R. T. Hardw. 398, 9. Freem. 224. Palm. 313; and she may include in one action trespasses to her land, committed as well in the lifetime of her husband as since his decease. Palm. 313. Com. Dig. Bar. & Feme, 2. A.

The consequences of a mistake, and the manner of taking advantage of husband and wife suing improperly, will be found in 1 Chit. on Pl. 22. 64.

1. *Where they must be sued jointly.*—When a feme sole who has entered into a contract

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*" (*a*); and if *against* each other, they would contradict another maxim, "*nemo tenetur seipsum accusare* (*b*)." But, where the offence is directly against the person of the wife, this rule has been usually dispensed with (*c*); 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

(*a*) "No one is allowed to be a witness in his own cause."

(*b*) "No one is bound to accuse himself."

(*c*) State Trials, vol. i. Lord Audley's case. Stra. 633.

marries, the husband and wife must in general be jointly sued, though the husband state an account, and expressly promise to pay the debt or perform the contract, 7 T. R. 348. All. 72. 1 Keb. 281. 2 T. R. 480. 3 Mod. 186. Bac. Ab. tit. Baron and Feme, L. 1 Taunt. 217. 254. Com. Dig. tit. Plead.; and a husband cannot be sued alone for the use and occupation of a house by his wife dum sola. 1 Bing. 50. 3 J. B. Moore, 307. S. C. Debt for rent upon a lease for life or years, made to husband and wife, should be against both. 1 Rol. 348. l. 45, 50. In the case of a feme covert executrix or administratrix, she must be joined with the husband in an action or any personal contract of the deceased. Cro. Car. 519. 145. Actions for torts committed by a woman before her marriage, must be against the husband and wife jointly, Co. Lit. 351. b. Bac. Ab. tit. Bar. & F. L.; and for torts committed by the wife during coverture, as for slander, assaults, &c. or for any forfeiture, under a penal statute, they must be jointly sued. Id. 1 Hawk. P. C. 3, 4. Bac. Ab. tit. Bar. & F. L. In an action of trespass, &c. against husband and wife for her tort, if she die before judgment the suit will abate, but if the husband die or become bankrupt, her liability will continue. R. T. Hardw. 390. Cullen, 392.

2. *Where the husband must be sued alone.*—The husband must in all cases be sued alone where the wife cannot be considered as in person or property creating the cause of action, and the wife can in no case be sued jointly, upon a mere personal contract made during coverture. 8 T. R. 545. 2 B. & P. 105. Palm. 312. 1 Taunt. 217. 4 Price, 48. And an action of assumpsit against husband and wife is bad, for as to the wife the promise is void. Palm. 313. 1 Taunt. 217. and see 7 Taunt. 432. 1 Moore, 126. S. C. The husband and wife cannot be sued jointly for the slander of both, for the slander by him he must be sued alone. 2 Wils. 227. Dyer, 19. a. pl. 112. Com. Dig. Bar. & F. Y. Bac. Ab. tit. Bar. & F. L. Detinue can only be supported against the husband, 1 Leon. 312. Bac. Ab. tit. Detinue. 2 Bulst. 308; and for a conversion by the husband and wife trover should in strictness be against him only, 2 Saund. 47. 3 Bar. & A. 685, but the objection would be cured by verdict. 3 B. & A. 685.

3. *Where the wife may be sued alone.*—The preceding note as to where the wife may sue alone, will be here applicable; for in cases where the wife may sue alone, so upon the same principle may she be sued.

4. *Where the husband and wife may be jointly sued or not at the election of the plaintiff in the action.*—Although the husband and wife must be joined in an action on the contract of the wife before coverture (supra), yet if the husband, in respect of some new consideration, as for forbearance, &c. expressly undertake in writing to pay the debt or perform the contract of the feme, he may be sued alone on such undertaking, All. 73. 7 T. R. 349; and when rent becomes due, or there is a breach of covenant during coverture upon a lease to the feme whilst sole, the action may be against both or the husband alone. 6 Mod. 239. 1 Roll. Ab. 348. pl. 45. 50. Thompson Ent. 117. Com. Dig. Bar. & F. Y. 6 T. R. 176. 1 N. R. 174. And on a lease to the husband and wife for the wife's benefit, the action may be against both, or the husband alone. 1 Roll. Ab. 348. 350. Bac. Ab. tit. Bar. & F. L. When the husband and wife can in point of law concur in committing the same injury, as an assault, &c. they may be sued jointly for the act of both, and the acquittal of the husband will not preclude the plaintiff from recovering. 1 Vent. 93. 3 B. & A. 685. acc. Yelv. 165. 1 Brownl. 209. Com. Dig. Bar. & F. X. contr. The husband and wife may be jointly sued for enticing away, or harbouring the servant of another, 2 Lev. 63.

5. *Who to be sued in case of death of husband or wife.*—Upon the death of the wife, the husband is not as such liable for any contract of the feme made before coverture, unless judgment has been obtained against him and his wife before her death, and if she die before judgment the suit will abate. 7 T. R. 350. Com. Dig. Bar. & F. 2. c. 3 Mod. 186. R. T. Talb. 173. 3 P. Wms. 410. 1 Chit. on Pl. 4 ed. 47. If the husband neglect during the wife's life to reduce her choses in action into possession, the creditor may sue her administrator for debts due before her marriage, 3 P. Wms. 409. R. T. Talb. 173; and for rent incurred before coverture, or upon a judgment obtained against husband and wife in case of her death, he may be sued. 3 Mod. 189. n. k. 6 Mod. 239. Com. Dig. tit. Bar. & F. 2. B. In case the wife survive she may be sued upon all contracts made before coverture. 7 T. R. 350. 1 Camp. 189.

The consequences of suing the husband and wife improperly, and the modes of taking advantage of coverture, are pointed out in 1 Chit. on Pl. 48. 81. 3 Chit. Com. Law, 38. Tidd. Bact. 8 ed.

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; [*444] 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 (46).

(46) The best reason for not allowing a husband or wife to be witnesses against each other is, that if a wife were a witness for her husband she would be under a strong temptation to commit perjury, and if against her husband it would be contrary to the policy of marriage, and might create much domestic dissention and unhappiness, so vice versa of the husband. Bul. N. P. 286. 4 T. R. 679. 2 T. R. 263. The husband and wife cannot be witnesses *for* each other, and on a prosecution against several for a conspiracy, the evidence of the wife of one of the defendants is inadmissible, 2 Stra. 1094. 5 Esp. Rep. 107; and it is the same in an action for assault, where the cases of the codefendants cannot be separated. Stra. 1095.

They cannot be witnesses *against* each other, therefore the husband cannot be a witness against the wife nor the wife against the husband, to prove the first marriage on an indictment for a second marriage. 2 Hawk. P. C. c. 46. s. 68. Sir T. Raym. 1. 4 St. Tr. f. 754. and see Co. Lit. 6. b. 2 T. R. 263. 2 Lord Ray. 752; but in such case the second wife or husband may be a witness, the second marriage being void. Bul. N. P. 287. 1 Hal. P. C. 693. So in a civil action, a first wife was refused to be admitted to prove her marriage. 2 Lord Ray. 752. In an action brought by a woman as a feme sole, the plaintiff's husband cannot be called to prove the marriage. 2 T. R. 265, 9. Brownl. 47.

Although the husband and wife be not a party to the suit, yet if either be interested in the result of the suit, the other cannot be a witness *for* the one so interested. Lord Ray. 744. Stra. 1095. 2 Stark. on Evid. 708. But the interest to disqualify the party must be certain and vested. Leach, 133. The wife of a bankrupt cannot be examined as to her husband's bankruptcy. 1 P. Wms. 610, 1. 12 Vin. Ab. pl. 28. 1 Brownl. 47. The husband is an incompetent witness for the wife where her separate estate is concerned. 1 Burr. 424. 4 T. R. 678. 2 N. R. 331. 2 Stark on Evid. 708. Lord Ray. 344. On the other hand, where the interest of the husband consisting in a civil liability would not have protected him from examination, it seems that the wife must also answer, although the effect may be to subject the husband to an action, for where the husband might be examined so may the wife. See 2 Stark. on Evid. 709. And in an action between other parties, the wife may be called to prove that credit was given to her husband. Bull. N. P. 287. 1 Stra. 501.

Upon the same principle that the husband and wife cannot be witnesses for or against each other, so in general are their *declarations* or *admissions* inadmissible in evidence. 6 T. R. 680. Willes, 577. 3 Ves. & B. 165. Bull. N. P. 28. Hutt. 16. 1 T. R. 69. 1 Burr. 635. Brownl. 47. The declarations of the wife are not evidence for the husband, 4 Camp. 70; and in an action for criminal conversation the wife's confessions are not evidence for the husband, Bull. N. P. 28. Willes, Rep. 577; but in such action the conduct of the husband and wife, and their letters passing between them, are admissible to shew the terms of affection on which they were living, but the letters ought to be strictly proved. 4 Esp. Rep. 39. 2 Stark. 191. 1 B. & A. 90. S. C. In such action also the letters of the wife to the defendant are not evidence against the husband, though indeed conversations between her and the defendant are. Bull. N. P. 28. Willes, 577. An admission by the wife, even of a trespass committed by her, is not evidence to affect the husband. 7 T. R. 112. So a declaration by the wife in an action against the husband, that the husband absented his house for fear of creditors, is inadmissible in evidence. 3 Moore, 23. and see 1 P. Wms. 610, 611. 12 Vin. Ab. pl. 28. 1 Brownl. 47. So the answer of the wife in equity cannot be read against the husband. 3 P. Wms. 238. Salk. 350. Vern. 60. 109. 110. But letters written by the husband to the wife may be read as evidence against him; and so a discourse between the husband and wife in the presence of a third person may be given in evidence against the husband, like any other conversation in which he may have been concerned. Bull. N. P. 28. 1 Phil. on Evid. 6 ed. 76.

The above rule of law as to the incompetency of the husband and wife being witnesses for or against each other is carried to such an *extent*, that even though the husband consent to the wife's being examined, it will not avoid such rule. R. T. Hardw. 264. 1 Hale, 48. And this rule holds even after the death of one of the parties, or a divorce for adultery, or a divorce a vinculo matrimonii. 6 East, 192. So a widow cannot be asked as to a conversation between her and her deceased husband. 1 Ry. & M. 198.

But there are various exceptions to the above general rule: thus, in high treason a wife may be admitted as a witness against her husband, because the tie of allegiance ought to be more obligatory than any other. Lord Raym. 1. Bull. N. P. 286. 1 Brownl. 47. See also 2 Keb. 403. 1 H. P. C. 301.

By 6 Geo. IV. c. 16. s. 37. commissioners of bankrupts are empowered to examine the bankrupt's wife, touching the discovery of the estate and property of the bankrupt.

So in the case of an indictment for forcible abduction and marriage, the woman is a competent witness for the crown. Supra Gilb. Ev. 254. Cro. Car. 182. 8, 9. 1 Hale, 301. 1 Vent. 243. 3 Keb. 193. 3 Stark. on Evid.

In the civil law the husband and the wife are considered as two distinct persons, and may have separate estates, contracts, debts, and injuries (*d*); and therefore in our ecclesiastical courts, a woman may sue and be sued without her husband (*e*) (47).

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 in-

(*d*) *Cod.* 4, 12, 1. (*e*) 2 Roll. Abr. 298.

711. So in such case, it is said, she is a competent witness for the prisoner. 2 Hawk. c. 46. s. 79. But if the marriage be ratified by voluntary cohabitation, she is incompetent. Hale, 301. 1 Vent. 243. 3 Keb. 193. Cro. Car. 488. Vent. 243. 4 Mod. 3. Stra. 633. Upon an indictment on 1 Jac. I. c. 11. for marrying a second wife, the first being alive, though the first cannot be a witness, yet the second may, the second marriage being void. Supra 1 Hale P. C. 693. 2 Hawk. P. C. c. 46. s 68. Sir T. Raym. 1. It is not a settled point whether a man and woman, not actually married but cohabiting together, can be admitted as witnesses for or against each other, but it should seem they can. See 3 Stark. on Ev. 711, 2. 1 Price, 81. Leach C. C. L. 245.

In cases of evident necessity, where the fact is presumed to be particularly within the wife's knowledge, there is an exception to the general rule. Thus, a wife may be a witness on the prosecution of her husband for an offence committed against her person. Stra. 633. 1202. Bull. N. P. 287. S. C. 1 East, P. C. 454. 13 East, 171. 1 T. R. 698. On the trial of a man for the murder of his wife, her dying declarations are admissible. 2 Leach C. L. 563. 1 East, P. C. 357.

The rule does not extend to declarations of the parties, which are in the nature of facts, for in such cases the presumptions which are made are not founded on the *credit* of the party, but of the fact. Thus the declaration of the wife at the time of effecting a policy on her life of the bad state of her health, is evidence against her husband. 6 East, 188. 2 Stark. on Evid. 712, 3.

Where the husband has allowed the wife to act as his agent in the management of his affairs, or any particular business, the representations and admissions of the wife, made within the general scope of her authority as such agent, are admissible in evidence against the husband. Thus in an action against the husband for board and lodging, where it appeared that the bargain for the apartments had been made by the wife, and that on a demand being made for the rent she acknowledged the debt, the plaintiff was held entitled to recover. 1 Esp. 142. And in an action for goods sold at defendant's shop, an offer by the wife to settle the demand was admitted in evidence, as she was accustomed to serve in the shop and transact business in the husband's absence. 1 Bing. 199. 2 Stark. 204. And the admission of the wife, as to an agreement for suckling a child, was allowed to be evidence against him. Stra. 527. 1 Esp. 141. And in an action by a servant for wages, the plaintiff was allowed to give in evidence a deed executed by the wife of the defendant at the time of the hiring, which, though void as a deed, was admitted in order to shew the terms of the contract. 6 T. R. 176.

So where an action was brought by the direction of the wife, in the name of the husband, to recover a sum of money which had been taken from her on suspicion that it was the produce of stolen property, it was considered that what she had said (in the absence of the husband) respecting money, when examined on a charge of being concerned in the robbery, was evidence for the husband. 4 Camp. 92. So in an action against the husband for goods sold to the wife during the time he occasionally visited her, an acknowledgment by the wife of the debt is evidence. 2 Esp. 211. 5 Esp. 145. 1 Camp. 594. And where the wife is accustomed to conduct business for the husband, her admission of a debt is available to take the case out of the statute of limitations. Holt C. N. P. 591. 2 Stark. 204. 1 Camp. 394. 4 Camp. 92, 3.

(47) There are cases in *equity* where the husband's and wife's interests are considered as distinct and separate, and will allow the husband to sue the wife, 1 Fonbl. 94 to 96. Prec. Ch. 24. 1 Atk. 272. Mitford, 22. 65; or the wife to set up claims adverse to those of her husband, and which she may prosecute by a suit instituted in the name of her prochein amy, or next friend, Prec. Ch. 275. 1 Ves. Jun. 21. 2 Ves. 452. 2 Vern. 493. 614. Gilb. Rep. 152. 3 P. Wms. 39. 269. 1 Fonbl. 94, 95. Mitford, 22. 83. and see cases there collected; but it does not seem that a wife can be sued in equity by a stranger, merely in respect of her separate property, except indeed in the cases before mentioned, where she may sue or be sued separately at law. See 1 Fonbl. 109. Co. Litt. 133. a. 2 Vern. 104. Salk. 116. 3 P. Wms. 37. Or except when the husband be not within the jurisdiction of the court, and she may be decreed to make good engagments which she has entered into respecting such property. 2 P. Wms. 144. Prec. Ch. 328. 2 Vern. 613. Even in such latter case, the most the court can do, is to call forth her separate property in the hands of her trustees, and to direct the application of it, for the court cannot make a personal decree against a feme covert for the payment of a debt. 1 Fonbl. 110. 1 Bro. Ch. R. 16. 2 Atk. 68. 4 Bro. C. R. 483. 9 Ves. 188. 17 Ves. 365. sed vide 15 Ves. 603. and see ante 443, note (42), as to enforcing in equity the wife's contracts. When a trust for a married woman is intended, and no trustees named, her husband, taking the legal estate, will be a trustee for her. 2 P. W. 316.

ferior to him, and acting by his compulsion. And therefore all deeds executed, and acts done, by her, during her coverture, are void; except it be a fine, or the like matter of record, in which case she must be solely and secretly examined, to learn if her act be voluntary (*f*). 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 (*g*). And in some felonies, and other inferior crimes, committed by her, through constraint of her husband, the law excuses her (*h*): but this extends not to treason or murder (48).

The husband also, by the old law, might give his wife moderate correction (*i*). 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 apprentices 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 (*j*), and the husband was prohibited from using any violence to his wife, *aliter quam ad virum, ex causa regiminis et castigationis uxoris suæ, licite et rationabiliter pertinet.* The civil law gave the [*445] 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* (*k*). But with us, in the politer reign of Charles the second, this power of correction began to be doubted (*l*); and a wife may now have security of the peace against her husband (*m*); or, in return, a husband against his wife (*n*). Yet the lower rank of people, who were always fond 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 (*o*).

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 (49).

(*f*) Litt. § 669, 670.
(*g*) Co Litt. 112.
(*h*) 1 Hawk. P. C. 2.
(*i*) *Ibid.* 130.
(*j*) Moor, 874.
(*k*) *Nov.* 117, c. 14, and Van Leeuwen *in loc.*
(*l*) 1 Sid. 113. 3 Kebb. 433.
(*m*) 2 Lev. 128.
(*n*) Stra. 1207.
(*o*) Stra. 478, 875.

(48) This constraint and coercion of the husband is presumed, when the wife is in company with the husband.

(49) Nothing, I apprehend, would more conciliate the good-will of the student in favour of the laws of England, than the persuasion that they had shewn a partiality to the female sex. But I am not so much in love with my subject as to be inclined to leave it in possession of a glory which it may not justly deserve. In addition to what has been observed in this chapter, by the learned Commentator, I shall here state some of the principal differences in the English law, respecting the two sexes; and I shall leave it to the reader to determine on which side is the balance, and how far this compliment is supported by truth.

Husband and wife, in the language of the law, are styled *baron* and *feme:* the word baron, or lord, attributes to the husband not a very courteous superiority. But we might be inclined to think this merely an unmeaning technical phrase, if we did not recollect, that if the baron kills his feme, it is the same as if he had killed a stranger, or any other person; but if the feme kills her baron, it is regarded by the laws as a much more atrocious crime; as she not only breaks through the restraints of humanity and conjugal affection, but throws off all subjection to the authority of her husband. And therefore the law denominates her crime a species of treason, and condemns her to the same punishment as if she had killed the king. And for every species of treason, (though in petit treason the punishment of men was only to be drawn and hanged,) till the 30 Geo. III. c. 48. the sentence of women was to be drawn and burnt alive. 4 book, 204.

By the common law all women were denied the benefit of clergy; and till the 3 and 4 W. & M. c. 9. they received sentence of death,

CHAPTER XVI.

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 nuptiæ demonstrant*," is the rule of the civil law (*a*); 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 inquire 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.

(*a*) *Ff.* 2, 4, 5.

and might have been executed, for the first offence in simple larceny, bigamy, manslaughter, &c. however learned they were, merely because their sex precluded the possibility of their taking holy orders; though a man, who could read, was for the same crime subject only to burning in the hand and a few months imprisonment. 4 book, 369.

These are the principal distinctions in criminal matters; now let us see how the account stands with regard to civil rights.

Intestate personal property is equally divided between males and females; but a son, though younger than all his sisters, is heir to the whole of real property.

A woman's personal property, by marriage, becomes absolutely her husband's, which at his death he may leave entirely away from her; but if he dies without will, she is entitled to one-third of his personal property, if he has children; if not, to one-half. In the province of York, to four-ninths or three-fourths.

By the marriage, the husband is absolutely master of the profits of the wife's lands during the coverture; and if he has had a living child, and survives the wife, he retains the whole of those lands, if they are estates of inheritance, during his life: but the wife is entitled only to dower, or one-third, if she survives, out of the husband's estates of inheritance; but this she has, whether she has had a child or not.

But a husband can be tenant by the courtesy of the trust estates of the wife, though the wife cannot be endowed of the trust estates of the husband. 3 *P. Wms.* 229.

With regard to the property of women, there is taxation without representation; for they pay taxes without having the liberty of voting for representatives; and indeed there seems at present no substantial reason why single women should be denied this privilege. Though the chastity of women is protected from violence, yet a parent can have no reparation, by our law, from the seducer of his daughter's virtue, but by stating that she is his servant, and that by the consequences of the seduction, he is deprived of the benefit of her labour; or where the seducer, at the same time, is a trespasser upon the close or premises of the parent. But when by such forced circumstances the law can take cognizance of the offence, juries disregard the pretended injury, and give damages commensurate to the wounded feelings of a parent.

Female virtue, by the temporal law, is perfectly exposed to the slanders of malignity and falsehood; for any one may proclaim in conversation, that the purest maid, or the chastest matron, is the most meretricious and incontinent of women, with impunity, or free from the animadversions of the temporal courts. Thus female honour, which is dearer to the sex than their lives, is left by the common law to be the sport of an abandoned calumniator. 3 book, 125.

From this impartial statement of the account, I fear there is little reason to pay a compliment to our laws for their respect and favour to the female sex.

As to the interest which the husband has in the chattels real and choses in action of his wife if he survive her, and what interest his representatives have if she survive him, I should recommend to the student's perusal Mr. Butler's note of Co. Litt. 351. *a.* n. 1.

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

[*447] *The duty of parents to provide for the *maintenance* of their children, is a principle of natural law; an obligation, says Puffendorf (*b*), 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 their 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 rigour of laws, that stifle her inclinations to perform this duty; and, besides, she generally wants ability.

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 στοργη, 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 disin-

[*448] herit 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 a 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.

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

(*b*) L. of N. l. 4, c. 11.
(*c*) Sp. L. b. 23, c. 2.
(*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.
(*h*) Raym. 500.

man to provide for those descended from his loins; and the manner in which this obligation shall be performed is thus pointed out (i) (1). The

(i) Stat. 43 Eliz. c. 2.

(1) Independently of the express enactment in the 43 Eliz. c. 2. and other subsequent statutes, there is no *legal* obligation on a parent to maintain his child, and therefore a third person, who may relieve the latter even from absolute want, cannot sue the parent for a reasonable remuneration, unless he expressly or impliedly *contracted* to pay. See per Le Blanc, J. 4. East. 84. Sir T. Raym. 260. margin. Palmer, 559. 2 Stark, 521. Whereas, as we have seen in the case of husband and wife, the former may, in some cases, be sued for necessaries provided for the latter, even in defiance of the husband's injunctions not to supply them. The common law considered moral duties of this nature like others of imperfect obligation, as better left in their performance to the impulse of nature. However a parent may, under circumstances, be indicted at common law for not supplying an infant child with necessaries. Russell & R. C. C. 20. 2 Camp. 650.

The statute 43 Eliz. c. 2. s. 7. enacts, that the father and grandfather, and the mother and grandmother, and the children of every poor, old, blind, lame, and impotent person, or other poor person, not able to work, being of a sufficent ability, shall, at their own charges, relieve and maintain every such poor person in that manner, *and according to that rate*, as by the justices of peace of that county where such sufficient persons dwell, or the greater number of them at their general quarter sessions, shall be assessed, upon pain that every one of them shall forfeit twenty shillings for every month which they shall fail therein.

Mr. Christian has supposed (p. 448. n. 1.) that the relations mentioned in the 43 Eliz. c. 2. can only be compelled to allow each other 20*s.* a month, or 13*l.* a year; but he has not distinguished between the power to award a sufficient maintenance and the punishment for the breach of the order. The amount of maintenance is in the discretion of the magistrates, and they may order much more than 20*s.* a month. And if the party disobey the order, by paying that sum, though exceeding 20*s.* a month, he may be indicted. 2 Burr. 799.

Any two justices may make this order of allowance, which is, in fact, in aid of the parish to which the indigent person belongs. The relation on whom the order is made, may appeal to the justices in sessions, who, upon evidence and the consideration of the circumstances and ability of the party, can reduce the allowance, or discharge the order. If the party disobey the order, he may, as we have seen, be indicted, 2 Burr. 799, or his goods may be distrained under a warrant of justices by distress, 43 Eliz. c. 2. s. 2. & 11.

The justices must be of the county where such parent dwells. 2 Bulst. 344.

Though independently of an express contract, or one implied from *particular* facts, a father cannot be sued for the price of necessaries provided for his infant son, yet very slight circumstances will suffice to justify a jury in finding a contract on his part.

In a late case, where a parent was sought to be charged for regimentals furnished to his son, the lord chief justice left it as a question for the jury to consider whether they could infer that the order was given by the assent and with the authority of the father, he said, that "a father would not be bound by the contract of his son unless either an actual authority were proved, or circumstances appeared, from which such an authority might be implied; were it otherwise, a father, who had an imprudent son, might be prejudiced to an indefinite extent, and it was therefore necessary that some proof should be given that the order of a son was made by the authority of his father. The question, therefore, for the consideration of the jury was, whether, under the circumstances of the particular case, there was sufficient to convince them that the defendant had invested his son with such authority. He had placed his son at the military college at Harlow, and had paid his expenses whilst he remained there; the son, it appeared, then obtained a commission in the army, and having found his way to London, at a considerable distance from his father's residence, had ordered regimentals and other articles suitable to his equipment for the East Indies. If it had appeared in evidence, that the defendant had supplied his son with money for this purpose, or that he had ordered these articles to be furnished elsewhere, either of those circumstances," the learned judge observed, "might have rebutted the presumption of any authority from the defendant, to order them from the plaintiff; nothing, however, of this nature had been proved; and since the articles were necessary for the son, and suitable to that station in which the defendant had placed him, it was for the jury to say, whether they were not satisfied that an authority had been given by the defendant." The jury found in the affirmative. 2 Stark. R. 521.

So where a man marries a widow, who has children by her former husband, who are received by the second husband into, and held out by him to the world as forming part of his own family, he will be liable to pay third persons for necessaries furnished for them. Per Lord Ellenborough, 4 East, 82.

But where a parent allows his child a reasonable sum for his expenses, he will not be liable, even for necessaries ordered by such child. 2 Esp. R. 471.

And where a tradesman has furnished a young man with clothes to an extravagant extent, he cannot sue the father for any part of his demand, 1 Esp. Rep. 17; nor is the infant liable for any part of the articles. 2 Bla. R. 1325.

And it should seem, as in the cases of husband and wife, or principal and agent, if the credit be given solely to the child, the parent will not in any case be liable.

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 session 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 toward their relief (2). 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, [*449] 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 (3). But at her death, the relation being dissolved, the husband is under no farther obligation.

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 (4), 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 de-

(*k*) Stat. 5 Geo. I. c. 8. (*l*) Styles, 283. 2 Bulstr. 346.

But although in a particular case, credit may have been given to a minor, and not to his parent, yet the latter may be responsible in a case of fraud. Thus, where the goods were supplied to a minor, on a fraudulent representation by his father, that he was about to relinquish business in favour of his son, although the credit was given to the son, the father dealing with the proceeds was held responsible, in assumpsit, for goods sold and delivered. 1 Stark. 20.

The father, mother, and children only of a pauper, and not his grand-parents or grandchildren, are bound to support him by the Rev. Statutes: see the mode of enforcing this support, 2 R. S. 614. The authorities quoted by Mr. Chitty scarcely sustain the position he lays down, that a father is under no legal liability to support his children. That from Sir Thos. Raymond seems to be of a contrary tendency. Spencer Ch. J. says, in 16 Johns. R. 281—5, "The duty of a parent to maintain his offspring until they attain the age of maturity is a perfect common law duty. The liability of a child to support its parents who are infirm, destitute, or aged, is wholly created by statute." See also 6 J. R. 566. So it is said by the court, 13 John R. 480, "A parent is under a natural obligation to furnish necessaries for his infant children: and if the parent neglect that duty, any other person who supplies such necessaries is deemed to have conferred a benefit on the delinquent parent, for which the *law* raises an implied promise to pay on the part of the parent. But what is actually necessary will depend on the precise situation of the infant: and which the party giving the credit must be acquainted with at his peril." Perhaps the true rule is contained in the beginning of the next section of Blackstone.

(2) The order of justices for seizing this property, must state how much of the goods or rents should be seized, and must specify the quantum of relief to be appropriated out of them; and in case of rents, must limit the period of such appropriations. 6 East, 163.

(3) This doctrine has been overruled, and a husband is not bound, even whilst his wife is alive, to support her parents, or her children by a former husband, or any other relation; for the statute 43 Eliz. c. 2. extends only to natural relations, being those by blood and not by marriage. 4 T. R. 118.

And where a step-father had maintained the son of his wife whilst he was under age, who, when he was of age, promised to pay his step-father the expense he had incurred; he brought an action for it, and it was held, he was not bound by the act of marriage with the mother to maintain her son, but stood in that respect in the situation of any other stranger. And having done an act beneficial to the defendant in his infancy, it was a good consideration for the defendant's promise after he came of age. If the step-father had been bound by law to maintain the children of the wife, then the promise of the step-son would have been a *nudum pactum*, and the step-father could have maintained no action upon it. 4 East, 82. The son's father is not compellable to maintain the son's wife. 2 Stra. 955.

(4) And the order must set forth such fact, Lord Raym. 669; and that the party to be charged is of sufficient ability. 2 Nol. 233. 3 ed.

The pauper must be chargeable, and it must so appear in the order. 16 Vin. Ab. 424. 2 Nol. 233. 323. 3 ed.

serving 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 entitled to none (*n*) (5). But this gave occasion (*o*) to another statute (*p*), 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.

Our law has made no provision to prevent the disinheriting of children by will; leaving every man's property in his *own dis- [*450] posal, 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 least a necessary subsistence. Indeed, 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 (*q*) (6).

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: natural 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 (*r*). A parent may also justify an assault and battery in defence of the persons of his children (*s*): 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 unfortunately died, it was not held to be murder, but manslaughter merely (*t*). Such indulgence does the law

(*m*) Stat. 11 and 12 W. III. c. 4.
(*n*) Lord Raym. 699.
(*o*) Com. Journ. 18 Feb. 12 Mar. 1701.
(*p*) 1 Ann. st. 1, c. 30.
(*q*) 1 Lev. 130.
(*r*) 2 Inst. 564.
(*s*) 1 Hawk. P. C. 131.
(*t*) Cro. Jac. 296. 1 Hawk. P. C. 83.

(5) It was not held that she was entitled to none because she was the daughter of a Jew, but because the order did not state that she was poor, or likely to become chargeable to the parish.

(6) And the heirs will not be disinherited by any implied construction of the devise of his ancestor, for descent is favoured, and this rule applies as well to heirs general as by custom; and there must be some plain words of gift, or necessary implication, to disinherit an heir at law. 2 Ves. 164. 11 Ves. 29. and cases collected in H. Chitty's Law of Descents, 311.

And it is a rule of the court of equity to turn the scale in favour of an heir, and the court always inclines in his favour, and will allow artificial reasoning to prevent his being disinherited. 3 Atk. 680. 747. Every heir has a right to inquire by what means, and under what deed he is disinherited. And before he has established his title, he may go into equity to remove terms out of the way which would prevent his recovering there, and may also have a production and inspection of deeds and writings in equity. 1 Atk. 339. 2 Ves. 389. 3 Atk. 387.

The law also favours bequests to children, in preference to other persons, on the account of the legacy duty.

See also cases of implied revocations of a will by subsequent marriage and birth of a child. 5 T. R. 49. 51. 4 M. & S. 10.

shew to the frailty of human nature, and the workings of parental affection.

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 (*u*), it is not *easy to imagine or allow, that a parent [*451] 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 (*w*); 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 (7). Yet in one case, that of religion, they are under peculiar restrictions; for (*x*) 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 100*l.*, which (*y*) shall go to the sole use and benefit of him that shall discover the offence. And (*z*) 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 [*452] 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 (8).

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

(*u*) L. of N. b. 6, c. 2, § 12.
(*w*) See page 426.
(*x*) Stat. 1 Ja. I. c. 4, and 3 Ja. I. c. 5.
(*y*) Stat. 11 and 12 W. III. c. 4.
(*z*) Stat. 3 Car. I. c. 2.

(7) The court of chancery has jurisdiction in these cases, especially if the child has a fortune independent of the father. See cases cited 10 Ves. J. 57.

(8) By the 31 Geo. III. c. 32, no person professing the Roman Catholic religion, who shall take and subscribe the oath required by that statute, shall be subject to the penalties in the statutes referred to in the preceding page.

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 (*a*). But the rigour of these laws was softened by subsequent constitutions; so that (*b*) 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 (*c*).

The power of a parent by our English laws is much more moderate; but still sufficient to keep the child in order and obedience (9). He may lawfully correct his child, being under age, in a reasonable manner (*d*); 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 (*e*) (10). 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 son's *estate* than as his trustee or guardian; for though he may receive the profits during the child's minority, yet he must account for them when he comes of age (11). 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,

[*453]

(*a*) *Ff.* 28, 2, 11. *Cod.* 8, 47, 10.
(*b*) *Ff.* 48, 9, 5.
(*c*) *Inst.* 2, 9, 1.
(*d*) 1 Hawk. P. C. 130.
(*e*) Stat. 26 Geo. II. c. 33.

(9) At law the father has against third persons the right to the custody and possession of his infant son, and the court of king's bench cannot directly control it. 5 East, 221. 10 Ves. J. 58, 9. And, at common law, it was an offence to take a child from his father's possession. Andrews, 312. And child-stealing is an offence now punishable by statute 54 Geo. III. c. 101. A court of equity controls this power of the parent when he conducts himself improperly, as being in constant habits of drunkenness or blasphemy, or attempting to mislead him in matters of religion, or to take him improperly out of the kingdom; and the father may be compelled to give security in these cases. 10 Ves. J. 58. 61. See 13 Johns. R. 418.

(10) The stat. 26 G. II. c. 33, is repealed by stat. 3 G. IV. c. 75. By the present marriage act, viz. stat. 4 G. IV. c. 76, § 16, such consent is directed to be obtained; but, although wanting, the marriage is not therefore void or voidable. The former law often originated much evil, particularly affecting the presumed wife.

(11) Where children have fortunes independent of their parents, lord Thurlow declared, that it was the practice in chancery to refer it to the master, to inquire whether the parents were of ability to maintain the children; if not, then to report what would be a proper maintenance. See per Le Blanc, J. 4 East, 84, 5. And this practice did not vary where a maintenance was directly given by the will, unless in cases where it was given to the father; under which circumstance it was a legacy to him. 1 Bro. 388. And an allowance will be made for their maintenance and education for the time past, since the death of the testator, and for the time to come, until they attain the age of twenty-one. 6 Ves. Jun. 454.

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 (12).

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 Athe-
[*454] nian 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 livelihood. 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 burthen, by furnishing them with no means of subsistence.

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 (13).

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;

(*f*) Potter's Antiq. b. 4, c. 15.
(*g*) Sp. L. b. 26, c. 5.
(*h*) Stat. 43 Eliz. c. 2.
(*i*) *Inst.* 1, 10, 13. *Decret. I.* 4, *t.* 17, *c.* 1.

(12) This power must be temperately exercised, and no schoolmaster should feel himself at liberty to administer chastisement co-extensively with the parent, howsoever the infant delinquent might appear to have deserved it. Delegation of parental power may not extend to apprenticing a child without his consent, 3 *B. and A.* 584. But, under some provisions found in the poor laws, magistrates have the power of binding children apprentices; and, in the case specified, have power to examine the father or mother. See stat. 56 G. III. c. 139, § 1.

(13) Whether a grandchild be compellable to relieve an indigent grandfather, has not been determined: Lord Holt being of opinion that he is; in Burn, it is alleged that he is not. The statute is ambiguously worded; but Mr. Christian appears to have thought Lord Holt's the better opinion.

which, though not so strict as to require that the child shall be *begotten*, *yet makes it an indispensable condition, to make it legitimate, 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 law 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 law 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*). [*455] [*456]

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*) (14). And this gives oc-

(*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 Angliæ mutare, quæ hucusque usitatæ sunt et approbatæ.* Stat. 20 Hen. III. c. 9. See the introduction to the great charter, *edit. Oxon.* 1759, *sub anno* 1253.

(*l*) Cro. Jac. 541.

(14) The following information from Dr. Hunter will be found in Harg. & B. Co. Lit. 123. b.:—1. The usual period of gestation is nine calendar months, but there is very commonly a difference of one, two, or three weeks. 2. A child may be born alive, at any time from

casion 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 rigour 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*) (15); and, if she be, to keep her under proper restraint till delivered; which is entirely conformable to the practice of the civil law (*o*): but, if the widow be, upon due examination, found not pregnant, the presumptive heir shall be admitted to the inheritance, though liable to lose it again, on the birth of a child within forty weeks from the death of a husband (*p*). 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 [*457] 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 (*q*). To prevent this, among other inconveniences, the civil law ordained that no widow should marry *infra annum luctus* (*r*), a rule which obtained so early as the reign of Augustus (*s*), 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 (*t*).

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* (*u*), for above nine months, so that no access to his wife can be presumed, her issue during that period shall be bastards (*v*). But, generally, during the coverture, access of the husband shall be presumed, unless the contrary can be shewn (*w*); which is such a negative as can only be proved by shewing him to be elsewhere: for the general rule is, *præsumitur pro legitimatione* (*x*) (16). In a divorce, *a mensa et thoro* (*y*), if the wife

(*m*) Stiernhook *de Jure Gothor. l.* 3, *c.* 5.
(*n*) Co. Litt. 8. Bract. *l.* 2, *c.* 32.
(*o*) *Ff.* 25, *tit.* 4, *per tot.*
(*p*) Britton, *c.* 66, *pag.* 166.
(*q*) Co. Litt. 8.
(*r*) *Cod.* 5, 9, 2.—"Within the year of mourning."
(*s*) But the year was then only *ten* months. Ovid, *Fast. l.* 27.
(*t*) *Sit omnis vidua sine marito duodecim menses. L. L. Ethelr.* A. D. 1008. *L. L. Canut, c.* 71.
(*u*) "Without the four seas."
(*v*) Co. Litt. 244.
(*w*) Salk. 123. 3 P. W. 276. Stra. 925.
(*x*) 5 Rep. 98.—"It is presumed for legitimation."
(*y*) "From table and from bed."

three months; but we see none born with powers of coming to manhood, or of being reared, before seven calendar months, or near that time; at six months it cannot be. 3. I have known a woman bear a living child, in a perfectly natural way, fourteen days later than nine calendar months; and believe two women to have been delivered of a child alive, in a natural way, above ten calendar months from the hour of conception. See further Runington on Ejectments, 1 ed.

In a case where the wife was a lewd woman, and she was delivered of a child forty weeks and ten days after the death of the husband, it was held legitimate. Hale's MSS. Stark. on Evid. part 4. 221. n. a. So where the child was born forty weeks and eleven days after the death of the first husband. 18 Rich. II. Hale's MSS. Cro. Jac. 541. Godb. 281. See also 2 Stra. 925. Roll. Ab. 356.

(15) The writ is granted not only to an heir at law, but to a devisee for life, or in tail, or in fee; and whether his interest is immediate or contingent. See 4 *Bro.* 90. For the proceedings under this writ, see 2 *P. Wms.* 591. And in Moseley's Report of Aiscough's case, the same in 2 P. Wms. 591, a case of personal estate is cited. The writ directs, that, in the presence of knights and women, the female *tractari per uberem et ventrem;* the presumed necessity of the case dispensing at once with common decency and with respectful deference to sex.

(16) Formerly, when the husband was living within the kingdom, access was presumed, unless strict proof was adduced that the husband and wife were all the time living at a distance from each other; but now, the legitimacy or illegitimacy of the child of a married woman, living in a notorious state of adultery,

ds children, they are bastards; for the law will presume the husband wife conformable to the sentence of separation, unless access be prov- but, in a voluntary separation by agreement, the law will suppose ess, unless the negative be shewn (z). So also, if there is an apparent ossibility of procreation on the part of the husband, as if he be only it years old, or the like, there the issue of the wife shall be bastards (a). ewise, in case of divorce in the spiritual court, *a vinculo matrimonii* (b), the issue born during the coverture are bastards (c); because h divorce is always upon *some cause, that rendered the mar- [*456] ge unlawful and null from the beginning.

I. Let us next see the duty of parents to their bastard children, by our r; which is principally that of maintenance. For, though bastards not looked upon as children to any civil purposes, yet the ties of nature, which maintenance is one, are not so easily dissolved: and they hold eed as to many other intentions; as, particularly, that a man shall not rry his bastard sister or daughter (d). The civil law, therefore, when lenied maintenance to bastards begotten under certain atrocious circum- nces (e), was neither consonant to nature nor reason, however profligate d wicked the parents might justly be esteemed.

The method in which the English law provides maintenance for them as follows (f). When a woman is delivered, or declares herself with ild, of a bastard, and will by oath before a justice of peace charge any rson as having got her with child, the justice shall cause such person be apprehended, and commit him till he gives security, either to main- in the child, or appear at the next quarter sessions to dispute and try e fact. But if the woman dies, or is married before delivery, or miscar- s, or proves not to have been with child, the person shall be discharg- l (17): otherwise the sessions, or two justices out of sessions, upon ori- inal application to them, may take order for the keeping of the bastard, y charging the mother or the reputed father with the payment of money r other sustentation for that purpose. And if such putative father, or ewd mother, run away from the parish, the overseers, by direction of two ustices, may seize their rents, goods, and chattels, in order to bring up the aid bastard child. Yet such is the humanity of our laws, that no woman an be compulsively questioned concerning the father of her child till one nonth after her delivery; which indulgence is, however, very frequently a ardship upon parishes, by giving the parents opportunity to escape (18).

(z) Salk. 123.
(a) Co. Litt. 244.
(b) "From the bond of marriage."
(c) *Ibid.* 235.
(d) Lord Raym. 68. Comb. 356.
(e) *Nov.* 89, c. 15.
(f) Stat. 18 Eliz. c. 3. 7 Jac. I. c. 4. 3 Car. I. c. 4. 13 and 14 Car. II. c. 12. 6 Geo. II. c. 31.

under all the circumstances, is a question for a jury to determine. 4 T. R. 356. and 251. And when the husband in the course of nature cannot have been the father of his wife's child, the child is by law considered a bastard; and lord Ellenborough said, that circumstances which shew a natural impossibility that the husband could be the father of the child of which the wife is delivered, whether arising from his being under the age of puberty, or from his labouring under disability occasioned by natural infirmity, or from the length of time elapsed since his death, are grounds on which the illegitimacy of the child may be founded. And, therefore, where it was proved that the husband had only access one fortnight before the birth of a child, it was held to be illegitimate; but the court said that the case where the parents have married so recently before the birth of the child that it could not have been begotten in wedlock, it stands upon its own peculiar ground, the child in that case is legitimated by the recognition of the husband, 8 East, 193; and as to proof of bastardy, see Stark. on Evid. part 4. 217 to 225.

See note 13, p. 436, and 2 R. S. 142, &c. If the children there mentioned are to be deemed illegitimate, they are to a limited extent exceptions to the rule mentioned in the text.

(17) Or he shall be discharged, if the justices at the sessions, upon hearing all the circumstances of the case, shall be of opinion that he is not the father of the child.

(18) In the technical treatises on the poor

[*459] *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* (*g*) (19). Yet he may gain a sirname by reputation (*h*), though he has none by inheritance (20). All other children have their primary settlement in their father's parish; but a bastard in the parish where born, for he hath no father (*i*). 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 where 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 (*j*); or, in the latter case, in the mother's own parish, if the mother be apprehended for her vagrancy (*k*). Bastards also born in any licensed hospital

(*g*) *Fort. de L. L.* c. 40.
(*h*) Co. Litt. 3.
(*i*) Salk. 427.
(*j*) *Ibid.* 121.
(*k*) Stat. 17 Geo. II. c. 5.

laws will be found the cases occurring as to the right of custody, whether it be in the father or in the mother of the bastard. And the right of the mother to such custody seems recognized and established. 5 East, 221. See also 1 B. and P. N. R. 148; 7 East, 579.

But the assent of either father or mother to a marriage of a bastard under age does not appear to be expressly required by the late marriage-act; and hence either banns, or the assent of a guardian appointed by the lord chancellor, seem necessary to establish its validity.

(19) But though he is considered *filius nullius* with respect to inheritances and successions, yet see Raymond 68, where the illegality of his incestuous connexion is noticed.

"So far at least as concerns the public support of a child, it is deemed a bastard by, 1 R. S. 641, when the husband of the mother continues out of the state for a whole year previous to the birth, separate from the mother, and she during that time continues to reside in this state: or when the mother and her husband are separated by a decree of a competent court."

(20) A bastard having gotten a name by reputation, may purchase by his reputed or known name to him and his heirs, Co. Lit. 3. b.; but this can only be to the heirs of his own body.

A conveyance to a man who is a bastard, and his heirs, though his estate is in its descent confined to the issue of his body, yet gives him a fee simple, and confers an unlimited power of alienation; and any person deriving title from him or his heirs, may transmit the estate in perpetual succession. The law, however, so far adverts to the situation of a bastard, that a limitation over on failure of the heirs of the bastard, after a gift by will to him and his heirs, would convert the devise into an estate tail. 3 Bulst. 195. 1 Lord Ray. 1152.

Bastards may take by gift or devise, provided they are sufficiently described, and have gained a name by reputation. 1 Ves. & B. 423. 1 Atk. 410.

But the rule as to a bastard's taking by his name of reputation, must be understood as giving a capacity to take by that name merely as a description, not as a child by a claim of kindred; therefore a bastard cannot claim a share under a devise to *children* generally, though the will was strong in his favour by implication, 5 Ves. 530. and see 1 Ves. & B. 434. 469. 6 Ves. 43. 1 Maddox, 430. H. Chitty's Law of Descents, 28. 29; nor is any illegitimate child entitled to immediate interest upon a legacy payable at a future time, when such legacy was given by its reputed father. 2 Roper on Leg. 2 ed. 199.

A limitation cannot be to a bastard en ventre sa mere, for bastards cannot take till they gain a name by reputation. 1 Inst. 3. b. 6 Co. 68. 1 P. Wms. 529. 17 Ves. 528. 1 Mer. 151. 18 Ves. 288. H. Chitty's Law of Descents, 29, 30.

Though a bastard may be a reputed son, yet he is not such a son for whom in cousin of blood an use can be raised. Dyer, 374. Yet on an estate otherwise effectually passed, an estate may be as well declared to a bastard being in esse, and sufficiently described, as to another person; but where the use will not arise but in consideration of *blood*, if derived through any but the pure channel of marriage, however near it may be, it will not prevail. Id. Co. Lit. 123. a. See 2 Fonb. on Eq. 5 ed. 124.

If a bastard die seised of a real estate of inheritance, without having devised it, and without issue, the estate will escheat to the king, or other immediate lord of the fee. 3 Bulstr. 195. 1 Ld. Raym. 1152. 1 Prest. Est. 468, 9. post 2 book, 249. 2 Cruise's Dig. 374. But as there might in many cases be much apparent hardship in the strict enforcement of this branch of the royal prerogative, it is usual in such cases to transfer the power of exercising it to some one of the family, reserving to the crown a small proportion as a tenth of the value of both the real and personal estate. 1 Wood. 397. 308. And so likewise in the case of personal estate, where a bastard dies intestate, and without issue, the king is entitled, and the ordinary of course grants, administration to the patentee or grantee of the crown. Salk. 37. 3 P. Wms. 33. See H. Chitty's Law of Descents, 27, 8.

for pregnant women, are settled in the parishes to which the mothers belong (*l*). 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 (21). 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 (*m*): 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 (*n*). A bastard may, lastly, be made legitimate, and capable of inheriting, by the transcendent power of an act of parliament, and not otherwise (*o*): as was done in the case of John of Gant's bastard children, by a statute of Richard the second.

CHAPTER XVII.

OF GUARDIAN AND WARD.

The only general private relation, now remaining to be discussed, is that of guardian and ward (1); 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.

(*l*) Stat. 13 Geo. III. c. 82.
(*m*) Fortesc. c. 40. 5 Rep. 58.
(*n*) Cod. 6, 57, 5.
(*o*) 4 Inst. 36.
(*a*) *Ff.* 26, 4, 1.

(21) Bastards cannot inherit, 1 R. S. 754: but if they die without children, their mother or her relations may inherit from them. Id. 753.

(1) The equity books supply the practical details of this title, particularly 2 Fonbl. Tr. Eq. 236; Maddock's Prin. and Prac.; and Mr. Hargrave's notes 63, 71, on pa. 88, Co. Litt. exhaust the learning upon the title. The same title occurring in Com. Dig. and Bac. Abr. may be consulted, and also in Tomlin's Law Dictionary.

[*461] *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*) (2). And, with regard to daughters, it seems by construction of the statute 4 and 5 Ph. and 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*) (3). 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*) (4). Next are guardians *in socage* (5), (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:

(*b*) Co. Litt. 88.
(*c*) 3 Rep. 39.
(*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 hæreditate clamare.* Glanv. l. 7, c. 11.

(2) But an executor is not justified in paying to the father a legacy left to the child; and if he pays it to the father, and the father becomes insolvent, he may be compelled to pay it over again. 1 *P. Wms.* 285.

(3) See Bac. Ab. Guardian, A. 1. It has been considered, that the power of a father to appoint a guardian under the act 4 and 5 Ph. & M. c. 8. extends to natural children, 2 Stra. 1162; but according to 2 Bro. Ch. R. 583. it does not. However where the putative father by a will names guardians for his natural child, the court will in general appoint them to be so, without any reference to the master, unless the property be considerable. Id. ibid. 2 Cox, 46. Bac. Ab. Guardian, A. 1 Jac. & W. 106. 395. An appointment of a testamentary guardian by a *mother* is absolutely void. Vaughan, 180. 3 Atk. 519. A father's appointment by deed of a guardian may be revoked by will. Finch, 323. 1 Vern. 442. Any form of words indicative of the intent suffices. Swimb. p. 3. c. 12. 2 Fonbl. on eq. 5 ed. 246, 7. A guardian appointed by the father cannot delegate or continue the authority to another. Vaughan, 179. 2 Atk. 15. Nor is a copyholder within the act. 3 Lev. 395.

(4) It might be questionable whether the ordinary would be permitted to interfere farther than to appoint *ad litem*. 3 Atkins, 631, Burr. 1436. For, where a legitimate child, even at the breast, is withheld from the custody of the father, habeas corpus may be brought. The king *v.* De Manneville, 5 East, 221. See also 1 Bl. R. 386; and 4 J. B. Moore, 366.

But, of an illegitimate child, the mother appears to be the natural guardian, 4 Taunt. 498, *ex parte* Knee, 1 N. R. 148. And habeas corpus lies at her instance. See the king *v.* Hopkins, 7 East, 579; 5 Id. 224, n. Also 5 T. R. 278.

The guardian upon record is liable to the costs of the suit, 2 Est. 473.

(5) A widow is guardian in socage to her daughters until they are fourteen years old, as well of freehold as of copyhold, 10 East, 491. 2 M. & S. 504.; and by residing on the ward's estate for forty days gain a settlement in the parish, and cannot be removed from the possession of it at any time. Id. ibid. She has a right as such to elect whether she will let the estate, or occupy it for their benefit. Id. ibid. Such a guardian has not a mere office or authority, but an interest in the ward's estate: she may maintain trespass and ejectment; avow damage feasant, make admittance to copyhold and lease in her own name. Id. ibid.

ıd this they boast to be "*summa providentia*" (*i*). But in the mean me they seem to have forgotten, how much it is the *guardian's [*462] ıterest to remove the incumbrance of his pupil's life from that ıtate for which he is supposed to have so great a regard (*k*). And this ffords Fortescue (*l*), and Sir Edward Coke (*m*), an ample opportunity for iumph; they affirming, that to commit the custody of an infant to him ıat is next in succession is "*quasi agnum committere lupo, ad devorandum*" ı) (6). These guardians in socage, like those for nurture, continue only ll the minor is fourteen years of age; for then, in both cases, he is preumed to have discretion, so far as to choose his own guardian. This he ıay do, unless one be appointed by the father, by virtue of the statute 12 ar. II. c. 24, which, considering the imbecility of judgment in children f the age of fourteen, and the abolition of guardianship *in chivalry* (which ısted till the age of twenty-one, and of which we shall speak hereafter), nacts, that any father, under age or of full age, may by deed or will dis-ose of the custody of his child, either born or unborn, to any person, xcept a popish recusant, either in possession or reversion, till such child ttains the age of one-and-twenty years (7). These are called guardians

(*i*) *Fl.* 26, 4, 1.

(*k*) The Roman satyrist was fully aware of this anger, when he puts this private prayer into the outh of a selfish guardian:

— *pupillum e utinam, quem proximus hares*
Impello, expungam. Pers. 1, 12.

(*l*) *C.* 44.

(*m*) 1 Inst. 88.

(*n*) See stat. *Hibern.* 14 Hen. III. This policy f 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 Antiq. b. 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. *Legg. Att. l.* 6, *t.* 7.)

(6) Lord Chancellor Macclesfield has vemently condemned the rule of our law, that he next of kin, to whom the land cannot descend, is to be the guardian in socage; and as declared, that "it is not grounded upon reason, but prevailed in barbarous times, before the nation was civilized." 2 *P. Wms.* 262. But as the law has placed the custody of the infant under the care of one who is just as likely to be in a near degree of kindred as the heir; one who probably will have the same affection for his person, without having any interest in even wishing his death, and therefore removed from all suspicion, however ill-founded; I cannot but think there is more wisdom in placing the infant under the guardianship of such a relation, than under that of the next heir.

A socage guardian can only be where the infant takes lands by descent. If he has lands by descent both *ex parte paterna* and *ex parte materna*, then the next of kin on each side shall, respectively, be guardians by socage of these lands; and of these two claimants the first occupant shall retain the custody of the infant's person. See Mr. Hargrave's notes to Co. Litt. 88. b. where these different kinds of guardianship are with great learning and perspicuity discriminated and discussed.

The custody of a lunatic's person and of his estate real and personal, may be committed to his next of kin though his heir at law, 1 Johns. C. R. 436. Tenure in socage is abolished in New-York, but the common law and statutory rights and duties of a guardian in socage over an infant holding any estate in lands, devolve first on the father, next on the mother; and if there be no father or mother, then to the nearest and eldest relative of full age, not being under any legal incapacity: males being preferred to females as between relatives of the same degree. 1 R. S. 718—9. No person under 21 years of age can be admitted to act as executor, 2 R. S. 69. though males of 18, and females of 16, may make a will of personal estate. Id. 60. So also by 38 Geo. III. c. 88. in England, see book 2, p. 502, note.

(7) By this statute the father may dispose of the guardianship of any child unmarried under the age of twenty-one, by deed or will, executed in the presence of two or more witnesses, till such child attains the age of twenty-one, or for any less time. And the guardian so appointed has the tuition of the ward, and the management of his estate and property.

The mother cannot appoint a guardian under this act, Vaugh. 180. 3 Atk. 519; nor can a guardian already appointed by the father. Vaugh. 179. 2 Atk. 15. A copyholder is not within the act. 3 Lev. 395.

A disposition of this nature by deed may be revoked by will, Finch, 323; but not so if the deed contain a covenant not to revoke. 1 Vern. 442.

A will appointing a guardian for this purpose, need not be proved in the spiritual court. 1 Vent. 207.

No material form of words are necessary to create the appointment. Swinb. p. 3. c. 12.

by statute, or *testamentary* guardians. There are also special guardians *by custom* of London, and other places (*o*); but they are particular exceptions, and do not fall under the general law (8).

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 (9), but shall only add, that the guardian, when the ward

(*o*) Co. Litt. 88.

See 2 Fonbl. on Eq. 5 ed. 246, 7. notes. But the power of the guardian exists only during the time for which he is expressly appointed. Vaugh. 184.

Though under this act a testamentary guardian has the custody of the infant's real estate, a lease granted by him of such real estate is absolutely void. 2 Wils. 129. 135.

The marriage of the infant before he becomes twenty-one years of age, does not determine the guardianship. 3 Atk. 625.

(8) The king is also an universal guardian of infants, who delegates it to the lord chancellor. See 2 Fonbl. on Eq. 5 ed. 225. Chit. Prerog. Regis. 155.

By virtue of this power the chancellor may appoint guardians to such infants as are without them, Bac. Ab. Guardians, c. 2 Fonbl. 5 ed. 225. And in a case where the infant, of the age of seventeen, had appointed a guardian by deed, it was decided that the chancellor had still a power to appoint a guardian, 4 Madd. 462; and guardians at common law may be removed or compelled to give security, if there appear any danger of their abusing the person or estate of the ward, 3 Cha. Ca. 237. Style, 456. Hard. 96. 1 Sid. 424. 3 Salk. 177; but it has been considered that a statute guardian cannot be wholly removed. 3 Salk. 178. 1 P. W. 698. 2 P. W. 112. 2 Fonbl. 232. and guardians are appointed by him where such appointment is necessary to protect the infant's general interest, or to sustain a suit, or to consent to the infant's marriage, 1 Madd. 213; but he never appoints a guardian to a woman after marriage. 1 Ves. 157. A guardian cannot be otherwise appointed in chancery than by bringing the infant into court, or his praying a commission to have a guardian assigned him. 1 Eq. Ca. Ab. 260. One of the six clerks may be appointed. 2 Cha. Ca. 164. Nels. Rep. 44. As to when the court of chancery may appoint a guardian in the place of another, see post. And see the jurisdiction of court of chancery in general on this subject. 2 Fonbl. 226. n. a.

The infant himself may also appoint a guardian, and this right arises only when from a defect in the law (or rather in the execution of it,) the infant finds himself wholly unprovided with a guardian. This may happen either *before* fourteen, when the infant has no such property as attracts a guardianship by tenure, and the father is dead without having executed his power of appointment, and there is no mother; or *after* fourteen, when the custody of the guardian in socage terminates, and there is no appointment by the father under the 12 Car. II. Lord Coke only takes notice of such election where the infant is under fourteen; and as to this, omits to state how or before whom it should be made. See 1 Inst. 87. b. Nor does this defect seem supplied by any prior or contemporary writer. As to a guardian under fourteen, it appears from the ending of guardianship in socage at that age, as if the common law deemed a guardian afterwards unnecessary. However, since the 12 Car. II. c. 24. it has been usual, in defect of an appointment under the statute, to allow the infant to elect one for himself; and this practice appears to have prevailed even in some degree before the Restoration: such election is said to be frequently made before a judge on the circuit, 1 Ves. 375; but this form does not seem essential.

The late lord Baltimore, when he was turned of eighteen, having no testamentary guardian, and being under the necessity of having one for special purposes, relative to his proprietary government of Maryland, named a guardian by deed, a mode adopted by the advice of counsel. It seems, in fact, as if there was no prescribed form of an infant's electing a guardian after fourteen, any more than there is before; and therefore election by parol, though unsolemn, might be legally sufficient. The deficiency in precedents on this occasion is easily accounted for, this kind of guardianship being of very late origin, unnoticed as it seems by any writer before Coke, except Swinburn. (Testam. edit. 1590. 97. b.) And there being yet no cases in print to explain the powers incident to it, or whether the infant may change a guardian so constituted by himself, Coke, though professing to enumerate the different sorts of guardianship, omits this in one case, whence perhaps it may be conjectured, that in his time it was in strictness scarcely recognised as legal. 1 Inst. 88. b. in notes. For these observations, see Toml. Law Dict. tit. Guardian. Though an infant thus appoint a guardian, yet it does not preclude the court of chancery from appointing another. 4 Mad. 462.

Guardians are also appointed *ad litem*. All courts of justice have a power to assign a guardian to an infant to sue or defend actions, if the infant comes into court and desires it; or a judge at his chambers, at the desire of the infant, may assign a person named by him to be his guardian. F. N. B. 27. 1 Inst. 88. b. n. 16. 135. b. 1. See post.

As to who is usually appointed, and the mode, &c. of appointing a prochein amy or guardian to an infant in the common law courts, see Tidd. Prac. 8 ed. 95, 96.

(9) The learned author has already shewn the general object of the appointment of these guardians; it may be further observed as to the guardian's duty, that he can do nothing but for the profit and benefit of the infant, nor

comes of age, is bound to give *him an account of all that he [*463]
has transacted on his behalf, and must answer for all losses by his wilful default or negligence (10). In order therefore to prevent disa-

intermmeddle with any thing but of what he may render an account.

Thus he cannot present to a church, Cro. Jac. 99. Co. Lit. 89. a. 3 Atk. 710; but quære whether the court will not control the presentation by the infant, if improperly obtained without the concurrence of the guardian. See 1 Fonbl. on Eq. 5 ed. 84. Bing. on Infancy, 76.

A guardian in socage of a manor may grant copyhold estates in his own name, and which will bind the heir, Cro. J. 55. 99. Poph. 127; and he may grant copyholds in reversion. Bac. Ab. Guardian, G. Leases made by him are good if they expire within the infant's minority; but though they expire afterwards, they are not absolutely void, but merely voidable by the infant. Bro. Gard. 70. Cro. Jac. 55. 98.

A prohibition of waste, as well as an action of waste, will lie against a guardian in socage, for a voluntary, but not for permissive waste, or waste done by a stranger. 2 Inst. 305.

A guardian for nurture cannot make leases for years, either in his own name or that of the infant, for he hath only the care of the person. Bingh. on Inf. 151.

A partition made by the guardian shall bind the infant, if equal. 2 Roll. Ab. 256.

A guardian ought to sell all moveables in a reasonable time, and turn them into land or money, except the minor is near of age, and may want such goods himself; and he will be liable to pay interest for money in his hands which might have been put out at interest, in which case it will be presumed the guardian made use of it himself. 3 Salk. 177.

A guardian cannot change the nature of the ward's estate, unless by some act manifestly for the ward's advantage, or by leave of the court of chancery. Amb. 370. 2 P. Wms. 278. 1 Vern. 435.

A guardian, by taking a bond for arrears of rent, makes it his own debt, and is liable for it to the infant. 2 Ch. Rep. 97.

A guardian may pay out of the profits of the estate the interest of any real incumbrances, as a judgment, and the principal of a mortgage, that are direct and immediate charge on the land, but not any other real incumbrances. 1 Esq. Ab. 261. 2 Vern. 193. 606.

But where a guardian borrowed money to pay off incumbrances on an infant's estate, and promised to give the lender security, but died before it was done, though the lender's money was duly applied, the court would not decree him satisfaction out of the infant's estate. 2 Vern. 280.

However, if the sum disbursed exceed the profits of the estate, for so much A shall have an account, as for money due to the guardian, and it shall be raised out of the infant's estate. Id.

If the guardian buys off an incumbrance of 600*l.* with 100*l.* he cannot charge the infant 600*l.* 2 Ch. Ca. 245.

Guardians appointed ad litem, may acknowledge satisfaction upon the record for a debt recovered at law for the infant. T. T. 23. Car. 2. B. R.

When the particular measure proposed is doubtful in its tendency, the more prudent course for guardians to pursue, is to seek the indemnity of a court of equity, which will direct one of its officers to inquire and report whether the measure be, or be not, in its probable effect beneficial to the infant. 2 Vern. 224. Bingh. 155.

The guardian cannot claim out of the estate any compensation for his trouble. 2 Ves. 547.

Where there has been some doubt of the sufficiency of a guardian in socage, the court of chancery has obliged him to give security. 2 Mod. 177.

A guardian may be ordered to enter into security by recognizance not to suffer the infant to marry while in his custody, and to permit other relations to visit, &c. 2 Lev. 128. 2 Ch. Rep. 237.

The answer in chancery of an infant by his guardian, cannot be read against him on a trial at law, 2 Ventr. 72. Carth. 79; for the law, out of tenderness to infants, will not permit them to be prejudiced by the oath of a guardian, Gilb. Ev. 51. 2 Vent. 72. 3 Mod. 258. 2 Stark. 366; but it seems that the answer of the guardian for the infant may afterwards be used in evidence against himself, for it is the answer of the guardian and not of the infant. 3 P. Wms. 237.

If the ward be taken away from the guardian, the statute of Westm. 2. c. 35, gives him a writ of ravishment of ward, in which he recovers the body of the ward, and not damages, as at common law, by the action of trespass. 2 Inst. 90. 438. 9 Co. 72.

Guardians of a female under age are justified in stopping her elopement, and in detaining her clothes if she has eloped; and a carrier by whom she has sent them may deliver them up to the guardians. 1 Carr. Rep. 101.

(10) This rule, that the guardian is compellable to account only when the infant comes of age, or until she marries, is applicable only to testamentary or other guardians not in socage, and exists only in a court of law; for under the general protection afforded to infants by the court of chancery, an infant may in that court by his prochein amy call his guardian to account, even during his minority. 2 Vern. 342. 2 P. Wms. 119. 1 Ves. 91.

Guardians in socage are by the common law accountable to the infant, either when he comes to the age of fourteen, or at any time after, as he thinks fit. Co. Lit. 87.

The guardian in his account shall have allowance of all reasonable expenses: if he is robbed of the rents and profits of the land without his default or negligence, he shall be discharged thereof in his account; for he is in the nature of a bailiff or servant to the infant, and undertakes no otherwise than for

greeable 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 will proceed to the removal of him, and appoint another in his stead (*p*) (11).

(*p*) 1 Sid. 424. 1 P. Will. 703.

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his diligence and fidelity. Co. Lit. 89. a. 123.

If a man intrudes upon an infant, he shall receive the profits but as guardian, and the infant may have an account against him as guardian, or the infant may treat him as a disseisor; and if a person, during a person's infancy, receives the profits of an infant's estate, and continues to do so for several years after the infant comes of age before any entry is made on him, yet he shall account for the profits throughout, and not during the infancy only; and so it seems at law he should be charged in an action of account, as tutor alienus. 1 Vern. 295. 1 Atk. 489. 2 Fonbl. 5 ed. 235, 6; and where a guardian, after his ward attains full age, continues to manage the property at the request of the ward, and before the accounts of his receipts and payments during the minority are settled, it is in effect a continuance of the guardianship as to the property, and he must account on the same principle as if they were transactions during the minority. And under these circumstances an injunction was granted on terms to restrain the guardian from proceeding in an action to recover the balance claimed by him on account of the transactions after his ward came of age. 1 Simons and Stu. Rep. 138.

A receiver to the guardian of an infant, whose account has been allowed by the guardian, shall not be obliged to account over again to the infant when he comes of age. Prec. Ch. 535.

(11) Testamentary guardians are within the preventive and controlling jurisdiction of this court; and if there be reason to apprehend that such a guardian meditates an injury to his ward, it will interfere, and prevent it. 1 P. Wms. 704, 5. 2 Fonb. 5 ed. 249. 3 Bro. P. C. 341. 1 Sid. 424.

If a person appointed guardian under statute 12 Car. II. c. 24. dies, or refuses the office, the chancellor may appoint one, 1 Equ. Ca. Ab. 260. pl. 2. 1 P. Wms. 703; and if he become a lunatic, he may be removed. Ex parte Brydes, H. T. 1791. So if he become a bankrupt. But, generally speaking, a guardian appointed by statute cannot be removed by this court, 2 Cha. Ca. 237. 1 Ves. 158. 1 Vern. 442. unless the infant be a ward of the court. 2 P. Wms. 561.

The court of chancery will in some cases on petition make an order of maintenance of the infant, 3 Bro. C. C. 88. 12 Ves. 492. but in general payments to the infant during his minority are discountenanced. 4 Ves. 369.

In a case where a father left a legacy payable to a child at a future day, though he was silent respecting the interest, the court allowed maintenance. 11 Ves. 1; and so in a case where the interest was directed to accumulate. Dick. 310. 1 Mad. 253. But an order of maintenance was refused, though so directed, the father being living, and of sufficient ability to maintain the infant. 1 Bro. C. C. 387.

In allowing maintenance, the court will attend to the circumstances and state of the family. 2 P. Wms. 21. 1 Ves. 160.

In some cases it will allow the principal to be broken in upon for the maintenance of the infant. 1 Vern. 255. 2 P. Wms. 22.

The court may interpose even against that authority and discretion which the father has in general in the education and management of the child, 1 P. Wms. 702. 2 P. Wms. 117. and cases cited in 2 Fonb. 5 ed. 232; but quære if such child must not be a ward of the court. 4 Bro. C. C. 101, 2.

The court will permit a stranger to come in, and complain of the guardian and abuse of the infant's estate. 2 Ves. 484.

The court will not suffer an infant to be prejudiced by the laches of his trustees or guardian. 2 Vern. 368. Prec. Ch. 151.

It must not be inferred that a court of equity will at any period, or under any circumstances, act upon a too indulgent disposition towards him; for if an infant neglect to enter his property within six years after he comes of age, he is as much bound by the statute of limitations from bringing a bill for an account of meme profits, as he is from an action of account at common law. Prec. Ch. 518. and see 1 Scho. & Lef. 352. 2 Fonb. 5 ed. 235, id. 1 vol. 159. 2. n (m).

The court of chancery will assist guardians in compelling the wards, to obey their legal desires; and where an infant went to Oxford, contrary to the orders of his guardian who wished him to go to Cambridge, the court sent a messenger to carry him from Oxford to Cambridge; and on his removing to Oxford, another messenger was sent to carry him to Cambridge, and keep him there. 1 Stra. 167. 3 Atk. 721.

Where a presbyterian having three daughters bred up in that persuasion, and three brothers who were presbyterians, made his

. Let us next consider the ward or person within age, for whose istance and support these guardians are constituted by law; or who it that is said to be within age. The ages of male and female are different different purposes. A male at *twelve* years old may take the oath of giance; at *fourteen* is at years of discretion, and therefore may consent disagree to marriage, may choose his guardian, and, if his discretion be ually proved, may make his testament of his personal estate; at *seven*- may be an executor; and at *twenty-one* is at his own disposal, and y alien his lands, goods, and chattels. A female also at *seven* years of may be betrothed or given in marriage; at *nine* is entitled to dower; *welve* is at years of maturity, and therefore may consent or disagree to rriage, and, if proved to have sufficient discretion, may bequeath her sonal estate; at *fourteen* is at years of legal discretion, and may choose uardian; at *seventeen* may be executrix; and at *twenty-one* may dispose herself and her lands. So that full age in male or female is twenty-one rs, which age is completed on the day preceding the anniversary of a son's birth (*g*) (12), who till that time is an infant, and so styled in . Among the ancient Greeks and Romans *women* were never age, but subject to perpetual guardianship(*r*), unless when [*464] ried, "*nisi convenissent in manum viri*" (*s*): and, when that petual tutelage wore away in process of time, we find that, in fe- es as well as males, full age was not till twenty-five years (*t*). Thus the constitution of different kingdoms, this period, which is merely arbi- y, and *juris positivi*, is fixed at different times. Scotland agrees with gland in this point; both probably copying from the old Saxon consti- ons on the continent, which extended the age of minority "*ad annum*

Salk. 44, 625. Lord Raym. 480, 1098. Toder nam, *Dom. Proc.* 27 Feb. 1775. Pott. Antiq. b. 4, c. 11. Cic. *pro Murena.* 12.

(*s*) "Unless when they shall come into the power of a husband."
(*t*) *Inst.* 1, 23, 1.

appointing his brothers and also a cler- of the church of England guardians to hree infant daughters, and died, having his eldest daughter to his next brother, the clergyman got possession of his two daughters, and placed them at boarding- ol, where they were educated according e church of England, and then filed a bill ve the eldest daughter placed out with the daughters, and the three presbyterian ers brought their bill to have the two hters delivered to them, offering parol ence that the testator directed that he d have his children bred up presbyteri- but the court declared that no proof out e will ought to be admitted in the case of rise of a testamentary guardianship, any than in a case of a devise of land, and the decision of the majority of the guar- ought not to govern; and directed that naster should inquire whether the school hich the two youngest daughters were d was proper; and as to the eldest, who of the age of sixteen, she was brought court, and asked where she desired to nd on her declaring her wish to be with of her uncles, it was ordered according- 3 P. Wms. 51. 2 Ves. 56. 1 P. Wms.

arrying a ward of the court of chancery out the consent of the court, is a con- tempt for which the party may be committed, or indicted, though he was ignorant of the wardship. 3 P. Wms. 116. 5 Ves. 15. But to render third persons so liable, it should ap- pear that they were apprized of the parties being a ward. 2 Atk. 157. 16 Ves. 259.

A marriage in fact is sufficient to ground the contempt, though the validity of the mar- riage be questionable. 6 Ves. 572.

To clear such a contempt a proper settle- ment must be made on the ward. 1 Ves. Jun. 154. But the making such settlement does not necessarily cure the contempt. 8 Ves. 74. It is not cleared by the ward's at- taining the age of twenty-one. 3 Ves. 89. 4 id. 386.

(12) If he is born on the 16th of February, 1608, he is of age to do any legal act on the morning of the 15th of February, 1629, though he may not have lived twenty-one years by nearly forty-eight hours: the reason assigned is, that in law there is no fraction of a day; and if the birth were on the last second of one day, and the act on the first second of the preceding day twenty-one years after, then twenty-one years would be complete; and in the law it is the same whether a thing is done upon one moment of the day or on another. 1 Sid. 162. 1 Keb. 589. 1 Salk. 44. Raym. 84.

vigesimum primum, et eo usque juvenes sub tutelam reponunt" (*u*) (*v*); 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*.

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 (*w*) (13): but he may sue either by his guardian, or *prochein amy*, his next friend who is not his guardian (14). 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 (*x*): but under the age of *seven* he cannot. The period between *seven* and *fourteen* is subject to much uncertainty: 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 [*465] puberty or *discretion (*y*). 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 ætatem*. So also, in much more modern times, a boy of ten years old, who was guilty of a heinous murder, was held a proper subject for capital punishment, by the opinion of all the judges (*z*).

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.

(*u*) "To the one-and-twentieth year; and, until then, the young remain under guardianship."
(*v*) Stierahook *de Jure Sueonum*, *l.* 2, *c.* 2. This is also the period when the king, as well as the subject, arrives at full age in modern Swedea. Mod. Un. Hist. xxxiii. 270.
(*w*) Co. Litt. 135.
(*x*) 1 Hal. P. C. 25.
(*y*) *Ibid.* 28.
(*z*) Foster, 72.

(13) An infant must in all cases, appear and defend by his guardian, and not by his prochein amy, or attorney. Co. Lit. 135. b. 2 Inst. 261. 2 Stra. 784.

If he appear by attorney, it is error, 2 Saund. 212. n. 4; and so, if several defendants appear by attorney, and one is an infant, id. And infants executors defendants must appear by attorney. 2 Stra. 783. 1 Moore, 250. 7 Taunt. 488. S. C.

But only the infant himself can take advantage of this objection, and therefore where there had been judgment of nonsuit in an action brought against an infant, it is no ground of error that he had appeared by attorney. 5 B. & A. 418.

If an infant appears by attorney, the court will, at the plaintiff's instance, compel an amendment of the appearance by substituting a guardian. 2 Wils. 50. 7 Taunt. 488. 1 Moore, 251. S. C.

(14) An infant executor may sue by attorney. 2 Stra. 783. 2 Saund. 212.

And where a plaintiff, an infant, appears by attorney, it is cured after verdict for him by the 21 Jac. I. c. 13. s. 2. or by 4 Ann. c. 16. s. 2. after judgment by confession nil dicit non sum informatus in any court of record, or after writ of inquiry executed.

If an infant sue by guardian, or prochein amy, he cannot afterwards remove his guardian, or disavow the action of his prochein amy, F. N. B. 63. K. 7th ed.; but he may either have a writ out of chancery to remove him, or, which is the usual course, may apply to the court, who may remove him at their discretion. Id. Cro. Car. 261.

It is generally true, that an infant can neither aliene 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 aliene their estates: but infant trustees, or mortgagees, are enabled to convey, under the direction of the court of chancery or exchequer, or other courts of equity, the estates they hold in trust or mortgage, to such person as the court shall appoint (*a*). Also it is generally true, that an infant can do no legal act: yet an infant, who has had an advowson, may present to the benefice when it becomes void (*b*). For the law in this case dispenses with one rule, in order to maintain others of far *greater consequence: it permits an infant to [*466] 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 (*c*). It is, farther, generally true, that an infant, under twenty-one, can make no deed but what is afterwards voidable: yet in some cases (*d*) he may bind himself apprentice by deed indented or indentures, for seven years; and (*e*) 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 (15): yet he may bind himself to pay for his necessary meat, drink, apparel, physic, and such other necessaries (16); and likewise for his good

(*a*) Stat. 7 Ann. c. 19. 4 Geo. III. c. 16.
(*b*) Co. Litt. 172.
(*c*) *Ibid.* 2.
(*d*) Stat. 5 Eliz. c. 4. 43 Eliz. c. 2. Cro. Car. 179.
(*e*) Stat. 12 Car II. c. 24.

(15) It has been considered, that a bill of exchange, or negotiable security, given by an infant during his minority, is in no case binding on him, though given for necessaries, 1 Camp. 552, 3. Holt. C. N. P. 78. 1 T. R. 40. 4 Price, 300. Chit. on Bills, 5 ed. 22; and most clearly so, if not given for necessaries. Carth. 160. But infancy being a personal privilege, the infant only can take advantage of this. 4 Esp. 187.

An infant is not liable on an account stated, even though the particulars of the account were for necessaries. 1 T. R. 40. See 2 Stark. 36. where otherwise in equity. 1 Eq. C. Ab. 286.

(16) This rule is providently intended for the benefit of the infant, that he may be enabled to gain credit for such things as are suited to his degree and station. The term *necessaries*, used by lord Coke, is a relative one; and the question, as to what are necessaries, must be determined by the age, fortune, condition, and rank in life of the infant. See 8 T. R. 578. 1 Esp. Rep. 212. Carter, 315. which must be real, and not apparent. Peake, 229. 1 Esp. Rep. 211. The question, as to what are necessaries, is for a jury. 1 M. & S. 738.

Liveries ordered by a captain in the army for his servant have been considered necessaries. 8 T. R. 578. Regimentals furnished to a member of volunteer corps may be recovered as necessaries. 5 Esp. 152. But it has been held, that a chronometer is not necessary for a lieutenant in the navy, when he was not in commission at the time it was supplied. Holt. C. N. P. 77.

An infant has been held liable for a fine on his admission to a copyhold estate. 3 Burr. 1717. But it has been said, that if an infant is the owner of houses, and it is necessary to have them put in repair, yet the contract to repair will not bind him at law; for no contracts are binding on infants, but such as concern his person. 2 Rol. Rep. 271; but in equity an agreement by infant, to pay compound interest on mortgage to prevent foreclosure, is binding. 1 Eq. C. Ab. 286. 1 Atk. 489.

An infant is liable for necessaries furnished to his wife and family, 1 Stra. 168. or for the nursing of his lawful child, Bacon Max. 18. but not for articles furnished in order for the marriage. 1 Stra. 168. He is liable for so much goods supplied to him to trade with, as were consumed as necessaries in his own family. 1 Car. Rep. 94.

teaching and instruction whereby he may profit himself afterwards (*f*). And thus much, at present, for the privileges and disabilities of infants (17).

(*f*) Co. Litt. 172.

(17) It has been observed, that the incidents which law has attached to infants in their natural capacity, do not extend to them in the exercise of corporate or political functions: imbecility and inexperience are not supposed to form a part of those abstract existences, which are constituted for the mere performance of public service, and which only require skill and diligence; and so far as that is concerned, the natural properties of the infant merge in his political capacity, to which age is neither material nor imputable. Bro. Age. Plowd. 379. 381. Bingh. 2. Therefore, if the king, within age, consent to an act of parliament, or make any lease or grant, he is bound as if he were of age. Co. Litt. 43. b. 1 Roll. 728. 7 Co. 12. Plowd. 213. Also, the acts of a mayor and commonalty shall not be avoided by reason of the nonage of the mayor. Cro. Car. 557.

If a parson, improperly admitted under age, make a lease with the due requisites, it will bind his successor; for the parson made the lease in his capacity of corporation sole. Bro. Age.

An infant may also hold the offices of park-keeper, forester, gaoler, sheriff, &c. 2 Inst. 382. Bac. Ab. Infancy and Age, E.

A grant by the bishop of the office of register of a diocese in reversion, after the death of a tenant for life, to an infant eleven years of age, exercendum per se vel deputatum sufficientem is good; but in this case the grantee attained full age before the office descended to him. Cro. Car. 555.

But an infant is disabled from holding an office concerning the administration of public justice, or of pecuniary trust, or where he cannot appoint a deputy. 5 B. & A. 81.

He cannot sit in the house of lords, or be elected a member of the house of commons. 2 Inst. 47. 7 & 8 W. & M. c. 25. s. 8.

He cannot be a juror. Hob. 325.

An infant cannot properly be *a mayor of a corporation*, Com. Dig. tit. Infant, C. 1. nor elected a burgess. 2 Selw. N. P. 6 ed. 1068. n. 4. but see supra.

And he cannot be appointed to the office of clerk of a court of requests, where it is part of the duty of that office to receive the money of the suitors, as it is in the nature of an office of a public trust. 5 B. & A. 81.

An infant cannot be steward of a manor, or of the courts of a bishop. Co. Lit. 3. b. Roll. Ab. 731. Cro. Eliz. 636.

He cannot be an attorney, because he cannot be sworn, nor charged in account. F. N. B. 118. Co. Lit. 128. a. Cro. Eliz. 637. March. 92. But for some acts he may be a private attorney. Co. Lit. 52. He cannot be a bailiff, factor, or receiver, Co. Lit. 172. Latch. 169. or guardian in socage. 1 Inst. 88. b.

Nor can an infant be charged as bailiff, &c. in equity, farther than in law; and therefore, it is said, if such a one is made factor, his friends should give security for his accounting. Eq. Ab. 6.

He may be appointed executor; but, by 38 Geo. III. c. 87. s. 6., he cannot administer before he is of the age of twenty-one; and until that age, administration is to be granted to his guardian or other person appointed by spiritual court. Still, if an infant and a man of full age be executors, they must be joined in an action. Wentw. 95. Yelv. 130. An infant cannot be appointed administrator before he is twenty-one: because, before that age, he cannot give a bond as required by the statute to administer faithfully. Bac. Ab. Executors and Administrators, a. Carth. 446.

If an infant commit any wrongful act, while in an office which he is legally capable of holding, he will in general be liable for it: thus, debt lies against an infant gaoler for an escape. 2 Inst. 382. 3 Mod. 322. He may be punished for doing or suffering waste as tenant by courtesy for life, or years, Co. Lit. 380. b. Com. Dig. Enfant, D. 3; and when in by purchase, he is liable to a cessavit. Co. Lit. 380. b. Also to the repair of bridges, highways, &c. when his lands are held by such tenure. 2 Inst. 703. And if an office in a parkship be given or descend to an infant, if the condition in law, annexed to such an office, which is skill, be not observed, the office is forfeited. 3 Mod. 224.

An infant executor cannot commit a devastavit till twenty-one. 1 Vern. 328. See Bing. on Inf. 92.

See Johnson's Dig. Reeve's Dom. Relations, and Comyn's Dig. title "Guardian and Ward."

But the trading contract of an infant is absolutely void, and not merely voidable; although indeed the trade in which he is engaged may be the means by which he gains his livelihood. Per Bayley, J. 2 B. & C. 826. 4 D. & R. 545. S. C. Cro. Jac. 494. 2 Esp. 480. Therefore an infant is not liable for goods supplied to him to trade with. Cro. Jac. 494. And for this reason he is not subject to the bankrupt laws. Bull. N. P. 38.

An infant is not liable for instruction in a trade or business. 1 T. R. 40.

It seems that an infant is liable for money paid for him in the purchase of necessaries. 5 Mod. 368. 10 Mod. 67. And money paid to release an infant out of custody from process of execution, may be recovered from the infant. 5 Esp. 28. vid. 13 East, 6. And so may money paid to release the infant from custody, under mesne process, provided the debt for which he was arrested was contracted for necessaries. Id. See also, as to a charge of bastardy, 8 East, 330.

But an infant is not liable at law for money lent, though laid out in the purchase of necessaries. 2 Esp. 472. n. 1 Salk, 279. 14 East, 302.

equity, however, relief may be obtained
ch case, by the lenders being allowed to
in the place of the creditor for necessa-
1 P. Wms. 482. 558. 1 Ves. 249.
t the privilege of infancy will not afford
nswer to an action substantially founded
tort, as for slander, trespass, or assault,
tinue, or trover for goods taken not under
ontract. 8 T. R. 336. Com. Dig. Infant,
Noy. 129. Bac. Ab. Infancy. 1 New.
140. But an infant cannot be a trespass-
prior or subsequent assent, but only by
wn act. Co. Lit. 180. b. n. 4.
seems an action of assumpsit, for money
nd received, will lie against an infant,
e, having been intrusted to pay money on
tain account, he pretended that he had
more than he really had, and embezzled
part of the money. Peake Rep. 223. 1
Rep. 172.
t where the substantial cause of com-
against him is founded on a contract,
which he is not liable, no action is main-
ble, though by the forms which prevail
, the party with whom he has contracted
have the option of proceeding either as
breach of contract, or ex delicto, as for
. As by suing in case for the immode-
r negligent use of a horse. 8 T. R. 336.
Dig. Infant, D. 4.
this principle, an action on the case is
maintainable against an infant for the
warranty of a horse, though he knew it
unsound when the sale took place. 2
. 485. 4 Camp. 118. Nor will an ac-
ie against him for falsely representing
e to be his property when it was not so.
. 1778. 1 Leon. 169. Nor is an infant
, on the custom of the realm, for the loss
ods committed to his care, as an inn-
r. Rol. Ab. Action sur le Case, D. 3.
r is he liable to an action at law for re-
nting himself to be of age, and by that
ice obtaining money. Bac. Ab. Infancy.
r. 169. 1 Sid. 258. sed vid. Peake's
223. But in equity, it seems, infancy
not protect a party against the conse-
es of an assent, which bears any dis-
t appearances; as where a man, who has
, stands by and encourages, and does not
a purchase inconsistent with such title,
all be bound, and all claiming under him.
l. 38. 2 Eq. Ca. Ab. 489. 1 Bro. Rep.
And it also seems, if an infant, above
ge of discretion, (viz. 14) be guilty of
raud in affirming himself to be of full
or if, by combination with his guardian,
ike any contract or agreement, with in-
fterwards to elude it by privilege of in-
, a court of equity will decree it good
st him, according to the circumstances
fraud. Bac. Ab. Infancy. 2 Vern. 224.
s. 212. 3 Burr. 1802. But it seems,
y can only thus exert itself, where the
one by the infant is voidable; if it be
rtely void, it cannot make it good, though
appear circumstances of fraud on the
of the infant. 1 H. Bla. 75. See Bing.
f. 96, 97.
a person, after attaining his full age, and
n any action brought, expressly and vo-
ntarily promise to pay a demand upon him,
though not for necessaries, he will be thereby rendered liable. 1 Stra. 690. 1 T. R. 648. 2 B. & C. 824. 4 D. & R. 545. S. C. Therefore, an express promise, made after the infant's attaining his full age, to pay a bill of exchange, accepted by him during his infancy, is binding on him. 4 Esp. Rep. 187. We have already seen what ratification is necessary, in order to render a person liable on a bond entered into by him during his infancy. 3 M. & S. 477.

In order to revive a debt to which infancy would afford a good answer, an express promise must be proved; for a mere acknowledgment of the debt, or a promise to pay a part, or even an actual payment of part, will not amount to a confirmation on the part of the infant, so as to render him liable. 2 Esp. Rep. 481. 628. 2 M. & S. 205. 209.

In chancery, however, it has been decreed, that if an infant borrow money and give a bond for it, and afterwards, being of sufficient capacity, devise his personal estate for the payment of his debt, the bond shall be paid. Nels. Ch. Rep. 55.

The promise must not be extorted under terror of an arrest. 5 Esp. 102. or by fraud. 2 Atk. 34. 2 Mad. 40.

A conditional promise is sufficient; but the plaintiff must prove the fulfilment of such condition. 3 Esp. Rep. 159.

The promise must be made before action brought. 2 B. & C. 824. 4 D. & R. 545. S. C.

If a lessee of premises be an infant, he may affirm the lease by continuing in possession after he has attained his full age. 1 Roll. Ab. 731. l. 45. Cro. Jac. 320. and see 8 Taunt. 37. Quære, whether four months after an infant becomes of age be a reasonable time for him to avoid a lease entered into during his minority. 1 Moore, 466. And so also, if an infant demise lands, reserving rent, the lease will be conclusively affirmed by acceptance of rent, after the age of privilege has ceased. See 5 B. & A. 147. 8 Taunt. 37.

And it has been held, that if an infant be partner with another, and, during his infancy, represent himself as such partner, and, upon his attaining twenty-one, dissolves the partnership, he must give notice of such dissolution, or he will be responsible for the subsequent contracts of his co-partner to persons ignorant of the dissolution. Id.

Infancy being a personal privilege, no one can take advantage of it but the infant, or his personal representatives 2 H. Bla. 515. Carth. 160. 3 Salk. 197. Cro. Eliz. 126. 3 Camp. 254.

And where several parties join in a security, the infancy of one of them cannot be taken advantage of by the others; and, in case of an action brought on it, the infant should not be joined as a defendant. 4 Taunt. 10. 468.

And the infant may always sue on his contract, the same as if he were an adult. 2 M. & S. 205. 6 Taunt. 118. 2 Stra. 938. 4 Taunt. 469. 1 Sid. 446. and cases collected in Bac. Ab. Infancy, 1. 4.

And where tutors dative appointed by a Scotch court as guardians of an infant, executed on his behalf, and in his name, a tack or

agreement for a lease, whereby a salmon fishery was demised for years to a tenant, at a certain rent, which was covenanted to be paid to the tutor's dative, the infant, or to any other person or persons duly authorized to receive the same for the behalf of the infant, his heirs, or assignees, it was held that such infant might maintain an action of debt in his own name for arrears of rent, though he was not an executing party to the agreement, nor proved to be of the age of twenty-one at the time the action was brought. 3 D. & R. 273.

CHAPTER XVIII.

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 were a mere voluntary assembly, the individuals which compose it might indeed read, pray, study, and perform scholastic exercises together, so long as [*468] 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

ration, when once vested in them, will be for ever vested, without any conveyance to new successions; for all the individual members that existed from the foundation to the present time, or that shall ever fter exist, are but one person in law, a person that never dies: in like er as the river Thames is still the same river, though the parts which ose it are changing every instant.

e honour of originally inventing these political constitutions entirely gs to the Romans. They were introduced, as Plutarch says, by a; who finding, upon his accession, the city torn to pieces by the two factions of Sabines and Romans, thought it a prudent and po- easure to subdivide these two into many smaller ones, by *in- [*469] ng separate societies of every manual trade and profession.

were afterwards much considered by the civil law (*a*), in which they called *universitates*, as forming one whole out of many individuals; *legia*, from being gathered together: they were adopted also by the law, for the maintenance of ecclesiastical discipline; and from them piritual corporations are derived. But our laws have considerably l and improved upon the invention, according to the usual genius of nglish nation: particularly with regard to sole corporations, consist- one person only, of which the Roman lawyers had no notion; their n being that "*tres faciunt collegium*" (*b*). Though they held, that if poration, originally consisting of three persons, be reduced to one, *niversitas ad unum redit*," it may still subsist as a corporation, "*et stet universitatis*" (*c*).

ore we proceed to treat of the several incidents of corporations, as led by the laws of England, let us first take a view of the several f them; and then we shall be better enabled to apprehend their re- ve qualities.

e first division of corporation is into *aggregate* and *sole*. Corporations gate consist of many persons united together into one society, and ept up by a perpetual succession of members, so as to continue for of which kind are the mayor and commonalty of a city, the head llows of a college, the dean and chapter of a cathedral church. rations sole consist of one person only and his successors, in some ular station, who are incorporated by law, in order to give them some capacities and advantages, particularly that of perpetuity, which in natural persons they could not have had. In this sense, the king is corporation (*d*); so is a bishop; so are some deans, and prebenda- istinct from their several chapters; and so is every parson and vicar. he necessity, or at least use, of this institution will be very ent, if we consider the case of *a parson of a church. At [*470] iginal endowment of parish churches, the freehold of the n, the church-yard, the parsonage house, the glebe, and the tithes of rish, were vested in the then parson by the bounty of the donor, as poral recompence to him for his spiritual care of the inhabitants, and ntent that the same emoluments should ever afterwards continue as mpence for the same care. But how was this to be effected? The ld was vested in the parson; and, if we suppose it vested in his l capacity, on his death it might descend to his heir, and would be to his debts and incumbrances: or, at best, the heir might be com- le, at some trouble and expense, to convey these rights to the suc-

l. 3, t. 4, *per tot.* (*c*) *Ff.* 3, 4, 7.
50, 16, 8.—"These form a corporation." (*d*) Co. Litt. 43.

ceeding 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.

Another division of incorporations, 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 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 *interregnum* 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 [*471] 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 antiquaries 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 (1).

(*e*) Such as Manchester, Eton, Winchester, &c. (*f*) 1 Lord Raym. 6.

(1) They are lay corporations because they are not subject to the jurisdiction of the ec-

*Having thus marshalled the several species of corporations, [*472] 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.

But, with us in England, the king's consent is absolutely necessary to the erection of any corporation, either impliedly or expressly given (*h*). 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 [*473] 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 (*i*), 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 (*j*): but it is observable, that, till of late years, 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 was usually performed by the king alone, in virtue of his royal prerogative (*o*).

(*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.

(*h*) Cities and towns were first erected into corporate communities on the continent, and endowed with many valuable privileges, about the eleventh century: I. Rob. C. V. 30, to which the consent of the feodal sovereign was absolutely necessary, as many of his prerogatives and revenues were thereby considerably diminished.

(*i*) 2 Inst. 330.

(*j*) 10 Rep. 29. 1 Roll. Abr. 512.

(*k*) 8 Rep. 114.

(*l*) 14 and 15 Hen. VIII. c. 5.

(*m*) Stat. 5 and 6 W. and M. c. 20.

(*n*) Stat. 23 Geo. II. c. 4.

(*o*) See page 272.

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clesiastical courts, or to the visitations of the ordinary or diocesan in their spiritual characters.

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 [*474] 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*).

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 has not formerly been 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 (*r*), to avoid the charges of incorporation and licences of mortmain in small benefactions; which in his days were grown so great, that they discouraged many men from undertaking these pious and charitable works.

The king, it is said, may grant to a subject the power of erecting corporations (*s*), though the contrary was formerly held (*t*): 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* (*u*). 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 to it; [*475] 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 (*v*). 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 (*w*). 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 a godfather, and by that same name the king baptizes the incorporation (*x*) (2).

(*p*) *Gild* signified among the Saxons a fraternity, derived from the verb gilban, to pay, because every man paid his share towards the expenses of the community. And hence their place of meeting is frequently called the *Guild*, or *Guild-hall*.
(*q*) 10 Rep. 30. 1 Roll. Abr. 513.
(*r*) 2 Inst. 722.
(*s*) Bro. *Abr. tit. Prerog.* 53. Vin. *Prerog.* 86, pl. 16.
(*t*) Yearbook, 2 Hen. VII. 13.
(*u*) 10 Rep. 33.
(*v*) 10 Rep. 122.
(*w*) Gilb. Hist. C. P. 182.
(*x*) 10 Rep. 28.

(2) As to necessity for a name, Bac. Ab. Com. Dig. Franchises, F. 9. Bac. Ab. Corporation, C. A corporation may have a name only by implication; as if the king should incorporate the inhabitants of Dale with power to choose a mayor annually, though no name be given, yet it is a good corporation by the name of mayor and commonalty. 1 Salk. 191. An hospital intended to be built may be incorporated by its intended name before it is erected. 10 Co. 32. By prescription it may have several different names. Hard. 504. Lut. 1498. 3 Salk. 102. pl. 2. So by charter a corporation may be incorporated by one name and afterwards by another, and after the change of the name the last ought to be used. 1 Rol. 572. l. 55. So a change of name or new charter does not merge the ancient privileges. 4 Co. 87. b. Ray. 439. And it retains the privileges and possessions it had

After a corporation is so formed and named, it acquires many powers, s, capacities, and incapacities, which we are next to consider. Some ese are necessarily and inseparably incident to every corporation; h incidents, as soon as a corporation is duly erected, are tacitly an- l, of course (*y*). As, 1. To have perpetual succession. This is the end of its incorporation: for there cannot be a succession for ever with- n incorporation (*z*); and therefore all aggregate corporations have a r necessarily implied of electing members in the room of such as go). 2. To sue or be sued, implead or be impleaded, grant or receive, s corporate name, and do all other acts as natural persons may (3).

) Rep. 30. Hob. 211.
) Rep. 26.

(*a*) 1 Roll. Abr. 514.

1 Rol. 513. l. 2. 1 Saund. 339. But ight to prescribe by their ancient name h a day, and shew how it was then d, and not by their last name. Hard. ut. 1496. 1 Saund. 340. n. 2. A mis- of the corporation name in a grant un- corporate seal, is immaterial. 2 Marsh. Taunt. 467. S. C. And where in eject- ie demise was laid to be by the mayor, the borough town of M., and on the turned out, from the charter, that the of the corporation was "the mayor," itting "of the borough town" of M., held that this was no variance, it ap- from the charter that M. was a bo- own, 1 B. & A. 699; and, in general, ice of this nature in pleading must be dvantage of by plea in abatement. 1 . 40. 3 Campb. 29. 1 Saund. 340. a. rds in the instrument of incorporation sufficient in law to make a corpora- Co. Rep. 29. 123. 3 Co. 73. but there ot be any precise words; the words erigere, &c. are not of necessity to in making corporations, 10 Co. 28. r words equivalent are sufficient; and ly the inhabitants of a town were in- ted when the king granted to them to nikdam mercatoriam. 2 Danv. Abr. Roll. 513. l. 10.

king grants lands to the inhabitants *heir heirs and successors* rendering a any thing touching these lands this poration, though not to other purposes; ie king grants lands to the inhabitants nd they be not incorporated before, if be reserved to the king, the grant is 2 Danv. 214.

king grants to the men of Islington scharged of toll, this is a good corpo- this intent, but not to purchase, &c. special words the king may make a corporation, or a corporation for a spe- pose. Id.

e the words of a charter are doubtful, y be explained by contemporaneous 3 T. R. 271. 288. n. 4 East, 338. poration may be constituted of persons or political. 10 Co. 29. b. It may be ed out of another corporation, 1 Rol. he other be a corporation by prescrip- Sid. 291.

corporation aggregate may be without Bro. Corp. 43. 10 Co. 30, b.

(3) But the mayor and commonalty cannot sue on a bond made to the mayor himself, by his own proper name, 21 Ed. IV. 15 Dyer, 48. though another be afterwards made mayor. Id. and see 1 Wils. 184. So the commonalty cannot sue alone if there be a mayor or a bailiff, though it would be otherwise if there were none. Dub. Th. Dig. l. 1. c. 22. s. 13. 16.

The mayor of a corporation, who, on the sale of certain lands by auction, of which the corporation were the vendors, signed a contract on behalf of himself and the corporation with the purchaser, for the due performance of the conditions of sale, cannot, in his individual capacity, sue the purchaser for a breach of the contract. 2 Taunt. 374. 387.

In the case of an aggregate corporation, the successors may sue on a contract or cause of action vested in their predecessors. Com. Dig. Biens. C. Bac. Ab. Corp. E. 4. Post 2 book, 430.

If there is judgment of ouster against the mayor and aldermen, and they all die, and a new charter is given, the corporation is so renewed, that they are liable to the debts and entitled to the credits of the old; and may sue in their new name on a bond given before the judgment. 3 Burr. 1872. 1866. 1 Bla. Rep. 591. 1 Lev. 237.

A corporation may sue in assumpsit. 2 Lev. 252. 1 Camp. 466.

A foreign corporation may sue in their corporate name. 1 Ry. & Moody's Rep. 190.

Corporations may be *sued* in that character in many instances, for damages arising from a neglect of duty, &c. 2 T. R. 872. 3 Camp. 403. See 1 Chit. on Pl. 65. Trespass or replevin lies not against a corporation. 8 East, 229.

But trover lies against a corporation; and if it be essential to their conversion of the property (*i. e.* in this instance the detainer of bank notes by the governor and company of the bank of England), that they should have authorized it under their seal, such authority will be presumed after verdict; but it does not seem necessary that the act of detention, done by their servants within the scope of their employment, should be authorized under their seal. 16 E. R. 6.

And it seems that an incorporated company may be guilty of a conversion by the act of their agent, acting under the direction of a committee appointed for managing the affairs

3. To purchase lands, and hold them, for the benefit of themselves and their successors; which two are consequential to the former (4). 4. To have a common seal (5). 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 [*476] whole (*b*). 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 (6). This is also included by law in the very act of incorporation (*c*): 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 (*d*). 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, under penalty of 40*l.* unless they be approved by the chancellor, treasurer, and chief justices, or the judges of assise in their circuits; and, even though they be so approved, still, if contrary to law, they are void (*e*). 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

(*b*) Dav. 44, 48.
(*c*) Hob. 211.
(*d*) *Sodales legem quam volent, dum ne quid ex publica lege corrumpant, sibi ferunto.*
(*e*) Stat. 19 Hen. VII. c. 7. 11 Rep. 54.

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of the company, under an act of parliament. 3 Stark. 50.

Assumpsit does not lie against a corporation, unless upon contracts sanctioned by particular legislative provisions. See 1 Rol. R. 82. and other cases. 1 Chit. on P. 95. 4 ed.

As to the process against a corporation, see Tidd's Prac. 8 ed. index, tit. Corporation. Com. Dig. Franchises, F. 16. As to the process in chancery, see Cowp. 377. Ca. Ch. 205.

A suit by a corporation as such does not abate on the death of some of the members. 3 Swanst. 138.

"Whenever a corporation is acting within the scope of the legitimate objects of its incorporation, all parol contracts made by its authorized agents are express promises of the corporation; and all duties imposed upon it by law, and all benefits conferred at its request, raise implied promises for the enforcement of which an action will lie. 14 John. R. 118.

(4) All corporations must have a license from the king to enable them to purchase and hold lands in mortmain. *Co. Litt.* 2. 7 and 8 *W.* 3. *c.* 37.

(5) 1 Saund. 340. a. 5 Taunt. 792. But a corporation which has a head may give a personal command, and do small acts without deed, as it may retain a servant, &c. Bro. Corp. 47. ac. 49, 50. 56. 1 Vent. 47. 2 Saund. 305. 1 Salk. 191. So it may thus authorize a person to make a distress, &c. 1 Salk. 191. So it may do an act upon record, without the common seal, for it is estopped by the record. 1 Salk. 192. And a tenancy from year to year, under a corporation, may be determined by a notice to quit, given by a steward of the corporation, without evidence that he had authority under corporate seal. 2 Camp. 96.

So there are many cases authorized by legislative enactments, in which a corporation may act without its common seal, as in the case of promissory notes and bills of exchange. 3 & 4. Ann. c. 9. See 5 B. & A. 204. 3 B. & A. 1. 6 Vin. Ab. 317. pl. 49.

Though the affixing of the common seal to the deed of conveyance of a corporation be sufficient to pass the estate, without a formal delivery, if done with intent, yet it has no such effect if the order for affixing the seal be accompanied with a direction to their clerk to retain the conveyance in his hands till accounts were adjusted with the purchaser. 9 East, 360.

As to what and how corporations may grant and receive, see 1 Kyd. 180. 182. 72. 4, &c.

(6) Where the power of making by-laws is in the body at large, they may delegate their right to a select body, who thus become the representative of the whole community. Rex v. Spencer, Ld. Mansfield, 3 Burr. 1837.

tify 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 (7), for it cannot appear in person, being, as Sir Edward Coke says (*f*), invisible, and existing only in intendment and consideration of law (8). 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 (*g*). A corporation cannot commit treason, or felony, or other crime, in its corporate capacity (*h*): though its members may, in their distinct individual capacities (*i*). Neither is it capable of suffering a *traitor's or felon's punishment, for it [*477] 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 seised of lands to the use of another (*j*); for such kind of confidence is foreign to the end of its institution. Neither can it be committed to prison (*k*); 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 (*l*). Neither can a corporation be excommunicated; for it has no soul, as is gravely observed by Sir Edward Coke (*m*); and therefore also it is not liable to be summoned into the ecclesiastical courts upon any account; for those courts act only *pro salute animæ*, and their sentences can only be inforced 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.

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 (*n*): for such moveable property is liable to be lost or imbezzled, and would raise a multitude of disputes between the successor

(*f*) 10 Rep. 32.
(*g*) Bro. *Abr. tit. Corporation*, 63.
(*h*) 10 Rep. 32.
(*i*) The civil law also ordains that, for the misbehaviour of a body corporate, the directors only shall be answerable in their personal capacities. *Ff.* 4, 3, 15.
(*j*) Bro. *Abr. tit. Feoffm. al. use.* 40. Bacon of Uses, 347.
(*k*) Plowd. 538.
(*l*) Bro. *Abr. tit. Corporation*, 11. *Outlawry*, 72.
(*m*) 10 Rep. 32.
(*n*) Co. Litt. 46.

(7) It ought to acknowledge a deed, or levy a fine by attorney, 1 Leo. 184. It may make a lease and seal it, and afterwards make a letter of attorney to enter and deliver the lease. 2 Leo. 97. 1 Leo. 30. If it makes an attorney to collect its rents and to enter, if it would avoid a lease for non-payment afterwards, it ought to make an attorney to enter *de novo*. Skin. 413. A corporation may acknowledge a deed before a judge in the chapter-house without an attorney, Moore, 676, or put the common seal to a deed. Id. So it may, with its head, give a personal command without attorney. Com. Dig. Franchises, F. (12). Any natural person may be this attorney, though he be a member of the same corporation. Bro. Corp. 4.

(8) Yet a corporation may acknowledge a deed before a judge in the chapter-house without an attorney. *Moore*, 676. But see 1 *Leon.* 184. Or, with its head, give personal command, *Lutw.* 1497. As to command a bailiff to make a distress, *Salk.* 191; but not to enter for condition broken, 2 Cro. 110. And the attorney may be a member of the corporation, *Bro. Cor.* 4. And a corporation may do any act upon record without their common seal; for they are estopped from saying it is not their act. 1 *And.* 23, 196.

and executor, which the law is careful to avoid (9). In ecclesiastical and eleemosynary foundations, the king or the founder may give them rules, laws, statutes, and ordinances, which they are bound to observe: [*478] but corporations merely *lay, constituted for civil purposes, are subject to no particular statutes (10); but to the common law, and to their own by-laws, not contrary to the laws of the realm (*o*). 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 (*p*). But there may be a corporation aggregate constituted without a head (*q*): as the collegiate church of Southwell, in Nottinghamshire, which consists only of prebendaries; and the governors of the Charterhouse, 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 (*r*). By the civil law this major part must have consisted of two-thirds of the whole, else no act could be performed (*s*): 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 (11).

We before observed, that it was incident to every corporation [*479] to have a capacity to purchase lands for themselves and *successors: and this is regularly true at the common law (*t*). But they are excepted out of the statute of wills (*u*): so that no devise of lands to a corporation by will is good, except for charitable uses, by statute 43 Eliz. c. 4 (*w*); which exception is again greatly narrowed by the statute 9 Geo.

(*o*) Lord Raym. 8.
(*p*) Co. Litt. 263, 264.
(*q*) 10 Rep. 30.
(*r*) Bro. Abr. tit. *Corporation*, 31, 34.
(*s*) *Ff.* 3, 4, 8.
(*t*) 10 Rep. 30.
(*u*) 34 Hen. VIII. c. 5.
(*w*) Hob. 136.

(9) Mr. Hargrave considers the jewels of the crown rather as heir-looms than an instance of chattels passing in succession in a sole corporation. *Co. Litt.* 9, *n.* 1.

(10) Their charters or immemorial usages, which are equivalent to the express provisions of a charter, are in fact their statutes.

(11) This act clearly vacates all private statutes, both prior and subsequent to its date, which require the concurrence of more than a majority to give validity to any grant or election. The learned judge is of opinion, that it has not affected the negative given by the statutes to the head of any society; but I am inclined to think this opinion may be questioned; especially in cases where, in the first instance, he gives his vote with the members of the society. It is the usual language of college statutes to direct that many acts shall be done by *gardianus et major pars sociorum*, or *magister*, or *propositus et major pars*; and it has been determined by the court of king's bench, (*Comp.* 377,) and by the visitor of Clarehall, Cambridge, and also by the visitors of Dublin College, that this expression does not confer upon the warden, master, or provost, any negative; but that his vote must be counted with the rest, and that he is concluded by a majority of votes against him.*

* And see 1 Str. 54, where it was held that the act of the majority of the common council of London was good, absent the mayor.

II. c. 36. And also, by a great variety of statutes (*z*), their privilege even of purchasing from any living grantor is much abridged: so that now a corporation, either ecclesiastical or lay, must have a licence from the king to purchase (*y*), 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 (*z*) 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*.

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 at 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 [*480] 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 inquire, 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, inquire 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 archbishop or metropolitan; the metropolitan has the charge and coercion of all his suffragan bishops; and the bishops in their several dioceses are in ecclesiastical matters 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*).

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 inquire 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 a mayor and commonalty, &c. where there are no possessions or endowments given to the body,

(*z*) From *magna carta*, 9 Hen. III. c. 36. to 9 Geo. II. c. 36.

(*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 sit, hæreditatem capere non posse, dubium non est.* Cod. 6, 24, 8.

(*z*) 1 Inst. 2.

(*a*) 10 Rep. 31.

there is no other founder but the king: but in eleemosynary foundations, such as colleges and hospitals, where there is an endowment of [*481] lands, the law distinguishes, and makes two species of *foundation; the one *fundatio 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 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 inquired 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 (*c*). 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 [*482] an appeal preferred to these supposed *visitors, they directed the legality of their own appointment to be argued; and, as this college was merely a 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 such property is rightly employed, as might 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 universities. These were all of them considered, by the

(*b*) 10 Rep. 33.

(*c*) This notion is perhaps too refined. The court of king's bench (it may be said), from its general superintendent authority, where other jurisdictions are deficient, has power to regulate all corporations where no special visitor is appointed. But not in the light of visitor: for, as its judgments are liable to be reversed by writs of error, it may be thought to want one of the essential marks of visitatorial power (12).

(12) And it wants, I conceive, another mark of visitatorial power; which is, the discretion of a visitor voluntarily to regulate and superintend. The court of king's bench, upon a proper complaint and application, can prevent and punish injustice in civil corporations, as in every other part of their jurisdiction; but it is not the language of the profession to call that part of their authority a visitatorial power.

h clergy, as of mere ecclesiastical jurisdiction: however, the law of and judged otherwise; and, with regard to hospitals, it has long been (*d*), that if the hospital be spiritual, the bishop shall visit; but if lay, patron. This right of lay patrons was indeed abridged by statute 2 . V. c. 1, which ordained, that the ordinary should visit *all* hospitals ded by subjects; though the king's right was reserved to visit by his missioners such as were of royal foundation. But the subject's right in part restored by statute 14 Eliz. c. 5, which directs the bishop to such hospitals only where no visitor is appointed by the founders reof: and all the hospitals founded by virtue of the statute 39 Eliz. c. re to be visited by such persons as shall be nominated by the respective nders. But still, if the founder appoints nobody, the bishop of the dio- e must visit (*e*).

Colleges in the universities (whatever the common law may now, or ght formerly, judge) were certainly considered by the popish clergy, ler whose direction they were, as *ecclesiastical*, or at least as *clerical*, cor- rations; and therefore the right of visitation was claimed by ordinary of the *diocese. This is evident, because in many [*483] our most ancient colleges, where the founder had a mind to bject them to a visitor of his own nomination, he obtained for that pur- se a papal bull to exempt them from the jurisdiction of the ordinary; veral of which are still preserved in the archives of the respective socie- s. And in some of our colleges, where no special visitor is appointed, the shop of that diocese, in which Oxford was formerly comprised, has im- emorially exercised visitatorial authority (13); which can be ascribed to thing else but his supposed title as ordinary to visit this, among other clesiastical foundations. And it is not impossible that the number of lleges in Cambridge, which are visited by the Bishop of Ely, may in art be derived from the same original (14).

But, whatever might be formerly the opinion of the clergy, it is now eld as established common law, that colleges are lay corporations, though ometimes totally composed of ecclesiastical persons; and that the right f visitation does not arise from any principles of the canon law, but of ecessity was created by the common law (*f*). And yet the power and urisdiction of visitors in colleges was left so much in the dark at common aw, that the whole doctrine was very unsettled till the famous case of *Phillips and Bury* (*g*). In this the main question was, whether the sen- tence 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

(*d*) Yearbook, 8 Edw. III. 28. 8 Ass. 29.
(*e*) 2 Inst. 725.
(*f*) Lord Raym. 8.
(*g*) Lord Raym. 5. 4 Mod. 106. Show. 35. Skinn. 407. Salk. 403. Carthew. 180.

(13) That is, the Bishop of Lincoln, from whose diocese that of Oxford was taken.

(14) Mr. Christian thinks that, in the university of Cambridge, the Bishop of Ely has no visitatorial authority from prescription; but that in every instance in which he is visitor he is appointed by the express declaration and special provision of the founder; and that without doubt the bishop was fixed upon from the dignity of his station, and the proximity of his residence.

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 en- [*484] tire 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 into the house of lords, they concurred in Sir John Holt's opinion, and reversed the judgment of the court of king's bench. To which 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 (*h*). Also it is said (*i*), 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 (15).

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 (*k*) (16). 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

(*h*) Stra. 797.
(*i*) 2 Lutw. 1566.
(*k*) 11 Rep. 98.

(15) No particular form of words is necessary for the appointment of a visitor. *Sit visitator*, or *visitationem commendamus*, will create a general visitor, and confer all the authority incidental to the office; (1 *Burr.* 199,) but this general power may be restrained and qualified, or the visitor may be directed by the statutes to do particular acts, in which instances he has no discretion as visitor: as where the statutes direct the visitor to appoint one of two persons, nominated by the fellows, the master of a college; the court of king's bench will examine the nomination of the fellows, and if correct, will compel the visitor to appoint one of the two. 2 *T. R.* 290. New ingrafted fellowships, if no statutes are given by the founders of them, must follow the original foundation, and are subject to the same discipline and judicature. 1 *Burr.* 203. It is the duty of the visitor, in every instance, to effectuate the intention of the founder, as far as he can collect it from the statutes and the nature of the institution, and in the exercise of this jurisdiction he is free from all controul. Lord Mansfield has declared, that "the visitatorial power, if properly exercised, without expence or delay, is useful to and convenient to colleges; and it is now settled and established, that the jurisdiction of a visitor is summary, and without appeal from it." 1 *Burr.* 200.

(16) Every member or officer of a corporation may *resign* his place or office. 2 Rol. 456. l. 10. 1 Sid. 14. Sembl. Cont. 1 Rol. 137. Pop. 134. 2 Rol. 11. And a corporation has power to take such resignation. 1 Sid. 14. A resignation by parol, if entered and accepted, is sufficient. 2 Salk. 433. Accepting another office incompatible with the other, implies a resignation. 3 Burr. 1615. If a resignation be once accepted, the party cannot afterwards claim to be restored. 1 Sid. 14. 2 Salk. 433.

A corporation may for good cause *remove* an officer from his office, 2 Stra. 819. Sir. T. Ray. 439, and this is incident to a corporation without charter or prescription, 1 Burr. 517. sed vid. 11 Co. 99. a. Style. 477. 480. 1 Lord Ray. 392. 2 Kyd. 50. &c.; a mandamus lies to compel a removal. 4 Mod. 233. If the member do any thing contrary to the duty of his place or oath he is removable, 11 Co. 99. a.; if an alderman be a common drunkard he is removable for it, 2 Roll. 455. l. 20. Dub. 1. Rol. 409; so if he removes from the borough and refuses attendance without lawful excuse. 4 Mod. 36. Semb. Show. 259. 4 Burr. 2067. and see further 9 Co. 99. Sir T. Raym. 438. Sty. 479. From the decisions on this subject, it appears that mere non-residence without any particular inconvenience arising to the corporation from it, and where the charter does not require it, is no cause for removal. See cases collected in 3 B. & C. 152. And a corporate office does not become ipso facto vacant by the non-residence of the corporator; a sentence must be passed. 2 T. R. 772. Where a charter does not require the members of a corporation to be resident, the court will not grant a mandamus commanding the corporation to meet and consider of the propriety of removing from their offices non-resident corporators, unless their absence has been productive of some serious inconvenience. 3 B. & C. 152. Where the charter of a borough directed that when any of the capital burgesses should happen to die or dwell out of the borough or be removed, it should be lawful for the remainder to elect others in the place of those so happening to die or be removed, omitting the intermediate circumstance of dwelling out of the borough,

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 (*l*). 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

(*l*) Co Litt. 13.

it was held that these words were not so unambiguous as to warrant the court to interfere, by granting a mandamus calling on the mayor and burgesses to elect and swear in two capital burgesses in the room of two non-resident capital burgesses who had not been previously removed by the corporation from their offices for the purpose of taking this matter into consideration 3 B. & A. 590. It is not a good cause that he attempted to act contrary to his duty. 11 Co. 98. b. As if he threatens the ruin of the charter or privileges, 11 Co. 97. b.; or dissuades the payment of customs due. Id. An indictment being preferred against him is no cause of itself of removal before he is convicted, Sty. 479; but if he be guilty of an indictable offence, he may be removed. R. T. Hardw. 153. It is not a good cause of removal that an alderman is above seventy years of age, 2 Rol. 456. l. 5. 2 Roll. 11; that he misbehaved himself when a mayor, Sty. 151; Sembl.; or did not account for money received by him to the use of the corporation, Sty. 151; or wrote a letter to a secretary of state which charged the mayor with subornation. Carth. 174. Bankruptcy is no cause of removal. 2 Burr. 723. Words to the chief magistrate contra bonos mores, &c. are no cause for disfranchisement, 11 Co. 96, 97, 98, 99. a.; nor is a refusal to pay his proportion for the renewal of the charter, 1 Sid. 282; nor refusing to make the usual payments for support of the company. Semble. Cont. Ray. 466. A defect in original qualification is no cause for removal, Dougl. 80, 81, 85, and see further as to what is a cause for removal, 2 Kyd. 62 to 94.

A ministerial officer chosen durante bene placito may be removed ad libitum, as a town-clerk, 1 Ventr. 77. 82. Ray. 188. 1 Lev. 291; a recorder, 1 Vent. 242. 2 Jones, 52. And a custom to remove an officer ad libitum is good, Dy. 332. b. Cro. 540. J. 2 Salk. 430; but generally an officer cannot be removed without good cause, though the charter says *generally* he may be removed, Dy. 332. b. or though it says he may be chosen for life *si viderint expedire*. 1 Lev. 148. If however a charter by express words empower either the corporation at large or a select body to remove an officer at pleasure, or empower them to choose him *during* pleasure, they may in either case remove him without cause. Sir T. Jones, 52. 3 Keb. 667. Sir T. Raym. 188. Though the election be general, if it be not under the common seal, the officers thereby elected may be removed ad libitum. 2 Jones, 52. 1 Vent. 355. A common freeman cannot in any case be deprived of his freedom ad libitum of the corporation at large, or of any select body. Cro. J. 540. Sir T. Raym. 188. 1 Lord Ray. 391.

A removal must in general be by the act of the whole body. If a special power to remove be delegated to part of the body it must be shewn. Cowp. 502, 3, 4. Dougl. 149. To this power of amotion the power of holding a corporate meeting for that purpose is necessarily incident. Dougl. 153, 5. A party cannot be removed but by the corporate act under seal. 5 Mod. 259. There must be a summons for the mayor, &c. expressly to meet for the purpose of deciding as to the removal, 1 Stra. 385., and every member of the assembly must be summoned where a summons is necessary. 2 Stra. 1051. A power reserved to the crown in a charter of incorporation to amove by order of council one or more of the corporators, which charter also declared that all or any of them so amoved should actually and without further process be amoved, and which also provided at the same time that upon such amotion the remaining corporators might proceed to fill up the vacancies, cannot be exercised to such an extent as not to leave a sufficient number to make a re-election, and therefore an amoval of all was held to be void, 2 T. R. 568; but that judgment was reversed in Dom. Proc. 4 T. R. 122. A corporation cannot in general amove a member without summoning the party to answer for himself and hearing him, for he may have a good excuse. 11 Co. 99. a. 1 Sid. 14. In some cases this may be dispensed with, and where non-residence is a good cause of amotion, it is unnecessary before proceeding to amove the party, to summon him to come and reside. Dougl. 149. But if he be removable for non-attendance at the corporate assemblies, he must have had personal notice to attend, and that his presence was necessary: the usual notice of the intended meeting will not be sufficient, unless that usual notice be personal. 1 Burr. 517. 527. 540. Where an officer is removable ad libitum, he may be removed without summons or hearing of him, &c. 1 Sid. 15. 1 Lev. 291. In general the summons should shew the particular charge alleged against the party to be amoved, 11 Co. 99. a. 4 Mod. 33. 37; but sometimes this is unnecessary, 1 Lord Raym. 225. 2 ed. 1240, especially where the party by his act dispenses with it. 2 Burr. 723. 1 Kyd. 447. 439.

If a member be improperly amoved a mandamus lies. Com. Dig. Mandamus, A. &c. Where it is *confessed* that a man has been rightly removed from an office, the court will not grant a mandamus for a restoration, though he had no notice to appear and defend himself. Cowp. 523. 2 T. R. 177. An order of restoration of a corporator illegally disfranchised, relates to the original right. Cowp. 503.

life (17). 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 (*m*) (18): agreeable to that maxim of the civil law, "*si quid universitati debetur, singulis non debetur; nec, quod debet universitas, singuli debent.*"

[*485] *A corporation may be dissolved, 1. By Act of parliament, which is boundless in its operations (19). 2. By the natural death of all its members, in case of an aggregate corporation (20). 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 (21). And the regular course is to bring an information in nature of a writ of *quo warranto*, to inquire by what warrant the members now exercise their corporate power, having forfeited it by such and such proceedings. 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 seizing the charter of the city of London, gave great and just offence; though perhaps, in strictness of law, the proceedings in most of them were sufficiently regular: but the judgment against that of London was reversed by Act of parliament (*o*) after the Revolution; and by the same statute it is enacted, that the franchises 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 (*p*), 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 prescriptive or charter day.

(*m*) 1 Lev. 237.
(*n*) *Ff.* 3, 4, 7.
(*o*) Stat. 2 W. and M. c. 8.
(*p*) Stat. 11 Geo. I. c. 4.

(17) But if a corporation have granted over their possessions to another before their dissolution, they do not return to the donor. 1 Rol. 816. l. 10. 20. and vide the cases collected in Bac. Ab. Corp. J.; if lands are given to a corporate body and it is dissolved, they will revert to the donor and not escheat. 9 Mod. 226.

(18) But a debt due to a corporation still remains, though their name is changed by a new charter. 3 Lev. 238.

(19) The king cannot by his prerogative destroy a corporation. Rex v. Amley, 2 Term R. 532.

(20) But if the king makes a corporation consisting of twelve men to continue always in succession, and when any of them die the others may choose another in his place, it may be so continued. 1 Roll. 524. Bac. Ab. tit. Corp. G. But where a corporation consists of several distinct integral parts, if one of these parts become extinct, whether by the death of the persons of whom it is composed, or by any other means, the whole corporation is dissolved. 3 Burr. 1866. When an integral part of a corporation is gone, and the corporation has no power to restore it or to do any corporate act, the corporation is so far dissolved that the crown may grant a new charter. 3 T. R. 199. And where the major part of an integral part of a corporation, whose attendance is required at the election of officers, being gone, it operates as a dissolution of the whole corporation, which has thereby lost the power of holding corporate assemblies for the purpose of filling up vacancies and continuing itself. 3 East, 213. And where the election of mayor was to be made by the majority of an assembly composed of several integral definite parts of a corporation and other burgesses and inhabitants for the time being, it was held that one of such definite integral parts, being reduced below its majority of a proper number, could no longer be represented in such corporate assembly, and the whole corporation was thereby dissolved, being no longer capable of continuing itself. 4 East, 17.

(21) Refusing or neglecting to choose such officers as they are obliged to do by their charter, is a ground of forfeiture. Carth. 483. sed vid. 11 Geo. I. c. 4. For a forfeiture a corporation is not dissolved without a judgment in a court of law to enforce it, and this is attained by scire facias or quo warranto. Bac. Ab. Corp. G. As to the effect of this judgment, see 2 T. R. 515. 4 T. R. 122. 2 Kyd. 496. Bac. Ab. Corp. G.

THE END OF THE FIRST BOOK.

COMMENTARIES

ON

THE LAWS OF ENGLAND.

BOOK THE SECOND.

OF THE RIGHTS OF THINGS.

CHAPTER I.

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 inquiry 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 in 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, [*2] 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 inquiries, 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 for making

them. But, when law is to be considered not only as a 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 man "dominion over all the earth; and over the fish of the sea, and over the fowl of the air, and over every living [*3] 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 primeval 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 these times, wherein "*erant omnia communia et indivisa omnibus, veluti unum cunctis patrimonium esset.*" (*b*). Not that this communion of goods seems ever to have been applicable, even in the earliest stages, to ought but the *substance* of the thing; nor could it 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 so 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 determined spot of it, for rest, for shade, or the like, acquired for the time a sort of ownership, from which it would have been unjust, and contrary to the law of nature, to [*4] have driven him by force: but the instant that he *quitted the use or occupation of it, 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 be continually broken and disturbed, while a variety of persons were striving who should get the first occupa-

(*a*) Gen. i. 28.
(*b*) Justin. l. 43, c. 1.
(*c*) Barbeyr. Puff. l. 4, c. 4.
(*d*) *Quemadmodum theatrum, cum commune sit, recte tamen dici potest, ejus esse eum locum quem quisque occupárit. De Fin. l. 3, c. 20.*

tion 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 usufructuary 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 to 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 moveable [*5] cabins, suited to the design of Providence for more speedily peopling 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 labour, bestowed upon any subject which before lay in common to all men, is universally allowed to give the fairest and most reasonable title to an exclusive property therein.

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*)." And Isaac, *about ninety years afterwards, reclaimed this his father's pro- [*6] perty; 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

(*e*) Gen. xxi. 30. (*f*) Gen. xxvi. 15, 18, &c.

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 seize 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 savage 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."

[*7] *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 Phœnicians and Greeks, as the Germans, Scythians, and other northern people. And, so long as it was confined to the stocking and cultivation of desert uninhabited countries, it kept strictly within the limits of the law of nature. But how far the seizing 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 find out new spots 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 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

(*g*) *Colunt discreti et diversi; ut fons, ut campus, ut nemus placuit. De mor. Ger.* 16. (*h*) Gen. c. xiii.

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 [*8] 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: or what it is that gave a man an exclusive right to retain in a permanent manner that specific *land*, which before belonged generally to every body, 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 on 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 natural justice, without any consent or compact, sufficient of itself to gain a title. A dispute that savours too much of nice and scholastic refinement. (1). However, both sides agree in this, that

(1) But it is of great importance that moral obligations and the rudiments of laws should be referred to true and intelligible principles, such as the minds of serious and well-disposed men can rely upon with confidence and satisfaction.

Mr. Locke says, "that the labour of a man's body, and the work of his hands, we may say are properly his. Whatsoever then he removes out of the state that nature hath provided and left it in, he hath mixed his labour with, and joined to it something that is his own, and thereby makes it his property." (*On Gov. c. 5.*)

But this argument seems to be a *petitio principii*; for mixing labour with a thing, can signify only to make an alteration in its shape or form; and if I had a right to the substance, before any labour was bestowed upon it, that right still adheres to all that remains of the substance, whatever changes it may have undergone: if I had no right before, it is clear that I have none after; and we have not advanced a single step by this demonstration.

The account of Grotius and Puffendorf, who maintain that the origin and inviolability of property are founded upon a tacit promise or compact, and therefore we cannot invade another's property without a violation of a promise or a breach of good faith, seems equally, or more, superfluous and inconclusive.

There appears to be just the same necessity to call in the aid of a promise to account for, or enforce, every other moral obligation, and to say that men are bound not to beat or murder each other, because they have promised not to do so. Men are bound to fulfil their contracts and engagements, because society could not otherwise exist; men are bound to refrain from another's property, because likewise society could not otherwise exist. Nothing therefore is gained by resolving one obligation into the other.

But how, or when, then, does property commence? I conceive no better answer can be

occupancy is the thing by which the title was in fact originally
[*9] gained; every man seizing to his 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 finder that will seize 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 a 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 (*i*).

But this method of one man's abandoning his property, and another seizing 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. Thus mutual convenience introduced commercial traffic, and the reciprocal transfer of property by sale, grant, or conveyance: which
[*10] *may be considered either as a continuance 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 my land to Titius, the deed of conveyance is an evidence of my intending to abandon 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 (2).

(*i*) See book 1. p. 295.

given, than by occupancy, or when any thing is separated for private use from the common stores of nature. This is agreeable to the reason and sentiments of mankind, prior to all civil establishments. When an untutored Indian has set before him the fruit which he has plucked from the tree that protects him from the heat of the sun, and the shell of water raised from the fountain that springs at his feet; if he is driven by any daring intruder from this repast, so easy to be replaced, he instantly feels and resents the violation of that law of property, which nature herself has written upon the hearts of all mankind.

(2) Upon whatever principle the right of property is founded, the power of giving and

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 of 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 case he neglects to dispose of it, or is not permitted to make any disposition *at all, the municipal law of the country then [*11] 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 (*k*) occasion. 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 (3). It is true, that the transmission of one's possessions to posterity

(*k*) 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.

transferring seems to follow as a natural consequence; if the hunter and the fisherman exchange the produce of their toils, no one ever disputed the validity of the contract, or the continuance of the original title. This does not seem to be aptly explained by occupancy, for it cannot be said that in such a case there is ever a vacancy of possession.

(3) I cannot agree with the learned Commentator, that the permanent right of property vested in the ancestor himself (that is, for his life), is not a natural, but merely a civil right.

I have endeavoured to shew, (Note 1,) that the notion of property is universal, and is suggested to the mind of man by reason and nature, prior to all positive institutions and civilized refinements. If the laws of the land were suspended, we should be under the same moral and natural obligation to refrain from invading each other's property as from attacking and assaulting each other's persons. I am obliged also to differ from the learned Judge, and all writers upon general law, who maintain, that children have no better claim by nature to succeed to the property of their deceased parents than strangers; and that the preference given to them, originates solely in political establishments. I know no other criterion by which we can determine any rule or obligation to be founded in nature, than its universality; and by inquiring whether it is not, and has not been, in all countries and ages, agreeable to the feelings, affections, and reason of mankind. The affection of parents towards their children is the most powerful and universal principle which nature has

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 from speculations altogether so delicate and refined, and, if not from fortuitous circumstances, at least from a plainer and more simple principle. A man's children or nearest [*12] relations are usually about him on his *death-bed, and are the earliest witnesses of his decease. They become 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 (*l*)."

While property continued only for life, testaments were useless and unknown: and, when it became inheritable, the inheritance was long indefeasible, 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 of 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 (4).

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 county having different ceremonies and requisites to make a testament completely valid: neither does any thing vary more than the right of inheritance under

(*l*) Gen. xv. 3.

planted in the human breast; and it cannot be conceived, even in the most savage state, that any one is so destitute of that affection and of reason, who would not revolt at the position, that a stranger has as good a right as his children to the property of a deceased parent.

Hæredes successoresque sui cuique liberi, seems not to have been confined to the woods of Germany, but to be one of the first laws in the code of nature; though positive institutions may have thought it prudent to leave the parent the full disposition of his property after his death, or to regulate the shares of the children, when the parent's will is unknown.

In the earliest history of mankind we have express authority that this is agreeable to the will of God himself; *and behold the word of the Lord came unto Abraham, saying, this shall not be thine heir; but he that shall come out of thine own bowels shall be thine heir.* Gen. c. 15.

(4) By 32 Hen. VIII. c. 1, all socage lands were made devisable, and two-thirds of lands of military tenure: when these at the restoration were converted into socage tenure, all lands became devisable, some copyholds excepted. See p. 375.

different *national establishments. In England particular- [*13]
ly, 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 their immediate 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 entitled 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 [*14]
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 usufructuary 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 naturae*, or of a wild and untameable disposition; which any man may seize upon and keep for his own use and pleasure. All these things, so long as they remain in possession, every man has a right to enjoy without disturbance; but if once they escape from his custody, or he voluntary abandons the use of them, they return to the common

stock, and any man else has an equal right to seize 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 [*15] 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 (5). 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 II.

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 (1).

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 (2). *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

(5) See this doctrine discussed in the note to page 419, post.

(1) These definitions have been objected to by Mr. Preston (1 Prest. on Est. 10.), but they will be found right when it is considered that Blackstone is defining *things* real and personal, and not an estate in those things.

(2) The terms, lands, tenements, and hereditaments, and other names describing real property, are fully explained in Co. Litt. 4 (a) to 6. (b). It will be found material to attain an accurate knowledge of them. An advowson in gross will not pass by the word "lands" in a will, but it is comprehended under the terms tenements and hereditaments. Fort. 351. 3 Atk. 464. Ca. Temp. Talb. 143.

accep*tation it is only applied to houses and other buildings, yet [*17] 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. (3) Thus *liberum tenementum*, frank tenement, or freehold, is applicable not only to lands and other solid objects, but also to offices, rents, commons, and the like (*a*): and, as lands and houses are tenements, so is an advowson a tenement; and a franchise, an office, a right of common, a peerage, or other property of the like unsubstantial kind, are all of them, legally speaking, tenements (*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 incorporeal, real, personal, or mixed. Thus an heir-loom, or implement of furniture which by custom descends to the heir together with a 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, marshes, furzes, and heath. *It legally includeth also all castles, houses, and other buildings: [*18] for they consist, said he, of two things; *land*, which is the foundation, and *structure* thereupon; so that if I convey the land or ground, the structure or 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 therefore I cannot bring an action to recover possession of a pool or other piece of water by

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

(3) Therefore in an action of ejectment, which, with the exception of tithe and common appurtenant, is only sustainable for a *corporeal* hereditament; it is improper to describe the property sought to be recovered as a *tenement*, unless with reference to a previous more certain description. 1 East. 441. 8 East, 357. By the general description of a messuage, a church may be recovered. 1 Salk. 256. The term *close* without stating a name or number of acres, is a sufficient description in ejectment. 11 Coke, 55. In common acceptation it means an enclosed field, but in law it rather signifies the separate interest of the party in a particular spot of land, whether enclosed or not. 7 East, 207. Doct. and Stud. 30. If a man make a feoffment of a house "*with the appurtenances*," nothing passes by the words *with the appurtenances*, but the garden, curtilage, and close adjoining to the house, and on which the house is built, and no other land, although usually occupied with the house; but by a devise of a messuage, without the words "*with the appurtenances*," the garden and curtilage will pass, and where the intent is apparent, even other adjacent property. See cases, 2 Saund. 401. note 2. 1 Bar. & Cres. 350; see further as to the effect of the word "appurtenant," 15 East, 109. 3 Taunt. 24. 147. 1 B. & P. 53. 55. 2 T. R. 498. 502. 3 M. & S. 171. The term *farm*, though in common acceptation it imports a tract of land with a house, out-buildings, and cultivated land, yet in law, and especially in the description in an action of ejectment, it signifies the leasehold interest in the premises, and does not mean a farm in its common acceptation. See post 316.

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* (*f*). 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, usufructuary, 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 cœlum*, is the maxim of the law; upwards, therefore no man may erect any building, or the like, to overhang another's land: and, downwards, whatever is in a direct line, between the surface of any land and the centre of the earth, belongs to the owner of the surface (4); 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
[*19] meadows. Not but the particular names of the things are *equally sufficient to pass them, except in the instance of water; by a grant of which, nothing passes but a right of fishing (*g*) (5): but the ca-

(*f*) Brownl. 142. (*g*) Co. Litt. 4.

(4) The passage in the text requires a little qualification.

The freehold of customary lands, and lands held by copy of court roll, is in the lord of the manor. In such lands, unless the act be authorized by special custom, (*Whitchurch* v. *Holworthy*, 19 Ves. 214. *S. C.* 4 Mau. & Sel. 340), it is neither lawful for the customary tenant, or copyholder, to dig and open new mines, without the licence of the lord of the manor; nor for the lord, without the consent of the tenant, to open new mines under the lands occupied by such tenant. (*Bishop of Winchester* v. *Knight*, 1 P. Wms. 406. And see, as to the latter point, the opinion of two Judges against one, in the *Lord of Rutland* v. *Greene*, 1 Keble, 557, and *infra*). The acts which a lord of a manor may do by custom, to enable him profitably to work mines, previously opened, under lands which are parcel of his manor, must not be unreasonably oppressive upon the occupier of the lands, or the custom cannot be maintained. (*Wilkes* v. *Broadbent*, 1 Wils. 64). And the lord of a manor cannot open new mines upon copyhold lands within the manor, without a special custom or reservation; for the effect might be a disinherison of the whole estate of the copyholder. The lord of a manor may be in the same situation with respect to mines as with respect to trees: that is, the property may be in him, but it does not follow that he can enter and take it. The lord must exercise a privilege over the copyholder's estate, if during the continuance of the copyhold he works mines under it; and a custom or reservation should be shewn to authorize such a privilege: but as soon as the copyhold is at an end, the surface will be the lord's as well as the minerals, and he will have to work upon nothing but his own property. (*Grey* v. The *Duke of Northumberland*, 13 Ves. 237. 17 Ves. 282; and S. P., at law, under the title of *Bourne* v. *Taylor*, 10 East, 205, where all the leading cases on the subject are discussed). The right to mines may be distinct from the right to the soil. In cases of copyholds, a lord may have a right under the soil of the copyholder: but where the soil is in the lord, all is resolvable into the ownership of the soil, and a grant of the soil will pass every thing under it. (*Townley* v. *Gibson*, 2 T. R. 705).

(5) Or the right to *use* the water, as in the case of rivers and mill-streams. Twenty years exclusive enjoyment of the water in any particular manner by the occupier of the adjoining lands, affords a conclusive presumption of right in the party so enjoying it; and he may maintain an action if the water be diverted from its course, so that the quantity he has thus been accustomed to enjoy is diminished, although the fishery may not be injured, 6 East, 208. 7 East, 195. 1 Wils. 175; and he may legally enter the land of a person, who has occasioned a nuisance to a watercourse, to abate it. 2 Smith's Rep. 9. Com. Dig. Pleader. 3 M. 41.

pital distinction is this, that by the name of a castle (6), messuage (7), toft (8), croft (9), 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 (*h*).

CHAPTER III.

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

(*h*) Co. Litt. 4, 5, 6. (*a*) *Ibid.* 19, 20.

(6) By the name of a castle, one or more manors may be conveyed; and *e converso*, by the name of a manor, a castle may pass. 1 Inst. 5. 2 Inst. 31.

"Land may be parcel of a castle; castle, honour, and the like, are things compound, and may comprise messuages, lands, meadows, woods, and such like." (*Hill* v. *Grange*, 1 Plowd. 168. 170.)

(7) A *messuage*, in intendment of law, *primâ facie* comprehends land, and it will be presumed that a curtilage, at least, belongs thereto. (*Scholes* v. *Hargreaves*, 5 T. R. 48. *Hockley* v. *Lamb*, 1 L. Raym. 726. *Scamler* v. *Johnson*, T. Jones, 227. *Patrick* v. *Lowre*, 2 Brownl. 101; it should be observed, however, that *North* v. *Coe*, Vaugh. 253, is *contra*). Rights of common, and even of *several* pasturage, may be appurtenant to a messuage; (*Potter* v. *Sir Henry North*, 1 Ventr. 390); or to a cottage; (*Emerton* v. *Selby*, 1 L. Raym. 1015); and where common is appurtenant, *in right*, to a tenement, it goes with the inheritance. (1 Bulst. 18. So, a garden may be said to be parcel of a house, and by that name will pass in a conveyance. (*Smith* v. *Martin*, 2 Saund. 401. a. *S. C.* 3 Keb. 44). It has also been held, that land may pass as pertaining to a house, if it hath been occupied therewith for ten or twelve years, for by that time it has gained the name of parcel or belonging, and shall pass with the house in a will or lease. (*Higham* v. *Baker*, Cro. Eliz. 16. *Wilson* v. *Armourer*, T. Raym. 207. *Loftes* v. *Barker*, Palm. 376.) And by the devise of a messuage, a garden and the curtilage will pass, without saying *cum pertinentiis*. (*Carden* v. *Tuck*, Cro. Eliz. 89). For this purpose the word *messuage* seems formerly to have been thought more efficacious than the word house. (*Thomas* v. *Lane*, 2 Cha. Ca. 27. S. P. Keilway, 57). But the subtilty of such a distinction has been since disapproved. (*Doe* v. *Collins*, 2 T. R. 502). And when a man departs with a messuage *cum pertinentiis*, even by feoffment, or other common law conveyance, not only the buildings, but the curtilage and garden (if any there be) will pass. (*Bettisworth's* case, 2 Rep. 32. *Hill* v. *Grange*, 1 Plowd. 170. a; *S. C.* Dyer, 130. b). *A fortiori*, in a will, although *lands* will not pass under the word *appurtenances*, taken in its strict technical sense; they will pass if it appear that a larger sense was intended to be given to it. (*Buck* v. *Nurton*, 1 Bos. & Pull. 57. *Ongley* v. *Chambers*, 1 Bingh. 498. *Press* v. *Parker*, 2 Bingh. 462).

(8) "When land is built upon, the space occupied by the building changes its name into that of a messuage. If the building afterwards falls to decay, yet it shall not have the name of land, although there be nothing in substance left but the land, but it shall be called a *toft*, which is a name superior to land and inferior to messuage." (*Hill* v. *Grange*, 1 Plowd. 170).

(9) *Croft*, is a small inclosure near to the homestead.

profits produced, and the thing, or hereditament, which produces them. An annuity, for instance, is an incorporeal hereditament (1): 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 [*21] from hand to hand. So tithes, if we consider the pro*duce of them, as the tenth sheaf or tenth lamb, seem to be completely corporeal; yet they are indeed incorporeal hereditaments: for they being merely a contingent springing right, collateral to or issuing out of lands, can never be the object of sense: that casual share of the annual increase is not, till severed, 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 (2).

I. Advowson is the right of presentation to a church, or ecclesiatical benefice. Advowson, *advocatio*, signifies *in 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 of 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 corporeal possession be [*22] *had of it. If the patron takes corporeal possession of the church, the church-yard, 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 (3), either oral or written, which is a kind of invisible mental trans-

(*b*) Book I. pag. 112.

(*c*) This original of the *jus patronatus*, by building and endowing the church, appears also to have been allowed in the Roman empire. *Nov.* 26, *t.* 12, *c.* 2. *Nov.* 118, *c.* 23.

(1) Of course, our author meant to speak of an annuity granted to a man and his heirs; not of an annuity for life, which in no sense of the word can be called an *hereditament*. The word is, no doubt, often inserted in grants for life *or years*, but then it is only with reference to some subject which is matter of inheritance. (*Smith* v. *Tindal*, 11 Mod. 90).

(2) There being no religious establishments in the U. S. there are no advowsons or tithes; and as all offices are trusts for the public, and are not private property, they are not hereditaments. So strictly we have no dignities, franchises, or corodies, in the sense above used, unless to be a corporation be a franchise, as it probably is. See 4 Wheel. 518.

(3) This is erroneous, for "advowsons, merely as such (*i. e.* in gross), could never pass by oral grant without deed." Lord Coke says expressly, that "grant is properly of things incorporeal, which cannot pass without deed," (1 Inst. 9.) and though before the statute of frauds, 29 Car. II. c. 3. any freehold interest in corporeal hereditaments might have passed

ter: and being so vested it lies dormant and unnoticed, till occasion calls it forth: when it produces a visible corporeal fruit, by entitling 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, (4) it is called an advowson in gross, or at large, and never can be appendant any more; but it is for the future annexed to the person of its owner, and not to his manor or lands (*g*).

Advowsons are also either *presentative*, *collative*, or *donative* (*h*): an advowson *presentative* is where the patron hath a right of presentation to the bishop or ordinary, and moreover to demand of him to institute his clerk, if he finds him canonically qualified; and this is the most usual advowson (5). An advowson *collative* is where the bishop and pa-

(*d*) Co. Litt. 199.
(*e*) *Ibid.* 121.
(*f*) *Ibid.* 307.
(*g*) *Ibid.* 120.
(*h*) *Ibid.*

by a verbal feoffment, accompanied with livery of seisin, (Litt. S. 59.) and by such a verbal grant of a manor, before the statute, an advowson appendant to it might have been conveyed; yet since that statute, the transfer must be in writing, and by deed. 2 Wood. 64. 1 Saund. 228.

(4) For instance, if the manor to which an advowson is appendant, be conveyed away in fee simple, excepting the advowson, or, *vice versâ*, if the advowson be conveyed away without the manor to which it was appendant, the advowson becomes in *gross*. (*Fulmerston* v. *Stuard*, Dyer, 103 b). If, upon partition between two coparceners, a manor be allotted to one, and an advowson appendant thereto to another, the advowson becomes, for a time at least, severed from the manor; but if by the death of one coparcener without issue, the two estates become re-united by law, the advowson which was once severed, is now appendant again. (Sir *Moyle Finch's case*, 6 Rep. 64 b. *Hartop* v. *Dalby*, Hetley, 14). The *dictum* in the text, therefore, which intimates that an advowson which once becomes *in gross*, can never again be appendant, must be qualified. (See Gibson's Codex, 757). And our author could not mean, that a temporary severance, by a lease for life or years of a manor, with the exception of an appendant advowson, will have the effect of totally destroying its appendant qualities: the contrary doctrine has been established. (*Hartop* v. *Cock*, Hutt. 69. Jenk. Cent. 310, pl. 91). And where several parties have a right to nominate and present to a church in turns, the advowson may be appendant for one turn, and *in gross* for another. (*Illiefield case*, Dyer, 259 a, pl. 19).

(5) The right of presentation is the right to offer a clerk to the bishop, to be instituted to a church. Co. Litt. 120. a. 3 Cruise, 3. All persons seised in fee, in tail, or for life, or possessed for a term of years of a manor to which an advowson is appendant, or of an advowson in gross, may present to a church when vacant. Although this is a right, considered of great value, as a provision for relations, a pledge of friendship, or what is its true use and object, the reward of learning and virtue; yet the possession of it never can yield any lucrative benefit to the owner, as the law has provided that the exercise of this right must be perfectly gratuitous. The advowson itself is valuable and saleable, but not the presentation when the living is void. 1 Leon. 205. Therefore the mortgagor shall present when the church is vacant, though the advowson alone is mortgaged in fee, for the mortgagee could derive no advantage from the presentation in reduction of his debt, 3 Atk. 599. Mirehouse, Adv. 150, 1; so, though the assignees of a bankrupt may sell the advowson, yet, if the church be void at the time of the sale, the bankrupt himself must present the clerk, Mirehouse, 156; and if an advowson is sold when the church is void, the grantee cannot have the benefit of the next presentation; and it has been doubted, whether the whole grant is not void, Cro. Eliz. 811. 3 Burr. 1510. Bla. Rep. 492. 1054. Amb. 268; though, probably, there would be no objection to the grant of an advowson, though the church is vacant if the next presentation be expresaly reserved by the grantor, especially as it has been decided that a conveyance of an advowson, though

tron 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
[*23] conferring the benefice, the whole that is done in common cases, by both presentation and institution. An advowson *donative* is when the king, or any subject by his licence, doth found a church or chapel, and ordains that it shall be merely in the gift or disposal of the patron; subject to his visitation only, and not to that of the ordinary; and vested absolutely in the clerk by the patron's deed of donation, without presentation, institution, or induction (*i*). 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. (*k*) And therefore though pope Alexander III. (*l*) in a letter to Becket, severely inveighs against a *pravæ 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 (*m*), 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 feodal 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.

(*i*) Co. Litt. 344.
(*k*) Seld. tith. c. 12, § 2.
(*l*) *Decretal. l.* 3, *t.* 7, *t.* 3.
(*m*) *A. D.* 1239.

it may be void for the next presentation, yet may be good for the remaining interest, when it can be fairly separated from the objectionable part. 5 Taunt. 727. 1 Marsh. 292. An advowson in fee in gross, is assets in the hands of the heir, 3 Bro. P. C. 556; but it is not extendible under an elegit, because a moiety cannot be set out, nor can it be valued at any certain rent towards payment of the debt. Gilb. Exec. 39. 2 Saund. 63. f.

He who has an advowson or right of patronage in fee, may, by deed, transfer every species of interest out of it, viz. in fee, in tail, for life, for years, or may grant one or more presentations. The right of presentation *descends* by course of inheritance, from heir to heir, as lands and tenements, unless the church become vacant in the lifetime of the person seised of the advowson in fee, when the void turn being then a chattel goes to the executor, unless it be a donative benefice, and in that case the right of donation descends to the heir, 2 Wils. 150; if, however, the patron presents and dies before his clerk is admitted, and his executor presents another, both these presentments are good, and the bishop may receive which of the clerks he pleases, Co. Litt. 388. a. Burn E. L. tit. Advowson, Mirehouse on Advowsons, 139, where see in general the right of presentation. See further as to presentation by joint-tenants and tenants in common. 2 Saund. 116. b. Where the same person is patron and incumbent, and dies, his heir is to present, 3 Lev. 47. 3 Buls. 47; but such patron and incumbent may devise the presentation. 1 Lev. 205. 2 Roll. Rep. 214. 6 Cruise Dig. 21. Mirehouse, 70. But as we have seen an advowson in gross will not pass by the word "lands" in a will, though it will be comprehended under the terms "tenements and hereditaments," ante 16. n. 2.

The remedy for the infraction of the right of presentation is an action of *quare impedit*, in which, although we have seen that no profit can be taken for presenting the clerk, yet the patron, whose right of patronage is injuriously disturbed, recovers two years' value of the church, if the turn of presentation is lost. 3 Cruise, 17, 18. The particulars of the action of quare impedit will be considered, post 3 book, 242 to 253. When the bishop refuses without good cause, or unduly delays to admit and institute a clerk, he may have his remedy against the bishop in the ecclesiastical court. 3 Cruise, 17. As to any remedy for the clerk at law, see 13 East, 419. 15 East, 117.

However this may be, if, as the law now stands, the true patron *once* waves this privilege of donation, and presents to the bishop, and his clerk is admitted and instituted, the ad*vowson is now become [*24] for ever presentative, and shall never be donative any more (*n*).

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 therefore reduce it to the standard of other ecclesiastical livings (6).

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 (7): the first species being usually called *predial*, as of corn, grass, hops, and wood (*o*): the second *mixed*, as of wool, milk, pigs, &c. (*p*), consisting of natural products, but nurtured and preserved in part by the care of man; and of these the tenth must be paid in gross; 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 (*q*) (8).

It is not to be expected from the nature of these general commentaries, that I should particularly specify what things are titheable, 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

(*n*) Co. Litt. 344. Cro. Jac. 63.
(*o*) 1 Roll. Abr. 635. 2 Inst. 649.
(*p*) *Ibid.*
(*q*) 1 Roll. Abr. 656.

(6) The contrary is held by a later authority than the authorities referred to by the learned Judge; in which it was declared, that although a presentation may destroy an impropriation, yet it cannot destroy a donative, because the creation thereof is by letters patent. 2 Salk. 541. 3 Salk. 140. Mirehouse, 26. It may here be observed, that when an incumbent is made a bishop, the right of presentation in that case is in the king, and is called a prerogative presentation; the law concerning which was doubted in Car. II.'s time, but in the time of king William it was finally determined in favour of the crown. 2 Bla. R. 770.

(7) The definition proposed in the text is not strictly accurate. The faulty part of the definition seems to be the supposition that tithe consists, in all cases, of the tenth part of the increase *yearly* arising and renewing. This is not correct, even as to predial tithes, universally; and to mixt and personal tithes it does not at all apply. (See the 4th ch. of Toller on Tithes).

Wood is one of the instances to shew that predial tithe may be payable in respect of an article of which the renewal is not annual. *Silva cædua* is titheable when it is felled; and between the falls several years commonly (and a great many years, not unfrequently) intervene. (*Page* v. *Wilson*, 2 Jac. & Walk. 523. *Walton* v. *Tryon*, 1 Dick. 245. *Chichester* v. *Sheldon*, Turn. & Russ. 249).

(8) The distinction between predial and mixed tithe is, that *predial* tithes, so called from prædium a farm, are those which arise immediately from the soil, either with or without the intervention of human industry. Those are *mixed* which arise mediately through the increase or other produce of animals, which receive their nutriment from the earth and its fruits. Therefore agistment is a predial tithe, though, as it is incapable of being set out in kind, it is not within the statute. 2 & 3 Ed. VI. c. 13. per Macdonald, Ch. B. 3 Anstr. 763. *Personal* tithes are so termed because they arise entirely from the *personal* industry of man. Mirehouse 1 & 2. These personal tithes are not, at present, paid anywhere except for fish caught in the sea, Bunb. Rep. 256. 3 T. R. 385. and for corn-mills, Mirehouse, 93 to 101. Tithe is not payable of common right of things feræ naturæ, as of deer in a park, or rabbits in a warren, or a decoy in hands of owner, but by special custom may be due. Com. Dig. Dismes, H. 4. 16. Owen, 34. Gwm. 275. Cro. Car. 339. 8 Price, 39.

In addition to this triple distinction, all tithes have been otherwise divided into two classes, *great* or *small*; the former, in general, comprehending the tithes of corn, peas, and beans, hay and wood; the latter, all other predial, together with all personal and mixed tithes. Tithes are great or small, according to the nature of the things which yield the tithe without reference to the quantity.

* Yearly seems here to mean periodical, as it does when applied to rents. See p. 41.

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 *ferae naturae*, as deer, hawks, &c. whose increase, so as to profit the owner, is not annual, but casual (*r*). It will rather be our business to consider, 1. The original of the [*25] 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 (9).

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 (*s*), 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 [*26] of the kings of Mercia* and Northumberland, the bishops, dukes, senators, and people. Which was a very few years later than the time that Charlemagne established the payment of them in (*t*) France,

(*r*) 2 Inst. 651.
(*s*) Seld. c. 8, § 2.
(*t*) *A. D.* 778.

(9) The argument that tithes may be taken to be part of the rent which the farmer pays for his land, is more plausible than sound, for the sum which he pays to his landlord under that name is certain, while the amount which he pays to the clergyman increases with the increase of his harvests, though that has been effected by an increased expenditure both of money and labour; it seems hard therefore that he should be stripped of one tenth of the results of his superior husbandry in addition to the tenth of the produce of his farm, by the ordinary course of cultivation. In the case of personal tithes, only a tenth of the clear profit is payable after deducting all expenses. 3 Anstr. 915. Mirehouse, 108. Why, therefore, should the tenths of the produce of lands be allowed without any deduction for expenses. The policy of a system which gives rise to jealousies, distrusts, and quarrels between the people and their spiritual guides, is at best questionable, and the true friends of the church must be anxious for those changes becoming general, which have prevented the recurrence of those evils wherever they have been introduced. Accordingly the courts and juries look with favour upon and endeavour to support compositions, ancient payments, and modules.

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 (*u*) (10).

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 (*w*): 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 (*x*) the payment of tithes not only *enjoined*, but a *penalty* added upon non-observance: which law is seconded by the laws of Athelstan (*y*), about the year 930. And this is as much as can certainly be traced out, with regard to their legal original.

2. We are next to consider the persons to whom they are due (11). And upon their first introduction (as hath formerly been observed) (*z*), though every man was obliged to pay tithes in general, yet he might give them to what priests he pleased (*a*); which were called *arbitrary* consecrations of tithes: or he might pay them into the hands of the bishop, who distributed among his diocesan clergy the revenues of the church, which were then in common (*b*). But, when dioceses were divided into parishes, the tithes of each parish were allotted to its own particular minister; first by common consent, or the appointment of lords of manors, and afterwards by the written law of the land (*c*).

*However, arbitrary consecrations of tithes took place again afterwards, and became in general use till the time of king John (*d*). [*27]
Which was probably owing to the intrigues of the regular clergy, or monks of the Benedictine and other rules, under archbishop Dunstan and his successors: who endeavoured to wean the people from paying their dues to the secular or parochial clergy (a much more valuable set of men than

(*u*) Book I. ch. 11. Seld. c. 6, § 7. Sp. of laws, b. 31, c. 12.
(*w*) Wilkins, pag. 51.
(*x*) *Cap.* 6.
(*y*) *Cap.* 1.
(*z*) Book I. Introd. § 4.
(*a*) Inst. 646. Hob. 296.
(*b*) Seld. c. 9, § 4.
(*c*) *LL. Edgar*, c. 1. & 2. *Canut.* c. 11.
(*d*) Seld. c. 11.

(10) With respect to the quadripartite division of tithes mentioned in the text, Toller (p. 6) thinks it was not only more antient than the law of Charlemagne upon the subject, but also conformable to some very old canon or usage. He draws this inference, reasonably enough, from the answer returned to Augustine, who, when he inquired of the Pope as to the bishop's portion of the oblations of the faithful, was told, that the *custom* was, generally, to make such a division as that alluded to:—a division which has very long been disregarded. With the exception of the chancel, which the rector is still bound to repair, no part of the tithes is, at the present day, applicable to the maintenance of the church. The *quantum* devoted to the poor, depends entirely upon the voluntary charity of the incumbent. And the bishop no longer looks, for the due support of his rank, to a participation in the tithes paid to the parochial clergy.

(11) The *rector* is prima facie entitled to all the tithes of the parish, small as well as great; and the *vicar*, in order to take any part of them from him, must either produce an endowment or give such evidence of usage as presupposes an endowment, since courts will not presume any thing in favour of the vicar against the rector. 2 Buls. 27. 2 Ves. Sen. 511. Yelverton, 86. 3 Atk. 497. Mirehouse on Tithes, 11. Where an endowment does not extend to the tithe in question, a subsequent more extensive endowment may be presumed from usage, Hardr. 328. 2 Buls. 27. 1 Price, 13. 2 Price, 250. 284. 329. 9 Price, 231; and forty years' usage is sufficient to afford presumption of a subsequent endowment, 4 Price, 198. 2 Price, 450; and perhaps 30 or 20 years would suffice. Gwil. 648. Bunb. 144. 9 Price, 231. 2 Bar. & C. 54. Mirehouse on T. 15. 17. In general, a *curate* has no claim to the tithes of a parish. Mirehouse on T. 20.

Portions of tithes may be vested in a person who is neither rector nor vicar, by grant before the restraining statutes, and which may be evidenced by long possession. Degge, c. 2. 226. 1 Anst. 311. Gwil. 1513.

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 every 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 (*e*) Third about the year 1200 in a decretal epistle, sent to the archbishop of Canterbury, and dated from the palace of Lateran: which has occasioned sir Henry Hobart and others to mistake it for a decree of the council of Lateran held A. D. 1179, which only prohibited what was called the infeodation of tithes, or their being granted to mere laymen (*f*), whereas this letter of pope Innocent to the archbishop enjoined the payment of tithes to the parsons of the respective parishes where every man inhabited, agreeable to what was afterwards directed by the same pope in other countries (*g*). This epistle, says sir Edward Coke (*h*), bound not the lay subjects of this realm: but, being rea-
[*28] sonable 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 (*i*), 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 (*k*), 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 (*l*).

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 (12) when an agreement is made between the

(*e*) *Opera Innocent. III. tom.* 2, *pag.* 452.
(*f*) *Decretal. l.* 3, *t.* 30, *c.* 19.
(*g*) *Ibid. c.* 2. 6.
(*h*) 2 Inst. 641.
(*i*) Regist. 46. Hob. 296.
(*k*) Book I. p. 385.
(*l*) In extraparochial places the king, by his royal prerogative, has a right to all the tithes. See book I. p. 113. 284.

(12) As to *real* compositions in general, see Mirehouse, 157. In order to establish it in evidence, the deed itself, executed between the commencement of the reign of Richard the First and the 13 Eliz. must be produced, or such evidence from whence, independent of mere usage, it may be inferred that the deed once existed, for otherwise every bad modus might be turned into a good composition. 3 Bro. Rep. 217. 2 Anst. 372, Wightw. 324. 1 Daniel's Rep. 10. 1 Price, 253. Gwil. 587. Without such evidence of a deed, a composition real cannot be proved by reputation, though corroboratory evidence of non-payment of tithes, and a deed creating a composition real, will not be presumed from payment for two hundred years of a sum of 20*l.* in lieu of tithes. 4 Mad. 140. 2 Bos. & P. 206. Mirehouse, 156, 7. 159; but see 5 Ves. J. 187.

With respect to *compositions* entered into

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 (*m*). This was permitted by law, because it was supposed that the clergy would be no losers by such composition; since the consent of the ordinary, whose duty it is to take care of the church in general; and of the patron, whose interest it is to protect that particular church, were both made necessary to render the composition effectual: and hence have arisen all such compositions as exist at this day by force of the common law. But experience shewing that even this caution was ineffectual, and *the possessions of the church being, by this and other means, every day diminished, the disabling statute 13 Eliz. c. 10. was made: which prevents, among other spiritual persons, all parsons and vicars from making any conveyances of the estates of their churches, other than for three lives, or twenty-one years. So that now, by virtue of this statute, no real composition made since the 13 Eliz. is good for any longer term than three lives, or twenty-one years, though made by consent of the patron and ordinary: which has indeed effectually demolished this kind of traffic; such compositions being now rarely heard of, unless by authority of parliament. [*29]

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

A *modus decimandi*, commonly called by the simple name of a *modus* only, is where there is by custom a particular manner of tithing allowed, different from the general law of taking tithes in kind, which are the actual tenth part of the annual increase. This is sometimes a pecuniary

(*m*) 2 Inst. 490. Regist. 38. 13 Rep. 40.

between the tithe owner and any parishioner, for the latter to retain the tithes of his own estate, they are clearly legal and binding on the parties; and it has been decided, that they are analogous to tenancies from year to year, between landlord and tenant; and if they are paid without, or beyond, an agreement for a specific time, they cannot be put an end to without half a year's notice, expiring at the time of the year from which the composition commenced; and the parishioner may avail himself of the defect of notice, at the same time that he controverts the right of the incumbent to receive tithes in kind; an objection not permitted to a tenant who denies the right of the landlord. 2 Rayner on T. 992. 2 Bro. 161. 1 Bos. & Pul. 458. And this doctrine was confirmed in 12 East, 83, where it was also decided, that the notice must be unequivocal. A parishioner who has compounded with the parson one year for his tithes, and has not determined the composition, cannot set up as a defence to an action for the next year's composition money, that the plaintiff is simoniacus. 6 Taunt. 333. 2 Marsh. 38. If the occupier disclaim any liability to pay tithes at all, and deny the parson's title, this dispenses with the necessity for a notice to determine the composition. 1 Brod. & B. 4. 3 B. Moore, 216. S. C. (See the form of notice, Tidd's Forms, chap. xlvi. 5; and if the time be uncertain, see id. s. 3.) In case of death of the incumbent who has agreed to the composition, the successor is entitled to tithe in kind; and there is no apportionment of the composition money under the 11 Geo. II. c. 19; but if the successor continue to receive the same payment thereon, he will be entitled to an apportionment. 10 East, 269. 8 Ves. 308. 2 Ves. & B. 334. Bunb. 294. Price v. Lytton, per Plumner, m. of rolls, H. T. 1818. By agreeing to a composition, a rector loses his remedy on the land, and on the statute Edward VI., and has only a personal action for the arrears of his composition. 4 Mad. 177. These compositions are purely personal, and in case of a change in the occupation of the land, the fresh occupier will be liable to set out tithe in kind. 2 Chitty's Rep. 405.

compensation, as two-pence an acre for the tithe of land: sometimes it is a compensation in work and labour, as that the parson shall have only the twelfth cock of hay, and not the tenth, in consideration of the owner's making it for him: sometimes, in lieu of a large quantity of crude or imperfect tithe, the parson shall have a less quantity, when arrived to greater maturity, as a couple of fowls in lieu of tithe eggs; and the like. Any means, in short, whereby the general law of tithing is altered, and a new method of taking them is introduced, is called a *modus decimandi*, or special manner of tithing.

[*30] *To make a good and sufficient *modus*, the following rules must be observed. 1. It must be *certain* and *invariable* (*n*), 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 (*o*); 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 (*p*); one load of hay, in lieu of *all* tithe hay, is no good *modus*; for no parson would *bonâ 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 (*q*). 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 (*r*): and therefore a *modus* that every *inhabitant* of a house shall pay 4*d.* 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 is called a *rank modus* (13): as if the real value of the tithes be 60*l. per annum*, and a *modus* is suggested of 40*l.*, this *modus* will not be established; though one of 40*s.* might have been valid (*s*). Indeed, properly speaking, the doctrine of *rankness* in a *modus* is a mere rule of evidence, drawn from the improbability of the fact, and not a rule of law (*t*). For, in these cases of prescriptive or customary *moduses*, it is supposed that an original real composition was anciently made; which being lost by length of time, the immemorial usage is admitted as evidence to shew that it once did

[*31] exist, and that from thence *such usage was derived. Now time of memory hath been long ago ascertained by the law to commence from the beginning of the reign of Richard the First (*u*); and any custom may be destroyed by evidence of non-existence in any part of the long period from that time to the present (14); wherefore, as this real

(*n*) 1 Keb. 602.
(*o*) 1 Roll. Abr. 649.
(*p*) 1 Lev. 179.
(*q*) Cro. Eliz. 486. Salk. 657.
(*r*) 2 P. Wms. 462.
(*s*) 11 Mod. 60.
(*t*) *Pyke* v. *Dowling*, Hil. 19 Geo. III. C. B.
(*u*) 2 Inst. 238, 239. This rule was adopted, when by the statute of Westm. I. (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 60 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 Litt. § 170. 34 Hen. VI. 37. 2 Roll. Abr. 269. pl. 16.

(13) Mirehouse, 164 to 177.

(14) But though it is essential to the validi-

composition is supposed to have been an equitable contract, or the full value of the tithes, at the time of making it, if the *modus* set up is so rank and large, as that it beyond dispute exceeds the value of the tithes in the time of Richard the First, this *modus* is (in point of evidence) *felo de se*, and destroys itself. For, as it would be destroyed by any direct evidence to prove its non-existence at any time since that era, so also it is destroyed by carrying in itself this internal evidence of a much later original (15).

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 (*v*). So a vicar shall pay no tithes to the rector, nor the rector to the vicar, for *ecclesia decimas non solvit ecclesiæ* (*w*) (16). But these *personal* privileges (not arising from or being annexed to the land) are personally confined to both the king and the clergy; for their tenant or lessee shall pay tithes, though in their own occupation their lands are not generally titheable (*x*). And, generally speaking, it is an established rule, that, in *lay* hands, *modus de non decimando non valet*. (17). But spiritual persons or corporations, as monasteries, abbots, bishops, and the like, were always capable of having their lands totally discharged of tithes by various ways (*z*); as, 1. By real composition: 2. By the pope's bull of exemption: 3. By unity of possession; as when the rectory of a parish, and lands in the same parish, both belonged to a religious *house, those lands were discharged of tithes [*32] 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 (*a*). Though upon the dissolution of abbeys by Hen. VIII. most of these exemptions from tithes would have fallen with them, and the lands become titheable again:

(*v*) Cro. Eliz. 511.
(*w*) Cro. Eliz. 479. 511. Sav. 3. Moor. 910.
(*x*) Cro. Eliz. 479.
(*y*) *Ibid.* 511.
(*z*) Hob. 309. Cro. Jac. 303.
(*a*) 2 Rep. 44. Seld. tith. c. 13, § 2.

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ty of a prescription or custom that it should have existed before the commencement of the reign of Rich. I., A. D. 1189, yet proof of a regular usage for twenty years, not explained or contradicted, is that upon which many private and public rights are held, and sufficient for a jury in finding the existence of an immemorial custom or prescription. 2 Bar. & Cres. 54. 2 Saund. 175. a. d. Peake's Evidence, 336. 4 Price R. 198. 2 Price R. 450.

(15) To constitute a good modus, it should be such as would have been a certain, fair, and reasonable equivalent or composition for the tithes in kind, before the year 1189, the commencement of the reign of Rich. I.; and therefore no modus for hops, turkeys, or other things *eo nomine*, introduced into England since that time, can be good. Bunb. 307; but per Ellenborough, C. J. there may be a good modus to include turkies, though the bird might have been introduced into this country within time of legal memory, as if there were a modus "for all domestic fowl." 12 East, 35.

The question of rankness, or rather modus or no modus, is a question of fact, which courts of equity will send to a jury, unless the grossness of the modus is so obvious as to preclude the necessity of it. 2 Bro. 163. 1 Bl. R. 420. 2 Bl. R. 1257. Bedford v. Sambell, M. 16 Geo. III. Scacc. 3 Gwm. 1058. Twells v. Welby, H. 20 Geo. III. Scacc. 3 Gwm. 1192. Mirehouse, 180 to 186.

(16) This maxim, it was said by Richards, C. B. merely applies to the case of a rector and vicar of the same church and parish, where the *ecclesia* would be paying tithes to *itself*. In no other case, it was added, can an ecclesiastical person rest his exemption upon this maxim, but must prescribe *de non decimando*. (*Warden and Minor Canons of St. Paul's* v. *The Dean*, 4 Pr. 77, 78).

(17) It is not very accurate to speak of a *modus de non decimando*; a modus, as our author has taught us, is a particular manner of tithing; where the privilege asserted is that of not paying tithes at all, *præscriptio* is the more proper word, as the commencement of the paragraph shews Blackstone to have been well aware. It would be idle to notice so trivial an oversight, if some of the books of practice had not copied it, by which a non-professional reader might be misled into supposing, that modus and prescription are, in all cases, convertible terms.

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 (18). 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* (19). 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 (*a*). And hence common is chiefly of four sorts; common of pasture, of piscary, of turbary, and of estovers (20).

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 (*b*).

[*33] *Common *appendant* is a right belonging to the owners or occupiers of arable land, to put commonable beasts upon the lord's waste, and upon the lands of other persons within the same manor. Commonable beasts are either beasts of the plough, or such as manure the ground. This is a matter of most universal right; and it was originally permitted (*c*), 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

(a) Finch. law. 157.
(b) Co. Litt. 122.
(c) 2 Inst. 86.

(18) This provision is peculiar to that statute, and therefore all the lands belonging to the lesser monasteries (i. e. such as had not lands of the clear yearly value of 200*l*.) dissolved by the 27 Hen. VIII. c. 28, are now liable to pay tithes. Com. Dig. Dism. E. 7.

(19) Mere non-payment of a particular species of tithe, or proof that no tithes in kind have ever been rendered within living memory, does not afford sufficient evidence of the exemption from tithe, Gwil. 757. 1 Mad. R. 242. 4 Price, 16; but the party insisting on the exemption, must shew the ground of discharge by deducing title from some ecclesiastical person, and thus shewing the origin of the exemption. 2 Co. 44. Peake on Evid. 470, 1. 4 ed. Bunb. 325. 345. 3 Anst. 762. 945. Mirehouse, 152. 156, 7. And the same rule applies when the claim of exemption is against a lay impropriator, as against an ecclesiastical rector, and against the former no presumption of a grant or conveyance of the tithes, so as to discharge the land, is to be entertained. 3 Anstr. 705, but see Rose v. Calland, 5 Ves. J. 186. contra see Mirehouse, 159.

(20) As to rights of common in general, see Com. Dig. tit. Common; Bac. Ab. tit. Common; 3 Com. Dig. 92 to 118, Selw. N. P. tit. Common; Saunder's Rep. by Patterson, index, tit. Common and Commoners. The better cultivation, improvement, and regulation, of the common fields, wastes, and commons of pasture, is effected by 29 Geo. II. c. 36. s. 1. 31 Geo. II. c. 41. 13 Geo. III. c. 81. and the 38 Geo. III. c. 65. contains regulations for preventing the depasturing of forests, commons, and open fields, with sheep or lambs infested with the scab or mange. The very general enclosure of commons has rendered litigation respecting them less frequent than formerly. Such enclosure is usually effected by a separate private act. But to prevent the repetition of clauses usually applicable to all local acts, the general inclosure act, 41 Geo. III. c. 109, (amended by 1 & 2 Geo. IV. c. 23.) was passed, which however is not to operate against the express provisions of any local act. See sect. 44. 1 Bar. & A. 630.

sustained without pasture: and pasture could not be had but in the lords' 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 appendant: which obtains in Sweden, and the other northern kingdoms, much in the same manner as in England (*d*). Common *appurtenant* ariseth from no connexion of tenure, nor from any absolute necessity: but may be annexed to lands in other lordships (*e*), or extend to other beasts, besides such as are generally commonable; as hogs, goats, or the like, which neither plough nor manure the ground. This not arising from any natural propriety or necessity, like common appendant, is therefore not of general right; but can only be claimed by immemorial usage and prescription (*f*), which the law esteems sufficient proof of a special grant or agreement for this purpose (21). 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 [*34] the other's common: but if they escape, and stray thither of themselves, the law winks at the trespass (*g*) (22). Common *in gross*, or at large, is such as is neither appendant nor appurtenant to land, but is annexed to a man's person; being granted to him and his heirs by deed; or it may be claimed by prescriptive right, as by a 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 (23).

(*d*) Stierah. *de jure Sueonum*, *l.* 2, *c.* 6.
(*e*) Cro. Car. 482. 1 Jon. 397.
(*f*) Co. Litt. 121, 122.
(*g*) Ibid. 122.

(21) In 2 Wooddes. 78. this description as a definition of the right of common par cause de vicinage is objected to as being a descriptive example or illustration rather than a definition. The lords of the contiguous manors may enclose the adjacent waste. 4 Co. 38. C. Co. Litt. 122. a. 2 Mod. 105. But if an open passage be left between the two commons sufficient for an highway, then as the separation was not complete so as to prevent the cattle from straying from one to the other by means of the highway, the common by vicinage still continues. 13 East, 348. In case of open field lands, the owner of any particular spot, may by custom exclude the other from right of pasture there by enclosing his own land. 2 Wils. 269.

(22) Levancy and couchancy is not essential. 5 Taunt. 244. A right of *common in gross*, "as the going of two head of cattle on a common," is a tenement within the statute 13 & 14 Car. II., and a precipe will lie for it; and therefore a person renting such a right of the annual value of 10*l.* thereby gains a settlement. 7 T. R. 671. 2 Nol. P. L. ch. 23. s. 2. As to *cattle-gates* (which are common in the north) they are not like common of pasture, for they are conveyed by lease and release, and must be devised according to the statute of frauds. The owners of them have a joint possession and a several inheritance. They have an interest in the soil itself, and a cattle-gate is a tenement within the 13 & 14 Car. II. c. 12. for the purpose of gaining a settlement. 1 T. R. 137. An ejectment will lie for a *beast-gate* in Suffolk, (signifying land and common for one beast) 2 Stra. 1084; and so for a cattle-gate. 2 T. R. 452. 2 Stra. 1084. Rep. T. Hardw. 167. Sel. N. P. Ejectment, 3. note 8.

If A. and all those whose estate he has in the manor of D. have had from time immemorial a fold-course, that is, common of pasture for any number of sheep not exceeding 300, in a certain field as appurtenant to the manor, he may grant over to another this fold-course, and so make it in gross, because the common is for a certain number, and by the prescription the sheep are not to be levant and couchant on the manor. 1 Rol. Ab. 402. pl. 3. Cro. Car. 432. Sir W. Jones, 375.

(23) Common appendant and appurtenant

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 (24). By the statute of Merton, however, and other subsequent statutes (*h*), 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 "improving" (*i*) (25). 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 (*k*).

2, 3. Common of *piscary* is a liberty of fishing in another man's water; as common of *turbary* is a liberty of digging turf upon another's ground (*l*) (26). There is also a common of digging for coals, minerals,

(*h*) 20 Hen. III. c. 4. 29 Geo. II. c. 36. and 31 Geo. II. c. 41.
(*i*) 2 Inst. 474.
(*k*) 9 Rep. 113.
(*l*) Co. Litt. 122.

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are limited as to the number of cattle either to an express number or by levancy and couchancy, sometimes termed common without number. Willes, 232. By common without number, is not meant common for any number of beasts which the commoner shall think fit to put into the common, but it is limited to his own commonable cattle *levant and couchant* upon his land (by which is to be understood as many cattle as the produce of the land of the commoner in the summer and autumn, can keep and maintain in the winter). And as it is uncertain how many in number these may be, there being in some years more than in others, it is therefore called common without number, as contradistinguished from common limited to a certain number, but still it is a common certain in its nature. (2 Brownl. 101. 1 Vent. 54. 5 T. R. 48. 1 Bar. & Ald. 706. Rogers v. Benstead, Selw. Ni. Pri. tit. Common.) Therefore a plea, prescribing for common appurtenant to land for commonable cattle, without saying *levant and couchant*, is bad. 1 Saund. 28. b. id. 343. For it shall be intended common without number, according to the strict import of the words, without any limitation whatsoever; for there is nothing to limit it when it is not said for cattle *levant and couchant*. 1 Rol. Abr. 398. pl. 3. Hard. 117, 118. 2 Saund. 346. note (1). 8 Term Rep. 396. From hence it follows, that where the common is limited to a certain number, it is not necessary to aver that they were *levant and couchant*, 1 Rol. Abr. 401. pl. 3. Cro Jac. 27. 2 Mod. 185. 1 Lord Raym. 726; because it is no prejudice to the owner of the soil, as the number is ascertained.

(24) The notion of this species of common is exploded: a right of common without stint cannot exist in law. Bennet v. Reeve, Willes, 232. 8 T. R. 396.

(25) See Com. Dig. Common; Selw. N. P. Common. Any person, who is seised in fee of part of a waste, may approve, besides the lord of the manor, provided he leaves a sufficiency of common for the tenants of the manor, but not otherwise, without consent of homage. 1 Stark. 102. 3 T. R. 445.

It seemed to have been generally understood that the lord could not approve, where the commoners had a right of turbary, piscary, of digging sand, or of taking any species of estovers upon the common. 2 T. R. 391. But it is now decided agreeably to the general principles of the subject, that where the tenants have such rights they will not hinder the lord from enclosing against the common of pasture, if sufficient be left, for this is a right quite distinct from the others; but if by such enclosure the tenants are interrupted in the enjoyment of their rights of turbary, piscary, &c. then the lord cannot justify the approvement in prejudice of these rights. 6 T. R. 741. Willes, 57. The right of the commoners to the pasturage may be subservient to the right of the lord; for if the lord has immemorially built houses or dug clay-pits upon the common without any regard to the extent of the herbage, the immemorial exercise of such acts is evidence that the lord reserved that right to himself, when he granted the right of pasturage to the commoners. 5 T. R. 411. If a lord of a manor plant trees upon a common, a commoner has no right to cut them down. His remedy is only by an action. 6 T. R. 483.

(26) Common of turbary can only be appendant, or appurtenant, to a house, not to lands: (*Tyringham's* case, 4 Rep. 37): and the turf cut for fuel must be burned in the commoner's house; (*Dean and Chapter of Ely* v. *Warren*, 3 Atk. 189); not sold. (*Valentine* v. *Penny*, Noy, 145). So, it seems, an alleged custom for the tenants of a manor to be entitled to cut and carry away from the wastes therein an indefinite quantity of turf, covered with grass, fit for the pasture of cattle, for the purpose of making and repairing grass plots in their gardens, or other improvements and repairs of their customary tenements, cannot be supported. (*Wilson* v. *Willes*, 7 East, 127).

stones, and the like. All these bear a resemblance to common of pasture in many respects: though in one point they go much further; 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 those aforementioned, are a right of carrying away the very soil itself.

*4. Common of estovers or *estouviers* (27), that is, *necessaries* [*35] (from *estoffer*, to furnish), is a liberty of taking necessary wood, for the use or furniture of a house or farm, from off another's estate. The Saxon word, *bote*, is used by us as synonymous to 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 hay, 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 (*m*).

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 fuel; 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 (28). I speak not here of

(m) Co. Litt. 41.

(27) The liberty which every tenant for life, or years, has, of common right, to take necessary estovers in the lands which he holds for such estate, seems to be confounded, in most of the text books, with right of common of estovers. Yet they appear to be essentially different. The privilege of the tenant for life or years is an exclusive privilege, not a commonable right. Right of common of estovers seems properly to mean, a right appendant or appurtenant to a messuage or tenement, to be exercised in lands not occupied by the holder of the tenement. Such a right may either be prescriptive, or it may arise from modern grant. (*Countess of Arundel* v. *Steere*, Cro. Jac. 25). And though the grant be made to an individual, for the repairs of his house, the right is not a personal one, but appurtenant to the house. (*Dean and Chapter of Windsor's case*, 5 Rep. 25. *Sir Henry Nevill's case*, Plowd. 381). Such a grant is not destroyed by any alteration of the house to which the estovers are appurtenant, but it may be restricted within the limits originally intended, if the altered state of the premises would create a consumption of estovers greater than that contemplated when the grant was made. *Luttrel's case*, 4 Rep. 87).

If a right of common of estovers of wood be granted, to be taken in a certain wood, the owner of which cuts down some of the wood, the grantee cannot take the wood so cut; even if the whole be cut down, he has no remedy but an action of covenant or on the case. (*Basset* v. *Maynard*, Cro. Eliz. 820. *Pomfret* v. *Ricroft*, 1 Saund. 322. *Douglass* v. *Kendal*, Cro. Jac. 256; *S. C.* Yelv. 187; which last case illustrates the distinction between an *exclusive* right to the wood growing on certain land, and a right of *common* of estovers only). It is true, that a single copyholder, or other tenant, and that one only, may be entitled to right of common of pasture, or estovers, or other profit in the land of the lord of the manor; but then, the lord at least must participate in the right; if the tenant enjoyed the right solely, severally, and exclusively, it would be difficult, without a violent strain of language, to discover in such a right any commonable qualities. (*Foiston and Crackenthe's case*, 4 Rep. 32. *North* v. *Coe*, Vaugh. 258).

(28) As to *highways* in general, see Com. Dig. tit. Chimin; Bac. Ab. Highways; Burn J. Highways; Selw. N. P. Trespass, iv. 7; Saunders by Patterson, index, Ways; Bateman's Turnpike Acts; 3 Chitty's Crim. L. 565 to 668. A highway may be created by the owner in fee dedicating it to the public, and even less than twenty years user may perfect the right. 11 East, 376. 1 Campb. 260. 4 Campb. 16. 5 Taunt. 125. 2 Saund. by Patterson, 175. e. n. e. But the erection of a bar or fence, in the middle or at one end, so as to prevent a thoroughfare, although it may have been knocked down, rebuts the presumption and negatives the dedication. Id. ibid. And a street made or permitted by a tenant, even for ninety-nine years, may be

the king's highways, which lead from town to town; nor yet of common ways, leading from a village into the fields; but of private ways, in which

stopped up by the owner in fee, at the expiration of the term. 5 Bar. & Ald. 454. In case of a public way, any person who has land immediately adjoining, may make an opening through his fence into the road in any part of it, but in a private road the party entitled to use it must go in at the usual path. Per Chambre, J. in 5 Taunt. 132.

Under the 13 Geo. III. c. 78. s. 19. which enables magistrates to divert an old road so as to make it nearer or more commodious to the public, it has been held, that a new way must be made in lieu of the old one to be stopped up. 6 East, 394. 3 M. & S. 459. But if a new road is substituted, partly over a new line and partly over an accustomed road, that is a sufficient compliance with the act, provided the new road convey the public to the same place as the old one did. 5 Taunt. 634. 1 Marsh. 261. And by the 55 Geo. III. c. 68. s. 2. two or more justices may stop up and sell any highway that shall appear to them to be unnecessary; but the order for that purpose must be made at a special sessions, and that fact must appear on the face of the order. 3 Bar. & A. 414. The commissioners under local enclosure acts generally have power to stop up such ways as they may think fit; but where such ways lead in part through old enclosures, it seems that they must have the concurrence of two or more justices. 41 Geo. III. c. 109. U. K. 8. 9 Price, 58. Burton and Logan, K. B. Tr. T. 1825.

With respect to *private ways*, see in general Com. Dig. Chimin, D. Bac. Ab. Highways, C. Selw. N. P. Trespass, iv. 7. 1 Saunders by Patterson, 323. note 6. id. index, Ways. A private way may be claimed by grant, prescription, custom, of necessity, by express reservation, or by virtue of an enclosure act.

By grant, as if A. grant that B. shall have a way from L. to M. through a close belonging to A.; so a covenant that B. shall enjoy such a way is equivalent to a grant. 3 Lev. 305. Com. Dig. Chimin, D. 3. So if A. seised of two acres, to which a way is appurtenant, grants one acre with all ways, &c. the way shall be granted. 6 Mod. 3. Plowd. 170. 1 B. & P. 376. So if a way be appurtenant to land, by a lease of the land, the way passes to the lessee without an express grant. Cro. Jac. 190. So if a man seised of close B. and close W. uses a way through W. to B., and afterwards conveys B. with all ways, &c. this way through W. shall pass to the grantee. 6 Mod. 3. And though no way or other easement can in strictness subsist on land of which there is unity of seisin, yet if a lessor having used convenient ways over his own adjoining land during his occupation demises premises "with all ways and easements to the said premises *belonging* and appertaining," unless it be shewn in evidence that there was some way appurtenant in alieno solo to satisfy the words of the grant, it shall be intended that he meant the ways used, and they shall pass, though he miscall them as appurtenant. 3 Taunt. 24. 15 East, 109. S. P. 1 B. & P. 376. 2 Saund. 175, 175. a. But after a way or other easement has been extinguished by unity of seisin, a devise or grant of premises with the appurtenances will not pass the old way, &c. or create a new one. 1 B. & P. 371. 1 Taunt. 205. After twenty years' uninterrupted user of a way, and no evidence appearing to shew that it was used by leave or favour, or under a mistake of an award, the jury may presume a grant from the owner of the land over which it passes. 2 East, 294. 1 Saund. 323. a. But permission of a tenant for life or years, without the concurrence of the owner in fee, will not affect the latter. 11 East, 372. 2 Saund. 175, 175. a. As to any implied grant of a way from the necessity of the case, vide post,

Unity of *seisin*, as well of the land to which the way belongs, as of the close over which the way passes, *extinguishes* a prescriptive right, because the minor right of way, common, or other easement, being vested in the owner of the soil, merges in the higher right; and it would be absurd for him who has the absolute and entire enjoyment of the soil to claim, by prescription, a right of way or other easement over it. See Com. Dig. Suspension, B. Vin. Ab. Extinguishment, C. 1 East, 377. This unity of seisin is frequently termed "unity of possession," but improperly so, because the mere circumstance of the same person being in *possession* of both, without being seised in fee, will not have the same operation, for then it merely suspends, and does not extinguish the right. Thus if a man hath right of common by prescription, and taketh a lease of the land for twenty years, whereby the common is suspended, after the years ended he may claim the common generally by prescription, for the suspension was but to the possession, and not to the right, and the inheritance of the common did always remain. Co. Litt. 114. b. Vin. Ab. Extinguishment, C. pl. 32. There is however a distinction between rights which are of *necessity*, and those which are merely by way of easement; the former are not destroyed by unity of seisin, as a way to a church or market, 2 Bul. Ab. Extinguishment, 936. b. 1. Poph. 172. 3 Bulst. 340. Noy, 84. or a gutter carried through an adjoining tenement, 11 H. 7. 25. or a watercourse running over the adjoining lands, Poph. 166. Latch. 153. 3 Bulst. 340. Palm. 446; another reason assigned is because it hath its being not by prescription, but ex jure naturæ. 1 Bos. & P. 374. n. a. Vin. Ab. Extinguishment, C. When there is reason to apprehend that it may appear in evidence, that there was at some time since the beginning of the reign of Richard the First, a unity of seisin which would defeat the claim of a way, &c. by prescription, it is then advisable to claim the way and plead it by way of non-existing grant. 3 East, 294. 4 Saund. 323, a. 2 Saund. 175. a. And the proper course is to ascertain who were the respective owners in fee of the land to which the way belongs, and of the land over which it passes, upwards of

a particular man may have an interest and a right, though another be owner of the soil. This may be granted on a special permission; as

twenty years before the trespass, and to plead the fictitious grant from one to the other, for it will not suffice to plead the supposed grant without stating the date and names of the supposed grantor and grantee. 10 East, 55. See form of plea, 3 Chitty on Pl. 4 ed. 1122.

As to the *mode of using* a way by grant, it has been held, that under the grant of a free and convenient way for the purpose of carrying coals, the grantee has a right to lay a framed waggon way, and under a grant of a way from A. in, through, and along a particular way, the grantee is not justified in making a traverse road across the same, 1 Term R. 560; and under a grant to B. the occupier of a house, of a liberty to use adjoining land, as a foot or carriage way, with all other liberties, powers, and authorities, incident or appurtenant, needful or necessary, to the enjoyment of the way, it was held that B. had a right to put a flag-stone on this land in front of a door opened by him out of his house into this piece of land, 2 New. R. 109; and if A. grant to B. land of unequal width, described as abutting on a road on his own soil, and in parts there was a narrow slip of land intervening, the grantee has a right to come out into the road over this slip of land, 1 Taunt. 495. though in general a private way can only be used at the usual opening. 5 Taunt. 132. If a person has a way through a close in a particular direction, and he afterwards purchases other closes adjoining, he cannot extend the way to those closes. 1 Rol. 391. l. 50. 1 Mod. 190. The *right* to repair a way by grant is an incident, 1 Saund. 323. 322. a. n. 3. 2 Saund. 114. a. 2 New. R. 109; but if the grantor be bound to repair by express stipulation, he may be sued for the neglect. 1 Saund. 322. a. Com. Dig. Chimin, D. 6. A person having a private way over the land of another, cannot, when the way has become impassable, even by the overflowing of a river, justify going on the adjoining land, although such land, together with that over which the way passes, both belong to the grantor of the way, unless the owner of the land was by express contract bound to repair the way and neglected to do so. Highways are governed by a different principle; they are for the public service, and if the usual track is impassable, it is for the general good that people should be entitled to pass on another line. Taylor v. Whitehead, Dougl. 744. 4 M. & S. 387. But if the owner of a close obstruct or plough up the way, and especially if he set out a new one, the person entitled to the way may use the new one until the old one is restored, but no longer. Yelv. 141. Willes, 282.

Prescription, which supposes a grant before time of legal memory, is the most usual mode of claiming a private way. The instance in the text of a right of way for all inhabitants is more properly a way by *custom*. A way by prescription is where a person, who is seised in fee of a messuage or close, claims that he and *all those whose estate he hath in the same*, have, from time immemorial, had a carriage-way, foot-way, &c. from the same into some highway, &c. over the land of another. A right of way being an easement merely, and not an interest, it is not proper to lay the way as appendant or appurtenant. It is otherwise of a common, for that is an interest, and may be of several natures, appurtenant, appendant, or in gross; but a way cannot be so. Yelv. 159. 1 Bulst. 47. Alleging a seisin in fee virtually includes an occupation, unless the contrary be shewn; and therefore, when the owner in fee prescribes, he need only allege that he was seised, without stating that he was possessed. 4 M. & S. 392. 16 East, 343. A person who is a particular tenant, as tenant for years under a person who is entitled to a way by prescription, must, in pleading, set forth the seisin in fee, the prescription, and the demise from the tenant in fee. Salk. 562. Carth. 445. Ld. Raym. 331. 3 Wils. 72.

Twenty years uninterrupted user of a way is prima facie evidence of a prescriptive right, and should be so pleaded; though if there be reason to apprehend that there has been a unity of seisin, then a plea of way by grant should be added. 1 Saund. 323. a.

A claim of a prescriptive way from A. over the defendant's close *unto* D. is not supported by proof that a close called C. over which the way once led and which adjoins D., was formerly possessed by the owner of A., and was by him conveyed in fee to another person without reserving the right of way, for thereby it appears that the prescriptive right of way does not, as claimed, extend unto D., but stops short at C., 1 East, 377; but if the claim had been for a prescriptive way over the close *towards* D. it would have sufficed. Id. ibid. So where in trespass the defendant prescribed for a way from his own close over the locus in quo *to and unto* a certain highway, &c. it was holden that such plea was sustained, though it appeared that one out of several intervening closes, was in possession of the defendant himself; for the party had a right to go the whole length of way, and the prescription to and unto was proved. Jackson v. Shillito, 1 East, 381, 2. Palm. 388. 2 Rol. R. 396. Bac. Ab. Highways, C. A person may prescribe for a private way in the same line as a public way. 8 East, 4. 6. Noy, 9.

The prescription must be for a way, and not a passage, which is properly over water and not land, and a party ought to observe the usual words, and those which are known in the law as a prescription and usage for a way, and not for a passage. Yelv. 163. It must also be shewn what manner of way it is, as whether on foot or horse, or cart-way, Yelv. 164; though in stating a public way it is otherwise, 8 East, 4. R. T. Hardw. 315. and the *termini* from, and to which the way leads must be stated, Yelv. 164. though it is otherwise in pleading highways. 1 Hen. B. 355.

It is better to lay the prescription so as only to cover the trespass complained of, for the

when the owner of the land *grants* to another the 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 can be justify taking another [*36] *person in his company (*n*). A way may be also by *prescription*; as if all the inhabitants of such a hamlet, or all the owners and occupiers of such a farm, have immemorially used to cross such a ground for such a particular purpose: for this immemorial usage supposes an original grant, whereby a right of way thus appurtenant to land or houses 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 (*o*). For when the law doth give any thing to one, it giveth impliedly whatsoever is necessary for enjoying the same (*p*). 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 (*q*) (29).

(*n*) Finch. law. 31.
(*o*) Ibid. 63.
(*p*) Co. Litt. 56.
(*q*) Lord Raym. 725. 1 Brownl. 212. 2 Show. 28. 1 Jon. 297.

proof of a prescriptive way for all purposes will not negative a plea claiming a way only on foot. Fountain v. Cook, Selw. N. P. Trespass, iv. 7. 1 Chitty on Pl. 4 ed. 328. And evidence of a prescriptive right of way for all manner of carriages, does not necessarily prove a right of way for all manner of cattle, though in many cases it would justify a jury in finding it. 1 Taunt. 279.

A way by custom.—As that every inhabitant of such a vill shall have a way over such land, either to church or to market, is valid, because it is but an easement and not a profit. Cro. Jac. 152. Cro. Car. 419. 2 Hen. Bla. 393. Bac. Ab. Highways, A.

A way of necessity, when the nature of it is considered, will be found to be nothing else but a way *by grant*. It derives its origin from a grant, for there seems to be no difference where a thing is granted by express words, and where by *operation of law* it pass as incident to the grant; and of course it is as necessary to set forth the title to a way of necessity as it is to a way by express grant. 2 Lutw. 1467. 1 Saund. 323. a. And it follows that there cannot exist, in point of law, a general way of necessity without specifying the manner whereby the land, over which the way is claimed, became charged with the burden. 4 M. & S. 387. 1 Saund. 323. 323. a. note 6. Where a man, having a close surrounded with his own land, grants the close to another in fee for life or years, the grantee shall have a way to the close over the grantor's land, as incident to the grant, for without it he cannot derive any benefit from the grant; so it is where he grants the land and reserves the close to himself. 2 Rol. Ab. 60. pl. 17, 18. Cro. J. 170. Owen, 122. 6 Mod. 3. 8 T. R. 56. Willes, 72, 3. note 6.

If the origin of a way of necessity cannot any longer be traced, but the way has been used without interruption, it must then be claimed as a way either by grant or prescription. 1 Saund. 323. a. note 6.

The proper mode of pleading is to state that the same person was seised in fee of both closes simul et semel, and being so seised, he granted one of them. 1 Saund. 323. a. note 6. See form, 3 Chitty on Pl. 1125. 4th. ed.

It has been considered, that a way of necessity is not extinguished by unity of seisin, 5 Taunt. 311. 1 Saund. 323. a; but it has since been held, that such a way is limited by the necessity which created it, and ceases if at any subsequent period the party entitled to it can approach the place to which it led by passing over his own land. Holmes v. Gorley, 2 Bingh. 76.

A rector or other tithe owner is entitled without express grant, and, as a matter of necessity, to make use of the road ordinarily used for the usual occupation of the close in which the tithe is taken, 2 New. R. 466. 1 Bulst. 108; but he cannot justify carrying his tithes home by any other road, although the farmer himself may have used it for the more convenient occupation of his farm. Id. ibid. 1 Saund. 323. a. b. 323. b. n. (i). See form of plea, 3 Chitty on Pl. 1128.

By express reservation a right of way may be secured, as where A. grants land to another, reserving to himself a way over such land. Selw. N. P. Trespass, iv. 7. We have seen that the law in some cases implies such a reservation as a matter of necessity, ante 35. n. 28. But the right we are now speaking of may be reserved to the grantor in gross.

(29) See last note: the doctrine of the text may be true, with respect to ways of im-

V. Offices, which are a right to exercise a public or private employment, and to take 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 (*r*). 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 (*s*); for those may be executed by deputy (30). Also, by statute 5 & 6 Edw. VI. c. 16. no public office (a few only excepted) shall be sold, under pain of disability to dispose of or hold it. For the law presumes that *he who buys an office [*37] will by bribery, extortion, or other unlawful means, make his purchase good, to the manifest detriment of the public (31).

VI. Dignities bear a near relation to offices. Of the nature of these we treated at large in the former book (*t*); it will therefore be here sufficient to mention them as a species of incorporeal hereditaments, wherein a man may have a property or estate (32).

VII. Franchises are a seventh species. Franchise and liberty are used as synonymous terms; and their definition is (*u*) 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 (*w*).

To be a county palatine is a franchise, vested in a number of persons:

(*r*) 9 Rep. 97.
(*s*) 11 Rep. 4.
(*t*) See book i. ch. 12.
(*u*) Finch. i. 164.
(*w*) 2 Roll. Abr. 191. Keilw. 196.

plied necessity, or as to highways, but not as to those claimed by grant.

(30) If two offices are incompatible, by the acceptance of the latter the first is relinquished and vacant, even if it should be a superior office. 2 *T. R.* 81.

(31) The 49 Geo. III. c. 126. extends the provisions of this statute to other offices.

(32) Dignities were originally annexed to the possession of certain estates in land, and created by a grant of those estates; or, at all events, that was the most usual course. (*Rex* v. *Knollys*, 1 L. Raym. 13). And although dignities are now become little more than personal distinctions, they are still classed under the head of real property; and, as having relation to land, in theory at least, may be entailed by the crown, within the statute *de donis*; or limited in remainder, to commence after the determination of a preceding estate tail in the same dignity. *Nevil's case*, 7 Rep. 122). And if a tenant in tail of a dignity should be attainted for felony, the dignity would be only forfeited during his life, but, after his decease, would vest in the person entitled to it *per formam doni*. (Stat. 54 Geo. III. c. 145). Even if a man in the line of entail of a dignity, but not actually possessed of it, were attainted of treason, his son, surviving him, might claim from the first acquirer, without being affected by the attainder of his father. (2 Hale's Pl. Cr. 356). But if the father was in possession of the dignity at the time of such attainder, then his corruption of blood would be fatal to the claim of the son; and in the case of a dignity descendible to heirs general, the attainder for treason of any ancestor, through whom the claimant of such dignity must derive his title, though the person attainted never was possessed of the dignity, will bar such claim. (*Rex.* v. *Purbeck*, Show. P. C. 1. *Law of Forfeiture*, 86, 87).

It is likewise a franchise, for a number of persons to be incorporated, and subsist as a body politic; with a power to maintain perpetual succession, and do other corporate acts: 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 waifs, wrecks, estrays, treasure-trove, royal fish, forfeitures, and deodands: to have a court of one's own, or liberty of holding pleas, and trying causes: to have the cognizance of pleas; which is a still greater liberty, being an exclusive right, so that no other court shall try causes arising within that jurisdiction: to have a baili-
[*38] wick, or liberty exempt from the sheriff of the county; *wherein the grantee only, and his officers, are to execute all process: to have a fair or market; with the right of taking toll, either there or at any other public places, as at bridges, wharfs, or the like; which tolls must have a reasonable cause of commencement (as in consideration of repairs, or the like), else the franchise is illegal and void (*x*): 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 (*y*). 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 in 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 an 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 (*z*). 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 (*a*), except such as possess these franchises of 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 (*b*); which, being *ferae naturae*, every one had
[*39] a right to kill as he could; 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 gamekeeper; but no man, not even a lord of a manor, could by common law justify sporting on another's soil, or even on his

(*x*) 2 Inst. 220.
(*y*) 4 Inst. 314.
(*z*) Co. Litt. 233. 2 Inst. 199. 11 Rep. 86.
(*a*) 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.)
(*b*) The beasts are hares, conies, and roes; the fowls are either *campestres*, as partridges, rails, and quails; or *sylvestres*, as woodcocks and pheasants; or *aquatiles*, as mallards and herons. (Co. Litt. 233.)

Manwood, For. L. c. 4, s. 3, gives a different account: he says, (and supports his opinion by referring to the Regist. Brev. fol. 93), there are only two beasts of warren, the hare and the coney, and but two fowls of warren, the pheasant and the partridge.

own, unless he had the liberty of free-warren (*c*). This franchise is almost fallen into disregard, since the new statutes for preserving the game; the name being now chiefly preserved in grounds that are set apart for breeding hares and rabbits. There are many instances of keen sportsmen in ancient times who have sold their estates, and reserved the free-warren, or right of killing game, to themselves; by which means it comes to pass that a man and his heirs have sometimes free-warren over another's ground (*d*) (33). A *free fishery*, or exclusive right of fishing in a public river, is also a royal franchise; and is considered as such in all countries where the feodal polity has prevailed (*e*); though the making such grants, and by that means appropriating what seems to be unnatural to restrain, the use of running water, was prohibited for the future by king John's great charter; and the rivers that were fenced in his time were directed to be laid open, as well as the forests to be disafforested (*f*). This opening was extended by the second (*g*) and third (*h*) 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 (or at least derive his right from) the owner of the soil (*i*), which in a free fishery is not requisite. It differs also from a *common* of piscary before mentioned, in that the free fishery is an exclu*sive [*40] 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 (*k*). 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 (*l*). But to consider such right as originally a flower of the prerogative, till restrained by *magna charta*, and derived by royal grant (previous to the reign of Richard I.) to such as now claim it by prescription, and to distinguish it (as we have done) from a *several* and a *common* of fishery, may remove some difficulties in respect to this matter, with which our books are embarrassed. For it must be acknowledged, that the right and distinctions of the three species of fishery are very much confounded in our law-books; and that there are not wanting respectable authorities (*m*) which maintain that a *several* fishery may exist distinct from the property of the soil, and that a *free* fishery implies no exclusive right, but is synonymous with *common* of piscary.

VIII. Corodies are a right of sustenance, or to receive certain allotments of victual and provision for one's maintenance (*n*). In lieu of which (especially when due from ecclesiastical persons) a pension or sum of money is sometimes substituted (*o*). 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,

(*c*) Salk. 637.
(*d*) Bro. *Abr.* tit. *Warren*, 3.
(*e*) Seld. *Mar. Claus. I.* 24. Dufresne, V. 503. Crag. *de Jur. feod. II.* 8. 15.
(*f*) *Cap.* 47, *edit. Oxon.*
(*g*) *Cap.* 20.
(*h*) 9 Hen. III. c. 16.
(*i*) *M.* 17 *Edw. IV.* 6 *P.* 13 *Edw. IV.* 4 *T.* 10 *Hen. VII.* 24. 26. *Salk.* 637.
(*k*) F. N. B. 88. Salk. 637.
(*l*) 2 Sid. 8.
(*m*) See them well digested in Hargrave's notes on Co. Litt. 122.
(*n*) Finch, I. 162.
(*o*) See book I. ch. 8.

(33) Any one may now lease or convey his land, and reserve to himself the right of entering to kill game, without being subject to be sued as a trespasser; but the right of free warren can only exist by the king's grant, or by prescription, from such a grant is presumed. *Manw. Warren. Forrest*, pl. 43.

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 burthen imposed upon and issuing out of *lands*, whereas an annuity is a yearly sum chargeable only upon the *person* of the grantor (*p*). Therefore, if a man by deed grant to another the sum of 20*l. 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 mortmain (*q*); and yet a man may have a real estate in it, though his security is merely personal (34).

[*41] *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 acknowledgment given for the possession of some corporeal inheritance (*r*). 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 matters may be rendered, and frequently are rendered, by way of rent (*s*). 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 services 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 (*t*); yet, as it is to be produced out of the profits of lands and tenements, as a recompense for being permitted to hold or 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

(*p*) Co. Litt. 144.
(*q*) *Ibid.* 2.
(*r*) *Ibid.* 144.
(*s*) *Ibid.* 142.
(*t*) *Ibid.* 47.

(34) This appears to require some explanation. If an annuity (not charged on lands) be granted to a man and his heirs, it is a fee simple *personal*. (Co. Litt. 2 a). And Mr. Hargrave, in his note upon the passage just cited, says, though an annuity of inheritance is held to be forfeitable for treason, as an hereditament; (7 Rep. 34 b); yet, being only *personal*, it is not an hereditament within the statute of mortmain, (7 Edw. I. st. 2), nor is it entailable within the statute *de donis*. Lord Coke again says, (Co. Litt. 20 a), "if I, by my deed, for me and my heirs, grant an annuity to a man, and the heirs of his body, this concerneth no land, nor savoureth of the realty." (And see *Earl of Stafford* v. *Buckley*. 2 Ves. Sen. 177. *Holdernesse* v. *Carmarthen*, 1 Br. 382. *Aubin* v. *Daly*, 4 Barn. & Ald. 59). Some of the diversities between a rent and an annuity are thus laid down, in the 30th chapter of the Doctor and Student, Dialogue 1.—"Every rent, be it rent-service, rent-charge, or rent-seck, is going out of land. Also, of an annuity there lieth no action, but only a writ of annuity: but of a rent the same action may lie as doth of land. Also, an annuity is never taken for assets, because it is no freehold in the law, nor shall it be put in execution upon a statute merchant, statute staple, or *elegit*, as a rent may." No doubt, when an annuity is granted, so as to bind both the person and real estate of the grantor, the grantee hath his election, either to bring a writ of annuity, treating his demand as a personal one only, or to distrain upon the land, as for a real interest. (Co. Litt. 144 b). The definition which Fitzherbert (N. B. p. 152) gives of an annuity is, that it either proceeds from the lands or the coffers of another. Where it is charged upon land, it may be real or personal, at the election of the holder. If it is out of the coffers, it is personal only as to the remedy; but the property itself is *real as to its descent to the heir*. And this seems to be the only sense in which an annuity, for which the security is merely personal, can be called real estate. (*Turner* v. *Turner*, Ambl. 782).

of the thing granted (*u*). It must, lastly, issue out of *lands and tenements corporeal*; that is, from 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 (*w*). 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 (*x*): though it doth not affect the inheritance, and is no legal rent in contemplation of law (35).

There are at common law (*y*) three manner of rents, rent-service, rent-charge, and rent-seck. *Rent-service* is so called *because [*42] it hath some corporeal service incident to it, as at the least fealty or his feodal oath of fidelity (*z*). 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 he 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*). 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 thereout, 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 (*b*) (36). *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 (*c*), which cannot be departed from or varied. Those of the freeholders are frequently called *chief*-rents, *reditus capitales*; and both sorts are indifferently denominated *quit*-rents, *quieti reditus*; 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, *blanch-farms*, *reditus albi* (*d*); in contradistinction to rents reserved in work, grain, or baser money, which were called **reditus nigri*, or *black-mail* (*e*). *Rack*-rent is only a rent of [*43] the full value of the tenement, or near it. A *fee-farm* rent is a rent-

(*u*) Plowd. 13. 8 Rep. 71.
(*w*) Co. Litt. 144.
(*x*) *Ibid.* 47.
(*y*) Litt. § 213.
(*z*) Co. Litt. 142.
(*a*) Litt. § 215.
(*b*) Co. Litt. 143.
(*c*) 2 Inst. 19.
(*d*) In Scotland this kind of small payment is called *blanch-holding*, or *reditus albae firmae*.
(*e*) 2 Inst. 19.

(35) There can be no doubt but the lessee of tithes, an advowson, or any incorporeal hereditament, would be liable to an action of debt for the rent agreed upon. See 2 Woodd. 69. where this passage is taken notice of.

(36) A clear rent-charge must be free from the land-tax. Bradbury v. Wright, Doug. 625. If land on which a rent-charge is granted is afterwards sold in parcels, and the grantee levies the whole rent on one purchaser, the court of chancery will relieve him by a contribution from the rest of the purchasers, and restrain the grantee from levying upon him only. Cary, 2. 92.

charge issuing out of an estate in fee; of at least one-fourth of the value of the lands, at the time of its reservation (*f*): 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 (37).

These are the general divisions of rents; 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 case of rents reserved upon lease (*g*) (38).

Rent is regularly due and payable upon the land from whence it issues, if no particular place is mentioned in the reservation (*h*): but in case of the king, the payment must be either to his officers at the exchequer, or to his receiver in the country (*i*). And strictly the rent is demandable and payable before the time of sunset of the day whereon it is reserved (*k*); though perhaps not absolutely due till midnight (*l*) (39).

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 they are redressed.

CHAPTER IV.

OF THE FEODAL SYSTEM (1).

It is impossible to understand, with any degree of accuracy, either the civil constitution of this kingdom (2), or the laws which regulate its land-

(*f*) Co. Litt. 143.
(*g*) Stat. 4 Geo. II. c. 28.
(*h*) Co. Litt. 201.
(*i*) 4 Rep. 73.
(*k*) Co. Litt. 202. 1 Anders. 253.
(*l*) 1 Saund. 287. Prec. Chanc. 558. Salk. 578.

(37) Mr. Hargrave is of opinion, that the quantum of the rent is not essential to create a fee-farm. Co. Litt. 144. n. 5; where he differs from Mr. Douglas, who had thought that a fee-farm was not necessarily a rent-charge, but might also be a rent-seck. Dougl. 627. n. 1.

(38) That is, for such as had been paid for three years, within twenty years before the passing of that act, or for such as have been since created. 4 Geo. II. c. 28. s. 5. Doug. 627. and n. 1. As to distresses, see 3 book, 6.

(39) If the lessor dies before sunset on the day upon which the rent is demandable, it is clearly settled that the rent unpaid is due to his heir, and not to his executor; but if he dies after sunset and before midnight, it seems to be the better opinion, that it shall go to the executor, and not to the heir. 1 P. Wms. 178. Toller on Executors, 177, 8.

(1) Upon the subject of the feodal system, in addition to the authorities cited in the text, see Robertson's History of Cha. 5th, 1 vol. and the masterly essay by Mr. Hallam in his History of the Middle Ages, ch. 2. part 2.

(2) Mr. Christian in his edition has the following note:—"An intimate acquaintance with the feodal system is absolutely necessary to the attainment of a comprehensive knowledge of the first principles and progress of our constitution. And this subject, in my opinion, might with great propriety have preceded the chapter upon parliament. The authority of lord Coke, upon constitutional questions, is greatly diminished by his neglect of the study of the feodal law: which sir Henry Spelman, who well knew its value and importance, feelingly laments: 'I do marvel many times, that my lord Coke, adorning our law with so many flowers of antiquity and foreign learning, hath not turned into this field, from whence so many roots of our law have, of old, been taken and transplanted.' Spelm. Orig. of Terms, c. viii." But Mr. Preston shews, contrary to the general opinion, that lord Coke was acquainted with the laws of feuds, and their applicability to some portions at least of our system. Preston on Estates, 1 vol. 201.

ed 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 misemployed, 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 scholar-like scientifical manner, without having recourse to 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 splendour.

*The constitution of feuds (*b*) had its original from the military [*45] policy of the northern or Celtic nations, the Goths, the Huns, 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 were called *feoda*, feuds, fiefs or fees; which last appellation in the northern language (*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 fidelitatis*, or oath of fealty (*g*) (3): and in case of the breach of

(*a*) Of parliaments, 57.

(*b*) See Spelman, of feuds, and Wright, of tenures, *per tot.*

(*c*) *De jure feod.* 19, 20.

(*d*) Wright, 7.

(*e*) Spelm. *Gl.* 216.

(*f*) 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 thence 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 *fee*, (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.

(3) Fealty, the essential feudal bond, is so necessary to the very notion of a feud, that it is a downright contradiction to suppose the most improper feud to subsist without it; but the other properties or obligations of an original feud may be qualified, or varied by the tenor, or express terms of the feudal donation. (Wright L. of Ten. 35). Fealty and homage are sometimes confounded; but they do not necessarily imply the same thing. Fealty was a solemn oath, made by the vassal, of fidelity and attachment to his lord. Homage was merely an acknowledgment of tenure, unless it was performed as *homagium ligeum*: that, indeed, did in strictness include allegiance as a subject, and could not be renounced; but *homagium non ligeum* contained a saving or exception of faith due to other lords, and the homager might at any time free himself from feudal dependence, by renouncing the land with which he had been invested. (Du Fresne Gloss. voc. *Hominium, Legius, et Fidelitas*). Mr. Hargrave (in note 1, to Co. Litt. 68 a) says, in some countries on the continent of Europe, homage and fealty are blended together, so as to form one engagement;

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 [*46] them to defend them: and, as they 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 other's 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 connexion was established, a proper military subjection was naturally introduced, and an army of feudatories was always ready enlisted, and mutually prepared to muster, not only in defence of each man's own several property, but also defence of the whole, and of every part of this their newly-acquired country (*i*); the produce of which constitution was soon sufficiently visible in the strength and spirit with which they maintained their conquests (4).

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 irruption into Italy about a century before the Christian æra. They demanded of the Romans, "*ut martius populus aliquid sibi terrae daret, quasi stipendium; caeterum, ut vellet, manibus atque armis suis 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 lord 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 [*47] Franks broke in upon Gaul, the Visigoths on *Spain, and the Lombards upon Italy; and introduced with themselves this northern plan of polity, serving at once to distribute and to protect the territories they had newly gained. And from hence too it is probable that the

(*h*) *Feud. l.* 2, *t.* 24.
(*i*) Wright, 2.
(*k*) *L. Florus. l.* 3, *c.* 3.

and therefore, foreign jurists frequently consider them as synonymous. But, in our law, whilst *both* continued, they were in some respect distinct: fealty was sometimes done where homage was not due. And Lord Coke himself tells us, (1 Inst. 151 a), fealty may remain, where homage is extinct. So, Wright, (L. of Ten. 55, in note), informs us, that it appears not only from the concurrent testimony of all our most authentic antient historians, (whom he cites), but likewise from Britton, Bracton, the Mirror, and Fleta, that homage and fealty were really with us distinct, though (generally) concomitant, engagements: and that homage, (be of course means *homagium non ligeum*), was merely a declaration of the homager's consent to become the military tenant of certain of the lord's lands or tenements.

The short result appears to be, that, whilst the tie of homage subsisted, fealty, though acknowledged by a distinct oath, was consequential thereto; but that the converse did not hold, as fealty might be due where homage was not.

The manner of doing homage and fealty, is prescribed by the act of 17 Edw. 2, st. 3, which enactment abundantly proves the distinct nature of the two acknowledgments at that time.

(4) See Hallam's Hist. of Middle Ages, ch. 2. p. 1. ch. 8. p. 2.

emperor Alexander Severus (*l*) took the hint of dividing lands conquered from the enemy among his generals and victorious soldiery, duly stocked with cattle and bondmen, or 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 obligations 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 (5). Which alteration of landed property, in so very material a point, necessarily drew after it an alteration of laws and customs: so that the feodal laws soon drove out the Roman, which had hitherto so 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, immanesque Longobardorum leges accepit.*

*But this feodal polity, which was thus by degrees established [*48] over all the continent of Europe, seems not to have been received n this part of our island, at least not universally, and as a part of the naional constitution, till the reign of William the Norman (*o*). Not but hat it is reasonable to believe, from abundant traces in our history and aws, that even in the times of the Saxons, who where a swarm from vhat sir William Temple calls the same northern hive, something similar o this was in use; yet not so extensively, nor attended with all the rigour hat was afterwards imported by the Normans. For the Saxons were rmly settled in this island, at least as early as the year 600: and it was ot till two centuries after, that feuds arrived to their full vigour and maurity, 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 conuest, nor by the mere arbitrary will and power of the conqueror; but to ave been gradually established by the Roman barons, and others, in such rfeited lands as they received from the gift of the conqueror, and afterards universally consented to by the great council of the nation, long ter his title was established. Indeed, from the prodigious slaughter of e English nobility at the battle of Hastings, and the fruitless insurrec-

l) "*Sola, quas de hostibus capta sunt limitaneis ribus et militibus donavit; ita ut eorum ita esset, si haeredes illorum militarent, nec unquam ad ostes pertinerent: dehens attentius illos militaos, si etiam sua rura defenderent. Addidit sane et animalia et servos, ut possent colere quod acerant; ne per inopiam hominum vel per senectutem desererentur rura vicina barbariae, quod turpissimum ille ducebat.*" (Æl. Lamprid. *in vita Alex. Severi.*)

(*m*) Wright, 10.

(*n*) Gravin. *Orig. l.* 1, § 139.

(*o*) Spelm. *Gloss.* 218. Bract. *l.* 2, *c.* 16, § 7.

(*p*) Crag. *l.* 2, *t.* 4.

5) The feudal constitutions and usages re first reduced to writing about the year O, by two lawyers of Milan, under the title *onsuetudines feudorum*, and have been subed to Justinian's Novels in nearly all the editions of the body of the Roman law. Though this was the feudal law of the German empire, other states have modified this law by the spirit of their respective constitutions.

tions 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 seized 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* (6); and this has led many hasty writers into a strange historical mistake, and one which, upon the slightest examination, [*49] 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 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 by law. And, though the time of this great revolution in our landed property cannot be ascertained with exactness, yet there are some circumstances that may lead us to a probable conjecture concerning it. 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-operate with the king's remonstrances, and the better incline 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 the compiling of the great survey called domesday-book (7), which was finish-

(*q*) A. D. 1085.

(*r*) *Rex tenuit magnum concilium, et graves sermones habuit cum suis proceribus de hac terra; quo modo incolerstur, et a quibus hominibus.* Chron. Sax. ibid.

(6) To determine whether the appellation was, or was not, properly applied in its ordinary sense to William I, it is necessary to consider the circumstances under which he mounted the throne. These circumstances will be best stated in the felicitous language of Hume. In the 4th chapter of his History, he says, "The Duke of Normandy's first invasion of the island was hostile; his subsequent administration was entirely supported by arms; in the very frame of his laws he made a distinction between the Normans and English, to the advantage of the former; he acted in every thing as absolute master over the natives, whose interest and affections he totally disregarded; and if there was an interval when he assumed the appearance of a legal sovereign, the period was very short, and was nothing but a temporary sacrifice, which he, as has been the case with most conquerors, was obliged to make, of his inclinations to present policy. Scarce any of those revolutions which, both in history and in common language, have always been denominated conquests, appear equally violent, or were attended with so sudden an alteration both of power and property. The Normans and other foreigners, who followed the standard of William, having totally subdued the natives, pushed the right of conquest to the utmost extremity against them. Except the former conquest of England by the Saxons themselves, who were induced, by peculiar circumstances, to proceed even to the extermination of the natives, it would be difficult to find in all history a revolution more destructive, or attended with a more complete subjection of the inhabitants. Contumely seems to have been wantonly added to oppression, and the natives were universally reduced to such a state of meanness and poverty, that the English name became a term of reproach, and several generations elapsed before one family of Saxon pedigree was raised to any considerable honours."

If these facts do not denote a conquest, in the ordinary sense of that word, then, to be sure, it will be difficult to prove that the Saxons were a conquered people.

(7) As to doomsday-book, see Phil. on Evid. 1 vol. 384.

ed 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 vassals, and did homage and fealty to his person (*s*). This may possibly have been the æra of formally introducing the feodal tenures by law; and perhaps the very law, thus made at the council of Sarum, is that which is still extant (*t*), *and couched in these remarkable words: [*50] "*Statuimus, ut omnes liberi homines foedere et sacramento affirment, quod intra et extra universum regnum Angliæ Wilhelmo regi domino suo fideles esse volunt; terras et honores illius omni fidelitate ubique servare cum eo, et contra inimicos et alienigenas defendere.*" The terms of this law (as sir Martin Wright has observed) (*u*) are plainly feodal: 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 lords' territories and titles against all enemies foreign and domestic. But what clearly evinces the legal establishment of this system, is another law of the same collection (*w*), which exacts the performance of the military feodal services, as ordained by the general council. "*Omnes comites, et barones, et milites, et servientes, et universi liberi homines totius regni nostri prædicti, habeant et teneant se semper bene in armis et in equis, ut decet et oportet: et sint semper prompti et bene parati, ad servitium suum integrum nobis explendum et peragendum, cum opus fuerit: secundum quod nobis debent de feodis et tenementis suis de jure facere, et sicut illis statuimus per commune concilium totius regni nostri 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 allodial 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 allodial estates in France were converted into feuds, and the freemen became the vassals of the crown (*x*). The only difference between this change of tenures in France, and that in England, was, that the former was effected gradually *by [*51] the consent of private persons; the latter was done at once, all over England, by the common consent of the nation (*y*).

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 (*z*): 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 feodal 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

(*s*) *Omnes prædia tenentes, quotquot essent notae melioris per totam Angliam, ejus homines facti sunt, et omnes se illi subdidere, ejusque facti sunt vasalli, ac ei fidelitatis juramenta praestiterunt, se contra alios quoscunque illi fidos futuros. Chron. Sax.* A. D. 1086.

(*t*) *Cap.* 52. Wilk. 223.

(*u*) Tenures, 66.

(*w*) *Cap.* 58. Wilk. 228.

(*x*) Montesq. Sp. L. b. 31, c. 8.

(*y*) 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. xlvii.)

(*z*) *Tout fuit in luy, et vient de luy al commencement.* (*M.* 24 *Edw. III.* 65.)

new polity, though the fact was indeed far otherwise. And indeed, by thus consenting to the introduction of feodal 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 vigour and fealty, *as if* they had received their lands from his bounty upon these express conditions, as pure, proper, beneficiary feudatories. But whatever their meaning was, the Norman interpreters, skilled in all the niceties of the feodal constitutions, and well understanding the import and extent of the feodal terms, gave a very different construction to this proceeding: 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 (*a*); 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, [*52] 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 (*b*). However, this king and his son William Rufus kept up with a high hand all the rigours of the feodal doctrines: but their successor 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 (*c*), whereby he 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 broken through, and the former grievances were revived and aggravated, by himself and succeeding princes; till in the reign of king John they became so intolerable, that they occasioned his barons, or principal feudatories, to rise up in arms against him; which at length produced the famous great charter 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) (*d*) 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.

[*53] *Having given this short history of their rise 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

(*a*) Spelm. of feuds, c. 22.
(*b*) Wright, 81.
(*c*) *LL. Hen. I.* c. 1.
(*d*) 9 *Hen. III.*

our public polity, and also the original of such of our own tenures as were either abolished in the last century, or still remain in force.

The grand and fundamental maxim of all feodal 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 feudatory, or *vassal*, which was only another name for the tenant, or holder of the lands; though, on account of the prejudices which we have justly conceived against the doctrines that were afterwards *grafted* on this system, we now use the word *vassal* opprobriously, as synonymous to slave or bondman (8). The manner of the grant was by words of gratuitous and pure donation, *dedi et concessi*; 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 vassals; which perpetuated among them the æra 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* (9), or profession of faith to the lord, which was the parent of our oath of allegiance, the vassal 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 sate before him; and there professing, that "he did become his *man*, from that day forth, of life and [*54]

(8) Mr. Christian says, "Nothing, I think, proves more strongly the detestation in which the people of this country held the feudal oppressions, than that the word *vassal*, which once signified a feudal tenant or grantee of land, is now synonymous to slave; and that the word *villain*, which once meant only an innocent inoffensive bondman, has kept its relative distance, and denotes a person destitute of every moral and honourable principle, and is become one of the most opprobrious terms in the English language." May it not be assumed that the system produced a moral debasement, equivalent to the political degradation which it inflicted; and that although *villain* originally meant nothing more than bondman, or labourer, it became afterwards, as we have seen, expressive of moral turpitude, from the vices which the system necessarily engendered in its victims.

(9) See *ante*, note (3) to this chapter, observing, in addition to what is there said, that lands held in *frankalmoigne*, or at will, according to common law, not affected by custom, form exceptions to the general rule, that fealty is incident to all manner of tenures. (1 Inst. 93. a, b). It should also be remarked, that no one who has not an estate in fee simple or fee tail, either in his own right or in right of another, was entitled either to receive, or even to do, homage. (1 Inst. 66 b, 67 a). Homage, indeed, seems to have been properly incident to tenure by knight's service only; at least, wherever homage was parcel of a tenure, that was held to afford a presumption that the tenure was by knight's service, unless the contrary could be proved. (1 Inst. 67 b). Whilst homage continued, it was far from being a mere ceremony, for the performance of it, where it was due, materially concerned both lord and tenant in point of interest and advantage. To the lord it was of consequence, because, till he had received homage from the heir, he was not entitled to the wardship of him and of his land; unless the lord had the seignory for life or years only, in which case he could not take homage, and therefore was allowed wardship without that previous act. To the tenants the homage was scarce of less importance; for, antiently, *every* kind of homage, when received, but not before, bound the lord to keep the tenant free from every molestation for services due to the lord paramount, (if there were any such), and to defend his title to the land against all others; though in subsequent times this implication of acquittal and warranty became peculiar to homage *auncestrel*. (Hargrave's note to Co. Litt. 67 b).

limb and earthly honour:" and then he received a kiss from his lord (*e*). Which ceremony was denominated *homagium*, or *manhood*, by the feudists, from the stated form of words, *devenio vester homo* (*f*).

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 recompense for the land that he held. This, in pure, proper, and original feuds, was only two-fold; to 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 vassals of the inferior lords were bound by their fealty to attend their domestic courts barons (*g*) (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 feodal institutions both here and on the continent, they are distinguished, by the appellation of the peers of the court; *pares curtis*, or *pares curiæ*. 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 reserv-
[*55] ing to themselves (in *almost every feodal 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, 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 (*h*), who was then 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 (*i*). This was professedly done lest their thoughts should be diverted from war to agriculture, lest the strong should encroach 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 superfluities of life. But, when the general migration was pretty well over, and a peaceable possession of the 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

(*e*) Litt. § 85.

(*f*) 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. 8°.) It will not, I hope, be thought puerile to remark, in confirmation of this observation, that in one of our ancient juvenile pastimes (the *king I am* or *bastlinda* of Julius Pollux, *Onomastic*, *l.* 9, *c.* 7.) the ceremonies and language of feodal homage are preserved with great exactness.

(*g*) *Feud. l.* 2, *t.* 55.

(*h*) *Feud. l.* 1, *t.* 1.

(*i*) Thus Tacitus: (*de mor. Germ.* c. 26.) "*agri ab universis per vices occupantur; arva per annos mutant.*" And Cæsar yet more fully: (*de bell. Gall.* l. 6, c. 21.) "*Neque quisquam agri modum certum aut fines proprios habet; sed magistratus et principes, in annos singulos, gentibus et cognationibus hominum qui una coierunt, quantum eis et quo loco visum est, attribuunt agri, atque anno post alio transire cogunt.*"

for the *life* of the feudatory (*k*). 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 (*l*): and therefore infants, women, and professed monks, who were incapable of *bearing arms, were also incapable of [*56] succeeding to a genuine feud. But the heir, when admitted to the feud which his ancestor possessed, used generally to pay a fine or acknowledgment to the lord, in horses, arms, money, and the like, for such renewal of the feud: which was called a relief, because it raised up and re-established the inheritance, or in the words of the feodal writers, "*incertam et caducam 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 vassal, 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 their lord, and did not descend to their children, or even to their surviving brothers, as not being specified in the donation (*m*). 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 the 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 feodal succession, that "none was capable of inheriting a feud, but such as was of the blood of, that is, lineally descended from, the first feudatory (*n*)." 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 feodal 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 [*57] son (*o*); in imitation of these, *military* feuds (or those we are now describing) began also in most countries to descend, according to the same rule of primogeniture, to the eldest son, in exclusion of all the rest (*p*).

Other qualities of feuds were, that the feudatory could not aliene or dispose of his feud; neither could he exchange, nor yet mortgage, nor even devise it by will, without the consent of the lord (*q*). 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 from his posterity who were presumed to inherit his valour, to others who might prove less able. And, as the feodal 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

(*k*) *Feud. l.* 1, *t.* 1.
(*l*) Wright, 14.
(*m*) *Ibid.* 17.
(*n*) *Ibid.* 183.
(*o*) *Feud.* 2, *t.* 55.
(*p*) Wright, 32.
(*q*) *Ibid.* 29.

no more transfer his seignory or protection without consent of his vassal, than the vassal could his feud without consent of his lord (*r*): it being equally unreasonable, that the lord should extend his protection to a person to whom he had exceptions, and that the vassal 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; which were 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 these means the feodal polity was greatly extended; these inferior feudatories (who held what are called in the Scots law "rere-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 superiors or lords (*s*). *But this at the same time demolished 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 began 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 descriptions; 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 respects follow the nature of an original, genuine, and proper feud (*t*).

[*58]

But as soon as the feodal 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 subtilty 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 (10).

(*r*) Wright, 30.
(*s*) *Ibid.* 30.
(*t*) *Feud.* 2, *t.* 7.

(10) See Mr. Butler's note upon the subject of feuds, Co. Litt. 191. a. n.

CHAPTER V.

OF THE ANCIENT ENGLISH TENURES (1).

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 feodal principles and no other; being fruits of, and deduced from, the feodal 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 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 (2): 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, [*60] 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 was supposed to make avail, or profit of the land (*a*). In this manner are all the lands of the kingdom holden, 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 feodal 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 burthensome services, than inferior tenures did (*d*). This dis-

(*a*) 1 Inst. 296.
(*b*) 1 Inst. 1.
(*c*) Page 47.
(*d*) In the Germanic constitution, the electors, the bishops, the secular princes, the imperial cities, &c. which hold directly from the emperor, are called

(1) See in general, Cruise Dig. 1 vol. 8. 11. 1d index, tit. Tenure, and Com. Dig. and ac. Ab. tit. Tenure.

(2) William the First, and other feudal sovereigns, though they made large and numerous grants of lands, always reserved a rent, or certain annual payments (commonly very trifling), which were collected by the sheriffs of the counties in which the lands lay, to shew that they still retained the *dominium directum* in themselves. (Madox Hist. Exch. c. 10. Craig de Feud, 1. 1. c. 9.)

tinction ran through all the different sorts of tenure, of which I now proceed to give an account.

I. There seems 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 were such as were not unbecoming the character of a soldier or [*61] a freeman to perform; *as to serve under his lord in the wars, to pay a sum of money, and the like. *Base* services were such as were only fit 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 an author ancient or modern (*e*); 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 in consideration of homage and *knight-service*; others in *free socage* with the service of fealty only." And again (*g*), "of villenages some are pure, and others privileged. He that holds in *pure villenage* shall do whatever is commanded him, and always be bound to an uncertain service. The other kind of villenage is called *villein-socage*; and these villein-socmen do villein services, but such as are certain and determined." Of which the sense seems to be as follows: first, where the service was *free* but *uncertain*, as military service with homage, that tenure was called the te- [*62] nure in *chivalry, *per servitium militare*, or by knight-service. Secondly, where the service was not only *free*, but also *certain*, as by fealty only, by rent and fealty, *&c.* that tenure was called *liberum socagium*, or free socage. These were the only *free* holdings or tenements; the others were *villenous* or servile, as thirdly, where the service was *base* in its nature, and *uncertain* as to time and quantity, the tenure was *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 socage (from the certainty of its services), but degraded by their *baseness* into the inferior title of *villanum socagium*, villein-socage.

the *immediate* states of the empire; all other landholders being denominated *mediate* ones. Mod. Un. Hist. xliii. 61.

(*e*) *l.* 4, *tr.* 1, *c.* 28.

(*f*) *Tenementorum aliud liberum, aliud villenagium. Item, liberorum aliud tenetur libere pro homagio et servitio militari; aliud in libero socagio cum fidelitate tantum.* § 1.

(*g*) *Villenagiorum aliud purum, aliud privilegiatum. Qui tenet in puro villenagio faciet quicquid ei praeceptum fuerit, et semper tenebitur ad incerta. Aliud genus villenagii dicitur villanum socagium; et hujusmodi villani socmanni—villana faciunt servitia, sed certa, et determinata.* § 8.

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 see, from a pure and proper feud, being entirely military, and the general effect of the feodal 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 measure of which in 3 Edw. I. was estimated at twelve ploughlands (*k*), and its value (though it varied with the times) (*l*) in the reigns of Edward I. and Edward II. (*m*) was stated at 20*l. per annum* (3). And he who held this proportion of land (or a whole fee) by knight-service, was bound to attend his lord to the wars for forty days in every year, if called upon (*n*); 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 (*o*). And there is reason to *apprehend, [*63] that this service 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 feodal 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 concessi* (*p*); 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 to shew to be of feodal original (4).

1. Aids were originally mere benevolences granted by the tenant to his lord, in times of difficulty and distress (*q*); 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 feodal attachment and fidelity: insomuch that the neglect of doing it, whenever it was in the vassal's power, was by the strict rigour of the feodal law an absolute forfeiture of his estate (*r*). 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

(*h*) Spelm. *Gloss.* 219.
(*i*) c. 2, § 27.
(*k*) *Pasch.* 3 Edw. I. Co. Litt. 69.
(*l*) 2 Inst. 596.
(*m*) Stat. Westm. 1, c. 36. Stat. *de milit.* 1 Edw. II. Co. Litt. 69.
(*n*) See writs for this purpose in *Memorand. Scacch.* 36, prefixed to Maynard's yearbook, Edw. II.
(*o*) Litt. § 95.
(*p*) Co. Litt. 9.
(*q*) *Auxilia fiunt de gratia, et non de jure,—cum dependeant ex gratia tenentium, et non ad voluntatem dominorum.* Bracton, *l.* 2, *tr.* 1, *c.* 16, § 8.
(*r*) Feud. *l.* 2, *t.* 24.

(3) Mr. Selden contends, that a knight's fee did not consist of land of a fixed extent or value, but was as much as the king was pleased to grant upon the condition of having the service of one knight. Tit. of Hon. p. 2. c. 5. s. 17. and 26. This is most probable: besides, it cannot be supposed that the same quantity of land was every where of the same value.

(4) Sir John Dalrymple, in an Essay on Feudal Property, p. 24. says, that "in England, before the 12 of Car. II, if the king had granted lands without reserving any particular services or tenure, the law creating a tenure for him would have made the grantee hold by knight's service."

Wright also says, that "military tenure was created by pure words of donation." Wright's Ten. 141.

arms (*s*): the intention of it being to breed up the eldest son and heir apparent of the seignory, 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 slender, few lords being able to save much out of
[*64] *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 (5). 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 (*t*). And one cannot but observe in this particular the great resemblance which the lord and vassal of the feodal 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. For, 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 (*u*).

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 charta* (*v*) ordained that no aids be taken by the king without consent of parliament, nor in anywise 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 Edward 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
[*65] restrain*ed, 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 (*w*); and that the aids taken by the king of his tenants *in capite* should be settled by parliament (*x*). But they were never completely ascertained and adjusted till the statute Westm. 1. 3 Edw. I. c. 36. which fixed the aids of inferior lords at twenty shillings, or the supposed twentieth part of the annual value 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.

(*s*) 2 Inst. 233.
(*t*) Philip's Life of Pole. I. 223.
(*u*) *Erat autem haec inter utrosque officiorum vicissitudo—at clientes ad collocandas senatorum filias de suo conferrent; in aeris alieni dissolutionem gratuitam pecuniam erogarent; et ab hostibus in bello captos redimerent.* Paul Manutius *de senatu Romano*, c. 1.
(*v*) *Cap.* 12. 15.
(*w*) *Ibid.* 15.
(*x*) *Ibid.* 14.

(5) By the statute, West. 1. c. 36. the aid for the marriage portion of the lord's eldest daughter could not be demanded till she was seven years of age, and if he died, leaving her unmarried, she might by the same statute recover the amount so received by him from his executors.

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; so that, if he pleased to demand an exorbitant relief, it was in effect to disinherit the heir (*y*). The English ill brooked this consequence of their new-adopted policy; and therefore William the Conqueror by his law (*z*) *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 vavasours repectively; 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 (*a*): but his brother Henry I., by the charter before mentioned, restored his father's law; *and ordained, that the relief to be paid [*66] should be according to the law so established, and not an arbitrary redemption (*b*). But afterwards, when, by an ordinance in 27 Hen. II. called the assize of arms, it was provided that every man's armour should descend to his heir, for defence of the realm; and it thereby became impracticable to pay these acknowledgments in arms according to the laws of the conqueror, the composition was universally accepted of 100*s*. for every knight's fee; as we find it ever after established (*c*). 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 burthen, only incident to the king's tenants *in capite*, and not to those who held of inferior or mesne lords. It was a 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 (*d*). 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 the death of a vassal, the superior was entitled 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: during which interval the lord was entitled to take the profits; and, unless the heir claimed within a year and a day, it was by the strict law a forfeiture (*e*). This practice however seems not to have long obtained in England, if ever, with regard to tenure under inferior lords; but as to the king's tenures *in capite*, the *prima seisina* was expressly declared, under Henry III. and Edward II., to belong to the king by prerogative, in contradistinction to other lords (*f*). The king was entitled to enter and receive the *whole profits of the land, till livery was sued; [*67] which suit being commonly made within a year and day next

(*y*) Wright, 99.
(*z*) c. 22, 23, 24.
(*a*) 2 Roll. Abr. 514.
(*b*) "*Haeres non redimet terram suam sicut faciebat tempore fratris mei, sed legitima et justa relevationi relevabitcam.*" (*Test. Roffens. cap.* 34.)
(*c*) Glanv. *l.* 9, *c.* 4. Litt. § 112.
(*d*) Co. Litt.
(*e*) *Feud. l.* 2, *t.* 24.
(*f*) Stat. Marlb. c. 16. 17 Edw. II. c. 3.

after the death of the tenant, in pursuance of the strict feodal rule, therefore the king used to take as an average the *first fruits*, that is to say, one year's profits of the land (*g*). And this afterwards gave a handle to the popes, who claimed 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 (*h*), the lord was entitled to the *wardship* of the heir, and was called the guardian in chivalry. This wardship consisted in having the custody of the body and lands of such heir, without any account of the profits, till the age of twenty-one in males, and 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 ancestor the heir-male 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. 3 Edw. I. c. 22., the two additional years being given by the legislature for no other reason but merely to benefit the lord (*i*) (6).

This wardship, so far as it related to land, though it was not nor could be part of the law 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
[*68] of the profits thereof provide a fit person *to supply the infant's services, till he should be of age to perform them himself (7). And if we consider the 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, so long as the service was suspended. Though undoubtedly to our English ancestors, where such a stipendiary donation was a mere supposition 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

(*g*) Staundf. Prerog. 12.
(*h*) Litt. § 103.
(*i*) Litt. § 108.

(6) The text is somewhat at variance with the authority of lord Coke, who says, "*Cessante causa cessat effectus*; and therefore, if within the two years the lord marrieth the heir-female, the heir-female shall presently enter, because for that cause the two years are given. If the guardian marry the heir-female after the age of twelve years, he shall not detain her land but until her age of fourteen, for the cause ceaseth. So it is if the ancestor marrieth his heir-female and dieth before she attain to her age of fourteen, the land shall be in ward, but the lord shall not have the two years." 2 Inst. 203, 4.

(7) If an heir, being in ward, was created a knight, his person thereby became out of ward, the sovereign of chivalry having adjudged him able to do knight's service: but he was not freed of the value of his marriage, which was previously vested in his lord. The case was different with respect to a party who, though under age when he was made a knight, was not then in ward: for instance, if an heir apparent was made a knight, within age, during the life of his ancestor, upon the death of that ancestor neither his person nor lands would be in ward; for, the title of wardship not having accrued, such a case did not come within the provision of the 3rd chapter of *Magna Charta*, (2nd Instit. 11, 12. *Sir Drew Drury's case*, 6 Rep. 74, 75).

of the land and the children, should belong to the widow or next of kin. But this noble immunity did not continue many years.

The wardship of the body was a consequence of the 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 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* (*k*); that is, the delivery of their lands out of their guardian's hands. For this they were obliged to pay a fine, namely, half a year's profit of the land; though this seems expressly contrary to *magna carta* (*l*). 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 (*m*). In order to ascertain the profits that arose to the crown by these first 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 (*n*), commonly called an *inquisitio post mortem*; which was instituted to inquire (at the death of any man of fortune) the value of his estate, the tenure by which it was *holden, and who, [*69] 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 grievance; 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 (*o*). And afterwards, a court of wards and liveries was erected (*p*), for conducting the same inquiries in a more solemn and legal manner.

When the heir thus came of full age, provided he held a knight's fee *in capite* under the crown, 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 (*q*), is supposed to have been the original of the feodal knighthood (*r*). This prerogative, of compelling the king's vassals (8) to be knighted, or to pay a fine, was expressly recognized in parliament by the statute *de militibus*, 1 Edw.

(*k*) Co. Litt. 77.
(*l*) 9 Hen. III. c. 3.
(*m*) Co. Litt. 77.
(*n*) Hoveden, *sub Ric. I.*
(*o*) 4 Inst. 198.
(*p*) Stat. 32 Hen. VIII. c. 46.
(*q*) Book I. p. 404.
(*r*) "*In ipso concilio vel principum aliquis, vel pater, vel propinquus, scuto frameaque juvenem ornant. Haec apud illos toga, hic primus juventae honos: ante hoc domus pars videntur; mox reipublicae.*" *De Mor. Germ. cap.* 13.

(8) Mr. Christian observes, that this prerogative was not confined to the king's tenants: lord Coke does not make that distinction in his commentary on the stat. *de milit.* 2 Inst. 593. Nor is the power of the commissioners limited to the king's tenants in the commissions issued by Edw. VI. and queen Elizabeth; which see in 15 Rym. Foed. 124. and 493. See 16 Car. I. c. 20. 2 Rushw. 70; and book i. p. 404.

II.; was exerted as an expedient for 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, among the other concessions made by [*70] *that unhappy prince, before the fatal recourse to arms, he agreed to divest himself of this undoubted flower of the 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 *matrimony*), which in its feodal 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 (*s*); that is, so much as a jury would assess, or any one would *bona fide* give to the guardian for such an alliance (*t*); and, if the infants married themselves without the guardian's consent, they forfeited double the value, *duplicem valorem maritagii* (*u*) (9). This seems to have been one of the greatest hardships of our ancient tenures. There were 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 (*w*); 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 feodal 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 (*x*); 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 [*71] give, provided such 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 (*y*); or, as it was expressed in the first draught of that charter, *ita maritentur ne disparagentur, et per consilium propinquorum de consanguinitate sua* (*z*). But these provisions in behalf of the relations were omitted in the charter of Henry III.; wherein (*a*) the clause stands merely thus, "*haeredes maritentur absque disparagatione:*" meaning certainly, by *haeredes*, heirs female, as there are no traces before this to be

(*s*) Litt. § 110.
(*t*) Stat. Mert. c. 6. Co. Litt. 82.
(*u*) Litt. § 110.
(*w*) Bract. *l.* 2, c. 37, § 6.
(*x*) Gr. Coust. 95.
(*y*) *Cap.* 6. *edit. Oxon.*
(*z*) *Cap.* 3. *ibid.*
(*a*) *Cap.* 6.

(9) That is, after a suitable match had been tendered by the lord. In the case of a tender and refusal, and no marriage elsewhere, the lord had the single value. Female heirs were not subject to the *duplex valor maritagii*. Co. Litt. 82. b. See also 5 Rep. 126. 6 Rep. 70. 2 Inst. 90. 92. ib. 202. 204.

found of the lord's claiming the marriage (*b*) of heirs male; and as Glanvil (*c*) 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, *sive sit masculus sive foemina*, as Bracton more than once expresses it (*d*): and also as nothing but disparagement was restrained by *magna carta*, they thought themselves at liberty to make all other advantages that they could (*e*). 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 (*f*); which is the first direct mention of it that I have met with, in our own or any other law (10).

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 or 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 feo*dal obligation was consi- [*72] dered as reciprocal, the lord also could not alienate his seignory 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 tenant to alienc, 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 acknowledgment 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* (*g*) (11), and the sta-

(*b*) The words *maritare* and *maritagium* seem ex vi *termini* to denote the providing of an husband.
(*c*) *l.* 9, *c.* 9 & 12, & *l.* 9, *c.* 4.
(*d*) *l.* 2, *c.* 38, § 1.
(*e*) Wright, 97.
(*f*) 20 Hen. III. c. 6.
(*g*) *Cap.* 32.

(10) What fruitful sources of revenue these wardships and marriages of the tenants, who held lands by knight's service, were to the crown, will appear from the two following instances, collected among others by lord Lyttleton, Hist. Hen. II. 2 vol. 296. "John earl of Lincoln gave Henry the Third 3000 marks to have the marriage of Richard de Clare, for the benefit of Matilda his eldest daughter; and Simon de Montford gave the same king 10,000 marks to have the custody of the lands and heir of Gilbert de Unfranville, with the heir's marriage, a sum equivalent to a hundred thousand pounds at present." In this case the estate must have been large, the minor young, and the alliance honourable. For, as Mr. Hargrave informs us, who has well described this species of guardianship, "the guardian in chivalry was not accountable for the profits made of the infant's lands, during the wardship, but received them for his own private emolument, subject only to the bare maintenance of the infant. And this guardianship, being deemed more an interest for the profit of the guardian, than a trust for the benefit of the ward, was saleable and transferable, like the ordinary subjects of property, to the best bidder; and if not disposed of, was transmissible to the lord's personal representatives. Thus the custody of the infant's person, as well as the care of his estate, might devolve upon the most perfect stranger to the infant; one prompted by every pecuniary motive to abuse the delicate and important trust of education, without any ties of blood or regard to counteract the temptations of interest, or any sufficient authority to restrain him from yielding to their influence." Co. Litt. 88. n. 11. One cannot read this without astonishment, that such should continue to be the condition of the country till the year 1660, which, from the extermination of these feudal oppressions, ought to be regarded as a memorable æra in the history of our law and liberty.

(11) Our author has the high authority of Lord Coke in support of his opinion that, the right of the tenants of common persons to alien their lands, without a licence, was recognized by *Magna Charta*. (1 Instit. 43. a. 2 Instit. 65. 501.) This recognition, however, is not distinctly expressed in the charter, and the construction of Lord Coke and of Black-

tute of *quia emptores* (*h*) (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 aliene without a licence; for if they did, it was in ancient strictness an absolute forfeiture of the land (*i*); though some have imagined otherwise. But this severity was mitigated by the statute 1 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 (*k*).

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 (12); [*73] whereby every inheritable quality was entirely blotted out *and abolished. In such cases the lands escheated, or fell back to the lord of the fee (*l*); that is, the tenure was determined by breach of the original condition expressed or implied in the feodal donation. In the one case, there were 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 vassal, having forgotten his duty as a subject; and therefore forfeited his feud, which he held under the implied condition that he should not be a 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 (*m*).

These were the principal qualities, fruits, and consequences of 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 the last century; and which was created, as sir Edward Coke expressly testifies (*n*), for a military purpose, *viz.* for defence of the 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 a knight-service proper; which was to attend the king in his wars. There were also some other species of knight-service; so 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* (13), *per*

(*h*) 18 Edw. I. c. 1.
(*i*) 2 Inst. 66.
(*k*) *Ibid.* 67.
(*l*) Co. Litt. 13.
(*m*) *Feud. l.* 2, *t.* 26.
(*n*) 2 Inst. 192.

stone has been repudiated, as a forced one in itself, and as being inconsistent with any reasonable interpretation of the statute of *quia emptores*. (Dalrymple's Hist. of Feud. prop. 80. Bacon's L. of Engl. 171. Wright's Law of Ten. 158. Sullivan's Lect. 385.

(12) By the statute of 54 Geo. III. c. 145, it is enacted, that no attainder for felony, (after the passing of the act), except in cases of high treason, petit treason, or murder, shall extend to the disinheriting of any heir, or to the prejudice of the right or title of any other person than the offender, during his natural life only; and that it shall be lawful to the person to whom the right or interest of or in any lands, tenements, or hereditaments, after the death of such offender, would have appertained, if no such attainder had been, to enter into the same.

(13) Mr. Hargave (note (1) to Co. Litt. 108 a) observes, that the tenure by grand serjeanty still continues, though it is so regulated by

magnum servitium, whereby the tenant was bound, instead of serving the king *generally* in his 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 (*o*). It was in most other respects like knight-service (*p*); only he was not bound to pay aid (*q*), or escuage (*r*); and, when tenant by knight-service paid [*74] 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 (*s*). Tenure by *cornage* (14), 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 (*t*).

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 sending 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 kind of tenure was called *scutagium* in Latin, or *servitium scuti*; *scutum* being then a well-known denomination for money: and, in like manner, it was called, in our Norman French, *escuage*; being indeed a pecuniary, instead of a military, service (15). 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 went to war, they levied scutages on their tenants, that is, on all the landholders of the kingdom, to defray their expenses, and to hire troops; and these assessments in the time of Hen. 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 scutage should be imposed without consent of parliament (*u*). But this clause was omitted in his son Henry III.'s charter, where we

(*o*) Litt. § 153.
(*p*) *Ibid.* § 158.
(*q*) 2 Inst. 233.
(*r*) Litt. § 158.
(*s*) *Ibid.* § 154.
(*t*) *Ibid.* § 156.
(*u*) *Nullum scutagium ponatur in regno nostro, nisi per commune consilium regni nostri. Cap.* 12.

the 12th of Cha. II. c. 24, as to be made in effect free and common socage, except so far as regards the merely honorary parts of grand serjeanty. These are preserved, with a cautious exception, not only of those burthensome properties which really were previously incident to that species of tenure, but also of some to which it never was subject; the drawer of the act not appearing to have recollected the distinctions, as to this matter, between knight's service and grand serjeanty, which our author points out.

(14) "A tenure by cornage of a common person, was knight's service; of the king, grand serjeanty. The royal dignity made a difference of the tenure in this case." (Co. Litt. 107 a). So the dignity of the person of the king gave the name of *petit serjeanty* to services, which, if rendered to a common person, would have been called plain *socage*; the incidents being, in fact, only such as belonged to socage. (Co. Litt. 108 b; and see *post*, our author's observation to a similar effect, in p. 82).

(15) But Littleton, Coke, and Bracton render it the service of the shield, i. e. of arms, being a compensation for actual service. Co. Litt. 68. b.

Sir M. Wright considers that escuage, though in some instances the compensation made to the lord for the omission of actual service, was also in many others a pecuniary aid or tribute originally reserved by particular lords instead of personal service, varying in amount according to the expenditure which the lord had to incur in his personal attendance upon the king in his wars. This explanation tends to elucidate the distinction between knight-service and escuage in the old authors. See Wright, 121. 134. Litt. s. 98. 120.

[*75] only find (*w*) that scutages *or escuage should be taken as they were used to be taken in 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 (*x*), it was again provided, that the king should take no aids or tasks but by the common assent of the realm: hence it was held in our old books, that escuage or scutage could not be levied but by consent of parliament (*y*); such scutages being indeed the groundwork of all succeeding subsidies, and the land-tax of later times.

Since therefore escuage differed from knight-service in nothing, but as a compensation differs from actual service, knight-service is frequently confounded with it. And thus Littleton (*z*) must be understood, when he tells us, that tenant by homage, fealty, and escuage, was tenant by knight-service: that is, that this tenure (being subservient to the military policy of the nation) was respected (*a*) as a tenure in chivalry (*b*). But as the actual service was uncertain, and depended upon emergencies, so it was necessary that this pecuniary compensation should be equally uncertain, and depend on the assessments of the legislature suited to those emergencies. For had the escuage been a settled invariable sum, payable at certain times, it had been neither more nor less than a mere pecuniary rent; and the tenure, instead of knight-service, would have then been of another kind, called socage (*c*), 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 escuage, 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 [*76] king and country, the whole of this system of *tenures now tended to nothing else but a 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 burthens, 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 scutages to which they were liable in defect of personal attendance, which however 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 (*d*) 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 reduce him still farther, 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 ex-

(*w*) Cap. 37.
(*x*) See book i. pag. 140.
(*y*) Old Ten. *tit. Escuage.*
(*z*) § 103.
(*a*) Wright, 122.
(*b*) *Pro feodo militari reputatur.* Flet. *l.* 2, c. 14, § 7.
(*c*) Litt. § 97. 120.
(*d*) Commonw. l. 3, c. 3.

pensive honour of *knighthood*, to make his poverty more completely splendid. And when by these deductions his fortune was so shattered and ruined, that perhaps he was obliged to sell his patrimony, he had not even that poor privilege allowed him without paying an exorbitant fine for a *licence* of *alienation*.

A slavery so complicated, and so extensive as this, called aloud for a remedy in a nation that boasted of its freedom. Palliatives were from time to time applied by successive acts of parliament, which assuaged some temporary grievances. Till at length the humanity of king James I. consented (*e*), in consideration of a proper equivalent, to abolish them all; though the plan *proceeded not to effect; in like man- [*77] ner as he had formed a scheme, and begun to put it in execution, for removing the feodal grievance of heretable jurisdictions in Scotland, (*f*) which has since been pursued and effected by the statute 20 Geo. II. c. 43 (*g*). 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 was to have been settled and inseparably annexed to the crown and assured to the inferior lords, payable out of every knight's fee within their respective seignories. An expedient seemingly much better than the hereditary excise, which was afterwards made the principal equivalent for these concessions. For at length the military tenures, with all their heavy appendages (having during the usurpation been discontinued) were destroyed at one blow by the statute 12 Car. II. c. 24. which enacts, "that the court of wards and liveries, and all wardships, liveries, primer seisins, and ousterlemains, values, and forfeitures of marriage, by reason of any tenure of the king or others, be totally taken away. And that all fines for alienation, tenures by homage, knight-service, and escuage, and also aids for marrying the daughter or knighting the son, and all tenures of the king *in capite*, be likewise taken away (16). And that all sorts of tenures, held of the king or others, be turned into free and common socage; save only tenures in frankalmoign, copyholds, and the honorary services (without the slavish part) of grand serjeanty." A statute, which was a greater acquisition to the civil property of this kingdom that even *magna carta* itself; since that only pruned the luxuriances that had grown out of the military tenures, and thereby preserved them in vigour; but the statute of king Charles extirpated the whole, and demolished both root and branches.

(*e*) 4 Inst. 202.
(*f*) Dalrymp. of Feuds, 292.
(*g*) By another statute of the same year (20 Geo. II. c. 50.) the tenure of *wardholding* (equivalent to the knight-service of England) is for ever abolished in Scotland.

(16) Both Mr. Madox and Mr. Hargrave have taken notice of this inaccuracy in the title and body of the act, viz. of taking away tenures *in capite*; (Mad. Bar. Ang. 238. Co. Litt. 108. n. 5.) for tenure *in capite* signifies nothing more than that the king is the immediate lord of the land-owner; and the land might have been either of military or socage tenure. The same incorrect language was held by the speaker of the house of commons in his pedantic address to the throne upon presenting this bill. "Royal sir, your tenures *in capite* are not only turned into a tenure in socage (though that alone will for ever give your majesty a just right and title to the labour of our ploughs, and the sweat of our brows), but they are likewise turned into a tenure *in corde*. What your majesty had before in your court of wards you will be sure to find it hereafter in the exchequer of your people's hearts." Journ. Dom. Proc. 11 vol. 231.

CHAPTER VI.

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 itself 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 12 Car. II. the tenures of socage 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* socage. 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 second species of tenure, or *free-socage*, consisted also of free and honourable services; but such as were liquidated and reduced to
[*79] an absolute certainty. And this tenure not only subsists to *this day, but has in a manner absorbed and swallowed up (since the statute of Charles the Second) almost every other species of tenure. And to this we are next to proceed.

II. Socage, in its most general and extensive signification, seems to denote a tenure by any certain and determinate 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 rent in money, without any escuage or serjeanty, "*id tenementum dici potest socagium*:" but if you add thereto any royal service, or escuage, to any, the smallest, amount, "*illud dici poterit feodum militare.*" So too the author of Fleta (*b*); "*ex donationibus, servitia militaria vel magnae serjantiae non continentibus, oritur nobis quoddam nomen generale, quod est socagium.*" 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 afterwards (*d*) he tells us, that whatsover is not tenure in chivalry is tenure in socage: in like manner as it is defined by Finch (*e*), a tenure to be done out of war. The service must therefore be certain, in order to denominate it socage; 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 socage (*f*).

But socage, as was hinted in the last chapter, is of two sorts: *free-*

(*a*) *l.* 2, *c.* 16, § 9.
(*b*) *l.* 3, *c.* 14, § 9.
(*c*) § 117.
(*d*) § 118.
(*e*) L. 147.
(*f*) Litt. § 117, 118, 119.

socage, where the services are not only certain, but honourable; and *villein*-socage, 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 sokemanni*, or tenants in free-socage. Of this tenure we are first 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. [*80] And therefore I cannot but assent to Mr. Somner's etymology of the word (*h*); who derives it from the Saxon appellation *soc*, which signifies liberty or privilege, and, being joined to a usual termination, is called *socage*, in Latin *socagium*; 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 *soca*, an old Latin word, denoting (as they tell us) a plough: for that in ancient time this socage 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 socage 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, is tenure in socage; for here is plainly no commutation for plough-service. Besides, even services, confessedly of a military nature and original (as escuage, which, while it remained uncertain, was equivalent to knight-service), the instant they were reduced to a certainty changed both their name and nature, and were called socage (*m*). It was the *certainty* therefore that denominated it a socage 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 the tenures of chivalry. Wherefore also Britton, who describes lands in socage tenure under the name of *fraunke ferme* (*n*), tells us, that they are "lands and tenements, whereof the nature of the fee 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, that if socage tenures were of such base and servile *original, it is hard to account for the very great immunities which the tenants of them always enjoyed; so highly [*81] 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 *fraunke ferme* or tenure by socage. We may therefore, I think, fairly conclude in favour of Somner's etymology, and the liberal extraction of the tenure in free socage, against the authority even of Littleton himself (1).

(*g*) *l.* 3, *c.* 7.
(*h*) Gavelk. 138.
(*i*) In like manner Skene, in his exposition of the Scots' law, title *socage*, tells us, that it is 'any kind of holding of lands quhen ony man is infeft *freely*,' &c.
(*k*) Litt. § 119.
(*l*) § 118.
(*m*) § 98. 120.
(*n*) *c.* 66.

(1) The following is Mr. Christian's intelligent note upon this subject:—"The learned Judge has done Mr. Somner the honour of adopting his derivation of *socage*, which Mr. Somner himself boasts of as a new discovery with no little pride and exultation, as appears from the following sentence: *Derivatio forte hæc nova et nostratibus adhuc inaudita, qui, à soc quatenus vel aratrum vel saltem vomerem signat, vocem derivare satagunt. Quam male tamen, eorum veniâ fusius a me jam monitum in tractatu de gavelkind, cap.* 4. Somn. Gloss. *Soca.* But notwithstanding this *unheard of* derivation has found an able defender in the learned Commentator, the editor is obliged to prefer the old derivation for the following reasons:—

Taking this then to be the meaning of the word, it seems probable that the socage 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 burthensome, 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 socage tenure (*o*); 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* socage.

As 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 abolished, 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 a personal service, so the other is a rent or render, both [*82] tending to some purpose relative to the king's per*son. Petit serjeanty, as defined by Littleton (*p*), consists in holding lands of

(*o*) Wright, 211. (*p*) § 159.

Our most ancient writers derive it from *soca* or *soccus*, a plough; and *sock*, in some parts of the north of England, is the common name for a plough-share to this day. The following description of *sockage* is given by Bracton; *dici poterit socagium à socco, et inde tenentes sockmanni, eo quod deputati sunt, ut videtur, tantummodo ad culturam, et quorum custodia et maritagia ad propinquiores parentes jure sanguinis pertinebant.* (C. 35.) This is not only adopted by Littleton and lord Coke, (Co. Litt. 86.) who says that *socagium est servitium socæ*, which is also the interpretation given by Ducange, (*voc.* Soc.) but sir Henry Spelman, whose authority is high in feudal antiquities, testifies that *feudum ignobile, plebeium vulgare Gall. fief roturier nobili opponitur, et propriè dicimus, quod ignobilibus et rusticis competit, nullo* feudali privilegio *ornatum, nos soccagium dicimus.* Gloss. voc. Feod. And *soccagium* he explains by *Gall. roture, fief roturier. Heretages en roture.* (Ib. voc. *Soc.*)

In a law of Edward the Confessor, the sokeman and villein are classed together: *Manbote de villano et sokeman xii oras, de liberis autem hominibus iii marcas.* (C. 12.) If we consider the nature of socage tenure, we shall see no reason why it should have the pre-eminence of the appellation of a privileged possession.

The services of military tenure were not left, as suggested by the learned Judge in the preceding page, *to the arbitrary calls of the lord:* for, though it was uncertain when the king would go to war, yet the tenant was *certain* that he could only be compelled to serve forty days in the year; the service therefore was as certain in its extent as that of socage; and the sokeman likewise could not know beforehand when he would be called upon to plough the land, or to perform other servile offices, for the lord. The *milites* are every where distinguished from the *sokemanni*, and the wisdom of the feudal polity appears in no view more strongly than in this; viz. that whilst it secured a powerful army of warriors, it was not improvident of the culture of the lands, and the domestic concerns of the country. But honour was the invigorating principle of that system, and it cannot be imagined that those who never grasped a sword, nor buckled on a coat of mail, should enjoy privileges and distinctions denied to the barons and milites, the companions of their sovereign. The sokemanni were indebted only to their own meanness and insignificance for their peculiar immunities. The king or lord had the profits of the military tenant's estate, during his nonage, in order to retain a substitute with accoutrements, and in a state suitable to the condition of his tenant; at the same time he took care that the minor was instructed in the martial accomplishments of the age. But they disdained to superintend the education of the sokemanni; and as they had nothing to apprehend from their opposition, and could expect no accession of strength from their connexions, their marriages therefore were an object of indifference to them. Hence when the age of chivalry was gone, and nothing but its slavery remained, by no uncommon vicissitude in the affairs of men, the sokemanni derived from their obscurity that independence and liberty, which they have transmitted to posterity, and which we are now proud to inherit."

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 socage 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 socagium*: 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* respected it in this light, when it enacted (*r*), that no wardship of the lands or body should be claimed by the king in virtue of a tenure by petit serjeanty (2).

Tenure in *burgage* is described by Glanvil (*s*), and is expressly said by Littleton (*t*), to be but tenure in socage: and it is where the king or other person is lord of an ancient borough, in which the tenements are held by a rent certain (*u*). It is indeed only a kind of town socage; as common socage, by which other lands are holden, is usually of a rural nature. A borough, as we have formerly seen, is usually 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 scite of houses, in an ancient borough, are held of some lord in common socage, by a certain established rent. And these seem to have withstood the shock of the Norman encroachments principally on account of their insignificancy, which made it not worth while to compel them to an alteration of tenure; as an hundred of them put together would scarce have amounted to a knight's fee. Besides, the owners of them, being chiefly artificers and persons engaged in trade, could not with any tolerable propriety be put on such a military establishment, as the tenure in chivalry was. And here also we have again an instance, where a tenure is confessedly in socage, and yet could not possibly ever have been held by plough-service; since the te*nants must have been citizens or burghers, the situ- [*83] ation frequently a walled town, the tenements 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 socage 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 many of these tenements so held in ancient burgage: the principal and most remarkable of which is that called *Borough English* (3), so named in contradistinction as it were to the Norman customs, and which is taken notice of by Glan-

(*q*) § 160.
(*r*) *Cap.* 27.
(*s*) *lib.* 7, *cap.* 3.
(*t*) § 162.
(*u*) Litt. § 162, 163.

(2) "The tenure of petit serjeanty is not named in 12 Cha. II. but the statute is not without its operation on this tenure. It being necessarily a tenure *in capite*, though in effect only so by socage, *livery* and *primer seisin* were of course incident to it on a descent, and these are expressly taken away by the statute from every species of tenure *in capite*, as well socage *in capite* as knight's service *in capite*. But we apprehend that in other respects petit serjeanty is the same as it was before, that it continues in denomination and still is a dignified branch of the tenure by socage, from which it only differs in name on account of its reference to war." Harg. and Butl. Co. Litt. 108. b. n. 1. The tenure by which the grants to the duke of Marlborough and the duke of Wellington, for their great military services, are held, are of this kind, each rendering a small flag or ensign annually, which is deposited in Windsor Castle.

(3) See Bac. Ab. and Com. Dig. tit. Borough English, Cru. Dig. 1 vol. 133. id. 3 vol. 476. This custom prevailed in the manors of Ford, Cundover, Wem, and Loppington, in Staffordshire; Bishop Hampton, Herefordshire; Havenham, Sussex; Malden, Essex; Skidby, East Riding, Yorkshire; and some others.

vil (*w*), and by Littleton (*x*); *viz.* that the youngest son, and not the eldest, succeeds to the burgage tenement on the death of his father. For which Littleton (*y*) gives this reason; because the younger son, by reason of his tender age, is not so capable as the rest of his brethren to help himself. Other authors (*z*) have indeed given a much stranger reason for this custom, as if the lord of the fee had anciently a right of concubinage with his tenant's wife on her wedding-night; and that therefore the 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 III (*a*). 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 to 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, therefore, who continues latest with his 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
[*84] father, which one be*came 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 Cæsar and Tacitus describe. Other special customs there are in different burgage tenures; as that, in some, 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, in others, a man might dispose of his tenements by will (*d*), which, in general, 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 socage tenure were fragments of Saxon liberty (4).

(*w*) *ubi supra.*
(*x*) § 165.
(*y*) § 211.
(*z*) 3 Mod. Pref.
(*a*) Seld. tit. of hon. 2. 1. 47. *Reg. Mag. l.* 4, c. 31.
(*b*) *Pater cunctos filios adultos a se pellebat, præter unum quem hæredem sui juris relinquebat.* (*Walsingh. Upodigm. Neustr. c.* 1.)
(*c*) Litt. § 166.
(*d*) § 167.
(*e*) Wright, 172.

(4) Custom, if properly pleaded and proved, seems to be conclusive in all questions as to descent in borough English. In *Chapman* v. *Chapman*, (March, 54, pl. 82), a custom respecting certain lands in borough English, that, if there were an estate in fee in those lands, they should descend to the younger son, according to the custom; but if the estate was in tail, they should descend to the heir at common law; was held to be good. The customary descent may, in particular places, be confined to estates in fee simple. (*Reeve* v. *Malster*, W. Jones, 363; and see Append. to Robins. on Gavelk.); but it may extend to fee tail, or any other inheritance. Lord Coke says, (1 Inst. 110 b.), "if lands of the nature of borough English be letten to a man and his heirs during the life of J. S., and the lessee dieth, the youngest son shall enjoy it." And, in the same place, he tells us "the customary descent may, in particular places, extend to collaterals;" but then it must be specially pleaded; for, the custom is in most places confined to cases of lineal descent; (*Bayley* v. *Stevens*, Cro. Jac. 198. *Reve* v. *Barrow*, Cro. Car. 410): and where lands would at common law descend to the issue of the eldest son *jure representationis*, they will, by the custom of borough English, descend upon the issue of the youngest. (*Clements* v. *Scudamore*, 2 Lord Raym. 1024; *S. C.* 1 P. Wms. 63; and 1 Salk. 243). The course of *descent* of lands held in gavelkind, or in borough English, cannot be altered by any limitation of the parties; for, customs which go with the land, and direct the course of inheritance, can be altered only by Parliament. (Co. Litt. 27 a. Jenkins Cent. page 220; S. P. Dyer, 179 b. *Roe* v. *Aistrop*, 2 W. Blacks. 1229. 2 Hale's Hist. of Com. L. 103). But, there is a great difference between the descent of such land and the purchase thereof: for if upon such purchase a remainder be limited to the right heir of the purchaser, or of any other person, the heir at com-

The nature of the tenure in *gavelkind* (5) affords us a still stronger argument. It is universally known what struggles the Kentish men made to preserve their ancient liberties, and with how much success those struggles were attended (6). And as it is principally here that we meet with the custom of 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 aliene 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 bough, the son to the plough" (*i*) (7). 3. In most places he had a power of devising lands 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 [*85] particular places particular customs prevailed (8). These, among other properties, distinguished this tenure in a most remarkable manner: and yet it is said to be only a species of a socage tenure, modified by the custom of the country; the lands being holden by suit of court and fealty,

(*f*) Stat. 32 Hen. VIII. c. 29. Kitch. of courts, 200.

(*g*) *In toto regno, ante ducis adventum, frequens et usitata fuit: postea cæteris adempta, sed privatis quorundam locorum consuetudinibus alibi postea reger minans: Cantianis solum integra et inviolata remansit.* (*Analect. l. 2, c. 7.*)

(*h*) Lamb. Peramb. 614.

(*i*) Lamb. 634.

(*k*) F. N. B. 198. Cro. Car. 561.

(*l*) Litt. § 210.

(*m*) Glanvil. *l.* 7, c. 3.

mon law will take it, and not the customary heir. For, the remainder being newly created, could not be considered within the old custom. (*Counden* v. *Clerk*, Hob. 31). On the other hand, if a man, seised in fee of lands in gavelkind, make a gift in tail, or a lease to a stranger for life, with remainder to his own right heirs, it seems all his sons will take; for the remainder limited to the right heirs of the donor is not a new purchase, but only a reversion, which will follow the customary course of descent. (Co. Litt. 10 a. *Cheater* v. *Chester*, 3 P. Wms. 63).

If the Court of Chancery is called upon to administer a will, creating an executory trust respecting lands held in borough English, or gavelkind, and the *cestuis que trust* are to take as purchasers; the lands will be directed to be conveyed not to heirs according to the custom, but to the heirs at common law. (*Roberts* v. *Dixwell*, 1 Atk. 609. *Starkey* v. *Starkey*, 7 Bac. Ab. 179). And all gavelkind and borough English lands are now deviseable; but, since the statute of frauds (29 Cha. II. c. 3), the devise of these, as of other lands, must be in writing.

(5) See in general, Robinson on Gavelkind; Bac. Ab. and Com. Dig. tit. Gavelkind; Cru. Dig. 1. 106. 132. 144. 2. 541. 3. 475. 499; Fearne's Con. Rem. 154; Preston on Conveyancing, 1 vol. 287. 290. H. Chitty on Descents, index, tit. Gavelkind.

(6) The best historians shew that the Kentish men owed what the learned commentator calls the preservation of their ancient liberties, not, as supposed by him, to their successful resistance of the invader, but to their policy in yielding a ready and apparently spontaneous submission to his authority. See authorities in Bac. Ab. Gavelkind, A.

(7) "But if tenant in gavelkind, being indicted for felony, absent himself and is outlawed, after proclamation made for him in the county (or if formerly he had taken sanctuary, and had abjured the realm), his heir shall reap no benefit by the custom, but the lands shall escheat to the lord; and the king shall have year day and waste in them, if holden of another, in like manner as the common law directs, as to lands which are not subject to the custom of gavelkind." Rob. Gav. 229.

(8) Gavelkind and borough English, being customs already acknowledged by law, need not be pleaded; it is sufficient to shew that the lands are affected and regulated by the same; but all other private customs must be pleaded. H. Chitty on Descents, 162. It is also proper to observe, that there cannot be any ancient descent with respect to tithes, because laymen were incapable of holding them before the dissolution of the monasteries. See Doe, dem. Lushington v. Bishop of Llandaff, 2 New. R. 491: where a rectory in Kent, formerly belonging to one of the dissolved monasteries, having been granted by Hen. VIII. to a layman, to be holden in fee by knight-service *in capite*, it was held that the lands were descendible according to the custom of gavelkind; but the tithes according to the common law. See also H. Chitty's Descents, 200.

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 holden of the see of Canterbury into tenures by knight's service; and by statute 31 Hen. VIII. c. 3. for disgavelling 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 socage* (9). Now the immunities which the tenants in gavelkind enjoyed were such, as we cannot conceive should be conferred upon mere ploughmen and peasants; from all which I think it sufficiently clear that tenures in free socage 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 socage, 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 socage 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; and that the rest of the socage tenures dispersed through England escaped the general fate 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 socage tenures soon after the conquest to have been very considerable, nor their value by any means large; [*86] 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 tenures.

However this may be, the tokens of their feodal original will evidently appear from a short comparison of the incidents and consequences of socage 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; one of the king, either immediately, or as lord paramount, and (in the latter case) of a subject or mesne lord between the king and his 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 socage, 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 renders) 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 tene-

(*n*) Wright, 211.
(*o*) Spelm. *cod. vet. leg.* 355.
(*p*) pag. 48.
(*q*) c. 66.
(*r*) Litt. § 117. 131.

(9) The gavelkind lands of several other persons in Kent, have been made descendible according to the rules of the common law, by special statutes. Rob. Gavelk. 75.

ments 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 neglected, it will by long continuance of time grow out of memory (as doubtless it frequently hath done) 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 contingencies (*t*).

4. The tenure in socage was subject, of common right, to aids for knighting the son and marrying the eldest daugh*ter (*u*): [*87] 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 socage 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 5*l.* or one quarter of the supposed value of the land; but a socage 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 (*x*) will not allow this to be properly a relief, but *quaedam praestatio loco relevii in recognitionem domini*. So too the statute 28 Edw. I. c. 1. declares, that a free sokeman 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 about measure. Reliefs in knight-service were only payable, if the heir at the death of his ancestor was of full age: but in socage 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 socage tenures; and therefore, wherever lands in fee-simple are holden by a rent, relief is still due of common right upon the death of a tenant (*z*).

6. Primer seisin was incident to the king's socage tenants *in capite*, as well as to those by knight-service. (*a*) But tenancy *in capite* as well as primer seisins are, among the other feodal burthens, entirely abolished by the statute.

7. Wardship is also incident to tenure in socage; 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 does not, nor ever did, belong to the lord of the fee; because in this tenure, no military or *other personal service being required, there was no occa- [*88] sion 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 socage, 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 (10); as was fully explained, together with the reasons for

(*s*) § 130.
(*t*) *Eo maxime praestandum est, ne dubium reddatur jus domini et vetustate temporis obscuretur.* (*Corvin. jus feod. l.* 2, *t.* 7.)
(*u*) Co. Litt. 91.
(*w*) Litt. § 126.
(*x*) *l.* 2, c. 37, § 8.
(*y*) Litt. § 127.
(*z*) 3 Lev. 145.
(*a*) Co. Litt. 77.

(10) Mr. Hargrave (in his 5th note to Co. Litt. 88 b.) intimates, that this rule should be confined to possibility of *immediate* descent. If this be not so, supposing an infant were entitled to lands and his father living, the father might be deprived of the guardianship; for, the infant's heir might be a person to whom the father might be heir.

The guardianship of a father, by our law, which in this instance is founded on the law

it, in the former book of these commentaries (*b*). At fourteen this wardship in socage ceases; and the heir may oust the guardian and call him to account for the rents and profits (*c*): for at this age the law supposes him capable of choosing 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 socage tenures had so 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, might make an improvident choice. Therefore, when almost all the lands in the kingdom were turned into socage 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, and name a guardian, to prevent an infant heir from improvidently exposing himself to ruin.

8. Marriage, or the *valor maritagii*, was not in socage 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 (*d*). 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 [*89] what they *might*, receive on the infant's behalf; *lest by some

(*b*) Book I. page 461.
(*c*) Litt. s. 123. Co. Litt. 89.
(*d*) Litt. s. 123.

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of nature, continues, with respect to his son and heir apparent, till that son attain the age of twenty-one years: but it so continues with respect to the custody of the *body* only. (The *King* v. *Thorp*, Comyns, 28; *S. C.* Carth. 386.) According to the strict language of our law, an heir apparent alone can be the subject of guardianship by nature. (*Ratcliffe's case*, 3 Rep. 38). But this technical construction must not lead us to conclude that parents have not any right to the custody of their other children; for our law gives the custody of them to their parents till the age of fourteen, by the guardianship of *nurture*. (*S. C.*) And the statute of 12 Charles II. c. 24, empowers a father (though himself under twenty-one) by deed or will, attested by two witnesses, to appoint guardians to all his children under twenty-one, and unmarried at his decease, or born after; such guardianship to last till the children attain the age of twenty-one, or for any less time, and the appointment to be effectual against all claiming as guardians in socage or otherwise, the testamentary guardian having the custody, not only of the children's persons, but of their estate, both real and personal.

Thus, it seems, a father may, by will, delegate to any stranger whom he chooses to select, a much more extensive power than the letter of the law gives to himself whilst he lives; for, the guardianship of nurture, as we have just seen, expires at the same time as guardianship in socage does, namely, when the infant attains the age of fourteen.

There is no sort of doubt, that the court of Chancery, representing the king as *parens patriæ*, has a jurisdiction now perfectly established, to control the right of a father to the possession of his child, whenever the welfare of the child imperatively requires so strong a measure. In the words of Lord Eldon, "the court has interposed in many instances of this sort, but the application is one of the most serious and important nature; the interposition of the court stands upon principles which it ought not to put into operation without keeping in view all the feelings of a parent's heart, and all the principles of the common law with respect to a parent's rights." (*Wellesley* v. The *Duke of Beaufort*, 1 Russ. 19, and see *Lyons* v. *Bleakin*, Jacob's Rep. 262. *Shelley* v. *Westbrooke*, Ibid. 266. *De Manneville* v. *De Manneville*, 10 Ves. 61. *Whitfield* v. *Hales*, 12 Ves. 492). In the reports of the cases cited, most of the other instances in which the jurisdiction in question has been exercised, are adverted to, and whoever examines them will find that the power has been wielded by considerate hands.

The control of the court of Chancery over the property of infants who are made its wards, is of course absolute; and many statutes, (the marriage act and others), in effect, recognize the chancellor as the constitutional depositary of that part of the king's prerogative or paternal duty, (whichever it may most properly be called) which consists of the guardianship of his infant subjects.

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 hath ceased with them. At fourteen years of age the ward might have disposed of himself in marriage, without any consent of his guardian, till the late act for preventing clandestine marriages. These doctrines of wardship and marriage in socage tenure were so diametrically opposite to those in knight-service, and so entirely agree with those parts of king Edward's laws, that were restored by Henry the First's charter, as might alone convince us that socage was of a higher original than the Norman conquest.

9. Fines for alienation were, I apprehend, due for lands holden of the king *in capite* by socage 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 (*e*), speak generally of all tenants *in capite*, without making any distinction: but now all fines for alienation are demolished by the statute of Charles the Second.

10. Escheats are equally incident to tenure in socage, 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 of heirs (*f*).

Thus much for the two grand species of tenure, under which almost all the free lands of the kingdom were holden till the restoration in 1660, when the former was abolished and sunk into the latter; so that the lands of both sorts are now holden *by one universal tenure of free and common socage.*

The other grand division of tenure, mentioned by Bracton, as cited in the preceding chapter, is that of *villenage*, as contradistinguished from *liberum tenementum*, or frank tenure. And this (we may remember) he subdivided 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 pre- [*90] sent *copyhold* (11) tenures, or tenure by copy of court roll at the will of the lord: 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 (12) 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* (13), because the usual residence of the owner, seems to have been a district of ground, held by lords or great person-

(*e*) 1 Inst. 73. 2 Inst. 65, 66, 67.
(*f*) Wright. 210.
(*g*) Co. Cop. s. 2 & 10.

(11) See in general, Bac. Ab, and Com. Dig. tit. Copyhold; 1 Cruise Dig. 293; Scriven, Watkins, and Fisher, on Copyhold; Fearne's Con. Rem. 60. et seq.; Preston on Conv. 27; and id. index, tit. Copyhold.

(12) As to manors in general, see the references in last note, and Watkins on Copyhold, 3 ed. 1 to 23.

(13) Mr. Watkins (1 Treat. of Cop. 7), following Lord Coke, (Copyh. p. 52), prefers that derivation of the word manor, which brings it from the Norman French word *mesner*, to guide; as most agreeing with the nature of a manor, all the tenants of which were under the guidance of the lord thereof. Lord Coke held this etymology most probable, because (he says) a manor signifies the jurisdiction and royalty incorporate, rather than the land or scite. Whatever the derivation of the word may be, it is certain, that the jurisdiction was, as our author himself informs us, at least as essential to the constitution of a manor, (or lordship or barony), as a mansion house ever was.

ages; 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, or *tenemental*, lands they distributed among their tenants; which from the different modes of tenure were 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 the free-socage lands (*k*); and from hence have arisen most of the freehold tenants who 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 or pasture to the lord and his tenants. Manors were formerly called baronies, as they still are lordships: and each lord or baron was empowered to hold a domestic court, called the court-baron, for redressing misdemesnors and nuisances within the manor; and for settling disputes of property among the tenants.

This court is an inseparable ingredient of every manor; and if the [*91] number* of suitors should so fail as not to leave sufficient to make a jury or homage, that is, two tenants at least, the manor itself is lost (14).

In the early times of our legal constitution, 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 holden of themselves: which do therefore now continue to be held under a superior lord, who is called in such cases the lord paramount over all these manors; and his seignory is frequently termed an honour, not a manor, especially if it hath belonged 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 others still more minute estates, 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: and also that the mesne lords themselves were so impoverished thereby, that they were disabled from performing their services to their own superiors. This occasioned, first, that provision in the thirty-second chapter of *magna carta*, 9 Hen. III. (which is not to be found in the first charter granted by that prince, nor in the great charter of king John) (*i*) that no man should either give or sell his land, without reserving sufficient to answer the demand of his lord; and afterwards the statute of Westm. 3. or *quia emptores*, 18 Edw. I. c. 1. 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

(*k*) Co. Cop. s. 3.

(*i*) See the Oxford editions of the charters.

(14) They must be two freeholders, holding of the manor subject to escheat, 3 T. R. 447. Bro. Abr. tit. Cause a remover, plec. pl. 35. A manor by reputation, but which has ceased to be a legal manor, by defect of suitors to the court, may yet retain some of its privileges, as a preserve for game, and the lord may still appoint a game-keeper. 10 East, 259. Watkins on Copyhold, 3 ed. 21, 22.

the fee, of whom such feoffor himself held it (15). But these provisions, not extending to the king's own tenants *in capite*, the like law concerning them is declared by the statutes of *prerogativa regis*, 17 Edw. II. c. 6. and of 34 Edw. III. c. 15. by which last all subinfeudations, previous to the reign of king *Edward I., were confirmed: but all subse- [* 92] quent to that period were left open to the king's prerogative. And from hence it is clear, that all manors existing at this day, must have existed as early as king Edward the First: for it is essential to a manor, that there be tenants who hold of the lord; and by the operation of these statutes, no tenant *in capite* since the accession of that prince, and no tenant of a common lord since the statute of *quia emptores*, could create any new tenants to hold of himself.

Now with regard to the folk-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 (*k*): and which also, on 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 (*l*), 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 removable 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 oath of fealty; which conferred a right of protection, and raised the tenant to a kind of estate superior to downright slavery, but inferior to every other condition (*m*). This they called villenage, and the tenants villeins, either from the word *vilis*, or else, as sir Edward Coke tells us (*n*), *a villa*; because they lived chiefly in villages, and were employed in rustic works of the most sordid kind: resembling the Spartan *helotes*, to whom alone the culture of the lands was consigned; their rugged masters, like our northern ancestors, esteeming war the only honourable employment of mankind.

*These villeins, belonging principally to lords of manors, were [*93] either villeins *regardant*, that is, annexed to the manor or land: or else they were *in gross*, or at large, that is, annexed to the person of the lord, and transferrable by deed from one owner to another (*o*). 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 (*p*): and their services were not only

(*k*) Wright, 215.
(*l*) Introd. Hist. Engl. 59.
(*m*) Wright, 217.
(*n*) 1 Inst. 116.
(*o*) Litt. s. 181.
(*p*) *Ibid.* s. 172.

(15) The words of the act are, "That it shall be lawful to every freeman to sell, at his own pleasure, his lands and tenements, or part of them, so that the feoffee shall hold the same of the chief lord of the same fee, by such service and customs *as his feoffor held before*."

base, but uncertain both as to their time and quantity (*q*). A villein, in short, was in much the same state with us, as lord Molesworth (*r*) describes to be that of the boors in Denmark, and which Stiernhook (*s*) 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 seize them to his own use, unless he contrived to dispose of them again before the lord had seized them; for the lord had then lost his opportunity (*t*).

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 (*u*); and, by the common law, the lord might also bring an action against the husband for damages in thus purloining his property (*w*). For the children of villeins were also in the same state of bondage with their [*94] pa*rents; whence they were called in Latin, *nativi*, which gave rise to the female appellation of a villein, who was called a *neife* (*x*). In case of a marriage between a freeman and a neife, or a villein and a freewoman, the issue followed the condition of the father, being free if he was free, and villein if he was villein; contrary to the maxim of the civil law, that *partus sequitur ventrem* (17). But no bastard could be born a villein, because of another maxim in our law, he is *nullius filius*: and as he can *gain* nothing by inheritance, it were hard that he should *lose* his natural freedom by it (*y*). The law however protected the persons of villeins, as the king's subjects, against atrocious injuries of the lord: for he might not kill, or maim his villein (*z*); though he might beat him with impunity, since the villein had no action or remedy at law against his lord, but in case of the murder of his ancestor, or the maim of his own person (18). Neifes indeed had also an appeal of rape in case the lord violated them by force (*a*).

Villeins might be enfranchised by manumission, which is either express or implied: express, as where a man granted to the villein a deed of manumission (*b*): implied, as where a man bound himself in a bond to his villein for a sum of money, granted him an annuity by deed, or gave him an estate in fee, for life or years (*c*); for this was dealing with his villein on the footing of a freeman, it was in some of the instances giving him an action against his lord, and in others vesting in him an ownership entirely inconsistent with his former state of bondage. So also if the lord brought an action against his villein, this enfranchised him (*d*); for as the lord might have a short remedy against his villein, by seizing his goods (which was more than equivalent to any damages he could recover), the

(*q*) *Ille qui tenet in villenagio faciet quicquid ei præceptum fuerit, nec scire debet vero quid facere debet in crastino, et semper tenebitur ad incerta.* (Bracton, *l.* 4, *tr.* 1, *c.* 28.) (16)
(*r*) *c.* 8.
(*s*) *de jure suconum*, *l.* 2, *c.* 4.
(*t*) Litt. s. 177.
(*u*) Co. Litt. 140.
(*w*) Litt. s. 202.
(*x*) *Ibid.* s. 187.
(*y*) *Ibid.* s. 187, 188.
(*z*) *Ibid.* s. 189. 194.
(*a*) *Ibid.* s. 190.
(*b*) *Ibid.* s. 204.
(*c*) S. 204, 5, 6.
(*d*) S. 208.

(16) Villeins were not protected by *magna charta*; *nullus liber homo capiatur vel imprisonetur*, &c. was cautiously expressed to exclude the poor villein; for, as lord Coke tells us, the lord might beat his villein, and if it be without cause, he cannot have any remedy.

(17) The rule of the civil law is followed where slavery exists. 20 Johns. R. 1.

(18) The damages recovered for the maim of his own person, might be immediately seized by his lord, and so no benefit accrued to him from such a suit. But the lord was subject to an indictment on the king's behalf. Litt. s. 194.

law which is always ready to catch at any thing in favour of liberty, presumed that by bringing this action he meant to set his villein on the same footing with himself, and therefore held it an implied *manumission. But, in case the lord indicted him for felony, it was otherwise; for the lord could not inflict a capital punishment on his villein, without calling in the assistance of the law. [*95]

Villeins, by these and many other means, in process of time gained considerable ground on their lords; and in particular strengthened the tenure of their estates to that degree, that they came to have in them an interest in many places full as good, in others better than their lords. For the good-nature and benevolence of many lords of manors having, time out of mind, permitted their villeins and their children to enjoy their possessions without interruption, in a regular course of descent, the common law, of which custom is the life, now gave them title to prescribe against their lords; and, on performance of the same services, to hold their lands, in spite of any determination of the lord's will. For though in general they are still said to hold their estates at the will of the lord, yet it is such a will as is agreeable to the custom of the manor; which customs are preserved and evidenced by the rolls of the several courts baron in which they are entered, or kept on foot by the constant immemorial usage of the several manors in which the lands lie. And, as such tenants had nothing to shew for their estates but these customs, and admissions in pursuance of them, entered on those rolls, or the copies of such entries witnessed by the steward, they now began to be called *tenants by copy of court-roll*, and their tenure itself a *copyhold* (*e*).

Thus copyhold tenures, as sir Edward Coke observes (*f*), although very meanly descended, yet come of an ancient house; for, from what has been premised, it appears, that copyholders are in truth no other but villeins, who, by a long series of immemorial encroachments on the lord, have at last established a customary right to those estates, which before were held absolutely at the lord's will (19). Which *affords a very substantial reason for the great variety 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 villenage was virtually 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 (*g*) testifies, that in all his time (and he was secretary to Edward VI.) he [*96]

(*e*) F. N. B. 12.
(*f*) Cop. s. 32.
(*g*) Commonwealth, b. 3, c. 10.

(19) In the second note to the case of *Grant* v. *Astle*, (Dougl. 725), we are informed, that Lord Loughborough doubted whether those who, like our author, refer the origin of copyhold tenure to a mitigation of the state of villenage, are not mistaken. His Lordship founded his doubts upon the fact, that; in those parts of Germany from which the Saxons migrated into England, there are still coexisting a species of tenure exactly the same with our copyhold estates, and likewise a complete state of villenage. But the last editor of Dougl. Rep. observes, this is by no means a conclusive argument. *All* villenage may not have been done away with throughout a country, but a *partial* mitigation of that state may have taken place: and, in those instances, the privileged villeins may hold by tenure resembling our copyhold, whilst, at the same time, others less favoured may remain in a state of pure villenage. It is highly improbable, that, in our own country, all villeins were at once elevated into the rank of copyholders; indeed we have every reason to be assured that the contrary was the fact. Lord Loughborough's doubts, therefore, cannot shake our author's statement in the text above, which is supported by all our best law writers on the subject, and is confirmed by the evidence of history, which furnishes distinct examples of the change of villein tenure into copyhold.

never knew any villein in gross throughout the realm; and the few villeins 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 especially 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 villeins. 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 villeins still (20)." By these several means the generality of villeins 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 (*h*).

[*97] *As a farther consequence of what has been premised, we may collect these two main principles, which are held (*i*) to be the supporters of the 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 (21).

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 by the precarious tenure of his lord's will (22).

(*h*) In some manors the copyholders were bound to perform the most servile offices, as to hedge and ditch the lord's grounds, to lop his trees, and 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 minstrel or piper for their diversion. (*Rot. Manser. de Edgware Comm. Mid.*) 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. 422.)

(*i*) Co. Litt. 58.

(20) The last claim of villenage, which we find recorded in our courts, was in the 15 Jac. I. Noy, 27. 11 Harg. St. Tr. 342.

(21) See this point considered, 1 Watkins on Copyhold, in the very able edition of that work by Vidal, tit. Grants, page 33. 51, &c. According to 3 Bos. & Pul. 346. 2 M. & S. 504. 2 Bar. & Ald. 189. and 2 Campb. 264, 5. without a special custom, the lord cannot make a new grant of waste to hold as copyhold, though slight evidence of a custom will suffice: but a custom for the lord to grant leases of the wastes of a manor without restriction is bad. 3 B. & A. 153.

(22) As soon as the death of a copyhold tenant is known to the homage, it should be presented at the next general court, and three several proclamations should be made at three successive general courts for the heir or other person claiming title to the land whereof such copyholder died seised, to come in and be admitted. Proclamation is said to be unnecessary where the heir appears in court, either personally or by attorney; but until such presentment and proclamations, the heir, though of full age, is not bound to come into court to be admitted. If, after the third proclamation, no such person claims to be admitted, a precept may be issued by the lord, or steward, to the bailiff of the manor, to seize the lands

The fruits and appendages of a copyhold tenure, that it hath in common with free tenures, 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 for 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 (*k*), 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. Wardship, in copyhold estates, par*takes both of that in chivalry and that in socage. [*98] Like that in chivalry, the lord is the legal guardian (23) (24); who usually assigns some relation of the infant tenant to act in his stead; and he, like the guardian in socage, is accountable to his ward for the profits.

(*k*) See ch. 28.

into the lord's hands for want of a tenant. Watkins on Copyholds, 239. H. Chitty's Descents, 165. 1 Keb. 287. Kitch. 246. 1 Leon. 100. 3 Id. 221. 4 Id. 30. 1 Scriv. 341, 2; but the seizure must be quousque, &c. and not as an absolute forfeiture, unless there be a custom to warrant it. 3 T. R. 162.

The admittance is merely as between the lord and the tenant, (Cowp. 741.) and the title of the heir to a copyhold is as against all but the lord complete without admittance. The ceremony of admittance is said to be for the lord's sake only; and therefore in one case the court refused a mandamus to the lord to admit a person who claimed by descent. But a mandamus ought to granted, if a proper case be laid before the court. 1 Wils. 283. Recently the court, as a matter of right, granted a mandamus to admit a person claiming by descent. 3 Bar. & Cres. 172. If the heir is refused admittance, he shall be terre-tenant, even though the lord loses his fine, Comyn. 245; for the lord is only trustee for the heir, and merely the instrument of the custom for the purpose of admittance. (1 Watk. Cop. 281. Cro. Car. 16. Co. Cop. s. 41.) So also is the steward; and therefore an admittance by him will be good, though he acts by a counterfeit or voidable authority, it being sufficient if in appearance he be steward. Co. Cop. 124.

(23) The statute of 9 Geo. I. c. 29, in relation to copyholders who are under age, and who are entitled by descent or surrender to the use of a last will, provides that, if they do not come in to be admitted in person, or by their *guardians*, or (having *no guardians*) by their attornies, (which the act enables them to appoint), at one of the three then next courts, the lord or steward, on due proclamation made, may appoint such *guardians* for the purpose of admission, and thereupon impose the just fines, (as to which see note 25). And if such fines are not paid as directed by that act, the lord is empowered to enter and take the profits (but without liberty to fell timber) till such fines and the consequent expenses are satisfied, rendering an account to the persons entitled. If the *guardians* pay such fines, then they may reimburse themselves in the like manner.

In the construction of this act, it was held both by Lord Eldon and Lord Erskine, that the Court of Chancery is not at liberty to speculate upon what the legislature might mean, beyond what it has expressed. The Court, it was said, must abide by the words of the act, which confine its operation to cases of descent or surrender to the use of a will; and do not apply to a title under a deed. Therefore, to a bill by a lord, praying a discovery, in aid of an action under the statute, for recovery of fines alleged to be due, a demurrer was allowed. (*Lord Kensington* v. *Mansell*, 13 Ves. 240).

However, as the statute of 55 Geo. III. c. 192, has since enacted, that all dispositions of copyhold estates by will shall be as effectual, to all intents and purposes, although no surrender shall have been made to the use of the will, as the same would have been if a surrender to the use of the will had been made; the statute of Geo. I. is, in this respect, enlarged. And, it is evident, the last-named statute materially qualifies the statement in the text, that "the lord is the legal guardian."

(24) This authority of the lord must be by virtue of a special custom in a manor; for by the 12 Cha. II. c. 24. s. 8 & 9, a father may appoint a guardian by his will as to the copyholds of his child; and though this custom is not abolished in terms, nor can be said to be taken away by implication in this statute, yet, where the custom does not exist in a manor, the better opinion is that the statute will operate, and even where the custom prevails, Mr. Watkins thinks, the father may by this statute appoint a guardian of the *person* of his child, if not of his copyhold property. See 2 Watk. on Copyh. 104, 5.

Of fines (25), some are in the nature of primer seisins, due on the death of each tenant, others are mere fines for the 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 copyholds, have tied them down to be *reasonable* in their extent; otherwise they might amount to a disherison of

(25) Fines, (as to which see note 23) may, by custom, be payable by a copyholder, in all, or any of the following cases, that is to say, on the change of the lord, or the change of the tenant, or for a license empowering the tenant to demise, or do any other act which, without such licence, would cause a forfeiture. A fine, on the change of the lord, can only be claimed when such change happens by his death; otherwise the lords by repeated alienations might oppress the tenants by multitude of fines. (Co. Litt. 59 b.) But, a custom that such a fine shall be due upon the death of the lord who admitted the copyholder, though he sold the lordship before his death, may be good; for such a custom is not open to the objection just stated, if no fine is claimed upon the death of the lord who succeeded to him, by whom the admission was granted. (*Lowther* v. *Raw*, 4 Br. P. C. 210, fol. edit. *Duke of Somerset* v. *France*, 1 Str. 657). When the fine is due on the change of the tenant, there the fine is payable as often as the tenancy is changed in any way. (*Earl of Bath* v. *Abney*, 1 Keny. 471, *S. C.* 1 Burr. 206.) If, by frequent alienations, the tenants choose to multiply the fines, they have no right to complain of the consequences of their own voluntary acts. (Co. Litt. 59 b). But if a copyholder in fee surrenders to the use of another for life, no more will pass than is requisite to serve the estate limited to the use; and he who made the surrender, retaining in himself the reversion, shall not pay any fine for re-admittance thereto, on the determination of the particular estate. (*Margaret Podger's case*, 9 Rep. 107. *Thrustout* v. *Cunningham*, 2 W. Bla. 1047. *Bullen* v. *Grant*, Cro. Eliz. 148). This rule, indeed, seems to hold generally, whenever a party comes in by virtue of his own old reversion; for a fine, upon a change of tenancy can be due only when a new estate arises. (The *King* v. The *Lord of the Manor of Hendon*, 2 T. R. 485). Upon analogous principle, a widow claiming her free bench, or dower, out of the copyhold estate of her deceased husband, need not be admitted; for her interest is considered as a continuing part of that estate which was in him. (*Howard* v. *Bartlett*, Hob. 181. *Vaughan* v. *Atkyns*, 5 Burr. 2787. *Walker* v. *Walker*, 1 Ves. sen. 55. *Jurden* v. *Stone*, Hutt. 18. *Waldo* v. *Bartlett*, Cro. Jac. 573).

It must be recollected, that the statute of uses does not extend to copyholds; (*Rigden* v. *Vallier*, 2 Ves. sen. 257); and as a use lies not in tenure, (Jenk. Cent. 190, pl. 92; and see *post*, p. 331, of this book), the person having the legal estate in a copyhold interest is the tenant to the lord; consequently, it will be upon his admission, or death, and not on the admission, or death, of the *cestui que use*, that a fine will become due. (*Trinity College, Cambridge* v. *Browne*, 1 Vern. 441. *Car* v. *Ellison*, 3 Atk. 75. *Burgess* v. *Wheate*, 1 W. Bla. 167. *Peachy* v. *Duke of Somerset*, 1 Str. 454).

Whether a fine be certain or not, must be decided by the rolls of the manor. (*Allen* v. *Abraham*, 2 Bulst. 32. *Lord Gerard's case*, Godb. 265). But, where the fine is considered to be arbitrary, it must not, upon the admission of a party entitled by descent, exceed two years' improved value of the lands, without deduction of land tax. (*Grant* v. *Astle*, 2 Doug. 725, note). But where the fine is payable by a purchaser, there, it has been said, the lord is not restricted to the amount of only two years' value. (*Pinsent's case*, cited 1 Freem. 496). And of course, where a lord is not compellable to admit, he may prescribe whatever terms he pleases, as the consideration for his voluntary grant of admission; to which terms the tenant will naturally refuse to accede, unless he thinks it for his advantage to do so. (*Paston* v. *Manne*, Hetl. 6. *Willowe's case*, 13 Rep. 3.).

So, in the manor of Harrow-on-the-hill, there is a custom, that, if a stranger purchase land, he shall pay five or six years' value for a fine; but one who was previously a copyholder, shall only pay two-pence, or some such very small sum; which, it has been said, lays a good ground for the custom of taking a large fine from a stranger upon his making his first purchase within the manor. (*Hayes* v. *Croyden*, cited 1 Show. 86). Dolben, J., said, (in *King* v. *Dilliston*, 1 Show. 86), he was of opinion, that if there was great delay on the part of an infant, as to the application for admission, that might justify the lord in demanding a larger fine than two years' value. But, since the statute of 9 Geo. I. mentioned in note 23, this question need never arise.

Till admission has been actually granted, the fine is not payable: but, after that admission, if the fine be not paid in reasonable time after demand thereof, the lord may maintain an action for it. (*Hobart* v. *Hammond*, 4 Rep. 28). The amount of the fine, where the copyholder was entitled to demand admission, will depend upon the value of the premises, where it is not ascertained by custom. The lord assesses it at his peril; if he assess it too high, he will not be entitled to recover it. But the assessment need not be entered on the court rolls, and there are cases in which it might be prejudicial to the lord if such entry were made. (*Lord Northwick* v. *Stanway*, 6 East, 57). See *post*, chap. 22, of this book, with respect to assurances of copyhold and customary estates.

the estate (26). No fine therefore is allowed to be taken upon descents and alienations (unless in particular circumstances) of more than two years' improved value of the estate (*k*). From this instance we may 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: and, where no custom has been suffered to grow up to the prejudice of the lord, as in this case of arbitrary fines, the law itself interposes with an equitable moderation, 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-socage*. This, he tells us (*l*), is such as has been held of the kings of England from the conquest *downwards; that the tenants herein, [*99] "*villana faciunt servitia, sed certa et determinata;*" that they cannot alienе or transfer their tenements by grant or feoffment, any more than pure villeins 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 an exalted species of copyhold, subsisting 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 socage in their certainty, he has therefore given a name compounded out of both, and calls it *villanum socagium*.

Ancient demesne (27) 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 (*m*). The tenants of these lands, under the crown, were not all of the same order or degree. Some of them, as Britton testifies (*n*), continued for a long time pure and absolute villeins, 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 (*o*). Others

(*k*) 2 Ch. Rep. 134.
(*l*) *l.* 4, *tr.* 1, *c.* 28.
(*m*) F. N. B. 14. 56.
(*n*) *c.* 66.
(*o*) F. N. B. 228.

(26) As, in the case where the lord is not bound to renew, or being so bound by the custom, the copyholder is allowed to put in more than one life at a time; and consequently several admissions are made at the same time, for which an increased fine may be fairly demanded. The rule generally is to take for the second life half what the immediate tenant for life pays, and for the third half what the second pays. But this must be understood of persons taking *successively*; for if they take as joint tenants, or as tenants in common, the single fine only would be due, to be apportioned in the latter case each paying severally. Watk. on Copyh. 1 vol. 312. Scriven on Copyh. 374. It seems that co-parceners are entitled to be admitted to copyhold tenements as one heir, and upon payment of one set of fees. 3 Bar. & C. 173.

(27) Besides the ancient demesne lands held freely by the grant of the king, and those called customary freeholds held of a manor which is ancient demesne, but not at the will of the lord, there is a third class similar to the last, except that the tenants hold by copy of court-roll at the will of the lord, and are called copyholders of base tenure. The neglect to keep in mind these distinctions, sometimes produces perplexity and confusion in the tenure in ancient demesne. See Scriven on Copyholds, 656.

were in a great measure enfranchised by the royal favour: being only bound in respect of their lands to perform some of the better sort of villein services, but those determinate and certain: as, to plough the king's land for so many days, to supply his court with such a quantity of provisions, or other stated services; all of which are now changed into pecuniary rents: and in consideration hereof they had many immunities and privileges granted to them (*p*); 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* (*q*) (28); not to pay toll or taxes; not to contribute to the expenses of knights of the shire; not to be put on juries; and the like (*r*).

[*100] *These tenants therefore, though their tenure be absolutely copyhold, yet have an *interest* equivalent to a freehold: for notwithstanding their services were of a base and villenous original (*s*), yet the tenants were esteemed in all other respects to be highly privileged villeins; and especially for that their services were fixed and determinate, and that they could not be compelled (like pure villeins) to relinquish these tenements at the lord's will, or to hold them against their own: "*et ideo*," says Bracton, "*dicuntur liberi*." Britton also, from such their freedom, calls them absolutely *sokemans*, and their tenure *sokemanries*; which he describes (*t*) to be "lands and tenements, which are not held by knight-service, nor by grand serjeanty, nor by petit, but by simple services, being, as it were, lands enfranchised by the king or his predecessors from their ancient demesne." And the same name is also given them in Fleta (*u*). Hence Fitzherbert observes (*w*), that no lands are ancient demesne, but lands holden in socage; that is, not in free and common socage, but in this amphibious subordinate class of villein-socage. And it is possible, that as this species of socage tenure is plainly founded upon predial services, or services of the plough, it may have given cause to imagine that all socage tenures arose from the same original; for want of distinguishing, with Bracton, between free socage or socage of frank tenure, and villein-socage or socage of ancient demesne.

Lands holden 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 co-

[*101] pyholds: *yet with this distinction (*x*), that in the surrender of these lands in ancient demesne, it is not used to say, "*to hold at the will of the lord*" in their copies, but only, "*to hold according to the custom of the manor*."

Thus have we taken a compendious view of the principal and funda-

(*p*) 4 Inst. 269.
(*q*) F. N. B. 11.
(*r*) *Ibid.* 14.
(*s*) Gilb. hist. of exch. 16. and 30.
(*t*) c. 66.
(*u*) *l.* 1, c. 8.
(*w*) N. B. 13.
(*x*) Kitchen on courts, 194.

(28) In an action of ejectment it may, by leave of the court, be pleaded in abatement, that the lands are part of a manor which is held in ancient demesne; but such a plea must be sworn to, and is not favoured. Because, to oust the court of K. B. of jurisdiction in such case, it must be shewn that *another* court *has jurisdiction*. 2 Burr. 1046.

mental points of the doctrine of tenures, both ancient and modern, in which we cannot but remark the mutual connexion and dependance 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 æra to 12 Car. II. all lay tenures are now in effect reduced to two species; *free* tenure in common socage, and *base* tenure by copy of court-roll.

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 eleemosyna* or free alms, is that whereby a religious corporation, aggregate or sole, holdeth lands of the donor to them and their successors for ever (*y*). The service which they were bound to render for these lands was not certainly defined; but only in general to pray for the soul of the donor and his heirs, dead or alive; and therefore they did no fealty, (which is incident to all other services but this) (*z*), because this divine service was of a higher and more exalted nature (*a*). 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 (*b*); the nature of the service being upon the reformation altered, and made conformable to the purer doctrines *of the [*102] 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 *frankalmoign* were discharged of all other services, except the *trinoda necessitas*, of repairing the highways, building castles, and repelling invasions (*c*): just as the Druids, among the ancient Britons, had *omnium rerum immunitatem* (*d*). 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 it (*e*). Wherein it materially differs from what was called *tenure by divine service* (29): 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 distrein, without any complaint to the visitor (*f*). All such donations are indeed now out of use: for, since the statute of *quia emptores*, 18 Edw. I. (30) none but the king can give lands to be holden by this tenure (*g*). 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 (31).

(*y*) Litt. s. 133.
(*z*) *Ibid.* s. 131.
(*a*) *Ibid.* s. 135.
(*b*) Bracton, *l.* 4, *tr.* 1, *c.* 28, § 1.
(*c*) Seld. *Jan.* 1. 42.
(*d*) Cæsar *de bell. Gall. l.* 6, *c.* 13.
(*e*) Litt. s. 136.
(*f*) *Ibid.* 137.
(*g*) *Ibid.* 140.

(29) Bac. Ab. Tenure, G.

(30) This statute enacts "that it shall be lawful to every freeman to sell at his own pleasure his lands and tenements, or part of them, so that the feoffee shall hold the same of the chief lord of the same fee by *such service and customs as his feoffor held before.*"

(31) In New-York, before the 1st January

CHAPTER VII.

OF FREEHOLD ESTATES OF INHERITANCE (1).

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 has therein: so that if a man grants all *his estate* in Dale to A and his heirs, 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 (2): 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, months, or days: or, lastly, it is infinite and unlimited, being vested in him and his representatives for ever. And this [*104] occasions the primary division of *estates into such as are *freehold*, and such as are *less than freehold*.

An estate of freehold (3), *liberum tenementum*, or franktenement, is defined by Britton (*b*) to be "the *possession* of the soil by a freeman." And St. Germyn (*c*) tells us, that "the possession of the land is called in the law of England the franktenement or freehold." 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

(a) Co. Litt. 345.
(b) c. 32.
(c) Dr. & Stud. b. 2, d. 22.

1830, the tenure of all lands derived from the *state* after the declaration of Independence was allodial: all held prior to the last mentioned time was held in free and common socage, free from all charges incident to knight service, and were so held from the 30th Aug. 1664. 1 R. L. (of 1813) p. 70. Since the 1st January, 1830, all lands are declared to be allodial, but subject to escheat, and all feodal tenures of every description, with all their incidents, are abolished, without however impairing any services or rents previously created. 1 R. S. 718. None of the local customs of England were introduced here, so that we have had no gavelkind, borough English, or copyhold tenure. The study of the ancient tenures is still necessary in order to understand old titles.

(1) For a more practical view of this subject in general, see Mr. Preston's admirable treatise on Estates, and Bac. Ab. and Com. Dig. title, Estates; Cru. Dig. index, tit. Estates; Fearne Con. Rem. index. tit. Estates.

(2) That is, *first*, the time during which his estate shall *continue*; and *secondly*, the time at which it shall *commence*.

(3) "Tenant in fee, tenant in tail, and tenant for life, are said to have a franktenement, so called, because it doth distinguish it from terms of years, chattels upon uncertain interests, lands in villenage, or customary or copyhold lands. And note, tenant by statute-merchant, statute-staple, or *elegit*, are said to hold land *ut liberum tenementum*, until their debt be paid; and yet in truth they have no freehold, but a chattel, which shall go to the executors. But *ut* is similitudinary, because they shall by the statutes have an assise, as tenants of the freehold shall have, and in that respect their estate hath a similitude of a freehold: but *nullum simile est idem*." (Co. Litt. 43 b). And see *post*, p. 387, of this book.

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 any 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 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 are conveyed with the same solemnity, therefore no others are properly freehold estates (4).

Estates of freehold (thus understood) are either estates *of inheritance*, or 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.

I. Tenant in fee-simple (or, as he is frequently styled, tenant in fee) (5) is he that hath lands, tenements, or hereditaments, to hold to him and his heirs for ever (*e*): 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 (*feodum*) is the same with that of feud or fief, and in its original sense it is *taken in [*105] contradistinction to *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 is said to be seised thereof absolutely *in dominico suo*, in his own demesne. But *feodum*, or fee, is that which is held of some superior, on condition of 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 vassal 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 *property* 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 subjects' lands are in the nature of *feodum* 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 feudal clogs which were laid upon the first

(*d*) § 59.
(*e*) Litt. § 1.
(*f*) See p. 46. 47.
(*g*) Of feuds, c. 1.
(*h*) Co. Litt. 1.
(*i*) *Praedium domini regis est directum dominium, cujus nullus est author nisi Deus.* Ibid.

(4) A freehold estate seems to be any estate of inheritance, or for life, in either a corporeal or incorporeal hereditament, existing in, or arising from, real property of free tenure; that is, now, of all which is not copyhold. And the learned Judge has elsewhere informed us, that "tithes and spiritual dues are freehold estates, whether the land out of which they issue are bond or free, being a separate and distinct inheritance from the lands themselves. And in this view they must be distinguished and excepted from other incorporeal hereditaments issuing out of land, as rents, &c. which, in general, will follow the nature of their principal, and cannot be freehold, unless the stock from which they spring be freehold also." 1 Bl. Tracts, 116. As to copyholders having a freehold interest, but not a freehold tenure, see 1 Prest. on Estate, 212. 5 East, 51.

(5) See in general, Preston on Estates, 1 vol. 419 to 511. and 2 vol. 1 to 68. Bac. Ab. tit. Estate in Fee-simple; Com. Dig. Estates, A.; Cru. Dig. 1. 17. and index, tit. Estate in Fee-simple; Fearne Con. Rem. 12. 304. 319. and index; Prest. on Conv. index, tit. Fee.

feudatory when it was originally granted. A subject therefore hath only the usufruct, and not the absolute property of the soil; or, as sir Edward Coke expresses 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 seised thereof *in his demesne, as of fee*." It is a man's demesne, *dominicum*, or property, since it belongs to him and his heirs for ever: yet this *dominicum*, property, or demesne, is strictly not absolute or allodial, 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.

[*106] *This is the primary sense and acceptation of the word *fee* (6). But (as sir Martin Wright very justly observes) (*l*) the doctrine, "that all lands are holden," having been so for 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 *allodium* 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 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

[*107] property is frequently *in one man, while the appendage or service is in another. Thus Caius may be seised *as of fee* of a way leading 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

(*k*) Co. Litt. 1.
(*l*) Of ten. 148.
(*m*) Co. Litt. 1.
(*n*) *Feodum est quod quis tenet sibi et haeredibus suis, sive sit tenementum, sive reditus, &c.* Flet. l. 5, c. 5, § 7.
(*o*) Litt. § 10.
(*p*) See page 20.
(*q*) *Servitus est jus, quo res mea alterius rei vel personae servit.* Fy. 8. 1. 1.

(6) See Definition, Prest. on Est. 1 vol. 419.

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 in law; there being no person in *esse*, 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 (7). Thus, in a grant to John for life, and afterwards to the heirs of Richard, the inheritance is plainly neither granted to John nor Richard, nor can it vest in the heirs of Richard till his death, *nam nemo est haeres viventis*: it remains therefore in waiting or abeyance, during the life of Richard (*r*) (8). 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*) (9).

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 feodal strictness; by which we may remember (*w*) it was required *that the form of the donation should be punctually pursued; [*108] or that, as Cragg (*x*) expresses it in the words of Baldus, "*dona-*

(*r*) *Co. Litt.* 342.
(*s*) *Litt.* § 646.
(*t*) *Ibid.* § 647.
(*u*) *Ibid.* § 1.
(*w*) See page 56.
(*x*) *l.* 1, *t.* 9, § 17.

(7) This rule and its exceptions are thus distinctly stated by Mr. Preston in his treatise on Estates, 1 vol. 216, 7. "It may be assumed as a general rule, that the first estate of freehold passing by any deed, or other assurance operating under the rules of the *common* law, cannot be put in abeyance. (5 Rep. 94. 2 Bla. Com. 165. 1 Burr. 107.) This rule is so strictly observed (2 Bla. Com. 165. 5 Rep. 194. Com. Dig. Abeyance), that no instance can be shewn in which the law allows the freehold to be in abeyance by the *act of the party*. The case of a *parson* is not an exception to the rule: for it is by the act of law, and not of the party, that the freehold is, in this instance, in abeyance, from the death of the incumbent till the induction of his successor, 1 Inst. 341. a; and considered as an exception, it is not within the reason of the rule.

(8) The inheritance or remainder in such a case has been said to be in abeyance, or *in nubibus*, or *in gremio legis*; but Mr. Fearne, with great ability and learning, has exposed the futility of these expressions, and the erroneous ideas which have been conveyed by them. Mr. Fearne produces authorities, which prove beyond controversy, "that where a remainder of inheritance is limited in *contingency* by way of use, or by devise, the inheritance in the mean time, if not otherwise disposed of, remains in the grantor and his heirs, or in the heirs of the testator, until the contingency happens to take it out of them." Fearne Cont. Rem. 513. 4th edit.

But although, as Mr. Fearne observes, "different opinions have prevailed in respect to the admission of this doctrine in conveyances at common law," (ib. 526.) yet he adduces arguments and authorities, which render the doctrine as unquestionable in this case as in the two former of *uses* and *devises*. If therefore in the instance put by the learned Judge, John should determine his estate either by his death, or by a feoffment in fee, which amounts to a forfeiture, in the lifetime of Richard, under which circumstances the remainder never could vest in the heirs of Richard; in that case, the grantor or his heir may enter and resume the estate.

(9) Mr. Fearne having attacked with so much success the doctrine of abeyance, the Editor may venture to observe, with respect to the two last instances, though they are collected from the text of Littleton, that there hardly seems any necessity to resort to abeyance, or *to the clouds*, to explain the residence of the inheritance, or of the freehold. In the first case, the whole fee-simple is conveyed to a sole corporation, the parson and his successors; but if any interest is not conveyed, it still remains, as in the former note, in the grantor and his heirs, to whom, upon the dissolution of the corporation, the estate will revert. See 1 book, 484. And in the second case, the freehold seems, in fact, from the moment of the death of the parson, to rest and abide in the successor, who is brought into view and notice by the institution and induction; for after induction he can recover all the rights of the church, which accrued from the death of the predecessor.

tiones sint stricti juris, ne quis plus donasse præsumatur 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 many exceptions (y) (10).

For, 1. It does not extend to devises by will (11); in which, as they

(y) Co. Litt. 9. 10.

(10) In New-York, since 1 January, 1830, the term "heirs" is not necessary to create a fee: but every grant or devise of real estate passes the party's whole estate, unless the intent to pass a less estate appears by express terms or by necessary implication. 1 R. S. 748.

(11) See *post*, the 23rd chapter of this book, page 380. Lord Coke teaches us (1 Inst. 322 b.) that it was the maxim of the common law, and not, as has been sometimes said, (*Idle* v. *Cook*, 1 P. Wms. 77), a principle arising out of the wording of the statutes of wills (32 Hen. VIII. c. 1. 34 Hen. VIII. c. 5), "*quod ultima voluntas testatoris est perimplenda, secundum veram intentionem suam.*" For this reason, Littleton says, (sect. 586), if a man deviseth tenements to another, *habendum in perpetuum*, the devisee taketh a fee simple; yet, if a deed of feoffment had been made to him by the devisor of the said tenements, *habendum sibi in perpetuum*, he should have an estate but for term of his life, for want of the word *heirs*. In *Webb* v. *Herring*, (1 Rolle's Rep. 399), it was determined, that a devise to a man and his successors, gives a fee. But, whether a devise to a man and his posterity would give an estate tail, or a fee, was doubted in the *Attorney-General* v. *Bamfield*. (2 Freem. 268). Under a devise to a legatee, "for her own use, and to give away at her death to whom she pleases," Mr. Justice Fortescue said, there was no doubt a fee passed: (*Tinewell* v. *Perkins*, 2 Atk. 103): and the same doctrine was held in *Goodtitle* v. *Otway*, (2 Wils. 7; see also *infra*). And a devise of the testator's lands and tenements to his executors, "freely to be possessed and enjoyed by them alike," was held, (in *Loveacres* v. *Blight*, Cowp. 357), to carry the fee: for, the testator had charged the estate with the payment of an annuity, which negatived the idea, that, by the word *freely* he only meant to give the estate *free of incumbrances*: the free enjoyment, therefore, it was held, must mean, free from all limitations. But, if the testator had not put any charge on the estate, this would not have been the necessary construction; nor would so extended a meaning have been given to those words against the heir, in any case where it was not certain that the testator meant more than that his devisee should possess and enjoy the estate, *free from all charges*, or, *free from impeachment of waste*. (*Goodright* v. *Barron*, 11 East, 224).

Thus, if a man devises all his freehold estate to his wife, *during her natural life*, and also *at her disposal afterwards, to leave it to whom she pleases*, the word *leave* confines the authority of the devisee for life to a disposition by will only. (*Doe* v. *Thorley*, 16 East, 443; and see *infra*). This, it will at once be obvious, is by no means inconsistent with what was laid down in *Tinewell* v. *Perkins*, as before cited. The distinction is pointed out in *Tomlinson* v. *Dighton*, (1 P. Wms. 171), thus: where a power is given, with a particular description and limitation of the estate devised to the donee of the power, the power is a distinct gift, coming in by way of addition, but will not enlarge the estate expressly given to the devisee; though, when the devise is general and indefinite, with a power to dispose of the fee, there the devisee himself takes the fee. In some few instances, indeed, courts of equity have inclined to consider a right of enjoyment for life, coupled with a power of appointment, as equivalent to the absolute property. (*Standen* v. *Standen*, 2 Ves. Junr. 594). A difference, however, seems now to be firmly established, not so much with regard to the party possessing a power of disposal, as out of consideration for those parties whose interests depend upon the non-execution of that power. (*Croft* v. *Slee*, 4 Ves. 64). Confining the attention to the former, there may be no reason why that which he has power to dispose of should not be considered as his property; but the interests of the latter ought not to be affected in any other manner than that specified at the creation of the power. (*Holmes* v. *Coghill*, 7 Ves. 506. *Jones* v. *Curry*, 1 Swanst. 73. *Reid* v. *Shergold*, 10 Ves. 383). When, therefore, a devise or bequest (for the principle seems to apply equally to realty as to personalty,) is made to any one expressly for life, with a power of appointment, by will only, superadded, that power (as already has been intimated) must be executed in the manner prescribed; for, the property not being absolute in the first taker, the objects of the power cannot take without a formal appointment; but, where the devise or bequest is made indefinitely, with a superadded power to dispose by will *or deed*, the property (as we have seen) vests absolutely. The distinction may, perhaps, seem slight, but it has been judicially declared to be perfectly settled. (*Bradley* v. *Westcott*, 13 Ves. 453. *Anderson* v. *Dawson*, 15 Ves. 536. *Barford* v. *Street*, 16 Ves. 139. *Nannock* v. *Horton*, 7 Ves. 398. *Irwin* v. *Farrer*, 19 Ves. 87). Where an estate is devised absolutely, without any prior estate limited to such uses as a person shall appoint, that is an estate in fee. (*Langham* v. *Nenny*, 3 Ves. 470). And the word "estate," when

were introduced at the time when the feodal rigour 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

used by a testator, and not restrained to a narrower signification by the context of the will, (*Doe* v. *Hurrell*, 5 Barn. & Ald. 21), is sufficient to carry real estate; (*Barnes* v. *Patch*, 8 Ves. 608. *Woollam* v. *Kenworthy*, 9 Ves. 142); and that not merely a life interest therein, but the fee, although no words of limitation in perpetuity are added. (*Roe* v. *Wright*, 7 East, 268. *Right* v. *Sidebotham*, 2 Dougl. 763. *Chorlton* v. *Taylor*, 3 Ves. and Bea. 163. *Pettiward* v. *Prescott*, 7 Ves. 545. *Nicholls* v. *Butcher*, 18 Ves. 195). And although the mere introductory words of a will, intimating in general terms the testator's intention to dispose of "all his estate, real and personal," will not of themselves pass a fee, if the will, in its operative clauses, contains no further declaration of such intent; still, where the subsequent clauses of devise are inexplicit, the introductory words will have an effect on the construction, as affording some indication of the testator's intention. (*Ibbetson* v. *Beckwith*, Ca. temp. Talb. 160. *Goodright* v. *Stocker*, 5 T. R. 13. *Doe* v. *Buckner*, 6 T. R. 612. *Gulliver* v. *Poyntz*, 3 Wils. 143. *Smith* v. *Coffin*, 2 H. Bla. 450). But, though slight circumstances may be admitted to explain obscurities, (*Randall* v. *Morgan*, 12 Ves. 77), and words may be enlarged, abridged, or transposed, in order to reach the testator's meaning, when such liberties are necessary to make the will consistent; (*Keiley* v. *Fowler*, Wilm. notes, 309); still, no operative and effective clause in a will must be controlled by ambiguous words occurring in the introductory parts of it, unless this is absolutely necessary in order to furnish a reasonable interpretation of the whole: (*Lord Oxford* v. *Churchill*, 3 Ves. & Bea. 67. *Hampson* v. *Brandwood*, 1 Mad. 388. *Leigh* v. *Norbury*, 13 Ves. 344. *Doe* v. *Pearce*, 1 Pr. 365): neither can a subsequent clause of limitation as to one subject of devise, be governed by words of introduction which, though clear, are not properly applicable to that particular subject; (*Nash* v. *Smith*, 17 Ves. 33. *Doe* v. *Clayton*, 8 East, 144. *Denn* v. *Gaskin*, Cowp. 661); whilst, on the other hand, an express disposition in an early part of a will must not receive an exposition from a subsequent passage, affording only a conjectural inference. (*Roach* v. *Haynes*, 8 Ves. 590. *Barker* v. *Lea*, 3 Ves. & Bea. 117, *S. C.* 1 Turn. & Russ. 416. *Jones* v. *Colbeck*, 8 Ves. 42. *Parsons* v. *Baker*, 18 Ves. 478. *Thackeray* v. *Hampson*, 2 Sim. & Stu. 217).

Where an estate is devised, and the devisee is subjected to a charge, which charge is not directed to be paid out of the rents and profits, the devise will carry a fee-simple, notwithstanding the testator has added no words of express limitation in perpetuity. Upon this point, the distinction is settled, that, where the charge is on the person to whom the land is devised (in general terms, not where he has an estate-tail given him, *Denn* v. *Slater*, 5 T. R. 337), there he must take the fee; but not where the charge is upon the land devised, and payable out of it. And the reason given, why in the former case the devisee must take the fee, is, because otherwise the estate may not be sufficient to pay the charge during the life of the devisee, which would make him a loser, and that could not have been the intention of the devisor. (*Goodtitle* v. *Maddern*, 4 East, 500. *Doe* v. *Holmes*, 8 T. R. 1. *Doe* v. *Clarke*, 2 New Rep. 349. *Roe* v. *Daw*, 3 Mau. & Sel. 522. *Baddeley* v. *Leapingwell*, Wilm. Notes, 235. *Collier's case*, 6 Rep. 16).

With regard to the operation of the word "hereditaments" in a will, Mr. Justice Buller said, there have been various opinions; in some cases it has been held to pass a fee, in others not; (*Doe* v. *Richards*, 3 T. R. 360); but the latter construction seems now to be firmly established as the true one. The settled sense of the word "hereditaments," Chief Baron Macdonald declared, (in *Moore* v. *Denn*, 2 Bos. & Pull. 251), is, to denote such things as may be the subject matter of inheritance, but not the inheritance itself; and cannot, therefore, by its own intrinsic force, enlarge an estate which is *primâ facie* a life estate, into a fee. It may have weight, under particular circumstances, in explaining the other expressions in a will, from whence it may be collected, in a manner agreeable to the rules of law, that the testator intended to give a fee: but in *Canning* v. *Canning*, (Mosely, 242), it was considered as quite settled by the decision in *Hopewell* v. *Ackland*, (1 Salk. 239), that a fee will not pass merely by the use of the word hereditament. (And see the same case of *Denn* v. *Moore*, in its previous stages of litigation, 3 Anstr. 787; 5 T. R. 563; as also *Pocock* v. *The Bishop of London*, 3 Brod. & Bing. 33).

Mr. Preston (in page 42, (4), of the 2nd volume of his Treat. of Est.) observes, the rule requiring the designation in terms, or by reference, of *heirs* in the limitation of estates, is confined, even with respect to common law assurances, to those cases in which the assurances are to *natural* persons; the rule does not take place where the assurances are made to corporations; or are made by matter of record; or operate only to extinguish a right, or a *collateral* interest; or which give one interest in lieu of another; or release the unity of title; or confer an equitable interest by way of contract, as distinguished from a conveyance. These, and other instances, as well as those of wills, to which the rule does not extend, he says, are more properly to be considered as not coming within the scope of the rule, or of the policy of the law which was the foundation of the rule, than as exceptions to the rule: and he devotes the greater part of the remainder of the volume cited to a collection and illustration of the different classes of cases in which a fee has been held to pass, though the word "heirs" has not been used. To this ample storehouse of materials, the reader who wishes to examine the subject more at length is referred.

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 word "heirs" 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 heirship is implied in the creation, unless it be otherwise specially provided: but in creations by patent, which *stricti juris*, the word "heirs" must be inserted, otherwise there is no inheritance. 4. In grants of lands to sole corporations and their successors, the word "successors" supplies the place of "heirs;" for as heirs take from the ancestor, so doth [*109] the successor from the predecessor (12). Nay, in *a grant to a bishop, or other sole spiritual corporation, in *frankalmoign*; the word "*frankalmoign*" supplies the place of "successors" (as the word "successors" supplies the place of "heirs") *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 word "successors" 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*). 5. Lastly, in the case of the king, a fee-simple will vest in him, without the word "heirs" or "successors" 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 word "heirs" is necessary to create an estate of inheritance.

II. We are next to consider limited fees (13), or such estates of inheritance as are clogged and confined with conditions, or qualifications, of any sort. 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*.

1. A base, or qualified fee, is such a one as hath a qualification subjoined thereto, and which must be determined whenever the qualification annexed to it is at an end. As, in the case of a grant to A. and his heirs, *tenants of the manor of Dale*; in this instance, whenever the heirs of A. cease to be tenants of that manor (14), the grant is entirely defeated. So,

(*z*) Co. Litt. 9.
(*a*) See book i. p. 494.
(*b*) See book i. p. 249.

(12) In a grant of lands to a sole corporation, the word "*heirs*" will not convey a fee any more than the word "*successors*" would in a grant to a natural person. For instance, a limitation to a parson in his politic capacity, and to his *heirs*, gives him only an estate for life. (Co. Litt. 8. b. 4 H. 5. 9.) The word *successors*, however, is not necessary to pass a fee to a sole corporation in the case of a gift in *frankalmoign*. Co. Litt. 94. b. But if unnecessary words be added to those which suffice to pass the fee, in grants to corporations sole, or natural persons, they may be rejected as surplusage; as if lands be granted to a bishop in his politic capacity, his *heirs* and successors, or to a man, his heirs and *successors*, the word "*heirs*" in the one case, and "*successors*" in the other, come within this rule. Co. Litt. 9. a.

(13) See in general, Bac. Ab. tit. Estate Tail; Com. Dig. tit. Estates; Prest. on Estates; Fearne's Con. Rem.; Cruise Dig. under the several heads in the respective indexes.

(14) Even for a short period, and they after-

when Henry VI. granted to John Talbot, lord of the manor of Kingston-Lisle in Berks, that he and his heirs, lords of the said manor, should be peers of the realm, by the title of barons of Lisle; 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 (15) is a fee, because by possibility it may endure [*110] 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: "*donatio stricta et coarctata* (*d*); *sicut certis haeredibus, quibusdam a successione exclusis*;" 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 of 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 of these limited, conditional fees, which could not 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. (16) Now we must observe, that, when any condition is performed, it is thenceforth entirely gone; and the thing to which it was before annexed, becomes absolute, *and wholly uncondi- [*111] tional. (17) So that, as soon as the grantee had any issue born,

(*c*) Co. Litt. 27.
(*d*) Flet. *l.* 3, *c.* 3, § 5.
(*e*) Plowd. 241.
(*f*) *Si quis terram haereditariam habeat, eam non vendat a cognatis haeredibus suis, si illi vire prohibitum sit, qui eam ab initio acquisivit, ut ita facere nequeat. LL. Aelfred. c.* 37.

wards resume it. Yelv. 150. Prest. on Estates, 20. But if A. die, the birth of a posthumous child will continue the tenancy and prevent the defeat of the grant. 1 Leon. 74.

(15) The proprietor of a qualified or base fee has the same rights and privileges over his estate, till the contingency upon which it is limited occurs, as if he were tenant in fee-simple. (*Walsingham's case*, Plowd, 557.)

(16) In the great case of *Willion* v. *Berkley*, (Plowd. 233), Lord C. J. Dyer said, upon the grant of a conditional fee, the fee-simple vested at the beginning; by having issue, the donee acquired power to alien, which he had not before, but the issue was not the cause of his having the fee, the first gift vested that: and (in p. 235 of S. C,) it was said, when land was given (before the statute *de donis*,) to a man and the heirs of his body, this was a fee simple, with a condition annexed, that, if the donee died without such heirs, the land should revert to the donor; to whom, therefore, the common law gave a *formedon in reverter*. But he was not entitled to a writ of *formedon in remainder*, for no remainder could be limited upon such an estate, which, though determinable, was considered a fee-simple until the statute *de donis* was made: since the statute we call that an estate-tail, which before was a conditional fee; (Ibid. p. 239); and whilst it continued so, if the donee had issue, he had power to alienate the fee, and to bar not only the succession of his issue, but the reversion of the donor in case his issue subsequently failed. To redress which evils (as they were thought to be), the act *de donis conditionalibus* was made. (Ibid. p. 242, 245).

(17) Where the person to whom a condi-

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 aliene 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 aliene the land, the course of descent was not altered by this performance of the condition; for if the issue had afterwards died, and then the tenant, or original grantee, had died, without making any alienation; the 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-simples took care to aliene as soon as they had performed the condition by having issue; and afterwards repurchased the lands, which gave them a fee-simple absolute, that would descend to the heirs general, according to the course of the common law. And 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.

[*112] *The inconveniences which attended these limited and fettered inheritances, were probably what induced the judges to give way to this subtle finesse of construction (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 (*l*) (commonly called the statute *de donis conditionalibus*) to be made; which paid 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 revived in some sort the ancient feodal 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.

(*g*) Co. Litt. 19. 2 Inst. 333.
(*h*) Co. Litt. *ibid.* 2 Inst. 334.
(*i*) Co. Litt. 19.
(*k*) 1 Inst. 19.
(*l*) 13 Edw. I. c. 1.

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tional fee was limited had issue, and suffered it to descend to such issue, they might alien it. But, if they did not alien, the donor would still have been entitled to his right of reverter; for, the estate would have continued subject to the limitations contained in the original donation. (*Nevil's case*, 7 Rep. 124. *Willion* v. *Berkley*, Plowd. 247). This authority supports the statement of our author, to a similar effect, lower down in the page; but it hardly authorizes the assertion, that, after issue, the estate became *wholly* unconditional.

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 they divided the estate into two parts, leaving in the donee a new kind of particular estate, which they denominated a *fee-tail* (*m*); and investing 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 [*113] 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 savour 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 savour 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 these last, if granted to a man and the heirs of his body, the grantee hath still a fee-conditional at common law, as before the statute; and by his alienation (after issue born) may bar the heir or reversioner (*r*) (17), (18). An estate to a man and his heirs for

(*m*) The expression *fee-tail*, or *feodum talliatum*, was borrowed from the feudists (See Crag. *l.* 1, *t.* 10, *s.* 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 *tailer* and the Italian *tagliare* are formed. (Spelm. *Gloss.* 531.)

(*n*) 2 Inst. 335.

(*o*) § 13.

(*p*) 1 Inst. 19, 20.

(*q*) 7 Rep. 33.

(*r*) Co. Litt. 19, 20.

(17) If an annuity is granted out of personal property to a man and the heirs of his body, it is a fee-conditional at common law, and there can be no remainder or further limitation of it; and when the grantee has issue, he has the full power of alienation, and of barring the possibility of its reverting to the grantor by the extinction of his issue. 2 Ves. 170. 1 Bro. 325.

But out of a term for years, or any personal chattel, except in the instance of an annuity, neither a fee-conditional nor an estate-tail can be created; for if they are granted or devised by such words as would convey an estate-tail in real property, the grantee or devisee has the entire and absolute interest without having issue; and as soon as such an interest is vested in any one, all subsequent limitations of consequence become null and void. 1 Bro. 274. Harg. Co. Litt. 20. Fearne, 345, 3d ed. Roper on Legacies, chap. xvii. see post 398.

(18) An annuity, when granted with words of inheritance, is descendible. It may be granted in fee: of course it may as a qualified or conditional fee; but it cannot be entailed, for it is not within the statute *de donis*; and, consequently, it has been held, there can be no remainder limited upon such a grant: but it seems there may be a limitation by way of executory devise, provided that is within the prescribed limits, and does not tend to a perpetuity. An annuity may be granted as a fee simple conditional; but then, it must end or become absolute, in the life of a particularized person. (*Turner* v. *Turner*, 1 Br. 325. *S. C.* Ambl. 782. *Earl of Stafford* v. *Buckley*, 2 Ves. senr. 180). An annuity granted to one, and the heirs male of his body, being a grant not coming within the statute *de donis*, all the rules applicable to conditional fees at common law still hold, with respect to such a grant. (*Nevil's case*, 7 Rep. 125).

The instance of an annuity, charging merely the person of the grantor, seems to be the only one in which a fee-conditional, of a personal chattel, can new be created. Neither leaseholds, nor any other descriptions of personal property (except such annuities as aforesaid) can be limited so as to make them transmissible in a course of succession to heirs: they must go to personal representatives. (*Countess of Lincoln* v. *Duke of Newcastle*, 12 Ves. 225. *Keiley* v. *Fowler*, Wilm. Notes, 310). There is consistency, therefore, in holding, that the very same words may be differently construed, and have very different operations, when applied, in the same instru-

another's life cannot be entailed (*s*): for this is strictly no estate of 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*) (19). 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. [*114] And this 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 lands be given to a man, and his *heirs male of his body begotten*, this is an estate in tail male general; but if to a man and the heirs *female of his body on his present wife begotten*, this is an estate in tail female special. And, in case of an entail male, the heirs female shall never inherit, nor any derived from them; nor, *è converso*, the heirs male, in case of a gift in tail female (*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 (*z*).

(*s*) 2 Vern. 225.
(*t*) 3 Rep. 8.
(*u*) Litt. § 14, 15.
(*w*) *Ibid.* § 16. 26, 27, 28, 29.
(*x*) *Ibid.* § 21, 22.
(*y*) *Ibid.* § 24.
(*z*) Co. Litt. 25.

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mant, to different descriptions of property, governed by different rules. (*Forth* v. *Chapman*, 1 P. Wms. 667. *Elton* v. *Eason*, 19 Ves. 77). Thus, the same words which would only give an estate tail in freehold property, will carry the absolute interest in leasehold, or other personal property. (*Green* v. *Stevens*, 19 Ves. 73. *Crooke* v. *De Vandes*, 9 Ves. 203. *Tothill* v. *Pitt*, 1 Mad. 509).

(19) Also a gift to the heirs of the body of a person to take as purchasers eo nomine, will give an estate to his issue in successive order, in the same manner as if the estate had been given to the father. (Co. Litt. 26. b.) Or, if there be a grandfather, father and son, a gift to the grandfather, and to his heirs of the body of his son, will be an estate tail in the grandfather. Co. Litt. 20. b. 12 H. 4. 2.

As the word *heirs* is necessary to create a fee, so in farther limitation of the strictness of the feodal donation, the word *body*, or some other words of procreation, are necessary to make it a fee-tail, and ascertain to what heirs in particular *the fee is limited. If therefore either [*115] the words of inheritance or words of procreation be omitted, albeit the others are inserted in the grant, this will not make an estate-tail. As, if the grant be to a man and his *issue of his body*, to a man and his *seed*, to a man and his *children*, or *offspring*; all these are only estates for life, there wanting the words of inheritance, his heirs (*a*). So, on the other hand, a gift to a man, and his *heirs male* or *female*, is an estate in fee-simple, and not in fee-tail; for there are no words to ascertain the body out of which they shall issue (*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 *seed*, or to a man and his *heirs male*; or by other irregular modes of expression (*c*) (20).

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 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 (*e*).

The *incidents* to a tenancy in tail, under the statute Westm. 2. are chiefly these (*f*). 1. That a tenant in tail may commit *waste* on the estate-tail, by felling timber, pulling down houses, or the like, without being impeached, or called to account for the same. *2. That [*116] 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) (*g*) occasioned infinite difficulties and disputes (*h*). 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

(*a*) Co. Litt., 20.
(*b*) Litt. § 31. Co. Litt. 27.
(*c*) Co. Litt. 9. 27.
(*d*) Litt. § 17.
(*e*) *Ibid.* § 19. 20.
(*f*) Co. Litt. 224.
(*g*) Com. Recov. 5.
(*h*) 1 Rep. 131.

(20) Or to a man and his children, if he has no children at the time of the devise (6 Co. 17.); or to a man and his posterity (1 H. Bl. 447.); or by any other words, which shew an intention to restrain the inheritance to the descendants of the devisee. See 381, post.

estate with their payment, he might also have defeated his issue, by mortgaging it for as much as it was worth: innumerable latent entails were produced to deprive purchasers of the lands they had fairly bought; of suits in consequence of which our ancient 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 (*i*). 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 contrivance 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 [*117] by the judges to be a *sufficient bar of an estate-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 was never 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 on 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 inquiry. 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 introduced, 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 inheritances, and thereby subjecting the lands to forfeiture, the rapacious prince [*118] then reigning, finding them frequently *resettled in a similar manner to suit the convenience of families, had address enough to procure a statute (*p*), 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.

(*i*) Co. Litt. 19. Moor, 156. 10 Rep. 38.
(*k*) 1 Rep. 131. 6 Rep. 40.
(*l*) 10 Rep. 37, 38.
(*m*) Pigott. 8.
(*n*) Year book. 12 Ed. IV. 14. 19. Fitzh. *Abr. tit. faux recov.* 20 Bro. *Abr. ibid.* 30. *tit. recov. in value*, 19. *tit. taile*, 36.
(*o*) 11 Hen. VII. c. 20. 7 Hen. VIII. c. 4. 34 & 35 Hen. VIII. c. 20. 14 Eliz. c. 8. 4 & 5 Ann. c. 16. 14 Geo. II. c. 20.
(*p*) 26 Hen. VIII. c. 13.

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 (*q*), 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, though willing to construe that statute as favourably as possible for the defeating of entailed estates, yet hesitated at giving fines so extensive a power by mere implication, when the statute *de donis* had expressly declared, that they would *not* be a bar to estates-tail. But the statute of Hen. 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 [*119] in the crown, shall be of any force and effect. Which is allowing, indirectly and collaterally, their full force and effect with respect to ordinary estates-tail, where the royal prerogative is not concerned.

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 (21). And, by the construction put on the statute 43 Eliz. c. 4. an appointment (*v*) 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 aliene 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 (22).

(*q*) 4 Hen. VII. c. 24.
(*r*) Co. Litt. 372.
(*s*) 33 Hen VIII. c. 39. § 75.
(*t*) Stat. 21 Jac. I. c. 19.
(*v*) 2 Vern. 453. Chan. Prec. 16.

(21) 6 Geo. IV. c. 16. s. 65.

(22) In New-York an act was passed 12th July 1782, and another 23rd February 1786, converting all estates-tail then in existence

CHAPTER VIII.

OF FREEHOLDS, NOT OF INHERITANCE (1).

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 the term of his own life, or for that of any other person, or for more lives than one: in any of which cases he is styled tenant for life; only when he holds the estate by the life of another, he is usually called tenant *per autre vie* (*b*). These estates for life are, like inheritances, of 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 rights 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.

[*121] *Estates for life may be created, not only by the express words before mentioned, but also by a general grant, without defining or limiting any specific estate. As, if one grants to A. 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 a term of life generally, shall be construed to be an estate for the life *of the grantee* (*e*); in case the grantor hath authority to make such grant: for an estate for a man's own life is more beneficial and of a higher nature than for 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

(*a*) Wright, 190.
(*b*) Litt. § 56.
(*c*) pag. 58.
(*d*) Co. Litt. 42.
(*e*) Co. Litt. 42.
(*f*) *Ibid.* 36.

or thereafter to arise into fees-simple. 1 R. L. (of 1813) p. 52. The Rev. Laws of 1830 (1 R. S. 722,) have a similar provision; with this exception, that if a *remainder in fee* shall be limited upon an estate-tail, it shall be valid as a contingent limitation upon a fee, and shall vest in possession on the death of the first taker, without issue living at the time of such death. So that the only estates of inheritance in New-York are the peculiar estates last mentioned, estates in fee-simple absolute, and in fee-simple conditional; perhaps the statutory estate above mentioned may be deemed a fee-simple conditional. All fines and common recoveries are abolished. 2 R. S. 343.

(1) See in general, Bac. Ab. Estate for Life and Occupancy; Com. Dig. Estates, E. & F.; 1 Cru. Dig. 59. and index, tit. Estate for Life; 1 Prest. on Conv. 43. 84; Fearne Con. Rem. index, tit. Life Estate.

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*).

*The *incidents* to an estate for life are principally the following; [*122] 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 to 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).

2. Tenant for life, or his representatives, shall not be prejudiced by any sudden determination of his estate, because such a determination is contingent and uncertain (*n*) (3). Therefore if a tenant for his own life sows

(*g*) Co. Litt. 42. 3 Rep. 20.
(*h*) 2 Rep. 48.
(*i*) See book i. p. 132.
(*k*) See p. 35.
(*l*) Co. Litt. 41.
(*m*) *Ibid.* 53.
(*n*) *Ibid.* 55.

(2) See p. 283, post, in what cases the tenant for life may cut down timber, as for necessary repairs, &c. and commit what in law is called waste.

(3) As to emblements in general, what they are, and who shall have them, see Com. Dig. Biens, G. 1, 2; Vin. Ab. Emblements and Executors, U.; Bac. Ab. Executors, H. 3.; Co. Litt. 55. a. b.; Toller's Law of Executors, book 2. ch. 4, &c.; 3 Atk. 16. Emblements are corn, peas, beans, tares, hemp, flax, and annual roots, as parsnips, carrots, and turnips, id. ibid; and if a lessee for life of a hop ground dies in August before severance of the hops, the executor shall have them, though on ancient roots, for all these are produced by great manurance and industry. Cro. Car. 515. Co. Litt. 55. b. note 1. Toller, b. 2, ch. 4. But all other roots and trees not annual, and fruits on the trees, though ripe, and grass growing, though ready to be cut into hay, and though improved by nature, and the labour and industry of the occupier, by trenching, or sowing hay seed, are not emblements, but belong to the remainderman or heir. Com. Dig. Biens, G. 1. Toller, b. 2. ch. 4.

With respect to who is entitled to emblements, lord Ellenborough observed, in 8 East, 343, that the distinction between the heir and devisee in this respect, is capricious enough. In the testator himself, the standing corn, though part of the realty, subsists for some purposes, as a chattel interest, which goes on his death to his executors, as against the heir; though, as against the executors, it goes to the devisee of the land, who is in the place of the heir, unless otherwise directed. This is founded upon a presumed intention of the devisor in favour of the devisee. But this again may be rebutted by words which shew an intent that the executor shall have it. A devise to the executor of all the testator's *stock* on the farm, entitles him to the crops, in opposition to the devisee of the estate. 6 East, 604. note d. 8 East, 339. Com. Dig. Biens, G. 2. Every one who has an uncertain estate or interest, if his estate determines by the *act of God*, before severance of the corn, shall have the emblements, or they go to his executor or administrator. As, if a tenant for life sow the land, and die before severance, or tenant pur auter vie and cestuy

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 [*123] 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 *cestuy que vie*, or he on whose life the land is held, dies after the corn sown, the tenant *per 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 a permanent or natural profit of the earth (*r*). For when a man plants a tree, he cannot be pre-

(*o*) *Feud. l.* 2, *t.* 28.
(*p*) 5 Rep. 116.
(*q*) Co. Litt. 55.
(*r*) Co. Litt. 55, 56. 1 Roll. Abr. 728.

que vie, dies, or tenant for years if he so long live, or the lessee of tenant for life, or if a lessee strictly at will, die, or if tenant by statute merchant, &c. sow, and be satisfied by a casual and sudden profit before severance. Co. Litt. 55. b. Com. Dig. Biens. G. 2. However, a lessee of tenant for life is bound to take notice of the time of the death, and if, in ignorance of it, he *afterwards* sow corn, he is not entitled to it. Bro. Ab. Notice, pl. 15. Vin. Ab. Notice, A. 2. pl. 5.

It has been held, that if a devise be to A. for life, remainder to B., and before severance A. dies, B. shall have them, Cro. Eliz. 61. Win. 51. Godb. 159; and that if a devise be to A. for life, who dies before severance, he in reversion shall have them, Cro. Eliz. 61; but the contrary is established, and that the executor of the tenant for life shall have them, it being for the benefit of the kingdom, which is interested in the continual produce of corn, and will not suffer them to go to the remainder man. 3 Atk. 16.

If the particular estate determine by the *act of another*, as if lessee at will sow the land, and before the severance the lessor determines his will, the lessee shall have the emblement. Co. Litt. 55.

But if a person have *a certain interest, and knows the determination of it*, he shall not have the emblements at the end of his term, unless he can establish a right to an away going crop, as sometimes exists by custom or local usage, as if lessee for years sow his land, and before the corn be severed his term ends, the lessor, or he in reversion, shall have the corn, Co. Litt. 55; and if an outgoing tenant sow corn even under a bona fide supposition that he is entitled to an away going crop, when he is not so, and after the expiration of his tenancy cut and carry away the corn, the landlord may support trover for the same. 1 Price Rep. 53.

So if a person determines his estate by his own act, he shall not have emblements, as if lessee at will sow and afterwards determines the will before severance. Co. Litt. 56. b. 5 Co. 116. Cro. Eliz. 461. So if an estate determine by forfeiture for condition broken. Co. Litt. 55. b. 1 Roll. 726. 1. 33. 36. Com. Dig. Biens, G. 2.

sumed to plant it in contemplation of any present profit; but merely with a prospect of its being useful to himself in future, and 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 (4). 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 the lessors, the original tenants for life. The same; for the law of estovers and emblements with *regard to the tenant for life, is also law [*124] 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 rateable proportion of rent from the last day of payment to the death of such lessor (5).

(*s*) Co. Litt. 55.
(*t*) Cro. Eliz. 461. 1 Roll. Abr. 727.
(*u*) 10 Rep. 127.
(*v*) Stat. 11 Geo. II. c. 19, § 15.

(4) That statute enables an incumbent to bequeath by will, the corn and grain growing upon the glebe-land, manured and sown at his own cost. s. 6. But a parson who resigns his living is not entitled to emblements. Bulwer v. Bulwer, 2 B. & A. 470.

(5) At common law, if tenant in fee die after sunset and before midnight of the last day when the rent becomes due, it shall go to the heir, and not to the executor, for the rent is not due till the last instant of the day. 1 Saund. 287. id. note 17. 2 Madd. 268.

Where the mischief recited in the act of 11 Geo. II. c. 19, does not apply, and the lease does not determine on the death of the tenant for life, the case is not affected by it; and therefore if a tenant for life, with a leasing power, demises the premises pursuant to such power, and dies before the rent becomes due, as the rent, and the means of recovering it, will go to the remainderman or reversioner, (see 3 Maule & S. 382.) and will not be lost, the case is not within the act, and the executors of the tenant for life are not entitled to any proportion of the accruing rent. 1 P. Wms. 177. 2 Madd. 268. But if the lease or demise of the tenant for life is not within the power, and determines on his death, this is a case of appointment under the statute. 1 Swanst. 337. and the learned note of the reporter, 357. It seems that the executors of tenants in tail, who had made leases void, as against the remainderman, and dies without issue, are within the equity of the statute. Ambl. 198. 2 Bro. C. C. 639. 8 Ves. 308. At all events, if the remainderman has received the whole rent, it seems settled he shall account in equity to the executor of the tenant in tail, id. ibid.; and which doctrine seems to apply to the successor of a parson who has received a composition for tithe jointly accruing in the lifetime of the deceased incumbent. 8 Ves. J. 308. 10 East, 334. It is laid down in 10 Co. 128. and Christian's edition, that this act is confined to the death of the landlord, who holds for his own life, and that therefore it seems if tenant pur auter vie leases, and the cestuy que vie dies, the lessee is not compellable to pay any rent from the last day of payment before the death of cestuy que vie. In 3 Taunt. 331. Mansfield, C. J. expresses his doubts, see 2 Saund. 288. D.; and it should seem that the case is within the act. See other cases as to apportionment, 1 P. Wms. 392. 3 Atk. 260. 583. 2 Ves. 672. Amb. 198. 279. 2 Bro. 659. 3 Bro. 99. 2 P. Wms. 502. There is no apportionment of an annuity, unless expressly provided for, 1 Swanst. 349. in notes;

II. The next estate for life is of the legal kind, 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, becomes extinct: in either of these cases the surviving tenant in special tail becomes tenant in 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*, [*125] 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 *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 (*y*). 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 (*z*).

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. (*a*) (6); or, he is tenant in tail, with many of

(*w*) Litt. § 32.
(*x*) Roll. Rep. 184. 11 Rep. 80.
(*y*) Co. Litt. 28.
(*z*) Litt. § 34. Co. Litt. 28.
(*a*) Co. Litt. 27.

but if there has been judgment on an annuity bond standing as a security for future payments of an annuity, the court will give plaintiff leave to take out execution for a proportion of a quarter, up to grantee's death, 2 Bla. R. 1017. 11 Ves. J. 361; and in equity the maintenance of an infant is always apportioned. Id. ibid. 1 Swanst. 350. There is no apportionment of dividends in the case of tenant for life; but there is of interest of mortgages, as that is perpetually accruing. 2 P. Wms. 76. 1 Swanst. 349. in notes. See 1 R. S. 747.

(6) See *post*, chapter 18 of this book, p. 283. All authorities agree, that tenant in tail after possibility of issue extinct is dispunishable for waste: (Doctor and Student, Dial. 2, c. 1): but, in *Herlakenden's case*, (4 Rep. 63), C. J. Wray is reported to have said, that, although tenant in tail after possibility, &c. cannot be punished in waste for cutting down trees upon the land he holds as such tenant; yet he cannot have the absolute interest in the trees, and, if he sells them, cannot retain the price. This *dictum* is noticed by Mr. Hargrave in his 2nd note to Co. Litt. 27 b; and is countenanced by another *dictum* in *Abraham* v. *Bubb*, (2 Freeman, 53); Mr. Christian, too, in his annotation upon the passage of the text, considers it as settled law, that, if a tenant in tail after possibility, &c., cuts down trees, they do not become his property, but will belong to the party who has the first estate of inheritance. In opposition however to the

the restrictions of a tenant for life; as to forfeit his estate, if he alienes it in fee-simple (*b*): 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. [*126] But, in general, the law looks upon this estate as equivalent to an estate for life only; and, as such, will permit this tenant to exchange his estate with a tenant for life, which exchange can only be made, as we shall see hereafter, of estates that are equal in their nature.

III. Tenant *by the curtesy of England* (7), is where a man marries a woman seised of an estate of inheritance, that is, of lands and tenements

(*b*) Co. Litt. 28.

doctrine imputed to C. J. Wray, and the *obiter dictum* in *Abraham* v. *Bubb*, it was distinctly resolved by the whole court of King's Bench. (consisting of Coke, Crooke, Doddridge, and Haughton), in the case of *Bowles* v. *Bertee*, (1 Rolle's Rep. 184, *S. C.* 11 Rep. 84), that a tenant after possibility has the whole property in trees which he either causes to be cut down, or which are blown down, on the estate. And this seems to be now firmly settled by the case of *Williams* v. *Williams*: when that case was before Lord Chancellor Eldon, his lordship (as reported in 15 Ves. 427) intimated, that he could not imagine how it was doubted that the tenant, being dispunishable, had not, as a consequence, the property in the trees. That it was singular there should be an argument raised, that such a tenant should be restrained from committing *malicious* waste, by cutting ornamental timber, (*Garth* v. *Cotton*, 1 Dick. 209), if it was understood to be the law that he could not commit waste of *any* kind. (*Attorney-General* v. *Duke of Marlborough*, 3 Mad. 539). However, as all the previous cases in which tenant in tail after possibility of issue extinct had been determined to be dispunishable of waste, were cases in which the tenant had once been tenant in tail *with* the other donee in possession; and in the case of *Williams* v. *Williams* the tenant claimed in *remainder*, after the death of the joint donee; Lord Eldon thought it advisable, before he made a final decree, to direct a case to the court of King's Bench, not describing the claimant as tenant in tail after possibility of issue extinct, but stating the limitations of the settlement under which the claim was made. The case was accordingly argued at law, and a certificate returned: that the claimant was tenant in tail after possibility of issue extinct; was unimpeachable of waste upon the estate comprised in the settlement; and, having cut timber thereon, was entitled to the timber so cut as her own property. (12 East, 221).

A tenant for life, without impeachment of waste, and a tenant in tail after possibility of issue extinct, seem to stand upon precisely the same footing in regard to all questions of waste: (*Attorney-General* v. *Duke of Marlborough*, 3 Mad. 539): and a tenant for life, dispunishable for waste, is clearly not compellable to pursue such a course of management of the timber upon the estate, as a tenant in fee might think most advantageous. Whatever trees are fit for the purpose of timber he may cut down, though they may be still in an improving state. (*Smythe* v. *Smythe*, 2 Swanst. 252. *Brydges* v. *Stevens*, 2 Swanst. 152, n. *Coffin* v. *Coffin*, Jacob's Rep. 72). No tenant for life, however, of any description, although not subject to impeachment for waste, must cut down trees planted for ornament or shelter to a mansion-house, or saplings not fit to be felled as timber, for this would not be a fairly beneficial exercise of the license given to him, but a malicious and fraudulent injury to the remainder-man. (*Chamberlayne* v. *Dummer*, 2 Br. 549. *Cholmeley* v. *Paston*, 3 Bing. 212. *Lord Tamworth* v. *Lord Ferrers*, 6 Ves. 420). In this respect, the claim which might, perhaps, be successfully asserted in a court of law, as to the right of felling any timber whatsoever, is controlled in courts of equity: (*Marquis of Downshire* v. *Lady Sandys*, 6 Ves. 114. *Lord Bernard's case*, Prec. in Cha. 455): and that even on the application of a mere tenant for life in remainder. (*Davies* v. *Leo*, 6 Ves. 787). And not only wanton malice, but fraud and collusion, by which the legal remedies against waste may be evaded, will give to courts of equity a jurisdiction over such cases, often beyond, and even contrary to, the rules of law. (*Garth* v. *Cotton*, 3 Atk. 755).

A tenant for life, without impeachment of waste, has no interest in the timber on the estate whilst it is standing; nor can he convey any interest in such growing timber to another: (*Cholmeley* v. *Paston*, 3 Bing. 211): if, in execution of a power, he should sell the estate, with the timber growing thereon, he cannot retain, for his own absolute use, that part of the purchase money which was the consideration for the timber; though, before he sold the estate, he might, it seems, have cut down every sizeable tree, and put the produce into his pocket. (*Doran* v. *Wiltshire*, 3 Swanst. 701). And the peculiar privileges which a tenant for life after possibility of issue extinct is allowed to enjoy, because the inheritance was once in him, are personal privileges; if he grants over his estate to another, his grantee will be bare tenant for life. (2 Inst. 302. *George Ap. Rice's case*, 3 Leon. 241).

(7) See in general, 2 Saunders, 45. n. 5. 46. n. q. 382. a. b. Bac. Ab. tit. Curtesy of England. Com. Dig. Estates, D. 1. Prest. on Conv. 69. 1 Cru. Dig. 104. and index, tit. Curtesy. Fearne Con. Rem. 55, 6. 341, 2. 562. n. g.

in fee-simple or fee-tail; 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 it 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 vassal or tenant), than to denote any peculiar favour belonging to this island (8). And therefore it is laid down (*f*) that by having issue, the husband shall be entitled to do homage to the lord, for the wife's lands, alone: whereas, before issue had, they must both have done it together. 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 feodal tenure (*k*), though I think some substantial feodal 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 en-
[*127] titled to *the profits of the lands in order to maintain it; for which reason 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*, did homage to the lord, and was called tenant by the curtesy *initiate*; and this estate being once vested in him by the birth of the child, was not suffered to determine 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 (9), but an actual possession, which is a seisin in deed (10). And therefore a man shall not be tenant by the curtesy of a

(*c*) Litt. § 35. 52.
(*d*) c. 1, § 3.
(*e*) Crag. *l.* 2, *c.* 19, § 4.
(*f*) Litt. § 90. Co. Litt. 30. 67.
(*g*) *Pat.* 11 *H. III. m.* 30. in 2 Bac. Abr. 630.
(*h*) *Grand Coustum. c.* 119.
(*i*) Lindenbrog. *LL. Alman. t.* 92.
(*k*) Wright, 294.
(*l*) F. N. B. 143.
(*m*) Co. Litt. 30.

(8) I should rather think with Mr. Wooddeson, that this estate took its name from its peculiarity to England; and that it was afterwards introduced into Scotland and Ireland. 2 Wood. 18. Tenant by the *curtesy* of England, perhaps originally signified nothing more than tenants by the *courts* of England; as in Latin he is called *tenens per legem Angliæ*. See stat. *pro tenentibus per legem Angliæ*. App. to Ruff. 29.

(9) 2 Saund. 45. n. n. (5). Courts of equity, however, allow curtesy of *trusts* and of other interests, which, although mere *rights* in *law*, are deemed *estates* in *equity*. 1 Atk. 603. 1 P. W. 106. Lord Redesdale on 2 Sch. and Lef. 388. suggests this reason for the distinction between dower and this claim, viz. that parties had been acting on this supposition, that the creation of trust estates would bar dower; and that it was necessary for the security of purchasers, mortgagees, and other persons taking the legal estate, to depart in cases of dower from the general principle of courts of equity, which is, in acting upon trusts to follow the law, but it was not necessary in cases of tenancy by the curtesy, because no such practice had prevailed.

(10) Entry is not always necessary to an actual seisin or seisin in deed; for, if the land be in lease for *years*, curtesy may be without entry or even receipt of rent, the possession of the lessee being the possession of the husband and wife. Co. Litt. 29. a. n. 3. 3 Atk. 469. But if the lands were not let, and the wife died before entry, there could be no curtesy. Co. Litt. 29.

remainder or reversion (11). 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 (12), where the church has not become void in the lifetime of the wife: which a man may hold by the curtesy, because it is impossible ever to have 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 the lands, and the husband's title depends entirely upon her seisin, the husband can have no title as tenant by the curtesy (*o*) (13). 3. 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 Cæsarean operation is performed, the husband in this case shall not be tenant by the *curtesy; 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 so 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*) (14). But in general there must be issue born: and such issue as is also capable of inheriting the mother's estate (*s*). 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 principal 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 entitle himself to such estate, he must have begotten issue that may be heir to the wife: but no one, by the standing rule of law, can 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 can be heir to those lands (15), he shall not be tenant of them by the 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 before or after the wife's seisin of the lands, [*128]

(*n*) Co. Litt. 29.
(*o*) Co. Litt. 30. Plowd. 263.
(*p*) Dyer, 25. 1 Rep. 34.
(*q*) Co. Litt. 29.
(*r*) *Ibid.* 30.
(*s*) Litt. § 56.
(*t*) Co. Litt. 29.
(*u*) Co. Litt. 40.

(11) A man will not be entitled to tenancy by the curtesy of, nor a woman to dower out of, a reversion or remainder *expectant upon an estate of freehold*; but upon a reversion expectant upon an estate for years, both these rights (of dower and of curtesy) accrue; (*Stoughton* v. *Leigh*, 1 Taunt. 410); for the possession of the tenant for years constitutes a legal seisin of the freehold in reversion. (*De Gray* v. *Richardson*, 3 Atk. 470. *Goodtitle* v. *Newman*, 3 Wils. 521).

(12) But if an advowson be appendant to a manor, and the wife die before entry into the manor, the husband shall not be tenant by the curtesy of the advowson. Hal. MSS.

(13) See this doubted in Harg. Co. Litt. 30. b. n. 2.

(14) But a tenant by curtesy of gavelkind lands has only a moiety of the wife's estate, which he loses by a second marriage. Robin. Gavelk. b. 2. c. 1.

(15) This is not stated with our author's usual precision. The issue, in the case put, might be heir to the *lands*, though he could not take as heir to his mother, but as heir to his ancestor, who was last actually seised. (See *post*, chapter. 14 of this book, pp. 209, 227; see also 1 Inst. 11 b).

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 (*w*). 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*) (16.)

[*129] *IV. Tenant in *dower* (17) 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 (18) part of all the lands and tenements whereof he was seised at any time 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 regulations of landed property according to the English and Roman laws. Dower out of the lands seems also to have been unknown in the early part of our Saxon constitution; for in the laws of king 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 (19). Yet some (*c*) have 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

(*w*) Co. Litt. 29.
(*x*) *Ibid.* 30.
(*y*) *Ibid.*
(*z*) Litt. § 36.
(*a*) Wilk. 75.
(*b*) Somner. Gavelk. 51. Co. Litt. 33. Bro. *Dower*, 70.
(*c*) Wright. 192.
(*d*) Crag. *l.* 2. *t.* 22. § 9.
(*e*) *Ibid.*

(16) If the child which the husband has by his wife be *capable*, and have a mere possibility of inheriting, the husband shall be tenant by the curtesy. Thus, if a woman seised in fee of lands marry and have a son, after which the husband dies, and she marries again and has a child by the second husband, here the husband shall be tenant by the curtesy, although there is but a mere possibility that the child which the wife had by her second husband should ever inherit the estate, the child by her first husband being alive. Prest. Est. 516.

(17) As to dower in general, see the excellent notes in 2 Saunder's Rep. 43 to 45. and id. index, Dower; Bac. Ab. and Com. Dig. tit. Dower; 1 Cru. Dig. 127. and index, tit. Dower; 1 Prest. on Conv. 69. index, tit. Dower; Fearne Con. Rem. 347.

(18) But of gavelkind lands, a woman is endowed of a moiety while she remains chaste and unmarried. Co. Litt. 33. b. Rob. Gavelk. 159. And of borough English lands, the widow is entitled for her dower to the whole of her husband's lands held by that tenure. But of copyhold lands a woman is endowed only of such lands whereof her husband was seised at the time of his death. Cowp. 481. And her title to dower or free-bench is governed by the custom; according to its authority she may take a moiety, or three parts, or the whole, or even less than a third, but it must be found precisely as it is pleaded. Boraston v. Hay, Cro. Eliz. 15.

(19) The distinction between *free-bench* and *dower* is, that free-bench is a widow's estate in such lands as her husband *dies seised of*; whereas, dower is the estate of the widow in all lands of which the husband was seized during the coverture. Godwin v. Winsmore, 2 Atk. 525; see also Carth. 275. 2 Ves. 633. 638. Cowp. 481. and Gilb. Ten. ed. Watkins, n. 164. The custom of *free-bench* prevails in the manors of East and West Enborne, and Chadleworth, in the county of Berks; at Torr, in Devonshire; Kilmersdon, in Somersetshire; and other places in the west of England.

therefore, that it might be with us the relic of a Danish custom: since, according to the historians of that country, dower was introduced into Denmark by Swein, the father of our Canute the Great, out of gratitude to the Danish ladies, who sold all their *jewels to ran- [*130] som 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 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 (20) 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 West. 2. (*l*) if a woman voluntarily leaves (which the law calls eloping from) her husband, and lives with an adulterer, she shall lose her dower, unless her husband be voluntarily reconciled to her (21). 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 1 Edw. VI c. 12. abated the rigour of the common law in this particular, and allowed *the wife her dower. But a subsequent statute (*p*) re- [*131] vived this severity against the widows of traitors, who are now barred of their dower (except in the case of certain modern treasons relating to the coin) (*q*), but not the widows of felons (22). An alien also cannot be endowed (23), unless she be queen consort; for no alien is ca-

(*f*) Mod. Un. Hist. xxxii. 91.
(*g*) Bract. *l.* 2 *c.* 39. Co. Litt. 30.
(*h*) Bract. *l.* 2. *c.* 39. § 4.
(*i*) Co. Litt. 32.
(*k*) Yet, among the ancient Goths, an adulteress was punished by the loss of her *dotalitii et trientis ex bonis mobilibus viri.* (Stiernh. *l.* 3, c. 2.)
(*l*) 13 Edw. I. c. 34.
(*m*) Co. Litt. 31.
(*n*) P. C. b. 3. c. 3.
(*o*) c. 110.
(*p*) 5 & 6 Edw. VI. c. 11.
(*q*) Stat. 5 Eliz. c. 11. 13 Eliz. c. 1. 5 & 9 W. III. c. 26. 15 & 16 Geo. II. c. 28.

(20) The lawfulness, and even the fact of a marriage, it has been said, can be established in no other way but by the bishop's certificate. (*Robins* v. *Cratchley*, 2 Wils. 125). But, when the marriage has not been had within any of our bishop's dioceses, or where, from any particular circumstances, the question seems not proper to be tried by the bishop's certificate; there, in the language of Chief Justice Eyre, "the common law, out of its own inexhaustible fountain of justice, must derive another mode of trial, and that mode is the trial by the country. (*Ilderton* v. *Ilderton*, 2 H. Bla. 156). The same doctrine, founded on obvious good sense, had been previously laid down in the case of (*The Protector* v. *Ashfield*, Hardr. 62).

(21) And in a case where John de Camoys had assigned his wife, by deed, to sir William Paynel, knight, which lord Coke calls *concessio mirabilis et inaudita*, it was decided in parliament, a few years after the statute was enacted, notwithstanding the purgation of the adultery in the spiritual court, that the wife was not entitled to dower. 2 Inst. 435. This is an indictable offence, being a great public misdemeanor.

(22) 54 Geo. III. c. 145.

(23) This statement is too general: alien women, whose marriage with Englishmen has not taken place with licence from the king, are not capable of acquiring dower, for the rea-

pable of holding lands (*r*). The wife must be above nine years old at her husband's death, otherwise she shall not be endowed (*s*): though in Bracton's time the age was indefinite, and dower was then only due "*si uxor possit dotem promereri, et virum sustinere* (*t*)."

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 (*u*) (24). 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 (*v*). 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 *transitory instant* [*132] **only*, when the same act which gives him the estate conveys it also out of him again (as where, by a fine, land is granted to a man, and he immediately renders it back by the same fine), such a seisin will not entitle the wife to dower (*x*): for the land was merely *in transitu*, and never rested in the husband, the grant and render being one continued act. But, if the land abides in him for the interval of but a *single moment*, it seems that the wife shall be endowed thereof (*y*). And, in short, a widow may be endowed of all her husband's lands, tenements, and hereditaments, corporeal or incorporeal (25), under the restrictions before

(*r*) Co. Litt. 31.
(*s*) Litt. § 36.
(*t*) *l.* 2. *c.* 2. § 3.
(*u*) Litt. § 36.
(*v*) *Ibid.* § 53.
(*w*) Co. Litt. 31.
(*x*) Cro. Jac. 615. 2 Rep. 67. Co. Litt. 31.
(*y*) 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 in fee by survivorship, in consequence of which seisin his widow had a verdict for her dower. (Cro. Eliz. 503.)

son assigned by our author. But, in consequence of a petition from the Commons, an act of Parliament was made in the 8th year of the reign of Henry V. (and which, though it is not printed amongst the statutes, is preserved in the 4th volume of Rot. Parl. pp. 128, 130), by which all alien women who from thenceforth should be married to Englishmen, by licence from the king, are enabled to have dower after their husband's death, in the same manner as Englishwomen. And if an alien woman be naturalized, she thereby becomes entitled to dower out of all lands whereof her husband was seised during the coverture; but, if she be only made a denizen, she will have no claim to dower out of lands which he aliened before her denization. (*Menvil's case*, 13 Rep. 23).

(24) But although at the death of her husband she has a right to the third part of his estates in dower, yet she is not entitled to emblements. Dy. 316. If the heir improve the land by building, &c. or impair the value of it, before assignment, she shall be endowed according to the value at the time of the assignment. Co. Litt. 32. a. *Sed secus* if *feoffee* improve the land, as in this case she shall be endowed, not according to the value at the time of the assignment, but according to the value at the time of the feoffment. 17 H. 3. Dower, 192. 31 E. 1. Vouch. 288.

(25) Our author, we may be sure, did not mean to intimate that a widow was entitled to dower out of *all* her husband's incorporeal hereditaments, of what nature soever; but only out of such incorporeal hereditaments as savour of the realty. (*Buckeridge* v. *Ingram*, 2 Ves. jun. 664). That a widow is dowable

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 (*x*): 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 (*a*). Copyhold estates are also 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 (*b*). But, where dower is allowable, it matters not though the husband aliene the lands during the coverture; for he alienes them liable to dower (*c*) (26).

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 (*d*), *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* (*e*); as that the wife should have half the husband's lands, or in some places the whole, and in some only a quarter. 3. Dower *ad ostium ecclesiae* (*f*): which is where tenant in fee-*simple of full age, openly [*133] at the church door, where all marriages were formerly celebrated, after affiance made and (sir Edward Coke in his translation of Littleton, 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 farther ceremony. 4. Dower *ex assensu patris* (*g*); which is only a species of dower *ad ostium 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 ostium ecclesiae; non enim valent facta in lecto mortali, nec in camera, aut alibi ubi clandestina fuere 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 ostium 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 rigour, was the husband allowed to endow

(*x*) Co. Litt. 31. 3 Lev. 401.
(*a*) Co. Litt. 32. 1 Jon. 315.
(*b*) 4 Rep. 22.
(*c*) Co. Litt. 32.
(*d*) Co. Litt. § 48, 49.
(*e*) Litt. § 37.
(*f*) *Ibid.* § 39.
(*g*) *Ibid.* § 40.
(*h*) Bracton, *l.* 2, c. 39, § 4.

(*i*) *Si mortuo viro uxor ejus remanserit, et sine liberis fuerit, dotem suam habebit;—si vero uxor cum liberis remanserit, dotem quidem habebit, dum corpus suum legitime servaverit.* (*Cart. Hen. I. A. D.* 1001. Introd. to great charter, *edit. Oxon.* pag. iv.)
(*k*) *l.* 6, c. 1 & 2.
(*l*) *Gr. Coustum.* c. 101.

out of such lands also, as her husband had *legal* seisin of, see *post*, note (30) to this chapter.

(26) If a man has made an exchange of lands, his widow must not be endowed both out of the lands given in exchange, and also of those taken in exchange, though the husband was seised of both during the coverture. The widow, however, may make her election out of which of the two estates she will take her dower. (Co. Litt. 31 b).

her *ad ostium 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 specific dotation was made at [*134] 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 endow her 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 chapter 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 entitled for her dower to the third part of *all* such lands as the husband had held in his lifetime (*r*): yet in case of a specific endowment of less *ad ostium ecclesiae*, 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 [*135] *expressly, that a woman may be endowed *ad ostium ecclesiae* 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 ostium ecclesiae* and *ex assensu 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 feodal 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 distrained to marry afresh, if she chooses to live with-

(*m*) Bract. *l.* 2, *c.* 39, § 6.

(*n*) *De questu suo.* (Glan. *ib.*)—*de terris acquisitis et acquirendis.* (Bract. *ib.*)

(*o*) Glanv. *c.* 2.

(*p*) When special endowments were made *ad ostium ecclesiae*, the husband after affiance made, and troth plighted, used to declare with what specific lands he meant to endow his wife (*quod dotem eam de tali maneric 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: "*sacerdos interroget dotem mulieris; et, si terra ei in dotem detur, tunc dicatur psalmus iste, &c.*" When the wife was endowed generally (*ubi quis uxorem suam dotaverit in generali, de omnibus a terris et tenementis*; Bract. *ib.*) 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 chattel*) I thee endow;" which entitled 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.

(*q*) A. D. 1216. *c.* 7. *edit. Oxon.*

(*r*) *Assignetur autem ei pro dote sua tertia pars totius terrae mariti sui quae sua fuit in vita sua, nisi de minori dotata fuerit ad ostium ecclesiae.* *c.* 7. (*Ibid.*)

(*s*) Bract. *ubi supr.* Britton. *c.* 101, 102. Flet. *l.* 5, *c.* 23, § 11, 12.

(*t*) P. 7 *Hen. IV.* 13, 14.

(*u*) § 39. F. N. B. 150.

(*w*) § 41.

(*x*) Mirr. *c.* 1, § 3.

(*y*) *ubi supra.*

(*z*) *cap.* 7.

out a husband; but shall not however marry against the consent of the lord; and farther, that nothing shall be taken for assignment of the widow's dower, but that she 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 holden. For the heir by this entry becomes tenant *thereof to the lord, [*136] and the widow is immediate tenant to the heir, by a kind of sub-infeudation, 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*). Or if the heir (being under age) or his guardian assign more than she ought to have, it may be afterwards remedied by writ of *admeasurement* of dower (*d*). 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 presentation to a church, the third toll-dish of a mill, the third part of the profits of an office, the third sheaf of tithe, and the like (*e*).

Upon preconcerted marriages, and in estates of considerable consequence, tenancy in 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 ostium ecclesiæ*, 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 inquire, lastly,

4. How dower may be *barred* or prevented (27). 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 (28), but also by detaining the title deeds or evidences of the estate from the heir, until she restores them (*f*): and, by the statute of Gloucester (*g*), if a dowager alienes the land assigned her for dower, she forfeits it *ipso *facto*, and the heir may recover it by action (28). A woman [*137]

(*a*) 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.
(*b*) Co. Litt. 34, 35.
(*c*) *Ibid.*
(*d*) F. N. B. 148. Finch. L. 314. Stat. Westm. 2. 13 Edw. I. c. 7.
(*e*) Co. Litt. 32.
(*f*) *Ibid.* 39.
(*g*) 6 Edw. I. c. 7.

(27) By the custom of Kent, the wife's dower of the moiety of gavelkind lands was in no case forfeitable for the felony of the husband, but where the heir should lose his inheritance. Noy's Max. 28. But this custom does not extend to treason. Wright's Tenures, 118. Rob. Gavelk. 230.

(28) "The mischief before the making of this statute (Glouoester, c. 7.) was not where a gift or feoffment was made in fee or for term of life (of a stranger) by tenant in dower, for in that case, he in the reversion might enter for the forfeiture, and avoid the estate. But the mischief was, that when the feoffee, or any other, died seised, whereby the entry of him in the reversion was taken away, he in the reversion could have no writ of entry *ad communem legem* until after the decease of te-

also may be barred of her dower, by levying a fine, or suffering a recovery of the lands, during her coverture (*h*). But the most usual method of barring dowers is by jointures, as regulated by the statute 27 Hen. VIII. c. 10.

A jointure (29), 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 (*i*); "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 Henry 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 (30), all wives would have become dowable of such lands as

(*h*) Fig. of recov. 66. (*i*) 1 Inst. 36.

nant in dower, and then the warranty contained in her deed barred him in the reversion if he were her heir, as commonly he was; and for the remedy of this mischief this statute gave the writ of entry *in casu proviso* in the lifetime of tenant in dower." 2 Inst. 309. But the statute was not intended to restrain tenant in dower from aliening for *her own life*, for such an estate wrought no wrong. Ibid.

(29) Bac. Ab. tit. Dower, E. Com. Dig. tit. Jointure. 1 Cru. Dig. 196. and index, tit. Jointure.

(30) It is established doctrine now, that a wife is not dowable of a *trust* estate: (*Godwin* v. *Winstmore*, 2 Atk. 526): for, dower is entirely a *legal* demand. (*Attorney-General* v. *Scott*, Ca. temp. Talb. 139). Yet, a man may be tenant by the curtesy of his deceased wife's trust estate, (*Watts* v. *Ball*, 1 P. Wms. 108), a seemingly partial diversity, for which Lord Talbot, C., said, he could see no reason; but which, as he found it settled, he did not feel himself at liberty to correct. (*Chaplin* v. *Chaplin*, 3 P. Wms. 234). Upon the principle, that a widow is not dowable out of lands of which her husband had not, during the coverture, *legal* seisin; it is held, that, if his estate was subject to a mortgage *in fee* at the time of his marriage, and remained so during the whole continuance of the coverture, his widow cannot claim dower; for, a right of redemption is merely an *equitable* title; (*Casburne* v. *Scarfe*, 2 Jac. & Walk. 200. *Dixon* v. *Saville*, 1 Br. 326); and though in such case the widow of the mortgagee would, at law, be entitled to dower out of the estate; (*Nash* v. *Preston*, Cro. Car. 191); the Court of Chancery would not allow her to take advantage of that legal right, because it is a general rule, that a trust estate is considered, in equity, as belonging to the *cestui que trust*, not to the trustee. (*Finch* v. *Earl of Winchelsea*, 1 P. Wms. 278. *Hinton* v. *Hinton*, 2 Ves. sen. 634. *Noel* v. *Jevon*, 2 Freem. 43). We have just seen, however, that this general rule is deviated from, when its operation would be to let in claims of dower, though it is enforced whenever it goes to exclude such claims. (See *post*, chapter 10, p. 158). It is also settled, that title to dower attaches only when the husband has, at some time during the marriage, been seised in possession of the entire inheritance, not expectant upon the determination of a *freehold* interest carved out of it, and interposed before the husband's remainder. (*Bates* v. *Bates*, 1 Lord Raym. 327).

Upon these principles, there are a variety of modes by which conveyances can, by deed before a man's marriage, prevent title to dower from attaching upon his estate. The most approved mode is, to limit the estate to such uses as the husband shall appoint, which gives him power over the whole fee: so that he may pass it to a purchaser without any fine, or the

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 [*138] jointure to the wife before marriage, she shall be for ever precluded from the dower (*k*). 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 (31). 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 (32) in satisfaction of her whole dower, and not of any particular part of it. If the jointure be made to her *after* marriage, she has her election after her husband's death, as in dower *ad ostium ecclesiae*, 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 (33). And if, by any fraud or accident,

(*k*) 4 Rep. 1, 2.

concurrence of any one else; and the purchaser, on the execution of the power, will be in from the original conveyance, and consequently paramount to the claims of the wife. But in order to give the husband the immediate legal right to the possession and freehold, and to the rents and profits, the next limitation is, in default of or until execution of the power of appointment, to the husband for life, with remainder to a trustee, his executors and administrators during the life of the husband; which will put the limitation over, in tail or in fee, in remainder. By the limitation to the husband for life, the legal estate will be vested in him; so that, if he die without making any appointment, the inheritance will vest in his heirs, or those to whom he may devise his property, unaffected by title of dower, and without any continuing estate in the trustee.

(31) Although the estate must be in point of quantity for her life, yet it may be such as may be determined sooner by her own act. Thus, an estate *durante viduitate* is a good jointure, because unless sooner determined by herself, it continues to her for life. Mary Vernon's case. 4 Rep. 3.

(32) Mr. Christian, in his annotation upon this passage of the text, says, "Or it may be averred to be, 4 Rep. 3. An assurance was made to a woman, to the intent it should be for her jointure, but it was not so expressed in the deed. And the opinion of the court was, that it might be averred that it was for a jointure, and that such averment was traversable. Owen, 33."

These authorities are correctly cited, but they are both antecedent to the Statute of Frauds, which expressly enacts, that no estates or interests of freehold shall be surrendered unless by deed or note *in writing*; but if it were allowed to be proved by oral testimony, that a provision for wife was intended as a jointure; the effect would be, to allow a surrender of her freehold title to dower to be proved by parol testimony, and there have been several decisions, since the statute, that such averment is not admissible. (*Charles* v. *Andrews*, 9 Mod. 152. *Tinney* v. *Tinney*, 3 Atk. 8). But it certainly is not necessary (in equity at least) that the provision for the wife should be stated, in express words, to be in lieu of dower, if it can be *clearly* collected, from the contents of the instrument, that such was the intention. (*Vizard* v. *Longdale*, cited in 3 Atk. 8, and in 1 Ves. sen. 55). A court of equity will be cautious, however, as to inferring an intention that a widow should be barred of dower by another provision, when that intention is not distinctly manifested. (*Lord Dorchester* v. *Lord Effingham*, Coop. 323; and see post, note (33) to this chapter.

(33) It is well established, as general doctrine, that since dower is a legal right, the intention to exclude that right, by a *devise or bequest* of something else, must be demonstrated, if not by express words, at least by (what appears to the Court to amount to) necessary implication. It is only where the claim of dower would be inconsistent with the will, or plainly tend to defeat some other part of the testator's disposition of his property, that the widow can be compelled to elect, whether she will take her dower, or the interest devised to her. (*Strahan* v. *Sutton*, 3 Ves. 252. *Thompson* v. *Nelson*, 1 Cox, 447). Of course, acceptance of a bequest of personalty can never operate in bar of dower, unless an intention to that effect can be unequivocally established; (*Ayres* v. *Willis*, 1 Ves. sen. 230); nor will a devise to the testator's widow of part of those lands out of which she might claim dower, exclude that claim with respect to the remainder of such lands; (*Lawrence* v. *Lawrence*, 1 Br. P. C. 591. *S. C.* 2 Freem. 234. *Lord Dorchester* v. *Lord Effingham*, Coop. 324. *Hitchins* v. *Hitchins*, 2 Freem. 241); unless the terms of the devise express, or clearly imply, that it was the testator's intent, the bequest of part of the lands, if accepted, should be in satisfaction of dower out of the remainder; (*Chalmers* v. *Storil*, 2 Ves. & Bea. 224. *Dickson* v. *Robinson*, Jacob's Rep. 503); and a devise of a *contingent remainder* to a woman for life, in the whole of the lands out of which her dower is demandable, it is well settled, will not, by implication, exclude her *immediate*

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 (*l*).

(*l*) These 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, sed uxori maritus affert; intersunt parentes et propinqui, et munera probant.*" (*de mor. Germ. c.* 18.) And Cæsar (*de bello Gallico, 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 nomine acceperunt, tantas ex suis bonis, æstimationi facta, cum dotibus communicant. Hujus omnis pecuniæ conjunctim ratio habetur, fructusque servantur. Uter eorum vita superavit, ad eum pars utriusque cum fructibus superiorum temporum pervenit.*" The dauphin's commentator on Cæsar 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 suppose, that it gave the hint for our statutable jointures.

title to dower; for there is nothing inconsistent in the two interests. (*Incledon* v. *Northcote*, 3 Atk. 435). In short, wherever a clear incontrovertible result does not arise from the testator's will, that he meant to exclude his widow from dower, she will not be put to her election: he may not have known that she would, under the circumstances, be dowable; but this will not be enough to exclude her right: it must appear that he did know it, and meant to bar her; or, at least, that her demand of dower would be repugnant to the dispositions he has made. (*French* v. *Davies*, 2 Ves. jun. 577, 581). Although a testator has devised his estate to trustees, charged with an annuity, or a gross sum, to his widow; still, as a wife's title to dower is paramount to the devise, a Court of equity will not readily infer that, because the testator has given all *his* property to trustees, it was necessarily his intention to give them that which was *not his*. (*Foster* v. *Cook*, 3 Br. 351. *Pitts* v. *Snowden*, 1 Br. 292. *Greatrex* v. *Cary*, 6 Ves. 616). But, although this would be inadmissible as a general construction, circumstances may justify it: (*Druce* v. *Dennison*, 6 Ves. 400. *Judd* v. *Pratt*, 13 Ves. 174. *Attorney-General* v. *Grote*, 3 Meriv. 320. *Penticost* v. *Ley*, 2 Jac. & Walk. 210. *Hewson* v. *Reed*, 5 Mad. 451. *Forrester* v. *Cotton*, 1 Eden, 535. *Dillon* v. *Parker*, 1 Swanst. 374): if the estates would be insufficient to satisfy the charges expressly imposed upon them, in case the title to dower were sustained, *that* might shew an intention to bar the claim of dower; and, it seems, a reference to ascertain that fact will be granted. (*Pearson* v. *Pearson*, 1 Br. 292. *French* v. *Davies*, 2 Ves. jun. 580). Still, the admissibility of parol evidence to enlarge the effect of the terms used in a will, though not in all cases absolutely rejected, is strongly discountenanced by the very highest authority. (*Doe* v. *Chichester*, 4 Dow, 89, 93.

A legacy given by a testator to his widow, as the price of her release of dower, must be *fully* paid before any mere legatees can claim; (*Burridge* v. *Bradyll*, 1 P. Wms. 127. *Davenhill* v. *Fletcher*, Ambl. 245); for, the widow, in such case, is a purchaser, and justly entitled to a preference; (*Blower* v. *Morrett*, 2 Ves. sen. 242); and it will not vary the principle of the case, to shew that the legacy was not the only consideration for the release of dower. (*Heath* v. *Dendy*, 1 Russ. 545).

Courts of equity exercise a jurisdiction in relieving or assisting jointresses, and in supplying defects in the execution of jointuring powers. If a jointure rests in articles, or covenant, made before marriage, equity will decree a specific performance of such articles, or covenant, (although the wife has eloped with an adulterer), by directing a settlement which will have relation to the period when it ought to have been made. (*Sidney* v. *Sidney*, 3 P. Wms. 276. *Seagrave* v. *Seagrave*, 13 Ves. 443. *Jee* v. *Thurlow*, 2 Barn. & Cress. 553. *Buchanan* v. *Buchanan*, 1 Ball. & Beat. 206. *Legard* v. *Johnson*, 3 Ves. 360).

A widow will also be assisted, by equity, in subjecting her husband's assets to make good any deficiency in her jointure, when he has engaged that it should be of a certain amount. (*Probert* v. *Morgan*, 1 Atk. 440. *Prime* v. *Stebbing*, 2 Ves. sen. 411. *Speake* v. *Speake*, 1 Vern. 218). And, if the widow be evicted of her jointure by a superior title, her husband's estate will be liable, in equity, to answer the difference between her dower (to which she may revert) and the jointure. (*Beard* v. *Nuthall*, 1 Vern. 428). So, although even a satisfied term for years may deprive a widow of the benefit of her dower, (*Maundrell* v. *Maundrell*, 10 Ves. 271. *Wynn* v. *Williams*, 3 Ves. 134), yet, an heir or devisee, or even a purchaser *with notice*, will be enjoined by equity not to set up an outstanding satisfied term, in order to prevent the widow from obtaining her jointure at law. (*Lady Radnor* v. *Rotheram*, Prec. in Cha. 65).

Though whenever, at the creation of powers, certain formalities of execution are prescribed, those formalities ought in strictness to be closely pursued; still, if a person, having a power, executes an instrument for valuable consideration, (and marriage is so considered), he is understood, *in equity*, to engage with the person with whom he is dealing, to make the instrument as effectual as he has power to make it, and if the instrument, though not such as the power prescribes, demonstrates an intent to charge, it will be decreed to have the operation of charging in that form which the power allows. (*Blake* v. *Marnell*, 2 Ball & Beat. 44). Thus, if a jointuring power ought to have been executed by deed, but has been executed by will, the jointure will be supported. (*Tollet* v. *Tollet*, 2 P. Wms. 490. *Sneed* v. *Sneed*, Ambl. 64); or if the instrument ought to have been attested by three witnesses, whereas it is attested by two only, equity will relieve against this defective execution. (*Parker* v. *Parker*, Rep. in Eq. 168. *Carter* v.

There are some advantages attending tenants in dower that do not extend to jointresses; and so *vice versâ*, 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 hers is almost the only estate on which, when derived from the king's debtor, the king cannot distrein for his debt; if contracted during the coverture (*m*). But, on the other *hand, a widow may enter at once, without any formal pro- [*139] cess, on her jointure land; as she also might have done on dower *ad ostium ecclesiae*, which a 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 (*n*). And, what is more, though dower be forfeited by the treason of the husband, yet lands settled in jointure remain unimpeached to the widow (*o*). Wherefore sir Edward Coke very justly gives it the preference, as being more sure and safe to the widow, than even dower *ad ostium ecclesiae*, the most eligible species of any (34).

(*m*) Co. Litt. 31. a. F. N. B. 150.
(*n*) Co. Litt. 36.
(*o*) *Ibid.* 37.

Layer, 2 P. Wms. 625. *Shannon* v. *Bradstreet*, 1 Sch. & Lef. 60).

Where a widow has accepted, and continued in the enjoyment of an interest, between which and her title to dower, she might have elected; that election, though she has not expressly declared it, will be fairly inferred from such circumstances; (*Ardesoife* v. *Bennet*, 2 Dick. 467); and her partial accession to a settlement may be held an election to abide by the whole. (*Milner* v. *Lord Harewood*, 17 Ves. 277). But, generally speaking, acts done by a party before he, or she, is fully informed of his, or her, rights, will not amount to an election. (*Pusey* v. *Desbouverie*, 3 P. Wms. 321. *Chalmers* v. *Storil*, 2 Ves. & Bea. 225. *Dillon* v. *Parker*, 1 Swanst. 381. *Whistler* v. *Webster*, 2 Ves. jun. 371. *Edwards* v. *Morgan*, M'Clel. 551).

A trust estate may constitute a good equitable jointure in bar of dower; and if a jointure be made of freehold estates in trust for an infant, this will, in equity, be a bar to her claim of dower. It was, indeed, once doubted whether a jointure, however formal, settled on an infant before marriage, was a bar to dower; but it has been determined that such a jointure is binding upon the infant, who cannot waive it after her husband's death, and claim her dower. (*Earl of Buckingham* v. *Drury*, 2 Eden, 73).

(34) In New-York, the law on the subject of this chapter is generally the same as in England; we have, however, no tenant in tail after possibility, &c. and no dower except as at common law. See as to dower, and jointure, 1 R. S. 740, &c. With us the widow of an alien husband, who had been allowed in his lifetime to hold real estate, may have dower if she be an inhabitant of the state. Mortgages being here deemed a mere *security* for a debt, the widow is entitled to dower on lands mortgaged, in the following manner. If she did not join in the mortgage, and they were mortgaged after marriage, then to one third of the whole for life: if she joined in the mortgage, or if they were mortgaged before marriage, or if mortgaged after marriage to secure part of the purchase money, she has for life one third of the surplus that remains after satisfying the mortgage. See 1 R. S. 740. 1 Johns. Ch. R. 45. 5 Id. 482. In Nelson v. Boyce, it was decided by Chancellor Jones, in Aug. 1826, that although the widow had joined in the mortgage, if the mortgagee be first satisfied, she is entitled for life to one third of the whole of the lands, not merely of the surplus; she joins in such case merely as a surety. Dower may be barred by a divorce on account of her adultery; and a jointure may be forfeited for the same causes as dower may be. Any estate in lands, or any pecuniary provision, given to an intended wife before marriage, bars dower, provided she join in the conveyance, if she be of full age; and if she join in it with her father or guardian, if she be under age. 2 R. S. 112, gives the widow dower in the surplus that may remain after sale of her husband's contract for the purchase of lands and payment of what remains due on it.

If lands or a pecuniary provision be given in lieu of dower after the marriage, it is deemed a satisfaction, unless the widow dissents and brings her action for dower in one year after the death of her husband. 1 R. S. 741, 742.

CHAPTER IX.

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* (1) is a contract for the possession of lands or tenements, for some determinate period; and it takes place 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*) (2). 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 digression, concerning the division and calculation of time by the English law.

The space of a *year* (3) is a determinate and well-known period, con-

(*a*) We may here remark, 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 maketh a 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.

(1) See Bac. Ab. Leases; Preston on Estates; 1 Cruise, 243, &c.

(2) Of course our author will be understood to put this case of letting, only as a particular instance of one mode in which an estate for years may be created. (See *post*, p. 143). There are obviously various ways in which such an estate may arise. Thus, where a person devises lands to his executors, for payment of his debts, or until his debts are paid, the executors take an estate, not of freehold, but for so many years as are necessary to raise the sum required. (*Carter* v. *Barnardiston*, 1 P. Wms. 509. *Hitchens* v. *Hitchens*, 2 Vern. 404. *S. C.* 2 Freem. 242. *Doe* v. *Simpson*, 5 East, 171. *Doe* v. *Nicholls*, 1 Barn. & Cress. 342). Though, in such case, if a gross sum ought to be paid at a fixed time, and the annual rents and profits will not enable them to make the payment within that time, the Court of Chancery will direct a sale or mortgage of the estate, as circumstances may render one course or the other most proper. (*Berry* v. *Askham*, 2 Vern. 26. *Sheldon* v. *Dormer*, 2 Vern. 311. *Green* v. *Belchier*, 1 Atk. 506. *Allan* v. *Backhouse*, 1 Ves. & Bea. 75. *Bootle* v. *Blundell*, 1 Meriv. 233).

(3) As to time, and the mode of computing it in general, see Com. Dig. tit. Ann. and tit. Temps; Vin. Ab. tit. Time; Bac. Ab. Leases, E. 2 & 3.; Burn Ecc. L. Kalendar; Jacob. Dic. tit. Day, tit. Month, and tit. Year.

Before 1752, the year commenced on the 25th March, and the Julian kalendar was used, and much inaccuracy and inconvenience resulted, which occasioned the introduction of the *new stile*, by the 24 Geo. II. c. 23. which enacts, that the 1st January shall be reckoned to be the first day of the year, and throws out eleven days in that year, from 2d September to the 14th, and in other respects regulates the future computation of time, with a saving of ancient customs, &c. See the statute set forth in Burn Ecc. L. tit. Kalendar. It has been held, that in a lease or other instrument under seal, if the feast of Michaelmas, &c. be mentioned, it must be taken to mean New Michaelmas, and parol evidence to the contrary is not admissible, 11 East, 312.; but upon a parol agreement it is otherwise. 4 B. & A. 588.

The *year* consists of three hundred and sixty-five days; there are six hours, within a few minutes, over in each year, which every fourth year make another day, viz. three hundred and sixty-six, and being the 29th February, constitute the bissextile or leap-year. Co. Lit. 135. 2 Roll. 521. l. 35. Com. Dig. Ann. A. 24 Geo. II. c. 23. s. 2. Where a statute speaks of a year, it shall be computed by the whole twelve months, according to the calendar, and not by a lunar month, Cro. Jac. 166; but if a statute direct a prosecution to be within twelve months, it is too late to proceed after the expiration of twelve lunar months. Carth. 407. A twelve-month, in the singular number, includes all the year; but twelve months shall be computed according to twenty-eight days for every month. 6 Co. 62.

Half a year consists of one hundred and eighty-two days, for there shall be no regard to a part or a fraction of a day. Co. Litt. 135. b. Cro. Jac. 166. The time to collate within six months shall be reckoned half a

sisting commonly of 365 days; for, though in bis*sextile or leap- [*141]
years, it consists properly of 366, yet by the statute 21 Hen.

year, or one hundred and eighty-two days, and not lunar months. Cro. Jac. 166. 6 Co. 61.

So a *quarter of a year* consists but of ninety-one days, for the law does not regard the six hours afterwards. Co. Litt. 135. b. 2 Roll. 521. l. 40. Com. Dig. Ann. A.

But both half-years and quarters are usually divided according to certain feasts or holidays, rather than a precise division of days, as Lady-day, Midsummer-day, Michaelmas-day, or Christmas, or Old Lady-day (6th April), or Old Michaelmas day (the 11th October). In these cases, such division of the year by the parties, is regarded by the law, and therefore, though half a year's notice to quit is necessary to determine a tenancy from year to year, yet a notice served on the 29th September to quit on 25th March, being half a year's notice according to the above division, is good, though there be less than one hundred and eighty-two, viz. one hundred and seventy-eight, days. 4 Esp. R. 5 & 198. 6 Esp. 53. Selw. N. P. Ejectment, V. Adams, 123.

As to the construction of the term, a year, it was held that the 43 Geo. III. c. 84, which prohibits under a penalty a spiritual person from absenting himself from his benefice for more than a certain time in any one year, means year from the time when the action is brought for the penalty. 2 M. & S. 534.

A *month* is *solar*, or computed according to the calendar, which contains thirty or thirty-one days; or lunar, which consists of twenty-eight days. Co. Litt. 135. b. In temporal matters, it is usually construed to mean lunar; in ecclesiastical, solar or calendar. 1 Bla. R. 450. 1 M. & S. 111. 1 Bingh. Rep. 307. In general, when a *statute* speaks of a month without adding "calendar," or other words shewing a contrary intention, it shall be intended a lunar month of twenty-eight days. See cases, Com. Dig. Ann. B. 6 Term Rep. 224. 3 East. 407. 1 Bingh. R. 307. And generally, in all matters temporal, the term month is understood to mean lunar; but in matters ecclesiastical, as non-residence, it is deemed a calendar month; because in each of these matters a different mode of computation prevails; the term, therefore, is taken in that sense which is conformable to the subject matter to which it is applied, 2 Roll. Ab. 521. 51. Hob. 179. 1 Bln. R. 450. 1 M. & S. 117. 1 Bingh. R. 307. Com. Dig. Ann. B.; and therefore when a deed states *calendar* months, and in pleading the word calendar be omitted, it is not necessarily a variance. 3 Brod. & B. 186.

When a *deed* speaks of a month, it shall be intended a lunar month, unless it can be collected from the context that it was intended to be calendar. 1 M. & S. 111. Com. Dig. Ann. B. Cro. Jac. 167. 4 Mod. 185. So in *all other contracts*, 4 Mod. 185. 1 Stra. 446. unless it be proved that the general understanding in that department of trade is, that bargains of that nature are according to calendar months. 1 Stra. 652. 1 M. & S. 111. And the *custom of trade*, as in case of bills of exchange and promissory notes, has established, that a month named in those contracts shall be deemed calendar. 3 Brod. & B. 187.

In all *legal proceedings*, as in commitments, pleadings, &c. a month means four weeks. 3 Bur. 1455. 1 Bla. R. 450. Dougl. 463. 446. When a calendar month's notice of action is required, the day on which it is served is included, and reckoned one of the days; and therefore if a notice be served on 28th April, it expires on 27th May, and the action may be commenced on 28th May. 3 T. R. 623. 2 Campb. 294. And when a statute requires the action against an officer of customs to be brought within three months, they mean lunar, though the same act requires a calendar month's notice of action. 1 Bingh. R. 307.

A *day* is natural, which consists of twenty-four hours; or artificial, which contains the time from the rising of the sun to the setting. Co. Litt. 135. a. A day is usually intended of a natural day, as in an indictment for burglary we say, in the night of the same day. Co. Litt. 135. a. 2 Inst. 318. Sometimes days are calculated exclusively, as where an act required ten clear days' notice of the intention to appeal, it was held, that the ten days are to be taken exclusively, both of the day of serving the notice and the day of holding the sessions. 3 B. & A. 581. A legal act done at any part of the day, will in general relate to the first period of that day. 11 East, 498.

The law generally rejects *fractions of a day*. 15 Ves. 257. Co. Litt. 135. b. 9 East, 154. 4 T. R. 660. 11 East, 496. 498. 3 Co. 36. a. But though the law does not in general allow of the fraction of a day, yet it admits it in cases where it is necessary to distinguish for the purposes of justice; and I do not see why the very hour may not be so too where it is necessary, and can be done, for it is not like a mathematical point which cannot be divided. Per Ld. Mansfield, 3 Burr. 1434. 9 East, 154. 3 Coke Rep. 36. a. Therefore fraction of a day was admitted in support of a commission of bankruptcy, by allowing evidence that the act of bankruptcy, though on the same day, was previous to issuing the commission. 8 Ves. 30. So where goods are seized under a fieri facias the same day that the party commits an act of bankruptcy, it is open to inquire at what time of the day the goods were seized and the act of bankruptcy was committed; and the validity of the execution depends on the actual priority. 4 Camp 197. 2 B. & A. 586.

An *hour* consists of sixty minutes. Com. Dig. Ann. C. By a misprint in 2 Inst. 318. it is stated to be forty minutes. There is a distinction in law as to the certainty of stating a month or day, and an hour. When a fact took place, "*circa horam*" is sufficient; but not so as to a day, which must be stated with precision, though it may be varied from in proof. 2 Inst. 318.

It has been considered an established rule,

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 almanacks, 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 (4); not only because it is always one uniform period, but because it falls naturally into a quarterly division by weeks. Therefore a lease for "twelve months" is only for forty-eight weeks; but if it be for "*a* twelvemonth" 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 money on any certain day, I discharge the obligation if I 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 consider-
[*142] ed 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 testator with the lord, and his other creditors, and were entitled to the stock upon the farm. The lessee's estate might also, by the ancient law, be at any

(*d*) 6 Rep. 61. (*e*) Co. Litt. 135.

that if a thing is to be done within such a time after such a fact, the day of the fact shall be taken inclusive. Hob. 139. Dougl. 463. 3 T. R. 623. Com. Dig. Temps. A. 3 East, 407. And therefore where the statute 21 Jac. I. c. 19. s. 2. enacts, that a trader lying in prison two months after an arrest for debt shall be adjudged a bankrupt, that includes the day of the arrest. 3 East, 407. When a month's notice of action is necessary, it begins with the day on which the notice is given, 3 T. R. 623; and if a robbery be committed on 9th October, the action against the hundred must be brought in a year inclusive of that day. Hob. 139. But where it is limited within such a time after the date of a deed, &c. the day of the date of the deed shall be taken exclusive; as if a statute require the enrollment within a specified time after date of the instrument. Hob. 139. 2. Campb. 294. Cowp. 714. Thus where a patent dated 10th May, contains a proviso that a specification shall be enrolled within one calendar month, next and immediately after the date thereof, and the specification was enrolled on the 10th June following, it was held, that the month did not begin to run till the day after the date of the patent, and that the specification was in time. 2 Campb. 294.

However, in a case in equity, the master of the rolls, after considering many of the decisions, said, upon the first part of this rule, that whatever dicta there may be that when a thing is to be done after the doing of an act, the day of its happening must be included, it is clear the actual decision cannot be brought under any such a general rule; and he inclined for excluding the first day in all cases, and ruled that where a security was to be given within six months after a testator's death, the day of the death was to be excluded. 15 Ves. J. 248.

(4) The rule has been lately reversed in New-York by 1 R. S. 606.

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 ever it 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 considerably exceed that period (*h*): and long terms, for three hundred years or a thousand, were certainly in use in the time of Edward III. (*i*), and probably of Edward I (*k*). But certainly, when by the statute 21 Hen. VIII. c. 15. the termor (that is, he who is entitled 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 [*143] same inferiority to freeholds, 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 (*l*). But *id certum est, quod certum reddi potest*: therefore if a man make a lease to another, for so many years as J. S. shall name, it is a good lease for years (*m*); 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 (*n*). A lease for so many years as J. S. shall live, is void from the beginning (*o*); 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 should so long continue parson, is good (*p*): for there is a certain period fixed, beyond which it cannot last; though it may determine sooner, on the death of J. S. or his ceasing to be parson there.

We have before remarked, and endeavoured to assign the reason of, the inferiority in which the law places an estate for years, when compared with an estate for life, or an inheritance: observing, that an estate for life, even if it be *pur 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 follows, that a lease for years may be made to commence *in futuro*,

(*f*) Co. Litt. 46.
(*g*) Mirror. c. 2, § 27. Co. Litt. 45, 46.
(*h*) Madox *Formulare Anglicanum*. n°. 239, *fol.* 140. Demise for eighty years, 21 Ric. II. . . . . *Ibid.* n°. 245, *fol.* 146, for the like term, A. D. 1429. . . . . *Ibid.* n°. 248, *fol.* 148, for fifty years, 7 Edw. IV.
(*i*) 32 Ass. pl. 6. Bro. Abr. t. *mordauncestor*, 42. *spoliation*, 6.
(*k*) Stat. of mortmain, 7 Edw. I.
(*l*) Co. Litt. 45.
(*m*) 6 Rep. 35.
(*n*) Co. Litt. 46.
(*o*) *Ibid.* 45.
(*p*) *Ibid.*
(*q*) *Ibid.* 46.

though a lease for life cannot. As, if I grant lands to Titius to [*144] hold from Michaelmas next for *twenty years, this is good; but to hold from Michaelmas next for the term of his natural life, is void. For no estate of freehold can commence *in futuro* (5); because it cannot be created at common law without livery of seisin, or corporal possession of the land; and corporal possession cannot be given of an estate now, which is not to commence now, but hereafter (*r*). And, because no livery of seisin is necessary to a lease for years, such lessee is not said to be *seised*, or to have true legal seisin of the lands. Nor indeed does the bare lease vest any estate in the lessee; but only gives him a right of entry on the tenement, which right is called his *interest in the term*, or *interesse termini*: but when he has actually so entered, and thereby accepted the grant, the estate is then, and not before, vested in him, and he is *possessed*, not properly of the land, but of the term of years (*s*); the possession or seisin of the *land* remaining still in him who hath the freehold (6). Thus the word, *term*, does not merely signify the time specified in the lease, but the estate also and interest that passes by that lease; and therefore the *term* may expire, during the continuance of the *time*; as by surrender, forfeiture, and the like. For which reason, if I grant a lease to A for the term of three years, and after the expiration of the said *term*, to B for six years, and A surrenders or forfeits his lease at the end of *one* year, B's interest shall immediately take effect: but if the remainder had been to B from and after the expiration of the said *three years*, or from and after the expiration of the said *time*, in this case B's interest will not commence till the time is fully elapsed, whatever may become of A's term (*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 (*u*) 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*).

[*145] *With regard to emblements, or the profits of lands sowed by tenant for years, there is this difference between him, and tenant for life: that where the term of tenant for years depends upon a certainty, as if he holds from midsummer for ten years, and in the last year he sows a crop of corn, and it is not ripe and cut before midsummer, 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 could never reap the profits of (*y*). But where the lease for years depends upon an uncertainty: as, upon the death of a 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

(*r*) 5 Rep. 94.
(*s*) Co. Litt. 46.
(*t*) *Ibid.* 45.
(*u*) pag. 122.
(*w*) Co. Litt. 45.
(*x*) pag. 35.
(*y*) Litt. § 68.

(5) That is, no estate of freehold in futuro can pass by a *common law* conveyance, as by feoffment; but, by a conveyance under the statute of uses, there may be a grant of a freehold to commence in futuro, and in the mean time the rent undisposed of will be a resulting trust. Sand. on U. & T. 1 vol. 128. 2 vol. 7.

In 4 Cowen, 427, it was held that a bargain and sale of a freehold to vest in futuro was void: that question, it is understood, is to be carried to the court of Errors. The Revised Statutes now expressly sanction such a conveyance if it be good in other respects. 1 R. S. 724.

(6) As to this point, see Bac. Ab. Leases, M.

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 entitled 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; because 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 connexion 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, [*146] 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 it 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 *instar 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 [*147] 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 (*n*). And if rent be payable quarterly, or half-yearly, and the lessee determines the will, the rent shall be paid to

(*z*) Co. Litt. 56.
(*a*) *Ibid.* 55.
(*b*) Litt. § 68.
(*c*) Co. Litt. 55.
(*d*) *Ibid.* 56.
(*e*) *Ibid.* 55.
(*f*) *Ibid.*
(*g*) 1 Ventr. 248.
(*h*) Co. Litt. 55.
(*i*) *Ibid.* 57.
(*k*) 1 Rol. Abr. 860. 2 Lev. 88.
(*l*) Co. Litt. 55.
(*m*) 5 Rep. 116. Co. Litt. 57. 62.
(*n*) Litt. § 69.

the end of the current quarter or half year (*o*). And, upon the same principle, courts of law have of late years leaned 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 (7): 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, which is generally understood to be six months (*p*) (8), (9).

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 (*q*), 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, accord-

(*o*) Salk. 414. 1 Sid. 339.

(*p*) This kind of lease was in use as long ago as the reign of Henry VIII. when half a year's notice seems to have been required to determine it. (7. 13 *Hen. VIII.* 15, 16.)

(*q*) pag. 93.

(7) A tenancy from year to year is where tenements are expressly or impliedly demised by the landlord to the tenant to hold from year to year, so long as the parties shall respectively please; and there cannot be such a tenancy determinable only at the will of the tenant, for then it would operate as a tenancy for his life, which is not creatable by parol, but only by feoffment or other deed. 8 East, 167. What was formerly considered as a tenancy at will, has, in modern times, been construed to be a tenancy from year to year, and from a general occupation such a tenancy will be inferred, unless a contrary intent appear. 3 Burr. 1609. 1 T. R. 163. 3 T. R. 16. 8 T. R. 3. And so in the cases in which the statute against frauds, 29 Car. II. c. 3. declares that the letting shall only have the effect of an estate at will, it operates as a tenancy from year to year. 8 T. R. 3. 5 T. R. 471. So where rent is received by a landlord, that raises an implied tenancy from year to year, though the tenant was originally let in under an invalid lease. 3 East, 451. So if a tenant hold over by consent after the expiration of a lease, he becomes tenant from year to year, 5 Esp. R. 173. even where the lease was determined by the death of the lessor tenant for life in the middle of a year. 1 H. B. 97.

But if the circumstances of the case clearly preclude the construction in favour of such a tenancy, it will not exist, as where a party let a shed to another for so long as both parties should like, on an agreement that the tenant should convert it into a stable, and the defendant should have all the dung for a compensation, there being no reservation referable to any aliquot part of a year, this was construed to be an estate at will. 4 Taunt. 128. And it must by no means be understood that a strict tenancy at will cannot exist at the present day, for it may clearly be created by the express agreement of the parties. Id. ibid. 5 B. & A. 604. 1 Dowl. & R. 272. So under an agreement that the tenant shall always be subject to quit at three months' notice, he is not tenant from year to year, but from quarter to quarter. 3 Campb. 510.

(8) When a lease or demise is determinable on a certain event, or at a particular period, no notice to quit is necessary, because both parties are equally apprized of the determination of the term, 1 T. R. 162; but in general when the tenancy would otherwise continue, there must be given *half a year's* (demy an. Tr. 13 Hen. VIII. 15, 16.) *notice to quit*, expiring at that time of the year when the tenancy commenced, whether the tenancy was of land or buildings, 1 T. R. 159; and where the tenant enters on different parts of the premises at different times, the notice should be given with reference to the substantial and principal part of them, and will be good for all, and what is the substantial part is a question for the jury. See instances 2 Bla. R. 1224. 6 East. 120. 7 East. 551. 11 East, 498. As to the *case of lodgings*, that depends on a particular contract, and is an exception to the general rule. The agreement between the parties may be for a month or less time, and there a much shorter notice may suffice, 1 T. R. 162; and usually the same space of time for the notice is required as the period for which the lodgings were originally taken, as a week's notice when taken by the week, and a month's when taken by the month, and so on. 1 Esp. Rep. 94. Adams, 124. If lodgings are taken generally at so much per annum, it it is construed to be only a taking for one year, and no notice to quit is necessary. 3 B. & C. 90.

When it is doubtful at what time of the year the tenancy commenced, it is advisable to serve a notice "to quit at the expiration of the current year of your tenancy, which shall expire next after one half year from the time of your being served with this notice." 2 Esp. R. 589. See further as to notices to quit, the service and waiver thereof, Adams on Ejectment, 96 to 140. 1 Saunders by Patteson and Williams, 276. note a.

(9) In New-York, the landlord may terminate a tenancy at will or sufferance by one month's notice in writing. 1 R. S. 745.

ing 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 [*148] of uniform wills. And therefore it is rightly observed by Calthorpe (r), 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, and hold them 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, promulgated 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 non-payment of a fine, and the like. Yet none of these interests amount to a freehold; for the freehold of the whole manor abides always in the lord only (s), who hath granted out the use and occupation, but not the corporeal seisin or true legal possession, of certain 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 [*149] the lord's will, seems to have arisen from the nature of villenage tenure; in which a grant of any estate of freehold, or even for years absolutely, was an immediate enfranchisement of the villein (t). 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 be descendible to their issue, yet not caring to manumit them entirely, might probably scruple to grant them any absolute freehold; 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

(r) On copyholds, 51. 54.
(s) Litt. § 81. 2 Inst. 325.
(t) Mirr. c. 2, § 28. Litt. § 204, 5, 6.

of all lands must necessarily rest and abide somewhere, the law supposed it still 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 their 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 as were thus nominally tenants at will could have any freehold interest; and therefore continued and now 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-socage (*u*), 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 (*v*); who are sometimes called *customary freeholders*, being allowed to have a freehold *interest*, though not a freehold *tenure*.

[*150] *However, in common cases, copyhold estates are still ranked (for the reasons above-mentioned) among tenancies at 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 a 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*) (10), (11). 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

(*u*) See page 98, &c.
(*v*) Fitz. *Abr. tit. corone.* 310. *custom.* 12 *Bro. Abr. tit. custom.* 2. 17. *tenant per copie.* 22. 9 Rep. 76. Co. Litt. 59. Co. Copyh. § 32. Cro. Car. 229. 1 Roll. Abr. 562. 2 Ventr. 143. Carth. 432. Lord Raym. 1225.
(*w*) Co. Litt. 57.

(10) A mortgagor who is suffered to continue in possession by the mortgagee, is a tenant at sufferance. 5 B. & A. 604. So a person who has been let into possession under an agreement for a lease, and from whom the landlord has not received rent, for he having no legal interest may, after demand, be evicted by the landlord, 2 Taunt. 148. though it would be otherwise if rent were received, which would afford evidence of a tenancy from year to year. 13 East, 19. So if a purchaser be let into possession before conveyance of the legal interest, he is a mere tenant at sufferance, and may be evicted after demand of the possession. 3 Campb. 8. 13 East, 210. 2 M. & S. 8.

(11) Lord Coke tells us (in 2d Instit. 134) this diversity is to be observed, that where a man cometh to a particular estate by the act of the party, there if he hold over, he is a tenant at sufferance; but where he cometh to the particular estate by act of law, as a guardian for instance, there, if he hold over, he is no tenant at sufferance, but an abator. The same doctrine is laid down in 1 Instit. 271.

Formerly, tenants at sufferance were not liable to pay any rent for the lands, because it was the folly of the owners to suffer them to continue in possession after the determination of their rightful estate. (*Finch's case*, 2 Leon. 143).

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, he 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 tortious, or, in common language, wrongful.

*Thus stands the law, with regard to tenants by sufferance, [*151] and landlords are obliged in these cases to make formal entries upon their lands (*z*), and recover possession by the legal process of ejectment (12); 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. 28. in case any tenant for life or years, or other person claiming under or by collusion with such tenant, shall wilfully hold over after the determination of the term, and demand made and notice in *writing* given, by him to whom the remainder or reversion of the premises shall belong, for delivering the possession thereof; such person, so holding over or keeping the other out of possession, shall pay for the time he detains the lands, at the rate of double their yearly *value*. And, by statute 11 Geo. II. c. 19. in case any tenant, having power to determine his lease, shall give notice of his intention to quit the premises, and shall not deliver up the possession at the time contained in such notice, he shall thenceforth pay double the former *rent*, for such time as he continues in possession. These statutes have almost put an end to the practice of tenancy by sufferance, unless with the tacit consent of the owner of the tenement (13).

CHAPTER X.

OF ESTATES UPON CONDITION (1).

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* (2); being

(*x*) Co. Litt. 57.
(*y*) *Ibid.*
(*z*) 5 Mod. 384.

(12) It has been a generally received notion, that if a tenant for a term, from year to year, at will, or at sufferance, hold over, and do not quit on request, the landlord is put to his action of ejectment, and cannot take possession; but see 7 T. R. 431. 1 Price Rep. 53. 1 Bingh. Rep. 158. 6 Taunt. 202—7. from which it appears, that if the landlord can get possession, without committing a breach of the peace, he may do so; and indeed if he were to occasion a breach of the peace, and be liable to be indicted for a forcible entry, still he would have a defence to any *action* at the suit of the party wrongfully holding over, because the plea of liberum tenementum, or other title in the lessor, would necessarily be pleadable in bar. Therefore, a person who wrongfully holds over, cannot distrain the cattle of the landlord put on the premises, 7 T. R. 471. or sue him in trespass for his entry. 1 Bingh. Rep. 158.

(13) As to the construction of these statutes, see Selw. N. P. Debt. VIII.

(1) See in general, 2 Cruise Dig. 2, &c. and 6 vol. index, Conditions; Com. Dig. Condition; Bac. Ab. Conditions; 2 Saunders, index, Forfeiture; Adams, Ejectm. Forfeiture.

(2) As to things executed, (a conveyance of lands, for instance), a condition, to be valid,

such whose existence depends upon the happening or not happening of some uncertain event, whereby the estate may be either originally created, or enlarged (3), or finally defeated (*a*) (4). And these conditional estates

(*a*) Co. Litt. 201.

must be created and annexed to the estate at the time that it is made, not subsequently; the condition may, indeed, be contained in a separate instrument, but then, that must be sealed and delivered at the same time with the principal deed. (Co. Litt. 236 b. Touch. 126). As to things executory, (such as rents, annuities, &c.), a grant of them may be restrained by a condition created after the execution of such grant. (Co. Litt. 237 a). Littleton (in his 328th and three following sections) says, divers words there be, which, by virtue of themselves, make estates upon condition. Not only the express words, "upon condition," but also the words "provided always," or "so that," will make a feoffment, or deed, conditional. And again (in his 331st section) he says, the words "if it happen" will make a condition in a deed, provided a *power of entry* is added. Without the reservation of such a power, the words "if it happen" will not alone, and by their own force, make a good condition. This distinction is also noticed in Sheph. Touch. 122, where it is also laid down, that although the words "proviso," "so that," and "on condition," are the most proper words to make a condition; yet they have not always that effect, but frequently serve for other purposes; sometimes they operate as a qualification or limitation, sometimes as a covenant. And when inserted *among the covenants* in a deed, they operate as a *condition*, only when attended with the following circumstances: 1st. When the clause wherein they are found is a substantive one, having no dependence upon any other sentence in the deed, or rather, perhaps, not being used merely in qualification of such other sentence, but standing by itself. 2nd. When it is compulsory upon the feoffee, donee, or lessee. 3rd. When it proceeds from the part of the feoffor, donor, or lessor, and declares *his* intention, (but as to this point, see *Whichcote* v. *Fox*, Cro. Jac. 398. *Cromwell's case*, 2 Rep. 72. and *infra*). 4th. When it is applied to the estate, or other subject matter.

The word "provided" may operate as a condition and also a covenant: thus, if the words are, "provided always, and the feoffee doth covenant" that neither he nor his heirs shall do such an act; this, if by indenture, is both a condition and a covenant, for the words will be considered as the words of *both* parties, (*Whichcote* v. *Fox*, Cro. Jac. 398). But if the clause have dependence on another clause in the deed, or be the words of the feoffee to compel the *feoffor* to do something; then it is not a condition, but a covenant only. So, if the clause be applied to some other thing, and not to the substance of the thing granted, then it is no condition. As, if a lease be made of land, rendering rent at B., provided that if such a thing happen it shall be paid at C., this does not make the estate conditional. And a proviso that a lessor shall not distrain for rent, may be a good condition to bind him; but not a condition annexed to the estate. (See Co. Litt. 203 b. *Englefield's case*, Moor, 307, *S. C.* 7 Rep. 78. *Berkeley* v. *The Earl of Pembroke*, Moor, 707, *S. C.* Cro. Eliz. 306, 560. *Browning* v. *Beeston*, Plowd. 131).

The word "if" frequently creates a condition, but not always; for sometimes it makes a *limitation*; as where a lease is made for years, if A. B. shall so long live. Conditions may be annexed to demises for years, without any of these formal words, where the intent that the estate should be conditional is apparent. (Co. Litt. 204 a, 214 b. Sheph. Touch. 123).

(3) A particular estate may be limited, with a condition, that, after the happening of a certain event, the person to whom the first estate is limited shall have a larger estate. Such a condition may be good and effectual, as well in relation to things which lie in grant, as to things which lie in livery, and may be annexed as well to an estate-tail, which cannot be drowned, as to an estate for life or years, which may be merged by the access of a greater estate. But, such increase of an estate by force of such a condition, ought to have four incidents. 1. There must be a particular estate as a foundation for the increase to take effect upon; which particular estate, Lord Coke held, must not be an estate at will, nor revocable, nor contingent. 2. Such particular estate ought to continue in the lessee or grantee, until the increase happens, or at least no alteration in privity of estate must be made by alienation of the lessee or grantee; though the alienation of the lessor or grantor will not affect the condition; and the alteration of persons by descent of the reversion to the heirs of the grantor, or his alienee, or of the particular estate to the representatives of the grantee, will not avoid the condition. Neither need such increase take place immediately upon the particular estate, but may enure as a remainder to the donee of the particular estate, or his representatives, subsequent to an intermediate remainder to somebody else. 3. The increase must vest and take effect immediately upon the performance of the condition; for, if an estate cannot be enlarged at the very instant appointed for its enlargement, the enlargement shall never take place. 4. The particular estate and the increase ought to derive their effect from one and the same instrument, or from several deeds delivered at one and the same time. (*Lord Stafford's case*, 8 Rep. 149—153).

(3) It is a rule of law, that a condition, the effect of which is to defeat or determine an estate to which it is annexed, must defeat the whole of such estate; not determine it in part only, leaving it good for the residue; (*Jermin* v. *Arscot*, stated by Chief Justice Anderson, in *Corbet's case*, 1 Rep. 85 b. and see Ibid. 86 b. *Chudleigh's case*, 1 Rep. 138 b).

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*.

I. 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 (*b*), on breach of which condition *it is [*153] lawful for the grantor, or his heirs, to oust him, and grant it to another person (*c*). 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 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 (*e*).

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.

*II. An estate on condition expressed in the grant itself is [*154] 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*) (5). These conditions are therefore

(*b*) Litt. § 378.
(*c*) 9 Rep. 50.
(*d*) Co. Litt. 233.
(*e*) *Ibid.* § 379.
(*f*) Co. Litt. 215.
(*g*) *Ibid.* 201.

(5) The instances of conditions which now most frequently arise in practice are those contained in leases or agreements between lessor and lessee, and are principally condi-

either *precedent*, or *subsequent* (6). Precedent are such as must happen or be performed before the estate can vest or be enlarged: subsequent are such, by the failure or non-performance of which an estate already vested may be defeated. 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 (*i*). But if a man grants 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 an estate upon condition subsequent, which is defeasible if the condition be not strictly performed (*k*). To this class may also be referred all base fees, and fee-simples conditional at the common law (*l*). 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 [*155] any of these *subsequent conditions, by the failure of these contingencies; 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 determinable and void.

(*h*) Show. Parl. Cas. 33, &c.
(*i*) Co. Litt. 217.
(*k*) Litt. § 325.
(*l*) See pag. 109, 110, 111.

tions subsequent, provided for in the usual clauses of re-entry in case of a breach of a particular, or any covenant in the lease, as non-payment of rent, not repairing, not insuring, not residing on the premises, or in case of assignment, or parting with the possession, or of bankruptcy, or insolvency, &c. See the cases upon this subject, 2 Cruise Dig. 10, 11, 13; 4 Cruise, 506; Adams, Ejectm. index, Covenant; 2 Saunders, by Patteson and Williams, index, Forfeiture.

(6) Even at common law, and in the construction of a deed, no precise technical words necessarily make a stipulation *precedent* or *subsequent*: neither does it depend upon the circumstance whether the clause has a prior or a posterior place in the deed, so that it takes effect as a proviso. For, the same words have been construed to operate either as a precedent or as a subsequent condition, according to the nature of the transaction. (*Hotham* v. *The East India Company*. 1 T. R. 645. *Acherley* v. *Vernon*, Willes, 156). The dependence, or independence, of covenants or conditions, Lord Mansfield said, is to be collected from the evident sense and meaning of the parties; and however transposed they may be in a deed, their precedency must depend upon the order of time in which the intent of the transaction requires their performance. (*Jones* v. *Barkley*, 2 Dougl. 691).

Equity will not allow any one to take advantage of a bequest over, who has himself been instrumental in causing the breach of a condition. (*Garrett* v. *Pretty*, stated from Reg. Lib. in 3 Meriv. 120. *Clarke* v. *Parker*, 19 Ves. 12. *D'Aguilar* v. *Drinkwater*, 2 Ves. & Bea. 225). But, it is a general rule, that where a condition is annexed by will to a devise or bequest, and no one is bound to give notice of such condition, the parties must themselves take notice, and perform the condition, in order to avoid a forfeiture. (*Chancey* v. *Graydon*, 2 Atk. 619. *Fry* v. *Porter*, 1 Mod. 314. *Burgess* v. *Robinson*, 3 Meriv. 9. *Phillips* v. *Bury*, Show. P. C. 50). Infancy will be no excuse, in such case, for non-performance of the condition. *Bertie* v. *Lord Falkland*, 2 Freem. 221. *Lady Ann Fry's case*, 1 Ventr. 200). The application of this general rule, however, is subject to one restriction:—where a condition is annexed to a devise of real estate to the testator's heir at law, there notice of the condition is necessary before he can incur a forfeiture; for, an heir at law will be supposed to have entered and made claim by descent, not under the will. (*Burleton* v. *Homfray*, Ambl. 259).

A distinction is however made between a *condition in deed* and a *limitation*, which Littleton (*m*) 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 Dale, or *while* he continues unmarried, or *until* out of the rents and profits he shall have made 500*l.* and the like (*n*). In such case 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 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*). Yet, though strict words of condition be used in the creation of the estate, 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 and not a *condition (*q*): because if it were a condition, then, upon the [*156] 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, and he may enter on the lands 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, or the survivor of them, shall so long live), this still continues a mere chattel, and is not, by such its uncertainty, ranked among estates of freehold.

These express conditions, if they be *impossible* at the time of their crea-

(*m*) § 330. 1 Inst. 234.
(*n*) 10 Rep. 41.
(*o*) *Ibid.* 42.
(*p*) Litt. § 347. Stat. 32 Hen. VIII. c. 34.
(*q*) 1 Vent. 202.
(*r*) Cro. Eliz. 206. 1 Roll. Abr. 411.
(*s*) Co. Litt. 42.

tion, 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 condi-
[*157] tions *subsequent*, that *is, to be performed 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 he marries with Jane S. by such a day (within which time the woman dies, or the feoffor marries her himself); or unless he kills another; or in case he alienes in fee; that 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 200*l.*) 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
[*158] another a specific sum (*e. g.* 200*l.*) *and grants him an estate in fee, on condition that if he, the mortgagor, shall repay the mortgagee the said sum of 200*l.* 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 then the mortgagee shall reconvey the estate to the mortgagor: in this case, the land, which is so put in pledge, is by law (7), 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 overruled 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 repayment of

(*t*) Co. Litt. 206.
(*u*) *Ibid.*
(*w*) *Ibid.* 205.
(*x*) Litt. § 332.
(*y*) Ibid. § 357. Cro. Car. 191.
(*z*) Hardr. 466.

(7) The *student* will observe, that "by law" is here meant, the law as administered in the common law courts: in equity a different rule prevails. See p. 159.

the mortgage-money: which course has been since pretty generally continued, principally because on the death of the mortgagee such term becomes vested in his personal representatives, who alone are entitled 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 be thus forfeited, and the *estate absolutely vested in the mortgagee at the [*159] common law, yet they will consider the real value of the tenements compared with the sum borrowed. And, if the estate be of greater value than the sum lent thereon, they will allow the mortgagor at any reasonable time to recall or redeem his estate (8); paying to the mortgagee his principal, interest, and expenses: for otherwise, in strictness of law, an estate worth 1000*l.* might be forfeited for non-payment of 100*l.*

(8) The policy of the statute of limitations (32 Hen. VIII. c. 2,) applies as strongly to a mortgaged estate as to any other. So long as the estate can be shewn to have been treated as a pledge, so long there is a recognition of the mortgagor's title: (*Hodle* v. *Healey*, 1 Ves. & Bea. 540. *S. C.* 6 Mad. 181. *Grubb* v. *Woodhouse*, 2 Freem. 187): but from the time when all accounts have ceased to be kept by the mortgagee; and provided also he has in no other way, (either in communications to the mortgagor or in dealings with third parties, *Hansard* v. *Hardy*, 18 Ves. 459. *Ord* v. *Smith*, Sel. Ca. in Cha. 10), admitted the estate to be held as a security only; the statute will begin to run, unless the mortgagor's situation bring him within some of the savings of the statute: and if he do not within twenty years assert his title to redeem, his right will have been forfeited by his own *laches*. (*Marquis of Cholmondeley* v. *Lord Clinton*, 2 Jac. & Walk. 180, *et seq.* *Whiting* v. *White*, Coop. 4. *S. C.* 2 Cox, 300. *Barren* v. *Martin*, 19 Ves. 327). But to shew that an estate has been treated as one affected by a subsisting mortgage, within twenty years immediately preceding a bill brought for redemption, parol evidence is admissible. (*Reeks* v. *Postlethwaite*, Coop. 170. *Perry* v. *Marston*, cited 2 Cox, 296. *Edsell* v. *Buchanan*, 2 Ves. jun. 84).

In the case of *Montgomery* v. *The Marquis of Bath*, (3 Ves. 560), a decree was made for a foreclosure as to the share of one of several joint mortgagees: but, it is to be observed, no opposition was made by the mortgagor in that case; and it is very doubtful whether a decree for a partial foreclosure ought ever to be made. (See *Cockburn* v. *Thompson*, 16 Ves. 324, n.) It is, at all events, certain, there can be no foreclosure or redemption, unless the whole of the parties entitled to any share of the mortgage money are before the court: (*Lowe* v. *Morgan*, 1 Br. 368. *Palmer* v. *The Earl of Carlisle*, 1 Sim. & Stu. 425): it being always the object of a court of equity to make a complete decree, embracing the whole subject, and determining (as far as possible) the rights of all the parties interested. (*Palk* v. *Clinton*, 12 Ves. 58. *Cholmondeley* v. *Clinton*, 2 Jac. & Walk. 134). Upon analogous principles, not only the mortgagor but a subsequent mortgagee, who comes to redeem the mortgage of a prior mortgagee, must offer to redeem it entirely; although the second mortgage may affect only part of the estates comprised in the first, and the titles are different. (*Palk* v. *Clinton*, 12 Ves. 59. *Reynolds* v. *Lowe*, cited from Forrester's MS. in 1 Hovenden's Suppl. to Ves. junr. 280). It is true that Lord Hardwicke (in *Ex parte King*, 1 Atk. 300), intimated a doubt whether it was an established rule of the court, that a mortgagor who has borrowed, from the same party, money on the security of two estates, shall be compelled to redeem both, if he will have back either estate: but it had previously been decided, that, in such cases, if one of the securities proves to be scanty, the mortgagor shall not be allowed to bring his bill for the redemption of the other mortgage only: (*Pusefoy* v. *Purefoy*, 1 Vern. 29. *Shuttleworth* v. *Laycock*, 1 Vern. 245. *Pope* v. *Onslow*, 2 Vern. 286): and modern cases have confirmed the doctrine, that the mortgagee may insist on being redeemed as to both his demands, or neither; with this reasonable restriction, however, that a man who happens to be engaged with another in one mortgage only, may redeem the same, though the other person concerned therein has also pledged another estate. (*Jones* v. *Smith*, 2 Ves. junr. 376. *Cator* v. *Charlton*, and *Collett* v. *Munden*, cited 2 Ves. junr. 377).

or a less sum. This reasonable advantage, allowed to mortgagors, is called the *equity of redemption* (9): and this enables a mortgagor to call on the mortgagee, who has possession of his estate, to deliver it back and account for the rents and profits received, on payment of his whole debt and interest; thereby turning the *mortuum* into a kind of *vivum vadium*. But, on the other hand, the mortgagee may either compel the sale of the estate, in order to get the whole of his money immediately; or else call upon the mortgagor to redeem his estate presently, or in default thereof, to be for ever *foreclosed* from redeeming the same; that is, to lose his equity of redemption without possibility of recall. And also, in some cases of fraudulent mortgages (*a*), the fraudulent mortgagor forfeits all equity of redemption whatsoever (10). It is not however usual for mortgagees to take possession of the mortgaged estate, unless where the security is precarious, or small; or where the mortgagor neglects even the payment of interest: when the mortgagee is frequently obliged to bring an ejectment (11), 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 re-assign his securities (12). In Glanvil's time, when the universal method of conveyance was by livery of seisin [*160] *or corporal tradition of the lands, no gage or pledge of lands was good unless possession was also delivered to the creditor; "*si non sequatur ipsius vadii traditio, curia domini regis hujusmodi privatas conventiones tueri non solet;*" for which the reason given is, to prevent subsequent and fraudulent pledges of the same land: "*cum in tali casu possit eadem res pluribus aliis creditoribus tum prius tum posterius invadiari* (*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 (13).

(*a*) Stat. 4 & 5 W. & M. c. 16.

(*b*) *Pignoris appellatione eam propriè rem contineri dicimus, quæ simul etiam traditur, creditori. At eam, quæ sine traditione nuda conventione tenetur, propriè hypothecæ appellatione contineri dicimus.* Inst. l. 4, t. 6, § 7.

(*c*) l. 10, c. 3.

(9) 2 Saund. 8. 46. 11. a.

(10) By the 4 & 5 W. & M. c. 16. if any person mortgages his estate, and does not previously inform the mortgagee in writing of a prior mortgage, or of any judgment or incumbrance, which he has voluntarily brought upon the estate, the mortgagee shall hold the estate as an absolute purchaser, free from the equity of redemption of the mortgagor.

(11) The mortgagee is not now obliged to bring an ejectment to recover the rents and profits of the estate, for it has been determined that where there is a tenant in possession, by a lease prior to the mortgage, the mortgagee may at any time give him notice to pay the rent to him; and he may distrain for all the rent which is due at the time of the notice, and also for all that accrues afterwards. Moss. v. Gallimore, Doug. 279. The mortgagor has no interest in the premises, but by the mere indulgence of the mortgagee; he has not even the estate of a tenant at will, for it is held he may be prevented from carrying away the emblements, or the crops which he himself has sown. Ib. 2 Fonblanque on Equity, 258.

If the mortgagor grants a lease after the mortgage, the mortgagee may recover the possession of the premises in an ejectment against the tenant in possession without a previous notice to quit. 3 East, 449. Keech v. Hall, 1 Doug. 21. But if the landlord mortgages, pending a yearly tenancy, the tenant is entitled to six months' notice from the mortgagee. 1 T. R. 378.

(12) The statute contains exceptions. See decisions, 7 T. R. 185. 2 Chitty's Rep. 264.

(13) An experiment made in the counties of York and Middlesex, to counteract, by registration, the inconveniences alluded to in the text, is mentioned by our author (at the close of the 20th chapter of this book), as one of very doubtful utility in practice, however plausible in theory.

If a mortgagee neglect to take possession

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 before the chief magistrate of some trading town, 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*), from whence this security is called a statute staple. They are both, I say, securities for debts acknowledged to be due; and originally permitted only among traders, for the benefit of commerce; whereby not only the body of the debtor may be imprisoned, and his goods seized in satisfaction of the debt, but also his lands may be delivered to the creditor, till out of the rents and profits of them the debt may be satisfied; and, during such time as the creditor so

(*d*) See Book I. c. 8.

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of, or if he part with, the title deeds of the mortgaged property, with a view to enable the mortgagor to commence frauds upon third persons; he will be postponed to incumbrancers who have been deceived, and induced to advance money, by his collusion with the mortgagor: but the mere circumstance of not taking, or keeping, possession of the title deeds, is not, of itself, a sufficient ground for postponing the first mortgagee; unless there be fraud, concealment, or some such purpose, or concurrence in such purpose; or that gross negligence which amounts to evidence of a fraudulent intention: (*Evans* v. *Bicknell*, 6 Ves. 190. *Martinez* v. *Cooper*, 2 Russ. 216. *Barnett* v. *Weston*, 12 Ves. 133. *Bailey* v. *Fermor*, 9 Pr. 267. *Peter* v. *Russell*, Gilb. Eq. Rep. 123): and, of course, a prior incumbrancer, to whose charge on the estate possession of the title deeds is not a necessary incident, cannot be postponed to subsequent incumbrancers, because he is not in possession of the title deeds. (*Harper* v. *Faulder*, 4 Mad. 138. *Tourle* v. *Rand*, 2 Br. 652).

Among mortgagees, where none of them have the legal estate, the rule in equity is, that, *qui prior est tempore potior est jure*; and the several incumbrances must be paid according to their priority in point of time. (*Brace* v. *Duchess of Marlborough*, 2 P. Wms. 495. *Clarke* v. *Abbot*, Bernard. Ch. Rep. 460. *Earl of Pomfret* v. *Lord Windsor*, 2 Ves. Sen. 486. *Maundrell* v. *Maundrell*, 10 Ves. 260. *Mackreth* v. *Symmons*, 15 Ves. 354). But when, of several persons having equal equity in their favour, one has been fortunate, or prudent, enough to get in the legal estate; he may make all the advantage thereof which the law admits, and thus protect his title, though subsequent in point of time to that of other claimants; courts of equity will not interfere in such cases, but leave the law to prevail. In conformity to this settled doctrine, if an estate be encumbered with several mortgage debts, the last mortgagee, provided he lent his money *bona fide* and without notice, may, by taking in the first incumbrance, carrying with it the legal estate, protect himself against any intermediate mortgage: no *mesne* mortgagee can take the estate out of his hands, without redeeming the last incumbrance as well as the first. (*Wortley* v. *Birkhead*, 2 Ves. sen. 573. *Morret* v. *Paske*, 2 Atk. 53. *Frere* v. *Moore*, 8 Pr. 487. *Barnett* v. *Weston*, 12 Ves. 135). But, to support the doctrine of tacking, the fairness of the circumstances under which the loan desired to be tacked was made, must be liable to no impeachment: (*Maundrell* v. *Maundrell*, 10 Ves. 260): and, though the point has never called for decision, it has been said to be very doubtful,—whether a third mortgagee, by taking in the first mortgage, can exclude the second, if the first mortgagee, when he conveyed to the third, knew of the second. (*Mackreth* v. *Symmons*, 15 Ves. 335). Indisputably, a mortgagee purchasing the mortgagor's equity of redemption, or a *puisne* incumbrancer, cannot set up a prior mortgage of his own, (nor, consequently, a mortgage which he has got in), against *mesne* incumbrances of which he had notice. (*Toulmin* v. *Steere*, 3 Meriv. 224. *Mocatta* v. *Murgatroyd*, 1 P. Wms. 393. *Morret* v. *Paske*, 2 Atk. 62). Upon analogous principles, if the first mortgagee stood by, without disclosing his own incumbrance on the estate, when the second mortgagee advanced his money, under the persuasion that the estate was liable for no prior debt; the first mortgagee, in just recompence of his fraudulent concealment, will be postponed to the second. And the rule, as well as the reason, of decision is the same, where the mortgagor has gained any other advantage, in subsequent dealings respecting the mortgaged estate, by the connivance of the mortgagee. (*Becket* v. *Cordley*, 1 Br. 357. *Berrisford* v. *Milward*, 2 Atk. 49). Part of this note is extracted from 2 Hovenden on Frauds, 183, 196.

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, acknowledged before either of the chief justices, or (out of term) before their substitutes, the mayor of the staple at Westminster and the recorder of London; whereby the benefit of this mercantile transaction is extended to all the king's subjects in general, by virtue of the statute 23 Hen. VIII. c. 6. amended by 8 Geo. I. c. 25. which directs such recognizances to be enrolled and certified into chancery. But these by the statute of frauds, 29 Car. II. c. 3. are only binding upon the lands in the hands of *bonâ fide* purchasers, from the day of their enrolment, which is ordered to be marked on the record.

V. Another similar conditional estate, created by operation of law, for security and satisfaction of debts, is called, an *estate 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 (*e*) 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 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* (*f*), 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) (*g*) the whole of a man's lands was liable to be pledged in a statute merchant, for a debt contracted in trade; though one *half* of them was liable to be taken in execution for any other debt of the owner.

[*161]

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 (*h*). "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 (*i*), yet it is but the *similitude of a freehold, and *nullum simile est 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 provided for personal debts due to the deceased, to which debts the executor is entitled,

[*162]

(*e*) 13 Edw. I. c. 18.
(*f*) 18 Edw. I.
(*g*) 13 Edw. I.
(*h*) 1 Inst. 42, 43.

(*i*) The words of the statute *de mercatoribus* are, "*puisse porter bref de novele disseisine, auxi come de franktenement.*"

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 those to whom the debts if recovered would belong. For 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 (*k*): because they, being liable to pay the original testator's debts, so far as his assets will extend, are in reason entitled to possess that fund out of which he has directed them to be paid (14).

CHAPTER XI.

OF ESTATES IN POSSESSION, REMAINDER, AND REVERSION (1).

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 the 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

(*k*) Co. Litt. 42.

(14) In New-York there is no statute merchant, statute staple, or elegit: but on an execution, the lands of a debtor may be sold absolutely.

The doctrine of tacking mortgages does not apply here, at least as between *registered* mortgages; 1 Caines' Cases, 112; and probably would not be applied to unregistered mortgages. By statute 1 R. S. 756, every conveyance of real estate thereafter made (including mortgages, id. 762.) must be recorded in the office of the clerk of the county where the lands are situated, or is void as against any subsequent purchaser (including mortgagees, &c. id. 762), in good faith and for a valuable consideration, whose conveyance shall be first recorded. Formerly, an unrecorded deed given subsequent to an unrecorded mortgage had a preference over the mortgage, which was not lost by the mortgage being recorded after the purchase, but before the deed was recorded. (19 Johns. R. 281, &c.) Notice, however, of a prior incumbrance binds a subsequent purchaser the same as if the prior incumbrance had been recorded. 2 Johns. C. R. 603. Where there is no priority under the statute, and the equitable interests are equal, they attach according to priority of time. id. As early as the 1st June 1754, our law gave priority to mortgages as between each other to the one first registered. (3 R. S. Append. 10.) The same policy has been followed up, and is now extended to all conveyances, except leases for a period not exceeding 3 years.

(1) An estate in *possession* gives a present right of present enjoyment. An estate in *remainder* gives a right of future enjoyment, whether certainly or eventually depends on the form of the gift; and when the interest is contingent in its limitations, then on the events which have taken place. An estate in *reversion* gives a present fixed *right* of future enjoyment. 1 Prest. on Est. 89, &c.

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* (2) may be defined to be, an estate limited to take effect and be enjoyed after another estate is deter-
[*164] mined. *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 in 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*) (3): 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 disposed
[*165] of. A particular estate, with all *the remainders expectant thereon, is only one fee-simple: as 40*l.* 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. (4) And, first, there must necessarily be some particular estate precedent to the estate in remainder (*c*). 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

(*a*) Co. Litt. 143.
(*b*) Plowd. 29. Vaugh. 269.
(*c*) Co. Litt. 49. Plowd. 25.

(2) See 1 R. S. 723, § 9, 10.
(3) Contra as to contingent remainders by 1 R. S. 724, § 24.
(4) Contra by 1 R. S. 724.

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 interests, which were considered in the light of mere contracts by the ancient law (*d*), 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 an estate of freehold cannot be created to commence *in futuro;* but it ought to take effect presently either in possession or remainder (*e*); because at *common law no freehold in lands [*166] 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 (5). 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 is completed; and for the grantor to deliver immediate possession of the land to the tenant of this particular estate, which is construed to be giving possession to him in remainder, since his estate and that of the particular tenant are one and the same estate in law. As, where 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 once from the grantor to the grantees, and the remainder-man is seised of his remainder at the same time that the termor is possessed of his term. The enjoyment of it must indeed be deferred till hereafter; but it is to all intents and purposes an estate commencing *in praesenti*, 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 [*167] made (*g*): or if the remainder be a chattel interest, though per-

(*d*) Raym. 151.
(*e*) 5 Rep. 94.
(*f*) 8 Rep. 75.
(*g*) Dyer, 12.

(5) Yet deeds acting under the statute of uses, such as bargain and sale, covenant to stand seised, or a conveyance to uses, or even a devise, may give an estate of freehold to commence *in futuro;* as a bargain and sale to A. and his heirs, from and after Michaelmas-day now next ensuing, is good; and the use in the mean time results to the bargainor, or his heir. See 2 Prest. Conv. 157. Saund. on Uses and Trusts, 1 vol. 128. 2 vol. 98.

haps the deed of creation might operate as a *future contract*, if the tenant for years be a party to it, 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*) (6): as where the particular estate is an estate for the life of the person not *in esse* (*k*); 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 (*m*) (7). 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 (*n*). 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 (*o*).

[*168] *3. 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 (*p*) (8). 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 (*q*). 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

(*h*) Raym. 151.
(*i*) Co. Litt. 298.
(*k*) 2 Roll. Abr. 415.
(*l*) 1 Jon. 58.
(*m*) Litt. § 671. Plowd. 25.
(*n*) Litt. § 60.
(*o*) Co. Litt. 49.
(*p*) Plowd. 25. 1 Rep. 66.
(*q*) 1 Rep. 138.

(6) Contra by 1 R. S. 725, § 32.
(7) Contra by 1 R. S. 724, § 24.
(8) Contra by 1 R. S. 725, § 33. 723, § 10.

estate between the particular estate, and the remainder supported thereby (*r*): the thing supported must fall to the ground, if once its support be severed from it (9).

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 if A be tenant for twenty years, [*169] remainder to B in fee; here B's is a vested remainder, which nothing can defeat, or set aside.

Contingent or *executory* remainders (whereby no present interest passes) are where the estate in remainder is limited to take effect, either to a dubious and uncertain *person*, or upon a dubious and uncertain *event*; so that the particular estate may chance to be determined, and the remainder never take effect (*s*) (10), (11).

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

(*r*) 3 Rep. 21. (*s*) *Ibid.* 20.

(9) By the feudal law, the freehold could not be vacant, or, as it was termed, in abeyance. There must have been a tenant to fulfil the feudal duties or returns, and against whom the rights of others might be maintained. If the tenancy once became vacant, though but for one instant, the lord was warranted in entering on the lands; and the moment the particular estate ended, by the cession of the tenancy, all limitations of that estate were also at an end. From these principles are deduced the rules, that no *freehold* remainder can be well created, unless it is supported by an immediate estate of freehold, vested in some person actually in existence, who may answer the *præcipe* of strangers; and also, that it is necessary the remainder should take effect during the existence of such particular estate, or *eo instanti* that it determines. (Watk. on Conv. 94). But, as to a contingent remainder *for years*, there does not appear to be any necessity for a preceding freehold to support it. For, the remainder not being freehold, no such estate appears requisite to pass out of the grantor, in order to give effect to a remainder of that sort. And although every contingent *freehold* remainder must be supported by a preceding freehold, yet it is not necessary that such preceding estate continue in the actual *seisin* of its rightful tenant; it is sufficient if there subsists a *right* to such preceding estate, at the time the remainder should vest; provided such right be a present right of *entry*, and not a right of action only. A right of *entry* implies the undoubted subsistence of the estate; but when a right of action only remains, it then becomes a question of law whether the same estate continues or not: till that question be determined, upon the action brought, another estate is acknowledged and protected by the law. (See Fearne, ch. 3). Where the legal estate is vested in trustees, that will be sufficient to support the limitations of contingent remainders; (see *post*, pp. 171, 172); and there will be no necessity for any other particular estate of freehold; nor need the remainders vest at the time when the preceding trust limitations expire. (*Habergham* v. *Vincent*, 2 Ves. jun. 233. *Gale* v. *Gale*, 2 Cox, 153. *Hopkins* v. *Hopkins*, Ca. temp. Talb. 151).

(10) See in general the celebrated work of Fearne on Contingent Remainders and Executory Devises, edited by Butler. "It is not the uncertainty of ever taking effect in possession that makes a remainder contingent, for to that every remainder for life, or in tail, expectant upon an estate for life, is and must be liable; as the remainderman may die, or die without issue, before the death of the tenant for life. The present capacity of taking effect in possession, if the possession were to become vacant, and not the certainty that the possession will become vacant before the estate limited in remainder determines, universally distinguishes a vested remainder from one that is contingent." 2 Cruise Dig. 270. See also Fearne Con. Rem. 216. 7 ed. 2 Ves. J. 357. "A contingent remainder is a remainder limited so as to depend on an event or condition which may never happen or be performed, or which may not happen or be performed till after the determination of the preceding estate; for if the preceding estate (unless it be a term) determine before such event or condition happens, the remainder will never take effect." Fearne Cont. Rem. 3. Bridgm. index, title Remainder.

(11) Accordingly, 1 R. S. 723, § 13.

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 *enseint*, 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 esse*, in whom the remainder could vest (*t*). But, to remedy this hardship, it is enacted by statute 10 & 11 W. III. c. 16. that (12) 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*) (13).

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 propinqua*, be *in esse* at or before the particular estate deter-
[*170] mines (*w*) (14). As if an estate be *made to A for life, remainder to the heirs of B; now, if A dies before B, the remainder is at an end; for during B's life he has no heir, *nemo est haeres viventis*: but if B dies first, the remainder then immediately vests in his heir, who will

(*t*) Salk. 228. 4 Mod. 232.
(*u*) See book I. p. 130.
(*w*) 2 Rep. 51.

(12) See accordingly 1 R. S. 725, § 31.

(13) The case of *Reeve* v. *Long* (1 Salk. 227), which gave occasion to the statute mentioned in the text, was to the following purport:

John Long devised lands to his nephew, Henry, for life, remainder to his first and other sons in tail, remainder to his nephew, Richard, for life, &c. Henry died without issue born, but leaving his wife pregnant. Richard entered as in his remainder, and afterwards a posthumous son of Henry was born. The guardian of the infant entered upon Richard; and it was held by the Courts of Common Pleas and of King's Bench, that nothing vested in the posthumous son, because a contingent remainder must vest during the particular estate, or at the moment of its determination.

On an appeal to the House of Lords, this judgment was reversed, against the opinion of all the judges, who were much dissatisfied. (3 Lev. 408). To set the question at rest, the statute was passed. Mr. Cruise, (2 Dig. 330), however remarks, it is somewhat singular that this statute does not mention limitations or devises by will. But, he says, there is a tradition, that as the case of *Reeve* v. *Long*, arose upon a will, the Lords considered the law to have been settled by their determination in that case, and were therefore unwilling to make any express mention of limitations made in wills, lest it should appear to call in question the authority, or propriety, of their determination. Besides, (he adds), the words of the act may be construed, without much violence, to comprise settlements of estates made by wills, as well as by deeds.

Mr. Christian, in his note upon the passage in the text, considers the statute as a reproof given by the house of Commons to the Lords for their assumption: but, had it been so understood, the concurrence of the Lords would probably not have been obtained.

In the case of *Thelluson* v. *Woodford*, (4 Ves. 342), Lord Rosslyn said, The case of *Reeve* v. *Long*, (certainly overruling *Archer's case*,) decided that a posthumous child was to be taken, to all intents and purposes, as born at the time the particular estate, on which his remainder depended, determined. Undoubtedly, the Court of Common Pleas, first, and upon a writ of error, the Court of King's Bench, had held differently. But it ought always to be remembered, it was the decision of Lord Somers; and that was not the only case in which he stood against the majority of the judges; and the better consideration of subsequent times has shewn his opinion deserved all the regard generally paid to it. The statute of William III. was not to affirm that decision. It did by implication affirm it, but it established that the same principle should govern the case, where the limitation was by deed of settlement. The manner in which the point has been treated ever since, in *Burdet* v. *Hopegood*, (1 P. Wms. 487.), and the other cases, (see 2 Ves. jun. 673. 11 Ves. 139. 2 Ves. & Bea. 367), proves what the opinion has been upon the propriety of a rule, which it is impossible to say is attended with real inconvenience, and which is according to every principle of justice and natural feeling.

A posthumous child, claiming under a remainder in a settlement, is entitled to the intermediate profits from the death of the father, as well as to the estate itself. (*Basset* v. *Basset*, 3 Atk. 203. *Thelluson* v. *Woodford*, 11 Ves. 139). But a posthumous son, who succeeds by descent, can claim the rents and profits only from the time of his birth. (*Goodtitle* v. *Newman*, 3 Wils. 526. Co. Litt. 11 b, note 4).

(14) Contra 1 R. S. 724, § 26.

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 propinqua*, 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 born; and, secondly, that he shall also die during the continuance of the particular estate; which make it *potentia remotissima*, 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*) (15): for though the law allows 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 be 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.

*Contingent remainders of either kind, if they amount to a [*171] freehold, cannot be limited on an estate for *years*, or any other particular estate, *less* than a freehold (16). Thus if land be granted to A for ten years, with remainder in fee to the right heirs of B, this remainder is

(*x*) Co. Litt. 378.
(*y*) Hob. 33.
(*z*) 5 Rep. 51.
(*a*) Cro. Eliz. 509.

(15) The several reports of the case to which our author refers as his authority for the passage in the text, are very discordant; and it rather appears that it was finally unnecessary to decide the question, whether a remainder to an unborn illegitimate child was necessarily invalid; as the claimant in *Blodwell* v. *Edwards* (the case in question,) turned out to be actually born in lawful wedlock. (See Co. Litt. 3 b. and Mr. Hargrave's note 1). However, Lord Parker, (afterwards Macclesfield,) in the case of *Metham* v. *The Duke of Devon*, (1 P. Wms. 530), said, he *inclined* to think that a natural child *en ventre sa mere* could not take under a bequest in a will to all the natural children of a named man by a certain woman. And Sir W. Grant, M. R. in *Earle* v. *Wilson*, (17 Ves. 531), said, whether the case referred to by Lord Coke, (which is also the case referred to by our author), does, or does not, fully warrant the rule laid down by him, yet, his own great authority and the adoption of it by Lord Macclesfield, were sufficient to induce him to adhere to it, without nicely examining the reasons upon which it stands. The rule (he added) is in substance, that a bastard cannot take as the issue of a particular man, until it has acquired the reputation of being the child of that man, which cannot be before its birth. (*Bayley* v. *Snelham*, 1 Sim. & Stu. 61). Yet, where a bequest is made to the natural child of which a particular woman is *enceinte*, without reference to any person as the father, there would be no uncertainty in that request, and probably it would be held good. But the rule of law does not acknowledge a natural child to have any father before its birth. By the later cases of *Gordon* v. *Gordon*, (1 Meriv. 153), and *Evans* v. *Massey*, (8 Pr. 33), it seems to be now established, that a prospective bequest to an illegitimate child, with which a woman is supposed to be *enceinte*, may be good, if the description of the object of bequest be not open to the uncertainty which must arise whenever it is made a condition precedent to the gift, that the child should actually be the child of a particular father, and when the description is in other respects so distinct as to leave no doubt as to the individual for whom the legacy is intended: though a contrary opinion, as intimated in the text, certainly appears to have been held formerly. (See *Wilkinson* v. *Adam*, 1 Ves. & Bea. 468. *Arnold* v. *Preston*, 18 Ves. 288).

(16) Contra 1 R. S. 724, § 24.

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*) (17). 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 (18). As, if there be tenant for life, with remainder to his eldest son unborn in tail, and the tenant for life, before any son is born, surrenders his life-estate, he by that means defeats the remainder in tail to his son: for his son not being *in esse*, when the particular estate determined, the remainder could not then vest: and, as it could not vest then, 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 estate determines (19). If therefore his estate for life determines otherwise than by his death, the estate of the trustees, for the residue [*172] of his natural life, will then take effect, and become a *particular estate in possession, sufficient to support the remainders depending in contingency. This method is said to have been invented by sir Orlando Bridgman, sir Geoffrey Palmer, and other eminent counsel, who betook themselves 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 (20).

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 subtleties 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

(*b*) 1 Rep. 130.
(*c*) *Ibid.* 66. 135.
(*d*) See Moor. 486. 2 Roll. Abr. 797, pl. 12. 2 Sid. 159. 2 Chan. Rep. 170.

(17) Contra 1 R. S. 725, § 32.

(18) But a conveyance of a greater estate than he has by bargain and sale, or by lease and release, is no forfeiture, and will not defeat a contingent remainder. 2 *Leo.* 60. 3 *Mod.* 151.

But the tenant for life may bar the contingent remainders by a feoffment, a fine, or a recovery. 1 *Co.* 66. *Cro. Eliz.* 630. 1 *Salk.* 224.

Where there is a tenant for life, with all the subsequent remainders contingent, and he suffers a recovery to the use of himself in fee, he has a right to this tortious fee against all persons but the heirs of the grantor or devisor. 1 *Salk.* 224.

(19) Trustees to support contingent remainders are not essential in copyhold, the lord's estate sufficing. 10 Ves. 282. 16 East, 406.

(20) As to executory devises in general, 6 Cruise, index, Devise; 2 Saund. index, Executory Devise; Fearne on Ex. Dev.; and Preston's Estates.

however omit, that in devises by last will and testament (which, being often drawn up when the party is *inops consilii*, are always more favoured in construction than formal deeds, which are presumed to be made with great caution, forethought, 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 a disposition of them by will, that thereby no estate vests at the death of the devisor, but only on some future contingency. It differs from a remainder in three very material points; 1. That it needs not any *particular estate to support it. [*173] 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.

1. The first case happens when a man devises a future estate to arise upon a contingency; and, till that contingency happens, does not dispose of the fee-simple, but leaves it to descend to his heirs 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 (*e*). 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 praesenti*. 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 (*f*).

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 deed, is good by way of executory devise (*g*). But, in both these species of executory devises, the contingencies ought to be such as may happen within a reasonable time; as within one or more life or lives in being, or within a mode*rate term of years, for courts of [*174] justice will not indulge even wills, so as to create a perpetuity, which the law abhors (*h*): because by perpetuities (or the settlement of an interest, which shall go in the succession prescribed, without any power of alienation) (*i*), 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 are devised to such unborn son

(*e*) 1 Sid. 153.
(*f*) Cro. Jac. 593.
(*g*) 2 Mod. 249.
(*h*) 12 Mod. 287. 1 Vern. 164.
(*i*) Salk. 229.

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*) (21), (22).

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 alienating 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 devisor thinks [*175] proper, yet they must all be **in esse* 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: and it was also settled, that such remainder may not be limited to take effect, unless upon such contingency as must happen (if at all) during the life of the first devisee (*p*) (23).

(*k*) Fort. 232.
(*l*) 3 Rep. 95.
(*m*) Bro. *tit. chattels*, 23. Dyer, 74.
(*n*) Dyer, 358. 3 Rep. 96.
(*o*) 1 Sid. 451.
(*p*) Skinn. 341. 3 P. Wms. 258.

(21) Lord Kenyon has explained the whole doctrine of executory devises in the following words: "The rules respecting executory devises have conformed to the rules laid down in the construction of legal limitations, and the courts have said, that the estate shall not be unalienable by executory devises for a longer term than is allowed by the limitations of a common law conveyance. In marriage settlements the estate may be limited to the first and other sons of the marriage, in tail; and until the person to whom the first remainder is limited is of age, the estate is unalienable. In conformity to that rule the courts have said, so far as we will allow executory devises to be good. To support this position, I could refer to many decisions; but it is sufficient to refer to the Duke of Norfolk's case, in which all the learning on this head was gone into; and from that time to the present, every Judge has acquiesced in that decision. It is an established rule that an executory devise is good, if it must necessarily happen within a life or lives in being, and twenty-one years, and the fraction of another year, allowing for the time of gestation." See Long *v.* Blackall, 7 *T. R.* 100. In that case it was determined that a child *en ventre sa mere* was to be considered as a child born, and therefore that an estate might be devised to it for life, and after its death to its issue in tail.

The 39 & 40 Geo. III. c. 98, enacts, that no person shall, by any deed, will, or by any other mode, settle or dispose of any real or personal property, so that the rents and profits may be wholly or partially accumulated for a longer term than the life of the grantor, or the term of twenty-one years after the death of the grantor or the testator, or the minority of any person who shall be living, or *en ventre sa mere*, at the death of the grantor or the testator, or during the minority only of such person as would for the time being, if of full age, be entitled to the rents and produce so directed to be accumulated; and where any accumulation is directed otherwise, such direction shall be void, and the rents and profits, during the time that the property is directed to be accumulated contrary to this act, shall go to such person as would have been entitled thereto, if no such accumulation had been directed; provided that this act shall not extend to any provision for the payment of debts, or for raising portions for children, or to any direction touching the produce of woods or timber.

A direction for accumulation during a life was held to be good for twenty-one years after the death of the testator. 9 Ves. jun. 137.

(22) See note at the end of this chapter.

(23) It has long been fully settled that a term for years, or any chattel interest, may be given by an executory devise to an unborn child of a person in existence, when it attains the age of twenty-one; and that the limits of executory devises of real and personal property are precisely the same. *Fearne*, 390. It is very common to bequeath chattel interests to A. and his issue, and if he dies without issue,

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.

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 (*q*). Sir Edward Coke (*r*) 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 never therefore 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 transferrable, when actually vested, being both estates *in praesenti*, 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 [*176] 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 acknowledgment 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 (*s*). The rent may be granted away, reserving the reversion; 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, sed sequitur, suum principale.*"

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 (*u*), 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 (*w*): for it is the old es-

(*q*) Co. Litt. 22.
(*r*) 1 Inst. 142.
(*s*) Co. Litt. 143.
(*t*) *Ibid.* 151, 152.
(*u*) Cro. Eliz. 321.
(*w*) 3 Lev. 407.

to B. It seems now to be determined, that where the words are such as would have given A. an estate-tail in real property, in personal property the subsequent limitations are void, and A. has the absolute interest: but if it appears from any clause or circumstance in the will, that the testator intended to give it over only in case A. had no issue living at the time of his death, upon that event the subsequent limitation will be good as an executory devise. See *Fearne*, 371. and cases referred to in 3 *Cose's P. Wms.* 262.

tate, 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 entitled to the rent, during the continuance of A's estate (*x*).

[*177] *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 death, 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 (24).

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 (*y*), the less is immediately annihilated; or, in the law phrase, is said to be *merged* (25), 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

(*x*) 1 And. 23. (*y*) 3 Lev. 437.

(24) See accordingly, 2 R. S. 343.

(25) Even if there be an intermediate *contingent* estate, it will be destroyed by the union and coalition of the greater estate and the less, (unless the greater estate is subjoined to the less by the same conveyance), when such coalition takes place by the conveyance or act of the parties. (*Purefoy* v. *Rogers*, 2 Saund. 387). But the reports of adjudged cases apparently differ with respect to the destruction of an intermediate contingent estate, in cases where the greater estate becomes united to the less by descent: these differences, however, may be reconciled, by distinguishing between those cases where the descent of the greater estate is immediate from the person by whose will the less estate, as well as the intermediate contingent estate, were limited; and the cases where the less estate and the contingent remainders were not created by the will of the ancestor from whom the greater estate immediately descends on the less estate. In the first set of cases, the descent of the greater estate does not merge and drown the intermediate contingent remainders; (*Boothley* v. *Vernon*, 9 Mod. 147. *Plunkett* v. *Holmes*, 1 Lev. 12. *Archer's case*, 1 Rep. 66); in the second class of cases, it does merge them. (*Hartpole* v. *Kent*, T. Jones, 77, *S. C.* 1 Ventr. 307. *Hooker* v. *Hooker*, Rep. temp. Hardw. 13. *Doe* v. *Scudamore*, 2 Bos. & Pull. 294; and see Fearne, p. 343, 6th ed., with Serjt. William's note to 2 Saund. 382 a).

A distinction (as already has been intimated), must be made between the cases where a particular estate is limited, with a contingent remainder over, and afterwards the inheritance is subjoined to the particular estate by the same conveyance; and those cases wherein the accession of the inheritance is by a conveyance, accident, or circumstance, distinct from that conveyance which created the particular estate. In the latter cases, we have seen, the contingent remainder is generally destroyed; in the former it is otherwise. For, where by the same conveyance a particular estate is first limited to a person, with a contingent remainder over to another, and with such a reversion or remainder to the first person as would, in its own nature, drown the particular estate first given him; this last limitation shall be considered as executed only *sub modo*; that is, upon such condition as to open and separate itself from the first estate, when the condition happens; and by no means to destroy the contingent estate. (*Lewis Bowles' case*, 11 Rep. 80. Fearne, 346, 6th ed.).

A court of equity will in some cases relieve against the merger of a term, and make it answer the purposes for which it was created. Thus, in *Powell* v. *Morgan*, (2 Vern. 90), a portion was directed to be raised out of a term for years, for the testator's daughter. The fee afterwards descended on her, and she, being under age, devised the portion. The Court of Chancery relieved against the merger of the term; and decreed the portion to go according to the will of the daughter. (See also, *Thomas* v. *Kemish*, 2 Freem. 208, *S. C.* 2 Vern. 352. *Saunders* v. *Bournford*, Finch, 424).

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 his 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 (*z*). 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 (*a*). For estates-tail are protected and preserved from merger by the *ope- [*178] ration and construction, though not by the express words, 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 (*b*). 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 destroy it, and now can only do it by certain special modes, by a fine, a recovery, and the like (*c*): it would therefore have been strangely improvident to have permitted the tenant in tail, by 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.*

(*z*) Plowd. 418. Cro. Jac. 275. Co. Litt. 338.
(*a*) 2 Rep. 61. 8 Rep. 74.
(*b*) Cro. Eliz. 302.
(*c*) See page 116.

* The principal alterations made in this chapter by the Revised Statutes, are contained in Ch. 1. part 2. 1 R. S. 722, &c. The suspension of the power of alienation is defined to be, when there are no persons in being by whom an absolute fee in possession can be conveyed. Such suspension cannot be for a longer period than two lives in being at the creation of the estate, except only that a contingent remainder in fee may be created on a prior remainder in fee, to take effect if the persons to whom the first remainder is limited die under 21; or on any other contingency by which the estate of such persons may be determined before they shall be 21. (§ 15, 16.) Successive estates for life cannot be limited to persons not in being at the creation of the estates. When a remainder is limited on more than two successive estates for life, or on an estate *pur autre vie* for the lives of more than two other persons, it takes effect immediately on the expiration of the two first lives; and the estates for the other lives are void. (§ 17, 19.) No remainder can be limited on an estate *pur autre vie*, except a fee: or, if the whole estate be a term for years, then the remainder must be for the whole residue of the term. (§ 18.) A contingent remainder, or a term for years, must be limited on such a contingency as to vest before or at the expiration of two lives in being at the creation of the remainder. (§ 20.) No estate for life can be limited as a remainder on a term of years, except to a person in being at the creation of such estate.

Subject to these rules, a freehold estate, as well as a chattel real, may be created to commence at a future day: an estate for life may be created in a term for years, and a remainder limited thereon: a remainder of a freehold or chattel real, either contingent or vested, may be created, expectant on the determination of a term of years: and a fee may be limited on a fee, on a contingency that must happen within the time above limited, (§ 24:) two or more future estates may be created, so that if the first fail to vest, the next shall be substituted. (§ 25.) No future estate shall be void merely on the ground of the improbability of the contingency on which it is to vest. (§ 26.) A remainder may be limited on a contingency that would abridge or determine the precedent estate, and shall be considered a conditional limitation. (§ 27.) No expectant estate can be defeated by any means, except such as the person creating the estate has provided for. § 32, 33, 34.

These rules limiting the suspension of future estates, apply to chattels real and personal as well as to freehold estates, except that "personal property" (query "chattels") can in no case be limited so as to suspend the absolute ownership longer than for two lives in being at the creation of the estate. 1 R. S. 724, § 23: 773, § 1, 2.

The accumulation of the profits of real es-

CHAPTER XII.

OF ESTATES IN SEVERALTY, JOINT-TENANCY, CO-PARCENARY, AND COMMON.

We come now to treat of estates, 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 (1) coparcenary, and in common.

I. 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.

[*180] *II. An estate in (2) *joint-tenancy* is where lands or tenements

tate, may be made as follows: if to commence on the creation of the estate out of which the profits are to come, then it must be for the benefit of one or more minors then in being, and terminate at the expiration of their minority. If to commence after the creation of such estate, it must commence within the time limited for the vesting of future estates, and during the minority of the persons for whose benefit it is created, and terminate at the expiration of such minority. 1 R. S. 726.

The accumulation of personal "property" (the act probably means to include "chattels") is governed by similar rules, except that it must commence within the time limited for the suspension of the absolute ownership of *personal* property. 1 R. S. 773, 774, § 1, 2.

All other expectant estates than those mentioned in the said chapter are abolished, thus limiting cross remainders, if they are permitted. (Id. 726. § 42.) This chapter also abolishes the rule in Shelly's case, makes all expectant estates descendible, devisable, and alienable, *in the same* manner as estates in possession, and adopts a new though reasonable rule, that where a remainder is to take effect on the death of a person without heirs, or heirs of his body, or issue, those words shall mean heirs or issue living at the death of the said person named as ancestor. § 28, 35, 22.

The effect of the Revised Statutes is to sanction these limitations of estates, by whatever lawful conveyance they be made: trusts in such cases being abolished by 1 R. S. 727.

The student will remember that the law, as contained in Blackstone, applies to all conveyances made prior to 1830.

(1) The Revised Statute, 726, does not recognize an estate in coparcenary: but, as the statute of descents, id. 753, adopts the common law where that statute is silent, the estate in coparcenary might *perhaps* arise in such cases; such at least was the general understanding under the Act of 1786: but as the chapter on tenures does not recognize any estate in coparcenary, and as the chapter on descents directs the inheritance to *descend* according to the course of the common law where the statute is silent, and then directs an inheritance that descends to several persons under the provisions of that chapter to be held by them as tenants in common; even those claiming by descent under the common law, may probably be considered as claiming under the provisions of that chapter, and therefore as tenants in common. The former law, 1 R. L. 54, &c. was somewhat different.

(2) As to *joint-tenants* in general, see 6 Cruise, ind. title Joint-tenancy; Bac. Ab. Joint-tenants and Tenants in Common; Com. Dig. Estates, K. 1.; Chancery, 3 V. 1. De-

are granted to two or more persons, to hold in fee-simple, fee-tail, for life, for years, or at will (3). In consequence of such grants an estate is called an estate in joint-tenancy (*a*), and sometimes an estate in *jointure*, which word as well as the other signifies an union or conjunction of interest; though in common speech the term *jointure* is now usually confined to that joint-estate, which by virtue of the statute 27 Hen. VIII. c. 19. is frequently vested in the husband and wife before marriage, as a full satisfaction and bar of the woman's dower (*b*).

In unfolding this title, and the two remaining ones, in the present chapter, we will first inquire how these estates may be *created*; next, their *properties* and respective *incidents*; and lastly, how they may be *severed* or *destroyed*.

1. 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 (4). For,

(*a*) Litt. 277. (*b*) See page 137.

vise, H. 7. N. 8.; Jacob's Dict. Joint-tenants; 2 Saunders, index, Joint-tenants; Preston on Estates.

(3) In New-York, every estate granted or devised to two or more persons in their own right, is a tenancy in common, unless expressly declared to be in joint-tenancy; but every estate vested in executors or trustees, as such is a joint-tenancy. This does not apply to personal chattels, I presume. The same law has prevailed since 1782. See 1 R. L. p. 54. & 1 R. S. 727.

(4) Joint-tenancies are now regarded with so little favour, both in courts of law and equity, that whenever the expressions will import an intention in favour of a tenancy in common, it will be given effect to, Fisher v. Wigg. 1 P. Wms. 14. n. and id. 1 Ld. Raym. 622. 1 Salk. 392. note 8. Lord Cowper says, that a joint-tenancy is in equity an odious thing. 1 Salk. 158. See also 2 Ves. Sen. 258. In wills the expressions "*equally to be divided, share and share alike, respectively between and amongst them*," have been held to create a tenancy in common. 2 Atk. 121. 4 Bro. 15. The words *equally to be divided* make a tenancy in common in surrenders of copyholds, 1 Salk. 391. 2 Salk. 620; and also in deeds which derive their operation from the statute of uses, 1 P. Wms. 14. 1 Wils. 341. Cowp. 660. 2 Ves. Sen. 257; and though Ld. Holt and Ld. Hardwicke seem to be of opinion that these words in a common law conveyance are not sufficient to create a tenancy in common, (same cases, and 1 Ves. Sen. 165. 2 Ves. Sen. 257. and see Bac. Ab. Joint-tenants, F.) yet from the notes to some of those cases, and 4 Cruise Dig. 1 ed. 455 to 459. 2 Bla. C. 193, 4. Mr. Christian's note, it may be collected that the same words in a common law conveyance would now create a tenancy in common. In a joint-tenancy for *life* to A. and B. the words *and the survivor of them*, are merely words of surplusage, as without them the lands upon the death of one joint-tenant go to the survivor. But in the creation of a joint-tenancy in *fee*, particular care must be taken not to insert these words. For the grant of an estate *to two and the survivor of them, and the heirs of the survivor*, does not make them joint-tenants in fee, but gives them an estate of freehold during their joint lives, with a contingent remainder in fee to the survivor. Harg. and Butl. Co. Litt. 191. a. n. 1. Where there was a devise to three sisters for, and during their joint lives, and the life of the survivor, to take as tenants in common, and not as joint-tenants, remainder to trustees during the respective lives of the sisters, and the life of the survivor, to preserve contingent remainders, and from and after their respective deceases and the decease of the survivor, *remainder over*; it was held that the sisters took the estate as joint-tenants, to be regulated in its enjoyment as a tenancy in common, or as tenants in common, with benefit of survivership. 1 M. & S. 426. Where testator devised the residue of his property to his daughters as tenants in common, and afterwards made a codicil expressly for a particular purpose, but thereby also re-devised the residue to his daughters, omitting the words of severance, the codicil was construed by the will, and they took as tenants in common. 3 Anstr. 727. Where the devise was to the use and behoof of the testator's niece A. and his nieces

2. 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.

[*181] *First, they must have one and the same *interest* (5). 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*) (6). 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 (7): 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 disseisin (*f*). Joint-tenancy cannot arise by descent or act of law; but

(*c*) Co. Litt. 188.
(*d*) Litt. § 277.
(*e*) *Ibid.* § 285.
(*f*) *Ibid.* § 278.

B. and C. and the survivor and survivors of them, and the heirs of the body of such survivors, as tenants in common and not as joint-tenants, it was held, that under this devise A., B., and C. took as tenants in common. (1 New. Rep. 82.) When two or more purchase lands, and pay in equal proportions, a conveyance being made to them and their heirs, this is a joint-tenancy. But if they advance the money in unequal proportions, they are considered in equity in the nature of partners; and if one of them die, the others have not his share by survivorship, but are considered as trustees for the deceased's representatives. (1 Eq. Ca. Abr. 291.)

(5) But, two persons may have an estate in joint-tenancy for their lives, and yet have several inheritances. (Litt. sect. 283, 284. 1 Inst. 184 a. *Cook* v. *Cook*, 2 Vern. 545. *Cray* v. *Willis*, 2 P. Wms. 530). This is the case, where an estate is granted in joint-tenancy to persons and the heirs of their bodies, which persons cannot intermarry. (See *post*, p. 192). But in this case, there is no division between the estate for lives and the several inheritances, and the joint-tenants cannot convey away their *inheritances* after their decease; (see post, note 7); the estate for lives and the inheritance are divided only in supposition and consideration of law, and to some purposes the inheritance is executed. (1 Inst. 188 b).

(6) Lord Coke says, that if a rent-charge of 10*l.* be granted to A. and B. to have and to hold to them two, viz. to A. till he be married, and to B. till he be advanced to a benefice, they are joint-tenants in the mean time, notwithstanding the limitations; and if A. die before marriage, the rent shall survive to B. But if A. had married, the rent should have ceased for a moiety, *et sic e converso*, on the other side. Co. Lit. 180. b. 2 Cruise Digest, 498.

(7) Lord Coke observes, "when land is given to two, and to the heirs of one of them, he in the remainder cannot grant away his fee-simple, as hath been said." (1 Inst. 184 b. and see ante, note 5). Mr. Hargrave, in his note upon this passage, remarks, that there is a seeming difficulty in it; but he conceives Lord Coke's meaning to be, that though for some purposes the estate for life of the joint-tenant having the fee, is distinct from, and unmerged in, his greater estate; yet, for granting, it is not so, but both estates are in that respect consolidated, notwithstanding the estate of the other joint-tenant: and therefore, that the fee cannot, in strictness of law, be granted as a remainder, *ex nomine*, and as an interest distinct from the estate for life. (See the last note). But, Lord Coke never meant that the joint-tenant, having the fee, could not in *any* form pass away the fee, subject to the estate of the other joint-tenant: that would be a doctrine not only contrary to the power of alienation, necessarily incident to a fee-simple, but would be inconsistent with Lord Coke's own statement in another part of his commentary. (See Co. Litt. 367 b). The true signification of the passage cited at the commencement of this note, may be illustrated by what the same great lawyer lays down in *Wiscot's case*, (2 Rep. 61 a), namely, that when an estate is made to several persons, and to the heirs of one of them, he who hath the fee cannot grant over his remainder, *and continue in himself an estate for life.*

merely by purchase or acquisition 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 a feoffment [*182] 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*) (8): 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 (*j*). And therefore, if an estate in fee be given to a man and his wife, they are neither properly joint-tenants, nor tenants in com-

(*g*) Co. Litt. 188.
(*h*) Dyer, 340. 1 Rep. 101.
(*i*) Litt. § 288. 5 Rep. 10.
(*j*) *Quilibet totum tenet et nihil tenet: scilicet, totum in communi, et nihil separatim per se.* Bract. *l.* 5, *tr.* 5, *c.* 26.

(8) The reason assigned in Gilbert's Treat. on Uses and Trusts, (p. 71 of the original work, or p. 134 of Mr. Sugden's greatly improved edition), is as follows: "here the husband has no property in the land, neither *jus in re*, nor *ad rem*, but the feoffee has the whole property, at first to the use of the husband only, and upon the contingency of marriage to the use of them both entirely. And this is the only rule of equity to support the trust in the same manner the parties have limited it, and now it is executed by the statute in the same form as it was governed in equity." Mr. Sugden, in his note upon this passage, observes, that the point so laid down was not established without difficulty, and that it seems questionable, whether the ground of decision was not that the use resulted to the feoffor till the marriage, and that upon the marriage the use declared arose, in which case the husband and wife took the use limited to them at the same time, and not at different periods. (*Mutton's case*, 2 Leon. 223). Mr. Sugden adds, it is clear, at this day, that persons may take as joint-tenants, by way of use, although at different times. Thus, suppose in a marriage settlement an estate to be limited to the children of the marriage, as joint-tenants in fee; on the birth of one child the whole vests in him; on the birth of another, that child takes jointly with the former; and so on if there are twenty children. (*Stratton* v. *Best*, 2 Br. 240).

And that it is a joint claim by the same conveyance which makes joint-tenants, not the time of vesting, has been held in various other cases. (See *Blamfords* v. *Blamfords*, 3 Bulstr. 101. *Earl of Sussex* v. *Temple*, 1 Lord Raym. 312. *Aylor* v. *Chey*, Cro. Jac. 259. *S. C.* Yelv. 183. *Oates* v. *Jackson*, 2 Str. 1172, *Hales* v. *Risley*, Pollexf. 373).

So, although some of the persons to whom an estate is limited, are in by the common law, and others by the statute of uses, yet they will take in joint-tenancy: (*Watts* v. *Lee*, Noy, 124. *Samms' case*, 13 Rep. 54); and Lord Thurlow held, that whether a settlement was to be considered as a conveyance of a legal estate, or a deed to uses, would make no difference, and that in either case, the vesting at different times would not necessarily prevent the settled estate from being taken in joint-tenancy. (*Stratton* v. *Best*, 2 Br. 240).

mon (9): for husband and wife being considered as one person in law, they cannot take the estate by moieties, but both are seised of the entirety, *per tout, et non per my*: the consequence of which is, that neither the husband nor the wife can dispose of any part without the assent of the other, but the whole must remain to the survivor (*k*) (10).

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*) (11). 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*). On 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*) (12). 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*). Upon the same ground it is held, that one joint-tenant cannot have an action against another for trespass, in respect of his land (*r*); for each has an equal right to enter on any part of it. But one joint-tenant is not capable by himself to do any act, which may tend to defeat or injure the estate of the other (13); as to let leases, or to grant copyholds (*s*): and

[*183]

(*k*) Litt. § 665. Co. Litt. 187. Bro. *Abr. t. cui in vita*, 8. 2 Vern. 120. 2 Lev. 39.
(*l*) Co. Litt. 214.
(*m*) *Ibid.* 192.
(*n*) *Ibid.* 48.
(*o*) *Ibid.* 319. 364.
(*p*) *Ibid.* 195.
(*q*) *Ibid.* 185.
(*r*) 3 Leon. 262.
(*s*) 1 Leon. 234.

(9) This peculiar estate was recognized as still subsisting in 16 J. 115, notwithstanding the Acts of 1782 and 1786 (1 R. L. 52, &c.) It probably was not intended to be affected by the Revised Statutes. 1 R. S. 727.

(10) 5 Term Rep. 654. And if a grant is made of a joint-estate to husband and wife, and a third person, the husband and wife shall have one moiety, and the third person the other moiety, in the same manner as if it had been granted only to two persons. So if the grant is to husband and wife and two others, the husband and wife take one third in joint-tenancy. Litt. § 291. But where an estate is conveyed to a man and a woman, who are not married together, and who afterwards intermarry, as they took originally by moieties, they will continue to hold by moieties after the marriage. 1 Inst. 187. b. Moody v. Moody. Amb. 649. 2 Cru. Dig. 511. 5 ib. 448.

(11) Per Abbott, C. J. "It is clear that if there be a joint lease by two tenants in common, reserving an entire rent, the two may join in an action to recover the same; but if there be a separate reservation to each, then there must be separate actions. 5 B. & A. 851. If there were originally a joint letting by parol, and afterwards one of the two give notice to the tenant to pay him separately, and his share be paid accordingly, this is evidence of a fresh separate demise of his share, and he must sue separately. Id. ibid.

(12) See last note. If four joint-tenants jointly demise from year to year, such of them as give notice to quit, may recover their several shares in ejectment on their several demises. 3 Taunt. 120.

(13) In consequence of the right of survivorship among joint-tenants, all charges made by a joint-tenant on the estate determine by his death, and do not affect the survivor. For, it is a maxim of law, that *jus accrescendi præfertur oneribus*. (1 Inst. 185 a. Litt. sect. 286). But, if the grantor of the charge survives, of course, it is good. (Co. Litt. 184 b). So, if one joint-tenant suffers a judgment in

if any waste be done, which tends to the destruction of the inheritance, one joint-tenant may have an action of waste against the other, by construction of the statute Westm. 2. c. 22 (*t*). So too, though at common law no action of account lay for one joint-tenant against another, unless he had constituted him his bailiff or receiver (*u*), yet now by the statute 4 Ann. c. 16. joint-tenants may have actions of account against each other, for receiving more than their due share of the profits of the tenements held in joint-tenancy (14).

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 auter 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*) (15). This is the natural and regular consequence of the union and entirety 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 becomes 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 the 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. [*184]

(*t*) 2 Inst. 403.
(*u*) Co. Litt. 200.
(*w*) Litt. § 280, 281.

an action of debt to be entered up against him, and dies before execution had, it will not be executed afterwards; but if execution be sued in the life of the cognizor, it will bind the survivor. (*Lord Abergavenny's case*, 6 Rep. 79. 1 Inst. 184 a).

There is, however, one exception to the rule, that joint-tenants cannot charge the estate in any way, so as to affect the interests of the survivors: for instance, if there are two joint-tenants in fee, and one of them makes a lease for years to a stranger, it will be good against the survivor, even though such lease is not made to commence till after the death of the joint tenant who executed it; because, the grant of a lease is a disposition of the land, made at the time of such grant, though possession is not then given. (Co. Litt. 185 a. Litt. s. 289. *Whittock* v. *Horton*, Cro. Jac. 91. *Clerk* v. *Turner*, 2 Vern. 323).

(14) This action is now scarcely ever brought; but the established practice is to apply to a court of equity to compel an account; which is also the jurisdiction generally resorted to in order to obtain a partition between joint-tenants, and tenants in common. Com. Dig. Chanc. 3 V. 6. & 4 E. Mitf. 109.

(15). Our author, however, will instruct us, in a subsequent part of this book, (ch. 25, p. 399), that, "for the encouragement of husbandry and trade, it is held, that 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. (See *Jackson* v. *Jackson*, 9 Ves. 596.

This right of survivorship is called by our ancient authors (*x*) the *jus accrescendi*, because the right upon the death of one joint-tenant accumulates and increases to the survivors: or, as they themselves express it, "*pars illa communis accrescit superstitibus, de persona in personam, usque ad ultimum superstitem.*" And this *jus accrescendi* ought to be mutual; which I apprehend to be one 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 (16).

[*185] *3. We are, lastly, to inquire 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) be affected by any subsequent transactions. But, 2. The joint-tenants' estate may be destroyed, without any alienation, by merely disuniting their *possession*. For joint-tenants being seised *per my 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 joint-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 other 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. 1. 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 (*c*). 3. The jointure may be destroyed by destroying the unity of *title*. As if one joint-tenant alienes 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 continues (17). But a devise

(*x*) Bracton, *l.* 4, *tr.* 3, c. 9, § 3. Fleta, *l.* 3, c. 4.
(*y*) Co. Litt. 190. Finch. L. 83.
(*z*) 2 Lev. 12.
(*a*) Co. Litt. 188. 193.
(*b*) Litt. § 290.
(*c*) Thus, by the civil law, *nemo invitus compelli-tur ad communionem*, (*Ff.* 12. 6. 26, § 4.) And again; *si non omnes qui rem communem habent, sed certi ex his, dividere desiderent; hoc judicium inter eos accipi potest.* (*Ff.* 10. 3. 8.)
(*d*) Litt. § 292.

(16) Mr. Christian quotes lord Coke, who says, "there may be joint-tenants, though there be not equal benefit of survivorship; as if a man let lands to A. and B. during the life of A.; if B. die, A. shall have all by survivorship; but if A. die, B. shall have nothing." Co. Litt. 181. And remarks, the mutuality of survivorship does not therefore appear to be the reason why a corporation cannot be a joint-tenant with a private person; for two corporations cannot be joint-tenants together; but whenever a joint-estate is granted to them, they take as tenants in common. Co. Litt. 190. But there is no survivorship of a capital, or a stock in trade, among merchants and traders; for this would be ruinous to the family of the deceased partner; and it is a legal maxim, *jus accrescendi inter mercatores pro beneficio commercii locum non habet.* Co. Litt. 182. See p. 399. post.

(17) When an estate is devised to A. and B. who are strangers to, and have no connexion with, each other, the conveyance by one of them severs the joint-tenancy, and passes a moiety; but per Kenyon, Ch. J., it has been settled for ages, that when the devise is to husband and wife, they take by entireties and not by moieties, and the husband

of one's share by will *is no severance of the jointure (18): for [*186]
no testament takes effect till after the death of the testator, and by such death the right of the survivor (which accrued at the original creation of the estate, and has therefore a priority to the other) (*e*) is already vested (*f*) (19). 4. It may also be destroyed by destroying the unity of *interest*. And therefore, if there be two joint-tenants for life, and the inheritance is purchased 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; because, being created by one and the same conveyance, they are not separate estates (which is requisite in order to a merger), but branches of one entire 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 accrescendi*, the same instant ceases with it (*k*). Yet, if one of three 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 release 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 an 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 indispensable properties, a sameness of interest, and 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.

*In general it is advantageous for the joint-tenants to dissolve [*187]
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

(*e*) *Jus accrescendi præfertur ultimæ voluntati.* Co. Litt. 185.
(*f*) Litt. § 287.
(*g*) Cro. Eliz. 470.
(*h*) 2 Rep. 60. Co. Litt. 182.
(*i*) Litt. § 302, 303.
(*k*) *Nihil de re accrescit ei, qui nihil in re quando jus accrescere habet.* Co. Litt. 188.
(*l*) Litt. § 294.
(*m*) *Ibid.* § 304.

alone cannot by his own conveyance, without joining his wife, devest the estate of the wife. 5 T. R. 654. If five trustees be joint-tenants, and if three execute a conveyance, it will sever the joint estate, and create a tenancy in common, and the person to whom the conveyance was made may recover three-fifths in ejectment. 11 East, 288.

(18) A covenant by a joint-tenant to sell, though it does not sever the joint-tenancy at law, will do so in equity; (*Browne* v. *Raindle*, 3 Ves. 257. *Hinton* v. *Hinton*, 2 Ves. sen. 639); provided the agreement for sale be one of which a specific performance could be enforced. (*Partriche* v. *Powlett*, 2 Atk. 54. *Hinton* v. *Hinton*, 2 Ves. sen. 634).

(19) A joint-tenant wishing to devise his estate must *first* sever it, which may be done by a commission, upon bill filed, from the lord chancellor in the nature of the common law writ. And if a joint-tenant of real property, devises his interest in premises, and after execution of the will there is a partition of the estate, the testator's share cannot pass by the devise unless there is a republication of the will subsequent to the partition. 3 Burr. 1488. Amb. 617. For a joint-tenant is not enabled to devise his estate by the statute of wills 32 Hen. VIII. c. 1. explained by 34 & 35 Hen. VIII. c. 5. as tenants in common and coparceners. But if a tenant in common devises his estate, a subsequent partition is not a revocation of the will. 3 P. Wms. 169.

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* (20) 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 coheirs 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*) (21).

[*188] *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 trespass against each other: but herein they differ from joint-tenants, that they are also excluded from maintaining an action of waste (*w*); for coparceners could at all times put a stop to any waste by 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 purchased 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 estates of inheritance, which are of a descendible nature; whereas not only estates in fee and in tail, but for life or years, may be held in joint-tenancy. 2. There is no unity of *time* necessary to an estate in coparcenary. For if a man had 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 (*y*); 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 an *unity*, have not an *entirety* of interest. They are properly entitled each to the whole of a distinct moiety (*z*); and of course there is no *jus accrescendi*, or sur-

(*n*) 1 Jones, 85.
(*o*) 4 Leon. 237.
(*p*) Co. Litt. 252.
(*q*) Litt. § 241, 242.
(*r*) *Ibid.* § 265.
(*s*) Co. Litt. 163.
(*t*) *Ibid.* 164.
(*u*) *Ibid.* 188. 243.
(*w*) 2 Inst. 403.
(*x*) Litt. § 254.
(*y*) Co. Litt. 164. 174.
(*z*) *Ibid.* 163, 164.

(20) As to *coparceners* in general, 6 Cruise, ind. Coparcenary; Bac. Ab. Coparceners; Com. Dig. Parceners; and Preston on Estates; 2 Saund. index, tit. Parcener.

(21) Semble therefore that coparceners are entitled to be admitted to copyhold tenements as one heir, and upon payment of one set of fees. 3 B. & C. 173.

vivorship 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 therein, whether male or female, called parceners. But if *the possession be once severed by partition, they are no [*189] longer parceners, but tenants in severalty; or if one parcener alienes her share, though no partition be made, then are the lands no longer held in *coparcenary*, but in *common* (*a*).

Parceners are so called, saith Littleton (*b*), because they may be constrained to make *partition* (22). And he mentions many methods of making it (*c*); 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. The privilege of seniority is in this case 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 (*d*) (23). 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 est divisio, alterius est 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 severalty (*e*). But there are some things *which are in their nature impartible. The mansion- [*190] 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

(*a*) Litt. § 309.
(*b*) § 241.
(*c*) § 243 to 264.
(*d*) Co. Litt. 166. 3 Rep. 22.
(*e*) By statute 8 & 9 W. III. c. 31, an easier method of carrying on the proceedings on a writ of partition, of lands held either in joint-tenancy, parcenary, or common, than was used at the common law, is chalked out and provided.

(22) *Coparceners* may convey to each other, both by feoffment and by release, because their seisin to some interests is joint, and to some several. Co. Litt. 200. b. Whereas *joint-tenants* can release to, but not enfeoff each other, because the freehold is joint. Ibid. And one *tenant in common* may infeoff his companion, but not release, because the freehold is several. Ibid.

Such partitions are now usually made by means of a bill in chancery in the same manner as partitions between joint-tenants. And it is said, in a modern case, that it was probably in consequence of the stat. 31 Hen. VIII. c. 1. that the court of chancery assumed this jurisdiction. 2 Ves. Jun. 125. Cruise Dig. 2 vol. 547. See page 183. n. Parceners of a copyhold cannot make partition without the sanction of the lord. P. 41 Eliz. B. R. Fuller, Hal. MSS.

(23) It has been doubted whether the grantee of the eldest sister shall have the first and sole presentation after death. Harg. Co. Litt, 266. But it was expressly determined in favour of such a grantee in 1 Ves. 340. See Burn's Ec. Law, 1 vol. 15.

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 a 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 mode of division was known in the law of the Lombards (*i*); which directs the woman so preferred in marriage, and claiming her share of the inheritance, *mittere in confusum cum sororibus, quantum pater aut frater ei dederit, quando ambulaverit ad maritum.* With us it is denominated bringing those lands into *hotch-pot* (*k*): which term I shall explain in the very words of Littleton (*l*): "it seemeth that this word *hotch-pot*, is in English a pudding; for in a pudding is not commonly put one thing alone, but one thing with other things together." By this housewifely metaphor our ancestors meant to 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 into hotch-pot, she was presumed to be [*191] sufficiently *provided for, and the rest of the inheritance was divided among her other sisters. The law of hotch-pot 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 hotch-pot (*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 the law, but by the designation of the giver, *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 hotch-pot; 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 hotch-pot, 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* (24) are such as hold by several and distinct

(*f*) Co. Litt. 164, 165.
(*g*) See page 115.
(*h*) Bracton, *l.* 2, *c.* 34. Litt. § 266 to 273.
(*i*) *l.* 2, *t.* 14, *c.* 15.
(*k*) Britton, *c.* 72.
(*l*) § 267.
(*m*) Litt. § 268.
(*n*) *Ibid.* § 274.
(*o*) *Ibid.* 275.

(24) As to *tenants in common*, in general, 6 Bac. Ab, Joint-tenants and Tenants in Common; Com. Dig. Estates, K. 8. K. 2; Devise, Cruise Dig. ind. tit. Tenancy in Common;

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 a unity of possession merely, but perhaps an entire disunion of interest, of title, and of time. For if there be two tenants in common of lands, one may hold his part in fee-simple, the other in tail, or for life; so that there is no *necessary unity [*192] 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 (25). By the destruction of the two other estates, I mean such destruction as does not sever the unity of possession, but only the unity of title or interest: As, if one of two joint-tenants in fee alienes his estate for the life of the alienee, the alienee and the other joint-tenant are tenants in common; for they have now 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 fee-simple, the alienee for his own life only. So, if one joint-tenant gives his part to A in tail, and the other gives his to B in tail, the donees are tenants in common, as holding by different titles and conveyances (*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 issue 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 two not titles by *pur- [*193] chase, 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 given to two or more, and it be not joint-tenancy, it must be a tenancy in common. But the law is apt in its constructions to favour joint-tenancy rather than tenancy in common (*u*) (26); 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

(*p*) Litt. 292.
(*q*) *Ibid.* 293.
(*r*) *Ibid.* 295.
(*s*) *Ibid.* 309.
(*t*) *Ibid.* 283.
(*u*) Salk. 392.

N. 8.; Chancery, 3 V. 4; and Preston on Estates. In quare impedit both must join. 2 Saund. 116. b. As to personalty, 2 Saund. 47. h. in notes.

(25) Or, in New-York, and generally in the United States, by descent. (1 R. S. 753, § 17.)
(26) See notes 3. and 4. p. 180.

two, to be holden the one moiety to one, and the other moiety to the other, is an estate in common (*w*); and, if one grants to another *half* his land, the grantor and grantee are also tenants in common (*x*): because, as has been before (*y*) 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 said to be a joint-tenancy (*z*); because that is necessarily implied in the word "jointly," the word "severally" perhaps only implying the power of partition: and an estate given to A and B, *equally to be divided* between them, though in *deeds* it hath been said to be a joint-tenancy (*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 (*c*); 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 grants makes it the most usual as well as the safest way, when a tenancy in common [*194] *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 (27). Their other incidents are such as merely arise from the unity of possession; and are therefore the same as appertain to joint-tenants merely upon that account: such as being liable to reciprocal actions of waste, and of account, by the statutes of Westm. 2. c. 22. and 4 Ann. c. 16. For by the common law no tenant in common was liable to account with 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*) (28). But, as for other incidents of joint-tenants, which arise from the privity of title, or the union

(*w*) Litt. § 298.
(*x*) *Ibid.* 299.
(*y*) See p. 182.
(*z*) Poph. 52.
(*a*) 1 Eq. Cas. Abr. 291.
(*b*) 1 P. Wms. 17.
(*c*) 3 Rep. 39. 1 Vent. 32.
(*d*) pag. 185 & 189.
(*e*) Co. Litt. 199.
(*f*) *Ibid.* 200.

(27) But a tenancy in common with benefit of survivorship may exist without being a joint-tenancy, because survivorship is not the only characteristic of a joint-tenancy. Per Bayley, J. 1 M. & S. 435.

(28) But adverse possession, or the uninterrupted receipt of the rents and profits, no demand being made by co-tenant, or if made, refused, and his *title denied*, is now held to be evidence of an actual ouster. And where one tenant in common has been in *undisturbed* possession for twenty years, in an ejectment brought against him by the co-tenant, the jury will be directed to *presume* an actual ouster, and consequently to find a verdict for the defendant, the plaintiff's right to recover in ejectment after twenty years being taken away by the statute of limitations. Cowp. 217. But the statute always receives a strict construction in favour of the claimant, therefore presumptions are against adverse possession, as between privies. 2 Bos. & Pul. 542. If a lessee of two tenants in common pay the whole of the rent to one after notice from the other to pay them each a moiety, the tenant in common, who gave such notice, may distrain for his share. Harrison v. Ornby, 5 T. R. 246. 5 Bar. & Ald. 851.

An action of ejectment is maintainable by one of two tenants in common who had agreed to divide their property, if after such agreement the defendant who held under both as occupier, pay rent under a distress to such co-tenant alone; and it is no defence to such action, that the deed of partition between the co-tenants had not been executed. 3 Moore, 229. Brod. & B. 11. S. C. and see 5 Bar. & Ald. 851.

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 (29).

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 inquiries with respect to the nature of *estates*.

CHAPTER XIII.

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 now come 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 est justa causa possidendi id quod nostrum est*: 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.

I. The lowest and most imperfect degree of title consists in the mere *naked possession*, or actual occupation of the estate; without any apparent right, or any shadow or pretence of right, to hold and continue such possession. This may happen, when one man invades the possession of another, and by force or surprise turns him out of the occupation of his lands; which is termed a *disseisin*, 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 [*196] 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

(*g*) Litt. § 311.
(*h*) Co. Litt. 197.
(*a*) 1 Inst. 345.

(29) The rule which determines whether tenants in common should sue jointly or severally, is founded upon the nature of their interest in the matter or thing which is the cause of action. For injuries to their common property, as trespass quare clausum fregit, or a nuisance, &c. or the recovery of any thing in which they have a common right, as for rent reserved by them, or waste upon a lease for years; they should all be a party to the action; but they must sue severally in a real action generally, for they have several titles. Com. Dig. Abatement, E. 10. Co. Litt. 197. But if waste be committed where there is no lease by them all, the action by one alone is good. 2 Mod. 62. But one tenant in common cannot avow alone for taking cattle damage feasant, but he ought also to make cognizance as bailiff of his companion. 2 Hen. Bla. 386. Sir Wm. Jones Rep. 253.

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 *length of time*, and negligence of him who hath the right, by degrees ripen into a perfect and indefeasible title (1). 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 not in himself, but 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 he thinks proper, by entering upon the disseisor, 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 disseisor, 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 by the common law the heir hath obtained an *apparent* right, though the *actual* right of possession resides in the person disseised; and it shall not be lawful for the person disseised to devest this apparent right by mere entry or other act of his own, but only by an action at law (*b*): for, until the contrary be proved by legal demonstration, the law will [*197] 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 upon 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

(*b*) Litt. § 385. (*c*) Gilb. Ten. 18.

(1) In general a person in *actual possession* of real property cannot be ousted unless the party claiming can establish some well-founded title, for it is a general rule, governing in all actions of ejectment (the proper proceeding to recover possession of an estate), that the plaintiff must recover on the strength of his own title, and of course he cannot in general found his claim upon the insufficiency of the defendant's, 5 T. R. 110. n. 1. 1 East, 246. 11 East, 488. 3 M. & S. 516; for possession gives the defendant a right against every person who cannot shew a sufficient title, and the party who would change the possession must therefore first establish a legal title; (id. ibid. 4 Burr. 2487. 2 T. R. 634. 7 T. R. 47.) and this rule it is said prevails even if a stranger, who has no colour of title, should evict a person who has been in possession short of twenty years, but who has not a strict legal title, 2 T. R. 749. 1 East, 246. 2 East, 469. 13 Ves. J. 119; but according to Allan v. Rivington, 2 Saund. 111. a. and 6 Taunt. 548. n. a. prior occupancy is a sufficient title against a wrongdoer;* but it is observed in a note to the first case, that this is contrary to the general use, and it is suggested that there is a mistake in terms. At all events a person who is let into possession by a landlord, cannot after the expiration of the tenancy, put the plaintiff to prove his title in an action of ejectment, or dispute the same. 2 Bla. R. 1250. 7 T. R. 488. 4 M. & S. 347.

* See, in accordance with this part of the note, 2 Johns. R. 22: 4 id. 202: 10 id. 338.

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* (2), 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 his 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 the disseisor or his heirs gain the actual right of possession: *for the law presumes that either he had a [*198] good right originally, in virtue of which he entered on the lands in 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 inquiring 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 heirs, 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 (3) (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 disseisor turns me out of possession of my lands, he thereby gains a *mere naked possession*, and I still retain the *right of possession*, and *right of property*. If the disseisor dies, and the lands descend to his son,

(*d*) Co. Litt. 345.

(2) By 2 R. S. 293, the same time is appointed as a bar to the right of *possession* and to the right of *property* in lands, viz. 20 years. This, however, is only to apply to rights accruing after 1 Jan. 1830. (Id. 300.) By 2 R. S. 303, the same remedy (the action of ejectment) is allowed for both rights. So that the right of property, as distinguished from the right of possession, seems to be lost, except as to rights existing before 1830.

(3) This must mean the possessory actions other than ejectment.

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 [*199] 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 (4). 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 property*. For if a tenant in tail infeoffs A in fee-simple, and dies, and B disseises A; now B will have the *possession*, A the *right of possession*, and the issue in tail the *right of property*: A may recover the possession against B; and afterwards the issue in tail may evict A, and unite in himself the possession, the right of possession, and also the right of property. In which union consists,

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, there is, according to the expression of Fleta (*g*), *juris et seisinae conjunctio*, then, and then only, is the title completely legal.

CHAPTER XIV.

OF TITLE BY DESCENT (1).

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 *property*) 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 his 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

(*e*) Mirr. *l.* 2, *c.* 27. (*g*) *l.* 3, *c.* 15, § 5.
(*f*) Co. Litt. 266. Bract. *l.* 5, *tr.* 3, *c.* 5.

(4) Of course the owner is here supposed not be under any disability.

(1) See in general, Watkins on Descent; H. Chitty on Descents; Com. Dig. Descents; Bac. Ab. Descent; Cruise Dig. title xxix. 2 vol. 372 to 488. id. 6 vol. index, Descents; Wood. Vin. Lect. 2 vol. 250 to 265.; Rowe on Descents.

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 [*201] acquisition are so interwoven, and so constantly contemplated together, that we never hear of a conveyance, without at once receiving the ideas 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 (*a*) (2), (3).

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

(*a*) Co. Litt. 18.

(2) Purchase in law is used in contradistinction to descent, and is any other mode of acquiring real property, viz. by a man's own act and agreement, by devise, and by every species of gift, or grant; and as the land taken by purchase has very different inheritable qualities from land taken by descent, the distinction is important. See post, page 241, 243.

The principal distinctions between these modes of acquiring estates are these; 1. that by purchase, the estate acquires a *new* inheritable quality, and is rendered descendible to the blood *in general* of the person, to whom it is limited, as a feud of indefinite antiquity. 2. That an estate acquired by purchase will not, like a title by descent, render the owner answerable for the acts of his ancestors. Cru. Dig. title xxx. s. 4. H. Chit. Desc. 4. Com. Dig. Descent, A. B. Bac. Ab. Descent, E.

It is a rule, that where the heir takes any thing which *might* have vested in the ancestor, the heir shall be in by descent, 1 Co. 98. a. Moore, 140. H. Chit. Desc. 51; but where a person takes an estate which never vested or attached, or might have vested or attached, in the ancestor, he shall take by purchase: as if a son buys an estate and takes a conveyance to him and his heirs; or if a remainder be limited by a stranger to the right heirs of A. who has no estate in the premises, (for the remainder might otherwise have been attracted to the particular estate of A. under the rule in Shelley's case, 1 Co. 104.) this will be an estate by purchase, id. 4. The instances of persons taking by *descent* may be classed under the following heads: 1. Where an estate devolves in a regular course of descent from father to son, or from any other ancestor to his heir at law. 2. Where the ancestor, by any gift or conveyance takes an estate of freehold, and in the same conveyance, an estate is limited, either mediately or immediately to his heirs in fee or in tail (the estates becoming both united in the ancestor under the rule in Shelley's case), 1 Coke, 93. 1 Preston, 263. 3. Where an ancestor devises his estate to his heir at law (the heir then taking by his preferable title, viz. by descent). Saund. 8. note 4. 4. Where an ancestor by deed, or his will, limits a particular estate to a stranger, and either limits over the remainder (or more properly speaking the reversion) to his right heirs, or leaves the same undisposed of. See H. Chit. Desc. 5—10. See further as to when an heir takes by descent or purchase, post 241, and the notes.

(3) Mr. Hargrave (in his 2nd note to Co. Litt. 18 b) observes; that instead of distributing all the several titles to land under the heads of purchase or descent, it would be more accurate to say, that the title to land is either by *purchase*, to which the act or agreement of the party is essential, or by *mere act of law*; and under the latter, to consider first, descent, and then escheat and such other titles, not being by descent, as, yet like titles by descent, accrue by mere act of law.

So, we learn from Lord Coke (1 Instit. 2 b) that if an alien purchases lands, he cannot hold them; the King is entitled to them: though in such case the King plainly takes neither by purchase, (according to Mr. Hargrave's explanation), nor by descent. Again (1 Instit. 3 b) Lord Coke says, "a purchase is when one cometh to lands by conveyance or title; and disseisins, abatements, intrusions, usurpations, and such like estates gained by wrong, are not purchases;"—and it is equally clear they are not acquisitions by descent. And (in 1 Instit. 18 b) Lord Coke gives other instances of titles, which, in strictness, if we admit Mr. Hargrave's explanation, can be referred neither to purchase nor descent: as escheats, and tenancy by curtesy, or in dower.

The division made by Blackstone seems the clearest, when we are considering the law of descents *alone*.

immediately on the death of the ancestor (4): 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 is 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 is 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 heirs; this is a point that we must result back to the standing law of descents in fee-simple to be informed of.

[*202] *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 embarrassment and confusion in our inquiries, 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*, 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 fees-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 acccording 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 to state, as briefly as possible, the true notion of this kindred or alliance in blood (*d*).

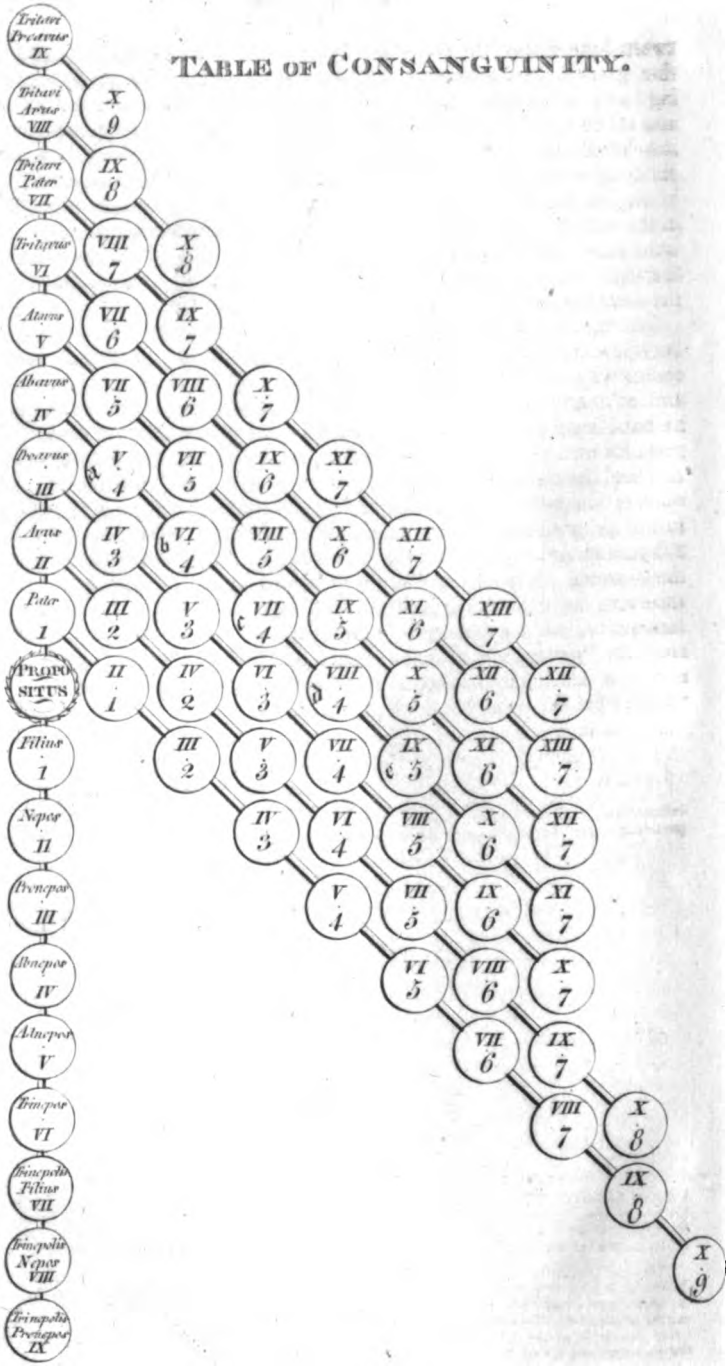
Consanguinity, or kindred, is defined by the writers on these subjects to be "*vinculum personarum ab eodem stipite descendentium*:" the connexion or relation of persons descended from the same stock or common ancestor. This consanguinity is either lineal, or collateral.

[*203] *Lineal consanguinity is that which subsists between persons, of whom one is descended in a direct line from the other, as be-

(b) See book I. pag. 74, 75. Book II. pag. 83. 85.
(c) See pag. 112, &c.
(d) For 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*. (Law tracts, Oxon. 1762, 8vo. or 1771, 4to.)

(4) Yet though the lands are cast on the heir by 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 entitled to take the possession, but the heir of the person who was last actually seised. It is not therefore only a mere right to enter, but the actual entry that makes a man complete owner; so as to transmit the inheritance to his own heirs: *non jus, sed seisina facit stipitem*; what a sufficient entry and seisin and what not. Com. Dig. Descent, C. 8, 9, 10; and see post, p. 312. 209. 227, 8.

TABLE OF CONSANGUINITY.



Book II. Page 278.

tween John Stiles (the *propositus* in the table of consanguinity) and his father, grandfather, great-grandfather, and so upwards in the direct ascending line; or between John Stiles and his son, grandson, great-grandson, and so downwards in the direct descending line. Every generation, in this lineal direct consanguinity, constitutes a different degree, reckoning either upwards or downwards: the father of John Stiles is related to him in the first degree, and so likewise is his son; his grandsire 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 this 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 stipite descendentium*; since lineal [*204] relations are such as descend one from the other, and both of course from the same common ancestor.

(*e*) *Ff.* 38. 10. 10.
(*f*) *Decretal. l. tit.* 14.
(*g*) Co. Litt. 23.
(*h*) *Ibid.* 12.
(*i*) This will seem surprising to those who are unacquainted with the increasing 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 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 degrees. Thus 16 (the number of 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.*

* This calculation is right in numbers, but is founded on a false supposition, as is evident from the results; one of which is to give a man a greater number of ancestors all living at one time than the whole population of the earth: another would be, that each man now living, instead of being descended from Noah and his wife alone, might claim to have had at that time an almost indefinite number of relatives. Intermarriages among relatives are one check on this incredible increase of relatives. This is noticed afterwards by Blackstone, as to collateral relatives.

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 one from the other. Collateral kinsmen are 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 [*205] John Stiles hath two sons, who have *each a numerous issue; both these issues are lineally descended from John Stiles 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 are derived from one father: *Titius* and his first cousin are related; why? because both descend from the same grandfather; and his second cousin's claim to consanguinity is this, that they are both 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 suppose 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 ancesters 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 in-

(*k*) This will swell more considerably than the former calculation; for here, though the first term is but 1, the denominator is 4; that is, there is *one* kinsman, (a brother) in the first degree, who makes, together with the *propositus*, the two descendants from the first couple of ancestors; and in every other degree the number of kindred must be the *quadruple* of those in the degree which immediately precedes it. For, since each couple of ancestors has two descendants, who increase in a duplicate *ratio*, it will follow that the *ratio*, in which all the descendants increase downwards, must be double to that in which the ancestors increase upwards; but we have seen that the ancestors increase upwards in a duplicate *ratio*: therefore the descendants must increase downwards in a double duplicate, that is, in a quadruple *ratio*. (5)

(5) "The learned Judge's reasoning is just and correct; and that the collateral relations are quadrupled in each generation may be thus demonstrated:—As we are supposed, upon an average, to have one brother or sister, the two children by the father's brother or sister will make two cousins, and the mother's brother or sister will produce two more, in all, four. For the same reason, my father and mother must each have had four cousins, and their children are my second cousins; so I have eight second cousins by my father, and eight by my mother; together sixteen. And thus again, I shall have 32 third cousins on my father's side, and 32 on my mother's, in all, 64. Hence it follows that each preceding number in the series must be multiplied by twice two or four.

"This immense increase of the numbers depends upon the supposition that no one marries a relation; but to avoid such a connexion it will very soon be necessary to leave the kingdom. How these two tables of consanguinity may be reduced by the intermarriage of relations, will appear from the following simple case: If two men and two women were put upon an uninhabited island, and became two married couple, if they had only two children each, a male and female, who respectively intermarried, and in like manner produced two children, who are thus continued *ad infinitum*; it is clear, that there would never be more than four persons in each generation; and if the parents lived to see their great-grandchildren, the whole number would never be more than sixteen; and thus the families might be perpetuated without any incestuous connexion."

compatible 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.

*The method of computing these degrees in the canon law (*l*), [*206] 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 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 [*207] 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 Bosworth, 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 Somerset, six; to

Collateral Degrees.	*Number of Kindred.*
1	1
2	4
3	16
4	64
5	256
6	1024
7	4096
8	16384
9	65536
10	262144
11	1048576
12	4194304
13	16777216
14	67108864
15	268435456
16	1073741824
17	4294967296
18	17179869184
19	68719476736
20	274877906944

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 cousins, and so on; we shall find that the present calculation is very far from being overcharged.

(*l*) *Decretal.* 4. 14. 3 & 9.

(*m*) Co. Litt. 23.

John duke of Somerset, seven; to Margaret countess of Richmond, eight; to king Henry the Seventh, nine (*n*) (6).

[*208] *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 (7).

(*n*) See 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 cyphers.

(6) The difference of the computation by the civil and canon laws may be expressed shortly thus: the civilians take the sum of the degrees in both lines to the common ancestor; the canonists take only the number of degrees in the longest line. Hence when the canon law prohibits all marriages between persons related to each other within the seventh degree, this would restrain all marriages within the 14th degree of the civil law. In the 1st book, 425. n. it is observed that all marriages are prohibited between persons who are related to each other within the third degree, according to the computation of the civil law. This affords a solution to the vulgar paradox, that first cousins may marry and second cousins cannot. For first cousins and all cousins may marry by the civil law; and neither first nor second cousins can marry by the canon law. But all the prohibitions of the canon law might have been dispensed with. It is said, that the canon law computation has been adopted by the law of England; yet I do not know a single instance in which we have occasion to refer to it. But the civil law computation is of great importance in ascertaining who are entitled to the administration, and to the distributive shares, of intestate personal property. See post, 504. 515.

(7) The common law, as to descents, prevailed in New-York until the passing of the Acts of 12 July 1782, and 23 Feb. 1786.

In our present statutory law of descents, these canons may be observed. The inheritance passes from the intestate,

I. To his lineal descendants.

II. To his father, unless the inheritance came from the part of the mother, and she be living; then he takes nothing: if it came from her, and she be dead, then to the father for life; and if the intestate left brothers or sisters, or their descendants, the reversion to them: if not, then to the father in fee: if the intestate left no issue, and no father capable of inheriting by the preceding rules, then

III. To the mother for life; and if the intestate left brothers or sisters, or their descendants, the reversion to them: if not, then to her in fee.

IV. To the brothers and sisters of the intestate and their descendants.

V. The above heirs failing, it passes next as follows:

§ 1. If the inheritance came from the part of the father, it passes to the brothers and sisters of the father and their descendants; they failing, to the brothers and sisters of the *mother* and their descendants.

§ 2. If it came from the part of the mother, it passes to her brothers and sisters, and their descendants; they failing, it passes to the brothers and sisters of the father and their descendants.

§ 3. If it came from the part of neither father nor mother, then the brothers and sisters and their descendants, of father and mother, take equally. As to more remote collaterals, the common law prevails. The Act of 1786 was the same as to lineal descendants, and as to descent to brothers and sisters and their *children*, (but not as to their issue generally,) and gave the inheritance to the father in fee, if the intestate died without issue and the inheritance did not come from the part of the mother.

The mode of distribution among the statutory heirs, is by both statutes governed by this rule: that if they be all of equal degrees, they take per capita; if not, they take per stirpes, the representation upwards per stirpes stopping at the ancestor of equal degree with the heir who is nearest in degree to the intestate. See 1 R. L. 1813. 52, &c. 1 R. S. 750, &c.

The Revised Statutes define an estate from the part of a parent, to be one that came to the intestate by descent, devise, or gift from such parent, or from any relative of the blood of such parent. Such was probably the law previously. Those statutes vary from the former statute, by providing that if an illegitimate child dies without issue, his estate shall pass to his mother; and if she be dead, to his relatives on the part of his mother, as if he had been legitimate.

Also, that all relatives of the half blood and their *descendants*, (not as before, brothers and sisters of the intestate only) shall inherit equally with those of the whole blood, unless the estate came to the intestate from the part of some ancestor.

Also, that the alienism of an ancestor shall not prevent a person otherwise capable from inheriting.

And that an advancement in real or personal estate to a child of an intestate as a settlement or portion, shall be deemed a part of his share of the real and personal estate of his father.

The Act of 1786 applied only where a person died *seised* of lands or hereditaments. According to 15 Johns. 343–5, and the as-

1. The first rule is, that inheritances shall lineally descend to the issue of the person who last died 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 est hæres viventis* (8). 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 heir 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*) (9).

(*o*) Bro. *tit. descent.* 58.

sumption of celebrated counsel as undisputed law in 2 Wendell, 192, and the concession of the opposite counsel, an adverse possession would not prevent the operation of the statute, at least where the intestate had been *once* seised in fact. According to 16 Johns. 96, where lands were devised by A. to B. a stranger, for life, who survived the heir at law, such heir having never had seisin in fact of the *freehold*, could not be a stock of descent: but A. was the stock of descent as the ancestor *last seised*. See also 13 Johns. 200. 1 R. S. 751. The Revised Statutes use a broader language: they say "the real estate of every person who dies without devising it shall descend, &c. making no seisin requisite: and (id. 754) they define real estate as here meaning every estate *right*, &c. in lands, tenements, and hereditaments, except such as are determined by the death of the intestate; thus clearly including a *right* of property without possession; and also, as it seems, any future estate, though there be a precedent freehold estate. If so, under this statute the ancestor is not the one last seised *in fact* of the freehold, but the one last entitled in any way to the estate. This seems to result from 1 R. S. 725, § 35, already referred to, by which expectant estates are made *descendible*, devisable, and alienable in the same manner as estates in possession. This last clause would seem to extend even to cases where the statute of descents does not apply; even to cases of the most remote collaterals. Qu. tamen.

(8) In a devise, however, if lands be left to the heir of M. it may be good as *designatio personæ*, and he may take in the lifetime of M. Goodright d. Brooking v. White, 2 Bla. 1010. There is also an exception to this rule in the case of the duchy of Cornwall, which vests in the king's first-born son by hereditary right in the lifetime of his father. 3 Bac. Ab. 449. 8 Rep. 1. Seld. tit. Hon. 2. 5. The title of duke of Cornwall, and the inheritance of the duchy, were first created and vested in Edward the Black Prince (who was the first duke in England after the duke of Normandy), by a grant in the eleventh year of the reign of Edward III. (A. D. 1337.) This grant has been held to be an act of the legislature, or a charter confirmed by parliament; and is consequently good, though it alter the established course of descent, which the king's grant could not do. The prince's case, 8 Rep. 1. It follows that the king's eldest son, being heir apparent, is always by inheritance duke of Cornwall, without a new creation. Id. ib. On the death of the eldest son, the second or eldest surviving son takes the inheritance; a peculiar descent, founded on the legislative grant. 1 Ves. 294. Collins' Bar. 148. 1 Bla. Com. 224. n. 10. by Mr. Christian. But it seems that as the duke of Cornwall must be not only the eldest son, but the heir apparent, the second surviving son would not succeed to the dukedom, if his eldest brother left issue, who would be heir apparent; but it would in that case revert to the crown. Id. n. 10. It appears that the disabilities of minority do not hold against a duke of Cornwall with respect to the duchy rights and possessions. Id. Chitty Jun. Prerog. 404. and 376. and n. (h) Bro. Ab. Prerog. p. 132. The general rule is, that till a prince is born, the king is seised of all the possessions, Com. Dig. Roy. 9; but when born, the prince is immediately seised in fee; and leases, &c. made by the king, may be determined by the prince, and he may have a *scire facias* for that purpose. See Chitty Jun.'s Prerog. of the Crown, p. 404. H. Chit. Desc. 15. n.

(9) But besides the case of a posthumous

[*209] *We must also remember, that no person can be properly such an ancestor, as that an inheritance of lands or tenements can be derived from him, unless he hath had *actual seisin* of such lands, either by his own entry, or by the possession of his own or his ancestor's lessee for years, or by receiving rent from a lessee of a 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 (10). Which

(*p*) Co. Litt. 15. (*q*) *Ibid.* 11.

child, if lands are given to a son, who dies, leaving a sister his heir; if the parents have, at any distance of time afterwards, another son, this son shall devest the descent upon the sister, and take the estate as heir to his brother. Co. Litt. 11. Doct. and Stud. 1 Dial. c. 7. So the same estate may be frequently devested by the subsequent birth of a nearer presumptive heir. As if an estate is given to an only child, who dies, it may descend to an aunt, who may be stripped of it by an after-born uncle, on whom a subsequent sister of the deceased may enter, and who will again be deprived of the estate by the birth of a brother. But every one has a right to retain the rents and profits which accrued whilst he was thus legally possessed of the inheritance. Harg. Co. Litt. 11. 3 Wils. 526. That is, in the case of a descent, (see H. Chit. Desc. 294.) but where a posthumous child takes by purchase, he is entitled not only to the estate itself, but to the intermediate profits of the estate also. Id. 296, 7, 8.

In New-York, in case of descent of lands, a posthumous child takes the intermediate profits. 1 R. S. 754, § 18.

(10) The nature of the seisin which a person acquires, and which will render such person an ancestor, to whom the next claimant must make himself heir, depends materially on the question,—Whether the estate was obtained by purchase or by descent?

Where any person acquires hereditaments by purchase, and such hereditaments are of a corporeal nature, he generally at the same time also acquires or receives the corporeal seisin or possession. Watk. Desc. 3. Where the deed of purchase, or instrument by which such hereditaments are conveyed to the ancestor, is founded upon feudal principles, it is always attended with actual livery of seisin, which is exactly similar to the investiture of the feudal law; and without which such instrument was in no instance sufficient to transfer an estate of freehold. Co. L. 48. a. post, p. 314. Where the instrument derives its essence from the statute of uses (27 Hen. VIII. c. 10.) the *cestui que use* is clothed with the actual possession of the lands by the operation of the act. And in case of a devise by will of lands to a man in fee, who dies after the devisor, the freehold or interest in law, is in the devisee before entry; and on his death, his heir may and will take by descent. Co. L. 111. a. 1 Show. 71. As to incorporeal hereditaments, and as to reversions and remainders, of which, when expectant on an estate of freehold, there can be no corporeal seisin, the property whether vested in possession, or only in interest, or merely contingent, is fixed or settled in the purchaser, at the time of the purchase, so as to render them transmissible to his heirs. Watk. Desc. 9, 10. Whether, however, the hereditaments be of a corporeal or incorporeal nature, or in possession or expectancy, the purchaser, on the purchase being completed, and the property in them being transferred, becomes immediately the root or stock of descent, and the hereditaments become descendible to his heirs. Watk. D. 4. In the instance therefore of a purchase, the question is, whether such property was legally vested or fixed in the purchaser, so as that, had he lived, he might have had the actual possession or enjoyment of it; and he may in many instances transmit it to his heirs, though he never had an actual seisin of it himself, and even where he never had any kind of seisin whatever, for it is a rule that where the heir takes any thing which *might* have vested in the ancestor, the heir shall be in by descent. 1 Co. 98. a. Moore, 140. Thus in the case of a fine levied, or recovery suffered, though the party die before execution, yet the execution afterwards shall have relation to the act of the ancestor, and the heir be in by descent. Shelley's case, 1 Co. 93. b. 106. b. Co. Litt. 361. b. 7 Co. 38. a. Burr. 2786. The execution of the writ consists in the delivery of seisin by the sheriff to the demandant; but it is now only returned, and never *in fact* executed. 5 T. R. 179, 180. And in the instance of an exchange, if both parties to the exchange die before either enters, the exchange is altogether void; but if either of the parties enters, and the other dies before entry, his heir may enter and will be in by descent. 1 Co. 98. a.

But where a person takes an estate by *descent*, he thereby acquires only a seisin in law of the estate descending, unless the estate

notoriety had succeeded in the place of the ancient feodal investiture, whereby, while feuds were precarious, the vassal 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 ancestor's 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 stipitem* (r) (11).

*When therefore a person dies so seised, the inheritance first [*210] goes to his issue: as if there be Geoffrey, John, and Matthew, grandfather, father, and son; and John purchases lands, 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) (12).

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 transmissible 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.

(r) Flet. l. 6, c. 2, § 2. (s) Litt. § 3.

were, on the death of the ancestor, held by any person under a lease for years (though otherwise if leased for an estate of freehold), for then the heir has not merely a seisin in law, but, by the possession of such lessee for years, acquires a seisin or possession in deed. Co. L. 15. a. 3 Atk. 469. Moore, 126. Case 272. Watk. 65. n. g. This seisin in law alone is not sufficient to make him an ancestor, but, in order to make himself the stock or root of descent, the fountain from which the hereditary blood of future claimants must be derived; and so enable him to turn the descent, and render the hereditary possessions descendible to his own heirs, it is requisite that such heir, who thus succeeds to the estate by descent, should gain an actual seisin or possession; or what is equivalent thereto according to the nature and quality of the estate descending. Watk. D. 36, 7. 57. Ratcliffe's case, 3 Co. 37.

This *actual seisin* may be acquired by entry into the lands descended, if of an estate in possession, which is the usual and direct mode of acquiring it; which may be made by the heir himself or by his guardian (if he is under age), or by his attorney, or even a stranger entering on his behalf. So also the heir may acquire an actual seisin by granting a lease for years or at will, and the entry of such his lessee under the lease, and the seisin in law cast upon him by the law, will be sufficient to enable him to grant such lease. Plowd. 87. 137. 142. 6 Com. Dig. Seisin (A. 2.) Bac. Ab. "Lease," I. 5. 2 Stra. 1066. [As to the subject of this note, see further H. Chit. Desc. c. 4. s. 3. p. 48—62.]

(11) See examples of this, page 228, post.

(12) That is, the father shall not take the estate as heir to his son in that capacity; yet as a father or mother may be cousin to his or her child, he or she may inherit to him as such, notwithstanding the relation of parent. Eastwood v. Vinke, 2 P. Wms. 613. So if a son purchase lands and dies without issue, his uncle shall have the land as heir, and not the father, though the father is nearer of blood, Litt. s. 3; but if in this case the uncle acquires actual seisin and dies without issue, while the father is alive, the latter may then by this circuity, have the land as heir to the uncle, though not as heir to the son, for that he cometh to the land by collateral descent, and not by lineal ascent. Craig. de Jur. Feud. 234. Wright's Ten. 182. n. (Z). So under a limitation to "the next of blood of A." the father would on the death of the son without issue, take, in exclusion both of the brothers and uncle of A. who would have first succeeded under the usual course of descent, as heirs of A.; for a father is nearer in proximity of blood than a brother or an uncle, Litt. s. 3. Co. L. 10. b. 11. a. 3 Rep. 40. b. 1 Vent. 414. Hale C. L. 323; and this is the reason why the father is preferred, in the administration of the goods of the son, before any other relation, except his wife and children. [See H. Chit. Desc. 68, 9.]

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 legal reason, may appear from considering as well the nature of the rule itself, as the occasion of introducing it into our laws.

[*211] *We are to reflect, in the first place, that all rules of succession to estates are creatures of the civil polity, and *juris positivi* 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

[*212] drawn *merely from the reason of the thing. For if the feud of which the son died seised, was really *feudum antiquum*, or one descended to him from his ancestors, the father could not possibly succeed to it, because it must have passed him in the course of descent, before it could come to the son; unless it were *feudum maternum*, or one descended from his mother, and then for other reasons (which will appear hereafter)

(*t*) Seld. *de success. Ebraeor.* c. 12.
(*v*) *Ff.* 38. 15. 1. Nov. 118. 127.
(*u*) Inst. 3. 3. 1.
(*w*) Craig. *de jur. feud. l.* 2, *t.* 13, § 15. Locke on gov. part 1, § 90.
(*x*) 2 *Feud.* 50.
(*y*) Domat. *p.* 2, *l.* 2, *t.* 2. Montesq. *Esp. L. l.* 3. 1, c. 33.
(*z*) *LL. Hen. 1.* c. 70.
(*a*) *l.* 7, *c.* 1.

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 vassal, 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 vassal 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 to 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 (13).

II. A second general rule or canon is, that the male issue shall be admitted before the female.

*Thus sons shall be admitted before daughters; or, as our male [*213] lawgivers have somewhat uncomplaisantly expressed it, the worthiest of blood shall be preferred (*e*). As if John Stiles 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 (*f*), and also among the states of Greece, or at least among the Athenians (*g*); but was totally unknown to the laws of Rome (*h*) (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 (*i*), yet our Danish predecessors (who succeeded them) seem to have made no distinction of sexes, but to have admitted all the children at once to the inheritance (*k*). But the feodal law of the Saxons on the continent (which was probably brought

(*b*) 1 *Feud.* 20.
(*c*) *Descendit itaque jus, quasi ponderosum quid eadem deorsum recta linea, et nunquam reascendit.* l. 2, c. 29.
(*d*) 1 Inst. 11.
(*e*) Hal. H. C. L. 235.
(*f*) Numb. c. 27.
(*g*) Petit. *LL. Attic.* t. 6, c. 6.
(*h*) *Inst.* 3. 1. 6.
(*i*) *Stat. Wall.* 12 Edw. I.
(*k*) *LL. Canut.* c. 68.

(13) Mr. Christian justly observes, that "however ingenious and satisfactory these reasons may appear, there is little consistency in the application of them; for if the father does not succeed to the estate, because it must be presumed that it has passed him in the course of descent, the same reason would prevent an elder brother from taking an estate by descent from the younger. And if it does not pass to the father, lest the lord should have been attended by an aged decrepit feudatory, the same principle would be still stronger to exclude the father's eldest brother from the inheritance, who is now permitted to succeed to his nephew."

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 non filiae haereditatem relinquent. . . . . Qui defunctus non filios sed filias reliquerit, ad eas omnis haereditas pertineat* (*l*)." It is possible therefore that this preference might be a branch of that imperfect system of feuds, which obtained here before the conquest; especially as it subsists among [*214] 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 (*m*). 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 (*n*), 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 (14).

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 anciently 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, and no other pre-emi- [*215] nence; 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 among the males only. This is certainly the most obvious and natural way; and has the appearance, at least in the opinion of younger

(*l*) *tit.* 7, § 1 & 4.
(*m*) c. 70.
(*n*) 1 *Feud.* 8.
(*o*) Litt. § 5. Hale, H. C. L. 238.
(*p*) Selden, *de succ. Ebr.* c. 5.
(*q*) c. 70.
(*r*) Glanvil. *l.* 7, c. 3.

(14) Daughters by different venters may inherit together as one heir to their common parent, though half blood is an impediment to the succession by descent from one to the other. Thus lord Hale says, (Com. L. c. 11.) "all the daughters, whether by the same or divers venters, do inherit together to the father." Therefore, if A. marries B. who dies leaving issue a daughter, and A. afterwards has issue one or more daughters by C. his second wife, and dies; all these daughters shall take his estate in equal shares among them in coparcenary, being equally his children. So Robinson says, all the daughters by different wives succeed to the inheritance of which their father was either seised in his own right, or to which their father would have been heir had he survived the person last seised. And the daughters by several husbands succeed, in the same manner, to the inheritance of their mother. Rob. Inh. 37, 8. See also Watk. D. 159. n. (b). Bro. Ab. Desc. pl. 20. 1 Rol. Ab. 627. Hale C. L. c. 11. post, p. 231. H. Chit. Desc. 78, 9.

As to the nature of the estate in coparcenary, see ante, p. 187.

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 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 socage estates frequently descended to all the sons equally, so lately as when Glanvil (*u*) wrote, in the reign of Henry the Second; and it is mentioned in the mirror (*w*) as a part of our ancient constitution, that knights' fees should descend to the eldest son, and socage fees should be partible among the male children. However in Henry the Third's time we find by Bracton (*x*) that socage lands, in imitation of lands in chivalry, had almost entirely fallen into the right of succession by primogeniture, as the law now stands: *except in [*216] Kent, where they gloried in the preservation of their ancient gavelkind tenure, of which a principal branch was a joint inheritance of all the sons (*y*); 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 (*z*); 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 (*a*) (15). In which disposition is preserved a

(*s*) 2 *Feud.* 55.
(*t*) Hale, H. C. L. 221.
(*u*) *l.* 7, *c.* 3.
(*w*) *c.* 1, § 3.
(*x*) *l.* 2, *c.* 30, 31.
(*y*) Somner. Gavelk. 7.
(*z*) Co. Litt. 165.
(*a*) *Ibid.*

(15) The king, in the case of coparceners of a title of honour, may direct which one of them and her issue shall bear it; and if the issue of that one become extinct, it will again be in abeyance, if there are descendants of more than one sister remaining. But upon the failure of the issue of all, except one, the descendant of that one being the sole heir, will have a right to claim, and to assume the dignity. There are instances of a title, on account of a descent to females, being dormant, or in abeyance, for many centuries.

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—"*progressum est ut ad filios deveniret, in quem scilicet dominus hoc vellet beneficium confirmare* (*b*)."

IV. A fourth rule, or canon of descents, is this; that the lineal [*217] 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* (*c*). 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 Stiles, 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 Stiles 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 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 (*d*); 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 each one third of his effects, and the ten grand-children had the remaining third divided between them. And so among collaterals, if any person 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 of the brethren were dead leaving issue, then (I apprehend) their representatives in equal degree became themselves princi- [*218] pals, *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

(*b*) 1 *Feud.* 1.
(*c*) Hale, H. C. L. 236, 237.
(*d*) Selden, *de succ. Ebr.* c. 1.
(*e*) *Nov.* 118, c. 3. *Inst.* 3. 1. 6.

Harg. Co. Litt. 165. Lord Coke says, there is a difference in an office of honour, which shall be executed by the husband or deputy of the eldest. Ib. Yet when the office of great chamberlain had descended to two sisters coheiresses of the duke of Ancaster, one of whom was married to Peter Burrell, esq.; the judges gave it as their opinion in the house of lords, "that the office belongs to both sisters; that the husband of the eldest is not of right entitled to execute it; and that both sisters may execute it by deputy, to be approved of by them; such deputy not being of a degree inferior to a knight, and to be approved of by the king." Ib. et. Journ. Dom. Proc. May 25, 1781. See also Parl. Reg. for 1780, vol. iv. p. 258 to 297.

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 first-born 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 right 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 first-born, 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. And if a man hath two sons, A and B, and A dies leaving two *sons, and then the grandfather dies; now the eldest son of A [*219] 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* (16).

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

(16) This right transferred by representation, is infinite and unlimited in the degrees of those that descend from the represented; for the son, the grandson, the great-grandson, and so all downwards *in infinitum*, enjoy the same privilege of representation as those, from whom they derive their pedigree, had. Hale, C. L. c. 11. And from hence it follows, that the nearest relation is not always the heir at law; as the next cousin, *jure representationis*, is preferred to the next cousin, *jure propinquitatis*. Co. L. 10. b. Proximity of blood, therefore, is twofold, either positive or representative. It is positive when the parties claim in their own individual right, as between the second and third son, or between the uncle and grand uncle. It is representative when either of the parties claim as being lineally descended from another, in which case he is entitled to the degree of proximity of his ancestor. Thus, the grandson of the elder son of any person proposed is entitled, before the second son of such person, though in common acceptation nearer by two degrees; and this principle of representative proximity is by the law of England so peremptory that a female may avail herself thereof to the total exclusion of a male claiming in his own right; for in descents in fee-simple, the daughter of the eldest son shall, as claiming by representation of her father, succeed in preference to the second, or younger son. See 3 Cru. Dig. 378, 9. [H. Chit. Desc. 84.]

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 1692 (*f*). 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 [*220] it) had not been *foris-familiated, in his lifetime. 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 (17).

(*f*) Mod. Un. Hist. xlii. 334.
(g) *l.* 7, *c.* 3.
(h) Hale, H. C. L. 217. 229.
(i) Bracton, *l.* 2, *c.* 30, § 2.

(17) The following historical observations and legal deductions relating to the doctrine of representations are extracted from Dalrymple on Feuds:

"The right of representation was more slowly introduced into the collateral than into the descending line.

"In the original law of nature representation must be unknown; those who are nearest in blood to a man, will be conceived to be nearest connected with him. Afterwards, it is observed to be a hardship that children bred up in a suitable rank to that of their father, and with a prospect of succeeding to his rights, should be cut off at once from that rank and that prospect. It comes to be observed as a farther hardship, that a woman who has married one seemingly her equal, should, by his untimely death, lose not only her husband, but see her children reduced to beggary.

"These considerations introduced the right of representation in the descending line: but the same considerations did not occur in the collateral line. The children of a brother or cousin have not the prospect of succeeding to their uncle's or cousin's estates, because, it is always to be supposed, every man is to have children of his own; it is therefore no hardship upon them to be removed by another uncle, or another cousin, from a succession which they could have no reasonable expectation of enjoying.

"The steps by which the right of representation in private successions came into the collateral line in Great Britain, or even in any other country in Europe, are extremely difficult to be traced, and perhaps are not very certain when they are traced; therefore we must supply them by the progress of the same representation in public successions.

"In these last successions it is plain that representation was originally unknown. From the histories of modern Europe, it appears that when succession was permitted amongst collaterals, the nearest of blood took to the exclusion of representation.

"In the time of Edward I., though representation in the descending line was tolerably well established throughout Europe, yet the point was so doubtful in the collateral line, that upon the death of Margaret of Norway, and the dispute for her succession between her cousins Bruce and Baliol, not only the eighty Scotch commissioners named by the candidates, and the twenty-four English named by king Edward were long doubtful, but all Europe was doubtful, which side ought to prevail. The precise question in the end put by the king to the commissioners, was,—*whether the more remote by one degree in succession, coming from the elder sister, ought to exclude the nearer by a degree, coming from the second sister?* And on the answer importing that representation should take place, judgment was given for Baliol.

"The Scotch writers of those days were positive this judgment was wrong; the English writers of the same period were as positive that it was right. These different opinions may be accounted for. In England at that time representation in collateral succession was beginning to take place, and this advance of their own nation the English made the measure of their opinion. The Scotch, on the other hand, at the same period, had not arrived at the same length; this species of representation was unknown to them; and therefore they disapproved of the judgment.

V. A fifth rule is, that on failure of lineal descendants, or issue, of the person last seised, the inheritance shall descend to his collateral relations, being of the blood of the first purchasor (18); subject to the three preceding rules (19).

Thus if Geoffrey Stiles purchases land, and it descends to John Stiles 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 (*k*) (20). 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 (*l*) agrees with our law in this respect: nor indeed is that agreement to be wondered at, since the law of descents in both is

(*k*) Co. Litt. 12.

(*l*) *Gr. Coustum. c.* 25.

"Solemn as this decision was, yet even in England a century afterwards, the right of representation in this line was so far from being complete, that it was the same doubt that gave rise to the disputes between the houses of York and Lancaster, and involved the kingdom in civil war. On the abdication of Richard the Second, the two persons claiming the right to the crown, were his two cousins, the duke of Lancaster, son of John of Gaunt, who was fourth son to Edward the Third, and the earl of March, grandson to Lionel duke of Clarence, who was third son of the same prince. And the discussions related to the rights of these persons, and whether representation in collateral successions ought to prevail.

"Even in later times, and when the law was better understood, it was on the same ground, that upon the death of Henry the Third of France, the League set up the cardinal of Bourbon as heir to the crown, in opposition to his nephew, the king of Navarre. This last prince was son of the elder branch to the cardinal: but the cardinal being one step nearer to the common stock, it was asserted that nearness of blood, and not representation, took place in collateral succession.

"For many ages it has now been fixed in private successions that representation in the collateral line shall take place; and although of late in Europe there has scarce been any such dispute in public successions as to give room for either example to prevail, yet the example of those private successions, and the now rivetted notions of mankind in favour of representation, will probably prevent it from being ever made again the subject of dispute." See Dalrymple on Feuds, ch. 5. s. 2. p. 178. H. Chit. Desc. 98. n.

(18) The custom of *gavelkind* extends to collaterals; so that, if one brother die without issue, *all* his other brothers shall succeed equally. (Robins. on Gavelk. book I. ch. 6). But, the custom of *borough English* does not extend to collaterals; and therefore, on the death of one brother, lands of that tenure shall not go to the youngest brother without a special custom. (Ibid).

(19) It should here be noticed, that though it is necessary that a person who would succeed must shew himself to be of the blood of the first purchasor; yet, where the persons who inherit, succeed or derive title to the inheritance, by virtue of remote and intermediate descents from the purchasor, it will be sufficient if they are related by half blood only to the purchasor, or to such other remote and intermediate ancestors who were formerly and intermediately seised of the inheritance in the regular course of descent from the purchasor, provided, according to the rule which follows, they are the worthiest legal relatives of the whole blood to the person last seised. Rob. Inh. 45. For example see post, p. 228.

(20) To be of the blood of Geoffrey, is either to be immediately descended from *him*, or to be descended from the *same couple* of common ancestors. Two persons are *consanguinei*, or are of the blood (that is, whole blood) of each other, who are descended from the same two ancestors.

The heir and ancestor must not only have two common ancestors with the original purchasor of the estate, but must have two common ancestors with each other; and therefore if the son purchases lands and dies without issue, and it descends to any heir on the part of the father, if the line of the father should afterwards become extinct, it cannot pass to the line of the mother. Hale's Hist. C. L. 246. 49 E. III. 12. And for the same reason, if it should descend to the line of any female, it can never afterwards, upon failure of that line, be transmitted to the line of any other female, for according to the next rule, viz. the sixth, the heir of the person last seised must be a collateral kinsman of the whole blood.

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 [*221] be of the blood of, that is, lineally de*scended from, the first feudatory or purchasor. In consequence whereof, if a vassal died seised 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 vassal 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, sine legitimo haerede defuncto, in beneficio quod eorum patris fuit succedat: sin autem unus e fratribus a domino feudum acceperit, eo defuncto sine legitimo haerede, frater ejus in feudum non succedit* (*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 haeredis, in prima investitura expressum, tantum ad descendentes ex corpore primi vasalli extenditur; et non ad collaterales, nisi ex corpore primi vasalli sive 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 rigour 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, [*222] descended from, the first imaginary purchasor. For *since it is not ascertained 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 suppose *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 be 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

(*m*) 1 *Feud.* 1, § 2. (*n*) Craig. *l.* 1, *t.* 9, § 36.

lands might have possibly been purchased, are capable of being called to the inheritance (21).

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 purchasor in them, and therefore shall never succeed (22). As, if lands come to John Stiles 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 Stiles, 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 Stiles; the relations of *his father's mo- [*223] ther, Cecilia Kempe, shall for the same reason never be admitted, but only those of his father's father (23)." This is also the rule of the French law (*o*), 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 Stiles, inherited it from his father Walter Stiles, 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 Stiles, either paternal or maternal, to be in their due order the heirs to John Stiles 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 purchasor; or, that it shall result back to the heirs of the body of that ancestor, from whom it either really has, or is supposed by fiction of law to have originally descended; according to the rule laid down in the year books (*p*),

(*o*) Domat. *part* 2. *pr.* (*p*) *M.* 12 *Edw. IV.* 14.

(21) Where a man takes by purchase he must take the estate as a *feudum antiquum*, and though it be limited to his heirs on the part of his mother, yet the heirs on the paternal side shall be preferred in the descent, for no one is at liberty to create a new kind of inheritance. H. Chit. Desc. 3. 123. 3 Cru. Dig. 359. Watk. D. 222, 223.

(22) It will sometimes happen that two estates or titles, the one legal, and the other equitable, will descend upon the same person, in which case they will become united, and the equitable shall follow the line of descent through which the legal estate descended. See Goodright d. Alston v. Wells. (Dougl. 771.) And in the late case of Langley v. Sneyd, (1 Simons & Stu. Rep. 45.) where an infant died seised of an equitable estate, descending *ex parte maternâ*, the legal estate being vested in trustees, his incapacity to call for a conveyance of the legal estate (by which the course of descent might have been broken), was held not to be a sufficient reason to induce a court of equity to consider the case, as if such a conveyance had actually been made, it not being, according to the terms of the trust, any part of the express duty of the trustees to execute such conveyance.

(23) Hence the expression *heir at law* must always be used with a reference to a specific estate; for if an only child has taken by descent an estate from his father, and another from his mother, upon his death without issue these estates will descend to two different persons: so also, if his two grandfathers and two grandmothers had each an estate, which descended to his father and mother, whom I suppose also to be only children, then, as before, these four estates will descend to four different heirs.

Fitzherbert, (*q*), Brook (*r*), and Hale (*s*), "that he who would have been heir to the father of the deceased" (and, of course, to the mother, or any other real or supposed purchasing ancestor) "shall also be heir to the son;" a maxim that will hold universally, except in the case of a brother or sister of the half-blood, which exception (as we shall see hereafter) depends upon very special grounds.

The rules of inheritance that remain are only rules of evidence, calculated to investigate who the purchasing ancestor was; which [*224] **in feudis 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* (24).

First, he must be his next collateral kinsman, either personally or *jure representationis* (25); 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

(*q*) *Abr. t. discent.* 2.
(*r*) *Ibid.* 33.
(*s*) H. C. L. 243.

(24) With reference to this and the preceding rule, it is to be observed, that, "in order to constitute a good title, the party must be the nearest collateral heir of the whole blood of the person last seised on the part of the ancestor through whom the estate descended. When lord Hale speaks of the nearest collateral relation of the whole blood of the person last seised, and of the blood of the first purchasor, he means the latter branch of the expression, as a qualification, and not an addition to the first branch, that the collateral heir of the whole blood must claim through the ancestor from whom the estate descended, and thus be of the blood of the first purchasor. Per Leach, vice-chancellor. Hawkins v. Shewen, 1 Sim. & Stu. Rep. 257. which case and the pedigree annexed to the same deserve attention. On account of the qualification required for the heir to be of the blood of the first purchasor, or acquirer, of the estate, it may not unfrequently happen, that the person upon whom the inheritance devolves in a regular and legal course of descent or succession, is not (as independently of, and laying aside this qualification) heir or next of kin to the person last seised of it, either in the paternal or maternal line.

It appears that Littleton, and his commentator, lord Coke, (Ten. s. 6. fo. 11. b.) have laid down a different doctrine, "touching the necessity of the person, who inherits, being always heir or the worthiest and nearest relative to the person last seised:" but it is conceived that the rules must be taken together in a connected view, and as such the rule will stand thus, "that the person or persons, who inherit, and upon whom the law casts the inheritance upon the death of the person seised, must always be the worthiest and nearest of such of the relatives of the whole blood of the person last seised, as are of the blood and consanguinity of the purchasor, and such as are not incapacitated by the first rule of descent." Rob. Inh. 46, 7. [H. Chit. Desc. 108, 9.]

(25) This is only true in the paternal line; for when the paternal and maternal lines are both admitted to the inheritance, the most remote collateral kinsman *ex parte paternâ* will inherit before the nearest *ex parte maternâ*. See p. 236, post.

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 (the father of the *propositus*), and therefore deriving only one-fourth of his blood from the same fountain; the latter, and also the *propositus* himself, being each of them distant only two degrees from the common ancestor (the grandfather of each), and 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 [*225] also respects the purchasing ancestor, from whom the estate was derived, it therein resembles the canon law, and therefore counts 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 suppose the law of England to use; since the right of representation, of the parent by the issue, is allowed to prevail *in infinitum* (26). This allowance

(26) It is suggested by Mr. Christian, in his edition of Blackstone, "that the true and only way of ascertaining an heir at law in any line or branch is by the representation of brothers or sisters in each generation, and that the introduction of the computation of kindred, either by the canon or civil law, into a treatise upon descents, may perplex, and can never assist; for if we refer this sixth rule either to the civil or canon law, it will in many instances be erroneous. It is certain that a great-grandson of the father's brother will inherit before a son of the grandfather's brother; yet the latter is the *next collateral kinsman* according to both the canon and civil law computation; for the former is in the fourth degree by the canon and the sixth by the civil law; the latter is in the third by the canon and the fifth by the civil; but in the descent of real property the former must be preferred."

The doctrine of consanguinity, as laid down by Blackstone, has however been thus vindicated by the author of the recent treatise of descents:

"Mr. Christian asserts, that 'this introduction of the computation of kindred into a treatise of descent, may perplex, but can never assist.'

"But it may be asked, by what means are we to ascertain and determine who is nearest to a person deceased, whether his uncle or his brother, or any other of his relations? We have no rule which directs that a brother can inherit before an uncle, but merely that on failure of lineal descendants, or issue of the person last seised, the inheritance shall descend to his collateral relations. (Canon 5.) And then follows this sixth rule, which designates which of these collateral relations shall be preferred; namely, the next collateral kinsman of the whole blood. And who, it will be asked, is the next collateral kinsman? Unless we can have recourse to the degrees of consanguinity, as pointed out by the canon law, in order to ascertain this fact, we have no rule by which we can determine what collateral relative is entitled to the inheritance. But Mr. Christian further asserts, that this computation of the sixth rule of descents, if referred either to the civil or canon law, will in many instances be erroneous; for a grandson of the father's brother will inherit before a son of the grandfather's brother; yet the latter is the next collateral kinsman. Mr. C's assertion is founded on a mistaken view of the rules of descent, and on a disregard of their connexion one with another; for if we refer to the fifth canon, which intimates that the descent in the collateral line is subject to the second, third, and fourth rules of descent, we shall find, that 'the lineal descendants of any person deceased shall represent their ancestor, and stand in the same place as the person himself would have done, had he been living;' and again, by the exposition of lord Coke of the word 'next,' we shall find, that it must be understood in a double sense; namely, next *jure representationis*, and next *jure propinquitatis*; that is, by right of representation, and by right of propinquity; and that Littleton, in his position, that the 'next collateral cousin shall inherit,' meaneth of the right of representation; for legally, in course of descents, he is next of blood inheritable. Co. Litt. 10. b. And therefore, though on the face of the table of consanguinity, the great-grandson of the father's brother does appear to be more degrees removed than the son of the grandfather's brother, yet inasmuch as he represents his lineal ancestor, the uncle of the deceased, he is one degree nearer than the son of the grandfather's brother, who represents only the great-uncle of the deceased. But again, Mr. C. disavows this doctrine of representation of blood, and proposes that the rule is only true in the paternal line; for when the paternal and maternal lines are both admitted to the inheritance (that is) when the deceased was the purchasor of the estate; and it therefore is a *feudum novum*, to be held *ut antiquum*, the most remote collateral kinsman, *ex parte paternâ*, will inherit before the nearest *ex parte maternâ*. Mr. C. again falls into the same error, and seems to disregard the subsequent rules of descent by which the kindred

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 material 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 Stiles's brother are all of them in the first degree of kindred with respect to inheritances, those of his uncle in the second, and those of his great-uncle in the third; as their respective ancestors, if living, would have been; 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 other subsisting issue of his next immediate ancestor. Thus, if John Stiles dies without issue, his estate shall descend to Francis his brother, or his representatives; he being lineally descended from Geoffrey Stiles, John's next immediate ancestor, or father. On failure of brethren, or sisters, and their issue, it shall descend to the uncle of John Stiles, 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 successoresque, sui cuique liberi, et nullum testamentum: si liberi, non sunt, proximus gradus in possessione, fratres, patrui, avunculi* (*t*)."

[*226] *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 the common stocks from which the next successor must spring. And therefore in the Jewish law, which in this respect entirely corresponds with ours (*u*), 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 offspring of the father, grandfather, *&c.* of the deceased (*w*). 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 (*x*). If Geoffrey Stiles 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

(*t*) Tacitus *de mor Germ.* 21.
(*u*) Numb. *c.* 27.
(*w*) Selden, *de succ. Ebr. c.* 12.
(*x*) Sid. 196. 1 Vent. 423. 1 Lev. 60. 12 Mod. 619.

derived from the blood of the male ancestors, however remote, are admitted before those from the blood of the female, however near. The rule therefore may stand good and unexceptionable in this form, that the collateral kinsman, who is either by representation, or in his own personal right, nearest to the deceased, shall be admitted, and succeed to the inheritance, on failure of his lineal descendants. The rules of descent must be taken together in a connected view; nor can we in many instances state any one of the canons of descent as a positive rule without such connexion the one with another. Thus, for instance, as in the direct descending line by the first canon, taken by itself, all the children, so by the fifth rule, all the collateral relatives, of any person deceased, would be entitled to an equal share of the inheritance: but these are subsequently explained, the one to mean the male issue, and of them the eldest, in preference to the females; and the latter, the next collateral, either in his own right, or by representation in the male line, in preference to the female." See H. Chit. Desc. 110—113.

son of Francis, who was the brother of John, who was the father of Matthew. But though 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 Stiles, it is first 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 couple of 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 Stiles must derive his descent; and in such derivation the same rules must be observed, with regard to the sex, *primogeniture, and representation, that have before been laid down with regard to lineal descents from the person of the last proprietor. [*227]

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; nay, the estate shall escheat to the lord, sooner than the half blood shall inherit (27).

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 had. Thus, the blood of John Stiles being composed of those of Geoffrey Stiles 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 Stiles; 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 (it is true) on the one part, but that of Lewis Gay (instead of Geoffrey Stiles), on the other part, it hath therefore only half the same ingredients with that of John Stiles; 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 it shall descend to a sister (if any) of the whole blood to A: for in such cases the maxim is, that the seisin or *possessio fratris facit sororem esse haeredem*. Yet, 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 (*y*) (28). [*228]

(*y*) Hale, H. C. L. 238.

(27) It may be observed, that it is always intended, or presumed, that a person is of the whole blood, until the contrary be shewn. Kitch. 225. a. Plowd. 77. a. Trin. 19. H. 8. pl. 6. p. 11. b. Watk. Desc. 75. n. (u).

(28) The meaning of the maxim is, that the

This total exclusion of the half blood from the inheritance, being almost peculiar to our own law, is looked upon as a strange 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 the heir to a *feudum antiquum* must be of the blood of the first feudatory or purchasor, 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 purchasor, 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 purchasor, and thereby the proof of an actual descent from him became impossible; then the law substituted what sir Martin Wright (*z*) calls a *reasonable*, in the stead of an *impossible*, proof; for it remits the proof of an actual descent from the first purchasor; 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 half of his ancestors above the common stock the same as mine; and therefore there is not the same probability (29) of that standing requisite in the law, that he be derived from the blood of the first purchasor.

(*z*) Tenures, 186.

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possession of a brother will make his sister of the whole blood his heir in preference to a brother of the half blood. Litt. 58.

It may from the above passage in the text be perceived, that the rule depends entirely on the question, whether the elder son had obtained a seisin of the estate; for if he has obtained such a seisin, though not by actual entry, as will be sufficient to make him an ancestor, so as to transmit the estate descending to his own right heirs, his sister of the whole blood will be entitled in preference to the brother of the half blood; but if he has not obtained such a seisin, his brother of the half blood will succeed as heir to his father, who was the person last seised. [H. Chit. Desc. 118.] Of some inheritances there cannot be a seisin, or a *possessio fratris*; as if the eldest brother dies before a presentation to an advowson, it will descend to the half-brother as heir to the person last seised, and not to the sister of the whole blood. 1 Burn Ec. 11. So of reversions, remainders, and executory devises, there can be no seisin or *possessio fratris*; and if they are reserved or granted to A and his heirs, he who is heir to A when they come into possession, is entitled to them by descent; that is, that person who would have been heir to A, if A had lived so long, and had then died actually seised. 2 Wood. 256. Fearne, 448. 2 Wils. 29. It may also be observed, that if the father die without heirs male, his daughters by different venters may inherit together to the father, although they cannot inherit to each other. Bro. Abr. *Descent*, pl. 20. 1 Roll. Abr. 627.

(29) This reason will be found on examination to be unsatisfactory, and indeed not to be founded in truth. It is not true, that in all, or even in most cases, there is a greater probability that a kinsman of the whole blood is derived from the blood of the first purchasor, than a kinsman of the half blood; or that a kinsman of the half blood has in all, or even in most cases, fewer common ancestors of the person last seised, than a kinsman of the whole blood. My brother of the half blood (the issue of my father), has one ancestor (my father), more in common with me, than my uncle of the whole blood; several more than my great-uncle (see *post*, page 231); and more, almost innumerably more, than the descendants of my paternal grandmother's maternal grandfather. Yet all these may inherit an estate descended to me from my father, and purchased by him, though my half brother, the son of my father, the original purchasor, cannot inherit. And it is plain, the law does not consider the point as

* To illustrate this by example. Let there be John Stiles, and [*229]
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 purchasors (whether of the whole or half blood) are entitled to inherit at all; for we have seen that *in feudis stricte novis* neither brethren nor any other collaterals were admitted. As *therefore in *feudis* [*230]
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 subtle nicety; but considering the principles upon which our law is founded, it is not an injustice, nor always 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 the whole blood was calculated to supply the frequent impossibility of proving a descent from the first purchasor, 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.

hinging upon greater or less probability: for then it would only *postpone* the half blood, instead of utterly *excluding* it, so that land shall rather escheat than devolve upon a kinsman of the half blood.

This note is partly extracted from the MS. supposed to be penned by a noble and learned Judge still living.

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 Stiles, above the common stock, are also the ancestors of his collateral kinsman of the whole blood; 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 belong to either of them respectively, from which the other is not descended, and therefore can have none of their blood. Thus, though John Stiles 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 *patruus*, or father's brother, derives not his descent from John's maternal ancestors: nor his *avunculus*, or mother's brother, [*231] *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, the whole brother of John Stiles is sure to be descended from that unknown ancestor; his half brother has only an even chance, for half John's ancestors are not his. So, in the second 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 of John's ancestors have no connexion in blood with him. Therefore the much less probability of the half blood's descent from the first purchasor, 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 kinsman of the whole blood in a remoter degree, as the uncle or great-uncle, is preferred to one of the half blood in a nearer degree, as the brother; for the half brother hath the same chance of being descended from the purchasing ancestor as the uncle; and a thrice (30) better chance than the great-uncle or kinsman in the third degree. It is also more especially overstrained, 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; in which case the younger son cannot inherit this estate, because he is not of the whole blood to the last [*232] proprietor (*a*). This, it must be *owned, carries a hardship with

(*a*) A still harder case than this happened, *M.* 10 *Edw. III.* On the death of a man, who had three daughters by a first wife, and a fourth by another, his lands descended equally to all four as coparceners. Afterwards the eldest two died without issue: and it was held, that the third daughter alone should inherit their shares, as being their heir of the whole blood; and that the youngest daughter should retain only her original fourth part of their common father's lands. (10 *Ass.* 27.) And yet it was clear

(30) Mr. Christian has justly observed that this ought to be *twice*; for the half brother has one chance in two, the great-uncle one in four; the chance of the half brother is therefore twice better than that of the great-uncle.

it, even upon feodal principles: for the rule was introduced only to supply the proof of a descent from the first purchasor; 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 purchasor, 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 purchasor, 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 (*b*) has singled out on which to ground his strictures on the English law of half blood. And, really, it should seem as if originally the custom of excluding the half blood in Normandy (*c*) extended only to exclude a *frater uterinus*, when the inheritance descended *a patre*, and *vice versa*, and possibly in England also; as even with us it remained a doubt, in the time of Bracton (*d*), and of Fleta (*e*), whether the half blood on the father's side was 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. So also the rule of law, as laid *down by our Fortescue (*f*), extends no farther than [*233] 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 (*g*), so that it be the blood of the first monarch purchasor, or (in the feodal language) conqueror of the reigning family. Thus it actually 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) (*h*) 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 (*i*): because, when the lineage is clearly made out, there is no need of this auxiliary proof (31). How far it might be desirable for the legislature to give relief, by amending the law of descents in one or two instances, and ordaining that the half blood might always inherit, where the estate notoriously descended from

law in *M.* 19 *Edw. II.* that where lands had descended to two sisters of the half blood, as coparceners, each might be heir of those lands to the other. Mayn. Edw. II. 628. Fitzh. *abr. tit. quare impedit.* 177.

(*b*) *l.* 2, *t.* 15, § 14.

(*c*) *Gr. Coustum. c.* 25.

(*d*) *l.* 2, c. 30, § 3.

(*e*) *l.* 6, c. 1, § 14.

(*f*) *de laud. LL. Angl.* 5.

(*g*) Plowd. 245. Co. Litt. 15.

(*h*) 12 Will. III. c. 2.

(*i*) Litt. § 14, 15.

(31) In titles of honour also half blood is no impediment to the descent: but a title can only be transmitted to those who are descended from the first person ennobled. Co. Litt. 15. Half blood is no obstruction in the succession to personal property. Page 505, post.

its own proper ancestor, and in cases of new-purchased lands, or uncertain descents, should never be excluded by the whole blood in a remoter degree; or how far a private inconvenience should be still submitted to, rather than a long-established rule should be shaken, it is not for me to determine (32).

The rule then, together with its illustration, amounts to this: that, in order to keep the estate of John Stiles 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 both.

[*234] *But here another difficulty arises. In the second, third, fourth, and every superior degree, every man has many couples of ancestors, increasing according to the distances in a geometrical progression upwards, (*k*), 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 Stiles and of Andrew and Esther Baker, the two grandsires and grandmothers of John Stiles, are each in the same degree of propinquity; in the third degree, the respective issues of Walter and Christian Stiles, 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 Stiles. 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 likewise to avoid all other confusion and uncertainty that might arise between the several stocks wherein the purchasing ancestor may be sought for, another qualification is requisite, besides the *proximity* and *entirety*, which is that of *dignity* or *worthiness* of blood. 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, however remote, shall be admitted before those from the blood of the female, however near),—unless where the lands have, in fact, descended from a female.

(*k*) See page 204.

(32) It has been observed, whatever ingenuity may have been exerted in apologizing for the exclusion of the half blood, nothing can be more cruel or contrary to our notions of propriety and consistency, than to give the estate to a distant relation, or to the lord, in preference to a half brother, either when it has descended from the common parent, or when the half-brother has himself acquired it. A case was determined in the common pleas, a few years ago, under the following circumstances: a father died intestate, leaving two daughters by his first wife, and his second wife pregnant, who was delivered of a son; this infant lived only a few weeks; and it was held, that as the mother had resided upon one of the father's estates, and had received rent for others after the father's death, she being the guardian in socage of the infant, this amounted to a legal seisin in him, and of consequence his two sisters could not inherit, and the estate descended perhaps to a remote relation. 3 Wils. 516. And in a late case, where a father died leaving two daughters by different mothers, the mother of the youngest entered upon the premises, and the eldest daughter died; it was held that, the mother being guardian in socage to the youngest, and having a right to enter for her own daughter, the entry of the mother was also an entry for the coparcener the half sister, which created a seisin in her, and therefore, upon her death, her moiety descended to some of her relations of the whole blood. And lord Kenyon held generally that an infant may consider whoever enters on his estate as entering for his use. And he referred to the distinction laid down by lord Coke (Co. Litt. 15. a.), viz. that if the father die, his estate being out on a freehold lease, that is not such a possession as to induce a *possessio fratris*, unless the elder son live to receive rent after the expiration of the lease, but if the father die leaving his estate out on a lease for years, the possession of the tenant is so far the possession of the eldest son as to constitute the *possessio fratris*. 7 T. R. 390.

Thus the relations on the father's side are admitted *in infinitum*, before those on the mother's side are admitted at all (*l*); and the relations of the father's father, before those of the father's mother; and so on (33). And in this the English law is not singular, but warranted by the examples of the Hebrew and Athenian laws, as stated by Selden (*m*), and Petit (*n*): though among the Greeks in the time of Hesiod (*o*), 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 (*p*) abolished all distinction between them. It is also conformable to the customary law of Normandy (*q*), which indeed in most respects agrees with our English law of inheritance. [*235]

However, I am inclined to think, that this rule of our law 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 principal canon of collateral inheritance, 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 from 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

(*l*) Litt. § 4.
(*m*) *de succ. Ebraeor. c.* 12.
(*n*) *LL. Attic. l.* 1, *t.* 6.
(*o*) Θεογον, 606.
(*p*) *Nov.* 118.
(*q*) *Gr. Coustum. c.* 25.

(33) So lord Hale says, "If a son purchases land in fee-simple, and dies without issue, those of the male line shall be preferred in the descent, (Hale Hist. Com. L. 326. rule 7. div. 1.) and the line of the part of the mother shall never inherit as long as there are any, though never so remote, of the line of the part of the father; and, consequently, though the mother had a brother, yet if the great great great grandfather or grandmother has a brother or sister or any descended from them, they shall be preferred to and exclude the mother's brother, though he is much nearer. Id. ib. div. 2. Clere v. Brooke, Plowd. 442. And so great is the preference shewn to the male line, that if a son dies, having purchased lands which descend to his heir on the part of his father, (not being his own brother or sister, see H. Chit. Desc. 123.) and the line of the father should afterwards fail, yet the descent shall never return to the line of the mother, though in the first instance, or first descent from the son, it might have descended to the heir of the part of the mother; for by this descent and seisin it is lodged in the father's line, to whom the heir of the part of the mother can never derive a title as heir, but it shall rather escheat. See Hargr. note 5. Co. L. 13. a.

"This preference of male stocks is continued throughout all manner of successions; for if, on default of heirs of the part of the father, the lands descend to the line of the mother, the heirs of the mother of the part of her father's side shall be preferred in the succession before her heirs of the part of her mother's side, because they are the more worthy." Hale, C. L. 330.

The several classes which can comprehend every description of kindred, are thus enumerated by Mr. Cruise, Dig. vol. 3. p. 377.

1. The male stock of the paternal line.
2. The female stock of the paternal line.
3. The male branches of the female stock of the paternal line.
4. The female branches of the female stock of the paternal line.
5. The male stock of the maternal line.
6. The female branches of the male stock of the maternal line.
7. The male branches of the female stock of the maternal line.
8. The female branches of the female stock of the maternal line.

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.

[*236] *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 Stiles from his father's mother Cecilia Kempe; here not only the blood of Lucy Baker his mother, but also of George Stiles 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 Stiles, 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 a 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 purchasor. 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 (34).

This I take to be the true reason of the constant preference of the agnatic succession, or issue derived from the male ancestors, through 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

[*237] first purchasor: 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 purchasor; which, joined with the other probability, of the wholeness of entirety of blood, will fall little short of a certainty.

Before we conclude this branch of our inquiries, it may not be amiss to exemplify these rules by a short sketch of the manner in which we must

(34) If a man seised in fee *ex parte materna*, levy a fine *sur grant et render*, granting to A. and his heirs; the estate taken by the conusor under the render will now be descendible to his heirs *ex parte paterna*. 1 Prest. Conv. 210. 318. Co. Litt. 316. Dyer, 237. b. Price v. Langford, 1 Salk. 92. And the same in the case of feoffment and re-infeoffment, or even if a man seised *ex parte materna*, make feoffment in fee reserving rent, the rent shall descend to the heirs ex parte paterna. Co. Litt. 12. b.

search for the heir of a person, as *John Stiles*, who dies seised of land which he acquired, and which therefore he held as a feud of indefinite antiquity (*r*).

In the first place succeeds the eldest son, Matthew Stiles, or his issue: (n° 1.)—if his line be extinct, then Gilbert Stiles and the other sons, respectively, in order of birth, or their issue: (n° 2.)—in default of these, all the daughters together, Margaret and Charlotte Stiles, or their issue: (n° 3.)—On failure of the descendants of *John Stiles*, himself, the issue of Geoffrey and Lucy Stiles, his parents, is called in: *viz.* first, Francis Stiles, the eldest brother of the whole blood, or his issue: (n° 4.)—then Oliver Stiles, and the other whole brothers, respectively, in order of birth, or their issue: (n° 5.)—then the sisters of the whole blood all together, Bridget and Alice Stiles, or their issue: (n° 6.)—In defect of these, the issue of George and Cecilia Stiles, his father's parents; respect being still had to their age and sex: (n° 7.)—then the issue of Walter and Christian Stiles, the parents of his paternal grandfather: (n° 8.)—then the issue of Richard and Anne Stiles, the parents of his paternal grandfather's father, (n° 9.)—and so on in the paternal grandfather's paternal line, or blood of Walter Stiles, *in infinitum*. In defect of these, the issue of William and Jane Smith, the parents of his paternal grandfather's mother: (n° 10.)—and so on in the paternal grandfather's maternal line, or blood of Christian Smith, *in infinitum*: till both the *immediate bloods [*238] of George Stiles, the paternal grandfather, are spent.—Then we must resort to the issue of Luke and Frances Kempe, the parents of *John Stiles's* paternal grandmother: (n° 11.)—then to the issue of Thomas and Sarah Kempe, the parents of his paternal grandmother's father: (n° 12.)—and so on in the paternal grandmother's paternal line, or blood of Luke Kempe, *in infinitum*.—In default of which we must call in the issue of Charles and Mary Holland, the parents of his paternal grandmother's mother: (n° 13.)—and so on 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 Stiles* entirely failing, recourse must then, and not before, be had to his maternal relations; or the blood of the Bakers, (n° 14, 15, 16.) Willis's, (n° 17.) Thorpe's, (n° 18, 19.) and White's, (n° 20.) in the same regular successive order as in the paternal line.

The student should however be informed, that the class, n° 10, would be postponed to n° 11, in consequence of the doctine laid down, *arguendo*, by justice Manwoode, in the case of Clere and Brooke (*s*); from whence it is adopted by lord Bacon (*t*), and sir Matthew Hale (*u*): because, it is said, that all the female ancestors on the part of the father are equally worthy of blood; and in that case proximity shall prevail (35). And yet, notwithstanding these respectable authorities, the compiler of this table hath ventured (in point of theory, for the case never yet occurred in practice) (36) to give the preference to n° 10 before n° 11; for the following

(*r*) See the table of descents annexed.
(*s*) Plowd. 450.
(*t*) Elem. c. 1.
(*u*) H. C. L. 240. 244.

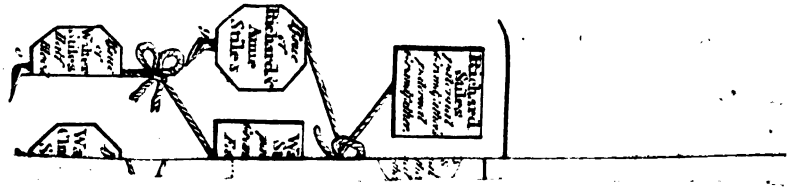
(35) See observations on the case of Clere and Brooke, and on the commentator's objections to it, H. Chitty on Descents, 125 to 130. and the note post, 240.

(36) Mr. Cruise states that a case exactly in point arose on the Midland circuit in 1805; and was intended to have been argued in Westminster-hall, but was compromised. "Several eminent counsul were however consulted, among whom was serjeant Williams; and they were all of opinion that sir W. Blackstone's doctrine was wrong." 3 Cru. Dig. 2 ed. 411. n.

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 (*w*), takes no notice of this doctrine. 3. Because it appears from Plowden's report that very many gentlemen of the law were dis-
[*239] satisfied *with this position of justice Manwoode; since the blood of n° 10 was derived to the purchasor through a greater number of males than the blood of n° 11, and was therefore in their opinion the more worthy of the two. 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; wherein n° 16, which is analogous in the maternal line to n° 10 in the paternal, is preferred to n° 18, which is analogous to n° 11, upon the authority of the eighth rule laid down by Hale himself: and it destroys also that constant preference of the male stocks in the law of inheritance, for which an additional reason is before (*x*) given, besides the mere dignity of blood. 5. Because it introduces all that uncertainty and contradiction, which is pointed out by that ingenious author (*y*); and establishes a collateral doctrine (*viz.* the preference of n° 11 to n° 10) seemingly, though perhaps not strictly, incompatible with the principal point resolved in the case of Clere and Brooke, *viz.* the preference of n° 11 to n° 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 the reason that is given for this doctrine by lord Bacon (*viz.* that in any degree, paramount the first, the law respecteth proximity, and not dignity of blood) is directly contrary to many instances given by Plowden and Hale, and every other writer on the law of descents. 7. Because this position seems to contradict the allowed doctrine of sir Edward Coke (*z*); who lays it down (under different names) that the blood of the Kempes (*alias* Sandies) shall not inherit till the blood of the Stiles's (*alias* Fairfields) fail. Now the blood of the Stiles's does certainly not fail, till both n° 9 and n° 10 are extinct. Wherefore n° 11 (being the blood of the Kempes) ought not to inherit till then. 8. Because in the case, Mich. 12 Edw. IV. 14 (*a*). (much relied on in that of Clere and Brooke) it is laid down as a rule, that "*cestuy, que doit inheriter al pere, doit inheriter al fils* (*b*)." And so sir Matthew Hale (*c*) says, "that though the law excludes the father from inheriting, yet it substitutes and directs the descent as it should have been had the father inherited (37)." Now it is settled, by the resolution of
[*240] Clere *and Brooke, that n° 10 should have inherited before n° 11 to Geoffrey Stiles, the father, had he been the person last seised; and therefore n° 10 ought also to be preferred in inheriting to *John Stiles*, the son.

(*w*) Dyer, 314.
(*x*) Pag. 235, 6, 7.
(*y*) Law of Inheritances, 2d edit. pag. 30, 31. 61, 62. 66.
(*z*) Co. Litt. 12. Hawk. abr. *in loc.*
(*a*) Fitzh. *Abr. tit. dissent.* 2. Bro. *Abr. tit. discent.* 3.
(*b*) See pag. 223.
(*c*) Hist. C. L. 243.

(37) This rule, however, does not apply in all cases; for a brother of the half blood would succeed to the father, though he could not to the son.



In case *John Stiles* was not himself the purchasor, 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: as was formerly fully explained (*d*). And the like rule, as there exemplified, will hold upon descents from any other ancestors.

The student should also bear in mind, that during this whole process, *John Stiles* 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 Stiles*, 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 Stiles*. The figures therefore denote the order in which the several classes would succeed to *John Stiles*, and not to each other: and before we search for an heir in any of the higher figures (as n° 8), we must be first assured that all the lower classes (from n° 1 to n° 7) were extinct, at *John Stiles's* decease (38).

CHAPTER XV.

OF TITLE BY PURCHASE (1).

AND

I. BY ESCHEAT.

PURCHASE, *perquisitio*, taken in its largest and most extensive sense, is thus defined by Littleton (*a*); 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 (*b*).

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 (*c*), and falls within Littleton's definition,

(*d*) See pag. 236.
(*a*) § 12.
(*b*) Co. Litt. 18.
(*c*) *Ibid.*

(38) The preference bestowed upon n° 10 to n° 11, in the accompanying table of descents, has given rise to a legal controversy, in which much learning and ability have been employed. On the side of Mr. Justice Blackstone, Mr. Christian and Mr. Watkins have ranged themselves; opposed to him are Mr. Wooddeson, Mr. Cruise, and Mr. Osgoode. It has been intimated, however, by more than one authority, that the point in dispute is scarcely worth the labour of an adjustment; for, up to the present time, no case of the kind has come before the courts for discussion. See ante 238. note 36. Nor is it probable that one will arise to render the determination of practical utility. See H. Chitty on Descents, 127, 8. See Cruise Dig. vol. 3. p. 430.

(1) See the division of the subject of the modes of acquiring a title into title by descent and purchase, ante 200, 201. 2 Wooddes. V. L. 250—265.

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 was 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 purchase (*d*). But if a man, seised in fee, devises his whole estate to his heir at law, so that the heir takes neither a greater [*242] nor a less estate by the *devise than he would have done without it, he shall be adjudged to take by descent (*e*), even though it be charged with incumbrances (*f*); this being for the benefit of creditors, and others, who have demands on the estate of the ancestor (2). 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 (*g*). But if an estate be made to A for life, remainder to his right heirs in fee, his heirs shall take by descent (3): 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* (*h*). And if A dies before entry, still his heirs 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 descent (*i*). The ancestor, during his life, beareth in himself all his heirs (*k*); and therefore, when once he is or might have been seised of the lands, the inheritance so limited to his heirs vests in the ancestor himself: and the word "heirs" in this case is not esteemed a word of *purchase*, but a word of *limitation*, enuring so as to increase the estate of the

(*d*) Lord Raym. 728.
(*e*) 1 Roll. Abr. 626.
(*f*) Salk. 241. Lord Raym. 728.
(*g*) 1 Roll. Abr. 627.
(*h*) 1 Rep. 104. 2 Lev. 60. Raym. 384.
(*i*) Shelley's case, 1 Rep. 98.
(*k*) Co. Litt. 22.

(2) See further on this point, Com. Dig. Descent, A. B. Bac. Ab. Descent, E. With respect to what shall be assets by descent, it is laid down as a general rule, that though the ancestor devise the estate to his heir, yet if he take the same estate in quantity and quality that the law would have given him, the devise is a nullity, and the heir is seised by descent, and the estate assets in his hands. As when a man seised of land in fee on part of his mother, devises it to his heir on the part of his mother in fee, the heir is in by descent. 1 Salk. 242. S. C. Prec. in Chan. 222. 2 Ld. Raym. 829. Com. Rep. 123. S. P. 2 Leon. 11. Dyer, 124. a. Plowd. 545, and note (f) in the English translation. So where a man seised in fee on the part of his mother devised to the executors for sixteen years for payment of his debts, remainder to his heir on the part of his mother, it was held that the heir took by descent, for it is no more than if the devisor had made a lease for sixteen years, and afterwards devised his reversion to the heir. 3 Lev. 127. So where one devises to another for life *remainder* to his heir in fee, the heir shall take the *reversion* by descent, and yet the law would have thrown the estate immediately on the heir by descent, if there had been no devise. 1 Rol. Abr. 626. (I) pl. 2. Sty. 148, 149. So where one devises land to his heir, charged with a rent issuing out of it, or with the payment of a sum of money, still the heir takes by descent. Com. Rep. 72. 1 Salk. 241. 1 Lutw. 793. 797. 1 Ld. Raym. 728. 2 Atk. 293. So where on *riens per descent* pleaded; it appeared that the ancestor devised the lands to the heir for payment of debts, it was adjudged that the heir was in by descent, for the tenure is not altered. 2 Str. 1270. 1 Black. Rep. 22. (For other authorities to the same point, see Co. Litt. 12. b. note 63.)

But where a different estate is devised than would descend to the heir, the disposition by the will shall prevail; as where the estate is devised to the heir in tail. Plow. 545. So where a man having issue two daughters, who are his heirs, devises lands to them and their heirs, they take under the will, for by law they would take as coparceners, but by the will they have it as joint-tenants. Cro. Eliz. 431. Bacon's Maxims Reg. n. 21. 1 Salk. 242. Comyns. 123. 2 Ld. Raym. 829. But since the statute 3 W. & M. c. 14. such a devise is fraudulent against creditors by specialty, and therefore an action may be brought against the devisee as heir and devisee. 2 Saund. 8. (d).

(3) This rule is abolished in New-York by the Revised Statutes, vol. 1. p. 725, § 28, and the heirs take as purchasors.

ancestor from a tenancy for life to a fee-simple (4). And, had it been otherwise, had the heir (who is uncertain till the death of the ancestor) been allowed to take as a purchasor 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 called *conquest*, *conquaestus*, or *conquisitio* (*l*): 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 Scotland (*m*): as it was among the Norman jurists, who styled *the first purchasor (that is, he who brought [*243] the estate into the family who at present owns it) the conqueror or *conquereur* (*n*). 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 *conquaestus*, and himself *conquaestor* or *conquisitor* (*o*); 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 reflection 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 had (*p*).

The difference, in effect, between the acquisition of an estate by descent and by purchase, consists principally in these two points: 1. That by purchase the estate acquires a new inheritable quality, and is descendible to the owner's blood in general, and not the blood only of some particular ancestor. For, when a man takes an estate by purchase, he takes it not *ut feudum 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 (or any other in trust for him) (*q*) had any estate of inheritance vested in him by descent *from, (or any [*244] estate *per auter vie* coming to him by special occupancy, as heir to) (*r*) that ancestor, sufficient to answer the charge (*s*); whether he remains in possession, or hath alienated it before action brought (*t*); which sufficient estate is in the law called *assets*; from the French word, *assez*, enough (*u*). Therefore if a man covenants, for himself and his heirs, to

(*l*) Craig. *l.* 1, *t.* 10, § 18.
(*m*) Dalrymple of feuds, 210.
(*n*) *Gr. Coustum. Gloss. a.* 25, *pag.* 40.
(*o*) Spelm. *Gloss.* 145.
(*p*) See Book I. ch. 3.
(*q*) Stat. 29 Car. II. c. 3, § 10.
(*r*) *Ibid.* § 12.
(*s*) 1 P. Wms. 777.
(*t*) Stat. 3 & 4 W. & M. c. 14.
(*u*) Finch, law, 119.

(4) This is the rule or maxim known among lawyers, as "the rule in Shelley's case." 1 Co. 88. See Harg. and Butl. Co. Litt. 376. b. n. 1. Fearne Cont. Rem. 28. Preston on Estates, 1 vol. 263 to 419. per tot.

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 compulsory, until he has assets by descent (*v*) (5).

This is the legal signification of the word *perquisitio*, or purchase; and in this sense it includes the five following methods of acquiring a title to estates: 1. Escheat (6). 2. Occupancy. 3. Prescription. 4. Forfeiture. 5. Alienation. Of all these in their order.

I. Escheat, we may remember (*w*), was one of the fruits and consequences of feodal tenure. The word itself is originally French or Norman (*x*), in which language it signifies chance or accident; and with us it 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 fee (*y*).

Escheat therefore being a title frequently vested in the lord by inheritance, as being the fruit of a signiory to which he was entitled by descent (for which reason the lands escheated shall attend the signiory, and be inheritable by such only of his heirs as are capable of inheriting the other) (*z*), it may seem in such cases to fall more properly under the former general head of acquiring title to estates, *viz.* by descent [*245] (being vested in him by act of 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 escheat* (*a*): 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 barred (*b*). 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 of titles by our legal writers, into those by descent and by purchase, seems in this respect rather inaccurate, and not marked with sufficient precision: 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 tenant (*c*), and therefore taking

(*v*) Finch. Rep. 86.
(*w*) See pag. 72.
(*x*) *Escheat*, or *eschet*, formed from the verb *escheir* or *eschoir*, to happen.
(*y*) 1 *Feud.* 86. Co. Litt. 13.
(*z*) Co. Litt. 13.
(*a*) Bro. *Abr. tit. escheat.* 26.
(*b*) Bro. *Abr. tit. acceptance*, 25. Co. Litt. 268.
(*c*) 1 Inst. 215.

(5) Copyhold estates are not liable as assets, either in law or equity, to the testator's debts, farther than he subjected them thereto. Aldrich v. Cooper, 8 Ves. 393.

(6) As to the doubtful propriety of considering escheats under the head of title by purchase, see *ante*, note (3) to chapter 14. It may be added, that escheats do not answer to the description given by our author, in the last page, of the effects of the acquisition of an estate by purchase; for, the inheritable quality of the lands escheated, as we are taught in the present page, follows the nature of the seignory, and does not attach in the person of the lord to whom the escheat falls. Nor are the lands exempt from the acts of the ancestor, from whom the seignory descends, or from the incumbrances of the last tenant. [See accordingly 1 R. S. 718, § 2.] (*Earl of Bedford's case*, 7 Rep. 6. *Smalman* v. *Agborough*, 1 Roll. Rep. 402).

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 sanguinis*, and those *propter delictum tenentis*: the one sort, if the tenant dies without heirs; the other, if his blood be attainted (*d*). But both these species may well be *comprehended under the first denomination only; [*246] 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 (*e*), "*dominus capitalis feodi loco haeredis habetur, quoties per defectum vel delictum extinguitur sanguis 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.

1, 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 purchasor 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 the 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 (7).

(*d*) Co. Litt. 13. 92. (*e*) *l.* 6, *c.* 1.

(7) See *ante*, p. 56, and the notes thereto; as also p. 108. The important case of *Burgess* v. *Wheate*, 1 Eden, 177—261, was to the following purport. A. being seised in fee *ex parte paternâ*, conveyed to trustees, in trust for herself, her heirs and assigns, to the intent that she might dispose thereof as she should by her will or other writing appoint. A. died without making any appointment, and without heirs *ex parte paternâ*. It was held by Lord Keeper Henley, (afterwards Northington), as well as by Sir Thomas Clarke, M. R., and by Lord Mansfield, C. J. (whose assistance the Lord Keeper had requested), that the heir *ex parte maternâ* was clearly not entitled. But Lord Mansfield thought the crown was entitled by escheat; or, if that were not so under the circumstances, then that, as between the maternal heir and the trustee, the former was entitled. This opinion, however, was contrary to that of the Lord Keeper and of the Master of the Rolls; and it was decided, that there being a *terre tenant*, (*Barclay* v. *Russel*, 3 Ves. 430), the crown, claiming by escheat, had not a title by *subpœna* to compel a conveyance from the trustee, the trust being absolutely determined. Upon the right of the trustee it was not necessary, for the determination of the question before the court, to pronounce any positive judgment. It should seem, however, that he would have received no assistance from equity in support of his

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 in any part of its body, [*247] yet if it *hath human shape it may be heir (*f*). This is a very ancient rule in the law of England (*g*); 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 successions (*h*): yet accounts them, however, children in some respects, where the parents, or at least the father, could reap any advantage thereby (*i*): (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 entitle the husband to be tenant by the curtesy (*k*); 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 determination (*l*). Such are held to be *nullius filii*, the sons of nobody; for the maxim of law is, *qui ex damnato coitu nascuntur, inter liberos non computantur* (*m*). 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 lord (*n*). 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 father (*o*): 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 inherit- [*248] ance (*p*); and a bastard was likewise *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 (*q*). 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

(*f*) Co. Litt. 7, 8.
(*g*) *Qui contra formam humani generis converso more procreantur, ut si mulier monstrorum vel prodigiosum enixa sit, inter liberos non computantur. Partus tamen, cui natura aliquantulum addiderit vel diminuerit, ut si sex vel tantum quatuor digitos habuerit, bene debet inter liberos connumerari; et, si membra sint inutilia aut tortuosa, non tamen est partus monstrosus.* Bract. *l.* 1, *c.* 6, & *l.* 5, *tr.* 5, *c.* 30.
(*h*) *Ff.* 1. 5. 14.
(*i*) *Ff.* 50. 16. 135. Paul. 4, *sent.* 9, § 63.
(*k*) Co. Litt. 29.
(*l*) See Book I. ch. 16.
(*m*) Co. Litt. 8.
(*n*) Finch. law. 117.
(*o*) *Nov.* 89, *c.* 8.
(*p*) *Ibid. c.* 12.
(*q*) *Cod.* 6. 57. 5.

claims. (*Williams* v. *Lord Lonsdale*, 3 Ves. 757). And clearly, a trustee not having the legal estate in lands purchased with the trust monies, cannot hold against the crown claiming by escheat. (*Walker* v. *Denne*, 2 Ves. jun. 170).

In the case last cited, the court is reported to have said, that "copyhold cannot escheat to the crown;" but this *dictum*, in all probability, however applicable to the instance then under consideration, was not intended to be understood as a general proposition. Copyholds holden of a manor, whereof a subject is lord, will escheat to him certainly, and not to the crown; but the 12th section of the statute of 39 & 40 Geo. III. c. 88, after reciting that "divers lands, tenements, and hereditaments, as well freehold as *copyhold*, have escheated and may escheat" to the crown, enacts that, "it shall be lawful to direct by warrant under the sign manual the execution of any trusts to which the lands so escheated were liable at the time of the escheat, or to which they would have been liable in the hands of a subject, and to make such grants of the lands so escheated as to the sovereign shall seem meet."

little regard; and that is usually termed the case of *bastard eignè* and *mulier puisnè*. 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 Glanvil (*r*) 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 eignè*; and the younger son is legitimate, or *mulier puisnè*. If then the father dies, and the *bastard eignè* enters upon his land, and enjoys it to his death, and dies seised thereof (8), whereby the inheritance descends to his issue; in this case the *mulier puisnè*, and all other heirs (though minors, femecoverts, or under any incapacity whatsoever), are totally barred of their right (*s*). And this, 1. 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 (9). 3. Because the canon law (following the civil) did allow such *bastard eignè* 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 kind of bastard; for, if the mother was never married to the father, such bastard could have no colourable title at all (*t*).

*As bastards cannot be heirs themselves, so neither can they [*249] 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 fee (*u*).

6. Aliens (*v*) (10), also, are incapable of taking by descent, or inheriting (*w*): 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 purchase (*x*) (11), they are under still

(*r*) l. 7, c. 1.
(*s*) Litt. § 399. Co. Litt. 244.
(*t*) Litt. § 400.
(*u*) Bract. l. 2, c. 7. Co. Litt. 244.
(*v*) See Book I. ch. 10.
(*w*) Co. Litt. 8.
(*x*) *Ibid.* 2.

(8) There must not only be a dying seised, but a descent to his *issue*. Co. Litt. 244. a. And if the bastard dieth seised, his wife esseint with a son, the mulier enter, the son is born, the issue of the bastard is barred. Ibid. Broke, tit. Descent, 41. Plow. 57. a. 372. a.

(9) The rule holds in this one case only of *bastard eignè* and *mulier puisnè*; for where a bastard is such by reason of his mother having a husband living at the time of her marriage with his father, he cannot take advantage of the rule, the marriage under which he claims being void without any divorce. Pride v. Earls of Bath and Montague, 1 Salk. 120.

(10) See cases and exceptions, 1 Chitty's Comm. Law, 162.

(11) If the purchase be made with the

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 holden (*y*), because they have not in them any inheritable blood.

And farther, if an alien be made a denizen by the king's letters patent, and then purchases lands (which the law allows such a one to do), 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 [*250] *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 (*z*).

Sir Edward Coke (*a*) 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 cited (*b*), that *cestuy, que doit inheriter 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 intermediate 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 overruled (*c*): and it is now held for law, that the sons of an alien born here, may inherit to each other; the descent from one brother to another being an *immediate* descent (*d*). 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.

[*251] *It is also enacted, by the statute 11 & 12 W. III. c. 6. (12) 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 (13). 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

(*y*) Co. Litt. 2. 1 Lev. 59.
(*z*) Co. Litt. 129.
(*a*) 1 Inst. 8.
(*b*) See pag. 223. and 239.
(*c*) 1 Ventr. 413. 1 Lev. 86. 1 Sid. 182.
(*d*) See pag. 226.

king's licence, it seems that he may hold. See 14 Hen. IV. 20. Harg. Co. Litt. 2. b. n. 2.
(12) Extended to Scotland by 16 Geo. III. c. 52.
(13) See accordingly in New-York, 1 R. S. 754, § 22.

elder brother of John Stiles 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 has a child born in England, it was feared that, under the statute of king William, this new-born 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 descent shall be divested in favour of an after-born brother, or the inheritance shall be divided with an after-born sister or sisters, according to the usual rule (*e*) 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 (14).

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 law (*f*), as a part of punishment for the offence; *and does not at all relate [*252] to the feodal system, nor is the consequence of any signiory or lordship paramount (*g*): but, being a prerogative vested in the crown, was neither superseded nor diminished by the introduction of 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 comprised) (*h*), is corrupted and stained, and the original donation of the feud is thereby determined, it being always granted to the vassal on the implied condition of *dum bene se gesserit*. 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 escheat (*i*), as it would

(*e*) See pag. 208 and 214.
(*f*) *LL. Aelfred. c.* 4. *LL. Canut. c.* 54.
(*g*) 2 Inst. 64. Salk. 85.
(*h*) 3 Inst. 15. Stat. 25 Edw. III. c. 2, § 12.
(*i*) 2 Inst. 36.

(14) In New-York nothing but an *outlawry* upon conviction of treason causes a forfeiture: in England, by 54 Geo. III. c. 145, no felony, except high treason, petit treason, or murder, or the abetting those offences, causes a forfeiture, except for the life of the offender. And in New-York, all forfeitures, whether for crimes or defect of blood, are to the State. See 2 R. S. 701, § 22. In New-York the forfeiture for treason is for the lifetime of the traitor as to such freehold lands as he was seised of at the commission of the treason or afterwards, and of his goods and chattels for ever, id. 656, § 3.

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 seems to be the old Saxon tenure), that they are in no case subject to escheat for felony, though they are liable to forfeiture for treason (*j*).

[*253] *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 1 Edw. VI. c. 12. enacted, that albeit any person be attainted of misprision 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. 11. that the wife of one attaint of high treason shall not be endowed at all (15).

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 that he now has shall escheat from him, but also that he shall 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 lands 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 (*k*). 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 for a year and a day, and so long after as the offender lives (*l*) (16).

[*254] There is yet a farther consequence of the corruption and extinction of hereditary blood, which is this: that the person *attainted 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 felony (*m*). 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 ancestors (*n*), at least on the part of their attainted father.

(*j*) Somner. 53. Wright, Ten. 118.
(*k*) Co. Litt. 13.
(*l*) 3 Inst. 47.
(*m*) Van Leeuwen in 2 Feud. 31.
(*n*) Co. Litt. 391.

(15) "Or of any other treasons whatsoever they be," s. 13; the wife therefore is barred by the attainder of her husband for petit as well as high treason, but not for any murder or other felony. See Co. Litt. 37, a. Staundf. 195, b.

(16) There is no corruption of blood in New-York. See note 14, p. 251.

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 thoroughly 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 (*o*).

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, that an [*255] 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 (*p*). 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 (*q*). Sir Edward Coke in this case allows (*r*), that if the ancestor be attainted, his sons born before the attainder 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 principles before mentioned, which are now over-ruled) (*s*) 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.

*This corruption of blood, thus arising from feodal principles, [*256] but perhaps extended farther than even those principles will warrant, has been long looked upon as a peculiar hardship: because the oppressive part of the feodal tenures being now in general abolished, it seems

(*o*) Co. Litt. 392.
(*p*) *Ibid.* 8.
(*q*) Dyer, 48.
(*r*) Co. Litt. 8.
(*s*) 1 Hal. P. C. 357.

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 late 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 accident 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 told (*t*), doth tacitly annex a condition to every such gift or grant, that if the corporation be dissolved, the donor or grantor [*257] shall re-enter; for the cause of the gift or grant *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. st. 1. 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 strictly reducible to this head, and yet must not be passed over in silence. It is enacted by the statute 11 & 12 Will. III. c. 4. (17) 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 descents to others of his kindred. In like manner as, even in the times of popery, one who entered in-

(*t*) Co. Litt. 13.

(17) Mr. Christian observes, "this act was repealed by the 18 Geo. III. c. 6, so far as to permit such Roman Catholics to inherit real property, as would take the oath of allegiance prescribed in the statute; which is the same oath that is directed to be taken by the 31 Geo. III. c. 32; which has repealed all the other odious restrictions upon those who profess the Roman Catholic religion." [Since Mr. Christian wrote, liberality has been making further progress, and many restrictions, which Mr. Christian did not consider odious, have been removed.

to religion, and became a monk professed, was incapable of inheriting lands, both in our own (*u*) and the feodal law; *eo quod desiit esse miles seculi qui factus est miles Christi: nec beneficium pertinet ad eum qui non debet gerere officium* (*w*). But yet he was accounted only *civiliter mortuus*; he did not impede the descent to others, but the next heir was entitled to his or his ancestor's estate.

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 XVI.

II. OF TITLE. BY OCCUPANCY.

Occupancy is the taking possession of those things which before belonged to nobody. This, as we have seen (*a*), 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 (*b*), *quod nullius est, id ratione naturali occupanti 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 *cestuy que vie*, or him by whose life it was holden; in this case he that could first enter on the land might lawfully retain the possession, so long as *cestuy que vie* lived, by right of occupancy (*c*).

*This seems to have been recurring to first principles, and call- [*259]
ing 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, though it formerly (*d*) was supposed so to do; for he had parted with all his interest, so long as *cestuy que vie* lived: it did not escheat to the lord of the fee, for all escheats must be of the absolute entire fee, and not of any particular estate carved out of it: 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 *hæreditas jacens* of the Romans, the law left it open to be seised and appropriated by the first person

(*u*) Co. Litt. 132.
(*w*) 2 *Feud.* 21.
(*a*) See pag. 3 & 8.
(*b*) *Ff.* 41. 1. 3.
(*c*) Co. Litt. 41.
(*d*) Bract. *l.* 2, *c.* 9, *l.* 4, *tr.* 3, *c.* 9, § 4. Flet. *l.* 3, *c.* 12, § 6, *l.* 5, *c.* 5, § 15.

that could enter upon it, during the life of *cestuy 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 *nullum tempus occurrit regi* (*e*). 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 *cestuy 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 propriety (*f*); 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 (according to the ancient rule of law) (*g*) that where there is no special occupant, in whom the estate may vest, [*260] the tenant *pur auter vie* may devise it *by will, or it shall go to the executors or administrators, and be assets in their hand for payment of debts (1): the other, that of 14 Geo. II. c. 20. which enacts,

(*e*) Co. Litt. 41.
(*f*) Vaugh. 201.
(*g*) Bract. *ibid.* Flet. *ibid.*

(1) The statute seems inaccurately stated in this sentence. The 12th section enacts, "That estates pur auter vie shall be devisable by will in writing, signed by the devisor, or by his agent, in presence of three witnesses; and if no such devise be made, the same shall be chargeable in hands of heir, if it shall come to him by reason of special occupancy, as assets by descent; and in case there be no special occupant, it shall go to the executor or administrator of the party who had the estate thereof by virtue of the grant, and shall be assets in his hands." Mr. Christian observes, "The meaning of the statute seems to be this, that every estate *pur auter vie*, whether there is a special occupant or not, may be devised like other estates in land, by a will attested by three witnesses. If not devised, and there is a special occupant, then it is assets by descent in the hands of the heir; if there is no special occupant, then it passes like personal property to executors and administrators, and shall be assets in their hands." Lord Kenyon in 6 Term Rep. 291. observed, "These questions on estates pur auter vie do not frequently arise. Such estates certainly are not estates of inheritance: they have been sometimes called, though improperly, descendible freeholds; strictly speaking, they are not descendible freeholds, because the heir at law does not take by descent. If an action at common law had been brought against the heir on the bond of his ancestor, he might have pleaded riens per descent, for these estates *were* not liable to the debts of the ancestor before the statute of frauds. That act made them chargeable in the hands of the heir, as assets by descent, if he took by reason of a special occupancy; and if there be no special occupant, it directs that they shall go to the executors, subject to the debts of the testator; and the statute 14 Geo. II. c. 20. renders them distributable as personalty. An estate pur auter vie therefore partakes somewhat of the nature of a personal estate, though it is not a chattel interest, it still remains a freehold interest for many purposes; such as giving a qualification to vote for members of parliament, and to kill game and some others; a will to dispose of it must also be attested by three witnesses under the statute of frauds. If such an estate be given to A. and the heirs of his body, the heirs of the body will take as special occupants, if no disposition be made of it by the first taker; but it is absolutely in his power to make what disposition of it he pleases, 1 Atk. 524. 3 P. W. 266. n. E. and Grey v. Mannock."

It has been that there can be no general occupancy of a copyhold, because the freehold is always in the lord; and the statutes 29 Car. II. c. 3. s. 12. and 14 Geo. II. c. 20. s. 9. appropriating estate pur auter vie, where there is no special occupant, do not extend to copyholds. And one who was admitted tenant upon a claim as administrator de bonis non to the grantee of a copyhold pur auter vie, having no title in such character, cannot recover in ejectment by virtue of such admission as upon a new and substantive grant of the lord, 7 East, 186.

If an estate pur auter vie be limited to a man, his heirs, executors, administrators, and assigns, and be not devised, it descends to his heir as special occupant, and is only liable for specialty debts. 4 Term. R. 229. If it be limited to a person and his executors, administrators, and assigns, the executors take it, subject to the same debts as personalty. 4 T. R. 224. 229.

that the surplus of such estate *pur auter vie*, after payment of debts, shall go in a course of distribution like a chattel interest (2).

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. But, as before the statutes there could no common occupancy be had of incorporeal hereditaments, as of rents, tithes, advowsons, commons, or the like (*h*), (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 be determined likewise; and the hereditaments would not be devisable, nor vest in the executors, nor go in a course of distribution. For these statutes must not be construed so as to create any new estate, or 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 (3). When there is a residue left, the statutes give it to the executors and administrators, instead of the first occupant; but they will not *create* a residue, on purpose to give it to either (*i*). 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 *casus omissus*, 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 (4), (5).

*This, I say, was the only instance; for I think there can be [*261] 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

(*h*) Co. Litt. 41. Vaugh. 201.

(*i*) But see now the statute 5 Geo. III. c. 17, which makes leases for one, two, or three lives, by *ecclesiastical* persons or any *eleemosynary* corporation, of tithes or other incorporeal hereditaments, as good and effectual *to all intents and purposes* as leases of corporeal possessions.

(2) In New-York, (1 R. S. 722, § 6, and 2 id. 82, § 6.) this estate, whether limited to heirs or not, is a freehold only during the life of the grantee or devisee, but after his death is a chattel real.

(3) Lord-keeper Harcourt has declared, there is no difference since the 29 Car. II. c. 3. between a grant of corporeal and incorporeal hereditaments *pur auter vie*; for by that statute every estate *pur auter vie* is made devisable, and if not devised, it shall be assets in the hands of the heir, if limited to the heir; if not limited to the heir, it shall go to the executors or administrators of the grantee, and be assets in their hands; and the statute, in the case of rents and other incorporeal hereditaments, does not enlarge, but only preserves the estate of the grantee. 3 P. Wms. 264. n.

(4) In page 113. ante, it is said, that an estate *pur auter vie* cannot be entailed; yet if such an estate be limited to A. in tail, with remainder to B., these limitations are designations of the persons who shall take as special occupants; but any alienation of the *quasi* tenant in tail will bar the interest of him in remainder. See 3 Cox, P. Wms. 266. and 6 T. R. 293, where it appears to have been the opinion of lord Northington and lord Kenyon that the tenant in tail of an estate *pur auter vie* may bar the remainders over by his will alone. See also 1 Atk. 524. 2 Vern. 225. 3 Cox, P. Wms. 10. n. 1. 1 Bro. Par. Ca. 457.

(5) In the mining districts of Derbyshire and Cornwall, by the laws of the Stannaries, an estate in mines might, and it is believed still may, be gained by occupancy. *Geary* v. *Barcroft*, 1 Sid. 347).

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 the sea or in a river, or by the alluvion or dereliction of the waters; in these instances the law of England assigns them an immediate owner. For Bracton tells us (*j*), 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 (*k*). 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 usually is whenever a several fishery is claimed (*l*), there it seems just (and so is the constant 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 rise in the *sea*, though the civil law gives it to the first occupant (*m*), yet ours gives it to the king (*n*).

[*262] *And as to lands gained from the sea, either by *alluvion*, 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, it shall go to the owner of the land adjoining (*o*). 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 or 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 dry (*p*). 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 (6). In

(*j*) *l.* 2, c. 2.
(*k*) *Inst.* 2. 1. 22.
(*l*) Salk. 637. See pag. 39.
(*m*) *Inst.* 2. 1. 18.
(*n*) Bract. *l.* 2, c. 2. Callis of sewers, 22.
(*o*) 2 Roll. Abr. 170. Dyer, 326.
(*p*) Callis, 24. 28.

(6) See these subjects of alluvion, avulsion, and reliction, and islands arising in the sea and rivers fully considered, and the cases collected in the able treatise of Mr. Schultes on Aquatic Rights, who in pages 115 to 138. draws this conclusion, "that all islands, relicted land, and other increase arising in the sea and in navigable streams, except under local circumstances before alluded to, belong to the crown; and that all islands, relicted land, and the soil of inland unnavigable rivers and streams under similar circumstances belong to the proprietor of the estates to which such rivers act as boundaries; and hence it may be considered as law, that all islands, sand beds, or other parcels of agglomerated or concreted earth which newly arise in rivers, or congregate to their banks by alluvion, reliction, or other aqueous means, as is frequently to be observed in rivers where the current is irregular, such accumulated or relicted property belongs to the owners of the neighbouring estates." Schultes on Aquat. Rights, 138. See further, Com. Dig. Prerog. D. 61. Bac. Ab. Prerogative. 3 Bar. & C. 91. 5 B. & A. 268. From the late case of the King v. Lord Yarborough, 3 Bar. & Cres. 91. (though the decision turned rather upon the pleadings and evidence than the general law of alluvion and reliction), and the cases cited, id. 102, it may be collected that if the salt water leave a great quantity of land on the shore, the king shall have the land by his prerogative, and not the owner of the adjoining soil; but not so when dry land is formed gradually, and by insensible imperceptible degrees,

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, it is said that he shall have what the river has left in any other place, as a recompense for this sudden loss (*q*). And this law of alluvions and derelictions, with regard to *rivers*, is nearly the same in the imperial law (*r*); 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 (*s*), that whatever hath no other owner is vested by law in the king.

CHAPTER XVII.

III. OF TITLE BY PRESCRIPTION (1).

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 inquired at large in the preceding part of these commentaries (*a*). 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 a *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 (*b*). As for example; if there be a

(*q*) Callis, 23.
(*r*) *Inst.* 2. 1. 20, 21, 22, 23, 24.
(*s*) See Book I. pag. 298.
(*a*) See Book I. pag. 75, &c.
(*b*) Co. Litt. 113.

by alluvions or relictions, however large it may ultimately become. As to unnavigable rivers, there is a case cited in Callis, 51. from the 22 lib. ass. pl. 93. which fully establishes the law. "The case was, that a river of water did run between two lordships, and the soil of one side, together with the river of water, did wholly belong to one of the said lordships, and the river by little and little, did gather upon the soil of the other lord, but so slowly, that if one had fixed his eye a whole day thereon together, it could not be perceived. By this petty and imperceptible increase, the increasement was got to the owner of the river, but if the river by a sudden and unusual flood, had gained hastily a great parcel of the other lord's ground, he should not thereby have lost the same; and so of petty and unperceivable increasements from the sea, the king gains no property for 'de minimis non curat lex.'" N. B. In the above text, it is supposed "he shall have what the river has left in any other place as a recompense for his sudden loss," but the case in 22 ass. pl. 93. says that "neither party shall lose *his* land." Schultes on Aquatic Rights, 136, 7.

(1) See in general, Com. Dig. Prescription; Vin. Ab. Prescription; Bac. Ab. Customs; Saunders by Patteson, index, tit. Prescription, and tit. Custom, and ante 35. note 28. per tot.

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 (*c*) 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 [*264] *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 formerly a man might, by the common law, have prescribed for a right which had been enjoyed by his ancestors or predecessors at any distance of time, though his or their enjoyment of it had been suspended (*e*) for an indefinite series 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 of his ancestor or predecessor, 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 of 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 a man shall not be said to prescribe, that he and his ancestors have immemorially used to hold the castle of Arundel: for this is clearly another sort 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 [*265] prescription must always be *laid in him that is tenant of the fee.

A tenant for life, for years, at will, or a copyholder, cannot prescribe, by reason of the imbecility of their estates (*h*). For, as prescription is usage beyond time of memory (2), it is absurd that they should pretend to prescribe for any thing, 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 under cover of the tenant in fee-simple. As if 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 Stiles and his ancestors had immemorially used to have this right of common, appurtenant to the said manor, and that John Stiles demised the said manor, with its appurtenances, to him the said tenant for life (3). 3. A prescription cannot

(*c*) 1 Lev. 176.
(*d*) 4 Rep. 32.
(*e*) Co. Litt. 113.
(*f*) This title, of prescription, was well known in the Roman law by the name of *usucapio*, (*Ff.* 41. 3, 3.) so called because a man, that gains a title by prescription, may be said *usu rem capere*.
(*g*) Dr. & St. dial. 1, c. 8. Finch, 132.
(*h*) 4 Rep. 31, 32.

(2) As to legal memory, ante 31.

(3) Thus in prescribing for common appurtenant, a man avers his *seisin in fee* of the land to which he claims his common, and then says that he *and all those whose estate he has* in the land, from time whereof the memory of man is not to the contrary, had, and of right ought to have had, common of pasture in the place, where, &c. for his cattle levant and couchant, in the land whereof he was so seised. 1 Saund.

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 (4). Thus the 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 prescription (*i*). 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 an 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 (*k*). 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, [*266] 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 (*l*). 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

(*i*) 1 Vent. 387.
(*k*) Co. Litt. 114.
(*l*) Litt. § 183. Finch. L. 104.

346. This is termed prescribing in a *que estate*, from the words in italic. Id. note 2. 4 T. R. 718, 9. Cro. Car. 599. If the party claims the easement as a member of a *corporation*, he must then prescribe under the corporation, stating that the same have immemorially been entitled to have for themselves and their burgesses common of pasture, and then aver that he was a burgess. 1 Saund. 340. b. Where a *copyholder* claims common or other profit in the *lord's soil*, he cannot prescribe for it in his own name, on account of the baseness and weakness of his estate, which in consideration of law, is only a tenancy at will; neither can he prescribe in the lord's name, for *he* cannot prescribe for common or other profit in his own soil, therefore of necessity the copyholder must entitle himself to it by way of *custom* within the manor. But where a copyholder claims common or other profit in the soil of a *stranger*, which is not parcel of the manor, he must prescribe in the name of the lord; namely, that the lord of the manor and his ancestor, and all those whose estate he has, have had common, &c. in such a place for himself and his customary tenants, &c. and then state the grant of the customary tenement; for the lord has the fee of all the copyholds of his manor. 4 Rep. 31. b. 6 Rep. 60. b. Hob. 86. Cro. Eliz. 390. Moore, 451. 1 Saund. 349.

(4) The general rule with regard to prescriptive claims is, that every such claim is good if by possibility it might have had a legal commencement, 1 Term R. 667. ante 31. note (14) and 35. note (28); and from upwards of twenty years' enjoyment of an easement or profit a prendre, grants, or, as lord Kenyon said, even a hundred grants will be presumed, even against the crown, if by possibility they could legally have been made. 11 East. 284. 495. Thus a fair or market may be claimed by prescription, which presumes a grant from the king, which by length of time is supposed to be lost or worn out, Gilb. Dist. 22; but if such a grant would be contrary to an express act of parliament it would be otherwise. 11 East, 495. But an exception to the general rule is the claim of toll *thorough*, where it is necessary to shew expressly for what consideration it was granted, though such proof is not necessary in respect of toll traverse. 1 T. R. 667. 1 B. & C. 223. An ancient grant without date does not necessarily destroy a prescriptive right, for it may be either prior to time of legal memory or in confirmation of such prescriptive right, which is matter to be left to a jury. 2 Bla. R. 989. Nor will a prescriptive right be destroyed by implication merely in an act of parliament. 3 B. & A. 193.

man may prescribe in a *que estate* for a common *appurtenant* to a manor; but, if he would prescribe for a common *in gross*, he must prescribe in himself and his ancestors (5). 6. Lastly (6), we may observe, that estates gained by prescription are 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 an 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 (7).

CHAPTER XVIII.

IV. OF TITLE BY FORFEITURE (1).

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: 1. By crimes and misdemesnors. 2. By alienation contrary to law. 3. By non-representation to a benefice, when the forfeiture is denominated a *lapse*. 4. By simony. 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 misdemesnors*, and the several degrees of those forfeitures proportioned to the several offences, have been hinted at in the preceding book (*a*); but it 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 six: 1. Treason. 2. Felony (2). 3. [*268] Misprision 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 (3). But at what time they severally

(*a*) Book I. pag. 299.

(5) 1 Saund. 346. supra note.

(6) Another rule may be added (viz.) that a person ought not to prescribe for that which is of common right, and which the law gives. Willes R. 268. Bac. Ab. Common, A.

(7) As to the extinguishment of prescription by unity of seisin, and when to claim an easement by grant, see ante 35. note 28.

(1) See in general, Com. Dig. Forfeiture; Bac. Ab. ib.; Vin. Ab. Forfeiture; Cruise Dig. index, Forfeiture.

(2) See the alteration in the law as to forfeiture, ante 251. note 14.

(3) But the statutes of recusancy are now repealed by 31 Geo. III. c. 32. provided papists take the oath prescribed therein, ante 257. n. 17.

commence, how far they extend, and how long they endure, will with greater propriety be reserved as the object of our future inquiries.

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* (4), *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 (*b*), 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 subtle 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 (*c*), for corporations to have a licence in mortmain *from the crown, to enable them to purchase lands; [*269] 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 land 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 dotations 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 in-

(*b*) See Book I. p. 479.
(*c*) F. N. B. 121.
(*d*) Selden, Jan. Angl. *l.* 2, § 45.
(*e*) *Ecclesiæ de feudo domini regis non possunt in perpetuum dari, absque assensu et consensione ipsius, c.* 2, *A. D.* 1164.
(*f*) See Book I. p. 384.

(4) See in general, Bac. Ab. Charitable Uses and Mortmain; Com. Dig. Capacity, B. 2; Uses, N. 1; 3 Mirehouse on Advowsons, 78; Cruise, title, 32; 4 vol. 23. title, 37; 6 vol. 17. and title, 38; 6 vol. 149; and Hig-more on Mortmain.

stantly 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 dotations 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 [*270] *stagnate; 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 ordered by the second of King Henry III.'s great charter (*g*), and afterwards by that printed in our common statute-book, 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 *bonâ fide* 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 sell, 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 [*271] bring an *action to recover it against the tenant; 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 Ed. 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

(*g*) *A. D.* 1217. *cap.* 43. *edit. Oxon.*

(*h*) *Non licet alicui de cætero dare terram suam alicui domui religiosæ, ita quod illam resumat tenendam de eadem domo; nec licet alicui domui religiosæ terram alicujus sic accipere, quod tradat illum ei a quo ipsam recepit tenendam: si quis autem de cætero terram suam domui religiosæ sic dederit, ut super hoc convincatur, domum suam penitus cassetur, ut terra illa domino suo illius feodi incurratur. Mag. Cart.* 9 *Hen. III.* c. 36.

(*i*) 2 Inst. 75.

(*k*) *cap.* 33.

from the feodal demands of their lords, by virtue of the privileges of those religious and military orders. So careful indeed was 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 their 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 dammum* was marked out, by the statute 27 Ed. I. st. 2. it was farther provided by statute 34 Ed. I. st. 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, while the seisin of the land remained in the [*272] 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 *cestuy 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 23 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. st. 3. c. 3. But, as doubts were conceived at the time of the revolution how far such licence was valid (*n*), since the kings had no *power to dispense with the sta- [*273] tutes 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

(*l*) 2 Inst. 501.
(*m*) cap. 3.
(*n*) 2 Hawk. P. C. 391.
(*o*) Stat. 1 W. & M. st. 2, c. 2.
(*p*) Co. Litt. 99.

the gradual declension of mesne signiories 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 alienе 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 death-beds 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 [*274] 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 (5). The two

(*q*) Stat. 2 & 3 Ann. c. 11. (*r*) Rep. 24.

(5) A bequest of money, to be employed in building upon, or otherwise improving, land already in mortmain, is not considered a violation of the statute. (*Attorney-General* v. *Parsons*, 8 Ves. 191. *Attorney-General* v. *Munby*, 1 Meriv. 345. *Corbyn* v. *French*, 4 Ves. 428). And where a testator has pointed out such a mode of applying his bequest, in favour of a charity, as the policy of the law will not admit, still, if he has left it entirely optional to his executors, or trustees, to adopt that mode, or to select some other not liable to the same objections, the bequest may be legally carried into effect. (*Grimmet* v. *Grimmet*, Ambl. 212; *S. C.* 1 Dick. 251. *Kirkbank* v. *Hudson*, 7 Price, 217. *Curtis* v. *Hutton*, 14 Ves. 539. *Attorney-General* v. *Goddard*, 1 Turn. & Russ. 350). But, where the testator has used words of request, or recommendation, (not expressly leaving the matter to the discretion of his executors), those words of request are held to be mandatory, (*Taylor* v. *George*, 2 Ves. & Bea. 378. *Paul* v. *Compton*, 8 Ves. 380. *Parsons* v. *Baker*, 18 Ves. 476), and if they point to an appropriation of the legacy contrary to the policy of the law, the legacy must fail. (*Grieves* v. *Case*, 1 Ves. junr. 550).

In the *Attorney-General* v. *Davies*, (9 Ves. 543), it was justly termed an absurd distinction, to say that a testator shall not give land to a charity, yet that he may give money conditionally, in consideration of another's giving land for a charity. And it is now perfectly well settled, notwithstanding some earlier decisions of Lord Hardwicke to the contrary, that if a testator give personal property "to erect and endow" a school, or hospital, it must be considered, unless it be otherwise declared in his will, that it was the testator's intention land should be acquired, as a necessary part of his purpose: (*Chapman* v. *Brown*, 6 Ves. 408. *Attorney-General* v. *Davies*, 9 Ves. 544): but where the testator has expressly directed

universities, their colleges, and the scholars upon the foundation of the colleges of Eton, Winchester, and Westminster, are excepted out of this act:

that no part of the money bequeathed shall be employed in the purchase of land, it being his expectation that other persons will, at their expense, purchase lands and buildings for the purposes intended, there the statute has been held not to apply. (*Henshaw* v. *Atkinson*, 3 Mad. 313). So, where a testator's directions can be sufficiently answered by *hiring* land or buildings for the purposes of a charity, the bequest may be sustained: (*Attorney-General* v. *Parsons*, 8 Ves. 191. *Johnson* v. *Swan*, 3 Mad. 467): but, it seems, such hiring must not be on *lease*, or it would be an acquisition, by the testator's direction, of such an interest in lands, tenements, or hereditaments, as the third section of the statute prohibits. (*Blandford* v. *Thackerell*, 2 Ves. jun. 241). And where a testator has directed that his real and personal estate shall be employed by the trustees named in his will, in the purchase of land and the erection of a school-house thereon, and the subsequent endowment and support of the school so to be erected; the illegality of this gift cannot be cured by an offer, on the part of the trustees or others, to provide at their own expense the land required. (*Attorney-General* v. *Nash*, 3 Brown, 588, 595).

Charitable legacies, secured by mortgages on lands, (*Currie* v. *Pye*, 17 Ves. 464. *Attorney-General* v. *Meyrick*, 2 Ves. sen. 46), or on turnpike tolls, (*Corbyn* v. *French*, 4 Ves. 380. *Howse* v. *Chapman*, 4 Ves. 545), or by an assignment of poor rates, or county rates, (*Finch* v. *Squire*, 10 Ves. 44. *The King* v. *Bates*, 3 Price, 358), are all void; as is a bequest of navigation shares to charitable uses; (*Buckeridge* v. *Ingram*, 2 Ves. jun. 663); for in each of these cases it has been held, that the donation not only savours of the realty, but partakes of it; that a real interest arising out of the soil, (though not the soil itself), is attempted to be given; and that this attempt, being in fraud of the statute, cannot be carried into effect.

A bequest to a charity being void so far as it touches any interest in land, it follows, upon principle, and, after some fluctuation, (*Attorney-General* v. *Graves*, Ambl. 158), is now confirmed by repeated decisions, that where a testator has charged his real estate, in aid of his personal, with payment of all his legacies, there, if the personal estate be not sufficient for payment of the whole, charitable legacies must abate, and receive such average proportion only as the personal assets afford for the discharge of the whole pecuniary legacies. If a court of equity were to marshal the assets, and secure full payment of the charitable legacies, by throwing the other pecuniary legacies upon the testator's real estate, it would be enabling that to be done circuitously which cannot be done directly. (*Attorney-General* v. *Tyndall*, 2 Eden, 210. *Waller* v. *Childs*, Ambl. 526. *Foster* v. *Blagden*, Ambl. 704. *Ridges* v. *Morrison*, 1 Cox, 181).

As the object of the statute of mortmain was wholly political, as it grew out of local circumstances, and was meant to have merely a local operation, it is decided that its provisions do not extend to the alienation of land in the West India colonies; (*Attorney-General* v. *Stewart*, 2 Meriv. 161); or in Scotland. (*Mackintosh* v. *Townsend*, 16 Ves. 338). But, a devise of real estate situate in England, for charitable purposes, will not be the less void because such purposes are to be carried into execution out of England. (*Curtis* v. *Hutton*, 14 Ves. 541).

It has been said, that if an heir-at-law will confirm his ancestor's devise of land to a charity, no court will take it away; for the gift becomes the act and deed of the heir: (*Attorney-General* v. *Graves*, Ambl. 158; and see *Pickering* v. *Lord Stamford*, 2 Ves. jun. 584): however, as an immediate gift from the heir would be good only in case it was made a year before his death; upon the principle of the statute, he ought to live a year after confirmation of the devise to give it validity.

When a bequest for charitable purposes, which, if it stood alone, would be valid, is coupled with and dependent upon a devise void under the statute of mortmain, the devise being the principal, and failing, the accessory bequest must also fail. (*Attorney-General* v. *Davies*, 9 Ves. 543. *Chapman* v. *Brown*, 6 Ves. 410. *Attorney-General* v. *Goulding*, 2 Brown, 429). And where an undefined portion of a legacy is directed by the testator to be applied for purposes which the policy of the law does not admit, the bequest of the residue to a charity which the law sanctions, cannot take effect; for, the illegal part of the gift being undefined, it is impossible to ascertain the amount of the residue. (*Attorney-General* v. *Hinxman*, 2 Jac. & Walk. 277. *Vezey* v. *Jamson*, 1 Sim. & Stu. 71. *Grieves* v. *Case*, 1 Ves. jun. 553). If, indeed, the legal bequest and the illegal purpose are not so connected as to be inseparable, and the proportions are defined, or capable of being exactly calculated, in such cases the bequest may be supported. (*Attorney-General* v. *Stepney*, 10 Ves. 29. *Waite* v. *Webb*, 6 Mad. 71).

Where a bequest of money to be laid out in land is void under the Mortmain Act, the money never becomes impressed with the character of land, and no resulting trust arises in favour of the testator's heir-at-law. (*Attorney-General* v. *Tonner*, 2 Ves. jun. 7. *Chapman* v. *Brown*, 6 Ves. 411).

By the statute of 43 Geo. III. c. 107, the operation of the Mortmain Act is so far qualified as to allow any one to give, by deed inrolled, or by will, any real or personal property for the augmentation of Queen Anne's bounty.

And by statute 43 Geo. III. c. 108, persons are allowed to give, by deed or will, lands not exceeding five acres, or goods and chattels not exceeding 500*l*., for the purposes of promoting the building or repairing of churches, or of houses for the residence of ministers, and of providing church-yards, or (with certain restrictions) glebes. If such gift exceed

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 (6), (7).

2. Secondly, alienation *to an alien* (8) is also a cause of forfeiture to the crown of the land 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 book (*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 feoffment or fine (9) for the life of another, or in tail, or in fee (10); 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 reversion (*u*). For which there seem to be two reasons. First, because such alienation amounts to a renunciation of the feodal connexion and dependance; it implies [*275] a refusal to perform the due renders and services to the lord of *the fee, of which fealty is constantly one: and it tends in its consequence 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 end to his own original interest; and on such determination the next taker is entitled 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 re-

(*s*) See pag. 249, 250.
(*t*) Book I. pag. 372.
(*v*) Co. Litt. 251.
(*u*) Litt. § 415.

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the prescribed limits, it is not therefore void, the Lord Chancellor may reduce it.

The greater part of this note is extracted from 2 Hovenden on Frauds, 308—312.

(6) By the 45 Geo. III. c. 101. this part of the statute is repealed, so that these colleges may now hold any number of advowsons. But it is said a licence from the crown is still necessary, when a college purchases an advowson. Many colleges are provided with licences to purchase to a specified extent, and they have been held valid.

(7) In New-York, every corporation has power to hold, purchase, and convey such real and personal estate as the purposes of the corporation shall require, not exceeding the amount limited in its charter; (1 R. S. 599, § 1): but it cannot take by *devise*, unless expressly authorised by its charter or by statute. (2 id. 57, § 3.) See the learned opinion of Chancellor Jones on the subject of devises to corporations. 9 Cowen, 437.

(8) An alien may be grantee in a deed, though he cannot hold it, for on office found the king shall have it by his prerogative. Co. Litt. 2 b. 5 Co. 52. 1 Leo. 47. 1 Chitty's Com. L. 162. As to copyhold, see 1 Mod. 17. All. 14.

(9) Conveyances by feoffment, and fines and recoveries, are abolished in New-York. (1 R. S. 738, § 136. 2 R. S. 343, § 24.) Such cause of forfeiture therefore no longer exists. See next note; and the statute 1 R. S. 739, § 145, so declares expressly.

(10) Or by recovery, 1 Co. 14. b.; but not by lease and release, bargain and sale, &c. as no estate passes by these conveyances, but what may legally pass. The alienation in fee by *deed*, by tenant for life, &c. of any thing which lies in grant, as an advowson, common, &c. does not amount to a forfeiture, Co. Litt. 251. b.; but a *fine* in fee of such an estate will be a forfeiture, (ibid.); but the fine of an *equitable* tenant for life will not work a forfeiture. 1 Prest. Conv. 202. See in general, as to this description of forfeiture, 1 Saund. 319. b. &c.

mainder-man, but a mere *discontinuance* (as it is called) (*w*) of the estate-tail, which the 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 tenant 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 (*z*), upon reasons most apparently feodal. And so likewise, if in any court of record the *particular tenant does [*276] any act which amounts to a virtual 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 tenant 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 presentation 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 Second, 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 (*i*) (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 the avoidance (*k*). [*277] But, if the bishop be both patron and ordinary, he shall not have a double time allowed him to collate in (*l*); for the forfeiture accrues by law, whenever the negligence has continued six months in the same per-

(*w*) See Book III. ch. 10.
(*x*) Litt. § 595, 6, 7.
(*y*) Co. Litt. 233.
(*z*) Finch. 270, 271.
(*a*) Co. Litt. 252.
(*b*) *Ibid.* 253.
(*c*) 2 Roll. Abr. 336, pl. 10.
(*d*) Bracton, *l.* 4, *tr.* 2, *c.* 3.
(*e*) See page 23.
(*f*) Bro. *Abr. tit. Quar. Imped.* 3 Cro. Jac. 518.
(*g*) St. 1 Geo. I. st. 2, c. 10.
(*h*) Stat. 17 Edw. II. c. 8. 2 Inst. 273.
(*i*) 6 Rep. 62. Regist. 42.
(*k*) 2 Inst. 361.
(*l*) Gibs. Cod. 769.

son. 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 elapsed, yet his presentation is good, and the bishop is bound to institute the patron's clerk (*m*). 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 patron should be deprived of his turn. If the bishop suffer the presentation to lapse to the metropolitan, the patron also has the same advantage if he presents before the archbishop 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 archbishop (*n*). 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* (*o*). 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; or, after induction, may remove him by *quare impedit*: 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 presentation (*p*).

[*278] *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*)(11). 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 habet principium, non habet 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 take advantage of his own wrong (*s*). 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*).

(*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.
(*q*) 4 Rep. 75. 2 Inst. 632.
(*r*) Co. Litt. 344, 345.
(*s*) 2 Roll. Abr. 369.
(*t*) Co. Litt. 344.

(11) See the cases collected, Mirehouse on Advowsons, 162. The 44 Geo. III. c. 43. enacts, that in case of avoidance or deprivation on account of nonage, &c. of incumbent, no title by lapse shall accrue till after six months' notice thereof by ordinary to patron.

IV. By *simony* (12), the right of presentation to a living is forfeited, and vested *pro hac vice* in the crown. Simony is the corrupt presentation of any one to an ecclesiastical benefice for money, gift, or reward. It is so called from the resemblance it is said to bear to the sin of Simon Magus, though the purchasing of holy orders seems to approach nearer to 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 simony. However, it was not an offence punishable in a criminal way at the common law (*w*); it being thought sufficient to leave the clerk to ecclesiastical censures. But as these did not affect *the [*279] simoniacal patron, nor were efficacious enough to repel the notorious practice of the thing, divers acts of parliament have been made to restrain it by means of civil forfeitures; which the modern prevailing usage, with regard to spiritual preferments, calls aloud to be put in execution. I shall briefly consider them in this place, because they devest the corrupt patron of the right of presentation, and vest a new right in the crown.

By the statute 31 Eliz. c. 6. it is for avoiding of simony enacted, that if any patron for any corrupt consideration, by gift or promise (13), directly or indirectly, shall present or collate any person to an ecclesiastical benefice or dignity; such presentation shall be void, and the presentee be rendered incapable of ever enjoying the same benefice: and the crown shall present to it for that turn only (*x*). But if the presentee dies, without being convicted of such simony in his lifetime, it is enacted by stat. 1 W. & M. c. 16. that the simoniacal contract shall not prejudice any other innocent patron, on pretence of lapse to the crown or otherwise. Also by the statute 12 Ann. stat. 2. c. 12. if any person for money or profit shall procure, in his own name or the name of any other, the next presentation to any living ecclesiastical, and shall be presented thereupon, this is declared to be a simoniacal contract; and the party is subject to all the ecclesiastical penalties of simony, is disabled from holding the benefice, and the presentation devolves to the crown.

Upon these statutes many questions have arisen, with regard to what is, and what is not simony. And, among others, these points seem to be clearly settled: 1. That to purchase a presentation, the living being actually vacant, is open and notorious simony (*y*): this being expressly in the face of the statute. 2. That for a clerk to bargain for the next presentation, the incumbent being sick and about to die, was simony, even before the statute of queen Anne (*z*) (14): and now, by that statute, to purchase,

(*u*) 3 Inst. 156.
(*w*) Moor. 864.
(*x*) For other penalties inflicted by this statute see book IV. ch. 4.
(*y*) Cro. Eliz. 778. Moor. 914.
(*z*) Hob. 165.

(12) See Mirehouse on Advowsons, 214 to 280; Cunningham's Law of Simony; Bac. Ab. Simony: and ante 22.

(13) Or "for any sum of money, reward, gift, profit, or benefit; or for any promise, agreement, grant, bond, covenant of or for any sum of money, reward, gift, profit, or benefit." s. 5. "Any person or persons" are the words of the statute, therefore a presentation by a stranger usurping the right would be also void, but the rightful patron, and not the crown, would be entitled to present in such case.

(14) Mr. Christian, in his note upon the passage in the text, reminds us, that "it has been determined, that the purchase of an advowson in fee, when the incumbent was upon his death-bed, without any privity of the clerk who was afterwards presented, was not simoniacal, and would not vacate the next presentation. (2 Bl. Rep. 1052)." And though in the later case of *Fox* v. *The Bishop of Chester*, (2 Barn. & Cress. 658. *S. C.* 4 Dowl. & Ryl. 111), the case of *Barret* v. *Glubb* (the case referred to by Mr. Christian), was

either in his own name or another's, the next presentation, and [*280] be thereupon presented *at any future time to the living, is direct and palpable simony. But, 3. It is held that for a father to purchase such a presentation, in order to provide for his son, is not simony: 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 simoniacal 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 simoniacal (*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 simoniacal (*e*); 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 being given, that the father is bound to provide for his son (*f*). 7. Lastly, general bonds to resign at the patron's request are held to be legal (*g*) (15): for they may possibly be

(*a*) Cro. Eliz. 686. Moor. 916.
(*b*) 3 Inst. 154. Cro. Jac. 385.
(*c*) Noy, 142.
(*d*) Stra. 534.
(*e*) Cro. Car. 180.
(*f*) Cro. Jac. 248. 274.
(*g*) Cro. Car. 180. Stra. 227.

repudiated by the Court of King's Bench; the principle of that case has since been re-established. In *Fox* v. *The Bishop of Chester*, where a contract was made for the sale of the next presentation of a living, the contracting parties at the time knowing the incumbent to be at the point of death, it was held by the court of King's Bench, that the contract was simoniacal, and the presentation made in pursuance thereof by the purchasor void; although the clerk presented was not privy to the transaction, and the contract was not entered into with a view to the presentation of any particular person. But this judgment was reversed, on appeal, by the House of Lords, on the 3rd of June, 1829.

(15) In the case of *Dashwood* v. *Peyton*, (18 Ves. 37), Lord Chancellor Eldon said, it was extremely difficult to reconcile the distinctions made between the simoniacal nature of general and of particular bonds of resignation, with the principle upon which the House of Lords decided the case of *The Bishop of London* v. *Ffytche*: and he repeated the same observation in *Rowlatt* v. *Rowlatt*, (1 Jac. & Walk. 283). The same learned Judge, in the earlier case of *Lord Kirkcudbright* v. *Lady Kirkcudbright*, (8 Ves. 61), observed, that the question as to the legality of resignation bonds would never have perplexed him, if there had not been so many authorities; and it may easily be collected, his Lordship's perplexity was occasioned, not by the cases in which it had been decided that general bonds of resignation are bad, but by those other cases in which a bond for resignation of an ecclesiastical benefice in favour of a particular individual, had been held good. In the modern case of *Lord Sondes* v. *Fletcher*, (determined in Dom. Proc. and reported in 3 Bing. 502), it was determined, that *all* bonds of resignation were illegal: but even this decision of the highest tribunal has not proved final: the Legislature has subsequently interfered, and, it is to be hoped, has set the question at rest, by the statute of 9 Geo. 4, c. 94, whereby it is enacted, that every engagement for the resignation of any spiritual office, to the intent, as manifested by the terms of the engagement, that *any one* person whosoever, specially named and described, or one or *two* persons specially named and described, being such persons as in the act mentioned, shall be presented or appointed to such spiritual office, shall be good, valid and effectual in law, and the performance of the same shall be enforced in equity; provided such engagement shall be entered into before the presentation or appointment of the party so entering into the same. Provided always, that where *two* persons shall be so specially named and described in such engagement, each of them shall be, either by blood or marriage, an uncle, son, grandson, brother, nephew, or grandnephew, of the patron or one of the patrons of such spiritual office, not being merely a trustee or trustees of the patronage of the same; or of the person or one of the persons for whom the patron or one of the patrons shall be a trustee or trustees; or of any married woman, whose husband in her right shall be the patron or one of the patrons of such spiritual office; or of any other person in whose right such presentation or bestowing shall be intended to be made. And it is enacted, that no presentation to any spiritual office shall be void by reason of such agreement to resign; but, the benefit of the act is not to extend to any engagement, unless the instrument by which it is entered into be deposited, within two months after the date thereof, with

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 (16). 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 simoniacal, 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 or 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*) (17).

*V. The next kind of forfeitures are those by *breach* or non- [*281] performance 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 fee-simple or fee-tail (*k*) (18).

(*h*) 1 Vern. 411. 1 Equ. Cas. Abr. 86, 87. Stra. 534.

(*i*) See ch. 10. page 152.

(*k*) Co. Litt. 53.

the registrar of the diocese or peculiar jurisdiction wherein the benefice is situated; nor unless the person named in such engagement shall be presented or appointed within six calendar months next after notice of resignation given to the patron or patrons of such spiritual office.

(16) Mr. Christian, in his note upon the text, observes, that, "in the great case of *The Bishop of London* v. *Ffytche*, it was determined by the House of Lords, that a general bond of resignation is simoniacal and illegal. The circumstances of that case were briefly these: Mr. Ffytche, the patron, presented Mr. Eyre, his clerk, to the bishop of London, for institution. The bishop refused to admit the presentation, because Mr. Eyre had given a general bond of resignation; upon this, Mr. Ffytche brought a *quare impedit* against the bishop, to which the bishop pleaded that the presentation was simoniacal and void, by reason of the bond of resignation; and to this plea Mr. Ffytche demurred. From a series of judicial decisions, the court of Common Pleas thought themselves bound to determine in his favour; and that judgment was affirmed by the court of King's Bench; but these judgments were afterwards reversed by the House of Lords. The principal question was this, viz. whether such a bond was a *reward*, *gift*, *profit*, or *benefit*, to the patron under the 31 Eliz. c. 6: if it were so, the statute had declared the presentation to be simoniacal and void. Such a bond is so manifestly intended by the parties, to be a *benefit* to the patron, that it is surprising that it should ever have been argued and decided that it was not a *benefit* within the meaning of the statute. Yet many learned men are dissatisfied with this determination of the Lords, and are of opinion that their judgment would be different, if the question were brought before them a second time. But it is generally understood that the Lords, from a regard to their dignity, and to preserve a consistency in their judgments, will never permit a question which they have once decided, to be again debated in their house. See 1 Bro. 286. The case of *The Bishop of London* v. *Ffytche*, is reported at length in Cunningham's Law of Simony, p. 52."

(17) In an action by the incumbent for the use and occupation of his glebe, the defendant cannot give in evidence the simoniacal presentation of the plaintiff. 5 T. R. 4. But it may be given in evidence by a defendant who is sued for the tithes. Hob. 168. If however the occupier has entered into an agreement for a composition for tithes, he cannot set up as a defence to an action on the agreement, that the incumbent was simoniacally presented. Brooksby v. Watts, 2 Marsh. 38. S. C. 6 Taunt. 333.

(18) A tenant for life has no property in timber or underwood till his estate comes into possession, and therefore cannot have an account in equity, or maintain an action of trover at law, for what has been cut wrongfully by a preceding tenant, notwithstanding his own estate, being without impeachment of waste, would have entitled him to cut such timber or underwood, and put the produce into his own pocket: the owner of the first estate of inheritance, at the time when the timber was cut, is the party entitled to redress in such case. (*Pigot* v. *Bullock*, 1 Ves. junr. 484. *Whitfield* v. *Bewit*, 2 P. Wms. 241). However, a tenant for life in remainder, though he cannot establish any property in timber actually severed during a prior estate, may bring a bill to restrain waste; and he may sustain such a suit, although he has not the immediate remainder, and notwithstanding his estate, whenever it comes into possession, will be subject to impeachment for waste; for, though

Waste is either *voluntary*, which is a crime of commission, as by pulling down a house; or it is *permissive* (19), 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*) (20). If a house be destroyed by tempest, lightning, or the like, which is the act of Providence, it is no waste: but otherwise, if the house be burnt by the carelessness or negligence of the lessee: though now by the statute 6 Ann. c. 31. no action will lie against a tenant for an accident of this kind (21). 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*).

(*l*) Hetl. 35.
(*m*) 4 Rep. 64.
(*n*) Co. Litt. 53.
(*o*) 4 Rep. 62.

he will have no right to the timber, he will have an interest in the mast and shade of the trees. (see *post*, note (22).) So, trustees to preserve contingent remainders may maintain a suit for a similar injunction, even though the contingent remainder-men have not come into *esse*. (*Perrot* v. *Perrot*, 3 Atk. 95. *Stansfield* v. *Habergham*, 10 Ves. 281. *Garth* v. *Cotton*, 3 Atk. 754). It is true, that, in cases of legal waste, if there be no person capable of maintaining an action, before the party who committed the waste dies, the wrong is then without a remedy at common law; but, where the question is brought within the cognizance of equity, those courts say, unauthorized waste shall not be committed with impunity; and the produce of the tortious act shall be laid up for the benefit of the contingent remainder-man. (*Marquis of Lansdowne* v. *Marchioness Dowager of Lansdowne*, 1 Mad. 149. *Bishop of Winchester* v. *Knight*, 1 P. Wms. 407. *Anonym.* 1 Ves. junr. 93).

(19) Where an estate is given for life, without impeachment of waste *other than wilful waste*, this will excuse *permissive* waste; (*Lansdowne* v. *Lansdowne*, 1 Jac. & Walk. 523); if the tenant for life, under such a limitation, cut timber, Sir Wm. Grant, M. R., seems to have felt it questionable whether the tenant could appropriate to himself the principal money produced by the sale of such timber, though he held it clear he was entitled to the interest thereof for his life: (*Wickham* v. *Wickham*, 19 Ves. 423. *S. C.* Cooper, 290): but, from the case of *Williams* v. *Williams*, (12 East, 220), it should appear that the tenant for life would have the entire property in timber so cut down.

(20) Between the heir and executor there has not been any relaxation of the ancient law with regard to fixtures, for there is no reason why the one should be more favoured than the other, or the courts would be disposed to assist the heir, and to prevent the inheritance from being dismembered and disfigured. If the inheritance cannot be enjoyed, without the things in dispute, the owner could never mean to give them to the executor, as in the case of salt-pans fixed with mortar to a brick floor, and without which the salt works produce no profit; but if removed are of very little value to the executor, as old materials only. 1 Hen. Bl. 259. n. a. But the courts are more favourable to an executor of a tenant for life against a person in remainder, and therefore they have held that his executor shall have the benefit of a fire-engine erected by a tenant for life, because the colliery might be worked without it, though not so conveniently. 3 Atk. 13. With regard to a tenant for years, it is fully established he may take down useful and necessary erections for the benefit of his trade or manufacture, and which enable him to carry it on with more advantage. Bac. Ab. Executor, H. 3. 3 Esp. 11. 2 East, 88. It has been so held in the case of cyder-mills. A tenant for years may also carry away ornamental marble chimney-pieces, wainscot fixed only by screws, and such like. But erections for the purposes of farming and agriculture, do not come under the exception with respect to trade, and cannot be taken down again. See Elwes v. Maw, 3 East, 52. And where the tenant has covenanted to leave all buildings, &c. he cannot remove even erections for trade. 1 Taunt. 19. Where a tenant for years has a right to remove erections and fixtures during his lease, and omits doing it, he is a trespasser afterwards for going upon the land, but not a trespasser *de bonis asportatis*. 2 East, 88. A farmer who raises young fruit-trees on the demised land for filling up his lessor's orchards, is not entitled to sell them, unless he is a nurseryman by trade. 4 Taunt. 316.

(21) With a proviso, however, that the act shall not defeat any agreement between landlord and tenant. See the statute. But if a lessee covenants to pay rent; and to repair with an express exception of casualties by fire; he may be obliged to pay rent during the whole term, though the premises are burnt down by accident, and never rebuilt by the lessor. 1 T. R. 310. Nor can he be relieved by a court of equity, Anst. 687. unless perhaps the landlord has received the value of his premises by insuring. Amb. 621. And if he covenants to repair generally without any express exceptions, and the premises are burnt down, he is bound to rebuild them. 6 T. R. 650.

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 for that reason 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 the tenant may cut down at any seasonable time *that he pleases (*q*); and may take sufficient estovers of common [*282] 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, *&c.* is waste; for that is a detriment to the inheritance (*v*) (22):

(*p*) Co. Litt. 53.
(*q*) 2 Roll. Abr. 817.
(*r*) Co. Litt. 41.
(*s*) Hob. 296.
(*t*) 1 Inst. 53.
(*u*) 1 Lev. 309.
(*v*) 5 Rep. 12.

but if the pits or

(22) It is in order to prevent irremediable injury to the inheritance that the court of Chancery will grant injunctions against waste, and allow affidavits to be read in support of such injunctions: the defendant might possibly be able to pay for the mischief done, if it could ultimately be proved that his act was tortious; but, if any thing is about to be abstracted which cannot be restored *in specie*, no man ought to be liable to have that taken away which cannot be replaced, merely because he may possibly recover (what others may deem) an equivalent in money. (*Berkeley* v. *Brymer*, 9 Ves. 356). But, although Lord Nottingham, (in *Tonson* v. *Walker*, 3 Swanst. 679), intimated that a probability of right might authorize an application for an injunction against waste, this was only an *obiter dictum*: it is a general rule that, in order to sustain a motion in restraint of waste, the party making the application must set forth and verify an express and positive title in himself, (or in those whose interests he has to support; see *ante*, note (18)); an hypothetical or disputed title will not do. (*Davis* v. *Leo*, 6 Ves. 787. *Whitelegg* v. *Blacklegg*, 1 Brown, 57). A plaintiff who, after failing in ejectment, comes to equity to restrain waste, stating that the defendant claims by adverse title, it has been said, states himself out of court. (*Pillsworth* v. *Hopton*, 6 Ves. 51). This *dictum* may perhaps admit occasional qualification; (see *Norway* v. *Rowe*, 19 Ves. 154. *Kinder* v. *Jones*, 17 Ves. 110. *Hodgson*, v. *Dean*, 2 Sim. & Stu. 224); but, clearly, where the title is disputed as between a devisee and the heir-at-law, neither an injunction to stay waste, nor a receiver, will be granted on the application of either party. (*Jones* v. *Jones*, 3 Meriv. 174. *Smith* v. *Collyer*, 8 Ves. 90). It is not, however, to be understood, that a plaintiff, who, though he has no *legal* title, has concluded a contract authorizing him to call upon the court to clothe his possession with the legal title, cannot sustain a motion in restraint of waste; provided the defendant's answer admits such contract. (*Norway* v. *Rowe*, 19 Ves. 155).

In general cases, for the purpose of dissolving an injunction granted *ex parte*, the established practice is to give credit to the answer when it comes in, if it denies all the circumstances upon which the equity of the plaintiff's application rests, and not to allow affidavits to be read in contradiction to such answer: (*Clapham* v. *White*, 8 Ves. 36): but, an exception to this rule is made in cases of alleged irremediable waste; (*Potter* v. *Chapman*, Ambl. 99); and in cases analogous to waste; (*Peacock* v. *Peacock*, 16 Ves. 51. *Gibbs* v. *Cole*, 3 P. Wms. 254); yet, even in such cases, the plaintiff's affidavits must not go to the question of *title*, but be confined to the question of fact as to *waste* done or threatened. (*Morphett* v. *Jones*, 19 Ves. 351. *Norway* v. *Rowe*, 19 Ves. 153. *Countess of Strathmore* v. *Bowes*, 1 Cox, 264). And as to matters which the plaintiff was acquainted with when he filed his bill, he ought at that time to have stated them upon affidavit, in order to give the defendant an opportunity of explaining or denying them by his answer; (*Lawson* v. *Morgan*, 1 Price, 306); though of course, acts of waste done subsequently to the filing of the bill would be entitled to a distinct consideration: (*Smythe* v. *Smythe*, 1 Swanst. 253): and where allegations in an injunction bill have been neither admitted nor denied in the answer, there can be no surprise on the defendant; and it should seem, that affidavits in support of those allegations may be read, though they were not filed till after the answer was put in. (*Morgan* v. *Goode*, 3 Meriv. 11. *Jefferies* v. *Smith*, 1 Jac. & Walk.

mines were open before, it is no waste for the tenant to continue digging them for his own use (*w*); 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 else 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 vassals or feudatories; "*si vasallus feudum dissipaverit, aut insigni detrimento deterius fecerit, privabitur*" (*x*). 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 [*283] *curtesy (*y*); and not in tenant for life or years (*z*). 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 52 Hen. III. c. 23. and of Gloucester 6 Edw. I. c. 5. 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

(*w*) Hob. 295.
(*x*) Wright, 44.
(*y*) It was however a doubt whether waste was punishable at the common law in tenant by the curtesy. Regist. 72. Bro. Abr. *tit. waste*, 88. 2 Inst. 301.
(*z*) 2 Inst. 299.

300. *Barrett* v. *Tickell*, Jacob's Rep. 155. *Taggart* v. *Hewlett*, 1 Meriv. 499).

Neither vague apprehension of an intention to commit waste; nor information given of such intention by a third person, who merely states his belief, but not the grounds of his belief, will sustain an application for an injunction. The affidavits should go (not necessarily, indeed, to positive acts, but, at least,) to explicit threats. A court of equity never grants an injunction on the notion that it will do no harm to the defendant, if he does not intend to commit the act in question; an injunction will not issue unless some positive reasons are shewn to call for it. (*Hannay* v. *M'Entire*, 11 Ves. 54. *Coffin* v. *Coffin*, Jacob's Rep. 72).

It was formerly held, that an injunction ought not to go against a person who was a mere stranger, and who consequently might, by summary legal process, be turned out of possession of premises which he was injuring. Such a person, it was said, was a trespasser; but, there not being any privity of estate, waste, strictly speaking, could not be alleged against him. (*Mortimer* v. *Cottrell*, 2 Cox. 205). But this technical rule is overturned; it is now established by numerous precedents, that, wherever a defendant is taking the substance of a plaintiff's inheritance, or committing or threatening irremediable mischief, equity ought to grant an injunction; although the acts are such as, in correct technical denomination, ought rather to be termed trespasses than waste. (*Mitchell* v. *Dors*, 6 Ves. 147. *Hanson* v. *Gardiner*, 7 Ves. 309. *Twort* v. *Twort*, 16 Ves. 130. *Earl Cowper* v. *Baker*, 17 Ves. 128. *Thomas* v. *Oakley*, 18 Ves. 186).

Any collusion, by which the legal remedies against waste may be evaded, will give to courts of equity a jurisdiction over such cases, often beyond, and even contrary to, the rules of law: (*Garth* v. *Cotton*, 3 Atk. 755): thus, trustees to preserve contingent remainders will be prohibited from joining with the tenant for life in the destruction of that estate, for the purpose of bringing forward a remainder, and thereby enabling him to gain a property in timber, so as to defeat contingent remainder-men; and wherever there is an executory devise over, after an estate for life subject to impeachment of waste, equity will not permit timber to be cut. (*Stansfield* v. *Habergham*, 10 Ves. 278. *Oxenden* v. *Lord Compton*, 2 Ves. jun. 71). So, though the property of timber severed during the estate of a strict tenant for life vests in the first owner of the inheritance; yet, where a party having the reversion in fee, is, by settlement, made tenant for life, if he, in fraud of that settlement, cuts timber, equity will take care that the property shall be restored to, and carried throughout all the uses of, the settlement. (*Powlett* v. *Duchess of Bolton*, 3 Ves. 377. *Williams* v. *Duke of Bolton*, 1 Cox, 73).

years past, all tenants merely 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, *absque impetitione vasti;* that is, with a provision or protection that no man shall *impetere*, or sue him for waste, committed. But tenant in tail after possibility of issue extinct is not impeachable for waste; because his estate was at its creation an estate of inheritance, and so not within the statutes (*a*). Neither does an action of waste lie *for the debtor* against tenant by statute, recognizance, or *elegit;* because against them the debtor may set off the damages in account (*b*): but it seems reasonable that it should lie *for the reversioner*, expectant on the determination of the debtor's own estate, or of these estates derived from the debtor (*c*).

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 Gloucester directs, that the other four species of tenants shall lose and forfeit the place wherein the waste is committed, and also treble damages to him that hath the inheritance (23). 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 *sparsim*, 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 [*284] it is impracticable for the reversioner to enjoy only the identical places wasted, 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 (*i*).

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 socage, for treason, felony, alienation, and waste: whereupon the lord may seise them without any presentment by the homage (*k*); 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 vassals, 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 *felmiae, per quas vasallus amitteret feudum* (*l*), still continue to be causes of forfeiture in many of our modern copyholds. As,

(*a*) Co. Litt. 27. 2 Roll. Abr. 826. 828.
(*b*) Co. Litt. 54.
(*c*) F. N. B. 58.
(*d*) 2 Inst. 146.
(*e*) *Ibid.* 300.
(*f*) 9 Hen. III. c. 4.
(*g*) 2 Inst. 303.
(*h*) Co. Litt. 54.
(*i*) 2 Inst. 304.
(*k*) 2 Ventr. 38. Cro. Eliz. 439.
(*l*) *Feud. l.* 2, *t.* 26, *in calc.*

(23) See 2 R. S. 335. § 10. It was decided in 13 Johns. R. 260, that the action of waste did not lie by the heir against the *assignee* of the tenant by curtesy: see, however, now 2 R. S. 334. § 1. In 7 Johns. 226, it is decided that the lessee of wild lands may fell *timber* so as to fit the land for cultivation, but not so as to permanently injure the inheritance, as by cutting down all the wood.

by subtraction of suit and service (*m*); *si dominum deservire noluerit* (*n*): by disclaiming to hold of the lord, or swearing himself not his copyholder (*o*); *si dominum ejuravit, i. e. negavit se a domino feudum habere* (*p*): by neglect to be admitted tenant within a year and a day (*q*); *si per annum et diem cessaverit in petenda investitura* (*r*): by contumacy in not appearing in court after three proclamations (*s*); *si a domino ter citatus non comparuerit* (*t*): or by refusing, when sworn of the homage, to present the truth according to his oath (*u*): **si pares veritatem noverint, et dicant se nescire, cum sciant* (*w*). In 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 suorum* (*y*); or, as it is more fully expressed in another place (*z*), *nemo miles adimatur de possessione sui beneficii, nisi convicta culpa, quae sit laudanda* (*a*) *per judicium parium suorum.*

[*285]

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 (24); 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 is 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 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 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 sell the same by deed indented and inrolled, or divide them proportionably among the creditors. This statute expressly included not only free, but customary and 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 sell or convey, by deed indented

[*286]

(*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.
(*r*) *Feud. l.* 2, *t.* 24.
(*s*) 8 Rep. 99. Co. Copyh. § 57.
(*t*) *Feud. l.* 2, *t.* 22.
(*u*) Co. Copyh. § 57.
(*w*) *Feud. l.* 2, *t.* 28.
(*x*) Co. Copyh. § 58.
(*y*) *Feud. l.* 1, *t.* 21.
(*z*) *Ibid. t.* 23.
(*a*) *i. e. arbitranda, definienda.* Du Fresne, IV. 79.

(24) See chapter 31.

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, remainder-men, 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 sell 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 purchasor *bona fide*, 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 (25).

(*b*) 1 Jac. I. c. 15.

(25) The statutes referred to in the text, with numerous others relating to bankrupts, were repealed by the act of 6 Geo. IV. c. 16, in which the whole of the bankrupt code, as at present established, is consolidated. By the 12th section of the statute just mentioned it it enacted, that commissioners appointed under the great seal shall have full power to take the order and direction of all such lands, tenements, and hereditaments, both within this realm and abroad, as well copy or customary-hold as freehold, as a bankrupt had in his own right before he became bankrupt; and also all such interest in any such lands, tenements and hereditaments as such bankrupt might lawfully depart withal, and to make sale thereof, or otherwise order the same, for the satisfaction and payment of his creditors. And, by the 64th section, it is further enacted, that the commissioners shall, by deed indented and enrolled, convey to the assignees, for the benefit of the creditors, all lands, tenements, and hereditaments, (except copy or customary-hold), in any part of the dominions or colonies belonging to his Majesty, to which any bankrupt is entitled, and all interest to which any such bankrupt is entitled in any of such lands, tenements and hereditaments, and of which he might have disposed; and all such lands, tenements, and hereditaments as he shall purchase, or which shall descend, be devised, revert, or come to such bankrupt before he shall have obtained his certificate; and every such deed shall be valid against the bankrupt and against all persons claiming under him: provided, that, where, according to the laws of any colony or plantation where such lands or tenements may be situated, such deed would require registration, enrolment, or recording, the same shall be so registered, enrolled, or recorded; and no such deed shall invalidate the title of any purchaser for valuable consideration prior to such registration, enrolment, or recording, without notice that the commission has issued. The 65th section enacts, that the commissioners shall make sale of any lands, tenements, or hereditaments, situate either in England or Ireland, whereof the bankrupt is seised of any estate-tail in possession, reversion, or remainder, (whereof no reversion is in the Crown), and every such deed shall be good against the bankrupt and the issue of his body, and against all persons claiming under him after he became bankrupt, and against all persons whom the bankrupt by fine, common recovery, or any other means, might cut off or debar from any remainder, reversion, or other interest, in, or out of such lands, tenements, or hereditaments.

The 68th and 69th sections enact, that the commissioners shall have power to make sale of any copyhold or customary-hold lands, or of any interest to which a bankrupt is entitled therein, and thereby to entitle any persons on their behalf to surrender the same for the purpose of any purchasers being admitted thereto; such purchasors, before they enter into or take any profit of such lands, compounding with the lords of the manors of which the same are holden for such fines and other services as have theretofore been usually paid for the same; and thereupon the said lords shall grant unto such purchasers the said copyhold or customary-hold lands, for such estate or interest as shall have been sold to them as aforesaid, reserving the antient rents, customs, and services. The 70th section enacts, that any estates conveyed or pledged upon condition, or with power of redemption, by a man who afterwards becomes bankrupt, may be redeemed by his assignees, according to such condition, as fully as the bankrupt might have done. The 71st section enacts, that if any real estate of any bankrupt be extended after he shall have become bankrupt, upon a false pretence of his being indebted to an accountant of, or debter to, the King, by contract originally made between the bankrupt and the said debtor or accountant to the King; a sale of such estate by the commissioners shall be valid against such extent and all persons claiming under it. The 73rd section enacts, that if any bankrupt, being at the time insolvent, shall (except upon the marriage of any

CHAPTER XIX.

V. OF TITLE BY ALIENATION (l).

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 comprised 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 substi-

(*a*) See page 57.

of his children, or for some valuable consideration) have conveyed, assigned, or transferred any hereditaments, the commissioners shall have power to sell and dispose of the same, and such sale shall be valid against the bankrupt and all persons claiming under him. The 76th section enacts, that if any bankrupt shall have entered into any agreement for the purchase of any estate or interest in land, the vendor may compel the assignees to elect whether they will abide by and execute such agreement, or deliver up the same, and the possession of the premises. The 77th section enacts, that all powers vested in a bankrupt which he might legally execute for his own benefit (except the right of nomination to any vacant ecclesiastical benefice,) may be executed by the assignees. The 78th section enacts, that the Lord Chancellor may order bankrupts to join in conveyances of their real estates, and if they shall not execute such conveyances within the time directed, they, and all persons claiming under them, shall be stopped from objecting to the validity of the conveyances; and all estate, right, and title, which the bankrupts had in such tenements, shall be as effectually barred by such order, as if the conveyances had been executed by the bankrupts. The 79th section enacts, that if any bankrupt shall, as trustee, either alone or jointly, be seised of, or entitled to, any real estate, or any interest secured upon or arising out of the same, the Lord Chancellor may order the assignees, and all persons whose act or consent thereto is necessary, to convey, assign, or transfer the said estate to such persons as the Lord Chancellor shall think fit, upon the same trusts as the said estate was subject to before the bankruptcy, or such of them as shall be then subsisting and capable of taking effect. The 81st section enacts, that all conveyances by, and all contracts by and with, any bankrupt, *bonâ fide* made and entered into more than two calendar months before the issuing of the commission against him, and all executions and attachments against the lands and tenements of such bankrupt, executed or levied more than two calendar months before the issuing of such commission, shall be valid, notwithstanding any prior act of bankruptcy by him committed; provided the person so dealing with such bankrupt had not, at the time of such conveyance, contract, dealing, or transaction, notice of any prior act of bankruptcy by the said bankrupt committed. The 83rd section enacts, that the issuing of a commission shall be deemed notice of a prior act of bankruptcy, (if an act of bankruptcy had been actually committed before the issuing of the commission), if the adjudication has been notified in the London Gazette, and the persons affected by such notice may reasonably be presumed to have seen it. But, the 86th section enacts, that no purchase from any bankrupt *bonâ fide* and for valuable consideration, though the purchaser had notice at the time of such purchase of an act of bankruptcy by such bankrupt committed, shall be impeached by reason thereof, unless the commission shall have been sued out within twelve calendar months after such act of bankruptcy. And the 87th section enacts, that no title to any real estate sold under a commission or order in bankruptcy, shall be impeached by the bankrupt, or any person claiming under him, in respect of any defect in the suing out the commission, or in any of the proceedings under the same, unless the bankrupt shall have commenced proceedings to supersede the said commission, and duly prosecuted the same, within twelve calendar months from the issuing thereof.

These are the statutory provisions at present affecting the real estates of bankrupts.

(l) See in general, Com. Dig. Alienation; Cru. Dig. index, Alienations; Vin. Ab. Alienations.

tuted and imposed upon him to perform the feodal 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 (*b*). And, as he could not aliene 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 aliene the estate, even with the consent of the lord, unless he had also obtained the consent of his own next apparent, or presumptive heir (*c*). And therefore it was very usual in ancient feoffments to express that *the alienation was [*288] made by consent of the heirs of the feoffor: or sometimes for the heir apparent himself to join with the feoffor in the grant (*d*). And, on the other hand, as the feodal obligation was looked upon to be reciprocal, the lord could not aliene or transfer his signiory without the consent of his vassal: 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 (*e*). This consent of the vassal was expressed by what was called *attorning* (*f*), 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 (*g*): 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 sell 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- [*289] tenanced by the feodal constitutions themselves (*i*): but he was not allowed to sell the whole of his own acquirements, so as totally to disinherit his children, any more than he was at liberty to aliene his paternal estate (*k*). 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 aliene (*l*): and also he might part with one-fourth of the inheritance of his ancestors without the consent of his heir (*m*).

(*b*) *Feud. l.* 1, *t.* 27.
(*c*) Co. Litt. 94. Wright, 168.
(*d*) Madox, *Formul. Angl.* N° 316. 319. 427.
(*e*) Gilb. Ten. 75.
(*f*) The same doctrine and the same denomination prevailed in Bretagne—*possessiones in jurisdictionalibus non aliter apprehendi posse, quam per attournances et avirances, ut loqui solent; cum vasallus, ejurato prioris domini obsequio et fide, novo se sacramento novo item domino acquirenti obstringebat, idque jussu auctoris.* D'Argentre *Antiq. Consuet. Brit. apud* Dufresne, l. 819, 820.
(*g*) Litt. § 551.
(*h*) *Emptiones vel acquisitiones suas det cui magis velit. Terram autem quam ei parentes dederunt, non mittat extra cognationem suam. LL. Hen. I. c.* 70.
(*i*) *Feud. l.* 2, *t.* 39.
(*k*) *Si questum tantum habuerit is, qui partem terrae suae donare voluerit, tunc quidem hoc ei licet: sed non totum questum, quia non potest filium suum haeredem exhaeredare.* Glanvil. *l.* 7, *c.* 1.
(*l*) Mirr. c. 1, § 3. This is also borrowed from the feodal law. *Feud. l.* 2, *t.* 48.
(*m*) Mirr. *ibid.*

By the great charter of Henry III. (*n*), 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 (*o*). But these restrictions were in general removed, by the statute of *quia emptores* (*p*), whereby all persons, except the king's tenants *in capite*, were left at liberty to aliene all or any part of their lands at their own discretion (*q*). And even these tenants *in capite* were by the statute 1 Edw. III. c. 12. permitted to aliene, on paying a fine to the king (*r*). By the temporary statutes 7 Hen. VII. c. 3, and 3 Hen. VIII. c. 4. all persons attending the king in his wars were allowed to aliene 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. II. c. 24. As to the power of *charging* lands with the debts of the owner, this was introduced so early as stat. Westm. 2. which (*s*) subjected a *moiety* of the tenant's lands to executions, for debts recovered by law: as the *whole* of them was likewise subjected to be pawned in a statute merchant by the statute *de mercatoribus*, made the same year, and in a statute staple by statute 27 [*290] Edw. III. c. 9. and in other similar recognizances by statute *23 Hen. VIII. 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 tenure (2). 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 to complete the grant or conveyance, by statute 4 & 5 Ann. c. 16; nor shall, by statute 11 Geo. II. c. 19. the attornment of any tenant affect the possession of any lands, unless made with consent of the landlord, or to a mortgagee after the mortgage is forfeited, or by direction of a court of justice (3), (4).

(*n*) 9 Hen. III. c. 32.
(*o*) Dalrymple of feuds, 95.
(*p*) 18 Edw. I. c. 1.
(*q*) See pag. 72. 91.
(*r*) 2 Inst. 67.
(*s*) 13 Ed. I. c. 18.

(2) The general power of devising was given by 32 Hen. VIII. c. 1. See post 375.

(3) An attornment at the common law was an agreement of the tenant to the grant of the signiory or of a rent, or of the donee in tail, or tenant for life or years, to a grant of reversion, or remainder made to another. Co. Litt. 309. a. And the attornment was necessary to the perfection of the grant. However, the necessity of attornments was in some measure avoided by the statute of uses, as by that statute the possession was immediately executed to the use, 1 Term R. 384. 386. and by the statute of wills, by which the legal estate is immediately vested in the devisee. Yet attornment continued after this to be necessary in many cases: but both the necessity and efficacy of attornments have been almost totally taken away by the statute 4 & 5 Anne, c. 16. s. 9, 10. and 11 Geo. II. c. 19. s. 11. The first statute having made attornment unnecessary; and the other having made it inoperative; it is now held not to be necessary, either to aver it in a declaration in covenant, or plead it in an avowry or other pleading whatever. Doug. 283. Moss v. Gallimore. See Mr. Serjt. Williams's note, 1 Saund. 234. b. n. 4. Under the proviso in the first act, any notice to the tenant, of his original landlord having parted with his interest, is sufficient; and therefore the tenant's knowledge of the title of *cestui que trust* as purchaser has been held sufficient notice to entitle his trustees to maintain an action of assumpsit for use and occupation as grantees of the reversion against the tenant, who had improperly paid over his rent to a vendor after such knowledge. 16 East, 99. Although the first mentioned act renders an attornment unnecessary, yet it is still useful for a purchasor to obtain it, because after an attornment he would not in any action against the tenant, be compelled to adduce full evidence of his title, Peake's Law of Evid. 266, 7. though the tenant would still be at liberty to shew that he had attorned by mistake. 6 Taunt. 202.

(4) 1 R. S. 739, § 146.

In examining the nature of alienation, let us first inquire, briefly, *who* may aliene, and to *whom*; and then, more largely, *how* a man may aliene, or the several modes of conveyance.

I. 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 disabilities. 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 (*s*) (5), (6). Yet reversions 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 (7), 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 (*t*).

Persons attainted of treason, felony, and *praemunire*, are incapable of conveying, from the time of the offence committed, provided attainder fol-

(*s*) Co. Litt. 214.
(*t*) Sheppard's touchstone, 238, 239. 322. 11 Mod. 152. 1 P. Wms. 574. Stra. 132.

(5) See 1 R. S. 739, § 147, as to New-York: but here, the rightful owner of lands held adversely may *mortgage* them. (Id. § 148.) See as to persons capable of taking or disposing of lands 1 R. S. 719. They are the same as mentioned in the text, except that Indians residing in the state cannot sell their lands in this state without the consent of the legislature, except that they may sell, with the approbation of the Surveyor-General, lands granted to them for their services in the revolutionary war. Aliens also, on declaring their intention to become citizens, and filing their declaration in the office of the Secretary of State, may acquire lands. Id. 719, 720.

(6) It is a very ancient rule of law that rights not reduced into possession should not be assignable to a stranger, on the ground that such alienation tended to increase maintenance and litigation, and afforded means to powerful men to purchase rights of action, and oppress others. Co. Litt. 214. 265. a. n. 1. 232. b. n. 1. Our ancestors were so anxious to prevent alienation of *choses*, or rights in action, that we find it enacted by the 32 Hen. VIII. c. 9. (which it is said was in affirmance of the common law, Plowd. 88.) that no person should buy or sell, or by any means obtain any right or title to any manors, lands, tenements, or hereditaments, unless the person contracting to sell or his ancestor, or they by whom he or they claim the same, had been in *possession* of the same, or of the reversion or remainder thereof, for the space of one year before the contract; and this statute was adjudged to extend to the assignment of a copyhold estate, 4 Co. 26. a. and of a chattel interest, or a lease for years, of land whereof the grantor was not in possession. Plowd. 88. At what time this doctrine, which, it is said, had relation originally only to *landed* estates, 2 Woodd. 388. was first adjudged to be equally applicable to the assignment of a mere *personal* chattel not in possession, it is not easy to decide: it seems, however, to have been so settled at a very early period of our history, as the works of our oldest text writers, and the reports, contain numberless observations and cases on the subject. Lord Coke says (Co. Litt. 214. a; see also 2 Bos. and Pul. 541.) that it is one of the maxims of the common law, that no right of action can be transferred, "because under colour thereof, pretended titles might be granted to great men, whereby right might be trodden down, and the weak oppressed, which the common law forbiddeth."

(7) It is now well established, as a general rule, that possibilities (not meaning thereby *mere hopes* of succession, *Carleton* v. *Leighton*, 3 Meriv. 671. *Jones* v. *Roe*, 3 T. R. 93. 96.) are devisable: for a disposition of equitable interests in land, though not good at law, may be sustained in equity. (*Perry* v. *Phelips*, 1 Ves. jun. 254. *Scawen* v. *Blunt*, 7 Ves. 300. *Moor* v. *Hawkins*, 2 Eden, 343). But, the generality of the doctrine that *every* equitable interest is devisable, requires at least one exception;—the devisee of a copyhold must be considered as having an equitable interest therein; but it has been decided, that he cannot devise the same before he has been admitted. (*Wainwright* v. *Elwell*, 1 Mad. 627). So, under a devise to two persons, or to the survivor of them, and the estate to be disposed of by the survivor, by will, as he should think fit; it was held, that the devisees took as tenants in common for life, with a contingent remainder in fee to the survivor; but that such contingent remainder was not devisable by a will made by one of the tenants in common in the lifetime of both. (*Doe* v. *Tomkinson*, 2 Mau. & Sel. 170.)

lows (*u*) (8): for such conveyance by them may tend to defeat
[*291] 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 (*w*). 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 nonsane 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, on behalf of an idiot, may avoid his grants or other acts (*x*). 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 (*y*): and there is a writ in the register (*z*) for the alienor himself to recover lands aliened by him during his insanity; *dum fuit non compos mentis suae, ut dicit, &c.* But under Edward III. a scruple began to arise, whether a man should be permitted to *blemish* himself, by pleading his own insanity (*a*): and, afterwards, a defendant in assise having pleaded a release by the plaintiff since the last continuance, to which the plaintiff replied (*ore 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 was asked, how he came to re-
member the release, if out of his senses when he gave it (*b*). Un-
[*292] der Henry VI. 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 (*c*); 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 (*d*), the maxim that a man shall not stultify himself hath been handed down as settled law (*e*): though later opinions, feeling the inconvenience of the rule, have in many points endeavoured to restrain it (*f*) (9). And, clearly, the next heir, or other person interested,

(*u*) Co. Litt. 42.
(*w*) *Ibid.* 2.
(*x*) *Ibid.* 247.
(*y*) Britton, *c.* 28. *fol.* 66.
(*z*) *fol.* 228. See also *Memorand. Scacch.* 22 Edw. I. (prefixed to Maynard's year-book, Edw. II.) *fol.* 23.
(*a*) 5 *Edw. III.* 70.
(*b*) 35 *Assis. pl.* 10.
(*c*) 39 *Hen. VI.* 42.
(*d*) F. N. B. 202.
(*e*) Litt. § 405. Cro. Eliz. 398. 4 Rep. 123. Jenk. 40.
(*f*) Com. 469. 3 Mod. 310, 311. 1 Equ. cas. abr. 279.

(8) See 251, note 14, ante.

(9) In Cro. Eliz. 398. the opinion of Fitzherbert is denied to be law, and *de non sane memory* held to be a bad plea to an action of debt upon an obligation. The defence might clearly be given in evidence under the general issue, non assumpsit, or non est factum. 3 Camp. 128. 2 Atk. 412. 3 Mod. Cases, 310. 2 Stra. 1104. 4 Co. 123. Ld. Raym. 315. See much learning respecting lunatics, collected in Mr. Fonblanque's edition of the Treatise of Equity, p. 40. & seq. and Collinson on Lunatics. In the ecclesiastical courts such a rule prevails, where lord Stowell annulled a marriage on the ground of the insanity of the husband; saying, "It is, I conceive, perfectly

may, after the death of the idiot or *non compos*, take advantage of his incapacity and avoid the grant (*g*). 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 (*h*). 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 (*i*). Persons also, who purchase or convey under duress, may affirm or avoid such transaction, whenever the duress is ceased (*j*) (10). 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. Yet the guardians or committees of a lunatic, by the statute of 11 Geo. III. c. 20. are empowered to renew in his right, under the directions of the court of chancery, any lease for lives or years, and apply the profits of such renewal for the benefit of such lunatic, his heirs or executors (11).

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 [*293] it by some act declaring his dissent (*k*). And, though he does nothing to avoid it, or even

(*g*) Perkins, § 21.
(*h*) Co. Litt. 2.
(*i*) *Ibid.*
(*j*) 2 Inst. 483. 5 Rep. 119.
(*k*) Co. Litt. 3.

clear in law, that a party may come forward to maintain his own past incapacity." 1 Hagg. Rep. 414.

See, in Sugden on powers, 395, &c. and 2 Hovenden on frauds, 488, &c., a discussion of the right of a person to stultify himself, and a distinction between feoffments, fines, and statutory conveyances or bonds, &c.

(10) Where a deed has been prepared in pursuance of personal instructions of the conveying party; yet, if it be proved that such party, though appearing to act voluntarily, was in fact not a free agent, but so subdued by harshness and cruelty that the deed spoke the mind, not of the party executing, but of another, such deed cannot, in equity, stand: though it may be difficult to make out a case of legal duress. (*Peel* v. ———, 16 Ves. 159, citing *Lady Strathmore* v. *Bowes*, 1 Ves. jun. 22). When the execution of a deed is prevented, or compelled, by force or artifice, equity will give relief, (*Middleton* v. *Middleton*, 1 Jac. & Walk. 96), in favour of a volunteer, and even, in some cases, as against innocent parties; (*Mastaer* v. *Gillespie*, 11 Ves. 639); for, it would be almost impossible ever to reach a case of fraud, if third persons were allowed to retain *gratuitous* benefits, which they have derived from the fraud, imposition, or undue influence practised by others. (*Huguenin* v. *Bazeley*, 14 Ves. 289. *Stilwell* v. *Wilkins*, Jacob's Rep. 282). Still, it would be pushing this principle too far to extend it to innocent *purchasers*: (*Lloyd* v. *Passingham*, Coop. 155): it is only when an estate has been obtained by a third person without payment, or with notice of fraud, that a court of equity will take it from him, to restore it to the party who has been defrauded of it; (*Mackreth* v. *Symmons*, 15 Ves. 340); a *bonâ fide* purchaser, for valuable consideration and without notice, will not be deprived of the advantage which his legal title gives him. (*Jerrard* v. *Saunders*, 2 Ves. jun. 457).

(11) And by virtue of the statute of 29 Geo. II. c. 31, the committee of a lunatic may *surrender* existing leases in order to obtain renewals thereof, to the same uses, and liable to the same trusts and conditions, as the former leases. By the statute of 43 Geo. III. c. 75, the sale or mortgage of the estates of lunatics is authorized for certain purposes; and it is enacted that committees may not only grant leases of tenements in which a *non compos* has an absolute estate, but, where the lunatic has a limited estate with a power of granting leases on fines, for lives or years, such power may be executed by his committee under the direction of the great seal; this power is extended to lands in antient demesne, by statute 59 Geo. III. c. 80, and the power of selling or mortgaging the estates of lunatics,* given by the statute of 43 Geo. III. c. 75, is extended by the 9 Geo. IV. c. 78, and may be exercised for any such purposes as the Lord Chancellor shall direct.

Where estates are vested in trustees, who are infants, idiots, lunatics, or trustees of unsound mind, or who cannot be compelled or refuse to act, the conveyance and transfer of such estates is provided for by the statute of 6 Geo. IV. c. 74, which consolidates and amends the previous enactments on the subject.

* See 2 R. S. 53. § 11, &c. as to power of leasing, mortgaging, or selling for support of lunatic or his family, or to pay debts. Also see id. p. 55. § 19. and p. 194. § 167. as to conveyances of estates held in trust by infants, lunatics, &c. through the court of chancery.

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 *conveyance* 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 (12).

The case of an alien born is also peculiar. For he may purchase (13) any thing; but after purchase he can *hold* nothing (14) except a lease for

(*l*) Co. Litt. 3.

(*m*) Perkins, § 154. 1 Sid. 120.

(12) The rule laid down in the text must be understood with some obvious qualifications. The possession by a married woman of property settled to her separate use, may, as a necessary incident, carry with it the right of disposition over such property. (*Rich* v. *Cockell*, 9 Ves. 375. *Fettiplace* v. *Gorges*, 1 Ves. jun. 49. *Tappenden* v. *Walsh*, 1 Phillim. 352. *Grigby* v. *Cox*, 1 Ves. sen. 518. *Bell* v. *Hyde*, Prec. in Cha. 330). A court of equity has no power to set aside, but is bound to give effect to, a disposition made by a *feme coverte* of property settled to her separate use, though such disposition be made in favour of her husband, or even of her own trustee; notwithstanding it may be plain, that the whole object of the settlement in the wife's favour may be counteracted by this exercise of her power. (*Pybus* v. *Smith*, 1 Ves. jun. 194. *Parkes* v. *White*, 11 Ves. 221, 222. *Jackson* v. *Hobhouse*, 2 Meriv. 487. *Nantes* v. *Corrock*, 9 Ves. 189. *Sperling* v. *Rochfort*, 8 Ves. 175. *Sturgis* v. *Corp*, 13 Ves. 190. *Glyn* v. *Baxter*, 1 Younge & Jerv. 332. *Acton* v. *White*, 1 Sim. & Stu. 432). And the assent of trustees to whom property is given for the separate use of a married woman, is not necessary to enable her to bind that property as she thinks fit; unless such assent is required by the instrument under which she is beneficially entitled to that property. (*Essex* v. *Atkins*, 14 Ves. 547. *Brown* v. *Like*, 14 Ves. 302. *Pybus* v. *Smith*, 1 Ves. jun. 194).

So, as Mr. Sugden, in the 3rd chapter of his Treatise on Powers, adduces numerous authorities to prove, it has long been settled, that a married woman may exercise a power over land, or, in other words, direct a conveyance of that land, whether the power be appendant, in gross, or simply collateral; and as well whether the estate be copyhold or freehold. (*Doe* v. *Staple*, 2 T. R. 695. *Tomlinson* v. *Dighton*, 1 P. Wms. 149. *Hearle* v. *Greenbank*, 3 Atk. 711. *Peacock* v. *Monk*, 2 Ves. sen. 191. *Wright* v. *Englefield*, Ambl. 473. *Driver* v. *Thompson*, 4 Taunt. 297). And it would operate palpable injustice, if, where a married woman held property in trust as executrix, or *en autre droit*, she could not convey and dispose of the same, as the duties of her trust required. (*Scammel* v. *Wilkinson*, 2 East, 557; Perkins, ch. 1. sect. 7).

No doubt, the separate estate of a *feme covert* cannot be reached as if she were a *feme sole*, without some charge on her part, either express or to be *implied*: it seems, however, to be settled, notwithstanding the dislike of the principle, which has been often expressed, (*Jones* v. *Harris*, 9 Ves. 497. *Nantes* v. *Corrock*, 9 Ves. 189. *Heatley* v. *Thomas*, 15 Ves. 604), that when a wife joins with her husband in a security, this is an *implied* execution of her power to charge her separate property. (*Greatley* v. *Noble*, 3 Mad. 94. *Stuart* v. *Lord Kirkwall*, 3 Mad. 389. *Hulme* v. *Tennent*, 1 Brown, 20. *Sperling* v. *Rochford*, 8 Ves. 175). And by joining in a sale with her husband by fine, a married woman may clearly come under obligations affecting her separate trust estate. (*Parkes* v. *White*, 11 Ves. 221, 224). A court of equity will certainly not interfere without great reluctance, for the purpose of giving effect to the improvident engagement of a married woman, for the accommodation of her husband; but where it appears in evidence that she was a free agent, and understood what she did when she engaged her separate property, a court of equity, it has been held, is bound to give effect to her contract. (*Essex* v. *Atkins*, 14 Ves. 547). Or rather, perhaps, it may be more correctly put, to say, that although a *feme coverte* cannot, by the equitable possession of separate property, acquire a power of personal contract, yet she has a power of disposition as incident to property, and her actual disposition will bind her. (*Aguilar* v. *Aguilar*, 5 Mad. 418). The distinction between the mere contract, or general engagement of a married woman, and an *appropriation* of her separate estate, has been frequently recognized: (*Power* v. *Bailey*, 1 Ball. & Beat. 52): she can enter into no contract affecting her person, the remedy must be against her property. (*Sockett* v. *Wray*, 4 Brown, 485. *Francis* v. *Wickville*, 1 Mad. 263).

Where her husband is banished for life, (*Countess of Portland* v. *Prodgers*, 2 Vern. 104), or, as it seems, is transported beyond the seas, (*Newsome* v. *Bowyer*, 3 P. Wms. 38. *Lean* v. *Schutz*, 2 W. Bla. 1198), or is an alien enemy, (*Deerly* v. *Duchess of Mazarine*, 1 Salk. 116; and see Co. Litt. 132 b, 133 a), in all these cases it has been held, that it is necessary the wife should be considered as a *feme sole*.

(13) In New-York, an alien cannot now even take by devise: but the land attempted to be devised to him passes to the heirs of the testator, or if there be none, to his residuary devisees. (2 R. S. 57, § 4.)

(14) If, says lord Coke, (Co. Litt. 2. a. b.

years of a house for convenience of merchandise, in case he be an alien friend (15); all other purchases (when found by an inquest of office) being immediately forfeited to the crown (*n*) (16).

Papists, lastly, and persons professing the popish religion, and neglecting to take the oath prescribed by statute 18 Geo. III. c. 60. within the time limited for that purpose (17), 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 (*o*).

II. We are next, but principally, to inquire, *how* a man may alienc 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 [*294] of occupancy or first possession. But this possession, 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 proprietor, after his *involuntary* dereliction of it by his death; the latter to continue it in those per-

(*n*) Co. Litt. 2.

(*o*) 1 P. Wms. 354.

Com Dig. Aliens, C. 2. see the reasons, Bac. Ab. Aliens, C.) "an alien *purchase* houses, lands, tenements, or hereditaments, to him and his heirs, albeit he can have no heirs, yet he is of capacity to *take* a fee-simple, but not to *hold*: for upon office found, that is, upon the inquest of a proper jury, the king shall have it by his prerogative of whomsoever the land is holden; and so it is if the alien doth purchase land and die, the law doth cast the freehold and inheritance upon the king." And if an alien purchase to him and the heirs of his body, he is tenant in tail; and if he suffer a recovery, and afterwards an office is found, the recovery is good to bar the remainder, (9 Co. 141. 2 Roll. 321. 4 Leon. 84. Com. Dig. Aliens, C. 2.); but the estate purchased by an alien does not vest in the king till office found, until which the alien is seised, and may sustain actions for injuries to the property. (5 Co. 52. b. 1 Leonard, 47. 4 Leon. 82. Com. Dig. Aliens, C. 4.) But though an alien may *take* real property by *purchase*, yet he cannot take by descent, by dower, or by the curtesy of England, which are the acts of the law, for the act of law, says sir Edward Coke, (7 Co. 25. a. Com. Dig. Aliens, C. 1. Bac. Ab. Aliens, c. 2 Bla. Com. 249.) giveth the alien nothing. Therefore, by the common law, (Co. Litt. 8. a.) an alien could not *inherit* to his father, though the father were a natural born subject, and the statutes have made no alteration in this respect in favour of persons who do not obtain denization or naturalization. So that an alien is at this day excluded not only from *holding* what he has taken by purchase, after office found, but from even *taking* by *descent* at all; and the reasons of this distinction between the act of the *alien himself*, by which he may take but cannot *hold*, and the act of the law by which he cannot even *take*, is marked by lord Hale in his judgment in the case of Collingwood v. Pace, 1 Vent. 417, where he says, though an alien may take by purchase by his own contract that which he cannot retain against the king, yet the law will not enable him by act of his own to transfer by hereditary *descent*, or to take by an act in *law*; for the law, *quæ nihil frustra* (which does nothing in vain) will not give an inheritance or freehold by act in law, for he cannot keep it.

The general rule of the law therefore appears to be, that an alien by *purchase*, which is his own act, may take real property but cannot *hold* it; by *descent*, dower, or curtesy, or any other conceivable act of the law, he cannot even *take* any lands, tenements, or hereditaments whatsoever, much less hold them. The reason of the law's general exclusion of aliens, we have seen ante, 1 book 371, 2.

(15) In former times no alien was permitted even to occupy a house for his habitation, and the alteration in that law was merely in favour of commerce and *merchants*. (See 1 Rapin Hist. Eng. 361. n. 9. Bac. Ab. Aliens, C.)

(16) But not before the inquest, 5 Co. 52. b. and if the purchase be made with the king's licence, there can be no forfeiture. 14 Hen. IV. 20. Harg. Co. Litt. 2. b. n. 2.

(17) The form of that oath is superseded by that required in 31 Geo. III. c. 32. s. 1. 43 Geo. III. c. 30.

sons to whom the proprietor, by his own *voluntary* act, should 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 XX.

OF ALIENATION BY DEED (1).

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.

I. First, then, 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*, κατ' ἐξοχην, 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 *instar dentium*, like the teeth of a saw, 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

(*a*) Co. Litt. 171. (*b*) Plowd. 434.

(1) See in general, Com. Dig. Fait; Cru. Dig. index, Deed; Vin. Ab. Deed; Bac. Ab, Obligations; and see 3 Chitty's Com. L. 5. to 11. as to the requisites of deeds and the distinctions between them and other contracts and instruments.

parchment, with some word or letters of the alphabet written between them; through which the parchment was cut, either in a straight or indented line, in such a manner as to leave half the word on *one part and half on the other. Deeds thus made were deno- [*296] minated *syngrapha* by the canonists (*c*); and with us *chirographa*, or hand-writings (*d*); the word *cirographum* or *cyrographum* being usually that which is 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 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 demised.

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 purchasors *bona fide* (*h*), or just and lawful creditors (*i*); any of which bad considerations will vacate the deed, and subject such persons, as put the same in ure, to forfeitures, and often to imprisonment. 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 himself (*k*). The consideration may be either *a *good* or a *valuable* one. A *good* consideration is such as that of [*297] blood, or of natural love and affection, when a man grants an estate to a near relation; being founded on 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 fide* purchasers (2).

(*c*) Lyndew. *l.* 1, *t.* 10, *c.* 1.
(*d*) Mirror. *c.* 2, § 27.
(*e*) Mirror. c. 2, § 27. Litt. § 371, 372.
(*f*) Co. Litt. 35.
(*g*) Stat. 13 Eliz. c. 5.
(*h*) Stat. 27 Eliz. c. 4.
(*i*) Stat. 13 Eliz. c. 5.
(*k*) Perk. § 533.
(*l*) 3 Rep. 83.

(2) This it has been said applies only to the case of a bargain and sale; for "herein it is said to differ from a gift which may be without any consideration or cause at all; and that (a bargain and sale) hath always some meritorious cause moving it, and cannot be without it." Shep. Touch. 221. A voluntary conveyance is good both in law and equity against the party himself. Tr. of Eq. b. 1. c. 5. s. 2. It was originally considered that if a person made a voluntary grant of lands, although he could not resume them himself, yet if he afterwards made another conveyance of them for a valuable consideration, the first grant would be void with regard to this purchaser under the 27 Eliz. c. 4. And though decided by lord Mansfield and the court that there must be some circumstance of *fraud* to

Thirdly; the deed must be *written*, or I presume *printed* (4), 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-estate or interest in lands, tenements, or hereditaments, made by livery of seisin, or by parol only (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; nor shall any assignment, grant, or surrender of any interest in any freehold hereditaments be valid: unless in both cases the same be put in writing, and signed by the party granting, or his agent lawfully authorized in writing (5), (6).

(*m*) Co. Litt. 229. F. N. B. 122.

vacate the first conveyance, and that the want of consideration alone was not sufficient. See Cowp. 705. Yet it was more recently determined in the case of Doe d. Otley v. Manning, 9 East. 59. that a *voluntary* settlement of lands made even *in consideration of natural love and affection*, and in favour of the nearest relation, as parents or children, is void, as against a subsequent purchaser for a *valuable* consideration, though with notice of a prior settlement before all the purchase money was paid or the deeds executed, and there was no fraud in fact in the transaction; for *the law* which is in all cases *the judge of fraud and covin* arising out of facts and *intents*, infers fraud in this case upon the construction of the 27 Eliz. c. 4. And it was remarked by lord Ellenborough in delivering the judgment of the court, that in the case of Doe v. Routledge, above referred to (and in which it was considered that lord Mansfield had established as a point of law, that the settlement must be *fraudulent*, as well as voluntary, to render it void), there was *no bonâ fide purchaser*, and that "*a marriage was had* upon the strength of that settlement," which is a good consideration. If a person is indebted at the time of making a voluntary grant, or becomes so soon afterwards, it will be held fraudulent and void with respect to creditors under the 13 Eliz. c. 5. and 6 Geo. IV. c. 16. Though a consideration is not in general essential to a deed. 7 T. R. 475. (3)

(3) In New-York, the law against fraudulent conveyances is contained in 2 R. S. 134, &c. but (id. 137, § 4,) makes the question of fraud a question of fact and not of law; and declares that a conveyance shall not be adjudged fraudulent solely on the ground that it was not founded on a valuable consideration. See the cases in New-York, collected in 1 Johns. Dig. 206, 207. A grantee ignorant of the fraud of the grantor, is not affected in his title by a subsequent purchase by one who has notice of the prior conveyance. (Id. 134, § 2.)

(4) Com. Dig. Fait, A. 3 Chitty's Com. L. 6. There seems no doubt that it may be printed, and that if signatures be requisite the name of a party in print at the foot of the instrument would suffice. 2 M. & S. 286.

(5) In New-York, no estate in lands, except leases for a term not exceeding *one* year, is valid, unless it be in writing subscribed by the *grantor*, or by his agent authorized in writing, or be created by operation of law. And no *contract* for any greater estate is valid, unless it be in writing signed by the *owner* of the *estate* or his agent. (2 R. S. 134, § 6, &c.) Every grant of a freehold estate must be subscribed and sealed by the grantor or his agent. (1 R. S. 738, § 137.)

(6) Courts of equity, though the practice has been lamented, have long been in the habit of deciding, upon equitable grounds, in contradiction to this positive enactment. The earliest case of the kind appears to have been that of *Foxcraft* v. *Lyster*, (Colles' P. C. 108). By the highest tribunal of the realm, it was held to be against conscience to suffer a party who had entered into lands, and expended his money, on the faith of a parol agreement, to be treated as a trespasser; and for the other party, in fraud of his engagement, (although that was only verbal), to enjoy the advantage of the money so laid out. This determination, though in the teeth of the act of Parliament, was clearly founded on sound abstract principles of natural justice; and confirmed as it has been by an almost daily succession of analogous authorities, is not now to be questioned.

It is settled also, that trusts of lands arising

Fourthly; the matter written must be *legally* or *orderly* set forth: that is, there must be words sufficient to specify the agreement and bind the parties; which *sufficiency must be left to the courts of [*298] law to determine (*n*) (7). 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 (8); and therefore I will here mention them in their usual (*o*) 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* may lessen, enlarge, explain, or qualify, but not totally contradict or be repugnant to the estate granted in the premises. As if a grant be "to A and the heirs of his body," in the premises; *habendum* "to him and his heirs for ever," or *vice versa*; 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;" *habendum* "to him for life," the *habendum* would be utterly void (*s*); for an estate of inheritance is vested in him before the *habendum* comes, and shall not afterwards be taken away or devested by it. The *tenendum*, "and to hold," is now of very

(*n*) Co. Litt. 225.
(*o*) *Ibid.* 6.
(*p*) See Appendix, N° II. § 1, pag. v.
(*q*) *Ibid.*
(*r*) Co. Litt. 21. 2 Roll. Rep. 19. 23. Cro. Jac. 476.
(*s*) 2 Rep. 23. 8 Rep. 56.

by implication, or operation of law, are not within the statute of frauds; if they were, it has been said, that statute would tend to promote frauds rather than prevent them. (*Young* v. *Peachy*, 2 Atk. 256, 257. *Willis* v. *Willis*, 2 Atk. 71. *Anonym.* 2 Ventr. 361).

The statute of frauds enacts, that no agreement respecting lands shall be of force, unless it be signed *by the party to be charged*; but the statute does not say that every agreement so signed shall be enforced. To adopt that construction would be, to enable any person who had procured another to sign an agreement, to make it depend on his own will and pleasure whether it should be an agreement or not. Lord Redesdale, indeed, has intimated a doubt, whether in any case (not turning upon the fact of part performance) an agreement ought to be enforced, which has not been signed by, or on behalf of, both parties; (*Lawrenson* v. *Butler*, 1 Sch. & Lef. 20. *O'Rourke* v. *Percival*, 2 Ball. & Beat. 62); Lord Hardwicke and Sir Wm. Grant held a different doctrine: (*Backhouse* v. *Mohun*, 3 Swanst. 435. *Fowle* v. *Freeman*, 9 Ves. 354. *Western* v. *Russel*, 3 Ves. & Bea. 192); Lord Eldon, without expressly deciding the point, seems to have leaned to Lord Redesdale's view of the question; (*Huddlestone* v. *Biscoe*, 11 Ves. 592); and Sir Thomas Plumer wished it to be considered whether, when one party has not bound himself, the other is not at liberty to enter into a new agreement with a third person. (*Martin* v. *Mitchell*, 2 Jac. & Walk. 428).

(7) If a deed correctly describe land by its quantities and occupiers, though it describe it as being in a parish in which it is not, the land shall pass by the deed. 5 Taunt. 207. A deed made with blanks and afterwards filled up and delivered by the agent of the party, is good. 1 Anst. 229. 4 B. & A. 672. And the palpable mistake of a word will not defeat the manifest intent of the parties. Dougl. 384.

(8) The maxim in pleading in favour of following approved precedents "num nihil simul inventum est et perfectum," may well be applied to conveyancing. Co. Litt. 230. a. Frequently the reason for using particular expressions will appear after many years study, when before, upon a cursory consideration, the words seemed unnecessary, if not improper.

little use, and is only kept in by custom. It was sometimes formerly *used to signify the tenure by which the estate granted was to be holden; *viz.* "*tenendum per servitium militare, in burgagio, in libero socagio, &c.*" But, all these being now reduced to free and common socage, the tenure is never specified. Before the statute of *quia emptores*, 18 Ed. I., it was also sometimes used to denote the lord of whom the land should be holden: but that statute directing all future purchasors 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.

[*299]

4. Next follow the terms of stipulation, if any, upon which the grant is made: the first of which is the *reddendum* 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*). Under the pure feodal system, this render, *reditus*, return or rent, consisted in chivalry principally of military services; in villeinage, of the most slavish offices; and in socage, it usually consists of money, though it may still consist of services, 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 mortgagee *500*l.* upon such a day, the whole estate granted shall determine; and the like (*z*).

[*300]

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 vassal'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 vassal 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 originally 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 auncestrel*), 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

(*t*) Appendix, N° 1. Madox. *Formul. passim.*
(*u*) *Ibid.* N° II. § 1, pag. iii.
(*w*) See pag. 41.
(*x*) Plowd. 13. 8 Rep. 71.
(*y*) Appendix, N° I. pag. i.
(*z*) *Ibid.* N° II. § 2, pag. viii.
(*a*) *Ibid.* N° I. pag. i.
(*b*) *Feud. l.* 2, *t.* 8 & 25.
(*c*) Co. Litt. 384.
(*d*) Litt. § 143.

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 statute *no warranty whatsoever is implied (*h*); they bearing no sort 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*). [*301]

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 a 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 fee-simple 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 disseisor 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 the *warranting ancestor; as where a younger brother released to his father's disseisor, with warranty, this was collateral to the elder brother (*m*). But where the very conveyance to which the warranty was annexed immediately followed a disseisin, or operated itself as such, (as, where a father tenant for years, with remainder to his son in fee, aliened 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 disseisin*; and, being too palpably injurious to be supported, was not binding upon any heir for such tortious warrantor (*n*). [*302]

(*e*) Co. Litt. 174.
(*f*) *Ibid.* 384.
(*g*) *Ibid.*
(*h*) *Ibid.* 102.
(*i*) Litt. § 733.
(*k*) Co. Litt. 373.
(*l*) Litt. § 703. 706, 707.
(*m*) *Ibid.* § 705. 707.
(*n*) *Ibid.* § 698. 702.

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 from 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 aliene their lands with warranty; which collateral warranty of the father descending upon the son (who was the heir of both his parents) barred him from claiming his maternal inheritance; to remedy which the statute of Gloucester, 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.
[*303] *to make the same provision universal, by enacting, that no collateral warranty should be a bar, unless where assets descended from the same ancestor (*q*); but it then proceeded not to effect (9). However, by the statute 11 Hen. VII. 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 in possession, 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 Gloucester, 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 bar (*r*): which was therefore formerly mentioned (*s*) 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 (*t*). 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

(*o*) Co. Litt. 102.
(*p*) Litt. 711, 712.
(*q*) Co. Litt. 373.
(*r*) Litt. § 712. 2 Inst. 293.
(*s*) Pag. 116.
(*t*) Co. Litt. 374. 2 Inst. 335.

(9) In New-York lineal and collateral warranties are abolished, but heirs and devisees continue liable to the covenants and agreements of their ancestor or testator to the extent of the lands received by them. (1 R. S. 739, § 141.)

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.

*7. After warranty usually follow *covenants* (10), or conven- [*304] tions, 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 grantee's quiet enjoyment; or the like; the grantee may covenant to pay his rent, or keep the premises in repair, &c. (u) 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 (11). It is also in some respects a less security, and therefore more beneficial to the grantor; who usually *covenants* only for the acts of himself and his ancestors, whereas a general *warranty* extends to all mankind. For which reasons the covenant has in modern practice totally superseded the other.

8. Lastly, comes the *conclusion*, which mentions the execution and date of 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) (12).

(u) Appendix, N° II. § 2, pag. viii.
(w) *Ibid.* pag. xii.
(x) Co. Litt. 46. Dyer, 28.

(10) As to covenants in general, see Com. Dig. Covenant. The word "*covenant*" is not essentially necessary to the validity of a covenant, for a *proviso* to pay is a covenant, and may be so declared upon. Clapham v. Moyle, Lev. 155. And it may be inferred from the exception in another covenant. 16 East, 352.

A vendor's covenant that he hath right to convey is usually only against his own acts, and not absolutely that he has a good title. Sometimes when he takes by descent, he covenants against his own acts and those of his ancestor; and if by devise, it is not unusual for him to covenant against the acts of the devisor as well as his own. But the usual words "notwithstanding any act by him done," &c. are generally to be taken as confining the covenant to acts of his own. 2 Bos. & P. 22. 26. Hob. 12. See the constructions on covenants for good title. 2 Saund. 178. a. b. 181.

Covenants which affect, or are intimately attached to the thing granted, as to repair, pay rent, &c. are said to run with the land, and bind not only the lessee, but his assignee also, 5 Co. 16. b. and enure to the heir and assignee of the lessor, even although not named in the covenant. See 2 Lev. 92. As are also those which the grantor makes that he is seised in fee, has a right to convey, for quiet enjoyment, for further assurance, and the like, which enure not only to the grantee, but also to his assignee. 1 Marsh. 107. S. C. 5 Taunt. 418. 4 M. & S. 188. id. 53. and to executors, &c. according to the nature of the estate. 2 Lev. 26. Spencer's case, 5 Co. 17. b. 3 T. R. 13. And these are covenants real, as they either pass a realty, or confirm an *obligation*, so connected with realty, that he who has the realty is either entitled to the benefit of, or is liable to perform, the obligation. Fitz. N. B. 145. Shep. Touch. c. 7. 161. See, as to right and liability of suing and being sued on these covenants, in case of heirs, assignees, &c. 1 Chitty on Pl. 10, 11. 13. 38, 39. 42.

(11) The executors and administrators are bound by every covenant without being named, unless it is such a covenant as is to be performed personally by the covenantor, and there has been no breach before his death. Cro. Eliz. 553.

(12) The date of a deed is not essential. Com. Dig. Fait, B. 3. In ancient times the date of the deed was generally omitted, and the reason was this, viz. that the time of prescription frequently changed, and a deed dated before the time of prescription was not pleadable, but a deed without date might be alleged to be made within the time of prescription. Dates began to be added in the reigns of Ed. II. and Ed. III.

Where a deed purported to bear date on the

I proceed now to the *fifth* requisite for making a good deed; the *reading* (13) 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 (*y*).

[*305] *Sixthly, it is requisite that the party, whose deed it is, should *seal* (14), and now in most cases I apprehend should *sign* it also (15). The use of seals, as a mark of authenticity 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 in England. For though sir Edward Coke (*c*) relies on an instance of king Edwin'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 authority, 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

(*y*) 2 Rep. 3. 9. 11 Rep. 27.

(*z*) 1 Kings, c. 21. Daniel, c. 6. Esther, c. 8.

(*a*) "And I bought the field of Hananeel, and weighed him the money, even seventeen shekels of silver. 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.

(*c*) 1 *Inst.* 7.

(*d*) "*Propria manu pro ignorantia literarum signum sanctae crucis expressi et subscripsi.*" Seld. *Jan. Angl. l.* 1, § 42. And this (according to Procopius), the emperor Justin in the east, and Theodore king of the Goths in Italy, had before authorized by their example, on account of their inability to write.

20th of November, and was executed by one of two defendants on the 16th of that month, and by the other on a previous day, it was held to be immaterial, it not appearing that a blank was left for the date at the time of the execution. 6 Moore, 483. A person may declare in covenant that the deed was indented, made, and concluded, on a day subsequent to the day on which the deed itself is stated on the face of it to have been indented, made, and concluded. 4 East, 477. And where there is no date to a deed, and it directs something to be done within a certain time after its supposed date, the time will be calculated from the delivery. 2 Ld. Raym. 1076. And see Bac. Ab. Leases, I. 1. Com. Dig. Fait, B. 3.

(13) 2 Co. 3. 9. 12 Co. 90. Skin. 158. 2 Atk. 327. 8 T. R. 147. Com. Dig. Fait, B. 2.

(14) See in general, Com. Dig. Fait, A. 2. Sealing must be averred in pleading. 1 Saund. 290. n. 1. If A. execute a deed for himself and his partner by the *authority* of his partner, and *in his presence*, it has been held a good execution, though only sealed *once*, 4 T. R. 313. 3 Ves. 578. though it is an established rule, that one partner cannot bind the other partners by deed. 7 T. R. 207. A person executing a deed for his principal, should sign in the name of the principal, 6 T. R. 176. or thus, "for A. B. (the principal), E. F. his attorney." 2 East, 142.

(15) Signing seems unnecessary, unless in cases under the statute of frauds and deeds executed under powers. Com. Dig. Fait, B. 1. 17 Ves. J. 459.

the same unsurmountable reason, the Normans, a brave but *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 (*e*). 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 (*f*). And in the reign of Edward I. every freeman, and even such of the more substantial villeins as were fit to be put upon juries, had their distinct particular seals (*g*). The impressions of these seals were sometimes a knight on horseback, sometimes other devices: but coats of arms were not introduced into seals, nor 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. [*306]

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 authenticate 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 (*h*) (16).

A seventh requisite to a good deed is, that it be *delivered* (17) by the party himself or his certain attorney, which therefore is *also expressed in the attestation; "sealed and *delivered*." A deed takes ef- [*307]

(*e*) Lamb. *Archeion.* 51.

(*f*) "*Normanni chirographorum confectionem, cum crucibus aureis, aliisque signaculis sacris, in Anglia firmari solitam, in earum impressam mutant, modumque scribendi Anglicum rejiciunt.*" Ingulph.

(*g*) Stat. Exon. 14 Ed. I.

(*h*) 3 Lev. 1. Stra. 764.

(16) In *Ellis* v. *Smith* (1 Ves. jun. 13), Chief Justice Willes said, "I do not think sealing is to be considered as signing; and I declare so now, because, if that question ever comes before me, I shall not think myself precluded from weighing it thoroughly, and decreeing that it is *not* signing, notwithstanding the *obiter dicta*, which in many cases were *nunquam dicta*, but barely the words of the reporters." And see to the same effect, *Smith* v. *Evans*, (1 Wils. 313). See also note 5 ante.

(17) With regard to the delivery of a deed, no particular form or ceremony is necessary; it will be sufficient if a party testifies his intention in any manner, whether by action or word, to deliver or put it into the possession of the other party, as by throwing it down upon the table, with the intent that it may be taken up by the other party; or if a stranger deliver it with the assent of the party to the deed. Phil. Ev. 449. 9 Rep. 137. a. Com. Dig. tit. Evidence. (A. 3.) Proof that a party signed a deed which bears on the face of it a declaration that the deed was sealed by the party, is when the testimony of a subscribing witness cannot be obtained, or when he has no recollection on the subject, evidence to be left to a jury that the party sealed and delivered the deed. 7 Taunt. 251. 2 Marsh. 527. and see 17 Ves. J. 439. Peake R. 146. It is a question of fact for the jury upon the whole evidence, whether a bond was delivered as a deed to take effect from the moment of delivery, or at some future time. In Murray v. Earl Stair, Abbott, C. J. told the jury, that "to make the delivery conditional, it was not necessary that any express words should be used at the time, the conclusion was to be drawn from all the circumstances. It obviated all question as to the intention of the party, if at the time of delivery he expressly declared, that he delivered it as an escrow, but that was not essential to make it an escrow." 2 B & C. 88. See also 4 B. & A. 440.

fect 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 (*i*), 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 (*j*).

The *last* requisite to the validity of a deed is the *attestation*, or execution of it *in the presence of witnesses* (18): though this is necessary, rather for preserving the evidence, than for constituting the essence of the deed (19). Our modern deeds are in reality nothing more than an improvement or amplification of the *brevia testata* 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 become 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 sort of memorandum: thus: "*hijs testibus Johanne Moore, Jacobo Smith, et aliis, ad hanc 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, hundredo, &c.* (*n*).

Afterwards the attestation of other witnesses was allowed, the tri-
[*308] al in *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. st. 1. c. 2. And in this manner, with some such clause of *hijs 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,

(*i*) Perk. § 130.
(*j*) Co. Litt. 36.
(*k*) *Feud. l.* 1, *t.* 4.
(*l*) Co. Litt. 7.
(*m*) *Feud. l.* 2, *t.* 32.
(*n*) Spelm. *Gloss.* 228. Madox. *Formul.* N° 21. 322. 660.
(*o*) Co. Litt. 6.
(*p*) 2 Inst. 77.

(18) It is not essential to the validity of a deed, in general, that it should be executed in the presence of a witness. Com. Dig. Fait, B. 4. Phil. on Evid. 413 to 421. 4th ed. And where the names of two fictitious persons had been subscribed by way of attestation, the judge permitted the plaintiff, who had received the deed from the defendant in that deceitful shape, to give evidence of the hand-writing of the defendant himself; and where the subscribing witness denied any recollection of the execution, proof of his hand-writing was deemed sufficient. Peake Rep. 23. 146. 2 Camp. 635.

The distinction between executions of deeds at common law, and executions under powers, is fully established. It is a well known rule, that all the formalities and circumstances prescribed by a power are to be strictly observed. If a particular number of attesting witnesses is required, there must be that number. If they are to attest in a particular form, that form must be followed; and they must attest every thing that is necessary for the execution of the power. 4 Taunt. 214. 7 Taunt. 361. 17 Ves. 454. S. C. Also Sugden on Powers. But the 54 Geo. III. c. 168. aids the omission of a memorandum of attestation, when in fact the deed has been duly attested.

(19) In New-York if a deed conveying a freehold is not acknowledged before the proper officer, nor attested by at least one witness, it does not take effect against a purchasor or incumbrancer until so acknowledged. (1 R. S. 738, § 137.)

or letters patent, the style is now altered: for at present the king is his own witness, and attests his letters patent thus: "*Teste 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 *hijs testibus* entirely discontinued till the reign of Henry the Eighth (*r*): which was also the æra 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 usually subscribed their attestations, either at the bottom, or on the back of the deed (*s*).

III. We are next to consider, how a deed may be *avoided*, 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 most cases signing also: or, 7. Delivery; it is a void deed *ab initio*. It may also be avoided by matter *ex post facto*: as, 1. 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*) (20). 2. By breaking off, or defacing the seal (*u*) (21). 3. By delivering it up to be cancelled; *that [*309] is, to have lines drawn over it in the form of lattice-work or *cancelli*; though the phrase is now used figuratively for any manner of obliteration or defacing it (22). 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. 5. 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 (23): 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

(*q*) Madox. *Formul.* N° 515.
(*r*) *Ibid.* Dissert. fol. 32.
(*s*) 2 Inst. 78. See pag. 378.
(*t*) 11 Rep. 27.
(*u*) 5 Rep. 23.
(*w*) Toth. nemo. 24. 1 Vern. 348.

(20) See in general, Com. Dig. Fait, F. A deed may be considered as an entire transaction, operating as to the different parties from the time of execution by each, but not perfect till the execution by all. Any alteration made in the progress of such a transaction still leaves the deed valid as to the parties previously executing it, provided the alteration has not affected the situation in which they stood. As thus, when A. executed there were blanks, which were filled up and interlineations made before B. executed, but as the filling up and interlineations did not affect A. the conveyance to C. was valid. 4 B. & A. 675.

(21) See in general, Com. Dig. Fait, F. 2. It must be an intentional breaking off or defacing by the party to whom the other is bound, for if the person bound break off or deface the seal, it will not avoid the deed. Touchstone, c. 4. s. 6. 2. And if it appear that the seal has been affixed and afterwards broken off or defaced by accident, the deed will still be valid. Palm. 403. And the defacing or cancelling a deed will not in any case divest property which has once vested by transmutation of possession. 2 Hen. Bla. 263; and see 4 B. & A. 675. If several join in a deed and be separately bound thereby, the breaking off the seal of one, with intent to discharge him from future liability, will not alter the liability of the others. 1 B. & C. 682.

(22) But when an estate has passed by the deed, the merely cancelling it will not suffice, but there must be a reconveyance, or in case of a lease, a surrender. 6 East, 86. 4 B. & A. 465.

(23) The courts of common law are equally competent to nullify the deed in such case, upon the principle that the mind not assenting, it is not the deed of the party sought to be charged by it; and there is no occasion to resort to a court of equity for relief, when evidence at law can be adduced. 2 T. R. 765.

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 infinite, to descant upon all the several instruments made use 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 (24), 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 *secondary*: whereby the benefit or estate originally created, is enlarged, restrained, transferred, or extinguished.

[*310] **Original* conveyances are the following: 1. Feoffment; 2. Gift; 3. Grant; 4. Lease; 5. Exchange; 6. Partition: *derivative* are, 7. Release; 8. Confirmation; 9. Surrender; 10. Assignment; 11. Defeazance (25).

1. A feoffment, *feoffamentum*, 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 proved. 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 word "*enfeoff*" or "grant," 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 the feodal grant, "*tenor est qui legem dat feudo*," is in other words become the maxim of our law with relation to feoffments, "*modus legem dat donationi*" (*z*). 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 which 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

(*x*) Co. Litt. 9.
(*y*) *Ibid.*
(*z*) Wright, 21.
(*a*) pag. 108.
(*b*) Co. Litt. 42.

(24) As to the remarks made in the *text* from this page to page 327 inclusive, the student will bear in mind that they apply to the common law conveyances, not always to statutory conveyances; otherwise he may fall into many errors. See p. 334, &c.

(25) Feoffments with livery of seisin are abolished in New-York; deeds of bargain and sale, and of lease and release, may still be used, but are deemed grants. 1 R. S. 738, &c. § 136, 142.

confined to his person, and subsist only for his life; unless the feoffor, by express provision in the creation *and constitution of the [*311] 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 or 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 corporeal possession of the land or tenement; which was held absolutely necessary to complete the donation. "*Nam feudum sine investitura nullo modo constitui potuit* (f):" and an estate was then only perfect, when, as the author of Fleta expresses it in our law, "*fit juris et seisinae conjunctio* (g) (26)."

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 by-standers, 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 property of lands. In the Roman law *plenum dominium* was not said to subsist, unless where a man had both the *right* and the *corporal possession*; which possession could not be acquired without 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 [*312]

(c) See Appendix, N° I.
(d) Co. Litt. 9.
(e) Litt. § 66.
(f) Wright, 37.
(g) *l.* 3, *c.* 14, § 5.
(h) *Nam apisci*mur *possessionem corpore et animo; neque per se corpore, neque per se animo. Non autem ita accipiendum est, ut qui fundum possidere velit, omnes glebas circumambulet; sed sufficit quamlibet partem ejus fundi introire.* (*Ff.* 41, 2, 3.) And again: *traditionibus dominia rerum, non nudis pactis, transferuntur.* (*Cod.* 2, 3, 20.)
(i) Decretal, *l.* 3, *t.* 4, *c.* 40.

(26) Lord Mansfield (in *Taylor* v. *Horde*, 1 Burr. 107), said, in conformity with the text above, "seisin is a technical term, to denote the completion of that investiture by which the tenant was admitted into the tenure, and without which no freehold could be constituted or pass. Disseisin, consequently, means some way of turning the tenant out of his tenure, and usurping his place and feudal relation." It should be observed, however, that livery of seisin, though the fact be not indorsed on the deed of feoffment, will be presumed, where the possession has gone according to the feoffment for a great length of time. (*Jackson* v. *Jackson*, Fitz-Gib. 147. *Throckmorton* v. *Tracey*, 1 Plowd. 149). And a court of equity will even supply the admitted defect of livery of seisin, where a feoffment appears to have been made for a good or a valuable consideration. (*Thompson* v. *Attfield*, as stated from Reg. Lib. in Mr. Raithby's note to 1 Vern. 40. *Burgh* v. *Francis*, 1 Eq. Ca. Ab. 390).

not the *jus in re*, or complete and full right, unless by corporal possession. Therefore in dignities possession is given by instalment; 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 entitled 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 as to transmit the inheritance to his own heirs: *non jus, sed seisina, facit stipitem* (*l*).

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 occupancy of this sign or symbol [*313] was per*mitted 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 seller 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 seller to the lord or his steward by delivery of a rod or verge, and then from the lord to the purchasor by re-delivery of the same, in the presence 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 encumbering 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 ab- [*314] solute 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

(*k*) See pag. 209. 227. 228.
(*l*) Flet. *l.* 6, *c.* 2, § 2.
(*m*) ch. 4. v. 7.
(*n*) Stiernhook, *de jure Sueon. l.* 2, *c.* 4.
(*o*) Hickes, *Dissert. Epistolar.* 85.

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 (at the common law) 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*) (27).

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 (*r*). 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, [*315] 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 (*v*) 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) (28), 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

(*p*) Co. Litt. 46.
(*q*) See pag. 165.
(*r*) pag. 167.
(*s*) Co. Litt. 49.
(*t*) *Ibid.* 48.
(*v*) pag. 288.
(*w*) Co. Litt. 48. West. Symb. 251.

(27) This is still so in conveyances at common law, but it is otherwise in conveyances to uses under the statute. 1 Saund. on Uses and T. 3 ed. 128, 9. 4 Taunt. 20. Willes, 682. 2 Wils. 75. See note 5. p. 144. ante.

(28) But the authority given to an attorney, &c. for this purpose should be by deed. And the authority so given, whether by the feoffor or feoffee, must be completely executed or performed in the lifetime of both the principals; for if either of them die before the livery of seisin is completed, his attorney cannot proceed, because his authority is then at an end. See 2 Roll. Ab. 8 R. pl. 4, 5. Co. Litt. 52. b.

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*) (29); 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 anciently 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 feodal law (*y*), *pares debent interesse investiturae feudi, et non* [*316] *alii*: for which 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 sight 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 an 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 or seisin, as feoffments in fee-simple (*h*). [*317] *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 fee-simple, 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,

(*x*) Litt. § 414.
(*y*) *Feud. l. 2, t. 55.*
(*z*) See pag. 307.
(*a*) Gilb. 10. 35.
(*b*) Dyer, 18.
(*c*) See Appendix, N° I.
(*d*) Litt. § 421, &c.
(*e*) Co. Litt. 42.
(*f*) *Ibid.* 52.
(*g*) West. Symbol. 256.
(*h*) Litt. § 59.
(*i*) § 57.

(29) By the act of induction, a parson is put into actual possession of a part for the whole. 2 B. & A. 470.

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 est 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 signiories, 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 concessi*, "have given and granted."

4. A lease 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, and to farm let; *dimisi, concessi, et ad firmam *tradidi.*" *Farm*, [*318] or *feorme*, is an old Saxon word signifying provision (*n*): 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 restriction, 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 seised 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 tenant for life, could make no leases which should bind the issue 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 (*o*). 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,

(*k*) Co. Litt. 9.
(*l*) *Ibid.* 172.
(*m*) *l.* 2, c. 18.
(*n*) Spelm. Gloss. 229.
(*o*) Co. Litt. 44.

have made leases for years, or for life, estates in tail, or in fee, with-
[*319] out any limitation or controul. 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, which extends not to 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 (30). 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 can-
[*320] not resort to them to distrein (*q*). 7. It must be of *lands and tenements most commonly letten for twenty years past; so that if they had been let for above half the time (or eleven years out of the twenty) either for life, or 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 (31).

(*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 any such ecclesiastical or eleemosynary corporation, and the successor shall be entitled 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.

(30) By various acts of parliament, and also frequently by private settlements, a power is granted of making leases in possession, but not in reversion, for a certain term; the object being that the estate may not be incumbered by the act of the party beyond a specific time. Yet persons, who had this limited power of making leases in possession only, had frequently demised the premises to hold *from the day of the date*; and the courts in several instances had determined that the words *from the day of the date* excluded the day of making the deed; and that of consequence these were leases in reversion, and void. See Cro. Jac. 258. 1 Buls. 177. 1 Rol. Rep. 387. 3 Buls. 204. Co. Litt. 46. b. But this question having been brought again before lord Mansfield and the court of king's bench, it was established, that *from the day* might either be inclusive or exclusive of the day; and therefore that it ought to be construed so as to effectuate these important deeds, and not to destroy them. Pugh v. Duke of Leeds, Cowp. 714. Freeman v. West, 2 Wils. 165.

(31) In New-York there are none of these statutes as to leases, but the common law remains in force.

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*) (32). But by a saving expressly made, this statute of 1 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 1 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. 11, and 43 Eliz. c. 29; which extend the restrictions laid by *the last-mentioned statute [*321] on bishops, to certain other inferior corporations, both sole and aggregate. From laying all which together we may collect, that all colleges, cathedrals, and other ecclesiastical or eleemosynary corporations, and all parsons and vicars, are restrained from making any leases of their lands, unless under the following regulations: 1. They must not exceed twenty-one years, or three lives, from the making. 2. The 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 of 13 & 18 Eliz. shall be void.

(*r*) Co. Litt. 45.
(*s*) 11 Rep. 71.
(*t*) Co. Litt. 45.

(32) The law of concurrent leases is somewhat involved from the conflicting operation of the ancient common law with the several statutes passed on the subject; but the practical results are as follows:

If a bishop have made a lease for twenty-one years, under the 32 Hen. VIII. he may make a fresh lease for twenty-one years from the making thereof, at any time exceeding a year before the expiration of the first, which will be valid upon being confirmed by the dean and chapter. For it is of no consequence to the successor how long the old lease has to run at the period of making the new one, as the term of the latter commences from its date, and both are thus running out at the same time; and if the first expire the next year, the second will expire twenty years after, as there is not at any period an interest of more than twenty-one years in lease. But there cannot be two leases in the same way running for *lives*, at the same time, nor one lease for lives and another for years; they must be both of the latter description, or they cannot co-exist, or concur in conferring an interest upon the lessee. If the second lease be granted to any other than the lessee in the first, the lessor may lose his remedy by distress for the recovery of his rent during the continuance of the old lease, because the old lessee may pay his rent to the new lessee, who is become the reversioner, and against whom the lessor can only proceed by action of debt or covenant. See Bac. Ab. tit. "Leases and Terms for Years," E. Rule 3.

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*) (33). Secondly, that though leases contrary to these acts are declared void, yet they are good against the *lessor* during his life, if he be a sole corporation; and are also good against an aggregate corporation so long as the head of it lives, who is presumed to be the most concerned in interest. For the act was intended for the benefit of the successor only; and no man shall make an advantage of his own wrong (*w*).

[*322] *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 the future be reserved in wheat or malt, reserving a quarter of 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 (*x*) to 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 new-found Indies (which effects were likely to increase to a greater degree), devised this method for upholding the revenues of colleges. Their foresight 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 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 (34).

The leases of beneficed clergymen are farther restrained, in case of their non-residence, by statutes 13 Eliz. c. 20, 14 Eliz. c. 11, and 18 Eliz. c. 11, and 43 Eliz. c. 9. (35), which direct, that if any beneficial 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

(*u*) Co. Litt. 44.
(*w*) *Ibid.* 45.
(*x*) Strype's Annals of Eliz.

(33) If the lease has not been confirmed by the ordinary, the acceptance of rent by the successor will not ratify the rest of the term which may be unexpired at the time of the death or cession of the lessor. Bro. Abr. Acceptance, pl. 26. And a lease of lands which have never before been in lease, though confirmed by the patron and ordinary, and in every other respect duly executed, is not binding upon the successor. 1 Bingh. Rep. 24.

(34) The colleges receiving a quarter of wheat, or its value, for every 13*s.* 4*d.* which they are paid in money, the corn rent, from the present price of wheat, will be in proportion to the money rent as four to one. But both these rents united are very far from the present value. Colleges therefore, in order to obtain the full value of the term, take a fine upon the renewal of their leases.

(35) These statutes were repealed by the 43 Geo. III. c. 84, and further amendments were made by the temporary statutes 54 Geo. III. c. 54. & 175. But the residence of spiritual persons is now regulated by the 57 Geo. III. c. 99, which repealed all former acts on this subject. By the 32d section of the statute, all contracts or agreements for letting houses of residence, or the buildings, gardens, orchards, and appurtenances, necessary for the convenient occupation of the same, belonging to any benefice, and in which spiritual persons are by the order of the bishop to reside, are void; and persons holding possession thereof after the day such spiritual persons are directed to reside, upon notice to that effect, forfeit 40*s.* for every day they so hold over.

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 (36): 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). [*323]

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 of *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) (37). 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 (e). 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 (f).

6. A partition 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 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. 1. and 32 Hen. VIII. c. 32. made no alteration in this point. But the statute of frauds, 20 Car. II. c. 2. hath now abolished this distinction, and made a deed in all cases necessary. [*324]

These are the several species of *primary* or *original* conveyances. Those

(y) For the other learning relating to leases, which is very curious and diffusive, I must refer the student to 3 Bac. abridg. 295. (title, *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. 300.
(g) Litt. § 250. Co. Litt. 169.

(36) But by the 57 Geo. III. c. 99. all these statutes which vacate leases by non-residence are repealed.

(37) On this account an exchange by lease and release is to be preferred, for in that case the statute executes the possession instantly, upon execution of the deeds. Butler's note to Co. Litt. 271. b. n. 1.

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 [*327] lease one grants an interest less *than his own, reserving to himself a reversion; in assignments he parts with the whole property, and the assignee stands to all intents and purposes in the place of the assignor (47).

11. A defeazance is a collateral deed, made at the same time with a feoffment or other conveyance, containing certain conditions, upon the performance of which the estate then created may be *defeated* (*z*) or totally undone. And in this manner mortgages were in former times usually made; the mortgagor enfeoffing the mortgagee, and he at the same time executing a deed of defeazance, whereby the feoffment was rendered void on repayment of the money 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 afterwards 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, or 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 (48)*.

Uses and *trusts* are in their original of a nature very similar, or rather exactly the same: answering more to the *fidei-commissum* than the *usus fructus* of the civil law: which latter was the temporary right of using a

(*z*) From the French verb *defaire*, *infectum reddere*.

(*a*) Co. Litt. 236.
(*b*) *Ibid.* 237.

is also what is termed a surrender in law, as if a person who has a term for years, or an estate for life, accept a new lease incompatible with the interest granted by the former lease, this is a surrender in law, being a virtual surrender of the former term. 5 Co. 11. 2 Prest. Conv. 138. And an agreement between the lessor and the assignee of the term, whereby the former agreed to pay an annual sum over and above the rent, towards the premium paid by the assignee to the lessee, operates as a surrender of the whole term. 1 T. R. 441. See also 6 East, 86. 12 East, 134. 2 B. & A. 119.

(47) This is not universally true; for there is a variety of distinctions when the assignee is bound by the covenants of the assignor, and when he is not. The general rule is, that he is bound by all covenants which run with the land; but not by collateral covenants which do not run with the land. As if a lessee covenants for himself, executors, and administrators, concerning a thing not in existence, as to build a wall upon the premises, the assignee will not be bound; but the assignee will be bound, if the lessee has covenanted for himself and *assigns*. Where the lessee covenants for himself, his executors and administrators, to reside upon the premises, this covenant binds his assignee, for it runs with, or is appurtenant to, the thing demised. 2 Hen. Bl. 133. The assignee in no case is bound by the covenant of the lessee, to build a house for the lessor any where *off the premises*, or to pay money to a *stranger*. 5 Co. 16. The assignee is not bound by a covenant broken *before* assignment. 3 Burr. 1271. See Com. Dig. Covenant. But if an underlease is made even for a day less than the whole term, the underlessee is not liable for rent or covenants to the original lessee, like an assignee of the whole term. Dougl. 183. 56. An assignee is liable for rent only whilst he continues in possession under the assignment. And he is held not to be guilty of a fraud, if he assigns even to a beggar, or to a person leaving the kingdom, provided the assignment be executed before his departure. 1 B. & P. 21. The same principle prevails in equity. See 2 Bridg. Eq. Dig. 138. 1 Vern. 87. 2 Vern. 103. 8 Ves. 95. 1 Sch. & Lefroy, 310. But the assignee's liability commences upon acceptance of the lease, though he never enter. 1 B. & P. 238.

(48) See in general, Saunders on Uses and Trusts; and 2 Saunders Rep. index, Uses and Trusts.

thing, without having the ultimate property, or full dominion of the substance (*c*). But the *fidei-commissum*, which usually was created by will, was the disposal of an inheritance to one, in confidence that he *should convey it or dispose of the profits at the will of another. [*328] And it was the business of a particular magistrate, the *praetor fidei 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 fiduciarium*, a right in trust, for which there was a remedy in conscience; and *jus precarium*, a right in courtesy, for which the remedy was only by entreaty 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 *cestuy que use*, or him to whose use it was granted, 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 *cestuy 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 religious houses directly, but to *the use of* the religious houses (*h*): which the clerical chancellors of those times held to be *fidei-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 *pos- [*329] sessed of the use only, such use was devisable by will. But we have seen (*i*) 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 a 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 Edw. IV. (before whose time, lord Bacon remarks (*k*), there are not

(*c*) *Ff.* 7. 1. 1.
(*d*) *Inst.* 2, *tit.* 23.
(*e*) *Ff.* 43. 26. 1. Bacon on Uses, 8vo. 306.
(*f*) Plowd. 352.
(*g*) Stat. 50 Edw. III. c. 6. 1 Ric. II. c. 9. 1 Rep. 139.
(*h*) See pag. 271.
(*i*) pag. 272.
(*k*) On Uses, 313.

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 *cestuy que use*, and not against his heir or alienee. 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 nor queen, on account of their dignity royal (*n*), nor any [*330] corporation *aggregate, on account of its limited capacity (*o*), could be seised to any use but their own; that is, they 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 to whom dower was assigned, 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 *cestuy 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 usu 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*) (49). 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

(*l*) Keilw. 42. Year-book, 22 Edw. IV. 6.
(*m*) *Ibid.* 46. Bacon on Uses, 312.
(*n*) Bro. *Abr. tit. Feoffm. al uses*, 31. Bacon of Uses, 346, 347.
(*o*) Bro. *Abr. tit. Feoffm. al. uses*, 40. Bacon, 347.
(*p*) 1 Rep. 122.
(*q*) 1 Jon. 127.
(*r*) Cro. Eliz. 401.
(*s*) See page 296.
(*t*) 1 And. 37.
(*u*) Moor. 634.
(*w*) 2 Roll. Abr. 780.
(*x*) Bacon of Uses, 312.
(*y*) *Ibid.* 308.

(49) Sece *ante*, p. 296. In the second section of the 3rd chapter of Gilbert on Uses, p. 222, the law is in substance thus laid down. If a feoffment be made, or a fine be levied, or recovery be suffered, without consideration, and no uses be expressed, the use results to the feoffor and his heirs. But if any uses be expressed, it shall be to those uses, though no consideration be had; and herein is the difference between raising uses by fine, feoffment, or other conveyance operating by transmutation of possession, and uses raised by covenant: for, upon the first, if no uses were expressed, it is equity that assigns the feoffor to have the resulting use; by the law, the feoffor has parted with all his interest; (see *Case* v. *Holford*, 3 Ves. 667): but where he expresses uses, there can be no equity in giving him the use against his own will. On the other hand, in case of a covenant there can be no use without a consideration; for the covenantee in such case can have no right by law, and there is no reason why equity should give him the use, (and see *Calthrop's case*, Moor, 101. *Stephen's case*, 1 Leon. 138. Jenkins' Cent. 6, case 36. *Mildmay's case*, 1 Rep. 176. 2 Roll's Ab. 790).

estate in the soil was not transferred by these transactions, no livery of seisin was necessary; *and, as the intention of the parties [*331] was the leading principle in this species of property, any instrument declaring that intention was allowed to be binding in equity. But *cestuy que use* could not at common law aliene 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 burthens; 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 *cestuy 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 outlines 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 [*332] 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 *cestuy 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 (*k*); and gave the lord the wardship of his heir, with certain other feodal perquisites (*l*).

These provisions all tended to consider *cestuy que use* as the real owner of the estate; and at length that idea was carried into full effect by the statute 27 Hen. VIII. c. 10. which is usually called the *statute of uses*, or, in 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 Gloucester, been frequently made a feoffee to uses, would upon the assumption of the

(*z*) Stat. 1 Ric. III. c. 1.
(*a*) Bro. *Abr. ibid.* 23.
(*b*) Jenk. 190.
(*c*) 4 Rep. 1. 2 And. 75.
(*d*) See pag. 137.
(*e*) Bro. *Abr. tit. executions*, 90.
(*f*) Use of the law, 153.
(*g*) Stat. 50 Edw. III. c. 6. 2 Ric. II. sess. 2, c. 8. 19 Hen. VII. c. 15.
(*h*) Stat. 1 Ric. II. c. 9. 4 Hen. IV. c. 7, c. 15. 11 Hen. VI. c. 3. 1 Hen. VII. c. 1.
(*i*) Stat. 11 Hen. VI. c. 5.
(*k*) Stat. 1 Ric. III. c. 1.
(*l*) Stat. 4 Hen. VII. c. 17. 19 Hen. VII. c. 15.

crown (as the law was then understood) have been entitled 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 enfeoffed 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 enfeoffed, the estate itself should vest in *cestuy que use* in like manner as he had the use. And so the stat. of Henry VIII., after reciting the various inconveniences before-mentioned, and many others, enacts, that

[*333] "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 entitled 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, *&c.* 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 *cestuy que use* complete owner of the lands and tenements, as well at law as in equity (50).

The statute having thus not abolished the conveyance to uses, but only annihilated the intervening estate of the feoffee, and turned the interest of *cestuy que use* into a legal instead of an equitable ownership; the courts of common law began to take cognizance of uses, instead of sending 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 raised, 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 purchasor 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 *cestuy 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 *cestuy que use*, who was now become the *terre-tenant* also; and they likewise were no longer devisable by will.

[*334] *The various necessities of mankind induced also the judges very soon to depart from the rigour 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 meanwhile 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

(*m*) 27 Hic. VIII. c. 5. (*n*) 2 Roll. Abr. 791. Cro. Eliz. 493.

(50) See 1 Saund. Rep. by serjt. Williams, 254. note 6.

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 constructions to declarations of uses, was also adopted in favour of *executory devises* (*p*). But herein these, which are called *contingent* or *springing* uses (51), differ from 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 permitted to be limited in equity; and then the statute executed the legal estate in the same manner as the use before subsisted. It was also held, that a use, though exe-

(*o*) Bro. *Abr. tit. Feoffm. al uses*, 30.
(*p*) See pag. 173.
(*q*) 1 Rep. 134. 138. Cro. Eliz. 439.
(*r*) Pollexf. 78. 10 Mod. 423.

(51) Mr. Sugden devotes a learned and instructive note, of considerable length, (annexed to the second chapter of his edition of Gilbert on Uses), to an elucidation of this subject. The reader will do well to peruse the whole, and not rest satisfied with the following extracts. Mr. Sugden says, shifting, secondary, and springing uses, are frequently confounded with each other, and with future or contingent uses. They may perhaps be thus classed: 1st, *Shifting* or *secondary uses*, which take effect in derogation of some other estate, and are either limited expressly by the deed, or are authorized to be created by some person named in the deed. 2ndly, *Springing uses*, confining this class to uses limited to arise on a future event, where no *preceding* use is limited, and which do not take effect in derogation of any other interest than that which results to the grantor, or remains in him, in the mean time. 3rdly, *Future or contingent uses*, are properly uses to take effect as remainders; for instance, a use to the first unborn son of A., after a previous limitation to him for life, or for years, determinable on his life, is a future or contingent use; but yet does not answer the notion of either a shifting or a springing use. Contingent uses naturally arose, after the statute of 27 Hen. VIII., in imitation of contingent remainders.

The first class, that is, *shifting or secondary uses*, are at this day so common that they pass without observation. In every marriage settlement, the first use is to the owner in fee until marriage, and after the marriage to other uses. Here, the owner, in the first instance, takes the fee, which upon the marriage ceases, and the new use arises. But a shifting use cannot be limited on a shifting use: and shifting uses must be confined within such limits as are not to tend to a perpetuity. (See *ante*, chap. 11). But a shifting use may be created after an estate-tail, to take effect at any period, however remote; because the tenant in tail for the time being may, by a recovery, defeat the shifting use.

As to the second class, or *springing uses*, before the statute of Hen. VIII. there was no mischief in an independent original springing use, to commence at a distant period, because the legal estate remained in the trustee. After the statute, too, the use was held to result to, or remain in, the person creating the future use, according to the mode of conveyance adopted, till the springing use arose. This resulting use the statute executed, so that the estate remained in the settlor till the period when the use was to rise: which might be at any time within the limits allowed by law, in case of an executory devise. When springing uses are raised by conveyances not operating by transmutation of possession, as such conveyances have only an equitable effect until the statute and use meet, a springing use may be limited by them at once: but where the conveyance is one which does operate by transmutation of possession, (as a feoffment, fine, recovery, or lease and release), two objects must be attended to, first, to convey the estate according to the rules of common law; secondly, to raise the use out of the seisin created by the conveyance. Now, the common law does not admit of a freehold being limited to commence *in futuro*. (See *ante*, p. 143).

As to the third class, or *future* or *contingent uses*, where an estate is limited previously to a future use, and the future use is limited by way of remainder, it will be subject to the rules of common law, and, if the previous estate is not sufficient to support it, will be void. (See *ante*, p. 168).

Future uses have been countenanced, and springing uses restrained, by what is now a firm rule of law, namely, that if such a construction can be put upon a limitation in use, as that it *may* take effect by way of remainder, it shall never take effect as a springing use. (*Southcot* v. *Stowel*, 1 Mod. 226, 237. 2 Mod. 207. *Goodtitle* v. *Billington*, Dougl. 758).

cuted, may change from one to another by circumstances *ex post 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 life: and, if she dies without issue, the whole results back to him in fee (*u*). 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 specially mentioned (*w*). 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 (*x*). And this was permitted, partly to indulge the convenience, and partly the caprice of mankind; who (as lord Bacon observes) (*y*) have always affected to have the disposition of their property revocable in their own time, and irrevocable ever afterwards.

[*335]

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 (52). But one or two technical scruples, which the judges found it

(*s*) Bro. *Abr. tit. Feoffm. al uses*, 30.
(*t*) Bacon of Uses, 351.
(*u*) *Ibid.* 350. 1 Rep. 120.
(*w*) See pag. 357.
(*x*) Co. Litt. 237.
(*y*) On Uses, 316.

(52) With respect to what shall be said to be an use executed by the statute of 37 H. VIII. c. 10. or a *trust* estate now not executed, it is held, that *where an use is limited upon an use, it is not executed, but the legal estate is vested in him to whom the first use is limited.* Dy. 155. As where an estate is conveyed to another in these words, "to W. and his heirs, to the *use* of him and his heirs, in trust for, or to the use of, R. and his heirs, the use is not executed in R. but in W.; and the legal estate is vested in him as trustee. Cas. T. Talb. 164. Ibid. 138, 139. 2 P. Will. 146. So where E. made a settlement to the use of himself and his heirs until his then intended marriage, and afterwards to the use of his wife for life, and after her death, *to the use of* trustees and their heirs during the life of E., upon trust to permit him to take the profits, remainder to the first and other sons of the marriage, &c., remainder to the use of the heirs of the body of E.; it was adjudged that E. took only a trust estate for life, for the use to him could not execute upon the use which was limited to the trustees for his life, and consequently the legal estate for his life was executed in them by the statute of uses, and the limitation to the heirs of the body of E. operated as words of purchase, and created a contingent remainder. Carth. 272. S. C. Comber, 312, 313. 1 Ld. Raym. 33. 4 Mod. 380. See also 7 T. R. 342. Ibid. 438. S. C. Ibid. 433. 12 Ves. 89.

So *where something is to be done by the trustees which makes it necessary for them to have the legal estate*, such as payment of the rents and profits to another's separate use, or of the debts of the testator, or to pay rates and taxes and keep the premises in repair, or the like, the legal estate is vested in them, and the grantee or devisee has only a trust estate. 3 Bos. & Pul. 178, 179. 2 T. R. 444. 6 T. R. 213. 8 East, 248. 12 East, 455. 4 Taunt. 772. As where lands were devised to trustees and their heirs in trust for A., a married woman and her heirs, and that the trustees should from time to time pay the rents and profits to A. or to such person as she, by any writing under her hand, as well during coverture as being sole, should appoint without the intermeddling of her husband, who he willed should have no benefit or disposal thereof; and as to the inheritance of the premises in trust for such person and for such estates as A. by her will, or other writing under her hand, should appoint, and, for want of such appointment, in trust for her and her heirs; the question was, whether this was an use executed by the statute, or a bare trust for the wife? and the court held it to be a trust only, and not an use executed by the statute. 1 Vern. 415. And again, in a late case where a de-

had to get over, restored it with tenfold increase. They held, in the first place, that "no use could be limited on a use (z);" and that when a man bar-

(z) Dyer, 155.

vise was to trustees and their heirs upon trust, to permit a married woman to receive the rents and profits during her life *for her own sole and separate use*, notwithstanding her coverture, *and without being in any wise subject to the debts or control of her then or after taken husband*, and her receipt alone to be a sufficient discharge, with remainder over, it was held that the legal estate was vested in the trustees; for it being the intention of the testator to secure to the wife a separate allowance, free from the control of her husband, it was essentially necessary that the trustees should take the estate with the use executed, in order to effectuate that intention; otherwise the husband should be entitled to receive the profits, and defeat the very object which the testator had in view. 7 Term Rep. 652. See also 5 East, 162. 9 East, 1. So where lands were devised to trustees and their heirs in trust to pay out of the rents and profits several legacies and annuities, and to pay all the residue of the rents and profits to C., a married woman, during her life, for her separate use, or as she should direct, and after her death the trustees to stand seised to the use of the heirs of her body with remainders over, it was held by lord *King*, that the use was executed in the trustees during the life of C., who had only a trust estate in the surplus of the rents and profits for life, with a contingent remainder to the heirs of her body, and that her eldest son would take as a purchaser; for by the subsequent words, viz. "that the trustees should stand seised to the use of the heirs of the body of C.," the use was executed in the persons entitled to take by virtue thereof; and, therefore, there being only a trust estate in C., and an use executed in the heirs of her body, these different interests could not unite and incorporate together, so as to create an estate-tail by operation of law in C. And he took a difference between the principal case and that of Broughton v. Langley (1 Lutw. 814. 2 Ld. Raym. 873.); for there it was to permit A. to receive the rents and profits for life, but in the principal case it was a trust to *pay over* the rents and profits to another, and therefore the estate must remain in the trustees to perform the will, 8 Vin. 262. pl. 19. 1 Equ. Cas. Abr. 383, 384., and this decree was affirmed in the house of lords. 3 Bro. C. P. 458. See 3 Bos. & Pull. 179. So where lands were devised to trustees and their heirs in trust to *pay out* of the rents and profits, *after deducting rates, taxes, and repairs*, the residue to C. S. for life, and after his decease to the use of the heirs male of the body of C. S. with remainder over; it was held by lord Thurlow, that the use was executed in the trustees during the life of C. S. who had only a trust estate for life, and the remainder in tail was a legal estate, which could not unite and incorporate together, and C. S. could not suffer a valid recovery; for in order to make a good tenant to the præcipe, there must either be a *legal* estate for life, and a legal remainder in tail, or an equitable estate for life, with an equitable remainder in tail. 1 Bro. C. C. 75. And also, where lands were devised to trustees and their heirs in trust, that they should, out of the rents and profits, or by sale or mortgage of the whole, or so much of the estate as should be necessary, raise a sum sufficient to pay the testator's debts and legacies, and afterwards in trust, and to the use of T. B, for life, with several remainders over, the question was, whether the legal estate vested in the trustees? Lord *Hardwicke* was of opinion that the devise to the trustees and their heirs carried the *whole fee* to them, and therefore the estate for life, as well as the estates in remainder, were merely trust estates in equity; that part of the trust was to sell the whole, or a sufficient part of the estate, for the payment of debts and legacies, which would carry a fee by construction, though the word heirs were omitted in the devise, as in 1 Eq. Cas. Abr. 184. for the trustees must have a fee in the whole estate to enable them to sell, because, it being uncertain what they may sell, no purchaser could otherwise be safe; that the only doubt he had, was on the case of Lord Say and Seal v. Lady Jones, before Lord King, and affirmed in the house of lords, as to that point: but, on examination, that case differed in a material part; and, taking together all the clauses of that will, it only amounted to a devise to trustees and their heirs during another's life, upon which a legal remainder might be properly limited. 1 Ves. 143. S. C. 2 Atk. 246. 570. And it was taken for granted in 2 Ves. 646. that a devise to trustees and their heirs in trust, to pay the rents and profits to another, vested the legal estate in the trustees. For in general the distinction is, that where the limitation to trustees and their heirs is *in trust to receive the rents and profits and pay them over to A.* for life, &c. this use to A. is not executed by the statute, but the legal estate is vested in the trustees to enable them to perform the will; but where the limitation is to trustees and their heirs in trust, *to permit and suffer A. to receive* the rents and profits for his life, &c. the use is executed in A. unless it be necessary the use should be executed in the trustees, to enable them to perform the trust, as in the case of Harton v. Harton, above mentioned. So in Taunt. 109. the devise being to trustees and their heirs in trust, *to pay unto, or permit and suffer, the testator's niece to have, receive, and take*, the rents and profits for her life, it was held that the use was executed in the niece, because the words *to permit*, &c. came last; and in a will the last words shall prevail. See 1 Eq. Ca. Abr. 383. As where lands were devised to trustees and their heirs *to the intent and purpose to permit* A. to receive the rents and profits for his life, and after that the trustees should stand seised to the use of the heirs of the body of A. with a proviso, that A. with

gains 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 (*a*). 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 *cestuy que use* (53). 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 termor is not *seised*, but only *possessed* (*b*); 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 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*) (54).

[*336]

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 *cestuy que use* of the term was expressly driven into the court of chancery

(*a*) 1 Aud. 37. 136.
(*b*) Bacon law of Uses, 335. Jenk. 244.
(*c*) Popb. 76. Dyer. 369. 2 T. R. 448.
(*d*) 1 Eq. Cas. Abr. 383, 384.

the consent of the trustees, might make a jointure on his wife, it was held that this was an use executed in A., and not a trust estate, for it would have been a plain trust at common law, and what was a trust of a freehold of inheritance at common law is executed by the statute which mentions the words trust as well as use; and the case in 2 Vent. 312. adjudged to the contrary upon this point, was denied to be law. 1 Lutw. 814. 823. S. C. 2 Ld. Raym. 873. 2 Salk. 679. And the same distinction was taken by lord Kenyon, in the case of Doe, on the demise of Woolley v. Pickard, Stafford summer assizes, 1797, and by Mr. Justice Lawrence, in Jones v. Prosser, Worcester spring assizes, 1798.

The statute of uses is not held to extend to *copyhold estates*, for it is against the nature of their tenure, that any person should be introduced into the estate without the consent of the lord, Gilb. Ten. 170. *nor to leases for years* which are actually in existence at the time of their being assigned to the use; as where A. possessed of a lease for years, assigns it to B., to the use of C., all the estate is in B.; and C. takes only a trust or equitable estate. But if A., seised in fee, makes a feoffment to the use of B. for a term of years, the term is served out of the seisin of the feoffee, and is executed by the statute. It is the same if he bargains and sells the estate of which he is seised in fee for a term of years. Dy. 369. a., and in the margin, 2 Inst. 671.

Nor does the statute of uses extend to cases where the party seised to the use and the *cestuy que* use is the *same person*, except there be a direct impossibility for the use to take effect at common law. Bac. Law Tracts, 352. 2 ed. 4 M. & S. 178. In that case, a release was made to A. and C. and their heirs, habendum to them and their heirs and assigns as tenants in common, and not as joint-tenants, to the use of them, their heirs, and assigns, held that A. and C. took as tenants in common. Cro. Car. 230. Jenkins v. Young, Ibid. 244. And see Cruise's Dig. title, Use, S. 31. et seq.

But where the purposes of a trust may be answered, by giving the trustees a less estate than a fee, no greater estate shall arise to them by implication, but the uses in remainder limited on such lesser estate so given to them shall be executed by the statute. Doe d. White v. Simpson, 5 East, 162. 1 Smith, 383. And a devise in fee to trustees, without any specific limitation to *cestuy que trust*, the latter takes a beneficial interest in fee. 8 T. R. 597. And an express devise in fee to trustees may be cut down to an estate for life, upon an implication of intent. 7 T. R. 433. So where the trustees are to receive and pay rents to a married woman, upon her death the legal estate is executed in the person who was to take in remainder. 7 T. R. 654.

(53) It is the practice to introduce only the names of the trustee and the *cestuy que trust*; the estate being conveyed to A. and his heirs, *to the use of* A. *and his heirs*, in trust for B. and his heirs; and thus this important statute has been effectually repealed by the repetition of half a dozen words.

(54) See note 52, ante.

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 (*e*). 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 (*f*).

*However, the courts of equity, in the exercise of this new [*337] jurisdiction, have wisely avoided in a great degree those mischiefs which made uses intolerable. The statute of frauds, 29 Car. II. c. 3, having required that every declaration, assignment, or grant of any trust in lands or hereditaments (except such as arise from implication or construction of law), shall be made in writing signed by the party, or by his written will (55): the courts now consider a trust-estate (either when expressly declared or resulting by such 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 trustee 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 purchasor without notice (*g*); which, as *cestuy 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 executions on judgments, statutes, and recognizances (by the express provision of the statute of frauds) (56), 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 (*h*), than from any well-grounded principle (57). It hath also been held not liable to escheat to the lord, in consequence of attainder or want of heirs (*i*): because the trust could never be intended for his benefit. But let us now return to the statute of uses (58).

(*e*) 1 Hal. P. C. 243.
(*f*) Vaugh. 50. Atk. 591.
(*g*) 2 Freem. 43.
(*h*) 1 Chanc. Rep. 254. 2 P. Wms. 640.
(*i*) Hard. 494. Burgess and Wheat, Hil. 32 Geo. II. in Canc.

(55) See accordingly 2 R. S. 134, § 6, 7; and id. 137, § 2.

(56) But it is held, that if a man be cestuy que trust of a term of years, it is not assets within this statute, for it extends only to a trust of land in fee. 2 Vern. 248. 8 East, 486. 4 B. & A. 684. And see further, 2 Saund. 11. a. n. 17. and note m, by Patteson.

(57) It has been decided, that when the legal and equitable estates meet in the same person, the trust or equitable estate is merged in the legal estate; as if a wife should have the legal estate and the husband the equitable; and if they have an only child, to whom these estates descend, and who dies intestate without issue, the two estates having united, the descent will follow the legal estate, and the estate will go to an heir on the part of the mother: and thus, which appears strange, the beneficial interest will pass out of one family into another, between whom there is no connexion by blood. Goodright v. Wells, Doug. 771.

Before the statute of uses there was neither dower nor tenancy by the curtesy of an use, but since the statute, the husband has curtesy of a trust estate, though it seems strange that the wife should, out of a similar estate, be deprived of dower. See ante, p. 132. n. But this distinction is accounted for by Ld. Redesdale, in 2 Sch. & Lif. 388. and see 2 Saund. 26. note q.

(58) The Revised Statutes of New-York abolish all uses and trusts, except trusts arising by implication of law and such as are hereafter mentioned, and converts them into *legal* estates, whether they existed before or since 1

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 sort as private as possible, and to save the trouble of making livery of seisin, the only ancient conveyance of corporal 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

[*338] *12. A twelfth species of conveyance, called a *covenant to stand seised to uses* (59): by which a man, seised of lands, covenants in

Jan. 1830: except that in case of trusts *existing before* 1 *Jan.* 1830, and which were not merely nominal, but, connected with some power of actual disposition or management, the estate of the trustees is still preserved.

Express trusts can only be *created*, to sell lands for the benefit of creditors, or to sell, mortgage, or lease lands for the benefit of legatees, or to satisfy any charge thereon, or to receive the rents and profits of lands, and apply them to the use of any person during his or her life, or for a shorter term, or to receive such rents, &c. and accumulate them as allowed by law. (1 R. S. 728, § 55.)

If lands are purchased with the money of one person in the name of another, no use or trust results in favour of the first, except that the conveyance shall be *presumed* fraudulent as against his creditors, unless the fraudulent intent is disproved. But if the purchase was so made without his consent, the trust shall then result in his favour.

No implied or resulting trust, however, can be alleged to defeat the title of a purchasor for valuable consideration and without notice. (§ 51–54.) In all cases where an *express* trust is created, but is not declared in the conveyance to the trustees, the conveyance is deemed absolute as to the *subsequent* creditors of the trustees not having notice of the trust, and as to purchasors from the trustees for valuable consideration and without notice. But if the trust is expressed in the instrument creating the estate, the conveyance by the trustee is void. (§ 64, 65.)

A *devise* of lands to executors or trustees to be sold or mortgaged, where the trustees are not also empowered to receive the rents and profits, gives such trustees only a *power*, and the estate descends to the heirs subject to the power. So also, any *express* trust not authorised as above, vests no *estate* in the trustees, but gives them only a power, and the estate remains or descends subject to the power. (§ 56, 58, 59.)

Any valid express trust vests the whole estate in law and *equity* in the trustees, giving to those beneficially interested only a right to enforce the trust in equity. The *creator* of the trust may declare, however, to whom the lands shall belong on the failure or termination of the trust, and may grant or devise them subject to the trust. Such grantee or devisee, has the *legal* estate as against all persons except the trustees and those claiming under them. But no one beneficially interested in a trust for the receipt of the *rents and profits* of lands, can in any way dispose of his interest therein: but the right of one for whose benefit a trust for the payment of a *sum in gross* is created, is assignable. (§ 63.)

When the purposes for which an express trust was created have ceased, the estate of the trustees also ceases: and on the death of the last surviving trustee of any *express* trust, his estate does not pass to his heirs, but the trust vests in the court of chancery. (§ 67, 68.) The court of chancery may also accept the resignation of any trustee under an express trust, or remove such trustee and appoint another on the application of any one beneficially interested. (§ 69, &c.)

By a comparison of 1 R. S. 722, § 1: 727, § 45: 750, § 10: and 744, § 1: the Act above referred to would seem to apply to leasehold as well as freehold estates.

(59) See in general, 2 Saund. Rep. 42. c. 96. b. et seq. & id. index, tit. Covenants. On the authority of Roe v. Tranman, it was held in 4 Taunt. 20. that a covenant to stand seised is good, though the use be a freehold to arise at a future time.

The only considerations which will support a covenant to stand seised are blood and marriage, therefore if a person covenant to stand seised to the use of a relation and a stranger, it is said that the whole use will vest in the relation. 2 Roll. Abr. 784. pl. 2 & 4. So where a man covenants to stand seised to the use of himself for life, with remainders over to his relations, and with a power for the tenant for life to make leases, this power is void, for the lessees would be strangers to the consideration of blood. Cro. Jac. 181. Cross v. Faustenaitch. So if a man should covenant to stand seised to the use of himself for life, with remainders to the use of trustees (who are not his relations), for the purpose of preserving contingent remainders, with remainder to his first and other sons in tail, &c. no use would vest in the trustees, because the consideration does not extend to them. This is a principal reason why covenants to stand seised are fallen into disuse. 2 Saunders, U. & T. 82.

This and the next species of conveyance, viz. bargain and sale, are to be distinguished by the nature of the instrument, and not by the words merely; for the words "covenant

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 (*k*), without ever seeing it, by a kind 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 real contract, whereby the bargainor for some pecuniary consideration bargains and sells, that is, contracts to convey, the land to the bargainee; and becomes by such a bargain a trustee for, or seised to the use of, the bargainee: and then the statute of uses completes the purchase (*l*); or, as it hath been well expressed (*m*), 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 (60). 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 (*n*); 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 it is to *foresee, and provide against, all the [*339] consequences of innovations! This omission has given rise 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, attorney-general to Charles I.) have formerly doubted its validity (*o*). 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 enrolment, makes the bargainor stand seised to the use of the bargainee, and vests 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 (61), is capable of receiving a release of the freehold

(*k*) Bacon, Use of the law, 151.
(*l*) *Ibid.* 150.
(*m*) Cro. Jac. 696.
(*n*) See pag. 142.
(*o*) 2 Mod. 252.

to stand seised to uses" are not essential in the one, nor "bargain and sell" in the other. For if a man for natural love and affection, bargain and sell his lands to the use of his wife or child, it is a covenant to stand seised to uses, and without enrolment vests the estate in the wife or child: so if for a pecuniary consideration he *covenants to stand seised* to the use of a stranger, if this deed be enrolled within six months, it is a good and valid bargain and sale under the statute, and the estate vests in the purchasor. 7 Co. 40. b. 2 Inst. 672. 1 Leon. 25. 1 Mod. 175. 2 Lev. 10. A bargain and sale without enrolment may be construed and act as a grant or surrender, which shews that the words "bargain and sell" have no precise legal import. 1 Prest. Conv. 38.

How a covenant to stand seised is to be *pleaded*, see 3 Salk. 306. 2 Ves. Sen. 253. 2 Saund. 97. b. c. Lutw. 1207. Carth. 307. 3 Lev. 370. 2 Chitty on Pleading, 4th ed. 576.

(60) See last note to this chapter.

(61) It must be borne in mind that in this

and reversion; which, we have seen before (*p*), must be made to a tenant in possession: and, accordingly, the next day, a release is granted to him (*q*). 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 (*r*).

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 (*s*), and founded in a previous power, reserved at the raising of the uses (*t*), to revoke such as were then declared; and to appoint others in their stead, which is incident to the power of revocation (*u*). 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.

[*340] *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 to *discharge* them again: of which nature are, *obligations* or bonds, *recognizances*, and *defeazances* upon them both.

1. An *obligation* or bond, is a deed (*v*) 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, though not a *direct*, yet a *collateral*, charge upon the lands (62). How it affects the personal property of the obligor will be more properly considered hereafter.

If the condition of a bond be impossible at the time of making it, or be

(*p*) pag. 324.
(*q*) See Appendix, N° II. § 1, 2.
(*r*) Co. Litt. 270. Cro. Jac. 604.
(*s*) pag. 335.
(*t*) See Appendix, N° II. pag. xl.
(*u*) Co. Litt. 237.
(*v*) See Appendix, N° III. pag. xliii.

and former instances, where it is said the statute annexes the *possession*, upon the vesting of the *use*, an actual occupancy or possession of the land is not meant.

The effect of the statute is to complete the title of the bargainee, or to give him a vested interest by which his ownership in the estate is as fully confirmed, as it would have been according to the common law, by livery and seisin. Mr. Preston in his Conveyancing, vol. 2. page 211. has discussed and explained this subject with his usual ability. See also Cruise Dig. index, Lease and Release. See also the opinion of Mr. Booth in Cases and Opinions, 2 vol. 143 to 149. tit. Reversions, edit. 1791. As to the effect of a conveyance by lease and release of a reversion expectant on a term, and the mode of pleading such a conveyance, see Co. Litt. 270. a. n. 3. 4 Cruise, 199. and 2 Chitty on Pleading, 4th edit. 578. note e.

(62) If in a bond the obligor *binds himself*, without adding his *heirs, executors, and administrators*, the executors and administrators are bound, but not the heir, Shep. Touch. 369. for the law will not imply the obligation upon the heir. Co. Litt. 209. a. A bond does not seem properly to be called an incumbrance upon land; for it does not follow the land like a recognizance and a judgment; and even if the heir at law alienes the land, the obligee in the bond, by which the heir is bound, can have his remedy only against the person of the heir to the amount of the value of the land; and he cannot follow it when it is in the possession of a *bonâ fide* purchasor. Bull. N. P. 175.

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, [*341] 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 (*w*). On the forfeiture of a bond, or its becoming single, the whole penalty was formerly recoverable at law: but here the courts of equity interposed, and would not permit a man to take more than in 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 like practice having gained some footing in the courts of law (*x*), the statute 4 and 5 Ann. c. 16. at length enacted, in the same spirit of equity, that, in case of a bond conditioned for the payment of money, the payment or tender of the principal sum due, with interest and costs, even though the bond be forfeited and a suit commenced thereon, shall be a full satisfaction and discharge (63).

2. A *recognizance* is an obligation of record, which a man enters into before some court of record or magistrate duly authorized (*y*), with condition to do some particular act; as to appear at the assises, to keep the peace, to pay a debt, or the like (64). 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 acknowledgment 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," which condition to be void on performance of the thing stipulated: in which case the king, the plaintiff, C. D. &c. is called the recognizee, "*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 propriety a deed, though the effects of it are greater than a *common obliga- [*342] tion (65), being allowed a priority in point of payment, and bind-

(*w*) Co. Litt. 206.
(*x*) 2 Keb. 553. 555. Salk. 596, 597. 6 Mod. 11. 60. 101.
(*y*) Bro. *Abr. tit. recognizance*, 24.

(63) If a bond lie dormant for twenty years, it cannot afterwards be recovered; for the law raises a presumption of its having been paid, and the defendant may plead *solvit ad diem* to an action upon it.* And in some cases, under particular circumstances, even a less time may found a presumption.† This length of time, however, must be understood as only raising a presumption; which presumption of course may be rebutted by evidence on the part of the plaintiff. See accordingly 2 R. S. 301, § 46, &c. and the same presumption applies to judgments.

(64) See the different recognizances fully treated of, 2 Saund. 68. and id. index, tit. Recovery and Statute Merchant and Staple.

(65) A recognizance has priority in point of payment, over a common obligation; but a judgment, or decree (not being a mere interlocutory decree), takes place of a recognizance. (*Littleton* v. *Hibbins*, Cro. Eliz. 793. *Searle* v. *Lane*, 2 Freem. 104; *S. C.* 2 Vern. 89. *Perry* v. *Phelips*, 10 Ves. 34). Between decrees and judgments, the right to priority of payment is determined by their real priority of date, without regard to the legal fiction of relation to the first day of Term. (*Darston* v. *Earl of Oxford*, 3 P. Wms. 401, n. *Joseph* v. *Mott*, Prec. in Cha. 79. *Morrice* v. *Bank of England*, 3 Swanst. 577).

* 1 Burr. 434. 4 Burr. 1963.

† 1 T. R. 271. Cowp. 109.

ing the lands of the cognizor, from the time of enrolment on record (*z*) (66). 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 (*a*), and shewn to be a charge upon real property (67).

3. A defeazance, on a bond, or 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 (*b*). 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 purchasors 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 (*c*); and the failure of the general register established by king Richard the First, for the starrs or mortgages made to
[*343] *Jews, in the *capitula de Judaeis*, 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 (*d*). And some of our own provincial divisions, particularly the extended county of York, and the populous county of Middlesex, have prevailed with the legislature (*e*) to erect such register 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 (68).

(*z*) Stat. 29 Car. II. c. 3. See pag. 161.
(*a*) See pag. 160.
(*b*) Co. Litt. 237. 2 Saund. 47.
(*c*) Hickes *Dissertat. epistolar.* 9.
(*d*) Dalrymple on feodal property, 262, &c.
(*e*) Stat. 2 & 3 Ann. c. 4. 6 Ann. c. 35. 7 Ann. c. 20. 8 Geo. II. c. 6.

(66) A recognizance not enrolled will be considered as an obligation, or bond, only; but, being sealed and acknowledged, must be paid as a debt by specialty. (*Bothomly* v. *Lord Fairfax*, 1 P. Wms. 340. *S. C.* 2 Vern. 751). If enrolment is allowed by special order, after the proper time has elapsed, this, for most purposes, makes the recognizance effectual from the time of its date; but, should the cognizor, between the date and the enrolment of the recognizance, have borrowed money on a judgment, the judgment-creditor will be allowed a preference. (*Fothergill* v. *Kendrick*, 2 Vern. 234).

(67) In New-York recognizances do not bind lands, but are mere evidences of debt, 2 R. S. 362, § 21.

(68) Mr. Christian observes, that "by the register-acts, a registered deed shall be preferred to a prior unregistered deed; yet it has been decreed by Lord Hardwicke, if the subsequent purchaser by the registered deed had previous notice of the unregistered one, he shall not avail himself of his deed, but the first purchaser shall be preferred. (1 Ves. sen. 64)." So also in New-York, 9 Johns. 163.

10 Johns. 457. 2 Johns. C. R. 603. 15 Johns. 555.

The legislature has been understood by our courts, not to have meant, that (the form of registration being unobserved) actual notice of an incumbrance on an estate should not bind a purchaser. (*Davis* v. *Earl of Strathmore*, 16 Ves. 430. *Le Neve* v. *Le Neve*, 3 Atk. 650. *Bushell* v. *Bushell*, 1 Sch. & Lef. 100. *Doe* v. *Allsop*, 5 Barn. & Ald. 147). The French courts adhered much more rigidly to the letter of their old code respecting registration, and held, that a creditor or purchasor might plead want of registration, in bar of a prior incumbrance, though such creditor or purchasor had full notice of the prior incumbrance, before he made his own contract or purchase. They thought, that, to admit a contrary doctrine would leave it always open to argument, whether sufficient notice had, or had not, been received; and that this would lead to endless uncertainty, confusion, and perjury; therefore, that it was much better the right of the subject should depend upon certain and fixed principles of law, than upon rules and constructions of equity. They decided, consequently, that nothing, not even the most actual and direct notice, should countervail the want of registration. (See Mr. Hargrave's note to Co. Litt. 290 b). With us, it has been much doubted, whether our courts ought ever to have suffered the question of notice to be agitated, as against a party who has duly registered his conveyance. (*Wyatt* v. *Barwell*, 19 Ves. 439).

Registration of an *equitable* mortgage, or other incumbrance upon lands situated in a register county, is clearly not, of itself, presumptive notice to a subsequent *legal* mortgagee, so as to take from him his legal advantage. (See, however, 2 R. S. 762, § 38: that the recording acts of New-York include all conveyances by which the title to any real estate may be affected in law or *equity*). (*Morecock* v. *Dickens*, Ambl. 680. *Bedford* v. *Bacchus*, 2 Eq. Ca. Ab. 615. *Hodgson* v. *Dean*, 2 Sim. & Stu. 224). Nor will registration of a mortgage of the equity of redemption preclude a third mortgagee from tacking that incumbrance, if he has bought in the first mortgage; provided he had not notice of the second mortgage, when he lent his money. (See contra, 1 Caine's Cases in Error, 112). (*Cater* v. *Cooley*, 1 Cox, 182). And an equitable mortgagee will not be compelled to deliver up the title deeds deposited with him, but will be entitled to the benefit thereof, as against a prior legal mortgagee, whose mortgage has been duly registered, but notice of which registration is not brought home to the equitable mortgagee; (See, however, 2 Johns. Ch. R. 603.) (*Wiseman* v. *Westland*, 1 Younge & Jerv. 121); for, it is settled, (though the soundness of the doctrine, as we have seen, is questionable), that the registry of a deed does not, of itself, amount to constructive notice. (*Cator* v. *Cooley*, 1 Cox, 182. *Jolland* v. *Stainbridge*, 3 Ves. 485. *Pentland* v. *Stokes*, 2 Ball & Beat. 75. *Bushell* v. *Bushell*, 1 Sch. & Lef. 97, 103. *Latouche* v. *Dunsany*, 1 Sch. & Lef. 157. *Underwood* v. *Courtown*, 2 Sch. & Lef. 64. *Hodgson* v. *Dean*, 2 Sim. & Stu. 225).

In New-York as early as Dec. 12, 1753, an act was passed to take effect on the 1st of June, 1754, by which a first registered *bona fide* mortgage for valuable consideration was preferred to a prior or subsequent unregistered mortgage. 3 R. S. Appendix 50: thus making priority of registry priority of right, as between mortgages. 19 Johns. 282. In 1798 an act was passed, taking effect Feb. 1, 1799, but applying only to the counties of Ontario, Steuben, Tioga, Herkimer, Oneida, Chenango, and Otsego, requiring all deeds and conveyances affecting lands in law or *equity* to be recorded, and making them void as against any *subsequent* bona fide purchasor or *mortgagee* for valuable consideration, unless they were recorded before the recording of the deed or conveyance of such subsequent purchasor or mortgagee. 3 R. S. Append. 29. A similar act was passed in 1819, applicable to Rensselaer county. Id. 38. In 1811, April 1, an act went into effect in the city of New-York, which required all deeds or conveyances in *fee* to be recorded, in order to be good as against a subsequent purchasor or mortgagor *bona fide* for valuable consideration, and without notice: id. p. 33: see as to other counties, id. 39, 40, 41.

In March 19, 1813, the act of 1753, as above quoted, was in substance re-enacted, with this proviso; in addition that no *mortgage* should prejudice the title of a bona fide *purchasor*, unless it should *have* been duly registered. Id. p. 43.

The case of *Jackson* v. *Campbell*, 19 Johns. 280, seems to have decided on these acts that *mortgages* take preference between each other according to priority of registry: but that an unrecorded mortgage cannot recover its precedence over a subsequent *deed* by being recorded after the execution, but before the recording, of the deed. See, however, the marginal note in that case; the report is far from being clear. See also act of 1822, 3 R. S. Appendix, p. 45.

The present law makes any conveyance of real estate made after Jan. 1, 1830, void as against a subsequent purchasor in good faith and for valuable consideration, whose conveyance shall be first recorded. 1 R. S. 756, § 1. It defines real estate as here meaning lands, tenements, and hereditaments, and chattels real, except leases not exceeding 3 years. Id. 762, § 36. It defines purchasor as one whose interest in real estate is *conveyed* for a valuable consideration, and also as including every assignee of a mortgage or lease, or other conditional estate. § 37. It defines conveyance as embracing every instrument in writing by which any estate or interest in real estate is created, aliened, mortgaged, or assigned, or by which the title to real estate may be affected in law or *equity*: except wills, leases for not more than three years, and executory contracts for the sale or purchase of lands, and letters of attorney. § 38, 39. So that now deeds and mortgages *seem* to be on the same footing. These conveyances are valid between the parties, though not recorded, 2 John. C. R. 603, and even against a subsequent doctated judgment, 1 Johns. 216.

CHAPTER XXI.

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* (1) are, especially of late years, become a very common mode of assurance. For it may sometimes happen, that by the ingenuity of some, 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 or- [*345] dinary 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

(1) See in general, Com. Dig. Parliament, R. 7. Bac. Ab. Statute, F. Vin. Ab. Statute, E. 2. Cruise Dig. title, 33. 4 vol. 509. and see ante, 1 book, 181. et seq. as to making them, and id. 59 & 85 to 92; and as to the construing them, Co. Litt. by Thomas, 1 vol. 27 to 34.

Where a private act is obtained by a tenant in tail, it will bar the estate-tail and all remainders, and the reversion depending on it, although the persons in remainder or reversion should not give their consent to the act, 2 Cas. & Op. 400. 4 Cru. Dig. 520. and although the rights of the remainderman were not excepted in the saving. Ambl. 697. But where a tenant for life enters into an agreement to convey the fee-simple, and a private act is passed for establishing such agreement, in which is a saving of the rights of all persons not parties to the act, it will not affect the persons entitled to the remainder expectant on the life estate. 3 Wils. 483. Private acts are construed in the same manner as common law conveyances; and therefore when any doubt arises as to the construction of a private act, the court will consider what was the object and intention of the parties in obtaining the act, and endeavour, if possible, to give effect to that intention. 4 Cru. Dig. 526. et vid. supra, 2 T. R. 701. It has been already observed, that a saving in an act, which is repugnant to the body of the act, is void, ante, 1 book, 89. 1 Co. 47. a; and in like manner it is held, that the general saving clause in a private act will not control the provisions in the body of the act, but must be so expounded as to be consistent therewith, or else be void. 2 Vern. 711. *Riddle* v. *White*, 4 Gwill. 1387. A private act may be relieved against, if obtained upon fraudulent suggestions, 2 Bl. Com. 346. 2 Hargr. per argum. 392. Canc. 8. 1773. *M'Kenzie* v. *Stuart*, Dom. Proc. 1754. *Biddulph* v. *Biddulph*, 4 Cru. Dig. 549; and it has been held to be void, if contrary to law and reason, 4 Co. 12. and no judge or jury is bound to take notice of it, unless the same be specially pleaded, but see ante, book 1. p. 86. and id. note 21. As to the distinctions between public and private acts, see ibid.; and as to the mode of passing private bills, and the standing orders of the house of lords relating thereto, see 4 Cru. Dig. 516, 517, 518. 553—563. As to the mode of pleading a private act of parliament, see 2 Chitty on Pleading, 4 ed. 579.

purchasor, against the remote or latent claims of infants or disabled persons, by settling a proper equivalent in proportion to the interest so barred (2). 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 was entitled 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 estate, 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 esse*, 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 consent is so given or purchased, and who are therein particularly named: though it hath been holden, that, even if such saving be omitted, the act shall bind none but the parties (*c*).

*A law thus made, though it binds all parties to the bill, is yet [*346] 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; it hath been relieved against, when obtained upon fraudulent suggestions (*d*); it hath been holden to be void, if contrary to law and reason (*e*) (3); 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* (4) are also matter of public record. For as St. Germyn says (*f*), the king's excellency is so high in the law, that no freehold may be given to the king, but derived from him but by matter of re-

(*a*) Lord Clar. Contin. 162.
(*b*) *Ibid.* 163.
(*c*) Co. 138. Godb. 171.
(*d*) Richardson v. Hamilton. Canc. 8. Jan. 1773. Mc Kenzie v. Stuart. *Dom. Proc.* 13 Mar. 1754.
(*e*) 4 Rep. 12.
(*f*) Dr. & Stud. b. 1, d. 8.

(2) Tenants for life sometimes obtain private acts of parliament to enable them to charge the inheritance for the amount of necessary repairs and improvements, which must enure to the benefit of the remainderman and reversioner. But parliament of course is the judge whether the proposed repairs and improvements are adequately beneficial to the amount to be charged upon the estate. As to the forms to be observed in the passing of private statutes see ante, 1 Book, 181. et seq.

(3) In New-York all laws of each session are published by the State Printer, and may be read in evidence from the printed volume. 1 R. S. 184, § 10. 12.

(4) Com. Dig. Grant, G. Bac. Ab. Prerogative, F. Vin. Ab. Prerogative of the King, T. Cruise Dig. title, 34. 4 vol. 564.

cord. And to this end a variety of offices are erected, communicating in a regular subordination one with another, through which all the king's grants must pass, and be transcribed, and enrolled; that the same may be narrowly inspected by his officers, who will inform him if any thing contained therein is improper, or unlawful to be granted. These grants, whether of lands, honours, liberties, franchises, or 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*.

Grants or letters patent must first pass by *bill* (5): which is pre-
[*347] pared by the attorney and solicitor general, in consequence *of a warrant from the crown; and is then signed, that is, subscribed 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 (*g*)." Otherwise the course is to carry an extract of the bill to the keeper of the *privy seal*, who makes out a writ or warrant thereupon to the chancery; so that the sign manual is the warrant to the privy seal, and the privy seal is the warrant to the great seal: and in this last case the patent is subscribed, "*per breve de privato sigillo*, by writ of privy seal (*h*)." 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 it 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 (*i*). 2. A subject's grant shall be construed to include many things, beside 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 (*j*): and if a feoffment of land was made by a lord to his villein, this operated as a manumission (*k*); 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
[*348] *such grant shall not also enure to make him a denizen, that so he may be capable of taking by grant (*l*). 3. When it appears,

(*g*) 9 Rep. 18.
(*h*) *Ibid.* 2 Inst. 555.
(*i*) Finch. L. 100. 10 Rep. 112.
(*j*) Co. Litt. 56.
(*k*) Litt. § 206.
(*l*) Bro. *Abr. tit. Patents*, 62. Finch. L. 176.

(5) See the mode in New-York, 1 R. S. 197.

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 (*m*). 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 grant it would be; because it may reasonably be supposed, that the king meant to give no more than an estate-tail (*n*): the grantee is therefore (if any thing) nothing more than tenant at will (*o*). 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 (6).

III. We are next to consider a very usual species of assurance, which is also of record; *viz.* a *fine* of lands and tenements (7). 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 (8) is sometimes said to be a feoffment of record (*p*): though it might with more accuracy be called an acknowledgment of a feoffment on record. By which is to be understood, 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 acknowledgment [*349] 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 (*q*). In its original it was founded on an actual suit, commenced at law for recovery of the possession of land or other hereditaments; and the possession thus gained by such composition was found to be so sure and effectual, that fictitious actions were, and continue to be, every day commenced, for the sake of obtaining the same security.

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 (*r*), 18 Edw. I. "*Non in regno Angliae provideiur, vel est, aliqua securitas major vel solennior, per quam aliquis statum certiorem habere possit, neque ad statum suum*

(*m*) Freem. 172.
(*n*) Finch. 101, 102.
(*o*) Bro. *Abr. tit. Estates*, 34. *tit. Patents*, 104. Dyer. 270. Dav. 45.
(*p*) Co. Litt. 50.
(*q*) *Ibid.* 120.
(*r*) 2 Roll. Abr. 13.

(6) In New-York, letters patent may be avoided by scire facias, when obtained by some fraudulent suggestion, or concealment of a material fact, or when issued through mistake, and in ignorance of some material fact, or when forfeited. (2 R. S. 578, § 12.)

(7) See in general, Com. Dig. Fine; Bac. Ab. Fines and Recoveries; Cruise on Fines and Recoveries; Vin. Ab. Fine; Cru. Dig. index, Fine; 1 Prest. on Conv. 200 to 309; Thomas Co. Litt. 2 vol. 606 to 613; 2 Saunders Rep. index, tit. Fine.

(8) In New-York, fines and common recoveries are abolished since 1 Jan. 1830. (2 R. S. 343, § 24.) But as prior titles sometimes depend on fines, the knowledge of the law relative to them may be still useful.

verificandum aliquod solennius testimonium producere, quam finem in curia domini regis levatum: qui quidem finis sic vocatur, eo quod finis et consummatio omnium placitorum esse debet, et hac de causâ providebatur." Fines indeed are of equal antiquity with the first rudiments of the law itself; are spoken of by Glanvil (*s*) and Bracton (*t*) in the reigns of Hen. II. and Hen. III. as things then well known and long established; and instances have been produced of them even prior to the Norman invasion (*u*). 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, [*350] commences an action or suit at law against the other, *generally an action of covenant (*v*), by suing out a writ of *praecipe*, called a writ of covenant (*w*): 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 (*x*). The suit being thus commenced, then follows,

2. The *licentia concordandi*, or leave to agree the suit (*y*). 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 (*z*).

3. Next comes the *concord*, or agreement itself (*a*), after leave obtained from the court: which is usually an acknowledgment 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 acknowledgment, or recognition of right, the party levying the fine is called the [*351] *cognizor*, and he to whom it is levied the *cognizee*. This acknowledgment must be made either openly in the court of common pleas (9), or before the lord chief justice of that court; or else before one

(*s*) *l.* 8, *c.* 1.
(*t*) *l.* 5, *t.* 5, *c.* 28.
(*u*) Plowd. 369.
(*v*) A fine may also be levied on a writ of *mesne*, of *warrantia chartae*, or *de consuetudinibus et servitiis*. (Finch. L. 278.)
(*w*) See Appendix, No. IV. § 1.
(*x*) 2 Inst. 511.
(*y*) Appendix, No. IV. § 2. In the times of strict feodal jurisdiction, if a vassal had commenced a suit in the lord's court, he could not abandon it without leave; lest the lord should be deprived of his perquisites for deciding the cause. (Robertson, Cha. V. i. 31.)
(*z*) 5 Rep. 39. 2 Inst. 511. Stat. 32 Geo. II. c. 14.
(*a*) Appendix, No. IV. § 3.

(9) All fines acknowledged in Westminster must be acknowledged before a judge or a serjeant; if there be a judge in town, and if it be acknowledged there before any of his commissioners, it is irregular. 3 Taunt. 49. Fines and recoveries in Westminster-hall of lands in Wales, or the counties palatine, are *coram non judice*, and therefore void. 1 Prest. Conv. 266. They may be levied in the respective local courts. See 34 and 35 Hen. VIII. c. 26. 43 Eliz. c. 15. 2 and 3 Edw. VI. c. 28. 37 Hen. VIII. c. 19. 5 Eliz. c. 7. Fines of copyhold lands should be levied in the lord's court, and fines of land in ancient demesne in the court of the manor. 1 Cruise Dig. 93. b. 1 Prest. Conv. 159. 266. But the court of common pleas has jurisdiction over the lands as far as they are of freehold tenure,

of the judges of that court, or two or more commissioners in the country, empowered by a special authority called a writ of *dedimus potestatem* (10); which judges and commissioners are bound by statute 18 Edw. I. st. 4. to take care that the cognizors be of full age, sound memory, and out of prison. If there be any feme-covert among the cognizors, she is privately examined whether she 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 (*b*), still the fine shall be carried on in all its remaining parts: of which the next is,

4. The *note* of the fine (*c*); 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 (*d*). 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 est 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 (11).

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 (12), by 27 Edw. I. *c. 1. the [*352] 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 acknowledgment, 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 (during which all pleas shall cease) sixteen times; *viz.* four times in the term in

(*b*) Comb. 71.
(*c*) Appendix, No. IV. § 4.
(*d*) *Ibid.* § 5.

so that the lord may implead or be impleaded in that court. Ib. 167. The courts in England have no jurisdiction over lands in Ireland or the West Indies, though a fine of lands in the West Indies is sometimes levied in the courts of Westminster-hall, because the colonial courts respect such fine, as a species of solemn conveyance. Ib. A fine may be levied in the king's bench on a writ of error from the common pleas, ib. 268; and if it be levied on a writ returnable in K. B. it is voidable only, not void. Co. Read. 8. 9 Vin. Abr. Fine, 217.

(10) Or before justices of assize, in which case it is the practice, though not deemed absolutely necessary, to sue out a *dedimus potestatem* after the acknowledgment is taken. 1 Prest. Conv. 278. See also Jenk. Cent. 277. Co. Read. 9.

(11) If the land lie in different counties, there must be a writ, concord, and fine for the parcels in each county, 1 Prest. Conv. 286; and several owners of distinct tenements will not be allowed to join in the same fine, unless the lands are under the value of 200*l.* and there is an affidavit to that effect. But this rule does not apply in the case of coparceners, joint-tenants, and tenants in common.

(12) As to the utility of proclamations, see 1 Prest. 214. et seq. 2 Saund. index, tit. Fines. Fines are as effectual as *conveyances*, without proclamations; but without that ceremony they cannot operate to bar issue, nor gain any title by non-claim; therefore fines levied in courts of ancient demesne, and such other courts as have not the power of making proclamations, are good as conveyances only, for no fine but a fine with proclamations is within the statute 4 Hen. VII. which enacts that a fine with proclamations shall bar an estate-tail. 1 Salk. 339. 1 Saund. 258. a. note 8.

which it is made, and four times in each of the three succeeding terms; which is reduced to once in each term by 31 Eliz. c. 2, and these proclamations are indorsed on the back of the record (*e*). It is also enacted by 23 Eliz. c. 3, that the chirographer of fines shall every term write out a table of the fines levied in each county in that term, and shall affix them in some open part of the court of common pleas all the next term: and shall also deliver the contents of such table to the sheriff of every county, who shall at the next assizes fix the same in some open place in the court, for the more public notoriety of the fine.

2. Fines, thus levied, are of four kinds. 1. What in our law French is called a fine "*sur cognizance de droit, come ceo que il ad de son done*;" or, a fine upon acknowledgment of the right of the cognizee, as that which he hath of the gift of the cognizor (*f*). This is the best and surest kind of fine; for thereby the deforciant, in order to keep his covenant with the plaintiff, of conveying to him the lands in question, and at the same time to avoid the formality of an actual feoffment and livery, acknowledges in court a former feoffment, or gift in possession, to have been made by him to the plaintiff. This fine is therefore said to be a feoffment of record; the livery, thus acknowledged in court, being equivalent to an actual livery: so that this assurance is rather a confession of a former conveyance, than a conveyance now originally made; for the deforciant or [*353] cognizor acknowledges, **cognoscit*, the right to be in the plaintiff, or cognizee, as that which he hath *de son done*, of the proper gift of himself, the cognizor. 2. A fine "*sur cognizance de droit tantum*," or upon acknowledgment of the right merely; not with the circumstance of a preceding gift from the cognizor. This is commonly used to pass a *reversionary* interest, which is in the cognizor. For of such reversions there can be no feoffment, or donation with livery, supposed; as the possession during the particular estate belongs to a third person (*g*). 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 (*h*)." 3. A fine "*sur concessit*" 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 (*i*). 4. A fine "*sur done, grant, et render*," is a double fine, comprehending the fine *sur cognizance de droit come ceo, &c.* and the fine *sur concessit*: and may be used to create particular limitations of estate: whereas the fine *sur cognizance de droit come ceo, &c.* conveys nothing but an absolute estate, either of inheritance or at least of freehold (*j*). 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 (13). But, in general, the first species of fine, *sur cognizance de droit come ceo, &c.* is the

(*e*) Appendix, No. IV. § 6.
(*f*) This is that sort, of which an example is given in the Appendix, No. IV.
(*g*) Moor. 629.
(*h*) West. Symb. p. 2, § 95.
(*i*) West. p. 2, § 66.
(*j*) Salk. 340.

(13) The estate so rendered makes the cognisor a new purchaser as much as a feoffment and re-feoffment at common law. Thus if before the fine the estate descended *ex parte materni*, it is afterwards descendible in the paternal line. 1 Salk. 337. Dy. 237. b. Co. Litt. 316.

most used, as it conveys a clean and absolute freehold, and gives the cognizee a seisin in law, without an 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 ancient common law, with respect to this point, *is very forcibly declared by the [*354] statute 18 Edw. I. in these words: "And the reason, 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 on the foot (*k*) of the fine 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. III. c. 16. which admitted persons to claim, and falsify a fine, at any indefinite distance (*l*); whereby, as sir Edward Coke observes (*m*), 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 rigour of the common law. For the statute, then made (*n*), 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 made claim, by way of action or lawful entry, 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 (14).

It seems to have been the intention of that politic prince, king Henry VII., 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 [*355] well aware that power will always accompany property. But doubts having arisen whether they could, by mere implication, be adjudged a sufficient bar (which they 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 ancestors, assigned to her in

(*k*) *Sur la pie*, as it is in the Cotton MS. and not *sur le pais*, as printed by Berthelet, and in 2 Inst. 511. There were then four methods of claiming, so as to avoid being concluded by a fine: 1. By action. 2. By entering such claim on the record at the *foot* of the fine. 3. By entry on the lands. 4. By continual claim, 2 Inst. 518. The second is not now in force under the statute of Henry VII.

(*l*) Litt. § 441.

(*m*) 2 Inst. 518.

(*n*) 4 Hen. VII. c. 24. See page 118.

(14) This is the chief use and excellence of a fine, that it confirms and secures a suspicious title, and puts an end to all litigation after five years. Other conveyances and assurances admit an entry to be made upon the estate within twenty years, and in some instances, the right to be disputed in a real action for sixty years afterwards. Harg. Co. Litt. 121. a. n. 1.

tail for her jointure (*o*); 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 statutes, 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 cognizees, and these are immediately concluded by the fine, and barred of any latent right they might have, even though under the legal impediment of coverture. And indeed, as this is almost the only act that a *feme-covert*, or married woman, is permitted by law to do (and that because she is privately examined as to her voluntary consent, which removes the general suspicion of compulsion by her husband) (15), 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.

[*356] 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 (*p*).

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 five 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 (*q*). 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 (16).

(*o*) See statute 11 Hen. VII. c. 20.
(*p*) 3 Rep. 87.
(*q*) Co. Litt. 372.

(15) See Mr. Hargrave's note 1 to Co. Lit. 122. that this is not the only reason.

(16) Whenever a fine begins to run against a person, it will continue to run against him; and in case of estates of inheritance, either in fee, or in tail, &c. against his heirs; and in case of chattel interests, &c. against his executors, &c. notwithstanding any subsequent disability. 4 T. Rep. 301. Plowd. 356. And therefore if the five years commence against a person who is adult, &c. they will continue to run against that person, though he becomes imprisoned, insane, &c. And though he dies either free from any disability, or under a disability, leaving for his heir, issue, or personal representative, a person who is either an infant under coverture, insane, or imprisoned, or though he dies intestate, and no *letters of administration* are taken, the five years non-claim will continue to run. 1 Prest. on Conv. 241, 2. See further upon the entry to avoid a fine, Adams on Ejectment, 83 to 94. 1 Saund. 319. n. b. 2 Saund. index, tit. Fine; and 1 Preston on Conv. 200. et seq.

If a lessee for life or years levies a fine, the lessor shall have five years after the death of the tenant for life. Cro. Eliz. 254; or after the term expires, though he may enter to avoid the fine within the five years after the last proclamation. Whaley v. Tancred, Vent. 241. See also 3 Co. 78. b. Or if A. have two *distinct* estates in the same land, as an estate for

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 risk defraud the owners by levying fines of their lands; for if the attempt be discovered, they can be no sufferers, but must only remain *in statu quo*: whereas if a tenant for life levies a fine, it is an absolute forfeiture of his estate to the remainder-man or reversioner (*r*), 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 (*s*), the estate is for ever barred by it. Yet where a *stranger*, whose presumption cannot be thus punished, officiously interferes in an estate which in nowise belongs to him, *his fine is of no effect; and may [*357] at any time be set aside (unless by such as are parties or privies thereunto) (*t*) by pleading that "*partes finis nihil habuerunt*." And, even if a tenant for years, who hath only a chattel interest, and no freehold in the land, levies a fine, it operates nothing, but is liable to be defeated by the same plea (*u*). Wherefore when a lessee for years is disposed to levy a fine, it is usual for him to make a feoffment first, to displace the estate of the reversioner (*v*), and create a new freehold by disseisin (17). 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 (18).

(*r*) Co. Litt. 251.
(*s*) 2 Lev. 52.
(*t*) Hob. 334.
(*u*) 5 Rep. 123. Hardr. 401.
(*v*) Hardr. 402. 2 Lev. 52.

life, with a remote estate of inheritance, he may enter to avoid the fine when the latter gives him a right to the possession, although the time has elapsed within which he might claim the former. See 1 Prest. Conv. 240. Shep. Touch. 34.

(17) So a person coming to a title which is bound by an equitable right, cannot by levying a fine discharge his estate from the consequences of that right. 1 Sch. & Lef. 380. In the case of Lord Portsmouth v. Vincent (cited in Lord Pomfret v. Lord Windsor), 2 Ves. 476. tenants at will in possession under a letting by a receiver in the court of chancery, were by the neglect of the parties in the cause, suffered to remain in possession for a great number of years, and not called on for their rent; they levied fines, and insisted on them as a bar; but lord Hardwicke said, "No, you gained possession as tenants under the receiver of the court; you gained that possession therefore in confidence, and you shall not by means of that possession defeat the title of the persons for whom you had the possession;" and he would not suffer the fine and non-claim to be a bar. 1 Sch. & Lef. 380. So where there was tenant for life, remainder to R. P. in fee, and the tenant for life leased for her life, and died in 1799, and lessee continued in possession without paying rent till his death in 1815, when his son took possession, and continued without paying rent, and in 1817 levied a fine with proclamations, it was held, that the heir of R. P., the remainder-man, might maintain an ejectment against the son, without an actual entry to avoid the fine, or a notice to determine the tenancy. 3 M. & S. 271.

(18) It is not necessary to be in possession of the freehold in order to levy a fine; but if any one entitled to the inheritance, or to a remainder in tail, levies a fine, it will bar his issue and all heirs who derive their title through him. Hob. 333. A fine by tenant in tail does not affect subsequent remainders, but it creates a base or qualified fee, determinable upon the failure of the issue of the person to whom the estate was granted in tail; upon which event the remainder-man may enter. Mashell v. Clarke, 2 Lord Raym. 778. Doe v. Whitehead, 3 Burr. 704. Doe v. Rivers, 7 T. R. 276. Doe v. Wichelo, 8 T. R. 211. If tenant in tail, with an immediate reversion in fee, levies a fine, the base fee merges in the reversion, and he thus gains a fee-simple, which will become liable to all the incumbrances of the ancestors, from whom the estate-tail descended; as judgments, recognizances, and such leases as are void with respect to the issue in tail. This has frequently happened in practice, from such a person being ill advised to levy a fine, instead of suffering a recovery. 5 T. R. 108. 1 Cru. 274. A recovery suffered by any tenant in tail lets in all the incumbrances created by himself, which were defeasible by the issue in tail, and after the recovery they will follow the lands in the hands of a *bonâ fide* purchasor. Pig. 120. 2 Cru. 287.

IV. The fourth species of assurance, by matter of record, is a common *recovery* (19). Concerning the original of which it was formerly observed (*w*), 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*.

1. 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 [*358] *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; avoiding, as far as possible, all technical terms and phrases not hitherto interpreted.

Let us, in the first place, suppose David Edwards (*x*) 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. 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 (*y*). The subsequent proceedings are made up into a record or recovery roll (*z*), 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

(*w*) pag. 117. 271.
(*x*) See Appendix, No. V.
(*y*) § 1.
(*z*) § 2.

(19) See in general, Com. Dig. Recovery; Bac. Ab. Fines and Recoveries; 1 Prest. on Conv. 1 vol. 1 to 200; Cru. Dig. index, Recovery; Cruise on Fines and Recoveries; Fearne's Con. Rem.; Vin. Ab. Recovery; 5 T. R. 107. n.; 2 Saund. 42. n. 7. and id. index, tit. Recovery; and as to pleading a recovery, see 2 Chitty on Pleadings, 4 ed. 582 to 586, where the nature and operation of common recoveries is stated and explained.

the recoveree; *and Edwards has judgment to recover of Ja- [*359]
cob 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 chapter (*a*). 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 land 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 (*b*). 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 (*c*). 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.

*This supposed recompense in value is the reason why the is- [*360]
sue in tail is held to be barred by a common recovery. For if the recoveree should 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 (*d*). This reason will also hold with equal force, as to *most* remainder-men and reversioners; to whom the possibility will remain and revert, as a full recompense for the reality, which they were otherwise entitled to: but it will not *always* hold: and therefore, as Pigot says (*e*), 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 an estate-tail can never take place (20).

(*a*) pag. 301.
(*b*) See Appendix, pag. xviii.
(*c*) Bro. *Abr. tit. Taile*, 82. Plowd. 9.
(*d*) Dr. & St. b. 1. dial. 26.
(*e*) Of com. recov. 13, 14.

(20) Chief justice Willes has declared that "Mr. Pigot has confounded himself and every

To such awkward shifts, 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 aliene his lands. But, since the ill consequences of fet-
[*361] tered 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 process 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, and the decisions of our own courts of justice, which allow a tenant in tail (without fine or recovery) to appoint his estate to any *charitable* use (*f*), but also by the precedent of the statute (*g*) 21 Jac. I. c. 19, which, in case of the 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 enrolment.

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
[*362] *woman, after her husband's death, shall suffer a recovery of lands settled on her by her husband, or settled on her husband and her by any of his ancestors (21). And by statute 14 Eliz. c. 8. no tenant

(*f*) See pag. 376. (*g*) See pag. 286.

body else who reads his book, by endeavouring to give reasons for and explain common recoveries. I only say this," he adds, "to shew that when men attempt to give reasons for common recoveries, they run into absurdities, and the whole of what they say is unintelligible jargon and learned nonsense. They have been in use some hundreds of years, have gained ground by time, and we must now take them, as they really are, common assurances." 1 Wils. 73.

(21) But the act does not prevent her levy-

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 against the tenant to the *praecipe*, it is as effectual to bar the estate-tail as if he himself were the recoveree (*h*) (22).

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 (*i*). 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 *actores 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 (*j*), that, though the legal freehold be vested in lessees, yet those who are entitled to the next freehold estate in remainder or reversion may make a good tenant to the *praecipe*;—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 twenty years, be sufficient [*363] evidence, on behalf of a purchasor 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 assurance by matter of record.

Before I conclude this head, I must add a word concerning deeds to *lead*, or to *declare*, the *use* 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 (*k*). And if a consideration appears, yet as the most usual fine, "*sur 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 designa-

(*h*) Salk. 571.
(*i*) Pigot, 28.
(*j*) Pigot, 41, &c. 4 Burr. I. 115.
(*k*) Dyer, 13.

ing a fine jointly with her husband, or after his death with the consent of the remainder-man, such consent appearing on record, or by deed enrolled. Cro. Jac. 474. Cruise on Recov. 160.

(22) If a tenant in tail, to whom the estate has descended *ex parte materna*, suffer a recovery, and declare the uses to himself in fee, the estate will descend to an heir on the part of the mother, even if he had the reversion in fee from his father, and *vice versa*; but if he took the estate-tail by purchase, the new fee will descend to the heirs general. 5 T. R. 104. If then a person, who has inherited an estate-tail from his mother, wish to cut off the entail, and to make the estate descendible to his heirs on the part of the father, after the recovery he ought to make a common conveyance to trustees, and to have the estate reconveyed back by them, by which means he will take the estate by purchase, which will then descend to his heirs general.

tions 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 reversion to himself in fee, would settle his estate on B for life, remainder to C in tail, remainder to D in fee; that is what by law he has no power of doing effectually, while his own estate-tail is in being. He therefore usually, after making the settlement proposed, covenants to levy a fine (or if there be any intermediate remainders, to suffer a recovery) to E, and directs 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 recoveror, hath a fee-simple vested in himself by the fine or recovery; yet, by the operation of [*364] this deed, he *becomes 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 (*l*). 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 by statute 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 any doubts that had arisen on the statute of frauds 29 Car. II. c. 3. to the contrary (23).

(*l*) This doctrine may perhaps be more clearly illustrated by example. In the deed or marriage settlement in the Appendix, N° 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.* to Abraham and Cecilia Barker till the marriage of John Barker with Katherine Edwards, and then to John Barker for life; remainder to trustees to preserve the contingent remainders; remainder to his wife Katherine for life, for her jointure; remainder to other trustees, for a term of five hundred years: remainder to the first and other sons of the marriage in tail; remainder to the 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, 187.) 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 that the recovery itself be suffered against this tenant to the *praecipe*, who shall vouch John Barker, and thereby bar his estate-tail, and become tenant to the fee-simple by virtue of such recovery; the uses of which estate so acquired are 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 (N° IV. and N° V.) of which this conveyance is a deed to *lead* the uses.

(23) By the statute of 7 Geo. IV. c. 45, a person who would be entitled to an estate tail in lands directed to be purchased under a settlement or will, may elect to take the money without having it so invested. But, where a recovery would have been necessary to bar a remainder-man's chance of succession, in case the money had been laid out in lands, a court of equity, if the funds are under its control, will not allow them to be paid over to the tenant in tail, until such time as he might actually have suffered a recovery; that is to say, he cannot get the money unless he should be living on the second day of the ensuing term, when he has presented his petition during the sittings out of term; (*Ex parte Bennett*, and *Ex parte Dollman*, 6 Ves. 116); or, if the application be made in term, unless sufficient time remains after the presentation of the petition, for a recovery to have been completed in that term. (*Ex parte Frith*, 8 Ves. 609). And before an order under the statute

CHAPTER XXII.

OF ALIENATION BY SPECIAL CUSTOM (1).

We are next to consider assurances by special custom (2), 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 demeane, or in manors of 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 seigniory, 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 (3). The method of doing this is generally by *surrender*; though in some manors, by special custom, recoveries may be suffered of copyholds (*b*): 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 consequences.

Surrender, *sursumredditio*, 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 behoof 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 the steward, either in court [*366] (or if the custom permits, out of court), or else to two customary tenants of the same manor, provided there be also 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

(*a*) Litt. § 74. (*b*) Moor. 637.

is made, the court always directs a reference to the Master, to inquire whether the parties have in any manner encumbered, or settled their interests in the money. (*Ex parte Hodges*, 6 Ves. 576. *Green* v. *Stephens*, 17 Ves. 79). It has also been determined, that the act applies only when the right is clear and indisputable; and that, where there is any question as to the right, the court is not, upon an *ex parte* petition, to enter into that question, in the absence of any of the parties interested. (*Ex parte Sterne*, 6 Ves. 157. *Ex parte Rees*, 3 Ves. & Bea. 11).

(1) There being no copyholds in New-York, this chapter is not applicable here, nor, it is believed, in any of the states of the U. S.

(2) See in general, Com. Dig.; Bac. Ab.; Vin. Ab. Copyhold; Cru. Dig. index, Copyhold; 1 Prest. on Conv. index, Copyhold; Watkins on Copyhold; and Scriven on Copyhold; 2 Saund. index, tit. Copyhold, and tit. Surrenders; and 1 Thomas Co. Lit. 653 to 676.

(3) Littleton, (sect. 76), was probably our author's authority for the doctrine stated in the text. Littleton says, "tenants by copy of court roll shall neither implead nor be impleaded for their tenements by the King's writ. But, if they will implead others for their tenements, they shall have a plaint entered in the lord's court." But, in *Widdowson* v. *Earl of Harrington*, (1 Jac. & Walk. 549), the Master of the Rolls observed, "with respect to the manner of proceeding for the recovery of copyholds, it is said by counsel, that it can be only by plaint in the lord's court; but, that is quite a mistake. There *was* a time when it was doubted whether you could proceed by the King's writ,—whether you could bring an ejectment for a copyhold. *But all that has given way*, and the King's courts are now open to ejectments for copyholds, in the same way as for freeholds. What is said by Littleton, (sect. 76), applies generally to *all* actions, but we know that, at this day, it is not true to that extent." And see *post*, p. 370.

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 *cestuy 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 (4). 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 (5).

In this brief abstract of the manner of transferring copyhold estates we may 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 alienee of a copyhold had merely *jus* [*367] *fiduciarium*, for which *there was no remedy at law, but only by *subpœna* 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 enforced 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 acknowledgment 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; "*quando hasta vel aliud corporeum quidlibet porrigitur a domino se investituram facere dicente; quae saltem coram duobus vasallis solemniter fieri debet* (e)." and, to crown the whole, the oath of fealty is annexed, the very bond of feodal subjection. From all which we may fairly conclude, that had there been no other

(c) Cro. Jac. 563.
(d) Bro. *Abr.* tit. *Tenant per copie*, 10.
(e) *Feud. l.* 2, *t.* 2.

(4) If a surrenderor dies before the admittance of the surrenderee, his heir would take by descent, as the surrenderor died seised of the premises, no legal title vesting in a surrenderee till admittance. (5 East, 132. 1 Smith, 363.) And where a devise was made by an unadmitted devisee, it was held that such second devisee, though admitted, could not recover in ejectment, for his admittance had no relation to the last legal surrender; but the legal title remained in the heir of the surrenderor, the first testator. 7 East, 8.

(5) Femes-covert and infants may be admitted by their attorney or guardian, and in default of their appearance, the lord may appoint a guardian or attorney for that purpose. If the fines are not paid, the lord may enter and receive the profits till he is satisfied, accounting yearly for the same upon demand of the person or persons entitled to the surplus, but no forfeiture shall be incurred by infants or femes-covert for not appearing, or refusing to pay fines. 9 Geo. I. c. 29.

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 villeins and bondmen.

This method of conveyance is so essential to the nature of a copyhold estate, that it cannot properly be transferred by any other assurance. No feoffment or grant 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 (6); and in my will I must declare my intentions, and name a devisee, who will then be entitled to admission (*f*). A fine or recovery had of copyhold lands in the king's court may, indeed, if not duly reversed, alter the tenure of the lands, and convert them into frank fee (*g*), which is defined in the old book of tenures (*h*) to be "land pleadable at the common law;" but upon an action on the case, in the nature of a writ of *deceit*, brought by the lord in the king's court, such fine or recovery will be reversed, the lord will recover his jurisdiction, and the lands will be restored to their former state of copyhold (*i*) (7). [*368]

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 (8), by an admittance subsequent whereto the convey-

(*f*) Co. Copyh. § 36.
(*g*) Old *Nat. Brev. t. briefs de recto clause.* F. N. B. 13.
(*h*) *t. tenir en franks fee.*
(*i*) See Book III. pag. 166*.

(6) To prevent the recurrence of the evils which frequently resulted from the devisors of copyhold lands, omitting either from negligence or ignorance to surrender them to the uses of their wills, it was enacted by 55 Geo. III. c. 192. that where, by the custom of any manor in England or Ireland, any copyhold tenant thereof may by will dispose of or appoint his copyhold tenement, the same having been surrendered to such uses as shall be by such will declared, every disposition or charge of any such copyholds or of any right or title to the same, made by any such will by any person who shall die after passing this act, viz. (12 July 1815), shall be as effectual, *although no surrender is made to the use of such will*, as it would have been had such surrender been made. But the claimants under the devise must pay the stamp duties, fees, &c. incident to a surrender, as well as those upon admission. Before the passing of this act, equity would relieve in favour of a wife or younger children (but not of a brother, grandchildren, or natural children); or where copyholds were devised for the payment of debts. See 1 Atk. 387. 3 Bro. 229. 1 P. Wms. 60. 2 Ves. 582. 6 Ves. 544. 5 Ves. 557. But where a surrender by a married woman to the use of her will is required by the particular custom of the manor, the want of a surrender is not aided; for the 55 Geo. III. c. 192. only aids the want of a formal surrender, and the surrender in this case is matter of substance, and requires to be accompanied by the separate examination of the wife. 5 Bar. & Ald. 492. 1 Dowl. & R. 81. S. C. Where copyhold premises have been surrendered to such uses as the owner shall appoint, the appointment may be made by will, and a surrender to the uses of such will was not necessary even before this statute. 3 M. & S. 158.

(7) A fine of lands in ancient demesne levied in the court of common pleas is not absolutely void, but voidable by the lord: and it seems, according to Mr. Preston, copyhold lands are within the same rule; but it is clearly more correct to levy the fine, or suffer the recovery in the lord's court. See 1 Prest. on Convey. 266, 7. and see 3 T. R. 162.

(8) A surrender does not destroy a contingent remainder. 2 Saund. 386. It receives the same construction as deeds operating by the statute of uses, and therefore cross remainders cannot be implied. 1 Saund. 186. b. A surrender may be by him in remainder. 1 Saund. 147. a. n. 3. The surrenderee is an assignee within the equity of the statute Hen. VIII. 1 Saund. 241. a. His title begins from the date of the surrender, by relation; and therefore, after he has been admitted, he may lay his demise in ejectment on the day of surrender, and recover mesne profits there-

ance 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 *cestuy 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 (9): 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 reduced to a certainty: for he cannot either by force or fraud be deprived or deluded of the effects and fruits of the surrender; but if the lord refuse to admit him, he is compellable to do it by a bill in [*369] 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 (*l*) (10).

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 to be 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 (*m*): the surrender, as being never truly pre-

(*k*) 2 Roll. Rep. 107.
(*l*) Co. Copyh. § 39.
(*m*) *Ibid.* § 40.

from. 1 T. R. 600. 2 Saund. 422. c. n. 2. But an equity of redemption cannot be surrendered. 2 Saund. 422. d. n. b. And devisees of contingent remainders on a copyhold not being in the seisin, cannot make a surrender of their interest, nor will such a surrender operate against them or their heirs. 11 East, 165. A feme-covert, who surrenders copyhold, ought previously to be examined separately from her husband, by the steward of the manor, or before two customary tenants by special custom; and if it be to such uses as she shall by will appoint, a paper purporting to be a will, though made by her, living her husband, is a good execution. 4 Taunt. 294.

(9) The surrenderee would not now be considered a trespasser; for it has been determined that he may recover in an ejectment against the surrenderor, upon a demise laid after the surrender, where there was an admittance of such party before trial: but as the surrenderor after the surrender is considered merely a trustee for the nominee, it should seem that the decision would have been the same even if the subsequent admittance had not been proved. 1 T. R. 600. 5 Burr. 2764. 16 East, 208.

(10) Of course it will be understood that a surrender by a copyholder to the use of his own will is always revokable. And, if a copyholder surrenders conditionally, and satisfies the condition before admittance of the nominee, the copyholder may surrender again absolutely, without taking a new estate by the admittance and surrender of the nominee in the conditional surrender, and to his own subsequent admittance. (Hargrave's note to Co. Litt. 62 a).

seised; the presentment, as being false; and the admittance, as being founded on such untrue presentment. If a man surrenders out of court, and dies before presentment, and presentment be made after his death, according to the custom, that is sufficient (*n*). So too, if *cestuy 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, 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 (*o*).

*3. Admittance (11) is the last stage, or perfection, of copyhold [*370] 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 socage 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 (*p*): nor is the tenant's estate, so granted, subject to any charges or incumbrances by the lord (*q*).

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 (*r*).

And, as in admittances upon surrenders, so in admittances *upon descents*, by the death of the ancestor, the lord *is used as a mere [*371] instrument; and, as no manner of interest passes into him by the

(*n*) Co. Litt. 62.
(*o*) Co. Copyh. § 40.
(*p*) *Ibid.* § 41.
(*q*) 8 Rep. 63.
(*r*) 4 Rep. 27. Co. Litt. 59.

(11) The admittance of the particular tenant is the admittance of the remainder-man, but the latter may be admitted by himself. 1 Saund. 147. a. n. (3) (4). It relates when made to the time of surrender. 1 T. R. 600. 2 Saund. 422. c. n. 2. A surrenderee cannot forfeit for felony before admittance, for till then the estate is in the surrenderor. 2 Saund. 422. c. n. 2. The lord's grantee has title without it. 2 B. & A. 453. 2 Saund. 422. c. If the surrenderee dies before admittance, his heir is entitled to it, and the widow to freebench. 2 Saund. 422. d. One effect of admittance is, that a copyholder after it, is estopped in an action by the lord for a forfeiture, from shewing that the legal estate was not in the lord at the time of admittance. 5 B. & A. 626. 1 Dowl. & R. 243.

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 (*s*).

Admittances, however, upon surrender, differ from admittances upon descent in this, that by surrender nothing is vested in *cestuy 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 him as of a perfect tenant of the land instantly upon the death 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 (*t*); 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 (12). For which reasons we may conclude, that the admittance of an heir is principally for the benefit of the lord, to entitle him to his fine, and not so much necessary for the strengthening and completing 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 to his copyhold in court; and so the lord may [*372] be defrauded of his fine. But to this we may reply in *the words of sir Edward Coke (*u*), "I assure myself, if it were in the election of the heir to be admitted or not to be admitted, he would be best contented without admittance; but the custom of every manor is in this point compulsory. For, either upon pain of forfeiture of their copyhold, or of incurring some great penalty, the heirs of copyholders 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 (13)."

(*s*) 4 Rep. 27. 1 Rep. 140.
(*t*) 4 Rep. 23.
(*u*) Copyh. § 41.

(12) It has been held that the heir having as complete a title without admittance as with it, against all the world but the lord, the court of king's bench will not grant a mandamus to compel the lord to admit him. 2 T. R. 197. But in a more recent case the court granted a mandamus in favour of an heir. 3 Bar. & Cres. 172. 4 Dowl. & R. 492. S. C. If the lord refuse to admit, the *surrenderee* cannot have an action on the case against him, but may compel him in chancery, Cro. Jac. 368. or by mandamus, 2 T. R. 484. And the lord has no right to the fine till after admittance. Ib. 1 Watk. on Cop. 1st ed. 263. 287. 1 East R. 632. Scriv. on Cop. 405, 6. But the surrenderor may bring an action for refusal to admit. 3 Bulst. 217.

(13) But a person claiming to be admitted as heir, need not tender himself for admittance at the lord's court, if he has been refused by the steward out of court. 2 M. & S. 87. A lord of the manor cannot seize a copyhold estate as forfeited *pro defectu tenentis* without a custom; and where he did so, even after three proclamations for the heir to come in, and granted it in fee to another, it was held an absolute seizure, not being warranted by custom, and could not be set up by the lord as a *seizure quousque*. 3 T. R. 162.

CHAPTER XXIII.

OF ALIENATION BY DEVISE (1).

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 inquire 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 (*a*). 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 (*b*). And some have questioned whether this restraint (which we may trace even from the ancient Germans) (*c*) 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, *that the [*374] 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 the estate of the deceased should always descend to his children; or, on failure of lineal descendants, should go to the collateral relations: which had an admirable effect in keeping up equality, and preventing the accumulation of estates. But when Solon (*d*) 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 dissensions; 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 propriety; by preventing the very evil which resulted from Solon's institution, the too great accumulation of property; which is the natural consequence 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,

(*a*) Wright of tenures, 172.
(*b*) See pag. 57.
(*c*) *Tacit. de mor. Germ. c.* 21.
(*d*) Plutarch. *in vita Solon.*

(1) See in general, Com. Dig. Devise; Vin. Ab. Devise; Cruise Dig. tit. Devise; 2 Chancery, 3 A. 1, &c.; 3 Y. 1, &c.; Condition, A. 4; Bac. Ab. Wills and Testaments; Saund. index, titles, Devise, Devisee, Wills; Preston on Estates, title, Wills.

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 (*f*). And though the feodal restraint on [*375] 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 (*g*). 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 (*h*), and the devisee of the use could in chancery compel its execution. For it is observed by Gilbert (*i*), 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 (*j*) 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. VIII. c. 1. explained by 34 Hen. VIII. c. 5. which enacted, that all persons being *seised in fee-simple* (2) (except feme-coverts (3), infants, idiots, and persons of non-sane memory) (4) might by will and testament in writing devise to any other *person*, except to bodies corporate, two-thirds of their lands, tenements, and hereditaments, held in chivalry, and the whole of those held in socage: 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 ex- [*376] tension of gifts in mortmain; but now, by construction *of the

(*e*) 2 Ipst. 7.
(*f*) Litt. § 167. 1 Inst. 111.
(*g*) Glanv. *l.* 7, *c.* 1.
(*h*) Plowd. 414.
(*i*) On devises, 7.
(*j*) 27 Hen. VIII. c. 10. See Dyer. 143.

(2) As copyholders and customary tenants, whose interest passes by surrender, are not seised in fee-simple, and do not hold their lands in socage, it follows that they cannot make a devise under this statute, nor need the requisites of it be observed, 7 East, 299 & 322. unless the terms of the surrender require the will to be signed. Id. ibid. 2 P. W. 258. 2 Atk. 37.

(3) A feme-covert, where lands are conveyed to trustees, may have the power of appointing the disposition of lands held in trust for her after her death, which appointment must be executed like the will of a *feme-sole*. 2 Ves. 610. 1 Bro. 99. And it has been determined by the house of lords, that the appointment of a married woman is effectual against the heir at law; though it depends only upon an agreement of her husband before marriage, without any conveyance of the estate to trustees. 2 Ves. Sen. 191. 6 Bro. P. C. 156. 2 Eden. 239. 1 Bro. P. C. 486. S. C. Amb. 565. 2 Roper's Hus. & Wife, 180. See the valuable note to 1 Hovenden's Supplement to Ves. Jun. Rep. 21.

(4) In New-York there are the same exceptions of persons incapable of devising; every estate and interest in real property descendible to heirs, may be devised; and not merely two thirds, but the whole of it. A devise to an alien not specially authorized by law to hold real estate, or to a corporation not expressly authorized by its charter or by statute to take by devise, is void. 2 R. S. 56, &c. See, as to devises to corporations, 9 Cowen, 437.

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 appointments 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*) (5).

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 solemnity nearly similar is requisite for revoking a devise by writing; though the same may be also revoked by burning, cancelling, tearing, or obliterating thereof by the devisor, or in his presence and with his consent (6): as likewise *impliedly*, by such a great and entire alteration in the circumstances and situation of the devisor, as arises from marriage and the birth of a child (*q*) (7).

(*k*) Ch. Prec. 272.
(*l*) Gilb. Rep. 45. 1 P. Wms. 248.
(*m*) Duke's charit. uses, 84.
(*n*) Moor. 890.
(*o*) 2 Vern. 453. Ch. Prec. 16.
(*p*) Dyer, 72. Cro. Eliz. 100.
(*q*) Christopher v. Christopher, Schacch. 6 Jul. 1771. Spragge v. Stone, at the Cockpit, 27 Mar. 1773, by Wilmot, de Grey and Parker. See pag. 502.

(5) See p. 273, 274, and note 5 ib.: the alterations caused by 9 Geo. II. c. 36.

(6) With respect to revocations in general, see 1 Saund. 277 to 279. d. Where a testator being angry with one of his devisees tore his will into four pieces, but was prevented from further tearing it, partly by force and partly by entreaty, and afterwards becoming calm expressed his satisfaction that no material part was injured, and that the will was no worse, the court held that it had been properly left to the jury to say whether the testator had perfected his intention of cancelling the will, or whether he was stopped in medio; and the jury having found the latter, the court refused to disturb the verdict. 3 B. & A. 489. But where the testator threw his will into the fire, out of which it was snatched by a by-stander and preserved without the testator's knowledge, the will was held to be cancelled. 2 Bla. R. 1043.

By the Revised Statutes of New-York, the destruction, cancelling, or revocation of a second will does not revive the first, unless the intention to revive it appear by the terms of revocation, or unless such first will be afterwards republished. 2 R. S. 66. § 53.

(7) Marriage and the birth of a posthumous child amount to a revocation. 5 T. R. 49, But the subsequent birth of a child, where the will is made after marriage, is not of itself sufficient. 5 T. R. 51. n. 4 M. & S. 10. 5 Ves. J. 656. In a case where a testator had devised his real estate to a woman with whom he cohabited, and to her children, he afterwards married her and had children by her, it was held these circumstances did not amount to a revocation of the will. Lord Ellenborough in his judgment says, "The doctrine of implied or presumptive revocation seems to stand upon a better foundation of reason, as it is put by lord Kenyon, in Doe v. Lancashire, 5 T. R. 58. namely, as being 'a tacit condition annexed to the will when made, that it should not take effect, if there should be a total change in the situation of the testator's family,' than on the ground of any presumed alteration of intention; which alteration of in-

In the construction of this last statute (9), it has been adjudged that the testator's name, written with his own hand, at the beginning of

tention should seem in legal reasoning not very material, unless it be considered as sufficient to found a presumption in fact, that an actual revocation has followed thereupon. But, upon whatever grounds this rule of revocation may be supposed to stand, it is on all hands allowed to apply only in cases where the wife and children, the new objects of duty, are wholly unprovided for, and where there is an entire disposition of the whole estate to their exclusion and prejudice. This, however, cannot be said to be the case, where the same persons, who, after the making of the will, stand in the legal relation of wife and children, were before specifically contemplated and provided for by the testator, though under a different character and denomination." 2 East, 530. See 5 Ves. Jun. 656. Where two wills are found in the possession of the testator, to invalidate the first the second should expressly revoke, or be clearly incompatible with the first devise, for no subsequent devise will revoke a prior one, unless it apply to the same subject matter. 1 P. Wms. 345. 7 Bro. P. C. 344. Cowper, 87. A devise of real property is not revoked by the bankruptcy of the devisor. The master of the rolls said, "from the moment the debts are paid, the assignees are mere trustees for the bankrupt, and can be called to convey to him." In this case all the debts were paid, and the bankrupt had been dead some time. 14 Ves. 580. See also as to implied or constructive revocations, 3 Mod. 218. Salk. 592. 3 Mod. 203. 2 East, 488. Carth. 81. 4 Burr. 2512. 7 Ves. Jun. 348. Cowp. 812. 4 East, 419. 2 N. R. 491. and post, "Title by Testament," 489, et seq.*(8).

(8) In New-York a will of either real or *personal* property must be subscribed by the testator at the *end* of the will: and such subscription must be made or acknowledged in the presence of two attesting witnesses, to whom the testator must at the same time declare the same to be his will, and each of whom must sign his name as a witness at the *end* of the will at the request of the testator. These solemnities are essential to the validity of the will: but the witnesses must also write their residences opposite to their names; and any one who signs the testator's name by his direction, must sign his own name also as a witness: the omission so to do will cause each witness to forfeit 50 dollars, but will not affect the will. 2 R. S. 63. § 40, 41. A will duly executed cannot be revoked, except by another instrument executed with the same formalities, or by being burnt, torn, cancelled, obliterated, or destroyed by the testator himself, with the intent of revoking it, or by another person in his presence, by his direction and consent: and when so done by another, the direction and consent of the testator, and the injury or destruction, must be proved by two witnesses. Id. § 42. Marriage by a woman revokes (not *suspends*) her will: Id. § 44: marriage by a man and the birth of a child, revokes his will made before marriage, if such will had disposed of the whole of his estate; and if the issue *or* the wife survives the testator, unless such issue has been provided for by some settlement, or by the will, or so mentioned therein as to show an intention not to make provision for it. No other evidence to rebut the presumption of revocation can be received. Id. § 43. It is expedient always to execute the will according to the old as well as the new law, as there may be lands affected by the will in other states where the old law prevails.

(9) As to what shall be deemed a sufficient compliance with this act, see 1 Fonblanque on Equity, 193. Phil. on Evid. chap. 8. sect. 8. It is observable, that the statute *requires* that the will shall be in *writing*, but it should seem it would suffice if in print, and signed by the testator. Semble, 2 M. & S. 286.

It next requires, that the will shall be *signed* by the testator, or some other person in his presence and by his express direction. The first case in which this question was raised was Lemayne v. Stanley, 3 Lev. 1. 1 Eq. Ca. Ab. 403, in which case it was determined, that if the testator write the *whole* of the will with his own hand, though he does not subscribe his name, but seals and publishes it, and three witnesses subscribe their names in his presence, it is a good will; for his name being written in the will it is a *sufficient* signing, and the statute does not direct whether it shall be at the top, bottom, &c. But from the case of Right lessee of Cater v. Price, Dougl. 241, it may be inferred that the above decision will apply only to those cases, where the testator appears to have considered such sufficient signing to support his will, and not to those where the testator appears to have intended to sign the instrument in form: and Mr. Christian, in his edition of Blackstone, 2 vol. 377. n. 5, properly observes, that writing the name at the beginning would never be considered a signing according to the statute, unless the whole will was written by the testator himself; for whatever is written by a stranger after the name of the testator affords no evidence of the testator's assent to it, if the subscription of his name in his own hand is not subjoined; and see Powell on Devises, 63. In the case of Right v. Price, the will was prepared in five sheets, and a seal affixed to the last, and the form of attestation written upon it, and the will was read over to the testator, who set his mark to the two first sheets, and attempted to set it to the third, but being unable, from the weakness of his hand, he said he could not do it, but that it was his will; and on the following day, being asked if he would sign his will, he said he would, and attempted to sign the two remaining sheets but was not able. Lord Mansfield observed, that "the testator, when he signed the two first sheets, had an intention of signing the others, but was not able; he therefore did not mean the signature of the two first as the signature of the whole will; there never was a signature of the whole, see also 4 Ves. Jun. 197. 9

* See also 1 Hovenden on frauds, 296, &c.

his will, as, "I, John Mills, do make this my last will and testament;" is a sufficient signing, without any name at the bot- [*377]

Ves. 249. And if it appear upon a will of personal estate that something more was intended to be done, and the party was not prevented by sickness or death from signing, this declaration at the beginning is not sufficient. 4 Ves. 197. n. 9 Ves. 249. But where a will, written on three sides of a sheet of paper and duly attested, concluded by stating "that the testator had signed his name to the two first sides thereof, and his hand and seal to the last," and it appeared he had put his hand and seal to the last only, omitting to sign the two first sides, it was held that the will was well executed, as his first intention was abandoned by the final signature made by him at the time of executing the will. 5 Moore, 484. 2 Bro. & Bing. 650. S. C. So where the testator had executed such a will, but some years afterwards made various interlineations and obliterations therein, but which was neither re-signed, republished, nor reattested, but a fair copy was afterwards made, in which he added one interlineation not affecting his freehold estate, but the copy was never signed, attested, or published, and the will and copy were found locked up in a drawer together, it was held that there was no revocation of the will as it originally stood; the alterations, &c. being merely demonstrative of an intention to execute another never carried into effect. Id. ibid. The testator's making a mark at the foot of his will, if intended as a signature, is sufficient. Freeman Rep. 538.*

The next doubt that occurred upon this point was, whether the testator *sealing* his will was not a signing within the statute, and in 2 Stra. 764. lord Raymond is reported to have held that it was; and of the same opinion three of the judges appear to have been, in 3 Lev. 1, on the ground that *signum* is no more than a mark, and sealing is a sufficient mark that this is his will; but in 1 Wils. 313. such opinion was said to be very strange doctrine; for that if it were so, it would be easy for one person to forge any man's will by only forging the names of any two obscure persons dead, for he would have no occasion to forge the testator's hand. And they said, "if the same thing should come in question again, they should not hold that sealing a will was a sufficient signing within the statute." But in 2 Atk. 176. lord Hardwicke seems to have thought, that sealing without signing in the presence of a third witness, the will having been duly signed in the presence of two, would have been sufficient to make it a good will. It was held in a case where the testator was blind, that it is not necessary to read over the will previous to the execution, in the presence of the attesting witnesses. 2 New R. 415. The signing of the testator need not be in the presence of the witnesses; it suffices if he acknowledge his signature to each of them. 3 P. W. 253. 2 Ves. 454. 1 Ves. J. 11. 8 Ves. 504. 1 Ves. & B. 362.

Upon the *attestation* of a will, many questions have also arisen. The first seems to have been whether the witnesses must attest the signing by the testator, and upon this point, the statute not requiring the testator to sign his will in the presence of the witnesses, it has been held sufficient, if the testator acknowledge to the witnesses that the name is his. 3 P. Wms. 253. 2 Ves. 254. See also 2 P. Wms. 510. Comyn's Rep. 197. 1 Ves. Jun. 11. The next question respecting the attestation was, what shall be construed a signing in the presence of the testator; and upon this point, which first came into consideration in 1 P. Wms. 740, lord Macclesfield held, that "the bare subscribing of a will, by the witnesses in the same room, did not necessarily imply it to be in the testator's presence; for it might be in a corner of the room, in a clandestine fraudulent way, and then it would not be a subscribing by the witness in the testator's presence, merely because in the same room; but that here, it being sworn by the witness, that he subscribed the will at the request of the testatrix and in the same room; this could not be fraudulent, and was therefore well enough." So in the case in 2 Salk. 688. the testator having desired the witnesses to go into another room seven yards distant, to attest it, in which room there was a window broken, through which the testator might have seen, the attestation was held good; for that it was enough that the testator *might* see the witnesses signing, and that it was not necessary that he should *actually* see them. See also 3 Salk. 395. And lord Thurlow, in 1 Bro. C. C. 99, relying upon the authority in 2 Salk. 688. inclined to think a will well attested where the testatrix could see the witnesses through the window of her carriage, and of the attorney's office. But the above cases turned upon the circumstance of the testator being in a situation which allowed of his seeing the witnesses sign; if, therefore, he be in a position in which he cannot see the signing, it seems such attestation would not be a compliance with the statute. Carth. 79. Holt's Rep. 222. 1 P. Wms. 239. 2 Show. 288. And in the case in Comyn's R. 531, it was determined that the question, whether present or not, was a fact for the consideration of the jury, upon all the circumstances of the case. See also, Stra. 1109. And if the jury find that the testator was in a situation where he could not see the witnesses, the will is not duly attested, 1 M. & S. 294; and if the testator were at the time of attestation insensible, though the witnesses signed in his presence, it is not a good attestation. Dougl. 241.

It seems also to have been a question, whether the witnesses should not attest the will in the presence of each other? But it was determined, very soon after the statute, that though the witnesses must all see the testator sign, or acknowledge the signing, yet that they may do it at different times. Anon. 2 Ch. Ca. 109. Freem. 486. Cook v. Parson,

* See Public Administrator v. Watts, 1 Paige Ch. R. and same case reversed, 4 Cowen, 168, as to wills appearing to be imperfectly executed.

tom (*q*); though the other is the safer way (10). 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* (11), lest by any possibility they should mistake the instrument (*s*). And, in one case determined by the court of king's bench (*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 purchasors 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 (12) given to witnesses, and thereby removing all possibility of their 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 (like that of all other witnesses) to be considered, on a view of all the circumstances, by the court [*378] *and jury before whom such will shall be contested. And in a much later case (*u*) 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 given on the former determination was said to be insufficient (13), (14).

(*q*) 3 Lev. 1.
(*r*) Freem. 486. 2 Ch. Cas. 109. Pr. ch. 185.
(*s*) 1 P. Wms. 740.
(*t*) Stra. 1253.
(*u*) M. 31 Geo. II. 4 Burr. 1. 430.

Pre. Ch. 185. Jones v. Lake, cited 2 Atk. 177. Bond v. Sewell, 3 Burr. R. 1773; and the acknowledgment by the testator to one of the witnesses, who did not see him sign, is good. See Addy v. Grix, 8 Ves. 504. Ellis v. Smith, 1 Ves. 11. As to the attestation by a marksman, see Harrison v. Harrison, 8 Ves. 185. It is not necessary that the witnesses should in their attestation express that they subscribed their names in the presence of the testator, but whether they did or not so subscribe is a question for the jury. 4 Taunt. 217. Willes Rep. 1.

Where there is a *power* to charge lands for the payment of debts, or for a provision for a wife or younger children, a court of equity will decree a will, though not executed according to the statute, a good execution of the power, Sch. & Lef. 60. 1 Duk. 165; and the defective execution of wills, in exercise of a power, is remedied by the 54 Geo. III. c. 168.

(10) But see ante 376. n. 8 and 9.

(11) In New-York the testator must sign in presence of the witnesses, and they must sign at his request; but, it would seem, need not sign in his presence. See note 8, ante, p. 376.

(12) This extends to devises of lands, and every interest given to the witnesses. But it has been held that a witness may be rendered competent to prove a will by a release, or the receipt of his legacy. 4 Burn Ecc. Law, 97. Pratt, C. J. however was of the opposite opinion.

(13) In New-York the law as to creditors is the same. (2 R. S. p. 57, § 6.) If a devise or legacy is given to one who is a *necessary* witness to prove the will, the devise is void, and he is a competent witness. But if without the will he would have been entitled to a share of the estate, then he shall receive such part of such share as will not exceed the part devised. (2 R. S. 65, § 50, 51.)

(14) A person who signs his name as witness to a will, by this act of attestation, so-

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 only) be deemed to be fraudulent and void: and that such creditors may maintain their actions jointly against both the heir and the devisee (15), (16).

A will of lands, made by the permission and under the control 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.

(*w*) See pag. 307, 308.

lemnly testifies the sanity of the testator. Should such witness afterwards attempt to impeach his own act, and to prove that the testator did not know what he was doing when he made (what purported to be) his will; though such testimony will be far indeed from conclusive, (*Hudson's case*, Skin. 70, *Digg's case*, cited ibid.), and Lord Mansfield held, that a witness impeaching his own act, instead of finding credit, deserved the pillory; (*Walton* v. *Shelley*, 1 T. R. 300. *Lowe* v. *Jolliffe*, 1 W. Bla. 366, *S. C.* 1 Dick. 389. *Goodtitle* v. *Clayton*, 4 Burr. 2225); yet, Lord Eldon held that the evidence of such parties was not to be entirely excluded; admitting, however, that it is to be received with the most scrupulous jealousy. (*Bootle* v. *Blundell*, 19 Ves. 504. *Howard* v. *Braithwaite*, 1 Ves. & Bea. 208). And Sir John Nicholl has laid it down as a distinct rule, that no fact stated by any witness open to such just suspicion can be relied on, where he is not corroborated by other evidence. (*Kinleside* v. *Harrison*, 2 Phillim. 499, and see *Burrowes* v. *Lock*, 10 Ves. 474.

(15) The statute 47 Geo. III. sess. 2. c. 74. enacts, that when any person, being at the time of his *death a trader*, within the true intent and meaning of the laws relating to bankrupts, shall die seised of or *entitled to any estate or interest* in lands, tenements, or hereditaments, or other real estate, which he shall not by his last will have charged with or devised, subject to or for the *payment of his debts*, and which before the passing of this act would have been *assets for the payment of his debts* due on any specialty in which the heirs were bound, the same shall be assets to be administered in courts of equity for the payment of *all the just debts* of such person, as well debts due on *simple contract* as on *speciality*; and that the heir or heirs at law, devisee or devisees of such debtors, shall be liable to all the same suits in equity, at the suit of any of the creditors of such debtor, whether creditors by simple contract or by specialty, as they were before the passing of this act, liable to, at the suit of creditors by specialty in which the heirs were bound: provided always, that in the administration of assets by courts of equity, under and by virtue of this act, all creditors by specialty in which the heirs are bound, *shall be paid the full amount of the debts due to them before any of the creditors by simple contract or by specialty*, in which the heirs are not bound, shall be paid any part of their demands.

With respect to the above enactments in the 3 & 4 W. & M. c. 14. see the decisions, Bac. Ab. Heir and Ancestor, F. 1 Chitty on Pl. 4th edit. 42. A devisee as such is liable to be sued at law only in an action of debt, and not of covenant. 7 East, 128. A devise to raise a portion for younger children, according to an agreement before marriage, and a devise for payment of debts, are exceptions in this statute; see section 4: but the payment of the debts must be provided for effectually, to bring the case within this exception. 1 Bro. 311. 2 Bro. 614. 7 Ves. J. 323.*

(16) Heirs and devisees are liable for the debts of their ancestor to the extent of the assets received by them: but they are only liable in case the personal estate is insufficient, and can be sued only in chancery. (2 R. S. 452, § 32 to 34: and p. 454, § 42: p. 456, § 60, 61.) The testator may, however, expressly charge lands descended or devised with debts, or direct the debts to be paid out of those lands before resorting to the personal estate. (Id. p. 453, § 45.)

* See 1 Hovenden's Supplement to Ves. Jun. R. 517.

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 of executing and publishing his will (*x*) (17). Where-
[*379] fore no *after-purchased lands will pass under such devise (*y*), unless, subsequent to the purchase or contract (*z*), the devisor republishes his will (*a*) (19).

(*x*) 1 P. Wms. 575. 11 Mod. 142.
(*y*) Moor. 255. 11 Mod. 127.
(*z*) 1 Ch. Cas. 39. 2 Ch. Cas. 144.
(*a*) Salk. 238.

(17) Lord Mansfield has declared, that this does not turn upon the construction of the statute 32 Henry VIII. c. 1. (as some have supposed) which says, that any person *having* lands, &c. may devise: for the same rule prevailed before the statute, where lands were devisable by custom. Cowp. 90. It has been determined, that where a testator has devised all his lands, or all the lands which he shall have at the time of his death; if he purchase copyholds after the execution of the will, and surrenders them to the uses *declared* by his will, they will pass by the will. Cowp. 130. Or if the testator, after making such a devise, purchase freehold lands, and then make a codicil duly executed according to the statute, though no notice is taken of the after-purchased lands; yet if the codicil is annexed to, or confirms the will, or, as it seems, has a reference to it, this amounts to a republication of the will, and the after-purchased lands will pass under the general devise. Cowp. 158. Com. 383. 4 Bro. 2. 7 Ves. Jun. 98. But if the codicil refer expressly to the lands only devised by the will, then the after-purchased lands will not pass under the general devise of the will. 7 T. R. 482. This also is a general rule, that if a man is seised of an estate in fee, and disposes of it by will, and afterwards make a conveyance of the fee-simple, and take back a new estate, this new estate will not pass by the will, for it is not the estate which the testator had at the time of publishing his will. A man possessed of estates in fee, before marriage, in order to make certain settlements upon his wife and children, entered into an agreement, in which he reserved to himself the reversion in fee, which reversion he afterwards disposed of by his will; and after the making of his will, he executed proper conveyances for the performance of the marriage-articles, in which, after the limitations to his wife and children, he took back the reversion in fee; this was held by lord Loughborough to be a revocation of the will, and his decision was afterwards confirmed by the house of lords in the case of Brydges v. Duchess of Chandos. 2 Ves. Jun. 417.

A similar decision was also made in the courts of common pleas and king's bench, in the case of Goodtitle v. Otway, 7 T. R. 399. In that case lord Kenyon lays down generally, "that it is now indisputably fixed, that where the whole estate is conveyed to uses, though the ultimate reversion comes back to the grantor by the same instrument, it operates as a revocation of a prior will." 7 T. R. 419.

Equity admits no revocation which would not upon legal grounds be a revocation at law. There are three cases which are exceptions to this general rule, viz. mortgages, which are revocations *pro tanto* only, a conveyance for payment of debts, or a conveyance merely for the purpose of a partition of an estate. In the two first a court of equity decrees the redemption, or the surplus, to that person who would have been entitled if such mortgage or conveyance had not existed, i. e. the devisee. 2 Ves. Jun. 428.

If an estate is modified in a different manner, as where a new interest is taken, from that in which it stood at the making of the will, it is a revocation. 3 Atk. 741. And equitable, being governed by the same rules as legal estates, if any new use be limited, or any alteration of the trusts upon which they were settled take place, a devise of them will be revoked. 2 Atk. 579. If A. having devised lands to B., afterwards convey to him a less estate, as for years, to commence from the death of the devisor, this is a revocation of the devise to B, Cro. Jac. 49; but a grant only of an estate for years, is not a revocation of a devise in fee. 2 Atk. 72. Or if A. after devising in fee, mortgage his lands or convey them in fee to trustees to pay debts, though this is a revocation at law, it is not so in equity, except *pro tanto*. 1 Vern. 329. 342. See also 3 Ves. Jun. 654. (18)

(18) The Revised Statutes of New-York have altered the law stated in the above note. 2 R. S. 51, § 2, makes every estate devisable that is descendible: id. § 5, directs that a will expressly of all the real estate of a testator, or using other terms, denoting an intent to devise all his real estate, shall be construed as passing all that he could devise at the *time of his death*; id. p. 64, § 45, &c. provides that a will shall be revoked by any bond, agreement, or covenant for valuable consideration to convey lands, or by any charge or incumbrance to secure the payment of money, or the performance of a covenant: or any conveyance or other act of a testator altering, but not wholly divesting, his estate: unless such conveyance expressly revokes the will, or the provisions of the instrument are wholly inconsistent with the devise or bequest: and if the instrument be inconsistent with such devise, and depend on a condition not performed or a contingency that does not happen, the revocation does not take place. In the cases above provided for, the lands pass to the devisee, subject to the agreement for specific performance, or to the charge or incumbrance.

(19) See most of the cases collected, 1 Saund. 277. n. 4; and see the principle, Gilb.

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 simplicitatem 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 expositio 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 a remainder a reversion may well pass, and *e converso* (*e*). And another maxim of law is, that "*mala grammatica 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 [*380] it be (if possible) made to take effect: and no word but what may operate in some shape or other (*h*). "*Nam verba 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. "*Verba fortius accipiuntur contra proferentem.*" As, if tenant in fee-simple grants to any one an estate for life, generally, it shall be construed an estate for the life of the grantee (*j*). 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 be taken between an indenture and a deed-poll: for the words of an indenture, executed by both parties, are to be considered as the words of them both; for, though delivered as the words of one party, yet they are not his words only, because the other party hath given his consent to every one of them. But in a deed-

(*b*) And. 60.
(*c*) 1 Balstr. 175. Hob. 304.
(*d*) 2 Saund. 157.
(*e*) Hob. 27.
(*f*) 10 Rep. 133. Co. Litt. 223. 2 Show. 334.
(*g*) 1 Balstr. 101.
(*h*) 1 P. Wms. 457.
(*i*) Plowd. 156.
(*j*) Co. Litt. 42.

U. & T. 116, 7. 1 Co. 105, 6. 6 T. R. 518. If an estate is given to A. and his heirs, or to A. and the heirs of his body, or any interest whatever to A., and A. dies before the testator, the devise is lapsed and void, and the heirs of A. can claim no benefit from the devise (20). White v. White, 6 T. R. 418. 1 Bro. 219. Doug. 330.

A devise is not compellable to take the estate devised to him, and a devisee in fee may by deed, without matter of record, disclaim the estate devised. 3 B. & A. 31.

(20) By the Revised Statutes of New-York, 2 vol. p. 66, § 52, if any real or personal estate be devised to any descendant of a testator, and such descendant die before the testator, but leaves any *descendant* surviving the testator, the surviving descendant takes the share devised.

poll, executed only by the grantor, they are the words of the grantor only, and shall be taken most strongly against him (*k*). And, in general, this rule, being a rule of some strictness and rigour, 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 to, and another against law; that sense be preferred, which is most agreeable thereto (*m*). As if tenant in tail lets a lease to have and to hold during life generally, it shall be construed to be a lease 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.

[*381] *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 is owing to the different natures of the two instruments; for the first deed and the last will are always most available in law (21). 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 or 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*) (22). By

(*k*) Co. Litt. 134.
(*l*) Bacon's Elem. c. 3.
(*m*) Co. Litt. 42.
(*n*) Hardr. 94.
(*o*) Co. Litt. 112.
(*p*) Cro. Eliz. 429. 1 Vern. 30.
(*q*) See pag. 108.
(*r*) See pag. 115.

(21) Such was held to be the law in the time of lord Coke. (See accordingly 6 Ves. 102: 5 Ves. 247, 407.) But now where the same estate is devised to A. in fee, and afterwards to B. in fee in the same will, they are construed to take the estate as joint-tenants, or tenants in common, according to the limitations of the estates and interests devised. 3 Atk. 493. Harg. Co. Litt. 112. b. n. 1.

(22) In the celebrated case of Perrin v. Blake, Burr. 2579. the question was, whether the manifest intention of the testator to give to the first taker an estate for life only ought to prevail, or that he should have an estate-tail from the construction which would have clearly been put upon the same words if they had been used in a deed? The devise in substance was as follows: the testator declared, it is my intent and meaning, that none of my children should sell or dispose of my estate for longer term than his own life; and *to that intent* I give my son John Williams my estate during his natural life, remainder to my brother-in-law during the life of my son John Williams (the design of that being to support the contingent remainder); remainder to the heirs of the body of John Williams. Lord Mansfield and two other judges of the court of king's bench determined, that John Williams took an estate for life only; but upon a writ of error to the exchequer-chamber, the decision was reversed, and six out of eight of the other judges held, that John Williams took an estate-tail, (see contra in New-York, by the Revised Statutes, vol. 1, 725, § 28,) which of consequence gave him an absolute power of *selling or disposing of* the estate as he pleased. The discussion of this subject called forth a splendid display of legal learning and ingenuity. Yet it has since been observed by a learned judge, that as one of the judges held that John Williams took an estate-tail, because he was of opinion that such might be presumed to be the testator's intention, no argument in future can be drawn from this case; because one half of the judges relied upon the ground of intention alone. And the editor entirely concurs with that learned judge, that it is the first and great rule in the exposition of wills, and to which all other rules must bend, that the intention of the testator, expressed in his will, shall prevail, provided it be *consistent with the rules of law*; that is, provided it can be effectuated consistently with the limits and bounds which the law prescribes. To argue that the intention shall be frustrated by a *rule of construction of certain words*, is to say that the intention shall be defeated by the use of the very words which the testator has adopted as the best to communicate his intention, and of which the sense is intelligible to all mankind. Where technical phrases and terms of art are used alone by a testator, it is fair to presume that he knew their artificial import and signification, and that such was his will and intention; but where he happens to in-

a will also an estate may pass by mere implication, without any express words to direct its course. As, where a man 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 (23). 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 such cross remainders are allowed between more than two devisees (*u*) (24): and, in general, where any implications are allowed, they must be such as are *necessary* (or at least highly **probable*) and not merely *possible* implications (*w*) (25). 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 of 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. [*382]

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 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 inquiries, namely, things real into the corporeal or substantial, and incorporeal or ideal *kind*; and have thus considered the rights of real pro-

(*s*) H. 13 Hen. VII. 17. 1 Ventr. 376.
(*t*) Freem. 484.
(*u*) Cro. Jac. 655. 1 Ventr. 224. 2 Show. 139.
(*w*) Vaugh. 262.
(*x*) Fitzg. 236. 11 Mod. 153.

troduce them, and at the same time in effect declares that I do not intend what conveyancers understand by these words, but my intention is to dispose of my estate directly contrary to the construction generally put upon them; surely courts of justice are, or ought to be, as much at liberty, or rather under an obligation, to effectuate that intention as far as the law will admit, as if he had expressed it in the most apt and appropriate language. 1 Bl. Rep. 672. 4 Burr. 2579. Doug. 329. Fearne, 113. Harg. Tracts, 351. 490.

See also a clear and elaborate exposition of the law and principles of construction in such case by Mr. Butler, Co. Litt. 376. b. n. 1. See further, 4 Ves. Jun. 412. 2 Ves. 248. and 3 Bro. C. C. 61.

(23) But it has been thought, that if it is given to a stranger after the wife's death, the devise raises no implication in favour of the wife, for it may descend to the heir during the life of the wife, which possibly may have been the testator's intention. Cro. Jac. 75. And courts of law have laid it down as a rule, that the heir shall not be disinherited but by a plain, and not merely probable, intention. Doe v. Wilkinson, 2 T. R. 209.

(24) The contrary has for some time been fully established; and this has been laid down by lord Mansfield, as a general rule, viz. wherever cross remainders are to be raised between two and no more, the favourable presumption is in support of cross remainders: where between more than two, the presumption is against them; but the intention of the testator may defeat the presumption in either case. Perry et al. v. White. Cowp. 777. 797. 4 T. R. 710.

In a will there may be cross remainders amongst any number by implication, where it is the manifest intention of the testator, though he has given the estates to the *respective* heirs of their bodies. 2 East, 36.

(25) "In construing a will conjecture must not be taken for implication, but necessary implication means not natural necessity, but so strong a probability of intention, that an intention contrary to that which is imputed to the testator, cannot be supposed." Lord Eldon, 1 V. & B. 466.

perty 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 book. 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 [*383] 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 causes 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 inquiries 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."

CHAPTER XXIV.

OF THINGS PERSONAL (1).

UNDER the name of things *personal* are included all sorts of things *moveable*, which may attend a man's person wherever he goes; and there-

(y) Proeme to 1 Inst.

(1) See in general, as to what is personal property, Com. Dig. Biens; Vin. Ab. Property; and 2 Roper on Legacies, ch. 16. sect. 1. See 387. post. "Chattels" are real or personal. Co. Lit. 118. b. Chattels real are such as concern the realty, as a term for years. Id. Chattels personal are cattle, stuff, &c. fowls tame or reclaimed, deer, conies tame, fish in a trunk, tithes severed from the nine parts, trees sold or reserved upon a sale, Hob. 173; and emblements, Com. Dig. Biens, A. 2. The terms "goods and chattels" include choses in action as well as those in possession. 12 Co. 1. 1 Atk. 182. But a bill of exchange, mortgage, bond, and banker's receipt, will not pass by a bequest of all the testator's "property" in a particular house, though cash and bank notes would have passed, they being quasi cash; for bills, bonds, &c. are mere evidence of title to things out of the house and not things in it. 1 Sch. & Lef. 318. 11 Ves. 662. The term "chattels" is more comprehensive than

fore, 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 *immoveable*, as land 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 as only 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 inflict- [*385]
ed by the common law, of *all* a man's goods 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 realty: 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 convenience, 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*, which, sir Edward Coke says (*a*), is a French word signifying goods. The appellation is in truth derived from the technical Latin word, *catalla*: which primarily signified only beasts of husbandry, or (as we still call them) *cattle*, but in its secondary sense was

(*a*) 1 Inst. 118.

"goods," and will include animate as well as inanimate property. The term "goods" will not include fixtures; but the word "effects" may embrace the same. 7 Taunt. 188. 4 J. B. Moore, 73. 4 B. & A. 206. Invalid exchequer bills are securities, and effects within meaning of 15 Geo. II. c. 13. 1 New. R. 1. The terms "effects, both real and personal," in a will, pass freehold estates, and all chattels real and personal. 3 Bro. P. C. 388. As to *trees*, see Com. Dig. Biens, H.; 2 Saund. index, Trees; Bridgm. index, tit. Timber. When severed, or contracted to be severed, from the land, they pass as personal property. Hob. 173. 11 Co. 50. Com. Dig. Biens, H. Toller's L. Ex. 195, 6.

applied to all moveables in general (*b*). In the *grand coustumier* of Normandy (*c*) a *chattel* is described as a mere moveable, but at the same time it is set in opposition to a fief or feud: so that not only goods, but [*386] whatever was not a feud, were accounted chattels. *And it is in this latter, more extended, negative sense, that our law adopts it; the idea of goods, or moveables only, being not sufficiently comprehensive to take in every thing that the law considers as a chattel interest. For since, as the commentator on the *coustumier* (*d*) 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; 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* (*e*).

1. Chattels *real*, saith sir Edward Coke (*f*), are such as concern, or savour of, the realty; as terms for years of land, wardships in chivalry (while the military tenures subsisted), the next presentation to a church, estates by a statute-merchant, statute-staple, *elegit*, or the like; of all which we have 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 feodal 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 (*g*). A freehold, which alone is a real estate, and seems (as has been said) to answer to the fief in Normandy, is conveyed by [*387] 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 *per auter vie*, and the determinable freeholds mentioned in a former chapter (*h*). 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 will certainly 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

(*b*) Dufresne, II. 409.
(*c*) c. 87.
(*d*) *Il conviendroit quil fust non meuuable et de durce a tou iiours, fol.* 107. *a.*
(*e*) So too in the Norman law, *Catheux sont meubles et immeubles: si comme vrais meubles sont qui transporter se peuvent, et ensuivir le corps; immeubles sont choses qui ne peuvent ensuivir le corps, ni estre transportees, et tout ce qui n'est point en heritage. LL.* Will. Nothi, 4. *apud* Dufresne, II. 409.
(*f*) 1 Inst. 118.
(*g*) See page 142.
(*h*) Page 120.

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 expired of course 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).

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 pro- [*388] perty being of a mongrel amphibious nature, originally endowed with one only of the characteristics 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 XXV.

OF PROPERTY IN THINGS PERSONAL (1).

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 a *qualified* property.

I. First, then, of property in *possession absolute* (2), 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 of a plant, when severed from the body of it; 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

(2) So in New-York, and in many other states in the U. S., a mortgage, though in form a conditional fee, is considered a mere chattel interest. 15 Johns. 320. In England the mortgagee, on the contrary, is considered the owner of the legal estate.

(1) See in general, Com. Dig. Biens; Vin. Ab. Property.

(2) It is a rule of law, that the absolute or general property of personal chattels, draws to it the supposed possession. 2 Saund. 47. a.

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 [*390] 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 are *ferae naturae*: some being of a *tame* and others of a *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 (3).

Of all tame and domestic animals, the brood belongs to the owner of the dam or mother; the English law agreeing with the civil, that "*partus sequitur ventrem*" in the brute creation, though for the most part in the human species it disallows that maxim. And therefore in the laws of England (*d*), as well as Rome (*e*), "*si equam meam equus tuus praegnantem fecerit, non est tuum sed meum quod natum est.*" 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 great expense 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 [*391] of the general rule cease, and "*cessante ratione cessat et ipsa lex:*" for the male is well known, by his constant association with the female; and for the same reason the owner of the one doth not suffer more disadvantage, during the time of pregnancy and nurture, than the owner of the other.

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*.

(*a*) 2 Mod. 319.
(*b*) *Vin. in Inst. l.* 2, *tit.* 1, § 15.
(*c*) 1 Hal. P. C. 511, 512.
(*d*) *Bro. Abr. tit. propertie*, 29.
(*e*) *Ff.* 6. 1. 5.
(*f*) L. of N. l. 4, c. 7.
(*g*) 7 Rep. 17.

(3) Com. Dig. Biens, F.

1. A qualified property may subsist in animals *ferae naturae per industriam hominis* (4): 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, quasi manui assueta.* 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 natu*rae, though it may happen that the [*392] latter shall be sometimes tamed and confined by the art and industry of man. Such as are deer in a park, hares or rabbits in an inclosed warren, doves in a dove-house, 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 (*h*) (5). A maxim which is borrowed from the civil law (*i*); "*revertendi animum videntur desinere habere tunc, cum revertendi consuetudinem deseruerint.*" The law therefore extends this possession farther than the mere manual occupation; for my tame hawk that is pursuing his quarry in my prescence, 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 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 manner, it is then lawful for any stranger to take them (*k*). 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 (*l*): 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 (*m*). *And to the same purpose, not [*393]

(*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.

(4) See in general the observations of Mr. Justice Bayley in Hannam v. Mockett, 2 B. & C. 937 to 944; Com. Dig. Biens, F. and Action sur Trover, C.; 1 Saund. 84. Trover lies for a parrot or monkey, because they are merchandise, and valuable, Cro. J. 262; but indictment does not lie for stealing a tamed ferret. Russ. & R. C. C. 350.

(5) As to pigeons, see 1 Chitty's Game Laws, 135 to 143. The killing or taking a dove-house pigeon, *any where*, subjects the party to a twenty shillings penalty. 2 Geo. III. c. 29.

to say in the same 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 poperty 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 entitled to take them. But it hath been also said (*o*), that with us the only ownership in bees is *ratione soli*; 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 (6).

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 hath ability to seize 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 (7). It is also as much felony by common law to steal such of them as are fit for food (8), 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 pro-
[*394] perty 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 relic of the

(*n*) *l.* 2, c. 1, § 3.
(*o*) Bro. *Abr. tit. propertie*, 37. cites 43 Edw. III. 24.
(*p*) 9 Hen. III. c. 13.
(*q*) 1 Hal. P. C. 512.
(*r*) Lamb. Eiren. 275.
(*s*) 7 Rep. 18. 3 Inst. 109.
(*t*) Bro. *Abr. tit. trespass*, 407.
(*u*) 1 Hal. P. C. 512. 1 Hawk. P. C. c. 33.

(6) With respect to *rooks*, it has been recently determined, that no action is sustainable against a person for maliciously causing loaded guns to be discharged near a neighbour's close and trees, and thereby disturbing and driving away the rooks which used to resort to and have young in the same, inasmuch as rooks are a species of birds ferae naturae, destructive in their habits, not properly an article of food, and not protected by any act of parliament, and that the plaintiff therefore could not have any property in them. Hannam v. Mocket, 2 Bar. & C. 934. 4 Dowl. & R. 518. S. C. But an action on the case lies for discharging guns near the *decoy-pond* of another, with design to damnify the owner, by frightening away the wild fowl resorting thereto, by which the wild fowl are frightened away, and the owner damnified; for wild fowl are protected by the 25 Hen. VIII. c. 11. and they constitute a known article of food; and a person keeping up a decoy expends money and employs skill in taking that which is of use to the public. It is a profitable mode of employing his land, and was considered by lord Holt as a description of trade. Keeble v. Hickeringill, 11 East, 574. 2 B. & C. 943. Other animals are specially protected by acts of parliament, as hawks, falcons, swans, partridges, pheasants, pigeons, wild ducks, mallards, teal, widgeons, wild geese, black game, red game, bustards, and herons, and consequently, in the eye of the law, are fit to be preserved. Bees are property, and the subject of larceny. Per Bayley, J. 2 B. & C. 944. Sir T. Raym. 33.

(7) Ante 391, note (4).

(8) But it is not felony to steal such animals of a wild nature, unless they are either so confined that the owner can take them whenever he pleases; or are reduced to tameness, and known by the thief to be so. And his knowledge of this fact may be made out before the jury by circumstantial evidence, arising out of his own conduct, and the condition and situation of the animal stolen. East's P. C. c. 16. s. 41. Hawk. b. 1. c. 33. s. 26.

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 stealing one was a grievous crime, and subjected the offender to a fine; especially if it belonged to the king's household, and was the *custos horrei regii*, for which there was a very peculiar forfeiture (*w*). And thus much of qualified property in wild animals, reclaimed *per industriam*.

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 [*395] 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 (9).

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 and 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 unpens 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.

(*w*) "*Si quis felem, horrei regii custodem, occiderit vel furto abstulerit, felis summa ocuda suspendatur, capite aream attingente, et in eam grana tritici effundantur, usquedum summitas caudae tritico co-operiatur.*" Wotton. *LL. Wall. l.* 3, *c.* 5, § 5. An amercement similar to which, sir Edward Coke tells us, (7 Rep. 18.) there anciently was for stealing swans; only suspending them by the beak, instead of the tail.

(*x*) *Cartadi de forest.* 9 Hen. III. c. 13.

(*y*) 7 Rep. 17. Lamb. Eiren. 274.

(*z*) Cro. Car. 554. Mar. 48. 5 Mod. 376. 12 Mod. 144.

(*a*) 9 Rep. 58.

(*b*) 9 Rep. 59. Lut. 92.

(*c*) 9 Rep. 59.

(*d*) 1 Leon. 273. Skin. 389.

(9) In New-York, and generally in the U. S., there are no such privileges.

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 [*396] ownership. *As in case of *bailment*, 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, immediately, his possession also (*e*) (10). 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 in them: the pledgor's property is conditional, and depends upon the performance of the condition of repayment, *&c.*; and so too is that of the pledgee, which depends upon its non-performance (*f*). The same may be said of goods distrained 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 upon; 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, but 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 [*397] 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 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

(*e*) 1 Roll. Abr. 607.
(*f*) Cro. Jac. 245.
(*g*) 3 Inst. 108.
(*h*) The same idea, and the same denomination, of property prevailed in the civil law. "*Rem in bonis nostris habere intelligimur, quotiens ad recuperandum eam actionem habeamus.*" (*Ff.* 41. 1. 52.) And again, "*aeque bonis adnumerabitur etiam, si quid est in actionibus, petitionibus, persecutionibus. Nam et haec in bonis esse videntur.*" (*Ff.* 50. 16. 49.)

(10) See 2 Saund. 47, b.

upon an *implied* contract, that if the covenantor does not perform the act he engaged to do, he shall pay me the damages I sustain by this breach of covenant. And 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 *esse*: though the owner may have as *absolute [*398] a property in, and be as well entitled to, such things in action, as to 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* (11). 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 (*l*): 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 goods, being analogous to the fee-simple which a tenant in tail may acquire in a real estate.

(*i*) Equ. Cas. Abr. 360.
(*k*) Mar. 106.
(*l*) 2 Freem. 206.
(*m*) 1 P. Wms. 290.

(11) At this day chattels real and personal cannot be directly *entailed*, but they may by deed of trust be as effectually settled to one *for life* with *remainders over*, as an estate of inheritance, if it be not attempted to render them unalienable beyond the period allowed by law. See Gilb. Uses and Trusts, by Sugden, 121. note 4. and Mr. Hargrave's note 5 to Co. Lit. 20. a.

[*399] *Next, as to the *number* of *owners* (12). Things 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 descend from the ancestor to the heir, which is necessary to constitute coparceners. But if a horse, or other personal chattel, be given to two or more, 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 accrescendi* 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*) (13).

(*n*) Litt. § 282. 1 Vern. 482.
(*o*) Litt. § 321.
(*p*) 1 Equ. Cas. abr. 292.
(*q*) pag. 193.
(*r*) 1 Vern. 217. Co. Litt. 182.

(12) When legacies are given to two or more persons *in undivided shares*, as 100*l.* "to A. and B." or to the children of C.; or in case of a bequest to two without words of severance, the legatees will take as *joint-tenants*. 2 P. Wm. 347. 529. 4 Bro. C. C. 15. 3 Ves. J. 628. 632. 6 Ves. J. 130.

When the legacies are given in *divided shares*, as so much of a sum of money to B. and so much to C., the legatees will be considered as *tenants in common*; as in instances where legacies are given to two or more persons, "share and share alike," or "to and among them," or "to them respectively," or "to be equally divided amongst them," such words will create a tenancy in common. 3 Atk. 731. 2 Atk. 441. 2 Atk. 121. 1 Atk. 494. 3 Bro. C. C. 25. 5 Ves. J. 510. Cases have occurred in which the determination that the above words or expressions should create a tenancy in common, would have seemingly involved a contradiction, as in those instances where such words of severance occurred, and a bequest over to surviving legatees was immediately grafted upon them. In those instances the court of chancery, in order to give effect to every word in the bequest, has considered the words creating the survivorship among the legatees, as intended to be confined *to the time of the death of the testator*, and therefore decreed that the legatees should be considered *tenants in common* from *that* period, with benefit of survivorship, in case of the death of any *before* the testator. 1 P. Wms. 96. 2 P. Wms. 280. 1 Eq. C. A. 292. Prec. Ch. 78. 2 Eq. C. A. 343. 2 Ves. J. 265. 634. 3 Ves. J. 205. 450. 4 Ves. J. 551. 5 Ves. J. 806. We must observe that the operation of a bequest to "*survivors*," grafted upon a tenancy in common, will not be confined to the period of the testator's death, if it can be further extended with propriety; therefore in several cases such bequest to survivors, from the particular construction of each will, was considered efficient during the minority of the legatees, as they were not entitled to the benefit of the provisions, before the age of twenty-one; and, perhaps, in order to effectuate the intention and prevent a lapse, when a life interest is given prior to the distribution, directed among the legatees, the period of survivorship will be extended during the life of the tenant for life. 1 Ves. 13. 3 Atk. 619. Amb. 383. A bequest to two or more, "in joint and equal proportions," or "jointly and between them," will create a tenancy in common; the terms "joint or jointly" not being considered as intended to impart a joint interest to the legatees, but to signify a gift to them altogether. Ambl. 656. 1 Bro. C. C. 118. Although, as we have already seen, the words "equally to be divided," "and share and share alike," &c. will create a tenancy in common; yet when it appears from the context of the will, that a joint-tenancy was intended, such words will not be permitted to sever the interests of the legatees. 3 Bro. C. C. 215. Holt's Rep. 370. Roper on Legacies, 2 vol. 259 to 287. Residuary legatees and executors are joint-tenants, unless the testator use some expression which converts their interest into a tenancy in common; and if one dies before a division or severance of the surplus, the whole that is undivided will pass to the survivor or survivors. 2 P. Wms. 529. 3 Bro. 455. see p. 193, ante.

(13) As between parties in trade or farming, there is, generally speaking, no survivorship between them as to personal property in *possession*, for each of their respective shares or degrees of interest go to their personal representatives, who become tenants in common with the survivor of all the partnership effects in possession, it being a maxim, [illegible]

CHAPTER XXVI.

OF TITLE TO THINGS PERSONAL BY OCCUPANCY (1).

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 or grant. 9. By contract. 10. By bankruptcy. 11. By testament. 12. By administration.

And, first, a property in goods and chattels may be acquired by *occupancy:* which, we have more than once remarked (*a*), 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 [*401] 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 seize to his own use such goods as belong to an alien enemy (*b*) (2). For such

(*a*) See pag. 3. 8. 258. (*b*) Finch. L. 178.

mercatores jus accrescendi locum non habet. Co. Lit. 3. 282. 182. a. 1 Vern. 217. 1 Meriv. 564. 1 Ld. Raym. 281. Vin. Ab. Partners. But it has been determined that the good-will of a partnership survives, but that has been disputed. 5 Ves. 539. 15 Ves. 218. 1 Jac. and W. 267. A court of equity has barred survivorship, although the deceased partner, upon being informed that by law there would be a survivorship, said he was content the stock should survive, 1 Vern. 217; and though if two persons take a farm, the lease will survive, but if they lay out money jointly upon it, in the way of trade, that turns round the estate at law, and makes it equitable. 1 Ves. J. 435; see further, 3 Chitt. Com. L. 235, 6. But although there is no survivorship as to partnership property in possession, yet at law there is as to *choses in action*, for when one or more partners having a joint legal interest on a contract, dies, an action against the said parties must be brought in the name of the survivor, and the executor or administrator of the deceased cannot be joined, neither can he sue separately, but must resort to a court of equity to obtain from the survivor the testator's share of the sum which has been recovered. 1 East, 497. 2 Salk. 441. 1 Ld. Raym. 346. Carth. 170. Vin. Ab. Partner, D.

(1) See in general, 2 Wooddes. Vin. L. 389 to 396; Schultes on Aquatic Rights, 20. 23. 106.

(2) Questions respecting the seizure of property as prizes, seldom arise in the common law or equity courts, they being, in general, cognizable only in the admiralty courts; and when a ship is bona fide seized as prize, the owner cannot sustain an action in a court of common law for the seizure, though she be released without any suit being instituted against her, his remedy, if any, being in the court of admiralty, 2 Marsh. R. 133; and the same rule applies to the imprisonment of the person when it has taken place merely as a consequence of taking a ship as prize, although the ship has been acquitted. 1 Le Caux v. Eden, Dougl. 594. For the law re-

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 seize 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 or 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 holden (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 seized (3). 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 sunset 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) re-
[*402] quire, that before the property can *be changed, the goods must have been brought into port, and have continued a night *intra præsidia*, in a place of safe custody, so that all hope of recovering them was lost (4).

(c) Freem. 40.
(d) Bro. *Abr. tit. propertis*, 38. *forfeiture*, 57.
(e) *Ibid.*
(f) *de j. b. & p. l.* 3, c. 6, § 3.
(g) Bynkersh. *quæst. jur. publ. l.* 4 Rocc. *de Assecur. not.* 66.

specting seizures and captures, and the modes of acquiring and losing property thereby, see the admiralty decisions of sir Wm. Scott, collected and arranged in 1 Chitty's Commercial L. 377 to 512. and 2 Wooddes. 435 to 457.

(3) And by modern decisions, the right to sue upon contracts made with him during peace, is only suspended, not forfeited, by war. 13 Ves. J. 71. 3 B. & P. 191. 6 Taunt. 239. 1 Chitty's Com. L. 423 to 426.

(4) Modern authorities require something more to vest the property of a captured vessel in the captors. "I apprehend that by the general practice of the law of nations, a sentence of condemnation is at present deemed generally necessary; and that a neutral purchaser in Europe, during war, does look to the legal sentence of condemnation as one of the title deeds of the ship, if he buys a prize vessel. I believe there is no instance in which a man, having purchased a prize vessel of a belligerent, has thought himself quite secure in making that purchase, merely because that ship had been in the enemy's possession twenty-four hours, or carried infra præsidia." Sir Wm. Scott, in the case of the Flad Oyen, 1 Rob. Rep. 139. See also 3 Rob. Rep. 97. and 236, 7, 8. Goss v. Withers, 2 Burr. 683. Assievedo v. Cambridge, 10 Mod. 79. But if after the transfer of a prize to a neutral, a peace be concluded between the belligerents, the transfer becomes valid, even though there was no legal condemnation. 6 Rob. Rep. 142. The title of a neutral will not be defeated, by his subsequently becoming an enemy. 6 Rob. Rep. 45. See 1 vol. Chitty's Com. Law. 433, 4. It has been established by several acts of parliament, that among English subjects, ships or goods taken at sea by an enemy, and afterwards retaken, at any indefinite period of time, and whether before or after sentence of condemnation, are to be restored to the original proprietors, on payment of certain salvage. 2 Burr. 1198. and 1 Bl. Rep. 27. The statute 43 Geo. III. c. 160. s. 39. makes an exception as to ships which have been set forth by the enemy as vessels of war; enacting, that these shall not be restored to the original owners, but belong wholly to the recaptors. And if the property recaptured, were captured first in an illegal trade, then the original right is divested, and the recaptors are not bound to restitution. 2 Rob. Rep. 77. In the case of the Santa Cruz, 1 Rob. Rep. 49, Sir Wm. Scott said, "The actual rule of the English maritime law I understand to be this, that the maritime law of England having adopted a most liberal rule of restitution with respect to the recaptured property of its own subjects, gives the benefit of that rule to its allies, till it appears that they act towards British property on a less liberal principle: in such a case it adopts their rule, and treats them according to their own measure of justice." But restitution in any case is not *gratuitous*, for by the 43 Geo. III. c. 160. certain rates of salvage are secured to the recaptors, for saving or recovering the property. One-eighth of the be-

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 (*i*) (5). And this doctrine seems to have been extended to negro-servants (*k*), who are purchased, when captives, of the nations with whom they are at war, and are therefore supposed to continue in some degree the property of the masters who buy them: though, accurately speaking, that property (if it indeed continues), consists rather in the perpetual *service*, than in the *body* or *person* of the captives (*l*).

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 mass 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 (*m*), 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 (6) overlooking my neighbour's ground, he may not erect any blind

(*h*) Bro. *Abr. tit. propertie*, 18.

(*i*) We meet with a curious writ of trespass in the register (102), for breaking a man's house, and setting such his prisoner at large. "*Quare domum ipsius A. apud W. (in quâ idem A. quendam H. Scotum per ipsum A. de guerrâ captum tanquam prisonem suum, quousque sibi de centum libris, per quas idem H. redemptionem suum cum præfato A. pro vitâ suâ salvandâ fecerat satisfactum foret, detinuit) fregit, et ipsum H. cepit et abduxit, vel quo voluit abire permisit, &c.*"

(*k*) 2 Lev. 201.

(*l*) Carth. 396. Ld. Raym. 147. Salk. 667.

(*m*) Book I. ch. 8.

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neficial interest in the whole recaptured property, is given to king's ships, and one-sixth to private ships. And the reward of salvage is given in cases of rescue, when it is effected by the rising of the captured crew against the captors. 1 Rob. Rep. 271. 4 ib. 147. 1 Edw. Rep. 68.

(5) Ransom of ships, &c. is now illegal, unless in case of necessity, to be allowed by the admiralty, by 22 Geo. III. c. 25. 43 Geo. III. c. 160. s. 34, 35, 36. 45 Geo. III. c. 72.*

(6) Formerly it was holden that a party could not maintain an action for a nuisance to an ancient light, unless he had gained a right to the window by prescription. 1 Leon. 168. Cro. El. 118. But the modern doctrine is, that upon proof of an adverse enjoyment of lights for twenty years or upwards unexplained, a jury may be directed to presume a right by grant or otherwise. 2 Saund. 175. a. 1 Esp. R. 148; but if the window was opened during the seisin of a mere tenant for life, or a tenancy for years, and the owner in fee did not acquiesce in, or know of the use of the light, he would not be bound, 11 East, 372. 3 Campb. 444. 4 Campb. 616; and where the adjoining land was glebe land in the possession of a rector, tenant for life, it was held that there could be no presumption of a grant so as to preclude a purchasor thereof under 55 Geo. III. c. 147. from building and obstructing an ancient light, 4 B. & A. 579; but when the window has been proved to have been in existence upwards of twenty years, and its origin cannot be traced, the purchasor from the owner in fee cannot disturb it, though no evidence that the latter acquiesced in the window can be adduced. 2 Bar. & Cres. 686. 4 Dowl. & R. 234. If the owner of land build a house on part, and afterwards sell the house to one person, and the rest of the land to another, the vendee of the house may maintain an action against the vendee of the land for obstructing his light, though the house was not an ancient one, because the law will not suffer the vendor, or any person claiming under him, to derogate from his own grant; and consequently less than twenty years' use of the light suffices. 1 Lev. 122. 1 Ventr. 237. 1 Price, 27. Ryan. v. Moodys, Rep. 24. 2 Saund. 114. n. 4. But if an ancient window has been completely blocked up above twenty years, it loses its privilege, 3 Campb. 514; and even the presumption of right from twenty years' undisturbed enjoyment, is excluded by the custom of London, which entitles every citizen to build upon an ancient foundation as high as he pleases. Com. Rep. 273. 2 Swanst. 333. But the circumstance of a window being built contrary to the building act, affords no defence to an action for obstructing it, 1 Marsh. 140; and if ancient windows be raised and enlarged, the owner of the adjoining land cannot legally obstruct the passage of light and air to any part of the space occupied by the ancient window. 3 Campb. 80. Total deprivation of light is not necessary to sustain this action, and if the party cannot enjoy the light in so free and ample a manner as he did before, he may sustain the action, but there should be some sensible diminution of light or air. 4 Esp. R. 69. Chilton v. Sir

* We have no such *statutes* in the U. S.

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 [*403] *makes a tan-yard, so as to annoy 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 may 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 (7).

4. With regard likewise to animals *ferae naturae* (8), 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 their 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, aërial, 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 (9). 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

T. Plumer, K. B. A. D. 1822. The building a wall which merely obstructs the prospect is not actionable. 9 Co. 58. b. 1 Mod. 55. Nor is the opening a window and destroying the privacy of the adjoining property; but such new window may be immediately obstructed, to prevent a right to it being acquired by twenty years' use. 3 Camp. 82.

(7) Running water is originally *publici juris*, and an individual can only acquire a right to it by applying so much of it as he requires for a beneficial purpose, leaving the rest to others, who, if they acquire a right to it by subsequent appropriation, cannot lawfully be disturbed in the enjoyment of it. But where the plaintiff alleged that defendant had erected one dam above plaintiff's premises, and widened another, and thereby prevented the water from running in its usual course, and in its usual calm and smooth manner, to the plaintiff's premises, and thereby the water ran in a different channel, and with greater violence, and injured the banks and premises of plaintiff, but did not allege any injury from the want of a sufficient quantity of water, and the jury found that plaintiff's premises were not injured, but were of opinion that defendant had no right to stop the water, or keep it pent up in the summer time, held that the plaintiff could not recover damages for the erection of the dam, but was bound to allege and prove that he had sustained an injury from the want of a sufficient quantity of water. 2 B. & C. 910. 4 Dowl. & Ryl. 583. S. C.* The owner of land through which a river runs, cannot by enlarging a channel of certain dimensions, leading out of the river through which the water had been used to flow, before any appropriation of it by another, divert more of it to the prejudice of any other land owner lower down the river, who had at any time before such enlargement appropriated to himself the surplus water which did not escape by the former channel. 6 East, 208. And the occupier of a mill may maintain an action for forcing back water and injuring his mill, although he has, within a few years previous, erected a wheel requiring less water than the one he previously used. 1 B. & A. 258. But where the defendant erected a dam above the mill of the plaintiff, by which the water was diverted from its accustomed channel, but to which it returned long before it reached the plaintiff's mill; which diversion affected the regularity of the supply, though it produced no waste of water, it was held that the plaintiff was entitled to recover. 7 Moore, 345. As to the pleadings, see 1 Price Rep. 1 and 2 Chitty on Pl. 788.

(8) Com. Dig. Biens, and 1 Chitty's Game L.

(9) See this controverted in page 419. note.

* See also 15 Johns. 213.

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*(10), by any *possessor* *of the land who [*404] hath sown or planted it, whether he be owner of the inheritance, or of a less estate: 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 action (*n*); and by the statute 11 Geo. II. c. 19. though not by the common law (*o*), they may be distreined for rent arrere (11). 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 entitled by his right of possession to the property of it under such its state of improvement (*r*): 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 (*s*) (12). And these doctrines are implicitly copied and adopted by our Bracton (*t*), and have since been *confirmed by many resolutions of [*405]

(*m*) Perk. § 512.
(*n*) Bro. *Abr. tit: emblements*, 21. 5 Rep. 116.
(*o*) 1 Roll. Abr. 668.
(*p*) page 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.

(10) "The right to emblements does not seem to be aptly referred to the principle of occupancy; for they are the continuation of an inchoate, and not the acquisition of an original, right." Mr. Christian's edit. See the law as to emblements, ante 122. note 3.

(11) But by the 56 Geo. III. c. 50. no sheriff or other officer shall sell or carry off from any lands any straw, chaff, or turnips, in any case, nor any hay or other produce, contrary to the covenant or written agreement made for the benefit of the owner of the land; but the tenant must give previous notice to the sheriff, &c. of the existence of such covenant, &c. But the produce, &c. may be so sold, subject to an agreement to expend it on the land. And landlords are not to distrein for rent on purchasors of crops severed from the soil, or other things sold subject to such agreement; nor shall the sheriff sell or dispose of any clover, rye-grass, or any artificial grass whatsoever, which shall be newly sown and be growing under any crop of standing corn. See sections 6 & 7.

(12) This also has long been the law of England; for it is laid down in the Yearbooks, that whatever alteration of form any property has undergone, the owner may seize it in its new shape, if he can prove the identity of the original materials; as if leather be made into shoes, cloth into a coat, or if a tree be squared into timber, or silver melted or beat into a different figure. 5 Hen. VII. fo. 15. 12 Hen. VIII. fo. 10. The cases referred to, Bro. Ab. Propertie, 23. Moor. 20. Poph. 38. are very explicit; see also 2 Campb. 576. Com. Dig. Pleader, 3. M. 28. Bac. Ab. Tresp. E. 2.

the courts (*u*). It hath even been held, that if one takes away and clothes another's wife or son, and afterwards they return home, the garments shall cease to be his property who provided them, being annexed to the person of the child or woman (*w*).

7. But in the case of *confusion* of goods (13), 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 (*x*). But if one wilfully 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 (*y*). But our law, to guard against fraud, 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 (if it subsists by the common law) being grounded on labour and invention, is more properly 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 composition: 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 seems to have clearly [*406] a *right to dispose of that identical work as he pleases, and any attempt to vary the disposition he has made of it, appears to be an invasion of that right. 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 exhibiting 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 exhibited; and no other man (it hath been thought) can have a right to exhibit it, especially for profit, without the author's consent. This consent may perhaps be tacitly given to all mankind, when an author suffers his work to be published by another hand, without any claim or reserve of right, and without stamping on it any marks of ownership; it being then a present to the public, like building a church or bridge, or laying out a new highway; but, in case the author sells a single book, or totally grants the copyright, it hath been supposed, in the one case, that the buyer hath no more right to multiply copies of that book for sale, than he hath to imitate for the like purpose the ticket which is bought for admission to an opera or a concert; and that, in the other, the whole property, with all its exclusive rights, is perpetually transferred to the grantee. On the other hand it is urged, that though the exclusive

(*u*) Bro. *Abr. tit. propertie*, 23. Moor. 20. Poph. 38.
(*w*) Moor. 214.
(*x*) *Inst.* 2. 1. 27, 28. 1 Vern. 217.
(*y*) *Inst.* 2. 1. 28.
(*z*) Poph. 38. 2 Bulstr. 325. 1 Hal. P. C. 513. 2 Vern. 516.
(*a*) On Gov. part 2, ch. 5.
(*b*) See pag. 8.

(13) See Com. Dig. Pleader, 3. M. 28. Bac. Ab. Trespass, E. 2. 2 Campb. 576.

property of the manuscript, and all which it contains, undoubtedly belongs to the author, *before* it is printed or published; yet, from the instant of publication, the exclusive right of an author or his assigns to the sole communication of his ideas immediately vanishes and evaporates; as being a right of too subtile and unsubstantial a nature to become the subject of property at the common law, and only capable of being guarded by positive statutes and special provisions of the magistrate.

The Roman law adjudged, that if one man wrote any thing on the paper or parchment of another, the writing should belong to the owner of the blank materials (*c*): meaning thereby the mechanical operation of writing, for which it directed the *scribe to receive a satis- [*407] faction; for in works of genius and invention, as in painting on another man's canvas, the same law (*d*) gave the canvas to the painter. As to any other property in the works of the understanding, the law is silent; 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 Statius (*g*). Neither with us in England hath there been (till very lately) any final (*h*) determination upon the right of authors at the common law (14).

(*c*) *Si in chartis membranisve tuis carmen vel historiam vel orationem Titius scripserit, hujus corporis non Titius sed tu dominus esse videris. Inst.* 2. 1. 33. See pag. 404.
(*d*) *Ibid.* § 34.
(*e*) *Prol. in Eunuch.* 20.
(*f*) *Epigr.* i. 67. iv. 72. xiii. 3. xiv. 194.
(*g*) *Syv.* vii. 83.
(*h*) Since this was first written, it was determined in the case of *Miller* v. *Taylor*, in *B. R. Pasch.* 9 Geo. III. 1769, that an exclusive and permanent copyright in authors subsisted by the common law. But afterwards, in the case of *Donaldson* v. *Becket*, before the house of lords, 21 *Febr.* 1774, it was held that no copyright now subsists in authors, after the expiration of the several terms created by the statute of queen Anne.

(14) Whether the productions of the mind could communicate a right of property or of exclusive enjoyment in reason and nature; and if such a moral right existed, whether it was recognised and supported by the common law of England; and whether the common law was intended to be restrained by the statute of queen Anne; are questions, upon which the learning and talents of the highest legal characters in this kingdom have been powerfully and zealously exerted.

These questions were finally so determined that an author has no right at present beyond the limits fixed by the statute. But as that determination was contrary to the opinion of lord Mansfield, the learned Commentator, and several other Judges, every person may still be permitted to indulge his own opinion upon the propriety of it, without incurring the imputation of arrogance. Nothing is more erroneous than the common practice of referring the origin of moral rights, and the system of natural equity, to that savage state, which is supposed to have preceded civilized establishments; in which literary composition, and of consequence the right to it, could have no existence. But the true mode of ascertaining a moral right I conceive is to inquire, whether it is such as the reason, the cultivated reason, of mankind must necessarily assent to.

No proposition seems more conformable to that criterion, than that every one should enjoy the reward of his labour, the harvest where he has sown, or the fruit of the tree which he has planted.

And if any private right ought to be preserved more sacred and inviolable than another, it is where the most extensive benefit flows to mankind from the labour by which it is acquired. Literary property, it must be admitted, is very different in its nature from a property in substantial and corporeal objects, and this difference has led some to deny its existence as property; but whether it is *sui generis*, or under whatever denomination of rights it may more properly be classed, it seems founded upon the same principle of general utility to society, which is the basis of all other moral rights and obligations.

Thus considered, an author's copyright ought to be esteemed an inviolable right, established in sound reason and abstract morality.

No less than eight of the twelve Judges were of opinion that this was a right allowed and perpetuated by the common law of England; but six held, that the enjoyment of it was abridged by the statute of queen Anne, and that all remedy for the violation of it was taken away after the expiration of the terms specified in the act; and agreeable to that opinion was the final judgment of the lords.

See the arguments at length of the Judges of the king's bench, and the opinions of the rest, in 4 *Burr.* 2303.

Before the union of Great Britain and Ireland in 1801, no statute existed to protect copyright in Ireland. But now, by the stat. 41 Geo. III. (U. K.) c. 107. provisions similar to those in the statute of Anne are re-enacted, and extended to the whole of the united kingdom: these provisions are also enforced by

But whatever inherent copyright might have been supposed to subsist by the common law, the statute 8 Ann. c. 19. (amended by stat. 15 Geo. III. c. 53.) hath now declared that the author and his assigns shall have the sole liberty of printing and reprinting his works for the term of fourteen years, *and no longer* (*i*); and hath also protected that property by additional penalties and forfeitures: directing farther, 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 (15): and a similar privilege is extended to the

(*i*) By statute 15 Geo. III. c. 53. some additional privileges in this respect are granted to the universities, and certain other learned societies.

additional remedies and increased penalties, and an action on the case for damages is specifically given to the party injured. Previous to this act, men of genius and learning in Ireland were stimulated only by the incentive which lord Camden splendidly described in the conclusion of his argument against literary property. "Glory is the reward of science, and those who deserve it scorn all meaner views. I speak not of the scribblers for bread, who tease the press with their wretched productions. Fourteen years are too long a privilege for their perishable trash. It was not for gain that Bacon, Newton, Milton, Locke, instructed and delighted the world. When the bookseller offered Milton five pounds for his Paradise Lost, he did not reject it, and commit his poem to the flames, nor did he accept the miserable pittance as the reward of his labour; he knew that the real price of his work was immortality, and that posterity would pay it."

(15) The statute of 54 Geo. III. c. 156. enacts, that the author of any book, printed and published subsequently to the said act, and the assignee or assigns of such author, shall have the sole liberty of printing and reprinting such book for the full term of twenty-eight years, to commence from the day of first publishing the same; and also, if the author shall be living at the end of that period, for the residue of his natural life; and that if any person, in any part of the British dominions, shall within the terms and times granted and limited by the said act as aforesaid, print, reprint, or import, or cause to be printed, reprinted, or imported, any such book, without the consent of the author, or other proprietor of the copyright, first had in writing; or, knowing the book to be so printed, reprinted, or imported without such consent, shall sell, publish, or expose to sale, or cause to be sold, published, or exposed to sale, or shall have in his possession for sale, any such book, without such consent first had and obtained as aforesaid; then such offender shall be liable to a special action on the case, at the suit of the author or other proprietor of the copyright of such book, and the author shall recover such damages as the jury on the trial of such action, or on the execution of a writ of enquiry thereon, shall give or assess, together with double costs of suit: and every such offender shall also forfeit such book or books, and shall deliver the same to the author or other proprietor of the copyright thereof, and the said author or proprietor shall make waste paper of such book or book; and every such offender shall also forfeit three-pence for every sheet thereof, either printed or printing, or published or exposed to sale: Provided that all actions, suits, bills, indictments or informations for any offence committed against the said act, shall be brought, sued, and commenced within twelve months next after such offence committed. The title to the copyright of books is directed by the act to be entered at Stationers'-hall, within a limited time, under a penalty of forfeiture of five pounds, together with eleven times the price at which such books shall be sold, or advertised for sale; Provided that no failure in making such entry shall in any manner affect the copyright, but shall only subject the person making default to the penalty aforesaid under the said act.

Whenever an action at the suit of the author would lie against a person pirating *books*, (*Lord Byron* v. *Johnston*, 2 Meriv. 29. *Hogg* v. *Kirby*, 8 Ves. 225. *Stockdale* v. *Onwhyne*. 5 Barn. & Cress. 177), or *music*, (*Platt* v *Button*, 19 Ves. 447. *Clementi* v. *Walker*, 2 Barn. & Cress. 861), or *prints*, or *charts*, (*Blackwell* v. *Harper*, Barnard. Cha. Rep. 120. *Wilkins* v. *Aikin*, 17 Ves. 425. *Harrison* v. *Hogg*, 2 Ves. Jun. 323. *Longman* v. *Winchester*, 16 Ves. 271. *Newton* v. *Cowie*, 4 Bingh. 245), a court of equity will grant an injunction, to restrain a fraud on the author's property: but, where the character of the publication is such that no damages could be recovered in respect thereof at law, equity will refuse to interpose. (*Lawrence* v. *Smith*, Jacob's Rep. 472. *Walcot* v. *Walker*, 7 Ves. 2. *Southey* v. *Sherwood*, 2 Meriv. 440. *Lord and Lady Percival* v. *Phipps*, 2 Ves. & Bea. 26. *Gee* v. *Pritchard*. 2 Swanst. 415). The plaintiff must also, in order to entitle him to an injunction, shew the property in the pirated work to be clearly vested in himself; either as the author, or as an assignee, for his own benefit, or in trust for others: and this interest must be distinctly stated in the bill; for, the injunction ought to be warranted by what appears in the bill, not by what is brought forward merely by affidavit. (*Nicol* v. *Stockdale*, 3 Swanst. 689).

The collection of materials may establish a claim to copyright in a work, notwithstanding the subject may be obvious to all mankind; and an injunction will issue to stop the publication of a work which is a servile copy of a preceding one, with merely colourable alterations. (*Matthewson* v. *Stockdale*, 12 Ves. 273, 276. *Butterworth* v. *Robinson*, 5 Ves. 709.

inventors of prints and engravings, for the term of eight-and-twenty years, by the statutes 8 Geo. II. c. 13. and 7 Geo. III. c. 38. besides an action for damages, with double costs, by statute 17 Geo. III. c. 57. All which parliamentary protections appear to have been suggested by 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

Tonson v. *Walker*, 3 Swanst. 679). The case would be different if the new work contained, not only alterations, but corrections and improvements of the original work; (*Cary* v. *Faden*, 5 Ves. 26); and such additions and corrections may properly be made the subject of copyright. (*Cary* v. *Longman & Rees*, 1 East, 380). But, it will not be permitted that one man should, under pretence of quotation, in fact publish another's work, and defraud him of the fruit of his labours: (*Wilkins* v. *Aikin*, 17 Ves. 424): for, although an abstract or fair abridgment of a publication is allowable, (*Dodsley* v. *Kinnersley*, Ambl. 403. *Gyles* v. *Wilcox*, Barnard. Cha. Rep. 368. *Bell* v. *Walker & Debrett*, 1 Br. 451. *Whittingham* v. *Wooler*, 2 Swanst. 431), and a colourable abstract will be restrained. (*Butterworth* v. *Robinson*, 5 Ves. 709: *Carnan* v. *Bowles*, 1 Cox, 285. *Macklin* v. *Richardson*, Ambl. 696. *Gyles* v. *Wilcox*, 2 Atk. 142).

No property can be acquired in any article copied, in the same language, from a prior work; (*Barfield* v. *Nicholson*, 2 Sim. & Stu. 1); but a translation is as much entitled to protection as an original production. (*Wyatt* v. *Barnard*, 2 Ves. & Bea. 78).

Forms of indictments, it has been decided, cannot be the subjects of copyright, nor can a statement of the evidence necessary to support indictments, and subjoined thereto, be so appropriated. And, further, though an author, after the publication of one or more editions of his work, sells the copyright, with an undertaking to prepare and edit the subsequent editions of the work, at a fixed price, he may publish any new matter on the same general subject, in a separate publication on his own account; notwithstanding the insertion of such new matter in the subsequent editions of the work of which he has sold the copyright may be absolutely necessary to their proper completion. (*Sweet* v. *Archbold*, so held by the Vice-Chancellor, in Hil. T. 1828, and by the Lord Chancellor during the sittings after that Term).

No one who chooses to copy and publish a specification of patents, can thereby acquire a right to restrain another from copying the same; for these are common property. (*Wyatt* v. *Barnard*, 3 Ves. & Bea. 78).

When a plaintiff has permitted repeated infringements of his copyright, for a length of time, equity will not interfere (by injunction, at any rate, whether it may be proper to direct an account to be kept or not,) before the right is determined at law. (*Platt* v. *Button*, 19 Ves. 448. *Rundell* v. *Murray*, Jacob's Rep. 316).

Whether the act of publication abroad makes a work, at once, *publici juris*, may be very questionable; but there can be no doubt that, where an author prints and publishes *abroad only*, or where he does not take prompt measures to publish here, he cannot, after a reasonable time for his publishing here has elapsed, and after some other person, in the regular and fair course of trade, has published the work in this country, sustain an injunction against such person. (*Clementi* v. *Walker*, 2 Barn. & Cress. 866, 870).

A *parol* assignment of the copyright of a work may not be sufficient, perhaps, to give the assignee the privileges conferred by the Legislature upon the author. (*Power* v. *Walker*, 3 Man. & Sel. 9). But, when a publisher has been induced by such assignment, to employ his capital and attention upon a work, withdrawing them from other matters in which they might possibly have been more profitably employed; and when the author has acquiesced in seeing his parol assignment acted upon for a length of time, a court of equity, even if it acknowledged the author's strict right, would probably think his conduct entitled him to no summary relief by injunction, and would leave him to such remedy as he might have at common law. (*Rundell* v. *Murray*, Jacob's Rep. 316).

The proprietor of a copyright must file a separate bill against each bookseller taking copies of a spurious edition for sale; for, there is no privity between such parties, and the defendants may justify their several acts upon totally dissimilar grounds. (*Dilly* v. *Doig*, 2 Ves. jun. 487. *Berke* v. *Harris*, Hardr. 337).

In cases of alleged piracy of literary property, a reference is usually directed to the Master; (——— v. *Leadbetter*, 4 Ves. 681. *Nicol* v. *Stockdale*, 3 Swanst. 689); but, in order to save expense, the Court itself will sometimes compare the two works. (*Whittingham* v. *Wooller*, 2 Swanst. 431).

Parts of this note and the next are extracted from 2 Hovenden on frauds, 147, 152.

As to the kind of *prerogative* copyright subsisting in certain publications, as bibles, liturgies, acts of Parliament, proclamations, and orders of council, see *post*, p. 410.

Mr. Christian observes, that "the principal differences in these three statutes concerning prints, seem to be these: the 8 Geo. II. gives an exclusive privilege of publishing to those who invent or design any print, for fourteen years only; the 7 Geo. III. extends the term to twenty-eight years absolutely, to all who either invent the design or make a print from another's design or picture; and those who copy such prints within that time, forfeit all their copies, to be destroyed, and five shillings for each copy; the 17 Geo. III. gives the proprietor an action to recover damages and double costs for the injury he has sustained by the violation of his right."

manufacture, for the sole working or making of the same; by virtue whereof it is held, that a temporary property therein becomes vested in the king's patentee (*k*) (16).

CHAPTER XXVII.

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 the king's grant, or by prescription, which supposes an ancient grant.

Such, in the first place, are all *tributes*, *taxes*, and *customs*, whether constitutionally inherent in the crown, as flowers of the prerogative and

(*k*) 1 Vern. 62.

(16) When the crown, on behalf of the public, grants letters patent, the grantee thereby enters into a contract with the crown, in the benefit of which contract the public are participators; under certain restrictions, affording a reasonable recompence to the grantee, the use of his invention, improvement, and employment of capital, is communicated to the public. If any infringement of a patent be attempted, after there has been an undisputed enjoyment by the patentee under the grant for a considerable time, courts of equity will deem it a less inconvenience to issue an injunction until the right can be determined at law, than to refuse such preventive interference, merely because it is possible the grant of the crown may, upon investigation, prove to be invalid. Such a question is not to be considered as it affects the parties on the record alone; for, unless the injunction issues, *any* person might violate the patent, and the consequence would be, that the patentee must be ruined by litigation. (*Harmer* v. *Plane*, 14 Ves. 132. *Universities of Oxford and Cambridge* v. *Richardson*, 6 Ves. 707. *Williams* v. *Williams*, 3 Meriv. 160). But, if the patent be a very recent one, and its validity is disputed, an injunction will not be granted before the patentee has established his legal right. (*Hill* v. *Thompson*, 3 Meriv. 624).

The grant of a patent, as already stated, is in the nature of a purchase for the public, to whom the patentee is bound to communicate a free participation in the benefit of his invention, at the expiration of the time limited: (*Williams* v. *Williams*, 3 Meriv. 160): if, therefore, the specification of a patent be not so clear as to enable all the world to use the invention, and all persons of reasonable skill in such matters to copy it, as soon as the term for which it has been granted is at an end, this is a fraud upon the public, and the patent cannot be sustained. (*Newbury* v. *James*, 2 Meriv. 451. *Ex parte Fox*, 1 Ves. & Bea. 67. *Turner* v. *Winter*, 1 T. R. 605. *Harmer* v. *Plane*, 11 East, 107).

The enrolment of a patent cannot be dispensed with, upon the ground that, if the specification is made public, foreigners make take advantage of the invention; for, the king's subjects have a right to see the specification: (*Ex parte Koops*, 6 Ves. 599): nor can the date of a patent be altered after it is once sealed, in order to enlarge the time (four months) allowed by the statute for the enrolment of specifications; even though the case may be a hard one, and the delay has arisen from innocent misapprehension. (*Ex parte Beck*, 1 Br. 577. *Ex parte Koops*, *ubi supra*). And, if a patentee seek, by his specification, more than he is strictly entitled to, his patent is thereby rendered ineffectual, even to the extent to which he would otherwise be entitled. (*Hill* v. *Thompson*, 3 Meriv. 629. *Harmer* v. *Plane*, 14 Ves. 135).

When a person has invented certain improvements upon an engine, or other subject, for which a patent has been granted, and those improvements cannot be used without the original engine; at the expiration of the patent for such original engine, a patent may be taken out for the improvements; but, before that time there can be no right to make use of the *substratum* protected by the first patent. (*Ex parte Fox*, 1 Ves. & Bea. 67). And, where industry and ingenuity have been exerted in annexing to the subject of a patent, improvements of such a nature that their value gives an additional value to the old machine; though a patent may be obtained for such improvements; yet, if the public choose to use the original machine, without the improvements, they may do so without any restriction, at the expiration of the original grant; if the public will abstain from the use of the first invention, in consideration of the superior advantages of the improved instrument, it is well; but the choice must be left open. (*Harmer* v. *Plane*, 14 Ves. 134).

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 book. 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 arising from a kind of artificial or secondary prerogative. And, in either case, the owner of the thing forfeited, and the person fined or amerced, lose and part with the property of the forfeiture, fine, or amercement, the instant the king or his grantee acquires it.

*In these several methods of acquiring property by prerogative [*409] 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 cannot, either by grant or contract, become a joint-tenant of a chattel real with another person (*a*); but by such grant or contract shall become entitled to the whole in severalty. 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 a 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 (1).

(*a*) See pag. 184.
(*b*) Fitzh. *Abr. t. dette*, 38. Plowd. 243.
(*c*) Cro. Eliz. 263. Plowd. 323. Finch. Law. 178. 10 Mod. 245.
(*d*) Co. Litt. 30.

(1) Mr. Christian observes, that "if a joint-tenant of any chattel interest commits suicide, the right to the whole chattel becomes vested in the king. This was decided after much solemn and subtle argument in 3 Eliz. The case is reported by Plowd. 262, Eng. ed. Sir James Hales, a judge of the Common Pleas, and his wife, were joint-tenants of a term for years: Sir James drowned himself, and was found *felo de se*; and it was held that the term did not survive to the wife, but that Sir James's interest was forfeited to the king by the felony, and that it consequently drew the wife's interest along with it. The argument of Lord Chief Justice Dyer is remarkably curious: 'The felony (says he) is attributed to the act; which act is always done by a living man, and in his lifetime, as my brother Brown said; for he said Sir James Hales was dead; and how came he to his death? It may be answered, by drowning; and who drowned him? Sir James Hales; and when did he drown him? in his lifetime. So that Sir James Hales, being alive, caused Sir James Hales to die; and the act of the living man was the death of the dead man. And then, for this offence, it is reasonable to punish the living man who committed the offence, and not the dead man. But how can he be said to be punished alive, when the punishment comes after his death? Sir, this can be done no other way but by divesting out of him, from the time of the act done in his lifetime, which was the cause of his death, the title and property of those things which he had in his lifetime.'

"This must have been a case of notoriety in the time of Shakespeare; and it is not improbable that he intended to ridicule this legal logic by the reasoning of the grave-digger in

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, [*410] 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 originally *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.

There is also a kind of prerogative *copyright* (2) subsisting in certain books, which is 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 is also said to have a right by purchase to the copies of such *law-books*, *grammars*, and other compositions, as were compiled or translated at the expense of the crown. And upon these two last principles, combined, the exclusive right of printing the translation of the *Bible* is founded.

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* (3), 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 inquiry concerning the original of these franchises, or royalties, on which we touched a little in [*411] a former chapter (*f*): the *right itself being an incorporeal hereditament, though the fruits and profits of it are of 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 the property of nobody, but liable to be seized by the first occupant. And so it was held by the imperial law, even so late as Justinian's time: "*Ferae igitur bestiae, et volucres, et omnia animalia quae mari, cælo, et terra nascuntur, simul atque ab aliquo capta fuerint, jure gentium statim illius esse incipiunt. Quod enim nullius est, id naturali ratione occupanti conceditur* (*g*)." But it follows from the very end and

(*f*) pp. 38, 39.

(*g*) *Inst.* 2. 1. 12.

Hamlet upon the drowning of Ophelia. See Sir J. Hawkins's note in Stephens's edition."

(2) See in general, Godson on Patents, 316, &c.

(3) As to game in general, see Com. Dig. Biens; Manwood's Forest Law; Christian on Game Laws; Chitty on G. L. vols. 1, 2, & 3; and see an essay by the same author, suggesting improvements therein.

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 (*h*). 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 general liberty. 3. For prevention of idleness and dissipation in husbandmen, artificers, and *others of lower rank; which would be the unavoidable [*412] consequence of universal licence. 4. For prevention of popular insurrections and resistance to the government, by disarming the bulk of the people (*i*); which last is a reason oftener meant than avowed by the makers of forest or game laws (4). Nor, certainly, in these prohibitions is there any *natural* injustice, as some have weakly enough supposed; since, as Puffendorff 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.

Yet, however defensible 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 irruption 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 (5); 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*, so 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 gratiâ, potest a domino prohiberi ne ingrediatur* (*k*)." For if there can, by the law of nature, be 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

(*h*) Puff. L. N. l. 4. c. 6, § 5.
(*i*) Warburton's Alliance, 324.
(*k*) *Inst.* 2. 1. § 12.

(4) Mr. Christian here gives the following note:—I am inclined to think that this reason did not operate upon the minds of those who framed the game laws of this country; for in several ancient statutes the avowed object is to encourage the use of the long-bow, the most effective armour then in use; and even since the modern practice of killing game with a gun has prevailed, every one is at liberty to keep or carry a gun, if he does not use it for the destruction of game.

(5) This is the only restriction generally in the U. S., except that at certain seasons of the year, game, &c. are not to be destroyed, and certain modes of taking them are prohibited.

to the other restriction, which relates to *persons* and not to *place*, the pontifical or canon law (*l*) interdicts, "*venationes, et sylvaticas vagationes cum canibus et accipitribus*," to all *clergymen* without distinction; grounded [*413] on *a saying of St. Jerome(*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 of every bishop, to have his kennel of hounds, or a composition in lieu thereof (*o*) (6).

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 from carrying arms, and also proscribing the use of nets, snares, or other engines [*414] 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 *quoties bella non ineunt, multum venatibus, plus per otium transigunt* (*s*). And indeed, like some of their modern successors, they had no other amusement to entertain their vacant hours; despising all arts as

(*l*) *Decretal. l.* 5, *tit.* 24, *c.* 2.
(*m*) *Decret. part.* 1, *dist.* 34, *l.* 1.
(*n*) *cap.* 64.
(*o*) 4 Inst. 309.
(*p*) *Feud. l.* 2, *tit.* 27, § 5.
(*q*) In the laws of Jenghis 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 recess from war. (Mod. Univ. Hist. iv. 468.)
(*r*) *De Bell. Gall. l.* 6, *c.* 20.
(*s*) *c.* 15.

(6) When archbishop Abbot by an unfortunate accident had killed a park-keeper in shooting at a deer with a crossbow, though it was allowed no blame could be imputed to the archbishop but from the nature of the diversion, yet it was thought to bring such scandal upon the church, that an apology was published upon the occasion, which was warmly and learnedly answered by sir Henry Spelman, who maintained that the archbishop was in the exercise of an act prohibited by the canons and ordinances of the church, and that he was even disqualified from exercising his spiritual functions. The king referred the consideration of the subject to the lord keeper and several of the judges and bishops, who recommended it to his majesty to grant his grace a dispensation *in majorem cautelam, si qua forte sit irregularitas*; which was done accordingly. See Reliquiæ Spelm. 107.

effaminate, and having no other learning, than 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 feodal policy remains the most uncorrupted, the forest or game laws continue in their highest rigour. In France all game is properly the king's (7); 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 enclosing 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 desert 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 sportsmen reserved for their own diversion, on pain of a pecuniary *forfeiture for such as interfered [*415] 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*); "*Sit quilibet homo dignus venatione sua, in sylva, et in agris, sibi propriis, et in dominio suo: et abstineat omnis homo a venariis regiis, 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 beasts 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 him. 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 rigour, 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 *tracts of country depopulated for [*416] that purpose, and reserved solely for the king's royal diversion;

(*t*) Matthæus *de Crimin.* c. 3, *tit.* 1. Carpzov. *Practic. Saxonic.* p. 2, c. 34.
(*u*) c. 36.
(*v*) c. 77.
(*w*) Stiernhook *de jure Sueon.* l. 2, c. 8.

(7) One of the first consequences of the French revolution was the repeal of the ancient game laws, which took place in 1789. Since which their system of jurisprudence, with respect to game, has been very much altered. See Code Penal, 28. 42.

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 *four-footed* creation: "*capturam avium per totam Angliam interdixit* (*x*)." The cruel and insupportable hardships, which those forest laws created to the subject, occasioned our ancestors to be as jealous for their reformation, as for the relaxation of the feodal rigours 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 (*y*), many forests were disafforested, or stripped of their oppressive privileges, and regulations were made in the regimen of such as remained; particularly (*z*) killing the king's deer was made no longer a capital offence, but only punished by a 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 lands to his subjects under the names of *chases* or *parks* (*a*), 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 is 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.

[*417] *As to all inferior species of game, called beasts and fowls of warren, the liberty of taking or killing them is another franchise of 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 to any one these franchises or liberties was in order to protect the game, by giving the grantee 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, to such as call themselves *qualified* sportsmen, 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,

(*x*) M. Paris, 309.
(*y*) 9 *Hen. III.*
(*z*) cap. 10.
(*a*) See pag. 36.
(*b*) Mirr. c. 5, § 2. See pag. 40.

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 [*418] to encroach on the royal prerogative by the 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 recollect but two instances wherein an *express permission* to kill game was ever given by statute; the one by 1 Jac. I. cap. 27. altered by 7 Jac. I. cap. 11. and virtually repealed by 22 & 23 Car. II. 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 (8): 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 alteration 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 or 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 *authorized* to kill game. The circumstance of having 100*l. per annum*, and

(8) Mr. Christian here gives the following note in his edition:—The Editor apprehends that what the learned Judge has here stated respecting the *first permission*, has arisen from a misconception of the subject. The first qualification act is the 13 R. II. c. 13. the title of which is, "None shall hunt but they who have a sufficient living." The preamble states, that "divers artificers, labourers, servants, and grooms keep greyhounds and dogs, and on the holydays, when good christian people be at church hearing divine service, they go a hunting in parks, and warrens, and connigrees of lords and others, to the very great destruction of the same, and sometimes under such colour they make their assemblies, conferences, and conspiracies for to rise and disobey their allegiance; it is therefore ordained, that no artificer, labourer, or other layman, which hath not lands or tenements to the value of 40*s.* by the year, nor any priest to the value of 10*l.* shall keep any dogs, nets, nor engines to destroy deer, hares, nor conies, nor other *gentlemen's* game upon pain of one year's imprisonment."

This statute clearly admits and restrains their former right: the 1 Jac. I. c. 27. which seems intended for the encouragement of hawking, the most honourable mode of killing game at that time, begins with a general prohibition to all persons whatever to kill game with guns, bows, setting-dogs, and nets; but there is afterwards a proviso in the act, that it shall and may be lawful for persons of a certain description and estate to take pheasants and partridges upon their own lands, in the day-time, with nets. This proviso clearly refers to the preceding prohibition introduced by the statute, and by no means gives a *new permission* to the persons thus qualified, which they did not possess antecedently to that statute.

The Editor trusts that those who will take the trouble to examine the statute, will be convinced of the truth of this remark; and that the correction of this error alone will contribute in some degree to the refutation of the doctrine which the learned Judge has advanced in this chapter and other parts of the Commentaries, viz. that all the game in the kingdom is the property of the king or his grantees, being usually the lords of manors, p. 15. ante; game is royal property, 4 book, 174; and the new constitutions vested the sole property of all the game in England in the king alone. Ib. 415.

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.

[*419] *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* (9). And it must

(9) It has been considered expedient to retain the following learned note of Mr. Christian, in opposition to the doctrine in the text.

"The learned Judge has frequently, and even zealously, inculcated the position, that the common law has *vested the sole property of all the game in England in the king alone*, and of consequence that no man, let his rank and fortune be what they may, is qualified to kill game, or is exempt from the original penalties, unless he possesses some peculiar privilege derived from the king. This doctrine, enforced by so celebrated an author, apparently the result of mature deliberation, and which has been so long acquiesced in, the Editor should have questioned with diffidence, if he had not been fully persuaded that it was unsupported by any prior authority, and that the authorities to the contrary were numerous and irresistible.

"The learned Judge himself admits, that this is a novel doctrine to such as call themselves qualified sportsmen; yet he has referred to no preceding authority whatever in any part of the Commentaries; but in p. 415. he has deduced this doctrine from two general principles. The first is, *that the king is the ultimate proprietor of all the lands in the kingdom, and therefore he has the right of the universal soil, to enter thereon*, and *to chase and take such creatures at his pleasure*. From the king's right to the universal soil, it is not evident why he should have a better right to take such creatures than to take any other production of that soil.

"And even if the king should have a right to enter in person all the lands in the kingdom in pursuit of game, this affords no inference that the land-owner may not enjoy this right concurrently with the king. But although no complaint can perhaps be made against the king for entering the lands of his subjects, it has been determined that this power cannot be given to his foresters and servants in a case in Keilway, which in the sequel of this note I shall have occasion to take notice of.

"The other general principle relied upon by the learned Commentator is, *another maxim of the common law, which he says he has frequently cited and illustrated, that these animals are* bona vacantia, *and, having no other owner, belong to the king by his prerogative*. It has been determined, that fish, if not confined as in a trunk, cannot be called *bona et catalla*; and so game, till it is taken, is every where said to be *nullius in bonis*. But I am inclined to think that the very reverse of the maxim is true, and that *bona vacantia* belong to the first occupant or fortunate finder, except in those instances particularly specified by the law, and in which they are expressly given to the king. See 1 book, 299. n. 20.

"A person might have acquired by occupancy, even in the sixteenth century, an estate in real property. See p. 258. ante. If a pearl should be found in an oyster, no lawyer I think would say, that it was the property of the king. If all wild animals had belonged to the crown, it would have been superfluous to have specified whales, sturgeons, and swans. Lord Coke tells us, that 'a swan is a royal fowl;' and all those the property whereof is not known, do belong to the king by his prerogative: and so whales and sturgeons are royal fish, and belong to the king by his prerogative:' Case of swans, 7 Co. 16. 'And the king may grant wild swans unmarked.' Ib. 18. But these are the only animals which our law has conferred this honour upon.

"It is true that our kings, prior to the *carta de foresta*, claimed and exercised the prerogative of making forests wherever they pleased over the grounds of their subjects: within the limits of these forests certain wild animals were preserved by severe laws, for the recreation of the sovereign. A district thus bounded at the king's pleasure might have been granted by the king to any of his subjects who enjoyed the exclusive privilege either of a forest, chase, park, or free warren, according to the extent of the jurisdiction and powers conferred by the royal grant; p. 38. ante. But beyond the boundaries of these privileged places, neither the king nor any of his grantees claimed a property in the game: for, according to the law of king Canute, *quilibet homo dignus venatione, sua in sylva, et in agris sibi propriis, et in dominio suo*; which law Manwood declares was confirmed by many succeeding kings. Tit. For. pl. 3. If this were so, it cannot be correct, what the learned Commentator has advanced, that *upon the Norman conquest a new doctrine took place*. By the *carta de foresta* all the new-made forests were disafforested and thrown open again; but besides the creation of new forests by the Norman kings, they had also made great encroachments and additions to the ancient Saxon forests; these en-

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

croachments were called *purlieus*, and as these were the same grievance to the owners of the land as the new forests, they also were disafforested, but with this distinction, that as the grievance extended only to the land-owner, he was allowed to enjoy his lands in as full a manner as he had done before the encroachment: but they still continued with respect to the rest of the world under the forest-law jurisdiction. Hence it followed as a consequence, that the owner of a purlieu might hunt and kill game within the limits of the purlieu, as any other man might have done in his own grounds: and the authorities of lord Coke and Manwood concur, if deer come out of the forest into the purlieu, the purlieu-man may hunt and kill them, provided he does it fairly and without *forestalling*. And this distinction is made; if a stag can recover the *filum forestæ*, the border of the forest, before the purlieu-man's dogs fasten upon him, he then belongs to the king or to the owner of the forest, and the purlieu-man must call his dogs back; but if they fasten upon him before he gains the forest, and he drags them into it, he belongs to the owner of the purlieu, who may enter the forest and carry him away. 4 Inst. 303. Manw. Purlieu. This alone is decisive, but there are various authorities to the same effect. In the year book 12 Hen. VIII. fo. 10. it is held, if a man drive a stag out of a forest and kill him, he shall gain no property in him, because he shall derive no advantage from his own wrongful act; yet if the stag comes of himself beyond the limits of the forest, then any one (if qualified) may kill and take him, for they are animals *feræ naturæ, et nullius in bonis*; and the maxim, as the judges declared, was, *capiat qui capere potest*, i. e. catch that catch can.

"That the king has no property in deer or other game when they are out of a forest, was determined also in a case reported by Keilway, 30. and copied by Manwood, 202. In that case an action of trespass was brought for entering the plaintiff's close; the defendant pleaded, that the place in which the trespass was supposed to be committed was adjoining to the king's forest, and that the plaintiff was bound to impale the said forest, and that for want of paling four deer escaped out of the forest into the plaintiff's land, and that he the defendant entered by the command of the forester to drive them back to the forest. The court held that this plea was not good; 'for though the plaintiff was in fault for not paling, yet it was not law for the forester or any person to drive the deer out of the ground, or to take them; and the reason was, *because the king had no property in them*; and this was different from the case of tame cattle, where the property still remains in the owner though they are out of his ground, for which reason he may retake them wherever he finds them; but it is not so when the beasts are wild.'

"The learned Judge frequently intimates that no person is exempt from the original penalties; but I am inclined to think that no authority whatever can be found that any penalties were ever inflicted for killing game out of privileged grounds, except those which have been introduced by modern game laws, or the qualification acts. Lord Coke reports that the court held in the case of monopolies, 11 Co. 87. that, 'it is true that none can make a park, chase, or warren without the king's licence, for that is *quodam modo* to appropriate those creatures, which are *feræ naturæ et nullius in bonis*, to himself, and to restrain them of their natural liberty, which he cannot do without the king's licence; but for hunting, hawking, &c. which are matters of pastime, pleasure, and recreation, there needs no licence, but every one may in his own land use them at his pleasure *without any restraint to be made unless by parliament*, as appears by the statutes of 11 Hen. VII. c. 17, 23 Eliz. c. 10, and 3 Jac. I. c. 13.'

"These authorities are also recognized and confirmed in Bro. Abr. tit. Propertie, and in Hale's Commentary on F. N. B. 197.

"The following may serve as a specimen of the authorities collected by Brooke: *quant beastes sauvages le roye aler hors del forrest, le property est hors del roy*; and again, *silz soint hors del parke capienti conceditur*.

"In a great case which was brought in 1791 from the courts of Scotland before the house of lords, the question was, whether by the law of Scotland the proprietor of an estate has a right to monopolize the game upon that estate, for the use of himself, and particular friends, authorized by his licence, and to exclude all gentlemen, legally qualified, from following that amusement over his waste and other grounds, not specially protected by any particular statute? The printed cases of the appellant and respondent contain much curious learning upon the Scotch game laws; but no idea was suggested that the game in Scotland belonged to the king. For the appellant, who insisted that he had a right to enter as a sportsman upon the respondent's estate, the authority of president Balfour in his Practics was chiefly relied upon; viz. 'It is leisome and permitted to all men to chase hares, foxes, and all other beistis, beand without forrestis, warrenis, parkis, or wardis.' But the judgment of the lords being for the respondent, this permission of courts must be confined to a man's own estate. *Livingstone, esq. appellant, v. lord Breadalbane, respondent.* This is precisely the same as the law of England; for neither a lord of a manor, nor his gamekeeper, can go into any part of the manor, which is the lord's own estate or waste, without being a trespasser like any other person." See further as to the king's right and that of the subject in relation to game, fish, &c. very learnedly discussed in Mr. Schultes's Aquatic Rights, 18, &c.; and see 1 Chitty's G. L. 1 to 13.

as the creatures remain within the limits of such respective franchises 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 (*c*). And this is grounded on reason and natural justice (*d*): 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 (*e*), 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 (*f*); the property arising *ratione soli*. 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 (*g*), though guilty of a trespass against both the owners (10).

[*420] *III. I proceed now to a third method, whereby a title to goods and chattels may be acquired and lost, *viz.* by *forfeiture* (11); 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 (*h*). 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 encumbered, 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 prohibita*, 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 (12); and the forfeiture of 10*l.* by 9 Ann. c. 23. (13) for printing an almanack 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 several proper heads,

(*c*) 11 Mod. 75.
(*d*) Puff. L. N. l. 4, c. 6.
(*e*) Lord Raym. 251. 2 Salk. 555. 3 Salk. 290. Comb. 458; and see 14 East, 249.
(*f*) Lord Raym. 251.
(*g*) Farr. 18. Lord Raym. 251.
(*h*) See pag. 287.

(10) These distinctions never could have existed, if the doctrine had been true that all the game was the property of the king: for in that case the maxim, *in æquali jure potior est conditio possidentis*, must have prevailed.

These distinctions I have heard recognized by lord Kenyon, who, in an action of trover, directed a verdict for the plaintiff; the defendant having carried away a hare, killed by the plaintiff's greyhounds upon the defendant's ground, but which had not been started there.

(11) See in general, Com. Dig. Forfeiture, B. C.; Bac. Ab. Forfeiture; Vin. Ab. Forfeiture; 1 Chitty's Com. L.

(12) This forfeiture is abolished by the 54 Geo. III. c. 96.

(13) This forfeiture is also abolished, and persons uttering or exposing to sale unstamped almanacks, are punishable with three months' imprisonment. 30 Geo. II. c. 19. s. 26.

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, [*421] accrues entirely to his creditors, I have therefore made it a distinct head of transferring property.

Goods and chattels then are totally forfeited (14) by conviction of *high treason* or *misprision* of treason; of *petit treason*; of *felony* in general, and particularly of *felony de se*, and of *manslaughter*; nay, even by conviction of *excusable homicide* (i); by *outlawry* for treason or felony; by conviction of *petit larceny*; by *flight*, 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 *praemunire*; by *pretended prophecies*, upon a second conviction; by *owling*; by the *residing abroad* of artificers (15); 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. (16).

CHAPTER XXVIII.

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 (1), which may entitle a man to a chattel interest in different parts of the kingdom; I shall there-

(i) Co. Litt. 391. 2 Inst. 316. 3 Inst. 220.

(14) In New-York no conviction for any crime causes a forfeiture of goods, except upon an *outlawry* for treason. 2 R. S. 701, § 22.

(15) By the 5 Geo. IV. c. 97. all the laws relative to artificers going into foreign parts are repealed.

(16) See cases, 1 Chitty's Crim. L. 730, &c. If, however, before conviction the personal property of a person about to be tried be conveyed away by deed, the grantee must distinctly prove that the transaction was bona fide, and for a sufficient valuable consideration. 1 Stark. Rep. 319.

(1) These customs do not exist in the U. S.

fore 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 (2), which were slightly touched upon in a former chapter (*a*), are usually divided into two sorts, heriot-*service*, and heriot-*custom*. The former are such as are due upon a special reservation in a grant or lease of lands, and therefore amount to little more than a mere rent (*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.

[*423] *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 dignitaries; 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 Spelman (*e*), signifies (3). These were delivered up to the sovereign on the death of the vassal, 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 relief, as was formerly observed (*f*); when he ascertained the precise relief to be taken of every tenant in chivalry, and, contrary to the feodal custom and the usage of his own duchy of Normandy, required arms and implements of war to be paid instead of money (*g*).

The Danish compulsive heriots being thus transmuted into reliefs, underwent the same several vicissitudes as the feodal tenures, and in socage 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

(*a*) Pag. 97.
(*b*) 2 Saund. 166.
(*c*) Co. Cop. § 24.
(*d*) *c.* 69.
(*e*) of feuds, *c.* 18.
(*f*) pag. 65.
(*g*) *LL. Guil. Conq. c.* 22, 23, 24.

(2) As to heriot-service and custom in general, see Com. Dig. Copyhold, K. 18; Bac. Ab. Heriot; Watkins on Copyhold; 2 Saunders, index, Heriot. A heriot may be due to the lord upon alienation by his tenant, by custom. Com. Dig. tit. Copyhold, K. 18. 1 Scriven, 431. It is only payable on death of legal tenant. 1 Vern. 441.

It was decided in the case of Attree v. Scutt, 6 East Rep. 476, that if a copyhold (which upon being divided into several tenancies, entitled the lord to a heriot for each), became re-united in one, the tenant would be bound to render to the lord the several heriots; but this decision was overruled in the case of Garland v. Jekyll, 2 Bingh. Rep. 273. C. J. Best observing, that the authority which appeared to govern the court in the former case (Fitz. Ab. tit. Heriot, pl. 1.) ought to have no weight, because there is no such authority as that referred to by Fitzherbert, and no judges of the names given could be found to have existed at that time. His lordship further observes, "there is nothing in any book or in any modern treatise, that goes the length of shewing, that when the estates are again united, the several heriots continue to be paid." "We are to say, whether without any custom being found, it is the necessary legal consequence, that when an estate has been divided and again re-united, all the heriots are to be paid, after the re-union of the several estates, that were paid whilst it was divided, we say there is no such law, no such doctrine." 2 Bingh. Rep. 303. A custom for the homage to assess a compensation in lieu of heriot, to be paid by an incoming copyholder on surrender or alienation, is not good. If the lord set up a custom to have the best live or dead chattel as a heriot, *quære* if the tenant can modify that custom by pleading another, that the homage shall assess a compensation in lieu of the heriot. 1 B. & P. 282.

(3) See derivation, Willes Rep. 194, 5.

us, and preserve that name, seeming rather to be of Saxon parentage, and at first to have been merely discretionary (*h*). 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 favoured the lord. For this payment was originally a voluntary donation, or gratuitous legacy of the tenant; perhaps in acknowledgment 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 one hand confirmed the tenant's interest in exclusion of the lord's will, has on the other hand established this discretional 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 by custom. Bracton (*i*) speaks of heriots as frequently due on the death of both species of tenants: "*est quidem alia praestatio quae nominatur heriettum; ubi tenens, liber vel servus, in morte sua, dominum suum, de quo tenuerit, respicit de meliori averio suo, vel de secundo meliori, secundum diversam locorum consuetudinem.*" And this he adds, "*magis fit de gratia quam de jure;*" in which Fleta (*k*) and Britton (*l*) agree: 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. [*424]

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 (*m*), 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 (*n*). 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 (*o*).

*2. Mortuaries (4) 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 a kind of expiation and amends to the clergy for the personal tithes, and other ecclesiastical duties, which the laity in their lifetime might have neglected or forgotten to pay. For this purpose, *after* (*p*) the lord's heriot or best good was taken out, the second best chattel was reserved to the church as a mortuary: "*si decedens plura habuerit animalia,* [*425]

(*h*) Lambard. Peramb. of Kent, 492.
(*i*) *l.* 2, c. 36, § 2.
(*k*) *l.* 3, c. 19.
(*l*) c. 69.
(*m*) Hob. 60.
(*n*) Keilw. 84. 4 Leon. 239.
(*o*) Co. Cop. § 31.
(*p*) Co. Litt. 185.

(4) See Burn. Ecc. L. tit. Mortuaries.

optimo cui de jure fuerit debitum reservato, ecclesiae suae sine dolo, fraude, seu contradictione qualibet, pro recompensatione subtractionis decimarum personalium, necnon et oblationum, secundum melius animal reservetur, post obitum, pro salute animae suae (*q*)." And therefore in the laws of king Canute (*r*) this mortuary is called soul-scot (ραγιρεατ) 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 merchandise, jewels, and other moveables (*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 this 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*) [*426] it is sometimes called a *corse-present*: a *term which bespeaks it to have been once a voluntary donation. However in Bracton's time, so early as Henry III. we find it rivetted 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 suum de meliori re quam habuerit recognoscere; 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 ecclesia melius animal de consuetudine; in quibusdam secundum, vel tertium melius; et in quibusdam nihil: et ideo consideranda est consuetudo loci* (*w*)." This custom still varies in different places, not only as 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 stat. 12 Ann. st. 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 (*y*) apprehends, that this is *a duty due upon death* and not a *mortuary*; a distinction which seems to be without a 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 [*427] to six things: the *bishop's best horse or palfrey, with his furniture; his cloak, or gown, and tippet; his cup and cover; his

(*q*) *Provinc. l.* 1, *tit.* 3.
(*r*) c. 13.
(*s*) *Paserualden, ad Decretal. l.* 3, *t.* 30, c. 32.
(*t*) Sp. L. b. 28, c. 41.
(*u*) Selden, Hist. of Tithes, c. 10.
(*w*) Bracton, *l.* 2, c. 26. Flet. *l.* 2, c. 57.
(*x*) Cro. Car. 257.
(*y*) 2 Inst. 491.

basin and ewer; his gold ring; and, lastly, his *mula 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, 3*s.* 4*d.*; if above thirty pounds and under forty pounds, 6*s.* 8*d.*; 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 feme-covert; nor for 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 (5) 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 heir-loom is nothing else but a limb or member of the inheritance. They are generally such things as cannot be taken away without damaging or dismembering the freehold: otherwise the general rule is, that no chattel interest whatsoever shall go to the heir, notwithstanding it be expressly limited to a man and his heirs, but

(*z*) pag. 413.

(*a*) Spelm. *Gloss.* 277.

(5) A court of equity will never fetter personal property, by adjudging it to be held under a will, as an heir-loom, upon presumption; more especially in the case of a testator who, when such was his intention, knew how to express it. A claim which, in effect, attempts to restrain alienation, and permanently to give to personalty the character of annexation to realty, can only be enforced on clear proof; not by doubts on the construction of a will. (*Saville* v. *Lord Scarborough*, 1 Swanst. 546. *Boon* v. *Cornforth*, 2 Ves. sen. 280. *Wythe* v. *Blackman*, 1 Ves. sen. 202). Still, where a testator has directed that certain personal chattels shall go as heir-looms; though the limitation may not have been made in such terms as the law, in a strict sense, requires for setting heir-looms, Lord Hardwicke seems to have held, that a court of equity should be disposed to give effect to the clear intent, as far as it can be made consistent with the rules of law: (*Gower* v. *Grosvenor*, Barnard. 66, 63; *S. C.* 5 Mad. 338, 349. *Trafford* v. *Trafford*, 3 Atk. 349): and Lord Eldon is reported to have said, that heir-looms are a kind of property which, like all *specific* bequests, are rather favourites of the court of Chancery. (*Clarke* v. *The Earl of Ormonde*, Jacob's Rep. 115). However this may be, it is settled, that the absolute interest in chattels so given, vests in the first tenant in tail who comes *in esse*. (*Carr* v. *Lord Errol*, 14 Ves. 487. And Lord Hardwicke himself admitted, that, in the case of *Gower* v. *Grosvenor*, he went to the utmost allowable extent of construction, in favour of heir-looms. (*Duke of Bridgwater* v. *Egerton*, 2 Ves. sen. 122). But, where a personal chattel has been well limited as an heir-loom, a bill in equity will hold for a specific delivery thereof to the party entitled to the possession. (*Earl of Macclesfield* v. *Davis*, 3 Ves. & Bea. 18). And clearly, where a testator gives specific articles, intending them to descend as heir-looms, it is the duty of his executors to see that such intention takes effect, as far as lies in their power. Creditors may, indeed, by adopting compulsory measures, drive the executors off that ground; for, no testator can, in any way, exempt any part of his property from payment of his debts; but, executors are bound to preserve, as far as the law will permit them, all articles which their testator intended to have treated as heir-looms. (*Clarke* v. *The Earl of Ormonde*, Jacob's Rep. 112, 114).

It seems that the journals of the House of Lords, which are delivered gratuitously to each peer, are heir-looms descending with the title, and cannot be retained by a deceased peer's personal representatives. (*Upton* v. *Lord Ferrars*, 5 Ves. 806).

[*428] shall vest in the executor (*b*) (6). But deer in a real *authorized park, fishes in a pond, doves in a dovehouse, &c. though in 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 (7), 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 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 kind, calling them by a very particular 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 istam nacta sunt, ut villis, sylvis, et aedibus, aliisque praediis, comparentur; quod solidiora mobilia ipsis aedibus ex destinatione patrisfamilias cohaerere videantur, et pro parte ipsarum aedium aestimentur* (*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, [*429] or the coat-armour of his ancestor there *hung up, with the pennons and other ensigns of honour, 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*) (8). Pews (9) in the

(*b*) Co. Litt. 388.
(*c*) *Ibid.* 8.
(*d*) *Ibid.* 18.
(*e*) Bro. *Abr. tit. chattels*, 18.
(*f*) Co. Litt. 18. 185.
(*g*) Spelm. *Gloss.* 277.
(*h*) 12 Mod. 520.
(*i*) Stockman's *de jure devolutionis*, c. 3, §. 16.
(*k*) 12 Rep. 105. Co. Litt. 18.

(6) Or if any chattel be given to a man and the heirs of his body, he takes the entire and absolute interest in it. There have been many fruitless attempts to make pictures, plate, books, and household furniture, descend to the heir with a family mansion. Where they are left to be enjoyed as heir-looms by the persons who shall respectively be in possession of a certain house, or to descend as heir-looms as far as courts of law and equity will admit, the absolute interest of them, subject to the life-interests of those who have life-estates in the real property, will vest in that person who is entitled to the first estate-tail or estate of inheritance, and upon his death that interest will pass to his personal representative. 1 Bro. 274. 3 Bro. 101. 1 Swanst. 537.

(7) In general the right to the custody of title-deeds descends or passes with the estate to the *existing* present owner, whether tenant for life or in fee, and he may retain or recover the deed from any other person. 4 Term R. 229.

(8) 3 Bing. 138.

(9) The right to sit in a particular pew in a church arises either from prescription as appurtenant to a messuage, or from a faculty or grant from the ordinary, for he has the disposition of all pews which are not claimed by prescription. Gibs. Cod. 221. See generally as to the right to pews, 1 Phill. E. C. 216.

In an action upon the case at law for a disturbance of the enjoyment of a pew in the body of the church, if the plaintiff claims it by prescription, he must state it in the declaration as appurtenant to a messuage in the parish. 5 B. &. A. 356. But a pew in the aisle or chancel of the church may be prescribed for in respect of a house out of 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 has 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 (10), (11).

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 XXIX.

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* (1): which is, in strictness of law, only ap-

(*l*) 3 Inst. 202. 12 Rep. 105.
(*m*) 3 Inst. 110. 12 Rep. 113. 1 Hal. P. C. 515.
(*n*) 1 Co. Litt. 185.

parish. Forrest. Rep. 14. 5 B. & A. 361. S. P. This prescription may be supported by an enjoyment for thirty-six years, and perhaps any time above twenty years. 1 T. R. 428. But where a pew was claimed as appurtenant to an ancient messuage, and it was proved that it had been so annexed for thirty years, but that it had no existence before that time, it was held this modern commencement defeated the prescriptive claim. 5 T. R. 296. In an action against the ordinary, the plaintiff must allege and prove repairs of the pew. 1 Wils. 326. But a possessory right to a pew is sufficient to sustain a suit in the ecclesiastical court against a mere disturber. 1 Phill. E. C. 316. See further the cases and precedents, 2 Chitty on Pl. 817. Com. Dig. Action on Case for Disturbance, A. 5. 2 Saund. 175. c. d.

(10) It has been determined, that stealing dead bodies, though for the improvement of the science of anatomy, is an indictable offence as a misdemeanor; it being considered a practice contrary to common decency, and shocking to the general sentiments and feelings of mankind. 2 T. R. 733. 2 Leach, 560. S. C.

The principle is well described by Cicero; *de humatione unum tenendum est, contemnendam in nobis, non negligendam in nostris; ita tamen mortuorum corpora nihil sentire intelligamus. Quantum autem consuetudini famaque dandum sit, id curent vivi.* Cic. 1 Tusc. n. 108.

(11 In New-York, the title to churches is vested in the trustees of the church, and the pews are then generally leased or sold by them. In churches where the pews are free to all, the title in them remains entirely in the trustees.

(1) As to corporations taking by succession, see Toller's L. Ex. b. 2. c. 4. s. 3; and as to churchwardens suing, see Bac. Ab. & Vin. Ab. tit. Churchwardens; and as to the overseer, &c. for the time being suing on a bond, see 54 Geo. III. c. 170. s. 8. and treasurer of friendly society, 33 Geo. III. c. 54.

plicable 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 (*a*). 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 cor-
[*431] poration subsists (*b*). 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 cathedral, 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 (*c*). 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 (*d*). For the word *successors*, when applied to a person in his political 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 successor, the property thereof must be in abeyance from
[*432] the *death of the present owner until the successor 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 in suspense; nor in the other sole corporations before mentioned, who are rather to be considered as heads of an aggregate body, than subsisting merely in their own right:

(*a*) 4 Rep. 65.
(*b*) Bro. *Abr. t. estates*, 90. Cro. Eliz. 464.
(*c*) Dyer, 48. Cro. Eliz. 464.
(*d*) Co. Litt. 46.
(*e*) Brownl. 132.

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 to or be acquired by them in 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 inherent 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. [*433]

VI. A sixth method of acquiring property in goods 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 or incorporated in that of the husband. And hence it 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 profits 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 pleasure, if he chooses to take possession of them: for, unless he 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 (2).

(*f*) Co. Litt. 46.
(*g*) *Ibid.* 90.
(*h*) 4 Rep. 65. Cro. Eliz. 682.
(*i*) See book I. c. 15.

(2) It seems to be, at present, clearly held, that a deed by which a husband assigns his wife's contingent or reversionary chattel interests, is not such a reduction thereof into possession by him, as to give even a qualified title to his assignee, if the wife prove to be

There is therefore a very considerable difference in the acquisi-
[*434] tion of this species of property by the husband, *according to

the survivor. (*Purdew* v. *Jackson*, 1 Russ. 50. *Hornsby* v. *Lee*, 2 Mad. 20). And though, (in *Gage* v. *Acton*, 1 Salk. 327), Chief Justice Holt said, that when the wife has *any* right or duty, which by possibility may happen to accrue during the marriage, the husband may, by release, discharge it; this *dictum* cannot now be relied on, without qualifying it by a condition, that the possibility shall actually come into possession during the coverture. Keeping this restriction in mind, there is no doubt that a wife's possibilities are assignable by her husband, for a valuable consideration; though the assignee may be compelled to make some provision for the wife, when the subject of assignment is of such a nature, that when the contingency has happened, it cannot be reached without the aid of equity: (*Johnson* v. *Johnson*, 1 Jac. & Walk. 477. *Beresford* v. *Hobson*, 1 Mad. 373. *Lloyd* v. *Williams*, 1 Mad. 457): and it seems, that courts of equity do not merely act in analogy to the legal doctrine, but were the first to hold that such assignment by the husband ought to be supported. (*Grey* v. *Kentish*, 1 Atk. 280. *Hawkyns*, v. *Obyn*, 2 Atk. 551. *Bates* v. *Dandy*, 2 Atk. 208. *Duke of Chandos* v. *Talbot*, 2 P. Wms. 608, and cases there cited. *Spragg* v. *Binks*, 5 Ves. 588).

It appears settled, however, that, where the wife's interest was such, that the husband could not, even for valuable consideration, have released it at law, equity will not assist him. Thus, if the reversion could not possibly fall into possession during the husband's life;—for instance, if it were a reversion upon his own death,—there the husband's release, or assignment, would be invalid at law; and clearly, the wife's consent would not be taken, in order to give it effect in equity. (*Dalbiac* v. *Dalbiac*, 16 Ves. 122). So, if a woman, before marriage, stipulate that her property shall revert to her own absolute disposal in the event of her surviving her husband, or if a bequest be made to her, accompanied with direction, and no power of disposition over the fund, during the marriage, be reserved by her, in one case, or given to her, in the other; there, it would obviously be to defeat the plain object of the settlement, or will, if the wife, whilst under the possible influence of her husband, were permitted, either by examination in court, or by any other act during the coverture, to dispose of her right of survivorship. (*Richards* v. *Chambers*, 10 Ves. 586. *Lee* v. *Muggeridge*, 1 Ves. & Bea. 123).

An assignment by a husband, to a particular assignee, of a *chose en action*, or equitable interest, given to his wife *for her life only*, (such assignment being made for valuable consideration, and at a time when the husband was maintaining his wife), will, it seems, not only be supported, but the purchasor will not be bound to make any provision for the wife. (*Elliot* v. *Cordell*, 5 Mad. 156. *Wright* v. *Morley*, 11 Ves. 18. *Mitford* v. *Mitford*, 9 Ves. 100). Equity, however, will not allow the general assignee under a commission of bankruptcy against a husband, to obtain possession of such property, without making some provision for the wife; since, when the title of such last-described assignee vests, the incapacity of the husband to maintain his wife has already raised this equity in her favour: (*Elliot* v. *Cordell*, *ubi supra*): and where the right to the whole equitable interest, or *chose en action*, was in the wife, absolutely, and not for life only, there, the preponderance of modern authority (after considerable fluctuation of judicial opinion), seems fully to establish, that the wife's right to a provision cannot be resisted by the particular assignee of her husband, more than by his general assignee. (*Johnson* v. *Johnson*, 1 Jac. & Walk. 477. *Lake* v. *Beresford*, 3 Ves. 512. *Macaulay* v. *Phillips*, 4 Ves. 19. *Beresford* v. *Hobson*, 1 Mad. 373. *Earl of Salisbury* v. *Newton*, 1 Eden, 371. *Oswell* v. *Probert*, 2 Ves. jun. 682).

When a husband makes a settlement in consideration of the wife's whole fortune, whatever fortune she then has, notwithstanding it may consist entirely of *choses en action*, is looked on as purchased by the husband, and it will go to his executors, though he may not have reduced it into possession: but, if the settlement was made in consideration of a part only of the wife's fortune, then the remaining part, if not reduced by the husband into possession during his life, will survive to his wife; (*Cleland* v. *Cleland*, Prec. in Cha. 63); for, the mere fact of his having made a settlement upon his wife at the time of the marriage, is not sufficient to entitle a husband to his wife's *choses en action*, or chattels; to constitute him a purchasor thereof, so as to exclude the wife's equity, there must be an agreement, either expressed or implied; (*Salwey* v. *Salwey*, Ambl. 693); and, according to the modern cases, a settlement made by the husband is no purchase of the wife's equitable interests, or *choses en action*, unless such settlement either distinctly expresses it to be made in consideration of the wife's fortune; or the contents thereof altogether import that, and plainly import it, as much as if it were expressed. (*Druce* v. *Dennison*, 6 Ves. 395). It is also well settled that, a settlement in consideration of the wife's fortune will be understood to have been intended to apply only to her fortune at the time; unless the settlement expressly, or by necessary implication, shews that it was the intention to comprehend all future property which might devolve upon the wife. Where no distinct agreement to that effect appears, should any subsequent accession of *choses en action* accrue to the wife, in such a shape that the husband cannot lay hold of it without the assistance of a court of equity, the wife will, according to the established rule of such courts, be entitled to an additional provision out of that additional fortune, as against either the husband or his assignee; (*Ex parte O'Ferrall*, 1 Glyn & Jameson, 348); and if the husband die first, not having reduced the property into possession,

the subject matter; *viz.* whether it be a chattel *real* or chattel *personal*; and, of chattels personal, whether it be in *possession*, or in *action* only. A *chattel real* vests in the husband, not absolutely, but *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 dispose 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 dispose 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 husband may have if he pleases; that is, if he reduces them into possession by receiving or recovering them at law (3). 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, so 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 seizes it, it is absolutely his property, but if he dies without seizing it, his executors are not now at liberty to seize it, but the wife or her heirs (*q*); for the husband never exerted the

(*k*) Co. Litt. 46.
(*l*) Plowd. 263.
(*m*) Co. Litt. 351.
(*n*) *Ibid.* 300.
(*o*) Poph. 5. Co. Litt. 351.
(*p*) Co. Litt. 351.
(*q*) *Ibid.*

nor having assigned it for valuable consideration, the whole will survive to the wife. (*Mitford* v. *Mitford*, 9 Ves. 95, 96. *Carr* v. *Taylor*, 10 Ves. 579. *Burnett* v. *Kinaston*, 2 Freem. 241. 2nd edit. *Wildman* v. *Wildman*, 9 Ves. 177. *Nash* v. *Nash*, 2 Mad. 139.) But, if the wife's property be of such a nature that the husband, or his assignees, can reach it by process of common law, there is no ground for the interposition of equity to restrain the exercise of the legal right. (*Oswell* v. *Probert*, 2 Ves. jun. 682. *Attorney-General* v. *Whorwood*, 1 Ves. sen. 539. *Macaulay* v. *Phillips*, 4 Ves. 18. *Langham* v. *Nenny*, 3 Ves. 469. *Jewson* v. *Moulson*, 2 Atk. 420. *Purdew* v. *Jackson*, 1 Russ. 54).

Stock, standing in the books of the Bank of England in the names of trustees, is a *chose en action*, and in a question of survivorship must be so considered. (*Scawen* v. *Blunt*, 7 Ves. 300).

As to the law in New-York, see 5 Johns. Ch. R. 464: and 6 Johns. Ch. R. 25, 178: where the doctrine *seems* to be, that the wife's equity to a provision out of her *separate* estate descended or devised to her during coverture, shall be preserved though the husband might have recovered it at law; or although he has assigned her estate to a bona fide purchasor for valuable consideration: id. p. 180.

(3) If a bill or note be made to a feme-sole, and she afterwards marry, being possessed of the note, the property vests in the husband, and he may indorse it or sue alone for the recovery of the amount, 3 Wils. 5. 1 B. & A. 218, for these instruments, when in possession of the wife, are to be considered rather as chattels personal, than choses in action. Id. ibid. The transfer of stock into the wife's name, to which she became entitled during the marriage, will not be considered as payment or transfer to her husband, so as to defeat her right by survivorship, 9 Ves. 174. 16 Ves. 413; but if it is transferred into *his* name, it is a reduction of it into his possession. 1 Roper's Law of Hus. & Wife, 218. So if a promissory note be given to the wife, the husband's receipt of the interest thereon will not defeat the right of the wife by survivorship. 2 Madd. 133. But where the husband *does* and can bring an action for a chose in action of the wife, in his own name, and dies after judgment, leaving his wife surviving, his representatives will be entitled. If however she is joined, she will be entitled, and may have a scire facias upon such judgment. 1 Vern. 396. 2 Ves. Sen. 677. 12 Mod. 346. 3 Lev. 403. Noy, 70. And if previously to marriage she had obtained a judgment, and afterwards she and her husband sued out a scire facias and had an award of execution, and she died before execution, the property would be changed by the award, and belong to the husband as the survivor. 1 Salk. 116. Roper L. Hus. & Wife, 1 vol. 210.

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*: for he [*435] shall have *the *chattel real* by survivorship, but not the *chose in action* (r); except in the case of arrears for 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 (4). 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 entitled to be her administrator; and may, in that capacity, recover such things in action as became due to her before or during the coverture (5).

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 (s).

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 remain to her after his death and not go to his executors. These are called [*436] her *paraphernalia* (6), *which is 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; and therefore even the jewels of a peeress (7) usually worn by her, have been held to be *paraphernalia* (u). These she becomes entitled to at the death of her husband, over and above her jointure or dower, and preferably to all other representatives (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).

(r) 3 Mod. 186.
(s) Co. Litt. 351.
(t) *Ff.* 23. 3. 9. § 3.
(u) Moor. 213.
(w) Cro. Car. 343. 1 Roll. Abr. 911. 2 Leon. 166.
(x) Noy's Max. c. 49. Grahme v. Ld. Londonderry, 24 Nov. 1746, Canc.

(4) So construed in Ognel's case, 4 Rep. 51.

(5) By 29 Car. II. c. 3. s. 25. the husband shall have administration of all his wife's personal estate, which he did not reduce into his possession before her death, and shall retain it to his own use: but he must first pay his wife's debts before coverture; and if he die before administration is granted to him, or he has recovered his wife's property, the right to it passes to his personal representative, and not to the wife's next of kin. 1 P. Wms. 378. 1 Mod. 231. Butler's Co. Lit. 351. 1 Wils. 168. See accordingly 2 R. S. 75, § 29.

(6) As to the widow's right to paraphernalia in general, see Toller's L. Ex. b. 2. ch. 5. s. 3.

(7) Or of any married lady. 2 Atk. 77. 11 Vin. Abr. 180.

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*) (8), (9).

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 the 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 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, or the contract or agreement made; and the law only gives him a remedy to recover the possession of that right, which already in justice belongs to him. *But there is also a species of property to which [*437] 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

(*y*) 1 P. Wms. 730.

(*z*) Noy's Max. c. 49.

(8) The husband may dispose absolutely of his wife's jewels or other paraphernalia in his *lifetime*, 3 Atk. 394. And although after his death they are liable to his debts, if his personal estate is exhausted, yet the widow may recover from the *heir* the amount of what she is obliged to pay in consequence of her husband's specialty creditors obtaining payment out of her paraphernalia. 1 P. Wms. 730. 3 Atk. 369. 393.

But she is not entitled to them after his death, if she has barred herself by an agreement before marriage of every thing she could claim out of his personal estate either by the common law or custom. 2 Atk. 642.

Where the husband permits the wife to make profit of certain articles for her own use, or in consideration of her supplying the family with particular necessaries, or makes her a yearly allowance for keeping house, the profits or savings will be considered in equity as the wife's own separate estate; Sir P. Neal's case, cited in Herbert v. Herbert, Pre. Ch. 44. 3 P. Wms. 337. 2 Eq. Ca. Abr. 156. in marg. except as against creditors, Pre. Ch. 297. See also 1 Vern. 244. 2 Vern 535. 1 Eq. Ca. Abr. 346. pl. 18. 1 Atk. 278. And she may dispose of her separate estate by anticipation, and her right of alienation is absolute, unless she is expressly restrained by the settlement. Jackson v. Hobhouse, 2 Meriv. 483. 11 Ves. 222. 1 Ves. Jun. 189. 3 Bro. C. C. 340. S. C. 12 Ves. 501. 14 Ves. 302. A husband's agreement before marriage that a wife shall have separate property, converts him into her trustee; see 1 Ventr. 193. 29 Ch. II. c. 3. s. 4. 1 Ves. Jun. 196. 12 Ves. 67. unless by fraud of the husband he prevents the agreement from being reduced to writing. Montacute v. Maxwell, 1 P. Wms. 620. 1 Stra. 236. S. C.

(9) In New-York if a man dies leaving a widow, *or* any children under age, the following articles go to the widow so long as she lives with and provides for the children: and if there be no children under age, go to her absolutely.

1. All spinning wheels, weaving looms, and stoves used in the family.

2. The Family bible, family pictures, and school books used in the family; and books not exceeding 50 dollars in value, and forming part of the family library.

3. All sheep to the number of 10, with their fleeces, and the yarn and cloth manufactured from the same; one cow, two swine, and the pork of such swine.

4. All necessary wearing apparel, beds, bedsteads, and bedding; necessary cooking utensils, the clothing of the family, the clothes of a widow, and her ornaments proper for her station; one table, six chairs, knives and forks, plates, teacups, saucers and spoons, one sugar dish, milk pot, and teapot. When the widow ceases to provide for the children, and to live with them, these articles go to those children; except that the widow still retains, as her own, her wearing apparel and ornaments, and one bed, bedstead, and the bedding for it. 2 R. S. 83, § 9, &c.

The above articles are protected from the creditors, and cannot be disposed of by will by the husband.

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 in-
[*438] stance, where a suit and judgment at law are *not only the *means* of recovering, 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.

(a) 2 Lev. 141. Stra. 1169. Combe v. Pitt. B. R. Tr. 3 Geo. III.
(b) Stat. 4 Hen. VII. c. 20.
(c) Cro. Eliz. 138. 11 Rep. 65.

*3. Hither also may be referred, upon the same principle, all [*439] title to costs and expenses of suit; which are often arbitrary, and rest entirely on 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 XXX.

OF TITLE BY GIFT, GRANT, AND CONTRACT.

We are now to proceed, according to the order marked out, to the discussion of two remaining methods of acquiring a title to property in things personal, which are much connected together, and answer in some measure to the conveyances of real estates; being those by *gift* or *grant*, and by *contract*: whereof the former vests a property in *possession*, the latter a property in *action*.

VIII. Gifts then, or *grants* (1), 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 pepper corn: 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* (2), are the act of transfer- [*441]

(1) See in general, Vin. Ab. tit. Gift; Com. Dig. tit. Biens, D. 2. and tit. Grant; Bac. Ab. Grant; Vin. Ab. Grants.

(2) A gift or grant of personal property may be by parol. 3 M. & S. 7. But when an assignment is for a valuable consideration, it is usually in writing; and when confined merely to personalty, is termed a bill of sale. An assignment, or covenant, does not pass after acquired personal property, 5 Taunt. 212; but where there has been a subsequent change of new for old articles, and the assignment is afterwards set aside, it will in general be left to a jury to say, whether the new were not substituted for the old. In general there should be an immediate change of possession, or the assignment made notorious, or creditors, who were ignorant of the transfer, may treat it as fraudulent and void, on the ground that the grantor was, by his continuance of possession, enabled to gain a false credit. Twyne's case, 3 Co. 81. See cases, Tidd. Prac. 8th ed. 1043, 4. 1 Campb. 333, 4. 5 Taunt. 212. As to the notoriety of the sale, 2 B. & P. 59. 8 Taunt. 838. 1 B. Moore, 189. If possession be taken at any time before an adverse execution, though long after the date of the deed, it seems it will be valid. 15 East, 21. An assignment to a creditor of all a party's effects, in trust for himself and other creditors, is valid. 3 M. & S. 517. And as a debtor may prefer one creditor to another, he may, on the eve of an execution of one creditor, assign his property to another, so as to satisfy the latter, and

ring the right and the possession of them; whereby one man recounces, and another man immediately acquires, all title and interest therein: which may be done either in writing, or by word of mouth (*a*), 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 (3): 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 an 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 effectual (4); 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 (5): 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 (*c*): unless it be prejudicial to creditors; or the donor were under any legal incapacity, as infancy, coverture, duress, or the like; or if he were drawn in, circumvented, or imposed upon, by false pretences, ebriety, or surprise. But if the gift does not take effect, by delivery of immediate possession (6), it is then

(*a*) Perk. § 57.
(*b*) See 3 Rep. 82.
(*c*) Jenk. 109.

leave the other unpaid. 5 T. R. 235. But an assignment made by way of sale, to a person not a creditor, in order to defeat an execution, will, if the purchaser knew that intention, be void, although he paid a full price for the goods. 1 East, 51. 1 Burr. 474.

(3) In New-York such deeds are void as to creditors. 2 R. S. 135, § 1.

(4) See accordingly 2 R. S. 137, § 1, &c.

(5) In Clayt. 135. it was said, that if A., being at York, give his horse in London to I. S., the latter may have trespass without other possession, F. N. B. 140. Perkins, 30; and that, though by the civil law, a gift of goods is not good without delivery, yet it is otherwise in our law. 1 Rol. R. 61. Vin. Ab. Gift. It was, however, recently determined, that by the law of England, in order to transfer property by gift, there must be a deed or instrument of gift, or there must be an actual delivery of the thing to the donee. 2 Bar. & Ald. 551.

(6) The 72d section of the statute of 6 Geo. IV. c. 16, in substance, enacts, that all goods in the possession of a bankrupt, by permission of the true owner, and whereof the bankrupt is the reputed owner, shall be liable to his creditors. (*Horn* v. *Baker*, 9 East, 238, *et seq.*) If, indeed, the possession retained by a bankrupt up to the time of his bankruptcy, was a possession according to a limited right of ownership in him, qualified by a right of property in others, that ulterior right will not be affected by the statute, even though credit may have been given on the faith of the absolute property appearing to be in the bankrupt. (*Joy* v. *Campbell*, 1 Sch. & Lef. 338. *Kirkley* v. *Hodgson*, 1 Barn. & Cress. 599. *Gibson* v. *Bray*, 8 Taunt. 80). And where it is a known usage, that certain chattels necessary for carrying on a trade, (as the machinery of a colliery, for instance), should be demised to a tenant, but the property thereof to remain in the landlord; there, the mere possession of such things is not evidence of reputed ownership, so as to bring the case within the statute. (*Storer* v. *Hunter*, 3 Barn. & Cres. 376). And there may be apparent possession and reputed ownership, yet the circumstances may rebut the imputation of fraud, even constructively, with reference to the bankrupt laws. Thus, where a wife has, *bonâ fide*, purchased, through the medium of trustees, the family pictures, plate, furniture, &c., of the house in which she and her husband reside together, though the possession may seem to be in the husband, the property, it should appear, cannot in any way be answerable to his creditors. (*Lady Arundell* v. *Phipps*, 10 Ves. 145; and see *Kidd* v. *Rawlinson*, 2 Bos. & Pull. 60. *Leonard* v. *Baker*, 1 Mau. & Sel. 252). And the possession of factors, brokers, lodgers, &c., does not

not properly a gift, but a contract; *and this a man cannot be [*442] 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

carry, to the understanding of the world, the reputed ownership: (*Horn* v. *Baker*, 9 East, 245): therefore, goods left in the hands of a factor, merely to be by him disposed of on account of his principal, cannot be seized under his commission, should he become bankrupt whilst the goods are in his possession with the consent of the true owner; for, this case, though within the letter, is not within the meaning of the bankrupt act. (*Ex parte Dumas*, 2 Ves. sen. 585. *Copeman* v. *Gallant*, 1 P. Wms. 314. *Taylor* v. *Plumer*, 3 Mau. & Sel. 575; and see the 6th section of the statute of 6 Geo. IV. c. 94, as to the extent to which pledges or contracts by factors or agents, of goods consigned to them, will be binding upon their principals). The same rule applies to goods of which a man is in possession, at the time of his bankruptcy, as broker, though he is to receive a share of the profits in lieu of brokerage; (*Smith* v. *Watson*, 2 Barn. & Cress. 408); or of which he merely holds the temporary custody, (after having sold the same), in the ordinary course of business, and without fraud. (*Flyn* v. *Matthews*, 1 Atk. 187. *Ex parte Marrable*, 1 Glyn & Jameson, 403). However, in the case last put, it is necessary that the change of property should be notorious, so that third persons, who use reasonable caution, cannot be deceived. (*Knowles* v. *Horsefall*, 5 Barn. & Ald. 140. *Lingard* v. *Messiter*, 1 Barn. & Cress. 313).

And it has been repeatedly held, that, if goods seized under an execution are *bonâ fide* sold, should the buyer suffer the debtor to continue in possession of the goods, they will, nevertheless, be protected against subsequent executions, if the circumstances under which he has the possession are known in the neighbourhood. (*Latimer* v. *Batson*, 4 Barn. & Cress. 655. *Muller* v. *Moss*, 1 Mau. & Sel. 338. *Leonard* v. *Baker*, Ibid. 253. *Watkins* v. *Birch*, 4 Taunt. 824. *Kidd* v. *Rawlinson*, 2 Bos. & Pull. 60). Still, it is a general rule, that a secret owner shall not be allowed to reclaim property which he has left in the visible possession of another, up to the period of his bankruptcy, thereby enabling him to obtain fictitious credit; but, by virtue of the bankrupt act, such property shall vest in the bankrupt's assignees. (*Mace* v. *Cadell*, Cowp. 232. *Ex parte Dale*, Buck, 366).

The statute only applies to property which has been left in the possession of another by the *consent* of the person who has the legal power of dealing with the property. (*Ex parte Richardson*, Buck, 488. *Ex parte Dale*, Buck, 366). The distinction is this: if trust property (clearly distinguishable, *Whitecomb* v. *Jacob*, 1 Salk. 160), remain in the possession of the trustee at the time of his bankruptcy, his assignees cannot make title thereto; but if the trustee, though in breach of his trust, have parted with the possession to one who subsequently becomes bankrupt, the case, as it is within all the mischief which the statute was designed to prevent, so it is within the remedial scope and spirit of the act; and the disposition of the property must follow the visible possession.

It has been often decided, that the registry of a vessel is *not always* conclusive as to the ownership; and that the ship-register acts are not to be so construed as to render inoperative the provisions of the bankrupt code in cases of visible ownership. Notwithstanding a vessel may have been registered in the name of one partner only, yet, if the apparent ownership and disposition thereof were in the whole partnership, it must, under a commission against them, be treated as joint property. (*Ex parte Burn*, 1 Jac. & Walk. 378. *Monkhouse* v. *Hay*, 2 Brod. & Bingh. 114. *Mair* v. *Glennie*, 4 Mau. & Sel. 244. *Robinson* v. *Macdonnell*, 5 Mau. & Sel. 237). And it would evidently open a wide door to fraud upon the bankrupt laws, if a person, having registered vessels in the name of another, who becomes bankrupt, were let in to show, that the bankrupt, though in possession as apparent owner, had, in fact, no interest in the ships: it is very clear, that no one ought to be heard, in a court of equity, to say that is *his* property, which he has held out to the world to be another's. (*Curtis* v. *Perry*, 6 Ves. 747, and see *Ex parte Houghton*, 17 Ves. 254). It is provided, however, by the 72nd section of the stat. 6 Geo. IV. c. 16, that the doctrine held, in bankruptcy, as to reputed ownership and its consequences, shall not invalidate or affect any transfer of a vessel, or a share thereof, made as a security, for any debt by mortgage or assignment duly registered: and although by the 45th section of the general register act, (6 Geo. IV. c. 110), it is enacted, that the mortgagee of a vessel or share thereof, is not to be deemed an owner, and that the mortgagor shall not be deemed to have ceased to be owner, except so far as may be necessary to make the vessel, or share, available for payment of the debt which the mortgage was intended to secure; yet, the 46th section enacts, that, if transfers of ships, or shares thereof, by way of mortgage, or assignment, in trust for security of debts, are duly registered, the right of the mortgagee, or assignee for the purpose aforesaid, shall not be in any manner affected by any subsequent act of bankruptcy, committed by the mortgagor or assignor, notwithstanding such mortgagor or assignor, at the time he becomes bankrupt, shall have in his possession, order and disposition, and shall be the reputed owner of, the vessel or share mortgaged or assigned as aforesaid; but that such mortgage or assignment shall take place of, and be preferred to, any claim on the part of the assignees under the bankruptcy of the mortgagor or assignor.

do a particular thing." From which definition there arise three points to be contemplated in all contracts: 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 is however not in possession, but in action merely, and recoverable by suit at law; wherefore 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 assignment (*e*): 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 (*f*).

[*443] *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 loads 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 contractu* (*g*).

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 it may be *executory*, as if they agree to change next week; here the right only vests, and their reciprocal property in each other's horse is not in possession but in action; for a contract

(*d*) Co. Litt. 214.
(*e*) Dyer, 30. Bro. *Abr. tit. chose in action*, 1 & 4.
(*f*) 3 P. Wms. 199.
(*g*) *Inst.* 3. 14. 2.

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 contracting party to *enter into the contract. "It is an agreement, upon *sufficient consideration*." The [*444] civilians hold, that in all contracts, either express or implied, there must be something given in exchange, something that is mutual or reciprocal (*h*). 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 (*i*), 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 (*j*). 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 to recompense, and is therefore as much an owner, or a creditor, as any other person (7).

These valuable considerations are divided by the civilians (*k*) 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 positive acts on both sides. Or, it may be to forbear on one side on consideration of something done on the other, as, that in consideration A, the tenant, will repair his house, B, the landlord, will not sue him for waste. Or, it may be for mutual forbearance

(*h*) *In omnibus contractibus, sive nominatis, sive innominatis, permutatio continetur.* Gravin. *l.* 2, § 12.

(*i*) pag. 297.
(*j*) 3 Rep. 83.
(*k*) *Fy.* 19. 5. 5.

(7) If there be no fraud in the transaction, mere inadequacy of price would not be deemed, even in equity, sufficient to vacate a contract. 10 Ves. 292. 295. 1 Brid. Eq. D. 359. Nor is mere folly without fraud a foundation for relief. 8 Price, 620. And on the question of executing an agreement, hardship cannot be regarded, unless it amount to a degree of inconvenience and absurdity, so great as to afford judicial proof that such could not be the meaning of the parties. 1 Swans. 329. But if there be such an inadequacy as to shew that the person did not understand the bargain he made, or that knowing it, he was so oppressed that he was glad to make it; this will show such a command over the grantor as may amount to fraud. 2 Bro. Ch. C. 167. 2 Brid. Eq. Dig. 55. An action was brought on an agreement to pay for a horse a barley corn a nail for every nail in the horse's shoes, and double every nail, which came to five hundred quarters of barley; and, on a trial before Holt, C. J. the jury gave only the value of the horse. 1 Lev. 111. And in an action of assumpsit, in consideration of 2*s.* 6*d.* paid, and 4*l.* 17*s.* 6*d.* to be paid, the defendant undertook to deliver two rye corns next Monday, and double every succeeding Monday, for a year, which would have required the delivery of more rye than was grown in all the world, on demurrer. Probyn, J. said, that though the contract was a foolish one, yet it would hold in law, and the defendant ought to pay something for his folly, and the defendant refund the 2*s.* 6*d.* and costs. 2 Ld. Raym. 1164. This seems to have been a vacating of the bargain as void, and a return for *that reason* of the money received without consideration. See further, 3 Chitty's Com. L. 158, 9. Bridgm. index, tit. Inadequacy of Price or Consideration.

[*445] on both sides; *as, that in consideration that A will not trade to Lisbon, B will not trade to Marseilles; so as to avoid interfering with each other. 3. The third species of consideration is, *facio, ut des:* when a man agrees to perform any thing for a price, either specifically mentioned, or left to the determination of the law to set a value to it. And 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 preceding. 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*) (8). 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 honour 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 (*m*) the maxim of the civil law (*n*), that *ex nudo pacto non oritur actio.* 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* (9). And as this rule was principally established, to avoid

(*l*) Dr. & St. d. 2, c. 24.
(*m*) Bro. *Abr. tit. dette.* 79. Salk. 129.
(*n*) *Cod.* 2, 3. 10. & 5. 14. 1.

(8) This must be read as confined to simple contracts; for no consideration is essential to the validity of a contract under seal, though in some cases creditors may treat voluntary deeds without consideration, as fraudulent and invalid. 7 T. R. 477. 4 East, 200. 2 Sch. & Lef. 228. Fonbl. Treat. Eq. 2d ed. 347. n. f. Plowd. 308, 9. The leading rule with respect to consideration is, that it must be some benefit to the party by whom the promise is made, or to a third person at his instance, or some detriment sustained at the instance of the party promising, by the party in whose favour the promise is made. 4 East, 455. 1 Taunt. 523. A written agreement, *not under seal,* is nudum pactum without consideration; and a negotiable security, as a bill of exchange, or promissory note, carries with it prima facie evidence of consideration, which is binding in the hands of a third party, to whom it has been negotiated, but may be inquired into between the immediate parties to the bill, &c. themselves. The consideration for a contract, as well as the promise for which it is given, must also be *legal.* Thus a contract for the sale of blasphemous, obscene, or libellous prints, or for the furtherance of immoral practices, or contrary to public policy, or detrimental to the rights of third parties, or in contravention of the statute law, in all these cases the considerations are invalid, and the contracts void. See 3 Chitty's Com. Law, 63. et seq.

(9) Where a man is under a moral obligation which no court of law or equity can enforce, and promises, the honesty and rectitude of the thing is a consideration. As if a man promise to pay a just debt, the recovery of which is barred by the statute of limitations; or if a man, after he comes of age, promise to pay a meritorious debt contracted during his minority, but not for necessaries; or if a bankrupt in affluent circumstances after his certificate, promise to pay the whole of his debts; or if a man promise to perform a secret trust, or a trust void for want of writing by the statute of frauds. In such and many other instances, though the promise gives a compulsory remedy where there was none before, either in law or equity, yet as the promise is only to do what an honest man ought to do, the ties of conscience upon an upright man are a sufficient consideration. Ld. Mansfield. Cowp. 290. These are the words of lord Mansfield, but perhaps the promise would only be obligatory in the three first instances. How far moral obligation is a legal consideration, see

the inconvenience that would arise from setting up mere verbal promises, for which no good reason could *be assigned (*o*), it [*446] 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*) (10), 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 price or 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," for the field of Macpe-

(*o*) Plowd. 308, 309.
(*p*) Hardr. 200. 1 Ch. R. 157.
(*q*) Ld. Raym. 760.
(*r*) Noy's Max. c. 42.

a learned note to the reports by Messrs. Bosanquet and Puller, 3 vol. p. 249. But if a bankrupt after obtaining his certificate, an infant after coming of age, or any person where the demand is barred by the statute of limitations, promise to pay a prior debt when he is able, it has been held that this is a conditional promise, and that the plaintiff must prove the defendant's ability to pay. 2 Hen. Bl. 116. See further on this subject, 3 vol. Ch. C. L. 72.

(10) Mr. Fonblanque, in his discussion of the subject of consideration, referred to in the last note but one, has taken notice of this inaccuracy: he says, what certainly is fully established, that, the want of consideration cannot be averred by the maker of a note, if the action be brought by an indorsee; but if the action be brought by the payee, the want of consideration is a bar to the plaintiff's recovering upon it. 1 Stra. 674. Bull. N. P. 274. 1 B. & P. 651. 2 Atk. 182. and Chitty on Bills, 68. An indorsee, who has given full value for a bill of exchange, may maintain an action both against him who drew it, and him who accepted it, without any consideration. 4 T. R. 339. 471. 5 Esp. Rep. 178. 3 Esp. R. 46. The most important authority respecting the consideration of written contracts is the case of Rann v. Hughes before the house of lords, in which lord chief baron Skynner delivered the unanimous opinion of the judges, that an administratrix was not bound by a written promise to pay the debt of her intestate out of her own property. See it reported in 7 T. R. 350. In that case, the chief baron said, that "all contracts are by the laws of England distinguished into agreements by specialty, and agreements by parol; nor is there any such third class as some of the counsel have endeavoured to maintain, as contracts in writing. If they be merely written, and not specialties, they are parol, and a consideration must be proved. He observed that the words of the statute of frauds were merely negative, and that executors and administrators should not be liable out of their own estates, unless the agreement upon which the action was brought, or some memorandum thereof, was in writing, and signed by the party. But this does not prove that the agreement was still not liable to be tried and judged of as all other agreements merely in writing are by the common law, and does not prove the converse of the proposition, that when in writing the party must be at all events liable."

lah (*s*); though the practice of exchange still subsists among
[*447] several of the savage nations. But with regard to the *law* of *sales and exchanges, there is no difference. I shall therefore treat of them both under the denomination of sales only; and shall consider their force and effect, in the 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 whomsoever 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 (*t*), 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 (*u*), and any subsequent sale was fraudulent; but the law was thus altered in favour of *purchasors*, 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 (*v*) (11), (12).

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 (*w*). 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*,
[*448] and interprets to be "*emptionis venditionis *contractae argumentum*") (*x*), 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 (*y*) (13). 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.* (14) or more, shall be valid, unless the buyer actually receives part of the goods sold, by way of

(*s*) Gen. c. 23, v. 16.
(*t*) 29 Car. II. c. 3.
(*u*) 8 Rep. 171. 1 Mod. 182.
(*v*) Comb. 33. 12 Mod. 5. 7 Mod. 95.
(*w*) Hob. 41. Noy's Max. c. 42.
(*x*) *Inst.* 3, *tit.* 24.
(*y*) Noy, *ibid.*

(11) If two writs are delivered to the sheriff on the same day, he is bound to execute the first which he receives; but if he levies and sells under the second, the sale to a vendee, without notice of the first, is irrevocable, and the sheriff makes himself answerable to both parties. 1 *Salk.* 320. 1 *T. R.* 729.

(12) In New-York, the title of a purchasor of goods in good faith, acquired prior to the *levy* of an execution, and without notice of the execution, is not affected by the prior delivery of the writ to the sheriff. (2 R. S. 366, § 17.)

(13) The property does not seem to be *absolutely bound* by the earnest; for lord Holt has laid down the following rules, viz. "That notwithstanding the earnest, the money must be paid upon fetching away the goods, because no other time for payment is appointed; that earnest only binds the bargain, and gives the party a right to demand; but then a demand without the payment of the money is void; that after earnest given, the vendor cannot sell the goods to another, without a default in the vendee; and therefore if the vendee does not come and pay, and take the goods, the vendor ought to go and request him; and then if he does not come and pay, and take away the goods in a convenient time, the agreement is dissolved, and he is at liberty to sell them to any other person." 1 Salk. 113. See 3 Campb. 426.

(14) See accordingly 2 R. S. 135, 136, § 2, 3; the amount fixed in New-York is 50 dollars.

earnest on his part; unless he gives part of the price to the vendor by way of earnest to bind the bargain, or in part of payment; or unless some note in writing be made and signed by the party, or his agent, who is to be charged with the contract (15). And with regard to goods under the value of 10*l.* no contract or agreement for the sale of them shall be valid, unless the goods are to be delivered within one year, or unless the contract be made in writing, and signed by the party, or his agent, 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 mutuam manuum complexionem* (*z*);" 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 tenders the price agreed on (*a*) (16). But if he

(*z*) Stiernhook *de jure Goth. l.* 2, *c.* 5. (*a*) Hob. 41.

(15) In construing the statute of frauds, the principal difficulty has arisen in determining what acts between the parties amount to a delivery on the one part, and acceptance on the other. An *actual* delivery by the seller, and acceptance by the buyer, is not necessary in all cases; as where goods are ponderous, delivery of the key of the warehouse in which they are deposited, or by delivery of other tokens of property, is sufficient. 1 Atk. 170. 1 East, 194. Or payment of warehouse rent by the purchasor. 1 Camp. Rep. 452. Where goods are sold by sample, delivery of the sample to the purchasor may be part delivery within the statute, 5 Esp. 267. 7 East, 564; but it is otherwise if the sample be not part of the bulk. 7 T. R. 14. Holt's C. N. P. 179. Delivery of an order by the seller, to a wharfinger or warehouseman who has the custody of the goods, to deliver them to the vendee is sufficient to satisfy the statute. 2 Esp. Rep. 598. So, if a purchasor write his name or initials upon the article bought, it will suffice; but other articles bought at the same time will not pass unless the signature is put upon them also. 1 Camp. 233. 235. n. But in the case of Tempest v. Fitzgerald, where the defendant agreed to purchase a horse for ready money, and to take it at a distant specified day, before which day defendant rode the horse and gave directions as to its treatment, but requested that it might remain in plaintiff's possession for a further time, when he would fetch it away and pay the price to which plaintiff assented, and the horse died in the interval, it was held that there was no acceptance of the horse within the meaning of the statute of frauds. In this case there was no earnest given, nor part payment, nor any note or memorandum in writing, which distinguishes it from the case in the text; and as it was a ready money bargain, the purchasor could have no right to take away the horse till the price was paid, and of course there could be no acceptance on the part of the defendant. These cases will illustrate the principle on which the statute of frauds is founded, the object of which (in the language of Mr. J. Holroyd) was to remove all doubts as to the completion of the *bargain*, and it therefore requires some clear and unequivocal acts to be done in order to shew that the thing had ceased to be in fieri. 3 Bar. & Ald. 684.

(16) It has long been settled that delivery to an agent of the vendee (and for this purpose common carriers, packers, and wharfingers, are considered to stand in that character) is for most purposes a delivery to the vendee himself. But this species of delivery affords a security to the vendor, upon credit, which does not exist where the delivery is actually made to the vendee himself; for if the vendor discover that the vendee is insolvent, or has become bankrupt, he may seize upon the goods so sold upon credit, and delivered into the hands of such carrier, &c. at any time before their actual and complete delivery to the vendee. This branch of the law is called STOPPAGE IN TRANSITU, and though not referred to in the text, may be properly stated in this place, from its importance in the concerns of trade and commerce. This law is founded upon an equitable right in the vendor to detain the goods until the price be paid or tendered, for stoppage in transitu does not rescind the contract of sale, 1 Atk. 245. 3 T. R. 466. 6 East 27; and if the vendor afterwards offer to deliver them, he may, unless he has resold them, recover the price which he could not do if by stopping in transitu the sale was rescinded, 1 Camp. 109. 6 Taunt. 162. The right extends to every case in which the contract is in effect a sale, and the consignor substantially the vendor of the goods. 3 East, 93. Amb. 399. 3 T. R. 783. It extends also to contracts of *exchange*, as to an agreement between consignor and consignee that the latter shall return another commodity of equal value in payment, and the fulfilment of which engagement is rendered hazardous by his insolvency. Sittings post M. Term, Guildhall, 1822. 3 Ch. C. L. 346. The con-

* See note 14, preceding page.

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, [*449] still he is entitled to the money, because, by the *contract, the property was in the vendee (*b*) (17). 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 (*c*), that all sales and contracts of any thing vendible, in fairs or markets *overt* (18), (that is, open), shall not

(*b*) Noy, c. 42.

(*c*) 2 Inst. 713.

signor of goods for sale on the joint account of himself and the consignee, may exercise this right in the event of the bankruptcy or insolvency of the latter, 6 East, 371; but it does not arise between principal and factor, for the property is never devested out of the principal, and the factor as against him has only a right of lien upon the goods, and he cannot, after parting with them, repossess himself of them while in transitu, 1 East, 4. 2 New. R. 64. Nor can the surety for the payment of the price of goods by the vendee, though he may have accepted the bills drawn upon him by the consignee for that purpose, stop the goods in transitu. 1 Bos. & Pul. 563. If a party, being indebted to another, on the balance of accounts, including bills of exchange running accepted by the latter, consign goods to him on account of this balance, the consignor has no right to stop them in transitu, upon the consignee becoming insolvent before the bills are paid. 4 Campb. 31. If a sale be legalized by licence, and the vendor be an alien enemy, he may stop the goods in transitu, 15 East, 419; and any authorized agent of the consignor may exercise the right. See 1 Campb. 369. Though the consignment must be on credit, at least for some part of the price, yet partial payment, acceptance of bills on account of, and not as actual payment, or the vendor's being indebted to the vendee in part of the value, will not defeat the right to resume possession before actual delivery to the vendee. 7 T. R. 440. 64. 3 East, 93. 2 Vern. 203. It is necessary that the consignee should become bankrupt or be insolvent, for the vendor to exercise this right. 6 Robinson Ad. R. 321. It is not necessary that the vendor, to exercise this right of stoppage, should *actually* take possession of the property consigned by corporal touch; he may put in his claim or demand of his right to the goods in transitu, either verbally or in writing, and it will be equivalent in law to an actual stoppage of the goods, provided it be made before the transit has expired, 2 B. & P. 457. 462. 2 Esp. R. 613. Co. B. L. 494. 1 Atk. 245. Amb. 399. 3 East, 394. This right may be exercised by making out a new invoice or bill of lading, Holt, C. N. P. 338; but such a claim on the part of the *consignee* would not be sufficient to devest the former of his right. 2 Esp. 613. 5 East, 175. 14 East, 308. The *transitus* in goods continues till there has been an actual delivery to the vendee or his *agent expressly authorized* for that purpose, with the express or implied consent of the vendor to sanction such delivery. 3 T. R. 466. 5 East, 181. The delivery of goods to the master on board a ship wholly chartered by the consignee, is not such a delivery to the vendee as to put an end to the *transitus*; for the master is a carrier of both consignor and consignee; and till a ship is actually at the end of her voyage, the right of stoppage in transitu continues: and where a ship came into port without performing quarantine, when she ought to have done so, and the assignees of the consignee, who had become bankrupt, took possession of the goods, and the ship was ordered out of port to perform quarantine, where an agent of the consignor claimed the goods on behalf of his principal, it was held that the consignor had properly exercised and might claim a stoppage in transitu. 1 Esp. 240. And goods deposited in the king's warehouses under 26 Geo. III. c. 59. may be stopped in transitu, though they have been claimed by the consignee. 2 Esp. 663.

On the other hand, the *transitus* may be determined by delivery of the key of the warehouse where the goods are deposited to the vendee, 3 T. R. 464. 8 T. R. 199, or payment of rent for such warehouse to the vendor, or to the wharfinger with the vendor's privity, 1 Campb. 452. 2 Camp. 243. 1 Marsh. 257, 8. And in all similar cases of constructive delivery and acceptance, the right to stoppage in transitu is at en end. See 7 Taun. 278. 2 Bar. & Cres. 540. 1 Ryan & Moody, N. P. C. 6. and 3 Chitty's Com. L. 340.

(17) When not, see 3 Bar. and Ald. 684, and ante 448. n. 15.

(18) There are no markets overt in New-York. 1 Johns. R. 471. 478.

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 (*d*), were tolls established in markets, *viz.* to testify the making of contracts; for every private contract was discountenanced by law: insomuch that 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 witnesses (*e*). 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 (*f*). The market place, or spot of ground set apart by custom for the sale of particular goods, is also in the country the only market overt (*g*); 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 (*h*). 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 (19). 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 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 respects) *will in no case bind him; though it binds infants, feme-coverts, [*450] idiots, and 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 (*i*) (20). 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 fair or market, or not at the usual hours; the owner's property is not bound thereby (*j*). If a man buys his own goods in a fair or market, the contract of sale shall not bind him, so 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 divested, so far as was consistent with that other necessary policy, that purchasers, *bona fide*, in a fair, open, and regular manner, shall not be afterwards put to difficulties by reason of the previous knavery of the seller.

(*d*) c. 1, § 3.
(*e*) *LL. Ethel.* 10. 12. *LL. Fadg.* Wilk. 180.
(*f*) Cro. Jac. 68.
(*g*) Godb. 131.
(*h*) 5 Rep. 83. 12 Mod. 521.
(*i*) Bacon's use of the law, 158.
(*j*) 2 Inst. 713, 714.
(*k*) Perk. § 93.
(*l*) 2 Inst. 713.

(19) See 2 R. S. 746, § 31, &c. same law in New-York.

(20) To encourage the prosecution of offenders, it is enacted, by the 57th section of the statute of 7 & 8 Geo. IV. c. 29, that the owner of stolen property, prosecuting the thief or receiver to conviction, shall have restitution of his property; with an exception as to securities, or negotiable instruments, which have been transferred *bona fide*, for a just and valuable consideration, without any notice, or without any reasonable cause to suspect that the same had by any felony or misdemeanor been stolen, taken, obtained, or converted.

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 (*m*). For a purchaser gains no property in a horse that has been stolen, unless it be bought in a fair or market overt, according to the direction of the statutes 2 P. & M. c. 7. and 31 Eliz. c. 12. By which it is enacted, that the horse 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 public place used for such sales, and not in any private yard or stable; and afterwards brought by both the vendor and vendee to the book-keeper of such fair or market; that toll be [*451] paid, if any *be due; and if not, one penny to the book-keeper, who shall enter down the price, colour, and marks of the horse, with the names, additions, and abode of the vendee and vendor; the latter being properly attested. Nor shall such sale take away the property of the owner, if within six months after the horse is stolen he puts in his claim before some magistrate, where the horse shall be found; and, within forty days more, proves such his property by the oath of two witnesses, and tenders to the person in possession such price as he *bona fide* paid for him in market overt. But in case any one of the points before-mentioned be not observed, such sale is utterly void; and the owner shall not lose his property, but at any distance of time may seize or bring an action for his horse, wherever he happens to find him.

By the civil law (*n*) an implied warranty was annexed to every sale, in respect to the title of the vendor; and so too, in our law, a purchaser 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 purpose (*o*). But with regard to the goodness of the wares so purchased, the vendor is not bound to answer: unless he expressly warrants them to be sound and good (*p*) (21), or unless he knew them to be otherwise, and hath used any art to disguise them (*q*), or unless they turn out to be different from what he represented them to the buyer (22).

(*m*) 2 Inst. 719.
(*n*) *Ff.* 21. 2. 1.
(*o*) Cro. Jac. 474. 1 Roll. Abr. 90.
(*p*) F. N. B. 94.
(*q*) 2 Roll. Rep. 5.

(21) In the case of *Jones* v. *Bright* (decided in the court of Common Pleas in Easter Term last, but not yet reported), the plaintiff, a shipowner, sued the defendant, a manufacturer of copper, on an *implied* warranty, on a sale of copper for sheathing the plaintiff's vessel, that the copper was reasonably fit and proper for the purpose for which it was sold. It appeared by the evidence, that, in consequence of some improper treatment in the manufacture, by which the copper had imbibed too great a portion of oxygen, its decay was materially accelerated, it being thereby rendered less capable of resisting the action of the salt water. Best, C. J., left it to the jury to say, whether the decay of the sheathing were produced by intrinsic or extrinsic causes. The jury found that its decay arose from some *intrinsic* defect in the quality. The court, after argument *in banc*, held the defendant liable, and said, that a person who sells goods, *manufactured by himself*, knowing the purpose for which they are to be used by the purchaser, *impliedly* warrants that they are reasonably fit and proper for that purpose, and is answerable for *latent* defects, inasmuch as, being the maker, he has the means of ascertaining and of guarding against those defects, whereas the purchaser must necessarily be altogether ignorant of them.

(22) Mr. Christian observes, that "the following distinctions seem peculiarly referable to the sale of horses. If the purchaser gives what is called a *sound* price, that is, such as from the appearance and nature of the horse would be a fair and full price for it, if it were in fact free from blemish and vice, and he afterwards discovers it to be unsound or vicious, and returns it in a reasonable time, he may recover back the price he has paid, in an action against the seller for so much money had and received to his use, provided he can prove the seller knew of the unsoundness or vice at the time of the sale; for the concealment of such a material circumstance is a fraud, which vacates the contract.

"But if a horse is sold with an express warranty by the seller that it is sound and free from vice, the buyer may maintain an action upon this warranty or special contract with-

2. Bailment (23), from the French *bailler*, to deliver, is a delivery of goods in trust, upon a contract expressed or implied, that the trust shall

out returning the horse to the seller, or without even giving him notice of the unsoundness or viciousness of the horse; yet it will raise a prejudice against the buyer's evidence, if he does not give notice within a reasonable time that he has reason to be dissatisfied with his bargain. (H. Bl. 17).

"The warranty cannot be tried in a general action of *assumpsit* to recover back the price of the horse. (Cowp. 819). In a warranty it is not necessary to shew that the seller knew of the horse's imperfections at the time of the sale."

[That a warranty does not bind in respect of patent and obvious defects, was held in *Dyer* v. *Hargrave* (10 Ves. 507), in *Grant* v. *Munt* (Cooper, 177), and in *Pasley* v. *Freeman* (3 T. R. 54). However, in *Wall* v. *Stubbs* (1 Mad. 81), Sir Thomas Plumer, V. C. declared, that any misrepresentation, whether of a fact latent *or patent*, might be successfully urged in opposition to a demand of specific performance, unless the purchaser actually knew how the fact really stood. The *dicta* may perhaps be reconciled, by taking this distinction: a party who had the full means of detecting the misrepresentation, and ascertaining the truth, has no right to complain, unless some illegal means have been resorted to for the purpose of throwing him off his guard. But it seems not sufficient to exclude a purchaser from the benefit of a warranty, that a defect should be obvious to the generality of observers: thus, as to the example put in *Bayly* v. *Merril* (Cro. Jac. 387), and alluded to in *Dyer* v. *Hargrave* (before cited), of a one-eyed horse, sold with a warranty that he has both eyes perfect, this would be a tolerably strong instance of a patent defect; yet, if the purchaser were a blind man, such a warranty given to him would, according to the year-books, not be binding. (See 3 Stark. 26, n.)

This is extracted from 2 Hovenden's Notes to Vesey jun.'s Reports, 238.]

(23) As to bailments in general, see Coggs & Barnard, 2 Ld. Raym. 909; Sir Wm. Jones on Bailments; and 3 Chitty's C. L. 354 to 386. The nature of bailments, though not incorrectly, is very imperfectly treated in the text; it has therefore been thought advisable, for the purposes of practical utility, to arrange the law on this subject, more in detail, in a note.

Sir Wm. Jones has divided bailments into five sorts, viz. 1. *Depositum*, or deposit. 2. *Mandatum*, or commission, without recompense. 3. *Commodatum*, or loan for use, without pay. 4. *Pignori acceptum*, or pawn. 5. *Locatum*, or hiring, which is always with reward. This last is subdivided into, 1. *Locatio rei*, or hiring, by which the hirer gains the temporary use of the thing. 2. *Locatio operis faciendi*, when something is to be done to the thing delivered. 3. *Locatio operis mercium vehendarum*, when the thing is merely to be carried from one place to another.

1. *Depositum*, or deposits, where the property bailed is to be kept by the bailee, for no particular purpose, without recompense. In this case the bailee must exercise the same degree of care (apportioned to the nature and value) as a man of ordinary prudence would bestow upon his own property under the like circumstances, Willes Rep. 121. 2 Stra. 1099; and he is not liable for loss, arising from an accident, over which he or his agent had no control. 4 T. R. 581. Selw. N. P. 397. 5th edit. 1 B. & A. 62. 1 Campb. 138. But if the bailee be known to the bailor to be a man of extreme negligence in his own affairs, less than ordinary care will suffice. If the goods bailed be of more than their *apparent* value, or require a *particular* kind of care, and that fact be concealed from the bailee, and he has no easy means of ascertaining it, he would not be liable for their loss, provided he used ordinary care, Ld. Raym. 912; but he is bound by his promise to exercise more than ordinary care. 4 Coke, 83. Or where such promise may be implied, as where the bailee officiously proposes to keep the goods of another, by which the bailor is prevented from depositing them elsewhere. Jones on Bailm. 50. A bailee is in all cases liable for fraud or *gross* negligence, but not if the goods be stolen from him. 2 Stra. 1099. Willes, 121. A bailee of this class cannot detain the bailment, or dispose of or pawn it against the consent of the bailor. 15 East, 42. 1 Wils. 8. 9. As against third persons he may maintain an action for any injury done to the property bailed, though he be not liable over to the bailor. 1 B. & A. 59. If bills deposited with a banker be destroyed by accident without his default, the loss would not fall on him. 2 B. & C. 433. And where A. hired a room in the house of B. at two shillings a week, for the purpose of depositing goods for safety, and kept the key of a padlock by which the room door was fastened, and the goods were stolen by one of B.'s family, it was held that B. could not be sued as bailee, for the value of the goods stolen. 4 D. & A. 636.

2. *Mandatum*, is where the bailee undertakes to do something to, or simply carry the bailment, *without recompense*. The duty here lies in *feazance*, the former in *custody*, and the same general principles prevail. The bailee is considered as having engaged himself to use a degree of diligence and attention adequate to the undertaking. He is neither to do any thing which may obstruct, or omit any thing (within his usual ability and skill) necessary to accomplish his undertaking in a proper manner. Ld. Raym. 909. Jones, 51. 5 T. R. 243; but if the task be out of his regular employment or profession, and he undertake it at the request of the bailor, he is not liable, if any damage ensue from his performing it inartificially. 1 H. B. 158. But if a party delude another with false pretensions to skill, then he is responsible for any injury occasioned by such delusion. 8 East, 348. This bailee is at all times liable to redeliver to the bailor, whether the purpose for which the thing was bailed has been fulfilled or not, as in the

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 clothes, he

case of stake-holders, who must be ready to deliver the stake to either party. 7 Price, 540.

3. *Commodatum* is where property is intrusted to the bailee without pay, to be used by him for his own benefit, and may be termed *loan for use*, in contradistinction to loan for *consumption*, where the same quantity or value, as of money, wine, corn, &c. is to be returned to the lender. More care is due from the bailee in this species of bailment, than in either of the preceding, because he is the only party benefitted, and he is liable if it be stolen, unless he shew that he used *extraordinary* care to prevent its being taken. Jones, 65. Nor will he be excused if it be lost by irresistible force, if he put the property in the way of it, by his own rashness or imprudence. Jones, 67. Ld. Raym. 915. And if the borrower obtained the property by any deceit, he is liable, although the accident or loss be *inevitable*. But if the property be lent for a purpose in which borrower and lender have a common interest, the former is only answerable for ordinary care, Jones, 72; and if lent for the *sole* advantage of the lender, the borrower is responsible for gross neglect only. A person having the gratuitous loan of a chattel, cannot, in general, lend or let it to a third person. 1 Mod. 210.

4. *Pignori acceptum*, or Pawns, is the bailment of a thing as a security for a debt. Under this head the law for the regulation of pawnbrokers may be considered. The general liabilities and restraints are the same in this and the preceding classes of bailments. A pawnee of goods cannot use them without the consent, express or implied, of the owner; consent is implied where the thing would be the better for using, as a horse, a cow, setting dogs, &c. Bull. N. P. 72. a. Jones, 81; but not where they would be the worse, as jewels, &c. Ld. Raym. 917. Owen, 123. Jones, 80.

Pawnbrokers.—In addition to the common law liabilities as above detailed, pawnbrokers are regulated in their dealings by the 39 and 40 Geo. III. c. 99. which fixes the rate of interest to be taken by them, and prescribes the mode of disposing of the bailments when not claimed within the year, and the means to facilitate the detection of stolen property which may be offered to them in pledge. A pawnbroker has no right to sell property pledged after the expiration of a year from the time it was pledged, after the original owner has tendered to him the principal and interest due; the intenton of the act being that the pawnbroker *may* sell then to reimburse himself, and not by the words "shall be deemed forfeited" to vest the whole property in him. 5 Bar. & Ald. 439. 1 Dowl. & Ryl. 1. S. C. The taking more interest than the statute allows is an offence cognizable by a magistrate. 12 East, 673. The statute provides, that upon the sale of property above the value of ten shillings, according to the act, the surplus beyond principal, profit, and reasonable expenses of the sale, shall be paid to the pawner or his legal representative, upon being claimed at any time within three years. See further the 1 Jac. I. c. 21.

5. *Locatum*, or Hiring; under which there are, as already stated, three classes of bailments. *First, When the thing is let to hire for reward*, by which the hirer gains a temporary qualified property in the thing hired, and the owner acquires an absolute property in the stipend or price of the hiring. The necessary degree of care will be collected from the following instances: if A. hire a horse, he is bound to ride it as moderately, and feed and treat it as well, as any commonly discreet man would his own. 2 Bro. and Bing. 359. 5 Moore, 74. S. C. 5 Esp. 35. If the horse be ill and he does not employ a farrier, but imprudently gives medicines to it himself, 3 Campb. 5, or exhausted, and he still uses it, he is answerable for any injury which may arise in consequence; or if he leave the door of his stable open at night, and the horse be stolen, he will be answerable for it, Jones, 89; but he would not be liable for any injury or loss occasioned without his default, 3 Camp. 5. in notes; nor would he be liable if he called in a farrier, and he administered improper medicines. 3 Campb. 5. If A. hire a carriage and any number of horses, and the owner send with them his postillion or coachman, A. is discharged from all attention to the horses, and has only to take care of the glasses and inside of the carriage while he sits in it. 2 Jones, 89. 5 Esp. 39.

In all cases the negligence of the servant acting under his master's directions, express or implied, is the negligence of the master. Salk. 282. Ld. Raym. 916. 3 Camp. 5. It will not be improper to add, that if *immoveable* property, as an orchard, garden, or farm, be let by parol, with no other stipulation than for the price or rent, the occupier is bound to use the same diligence in preserving the trees, implements, &c. as a prudent man would use if they were his own. 5 T. R. 373. 4 East, 154.

Secondly, Locatio operis faciendi. This species of bailment comprehends all those cases in which the bailee undertakes to execute work for a sum of money. He is bound to use more care than the gratuitous bailee, and as much as the hirer of property should do, the observations with respect to whom are here applicable, see 1 Gow. C. N. P. 30. 1 Camp. 138; and if mischief accrue to the thing bailed from the violence of the elements, which might have been arrested in its progress by the application of obvious means, the bailee is responsible. Cattle taken in to agist must be guarded with more than ordinary care. 8 Rep. 32. Holt, C. N. P. 547. So a bailee to keep for hire, must take care not to deliver the goods to an unauthorized person, or he becomes liable for the value of them. 1 Stark. 104. An *innkeeper* is bound to keep safely all such things as his guests deposit in his custody, or within his inn; and he is liable for all losses, except those arising from irresistible

has it upon an implied contract to render it again when made, and that in a workmanly manner (r). If money or goods be delivered to a common

(r) 1 Vern. 268.

force, the act of God, or the king's enemies. He may excuse himself by shewing it was the guest's own default, as that the robbery was committed by the guest's own servant or companion, but the plea of sickness, or even insanity at the time, will not avail him. Jeremy, 145. Cro. Eliz. 622. Nor can he discharge himself from responsibility by *refusing* to take charge of the goods, because there are suspected persons in the house, whose conduct he cannot control. Jones, 95. 5 T. R. 273. 8 Coke, 32. If he refuse because his house is full of parcels, he is still liable for a loss, if the goods are deposited there, though he is not informed of it, provided the owner remains as a guest. 8 Rep. 63. 5 T. R. 273. When the guest quits, the goods, if left, become a simple deposit, gratuitous or for hire, as the case may be. But if the guest obtain exclusive use of a room for the purposes of a shop or warehouse, he exonerates the innkeeper as to the property therein. Holt, C. N. P. 209. 211. n. 1 Stark. 249. See also 4 M. & S. 306. 4 D. & R. 636.

The 6 Anne, c. 31. and 14 Geo. III. c. 78. seem to exonerate bailees generally from liability for losses occasioned by fire beginning in any *house* or *chamber*: the latter act extends to barns, stables, or other buildings, or on any person's estate, within the bills of mortality; but it seems that innkeepers and carriers are not within the protection of this statute. 4 T. R. 581. 5 T. R. 389. 1 Stark. 72.

Warehousemen and *Wharfingers* stand generally in the situation of ordinary bailees for hire, and are therefore answerable only for ordinary neglect. Jones, 96. They are not answerable for thefts by their servants, if they can prove that they have exercised the same care of their bailments as of their own property. Peake, 113. Cowp. 480. 4 T. R. 581. It is a question, whether a warehouseman by removing goods from the warehouse (for the use of which the owner pays warehouse room) to another, is not liable for loss by fire? 2 Stark. 400. The responsibility commences from the moment the warehouseman's tackle is applied to the goods, and ceases upon his delivery of them, according to the owner's express or implied directions. 4 Esp. Rep. 262. 5 Esp. 43. 2 Ld. Raym. 909. Where goods are to be forwarded coastwise, and it is the custom of wharfingers to deliver them to the mates of the coasters, the wharfinger's responsibility ceases upon such delivery, though the goods be lost before they are carried off the wharf. 5 Esp. 41.

With respect to *Factors, Attornies, Auctioneers, and Bailiffs*, when their undertaking lies in feazance, and not merely in custody, more or less diligence is required, according to the nature of the business; and the question as to what amounts to reasonable care, is for a jury to decide. 4 Rep. 84. 1 Inst. 89. Lord Raym. 918. 4 Bar. & Ald. 202.

Thirdly, Locatio operis mercium vehendarum, or Carriers. There are varieties of this species of bailees, but their obligations are the same, except in the case of common carriers, of whom greater care and diligence is demanded. Any person undertaking to carry goods, either by land or water, of all persons indifferently, is for this purpose a common carrier, 1 Salk. 249. Cro. Jac. 262. 2 Chitty's Rep. 1. 6 Moore, 141. 2 Bos. & Pul. 419. though a hackney coachman is not. Jeremy, 13, 14. The postmaster-general, and deputy postmaster, are not liable as common carriers, 1 Salk. 17. Cowp. 754. but the deputy-postmaster is liable for not delivering letters in due time. 3 Wils. 443. 2 Bla. Rep. 906. 5 Burr. 2711. Common carriers are bound to receive and carry goods for reasonable hire and reward. 2 Show. 81. 129. They are liable for every mischief which might have been provided against; as if a rat make a hole in a ship and the goods are damaged, or if the ship strike against an anchor under water and sink, and the goods are lost, 3 Esp. 127. Selw. N. P. 395. 1 Wils. 181; or if they be stolen. 1 Inst. 89. a. Gow. C. N. P. 115. A carrier is considered in the nature of an insurer, and is answerable for inevitable accident while the goods remain in his custody as a common carrier, 1 T. R. 33. Stra. 690. 5 T. R. 389. but if the goods remain in his warehouse at the end of the journey, at the request, and merely for the convenience of the owner (the owner not paying warehouse room), the carrier is not liable. 4 T. R. 581.

The duties of carriers to London, with respect to *delivery*, are pointed out by the *porterage act* (39 Geo. III. c. 58. s. 4.) which provides, that parcels arriving in town by any conveyance other than stage waggons, between four in the evening and seven in the morning, shall be delivered within six hours after such hour in the morning; if arriving at any other hour in the day, within six hours after such arrival, under a penalty not exceeding 20*s.* nor less than 10*s.*; and every parcel arriving by any public stage waggon, shall be delivered within twenty-four hours after such arrival, under a penalty of 40*s.* Upon every parcel directed to be left till called for, the charge for carriage, and two-pence for warehouse room must be paid, on delivery to the person duly authorized to call for it. The porters are subject to penalties for misbehaviour, and a parcel may be demanded which is not directed to be left till called for, upon payment of the carriage, and the additional two-pence for warehouse room.

A carrier is not liable for loss or damage occasioned by tempest, storm, or the like, unless he voluntarily, or by negligence, encounters the mischief. 3 Esp. 74. 181. 1 T. R. 27. 2 Buls. 280. Deceit, artifice, concealment, fraud, or neglect of the bailor, by which a parcel, containing things of great value, appears to be of small value, will discharge

carrier, to convey from Oxford to London, he is under a contract in law to pay, or carry them, to the person appointed (*s*). If a horse, or other goods, be delivered to an innkeeper or his servants, he is bound to keep [*452] *them safely, and restore them when his guest leaves the house (*t*). If a man takes in a horse, or other cattle, to graze and depasture

(*s*) 12 Mod. 482. (*t*) Cro. Eliz. 622.

the carrier from liability, 4 Burr. 2298. 4 B. & A. 28. 41; but directing a banker's parcel to a third person, so as to prevent its being known as a banker's, is not a fraudulent concealment. 2 B. & A. 350. The bailor need not, unless requested, disclose the value to the carrier; but if the latter has given notice, qualifying his liability, it is then necessary; but though *falsely* stated, if the carrier *know* its *real* value, he is still liable. 4 B. & A. 25. 32. Stra. 145. Bull. N. P. 70. If the goods be lost or injured by the bailor's imperfect packing, which the carrier could not perceive, 2 Stark. 323; or by the omission of a condition precedent, as obtaining a permit, &c. the carrier is not liable. 3 Esp. 74. If the bailor send his servant with the goods, who has the exclusive care of them, the carrier is not responsible. 1 Stra. 690. 2 Bos. & Pul. 406. 2 Bulst. 280.

Carriers by water are not answerable for loss for not having a pilot on board, unless they refuse or neglect the proper means to obtain one. See the pilot act, 52 Geo. III. c. 39. 6 Rob. Rep. 317, 8. in notes. See 1 Moore, Rep. 4. 7 Taunt. 258. 309. 3 Stark. 12. 3 Price, 317. Nor by the *statute* in any case are they liable beyond the value of the ship, appurtenances, and freight of the voyage, s. 27. See also the 53 Geo. III. c. 159. by which the responsibility of carriers by sea is slightly modified from the preceding. By the 26 Geo. III. c. 86. owners shall not be liable for loss by fire on board the ship, nor for loss or damage to gold, jewels, watches, &c. by reason of robbery or embezzlement, &c. unless the shipper thereof insert in his bill of lading, or otherwise declare in writing, to the master, &c. the true nature and quality of such articles.

Carriers may *limit*, or entirely get rid of their liability by notice, proved to be known and understood by the bailor or his servant on the delivery of the goods, 3 Camp. 27. 2 Stark. 53. except for misfeazance, gross negligence, or contravention of an act of parliament, as the porterage act. 1 Hen. Bla. 298. 4 East, 370. 5 East, 507. Alcyn, 93. 1 Stark. 72. On all questions of notice it is for the jury to determine whether the bailor had notice or not, 1 Stark. 186. 1 Hen. Bla. 198; and notices are construed strictly against carriers, nor is their personal default, as misdelivery of parcels, &c. within them. 5 East, 428. 2 B. & A. 369. The word "glass" written on the package, is a sufficient notification of the nature and value of the goods, where a notification is necessary, from their value being much greater than their bulk and appearance indicate, 3 Camp. 527; but see 3 Starkie, 107; and where an agent in the country sends goods to the plaintiff in town, who is aware of the restrictive notice, that is sufficient to bind the plaintiff. 3 Stark. 136.

A carrier's liability commences from the time the goods are actually delivered to him or his authorized agent. 5 T. R. 389. Delivery to the driver of a stage coach, as servant of the carrier, is sufficient, 2 Stark. 82; or to the captain of a ship, is good against the owners, or the charterer, pro hac vice, if under charter. 3 Esp. 27. Where the carriage is to be by the post, it is not sufficient to make the *consignee* liable for the loss, if the letter was only given to a bell-man; but if it were delivered at the general post-office, or a receiving house, it would be otherwise. Peake, C. N. P. 186.

The carrier's liability ceases when he vests the property in the hands of the consignee or his agent, by actual delivery, or on its being resumed by the consignor, in pursuance of his right of stoppage *in transitu*. The leaving goods at an inn is not a sufficient delivery. Selw. N. P. tit. Carriers. The usual liability of carriers may in some degree be limited by usage, or by a special contract with the owner of the goods. 2 Moore Rep. 500. 1 T. R. 27. So where the consignee directs the carrier to let the goods remain in his waggon office till he (the consignee) removes them, the carrier's liability ceases on the arrival of the goods at the waggon office. 1 Moore, 526. In such case the carrier can only be considered as a warehouseman. 2 Moore Rep. 500; see 1 T. R. 27. In the river Thames the liability of the master continues till the goods are loaded in the lighter sent by the consignee to receive them, 1 Bos. & Pul. 16; and if they are wrongfully detained by revenue officers, his liability still continues, he having a remedy against the officers. 1 Campb. 451.

The rate of charge for carriage is to be in some cases regulated by statute, (see 2 & 3 W. & M. c. 12. s. 24. and 39 Geo. III. c. 58.) and in others by special stipulation between the parties; but in no case can a common carrier claim more than is reasonable for his trouble. 3 Taunt. 264; see Cro. Jac. 262. 2 Show. 81. 129. The former of the statutes above cited, authorizes the justices in Easter quarter sessions throughout England, yearly to assess and rate the price of all land carriage; and though this statute is not acted upon, it may be considered as still in force. Jeremy, 112. 6 T. R. 17. 3 Taunt. 264.

Special carriers are those who do not carry for all persons indiscriminately, and are not like common carriers *compellable* to undertake the carriage of the goods. They are only liable as common mandatories, the law with respect to whom is explained in the 2d species of bailments, ante 451. (a).

in his grounds, which the law calls *agistment*, he takes them upon an implied contract to return them on demand to the owner (*u*). 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 (*w*): for the due execution of which contract many useful regulations are made by statute 30 Geo. II. c. 24. And so if a landlord distrains goods for rent, or a parish officer for taxes, these for a time are only a pledge in the hands of the distrainors, 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 (*x*); unless he expressly undertook (*y*) to 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 (*z*), that such a general bailment will not charge the bailee with any loss, unless it happens by gross neglect, which is an evidence of fraud: but, if he undertakes specially to keep the goods safely and securely, he is bound to take the same care of them, as a prudent man would take of his own (*a*).

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, because of his *contract for restitution; [*453] the bailor having still left in him the right to a *chose* in action, grounded upon such contract. 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 agisting farmer, the pawnbroker, the distrainor, and the general bailee, may all of them vindicate, in their own right, this their possessory interest, against any stranger or third person (*b*). For, being responsible to the bailor, or if the goods are lost or damaged by his wilful 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 of action 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 contracts by which a qualified property may be transferred to the hirer or borrower: in which there is only this difference, that hiring is always for a price, or stipend, or additional recompense; borrowing is merely gratuitous. But the law in both cases is the same (24). They are both contracts, whereby the possession and a transient property is transferred for a particular time or use, on condition

(*u*) Cro. Car. 271.
(*w*) Cro. Jac. 245. Yelv. 178.
(*x*) Co. Litt. 89.
(*y*) 4 Rep. 84.
(*z*) Lord Raym. 909. 12 Mod. 487.
(*a*) 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 nostra*," says Suernhook, "*dolum præsumunt, si una non perierit.*" (*De jure Sueon. l. 2, c. 5.*)
(*b*) 13 Rep. 69.

(24) The learned Commentator has here followed lord Holt, who has treated a *commodatum* and *locatio* without distinction. Lord Raym. 916. But this seems to be properly corrected by Sir W. Jones, 85; who concludes, that the hirer of a thing is answerable only for ordinary neglect; but that a gratuitous borrower is responsible even for slight negligence. Ib. 120.

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 it with moderation, and not to 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) entitled also to the price for which the horse was hired (*c*).

[*454] *There is one species of this price or reward, the most usual of any, but concerning which many good and learned men have 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 generally is called *interest* by those who think it lawful, and *usury* by those who do not so. For 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 said to be laid down by Aristotle (*d*), 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 (*e*) has proscribed the taking any, the least, increase for the loan of money as a mortal sin.

But, in answer to this, it hath been 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 (*f*): 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 the reason supposed to be given by Aristotle, and 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

[*455] 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 ease of borrowing at a short warning (which is the life of commerce) would

(*c*) Yelv. 172. Cro. Jac. 296.
(*d*) *Polit.* l. 1, c. 10. This passage hath been suspected to be spurious.
(*e*) *Decretal*, l. 5, tit. 19.
(*f*) Deut. xxiii. 20.

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, as to any scruples of conscience, since all other conveniences of life may either be bought or hired, but money can only be hired, there seems to be no greater oppression in taking a recompense or price for the hire of this, than of any other convenience. 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, which the owner may feel by the want of it, and for the hazard of his losing it entirely, is not more immoral in one case than it is in the other. 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. A capital *distinction must therefore be made between a moderate [*456] 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 Grotius (*g*), "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 can never 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 the lenders, and the lower ought the rate of the national interest to be; but where there is not enough circulating cash, or barely enough, 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.

(*g*) *de j. b. & p. l.* 2, *c.* 12, § 22.

[*457] *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 a 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 gives rise to the practice of, 1. Bottomry, or *respondentia*. 2. Policies of insurance. 3. Annuities upon lives.

And first, *bottomry* (25) (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 (*partem 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 [*458] 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 (*h*). 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 merchandise, 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 (*i*): which kind of agreement is sometimes called *foenus nauticum*, and sometimes *usura maritima* (*j*). 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 merchandise; that the lender shall have the benefit of salvage (*k*); and that if the borrower hath not an interest in the ship, or in the effects on board, equal to the value of the sum borrowed, he shall be responsible to the lender for so

(*h*) Moll. *de jur. mar.* 361. Malyne, *lex mercat.* b. 1, c. 31. Bacon's essays, c. 41. Cro. Jac. 208. Bynkersh. *quaest. jur. privat. l.* 3, *c.* 16. (*i*) 1 Sid. 27. (*j*) Molloy, *ibid.* Malyne, *ibid.* (*k*) See Book I. page 294.

(25) See in general, Abbott on Shipping, 143. 2 Holt, 398. 3 Chitty's Com. L. 313 to 316.

much of the principal as hath not been laid out, with legal interest and all other charges, though the ship and merchandise be totally lost (26).

Secondly, a policy of *insurance* (27) 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 same principles as the doctrine of interest upon loans, that of hazard; but not that of inconvenience. For if I insure a ship to the Levant, and back again, at *five per cent.*; here 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 [*459] be immediately out of possession of my money, the inconvenience of which we have supposed 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 possession 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 life, it is frequent (besides 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 to 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

(26) The general nature of *a respondentia* bond is this, the borrower binds himself in a large penal sum, upon condition that the obligation shall be void, if he pay the lender the sum borrowed and so much a month from the date of the bond till the ship arrives at a certain port, or if the ship be lost or captured in the course of the voyage. The respondentia interest is frequently at the rate of forty or fifty *per cent.* or in proportion to the risk and profit of the voyage. The respondentia lender may insure his interest in the success of the voyage, but it must be expressly specified in the policy to be respondentia interest, 3 Burr. 1391; unless there is a particular usage to the contrary. Park. Ins. 11. A lender upon respondentia is not obliged to pay salvage or average losses, but he is entitled to receive the whole sum advanced, provided the ship and cargo arrive at the port of destination; nor will he lose the benefit of the bond, if an accident happens by the default of the borrower or the captain of the ship. Ib. 421. Nor will a *temporary* capture, or any damage short of the destruction of the ship, defeat his claim. 2 Park. 626, 7. 1 M. & S. 30.

Where bottomry bonds are sealed, and the money paid, the person borrowing runs the hazard of all injuries by storm, fire, &c. before the beginning of the voyage, unless it be otherwise provided. As, that, if the ship shall *not arrive at such* a place at such a time, &c. then the contract hath a beginning from the time of sealing; but if the condition be, that if such ship shall *sail from London* to any port abroad, and shall not arrive there, &c. then, &c. the contingency hath not its beginning till the departure. Beawes Lex. Merc. 143. Park. 626. A lender on bottomry or respondentia is not liable to contribute in the case of general average, nor is he entitled to the benefit of salvage. Park. 627. 629. 4 M. & Selw. 141. See, however, Marshal on Insurance. 6 Ch. book 2. In the case of hypothecation, the lender may recover the ship itself in the admiralty court, but not in bottomry or respondentia. See 6 Moore, 397.

(27) See in general, Park & Marshal on Insurances, and 3 Chitty Com. L. 445 to 536.

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. But, in order to prevent these insurances from being turned into a mischievous kind of gaming, it is enacted by statute 14 Geo. III. c. 48, that no insurance shall be made on lives, or on any other event, wherein the party insured hath no interest; that in all policies the name of such interested party shall be [*460] *inserted; and nothing more shall be recovered thereon than the amount of the interest of the insured (28).

This does not however extend to marine insurances, which were provided for by a prior law of their own. The learning relating to these 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 (29.) Thus much however may 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 stat. 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 of which had the same pernicious tendency), shall be totally null and void, except upon privateers, or upon ships or merchandise from the Spanish and Portuguese dominions, for reasons sufficiently obvious; and that no re-assurance shall be lawful, except the former insurer shall be insolvent, 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 [*461] right to be insured for the money lent, and the borrower *shall (in case of a loss) recover no more upon any insurance than the surplus of his property, above the value of his bottomry, or *respondentia* bond (30).

(28) In New-York all wagers depending on any lot, chance, casualty, or unknown or contingent event, are unlawful; but this provision does not affect any insurances made in good faith for the *security* or *indemnity* of the party insured, and which are not otherwise prohibited by law, nor any contract on bottomry or respondentia. 1 R. S. 662, § 1 & 3.

(29) This task was accomplished by Mr. Justice Park in his masterly treatise on the subject, which was followed by Mr. Serjt. Marshal's excellent work; and see 3 Chitty's Commercial Law, 445 to 536.

(30) This statute does not extend to foreign ships, upon which, as before the statute, there may still be insurances, *interest or no interest*. These were not included in the act, on account of the difficulty of bringing witnesses from abroad to prove the interest. Doug. 316. But where there is an interest on board, the owner by a *valued* policy may insure somewhat beyond the extent of the real value, because the adverse party has *admitted* the value. Such a case is held not to be within the

Thirdly, the practice of purchasing *annuities for lives* at a certain price or premium, instead of advancing the same sum on an ordinary loan,

statute, unless it should appear that the interest of the insured is so small as to be a mere evasion of the act, and a pretence for gaming. But if the loss be partial, then the amount must be proved, even under a valued policy. If the goods are fraudulently overvalued, to cheat the insurers, nothing can be recovered. 3 Camp. 319. In an *open* policy, where no value is fixed, the prime cost of the goods must be proved. 2 Burr. 1170. 4 Burr. 1966.

A policy may be altered without a fresh stamp, before notice of the determination of the risk, so that the property remain in the same person, and the term and sum be the same; but a new stamp is necessary if any material or essential alteration is made. See 35 Geo. III. c. 63. s. 13. 8 East, 373. 4 Taun. 169. 1 M. & S. 217. 4 Camp. 107. 5 Taun. 359. 1 Stark. 336. 5 M. & S. 267. 2 B. & A. 320. But a material alteration, without the consent of the underwriter, who is defendant (though others who signed may have assented), vitiates the policy, 4 Taunt. 329. 7 Taunt. 416. 2 Stark. 64. 3 Brod. & Bingh. 168, but not so an immaterial alteration. 4 Moore, 5. 1 B. & B. 426. A misrepresentation of a material fact by the assured, though *innocently* or inadvertently made, vitiates the policy, the premium to be returned; and if fraudulently made, the underwriter may retain the premium. 1 Bla. Rep. 593, 594. Doug. 260. 1 T. R. 12.

There is a distinction between a *representation* and a *warranty*, the latter being a condition or contingency inserted in the policy itself; thus, where a ship is warranted to sail on a particular day, and she sails either before or after, though, for the best reason, the assurer is discharged. 1 T. R. 345. Cowp. 606, 607. See 3 M. & S. 461. 6 Taun. 241. 1 Marsh. 570; but it is enough that a representation be substantially performed. Cowper, 785. Negligence of the crew at the time of the loss is no breach of the implied warranty, if the crew be sufficient at the outset. 2 B. & A. 73. An insurance on goods from an enemy's port to this country, though in a neutral vessel, is void. 8 T. R. 548. 1 East, 475. 8 East, 273. A *voluntary* and unnecessary deviation, even for a night or an hour, from the voyage, discharges the assurer from the policy, Park, Ins. 298. 3 Taunt. 16. 4 Taunt. 229. 3 Camp. 437. 16 East, 312. Selw. N. P. 978. 4 Moore, 150. 5 Bar. & Ald. 45; but "a vessel when insured, may always do whatever it would be expedient to do if uninsured." Per Gibbs, C. J. Holt's N. P. C. 186.

The underwriter is not answerable for any loss happening (though in consequence of an act done in the voyage) after the ship has been twenty-four hours in port in good safety, Park, 35; but if the policy be, "until the ship shall have ended and be discharged of her voyage," and not "until she shall have moored at anchor twenty-four hours in good safety," it has been holden that the policy is not discharged till she is unloaded. Skin. 243. The presumption, as to the loss of a missing ship, will be governed by the circumstances laid before the jury. Holt's N. P. C. 244. 2 Camp. 85. If after payment on such a presumption the vessel reappear, she will belong to the underwriters. Holt, 242.

Barratry comprehends every species of fraud, knavery, or criminal conduct in the master, by which the owners or freighters are injured. Cowp. 155, 156. 1 T. R. 159. 4 T. R. 33.

It is a general principle that the insured shall recover, in case of loss, no more than an indemnity; but mercantile usage may entitle him to the whole, which would be payable to him on a safe arrival, without deducting tonnage duty, pilotage, &c. Bingh. Rep. 61. If the voyage is lost, though the property is safe, the owner may abandon; or if the salvage is high, the expense of pursuing the voyage great, and the assurer will not bear it, 1 T. R. 615. 2 Burr. 1209; but he cannot elect to abandon or not till he hears of the loss, nor after he hears the peril is over and the ship is in safety. 2 Burr. 1211. See 2 Saunders, 200. Goram v. Sweeting, in notes.

A reassurance is the contract which an insurer, who wishes to be indemnified against the risk he has taken upon himself, makes with another person, by giving him a premium to reassure to him the same event, which he himself has insured. Reassurances are prohibited by the statute 19 Geo. II. c. 37. both upon foreign and English ships, unless the assurer is insolvent, a bankrupt, or dead; in which cases he, his assignee, or personal representative, may make a reassurance, which must be expressly mentioned as a reassurance in the policy. 2 T. R. 161. The object of prohibiting reassurance, was to prevent idle gaming speculations, by persons endeavouring to obtain a high premium for insurance, and then to secure themselves by getting the same risk insured at a lower rate. The learned judge seems to have mistaken a double assurance for a reassurance; a double insurance is where the owner insures his goods twice or *several times over*, with different underwriters, which he may lawfully do. By which means he increases his security, and though he cannot recover more than a single satisfaction for his loss, yet he may bring his action against any one of the underwriters, and compel him to pay the whole extent of the interest insured. And this underwriter may afterwards recover from each of the rest a rateable satisfaction or apportionment of the sum which he has been obliged to pay to the assured. Park, Ins. 280. Insurance is merely a contract of indemnification against loss, and cannot be made a mode of gaining a prize, where no loss has been sustained. A person to whom Mr. Pitt was indebted insured his life to the amount of his debt; after Mr. Pitt's death, he was paid by his executors, and in an action against the insurers, the court of king's bench held that he could not recover, and that

arises usually from the inability of the borrower to give the lender a permanent security for the return of the money borrowed, at any one period of time. He therefore stipulates (in effect) to repay annually, during his life, some part of the money borrowed; together with legal interest for so much of the principal as annually remains unpaid, and an additional compensation for the extraordinary hazard run, of losing that principal entirely by the contingency of the borrower's death; all which considerations, being calculated and blended together, will constitute the just proportion or *quantum* of the annuity which ought to be granted. The real value of that contingency must depend on the age, constitution, situation, and conduct of the borrower; and therefore the price of such annuities cannot, without the utmost difficulty, be reduced to any general rules. So that if, by the terms of the contract, the lender's principal is *bonâ fide* (and not colourably) (*l*) put in jeopardy, no inequality of price will make it an usurious bargain; though, under some circumstances of imposition, it may be relieved against in equity. To throw however some check upon improvident transactions of this kind, which are usually carried on with great privacy, the statute 17 Geo. III. c. 26. has directed, that upon the sale of any life annuity of more than the value of ten pounds *per annum* (unless on a sufficient pledge of lands in fee-simple or stock in the public funds) the true consideration, which shall be in money only, shall be set forth and described in the security itself; and a memorial of the date of the security, of the names of the parties, *cestuy que trusts*, *cestuy que vies*, and witnesses, and of the consideration money, shall within twenty days after its execution be enrolled in the court of chancery; else the security shall be null and void (31): and, in case of collusive practices respecting the [*462] consideration, the *court, in which any action is brought or judgment obtained upon such collusive security, may order the same to be cancelled, and the judgment (if any) to be vacated: and also all contracts for the purchase of annuities from infants shall remain utterly void, and be incapable of confirmation after such infants arrive to the age of maturity. 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*, *one per cent.* monthly, or *twelve per cent. per annum*, to be taken for common loans; but Justinian (*m*) reduced it to *trientes*, or one third of the *as* or *centesimae*,

(*l*) Carth. 67.

(*m*) Cod. 4. 32. 26. *Nov.* 33, 34, 35.——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 Pisones*, 325.

Romani pueri longis rationibus assem
Discunt in partes centum *diducere. Dicat*
Filius Albini, si de quincunce *remota est*
Uncia, *quid superet? poterat dixisse*, triens; *eu,*
Rem poteris servare tuam! redit uncia, *quid sit?*
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 centesimae*, amounting yearly to twelve *per cent.* Now as the *as*, or Roman pound, was commonly used to express any integral sum, and was

no action can be brought for indemnity, where, upon the whole event, no damage has been sustained. 9 East, 72.

(31) The statute cited in the text was repealed by the statute of 53 Geo. III. c. 141, which last-named act was explained by the subsequent one, of 3 Geo. IV. c. 92, and lastly by that of 7 Geo. IV. c. 75: by these three acts the enrolments and forms of attestation of annuity instruments are now regulated.

that is, *four per cent.*; but allowed higher interest to be taken of merchants, because there the hazard was greater. So too Grotius informs us (*n*), that in Holland the rate of interest was then eight *per* **cent.* [*463] in common loans, but twelve to merchants. And lord Bacon was desirous of introducing a similar policy in England (*o*): but our law establishes one standard for all alike, where the pledge of 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, by annuities for lives, 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 successor 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. st. 2. c. 16. it was brought down to five *per cent.* yearly, which is now the extremity of legal interest that can be taken (32). But yet, if a contract

divisible into twelve parts or *unciæ*, therefore these twelve monthly payments or *unciæ* were held to amount annually to one pound, or *as usurarius*; and so the *usuræ asses* were synonymous to the *usuræ centesimæ*. And all lower rates of interest were denominated according to the relation they bore to this centesimal usury, or *usuræ asses*: for the several multiplies of the *unciæ*, or duodecimal parts of the *as*, were known by different names according to their different combinations; *sextans, quadrans, triens, quincunx, semis, septunx, bes dodrans, dextans, deunx*, containing respectively 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, *unciæ*, or duodecimal parts of an *as*. (*Ff.* 28. *tit.* 50, § 2. Gravin. *orig. jur. civ. l.* 2, § 47.) This being premised, the following table will clearly exhibit at once the subdivisions of the *as*, and the denominations of the rate of interest.

USURÆ.	PARTES ASSIS.	PER ANNUM.
Asses, sive centesimæ	*integer*	12 *per cent.*
Deunces	11-12ths	11
Dextantes, vel decunces	5-6	10
Dodrantes	3-4	9
Besses	2-3	8
Septunces	7-12	7
Semisses	1-2	6
Quincunces	5-12	5
Trientes	1-3	4
Quadrantes	1-4	3
Sextantes	1-6	2
Unciæ	1-12	1

(*n*) *De jur. b. & p.* 2. 12. 22.

(*o*) Essays, c. 41.

(32) As to the law of usury in general, see 3 Chitty's Com. L. 87 to 91. 310 to 316. R. B. Comyn on Usury, Ord. on Usury, and Plowden on Usury. There must be an unlawful *intent*, and therefore if the usury arise from error in computation, it will not vitiate. Cro. Car. 501. 2 Bla. Rep. 792. 1 Camp. 149. Exorbitant discount to induce the acceptor to take up a bill before it is due is not usurious, because there must be a loan or forbearance of payment, or some device for the purpose of concealing or evading the appearance of a loan or forbearance. 4 East, 55. 5 Esp. 11. Peake, 200. 1 B. & P. 144. 4 Taunt. 810. Nor if the charge alleged to be usurious is fairly referable to the trouble, expense, &c. in the transaction. 3 B. & P. 154. 4 M. & S. 192. 2 T. R. 238. 1 Mad. Rep. 112. 1 Camp. 177. 15 Ves. 120. Bankers may charge their usual commission beyond legal interest. 2 T. R. 52. Under the direction of the court, it is the province of the jury to determine when there is usury in a transaction. 4 M. & S. 192. 1 Dowl. & R. 570. 3 B. & A. 664. 2 Bla. Rep. 864. The purchase of an annuity at ever so cheap a rate, will not *primâ facie* be usurious, but if it be for *years*, or an express agreement to repurchase, and on calculation more than the principal with legal interest is to be returned, it will. 3 B. & P. 151. 3 B. & A. 666. And if part of the advance be in goods, it must be shewn that they were not overcharged in price. Doug. 735. 1 Esp. 40. 2 Camp. 375. Holt, N. P. C. 256. A loan made returnable on a certain day, on payment of a sum beyond legal interest, on default thereof may be a *penalty* and not usurious interest, the intention of the parties being the criterion in all cases. If money be lent on risk at more than legal interest, and the casualty affects the *interest* only, it is usury, not so, if it affects the *principal also*. Cro. J. 508.

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 (*p*). Thus Irish, American, Turkish, and [*464] 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 (34). And, by statute 14 Geo. III. c. 79. all mortgages and other securities upon estates or other property in Ireland or the plantations, bearing interest not exceeding six *per cent.* shall be legal; though executed in the kingdom of Great Britain; unless the money lent shall be known at the time to exceed the value of the thing in pledge; in which case also, to prevent usurious contracts at home under colour of such foreign securities, the borrower shall forfeit treble the sum so borrowed (35).

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

(*p*) 1 Equ. Cas. Abr. 289. 1 P. Wms. 395. (*q*) F. N. B. 119.

3 Wils. 395. The usury must be part of the contract in its inception, and being void in its commencement, it is so in all its stages, Doug. 735. 1 Stark. 385. though bills of exchange so tainted, are by the 58 Geo. III. c. 93. rendered valid in the hands of a *bonâ fide* holder, unless he has actual notice of the usury, but if the drawer of a bill transfer it for a valuable consideration, he cannot set up antecedent usury with the acceptor as a defence. 4 Bar. & Ald. 215. A security with legal interest only, substituted for one that is usurious, is valid. 1 Camp. 165. n. 2 Taunt. 184. 2 Stark. 237. Taking usurious interest on a *bonâ fide* debt, does not destroy the debt. 1 H. B. 462. 1 T. R. 153. 2 Ves. 567. 1 Saund. 295. The *penalty* of three times the amount of the principal is not incurred, till the usurious interest has been actually received; and the action must be brought within one year afterwards. 2 Bla. Rep. 792. 2 B. & P. 381. 1 Saund. 295. a. The borrower is a competent witness in an action for the penalty. 1 Saund. 295. a. (33).

(33) In New-York interest is 7 per cent.: all contracts or securities reserving more are void, except the securities be promissory notes or bills of exchange payable to order or bearer, in the hands of a holder or endorsee who shall have received them and paid a valuable consideration in good faith and without notice of the usury. The lender may be compelled in chancery to discover the usury; and on a bill for that purpose the borrower need not offer to pay any interest whatever. 1 R. S. 771, &c. § 1. 3. 8.

(34) By the 13 Geo. III. c. 63. s. 30. no subject of his majesty in the East Indies shall take more than 12 *per cent.* for the loan of any money or merchandise for a year, and every contract for more is declared void; and he who receives more shall forfeit treble the value of the money or merchandise lent, with costs, one moiety to the East-India company, and the other moiety to him who sues in the courts in India. If there be no such prosecution within three years, the party aggrieved may recover what he has paid above 12 *per cent.* If the informer shall compound the suit before the defendant's answer, or afterwards without leave of the court, he shall be liable upon conviction to be fined and imprisoned at the discretion of the court. Sec. 21.

Where foreign interest is to be taken or not, see in general 1 P. Wms. 395. 696. 2 T. R. 52. 1 Bla. R. 267. Burr. 1094. 2 Bro. C. R. 2. 2 Vern. 395. 3 Atk. 727. 1 Ves. 427. Comyn on Usury, 152.

(35) To remove doubts which had arisen upon this statute, the 1 & 2 Geo. IV. c. 51. provides that bonds, &c. made in Great Britain, concerning lands, &c. in Ireland or the colonies, whether the interest be payable there or in this country, and bonds under similar circumstances, given as a collateral security, shall be good and valid to all intents and purposes, the same as if the parties had resided on the spot where the security exists. But this act and the 14 Geo. III. c. 79. extend only to *landed* securities, and therefore where A. contracted with B. for the sale of an estate in the West Indies, and part of the purchase money was secured by the bond of B. and C. which bond having been cancelled, another was executed in England reserving 6*l.* per cent. it was held usurious. 3 T. R. 425.

for any special purpose, he becomes indebted to the bailor in the same numerical sum, upon his implied contract, that he should 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 of 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 usu- [*465] ally divided into debts of *record*, debts by *special*, and debts by *simple* contract (36).

(36) As the description in the text of the different kinds of contracts is too succinct, it may be useful to the student to state the distinctions between each, and give a comparative view of their relative effect. In point of *form*, contracts are three-fold; by *parol*, by *specialty*, and by matter of *record*. Those most in use in commercial affairs, are *parol* or simple contracts not under seal. All contracts are called parol, unless they be either specialties, that is, deeds under seal, or be matter of record. A written agreement not under seal, is classed as a parol or simple contract, and is usually considered as such, just as much as any agreement by mere word of mouth. For, as observed by chief baron Skynner, 7 Term. Rep. 350. Plowd. 308. there is at common law no such class of contracts as contracts in writing, contradistinguished from those by parol or specialty. If they are merely *written* and *not* specialties, they are parol. There are, indeed, distinctions between the two kinds of simple contracts under the statute of frauds, which render it necessary that certain descriptions of simple contracts should be in writing, and sometimes signed. But though *written*, they still continue, like *all other* contracts not under seal nor of record, to be considered merely as in the nature of *contracts* by *parol*.

The principal points in which a deed differs in effect from a parol contract are, 1st. That the want of consideration constitutes no defence at law to an action on such deed.* And though in equity relief may sometimes be had in cases of surprise, or catching bargains, or in favour of creditors, yet the mere circumstance of a bond or deed having been given voluntarily without consideration, constitutes no ground for relieving the party himself. Fonbl. on Eq. 2d edit. 347. n. f. Toller, 1st edit. 222, 3. Whereas in support of any proceeding on a simple contract, the creditor must prove, that it was founded on a sufficient consideration. 4 East, 403. 7 T. R. 350. 7 Bro. P. C. 550. 2 B. & P. 77. And though the defendant in an action on a deed is at liberty to avail himself of any illegality in the consideration or transaction, yet it is incumbent on him to state the objection with precision in pleading, whereas in an action on a simple contract, such ground of defence may be given in evidence under the general issue. 1 Saund. 295. 3 T. R. 538. 3 T. R. 424. 2 Wils. 347. 1 Bla. R. 445. 7 T. R. 477. 2dly. That in pleading a deed it is not necessary to shew that it was founded on any consideration, except in setting forth conveyances operating under the statute of uses, 1 Hen. Bla. 261. 2 Stra. 1229, whereas a declaration on a simple contract will be bad in arrest of judgment, unless it appear therefrom that there was a consideration co-extensive with the promise. 7 T. R. 348. 4 East, 455. 3dly. That the party to a deed is in most cases estopped or precluded from controverting any statement therein, or to shew that it was executed with a different intent or object to that which the deed itself imports, Hayne v. Maltby, 3 T. R. 9. 438. Com. Dig. Estoppel. 1 Saund. 216. n. 2. Willes, 9, except indeed in cases of duress, fraud, or illegality, which defences the law admits, notwithstanding the security has the appearance of having been deliberately framed. 3 T. R. 418. 4thly. That the efficacy of a stipulation by deed, cannot be affected or altered at law by any subsequent simple contract, nor can the party be discharged or released from the obligation of a deed by any subsequent contract, unless by a release under seal. Co. Litt. 222. b. 3 T. R. 590. 8 East, 346. 5thly. That a deed binds the heir when named, Bac. Ab. Heir and Ancestor, F. 2 Saund. 7. n. 4. 136. Plowd. 439. 441; and a devisee of real estate may be sued in debt, though not in covenant on such a deed. 3 & 4 W. & M. c. 14. Bac. Ab. Heir, F. 1 P. Wms. 99. 7 East, 128. Whereas a simple contract creditor has no remedy at *law* in any case against the real estate of his deceased debtor;† though in some cases by marshalling the assets, 3 Wooddes. 488; or where the debtor died a *trader*, relief may be obtained in equity; 47 Geo. III. sess. 2. c. 74. 6thly. That a deed is entitled to preference, except as to rent due on a parol demise, over simple contract debts, in the course of payment of a testator's debts, supra 465. Toller, 1st ed. 221. 5 T. R. 307; and though this rule does not obtain in case of bankruptcy, where all creditors receive a dividend *pari*

* In New-York, in case of a set-off, or an action on a sealed instrument, the seal is only presumptive evidence of consideration. (2 R. S. 406, § 77.)

† In New-York the simple contract creditor has the same remedy against heirs and devisees as the specialty creditor; (2 R. S. 452, § 32): and is entitled to payment from executors, &c. pro rata with specialty creditors. (Id. 87, § 27, 28).

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. Debts upon recognizance are also 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 acknowledgment 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.* if forfeited by non-performance of the condition, are also ranked among this first and principal class of debts, *viz.* debts of record; since the contract, on which they are founded, is witnessed by the highest kind of evidence, *viz.* by matter of record.

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 chapter of the present book; and then shewed that it is a crea-

passu, yet by means of a mortgage and some other deeds, some specific security may frequently be obtained, or right to prove acquired, which even in that event, places one creditor in a better situation than he would otherwise have been. 7thly. That a deed is not affected by the statute of limitations, which renders it necessary for a simple contract creditor to proceed within six years after his cause of action accrued. Cowp. 109. 1 Saund. 37, 8. 21 Jac. I. c. 16. Tidd, 6th edit. 19. 8thly. That in pleading a deed it is in general necessary to make a profert, as it is technically termed, of the deed, or to state upon the record some excuse for the omission. 10 Co. 92. b. 1 Chitty's Plead. 351. 3 T. R. 151. 4 East, 585. 9thly. That in case of a deed when a profert is necessary, the other party is entitled to oyer and copy, 1 Saund. 9. n. 1. a right which does not in general exist in case of simple contracts. Tidd. 6th edit. 618, 9. 10thly. That if a deed be given expressly to secure a pre-existing simple contract debt, due from the obligor, it will at law merge the latter, and prevent him from suing upon the same, 3 East, 258, 9. Cro. Car. 415; though if the deed be given as a collateral security, or by a third party, it will not have that operation. 3 East, 251. Com. Dig. Accord. 6 Term Rep. 176, 7. 2 Leon. 110.

Debts or *contracts of record*, being as we have seen, sanctioned in their creation, by some court or magistrate, having competent jurisdiction, have certain particular properties distinguishing them as well from simple contracts as from specialties. 1st. These debts or contracts cannot in pleading be impeached or affected by any supposed defect or illegality in the transaction on which they are founded, and if a judgment be erroneous, that circumstance will afford no answer to an action of debt upon it, and the only course for the defendant is to reverse it by writ of error, 2 Burr. 1005. 4 East, 311. 2 Lev. 161. Gilb. on U. & T. 109. Gilb. Debt, 412. Yelv. 155. Tidd, 6th ed. 1152; and though third persons, who have been defrauded by a collusive judgment, may shew such fraud, so as to prevent themselves from being prejudiced by it, 13 Eliz. c. 5. 2 Marsh. 392. 7 Taunt. 97. the parties to such judgment are estopped at law, from pleading such a plea, and must in general apply for relief to a court of equity. 13 Eliz. c. 5. 2 Marsh. 392. 7 Taunt. 97. 1 Anstr. 8. There is however one instance in which a party may apply to the common law court to set the judgment aside, viz. where it has been signed upon a warrant of attorney, given upon an unlawful consideration, or obtained by fraud; in which case, as this is a peculiar instrument, affording the defendant no opportunity to resist the claim by pleading, and frequently given by persons in distressed circumstances, the court will afford relief upon a summary application, Dougl. 196. Cowp. 727. 1 Hen. Bla. 75. Semble; not so in Exchequer. 1 Anstr. 7, 8. Another peculiar property of a contract of record is, that its existence, if disputed, must be tried by inspection of the record, entry of recognizance, &c. and not by a jury of the country. Tidd, 6th edit. 797, 8. But notwithstanding, since the act of union, an Irish judgment is a record, yet it is only proveable by an examined copy on oath, and therefore it is only triable by a jury. 5 East, 473. Another quality, and one of the most important, is, that a judgment when docketted, binds the land as against subsequent purchasers, Tidd, 6th edit. 966, 7; and such a judgment and recognizance* is entitled to preference to a specialty and other debts of an inferior nature. 6 T. R. 384. Tidd, 6th edit. 967. Lastly, if a judgment be obtained expressly for a simple contract or specialty debt, and not as a collateral security, the inferior demand is merged, according to the rule *transit in rem judicatam*, but if the judgment were obtained merely as a collateral security, the creditor retains an election to proceed either on the judgment or inferior security. 3 East, 258.

* In New-York recognizances do not bind lands, 2 R. S. 362, § 21.

tion or acknowledgment of 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 [*466] 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 or 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 to 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 (37).

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* (38) 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 to 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 [*467] 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. But the invention of it was a little earlier; for the Jews were banished out of Guienne in 1287, and out of England in 1290 (*r*); and in 1236 the use of paper credit was

2 Carte. Hist. Eng. 203. 206.

(37) 2 R. S. 135, § 2.

(38) See Bayley on Bills, and Chitty on Bills, per tot. The subject is so very slightly commented on in the text, that it will be essential to the student to look into the works referred to in order to obtain a competent knowledge of the subject.

introduced into the Mogul empire in China (*s*). In common speech such a bill is frequently called a *draft*, 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 especially named, or the *bearer* generally) is called the *payee*.

These bills are either *foreign*, or *inland* (39); *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 (*t*), being by those statutes expressly enacted with regard to the other. So that now there is not in law any manner of difference between them (40).

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 (41). But, by [*468] statute 15 Geo. III. c. 51. all promissory or other notes *bills of exchange, drafts, and undertakings in writing, being negotiable or transferable, for the payment of less than twenty shillings, are declared to be null and void; and it is made penal to utter or publish any such; they being deemed prejudicial to trade and public credit. And by 17 Geo. III. c. 30. all such notes, bills, drafts, and undertakings, to the amount of twenty shillings, and less than five pounds, are subjected to many other regulations and formalities; the omission of any one of which vacates the security, and is penal to him that utters it (42).

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

(*s*) Mod. Un. Hist. iv. 499.

(*t*) Roll. Abr. 6.

(39) A bill drawn in one state of the U. S. on a person in another of those states, is a foreign bill. 2 Peters U. S. R.

(40) Mr. Christian observes, that "one very important distinction between foreign and inland bills of exchange still remains unaltered by the statutes; viz. in a foreign bill, in order to recover against the drawer or indorsers, it is necessary that the bill should be protested for non-acceptance or non-payment; (5 T. R. 239); but a protest is not necessary upon an inland bill, to enable the holder to recover the amount of it against the drawer or indorsers;* and the only advantage of a protest upon an inland bill is to give the holder a right to recover interest and expenses incurred by the non-acceptance or non-payment. (Ld. Raym. 993). No inland bill, payable at or after sight, can be protested; or which is not drawn payable at some time after date. (4 T. R. 170)."

In *Windle* v. *Andrews*, (2 Barn. & Ald. 701), it was decided, that, although the indorsee of an inland bill of exchange has no remedy for interest under the statute of Ann., unless the bill has been regularly protested; still, that statute does not take away any remedy which the holder of a bill of exchange had previously; and the drawer of a bill of exchange, which is not duly paid, is liable at common law for interest, although no protest was made.

(41) See accordingly 1 R. S. 768, § 1, &c.

(42) By the statute of 7 Geo. IV. ch. 6, the issuing of promissory notes for any sum under 5*l.* is prohibited, under a penalty of 20*l.* for every such note issued.

* The student will observe that it is not meant that a demand on the drawer and notice to the indorser is not necessary, but that a *protest* by a *notary* is not necessary for these purposes.

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 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 (*u*); 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 charge 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 ex- [*469] change, 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 acknowledgment 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 it for *non-acceptance*; which protest must be made in writing, under a copy of such bill 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 (43), (44).

(*u*) Stra. 1212. III. B. R.
(*v*) 2 Show. 235.—Grant v. Vaughan. T. 4 Geo. (*w*) Stra. 1000.

(43) In New-York, no person can be charged as acceptor unless the acceptance is in writing, or the acceptor destroys the bill or refuses for more than 24 hours to return it. (1 R. S. 768, § 6, 11.)

(44) With respect to *acceptance* and *protest*, the law now is, in several material points, different from the statement of it in the text. Acceptance is not necessary, though usual and desirable on bills payable at a certain time; but when the bill is payable at a certain distance of time after *sight*, then acceptance is essential and should not be delayed, because (as the time for payment of the bill does not begin to run till it is accepted, 6 T. R. 212. Bayl. 112. Chitty on Bills, 268.) the responsibility of the drawer would be thereby protracted. Acceptance of an *inland* bill can now be in *writing* only on the face of the bill itself, by 1 & 2 Geo. IV. c. 78; though formerly, as *is the case still with foreign* bills, it might have been verbal, or in writing on any other paper. 4 East, 67. 5 East, 514. But in all cases, whether of an inland or foreign bill, if it be presented and acceptance is refused, prompt notice (within fourteen days will not suffice, but usually the next day to the immediate indorser, and each indorser is allowed a day) must be given to the drawer and indorsers, or they will be discharged from responsibility. Upon non-acceptance, the holder may immediately sue the drawer, 2 Camp. 458. and indorsers, 4 East, 481. without waiting till the bill become due, according to the terms of it. No protest of an inland bill is essential to entitle the holder to recover interest and costs, and such protest now seems useless. 2 B. & A. 696.

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 it protested for *non-payment*, in the same manner, and by the same persons who are to protest it in case of non-acceptance, and such protest must also be notified, within fourteen days after, to the drawer. And 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 con-
[*470] veniently 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 convénient 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 rise 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 indorser, or if the bill has been negotiated through many hands, upon any of the indorsers; for each indorser is a warrantor for the payment of the bill, which is frequently taken in payment as much (or more) upon the credit of the indorser, as of the drawer. And if such indorser, so called upon, has the names of one or more indorsers 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 indorser has nobody to resort to, but the drawer only (45).

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 indorsers.

(*x*) Lord Raym. 993. (*y*) Salk. 127.

(45) The holder of the bill may bring actions against the acceptor, drawer, and all the indorsers at the same time; but though he may obtain judgments in all the actions, yet he can recover but one satisfaction for the value of the bill; but he may sue out execution against all the rest for the costs of their respective actions. Bayley, 43.

CHAPTER XXXI.

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 (1); a title which we before lightly touched upon (*a*), so far as it related to the transfer of the real estate of the bankrupt (2). 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 nations (*e*). But at pre- [*472] sent 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

(*a*) See page 285.
(*b*) *Ibid.*
(*c*) Stat. 1 Jac. I. c. 15, § 17.
(*d*) 4 Inst. 277.
(*e*) The word itself is derived from the word *banco* or *banque*, which signifies the table or counter of a tradesman, (Dufresne, I. 869), and *ruptus*, broken; denoting thereby one whose shop or place of trade is broken and gone; though others rather choose 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 font banque route*.

(1) The Congress of the U. S. have power to make uniform bankrupt laws, but do not deem it expedient to exercise that power at present. When exercised, it would act as a repeal or suspension of the involvent laws of the several states. See 1 Kent's Com. 393, &c. See the insolvent laws of New-York, 2 R. S. 1, &c. They differ so much in the minutiæ from the English bankrupt law, that they must be studied from the statute itself. The decisions, however, are frequently applicable to both laws; and the *general* principles are nearly alike.

(2) See *ante*, note 25 to chap. 18, p. 286, a summary of the statutory provisions at present affecting the real estates of bankrupts.

† Mr. Christian observes, that "throughout the three first statutes the bankrupt is uniformly called an offender, and the original design of the bankrupt law appears to have been to prevent and defeat the frauds of criminal debtors."

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 debitore in partes secando*, is to be understood in so very butcherly a light; which many learned men have with reason doubted (*f*). 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 selling him, his wife, and children, to perpetual foreign slavery [*473] *trans Tiberim* (*g*): an oppression which produced so many *popular insurrections, and secessions to the *mons sacer*. 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 gaol, "*omni quoque corporali cruciatu semoto* (*h*)." For, as the emperor justly observes (*i*), "*inhumanum erat spoliatum fortunis suis 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 (*k*), 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, so 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 trader to encumber himself with [*474] debts of any considerable value. If a gentleman, or *one in a 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.

(*f*) Taylor, Comment. in L. decemviral. Bynkersh. Observ. Jur. I. 1. Heinecc. Antiq. III. 30. 4.

(*g*) In Pegu and the adjacent countries in East India, the creditor is entitled to dispose of the debtor himself, and likewise of his wife and children; insomuch 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. 118).

(*h*) Cod. 7. 71, *per tot.*

(*i*) *Inst.* 4. 6. 40.

(*k*) Nov. 135, c. 1.

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 trader becomes incapable of discharging his own debts, it is his misfortune and not his fault. To the misfortunes, therefore, of debtors, the law has given a compassionate remedy, but denied it to 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 34 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, re-change, bartering, chevisance (*l*), or otherwise; or have *sought their living by buying and selling* (3). And by statute 21 Jac. I. c. 19, persons using the trade or profession of a *scrivener*, receiving other men's 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 sub- [*475] jects; being intended entirely for the protection of trade, in which

(*l*) That is, making contracts. (Dufresne, II. 569).

(3) Our author intimates, in page 477, that a commission of bankruptcy taken out against an infant, is of no legal validity. (*Ex parte Adam*, 1 Ves. & Bea. 494. *Ex parte Barnes*, 6 Ves. 401). But, where an infant has held himself out to the world as an adult and *sui juris*, contracting debts as such, a court of equity will not be disposed summarily to supersede a commission against him, on his petition; but will leave him to bring his action at law. (*Ex parte Watson*, 16 Ves. 266). Married women cannot, generally speaking, be made bankrupts; but a *feme-coverte* being a sole trader in London, and the wife or daughter of a freeman, is, by the custom of the city, liable to a commission of bankruptcy. (*La Vie* v. *Philips*, 1 W. Bla. 574. *Ex parte Carrington*, 1 Atk. 206). And, in cases not coming within the custom of London, if a married woman be so circumstanced as to be subject to a common law execution, it seems, she will likewise be subject to a commission of bankruptcy, (*Ex parte Preston*, Cooke's B. L. ch. 3, s. 1), which is considered pretty much in the nature of a statute execution. (*Ex parte Detastet*, 17 Ves. 251. *Ex parte Barned*, 1 Glyn & Jameson, 311. *Ex parte Freeman*, 1 Ves. & Bea. 41. *Ex parte Brown*, Ibid. 66. *In the matter of Wait*, 1 Jac. & Walk. 610. *Lee* v. *Lopez*, 1 Rose, 343). It was laid down in *Ex parte Layton*, (6 Ves. 440), that a lunatic cannot be made a bankrupt; but, in a later case, (reported *Anonymously* in 13 Ves. 590), Lord Eldon held that, as a commission of lunacy will not protect the lunatic against an action, so lunacy cannot be a defence against a commission of bankruptcy, which is a species of action. The two decisions may, perhaps, be reconciled by a third, in which it was settled, upon very intelligible principles, that a lunatic cannot commit an act of bankruptcy; but, if the party was sane when he did the act upon which a commission has issued, there is no reason why such commission should not be supported. (*Ex parte Priddy*, decided 8th June, 1793).

The second section of the consolidated bankrupt act (6 Geo. IV. c. 16), enacts that all bankers, brokers, and persons using the trade of a scrivener, receiving other men's monies or estates into their trust or custody, and persons insuring ships, or their freight, or other matters, against perils of the sea, warehousemen, wharfingers, packers, builders, carpenters, shipwrights, victuallers, keepers of inns, taverns, hotels, or coffee-houses, dyers, printers, bleachers, fullers, calenderers, cattle or sheep salesmen, and all persons using the trade of merchandize by way of bargaining, exchange, bartering, commission, consignments, or otherwise, in gross, or by retail; and all persons who, either for themselves, or as agents or factors for others, seek their living by buying and selling, or by buying and selling for hire, or by the workmanship of goods or commodities, shall be deemed traders liable to become bankrupt: Provided, that no farmer, grazier, common labourer, or workman for hire, receiver-general of the taxes, or member of or subscriber to any incorporated, commercial, or trading companies established by charter or act of parliament, shall be deemed, as such, a trader liable by virtue of the said act to become bankrupt.

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 sell 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 altogether he is indebted 200*l.* (4). 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.

[*476] *In the interpretation of these several statutes, it hath been held, that buying only, or selling only, will not qualify a man to

(*m*) § 39. (*o*) *Ibid.*
(*n*) § 40. (*p*) § 23.

(4) The amount of the debt of the petitioning creditor, or creditors, is still fixed at the sums stated in the text; but the 15th section of the statute of 6 Geo. IV. c. 16, enacts that every person who has given credit to any trader upon valuable consideration for any sum payable at a certain time, which time shall not have arrived when such trader committed an act of bankruptcy, may be a petitioning creditor, whether he shall have any security in writing, or otherwise, for such sum or not.

† Mr. Christian observes, that "any person, whether native, denizen, or alien, who trades *to* England, although he never resides here as a trader, may be a bankrupt, if he should come to England and commit an act of bankruptcy whilst he is here. Cowp. 398." And see *Allen* v. *Cannon*, 4 Barn. & Ald. 419.

‡ Mr. Christian observes, that "although a farmer, grazier, and drover, cannot from their respective occupations alone be bankrupts, yet if they buy and sell, or are dealers, independently of these characters, they become, like other traders, subject to the bankrupt laws: as, one farmer was declared a bankrupt, who bought large quantities of potatoes, not for planting or consuming upon his farm, but for selling again for profit; (1 Str. 513); and another, who occasionally bought horses, not for the use of his farm, but to make a profit of by re-selling. (1 T. R. 517.) A farmer, who makes upon his farm bricks for sale, from earth not taken from the farm, may be a bankrupt. (1 Bro. 173). But where a man rented a farm, wherein there was a brick ground, upon which he dug the clay and manufactured bricks for sale, the court of Common Pleas decided he could not be a bankrupt; but this judgment was afterwards reversed by the court of King's Bench. (1 T. R. 34. Cooke, 52, 3rd edit.)"

In *Ex parte Ridge*, (1 Ves. & Bea. 360), it was held that a farmer making lime, from a lime-pit opened before the commencement of his term, and selling the surplus beyond what he wanted for manure, is not a trader within the bankrupt laws. (And see *Sutton* v. *Weeley*, 7 East, 446), *Drovers* are not particularized in the consolidated bankrupt act (6 Geo. 4, c. 16), but cattle and sheep *salesmen* are expressly declared to be within the purview of the act. See note 7, post.

be a bankrupt; but it must be both buying and selling, and also getting a livelihood by it. As, by exercising the calling of a merchant, a grocer, a mercer, or in one general word, a *chapman* (5), who is one that buys and sells any thing. But no handicraft occupation (where nothing is bought and sold, and where 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 labour (*q*). Also an inn-keeper cannot, as such, be a bankrupt (*r*) (6): for his gain or livelihood does not arise from buying and selling 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 sell 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 selling, yet they are within the statutes of bankrupts (*t*): for the labour is only in melioration of the commodity, and rendering it more fit for sale.

One single act of buying and selling will not make a man a trader (7); but a repeated practice, and profit by it. Buying and selling 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 sell-

(*q*) Cro. Car. 31.
(*r*) Cro. Car. 549. Skinn. 291.
(*s*) Skinn. 292. 3 Mod. 330.
(*t*) Cro. Car. 31. Skinn. 292.
(*u*) 2 P. Wms. 306.

(5) It has been long held that, if the affidavit of debt term the debtor a "dealer and chapman," that is a sufficient description of trading to support a commission of bankruptcy. And a general statement in the commission, that the bankrupt "got his living by buying and selling," is enough to support it, though the bankrupt is described as a waterman: (*Ex parte Herbert*, 2 Ves. & Bea. 400): for, no clearer information can be received from the expression "dealer and chapman," than would be conveyed by the description of the bankrupt as one who "gained his livelihood by buying and selling;" which general statement will admit the finding of any particular trading. (*Hale* v. *Small*, 2 Brod. & Bing. 27. *S. C.* 2 Wils. Cha. Ca. 86).

(6) The act of 6 Geo. IV. c. 16, expressly enacts, that inn-keepers shall be subject to the bankrupt laws: see *ante*, the concluding paragraph of note (3) to this chapter.

(7) It has been decided, that, a single purchase, made with intent to sell again, is enough to constitute a trading, so as to bring the party within the purview and operation of the bankrupt laws. (*Holroyd* v. *Gwynne*, 2 Taunt. 176. *Newland* v. *Bell*, Holt's N. P. C. 223). This, however, must be qualified: Lord Ellenborough held, that a fisherman, who bought fish at sea from other boats, for the purpose of making up his own cargo, which he carried ashore and sold, was a trader within the meaning of the bankrupt laws: (*Heanny* v. *Birch*, 3 Campb 233): but, Lord Eldon, adverting to this decision, expressed his opinion to be, that, although it would be immaterial whether the acts were few or many, if the fisherman went out for the purpose of buying fish, that would make him a general trader; still, if the case were no more than that a person who went to sea to fish, and, not obtaining a sufficient cargo, buys a few fish to make it up, it would be hasty to say that such a partial buying would amount to a general trading. Such a case, his Lordship added, must always depend upon its own particular circumstances, and be properly the subject of a trial at law. It was further observed, that a farmer, who is converting his apples, the fruit of his orchard, into cider, and finding he has not a sufficient supply from his own orchard, makes up the deficiency by purchasing apples from his neighbours; or the owner and worker of a coal-mine who buys small articles, as bread, cheese, &c., in order to sell them again to his own pit-men; does not thereby render himself a trader within the bankrupt laws. (*Ex parte Gallimore*, 2 Rose, 427, 428).

But, it seems quite clear, the question of law is not now governed by the *quantum* of the trading; it is a settled rule, that, if any stranger may be supplied with the commodity which is sold, and it is not sold as a favour to any particular person, there, the person so selling is subject to the bankrupt laws. (*Patman* v. *Vaughan*, 1 T. R. 573. *Wright* v. *Bird*, 1 Price, 22).

ing under particular restraints, or for particular purposes; as, if [*477] *a commissioner of the navy uses to buy victuals for the fleet, and dispose of the surplus and refuse, he is not thereby made a trader within the statutes (*w*). An infant (8), 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 pay (*x*). But a feme-covert in London, being a sole trader according to the custom, is liable to a commission of bankrupt (*y*) (9), (10).

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 (11). A bankrupt is "a 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

(*w*) 1 Salk. 110. Skinn. 292.
(*x*) Lord Raym. 443.
(*y*) *La Vie* v. *Philips*, M. 6 Geo. III. B. R.

(8) See *ante*, note (3) to this chapter.

(9) In New-York, *any* insolvent debtor residing or imprisoned in the state, may take the *benefit* of the insolvent laws. (2 R. S. 16, § 1, and 35, § 2.) The property of a debtor may be attached by his creditors, when he, being an inhabitant of the state, departs from it or keeps concealed in it, to defraud his creditors or to avoid civil process: or when, not being a resident, he is indebted on a contract made in this state, *or* to a creditor residing in this state. (2 R. S. 1, § 1.) So also if a debtor is imprisoned for a crime in a county jail for more than a year, or in the state prison: (id. p. 14, § 1:) or remains imprisoned more than 60 days on execution in a civil action: his creditors may apply for a general assignment of his property. (Id. p. 24, § 1.) These are, the only *acts* of insolvency: and these acts of concealment, &c. do not of themselves affect any transfer of the insolvent's property. As to the meaning of resident in this act, see 1 Wendell, 43.

(10) See the reference given in note 7.

(11) The 3rd, 4th, and 5th sections of the statute of 6 Geo. IV. c. 16, enact, that, if any trader shall depart this realm, or, being out of this realm, shall remain abroad, or depart from his dwelling-house, or otherwise absent himself, or begin to keep his house, or suffer himself to be arrested for any debt not due, or yield himself to prison, or suffer himself to be outlawed, or procure himself to be arrested, or his goods, money, or chattels, to be attached, sequestered, or taken in execution, or make or cause to be made, either within this realm or elsewhere, any fraudulent grant or conveyance of any of his lands, tenements, goods, or chattels, or make or cause to be made any fraudulent gift, delivery, or transfer, of any of his goods or chattels; every such trader, doing, suffering, procuring, executing, permitting, making, or causing to be made, any of the acts, deeds, or matters aforesaid, with intent to defeat or delay his creditors, shall be deemed to have thereby committed an act of bankruptcy. But a conveyance of all a trader's property, in trust for the benefit of his creditors, shall not be deemed an act of bankruptcy, unless a commission issue within six calendar months from the execution of such conveyance, provided such trust deed is executed by each of the trustees within fifteen days after the execution thereof by the trader, and the execution of each party is attested by an attorney or solicitor, and due notice is published in the Gazette and newspapers. And it is also enacted, that, if any trader, having been arrested or committed to prison for debt, or on attachment for non-payment of money, shall, upon such or any other arrest, or commitment for debt or non-payment of money, or upon any detention for debt, lie in prison for twenty-one days after any detainer for debt lodged against him, and not discharged, every such trader shall be deemed to have thereby committed an act of bankruptcy; or, if any trader, having been arrested, committed, or detained for debt, shall escape out of prison or custody, every such trader shall be deemed to have thereby committed an act of bankruptcy from the time of such arrest, commitment, or detention. And by the 8th section of the same statute, it is enacted, that any trader who shall, after a docket struck against him, compound with the petitioning creditor, so as to pay or give him security for more in the pound in respect of his debt than the other creditors, shall be held to have thereby committed an act of bankruptcy; and if any commission has issued upon the docket so struck, the Lord Chancellor may either supersede the same, or order it to be proceeded in, as he shall see fit: and the creditor so compounding shall forfeit his whole debt, and refund or deliver up the payment or security so by him received.

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 may [*478] 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 (*z*) (12). 2. Departing from his own house, with intent to secrete himself, and avoid his creditors (*a*) (13). 3. Keeping in his own house, privately, so as not to be seen or spoken with by his creditors, except for just and necesssary cause; which is likewise construed to be an intention to defraud his creditors, by avoiding the process of the law (*b*) (14). 4. Procuring or suffering himself willingly to be

(*z*) Stat. 13 Eliz. c. 7.
(*a*) *Ibid.* 1 Jac. I. c. 15.
(*b*) Stat. 13 Eliz. c. 7.

(12) A commission of bankruptcy cannot be sustained merely by shewing that the debtor is residing abroad, more especially if the debt was not due when he went abroad; for, in such case, what date could be given to the act of bankruptcy? If a man goes out of the kingdom with a fair intention, and for a proper purpose, that, it has been long determined, will not be an act of bankruptcy, though creditors are delayed. Then, suppose a man who was not in debt when he went abroad, continues to reside there after debts are contracted here by his agent or partner,—how can his leaving this kingdom be connected as an act of bankruptcy with the posterior debt? (*Ex parte Mutrie*, 5 Ves. 578). And though a tradesman is actually indebted at the time of his departure from the realm, and some of his creditors may suffer delay in consequence of that departure, it will not be an act of bankruptcy, without proof or necessary inference that the departure was with an intent, at the very time, to delay creditors. (*Ex parte Osborne*, 2 Ves. & Bea. 179). See, however, 1 Wendell, 43.

(13) The departure of a trader from his dwelling-house, with *intent* to delay his creditors, (*Fowler* v. *Padget*, 7 T. R. 514), is an act of bankruptcy, though no creditor be in fact delayed thereby. (*Robertson* v. *Liddell*, 9 East, 491. *Williams* v. *Nunn*, 1 Taunt. 270. *Bayly* v. *Schofield*, 1 Mau. & Sel. 352. *Harney* v. *Ramsbottom*, 1 Barn. & Cress. 60). But many circumstances may afford a satisfactory explanation of a trader's conduct in departing from his dwelling-house; (*Wydown's case*, 14 Ves. 90); and whether such departure was accompanied with an intent to delay a creditor, is a question of fact, which is proper, in most cases, to be left to a jury to determine, upon all the circumstances. (*Aldridge* v. *Ireland*, cited in 1 Taunt. 273). But, if a trader quitted his dwelling-house with the intention of delaying a creditor, the act of bankruptcy will not be less complete because it was committed under the impression of a groundless apprehension. For instance, if a debtor, knowing that a writ is out against him, and seeing a bailiff coming to his house, absconds, the act of bankruptcy is complete, although the officer in fact had not the writ with him. (*Ex parte Bamford*, 15 Ves. 459).

A trader may be guilty of an act of bankruptcy, not only by departing from the realm, or absconding from his dwelling-house, but by "otherwise absenting himself," if he does so with *intent* to delay his creditors; (*Harvey* v. *Ramsbottom*, 1 Barn. & Cress. 60. *Judine* v. *Da Cossen*, 1 New Rep. 235. *Gimmingham* v. *Laing*, 2 Marsh. 241): and, in such case also, the act of bankruptcy depends on the *intent* to delay; it is immaterial whether that intent was productive of actual delay or not. (*Chenoweth* v. *Hay*, 1 Mau. & Sel. 679). But, a debtor's mere breach of an appointment to meet his creditor at a specified place, (not being the debtor's abode or usual place of business), without any evidence that the debtor absented himself from the place appointed, with a view to delay his creditors, does not present even a *primâ facie* case of an act of bankruptcy. (*Tucker* v. *Jones*, 2 Bing. 3). The case might be very different if the place of appointment were that in which the debtor was in the habit of giving daily attendance, for the purpose of carrying on his trade. (*Gimmingham* v. *Laing*, 2 Marsh. 241).

(14) An act of bankruptcy may be commit-

arrested, or outlawed, or imprisoned, without just and lawful cause; which is likewise deemed an attempt to defraud his creditors (*c*) (15). 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 (*d*). 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 (*e*) (16). 7. Procuring any protection, not being himself

(*c*) *Ibid.* 1 Jac. I. c. 15.
(*d*) Stat. 1 Jac. I. c. 15.
(*e*) *Ibid.*

ted by denial to a person who knows that the debtor is in the house, and actually hears him give directions to be denied, and even sees him through the window of a partition: the proof of beginning to keep house depending, not upon the possibility of gaining access to the debtor, but upon his intention in denying himself. (*Ex parte Bamford*, 15 Ves. 460). If a trader gives a general order to be denied to all comers, this is sufficient evidence of a beginning to keep house with intention to delay creditors; and may constitute an act of bankruptcy, though no creditor is actually delayed by such order: (*Lloyd* v. *Heathcote*, 2 Brod. & Bing. 391. *Harvey* v. *Ramsbottom*, 1 Barn. & Cress. 61. *Ex parte White*, 3 Ves. & Bea. 129): for, it is not the denial of access when a creditor calls which constitutes an act of bankruptcy; *that* is only evidence, if unexplained, of an act of bankruptcy, committed either by keeping house, or absconding therefrom, with *intent* to delay creditors. (*Bayly* v. *Schofield*, 1 Mau. & Scl. 352. *Robertson* v. *Liddell*, 9 East, 494. *Lloyd* v. *Heathcote*, 2 Brod. & Bing. 392).

A denial given to a creditor by the debtor's servant, which denial the master subsequently approves, will not amount to an act of bankruptcy, if it cannot be connected with a previous direction by the master that such denial should be given; or if, in the interval between such denial and the approbation thereof, the debtor has seen and conversed with the creditor. (*Ex parte Foster*, 17 Ves. 416). But, if a trader gives a general order to be denied, and is denied to a creditor, it is a "beginning to keep house," within the meaning of the statute, though the debtor immediately overtakes the creditor and says he was not afraid of *him*. (*Mucklow* v. *May*, 1 Taunt. 483).†

(15) With respect to this, and the subsequent acts of bankruptcy detailed by our author in the text, it is necessary to refer to the statute of 6 Geo. IV. c. 16, which is differently worded, and in some respects very materially so, from the statutes upon which Blackstone was commenting. See the sections of the modern statute which relate to this matter, cited *ante*, in note (11) to this chapter.

(16) The statute of 6 Geo. IV. c. 16, (as stated *ante*, in note (11) to this chapter, which see), enacts, that a conveyance of the whole even of a trader's property, in trust for the benefit of his creditors, though it necessarily takes such effects out of the ordinary course of distribution by process of law, shall not be *ipso facto*, as it formerly was, an act of bankruptcy.

Under the words of the recent statute, in order to prove any grant or conveyance made by a trader, to be an act of bankruptcy, it seems necessary to shew that the transfer was made with intent to delay his creditors. To ascertain the intent, parol evidence is let in; and the fraudulent intention is to be collected, not merely from the form of the instrument, but from all the circumstances which can shew what was its proposed or necessary operation. (*Ex parte Cawkwell*, 19 Ves. 234. *Dutton* v. *Morrison*, 17 Ves. 169. *Ex parte Bourne*, 16 Ves. 148. *Gibbins* v. *Phillips*, 7 Barn. & Cress. 534). Where the subject of such a grant is left in the possession and disposal of the bankrupt, the transaction is clearly fraudulent; and the property will, of course, go to the general creditors of the grantor. (*M'Neill* v. *Cahill*, 2 Bligh, 260. *Ex parte Smith*, 1 Ves. & Bea. 522).

If a man, though not in trade at the time of his marriage, appears to look forward to the purpose of becoming a trader, and the possible consequences of that purpose, and limits an estate or interest to his wife upon the contingency of his becoming a bankrupt: such a limitation being plainly and obviously adopted solely with an intent of evading the bankrupt laws, the estate or interest will go to the settlor's creditors, should he eventually become a bankrupt. (*Higinbotham* v. *Holme*, 19 Ves. 92). Post-nuptial settlements, made by a man who afterwards becomes a bankrupt, cannot be supported as against his assignees; (*Beaumont* v. *Thorp*, 1 Ves. sen. 27); unless the settlement was made in pursuance of ante-

† Mr. Christian, in his note upon this passage of the text, extracts the following observations from Cooke's B. L. "A denial that the trader is at home, (when in fact he is), by his order or approbation, to a creditor or his servant, who comes to demand payment of a debt, is *primâ facie*, and is generally admitted, evidence of this act of bankruptcy; yet, if the denial were made, not to delay payment, but for some other cause, as sickness, company, business, or the unseasonableness of the hour, it does not amount to an act of bankruptcy."

A denial on a *Sunday* is not an act of bankruptcy, although the debtor may have appointed that day for settling accounts with his creditor. (*Ex parte Preston*, 2 Ves. & Bea. 212).

privileged by parliament, in order to screen his person from arrests; which also is an endeavour to elude the justice of the law (*f*) (17). 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 acknowledgment of either his poverty or his knavery (*g*). 9. Lying in prison for two months (18), or more, upon arrest or other detention for debt, without finding bail in order to obtain his liberty (*h*). 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. [*479] 10. Escaping from prison after an arrest (19) for a just debt of 100*l.* or upwards (*i*). 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 (*k*) (20).

(*f*) Stat. 21 Jac. I. c. 19.
(*g*) *Ibid.*
(*h*) *Ibid.*
(*i*) *Ibid.*
(*k*) Stat. 4 Geo. III. c. 33.

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nuptial articles, clearly proved; (*Kelly* v. *Power*, 2 Ball & Beat. 251. *Sir Ralph Bovye's case*, 1 Ventr. 194. *Battersbee* v. *Farrington*, 1 Swanst. 113); or unless it was made under the direction of a court of equity: (*Wheeler* v. *Caryl*, Ambl. 121. *Ball* v. *Coutts*, 1 Ves. & Bea. 299): or in consideration of an additional portion then received by the husband from his wife's friends. (*Brown* v. *Jones*, 1 Atk. 190. *Ward* v. *Shallett*, 2 Ves. sen. 16. *Ex parte Hall*, 1 Ves. & Bea. 114. *Doe* v. *Routledge*, Cowp. 711).

With respect to payments made, or securities for just debts given, by an insolvent on the eve of his bankruptcy, the material question will be, whether the payment was made, or the security given, by the debtor voluntarily, with an intent to give a preference to a particular creditor (which would be fraudulent and void), or whether it was made in consequence of the pressing importunity of the creditor; for, in the latter case, actual payments, at all events, could not be recalled. (*Fidgeon* v. *Sharpe*, 5 Taunt. 545. *Poland* v. *Glyn*, 2 Dowl. & Ryl. 312. Stat. 6 Geo. IV. c. 16, s. 82). The object of the debtor, under such circumstances, is, not to give a preference, but to deliver himself: and it should seem, this consideration would be sufficient to bring the transaction, whether it was one of actual payment or a delivery of securities, within the benefit of the exception contained in the 72nd section of the consolidated bankrupt act, already cited. (And see *Ex parte Scudamore*, 3 Ves. 88). But, where a debtor, though under the pressure of a hostile creditor, conveyed his real estates to trustees to sell to pay that creditor, and with *a further trust* to pay debts to certain relations, *to give* them *a preference*, this was decided to be clearly an act of bankruptcy. (*Morgan* v. *Horseman*, 3 Taunt. 241. *Pulling* v. *Tucker*, 4 Barn. & Ald. 384).

(17) By the statute of 7 Ann. c. 12, s. 5, declaring the privilege of ambassadors and their train, it is enacted, that no merchant or other trader whatsoever, within the description of any of the statutes against bankrupts, shall have any benefit by that act.

(18) See the present legislative enactments on this head stated, *ante*, in note (11) to this chapter.

(19) See the reference given in the last note.

(20) By the 9th section of the statute of 6 Geo. IV. c. 16, it is enacted, that, if any trader having privilege of parliament shall commit any of the acts of bankruptcy previously mentioned in the said act, (for an enumeration of which see *ante*, note (11) to this chapter), a commission of bankruptcy may issue against him, and he may be proceeded against in like manner as other bankrupts, except that he cannot be arrested or imprisoned during the time of such privilege, unless in cases declared by the said act to amount to felony. The 10th section of the statute enacts, that, if any creditor of such trader having privilege of parliament, shall file an affidavit, in any court of record at Westminster, of a debt of sufficient amount to support a commission, justly due to him from such trader, and shall sue out a summons and serve the same upon such trader, if such trader shall not, within one calendar month after personal service of such summons, pay, secure, or compound such debt to the satisfaction of such creditor; or enter into a bond, with two sufficient sureties, to pay such sum as shall be recovered in an action against him for the said debt, together with such costs as shall be given in the same, and also cause an appearance to be entered in such action, every

These are the several acts of bankruptcy, expressly defined by the statutes relating to this title (21): which being so numerous, and the whole law of bankrupts being an innovation on the common law, our courts of justice have been tender of extending or multiplying acts of bankruptcy by any construction or implication. And, therefore, Sir John Holt held (*l*), that a man's removing his goods privately to prevent their being seized in execution, was no act of bankruptcy. For, the statutes mention only fraudulent gifts to third persons, and procuring them to be seized 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 no act of bankruptcy (*m*): but, if he goes to prison, and lies there two months (22), then, and not before, he is 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 [*480] affect the bankrupt himself. And these depend entirely *on the

(*l*) Lord Raym. 725. (*m*) 7 Mod. 139.

such trader shall be deemed to have committed an act of bankruptcy from the time of the service of such summons, and any creditor or creditors, whose debts are of sufficient amount, may sue out a commission against him, and proceed thereon in like manner as against other bankrupts. And, by the 11th section of the statute it is enacted, that, when any decree or order shall have been pronounced in any court of equity, or any order shall have been made in any matter of bankruptcy, or of lunacy, against any person within the description of the statutes relating to bankrupts, but having privilege of parliament, thereby ordering such person to pay any sum of money, and such trader shall disobey, the same having been duly served upon him, the person entitled to receive the money, or interested in enforcing the payment thereof, may apply to the court to fix a peremptory day for payment, which shall accordingly be fixed by order for that purpose; and, if such trader, being personally served with such last-mentioned order eight days before the day therein appointed for payment of the money, shall neglect to pay the same, he shall be deemed to have committed an act of bankruptcy from the time of the service thereof; and a commission may be sued out against him.

For the preservation of the dignity and independence of parliament, it is enacted, by the statute 52 Geo. III. c. 144, that, whenever a member of the House of Commons shall be declared a bankrupt, his right of sitting and voting in the said House shall be suspended for twelve months, unless within that period the said commission shall be superseded; or unless the creditors shall be paid or satisfied their full debts; provided that any disputed debts which such bankrupt shall have given bond, with two sureties, to pay, if the said debts are, by any proceeding in law or equity recovered against him, shall, for the purposes of the act, be considered as paid or satisfied. And by the second section of the same act, it is declared that the seat of such member shall be absolutely vacated, if the commission against him shall not be superseded within twelve months from the issuing thereof.

(21) Another act of bankruptcy is established by the 6th section of the statute of 6 Geo. IV. c. 16, which enacts, that, if any trader shall file in the office of the Lord Chancellor's secretary of bankrupts a declaration, signed by such trader, and attested by an attorney or solicitor, that he is insolvent, or unable to meet his engagements, such declaration shall, after insertion of an advertisement thereof in the London Gazette, be an act of bankruptcy committed at the time when such declaration was filed; but no commission shall issue thereon, unless it be sued out within two months next after the insertion of such advertisement, and unless such advertisement shall have been made within eight days after such declaration was filed: and no docket shall be struck upon such act of bankruptcy before the expiration of four days next after the insertion of such advertisement, in case such commission is to be executed in London, or before the expiration of eight days, in case the commission is to be executed in the country.

The 7th section of the statute enacts, that a commission founded on such declaration shall not be invalid, because the declaration was concerted between the bankrupt and any creditor or other person.

(22) The time is now shortened to twenty-one days; see *ante*, note (11) to this chapter.

several statutes of bankruptcy; all which I 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.* (23); which debts must be proved by *affidavit* (*n*) (24)†: upon which he grants a *commission* to such discreet persons as to him shall seem good, who are then stiled commissioners of bankrupt (*o*). 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 (25). And if, on the other hand, they receive any money

(n) Stat. 5 Geo. II. c. 30.

(o) 3 Stat. 13 Eliz. c. 7.

(23) See *ante*, note (5) to this chapter.

(24) See the 13th section of the statute of 6 Geo. IV. c. 16. To support a commission of bankruptcy, the petitioning creditor's debt must be a *legal* one. (*Ex parte Hillyard*, 2 Ves. sen. 407. *Ex parte Lee*, 1 P. Wms. 782. *Ex parte Sutton*, 11 Ves. 164). The 16th section of the statute above cited enacts, that any creditor or creditors whose debt or debts, is or are sufficient to support a commission against all the partners of any firm, may petition for a commission against one or more partners of such firm, not including the whole: and the 18th section of the statute enacts that, if after adjudication the debt of the petitioning creditor be found insufficient to support a commission, it shall be lawful for the Lord Chancellor, upon the application of any other creditor who has a debt sufficient to support a commission, to order the existing commission to be proceeded with. In the construction of this enactment, it has been held, that the debt of the petitioning creditor should be expunged by the commissioners, before any other creditor comes to have his own debt substituted in order to support the commission. (*Ex parte Chapple*, 2 Glyn & Jameson, 132); but this doctrine was qualified in *Ex parte Robinson*, (1 Mont. & M'Arth. 50). A previous application must be made to the commissioners, but it is not necessary that the debt should have been expunged; indeed, this may in some cases be impossible, for it may perhaps never have been proved at all. The deposition of the petitioning creditor at the opening of the commission is not a proof; it is merely taken *ex parte*, and the proof must be made at a public meeting. (*Ex parte Rawson*, 2 Glyn & Jameson, 354).

A creditor who has brought an action, or instituted a suit, against his debtor for his debt, cannot petition for a commission of bankruptcy, founded on the same debt, without relinquishing such action or suit: and, if the creditor has proceeded to take the debtor in execution, he cannot afterwards, though the debtor is discharged, sue out a commission against him for the same debt, which has been legally satisfied by taking his body in execution: (*Cohen* v. *Cunningham*, 8 T. R. 125): a creditor who has his debtor in prison or custody, cannot even come in and prove, in respect of the same debt, under a commission sued out by another creditor, without giving a sufficient authority for the discharge of the bankrupt; (*Ex parte Knowell*, 13 Ves. 193); for, it is enacted by the 59th section of the consolidated bankrupt act, that proving or claiming a debt under a commission by any creditor shall be deemed an election by such creditor to take the benefit of such commission with respect to the debt so proved or claimed: (*Ex parte Edwards*, 1 Mont. & M'Arth. 126. *Ex parte Chambers*, Ibid. 132): provided, that any creditor, who shall have so elected, if the commission shall be afterwards superseded, may proceed in the action as if he had not so elected, and, in bailable actions, shall be at liberty to arrest the defendant *de novo*, if the defendant has not perfected bail, or, if the defendant has perfected bail, to have recourse against such bail.

(25) See the 13th section of the statute of 6 Geo. IV. c. 16. This statutory provision

† Mr. Christian observes, that, "the petitioning creditor's debt must be contracted before the bankrupt left off trade. If a note or bill is drawn before the act of bankruptcy, but indorsed without fraud afterwards, the indorsee has the same right to petition for, and to prove it under the commission, as the original payee.

"If the petitioning creditor has a debt due to him less than 100*l.* at the time of the act of bankruptcy, and has a note indorsed to him afterwards, but before the suing out the commission of bankrupt, making up more than 100*l.*, this will be sufficient. (7 T. R. 498).

"A debt by simple contract, of more than six years' standing, is sufficient to support a commission of bankruptcy. (5 Burr. 2630)."

This must not be received without great qualification. A bankrupt may apply to have a commission superseded which has issued against him, upon a debt of more than six years' standing: though if *he* does not take advantage of the statute of limitations, *his debtors* will not be permitted to dispute, on this ground, the validity of the commission, in order to elude the payment of their debts to the assignees. (*Ex parte Dewdney*, 15 Ves. 492, 498. *Jellis* v. *Mountford*, 4 Barn. & Ald. 265. *Ex parte Roffey*, 19 Ves. 471. *Mayor* v. *Payne*, 3 Bing. 287). "An infant cannot be a petitioning creditor, because his bond to the great seal would be voidable. (3 Ves. jun. 554)."

or effects from the bankrupt, as a recompense for suing out the commission, so as to receive more than their rateable dividends of the bankrupt's estate, they forfeit not only what they shall have so received, but their whole debt (26). 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 awarded 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 sitting (27). And no commission of bankrupt shall abate, or be void, upon any demise of the crown (*p*) (28), (29).

(*p*) Stat. 5 Geo. II. c. 30.

does not take away the common law remedy, which a party aggrieved by a commission maliciously sued out against him previously had by way of action for damages, not limited; which may, in many cases, be more advantageous than the remedy upon the bond, confined to the sum of 200*l.* (*Wydown's case*, 14 Ves. 90. *Ex parte Stokes*, 7 Ves. 407. *Holmes* v. *Wainewright*, 1 Swanst. 23). On the other hand, as the statute of 5 Geo. II. upon which the last enactment is founded, was held to be not imperative on the court, but merely permissive; (*Ex parte Gayter*, 1 Atk. 144); in a case where the whole penalty of the bond would be disproportioned to the injury sustained, the court will not assign the bond; though it may be disposed to direct the bond to stand as a security for damages, to be ascertained by a *quantum damnificatus*; (*Ex parte Rimene*, 14 Ves. 601. *Ex parte Lane*, 11 Ves. 416); unless the petitioning creditor who took out such commission has himself become bankrupt; in which case, damages so ascertained would become a liquidated debt after his bankruptcy, and, as such, not recoverable under the commission against him: under these circumstances, therefore, the bond would be ordered to stand as a security for such a specific sum as the court should think reasonable. (*Ex parte Rimene, ubi supra*).

A general order in bankruptcy, dated 26th June, 1793, was issued by Lord Chancellor Loughborough, purporting, that if a commission is to be executed in London, it shall be supersedeable for want of prosecution at the expiration of fourteen days after the date thereof; and, if it is to be executed in the country, it shall be supersedeable for the like cause at the expiration of 28 days; and the first application for a *supersedeas*, and for a new commission, made by any other attorney or solicitor than the one at whose instance the supersedeable commission was issued, shall be preferred to an application for the same purposes, by such attorney or solicitor.

This general order has been since declared to be a most wholesome one, in ordinary cases; (*Ex parte Mavor*, 19 Ves. 540. *Ex parte Lake*, 1 Glyn & Jameson, 363); still, it has been decided, that its application is discretionary; and that, if it were inflexible, a regulation intended to prevent fraud might frequently be made an instrument to forward it. (*Ex parte Freeman*, 1 Rose, 384. *Ex parte Sanden*, 1 Rose 86. *Ex parte Leicester*, 6 Ves. 433). If, therefore, the suer out of a commission has always had a *bona fide* intention to prosecute the commission, though some delay may have arisen, yet, when that delay is satisfactorily accounted for, the commission will not be superseded. (*Ex parte Soppit*, Buck, 82. *Ex parte Knight*, 2 Rose, 322). When a commission has been opened, and an adjudication thereunder obtained, it has been held that Lord Loughborough's order is satisfied, notwithstanding publication has not been made in the Gazette, within the number of days limited for *proceeding* under the commission by that order. (*Ex parte Ellis*, 7 Ves. 136). The case just cited, however, has been declared to stand alone, and to have been determined upon its own very particular circumstances. (*Ex parte Henderson*, Coop. 228).

(26) See *ante*, note (11) to this chapter, where the 8th section of the consolidated bankrupt act is cited.

(27) The 22nd section of the statute 6 Geo. IV. c. 16, enacts, that the commissioners shall receive the fee of twenty shillings for every meeting, and the like sum for every deed of conveyance executed by them, and for the signature of the bankrupt's certificate; and where any commission shall be executed in the country, every commissioner, being a barrister at law, shall receive a further fee of twenty shillings for each meeting; and in case the usual residence of such commissioner is distant seven miles or upwards from the place where such meetings are holden, he shall receive a further sum of twenty shillings for each of such meetings which he attends.

(28) The 26th section of the statute of 6 Geo. IV. c. 16, enacts, that no commission shall abate by demise of the crown, and that any commission may be renewed, (if by reason of the death of commissioners, or for any other cause, it become necessary), on payment of half the fees usually paid upon obtaining commissions; and if any bankrupt die after adjudication, the commissioners may proceed as they might have done if he were living.

(29) As to the officers before whom the application under the insolvent laws is to be made in New-York, see 2 R. S. 34, § 1, 2.

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 one 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 chosen by the major *part, in value, of the [*481] creditors who shall then have proved their debts: but may be originally appointed by the commissioners, and afterwards approved or rejected by the creditors: 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*. And at the third meeting, at farthest, which must be on the forty-second day after the advertisement in the Gazette (unless the time be enlarged by the Lord Chancellor), the bankrupt, upon notice also personally served upon him, or left at his usual place of abode, must surrender himself personally to the commissioners; which surrender (if voluntary) protects him from all arrests till his final examination is past: and he must thenceforth in all respects conform to the directions of the statutes of bankruptcy; or, in default of either surrender or conformity, shall be guilty of felony without benefit of clergy, and shall suffer death, and his goods and estate shall be distributed among his creditors (*q*) (30).

(*q*) Stat. 5 Geo. II. c. 30.

The other provisions differ so much from those under the English bankrupt law, that a reference to the statutes themselves will be necessary for the student.

(30) The rigour of the law as to this matter has been relaxed. By the 112th section of the statute of 6 Geo. IV. c. 16, it is enacted, that a bankrupt not surrendering and submitting to be examined, or not making a discovery of his estate and effects, or not delivering up his effects, and all books and writings relating thereto, or removing, concealing, or embezzling any part of his effects to the value of 10*l*. with intent to defraud his creditors, shall be deemed guilty of felony, and be liable to be *transported* for life, or for any term not less than seven years, or to be *imprisoned* and kept to hard labour for any term not exceeding seven years.

The 113th section of the statute authorizes the Lord Chancellor to enlarge the time for the bankrupt's surrender, so as every order to that effect be made at least six days before the day on which the bankrupt was to surrender himself.

The 115th section of the statute enacts, that, if any bankrupt apprehended by any warrant of the commissioners shall, within the time allowed by the act for him to surrender, submit to be examined, and in all things conform, he shall have the same benefit as if he had voluntarily surrendered.

The 117th section of the statute enacts, that a bankrupt shall be free from arrest or imprisonment by any creditor in coming to surrender, and, after such surrender, during the 42 days regularly allowed for his examination, and such further time as shall be allowed him for finishing his examination, provided he was not in custody at the time of such surrender; and the 118th section authorizes the commissioners to adjourn the last examination *sine die*, and that the bankrupt shall be free from arrest or imprisonment for such time, not exceeding three calendar months, as the commissioners shall appoint.

It is to be observed, that the bankrupt laws do not, in this respect, bind the crown; (see, *post*, p. 486); and a bankrupt is protected from arrest grounded on an *extent*, only whilst he is in actual attendance on the commissioners, and in the execution of his duty of going through his examination. (*Ex parte Temple*, 2 Ves. & Bea. 394). Still, though the bankrupt statutes do not bind the crown, the general principle of law, according to which witnesses called before a court of justice (and, for this purpose, commissioners of bankrupt are so considered) cannot be arrested during such attendance, extends to the crown as well as to a subject. (*Ex parte Russell*, 19 Ves. 165, and see *infra*).

† Mr. Christian observes, that, "the first inquiry is the amount and nature of the petitioning creditor's debt. The petitioning creditor must attend in person before the commissioners, and must specify the time when the debt was contracted, and the particulars of it. The time ought to be specified in the deposition of the witness who proves the act of bankruptcy; for, upon the death of the witness after the proceedings are recorded, the deposition will be evidence in any court of justice. Doug. 244."

See the 92nd and 96th sections of the statute of 6 Geo. IV. c. 16.

In case the bankrupt absconds, or is likely to run away, between the time of the commission issued, and the last day of surrender, he may by warrant from any judge or justice of the peace be apprehended and committed to the county gaol, in order to be forthcoming to the commissioners; who are also empowered immediately to grant a warrant for seizing his goods and papers (*r*).

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 (*s*), 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, to any lawful question, or shall refuse to subscribe such their examination, the commissioners may commit them to prison without bail, till they submit themselves and make and sign a full answer; the commissioners specifying in their warrant of commitment the question so refused to be answered. And any gaoler permitting such person to escape or go out of prison, shall forfeit 500*l.* to the creditors (*t*) (31).

(*r*) Stat. 5 Geo. II. c. 30.
(*s*) Stat. 21 Jac. I. c. 19.
(*t*) Stat. 5 Geo. II. c. 30.

The effect of those words of the statute which exempt a bankrupt from arrest upon any "escape warrant," during the time allowed him for finishing his examination, was deliberately considered by Lord Eldon, C., with the assistance of Le Blanc, J., in the case *Ex parte Johnson* (14 Ves. 41), and the words in question were held to be applicable to creditors only, not to a gaoler who, without any process, retakes a prisoner who has escaped: independently of any escape warrant, the law considers the prisoner as still in the custody of the gaoler, who may take him wherever he finds him: (*Anderson* v. *Hampton*, 1 Barn. & Ald. 311): such a case, it was observed, cannot be distinguished from the case of bail, who, it has been long held, are guilty of no contempt of court, although, in discharge of themselves, they surrender a bankrupt during the period allowed for his examination, provided such examination is not actually going on at the very time. (*Ex parte Gibbons*, 1 Atk. 239).

A creditor attending to prove his debt before the commissioners, or a solicitor attending a bankrupt petition, is entitled to the same privilege of exemption from arrest, not only whilst in actual attendance before the court, but *eundo et redeundo, bona fide*, therefrom. (*List's case*, 2 Ves. & Bea. 374. *Ex parte Bryant*, 1 Mad. 49. *Gascoygne's case*, 14 Ves. 183. *Castle's case*, 16 Ves. 412). And, as before intimated, any person attending under a summons of the commissioners will be equally protected (*Ex parte King*, 7 Ves. 312), both from arrest and subsequent detainers lodged against him. (*Sidgier* v. *Birch*, 9 Ves. 69).

(31) The 33d section of the statute of 6 Geo. IV. c. 16, authorizes the commissioners to summon, and enforce the attendance of, any person suspected of having in his possession any part of any bankrupt's estate, or who is supposed to be indebted to the bankrupt, or to be capable of giving information concerning the person, trade, dealings, or estate of such bankrupt, or concerning any act of bankruptcy committed by him; and the commissioners are empowered to require the person so summoned to produce any writings or documents in his power, which the commissioners may think necessary to the verification of the deposition of such person, or to the full disclosure of any of the matters which the commissioners are authorized to inquire into. And the 34th section enacts, that the commissioners may examine any person so summoned, or any person present at any of their meetings, upon oath, concerning the person, trade, dealings, or estate of the bankrupt, or concerning any act of bankruptcy by him committed; and may reduce into writing the answers of every such person, which writing he must sign; and if any such person refuses to be sworn, or to answer any lawful questions touching any of the matters aforesaid, or shall not fully answer to the satisfaction of the commissioners, or shall refuse to sign his examination, or shall not produce any documents in his custody, relating to any of the matters aforesaid, which documents he has been desired to produce, and to the production of which he has not stated some objection allowed by the commissioners, such person may be by them committed to prison. The 35th section enacts, that every person summoned to attend before the commissioners shall have his costs and expenses. The 36th section authorizes the commissioners to summon any bankrupt before them, and to enforce his attendance, whether such bankrupt shall have obtained his certificate or not, and to examine him touching all matters relating either to his trade, dealings, or estate, or which may tend to disclose any secret grant, conveyance, or concealment of his lands, tenements, goods, money, or debts, and to reduce his answers into writing, which examination the bankrupt must

The bankrupt, upon this examination, is bound upon pain of death (32), 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; and his goods and estates shall be divided among his creditors (*u*). And unless it shall appear that his inability to pay his debts arose from some casual loss, he may, upon conviction by indictment of such gross misconduct and negligence, be set upon the pillory for two hours, and have one of his ears nailed to the same and cut off (*v*).

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 wilfully 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 (*w*) (33).

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 rigour and severity. For, if the bankrupt hath made an ingenuous discovery (of the truth and sufficiency of which there remains no reason to doubt), and hath conformed in all points to the directions of the law; and if, in consequence thereof, the creditors, or four parts in five of them in number and value (34), (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 of the judges whom he shall appoint, on oath *made [*483] by the bankrupt that such certificate was obtained without fraud,

(*u*) Stat. 5 Geo. II. c. 30. 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).

(*v*) Stat. 21 Jac. I. c. 19.

(*w*) Stat. 5 Geo. II. c. 30.

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sign; and if such bankrupt refuses to be sworn, or to answer any questions put to him touching any of the matters aforesaid, or shall not fully answer to the satisfaction of the commissioners any such questions, or shall refuse to sign his examination, (not having any lawful objection, allowed by the commissioners), he may be committed to prison until he yields compliance. The 37th section enables the commissioners to summon and enforce the attendance of any bankrupt's wife, and to examine her for the finding out and discovery of the estate, goods and chattels of such bankrupt, concealed, kept or disposed of by such wife in her own person, or by her own act, or by any other person, and to deal with her as with any other witness. And the 38th section subjects to a forfeiture of 500*l.* any gaoler who suffers any bankrupt or other person committed to his custody by the commissioners to escape.

(32) These offences are no longer capital; see, *ante*, note (30) to this chapter, citing the 113th section of the consolidated bankrupt act. The amount of embezzlement which now subjects a bankrupt to the mitigated punishment of transportation, is fixed at 10*l.* If bankrupts ever were put into the pillory for mismanagement of their affairs, they are no longer subject to such punishment; the statute of 56 Geo. III. c. 138, abolishes that mode of punishment in all cases except those specified in the said act, that is, in cases of perjury, or subornation of perjury.

(33) The 120th section of the statute of 6 Geo. IV. c. 16, embodies the substance of this paragraph of the text.

(34) Or, after six calendar months from the last examination of the bankrupt, then either by *three fifths in number and value* of such creditors, or by *nine tenths in number*. (122d section of the statute of 6 Geo. IV. c. 16).

may allow the same; or disallow it, upon cause shewn by any of the creditors of the bankrupt (*x*) (35).

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 to his former good behaviour, in the early discovery of the decline of his affairs, and thereby giving his creditors a larger dividend. For, if his effects will not pay one half of his debts, or ten shillings in the

(*x*) Stat. 5 Geo. II. c. 30.

(35) The 124th section of the statute of 6 Geo. 4, c. 16, enacts, that the commissioners shall not sign any certificate unless they have proof of the signature of the creditors thereto, or of persons duly authorized by such creditors; and the proofs of such signature must be laid before the Lord Chancellor, with the certificate, previous to the allowance thereof.

The certificate of the commissioners, that the bankrupt has in all respects conformed himself to the directions of the statute, must be before the court, sitting in bankruptcy, previously to any discussion of the propriety of the Lord Chancellor's allowance of the certificate. But, it is not a necessary consequence, that because the commissioners have been satisfied, the holder of the great seal must be so likewise: if circumstances justify a suspicion that the bankrupt has not made a full discovery, his certificate will be stayed; (*Ex parte Bangley*, 17 Ves. 118); and the commissioners may be directed to review their judgment. (*Ex parte King*, 15 Ves. 129). Still, as the commissioners have, to a certain extent, an independent judicial character, (*Ex parte Linthwaite*, 16 Ves. 236), delicacy will be felt as to controlling their discretion, whether as to granting or refusing their certificate of conformity; though they cannot properly refuse it, unless, under the sanction of their oath, they believe there is reason to suspect that the bankrupt has not made that discovery which, according to the statute, he ought to make. (*Ex parte King*, 11 Ves. 420. *Ex parte Oliver*, 2 Ves. & Bea. 251). A bankrupt's right to his certificate is not to be made dependent upon his conduct antecedently to his bankruptcy: if, whilst a bankrupt, he has acted as a bankrupt ought, neither the commissioners, nor even the Lord Chancellor, have any right to examine his previous conduct, and on the ground of its impropriety to withhold the certificate. (*Ex parte Gardner*, 1 Ves. & Bea. 47. *Ex parte Joseph*, 18 Ves. 342).

The 130th section of the statute enacts, that no bankrupt shall be entitled to his certificate, or to any allowance, but his certificate, if obtained, shall be void, if such bankrupt has lost, by any sort of gaming, in one day, 20*l*., or within one year next preceding his bankruptcy, 200*l*., or if he has within the last-mentioned time lost 200*l*. by stock-jobbing: or if he has, after an act of bankruptcy committed, or in contemplation of bankruptcy, destroyed, altered, mutilated, or falsified, any of his books, papers, writings, or securities, or caused any such acts to be done; or if he has made or been privy to the making of any false or fraudulent entries in any book of account or other document, with intent to defraud his creditors; or if he has concealed property to the value of 10*l*., or if he has not disclosed, within one month, his knowledge that a false debt has been proved under the commission.

But, if the affidavits, or other evidence, setting forth the violation of the law in any of these respects, be so contradictory as not to establish, distinctly, what the fact really is; to refuse the certificate would be to refuse the bankrupt a trial of the fact by a jury, of which he ought to have the benefit. (*Ex parte Kennet*, 1 Ves. & Bea. 194). When the certificate is granted, it may still be avoided, if just grounds for doing so exist; (*Hughes* v. *Morley*, 1 Barn. & Ald. 26); or the bankrupt may be open to an indictment for perjury, or for conspiracy.

The judicial construction put on the enactment imposing penalties upon concealment of property, refers it to concealment undetected at the time of signing the certificate: if, with full knowledge of the fact, the commissioners have thought fit, upon a proper atonement being made, to sign the certificate, it has been held, that it ought not to be stayed. (*Ex parte Bryant*, 1 Glyn & Jameson, 206).

If the signature of a single creditor is purchased, the certificate is avoided, though the bankrupt may have been totally ignorant of the transaction: (*Ex parte Butt*, 10 Ves. 360. *Ex parte Hall*, 17 Ves. 63): and any contract or security made or given to induce creditors to sign, is declared void by the 125th section of the statute; and whenever fraud in obtaining a certificate is clearly brought home to a bankrupt, such certificate, though after allowance, will be recalled; (*Ex parte Casethorne*, 19 Ves. 260); provided such revocation will affect the bankrupt only; but not if such revocation will operate injustice, or hardship, to innocent persons who have dealt with the party on the faith of his certificate. (*Ex parte Tallis*, 1 Ball & Beat. 322. *Ex parte Reed*, Buck, 430). In all cases where it is sought to have a certificate recalled, the grounds of the application must be fully established, or the petition will be dismissed with costs. (*Ex parte Hood*, 1 Glyn & Jameson, 221. *Ex parte Wright*, Ibid. 353. *Ex parte Boyle*, Buck, 248. *Ex parte Levi*, Buck, 77).

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 six-pence, then *seven and a half per cent.*; and if fifteen shillings in the pound, then the bankrupt shall be allowed *ten per cent.*; provided that such allowance do not, in the first case, exceed 200*l.*, in the second, 250*l.*, and in the third, 300*l.* (*y*) (36).

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 (*z*). Thus, *the bankrupt becomes a clear [*484] man again (37): 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, 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 loses all title to these advantages (*a*). 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 stock-jobbing (38). Also,

(*y*) Stat. 5 Geo. II. c. 30. By the Roman law of cession, if the debtor acquired any considerable property subsequent to the giving up of his all, it was liable to the demands of his creditors. (*Ff.* 42. 3, 4). But this did not extend to such allowance as was left to him on the score of compassion for the maintenance of himself and family. *Si quid misericordia causa si fuerit relictum, puta menstruum vel annuum, alimentorum nomine, non oportet propter hoc bona ejus iterato venundari: nec enim fraudandus est alimentis cottidianis.* (*Ibid. l.* 6).

(*z*) Stat. 5 Geo. II. c. 30.

(*a*) Stat. 24 Geo. II. c. 57.

(36) The 128th section of the statute so often referred to on this subject, embodies the substance of the text, with this variation only, that the allowance to a creditor who pays ten shillings in the pound, or upwards, may now be made to the amount of 400*l.*, and the allowance to a bankrupt who pays twelve shillings and sixpence in the pound, may amount to 500*l.*, and the allowance to a bankrupt who pays fifteen shillings in the pound, may amount to 600*l.*; and a discretionary allowance to a bankrupt who does not pay ten shillings in the pound, may be given to the amount of 300*l.*

(37) See *ante*, note (2) to this chapter. The 121st section of the statute of 6 Geo. IV. c. 16, enacts, that a bankrupt who has in all things conformed to the bankrupt laws, and obtained his certificate, shall be discharged from all debts due by him when he became bankrupt, and from *all claims* and demands *proveable under the commission*; and the 131st section enacts, that no promise, after the certificate allowed, to pay any debt discharged by such certificate, shall be binding, unless such promise be made in writing, signed by the bankrupt, or by some person lawfully authorized, in writing, by such bankrupt.

(38) In note (35) to this chapter, the 130th section of the consolidated bankrupt act is

† The discharge, to have this effect in New-York, must have been granted on an application made by the debtor and two thirds in value of all his creditors residing in the U. S.; (2 R. S. p. 16. § 1, 2: p. 22. § 30, 31, &c.); or else on the application of a creditor, when the debtor has been imprisoned more than 60 days; (id. p. 24, § 1. and p. 27, § 17.) In other cases his person only is exempted from imprisonment.

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 assizes; in which case their perjury or fraud is usually, as in case of bankrupts, punished with death. Persons who have been once cleared by any of these methods, and afterwards become bankrupts again, unless [*485] 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 (*b*) (39).

(*b*) Stat. 5 Geo. II. c. 30.

cited, which makes an alteration as to the amount of gambling losses which will deprive a bankrupt of the advantages of a certificate or allowance. It appears, also, from the 73rd section of the same act, that portions given by a trader to any of his children upon their marriage, though such portions exceeded 100*l.* and he was at the time insolvent, cannot be recalled upon his bankruptcy; and that part of the 12th section of stat. 5 Geo. II. c. 30, which deprived a bankrupt who had given such portion of the benefits of a certificate, is not retained in the recent act.

(39) The 127th section of the statute of 6 Geo. IV. c. 16, does not merely make such future estate *liable* to such bankrupt's creditors, but absolutely *vests* it in the assignees under their commission, who are authorized to seize the same, in like manner as they might have seized property of which such bankrupt was possessed at the issuing of the commissions against them.

It may be here observed, to close this branch of the subject, that, by the 50th section of the same act, mutual debts and credits may be set off against each other, notwithstanding any prior act of bankruptcy committed before the credit given to, or the debt contracted by, the bankrupt; provided the person claiming the benefit of such set off had not, when such credit was given, notice of the act of bankruptcy. By the 51st section of the act, debts which were not payable at the time of the bankruptcy may be proved, deducting a rebate of interest, at the rate of 5 *per cent.* to be computed from the declaration of a dividend to the time when such debt would regularly have become payable. The 52nd section of the statute enables sureties and persons liable for the debts of bankrupts, after they have discharged the debts, to prove their demands in respect of such payments, as debts under the commissions, and to receive dividends with the other creditors, not disturbing any former dividends.

The 53rd section contains a proviso for proof by an obligee in a bottomry or *respondentia* bond, and the assured in any policy of insurance, though the loss or contingency may have happened after the issuing of the commission against the obligor or insurer. The 54th section of the act admits annuity creditors to prove for the actual value of their annuities, such value to be ascertained by the commissioners. The 55th section provides, that, until the value of an annuity granted by a bankrupt shall have been so ascertained as aforesaid, the grantor shall not be allowed to sue any collateral surety for the payment of such annuity; (this clause, it has been held, applies to annuities granted before the passing of the act, as well as to those granted since. *Bell* v. *Bilton*, 1 B. Moore & Payne, 582); and if the surety pay the amount so ascertained and proved under the commission, he shall thereby be discharged from all claims in respect of such annuity: but, if such surety shall not pay the sum so proved, he may be sued for the accruing payments of the annuity, until he shall have satisfied the amount so proved, with interest thereon, at the rate of 4 *per cent.* from the time of notice of such proof, and after such satisfaction, the surety shall stand in the place of the annuitant in respect of such proof; and the certificate of the bankrupt shall be a discharge to him from all claims of such annuitant or of such surety in respect of such annuity. The 56th section of the statute enacts, that debts which are contingent at the time of the debtor's bankruptcy, may, if the creditor wishes it, be valued by the commissioners, and proof shall be admitted to the amount so ascertained, and dividends be payable thereon; or, if such value shall not be ascertained before the contingency happens, the creditor may prove in respect of the entire debt, and receive dividends thereon, not disturbing former dividends; provided the creditor had not, when such debt was contracted, notice of any act of bankruptcy by the bankrupt committed. The 75th section of the act relieves a bankrupt en-

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 (*c*). 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 (*d*), 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 broke open, in order to enter upon and 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 (*e*).

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, that a plain direct act of bankruptcy once *committed cannot be purged, or explained away, by [*486] any subsequent conduct, as a dubious equivocal act may be (*f*); 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 (*g*). 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 (40). But the king is not bound by this fictitious relation, nor is he within the statutes of bankrupts (*h*); 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 (*i*) (41). In France, this doctrine of

(*c*) Pag. 285.
(*d*) Stat. 1 Jac. I. c. 15. 21 Jac. I. c. 19.
(*e*) 12 Mod. 324.
(*f*) Salk. 110.
(*g*) 4 Burr. 32.
(*h*) 1 Atk. 262.
(*i*) Viner, Abr. t. *Creditor & Bankrupt*, 104.

titled to a lease, which the assignees accept, from all liability to pay any rent accruing after the date of the commission, or to be sued in respect of any subsequent non-observance or the non-performance of the covenants contained in such lease; and, if the assignees decline to accept the same, the bankrupt will still be released from the said liabilities, in case he deliver up the lease to the lessor within fourteen days after he shall have had notice that the assignees have declined to accept the same.

(40) If a sheriff take goods in execution after an act of bankruptcy committed by the party against whom the execution is sued out, it has been held, that the sheriff is liable to the assignees, in *trover*, although he had no notice of the act of bankruptcy, and although the commission did not issue until nearly two months after the execution. (*Price* v. *Helyar*, 1 B. Moore & Payne, 552).

(41) The King is not bound by the acts relating to bankrupts, not being named therein; (*Awdley* v. *Halsey*, W. Jones, 203. *Brassey* v. *Dawson*, 2 Str. 982; and see *ante*, note (30) to this chapter); and, by virtue of the prerogative, if a debtor to the crown become a bankrupt, and a commission be sued out

* This relation back to the act of insolvency, does not take place in New-York.

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 (*k*). But with us the law stands upon a more reasonable footing: for, as these acts of bankruptcy may sometimes be secret to all but a few, and it would be prejudicial to trade to carry this notion to its utmost length, it is provided by statute 19 Geo. II. c. 32, that no money paid by a bankrupt to a *bonâ fide* 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 (42).

(*k*) Sp. L. b. 29, *c.* 16.

against him, and an assignment made of his estate; an extent issued for the crown, and tested the day of the date of the assignment will be preferred: (*Rogers* v. *Mackenzie*, 4 Ves. 752. *The King* v. *Crump and Hanbury*, cited in Park. 127, and in 2 Show. 481): to prevent which sweeping away of the whole estate by the crown, a commission of bankruptcy has frequently been sealed at midnight. (*Wydown's case*, 14 Ves. 87). The crown not only has the priority above mentioned, but is not subject to the equity of being bound to use its securities against parties primarily liable, in behalf of those secondarily liable. (*Whitehouse* v. *Partridge*, 3 Swanst. 376, 378). The affidavit, therefore, upon which an order for an extent, which has such sweeping consequences, is grounded, ought to be unequivocal: it may not be improper for a Baron of the Exchequer, even when he feels some doubt upon the subject, to give his preliminary *fiat* for an extent, because the issuing the writ only enables the crown to lay its hands upon the property, and does not prevent any other proper claims from being put on the record and fully discussed; but, if upon such discussion the affidavit should be determined by the court not to be sufficiently positive and distinct, the extent will be set aside; (*The King* v. *Marsh*, M'Clel. 701): and there may be cases in which the court will receive and examine counter-affidavits, in order to determine whether an extent issued properly. (*Phillips* v. *Shaw*, 8 Ves. 252). If, upon examination, an extent is set aside for irregularity, and the effects are ordered to be delivered up to the assignees of the debtor, duly appointed under a commission of bankruptcy; a second extent, tested the same day on which the first was set aside, and delivered to the sheriff before the execution of the order for delivery of the goods to the assignees, will give the crown no *lien* on the effects, but the assignees will be entitled to reduce them into possession. (*The King* v. *Marsh*, M'Clel. & Younge, 257).

And the 71st section of the consolidated bankrupt-act enacts, that, if any real or personal estate or debts of any bankrupt be extended after he shall have become bankrupt, under pretence of his being indebted to an accountant of, or debtor to, the King, upon some contract originally made between such accountant and the bankrupt, the commissioners may examine upon oath whether such was the fact, and if such contract was originally made with any other person than the said accountant, or with him, but in trust for any other person, the commissioners may sell and dispose of such real and personal estate for the benefit of the creditors under the commission, and such sale shall be valid against the said extent and all persons claiming under it; and any person to whom the said real and personal estate shall be bargained, sold, granted, or assigned by the commissioners, shall have, and may recover, the same against any person who shall detain the same.

(42) The 81st section of the statute of 6 Geo. IV. c. 16, enacts, that all conveyances by, and all contracts and other dealings and transactions by and with any bankrupt, *bonâ fide* made and entered into more than two calendar months before the issuing of the commission against him, and all executions and attachments against the tenements or chattels of such bankrupt, *bonâ fide* executed or levied more than two months before the issuing of such commission, shall be valid, notwithstanding any prior act of bankruptcy by him committed: provided the persons so dealing with the bankrupt had not at the time of such conveyance, contract, dealing, or transaction, or at the time of executing or levying such execution or attachment, *notice* of any prior act of bankruptcy by him committed. And the 86th section of the statute enacts, that no purchase from any bankrupt *bonâ fide* and for a valuable consideration, where the purchaser *had notice* at the time of such purchase of an act of bankruptcy by such bankrupt committed, shall be impeached by reason thereof, unless the commission against such bankrupt shall have been sued out within twelve calendar months after such act of bankruptcy. By the 82nd section of the statute it is enacted, that all payments really and *bonâ fide* made by a bankrupt, before the date and issuing of the commission against him (such payments by the bankrupt not being a fraudulent preference of the creditors to whom they are made), shall be valid, notwithstanding any prior act of bankruptcy by such bankrupt committed; and all payments really and *bonâ fide* made to a bankrupt before the issuing of the commission against him, shall be also valid, notwithstanding any prior

The assignees may pursue any *legal* method of recovering this property so vested in them, by their own authority; but *cannot commence a suit in *equity*, nor compound any debts owing to the bankrupt, nor refer any matters to arbitration, without the consent of the creditors, or the major part of them in value, at a meeting to be held in pursuance of notice in the Gazette (*l*) (43). [*487]

When they have got in all the effects they can reasonably hope for, and reduced them to ready money, the assignees must, after four and 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 (44). This dividend must be made equally, and in a rateable 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 (*m*). So are also personal debts, where the creditor has a pledge in his hands, as a pledge or pawn for the payment, or has taken the debtor's lands or goods in execution (45) †. And, upon the equity of

(*l*) Stat. 5 Geo. II. c. 30. (*m*) Finch, Rep. 466.

act of bankruptcy by him committed; and such creditor shall not be liable to refund the same to the assignees of such bankrupt, provided the person so dealing with the bankrupt had not, at the time of such payment by or to the bankrupt, notice of any act of bankruptcy by such bankrupt committed.

(43) If, after such notice given, creditors whose debts amount to one third in value of the whole sum proved under the commission do not attend the meeting, the assignees are empowered by the 88th section of the statute of 6 Geo. IV. c. 16, to do any of the acts specified in the text above, the commissioners giving their consent in writing.

(44) The 106th section of the statute of 6 Geo. IV. c. 16, enacts, that the commissioners shall appoint a public meeting, not sooner than four calendar months from the date of the commission, nor later than six calendar months from the last examination of the bankrupt, for the purpose of auditing the accounts of the assignees: and the 107th section enacts, that the commissioners shall, not sooner than four nor later than twelve calendar months from the issuing the commission, appoint a public meeting to make a dividend of the bankrupt's estate, at which meeting all creditors who have not proved their debts shall be entitled to prove the same; and the commissioners shall then order such a dividend as they see fit to be made, and the assignees shall forthwith make such dividend; but no dividend shall be declared, unless the accounts of the assignees shall have been first audited as aforesaid.

(45) The 108th section of the statute of 6 Geo. IV. c. 16, enacts, that no creditor having any security for his debt; or having made any attachment *in London*, or any other place, by *virtue of any custom* there used, of the goods and chattels of a bankrupt; shall receive upon any such security or attachment more than a rateable part of such debt; except in respect of any execution or extent served and levied by seizure upon, or any mortgage of or lien upon, any part of the property of such bankrupt before the bankruptcy: provided that no creditor, though for a valuable consideration, who shall sue out execution upon any judgment obtained by default, confession, or *nil dicit*, shall avail himself of *such* execution to the prejudice of other fair creditors, but shall be paid rateably with such creditors. The execution, however, will not be set aside, but will stand for the benefit of all the creditors rateably: (*Taylor* v. *Taylor*, 5 Barn. & Cress. 394): and this rateable distribution will be enforced at common law, without putting the parties interested to the extraordinary remedy of a court of equity. (*Mitchell* v. *Knott*, 1 Simons, 499). The case of a creditor who obtained judgment before his debtor's bankruptcy, and who does not come in under his commission, is left as it was before the passing of the act. (*Ex parte Botcherley*, 2 Glyn & Jameson, 370).

The great seal exercises (with caution) a

† Mr. Christian observes, that "where a creditor has a mortgage or pledge, which he thinks insufficient to satisfy the whole of his debt, he may apply to the commissioners, and if they see no objection to the title of the mortgage they may order it to be sold, and that the produce shall be applied in discharge of the expenses of the sale, and of the mortgagee's debt; and if there be a deficiency, the mortgagee shall be permitted to prove it under the commission. Order March 8th, 1794.

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 (46), even though he hath neglected to distrain†, while the goods remained on the premises; which he is otherwise entitled to do for his entire rent, be the *quantum* what it may (*n*) (47). But, otherwise, judgments and recognizances (both which are debts of record, and

(n) 1 Atk. 103, 104.

discretionary power of ordering a value to be put upon a security held by a creditor; instead of directing a sale. (*Ex parte Smith*, 1 Ves. & Bea. 521). If a creditor, as an additional security for his debt, has taken the bankrupt's acceptances: it is his duty, when he comes to prove his debt, to produce the securities, if they are in his power; and if they are not, to state the fact to the commissioners: otherwise, he might himself prove for the full amount of his debt, leaving the holders of the outstanding bills to come in afterwards and prove upon such bills; thus exposing the estate to a double proof. (*Ex parte Hossack*, Buck, 392). And where bankers have given their acceptances, on the security of promissory notes delivered to them by a trader who becomes bankrupt, the debt may be proved under the commission, but the court will require that the bankers should take up their acceptances. (*Ex parte Bloxham*, 8 Ves. 533. *Sarratt* v. *Austin*, 4 Taunt. 208).

A creditor who has taken goods of his bankrupt debtor in execution, cannot, whilst those goods remain unsold, come in and prove under the commission: (*Ex parte Hopley*, 1 Jac. & Walk. 423): the case would be different if the goods were sold; for then the amount of debt remaining due would be certain. (*S. C.* 1 Glyn & Jameson, 63. *Ex parte Smith*, 2 Rose, 64). A similar rule applies where the creditor holds a security: it must be given up, or made available as far as possible, before the creditor can prove: if, indeed, a creditor who holds bills or other securities, obtained in the regular course of business, and not handed over with a view to give him a preference, (*Ex parte Barclay*, 1 Glyn & J. 279), will retain such bills at the full amount which they purport to secure, (and they cannot be worth more, but may be worth less), if that amount be deducted, he may come in and prove for the balance due to him. (*Ex parte De Tastet, Carrol, & Roberts*, 1 Ves. & Bea. 289. And see *Ex parte Greenwood*, Buck, 325). And a pending execution in respect of a joint debt will not affect a creditor's right to prove a distinct separate debt, under a commission against one of the debtors: (*Ex parte Stanborough*, 5 Mad. 89): though a creditor who holds a joint and separate security, must, on the bankruptcy of some of the parties responsible, elect whether he will go against the joint estate, or the separate estate of each: (*Ex parte Hay*, 15 Ves. 4. *Ex parte Bevan*, 10 Ves. 109): bare proof against either estate will not conclude his election; but he is bound to make his election before a dividend is declared of the estate against which he has proved. (*Ex parte Husband*, 5 Mad. 421).

The general rule in bankruptcy, as to proof in respect of bills of exchange, is, that the holder may prove the full amount against the estate of every person who is a debtor on those bills, with these restrictions, viz. if previously to the proof a part of the debt has been recovered from any quarter, the proof can only be for the residue; and that he must not receive more than twenty shillings in the pound from the aggregate of the dividends. (*Ex parte The Bank of Scotland*, 19 Ves. 311. *Ex parte Lees*, 6 Ves. 615. *Ex parte Bloxham*, 6 Ves. 450, 601).

When a creditor has proved in respect of several bills of exchange drawn by the bankrupt, and discounted by the creditor, should one of the bills be afterwards paid in full, the proof as to that bill must be expunged: for the law considers each act of discount as a distinct isolated transaction; and though the *form* of proof is upon the whole loan, the proof is, in truth, upon each bill separately. (*Ex parte Barratt*, 1 Glyn & Jameson, 329).

A creditor who has proved a debt, part of which he was not entitled to prove, will not be allowed to take a dividend before that is set right; and, if he has actually received a dividend, he will be compelled to refund it. (*Ex parte Hilton*, 1 Jac. & Walk. 469).

(46) The 74th section of the statute of 6 Geo. IV. c. 16, enacts, that no distress levied after an act of bankruptcy, upon the goods or effects of any bankrupt (whether before or after the issuing of the commission), shall be available for more than one year's rent, accrued prior to the date of the commission; but the landlord or party to whom the rent shall be due, shall be allowed to come in as a creditor under the commission, for the overplus of the rent due, and for which the distress shall not be available.

(47) Not so; see note (46).

† Mr. Christian observes, that "Lord Bathurst, Chancellor, declared expressly, that this proposition in the Commentaries was erroneous; and decreed that a landlord, if he has not availed himself of his right to distrain, has no privilege under the bankrupt statutes, but must come in *pari passu* with other creditors for every part of the rent due to him. (Cooke, 222)."

therefore at other times have a priority), and also bonds and obligations by deed or special instrument (which are called debts by specialty, and are usually the next *in order), these are all put on a le- [*488] vel with debts by mere simple contract, and all paid *pari passu* (*o*).

Nay, so far is this matter carried, that, by the express provision of the statutes (*p*), debts not due at the time of the dividend made, as bonds or notes of hand payable at a future day certain, shall be proved and paid equally with the rest (*q*), allowing a discount or drawback in proportion. And insurances, and obligations upon bottomry or *respondentia*, *bonâ fide* 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 (*r*) (48).

Within eighteen months after the commission issued, a second and final dividend shall be made, unless all the effects were exhausted by the first (*s*) (49). And if any surplus remains, after selling his estates and paying every creditor his full debt, it shall be restored to the bankrupt (*t*). 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* (*u*). 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 (*w*), or his representatives (50).

(*o*) Stat. 21 Jac. I. c. 19.
(*p*) Stat. 7 Geo. I. c. 31.
(*q*) Lord Raym. 1549. Stra. 1211.
(*r*) Stat. 19 Geo. II. c. 32.
(*s*) Stat. 5 Geo. II. c. 30.
(*t*) Stat. 13 Eliz. c. 7.
(*u*) 2 Ch. Cas. 144.
(*w*) 1 Atk. 244.

(48) See *ante*, note (39) to this chapter.

(49) The 109th section of the statute of 6 Geo. IV. c. 16, enacts, that if a bankrupt's estate shall not have been wholly divided upon the first dividend, the commissioners shall, within eighteen calendar months after the issuing of the commission, appoint a public meeting to make a second dividend, when all creditors who have not proved their debts may prove the same; and such second dividend shall be final, unless any action or suit be depending, or any part of the estate be standing out not sold or disposed of, or unless some other estate or effects of the bankrupt shall afterwards come to the assignees, in which case they shall, as soon as may be, convert such estate and effects into money, and within two calendar months after the same shall be so converted, divide the same.

When the act says, that, for the purpose of making a final dividend, the assignees shall convert the bankrupt's estate into money, "as soon as may be," it seems that this must be understood to mean, *as soon as it can prudently be done*; for, though Lord Thurlow, (in *Ex parte Goring*, 1 Ves. jun. 169), held, that under the old act, a consideration of the imprudence of a hasty sale, or its consequences, would not authorize the Court to suspend the sale, yet Lord Eldon over-ruled this opinion, and (in *Ex parte Kendall*, 17 Ves. 519) decided, that it was competent to the court to exercise a sound discretion as to the time when the assets are to be converted into money; and that a different rule would, in many concerns, impose the necessity of ruining the property. His lordship held, therefore, that the court might suspend a sale of the bankrupt's estate, and consequently postpone a final dividend, when it was satisfied that such a measure would be just to all whom the order would affect; but, the court will require the assignees to make out a clear case, why the dividend should not be made within the time limited by the statute. (*Ex parte Grosvenor*, 14 Ves. 590).

(50) The 132nd section of the statute of 6 Geo. IV. c. 16, enacts, that in case of a surplus after full payment of a bankrupt's debts, the assignees shall pay it to the bankrupt;

CHAPTER XXXII.

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 these 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, inquire 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, [*490] *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, or where no nomination is permitted, 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 intestato*, and which answers to the descent or inheritance of real estates.

Testaments are of very high antiquity. We find them in use among

(*a*) Puff. L. of N. b. 4, c. 10. (*b*) *Ibid.* b. 4, c. 11.

but such surplus is not to be handed over, until interest upon all the debts proved under the commission has been paid, at the rate and in the order following; that is to say, all creditors whose debts are by law entitled to carry interest, in the event of a surplus, shall first receive interest on such debts, at the rate of interest reserved or payable thereon, to be calculated from the date of the commission; and after such interest shall have been paid, *all* other creditors who have proved under the commission shall receive interest on their debts from the date of the commission, at the rate of 4*l. per cent.*

The 57th section of the same statute enacts, that although interest is not reserved upon a bill of exchange or promissory note overdue at the issuing of a commission of bankruptcy against a party liable upon such bill or note, the holder thereof shall be entitled to prove for interest upon the same, to be calculated to the date of the commission, at the rate of 5*l. per cent. per annum.*

the antient 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 Eusebius 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 bequeaths to his son Joseph a portion of his *inheritance [*491] 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 descendants 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 (1), 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*) (2); 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*).

(*c*) Barbeyr. Puff. 4. 10. 4. Godolph. Orph. Leg. 1. 1.
(*d*) Gen. c. 15.
(*e*) Taylor's Elem. Civ. Law, 517.
(*f*) See pag. 12.
(*g*) Selden, de succ. Ebr. c. 24.
(*h*) Gen. c. 48.
(*i*) Plutarch. in vita Solon.
(*k*) Pott. Antiq. *l.* 4, c. 15.
(*l*) Inst. 2. 22. 1.
(*m*) Tacit. de mor. Germ. 21.
(*n*) See pag. 13.
(*o*) Sp. L. b. 27, c. 1. Vinnius in Inst. l. 2, tit. 10.

(1) This position is very questionable. Long before the compilation of the laws of the Twelve Tables, a testament might be made by a Roman, and his private will converted into a public law, by promulgation *in calatis comitiis*. A Roman also who was *girt* for war, and about to proceed to battle, was allowed, antecedently to the laws of the Twelve Tables, to make what was termed *testamentum in procinctu*. And a third mode of making a will, without the formality of ratification by the *comitia*, and by persons who were not entitled to the exclusively military privilege of making *testamentum procinctum*, was in use before the introduction of the laws of the Twelve Tables:—this was by means of a fictitious purchase by the intended inheritor, to whom the purchase money was tendered, and weighed in a balance, before witnesses: which was termed *testamentum per æs et libram*.

"*Sciendum est, olim quidem duo genera testamentorum in usu fuisse; quorum altero in pace et otio utebantur, quod calatis comitiis appellabant; altero, cum in prælium exituri essent, quod procinctum dicebatur. Accessit deinde tertium genus testamentorum, quod dicebatur per æs et libram, scilicet quod per emancipationem, id est, imaginariam quandam venditionem agebatur, quinque testibus et libripende civibus Romanis puberibus, præsentibus, et eo qui familiæ emptor dicebatur. Sed illa quidem prora duo genera testamentorum ex veteribus temporibus in desuetudinem abierunt: quod vero per æs et libram fiebat, diutius permanserit.*" (Vinnius, lib. 2, tit. 10). Heineccius, in his commentary on this passage, observes, that the *comitia*, which were *calata*, or *convocata*, for the purpose of giving a public sanction to private wills, could neither have been the *comitia centuriata*, nor the *comitia tributa*, but must necessarily have been the *comitia curiata, quæ sola, primis temporibus, cum in concione testamenta fiebant, in urbe haberentur. Certum est tempore medio jurisprudentiæ comitiis testari desitum fuisse. Immo, latis tabulis xii. desiisse testamenta in comitiis calatis fieri, verisimillimum est. Quis enim voluisset voluntatem suam submittere populi suffragiis, quam libers suoque arbitrio testari posset? Et quis maluisset publice et palam hæredem nuncupare, quam jure uti xii. tabularum concesso?*

(2) But see *ante*, notes (21),(23),(27), to ch. 1.

With us in England this power of bequeathing is coeval 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, sive morte repentina, fuerit intestatus mortuus, dominus tamen nullam rerum suarum partem (præter eam quæ jure debetur hereoti nomine) sibi assumito. Verum possessiones uxori, liberis, et cognatione proximis, pro suo cuique jure, distribuantur* (p)." But we are not to imagine, that this power of bequeathing extended originally to *all* a man's personal estate. On the contrary, Glanvil [*492] will inform us (q), that by the common law, *as it stood 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 were called their *reasonable* parts; and the writ *de rationabili parte bonorum* was given to recover them (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; salvis uxori ipsius et pueris suis 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 (w): and Sir Henry Finch lays it down expressly (x), 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 (y) is of [*493] 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 (z) 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

(p) LL. Canut. c. 68.
(q) L. 2, c. 5.
(r) Bracton, l. 2, c. 26. Flet. l. 2, c. 57.
(s) F. N. B. 122.
(t) 9 Hen. III. c. 18.
(u) A widow brought an action of detinue against her husband's executors, *quod cum per consuetudinem totius regni Angliæ hactenus usitatam et approbatam, uxores debent et solent a tempore*, &c. *habere suam rationabilem partem bonorum maritorum suorum: ita videlicet, quod si nullos habuerint liberos, tunc medietatem; et, si habuerint, tunc tertiam partem*, &c. and that her husband died worth 200,000 marks, without issue had between them; and thereupon she claimed the moiety. Some exceptions were taken to the pleadings, and the fact of the husband's dying without issue was denied; but the rule of law, as stated in the writ, seems to have been universally allowed. (M. 30 Edw. III. 25). And a similar case occurs in H. 17 Edw. III. 9.
(w) Reg. Brev. 142. Co. Litt. 176.
(x) Law. 175.
(y) 2 Inst. 33.
(z) *l.* 2, c. 26, § 2.

† See limitation of this in New-York, ante p. 436, note 9.

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 (*a*). 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 antient method continued in use in the province of York, the principality of Wales, and in 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.

*In case a person made no disposition of such of his goods [*494] 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 seize upon his goods, as the *parens patriæ*, 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, saith 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 seize them, and keep them without wasting, and also might give, aliene, or sell them at his will, and dispose of the money *in pios usus*: 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

(*a*) Dalrymp. of Feud. Property, 145.
(*b*) Pag. 425.
(*c*) 9 Rep. 38.
(*d*) *Ibid.* 37.
(*e*) § 486.
(*f*) Finch, Law, 173, 174.
(*g*) Plowd. 277.

of the prelate, whose right of distributing his chattels for the good of his soul was effectually superseded thereby.

[*495] *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, hujusmodi bona nomine ecclesiæ occupantes nullam vel saltem 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 decendentium ab intestato in opus ecclesiæ 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

[*496] *dependents: 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.

(*h*) Plowd. 277.
(*i*) *l.* 2, *c.* 57, § 10.
(*k*) In Decretal. *l.* 5, *t.* 3, *c.* 42.
(*l*) The proportion given to the priest and to other pious uses, was different in different countries. In the archdeconry of Richmond in Yorkshire, this proportion was settled by a papal bulle, A. D. 1254. (*Regist. Honoris de Richm.* 101), and was observed till abolished by the statute 26 Hen. VIII. c. 15.
(*m*) 13 Ed. I. c. 19.
(*n*) 9 Rep. 39.

† By 2 R. S. 74, § 27, 28, the order of granting administration is determined, and the widow is preferred to all others, next the children, then the father, &c. males are preferred to females. The husband alone can take out administration on his wife's estate, (id. and § 29,) unless he neglects or is incompetent to act: he takes her personal estate to his own use subject only to her debts. Ib.

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 inquire who may, or may not, make a testament; or what persons are absolutely obliged by law to die intestate (3). 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 of sufficient discretion; for want [*497] 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*§, idiots or natural fools (4), persons grown childish by reason of old age or distemper (5), such as have their senses besotted with drunkenness (6)—all these are incapable, by reason of mental dis-

(*o*) Godolph. Orph. Leg. p. 1, c. 7.
(*p*) Godolph. p. 1, c. 8. Wentw. 212. 2 Vern. 104. 469. Gilb. Rep. 74.
(*q*) Perkins, § 503.
(*r*) Co. Litt. 89.

(3) In pursuing this inquiry, our author appears to have taken Swinburne for his guide; the second part of whose Treatise on Wills and Testaments he has closely followed.

(4) See Swinburne, pt. 2, sect. 4, an idiot, according to juridical definition, is one who, from his nativity, by a perpetual infirmity, is *non compos mentis*. (Co. Litt. 246 a).

(5) See Swinburne, pt. 2, sect. 5. Old age alone does not justify a presumption of the party's incapacity; (*Lewis* v. *Pead*, 1 Ves. jun. 19); but, when accompanied by great infirmity, it will be a circumstance of weight in estimating the validity of any transaction; (*Griffiths* v. *Robins*, 3 Mad. 192); for, that hypothetical disability which is always supposed to exist during infancy, may really subsist when the party is of age, and even a much greater degree of incapacity, though the case be not one of insanity, or of lunacy, strictly speaking. *Sherwood* v. *Saunderson*, 19 Ves. 283. *Ridgway* v. *Darwin*, 8 Ves. 67. *Ex parte Cranmer*, 12 Ves. 449).

(6) See Swinburne, pt. 2, sect. 6. A commission of lunacy has issued against a party who, when he could be kept sober, was a very sensible man; but whose constant habits were those of intoxication. (*Anonym.* cited in 8 Ves. 66). And in the case of *Rex* v. *Wright*, (2 Burr. 1099), a rule was made upon the de-

† In New-York males must be 18, females 16 years of age. 2 R. S. 60, § 21.

‡ Mr. Christian observes, that "this has been thought an error of the press in Perkins, and that four by mistake was printed for fourteen." The correction was first made by Swinburne, who, in a note to pt. 2, sect. 2, of his Treatise, speaks of the passage in Perkins as "*impressio vitiosa, literâ (x) omissâ, nam quod sic scribitur* iiij. *scribi debuit* xiiij." "See this subject learnedly investigated by Mr. Hargrave, who concludes with the learned Judge, that a will of personal estate may be made by a male at the age of fourteen, and by a female at the age of twelve, and not sooner. (Harg. Co. Litt. 90)."

§ See Swinburne, pt. 2. sect. 3. 1 Phillim. 100. 88. 9 Ves. 610. 3 Br. 444. 11 Ves. 11. 1 Adams, 284.

ability, 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 have always wanted the common inlets of understanding, are incapable of having *animum testandi*, and their testaments are therefore void (7).

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*) (8). But the law of England does not make such persons absolutely intestable; but only leaves it to the discretion of the court to judge, upon the consideration of their particular circumstances of duress, whether or no such persons could be supposed to have *liberum animum testandi*. And, with regard to feme-coverts, our law differs still more materially from the civil. Among the Romans there was no distinction; a married woman was as capable of bequeathing as a feme-sole (*t*). But [*498] with us 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 license of her husband‡. For all her personal chattels are absolutely his; and he may dispose of her chattels real, or shall have them to 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 (*v*). Yet by her husband's licence she may make a testament (*u*); 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 (*w*). Yet it shall be sufficient to repel the husband from his general right of administering his wife's effects; and administration shall be granted to her appointee, with such testamentary paper annexed (*x*). So that, in reality, the woman makes no will at all, but only something like a will (*y*); 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 (*z*), yet he might, with the like permission of his father, make what was called a *donatio mortis causa* (*a*). The queen consort is an exception to this general rule, for she

(*s*) Godolph. p. 1, c. 9.
(*t*) *Ff.* 31. 1. 77.
(*v*) 4 Rep. 51.
(*u*) Dr. & St. d. 1, c. 7.
(*w*) Bro. Abr. tit. *Devise*, 34. Stra. 891.
(*x*) *The King* v. *Bettesworth*, T. 13 Geo. II. B. R.
(*y*) Cro. Car. 376. 1 Mod. 211.
(*z*) *Ff.* 28. 1. 6.
(*a*) *Ff.* 39. 6. 25.

fendants, to shew cause why a criminal information should not be exhibited against them, for the misdemeanor of using artifices to obtain a will from a woman addicted to liquor, when she was under very improper circumstances of mind to make one.

(7) See Swinburne, pt. 2, sect. 10 and 11.
(8) See Swinburne, pt. 2, sect. 8.

† "But, if a person of sound mind makes his will, this will is not revoked nor affected by his subsequent insanity. (4 Co. 61)." For, what the law requires is, that a testator should be of capacity at the time he *makes* his will. (Swinb. pt. 2, sect. 3). Therefore, if a child, before he has reached the age prescribed by law, makes a written disposition of his effects, that disposition will be of no validity, though he should afterwards attain the age at which he might make a testament; unless he then expressly confirms his previous testamentary disposition; which is, in fact, making a new will. (Swinb. pt. 2, sect. 2).

‡ 2 R. S. 60, § 21.

may dispose of her chattels by will, without the consent of her lord (*b*): and any feme-covert may make her will of goods, which are in her possession *in auter droit*, as executrix or administratrix; for these can never be the property of the husband (*c*): and, if she has any pin-money or separate maintenance, it is said she may dispose of her savings thereout *by testament, without the control of her husband (*d*). [*499] But, if a feme-sole makes her will, and afterwards marries, such subsequent marriage is esteemed a revocation in law, and entirely vacates the will (*e*) (9).

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 (10). Neither can a *felo de se* 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*) (11).† 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*) (12). 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), by the common law their testaments may be good (*h*) (13). And in general the rule is, and has been so at least ever since Glanvil's time (*i*), *quod libera sit cujuscunque 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, what are the nature and incidents of a testament. Testaments, both Justinian (*j*) and Sir Edward Coke (*k*) agree to be so called, because they are *testatio mentis*: an etymon which seems to savour too much of the conceit; it being plainly a substantive derived from the verb *testari*, 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 nostræ justa sententia de eo, quod quis post mortem suam fieri velit* (*l*):" which may be thus rendered into English, "the legal declaration of a man's intentions, *which he wills to be performed after his death (14)." It is called *sententia*, to denote the circumspection and prudence with which it is supposed to be made: it is *voluntatis nostræ sententia*, because its efficacy depends on its declaring the testator's intention, whence in England it is emphatically stiled his *will*: it is *justa sententia*; that is, [*500]

(*b*) Co. Litt. 133.
(*c*) Godolph. 1. 10.
(*d*) Prec. Chan. 44.
(*e*) 4 Rep. 60. 2 P. Wms. 624.
(*f*) Plowd. 261.
(*g*) Fitz. Abr. tit. *Descent*, 16.
(*h*) Godolph. p. 1, c. 12.
(*i*) *l.* 7, c. 5.
(*j*) Inst. 2, 10.
(*k*) 1 Inst. 111. 322.
(*l*) *Ff.* 28. 1. 1.

(9) See Swinburne, pt. 2, sect. 9.

(10) See Swinburne, pt. 2, sections 12 and 13.

(11) Lands never were forfeited without an attainder by course of law; (3 Inst. 55); and now, no attainder, except for high treason, petit treason, or murder, or abetting those crimes, extends to the disinherison of any heir; nor to the prejudice of the right or title of any other persons than the offenders. (Stat. 54 Geo. III. c. 145).

(12) See Swinburne, pt. 2, sect. 21.

(13) See Swinburne, pt. 2, sections 16, 17, 19, as to the restraints which the *civil* law imposed upon the testamentary dispositions of usurers, incestuous persons, and libellers.

(14) See Swinburne, pt. 1, section 3 and 4.

† No conviction, except upon an outlawry for treason, would have this effect in New-York. 2 R. S. 701, § 22.

drawn, attested, and published, with all due solemnities and forms of law: it is *de eo, quod quis post mortem suam fieri velit*, 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* (15), *codicillus*, a little book or writing, is a supplement to a will, or an addition made by the testator, and annexed to, and to be taken as part of, a testament; being for its explanation, or alteration, or to make some addition to, or else some subtraction from, the former 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 than 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, hath laid them under many restrictions; except when made by mariners at sea, and soldiers in actual service. As to all other persons, it 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 (16); 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 anywise 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 [*501] were specially required to bear *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 surprised 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 hath first issued to call in the widow, or next of kin, to contest it, if they think proper. Thus hath the legislature provided against any frauds in setting up nuncupative wills, by so numerous a train of requisites, that the thing itself has fallen into disuse (17); and is hardly ever heard of, but in the

(m) Godolph. p. 1, c. 1, § 3. (n) Inst. 2. 10. 14.

(15) See Swinburne, pt. 1, sect. 5.

(16) But, if a legacy given by a written will has lapsed, or is void, *quatenus* the subject of such legacy, there is no written will, and a nuncupative codicil is *quasi* an original will for so much, not an alteration of that disposition which had previously become determined, or which was in its creation void. (*Stonywell's case*, T. Raym. 334). And the act which says that no written will shall be repealed or altered, by a nuncupative codicil, does not prohibit the disposition, by such codocil, of that which is not disposed of by the written will.

(17) Nuncupative wills are not favourites with courts of probate, though, if duly proved, they are equally entitled to be pronounced for with written wills. Much more, however, is requisite to the due proof of a nuncupative will than of a written one, in several particulars. In the first place, the provisions of the statute of frauds must be *strictly* complied

† In New-York no nuncupative or unwritten will is good, even as to personal estate, unless made by a soldier in actual service, or by a sailor at sea. (2 R. S. 60, § 22.) A will of personal estate must be executed in the same manner as a will of real estate, (*id.* 63, § 40:) and revoked in the same way. (*Id.* § 42.) See ante, p. 376, note 8, as to the solemnities required.

only instance where favour ought to be shewn to it, when the testator is surprised 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 surprised.

As to *written* wills, they need not any witness of their publication†. I speak not here of devises of lands, which are quite of a different nature; being conveyances by statute (18), unknown to the feodal 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 [*502] 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* (*r*) (19)." And therefore, if there be many testaments, the

(*o*) Godolph. p. 1, c. 21. Gilb. Rep. 260.
(*p*) Comyns, 452, 3, 4.
(*q*) *l.* 2, *c.* 26.
(*r*) Co. Litt. 1.

with, to entitle any nuncupative will to probate. Consequently, the absence of due proof of any one of these (that enjoining the *rogatio testium*, or calling upon persons to bear witness of the act, for instance, *Bennet* v. *Jackson*, 1 Phillim. 191. *Parsons* v. *Miller*, Ibid. 195) is fatal, at once, to a case of this species. But, added to this, and independent of the statute of frauds, the *factum* of a nuncupative will requires to be proved by evidence more strict and stringent than that of a written one, in every single particular. This is requisite in consideration of the facilities with which fraud in setting up nuncupative wills are obviously attended; facilities which absolutely require to be counteracted by courts insisting on the strictest proof as to the *facta* of such wills. The testamentary capacity of the deceased, and the *animus testandi* at the time of the alleged nuncupation, must appear by the clearest and most indisputable testimony. Above all, it must plainly result from the evidence, that the instrument propounded contains the true substance and import, at least, of the alleged nuncupation; and consequently that it embodies the deceased's *real* testamentary intentions. (*Lemann* v. *Bonsall*, 1 Addams, 389).

The statute of frauds is imperative, that a nuncupative will must be proved by the oaths of three witnesses; therefore, supposing no more than three witnesses were present at the making of such will, the death of any one of them, before such proof has been formally made, will render the nuncupative will void; however clear and unsuspected the evidence of the two surviving witnesses to the transaction may be: (*Phillips* v. *The Parish of St. Clement's Danes*, 1 Eq. Ca. Ab. 404): though at law, the execution of a written will is usually proved by calling *one* of the subscribing witnesses; and notwithstanding it is the general rule of equity to examine *all* the subscribing witnesses, this rule does not apply when any of the witnesses are dead, or cannot be discovered, or brought within the jurisdiction.

(18) See, *ante*, p. 378.

(19) This, Lord Loughborough observed, was the most general maxim he knew: (*Matthews* v. *Warner*, 4 Ves. 210): it is essential to every testamentary instrument, that it may

† Contrary rule in New-York. See note to p. 500.

last overthrows all the former (*s*): but the republication of a former will revokes one of a later date, and establishes the first again (*t*) 20.

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 (*u*). For this, saith Lord Bacon (*w*), 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 (*x*) †. The Romans were also wont to set aside testaments as being *inofficiosa*, deficient in natural duty, if they disinherited or totally passed by (without assigning a true and sufficient reason) (*y*) any of the children of the testator (*z*). 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 inofficiosi 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 constrained suppositions of forgetfulness or insanity; and therefore, though the heir or next of kin be totally omitted, it admits no *querela inofficiosi*, to set aside such a testament (21).

[*503]

We are next to consider, *fourthly*, what is an executor, and what 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 (22) and infants: nay, even infants unborn, or *in ventre sa*

(*s*) Litt. § 168. Perk. 478.
(*t*) Perk. 479.
(*u*) 8 Rep. 82.
(*w*) Elem. c. 19.
(*x*) Lord Raym. 441. 1 P. Wms. 204.
(*y*) See book I. ch. 16.
(*z*) Inst. 2. 18. 1.

be altered even *in articulo mortis*: (*Balch* v. *Symes*, 1 Turn. & Russ. 92): irrevocability would destroy its essence as a last will. (*Hobson* v. *Blackburn*, 1 Addams, 278. *Reid* v. *Shergold*, 10 Ves. 379).

(20) Republication of a will makes the will speak as of the time of such republication. (*Long* v. *Aldred*, 3 Addams, 51, *Goodtitle* v. *Meredith*, 2 Mau. & Sel. 14. If a man by a second will revokes a former, but keeps the first undestroyed, and afterwards destroys the second; whether the first will is thereby revived, has been much questioned: the result seems to be, that no general and invariable rule prevails upon the subject, but it must depend upon the intention of the testator, as that is to be collected from the circumstances of each particular case.

See the last paragraph of note 6, p. 376, as to the law in New-York.

(21) Courts of probate, however, look with much greater jealousy at, and require more stringent evidence in support of, an inofficious testament, than one which is consonant with the testator's duties, and with natural feeling. (*Brogden* v. *Brown*, 2 Addams, 449. *Dew* v. *Clerk*, 3 Addams, 207.

(22) But a *feme coverte* should not be allowed to act as an executrix or administratrix, without the assent of her husband: for, as he would be answerable for her acts in either of those capacities, he ought not to be exposed to this responsibility, unless by his own concurrence. (See 1 Anders. 117, case 164). It

† See note 8, p. 376, as to law of New-York.

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 ætate* (*b*) (23). 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 (24). But if the testator makes an incomplete will, without naming any executors, or if he names incapable persons, or if the executors named refuse to act: in any of these cases, the ordinary must *grant administration [*504] *cum testamento annexo* (*f*) to some other person §; and then the duty of the administrator, as also when he is constituted only *durante minore ætate*, &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, that "*testamenti executores esse debent ii, quos testator ad hoc elegerit, et quibus curam ipse commiserit; si vero testator nullos ad hoc nominaverit, possunt propinqui et consanguinei ipsius defuncti ad id faciendum se ingerere.*"

But if the deceased died wholly 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

(*a*) West. Symb. p. 1, § 635.
(*b*) Went. Off. Ex. c. 18.
(*c*) 1 Lutw. 342.
(*d*) 2 P. Wms. 589, 590.
(*e*) Went. c. 1. Plowd. 281.
(*f*) 1 Roll. Abr. 907. Comb. 20.
(*g*) *l.* 7, c. 6.
(*h*) Cro. Car. 106. Stat. 29 Car. II. c. 3. 1 P. Wms. 381.
(*i*) Salk. 36. Stra. 532.
(*k*) See page 496.
(*l*) Prec. Chanc. 598.

might be equally injurious to the legatees, creditors, or next of kin, of a testator, or intestate, if a married woman were allowed to act as executrix, or administratrix, when her husband was not amenable to the courts of this country; for, if she should waste the assets, the parties interested would have no remedy, as the husband must be joined in any action brought against her in respect of such transactions. (*Taylor* v. *Allen*, 2 Atk. 213).

† In New-York, no person can be an administrator who is convicted of an infamous crime, or incapable by law of making a contract, or an alien not residing in this state, or under age, or judged incompetent by the surrogate for drunkenness, improvidence, or want of understanding, or a married woman: but when a married woman is entitled to administration, it is granted to her husband in her right; (2 R. S. 75, § 32:) and when an infant is entitled, it is granted to his guardian. (Id. § 33.) Neither can such persons be executors, except married women, who may on filing the written consent of their husbands. (Id. 69, § 3, 4.)

‡ See 2 R. S. 70, § 7.

§ See 2 R. S. 71, § 14.

‖ 2 R. S. 74, § 27, order of administration and ante p. 496, note. The surrogate seems to have no discretion as to choice, except between parties in equal degree. (2 R. S. 74, § 28.)

(23) See *post*, p. 508. By stat. 38 Geo. III. c. 87, such administration is to last till the infant attains the age of twenty-one years.

(24) Swinburne, in pt. 4, sect. 4, of his treatise, supplies many instances in which the intention of a testator to appoint certain persons his executors, may be implied, though he has not described them *eo nomine*: (and see *Pickering* v. *Towers*, Ambl. 364).

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 (25). And therefore in the first place the children, or (on failure of children) the parents of the deceased, are entitled to the administration: both which are indeed in the [*505] first degree; but *with us (*n*) the children are allowed the preference (*o*). Then follow brothers (*p*) †, grandfathers (*q*), uncles or 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 (26). 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*). 7. And, lastly, the ordinary may, in defect of all these, commit administration (as he might have done (*x*) before the statute of Edward III.) to such discreet person as he approves of: or may grant him letters *ad colligendum bona defuncti*, which neither makes him executor nor administrator; his only business being to keep the goods in his safe custody (*y*), and to do other acts for the benefit of such as are entitled to the property of the deceased (*z*). 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 seize his goods and dispose of them *in pios usus*. But the usual course now is for some one to procure [*506] letters *patent, or other authority from the king (27); and then the ordinary of course grants administration to such appointee of the crown (*b*).

The interest vested in the executor by the will of the deceased, may be continued and kept alive by the will of the same executor ‡: so that the executor of A.'s executor is to all intents and purposes the executor and representative of A. himself (*c*); but the executor of A.'s administrator, or

(*m*) See pages 203. 207. 224.
(*n*) Godolph. p. 2, c. 34, § 1. 2 Vern. 125.
(*o*) In Germany there was a long 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 entitled to his goods and chattels in preference to his parents. (Mod. Un. Hist. xxix. 28).
(*p*) Harris in Nov. 118, c. 2.
(*q*) Prec. Chan. 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*) Wentw. ch. 14.
(*z*) 2 Inst. 398.
(*a*) Salk. 37.
(*b*) 3 P. Wms. 33.
(*c*) Stat. 25 Edw. III. st. 5, c. 5. 1 Leon. 275.

(25) See, *ante*, page 207, note (G) to chapter 14.

(26) See, *ante*, the sixth section of chap. 14, pp. 224, 234, with the notes thereto.

(27) Mr. Wooddeson (in his 15th Vin. Lect.), observes, that, in such cases, it is usual for the crown to reserve one tenth, or other small proportion, of the value, both of real and personal property.

† In New-York, grand-children are preferred to grand-parents; (2 R. S. 74, § 27) males also are preferred to females.

‡ In New-York, the Revised laws have adopted a different rule, and letters of administration with *the first* will annexed, must be taken out. (2 R. S. 72, § 17.)

the administrator of A.'s executor, is not the representative of A. (*d*). 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 privity 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 afresh, *of the goods* of the deceased *not* administered by the former executor or administrator. And this administrator *de bonis non*, is the only legal representative of the deceased in matters of personal property (*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 to others (*f*).

*Having thus shewn what is, and who may be, an executor [*507] or administrator, I proceed now, *fifthly* and lastly, to inquire 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 (*g*) (28), but an administrator may do nothing (29) 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 transac-

(*d*) Bro. Abr. tit. *Administrator*, 7.
(*e*) Styl. 225.
(*f*) 1 Roll. Abr. 903. Godolph. p. 2, c. 30. Salk. 36.
(*g*) Wentw. ch. 3.
(*h*) Comyns, 151.
(*i*) 5 Rep. 33, 34.

(28) Before he proves the will, he may lawfully perform most acts incident to the office; (*Wankford* v. *Wankford*, 1 Salk. 301); he does not derive his title under the probate, but under the will; the probate is only *evidence* of his right: *Smith* v. *Milles*, 1 T. R. 480): it is true, that, in order to assert completely his claims in a court of justice, he must produce the copy of the will, certified under the seal of the ordinary; but it is not necessary he should be in possession of this evidence of his right at the time he commences an action at law, as executor; it will be in due time, if he obtain it before he declares in such action: (see the last note): so, if he file a bill in equity, in the same character, a probate obtained at any time before the hearing of the cause, will sustain the suit. (*Humphreys* v. *Humphreys*, 3 P. Wms. 351).

(29) A person who takes upon himself to interfere with the effects of a party deceased, or, at all events, to dispose thereof, or apply them to his own use, will, by such interference, constitute himself an executor *de son tort*, as stated in the text; (and see *Edwards* v. *Harben*, 2 T. R. 597); but Lord Hardwicke held, that, although a person entitled to administration could not, before administration actually granted to him, *commence* an action at law, (see the last note, as to an executor who has not obtained probate), he might be allowed to file a bill in equity, as administrator, and that such bill would be sustained by an administration subsequently taken out. (*Fell* v. *Lutwidge*, Barnard, Ch. Rep. 320; *S. C.* 2 Atk. 120).

† In New-York, the similarity is still more increased now, as the executor before probate cannot interfere with the estate, except to preserve it, or to pay funeral charges. (2 R. S. 74, § 16.)

tions) (*k*), he is called in law an executor of his own wrong, *de son tort*) (30), 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*) (31), but actions may be brought 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 (*o*). 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 [*508] superior degree (*q*), *himself 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 expenses 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 ætate*, 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 (*w*). 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

(*k*) Wentw. ch. 14. Stat. 43 Eliz. c. 8.
(*l*) Dyer, 166.
(*m*) Bro. Abr. t. *Administrator*, 8.
(*n*) 5 Rep. 31.
(*o*) 12 Mod. 471.
(*p*) Dyer, 166.
(*q*) 1 Chan. Cas. 33.
(*r*) 5 Rep. 30. Moor, 527.
(*s*) 12 Mod. 441, 471.
(*t*) Wentw. ch. 14.
(*u*) Salk. 196. Godolph. p. 2, c. 26, § 2.
(*w*) Godolph. p. 1, c. 20, § 4.

(30) Whether a man has or has not rendered himself liable to be treated as an executor *de son tort*, is not a question to be left to a jury ; but is a conclusion of law, to be drawn by the court before which that question is raised. (*Padget* v. *Priest*, 2 T. R. 99).

(31) But, if a person entitled to letters of administration is opposed in the ecclesiastical court, and does any acts *pendente lite* to make himself executor *de son tort*, those acts will be purged by his afterwards obtaining letters of administration. (*Curtis* v. *Vernon*, 3 T. R. 590).

† See accordingly, 2 R. S. 81, § 60.

‡ Mr. Christian observes, that "it is held, that the least intermeddling with the effects of the intestate, even milking cows, or taking a dog, will constitute an executor *de son tort*. (Dy. 166). An executor of his own wrong will be liable to an action, unless he has delivered over the goods of the intestate to the rightful administrator before the action is brought against him. And he cannot retain the intestate's property in discharge of his own debt, although it is a debt of a superior degree. (3 T. R. 590. 2 T. R. 100)." See *post*, p. 511.

stiled 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 *ordi- [*509] nary †, 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 (*x*); whence the courts where the validity of such wills is tried, and the offices where they are registered, are called the prerogative courts, and the prerogative offices, of the provinces of Canterbury and York. Lyndewode, who flourished in the beginning of the fifteenth century, and was official to Archbishop 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 (*y*) that the hundred shillings, which constituted *bona notabilia*, were then equal in current money to 23*l.* 3*s.* $0\frac{1}{4}d.$ This will account for what is said in our antient books, that *bona notabilia* in the diocese of London (*z*), and indeed every where else (*a*), 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 antient rule to be meant of the shillings current in the reign of James I., and have, therefore, directed (*b*) 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 [*510] 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

(*x*) 4 Inst. 335.
(*y*) *Provinc.* l. 3, t. 13, c. *item. v. centum. &c. statutum v. laicis.*
(*z*) 4 Inst. 335. Godolph. p. 2, c. 22.
(*a*) Plowd. 281.
(*b*) Can. 92.

† In New-York, the officers having jurisdiction are surrogates. The surrogate has jurisdiction: 1. When the deceased, at the time of his death, was an inhabitant of the county of the surrogate. 2. Or, not being an inhabitant of the state, died in that county, and left assets there. 3. Or, not being an inhabitant, died out of the state, leaving assets in that county, (and in the case of an intestate, in no other county.) 4. Or, not being an inhabitant of the state, died out of it, not *leaving* assets in it, but assets afterwards come to that county. (2 R. S. 73, § 23, and p. 60, § 23).

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* (*c*) of all the goods and chattels, whether in possession or action, of the deceased; which he is to deliver in to the ordinary upon oath, if thereunto lawfully required (32) †.

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
[*511] legatee, so far as such goods and chattels extend. *Whatever assets so come to his hands he may convert into ready money, to answer the demands that may be made upon him: which is the next thing to be considered: for,

5. The executor or 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 woollen (*i*), money due upon poor rates (*k*), for letters to the post office (*l*), and some others. Fourthly, debts of record; as judgments, (docquetted according to the statute 4 & 5 W. & M. c. 20), statutes and recognizances (*m*) (33). Fifthly, debts due on special con-

(*c*) Stat. 21 Hen. VIII. c. 5.
(*d*) Co. Litt. 209.
(*e*) Dyer, 23.
(*f*) 1 Atk. 460.
(*g*) See page 244.
(*h*) 1 And. 129.
(*i*) Stat. 30 Car. II. c. 3.
(*k*) Stat. 17 Geo. II. c. 38.
(*l*) Stat. 9 Ann. c. 10.
(*m*) 4 Rep. 60. Cro. Car. 363.

(32) The ecclesiastical courts do not compel all executors to give an inventory; and always enquire into the interest of a party who requires one; but, even a probable or contingent interest will justify a party in calling for an inventory; and, in such cases, that which is by law required generally, must be enforced. There is only one case in which it could be refused; that is, if a creditor had brought a suit in chancery for a discovery of assets; there, the ecclesiastical court might say, the party should not proceed in both courts. (*Phillips* v. *Bignell*, 1 Phillim. 240. *Myddleton* v. *Rushout*, Ibid. 247).

(33) A final decree for payment of a debt, or other personal demand, is equal to a judg-

† 2 R. S. 82, § 2, &c.

‡ In New-York debts of the deceased are paid in the following order:

1. Debts entitled to a preference under the laws of the U. S.

2. Taxes on the estate of the deceased before his death.

3. Judgments docketed and decrees enrolled according to their respective priorities.

4. All other debts are put on an equal footing with each other. (2 R. S. 87. § 27).

The surrogate may give a preference to rent due by the deceased, if he is satisfied it will benefit the estate. (§ 30.)

tracts; as for rent (for which the lessor has often a better remedy in his own hands, by distreining), 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 antient law, according to Bracton (*p*) and Fleta (*q*), who reckon among the first debts to be paid, *servitia servientium et 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 (34): 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 his own wrong, which is contrary to the rule of law (*s*). If a *creditor constitutes his debtor his executor, this is a release or [*512] discharge of the debt, whether the executor acts or no (*t*) §; provided there be assets sufficient to pay the testator's debts: for though this discharge of the debt shall take place of all legacies (35), yet it were

(*n*) Wentw. ch. 12.
(*o*) 1 Roll. Abr. 927.
(*p*) *l.* 2, *c.* 26.
(*q*) *l.* 2, *c.* 56, § 10.
(*r*) 10 Mod. 496. See Book III. p. 18.
(*s*) 5 Rep. 30.
(*t*) Plowd. 184. Salk. 299.

ment. (*Gray* v. *Chiswell*, 9 Ves. 125. *Goate* v. *Fryer*, 2 Cox, 202). Courts of equity will not restrain proceedings at law by creditors, who are seeking in that way to obtain payment by executors, until there is a decree for carrying the trusts of the will into execution, under a bill filed by other creditors. (*Rush* v. *Higgs*, 4 Ves. 643. *Martin* v. *Martin*, 1 Ves. sen. 213). But, from the moment a final decree to that effect is made, it is considered as a judgment in favour of *all* the creditors; and there the court of equity could not execute its own decree, if it permitted the course of payment to be altered by a subsequent judgment of a court of law. (*Largan* v. *Bowen*, 1 Sch. & Lef. 299. *Paxton* v. *Douglas*, 8 Ves. 521). Between decrees and judgments, the right to priority of payment is determined by their *real* priority of date. (See *ante*, p. 342, note (65) to chapter 20; and further, as to the classification and priority of debts, see *ante*, p. 465).

(34) See *ante*, pp. 507 and 508.

(35) Such is, certainly, the rule at common law; and it has been questioned, formerly, whether it did not hold in equity: (*Brown* v. *Selwin*, Ca. temp. Talb. 242): but, it seems to have been long esteemed the better opinion, that a debt due from a testator's executor is general assets for payment of the testator's legacies: (*Phillips* v. *Phillips*, 2 Freem. 11. *Anonym.* c. 58. Ibid. 52): and that, in such cases, though the action at law is gone, the duty remains; which may be sued for either in equity or in the spiritual court: (*Flud* v. *Rumsey*, Yelv. 150. *Hudson* v. *Hudson*, 1 Atk. 461): Lord Thurlow, (in *Casey* v. *Goodinge*, 3 Br. 111), and Sir William Grant, (in *Berry* v. *Usher*, 11 Ves. 90), treated this as a point perfectly settled: and Lord Erskine (in *Simmons* v. *Gutteridge*, 13 Ves. 264) said, a debt due by an executor to the estate of his testator is assets, but, he cannot sue himself; and the consequence seems necessary, that, in all cases, under the usual decree against an executor, an interrogatory ought to be pointed to the inquiry, whether he has assets in his hands arising from a debt due by himself: and any legatee has a right to exhibit such an interrogatory, if it has been omitted in drawing up the decree to account.

Some writers have, indeed, thought that the appointment of a debtor to be the executor of his creditor, ought to be considered in the light of a specific bequest or legacy to the debtor; (see Hargrave's note (1) to Co. Litt. 264 b); yet, even if this really were so, it would be difficult to maintain the executor's right of retainer as against other legatees; (see *post*, p. 512); but Lord Holt (in *Wankford* v. *Wankford*, 1 Salk. 306) said, "When the obligee makes the obligor his executor, though it is a discharge of the action, yet the debt is assets; and the making him executor does *not* amount to *a legacy*, but to payment and a release. If H. be bound to J. S. in a bond of 100*l.*, and then J. S. makes H. his executor; H. *has* actually *received so much money, and is answerable for it*, and if he does not administer so much, it is a *devastavit*."

† Mr. Christian observes, that "a court of equity will order voluntary bonds or other special contracts, without consideration, to be postponed to simple contract debts. 3 P. Wms. 222." As to bonds *pro turpi causâ*, and as to the importance of a good and sufficient consideration, to support a bond, or other deed, see *ante*, pp. 296, 297, with the notes thereto.

‡ See note p. 511: not allowed in New-York. (2 R. S. 88. § 33.)

§ It is now no discharge or release in New-York, (2 R. S. 84. § 13), even as against legatees, &c.

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 (36), the executor has no legal notice of the debt (*w*) †.

(*u*) Salk. 306. 1 Roll. Abr. 921. (*w*) Dyer, 32. 2 Leon. 60.

(36) It is not enough that a suit has been *commenced*, (*Sorrell* v. *Carpenter*, 2 P. Wms. 483), there must have been a decree for payment of debts, or an executor will be at liberty to give a preference, amongst creditors of equal degree. (*Maltby* v. *Russell*, 2 Sim. & Stu. 228. *Perry* v. *Philips*, 10 Ves. 39. And see *ante*, p. 511. note 33). But if an executor who has, in any way, notice of an outstanding bond, or other specialty affecting his testator's assets, confesses a judgment in an action brought for a simple contract debt, should judgment be afterwards given against him on the bond, he will be obliged, however insufficient the assets, to satisfy both the judgments; for, to the debt on simple contract, he might have pleaded the demand of a higher nature. An executor must not, by negligence or collusion, defeat specialty creditors of his testator, by confessing judgments on simple-contract debts, of which he had notice. (*Sawyer* v. *Merrer*, 1 T. R. 690. *Davies* v. *Monkhouse*, Fitz-Gib. 77. *Britton* v. *Bathurst*, 3 Lev. 115). And where the testator's debt was a debt upon record, or established by a judgment or decree, the executor will be held to have had sufficient constructive notice thereof, and it will be immaterial whether he had actual notice or not. If he has paid any debts of inferior degree, he will be answerable as for a *devastavit*. (*Littleton* v. *Hibbins*, Cro. Eliz. 793. *Searle* v. *Lane*, 2 Freem. 104; *S. C.* 2 Vern. 37).

Since the statute of 3 Will. & Mary, c. 14, simple contract debts are lot in to be paid *pari passu* with debts by specialty, when a testator has limited lands to his executors or trustees, in trust for payment of his debts generally. (*Kidney* v. *Coussmaker*, 12 Ves. 154). But this rule seems to have been of earlier date than the statute. (*Foly's case*, 2 Freem. 49. *Hickson* v. *Witham*, Ibid. c. 12, in Appendix to 2nd edit. 306). And it is now settled, that a *charge* for payment of debts, which does not break the descent of real estate to the heir, will be *equitable* assets for the payment of all creditors alike. (*Shiphard* v. *Lutwidge*, 8 Ves. 30. *Bailey* v. *Ekins*, 7 Ves. 323. *Clay* v. *Willis*, 1 Barn. & Cress. 372).

If, therefore, specialty creditors sweep away the whole of the testator's personal assets, they will not be allowed to participate in the benefit of the devise, until the creditors by simple contract have received so much thereout as to make them equal and upon the level with the creditors by specialty, in respect of what *they* received out of the personal estate. (*Haslewood* v. *Pope*, 3 P. Wms. 323). And whenever a plaintiff is under the necessity of applying to the court of Chancery for relief, the general rule of that court is, to do equal justice to all creditors, without any distinction as to priority. (*Plunkett* v. *Penson*, 2 Atk. 293). Thus, the equity of redemption of a mortgage of a term for years, has been held equitable assets; (*Sir Charles Cox's case*, 3 P. Wms. 341. *Hartwell* v. *Chitters*, Ambl. 308. *Newton* v. *Bennet*, 1 Br. 137. *Clay* v. *Willis*, 1 Barn. & Cress. 372); and so, perhaps, would an equity of redemption of a mortgage in fee, if mere bond creditors contended for priority of payment; (for it is clear such assets could only be got at by aid of equity); but it has been decided, that, in such a case, judgment creditors could not be compelled to come in *pari passu* with simple contract creditors, but that, as the judgment creditors had a right to redeem, they must be paid in the first instance, and there could be no marshalling as against them. (*Sharpe* v. *Earl of Scarborough*, 3 Ves. 542).

The personal estate of a testator is the primary fund for payment of his debts and legacies; and it will not be enough for the personal representative to shew that the real estate is charged therewith; he must satisfactorily shew that the personal estate is discharged: (*Tower* v. *Lord Rous*, 18 Ves. 138. *Bootle* v. *Blundell*, 19 Ves. 548. *Watson* v. *Brickwood*, 9 Ves. 454. *Barnewall* v. *Lord Cawdor*, 3 Mad. 456): still, where such an intention is plainly made out, it will prevail: (*Greene* v. *Greene*, 4 Mad. 157. *Burton* v. *Knowlton*, 3 Ves. 108): and parties entitled, by descent or devise, to real estate, cannot claim to have the incumbrance thereon discharged out of their ancestor's or devisor's personal estate, so as to interfere with specific, or even with general legatees: (*Bishop* v. *Sharpe*, 2 Freem. 278. *Tipping* v. *Tipping*, 1 P. Wms. 730. *O'Neale* v. *Meade*, Ibid. 694. *Davis* v. *Gardiner*, 2 P. Wms. 190. *Rider* v. *Wager*, Ibid. 335): and, *a fortiori*, they could not maintain such a claim, when it would go to disappoint creditors. (*Lutkins* v. *Leigh*, Ca. temp. Talb. 54. *Goree* v. *Marsh*, 2 Freem. 113).

When the owner of an estate has, himself, subjected it to a mortgage debt, and dies; his personal estate is first applicable to the discharge of his covenant for payment of that debt: (*Robinson* v. *Gee*, 1 Ves. sen. 252): and the case would be the same even although the mortgagor had entered into no such personal covenant, provided he received the money. (*King* v. *King*, 3 P. Wms. 360. *Cope* v. *Cope*, 2 Salk. 449). The mere form of devising a mortgaged estate, *subject to the incumbrance thereon*, (but without expressly exonerating the other funds from liability in respect thereof), will not affect the question as to the application of assets in discharge of the debt; those words convey no more than would be implied if they had not been used. (*Serle*

† Contrary law now in New-York. (2 R. S. 87. § 28).

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 was given is stiled the legatee: which every person is capable of being, unless particularly disabled by the common law or statutes, as traitors, papists (37), 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 (38); 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 antient law (*z*), "*de bonis defuncti primo deducenda sunt ea quæ sunt necessitatis, et postea quæ sunt utilitatis, et ultimo quæ sunt voluntatis.*" And in case of a deficiency of assets, all the

(*x*) 2 Vern. 434. 2 P. Wms. 25. 2 Freem. 134. 2 Atk. 171.

(*y*) Co. Litt. 111. Aleyn. 39.

(*z*) *l.* 2, *c.* 26.

v. *St. Eloy*, 2 P. Wms. 386. *Beetle* v. *Blundell.* 19 Ves. 523). This rule, however, does not apply where the mortgage debt was not contracted by the testator, and whose personal estate, consequently, was never augmented by the borrowed money; for such a construction would be to make the personal estate of one man answerable for the debt of another. (*Evelyn* v. *Evelyn*, 2 P. Wms. 664. *Earl of Tankerville* v. *Fawcett*, 1 Cox, 239. *Basset* v. *Percival*, 1 Cox, 270. *Parsons* v. *Freeman*, Ambl. 115. *Tweddel* v. *Tweddel*, 2 Br. 154). But any one may, of course, so act as to make his personal assets liable to the discharge of debts contracted by another. (*Woods* v. *Huntingford*, 3 Ves. 152).

Though a court of equity cannot prevent a creditor from coming upon the personal estate of his deceased debtor, in respect of a debt which might be demanded out of his real estate; still the other creditors will have an equity to charge the real estate for so much as, by that means, is taken out of the personal estate. (*Colchester* v. *Lord Stamford*, 2 Freem. 124. *Grise* v. *Goodwin*, Ibid. 265). And if a bill has been filed for administration of the assets, should it appear that a specialty creditor has been paid out of the personal estate, it is not necessary to file another bill for the purpose of marshalling the assets; but the court will, without being called on, give the requisite directions. (*Gibbs* v. *Augier*, 12 Ves. 416).

(37) This ground of disability no longer disgraces the statute book.

(38) It has been much questioned, whether it was not the intention of the legislature, that a specific devise of stock in the public funds should be considered in the nature of a parliamentary appointment, and not want the assent of the executor: (*Pearson* v. *The Bank of England*, 2 Cox, 179); though a different practical construction has been put on the statute creating government annuities; (*Bank of England* v. *Lunn*, 15 Ves. 578), and it must now be taken to be the law, that stock, like all other personal property, is assets in the hands of the executor. The consequence necessarily follows that it must vest in the executor, and, till he assents, the legatee has no right to the legacy. (*Franklin* v. *The Bank of England*, 1 Russ. 597. *Bank of England* v. *Moffat*, 3 Br. 262).

The assent of the executor is equally necessary whether a legacy be specific or merely pecuniary; (*Flanders* v. *Clarke*, 3 Atk. 510. *Abney* v. *Miller*, 2 Atk. 598); a court of equity, indeed, will compel the executor to deliver the specific articles devised; (*Northey* v. *Northey*, 2 Atk. 77); but, as a general rule, no action at law can be maintained for a legacy, (*Deeks* v. *Strutt*, 5 T. R. 692), or for a distributive share under an intestacy. (*Jones* v. *Tanner*, 7 Barn. & Cress. 544). It was held, however, in *Doe* v. *Guy*, (3 East, 123), to be clear, from all the authorities, that the interest in any specific thing bequeathed vests, at law, in the legatee, upon the assent of the executor; and, therefore, that, whenever an executor has given assent (expressly, and not merely by implication,) to a specific legacy, should he subsequently withhold it, the legatee may maintain an action at law for the recovery of the interest so vested in him. If a deficiency of assets to pay creditors were afterwards to appear, the court of Chancery would have power to interfere, and make the legatee refund, in the proportion required.†

† Legatees, or the next of kin, may sue executors or administrators at law in New-York after the expiration of one year from the granting of letters, if there be more than enough to pay debts, and if a demand be made first, and bonds to indemnify, &c. be first given. (2 R. S. 114, § 9.)

general legacies must abate proportionably, in order to pay the [*513] debts; *but a *specific* legacy (of a piece of plate, a horse, or the like) is not to abate at all, or allow any thing by way of abatement, unless there be not sufficient without it (*a*) (39). Upon the same principle, if the legatees had 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 (*b*). And this law is as old as Bracton and Fleta, who tell us (*c*), "*si plura sint debita, vel plus legatum fuerit, ad quæ catalla defuncti non sufficiant, 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 (*d*) (40). But a legacy

(a) 2 Vern. 111.
(b) *Ibid.* 205.
(c) Bract. l. 2, c. 26. Flet. l. 2, c. 57, § 11.
(d) Dyer, 59. 1 Eq. Cas. Abr. 295.

(39) A specific legacy is an immediate gift of any fund bequeathed, with all its produce; and is therefore an exception to the general rule, that a legacy does not carry interest till the end of a year after the testator's death: (*Raven* v. *Waite*, 1 Swanst. 557. *Barrington* v. *Tristram*, 6 Ves. 349): and, though the payment of a principal fund, bequeathed to an infant, may depend on his attaining his majority; yet, the interest accrued from the death of the testator, may belong to the legatee, notwithstanding he does not live to take any thing in the principal. (*Deane* v. *Test*, 9 Ves. 153).

The criterion of a specific legacy is, that it is liable to ademption; that when the thing bequeathed is once gone, in the testator's lifetime, it is absolutely lost to the legatee. (*Parrot* v. *Worsfield*, 1 Jac. & Walk. 601). When, therefore, a testator has bequeathed a legacy of certain stock in the public funds, or of a particular debt, so described as to render the bequest, in either case, specific; if that stock should be afterwards sold out by the testator, or if that debt should, in his lifetime, be paid or cancelled, the legacy would be adeemed. (*Ashburner* v. *M'Guire*, 2 Br. 109). And it appears that there is no distinction between a voluntary and a compulsory payment to the testator, as to the question of ademption. (*Innes* v. *Johnson*, 4 Ves. 574). The idea of proceeding on the *animus adimendi*, (though supported by plausible reasoning), was found to introduce a degree of confusion into the decisions on the subject, and to afford no precise rule. (*Stanley* v. *Potter*, 2 Cox, 182. *Humphreys* v. *Humphreys*, 2 Cox, 185). It seems, therefore, now established that, whenever the testator has himself received, or otherwise disposed of, the subject of gift, the principle of ademption is, that the thing given no longer exists; and if, after a particular debt given by will had been received by the testator, it could be demanded by the legatee, that would be converting it into a pecuniary, instead of a specific legacy. (*Fryer* v. *Morris*, 9 Ves. 363. *Barker* v. *Rayner*, 5 Mad. 217). Where, indeed, the identical *corpus* is not given; (*Selwood* v. *Mildmay*, 3 Ves. 310); where the legacy is not specific, but what is termed in the civil law a demonstrative legacy—that is, a general pecuniary legacy, with a particular security pointed out as a convenient mode of payment; there, although such security may be called in, or fail, the legacy will not be adeemed: (*Guillaume* v. *Adderley*, 15 Ves. 389. *Sibley* v. *Perry*, 7 Ves. 529. *Kirby* v. *Potter*, 4 Ves. 751. *Le Grice* v. *Finch*, 3 Meriv. 52. *Fowler* v. *Willoughby*, 2 Sim. & Stu. 358): but, when it is once settled that a legacy is specific, the only safe and clear way, it has been judicially said, is to adhere to the plain rule—that there is an end of a specific gift, if the specific thing do not exist at the testator's death. (*Barker* v. *Rayner*, 5 Mad. 217; *S. C.* on appeal, 2 Russ. 125).

Courts of equity are always anxious to hold a legacy to be pecuniary, rather than specific, where the intention of the testator is at all doubtful. (*Chaworth* v. *Beech*, 4 Ves. 566. *Innes* v. *Johnson*, Ibid. 573. *Kirby* v. *Potter*, Ibid. 752. *Sibley* v. *Perry*, 7 Ves. 529. *Webster* v. *Hale*, 8 Ves. 413).

The greater part of this note is extracted from 1 Hovenden's Suppl. to Ves. jun. Reports, 312.

(40) A legacy may be so given, as that the legatee shall be entitled to the interest or produce thereof, from the time of the testator's death to his own, although such legatee may not live long enough to entitle himself to the principal. (*Deane* v. *Test*, 9 Ves. 153, as cited in the last note).

But where a bequest is made to a legatee, "at the age of twenty-one," or any other specified age; or, "if he attain such age;" this is such a description of the person who is to take, that if the legatee do not sustain the character at that time, the legacy will fail: the time when it is to be paid is attached to the legacy itself, and the condition precedent prevents the legacy from vesting. (*Parsons* v. *Parsons*, 5 Ves. 582. *Sansbury* v. *Read*, 12 Ves. 78. *Errington* v. *Chapman*, Ibid. 24). But if the legacy be to an infant, "*payable* at twenty-one," the legacy is held to be vested; the description of the legatee is satisfied, and the other part of the direction refers to the

to one, *to be paid* when he attains the age of twenty-one years, is a *vested* legacy; an interest which commences *in præsenti*, 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 (41). This distinction is borrowed from the civil law (*e*); 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 (*f*). But, if such legacies be charged upon a real estate, in both cases they shall lapse for the benefit of the heir (*g*); for, with regard to devises affecting lands, the ecclesiastical court hath no concurrent jurisdiction (42). And, in case of a vested legacy, due immediately, and

(*e*) *Ff.* 35. 1. 1 & 2.
(*f*) 1 Equ. Cas. Abr. 295.
(*g*) 2 P. Wms. 601.

payment only. This distinction (as stated in the text) is borrowed from the civil law, but is adopted as to personal legacies only, not as to bequests charged upon real estate; and it has been spoken of, in many cases, as a rule neither to be extended nor approved. (*Dawson* v. *Killett*, 1 Br. 123. *Duke of Chandos* v. *Talbot*, 2 P. Wms. 613. *Mackell* v. *Winter*, 3 Ves. 543. *Boiger* v. *Mackell*, 5 Ves. 509. *Hanson* v. *Graham*, 6 Ves. 245). If real estate, either copyhold or freehold, be devised to an infant and his heirs, "when and so soon as" he should attain a certain age; these words, it has been decided, only denote the time when the beneficial interest is to take effect in possession; but the interest vests immediately upon the testator's decease; and should the devisee die before he attains the specified age, the estate will descend to his heir-at-law. It would be a different thing if the devise were to the infant "if he attained a certain age," those words would create a condition precedent, and no interest would vest in him unless he attained that age. (*Doe* v. *Lea*, 3 T. R. 42. *Boraston's case*, 3 Rep. 21).

(41) But it seems, if the testator's personal representatives were to be accountable for interest, and the delay of payment, as to the principal, was only directed with reference to the minority of the legatee, his executor or administrator may claim the legacy forthwith, provided a year has elapsed since the death of the original testator. (*Crickett* v. *Dolby*, 3 Ves. 13. *Cloberry* v. *Lampen*, 2 Freem. 25. *Anonym.* Ibid. 64. *Anonym.* 2 Vern. 199. *Green* v. *Pigot*, 1 Br. 105. *Fonnereau* v. *Fonnereau*, 1 Ves. sen. 119). But, a small yearly sum directed to be paid for the maintenance of the infant legatee, will not be deemed equivalent, for the purpose of vesting a legacy, to a direction that interest should be paid on the legacy. (*Chester* v. *Painter*, 2 P. Wms. 336. *Hanson* v. *Graham*, 6 Ves. 249. *Roden* v. *Smith*, Ambl. 588). If a bequest, however, be made to an infant, "at his age of twenty-one years, and, if he die before that age, then over to another;" in such case, the legatee over does not claim under the infant, but the bequest over to him is a distinct substantive bequest, and is to be paid on the death of the infant under twenty-one. (*Laundy* v. *Williams*, 2 P. Wms. 480. *Crickett* v. *Dolby*, 3 Ves. 16.)

(42) Where legacies are charged upon land, or the gift at all savours of the *realty*, the trusts must be carried into execution with analogy to the common law. (*Scott* v. *Tyler*, 2 Dick. 719. *Long* v. *Ricketts*, 2 Sim. & Stu. 183). And the general rule of common law is, that legacies, or portions, charged on lands, do not vest till the time of payment comes. (*Harvey* v. *Aston*, 1 Atk. 378, 379; *S. C.* Willes, 91. *Harrison* v. *Naylour*, 2 Cox, 248). But a testator may make a legacy vested and transmissible, though charged on a real estate, and payable at a future time, provided he distinctly expresses himself to that effect, or the context of the will affords a plain implication that such was his intention. (Hargrave's note to Co. Litt. 237). In coming to a just conclusion as to this matter, it has been often said, it ought to be examined whether the testator has directed payment to be postponed, from a consideration of circumstances merely personal as to the legatee, or with reference to the condition of the estate to be charged, and the interests of others therein. When the direction, that the charge shall not be raised till a future day, refers to the circumstances of the person to take (as, for instance, if the charge be intended for a portion), there the construction has been, that the gift is so connected with the *purpose* for which it was given, that, if such purpose fail, the land ought not to be charged: but, it has been as repeatedly said, a legacy vests immediately in interest, though it be charged on lands, if the time of payment appears to have been postponed only out of regard to the circumstances of the estate. (*Lowther* v. *Condon*, 2 Atk. 128. *Dawson* v. *Killet*, 1 Br. 123. *Godwin* v. *Munday*, Ibid. 194. *Smith* v. *Partridge*, Ambl. 267. *Sherman* v. *Collins*, 3 Atk. 320).

charged on land or money in the funds, which yield an imme-
[*514] diate profit, *interest shall be payable thereon from the testator's death (43); 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*) (44).

(*h*) 2 P. Wms. 26, 27.

(43) The old authorities are in conformity with the text, and hold, that, where a fund, of whatever nature, upon which a testator has charged legacies, is carrying interest, there, interest shall be payable upon the legacies, from the time of the testator's death. But that is exploded now by every day's practice. Though a testator may have left no other property than money in the funds, interest upon the pecuniary legacies he has charged thereon, is now never given till the end of a year after his death. (*Gibson* v. *Bott*, 7 Ves. 97). The rule is different with respect to legacies charged on land. Whether the reason assigned for this distinction, in the text, and in *Maxwell* v. *Wettenhall*, (1 P. Wms. 25), be the true one, has been doubted: a fund, consisting of personalty, may be "yielding immediate profits," as well as lands, but, it is obvious that the reason of the rule as to the commencement of interest upon legacies given out of personal estate, which is a rule adopted merely for convenience, (*Garthshore* v. *Chalie*, 10 Ves. 13. *Wood* v. *Penoyre*, 13 Ves. 333), cannot apply to the case of legacies not dependent on the getting in of the personal estate, and charged upon lands only; in such case, interest, it has been said, must be chargable from the death of the testator, or not at all. (*Pearson* v. *Pearson*, 1 Sch. & Lef. 11. *Spurway* v. *Glyn*, 9 Ves. 486. *Shirt* v. *Westby*, 16 Ves. 396).

(44) As a legacy, for the payment of which no other period is assigned by the will, (*Anonym.* 2 Freem. 207), is not *due* till the end of a year after the testator's death; (*Hearle* v. *Greenbank*, 3 Atk. 716); and as interest can only be claimed for non-payment of a demand actually due; it is an undisputed general rule, that although a legacy vests (where no special intention to the contrary appears) at the testator's death, (*Garthshore* v. *Chalie*, 10 Ves. 13), it does not begin to carry interest till a year afterwards, unless it be charged solely on lands. (See the last note). That general rule, however, has exceptions: (*Raven* v. *Waite*, 1 Swanst. 557. *Beckford* v. *Tobin*, 1 Ves. sen. 310): a specific bequest of a *corpus* passes an immediate gift of the fund, with all its produce, from the death of the testator. (*Kirby* v. *Potter*, 4 Ves. 751. *Barrington* v. *Tristram*, 6 Ves. 349). Another exception arises when a legacy is given to an infant by a parent, or by a benefactor who has put himself *in loco parentis*; in such case, the necessary support of the infant may require immediate payment of interest. (*Lowndes* v. *Lowndes*, 15 Ves. 304. *Heath* v. *Perry*, 3 Atk. 102. *Mitchell* v. *Bower*, 3 Ves. 287). It must, however, be observed, this latter exception operates only when the child is otherwise unprovided for: when a father gives a legacy to a child, it will carry interest from the death of the testator, as a maintenance for the child, where no other fund is applicable for such maintenance; (*Carew* v. *Askew*, 1 Cox, 244. *Harvey* v. *Harvey*, 2 P. Wms. 22); but where other means of support are provided for the child, then the legacy will not carry interest from an earlier period than it would in the case of a bequest to a perfect stranger. (*Wynch* v. *Wynch*, 1 Cox, 435. *Ellis* v. *Ellis*, 1 Sch. & Lef. 5. *Tyrrel* v. *Tyrrel*, 4 Ves. 5). And the general rule as to non-payment of interest upon a legacy, before such legacy becomes due, must not be broken in upon by an exception in favour of an *adult* legatee, however nearly related to the testator; (*Raven* v. *Waite*, 1 Swanst. 588); nor, as illegitimate children are no more, in legal contemplation, than strangers, (*Lowndes* v. *Lowndes*, 15 Ves. 304), will interest be allowed, by way of maintenance for such legatees; (*Perry* v. *Whitehead*, 6 Ves. 547); unless it can be satisfactorily collected from the will, that the testator intended to give interest. (*Beckford* v. *Tobin*, 1 Ves. sen. 310. *Ellis* v. *Ellis*, 1 Sch. & Lef. 6. *Newman* v. *Bateson*, 3 Swanst. 690). Even in the case of a grandchild, an executor must not take upon himself to pay interest upon a legacy by way of maintenance, when that is not expressly provided by the will; for, though a court of equity will struggle in favour of the grandchild, (*Crickett* v. *Dolby*, 3 Ves. 12. *Collis* v. *Blackburn*, 9 Ves. 470), yet, it seems, there must be something more than the mere gift of a legacy, something indicating that the testator put himself *in loco parentis*, to justify a court in decreeing interest for a grandchild's maintenance. (*Perry* v. *Whitehead*, 6 Ves. 547. *Rawlins* v. *Goldtrap*, 5 Ves. 443. *Hill* v. *Hill*, 3 Ves. & Bea. 186). But, of course, even when a legacy to a grandchild will never become due unless he attains his majority, still, maintenance may be allowed for his support during his infancy, provided the parties to whom the legacy is given over in case of the infant's death, are competent, and willing, to consent. (*Cavendish* v. *Mercer*, 5 Ves. 195, in note). Under any other circumstances, when a legacy to infants is not given absolutely, and in all events, but is either not to vest till a given period, or is subject to being devested by certain contingencies, upon the occurrence of which it is given over; (*Errington* v. *Chapman*, 12 Ves. 25); if the words of the will do not authorize the application of interest to the maintenance of the infant legatees, a court of equity never goes further than to say that, if it can collect before it all the individuals who may entitled to the fund, so as to make each a compensation for taking from him part, it will grant an allowance for

Besides these formal legacies, contained in a man's will and testament, there is 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 accompained 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) (45). This method of donation might have

(i) Prec. Chanc. 269. 1 P. Wms. 406. 441. 3 P. Wms. 357.

maintenance; (*Errat* v. *Barlow*, 14 Ves. 203. *Marshall* v. *Holloway*, 2 Swanst. 436. *Ex parte Whitehead*, 2 Younge & Jerv. 249), or, where there is no gift over, and all the children of a family are to take equally, there, although other children may possibly come *in esse* after the order made, yet, all the children, born or to be born, will be held to have a common interest; and therefore, the interest of the fund, as far as it may be requisite, will be applicable for maintenance. (*Fairman* v. *Green*, 10 Ves. 48. *Greenwell* v. *Greenwell*, 5 Ves. 199. *Errat* v. *Barlow*, 14 Ves. 204. *Haley* v. *Bannister*, 4 Mad. 280). But, if the will contain *successive limitations*, under which persons of another family, and not in being, may become entitled; it is not sufficient that all parties, presumptively entitled, then living, are before the court; for none of the living may be the parties who, eventually, may become entitled to the property. In such a case, an order for interest by way of maintenance might be, in effect, to give to one person the property of another. (*Marshall* v. *Holloway*, 2 Swanst. 436. *Ex parte Kebble*, 11 Ves. 606).

No exception is to be made, in favour of the testator's wife, to the general rule that, a pecuniary legacy does not bear interest before the time when the principal ought to be paid, unless a distinct intention to give interest from an earlier period can be fairly collected from the words of the testator's will. (*Stent* v. *Robinson*, 12 Ves. 461. *Lowndes* v. *Lowndes*, 15 Ves. 304. *Raven* v. *Waite*, 1 Swanst. 559).

Great part of this note is extracted from 1 Hovenden's Suppl. to Ves. jun. Rep. 144, 145.

(45) A *donatio mortis causâ* has many of the properties of a legacy; it is liable to debts, and is dependent on survivorship. (*Tate* v. *Hilbert*, 2 Ves. jun. 120. *Jones* v. *Selby*, Prec. in Cha. 303. *Miller* v. *Miller*, 3 P. Wms. 357). It is not a present absolute gift, vesting immediately, but a revocable and conditional one, of which the enjoyment is postponed, till after the giver's death. (*Walter* v. *Hodge*, 2 Swanst. 98). On the other hand, though liable to be defeazanced, it must, subject to such power of revocation, be a complete gift *inter vivos*, and therefore requires no probate; (*Ward* v. *Turner*, 2 Ves. sen. 435. *Ashton* v. *Dawson*, Sel. Ca. in Cha. 14); though a question has been made whether, as such a gift is only to take effect in case of the donor's death, it ought not to be held so far testamentary as to be liable to legacy duty. (*Woodbridge* v. *Spooner*, 3 Barn. & Ald. 236).

A *donatio mortis causâ* plainly differs from a legacy in this particular,—the subject of gift must in the former case be delivered *by the donor*; in the latter case, *by his representative*. (*Walter* v. *Hodge*, 2 Swanst. 98). So, the distinction between a nuncupative will, and a *donatio mortis causâ* is, that the bounty given in the first-named mode is to be received from the executor; but in the latter case may be held against him, and requires no assent on his part, the delivery having been completed by the donor himself. (*Duffield* v. *Elwes*, 1 Sim. & Stu. 244. *Ward* v. *Turner*, 2 Ves. sen. 443.) The greater number of cases upon this subject have turned on the queston of actual tradition of the gift; the general rule, according to which delivery is necessary, is never now disputed; but whether such delivery has, or has not, been legally completed, or whether the nature of the gift constitutes an exception, exempting it from the general rule, are points which still, not unfrequently, present debateable ground. (*Tate* v. *Hilbert*, 2 Ves. jun. 120; *Lawson* v. *Lawson*, 1 P. Wms. 441). Where actual tradition is impracticable, if the donor proceed as far as the nature of the subject admits towards a transfer of the possession, effect may be given to his intended bounty; thus, a ship at sea has been held to be virtually delivered by a delivery of the bill of sale thereof, defeasible on the donor's recovery; and delivery of the key of a warehouse, or of a trunk, has been determined to be a sufficient delivery of the goods in such warehouse, and of the contents of the trunk; for, in these instances, the bill of sale and the keys were not considered as mere symbols, but as the means of obtaining possession of the property. (*Brown* v. *Williams*, cited in 2 Ves. sen. 434. *Jones* v. *Selby*, as cited *Ibid.* p. 441). A mere symbolical delivery, however, will not be sufficient; therefore, there can be no *donatio mortis causâ* of a simple contract debt; (*Gardner* v. *Parker*, 3 Mad. 185); though

† Are not these legacies abolished in New-York? See note † p. 500, ante; probably they are not. See next note.

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 [*515] own, yet wherever 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 undevised surplus of the estate shall go to the next of kin (46), the executor then

(*k*) Law of Forfeit. 16.
(*l*) Inst. 2. 7. 1. *Ff.* l. 39, t. 6.
(*m*) There is a very complete *donatio mortis causâ*, in the Odyssey, b. 17, v. 78, made by Telemachus to his friend Piræus; and another by Hercules, in the Alcestes of Euripides, v. 1020.
(*n*) Perkins, 525.
(*o*) Prec. Chanc. 323. 1 P. Wms. 7. 544. 2 P. Wms. 338. 3 P. Wms. 43. 194. Stra. 559. *Lawson*, v. *Lawson*, Dom. Proc. 28 Apr. 1777.

there may of a bond; (*Snellgrove* v. *Bailey*, 3 Atk. 214); for, notwithstanding it is a *chose en action*, some property is conveyed by the delivery. (*Ward* v. *Turner*, 2 Ves. sen. 442). But, the case of a bond-debt is an exception, not a rule; and where a bond is only a collateral security for a mortgage debt, the delivery of the bond will not be a complete gift of the mortgage. (*Duffield* v. *Elwes*, 1 Sim. & Stu. 244). A cheque drawn by the donor on a banker, (*Tate* v. *Hilbert*, 4 Br. 291), or a promissory note payable to him, (*Miller* v. *Miller*, 3 P. Wms. 357), cannot, it seems, be disposed of by way of *donatio mortis causâ*: no banker, indeed, is justified in paying a cheque after the death of the drawer; and a promissory note, not being a negotiable security payable to the bearer, must come under the same consideration as any other simple contract debt; and as the amount thereof could only be sued for in the name of the executors, that seems a sufficient reason why it could not be made the subject of a *donatio mortis causâ*. (*Miller* v. *Miller*, 3 P. Wms. 357). It is to be observed, that although there may have been a complete delivery of the gift, yet, if the possession be not continued in the donee, but the donor resume it, the gift, (whether such resumption of possession be intended to have that effect, or not), is at an end. (*Bunn* v. *Markham*, 7 Taunt. 232; *S. C.* 2 Marsh. 539).

(46) The right of an executor to a beneficial interest in the assets of his testator, not expressly disposed of, may be excluded, not only by a plain declaration of trust in the will, but by circumstances indicated by the will; in support of which parol evidence may be given to raise a presumption of trust; as, on the other hand, the executor may adduce evidence to repel such presumption. But, where a conclusive intention is evident on the face of the will, parol evidence cannot be let in on either side. (*Gladding* v. *Yapp*, 5 Mad. 59. *Lynn* v. *Beaver*, 1 Turn. & Russ. 68. *Langham* v. *Sandford*, 2 Meriv. 17. *Giraud* v. *Hanbury*, Ibid. 153. *Pratt* v. *Sladden*, 14 Ves. 197. *Walton* v. *Walton*, Ibid. 322).

Lord Eldon said, he feared there was no possibility of denying, now, that parol declarations of a testator, both previous and subsequent to the time of making his will, are admissible evidence to repel a legal presumption; but, his Lordship added, such declarations are not all alike weighty and efficacious; a declaration at the time of executing a will is of more consequence than a declaration made afterwards; and a declaration by the testator, subsequently to his will, as to what he *had* done, is entitled to more weight than a declaration before making his will, as to what he *intended* to do, for he may very well have altered that intention: therefore, although all such declarations are equally admissible, very different degrees of credit and weight are to be attached to them. (*Trimmer* v. *Bayne*, 7 Ves. 518. *Pole* v. *Lord Somers*, 6 Ves. 32. See also *Usticke* v. *Bawden*, 2 Addams, 128. *Langham* v. *Sandford*, 2 Meriv. 23).

The proposition, sometimes alleged, that the appointment of an executor gives him every thing not disposed of by the will, is not correct. In the strongest way of putting the executor's right, he can only take what the testator did not *mean* to dispose of. In the case of a lapse, for instance, the executor would not take the lapsed bequest. So, if a testator appoint an executor in trust, but omit to express the intention of such trust, the executor will not, by virtue of his office, take beneficially. (*Dawson* v. *Clarke*, 18 Ves. 254, 255. *Urquhart* v. *King*, 7 Ves. 228). And where a testator leaves an unfinished clause in his will, this is understood as an indication that he intended to make a further disposition, in exclusion of any claim by his executors. (*Knewell* v. *Gardner*, Gilb. Eq. Rep. 184. *Lord North* v. *Purdon*, 2 Ves. sen. 496). For, the slightest indication of a testator's intention to dispose of the residue of his property is sufficient to exclude his executor; though

standing upon exactly the same footing as an administrator, concerning whom indeed there formerly was much debate (*p*), 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 (*q*). And the right of the husband not only to administer, but also to enjoy exclusively, the effects of his deceased wife, depends still on this doctrine of the common law: the statute of frauds 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, explained by 29 Car. II. c. 30, it is enacted, that the surplusage of intestates' estates, (except of femes-covert, which are left as at common law) (*r*), 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

(*p*) Godolph. p. 2, c. 32.
(*q*) 1 Lev. 233. Cart. 125. 2 P. Wms. 447.
(*r*) Stat. 29 Car. II. c. 3, § 25.

it may be wholly uncertain *what* disposition the testator may have intended to make of that residue. (*Mence* v. *Mence*, 18 Ves. 351. *Mordaunt* v. *Hussey*, 4 Ves. 118). Even an intention on the part of a testator to make such a disposition of his residue as should exclude the claims of his next of kin, if it cannot be collected, from the evidence, that he meant to effect that object by any other mode than an express disposition of the residue, will not turn the scale in favour of the executor. (*Langham* v. *Sandford*, 17 Ves. 451. *The Bishop of Cloyne* v. *Young*, 2 Ves. sen. 95. *Nourse* v. *Finch*, 1 Ves. jun. 361). It is true that, in the case of *Clennel* v. *Lewthwaite* (2 Ves. jun. 476), the bequest of "a shilling" to the testator's sister, was held a material circumstance in exclusion of her claim to any part of his residuary estate; and, coupled with other evidence of intention, it might fairly be deemed some corroboration of that evidence; but, it is well settled that mere legacies to the next of kin will not rebut their claim to a residue undisposed of, where the executors would otherwise be held trustees. (*Griffiths* v. *Hamilton*, 12 Ves. 309. *Seely* v. *Wood*, 10 Ves. 75. *Langham* v. *Sandford*, 17 Ves. 451).

Numerous cases have fully established, as a general rule, that testamentary words of recommendation, request, or confidence, are imperative, and raise a trust; (*Paul* v. *Compton*, 8 Ves. 380. *Taylor* v. *George*, 2 Ves. & Bea. 378. *Parsons* v. *Baker*, 18 Ves. 476. *Kirkbank* v. *Hudson*, 7 Pr. 220); and although the testator's object fails; or is contrary to the policy of the law; or is too vaguely expressed to be capable of being carried into execution; yet, as it was the intent that the executor should only take as trustee, the necessary legal consequence is, that there must be a resulting trust for the testator's next of kin. (*Morice* v. *The Bishop of Durham*, 9 Ves. 405. *James* v. *Allen*, 3 Meriv. 19. *Vezey* v. *Jamson*, 1 Sim. & Stu. 71. *Paice* v. *The Archbishop of Canterbury*, 14 Ves. 370).

Where a single executor is named, a legacy of any part of the testator's personal estate to such executor, will (unless there are special circumstances) bar his general right, as executor, to any residue not disposed of by his testator's will. (*Dicks* v. *Lambert*, 4 Ves. 729). But, a legacy to one of several executors, or unequal legacies to more than one, will not exclude the legal title which executors, as such, have to a beneficial interest in the property of their testator, of which he has indicated no intention to make a different disposition: by giving a legacy to one only, or by given unequal legacies to several, the testator may only have intended a preference *pro tanto*. (*Rawlings* v. *Jennings*, 13 Ves. 46. *Langham* v. *Sandford*, 2 Meriv. 22. *Griffiths* v. *Hamilton*, 12 Ves. 309).

Sir Wm. Grant, in the case of *Seely* v. *Wood*, (10 Ves. 75), expressed a clear opinion, that a reversionary interest, after a previous interest for life, would exclude an executor, as effectually as a direct and immediate legacy. Lord Eldon, however, without expressly overruling, has thrown some doubt on this *dictum*. (*Lynn* v. *Beaver*, 1 Turn. & Russ. 69).

but no representatives are admitted, among collaterals, farther than the children of the intestate's brothers and sisters (*s*). The next of kindred, here referred to, are to be investigated by the same rules of consanguinity, as those who are entitled to letters of administration; of whom we [*516] have sufficiently spoken (*t*). *And therefore by this statute 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 of distributions bears to our antient 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 (in point of conscience at least) 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 succession *ab intestato* (*x*); which, and because the act was also penned by an eminent civilian (*y*), has occasioned a notion that the parliament of England copied it from the Roman prætor: though, indeed, it is little more than a restoration, with some refinements and regulations, of our 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 heard 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 [*517] any part of the surplusage with their *brothers and sisters; but,

(*s*) Raym. 496. Lord Raym. 571.
(*t*) Page 504.
(*u*) Pag. 492.
(*w*) 2 Inst. 33. See 1 P. Wms. 8.
(*x*) 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.)
(*y*) Sir Walter Walker. Lord Raym. 574.

† Mr. Christian observes, that "the next of kin, who are to have the benefit of the statute of distributions, must be ascertained according to the computation of the civil law, including the relations both on the paternal and maternal sides.

"And when relations are thus found who are distant from the intestate by an equal number of degrees, they will share the personal property equally, although they are relations to the intestate of very different denominations, and perhaps not relations to each other. There is only one exception to this rule, viz. where the nearest relations are a grandfather or grandmother, and brothers or sisters, although all these are related in the second degree, yet the former shall not participate with the latter; for which singular exception it does not appear that any good reason can be given. (3 Atk. 762). No difference is made between the whole and half blood in the distribution of intestate personal property."

‡ The only material alterations made by the Revised Statutes of New-York, are contained in 2 R. S. 96, § 75, part 3, which enacts, that if the deceased leave a widow and no descendant or parent, brother or sister, nephew or niece, the widow shall take the whole; if there be a brother or sister, nephew or niece, and no descendant or parent, the widow shall take a moiety, and the residue also if it do not exceed 2000 dollars; and if the residue do exceed that sum, she shall receive, in addition to her moiety, 2000 dollars: and the remainder shall go to the brothers and sisters and their representatives.

if the estates so 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 *collatio bonorum* of the imperial law (*z*): which it 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 antient custom of London, of the province of York, and of our sister kingdom of Scotland: and, with regard to lands descending in co-parcenary, that it hath always been, and still is, the common law of England, under the name of *hotchpot* (*a*).

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 happen, 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 (*b*). 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 repræsentationis*, in the right of another person. As, if the next of kin be the intestate's three brothers, A., B., and C.; here his effects are 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 one fifth part (*c*) (47).

The statute of distributions expressly excepts and reserves the customs of the city of London, of the province of York, *and of [*518] 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 antient 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 (*e*), and

(*z*) *Ff.* 37. 6. 1.
(*a*) See ch. 12, page 191.
(*b*) See ch. 14, page 217.
(*c*) Prec. Chanc. 54.
(*d*) Page 493.
(*e*) Lord Raym. 1329.

(47) Representations of lineal descendants are admitted to the remotest degree. (*Carter* v. *Crawley*, T. Raym. 500); but the 7th section of the statute of distributions provides, that "no representations shall be admitted amongst collaterals after brothers' and sisters' children." This proviso has been construed to mean brothers and sisters *of the intestate*, and not as admitting representation, when the distribution happens to fall among brothers and sisters who are only remotely related to the intestate. The reasonableness of this construction of the act was demonstrated by powerful arguments, in the case of *Carter* v. *Crawley* before cited; and was admitted in *Pett* v. *Pett*, (Comyns, 87; *S. C.* 1 P. Wms. 27), in the *Anonymous case*, in Appendix to 2 Freem. 298, and in *Bowers* v. *Littlewood*, (1 P. Wms. 594).

In a question of distribution, the next of kin to an intestate, though such next of kin be a collateral relative only, may, since the statute of Cha. II. be preferred to a more remote lineal relation in the ascending line: but, between relatives in equal degree, a lineal will be preferred to a collateral claimant. (*Blackborough* v. *Davis*, 1 P. Wms. 50).

† Sec 2 R. S. 97, § 76, &c. accordingly.

province of York (*f*), as well as in the kingdom of Scotland (*g*), and 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 antient universal doctrine of the *pars rationabilis*. If the deceased leaves a widow and children, his substance (deducting for the widow her apparel and the 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 widow nor child, 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 statute of distributions. So that if a man dies worth 1,800*l.* personal estate, leaving a widow and two children, this 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, she shall still have eight parts, as before; and the child shall have ten, six by the custom and four 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 sta-
[*519] *tute; and the remaining 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, it puts her in a state of non-entity, with regard to the custom only (*l*); but she shall be entitled 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 (48), before they are entitled to any benefit under the custom (*n*): but, if they are fully advanced, the custom entitles them to no further 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

(*f*) 2 Burn. Eccl. Law, 746.
(*g*) *Ibid.* 782.
(*h*) 1 P. Wms. 341. Salk. 246.
(*i*) 2 Show. 175.
(*k*) 2 Freem. 35. 1 Vern. 135.
(*l*) 2 Vern. 665. 3 P. Wms, 16.
(*m*) 1 Vern. 15. 2 Chan. Rep. 252.
(*n*) 2 Freem. 279. 1 Eq. Cas. Abr. 155. 2 P. Wms. 526.
(*o*) 2 P. Wms. 527.

(48) Advances which an intestate has made to any of his children, are *never* brought into hotchpot for the benefit of his widow; (*Kirkcudbright* v. *Kirkcudbright*, 8 Ves. 64); but solely with a view to equality as amongst the children; (*Gibbons* v. *Caunt*, 4 Ves. 847; and in cases arising upon the custom of London, the effect of the full advancement of one child is merely to remove that child out of the way, and to increase the shares of the others. (*Folkes* v. *Western*, 9 Ves. 460). So, when a settlement bars, or makes a composition for, the wife's customary share, that share, if the husband die intestate, will be distributable as if he had left no wife; (*Knipe* v. *Thornton*, 2 Eden, 121. *Morris* v. *Burrows*, 2 Atk. 629. *Read* v. *Snell*, Ibid. 644); and will not go to increase what is called "the dead man's part," (*Medcalfe* v. *Ives*, 1 Atk. 63), to a distributive share of which the widow would be entitled, notwithstanding she had compounded for her customary part; (*Whithull* v. *Phelps*, Prec. in Cha. 328); unless the expressed, or clearly implied, intention was, that she should be barred as well of her share of the dead man's part, as of her share by the custom. (*Benson*, v. *Bellasis*, 1 Vern. 16). A jointure in bar of *dower*, without saying more, will be no bar of a widow's claim to a customary share of personal estate; for dower affects lands only, and land is wholly out of the custom. (*Babington* v. *Greenwood*, 1 P. Wms. 531).

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 land 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 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 Justinian, from whose constitutions in many points *(particularly in the advan- [*520] tages 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 Cæsar, who established a colony in Britain to instruct the natives in legal knowledge (*s*); inculcated and diffused by Papinian, who presided at York as *præfectus prætorio*, under the emperors Severus and Caracalla (*t*): and continued by his successors till the final departure of the Romans in the beginning of the fifth century after Christ.

(*p*) 2 Vern. 558.
(*q*) Prec. Chan. 537.
(*r*) 2 Burn. 754.
(*s*) Tacit. Annal. l. 12, c. 32.
(*t*) Selden, in Fletam, cap. 4, § 3.

THE END OF THE SECOND BOOK.

APPENDIX.

No. I.

VETUS CARTA FEOFFAMENTI.

Premises.

SCIANT presentes et futuri, quod ego Willielmus, filius Willielmi de Segenho, dedi, concessi, et hac presenti carta mea confirmavi, Johanni quondam filio Johannis de Saleford, pro quadam summa pecunie quam michi dedit pre manibus, unam acram terre mee arabilis, jacentem in campo de Saleford, juxta terram quondam Richardi de la Mere: *Habendam et Tenendam* totam predictam acram terre, cum omnibus ejus pertinentiis, prefato Johanni, et heredibus suis, et suis assignatis, de capitalibus dominis feodi: *Reddendo* et faciendo annuatim eisdem dominis capitalibus servitia inde debita et consueta: *Et* ego predictus Willielmus, et heredes mei, et mei assignati, totam predictam acram terre, cum omnibus suis pertinentiis, predicto Johanni de Saleford, et heredibus suis, et suis assignatis, contra omnes gentes warrantizabimus in perpetuum. *In cujus* rei testimonium huic presenti carte sigillum meum apposui: *Hiis* testibus, Nigello de Saleford, Johanne de Seybroke, Radulpho clerico de Saleford, Johanne molendario de eadem villa, et aliis. *Data* apud Saleford die Veneris proximo ante festum sancte Margarete virginis, anno regni regis EDWARDI filii regis EDWARDI sexto.

Habendum, & Tenendum.

Reddendum.

Warranty.

Conclusion.

(L. S.)

MEMORANDUM, quod die et anno infrascriptis plena et pacifica seisina acre infraspecificate, cum pertinentiis, data et deliberata fuit per infranominatum Willielmum de Segenho infranominato Johanni de Saleford, in propriis personis suis, secundum tenorem et effectum carte infrascripte, in presentia Nigelli de Saleford, Johannis de Seybroke, et aliorum.

Livery of seisin endorsed.

No. II.

A MODERN CONVEYANCE BY LEASE AND RELEASE.

SECT. 1. LEASE OR BARGAIN AND SALE, FOR A YEAR.

Premises.

THIS INDENTURE, made the third day of September, in the twenty-first year of the reign of our sovereign lord GEORGE the second, by the grace of God, king of Great Britain, France, and Ireland, defender of the faith, and so forth, and in the year of our Lord one thousand seven hundred and forty-seven, between Abraham Barker, of Dale Hall, in the county of Norfolk, esquire, and Cecilia his wife, of the one part, and David Edwards, of Lincoln's Inn, in the county of Middlesex, esquire, and Francis Golding, of the city of Norwich, clerk, of the other part, witnesseth; that the said Abraham Barker and Cecilia his wife, in consideration of five shillings of lawful money of Great Britain, to them in hand paid by the said David Edwards and Francis Golding, at, or before, the ensealing and delivery of these presents, (the receipt whereof is hereby acknowledged), and for other good causes and considerations, them the said Abraham Barker and Cecilia his wife, hereunto specially moving, *have* bargained and sold, and by these presents do, and each of them doth, bargain and sell, unto the said David Edwards and Francis Golding, their executors, administrators, and assigns,

Parties.

Consideration.

Bargain and sale.

No. II.

Parcels. *All* that the capital messuage, called Dale Hall, in the parish of Dale, in the said county of Norfolk, wherein the said Abraham Barker and Cecilia his wife now dwell, and all those their lands in the said parish of Dale, called or known by the name of Wilson's farm, containing by estimation five hundred and forty acres, be the same more or less, together with all and singular houses, dove-houses, barns, buildings, stables, yards, gardens, orchards, lands, tenements, meadows, pastures, feedings, commons, woods, underwoods, ways, waters, watercourses, fishings, privileges, profits, easements, commodities, advantages, emoluments, hereditaments, and appurtenances whatsoever to the said capital messuage and farm belonging or appertaining, or with the same used or enjoyed, or accepted, reputed, taken, or known, as part, parcel, or member thereof, or as belonging to the same, or any part thereof; and the reversion and reversions, remainder and remainders, yearly and other rents, issues, and profits thereof, and of every part and parcel thereof: *To have and to hold* the said capital messuage, lands,

Habendum. tenements, hereditaments, and all and singular other the premises hereinbefore mentioned, or intended to be bargained and sold, and every part and parcel thereof, with their and every of their rights, members, and appurtenances, unto the said David Edwards and Francis Golding, their executors, administrators, and assigns, from the day next before the day of the date of these presents, for and during, and unto the full end and term of, one whole year from thence next ensuing, and fully to be complete and ended: *Yield-*

Reddendum. *ing* and paying, therefore, unto the said Abraham Barker, and Cecilia his wife, and their heirs and assigns, the yearly rent of one pepper-corn at the expiration of the said term, if the same shall be lawfully demanded: *To the*

Intent. *intent* and purpose that, by virtue of these presents, and of the statute for transferring uses into possession, the said David Edwards and Francis Golding may be in the actual possession of the premises, and be thereby enabled to take and accept a grant and release of the freehold, reversion, and inheritance of the same premises, and of every part and parcel thereof, to them, their heirs and assigns; to the uses and upon the trusts, thereof to be declared by another indenture, intended to bear date the next day after the day of the date hereof. *In witness* whereof, the parties to these pre-

Conclusion. sents their hands and seals have subscribed and set, the day and year first above written.

Sealed and delivered, being first duly stamped, in the presence of
George Carter.
William Browne.

Abraham Barker. (L. S.)
Cecilia Barker. (L. S.)
David Edwards. (L. S.)
Francis Golding. (L. S.)

Sect. 2. Deed of Release.

Premises. This Indenture of five parts, made the fourth day of September, in the twenty-first year of the reign of our sovereign lord George the second, by the grace of God king of Great Britain, France, and Ireland, defender of the faith, and so forth, and in the year of our Lord one thousand seven hundred

Parties. and forty-seven, between Abraham Barker, of Dale Hall, in the county of Norfolk, esquire, and Cecilia his wife, of the first part; David Edwards, of Lincoln's Inn, in the county of Middlesex, esquire, executor of the last will and testament of Lewis Edwards, of Cowbridge, in the county of Glamorgan, gentleman, his late father, deceased, and Francis Golding, of the city of Norwich, clerk, of the second part; Charles Browne, of Enstone, in the county of Oxford, gentleman, and Richard More, of the city of Bristol, merchant, of the third part; John Barker, esquire, son and heir apparent of the said Abraham Barker, of the fourth part; and Katherine Edwards, spinster, one of the sisters of the said David Edwards, of the fifth part.

Recital. *Whereas* a marriage is intended, by the permission of God, to be shortly had

Consideration. and solemnized between the said John Barker and Katherine Edwards: *Now this Indenture witnesseth*, that in consideration of the said intended marriage, and of the sum of five thousand pounds, of good and lawful money of Great Britain, to the said Abraham Barker, (by and with the consent and agreement of the said John Barker and Katherine Edwards, testified by their being parties to, and their sealing and delivery of, these presents), by the said David Edwards in hand paid, at or before the ensealing and delivery

hereof, being the marriage portion of the said Katherine Edwards, bequeathed to her by the last will and testament of the said Lewis Edwards, her late father, deceased; the receipt and payment whereof the said Abraham Barker doth hereby acknowledge, and thereof, and of every part and parcel thereof, they the said Abraham Barker, John Barker, and Katherine Edwards, do, and each of them doth, release, acquit, and discharge the said David Edwards, his executors and administrators, for ever by these presents: and for providing a competent jointure and provision of maintenance for the said Katherine Edwards, in case she shall, after the said intended marriage had, survive and overlive the said John Barker, her intended husband: and for settling and assuring the capital messuage, lands, tenements, and hereditaments, hereinafter mentioned, unto such uses, and upon such trusts, as are hereinafter expressed and declared: and for and in consideration of the sum of five shillings, of lawful money of Great Britain, to the said Abraham Barker and Cecilia his wife, in hand paid by the said David Edwards and Francis Golding, and of ten shillings of like lawful money to them also in hand paid by the said Charles Browne and Richard More, at or before the ensealing and delivery hereof, (the several receipts whereof are hereby respectively acknowledged), they the said Abraham Barker and Cecilia his wife, *Have*, and each of them hath, granted, bargained, sold, released, and confirmed, and by these presents do, and each of them doth, grant, bargain, sell, release, and confirm unto the said David Edwards and Francis Golding, their heirs and assigns, *All* that, the capital messuage called Dale Hall, in the parish of Dale, in the said county of Norfolk, wherein the said Abraham Barker and Cecilia his wife now dwell, and all those their lands in the said parish of Dale, called or known by the name of Wilson's farm, containing by estimation, five hundred and forty acres, be the same more or less, together with all and singular houses, dove-houses, barns, buildings, stables, yards, gardens, orchards, lands, tenements, meadows, pastures, feedings, commons, woods, underwoods, ways, waters, watercourses, fishings, privileges, profits, easements, commodities, advantages, emoluments, hereditaments, and appurtenances whatsoever to the said capital messuage and farm belonging or appertaining, or with the same used or enjoyed, or accepted, reputed, taken, or known, as part, parcel, or member thereof, or as belonging to the same or any part thereof; (all which said premises are now in the actual possession of the said David Edwards and Francis Golding, by virtue of a bargain and sale to them thereof made by the said Abraham Barker and Cecilia his wife, for one whole year, in consideration of five shillings to them paid by the said David Edwards and Francis Golding, in and by one indenture, bearing date the day next before the day of the date hereof, and by force of the statute for transferring uses into possession); and the reversion and reversions, remainder and remainders, yearly and other rents, issues and profits thereof, and every part and parcel thereof, and also all the estate, right, title, interest, trust, property, claim, and demand whatsoever, both at law and in equity, of them the said Abraham Barker and Cecilia his wife, in, to, or out of the said capital messuage, lands, tenements, hereditaments, and premises: *To have and to hold* the said capital messuage, lands, tenements, hereditaments, and all and singular other the premises hereinbefore mentioned to be hereby granted and released, with their and every of their appurtenances, unto the said David Edwards and Francis Golding, their heirs and assigns, to such uses, upon such trusts, and to and for such intents and purposes, as are hereinafter mentioned, expressed, and declared, of and concerning the same: that is to say, to the use and behoof of the said Abraham Barker and Cecilia his wife, according to their several and respective estates and interests therein, at the time of, or immediately before, the execution of these presents, until the solemnization of the said intended marriage: and from and after the solemnization thereof, to the use and behoof of the said John Barker, for and during the term of his natural life; without impeachment of or for any manner of waste: and from and after the determination of that estate, then to the use of the said David Edwards and Francis Golding, and their heirs, during the life of the said John Barker, upon trust to support and preserve the contingent uses and estates hereinafter limited from being defeated and destroyed, and for that purpose to make entries, or bring actions, as the case shall require; but, nevertheless,

Release.

Parcels.

Mention of bargain and sale.

Habendum.

To the use of the grantors till marriage:

Then of the husband for life, *sans waste*:

Remainder to trustees to pre-

No. II.

to permit and suffer the said John Barker, and his assigns, during his life, to receive and take the rents and profits thereof, and of every part thereof, to and for his and their own use and benefit: and from and after the decease of the said John Barker, then to the use and behoof of the said Katherine Edwards, his intended wife, for and during the term of her natural life, for her jointure, and in lieu, bar, and satisfaction of her dower and thirds at common law, which she can or may have or claim, of, in, to, or out of, all and every, or any, of the lands, tenements, and hereditaments, whereof or wherein the said John Barker now is, or at any time or times hereafter during the coverture between them shall be, seised of any estate of freehold or inheritance: and from and after the decease of the said Katherine Edwards, or other sooner determination of the said estate, then to the use and behoof of the said Charles Browne and Richard More, their executors, administrators, and assigns, for and during and unto the full end and term of five hundred years from thence next ensuing, and fully to be complete and ended, without impeachment of waste: upon such trusts nevertheless, and to and for such intents and purposes, and under and subject to such provisoes and agreements, as are hereinafter mentioned, expressed, and declared of and concerning the same: and from and after the end, expiration, or other sooner determination of the said term of five hundred years, and subject thereunto, to the use and behoof of the first son of the said John Barker on the body of the said Katherine Edwards his intended wife to be begotten, and of the heirs of the body of such first son lawfully issuing: and for default of such issue, then to the use and behoof of the second, third, fourth, fifth, sixth, seventh, eighth, ninth, tenth, and of all and every other the son and sons of the said John Barker on the body of the said Katherine Edwards his intended wife to be begotten, severally, successively, and in remainder, one after another, as they and every of them shall be in seniority of age, and priority of birth, and of the several and respective heirs of the body and bodies of all and every such son and sons lawfully issuing; the elder of such sons, and the heirs of his body issuing, being always to be preferred and to take before the younger of such sons, and the heirs of his or their body or bodies issuing: and for default of such issue, then to the use and behoof of all and every the daughter and daughters of the said John Barker on the body of the said Katherine Edwards his intended wife to be begotten, to be equally divided between them (if more than one), share and share alike, as tenants in common and not as joint-tenants, and of the several and respective heirs of the body and bodies of all and every such daughter and daughters lawfully issuing: and for default of such issue, then to the use and behoof of the heirs of the body of him the said John Barker lawfully issuing: and for default of such heirs, then to the use and behoof of the said Cecilia, the wife of the said Abraham Barker, and of her heirs and assigns for ever. *And* as to, for, and concerning the term of five hundred years herein-before limited to the said Charles Browne and Richard More, their executors, administrators, and assigns, as aforesaid, it is hereby declared and agreed by and between all the said parties to these presents, that the same is so limited to them upon the trusts, and to and for the intents and purposes, and under and subject to the provisoes and agreements, hereinafter mentioned, expressed, and declared, of and concerning the same: that is to say, in case there shall be an eldest or only son and one or more other child or children of the said John Barker on the body of the said Katherine his intended wife to be begotten, then upon trust that they the said Charles Browne and Richard More, their executors, administrators, and assigns, by sale or mortgage of the said term of five hundred years, or by such other ways and means as they or the survivor of them, or the executors or administrators of such survivor, shall think fit, shall and do raise and levy, or borrow and take up at interest, the sum of four thousand pounds of lawful money of Great Britain, for the portion or portions of such other child or children (besides the eldest or only son) as aforesaid, to be equally divided between them (if more than one) share and share alike; the portion or portions of such of them as shall be a son or sons to be paid at his or their respective age or ages of twenty-one years; and the portion or portions of such of them as shall be a daughter or daughters to be paid at her or their respective age or ages of twenty-one years, or day or days of marriage, which shall first happen. And upon this further trust, that in the mean time and until the same por-

reserve contingent remainders:

Remainder to the wife for life, for her jointure, in bar of dower:

Remainder to other trustees for a term, upon trusts after mentioned:

Remainder to the first and other sons of the marriage in tail:

Remainder to the daughters,

as tenants in common, in tail:

Remainder to the husband in tail:

Remainder to the husband's mother in fee.

The trust of the term declared;

to raise portions for younger children,

payable at certain times,

with mainte-

tions shall become payable as aforesaid, the said Charles Browne and Richard More, their executors, administrators, and assigns, shall and do, by and out of the rents, issues, and profits of the premises aforesaid, raise and levy such competent yearly sum and sums of money for the maintenance and education of such child or children, as shall not exceed in the whole the interest of their respective portions after the rate of four pounds in the hundred yearly. Provided always, that in case any of the same children shall happen to die before his, her, or their portions shall become payable as aforesaid, then the portion or portions of such of them so dying shall go and be paid unto and be equally divided among the survivor or survivors of them, when and at such time as the original portion or portions of such surviving child or children shall become payable as aforesaid. *Provided* also, that, in case there shall be no such child or children of the said John Barker on the body of the said Katherine his intended wife begotten, besides an eldest or only son; or in case all and every such child or children shall happen to die before all or any of their said portions shall become due and payable as aforesaid; or in case the said portions, and also such maintenance as aforesaid, shall by the said Charles Browne and Richard More, their executors, administrators, or assigns, be raised and levied by any of the ways and means in that behalf afore-mentioned; or in case the same by such person or persons as shall for the time being be next in reversion or remainder of the same premises expectant upon the said term of five hundred years, shall be paid, or well and duly secured to be paid, according to the true intent and meaning of these presents; then and in any of the said cases, and at all times thenceforth, the said term of five hundred years, or so much thereof as shall remain unsold or undisposed of for the purposes aforesaid, shall cease, determine, and be utterly void to all intents and purposes, any thing herein contained to the contrary thereof in any wise notwithstanding. *Provided* also, and it is hereby further declared and agreed by and between all the said parties to these presents, that in case the said Abraham Barker or Cecilia his wife, at any time during their lives, or the life of the survivor of them, with the approbation of the said David Edwards and Francis Golding, or the survivor of them, or the executors and administrators of such survivor, shall settle, convey, and assure other lands and tenements of an estate of inheritance in fee-simple, in possession, in some convenient place or places within the realm of England, of equal or better value than the said capital messuage, lands, tenements, hereditaments, and premises, hereby granted and released, and in lieu and recompense thereof, unto and for such and the like uses, intents and purposes, and upon such and the like trusts, as the said capital messuage, lands, tenements, hereditaments, and premises are hereby settled and assured unto and upon, then and in such case, and at all times from thenceforth, all and every the use and uses, trust and trusts, estate and estates herein-before limited, expressed, and declared of or concerning the same, shall cease, determine, and be utterly void to all intents and purposes; and the same capital messuage, lands, tenements, hereditaments, and premises, shall from thenceforth remain and be to and for the only proper use and behoof of the said Abraham Barker or Cecilia his wife, or the survivor of them, so settling, conveying, and assuring such other lands and tenements as aforesaid, and of his or her heirs and assigns for ever; and to and for no other use, intent, or purpose whatsoever; any thing herein contained to the contrary thereof in any wise notwithstanding. *And*, for the considerations aforesaid, and for barring all estates-tail, and all remainders or reversions thereupon expectant or depending, if any be now subsisting and unbarred or otherwise undetermined, of and in the said capital messuage, lands, tenements, hereditaments, and premises, hereby granted and released, or mentioned to be hereby granted and released, or any of them, or any part thereof, the said Abraham Barker for himself and the said Cecilia his wife, his and her heirs, executors, and administrators, and the said John Barker for himself, his heirs, executors, and administrators, do, and each of them doth, respectively covenant, promise, and grant, to and with the said David Edwards and Francis Golding, their heirs, executors, and administrators, by these presents, that they the said Abraham Barker and Cecilia his wife, and John Barker, shall and will, at the costs and charges of the said Abraham Barker, before the end of Michaelmas term next en-

nance at the rate of 4 *per cent.*

and benefit of survivorship.

If no such child,

or if all die,

or if the portions be raised,

or paid,

or secured by the person next in remainder; the residue of the term to cease.

Condition, that the uses and estates hereby granted shall be void, on settling other lands of equal value in recompense.

Covenant to levy a fine;

No. II.

suing the date hereof, acknowledge and levy, before his majesty's justices of the court of Common Pleas at Westminster, one or more fine or fines, *sur cognizance de droit, come ceo, &c.* with proclamations according to the form of the statutes in that case made and provided, and the usual course of fines in such cases accustomed, unto the said David Edwards, and his heirs, of the said capital messuage, lands, tenements, hereditaments, and premises, by such apt and convenient names, quantities, qualities, number of acres and other descriptions to ascertain the same, as shall be thought meet; which said fine or fines, so as aforesaid, or in any other manner, levied and acknowledged, or to be levied and acknowledged, shall be and enure, and shall be adjudged, deemed, construed, and taken, and so are and were meant and intended, to be and enure, and are hereby declared by all the said parties to these presents to be and enure, to the use and behoof of the said David Edwards, and his heirs and assigns; to the intent and purpose that the said David Edwards may, by virtue of the said fine or fines so covenanted and agreed to be levied as aforesaid, be and become perfect tenant of the freehold of the said capital messuage, lands, tenements, hereditaments, and all other the premises, to the end that one or more good and perfect common recovery or recoveries may be thereof had and suffered, in such manner as is hereinafter for that purpose mentioned. And it is hereby declared and agreed by and between all the said parties to these presents, that it shall and may be lawful to and for the said Francis Golding, at the costs and charges of the said Abraham Barker, before the end of Michaelmas term next ensuing the date hereof, to sue forth and prosecute out of his majesty's high court of Chancery, one or more writ or writs of entry *sur disseisin en le post*, returnable before his majesty's Justices of the court of Common Pleas at Westminster, thereby demanding by apt and convenient names, quantities, qualities, number of acres, and other descriptions, the said capital messuage, lands, tenements, hereditaments, and premises, against the said David Edwards; to which said writ, or writs, of entry he the said David Edwards shall appear *gratis*, either in his own proper person, or by his attorney thereto lawfully authorized, and vouch over to warranty the said Abraham Barker and Cecilia his wife, and John Barker; who shall also *gratis* appear in their proper persons, or by their attorney or attornies, thereto lawfully authorized, and enter into the warranty, and vouch over to warranty the common vouchee of the same court; who shall also appear, and after imparlance shall make default: so as judgment shall and may be thereupon had and given for the said Francis Golding, to recover the said capital messuage, lands, tenements, hereditaments, and premises, against the said David Edwards, and for him to recover in value against the said Abraham Barker and Cecilia his wife, and John Barker, and for them to recover in value against the said common vouchee, and that execution shall and may be thereupon awarded and had accordingly, and all and every other act and thing be done and executed, needful and requisite for the suffering and perfecting of such common recovery or recoveries, with vouchers as aforesaid. And it is hereby further declared and agreed by and between all the said parties to these presents, that immediately from and after the suffering and perfecting of the said recovery or recoveries, so as aforesaid, or in any other manner, or at any other time or times, suffered or to be suffered, as well these presents and the assurance hereby made, and the said fine or fines so covenanted to be levied as aforesaid, as also the said recovery or recoveries, and also all and every other fine or fines, recovery and recoveries, conveyances, and assurances in the law whatsoever heretofore had, made, levied, suffered, or executed, or hereafter to be had, made, levied, suffered, or executed, of the said capital messuage, lands, tenements, hereditaments, and premises, or any of them, or any part thereof, by and between the said parties to these presents, or any of them, or whereunto they or any of them are or shall be parties or privies, shall be and enure, and shall be adjudged, deemed, construed, and taken, and so are and were meant and intended, to be and enure, and the recoveror or recoverors in the said recovery or recoveries named or to be named, and his or their heirs, shall stand and be seised of the said capital messuage, lands, tenements, hereditaments, and premises, and of every part and parcel thereof, to the uses, upon the trusts, and to and for the intents and purposes, and under and subject to the

In order to make a tenant to the *precipe*, that a recovery may be suffered;

to enure.

to the preced-

provisoes, limitations, and agreements, herein-before mentioned, expressed, and declared, of and concerning the same. *And* the said Abraham Barker, party hereunto, doth hereby, for himself, his heirs, executors, and administrators, further covenant, promise, grant and agree to and with the said David Edwards and Francis Golding, their heirs, executors, and administrators, in manner and form following; that is to say, that the said capital messuage, lands, tenements, hereditaments, and premises, shall and may at all times hereafter remain, continue, and be, to and for the uses and purposes, upon the trusts, and under and subject to the provisoes, limitations, and agreements, herein-before mentioned, expressed, and declared, of and concerning the same; and shall and may be peaceably and quietly had, held, and enjoyed accordingly, without any lawful let or interruption of or by the said Abraham Barker or Cecilia his wife, parties hereunto, his or her heirs or assigns, or of or by any other person or persons lawfully claiming or to claim from, by, or under, or in trust for, him, her, them, or any of them; or from, by, or under his or her ancestors, or any of them; and shall so remain, continue, and be, free and clear, and freely and clearly acquitted, exonerated, and discharged, or otherwise by the said Abraham Barker or Cecilia his wife, parties hereunto, his or her heirs, executors, or administrators, well and sufficiently saved, defended, kept harmless, and indemnified, of, from, and against all former and other gifts, grants, bargains, sales, leases, mortgages, estates, titles, troubles, charges, and incumbrances whatsoever, had, made, done, committed, occasioned, or suffered, or to be had, made, done, committed, occasioned, or suffered, by the said Abraham Barker or Cecilia his wife, or by his or her ancestors, or any of them, or by his, her, their, or any of their, act, means, assent, consent, or procurement: *And moreover* that he the said Abraham Barker and Cecilia his wife, parties hereunto, and his or her heirs, and all other persons having or lawfully claiming, or which shall or may have or lawfully claim, any estate, right, title, trust, or interest, at law or in equity, of, in, to, or out of, the said capital messuage, lands, tenements, hereditaments, and premises, or any of them, or any part thereof, by or under or in trust for him, her, them, or any of them, or by or under his or her ancestors or any of them, shall and will, from time to time, and at all times hereafter, upon every reasonable request, and at the costs and charges of the said David Edwards and Francis Golding, or either of them, their or either of their heirs, executors, or administrators, make, do, and execute, or cause to be made, done, and executed, all such further and other lawful and reasonable acts, deeds, conveyances, and assurances in the law whatsoever, for the further, better, more perfect, and absolute granting, conveying, settling, and assuring of the same capital messuage, lands, tenements, hereditaments, and premises, to and for the uses and purposes, upon the trusts, and under and subject to the provisoes, limitations, and agreements herein-before mentioned, expressed, and declared, of and concerning the same, as by the said David Edwards and Francis Golding, or either of them, their or either of their heirs, executors, or administrators, or their or any of their counsel learned in the law, shall be reasonably advised, devised, or required: so as such further assurances contain in them no further or other warranty or covenants than against the person or persons, his, her, or their heirs, who shall make or do the same; and so as the party or parties who shall be requested to make such further assurances, be not compelled or compellable, for making or doing thereof, to go and travel above five miles from his, her, or their then respective dwellings, or places of abode. *Provided lastly*, and it is hereby further declared and agreed by and between all the parties to these presents, that it shall and may be lawful to and for the said Abraham Barker and Cecilia his wife, John Barker and Katherine his intended wife, and David Edwards, at any time or times hereafter, during their joint lives, by any writing or writings under their respective hands and seals, and attested by two or more credible witnesses, to revoke, make void, alter or change all and every or any the use and uses, estate and estates, herein and hereby before limited and declared, or mentioned or intended to be limited and declared, of and in the capital messuage, lands, tenements, hereditaments, and premises aforesaid, or of and in any part or parcel thereof, and to declare new and other uses of the same, or of any part or parcel thereof, any thing herein contained to the contrary thereof in

No. II.

ing uses in this deed.

Other covenants; for quiet enjoyment,

free from incumbrances;

and for further assurance.

Power of revocation.

No. III. Conclusion.

any wise notwithstanding. *In witness* whereof the parties to these presents their hands and seals have subscribed and set, the day and year first above written.

Sealed and delivered, being first duly stamped, in the presence of
George Carter.
William Browne.

Abraham Barker. (L. S.)
Cecilia Barker. (L. S.)
David Edwards. (L. S.)
Francis Golding. (L. S.)
Charles Browne. (L. S.)
Richard More. (L. S.)
John Barker. (L. S.)
Katherine Edwards. (L. S.)

No. III.

AN OBLIGATION, OR BOND, WITH CONDITION FOR THE PAYMENT OF MONEY.

KNOW ALL MEN by these presents, that I David Edwards of Lincoln's Inn, in the county of Middlesex, esquire, am held and firmly bound to Abraham Barker of Dale Hall in the county of Norfolk, esquire, in ten thousand pounds of lawful money of Great Britain to be paid to the said Abraham Barker, or his certain attorney, executors, administrators, or assigns; for which payment well and truly to be made, I bind myself, my heirs, executors, and administrators, firmly by these presents, sealed with my seal. Dated the fourth day of September in the twenty-first year of the reign of our sovereign lord George the second, by the grace of God king of Great Britain, France, and Ireland, defender of the faith, and so forth, and in the year of our Lord one thousand seven hundred and forty-seven.

The condition of this obligation is such, that if the above-bounden David Edwards, his heirs, executors, or administrators, do and shall well and truly pay, or cause to be paid, unto the above-named Abraham Barker, his executors, administrators, or assigns, the full sum of five thousand pounds of lawful British money, with lawful interest for the same, on the fourth day of March next ensuing the date of the above-written obligation, then this obligation shall be void and of none effect, or else shall be and remain in full force and virtue.

Sealed and delivered, being first duly stamped, in the presence of
George Carter.
William Browne.

David Edwards. (L. S.)

No. IV.

A FINE OF LANDS SUR COGNIZANCE DE DROIT, COME CEO, &c.

SECT. 1. WRIT OF COVENANT; OR PRÆCIPE.

GEORGE the second, by the grace of God, of Great Britain, France, and Ireland king, defender of the faith, and so forth, to the sheriff of Norfolk, greeting. *Command* Abraham Barker, esquire, and Cecilia his wife, and John Barker, esquire, that justly and without delay they perform to David Edwards, esquire, the covenant made between them of two messuages, two gardens, three hundred acres of land, one hundred acres of meadow, two hundred acres of pasture, and fifty acres of wood, with the appurtenances, in Dale; and unless they shall so do, and if the said David shall give you security of prosecuting his claim, then summon by good summoners the said Abraham, Cecilia, and John, that they appear before our justices at Westminster, from the day of St. Michael in one month, to shew wherefore they

have not done it: and have you there the summoners, and this writ. Witness ourself at Westminster the ninth day of October, in the twenty-first year of our reign. No. IV.

Pledges of prosecution.	John Doe. Richard Roe.	Summoners of the within-named Abraham, Cecilia, and John.	John Den. Richard Fen.	Sheriff's return.

SECT. 2. THE LICENCE TO AGREE.

Norfolk, to wit, } DAVID EDWARDS, esquire, gives to the lord the king ten marks, for licence to agree with Abraham Barker, esquire, of a plea of covenant of two messuages, two gardens, three hundred acres of land, one hundred acres of meadow, two hundred acres of pasture, and fifty acres of wood, with the appurtenances, in Dale.

SECT. 3. THE CONCORD.

AND the agreement is such, to wit, that the aforesaid Abraham, Cecilia, and John have acknowledged the aforesaid tenements, with the appurtenances, to be the right of him the said David, as those which the said David hath of the gift of the aforesaid Abraham, Cecilia, and John; and those they have remised and quitted claim, from them and their heirs, to the aforesaid David, and his heirs, for ever. And further, the same Abraham, Cecilia, and John, have granted, for themselves and their heirs, that they will warrant to the aforesaid David, and his heirs, the aforesaid tenements, with the appurtenances, against all men, for ever. And for this recognition, remise, quit-claim, warranty, fine, and agreement, the said David hath given to the said Abraham, Cecilia, and John, two hundred pounds sterling.

SECT. 4. THE NOTE OR ABSTRACT.

Norfolk, to wit. } BETWEEN David Edwards, esquire, complainant, and Abraham Barker, esquire, and Cecilia his wife, and John Barker, esquire, deforciants, of two messuages, two gardens, three hundred acres of land, one hundred acres of meadow, two hundred acres of pasture, and fifty acres of wood, with the appurtenances, in Dale, whereupon a plea of covenant was summoned between them: to wit, that the said Abraham, Cecilia, and John, have acknowledged the aforesaid tenements, with the appurtenances, to be the right of him the said David, as those which the said David hath of the gift of the aforesaid Abraham, Cecilia, and John; and those they have remised and quitted claim, from them and their heirs, to the aforesaid David and his heirs for ever. And further, the same Abraham, Cecilia, and John, have granted for themselves, and their heirs, that they will warrant to the aforesaid David, and his heirs, the aforesaid tenements, with the appurtenances, against all men, for ever. And for this recognition, remise, quit-claim, warranty, fine, and agreement, the said David hath given to the said Abraham, Cecilia, and John, two hundred pounds sterling.

SECT. 5. THE FOOT, CHIROGRAPH, OR INDENTURES OF THE FINE.

Norfolk, to wit. } THIS IS THE FINAL AGREEMENT, made in the court of the lord the king at Westminster, from the day of Saint Michael in one month, in the twenty-first year of the reign of the lord George the second, by the grace of God, of Great Britain, France, and Ireland king, defender of the faith, and so forth, before John Willes, Thomas Abney, Thomas Burnet, and Thomas Birch, justices, and other faithful subjects of the lord the king then there present, between David Edwards, esquire, complainant, and Abraham Barker, esquire, and Cecilia his wife, and John Barker, esquire, deforciants, of two messuages, two gardens, three hundred acres of land, one hundred acres of meadow, two hundred acres of pasture, and fifty acres of wood, with the appurtenances, in Dale, whereupon a plea of covenant was summoned between them in the said court; to wit, that the

No. IV.

aforesaid Abraham, Cecilia, and John, have acknowledged the aforesaid tenements, with the appurtenances, to be the right of him the said David, as those which the said David hath of the gift of the aforesaid Abraham, Cecilia, and John; and those they have remised and quitted claim, from them and their heirs, to the aforesaid David, and his heirs, for ever. And further, the same Abraham, Cecilia, and John, have granted for themselves and their heirs, that they will warrant to the aforesaid David and his heirs, the aforesaid tenements, with the appurtenances, against all men, for ever. And for this recognition, remise, quit-claim, warranty, fine, and agreement, the said David hath given to the said Abraham, Cecilia, and John, two hundred pounds sterling.

SECT. 6. PROCLAMATIONS, ENDORSED UPON THE FINE, ACCORDING TO THE STATUTES.

THE FIRST proclamation was made the sixteenth day of November, in the term of Saint Michael, in the twenty-first year of the king within-written.

The second proclamation was made the fourth day of February, in the term of Saint Hilary, in the twenty-first year of the king within-written.

The third proclamation was made the thirteenth day of May, in the term of Easter, in the twenty-first year of the king within-written.

The fourth proclamation was made the twenty-eighth day of June, in the term of the holy Trinity, in the twenty-second year of the king within-written.

No. V.

No. V.

A COMMON RECOVERY OF LANDS WITH* DOUBLE VOUCHER.

SECT. 1. WRIT OF ENTRY SUR DISSEISIN IN THE POST; OR PRÆCIPE.

GEORGE the second, by the grace of God, of Great Britain, France, and Ireland king, defender of the faith, and so forth, to the sheriff of Norfolk, greeting. *Command* David Edwards, esquire, that, justly and without delay, he render to Francis Golding, clerk, two messuages, two gardens, three hundred acres of land, one hundred acres of meadow, two hundred acres of pasture, and fifty acres of wood, with the appurtenances, in Dale, which he claims to be his right and inheritance, and into which the said David hath not entry, unless after the disseisin, which Hugh Hunt thereof unjustly, and without judgment, hath made to the aforesaid Francis, within thirty years now last past, as he saith, and whereupon he complains that the aforesaid David deforceth him. And unless he shall so do, and if the said Francis shall give you security of prosecuting his claim, then summon by good summoners the said David, that he appear before our justices at Westminster on the octave of Saint Martin, to shew wherefore he hath not done it: and have you there the summoners, and this writ. *Witness* ourself at Westminster, the twenty-ninth day of October, in the twenty-first year of our reign.

Sheriff's return. Pledges of prosecution. John Doe. Richard Roe. Summoners of the within-named David. John Den. Richard Fen.

SECT. 2. EXEMPLIFICATION OF THE RECOVERY-ROLL.

GEORGE the second, by the grace of God, of Great Britain, France, and Ireland king, defender of the faith, and so forth, to all to whom these our present letters shall come, greeting. *Know ye*, that among the pleas of

* Note, that, if the recovery be had with single voucher, the parts marked "thus" in sect. 2, are omitted.

No. V.

land enrolled at Westminster, before Sir John Willes, knight, and his fellows, our justices of the bench, of the term of Saint Michael, in the twenty-first year of our reign, upon the fifty-second roll it is thus contained: *Entry* returnable on the octave of Saint Martin. *Norfolk*, to wit: Francis Golding, clerk, in his proper person demandeth against David Edwards, esquire, two messuages, two gardens, three hundred acres of land, one hundred acres of meadow, two hundred acres of pasture, and fifty acres of wood, with the appurtenances, in Dale, as his right and inheritance, and into which the said David hath not entry, unless after the disseisin which Hugh Hunt thereof unjustly, and without judgment, hath made to the aforesaid Francis, within thirty years now last past. And whereupon he saith, that he himself was seised of the tenements aforesaid, with the appurtenances, in his demesne as of fee and right, in time of peace, in the time of the lord the king that now is, by taking the profits thereof to the value [*of six shillings and eight pence, and more, in rents, corn, and grass]: and into which [the said David hath not entry, unless as aforesaid]: and thereupon he bringeth suit [and good proof]. *And* the said David in his proper person comes and defendeth his right, when [and where it shall behove him], and thereupon voucheth to warranty "John Barker, "esquire; who is present here in court in his proper person, and the tene- "ments aforesaid, with the appurtenances to him freely warranteth [and "prays that the said Francis may count against him]. *And* hereupon the "said Francis demandeth against the said John, tenant by his own war- "ranty, the tenements aforesaid, with the appurtenances, in form aforesaid, "&c. And whereupon he saith, that he himself was seised of the tene- "ments aforesaid, with the appurtenances, in his demesne as of fee and "right, in time of peace, in the time of the lord the king that now is, by "taking the profits thereof to the value, &c. And into which, &c. And "thereupon he bringeth suit, &c. *And* the aforesaid John, tenant by his "own warranty, defends his right, when, &c. and thereupon he further "voucheth to warranty" Jacob Morland; who is present here in court in his proper person, and the tenements aforesaid, with the appurtenances, to him freely warranteth, &c. *And* hereupon the said Francis demandeth against the said Jacob, tenant by his own warranty, the tenements aforesaid, with the appurtenances, in form aforesaid, &c. And whereupon he saith, that he himself was seised of the tenements aforesaid, with the appurtenances, in his demesne as of fee and right, in time of peace, in the time of the lord the king that now is, by taking the profits thereof to the value, &c. And into which, &c. And thereupon he bringeth suit, &c. *And* the aforesaid Jacob, tenant by his own warranty, defends his right, when, &c. And saith that the aforesaid Hugh did not disseise the aforesaid Francis of the tenements aforesaid, as the aforesaid Francis by his writ and count aforesaid above doth suppose: and of this he puts himself upon the country. *And* the aforesaid Francis thereupon craveth leave to imparl; and he hath it. And afterwards the aforesaid Francis cometh again here into court, in this same term in his proper person, and the aforesaid Jacob, though solemnly called, cometh not again, but hath departed in contempt of the court, and maketh default. *Therefore it is considered*, that the aforesaid Francis do recover his seisin against the aforesaid David of the tenements aforesaid, with the appurtenances: and that the said David have of the land of the aforesaid "John, to the value [of the tenements aforesaid]; and further, "that the said John have of the land of the said" Jacob to the value [of the tenements aforesaid]. And the said Jacob in mercy. *And* hereupon the said Francis prays a writ of the lord the king, to be directed to the sheriff of the county aforesaid, to cause him to have full seisin of the tenements aforesaid, with the appurtenances: and it is granted unto him, returnable here without delay. Afterwards, that is to say, the twenty-eighth day of November in this same term, here cometh the said Francis in his proper person; and the sheriff, namely, Sir Charles Thompson, knight, now sendeth, that he by virtue of the writ aforesaid to him directed, on the twenty-fourth day of the same month, did cause the said Francis to have full seisin of the tenements aforesaid with the appurtenances, as he was commanded.

Return.
Demand against the tenant.
Count.
Esplees.
Defence of the tenant.
Voucher.
" Warranty.
" Demand
" against the
" vouchee.
" Count.
" Defence of
" the vouchee.
" Second
" voucher.
" Warranty.
Demand against the common vouchee.
Count.
Defence of the common vouchee.
Plea, *nul disseisin.*
Imparlance.
Default of the common vouchee.
Judgment for the demandant.
Recovery in value.
Amercement.
Award of the writ of seisin, and return.

* The clauses between hooks are no otherwise expressed in the record than by an &c.

No. VI.

Exemplification continued Tests.

All and singular which premises, at the request of the said Francis, by the tenor of these presents, we have held good to be exemplified. In testimony whereof we have caused our seal, appointed for sealing writs in the Bench aforesaid, to be affixed to these presents. *Witness* Sir John Willes, knight, at Westminster, the twenty-eighth day of November, in the twenty-first year of our reign.

COOKE.

END OF VOL. I.