

# COMMENTARIES

ON THE

# LAWS OF ENGLAND.

IN FOUR BOOKS.

BY

SIR WILLIAM BLACKSTONE, KNT.

ONE OF THE JUSTICES OF HIS MAJESTY'S COURT OF COMMON PLEAS.

WITH

NOTES SELECTED FROM THE EDITIONS OF ARCHBOLD, CHRISTIAN, COLERIDGE, CHITTY, STEWART  
KERR, AND OTHERS,

BARRON FIELD'S ANALYSIS,

AND

*Additional Notes, and a Life of the Author,*

BY

GEORGE SHARSWOOD,

CHIEF JUSTICE OF THE SUPREME COURT OF PENNSYLVANIA.

IN TWO VOLUMES.

VOL. I.—BOOKS I. & II.

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PREFACE BY THE AMERICAN EDITOR.

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THE present edition of the Commentaries of Sir William Blackstone has been prepared with especial reference to the use of American law-students. The main object of the notes, selected and original, has been to correct any statement in itself erroneous, and to explain what might be calculated to mislead. In some cases where the text appeared to pass over important topics, they have been introduced in order to render the book complete as an institute of legal education. Besides the editions of Archbold, Christian, and Chitty, which have been republished in this country, the editor has drawn largely upon the valuable notes of Mr. Justice Coleridge. The late English editions by James Stewart and Robert Malcolm Kerr—in which all the recent alterations by statutes have been referred to and incorporated—have been freely used, and an occasional note will be found from the late abridgment of Blackstone by Samuel Warren; and the attention of the student is especially called to the notes added to the last chapter of the work, on the rise, progress, and gradual improvement of the laws of England, for valuable sketches by Coleridge, John William Smith, Stewart, Warren, and Kerr, of the latest enactments, to which the American editor has ventured to add some remarks upon American jurisprudence. Barron Field's Analysis—a most important aid to the student in the work of self-examination—has been added at the end. On the whole, it is hoped that this edition—the fruit of much care and toil, as much in rejecting (which does not appear) as in adopting (which does)—may meet the approbation of the profession and the public.

G. S.

PILADELPHIA, June. 1859.

## PREFACE.

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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 patronized 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 benefactions 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.

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## 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 animadvertisers 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.

A MEMOIR  
OF  
SIR WILLIAM BLACKSTONE,  
BY THE AMERICAN EDITOR.

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THE ambition of posthumous fame is very general, if not universal, among mankind. It is one of the strong arguments for our immortality, that we stretch out our desires beyond the brief span of our present existence and live in the future. A sad and dreary thought would it be to a man,—that of dying unwept by any one, unhonoured by any survivor, and entirely forgotten as soon as removed from sight. If not an actor upon the more prominent theatre of the world's history, within some narrower circle of society—his neighbourhood, his friends, his family, or at least his descendants—every one looks anxiously forward, in the hope that his memory will be respectfully cherished, his faults and foibles overlooked and excused, his virtues adorned in their fairest and loveliest colours. Whether, in that spirit-land where our immortal natures still live after their earthly tabernacles have crumbled to their original clay, they have any knowledge of or interest in the affairs of the world which they have left behind, we do not know: it has not been revealed to us. From that bourne no traveller has returned. The faculties and powers of the soul,—especially memory,—the strong affections of the heart, all belonging to and constituting an inseparable part of its spiritual nature, as well as its unwearying activity even while the body reposes in soundest slumber, render it, to say the least, a reasonable conjecture that, though engaged in moral and intellectual employments and enjoyments much nobler and purer than earth's, they are still spectators—interested, curious spectators—in the works of God's providence which relate to his moral creation. The common superstitions of the people in all ages and countries, which may be regarded either as the tradition of an original revelation or the result of a strongly-impressed innate sentiment, are not without weight on such a question. Such superstitions have intertwined themselves with the earliest poetry: they form a part of the legends of childhood: in spite of ourselves, we are all, more or less, believers in the communion of spirits. The man who has entirely cast off this prejudice or superstition, if we please to term it so, has lost one restraint which has been known to exert its salutary influence when even the sense of higher accountability has been disregarded. We may well fancy, then,

a power in departed spirits of watching and tracing the influences of their own lives, writings, or actions upon those who have come after them. If these influences have been for human virtue and happiness, the wider and more extended the purer must be the pleasure afforded; if they are otherwise, they must be the source of bitter, unavailing, and never-ending regrets. Such considerations may well excite us to the practice of virtuous actions, to the cultivation of noble and generous sympathies and emotions; a part of their appropriate reward may be the observation hereafter of their widening circles as they spread with their influences for good the name we have borne, down to the remotest generation.

The fame of a lawyer, however much he may live in the public eye, and however large may seem the space he occupies in the public consideration, is in general a very narrow and circumscribed one. He is prominently useful in his own day and generation and among his contemporaries. He supports and defends the accused and oppressed; he maintains the cause of the poor and friendless; he succours those that are ready to perish; he counsels the ignorant, he guides and saves those who are wandering and out of the way, and, when "he has run his course and sleeps in blessings," his bones "have a tomb of orphans' tears wept on them." How much untold good is done by an honest, wise, and generous man, in the full practice of this profession, which even those to whom he has consecrated his time and thoughts without the hope of adequate compensation never appreciate! How often, contrary to his own interest, does he succeed in calming the surges of passion, and leading the bitter partisan to measures of peace and compromise! How often does his beneficence possess that best and purest characteristic of the heavenly grace, that his right hand knoweth not what his left hand doeth! Yet—beyond the circle of his own profession, the student of which may occasionally meet with a few brief evidences of his learning and industry in print on the pages of some dusty report-book, and pause to spell his name and wonder who he was—posterity will scarcely ever hear of him, and his severest efforts and brightest intellectual achievements will sink forever in the night of oblivion. The important case of *Taylor on the demise of Atkyns vs. Horde* was argued before Lord Mansfield and the court of King's Bench about one hundred years ago. The title to a large estate was at issue; knotty and difficult points of old law-learning were required to be discussed, and they were discussed with exhausting research and ability. It is not to be doubted that the counsel engaged were the most eminent at the English bar. We have a further assurance from the character of some of them. Mr. Pratt,—afterwards Lord Camden, a name forever associated with English liberty, as the dauntless opponent of general warrants, and the champion of American colonial rights upon the floor of Parliament,—Mr. Yorke, son of Lord-Chancellor Hardwicke, the Hon. Charles Yorke, afterwards Lord-Chancellor, are named as of counsel for plaintiff. With them were Mr. Caldecot, the compiler of the Settlement Cases. Opposed to these men, there were for the defendant the names of Mr. Knowles, Mr. Perrot, and Mr. Sergeant Prime. Pratt and Yorke having occupied high poli-

tical and judicial positions, their lives have been written, their characters have been portrayed and will be preserved. Who were these others deemed worthy to enter the lists and measure lances with them in this important intellectual contest? Where is their memorial, even among the members of that profession of which, while they lived, they were the pride and ornament?

Besides official and political position, which must frequently give character and fame to the lawyer, there are some other exceptions,—of those who hand down their names within the bounds of their profession by contributing valuable works to its legal literature. The legal writings of Lord Coke have contributed more than his office and influence to this result. Hale, Foster, Gilbert, and others may be placed in the same category. But that they have largely paid that debt which, according to Lord Bacon, every man owes to his profession, how soon would the names of Fearne, Hargrave, Butler, Preston, Powell, Stephen, and Williams have to be classed with those of Knowles, Perrot, and Prime!

There is one English legal writer whose fortune in this respect is peculiar. He produced an elementary work,—written with so much system and accuracy, and in style and language so pure and elegant, that it not only at once assumed and has ever since maintained the place of First Institute of legal education to all who make the common law of England their special study, but became a book of instruction and interest to scholars and gentlemen of all pursuits,—which has been for that reason translated into many other tongues. That lawyer was Sir William Blackstone. An American author has in like manner illustrated his name by a work which both here and abroad will forever stand alongside and share the enviable fame of that of the illustrious English commentator: It is unnecessary to name James Kent.

The father of Sir William Blackstone was Charles Blackstone, a citizen and silkman of London, whose family was from the West of England. He was born on the 10th July, 1723: his father had died before; and he lost his mother at the early age of eleven.

By the early loss of both parents, William and his two brothers Charles and Henry were thrown upon the care of their maternal uncles. Charles and Henry were educated at Winchester, under the care of Dr. Bigg, who was warden of that school. Both of them took orders in the Church. The care and education of William fell to the lot of another uncle,—Mr. Thomas Bigg, an eminent surgeon of London.

In 1730, William, then about seven years old, was put to school at the Charter-House, and in 1735 was, by the nomination of Sir Robert Walpole, through the influence of another member of his mother's family, admitted as a scholar upon its foundation. He is said to have been a studious and exemplary boy and to have gained the favour of his masters. At the age of fifteen he was at the head of the school, and was thought sufficiently advanced to be removed to the university; and he was accordingly entered a commouer at Pembroke College, in Oxford, on the 30th of November, 1736. He was allowed to remain at school until after the 12th of December, the anniversary com-

memoration of the foundation of the Charter-House, in order that he might deliver the customary oration in honour of Richard Sutton,—by which he gained much applause.

After having been three years prosecuting his studies at this illustrious seat of learning, on the 20th November, 1741, being then eighteen, he entered himself a member of the Middle Temple and commenced the study of the law. He was called to the bar as soon as the probationary period of five years had expired,—viz., on the 28th November, 1746.

In the early periods of English jurisprudence, the Inns of Court were resorted to by large numbers of young gentlemen, not merely to acquire a profession, but to complete a liberal education by the study of the laws of their country. In the time of Fortescue, who wrote in the reign of Henry VI., there are said to have been about eighteen hundred or two thousand students in the Inns of Court and Chancery. The number was still very considerable in the time of Ben Jonson, who has left on record his estimate of their influence and character in the dedication of his comedy of *Every Man out of his Humour*, which he inscribed "To the noblest nurseries of humanity and liberty in the kingdom, the Inns of Court." To characterize a law-school as the nursery of sound learning and civil liberty is indeed a highly-wrought eulogium of the legal profession,—a praise, however, which its history shows to have been well deserved. In the Inns of Chancery the younger students of the law were usually placed, "learning and studying," says Fortescue, "the originals, and as it were the elements, of the law; who profiting therein, as they grew to ripeness, so were they admitted into the greater inns of the same study, called the Inns of Court."

The word "Inns" was anciently used to denote town-houses, in which the nobility and gentry resided when they were in attendance at court; and it is frequently employed by the old poets to denote a spacious and elegant mansion. The Inns of Court were in old French termed *hostells*. In the court-records in Latin they are called *hospitia*; while *diversoria* is the name applied to public lodging-houses, which are now commonly known as inns. The buildings originally purchased for the purposes of these legal societies, having been at the time private residences, still retained in their new use the ancient names by which they were designated. The Middle and Inner Temples were formerly dwellings of the Knights Templars; Lincoln's and Gray's Inn anciently belonged to the Earls of Lincoln and Gray. So the names of the several Inns of Chancery are taken from the names of their original proprietors,—except New Inn, Staple Inn, which belonged to the Merchants of the Staple, and Lion Inn, which was a common tavern, with the sign of the lion.

There can be no doubt that there was originally provided in these schools some system of instruction for the students. Competent persons, termed *readers*, were appointed to deliver public lectures. Such men as More, Coke, and Holt were chosen as readers. They fell into disuse, however; and before the time of Blackstone the student at the Inns was left to his own discretion, and was even called to the bar, after a set time, without any examination as to

his qualification for the exercise of his profession. According to the regulations at that time, and with some modification still existing, every man was entitled to be called to the bar who had paid the fees accustomed and due to the Inn at which he had entered, and had kept twelve terms. A term was kept in a very easy and pleasant way indeed, by being present at a certain number of dinners in common—generally five in each term—in presence of the benchers. He must have gone nine times through a certain ceremony which is called *performing an exercise*. Exercises were performed thus. The student was furnished by the steward of the society with a piece of paper, on which was supposed to be written an argument on some point of law, but, owing to the negligence of successive copyists, the writing came at last to consist of a piece of legal jargon wholly unintelligible. When, after-dinner, grace had been said, the student advanced to the barristers' table and commenced reading from this paper; upon which one of the barristers present made him a slight bow, took the paper from him and told him that it was quite sufficient. Throwing aside this piece of antiquated and ridiculous mummary, we may say, then, that practically all that was required as a qualification for the English bar was that the applicant had eaten sixty dinners at certain intervals.

We have not been informed under whose advice or by whose direction Blackstone prosecuted his course of legal studies in the Middle Temple. He has himself depicted in a very lively manner the dangers and difficulties of such a course:—"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 inexperienced 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; 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."

We may conjecture that Blackstone began with Finch, and then proceeded to set upon the rough mines of legal treasure to be found in Coke upon Littleton, as well as to look into Bracton, Glanville, Fleta, and the Reports. It was somewhat better than when, not quite two centuries before, in 1652, Sir Henry Spelman so graphically described it as *linguam peregrinam, dialectum barbarum, methodum inconcinnum, molem non ingentem solum sed perpetuis humeris sustinendam*.

The young student, whose career we are to sketch, little thought that, in the design of Providence, he was the engineer selected to make a new road through this wild and almost impassable country, and that he would do so with so much skill and judgment, and at the same time adorn its sides and environs with so green and rich a landscape, as to convert the journey from a wearisome toil

to an attractive pleasure. For almost a century the Commentaries have been the first book of the student of law; and, whatever criticisms have been or may be made upon their learning or accuracy, the fact is, that no lawyer fails to make them a part of his course of study, sooner or later.

At Oxford he had been a diligent student. Before he was twenty, he had compiled a treatise on the Elements of Architecture, with plans and drawings from his own pen. He devoted a large portion of his time to elegant literature, and had cultivated to a considerable extent the art of poetry. Even at school he had shown poetic ability by some verses on Milton, for which he was rewarded with a gold medal. Upon betaking himself to the study of the law, he appears to have considered it necessary to abandon this employment. He wrote "The Lawyer's Farewell to his Muse," which was afterwards printed in Dodsley's Miscellanies,—a poem exhibiting a cultivated taste and a chastened fancy, as well as great command of language. Afterwards, in 1751, he wrote an elegy on the death of Frederick, Prince of Wales, which was published in the Oxford Collection. Judging from these pieces, it is, perhaps, not a subject of regret that he relinquished poetry; nor are we tempted to exclaim, as Pope did of Lord Mansfield,—

*How sweet an Ovid, Murray, was our boast,  
How many Martials were in Pulteney lost.*

It has, however, been well remarked that "to his early predilection for poetry we may reasonably attribute the formation of that exquisite style and method with which he afterwards embellished and illustrated the law. For nothing so well can teach us that propriety of expression, that felicity of illustration, and that symmetry of method by which the most abstruse subject may be rendered clear and delightful, as the study of the works of those who may be styled the masters of language." It is not uncommon to hear the expression, "The law is a jealous mistress." It is true that this profession, like all others, demands of those who would succeed in it an earnest and entire devotion. It must be the main business of the student: he must love it. But it is not inconsistent with all this that he should still pursue his classical reading,—that he should maintain a constant acquaintance and familiarity with those authors in every tongue who, by the unanimous award of time, are the standards of taste and eloquence. A man may become a first rate practitioner or scrivener by devoting himself exclusively to professional reading, and, if money be his whole object, with great success; but if his aim be—as it ought to be—higher, then liberal studies will be found as necessary to make the truly great and accomplished lawyer as any other. It is not the mere gathering of flowers in devious by-paths, but of rich and nourishing fruit, which gives tone and vigour to the moral and intellectual man. The old partition of time, which even Lord Coke has sanctioned by his authority, "for the good spending of the day," assigned six hours of the twenty-four to the "sacred muses:"—

*"Sex horas somno, totidem des legibus æquis  
Quatuor orabis, des epulisque duas  
Quod superest ultra sacris largire camænia."*



Previously to Blackstone's call to the bar, he had removed from Pembroke to All-Souls, and in June, 1744, had become a fellow of the latter college. All-Souls was celebrated for lawyers; and Lord Northington and Chief-Justice Willes were fellows of this college. In 1745, he graduated Bachelor of Civil Law.

After his admission to the bar, he was condemned, like the great majority of all who adopt this profession, to undergo a long and trying novitiate. From 1746 to 1760, he only reports himself to have been engaged in two cases, and those so unimportant that they are not mentioned in any other report-book. Happy are those who adopt as their motto *Ne cede malis, sed contra audentior ito*,—who seize this as the favourable time for close observation of men and things, as well as for an extended and thorough course of professional reading,—remembering that the mower loses no time while he is whetting his scythe,—but being careful not to sink into the mere recluse and book-worm. Our author appears to have attempted this happy middle way; but, at the same time, hope so long deferred made his heart sick; and it has been noticed that though from his call to the bar until Michaelmas Term, 1750, he regularly attended the court of King's Bench and took notes of cases, his diligence relaxed, and latterly the only cases noted are those concerning the universities, in whose affairs he always took an especial interest. He made the acquaintance, however, and secured the friendship, during this time, of some of the most eminent men in the profession, who appear to have discovered in him that merit which he only wanted the opportunity to display to all. One of these was William Murray, afterwards Earl of Mansfield. Upon a vacancy in the professorship of Civil Law in the University of Oxford, Mr. Murray introduced Mr. Blackstone to the Duke of Newcastle, then Chancellor of the University, and warmly recommended him as entirely able to fill the vacant chair. For his grace, however, this was not enough, unless he could rely on his support in favour of the administration. To ascertain the political principles of Blackstone, he said to him, "Sir, I can rely upon the judgment of your friend Mr. Murray as to your giving law-lectures in a style most beneficial to the students; and I dare say I may safely rely on you, whenever any thing in the political hemisphere is agitated in the university, that you will exert yourself in *our* behalf." The answer was, "Your grace may be assured that I will discharge my duty in giving law-lectures to the best of my poor ability." "Ay, ay," replied his grace, "and your duty in the other branch, too." Mr. Blackstone coolly bowed; and a few days after Dr. Jenner was appointed professor.

Mr. Blackstone passed much of his time in Oxford, and took an active interest in the affairs of the university. He was elected *bursar*, or treasurer, of his college. Finding the muniments in a confused state, with considerable research and labour he made a new arrangement of them. He drew up a dissertation upon the method of keeping the accounts, with a view to render them more simple and intelligible,—a copy of which is still preserved, for the benefit of his successors in the bursarship. He took a lively interest in the Codrington Library, exerted himself actively to secure the completion of the building,

and formed a new arrangement and classification of the books. In May, 1749, as a small reward for his services, and to afford him further opportunities of advancing the interests of the college, he was appointed Steward of their Manors. 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. On the 26th of April, 1750, he commenced Doctor of Civil Law, and thereby became a member of the convocation. About this time he published *An Essay on Collateral Consanguinity*. The design of the work was to attack the claims of those who, on the ground of kindred with Archbishop Chichele, the founder of All-Souls, asserted a right of being elected in preference to all others into that society. He undertook to prove that as the archbishop, who by the canons could not lawfully marry, never had any legitimate lineal descendants, the great lapse of time since his death, by the rules both of the civil and canon law, had put an end to all collateral relationship,—or, in other words, that all mankind might be presumed equally akin to the founder. The college acted on this doctrine; but Archbishop Secker, in 1762, as visitor, reversed their decision. Secker's successor, Archbishop Cornwallis, chose Blackstone one of his assessors, and with his assistance, and that of Dr. Hay, an eminent civilian, formed a regulation which, without entirely setting aside all claims founded on the express words of the college-statutes, limited the number of the founder's kin who could be admitted,—a regulation which in a great measure removed the inconvenience and gave satisfaction on all sides.

It was about the year 1750 that Blackstone first began to plan his Lectures on the Laws of England. He despaired of success at the bar, and determined to confine himself to his fellowship and an academical life, continuing the practice of his profession as provincial counsel. In Michaelmas Term, 1753, he delivered his first course at Oxford. Whether from the novelty of the subject or the reputation of the lecturer, his first course was numerously attended. Nor did the interest flag. Such was the elegance of style and popular character of the course, that attendance soon became the fashion. In 1754, he found it worth while, from the number attending, to publish his *Analysis of the Laws of England*, for the use of his hearers. It is founded on a similar work by Sir Matthew Hale, with some alterations, not generally regarded as improvements.

In July, 1755, he was appointed one of the delegates of the Clarendon Press. He entered upon this office with that determination to do his whole duty which characterized him in every other situation in which he was placed. He found that abuses had crept into that trust; and, in order to obtain a clearer insight into the matter, and to be better qualified to enter upon the task of correcting them, he made himself master of the mechanical art of printing. He proposed a valuable reform, which he had the pleasure of seeing successfully put in execution, much to the advantage of the university. He wrote a small tract on the Management of the University Press, which he left for the use of his successors in that office. In 1757, he was elected by the surviving visitors of Michel's new foundation in Queen's College into that body. There had been

a long dispute between the members of the old and the new foundation. Here again he exerted himself successfully; and principally through his instrumentality this donation became a valuable acquisition to the college, as well as an ornament to the university, by the completion of that handsome pile of buildings towards the High Street which for many years had been little better than a confused heap of ruins. Dr. Blackstone drew up a body of statutes for the regulation of the endowment, which was confirmed by Act of Parliament in the year 1769.

Mr. Viner having bequeathed to the University of Oxford a considerable sum of money and the copyright of his Abridgment of Law, for the purpose of instituting a professorship of Common Law, with fellowships and scholarships, Dr. Blackstone was, on the 20th of October, 1758, unanimously elected first Vinerian Professor. He lost no time in entering upon his duties, and on the 25th of the same month delivered his Introductory Lecture on the Study of the Law,—certainly, if no sketch had previously existed, a most remarkable composition to be prepared in so short a period of time. At the request of the Vice-Chancellor and heads of houses, he published this introductory, and afterwards prefixed it to his Commentaries. His lectures soon became celebrated throughout the kingdom. He was requested to read them to the Prince of Wales, (afterwards George III.;) but, being at that time engaged with a numerous class of pupils at Oxford, whom he did not think it right to leave, he declined the honour. However, he transmitted copies for the prince's perusal, who in return sent him a handsome present.

In 1756, he had resumed his attendance at Westminster, coming up to town every winter and showing himself in court each Michaelmas and Hilary Term,—for the purpose, doubtless, of making himself known. He does not record, however, that he was engaged in any cause. In June, 1759, he resigned his offices of Assessor in the Vice-Chancellor's Court and Steward of All-Souls Manors, and purchased chambers in the Temple, where he came to reside. He did not appear in court until Trinity Term, 1760; nor, indeed, does it seem that he ever acquired much celebrity as an advocate. His principal practice was as a chamber counsel. That he was commanding notice and regard in the profession appears from the fact that Lord Chief-Justice Willes and Mr. Justice Bathurst invited him to take the coif, which he declined,—probably from economical reasons. The expense accompanying that honour was considerable; and in that which Blackstone felt to be more his professional line, the advantages and privileges of the order—principally then the monopoly of the practice at the bar of the Common Pleas—were not sufficient to counterbalance its expense and inconvenience. In the same year (1759) he published two small pieces relative to the university: the one entitled *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*. In November, 1759, he published a new edition of the Great Charter and Charter of the Forest, and also a tract *On the Law of Descents in Fee-*

*Simple.* As to the former, while the mechanical execution reflected great honour on the author as the principal reformer of the Clarendon Press, from which no volume had ever before issued equal in beauty to this, the work itself added materially to his former reputation as a lawyer and antiquary. It led him, however, into an unpleasant controversy with Dr. Lyttelton, Dean of Exeter, afterwards Bishop of Carlisle, in regard to the authenticity of an ancient roll, containing the Great Charter and the Charter of the Forest, belonging to Lord Lyttelton, which, however, Blackstone did not consider an original.

The first cause of any interest which he argued was that of *Robinson vs. Bland*, in Trinity Term, 1760. The question was whether a gaming-debt, contracted in France could be recovered in England. It is to be found reported 1 W. Blacks. 234, 256; 2 Burr. 1077. His argument is certainly elaborate and ingenious. The next cause in which he appears to have been engaged was, in a legal point of view, decidedly the most interesting that ever came before the courts,—namely, the common-law right of literary property. It was the case of *Tonson vs. Collins*, 1 Sir W. Blacks. 301, 321. Blackstone's admirable argument is to be found at p. 321. After this, it would be tedious and uninteresting to trace his connection with other important cases at the bar. In 1761, the appointment of Chief-Justice of the Common Pleas for Ireland was offered to him, but declined. In March of the same year, he was returned to Parliament for Hindon, in Wiltshire, and on May 6th received a patent of precedence. On the 5th May, 1761, he married the daughter of James Clitherow, Esq., of Boston House, in the county of Middlesex. Having by this marriage vacated his fellowship of All-Souls, he was on the 28th of July, 1761, appointed Principal of New Inn Hall, by the Earl of Westmoreland, then Chancellor of Oxford. This appointment, besides the rank it gave him in the university, assured him an agreeable residence during the delivery of his lectures. In 1762, he collected and republished several of his pieces, under the title of *Law Tracts*, in two volumes octavo. In 1763, he was appointed Solicitor-General to the Queen, and elected about the same time a Bencher of the Middle Temple. In 1765 appeared the first volume of the Commentaries,—twelve years after the delivery of his original lectures; and the other three volumes were published in the course of the four succeeding years.

In 1766, he resigned the Vinerian professorship, and at the same time the principality of New Inn Hall. He had hoped that the professorship might be permanently connected with some college or hall, as Mr. Viner had contemplated, and thus a permanent settlement in Oxford be rendered agreeable. But this plan was rejected in convocation, and thus his views of a lasting settlement disappointed.

In 1768, he was returned to Parliament for the borough of Westbury, in Wiltshire, and took part in the debates relative to the election of John Wilkes, when his adversaries observed and pointed out an inconsistency between his position and the doctrine laid down in his Commentaries on the subject. He

published a pamphlet on the subject, which drew upon him severe sarcasms from the author of Junius. In the same year Dr. Priestley animadverted on his positions in the Commentaries relative to offences against the doctrine of the Established Church, and Dr. Furneaux addressed him some letters on his Exposition of the Toleration Act. He published an answer to Dr. Priestley, and in subsequent editions modified the passages in which errors and inaccuracies had been pointed out.

He was offered the Solicitor-Generalship by Lord North in January, 1770, on the resignation of Dunning. He accepted, however, the position of a Judge of the Common Pleas, on the resignation of Mr. Justice Clive. He was of course called to the degree of Sergeant, and gave rings with the motto "*Secundis dubiisque rectus.*" "But, Mr. Justice Yates being desirous to retire" (to use Blackstone's own words) "into the court of Common Pleas, I consented to exchange with him; and accordingly (February 16th) I kissed his majesty's hand on being appointed a Judge of the King's Bench, and received the honour of knighthood." Sir Joseph Yates did not long survive his retirement; for on the Whit-Sunday following he was taken ill at church, and died on Thursday following, "to the great loss of the public, and the court of Common Pleas in particular, wherein he sat one term only." On this event Sir William Blackstone likewise "*retired* into the court of Common Pleas," which, says Burrow, "he was always understood to have in view whenever opportunity offered."

Sir William Blackstone maintained the reputation he had previously acquired by his performance of his duties on the bench. There are several very elaborate judgments of his, in his own reports, upon important and difficult questions, which display his ability and research to great advantage. The court of Common Pleas during the time of Blackstone differed in opinion only upon two cases. In both he dissented. The first was *Scott vs. Shepherd*, (2 W. Bl. 892,) relative to the distinction between actions of trespass and on the case; the other, *Goodright dem. Rolfe vs. Harwood*, (2 W. Bl. 937,) in which the judgment of the Common Pleas was unanimously reversed by the King's Bench, and that reversal confirmed by the House of Lords, upon the opinions of the Barons of the Exchequer. The opinion of Sir William Blackstone in the celebrated case of *Perrin vs. Blake* (1 W. Bl. 672) has been always highly esteemed as a most ingenious and able view of the knotty question which arose in that case, and has attained a very just celebrity. It may well be doubted whether Mr. Roscoe is sustained by the facts in the opinion which he has so confidently expressed,—that "after the publication of the Commentaries the legal acquirements of Blackstone rather declined than advanced."

He had purchased shortly after his marriage a villa, called Priory Place, in Wallingford. He exerted himself, with his accustomed activity, in the promotion of every plan for the improvement of his neighbourhood, not only substantially in the opening of roads and building of bridges, but ornamentally in the rebuilding of that handsome fabric, St. Peter's Church. Such were his employments at home. In London, besides the duties of his public post, he was generally engaged in some scheme of public utility. In the latter part

of his life he devoted much time to the consideration of the subject of prison-discipline. He exerted himself, in conjunction with John Howard, to procure an Act of Parliament for the establishment of Penitentiary Houses near London, the objects of which should be "to seclude the criminals from their former associates; to separate those of whom hopes might be entertained from those who were desperate; to teach them useful trades; to accustom them to habits of industry; to give them religious instruction; and to provide them with a recommendation to the world, and the means of obtaining an honest livelihood after the expiration of the term of their imprisonment." The statute 19 Geo. III. c. 74 was accordingly passed; and, though it did not produce all the beneficial effects that were expected from it, it led the way to more just and rational views of prison-discipline. In one of his charges to a grand jury, he referred to the establishment of penitentiaries under this act in the following terms:—"In these houses the convicts are to be separately confined during the intervals of their labours, debarred from all incentives to debauchery, 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 happily 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, sobriety will restore vigour, and labour will beget a habit of honest industry; while the aid of a religious instructor may implant new principles in his heart, and, when the date of his punishment is expired, will conduce both to his temporal and eternal welfare. Such a prospect as this is surely well worth the trouble of an experiment."

He indulged, also, in literary labours to some extent. The only fruits of these, however, are "An Account of the Dispute between Addison and Pope," communicated to Dr. Kippis, and by him published in the "Biographia Britannica," in the Life of Addison; and some notes upon Shakspeare, which are published in Malone's edition of 1780, marked by the final letter of his name.

He did not, however, long continue to enjoy this life of quiet usefulness, honour, and happiness. Sedentary employments, such as those in which he delighted, are never conducive to health. As he advanced in age, he became corpulent, and was occasionally visited by gout, dropsy, and vertigo. About Christmas, 1779, he was seized with a violent shortness of breath, which his physicians attributed to his dropsical habit and to water on the chest; and their prescriptions gave him a temporary relief. He was able to come to town to attend Hilary Term,—when he was again attacked in a more formidable shape, chiefly in his head, which induced a drowsiness and stupor that baffled all the skill of his medical attendants. After lying in a state of insensibility for several days, he expired at his house in Lincoln's Inn Fields, on the 14th of February, 1780, being in the fifty-seventh year of his age. He was buried at St. Peter's Church, Wallingford,—his friend Dr. Barrington, Bishop of Llandaff, officiating at his funeral.

He had nine children, of whom seven survived him. Henry Blackstone, the reporter, was his nephew, and died from the effects of over-exertion in his profession. Of his sons, James enjoyed nearly the same university preferments as his father: he was Fellow of All-Souls, Principal of New Inn Hall, Vinerian Professor, Deputy High Steward, and Assessor in the Vice-Chancellor's Courts. He died in 1831.

The notes of decisions which he had collected while at the bar and on the bench, and which he had himself prepared for the press, were published after his death, in two volumes folio, agreeably to a direction in his will. 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 as 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. They were published under the superintendance of his executor and brother-in-law, James Clitherow, Esq.; prefaced by a sketch of his life, from which the facts contained in this memoir have been principally taken.

"Having now given," says Mr. Clitherow, "a faithful, and, it is hoped, not too prolix, a 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. A hard task for the pen of a friend! To do justice to the merits 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 once 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 company 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 economy. 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 (Lord Clarendon) said of Mr. Selden: ‘If he had some infirmities with other men, they were weighed down with wonderful and prodigious abilities and excellencies in the other scale.’”

Such is the testimony of a friend and kinsman to the character of Sir William Blackstone. Partial, no doubt, in some respects; but on the whole it bears on its face the marks of an honest effort to tell the truth,—not to conceal what appeared to be unlovely. We may accept it with the more confidence as truthful and reliable. “There may have been,” concludes Mr. Welsby, (*Lives of Eminent English Judges*), “more shining characters, of whom we read with deeper interest; but there have been few men more useful in their sphere, few whose example we can contemplate more profitably, few who better realized the wish so happily expressed by himself:—

“Untainted by the guilty bribe,  
Uncurs'd amidst the harpy tribe;  
No orphan's cry to wound my ear,  
My honour and my conscience clear;  
Thus may I calmly meet my end,—  
Thus to the grave in peace descend.”

Of the Commentaries as an Institute of Legal Education, very different opinions have been expressed; but, with one or two exceptions, there is a concurrent admiration of their style and method. When the illustrious contemporary of Blackstone—Lord Mansfield—was asked to point out the books proper for the perusal of a student of the law, that great man bore this emphatic testimony to their value:—“Till of late I could never with any satisfaction to myself answer that question; but since the publication of Mr. Blackstone's Commentaries I can never be at a loss. There your son will find analytical reasoning; diffused in a pleasing and perspicuous style. There he may imbibe imperceptibly the first principles on which our excellent laws are founded; and there he may become acquainted with an uncouth crabbed author, Coke upon Littleton, who has disappointed many a tyro, but who cannot fail to please in a modern dress.” One of his most stern and unrelenting critics,—Jeremy Bentham,—himself a jurist, and fundamentally opposed to Blackstone in his general views and principles of government, thus speaks of the style in which the Commentaries were written:—“He it is 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 which is drawn only from the sterling treasury of the sciences, has decked her out to advantage from the toilet of classic erudition, enlivened her with metaphors and allusions, and sent her abroad in some

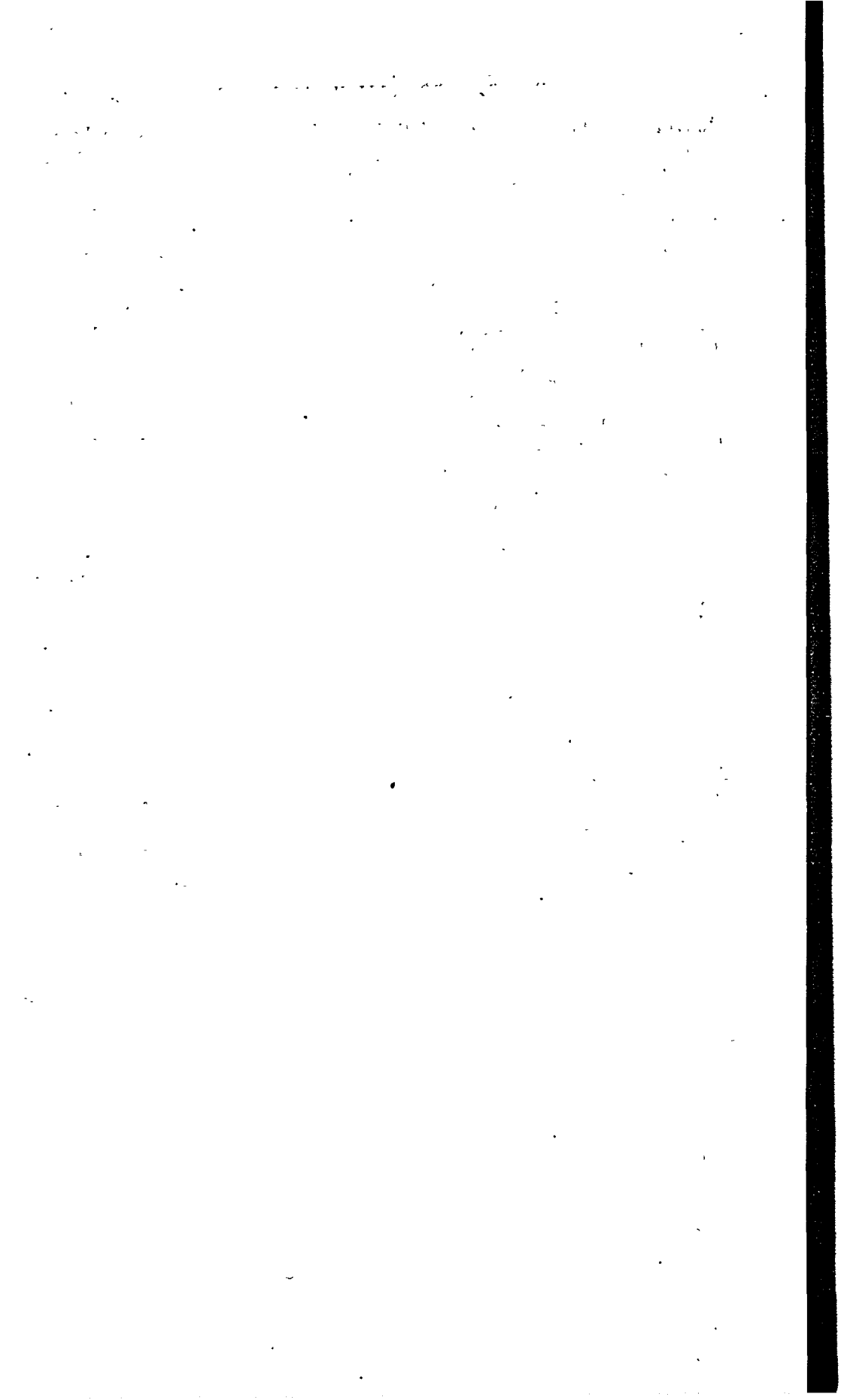
measure to instruct, and in still greater measure to entertain, the most miscellaneous and even the most fastidious societies. The merit to which, as much perhaps as to any, this work stands indebted, is the enchanting harmony of its numbers." "It is easy," says Mr. Justice Coleridge, "to point out their faults; and their general merits of lucid order, sound and clear exposition, and a style almost faultless in its kind, are also easily perceived and universally acknowledged; but it requires perhaps the study necessarily imposed upon an editor to understand fully the whole extent of praise to which the author is entitled: his materials should be seen in their crude and scattered state; the controversies examined, of which the result only is shortly given; what he has rejected, what he has forborne to say, should be known before his learning, judgment, taste, and, above all, his total want of self-display, can be justly appreciated." Lord Avonmore has said, "He it was who first gave to the law the air of a science. He found it a skeleton, and clothed it with life, colour, and complexion: he embraced the cold statue, and by his touch it grew into youth, health, and beauty." Sir William Jones, one of the most accomplished scholars the legal profession can boast of having produced, and an ornament not to that profession alone, but to human nature, gives his opinion in these words:—"His Commentaries are the most correct and beautiful outline that ever was exhibited of any human science; but they alone will no more form a lawyer than a general map of the world, how accurately and elegantly soever it may be delineated, will make a geographer. If, indeed, all the titles which he professed only to sketch in elementary discourses were filled up with exactness and perspicuity, Englishmen might hope at length to possess a digest of their laws which would leave but little room for controversy except in cases depending upon their particular circumstances,—a work which every lover of humanity and peace must anxiously wish to see accomplished."

To these many similar authorities might be added; but we may be allowed to subjoin the testimony of the distinguished American Commentator Chancellor Kent:—"He [Blackstone] is justly placed at the head of all the modern writers who treat of the general elementary principles of law. By the excellence of his arrangement, the variety of his learning, the justness of his taste, and the purity and elegance of his style, he communicated to those subjects, which were harsh and forbidding in the pages of Coke, the attraction of a liberal science and the embellishments of polite literature. The second and third volumes of the Commentaries are to be thoroughly studied and accurately understood. What is obsolete is necessary to illustrate that which remains in use; and the greater part of the matter in these volumes is law at this day and on this side of the Atlantic."

In opposition to this stand Mr. Ritso and Mr. Austin, the former in his curious and useful Introduction to the Study of Coke upon Littleton, and the latter in his Outlines of Lectures on the Province of Jurisprudence. They deny to Sir William Blackstone all merit as an institutional writer, and even condemn his style, as unfitted to the subject and meretricious. His manner, says Mr. Austin, "is not the manner of those classical Roman jurists, who are

always models of expression, though their meaning be never so faulty. It differs from their unaffected, yet apt and nervous, style, as the tawdry and flimsy dress of a milliner's doll from the graceful and imposing nakedness of a Grecian statue." Mr. Ritso is an idolater of Lord Coke, and unwilling that any book should share in the honours of the Institutes, much less displace it as a first book in the hands of the professional student. Mr. Austin is an enthusiastic Benthamite. His associations have been altogether with codes and systems. What other arrangement he would have made of the Common Law of England than that followed by Blackstone and Hale can only be conjectured; but the probability is that it would not have been adapted to the science as it practically existed, and would have been inconvenient because artificial. The Common Law is not a strait canal cut by the art of civil engineers, but a mighty river, its head lost in the sands of antiquity, which has sought and made its own channel, and that the most natural and the best, though occasionally requiring to be improved by legislative dams and embankments.

It is not difficult to arrive at a just conclusion between these conflicting opinions. Blackstone is not an authority in the law in the same sense in which Littleton or his commentator Lord Coke is. He has fallen into some errors and inaccuracies,—not, however, so many nor so important that the student ought to have his confidence in it as an Institute at all impaired. In fact, these errors and inaccuracies have been for the most part pointed out and corrected in the modern editions. There is certainly truth in the charge brought against Blackstone of overweening admiration of the British Constitution; but that is not likely to mislead an American student. We can sympathize with his panegyric of the free spirit and general justice of the Common Law. We claim it as our birthright and boast of it as the substratum of our own jurisprudence. As an elementary book, however, it may be enough to say that the whole body of American lawyers and advocates, with very few exceptions, since the Revolution, have drawn their first lessons in jurisprudence from the pages of Blackstone's Commentaries; and no more modern work has succeeded as yet in superseding it.



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## ANALYSIS.

### INTRODUCTION.

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

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# INTRODUCTION.

## Of the Study, Nature, and Extent of the Laws of England.

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### SECTION I.

#### ON THE STUDY OF THE LAW.†

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##### MR. VICE-CHANCELLOR AND THE 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 [ \* 4 time the \*public-spirited design of our wise and munificent benefactor. And this he must more especially dread, when he feels by experience how unequal his abilities are (unassisted by preceding examples) to complete, in the manner he could wish, so extensive and arduous a task; since he freely confesses, that his former more private attempts have fallen very short of his own ideas of perfection. And yet the candour he has already experienced, and this last transcendent mark of regard, his present nomination by the free and unanimous suffrage of a great and learned university, (an honour to be ever remembered with the deepest and most affectionate gratitude,) these testimonies of your public judgment must entirely supersede his own, and forbid him to believe himself totally insufficient for the labour at least of this employment. One thing he will venture to hope for, and it certainly shall be his constant aim, by diligence and attention to atone for his other defects: esteeming, that the best return which he can possibly make for your favourable opinion of his capacity, will be his unwearyed 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 of the continent, where the civil or imperial law, under different modifications, is closely interwoven with the municipal laws of the land, no gentleman, or at least no scholar, thinks his education is completed, till he has attended a course or two of lectures, both upon the institutes of Justinian and

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† Read in Oxford at the opening of the Vinerian lectures, 25th October, 1758.

The author had been elected first Vinerian professor the 20th of October previously.

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 merits which abound 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  
r 6 ] a competent knowledge of the laws of that society \*in which we live, is the proper accomplishment of every gentleman and scholar; an highly useful, I had almost said essential, part of liberal and polite education. And in this I am warranted by the example of ancient Rome; where, as Cicero informs us, (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.<sup>1</sup>

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

(a) *De Legg.* 2. 22.

(b) *Montesq. Esp. L. 1. 11, c. 5.*

<sup>1</sup> In the Great Law enacted by the first General Assembly of Pennsylvania, convened at Chester or Upland, Dec. 4, 1682, containing sixty-one chapters, was one requiring the laws to be taught in the schools of the province and territories.—*Gordon's Hist. of Penna.*, v. 71; *Hazard's Annals*, 634.—SHARSWOOD.

whatever the laws permit,<sup>(c)</sup> 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 condition, who [ \*7 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<sup>(d)</sup> 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 meaning of the testator, or sometimes [ \*8 in discovering any meaning at all; so that in the end his estate \*may often be vested quite contrary to these his enigmatical intentions, because perhaps he has omitted one or two formal words, which are necessary to ascertain the sense with indisputable legal precision, or has executed his will in the presence of fewer witnesses than the law requires.

But to proceed from private concerns to those of a more public consideration. All gentlemen of fortune are, in consequence of their property, liable to be called upon to establish the rights, to estimate the injuries, to weigh the accusations and sometimes to dispose of the lives of their fellow-subjects, by serving upon juries. In this situation they have frequently a right to decide, and that upon their oaths,

(c) *Facultas ejus, quod cuique facere libet, nisi quid vi, aut jure prohibetur.* Inst. l. 3. 1.

(d) Education, Sec. 167.

<sup>3</sup> This definition has been much criticized. "Consistently with this, a negro slave on a sugar-estate is free: he may do whatever the laws permit him to do."—*Coleridge*. If we read what follows as part of the definition, it evidently contemplates just and equal laws,—equitable rules of action. Civil liberty is the power of doing whatsoever we will, except when restrained by just and equal laws. Political liberty is that condition in which a man's civil liberty is fully secured. Mr. Justice Coleridge cites, as preferable to the text, the following definition from Locke:—"Freedom of men under government is to have a standing rule to live by, common to every one of that society, and made by the legislative power vested in it; a liberty to follow my own will in all things, when the rule prescribes not, and not to be subject to the inconstant, uncertain, unknown, arbitrary will of another man."—*On Government*, b. xi. c. 4. Mr. Locke's definition confounds civil with political liberty, which ought always to be carefully distinguished in discussion upon this subject.—SHARSWOOD.



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 \*9] he has mistaken his authority, through passion, through ignorance, or absurdity, he will be the object of \*contempt from his inferiors, and of censure from those to whom he is accountable for his conduct.

Yet farther; most gentlemen of considerable property, at some period or other in their lives, are ambitious of representing their country in parliament: and those, who are ambitious of receiving so high a trust, would also do well to remember 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 instruction is not looked upon as requisite, except only the science of legislation, the noblest and most difficult of any. Apprenticeships are held necessary to almost every art, commercial or mechanical: a long course of reading and study must form the divine, the physician, and the practical professor of the laws; but every man of superior \*10] 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."

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

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

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; [ \*11 then should very few questions in law arise, \*and the learned should not so often and so much perplex their heads to make atonement and peace, by construction of law, between insensible and disagreeing words, sentences, and provisoes, as they now do." And if this inconvenience was so heavily felt in the reign of Queen Elizabeth, you may judge how the evil is increased in later times, when the statute book is swelled to ten times a larger bulk, unless it should be found that the penners of our modern statutes have proportionably better informed themselves in the knowledge of the common law.

What is said of our gentlemen in general, and the propriety of their application to the study of the laws of their country, will hold equally strong or still stronger with regard to the nobility of this realm, except only in the article of serving upon juries. But, instead of this, they have several peculiar provinces of far greater consequence and concern; being not only by birth hereditary counsellors of the crown, and judges upon their honour of the lives of their brother-peers, but also arbiters of the property of all their fellow-subjects, and that in the last resort. In this their judicial capacity they are bound to decide the nicest and most critical points of the law: to examine and correct such errors as have escaped the most experienced sages of the profession, the lord keeper, and the judges of the courts at Westminster. Their sentence is final, decisive, irrevocable; no appeal, no correction, not even a review, can be had: and to their determination, whatever it be, the inferior courts of justice must conform; otherwise the rule of property would no longer be uniform and steady.

Should a judge in the most subordinate jurisdiction be deficient in the knowledge of the law, it would reflect infinite contempt upon himself, and disgrace upon those who employ him. And yet the consequence of his ignorance is comparatively very trifling and small: his judgment may be examined, and his errors rectified, by other courts. But how much more serious and affecting is the case of a superior judge, \*if without any skill in the laws he will boldly [ \*12 venture to decide a question upon which the welfare and subsistence of whole families may depend! where the chance of his judging right, or wrong, is barely equal; and where, if he chances to judge wrong, he does an injury of the most alarming nature, an injury without possibility of redress.

Yet, vast as this trust is, it can nowhere 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.<sup>3</sup>

(f) 2 Rep. pref.

<sup>3</sup>This assertion, that the law esteems the word of honour of a peer as an obligation equal to another's oath, is not accurate. In the courts of common law, when a nobleman is examined as a witness, he must be sworn to speak the truth, just as a commoner must

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,<sup>(g)</sup> "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 \*13] law, wherein he arrived to that proficiency, that he left behind him about an hundred and fourscore volumes of his own compiling upon the subject; and became, in the opinion of Cicero,<sup>(h)</sup> a much more complete lawyer than even Mutius Scævola himself.

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 intrusted 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 \*14] their rank and fortune, have also abundant reason, considered merely as clergymen, to be acquainted with many branches of the law, which are almost peculiar and appropriated to themselves alone. Such are the laws relating to advowsons, institutions, and inductions; to simony and 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

(g) *Ef. l. 2. 2. § 43. Turpe esse patricio, et nobili, et causarum ranti, jus in quo versaretur ignorare.* (h) *Brut. 41.*

But, in courts of equity, peers and peeresses are privileged to put in their answers on their honour only, when others are required to be sworn. And so the members of the House of Peers, when sitting judicially upon the trial of impeachments. are upon their pledge of honour only.

It may be remarked also, as qualifying what is said of the jurisdiction of the House of Peers as the highest court of errors and appeals, that this part of their business is transacted by the Lord Chancellor, and those members, who are lawyers by profession and have filled judicial stations. The lay peers, who attend the sessions, abstain from voting in such cases. Baron Parke was recently raised to the peerage, with the title of Lord Wensleydale, for the avowed purpose of strengthening the legal staff in that body. He was first created a baron for life; but, much dissatisfaction having been expressed at such a precedent, as of a dangerous nature in its tendency to increase the influence of the crown, a patent was issued to him entailing the dignity to him and his heirs male.—SHARSWOOD.

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.<sup>4</sup>

But those gentlemen who intend to profess the civil and ecclesiastical laws, in the spiritual and maritime courts of this kingdom, are of all men (next to common lawyers) the most indispensably obliged to apply themselves seriously to the study of our municipal laws. For the civil and canon laws, considered with respect to any intrinsic obligation, have no force or authority in this kingdom; they are no more binding in England than our laws are binding at Rome. But as far as these foreign laws, on account of some peculiar propriety, have in some particular cases, and in some particular courts, been introduced and allowed by our laws, so far they oblige, and no farther; their authority being wholly founded upon that permission and adoption. In which we are not singular in our notions; for even in Holland, where the imperial law is much cultivated, [\*15 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 Almans, the Franks, the Saxons, the Goths, the Vandals, and other of the ancient 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.<sup>5</sup> For which reason it becomes highly necessary for every civilian and canonist, that would act with

(i) *Pedicatio corporis juris civilis*. Edit. 1663.

(k) Hale Hist. C. L. c. 2. Selden in *Fletam*. 5 Rep. *Cau drey's case*. 2 *Inst.* 599.

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<sup>4</sup> It ought, perhaps, to be added in this place, that, as medical men are frequently required to testify as experts in courts of justice, it is quite important that they should possess at least a knowledge of the general principles of the law which apply to those classes of cases in which they are most liable to be called upon. Such are mental capacity to make contracts, wills, and do other legal acts, or to incur liability for crimes, the causes of death, the period of gestation, and other similar questions. The subject of Medical Jurisprudence, or, as it is perhaps more properly termed, Forensic Medicine, has of late years much attracted the attention of the medical profession, and many works have been prepared and published. One of the latest and best is "Wharton and Stille's Medical Jurisprudence," an American work which appears to exhaust all the topics which belong to this title,—a title both in law and medicine, which thus links together these two honourable professions.—SHARSWOOD.

<sup>5</sup> The ROTA, or RUOTA ROMANA, is the highest papal court of appeal. It has a collegiate constitution, and consists of twelve prelates. Its jurisdiction extends over all Christendom; and it decides not only spiritual controversies, but questions concerning ecclesiastical benefices. The name is said to be derived from the circumstance that the floor of their hall is overlaid with marble slabs in the form of wheels. Others, however, attri-

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 patrique juris notas habere.*" And the statutes(m) of the university of Cambridge speak expressly to the same effect.

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

(l) Tit. VII. Sect. 2 § 2.

(m) *Doctor legum mox a doctoratu dabit operam legibus Angliæ, ut non sit imperitus earum legum quas habet sua patria, et differentias exteri patrique juris noscat. Stat. Eliz. R. C. 14. Cowell, Institut. in præmio.*

(n) C. 47.

(o) C. 48.

(p) In Fletam, 7, 7.

bute the name to the fact that in ancient Rome a round public building stood upon the place where this tribunal was first established.

The IMPERIAL CHAMBER was a court of the German Empire, instituted by the Emperor Maximilian I. in 1495. It had concurrent jurisdiction with the Aulic Council, and was intended, among other things, to adjust the disputes between the different members of the German Empire, and between them and the Emperor. It expired in 1506.—

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the British Druids),(g) 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 Malmshury.(r) The judges there fore 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 only handed down by tradition, use, and experience, was not so heartily relished by the foreign clergy, who came over hither in shoals during the reign of the conqueror and his two sons, and were utter strangers to our constitution as well as our language. And an accident, which soon after happened, had nearly completed its ruin. A copy of Justinian's pandects, being newly(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 feudal 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, surnamed 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

(g) *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,—siccome les archevesques, evesques, les chanoines des eglises cathedraux, et les autres personnes qui ont dignitez en sainte eglise; les abbez, les prieurs conventaux, et les gouverneurs des eglises, &c.* *Grand Coutumier*, ch. 9.

(u) *Circ. A.D.* 1130.

(w) *LL. Wirgath.* 2, 1, 9.

(x) *Capitular. Hudon.* Pri. 4, 102.

(y) Selden in *Medam.* 5, 5.

(z) Domat's *Treatise of Law*, c. 13 § 9. *Epistol. Innocent IV.* in *M. Paris ad A.D.* 1251.

(a) *A.D.* 1138.

(b) *Gervas. Dorobern. Act. Pontif. Cantuar.* col. 1065.

\* The common account of this matter is that this copy of the Pandects was transcribed at Constantinople, in the seventh century, by a Greek scribe. It was discovered at Amalfi, A.D. 1135, by the Pisans, who took that city. Their ally, Lothaire II., granted them the copy in recompense of their services. On Pisa being taken by the Florentines, A.D. 1406, it was transported to Florence, rebound in purple, placed in a rich casket in the ancient palace of the republic as a sacred relic, and shown to the curious by the monks or magistrates uncovered. It is supposed that all editions of the Pandects trace their origin to this copy.

M. Savigny contests the whole of this account, and, after examination of the historical evidence produced in its favour, pronounces it unsatisfactory, (*Hist. Droit Rom.*, vol. ii. c. 15.) Mr. Hallam also gives reasons for doubting it, (*Middle Ages*, vol. ii. p. 520.) The Florentine manuscript is undoubtedly the oldest in existence; but it appears to be the better opinion that many others were copied from still older ones. They were quoted by John of Chartres, who died A.D. 1117, by Theobald, Archbishop of Canterbury, and by Vacarius, the first professor of civil law in England, in A.D. 1140.—*Colquhoun's Summary*, vol. i. p. 67.—SHARSWOOD.

\*19] Norman innovations, continued wedded to the use of the common law: 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 to be found in each. 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 \*20] the consent of our lord the king, and the lords of parliament, shall it ever be \*ruled or governed by the civil law."(h) 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,

(c) Rog. Bacon *stat. per Selden, in Fletam*. 7, 6, in *Fortesc.* c. 34, and 8 Rep. Prof.

(d) Joan Sarisburiensis. *Polykrat.* 8, 22.

(e) *Ibid.* lib. 6, 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 Anglie mutare, que hucusque usitate sunt et approbate*

(g) 11 Ric. 11.

(h) Selden, *Jan. Anglor.* l. 2. § 43, in *Fortesc.* c. 33.

Mr. F. Hargrave, in his notes to the first volume of *Blackstone*, has here presented an interesting history of the contests which have existed since this event between the clergy and the common lawyers. He shows that prior to the Reformation the latter kept the ecclesiastics within proper bounds,—that they were prominent actors in the events of the Reformation. Subsequently, if we are to believe Whitelocke's speech to the House of Commons in 1649, (*Parl. Hist.* iii. 1341,) the lawyers bore no mean part in the field of battle on the side of the Parliament. "The gown," says he, "does not abate a man's courage or his wisdom, or make him less capable of using a sword. You all know this to be true by the great services performed by Lieutenant-General Jones, and Commissary Ireton, and many of the members and other lawyers, who, putting off their gowns when you required it, have served you stoutly and successfully as soldiers, and undergone great dangers and hardships." He remarks, also, that in the Westminster Assembly, Hale, Maynard, Wilde, Selden, Whitelocke, St. John, and other lawyers, successfully resisted the attempts of the Presbyterians to clothe themselves with the *jus divinum*, which had just been stripped from the deposed hierarchy.

Bishop Burnet, indeed, seems to have thought that antipathy to the national church is an inseparable characteristic of the lawyers. In his account of the contests between the French bishops and the parliament of Paris, in the beginning of the seventeenth century, is the following passage:—"It has been everywhere observed that no host of men have made head against those things which have been called rights of the church, with more zeal and indignation than lawyers and secular courts. This ecclesiastics impute to their enmity to the church and their envy at her prosperity; lawyers, on the other hand, pretend that their studies carry them further than other men into the discovery of those cheats and late inventions by which the world has been imposed on in former ages."—(*Rights of Princes*, ch. 8.)—SHARSWOOD.

episcopal constitutions were published,(i) forbidding all ecclesiastics to appear as advocates *in foro sæculari*: 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 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 to \*be [ \*21 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 \*laws will probably be more generally known; we may [ \*22 hope that the method of studying them will soon revert to its antient 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

(i) Spelman, *Concil. A.D.* 1217. Wilkins, vol. 1 p. 574, 599.

(k) Selden, in *Fletam.* 9, 3.

(l) M. Paris, *A.D.* 1254.

(m) There cannot be a stronger instance of the absurd and superstitious veneration that was paid to these laws, than that the most learned writers of the times thought they could not form a perfect character, even of the blessed virgin, without making her a civilian and a canonist; which Albertus Magnus, the renowned Dominican doctor of the thirteenth century, thus proves in his *Summa de laudibus christiferae virginis (divinum magis quam humanum opus) qu. 23 § 5.* "Item quod jura civilia, et leges, et decreta scivil in summo, probatur hoc modo: sapientia advocati manifestatur in tribus; primum, quod obtineat omnia contra iudicem justum et sapientem; secundo, quod contra adversarium

atutum et sagacem; tertio, quod in causa desperata: sed beatissima virgo, contra iudicem sapientissimum, Dominum; contra adversarium callidissimum diabolum; 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 uzore Joannis Andree glossatoris, quod tantam peritiam in utroque jure habuit, ut publice in scholis legere ausa sit."

(n) Fortesc. de *Laud. L. l. c. 23.*

(o) This remarkably appeared in the case of the Abbot of Torum, *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



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 gradually lost and overrun by the civil, (a suspicion well justified from the frequent transcripts of Justinian to be met with in Bracton and Fleta,) had it not been for a peculiar incident, which happened at a very critical time, and contributed greatly to its support.

The incident which I mean was the fixing of 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.

\*23 ] Formerly that, in conjunction with all the other superior \*courts, was held before the king's capital justiciary of England, in the *aula regis*, or such of his palaces wherein his royal person resided; and removed, with his household, from one end of the kingdom to the other. This was found to occasion great inconvenience to the suitors; to remedy which it was made an article of the great charter of liberties, both that of King John and King Henry the Third, (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

\*24 ] 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 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 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,

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 Ekipwith, the king's serjeant, and afterwards Chief Baron of the Exchequer, declares them to be flat nonsense: "*in ceus parols, contra inhibitionem novi operis, ny ad pas entendment;*" 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 restituon en lour ley, pur que a ceo n'avomus regard, &c.*"

(p) C. 11.

(q) *Glossar.* 334.

(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. 57. Dugdale, *Orig. Jurid.* 55.

(t) The first mention which I have met with in our law-books of serjeants or counors is in the statute of Westm.

1, 3 Edw. I. c. 29, and in Horn's Mirror, c. 1 § 10, c. 2 § 5 c. 3, § 1, in the same reign. But M. Paris, in his life of John II., Abbot of St. Alban's, which he wrote in 1255, 39 Henry III. speaks of advocates at the common law, or counors, (*quos banci narratores vulgariter appellamus*),—as of an order of men well known. And we have an example of the antiquity of the cof in the same author's History of England, A. D. 1259, in the case of one William de Bussy; who, being called to account for his great knavery and malpractices, claimed the benefit of his orders or clergy, which till then remained an entire secret; and to that end *voluit ligamenta coifse suae solvere, ut palam monstraret se tonsuram habere clericalem; sed non est permisus.*—*Satelles vero eum arripens, non per coifse 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.

(u) *Ne aliquis scholas regens de legibus in eadem civitate de cetero ibidem leges doceat.*

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.

\*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.<sup>8</sup>

(w) *In Flid.* 8, 2.(x) 2 *Inst. proem.*

(y) C. 49.

(z) 3 *Rep. pref.*

(a) C. 49.

<sup>8</sup>The number was not materially different in the time of Ben Jonson, who has given evidence of their influence and character in the dedication of his comedy of *Every Man out of his Humour*, which he inscribed "To the noblest nurseries of humanity and liberty in the kingdom,—the Inns of Court." By humanity is evidently meant classical learning,—a meaning of the word which is now almost lost by disuse. To characterize a law school as the nursery of sound literature and civil liberty is indeed a highly-wrought eulogium of the legal profession,—a tribute, however, which it is believed that its history shows to have been well merited. In the time of Jonson, the Inns of Court were still in a very flourishing condition. In the year 1586, there were in term 1703, out of term 643. There were four Inns of Court,—Gray's Inn, Lincoln's Inn, the Middle Temple, and the Inner Temple. These had attached to them certain Inns of Chancery, in all numbering eight. Clifford's Inn, Clement's Inn, and Lion's Inn belonged to the Inner Temple; New Inn, to the Middle Temple; Furnival's Inn (which has since ceased to exist) and Thavie's Inn to Lincoln's Inn, and Staple's Inn and Barnard's Inn to Gray's Inn.

Sir Edward Coke seems to consider the writ of Henry III., mentioned in the text, as intended to attack the memory of Magna Charta and the Charter of the Forest, by silencing, in an arbitrary and summary manner, legal teachers who based upon these documents instruction in the laws of England.

It may be doubted whether the opinion of Sir William Blackstone, that the lawyers were collected together at so early a period, will bear examination. Of Lincoln's Inn Dugdale mentions a tradition as still current among the ancients, that the professors of the law were brought to settle in that place by Henry, Earl of Lincoln, "about the beginning of Edward II.'s time." This was written more than seventy years after the nineteenth of Henry III. There is an account of Gray's Inn (formerly the property of the Lords Gray of Wilton) as having been held by lease from them by students of the law, in the time of King Edward III. And Dugdale gives a traditionary account that the temple, having passed to the Knights Hospitallers in the reign of Edward III., came to the lawyers by demise from them.

The word *Inns* was anciently used to denote town-houses, in which the nobility and gentry resided when they were in attendance at court; and it is frequently employed by the old poets to denote a noble mansion. The Inns of Court were in French termed *hostells*. In all our Latin records they are called *hospitia*; while *diversoria* is the name applied to public lodging-houses, which are now commonly known as inns. The buildings originally purchased for the purposes of these legal societies, having been at the time handsome private residences, still retained in their new use the ancient names by which they were designated. The Middle and Inner Temple were formerly dwellings of the Knights Templars. Lincoln's and Gray's Inns anciently belonged to the Earls of Lincoln and Gray. So the names of the several Inns of Chancery are taken from the names of their original proprietors, except New Inn, Staple's Inn, which belonged to the Merchants of the Staple, and Lion's Inn, which was a common inn with the sign of a lion.

At a very early period Holborn was a quiet suburban village of London, watered by a

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 Eliza-

little rivulet which descended to the river Fleet, with an extensive prospect of the adjacent country. It was called *Old Bourne*, from which it derived its modern name. It was in and near this secluded and beautiful spot that the professors and practitioners of the common law of England established their chambers and university. Situated between the city of Westminster, the place of holding the king's courts, on the one side, and the city of London on the other, they enjoyed the advantage of "ready access to the one and plenty of provisions in the other." A river separated them from the city, flowing from Battle Bridge past the foot of Holborn Hill, and joining the Thames at Blackfriars. This river was called the Fleet or Swift River, and gave their names to Fleet Street and Fleet Prison.

The Inns of Chancery were originally in fact, what in later years they became only in name,—preparatory seminaries for the study of the grounds and principles of the law. Such men as More, Coke, and Holt were chosen to deliver lectures. They were governed by principals and ancients, elected by the members, exercising their authority in subordination to the benchers of the Inns of Court to which they respectively belonged. The readings, in time, came to be attended with costly entertainments, which eventually led to the suspension of these valuable exercises. The Inns of Court were much celebrated for the magnificence of their revels. The last of these took place in 1773, in the Inner Temple, in honour of Mr. Talbot, when he took leave of that house, of which he was a bencher, on having the Great Seal delivered to him. Something of the same kind was exhibited in Lincoln's Inn in 1845, on the occasion of the queen's visit at the opening of the New Hall, when Prince Albert was made a barrister and bencher.

In modern times, lectures and examinations have been reintroduced into these establishments; but attendance upon them is entirely voluntary. To entitle a person to be called, he must keep twelve terms. A term is kept by the student being present at a certain number of dinners, generally five in each term. He must also have gone nine times through a certain ceremony which is called *performing an exercise*. The student is furnished by the steward with a piece of paper, on which is supposed to be written an argument on some point of law; but, owing to the negligence of successive copyists, the writing now consists of a piece of legal jargon wholly unintelligible. When, after dinner, grace has been said, the student advances to the barristers' table and commences reading from this paper; upon which one of the senior barristers present makes him a bow, takes the paper from him, and tells him that it is quite sufficient. With the payment of the necessary fees and taking certain oaths, the student, having kept his terms and performed his exercises, receives his call to the bar.

"The original institution of the Inns of Court nowhere precisely appears; but it is certain that they are not corporations, and have no charter from the crown. They are voluntary societies, which for ages have submitted to a government analogous to that of the seminaries of learning."—LORD MANSFIELD.

The student who desires to be more fully informed on this subject is referred to Dugdale's *Origines Juridicales*, Herbert's *Antiquities of the Inns of Court and Chancery*, and Pearce's *History of the Inns of Court*.

A commission was issued May 8, 1854, by the crown to several distinguished lawyers, to inquire into the arrangements in the Inns of Court and Inns of Chancery for the promoting the study of the law and jurisprudence. Their report was made Aug. 10, 1855, and contains a mass of the most interesting and valuable information, not only in regard to the state, revenues, and management of the institutions, which were the subject of the inquiry, but as to the state of legal education not only in England and Scotland, but in the different countries of Europe and the United States of America. The commissioners recommend that a university be constituted, with the power of conferring degrees in law; the chancellor of the university to be elected for life, the electors being all barristers (including serjeants) and masters of law; the senate, consisting of thirty-two members, to be elected eight by each Inn of Court. They contemplate a preliminary examination prior to admission as a student, unless in the case of one who has obtained the degree of Bachelor of Arts, or Master or Bachelor in Law, at some university within the British dominions; and that no person shall be called to the bar without having passed an examination satisfactory in at least one subject of each of the following two branches: First branch: *a*, constitutional law and legal history; *b*, jurisprudence; *c*, the Roman civil law. Second branch: *x*, common law; *b*, equity; *c*, the law of real property.—SHARWOOD.

beth, Sir Edward Coke<sup>(b)</sup> 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 any young students entered at the inns of chancery: secondly, because in the inns of court all sorts of regimen and academical superintendance, either with regard to morals or studies, are found impracticable, and therefore entirely neglected: lastly, because persons of birth and fortune, after having finished their usual courses at the universities, have \*seldom leisure or resolution sufficient to enter [ \*26 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 of thinking begins now universally to prevail. The attainment of liberal and genteel accomplishments, though [ \*27 not of the intellectual sort, has been thought by our wisest and most affectionate patrons,<sup>(c)</sup> and very lately by the whole university,<sup>(d)</sup> 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.<sup>9</sup> Surely, if it were not before an object

<sup>(b)</sup> 3 Rep. pref.

<sup>(c)</sup> 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."

<sup>(d)</sup> 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 *manse* in the university.

<sup>9</sup> This brief eulogium upon the science of the laws has been the subject of deserved admiration. We may add to it the following, which have been equally celebrated:—

"Of law there can be no less acknowledged than that her seat is the bosom of God.

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 laws of the land, con-  
 \*28] signed 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 emulation who best should understand, or most faithfully pursue, the designs of our generous patron: and  
 \*30] with pleasure we recollect, that those who are most distinguished \*by their quality, their fortune, their station, their learning, or their experience, have appeared the most zealous to promote the success of Mr. Viner's establishment.

(e) Τελεια βασιστα αρετη, οτι της τελειας αρετης χρησης 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. Whaley, 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, 1753. 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 esta-

blished, 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

her voice the harmony of the world. All things in heaven and earth do her homage,—the very least as feeling her care, the greatest as not exempted from her power: both angels and men and creatures, of what condition soever, though each in different sort and manner, yet all with uniform consent, admiring her as the mother of their peace and joy."—*Hooker's Eccl. Pol.*

"I might instance 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 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 quidam 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

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

life, unless in case of such misbehaviour as shall amount to banishment 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, 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

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

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 chicanery. 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.”—BOLINGBROKE: *Study of History.*

“Law,” said Dr. Johnson, “is the science in which the greatest powers of the understanding are applied to the greatest number of facts.” “And no one,” said Sir James Mackintosh, “who is acquainted with the variety and multiplicity of the subjects of jurisprudence, and with the prodigious powers of discrimination employed upon them, can doubt the truth of this observation.”

“The science of jurisprudence is the pride of the human intellect, which, with all its defects, redundancies, and errors, is the collected reason of ages, combining the principles of original justice with the infinite variety of human concerns. One of the first and noblest of human sciences,—a science which does more to quicken and invigorate the human understanding than all other kinds of human learning put together; but it is not apt, except in persons very happily born, to open and liberalize the mind exactly in the same proportion.”—EDMUND BURKE.

“There is not, in my opinion, in the whole compass of human affairs so noble a spectacle as that which is displayed in the progress of jurisprudence; where we may contemplate the cautious and unwearied exertions of wise men through a long course of ages, withdrawing every case, as it arises, from the dangerous power of discretion and subjecting it to inflexible rules, extending the dominion of justice and reason, and gradually contracting within the narrowest possible limits the domain of brutal force and arbitrary will.”—(SIR JAMES MACKINTOSH.)—SHARSWOOD.

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 *pomæria* \*31] of university learning, and adopt a new tribe of citizens within these philosophical walls, we interest a very \*numerous and very powerful profession in the preservation of our rights and revenues.<sup>10</sup>

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; 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. How little, therefore, is it to be wondered at, that we hear of so frequent miscarriages; that so many gentlemen of bright

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<sup>10</sup> Hitherto, however, the study of the law at the English universities has not been cultivated with much success, even where facilities have been afforded to it. In 1758 a professorship of law was founded under the will of Mr. Viner, and Blackstone was the first Vinerian professor. The professorship, although commenced under such brilliant auspices, has, according to Mr. Christian, long sunk into the inglorious duty of receiving the stipend. But the report of the Oxford University commission gives strong reason for expecting, not only an active revival of the duties of that learned professor, but also the establishment of a law school in the University, on the very principles contended for by Blackstone. From the Downing professorship of law at Cambridge, founded in 1800, results equally beneficial may be expected. In the latter university, also, the civil law classes (in which English and international law also find place) have for some years past been working with good results. The evidence taken by the university commissioners is much in favour of the present system; but they recommend a complete fusion of the studies of English civil and international law with a board of legal studies. "The faculty of law," they say, "should embrace an examination of the principles upon which existing systems of laws are founded, and investigations of the principles on which all laws ought to be founded." And they are of opinion that the foundation of professional education should be laid at the university. Within the last few years some additional facilities for this study have been afforded in the metropolis. Two professorships of law have been established,—the one at King's College, the other at the London University, where courses of lectures on the various branches of the law are delivered. Law lectures are also regularly given at the Incorporated Law Society.

It has long been much regretted that no part of the resources of the Inns of Court should be devoted to the endowment of lectureships on the various branches of the law, and to a general scheme of legal education. It is to the honour of the present rulers of these institutions that they have at length, and after much deliberation, taken steps to wipe off this stain on the character of the Inns of Court as seminaries of legal learning. A scheme, which, if not so comprehensive as the subject would admit, is an admirable commencement, has been adopted by the Inns of Court, whereby readerships have been established on—1. Constitutional law and legal history; 2. Jurisprudence and the civil law; 3. The law of real property; 4. The common law; and 5. Equity. A year's attendance at the lectures of the readers is now compulsory on all candidates for the bar who had not, by the first day of Trinity Term, 1852, kept twelve terms. Examinations are held on the subjects lectured upon, and studentships and certificates of merit are conferred. It is to be maturely considered, however, whether these examinations should not be made compulsory before any law degree is conferred.—STEWART.

imaginatjons grow weary of, so unpromising a search,<sup>(l)</sup> 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 be general, must have proved of extremely pernicious consequence. I mean the custom, [\*32 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 dexterous 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 short-sighted 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:<sup>(m)</sup> 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 foretell that a lawyer, thus educated to the bar, in subservience to attorneys and solicitors,<sup>(n)</sup> 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 not instructed in the elements and first principles upon which the rule of practice is founded, the least variation from established precedents will totally distract and bewilder him: *ita lex scripta est*<sup>(o)</sup> 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 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: [\*33

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

(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 salvassem, reperissemque linguam peregrinam, dialectum barbarum, methodum inconcinnam, molem non ingentem solum sed perpetuis humeris sustinendam, excidit mihi (faleor) 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.

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

<sup>11</sup> Lord Northington and Lord Chief-Justice Willes, of All Souls College, Lord Mansfield, of Christ Church, and Sir Thomas Sewall, Master of the Rolls, of Trinity College, Cambridge, then occupied the highest judicial offices.—SHARSWOOD.



will best deserve his regard; if he can reason with precision, and separate argument from fallacy, by the clear simple rules of pure unsophisticated logic; if he can fix his attention, and steadily pursue truth through any the most intricate deduction, by the use of mathematical demonstrations; if he has enlarged his conceptions of nature and art, by a view of the several branches of genuine experimental philosophy; if he has impressed on his mind the sound maxims of the law of nature, the best and most authentic foundation of human laws; if, lastly, he has contemplated those maxims reduced to a practical system in the laws of imperial Rome; if he has done this, or any part of it, (though all may be easily done under as able instructors as ever graced any seats of learning,) a student thus qualified may enter upon the study of the law with incredible advantage \*34] and reputation. And if, at the conclusion, or during the acquisition of these accomplishments, he will afford himself here a year or two's further leisure, to lay the foundation of his future labours in a solid scientific 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 nowhere 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 \*35] method will be necessary; and, till a better is proposed, I shall take the liberty to follow the same that I have already submitted to the public, (*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 connections 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 understanding of the student be loaded

(*p*) See Lowth's *Oratio Creviana*, p. 365.

(*q*) The *Analysis of the Laws of England*, first published in 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 in 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 inartatum animum studiosi multitudine ac varietate rerum oneravimus, duorum alterum, aut desertorem studio rum efficiemus, aut cum magno labore, sepe etiam cum diff-*

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 inexhaustible reservoir of legal antiquities and learning, the feudal 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 shown 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 expense of attention." An attention, however, not greater than is usually bestowed in mastering the rudiments of other sciences, or sometimes 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 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 awkward interval from childhood to twenty-one, between the restraints of the school and the licentiousness of politer life, in a calm middle state of mental and of moral inactivity; to these Mr. Viner gives no invitation to an entertainment which they never can relish. But to the long and illustrious train of noble and 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,

*identia (quæ plerumque juvenes avertit) serius ad id perducuntur ad quod, leviori via ductus, sine magno labore, & sine ulla diffidentia a maturius perducti potuissent. Inst. l. 1. 2.*

(t) Of parliaments, 57.

(s) Dr. Taylor's Pref. to Elem. of Civil Law.

(u) De Laud. Leg. c. 8.

and inspire them with a desire to be still better acquainted with the laws and constitution of their country.<sup>12</sup>

<sup>12</sup> It is proposed to present a few considerations upon the proper mode of training for the practice of the profession of the law in this country. They will be altogether of a practical character.

The bar in the United States is open to all who wish to enter it. It is mostly under the regulation of the various courts, and their rules have been framed upon the most liberal principles. Generally a certain period of study has been prescribed, never, it is believed, exceeding three years. In some States, however, even this restriction is not found. The applicant for admission is examined, as to his knowledge and qualifications either by the courts or by a committee of members of the bar.

The profession is the avenue to political honours and influence. Those who attain eminence in it are largely rewarded, and, with ordinary prudence, cannot fail to accumulate a handsome competence. Hence the young and ambitious are found crowding into it.

There is a great—perhaps an overdue—haste in American youth to enter upon the active and stirring scenes of life. Hence it is undoubtedly true that many men are to be found in the ranks of the profession without adequate preparation. Very often the difficulties presented by the want of a suitable education are overcome by native energy, application, and perseverance; but more commonly they prevent permanent success, and confine the unlettered advocate to the lower walks of the profession, which promise neither profit nor honour. Unless in cases of extraordinary enthusiasm and where there are evident marks of bright natural talents, a young man without the advantages of education should be discouraged from commencing the study of the law. Not that a collegiate or classical course of training should be insisted on as essential,—although it is, doubtless, of the highest importance. Classical studies are especially calculated to exercise the mental faculties in habits of close investigation and searching analysis, as well as to form the taste upon models of the purest eloquence. The orators and historians of Greece and of Rome are a school in which exalted patriotism, high-toned moral feeling, and a generous enthusiasm can be most successfully cultivated. With a good English education, however, many a man has made a respectable figure at the bar.

Lord Campbell has said that "he who is not a good lawyer before he comes to the bar will never be a good one after it." It is, no doubt, highly necessary that the years of preparation should be years of earnest, diligent study; but it is entirely too much to say, with us, that a course of three years' reading, at so early a stage, will make a good lawyer. In truth, the most important part of every lawyer's education begins with his admission to practice. He that ceases then to follow a close and systematical course of reading, although he may succeed in acquiring a considerable amount of practical knowledge, from the necessity he will be under of investigating different questions, yet it will not be of that deep-laid character necessary to sustain him in every emergency. It may be safe, then, to divide the period of a lawyer's preparation into—first, a course of two or three years' reading before his admission, and, second, one of five or seven years' close and continued application after that event.

At the commencement of his studies in the office of his legal preceptor, the cardinal maxim by which he should be governed in his reading should be *non multa, sed multum*. Indeed, it was an observation of Lord Mansfield, that the quantity of professional reading absolutely necessary, or even really useful, to a lawyer, was not so great as was usually imagined. The Commentaries of Blackstone and of Chancellor Kent should be read, and read again and again. The elementary principles so well and elegantly presented and illustrated in these two justly-celebrated works should be rendered familiar. They form, too, a general plan or outline of the science, by which the student will be able to arrange and systematize all his subsequent acquisitions. To these may be added a few books of a more practical cast; such as Tidd's Practice, Stephens on Pleading, Greenleaf's Evidence, Stephens or Leigh's Nisi Prius, Mitford or Story's Equity Pleading, which, with such reading of the local law of the State in which he purposes to settle as may be necessary, make up the best part of office-reading. It will be better to have well mastered thus much than to have run over three times as many books hastily and superficially. Let the student often stop and examine himself upon what he has read. It would be an excellent mode of proceeding for him, after having read a lecture or chapter, to lay aside the book and endeavour to commit the substance of it to writing, trusting entirely to his memory for the matter, and using his own language. After having done this, let him reperuse the section, by which he will not only discern what parts have escaped his memory, but the whole will be more certainly impressed upon his mind, and become incorporated with it as if it had been originally his own work. Let him cultivate intercourse with others pursuing the same studies, and converse frequently upon the subject of their reading. The biographer of Lord-Keeper

North has recorded of him that "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 that."

Much, of course, will depend upon what may be termed the mental temperament of the student himself, which no one can so well observe as his immediate preceptor; and he will be governed accordingly in the selection of the works to be placed in his hands, and his general course of training. No lawyer does his duty who does not frequently examine his student,—not merely as an important means of exciting him to attention and application, but in order to acquire such an acquaintance with the character of his pupil's mind—its quickness or slowness, its concentrativeness or discursiveness—as to be able to form a judgment as to whether he requires the curb or the spur. It is an inestimable advantage to a young man to have a judicious and experienced friend watching anxiously his progress, and competent to direct him when, if left to himself, he will most probably wander in darkness and danger.

In regard to the more thorough and extended course of reading which may and ought to be prosecuted after admission to the bar, the remarks of one of the most distinguished men, who has ever graced the American bar, whose own example has enforced and illustrated their value, may be commended to the serious consideration of the student. "There are two very different methods of acquiring a knowledge of the laws of England," says Horace Binney, (art. Edward Tilghman, *Encyclopedia Americana*, vol. xiv.,) "and by each of them men have succeeded in public estimation to an almost equal extent. One of them, which may be called the old way, is a methodical study of the general system of law, and of its grounds and reasons, beginning with the fundamental law of estates and tenures, and pursuing the derivative branches in logical succession, and the collateral subjects in due order; by which the student acquires a knowledge of principles that rule in all departments of the science, and learns to feel, as much as to know, what is in harmony with the system and what not. The other is, to get an outline of the system, by the aid of commentaries, and to fill it up by desultory reading of treatises and reports, according to the bent of the student, without much shape or certainty in the knowledge so acquired, until it is given by investigation in the courts of practice. A good deal of law may be put together by a facile or flexible man in the second of these modes, and the public are often satisfied; but the professor itself knows the first, by its fruits, to be the most effectual way of making a great lawyer."

Under this view, the following course of reading may be pursued. The whole subject is divided into heads, and the order of proceeding is suggested. All the books named may not be within the student's reach: some may be omitted, or others may be substituted. It may, however, be somewhat irksome to pursue any one branch for too long a period unvaried. When that is found to be the case, the last five heads may be adopted as collateral studies, and pursued simultaneously with the first three.

I. REAL ESTATE AND EQUITY.—Hale's History of the Common Law. Reeves's History of the English Law. Robertson's Charles V. Hallam's Middle Ages. Darymple on Feudal Property. Wright on Tenures. Finch's Law. Doctor and Student. Littleton's Tenures. Coke upon Littleton. Preston on Estates. Fearne on Contingent Remainders. Sheppard's Touchstone. Preston on Abstracts. Preston on Conveyancing. Jeremy on Equity. Story's Equity Jurisprudence. Powell on Mortgages. Bacon on Uses. Sanders on Uses and Trusts. Sugden on Powers. Sugden on Vendors and Purchasers. Powell on Devises. Jarman on Wills. Washburn on Real Property.

II. PRACTICE, PLEADING, AND EVIDENCE.—Sellon's Practice. Tidd's Practice. Stephen on Pleading. Williams's Saunders. Greenleaf on Evidence. Mitford's Equity Pleading. Barton's Suit in Equity. Newland's Chancery. Gresley on Equity Evidence.

III. CRIMES AND FORFEITURES.—Hale's Pleas of the Crown. Foster's Crown Law. Yorke on Forfeiture. Coke's Institutes, Part III. Russell on Crimes and Misdemeanors. Roscoe on Criminal Evidence. Chitty's Criminal Law. Wharton's Criminal Law. Bishop's Criminal Law.

IV. NATURAL AND INTERNATIONAL LAW.—Burlamaqui's Natural and Political Law. Grotius de Jure Belli et Pacis. Rutherford's Institutes. Vattel's Law of Nations. Bynkershoeck Questions Publici Juris. Wicquefort's Ambassador. Bynkershoeck de Foro Legatorum. Mackintosh's Discourse. Wheaton's History of International Law. Robinson's Admiralty Reports. Cases in the Supreme Court U. S. Dunlap's Admiralty Practice.

V. CONSTITUTIONAL LAW.—Coke's Institutes, Part II. Hallam's Constitutional History. Wynne's Eunomus. De Lolme, with Stephens's Introduction. The Federalist. Rawle on the Constitution. Story on the Constitution. Baldwin's Constitutional Views. Upshur's Brief Enquiry. Calhoun's Works, vol. i. All the Cases on the Subject in the U. S.

VI. CIVIL LAW.—Butler's *Horæ Juridicæ*. Gibbon's History of the Rise and Fall,

chs. p. 44. Justinian's Institutes. Taylor's Elements. Mackeldy's Compendium. Colquhoun's Summary. Doimat's Civil Law. Savigny's Histoire du Droit Romain. Savigny's Traité du Droit Romain.

VII. PERSONS AND PERSONAL PROPERTY.—Reeves on Domestic Relations. Bingham on Infancy and Coverture. Roper on Husband and Wife. Angell and Ames on Corporations. Pothier's Works. Smith on Contracts. Jones on Bailments. Story on Bailments. Story on Partnerships. Byles on Bills. Abbott on Shipping. Duer on Insurance. Emerigon Traité des Assurances. Boulay-Paty Cours de Droit Commercial. Story on the Conflict of Laws. Parsons on Contracts. Parsons's Elements of Mercantile Law. Parsons on Shipping, Insurance, and Admiralty; being a Treatise on Maritime Law. Phillips on Insurance.

VIII. EXECUTORS AND ADMINISTRATORS.—Roper on Legacies. Toller on Executors. Williams on Executors. Lovell's Law's Disposal.

Very few Report books are set down in this list as to be read in course. In his regular reading, the student should constantly, where it is in his power, resort to and examine the leading cases referred to and commented upon by his authors. In this way he will read them more intelligently, and they will be better impressed on his memory.

It is believed that the course thus sketched, if steadily and laboriously pursued, will make a very thorough lawyer. There is certainly nothing in the plan beyond the reach of any young man with industry and application, in a period of from five to seven years, with a considerable allowance for the interruptions of business and relaxation. He must have, however, certain fixed and regular hours for his law-studies, and he must not suffer the charms of a light literature to allure him aside. The fruits of study cannot be gathered without its toil. In the law, a young man must be the architect of his own character, as well as of his fortune. "The profession of the law," says Mr. Ritso, "is that, of all others, which imposes the most extensive obligations upon those who have had the confidence to make choice of it; and, indeed, there is no other path of life in which the unassumed superiority of individual merit is more conspicuously distinguished according to the respective abilities of the parties. The laurels that grow within these precincts are to be gathered with no vulgar hands: they resist the unhalloved grasp, like the golden branch with which the hero of the *Æneid* threw open the adamantine gates that led to Elysium."—SHARSWOOD.

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## 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 movable 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 \*39] \*nutrition, digestion, secretion, and all other branches of vital economy; are not left to chance, or the will of the creature itself, but are performed in a wondrous involuntary manner, and guided by unerring rules laid down by the great Creator.

This, then, is the general signification of law, a rule of action dictated by some superior being; and, in those creatures that have neither the power to think, nor to will, such laws must be invariably obeyed, so long as the creature itself subsists, for its existence depends on that obedience. But laws, in their more confined sense, and in which it is our present business to consider them, denote the rules, not of action in general, but of *human* action or conduct; that is, the precepts by which man, the noblest of all sublunary beings, a creature endowed with both reason and free-will, is commanded to make use of those faculties in the general regulation of his behaviour.<sup>1</sup>

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

<sup>1</sup> 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, *ὡς γενεσθαι και εγερει*. 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 forever 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*.—CHRISTIAN.

It has been objected that law, in its proper sense, is confined to the conduct of intelligent beings. It is to be observed, however, that we apply the term in the English language to any rule whatever which we conceive to have been established by a superior. In this sense, all the operations of nature may be considered as the result of certain rules laid down by the Supreme Being in creation; in other words, that every existence, spiritual, animal, vegetable, or mineral, had impressed upon it certain rules of action. They may be called qualities, properties, or peculiarities; but, considering them all as the work of an Almighty Creator, it is perfectly accurate and most proper to call them laws. By the use of this word we keep constantly in mind, as we ought, that the universe was not the result of a blind chance, but the work of Intelligence. A perfectly correct, as well as most general, definition of the word *law* is, the command of a superior.

In most languages there are two words,—one expressive of law in its general or abstract, and another in its concrete, sense. Thus, in Latin, *jus* expresses the former, *lex* the latter; in French, *droit* and *loi*; in German, *recht* and *gesetz*. The word *right*, in English, might be adopted for the abstract sense of law; but it has not been. *Usus non jus facit norma loquendi*. Considering the word *law* as comprehending this general and abstract sense, there is no objection to the text.—SHARWOOD.

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 \*10] endued him with free-will to conduct himself in all parts of \*life, he laid down certain immutable laws of human nature, whereby that free-will is in some degree regulated and restrained, and gave him also the faculty of reason to discover the purport of those laws.<sup>2</sup>

Considering the Creator only as a being of infinite *power*, he was able unquestionably to have prescribed whatever laws he pleased to his creature, man, however unjust or severe. But, as he is also a being of infinite *wisdom*, he has laid down only such laws as were founded in those relations of justice that existed in the nature of things antecedent to any positive precept. These are the eternal immutable laws of good and evil, to which the Creator himself, in all his dispensations, conforms; and which he has enabled human reason to discover, so far as they are necessary for the conduct of human actions. Such, among others, are these principles: that we should live honestly, should hurt nobody, and should render to every one his due; to which three general precepts Justinian(a) has reduced the whole doctrine of law.<sup>3</sup>

(a) *Juris præcepta sunt hæc, honeste vivere, alterum non lædere, suum cuique tribuere. Inst. I. l. 3.*

<sup>2</sup> The laws of our moral being are the necessary relations sustained by us to our Maker and to other beings. The existence of a Supreme Being—a Spirit infinite, eternal, omniscient, omnipotent—is a first truth of moral science. It may be assumed safely as an admitted truth. Having created us such as we are, our relations to him and to one another arose not from his will, but from those eternal principles of rectitude which were coeternal with his will. “*Erat enim ratio perfecta a rerum natura et ad recti faciendum impellens, et a delicto avocans; quæ tum denique incepti lex esse non cum scripta est, sed tum, cum orta est; orta autem simul est cum mente divina.*”—*Cic. de Legg.*, l. ii. s. 4. The same may be affirmed of other than moral relations. We may say without the slightest irreverence that, having created things having extension, God could not make two things, both equal to a third, which would not at the same time be equal to one another. There is, in like manner, an inherent difference between right and wrong, independently of the will of any being. God himself cannot make right wrong or wrong right. Right and wrong are eternal as the Deity. They depend upon the relations of moral beings; and, even before such beings were created, those relations existed in possibility, though not in act. The will of God existed coeternally with himself; and that will, infinitely perfect and incorrupt, never could do else than choose the right and refuse the wrong. Right and wrong are not created existences, but the moral qualities of created existences.

It may well be questioned, then, whether the learned commentator, in starting with the assertion that the law of nature is the will of the Creator, has not assumed an erroneous principle as the foundation of his reasoning. In his sense, the law of nature denotes “the rules 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 free-will, is commanded to make use of those faculties in the general regulation of his behaviour.” It is clear that this law respects entirely the question of what is right and wrong. It is true that, in willing to create moral beings, our Maker knew what their necessary relations both to himself and each other would be; and, in a secondary sense, he may be said to have willed the existence of those relations. But this is an entirely different thing from the idea that the rules of right and wrong resulting from those relations were simple creations of his will; for that implies that he might have made them other than they are.—SHARSWOOD.

<sup>3</sup> 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 *bien-séance*; and that this precept was intended to comprise that class of duties of which the violations

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 connection of justice and human felicity, he \*has not [\*41 perplexed the law of nature with a multitude of abstracted rules and precepts, referring merely to the fitness or unfitness of things, as some have vainly surmised, but has graciously reduced the rule of obedience to this one paternal precept, "that man should pursue his own 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.<sup>4</sup>

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are ruinous to society, and not by immediate but remote consequences, as drunkenness, debauchery, profaneness, extravagance, gaming, &c.—CHRISTIAN.

<sup>4</sup>There is in every moral being a faculty or sense by which he is enabled to distinguish right from wrong. There have been a great number of theories among those who have rejected the doctrine of a moral sense. They have succeeded each man in showing every other theory but his own to be baseless. The *reductio ad absurdum* of every other system, which ingenuity has ever framed, would alone seem to leave the advocates of a moral sense in possession of the field. The appeal, after all, must be made to every man's consciousness. And why not? Every other faculty is proved in the same way. Let any one attempt to demonstrate that there is in men a natural taste for beauty. He will be met by precisely the same course of argument as that which attacks the existence of the moral sense, or, as it may well be termed, the taste for moral beauty. All men have it not in the same perfection. In some it is undeveloped, in some it is corrupted. Indeed, the same objections may be urged against the perceptions of the palate or of any other natural sense. That some men love the taste of tobacco by no means proves that there is not a natural faculty in all men which distinguishes between the qualities of sweet and bitter.

The commentator appears to have adopted the idea that utility is the standard of right and wrong; in other words, that we are determined in our judgment of the moral qualities of an action solely by a consideration of its effect on our happiness. Such a doctrine contradicts the common sense and feeling of mankind. If a gross instance of ingratitude to a benefactor—of filial impiety—of marital cruelty—is presented to the mind, no man stops to estimate its consequences before pronouncing judgment of condemnation or feeling a sense of detestation. If a grovelling miser were robbed of his treasure by a philanthropist in order to devote every cent of it to the relief of suffering humanity, nay, though the result should be peace and joy to many families, without one element of unhappiness to the sordid wretch whose property was thus wrested from him, the common sense and feeling of mankind would condemn the act as *wrong*. It would be *right* on the utilitarian scheme, even if you give the widest scope to the idea of utility, as Archdeacon Paley has done; for even the precedent, if we confine its authority (as all precedents must be) to the very case given, would not be *bad*.

"According to this view," says the Rev. Dr. Alexander, "unless a man is persuaded that he shall gain something by keeping his word, he is under no obligation to do it. Even if God should clearly make known his will and lay upon him his command, he is under no obligation to obey, unless certain that he shall receive benefit by so doing. This is, indeed, to make virtue a mercenary thing and reduce all motives to a level. And, as self-love or the desire of happiness is the only rational motive, (and all men possess this in a sufficient degree of strength,) the only conceivable difference between



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; and such of them as are valid derive all their force and all their authority, mediately or immediately, from this original.<sup>5</sup>

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, and the blindness \*42] 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

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the good and the bad consists in the superior sagacity which the one has above the other to discern what will most contribute to happiness. And if what we call vice or sin could be made to contribute to happiness, then it would change its nature and become virtue."—*Elements of Moral Science*, p. 57.

Right and wrong, indeed, are words which are often employed in common speech in a much larger sense than is attached to them by moral science; and it is necessary to distinguish this popular from their strictly philosophical meaning. *Right*, in this popular sense, is synonymous with *expediency*,—fitness to an end. In the strict sense of the word, as a moral quality, *right* is conformity to that rule of moral conduct which the conscience approves; *wrong*, that which it disapproves. It is not the conscience, but the understanding, which is called into exercise when we judge of questions of expediency or utility,—of the fitness of certain things or actions to certain ends. That feeling of complacency which, in its higher or lower degrees, we term admiration or approbation, must always accompany a judgment of moral right; detestation or disapprobation, a judgment of moral wrong.—SHARSWOOD.

<sup>5</sup> Mr. Justice Coleridge remarks that he understands the author to mean by this merely that a human law against the law of nature has no binding force on the conscience, and that if a man submits to the penalty of disobedience he stands acquitted; and that, in this sense, the position seems unquestionable. He subsequently states that the burden of proof and the moral responsibility in case of error lie on him who disobeys; that is, on him who sets up his own understanding of the divine law as a ground in conscience for refusing to submit to the lawfully-constituted legislature of the country.

It appears to me, however, that, in such a case, the subject or citizen has only one of two alternatives: revolution,—an appeal to the ultimate power which exists in every society, after he has tried all the ordinary forms of the constitution to obtain a repeal of the obnoxious law,—or removal to another country. I cannot agree that when a law, decided to be constitutional, is in full force, its provisions can be conscientiously violated, even though its penalty be submitted to. It may be necessary to do so for a time, and such necessity may afford a sufficient justification *in foro conscientiae*. I do not say that a man's circumstances, and especially his relation to his family, may not be such as to make this justification permanently a good one. All I mean to say is that he ought not voluntarily to place himself, or remain, in such a position.—SHARSWOOD.

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 moral guilt, or \*superadd any fresh obligation, *in foro con-* [\*43  
*scientiæ*, to abstain from its perpetration. Nay, if any human law should allow or enjoin us to commit it, we are bound to transgress that human law, or else we must offend both the natural and the divine. But, with regard to matters that are in themselves indifferent, and are not commanded or forbidden by those superior laws,—such, for instance, as exporting of wool into foreign countries,—here the inferior legislature has scope and opportunity to interpose, and to make that action unlawful which before was not so.

If man were to live in a state of nature, unconnected with other individuals, there would be no occasion for any other laws than the law of nature, and the law of God. Neither could any other law possibly exist: for a law always supposes some superior who is to make it; and, in a state of nature, we are all equal, without any other superior but Him who is the author of our being. But man was formed for society; and, as is demonstrated by the writers on this subject, (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 hable 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.*<sup>1</sup>

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

(c) Ff. L 1, 9

<sup>1</sup> 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.—CHRISTIAN.

Modern writers have agreed that the term International Law is more proper than Law of Nations. *Jus gentium* is rather what Adam Smith has called natural jurisprudence, which he says is “a theory of the principles which ought to run through, and to be the foundation of, the laws of all nations.” The two phrases *jus naturæ* and *jus gentium* are used by the Roman lawyers almost indiscriminately. *Jus feiale* more properly was employed to express among the Romans what we mean by the law of nations. They had

\*41] \*Thus much I thought it necessary to premise concerning the law of nature, the revealed law, and the law of nations, before I proceeded to treat more fully of the principal subject of this section, municipal or civil law; that is, the rule by which particular districts; communities, or nations, are governed; being thus defined by Justinian, (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."<sup>8</sup> Let us endeavour to explain its several proper-

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

a college of heralds, by whose ministry the declaration of war was always announced to the enemy, and by whom occasionally, no doubt, questions connected with the relation of states were considered. The history of Rome is a history of continual wars. From Numa to Augustus, the gates of the temple of Janus were never closed. Hence most of the questions which arose must necessarily have been connected with a state of war. On the other hand, the definition of *jus gentium* by the Digest is, *Quod naturalis ratio inter omnes homines constituit, idque apud omnes peræque custoditur vocaturque jus gentium.*—*Dig.* i. 9. What is termed the Law of Nations was more accurately called the *jus inter gentes*—the law between or among nations—by Dr. Zouch, an English civilian, distinguished in the celebrated controversy between the civil and common lawyers, during the reign of Charles II., as to the extent of the admiralty jurisdiction. He suggested this term as more appropriate to express the real scope and object of the law. An equivalent term in the French language was subsequently proposed by Chancellor D'Aguesseau, as better adapted to express the idea properly annexed to that system of jurisprudence commonly called *le droit des gens*, but which, according to him, ought to be called *le droit entre les gens*. The term International Law has since been advocated by Mr. Bentham, as well adapted to express in our language, "in a more significant manner, that branch of jurisprudence which goes under the name of *law of nations*,—a denomination [he remarks] so uncharacteristic, that, were it not for the force of custom, it would rather seem to refer to internal or municipal jurisprudence." The terms *International Law* and *Droit international* have now taken root in our legal nomenclature, and are constantly used in all discussions connected with this important science.—SHARSWOOD.

<sup>8</sup> 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 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 faciendâ 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 ἐπειδὴν εἰρεθῆ, κοινὸν τοῦτο πρόβλημα ἀπεδείχθη, πᾶσιν ἴσον καὶ ὁμοῖον. καὶ τοῦτ', ἐστὶ νόμος, ὃ πάντας προσήκει πείθεσθαι διὰ πολλὰ καὶ μάλισθ', ὅτι πᾶς ἐστὶ νόμος εἴρημα μὲν καὶ ὄδρον θεῶν, δόγμα δ' ἀνθρώπων φρονίμων, ἐπανόρθωμα δὲ τῶν ἑκουσίων καὶ ἄκουσίων ἀμαρτημάτων, πόλεως δὲ συνθήκη κοινή· καθ' ἣν πᾶσι προσήκει ζῆν τοῖς ἐν τῇ πόλει.* "The design and object of the 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

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

\*It is also called a *rule*, to distinguish it from a *compact* or *agreement*; [ \*45 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 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

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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.—CHRISTIAN.*

It has been justly observed that the last clause of this definition is surplusage, if the meaning be that what the law commands is therefore right, and what it prohibits wrong. But mere law, the command of a superior, cannot *per se* annex the moral quality of right or wrong to the action in itself considered, commanded or prohibited. Right or wrong are abstract moral qualities, resulting necessarily from the relations of persons or things. No law can make that right which is itself wrong. The definition of Cicero certainly avoids this objectionable feature of Blackstone's language:—*Lex est summa ratio insita à naturâ, quæ jubet ea, quæ faciendâ sunt prohibetque contraria*. If the definition of the text were modified so as to conform to this idea, it would be better:—"Municipal law is a rule of civil conduct prescribed by the supreme power in a state, commanding what is to be done, and forbidding the contrary."—SHARSWOOD.

\*The act to confiscate the goods of Titius would, in Latin, be *lex*, not *jus*; in French *loi*, not *droit*: in English, however, it is called *law*. Public and private acts of the legislature are indiscriminately termed *laws*.—SHARSWOOD.

\*16] acts of parliament as are appointed\* to be publicly read in churches and other assemblies. It may lastly be notified by writing, printing, or the like; which is the general course taken with all our acts of parliament. Yet, whatever way is made use of, it is incumbent on the promulgators to do it in the most public and perspicuous manner; not like Caligula, who (according to Dio Cassius) wrote his laws in a very small character, and hung them 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.<sup>(e)</sup> 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.<sup>10</sup>

(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.—CHRISTIAN.

<sup>10</sup> 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. See 1, Lev. 91, 4 T. R. 660; but this is remedied by 33 Geo. III. 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, sec. 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.

According to the rule of the English law, acts of parliament took effect by relation to the first day of the session of parliament at which they were passed, unless some other day was specially named in the body of the act. The entire session of parliament was regarded by a fiction as one day. In the case of the King vs. Thurston, this doctrine of carrying a statute back by relation to the first day of the session was admitted in the King's Bench, although the consequence of it was to render an act murder which would not have been so without such relation. (1 Lev. 91.) By the stat. 33 Geo. III. c. 13, it was declared that statutes are to have effect only from the time they receive the royal assent; and the former rule was abolished, to use the words of the statute, by reason of "its great and manifest injustice."

In the United States, an act of Congress takes effect from the time of its passage. So wide-spread is the territory the inhabitants of which may be affected by the provisions of such act, that it is impossible they can have notice of the existence of the law until some time after it has been passed.

The Code Napoleon declared that laws were binding from the moment their promulgation could be known; and that the promulgation should be considered as known in the department of the Imperial residence one day after that promulgation, and in each of the other departments of the French empire after the expiration of the same space of time, augmented by as many days as there were distances of twenty leagues between the seat of government and the place. The New York Revised Statutes have also declared that every law, unless a different time be prescribed therein, shall take effect throughout the State on and not before the twentieth day after the day of its final passage.

By the constitution of the United States, art. 1, s. 8 and 10, Congress and the States are forbidden to pass *ex post facto* laws. An *ex post facto* law is one which renders an act punishable in a manner in which it was not punishable when it was committed. Every

But farther: municipal law is "a rule of civil conduct prescribed by the supreme power in a state." For legislature, as was before observed, is the greatest act of superiority that can be exercised by one being over another. Wherefore it is requisite to the very essence of a law, that it be made by the supreme power. Sovereignty and legislature are indeed convertible terms; one cannot subsist without the other.

\*This will naturally lead us into a short 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. [\*17]

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 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 should be certainly extended to any. [\*48]

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law that makes an act done before the passing of the law, and which was innocent when done, criminal, or which aggravates a crime and makes it greater than it was when it was committed, or which changes the punishment and inflicts a greater punishment than the law annexed to the crime when committed, or which alters the legal rules of evidence and makes less or different testimony than the law required at the time of the commission of the offence sufficient in order to convict the offender, falls within this definition. *Ex post facto* laws relate to penal and criminal proceedings, which impose punishments or forfeitures, and not to civil proceedings, which affect private rights retrospectively. Retrospective laws and State laws divesting vested rights, unless *ex post facto*, or impairing the obligation of contracts, do not fall within the prohibition contained in the constitution of the United States, however repugnant they may be to the principles of sound legislation. Of retrospective laws Lord Bacon says, "Cujus generis leges raro et magna cum cautione sunt adhibendæ: neque enim placet Janus in legibus." — *Tract. de Just. Univ.*, aphorism xlvi. 1 Kent Com. 405. *Calder vs. Bull*, 3 Dall. 386. *Fletcher vs. Peck*, 6 Cranch, 135. *Satterlee vs. Matthewson*, 2 Peters, 413. *Watson vs. Mercer*, 8 Peters, 88. — SHARSWOOD.

<sup>11</sup> Man is by nature a social being. He is made to live in the society of other moral beings. He cannot be contented in a state of solitude. He would rather "dwell in the

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 intrusted? To this the general answer is easy; but the application of it to particular cases has occasioned one half of those mischiefs, which are apt to proceed from misguided political zeal. In general, all mankind will agree that government should be reposed in such persons, in whom those qualities are most likely to be found, the perfection of which 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.

midst of alarm than reign" in a desert. The commentator is right when he says that "man was formed for society, and, as is demonstrated by the writers on this subject, is neither capable of living alone, nor, indeed, has the courage to do it." But it is not consistent with this admission to say, as he afterwards does, that "the only true and natural foundations of society are the wants and fears of individuals." It may be fearlessly asserted that a state of solitude would be unnatural and unsuited to a man if he had no wants and no fears. He confounds in this passage society and government. It is true that the wants and fears of individuals in society tend to government; or, as he afterwards expresses it, government "results of course, as necessary to preserve and keep society in order." But it would be more philosophical to go one step further back to that principle in human nature which makes the wants and fears of men in society tend necessarily to government. That principle is, that, strong as the social feelings are, the individual or *selfish* (using the word in a sense not necessarily bad) are still stronger. Each man, in consequence, looks more to his own interest and happiness than those of others, and conflicts must take place,—universal discord and confusion, destructive of the social state and the ends for which it is ordained. There must be a controlling power somewhere lodged; and, wherever or whatever it is, that is *Government*.

It having been shown that government is a necessary relation of man from his natural constitution, it follows that government is *right*. The moral government of the Supreme Being over the universe of matter and mind has this same moral quality. It is therefore in a secondary sense that all government—and, of course, human government—may be said to be of divine ordination. In the creation of moral beings with social natures, this relation of government resulted as necessarily as the equality of the three angles of a triangle to two right angles. It is in this sense we are to receive the declaration that "the powers that be are ordained of God."—Rom. xiii. 1.

Writers have amused themselves with supposing an original compact in every society. The nearest approach to such a thing in history is to be found in the original settlement of the United States. The different colonies were constituted under charters from the crown of Great Britain; and the original adventurers, as well as those who succeeded, may without much violence be considered as having, either expressly or tacitly, become parties to a compact of society founded upon the terms set forth in those charters. Each colony was a separate state or nation. They all agreed in recognising the King of Great Britain as their supreme executive magistrate, and the power of the British Parliament to extend over them in certain respects; but, in the main, their local laws were to be made by them through their Representative Assemblies. At the Revolution, they threw off their dependence upon the British crown and declared themselves "free and independent States." The Declaration of Independence was the joint and several act of the colonies, and its effect was to constitute each separate colony a free and independent State. So they themselves considered; for, as they had done before, they continued to act by a Congress of States, each State, by its delegates, having one vote in the Congress; and when, subsequently, they entered into articles of confederation, it was declared expressly, "Each State retains its sovereignty, freedom, and independence, and every power, jurisdiction, and right which is not by this Confederation expressly delegated to the United States in Congress assembled."

The fundamental principle announced to the world in the Declaration of Independ-

How the several forms of government we now see in the world at first actually began, is matter of great uncertainty, and has occasioned infinite disputes. It is not my business or intention to enter into any of them. However they began, or by \*what right soever they subsist, there is and must be in all of them a supreme, irresistible, absolute, uncontrolled authority, in which [\*49 of 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 intrusted 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

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ence was that governments derive their just powers from the consent of the governed, that it is the right of the people to alter or abolish their form of government and institute a new one, laying its foundation on such principles and organizing its powers in such form as to them shall seem most likely to effect their safety and happiness. This may be treated as the established doctrine of this country. Nor is it inconsistent with any thing before advanced in these notes; for, while government is a moral relation necessarily resulting from the nature of men, and therefore of divine ordination, the particular form of government is evidently of human contrivance. The great majority of governments have been the result of force\*or fraud; yet even these may be considered as resting upon the tacit consent or acquiescence of the governed. If they have the physical power, they are competent to overthrow it; nor are other nations justified in interfering in such domestic conflicts. It is to be remarked that in the freest nations—even in the republics which compose the United States—the consent of the entire body of the people has never been expressly obtained. The people comprehend all the men, women, and children of every age and class. A certain number of the men have assumed to act in the name of all the community. The qualifications of electors or voters was in general settled by the colonial charters, and so continued until altered subsequently by the authority of the same body. It was settled, too, that the acts of the majority of such body of electors were binding on the whole number.

Very plainly, then, it is essential to the American doctrine to hold that every citizen shall have a right at any time to expatriate himself. It is well known that it is settled to the contrary in the English courts. *Nemo potest exuere patriam*. But how can the consent of the governed be in any sense implied if the citizen is coerced to remain a member of the state through all the changes which its form of government may undergo, whether with or without his approbation? It is clear that in any such change, he may remove himself and his property to another country if he chooses, and should be allowed a reasonable time in which to make his election. This course was adopted at the period of the American Revolution. All persons, whether natives or inhabitants, were considered entitled to make their choice either to remain subjects of the British crown or to become citizens of one or other of the United States. This choice was necessarily to be made within a reasonable time. In some cases, that time was pointed out by express acts of the legislature; and the fact of abiding within the State after its assumed independence, or after some other specified period, was declared to be an election to become a citizen. That was the course in Massachusetts, New York, New Jersey, and Pennsylvania. In other States, no special laws were passed, but each case was left to be decided upon its own circumstances, according to the voluntary acts and conduct of the party.—SHARSWOOD.



legislative power in the discharge of their several functions, or else the constitution is at an end.<sup>12</sup>

<sup>12</sup> The sovereignty or supreme power in every state resides ultimately in the body of the people. Blackstone supposes the *jura summi imperii*, or the right of sovereignty, to reside in those hands in which the exercise of the power of making laws is placed. Our simple and more reasonable idea is, that the government is a mere agency established by the people for the exercise of those powers which reside in them. The powers of government are not, in strictness, *granted*, but *delegated*, powers. As all delegated powers are, they are trust powers, and may be revoked. It results that no portion of sovereignty resides in government. A man makes no grant of his estate when he constitutes an attorney to manage it. The sovereignty—the *jura summi imperii*—resides in the body of the state or nation by whose consent, expressed or implied, a form of government was at one time established as the organ to make known its sovereign will. This sovereignty is indivisible, and can be lost only in one way,—by a voluntary or forced subjection to, or merger with, some other state or people.

That act of the people which constitutes the form of government we call the *constitution*. It may be a general unlimited delegation of all the power of the people to certain prescribed functionaries. This is the case with the English constitution. The king, Lords, and Commons are vested with unlimited power. They can change at any time the established form of the government, and have done so in many instances, as in the change of the succession to the throne, the powers and organization of the Lords and House of Commons. What is popularly termed the English constitution are certain principles according to which the government has been organized, and which, according to the most liberal view, forms an implied restriction upon the omnipotence of the king, Lords, and Commons. Yet it is certain that, if Parliament were to pass a law clearly inconsistent with those principles, no court in England would venture to pronounce it void. And if it could not be repealed by the force of the popular will, by the same power which made it, it would have to be submitted to as the law of the land, unless the people chose to resort to a revolution. Revolution means nothing more nor less than a peaceable or forcible change by a people of their constitution.

The constitutions of our American Republics have always been written. The charters which prescribed the forms of government were so. Those adopted by the several States at the period of the Revolution were all so. They not only organized the several departments,—the legislative, executive, and judicial,—but by various Bills of Rights, as well as express restrictions, prescribed limitations to the power of the government. In other words, certain of the powers of sovereignty they refused to delegate, and as to others, provided that they should only be exercised in a prescribed manner. It results that the provisions of the constitution, emanating directly from the people, are the expression of their permanent will, and no act of the government inconsistent with it of any validity. The courts will pronounce such acts invalid, null, and void. "It is emphatically the province and duty of the judicial department to say what the law is. Those who apply the rule to particular cases must of necessity expound and interpret that rule. If two laws conflict with each other, the courts must decide on the operation of each. So if a law be in opposition to the constitution, if both the law and the constitution apply to a particular case, so that the court must either decide that case conformably to the law, disregarding the constitution, or conformably to the constitution, disregarding the law, the court must determine which of the conflicting rules governs the case. This is of the essence of judicial duty. If, then, the courts are to regard the constitution, and the constitution is superior to any ordinary act of the legislature, the constitution, and not such ordinary act, must govern the case to which they both apply. Those, then, who controvert the principle that the constitution is to be considered in court as a paramount law are reduced to the necessity of maintaining that courts must close their eyes on the constitution and see only the law. This doctrine must subvert the very foundation of all written constitutions. It would declare that an act which, according to the principles and theory of our government, is entirely void, is yet in practice completely obligatory. It would declare that, if the legislature shall do what is expressly forbidden, such act, notwithstanding the express prohibition, is in reality effectual. It would be giving to the legislature a practical and real omnipotence with the same breath which professes to restrict their powers within narrow limits. It is prescribing limits and declaring that those limits may be passed at pleasure."—C. J. MARSHALL, in *Marbury vs. Madison*, 1 Cranch, 177.

In general, in our State constitutions the right of suffrage is almost universally extended to all free white male citizens, and the principle is to give effect to the will of the numerical majority of the voters. Yet the States are not pure, but representative, democracies. The legislative functions are vested in two separate bodies, differently constituted,—a Senate and a House,—whose concurrence is required to the passage of laws,

In a democracy, where the right of making laws resides in the people at large, public virtue, or goodness of intention, is more likely to be found, than either of the other qualities of government. Popular assemblies are frequently foolish in their contrivance, and weak in their execution; but generally mean to do the thing that is right and just, and have always a degree of patriotism or public spirit. In aristocracies there is more wisdom to be found, than in the other frames of government; being composed, or intended to be composed, of the most experienced citizens: but there is less honesty than in a republic, and less strength than in a monarchy. A monarchy is indeed the most powerful of any; 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 these means into execution. And the ancients, as was observed, had in general no idea of any other permanent form

and a qualified veto is generally allowed to the executive. But, as the representatives of the people in the legislatures are elected by separate districts, it may so happen, if there are large majorities for some of the representatives, while those of different views are chosen by small majorities, that either or both branches may not truly represent the views of a majority of all the voters. While the bare numerical majority may be safely intrusted with the election of the executive magistrate, and in general, directly or indirectly, with the disposition of the offices of trust and profit, it has long been a prevailing opinion that something more than a bare numerical majority should be required in the passage of laws. Stability is of the highest importance in regard to measures of financial and jurisprudential policy; and, where parties are pretty nearly equally divided, a sudden gust of popular excitement—a flying camp of voters easily swayed by passion or interest from one side to another—what is still worse, a small neutral party with one idea, ready to make its terms with either of the others—will often change the politics of a state so frequently as to be very injurious to the best interests of the commonwealth. The difficulty is, and has been felt to be, how to arrange such a system which, while not denying to the numerical majority its legitimate influence, will operate to afford such a check upon it as to secure the rights and interests of the minority. Perhaps the adoption of a different basis for the two branches, as of territory for the Senate, and of population for the lower house, comes nearer practicability than any other plan.

Besides the constitutions of the several States, there is also the constitution of the United States, with paramount authority over the people of all the States. By that constitution certain specified powers were delegated to a general or federal government,—all powers not delegated being reserved to the States or to the people. The special powers thus delegated are principally such as concern the foreign relations of the country, the rights of war and peace, the regulation of foreign and domestic commerce, and other objects most appropriately assigned to the general government. The government invested with the exercise of these powers is distributed into legislative, executive, and judicial departments. The legislative is divided into two branches,—a Senate, composed of two members from each State, elected by the legislature thereof, and a House, composed of representatives from each State in proportion to their respective numbers, determined by adding to the whole number of free persons, including those bound to service for a term of years and excluding Indians not taxed, three-fifths of all other persons. The voters in each State are such persons as by the constitution thereof are the electors of the most numerous branch of the State legislature. The executive power is vested in a President, who is chosen by electors chosen in each State as its legislature may prescribe,—each State being entitled to as many electors as it has Senators and representatives. He has a qualified veto upon the acts of the legislature. The judicial power is vested in a supreme court, and such inferior courts as may be established by law,—the judges receiving their appointment from the President by and with the advice and consent of the Senate, and holding their office by the tenure of good behaviour. It is unnecessary to proceed with further details on this subject. The student must be referred to the instrument itself, with which he should make himself familiar at an early stage of his professional studies; and it would be well worth his while to commit it to memory, so as to have its very words at all times at command.—SHARWOOD.

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 despatch, that are to be found in the most absolute monarchy: and, as the legislature of the kingdom is intrusted to three distinct powers, entirely independent of each other; first, the king; secondly, the lords spiritual and temporal, which is an aristocratical assemblage of persons \*51] selected for their piety, \*their birth, their wisdom, their valour, or their property; and, thirdly, the House of Commons, *freely chosen by the people from among themselves*, which makes it a kind of democracy: as this aggregate body, actuated by different springs, and attentive to different interests, composes the British parliament, and has the supreme disposal of 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 \*52] subservient to the views of either of the other two, there would \*soon be an end of our constitution.<sup>12</sup> 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

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

(*g*) "*Cunctas nationes et urbes populus aut primores, aut magistri regunt; delecta ex his et constituta reipublicæ forma*

*laudari facilius quam evenire, vel si evenit, haud diuturnum esse potest.*" Ann. l. 4.

(*h*) On government, part 2, § 212.

<sup>12</sup> If it be true that there would be an end of the constitution if at any time any one of the three should become subservient to the views of either of the other branches, then assuredly the constitution is at an end; for it would be difficult to contend that in the times of Henry VIII. and Elizabeth the two Houses of Parliament were not subservient to the crown, or that before the Reform Act the House of Lords had not the ascendancy, or that since that act the House of Commons have not had it. Indeed, it does not seem easy to name any eventful period of our constitutional history when the exact equilibrium of power, referred to by Blackstone, existed. That this supposed theory of our constitution is now denied by political writers of different parties is, at any rate, indisputable.—STEWART.

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 intrusted: 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 expedient that they receive [\*53] 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. And when this is once done, it will follow of course that it is likewise the business of the law, considered as a rule of civil conduct, to enforce these rights, and to restrain or redress these wrongs. It remains therefore only to consider in what manner the law is said to ascertain the boundaries of right and wrong; and the methods which it takes to command the one and prohibit the other.

For this purpose every law may be said to consist of several parts: one, *declaratory*; whereby the rights to be observed, and the wrongs to be eschewed, are clearly defined and \*laid down: another, *directory*; whereby the subject is instructed and enjoined to observe those rights, and to abstain [\*54] 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 *vindictory* 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 misdemeanors, 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 law-giver, 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 misdemeanors, according as the municipal legislator sees proper, for promoting the welfare of the society, and more effectually carrying on the purposes of civil life. Thus our own common law has declared, that the goods of the wife do instantly upon marriage become the property and right of the husband; and our statute law has declared all monopolies a public offence: yet that right, and this offence, have no foundation in nature, but are merely created by the law, for the purposes of civil society. And sometimes, where the thing itself has its rise from the law of nature, the particular circumstances and mode of doing it become right or wrong, as the law of the land shall direct. Thus, for instance, in civil duties; obedience to superiors is the doctrine of revealed as well as natural religion: but who those superiors shall be, and in what circumstances or to what degrees they shall be obeyed, 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<sup>(1)</sup> 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, \*56] 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 these 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.

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 *vindictory* 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 muni-

(1) See page 43.

cial 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.<sup>(k)</sup> 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 intrusted with the care of putting the laws in execution.

\*Of all the parts of a law the most effectual is the *vindictory*. For it is but lost labour to say, "do this, or avoid that," unless we also declare, [\*57 "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.

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

It is 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,<sup>(l)</sup> here I apprehend conscience is no farther concerned, than by directing a submission to the penalty, in case of our breach of those laws: for otherwise the multitude of penal laws in a state would not only be looked upon as an impolitic, but would also be a very wicked thing; if every such law were a snare for the conscience of the subject. But in these cases the alternative is offered to every man; "either abstain from this, or submit to such a penalty:" and his conscience will be clear, whichever side of the alternative he thinks proper to embrace. Thus, by the statutes for preserving the game, a penalty is denounced against every unqualified person that kills a hare, 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,<sup>14</sup> for not burying the dead in woollen, for not performing the statute-work on the public roads, and for innumerable other positive misdemeanors. 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

(\*) Locke, II. Um. Und., b. II. c. 21.

(l) See book II. page 420.

<sup>14</sup> By stat. 54 Geo. III., c. 96, this law, and by stat. 54 Geo. III., c. 108 that for not burying in woollen, are repealed.—CHITTY.

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.<sup>15</sup> But where disobedience to the law 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.<sup>(m)</sup>

I have now gone through the definition laid down of a municipal law; and

<sup>(m)</sup> *Lex pure poenalis obligat tantum ad poenam, non item poenam.* (Sanderson *de conscient. obligat. pract.* viii. § 17, et *culpam: lex poenalis mixta et ad culpam obligat, et ad* 24.)

<sup>15</sup> 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 justii prope mater et æqui.*"

But the necessity of one set of laws is seen 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 seafaring 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 (Book iv., 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 practise 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.

Punishments 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 is 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 recompense 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 jail. 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

have shown that it is "a rule of civil conduct prescribed by the supreme power in a state, commanding what is right, and prohibiting what is wrong;" in the explication of which I have endeavoured to interweave a few useful principles concerning the nature of civil government, and the obligation of human laws. Before I conclude this section, it may not be amiss to add a few observations concerning the *interpretation* of laws.

When any doubt arose upon the construction of the Roman laws, the usage was to state the case to the emperor in writing, and take his opinion upon it. This was certainly a bad method of interpretation. To interrogate the legislature to decide particular disputes is not only endless, but affords great room for partiality and oppression. The answers of the emperor were called his rescripts, and these had in succeeding cases the force of perpetual laws; though they ought to be carefully distinguished by every rational civilian from those general constitutions which had only the nature of things for their guide. The emperor Macrinus, as his historian Capitolinus informs us, had once resolved to abolish these rescripts, and retain only the general edicts: he could not bear that the hasty and crude answers of such princes as Commodus and Caracalla should be revered as laws. But Justinian thought otherwise, and he has preserved them all. In like manner the canon laws, or decretal epistles of the popes, are all of them rescripts in the strictest sense. Contrary to all true forms of reasoning, they argue from particulars to generals.

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

1. Words are generally to be understood in their usual and most known signification; not so much regarding the propriety of grammar, as their general and popular use. Thus the law mentioned by Puffendorf<sup>(\*)</sup> which forbade 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 accord-

(\*) *Inst.* 1, 2, 6.

(\*) *L. of N. and N.* 5, 12, 3.

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 further, 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. An eloquent modern divine has also said, "Let the great general duty of submission to civil authority be engraven on our hearts, wrought into the very habit of the mind, and made a part of our elementary morality." *Hall's Sermon*, Oct. 1803.—CHRISTIAN.

The morality of this position of the learned commentator has been well questioned. Its soundness as a legal principle, though it once had sway in the courts, has been since repudiated. With all the qualifications which have been cautiously annexed to it in the text,—namely, that the thing forbidden or enjoined is wholly a matter of indifference, and the penalty inflicted an adequate compensation for the civil inconvenience supposed to arise from the offence,—it must be admitted to be fraught with practical danger to society. There is a moral obligation resting on every individual to obey the laws of that community in which he lives. The breach of any known law is a violation of that obligation. If the laws be so multiplied that the citizen cannot be expected to know or understand them, then, although in the eye of the law he may not be excused,—*legis ignorantia neminem excusat*,—yet it is different *in foro conscientia*. This is the answer to the suggestion that such laws would be a snare to the conscience. But if the subject knows, or ought to know, the law, if he had exercised ordinary diligence, he has no right to set up his own judgment as to the indifference of the action which the legislature has prohibited or enjoined. Every penalty implies a prohibition, even if not expressed. It is now well settled that every contract to do a thing made penal by



ing to the acceptance of the learned in each art, trade, and science. So in the act of settlement, where the crown of England is limited "to the princess Sophia, and the heirs of her body, being Protestants," it becomes necessary to call in the assistance of lawyers to ascertain the precise idea of the words "*heirs of her body*," which, in a legal sense, comprise only certain of her lineal descendants.<sup>16</sup>

\*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.<sup>17</sup> 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.<sup>18</sup> Thus, when the law

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statute is void as unlawful. *Aubert vs. Maze*, 2 Bos. & Pul. 371. *Cannon vs. Bryce*, 3 B. & Ald. 179. *De Begnis vs. Armistead*, 10 Bingham. 107. *Mitchell vs. Smith*, 4 Dall. 269; 1 Binn. 118. *Elkins vs. Parkhurst*, 17 Verm. 105.—SHARSWOOD.

<sup>16</sup> If words or expressions have acquired a definite meaning in law, they must be so expounded. 2 M. & Sel. 230. 1 Term. Rep. 723.

The natural import of the words is to be adopted; and if technical words are used, they are in general to have assigned to them their technical sense. *Ex parte Hall*, 1 Pick. 261. *The State vs. Smith*, 5 Humph. 392. *Bank vs. Cook*, 4 Pick. 405. Where a word has a clear and settled meaning at common law, it ought to have the same meaning in construing a statute in which it is used. *Adams vs. Turrentine*, 8 Iredell, 147. Where a law is plain and unambiguous, whether expressed in general or limited terms, there is no room left for construction, and a resort to extrinsic facts is not permitted to ascertain its meaning. *Bartlett vs. Morris*, 9 Porter, 266. No mere misnomer in the name of a natural person or corporation is fatal to the validity of an act if the person or corporation intended can be collected from the words. *Blanchard vs. Sprague*, 3 Sumner, 279. The term "person" in a statute embraces not only natural but artificial persons or corporations, unless the language indicates that it was used in a more limited sense. *Bank vs. Andrews*, 8 Porter, 404. *U.S. vs. Ammedy*, 11 Wheat. 392. Where provision is made that criminal prosecutions are to be instituted "on complaint," a complaint under oath or affirmation is implied as a part of the technical meaning of the terms. *Campbell vs. Thompson*, 4 Shep. 117. The word "may" always is held to mean "must" or "shall" in cases where the public interest and rights are concerned, and where the public or third persons have a claim *de jure* that the power delegated should be exercised. *Ex parte Simonton*, 9 Porter, 390. *Minor vs. Bank*, 1 Peters, 64. *Schuyler Co. vs. Mercer Co.*, 4 Gilman, 20. *Turnpike vs. Miller*, 5 Johns. Ch. Rep. 101. A conjunctive may be taken in a disjunctive sense: in other words, "and" may be construed to be "or." *Barker vs. Esty*, 19 Vermont, 131. By judicial construction, in some instances the extent and force of the term "void" when used in statutes has been limited so as to mean "voidable;" that is, to be made void by some plea or act of the party in whose favour the statutes are set up. *Green vs. Kemp*, 13 Mass. 515. *Smith vs. Saxton*, 6 Pick. 483.—SHARSWOOD.

<sup>17</sup> But a positive enactment is not to be considered restrained by the preamble. 1 Term. Rep. 44. 4 Term. Rep. 790. 3 M. & Sel. 66. *Lofft's Rep.* 783.—CHITTY.

<sup>18</sup> It is an established rule of construction that statutes *in pari materia*, or upon the same subject, must be construed with reference to each other; that is, that what is clear in one statute shall be called in aid to explain what 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 or 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 vs. 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.—CHRISTIAN. See 5 Cowen, 421.

of England declares murder to be felony without benefit of clergy, we must resort to the same law of England to learn what the benefit of clergy is; and when the common law censures simoniacal contracts, it affords great light to the subject to consider what the canon law has adjudged to be simony.<sup>19</sup>

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,<sup>(p)</sup> 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.<sup>20</sup> 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.<sup>(q)</sup> 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 stayed in it. In a dangerous tempest all the mariners forsook the ship, except only one sick passenger, who, by reason

(p) l. 5, c. 12, § 8.

(q) l. 1, c. 11.

<sup>19</sup> It may be laid down that the intention of the makers of a statute is to govern, even though the construction grounded upon such intention may appear to be contrary to the literal import of the words. Every technical rule as to the construction or form of particular terms must yield to the clear expression of the paramount will of the legislature. *Wilkinson vs. Leland*, 2 Peters, 661. In construing statutes, penal as well as others, an interpretation must never be adopted, which will defeat the evident purpose of the law, if it will admit of any other reasonable construction. *The Emily and Caroline*, 9 Wheat. 388.

All the parts of a statute—title and preamble as well as the body—may be consulted for the purpose of arriving at a knowledge of the general intention of the lawgivers. The title and preamble, however, yield always to the clear expressions of the body of the act, and are referred to as explanatory only when an ambiguity exists. *Jackson vs. Gilchrist*, 15 Johns. 89. *Holbrook vs. Holbrook*, 1 Pick. 248. *Eastman vs. McAlpin*, 1 Kelly, 157. *Bartlett vs. Morris*, 9 Porter, 266. When the language of the enacting part or body of a law is doubtful and may admit of a larger or more restricted interpretation, the preamble may be referred to in order to determine which sense was intended by the legislature. *The U.S. vs. Webster, Davies*, 38. The true rule seems to be that, where an inconvenience or particular mischief would arise from giving the enacting words their broad and general meaning, they shall in that case be restrained by the preamble, but not otherwise. *Seidenbender vs. Charles*, 4 S. & R. 166. *Lucas vs. McBlair*, 12 Gill. & Johns. 1. *James vs. Dubois*, 1 Harring, 285.

Statutes *in pari materia* are to be construed together. *Schooner Harriet*, 1 Story, 51. *Scott vs. Searles*, 1 S. & M. 590. *Harrison vs. Walker*, 1 Kelly, 32. If it can be gathered from a subsequent statute what meaning the legislature attached to the words of a former one, this will amount to a legislative declaration of its meaning. *U.S. vs. Freeman*, 3 How. U.S. 556. The general system of legislation upon the subject-matter may be taken into view, in order to throw light upon a particular act relating to the same subject. *Fort vs. Burch*, 6 Barb. S. C. 60. Thus, the history of legislation, including the language of repealed statutes, may be referred to and considered. *Henry vs. Tilson*, 17 Verm. 479.—SHARSWOOD.

<sup>20</sup> The ends contemplated are to be considered, and general words may be thereby restrained. 3 Maule and Selwyn, 510.—CHITTY.

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 stayed in the ship upon that account, nor contributed any thing to its preservation.<sup>21</sup>

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.*"<sup>22</sup>

\*62] Equity thus depending, essentially, upon the particular circumstances of each individual case, there can be no established \*rules and fixed precepts of equity laid down, without destroying 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.

(r) *De Equitate*, § 3.

<sup>21</sup> See a very sensible chapter upon the interpretation of laws in general, in Rutherford's Institutes of Natural Law, b. ii. c. 7.—CHRISTIAN.

<sup>22</sup> 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.—CHRISTIAN.

What the learned commentator here says is certainly inaccurate, if it leads to the supposition that any other rules of interpretation are applied to statutes in courts of equity than in courts of law. On the contrary, herein equity follows the law, just as it does in the construction of wills and other instruments. In England, the court of chancery often sends cases to the common law courts, in order to procure their opinion on such points. The system administered in that court differs from the common law mainly in its means of getting at the truth by enforcing a discovery by the defendant under oath, and by the peculiar remedy it affords by injunction and the decree for specific performance.

What the commentator does mean, perhaps, is what is generally termed *the equity of a statute*, which is in reality a compendious mode of expressing his fifth rule of interpretation. Those cases are said to be within the equity of a statute which, though not directly comprehended by its language, are nevertheless within the intention of the lawgiver, reached by its reason and spirit.

It seems that when, had the legislature foreseen the occurrence of a particular contingency, the letter of the statute would have been enlarged to receive it, this is sufficient warrant for the courts to bring it within the spirit. *Brinker vs. Brinker*, 7 Barr, 23.--

<sup>2</sup>HARRISWOOD.

## 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.

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, and in the treatises of learned sages of the profession, preserved [\*64 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 reign of King Edward the [\*65

(a) *Cæs. de B. G. lib. 6, c. 3.*

(b) *Spelm. Gl. 362.*

(c) *C. 17.*

(d) See his proposals for a digest.

Fourth, but is now unfortunately lost.<sup>1</sup> It contained, we may probably suppose, the principal maxims of the common law, the penalties for misdemeanors, and the forms of judicial proceedings. Thus much may at least be collected from that injunction to observe it, which we find in the laws of king Edward the elder, the son of Alfred. (e) "*Omnibus qui reipublicæ præsumunt etiam atque etiam mando, ut omnibus æquos se præbeant iudices, perinde ac in judiciali libro (Saxonice, dom-Dee) scriptum habetur: nec quicquam formident quin jus commune (Saxonice, folepibre) audacter libereque dicant.*"

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)

\*Out of these three laws, Roger Hoveden (g) and Ranulphus Cestrensis (h) \*66] 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 *Las Partidas*: (l) and in Sweden, about the same æra, when a universal body of common law was compiled out of the particular customs established

(e) C. 1.

(f) Hal. Hist. 55.

(g) In Hen. II.

(h) In Edw. Confessor.

(i) In *Seld. ad Euseb.*, 6.

(k) Mod. Un. Hist. xxii. 135.

(l) *Ibid.* xx. 211.

<sup>1</sup> Both Hallam and Turner doubted the fact that such a work ever existed. It has, however, recently been brought to light, and may be seen, in both Saxon and English, in "The Ancient Laws and Institutes of England," published by the Record Commissioners, vol. i. pp. 45-101. At the head of it stand the Ten Commandments, followed by many of the Mosaic precepts, with the express and solemn sanction given them by our Saviour in the Gospel:—"Think not that I am come to destroy the law or the prophets: I am not come to destroy, but to fulfil." After quoting the canons of the apostolical council at Jerusalem, Alfred refers to the divine commandment, "As ye would that men should do to you, do ye also to them," adding, "from this one doom, a man may remember that he judge every one righteously: he need heed no other doom-book." A noble and affecting incident this in the history of our laws,—which, though since swollen into an enormous bulk and complexity and fed from many sources, still bear the same relations to religion, which we observe in the rude and simple elements of these laws in the days of our illustrious Alfred. The work, however, is little more than a collection of punishments for offences, and has no pretensions to be regarded as a general system of municipal law.—WARREN. Spence says there is no trace of it. 1 Spence, 61 n.

by the laghman of every province, and entitled the *land's lagh*, being analogous to the *common law* of England.<sup>(m)</sup><sup>2</sup>

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*.<sup>3</sup> These, however, are the laws which our histories so often mention under the name of the laws of Edward the confessor, which our ancestors struggled so hardly to maintain, under the first princes of the Norman line; and which subsequent princes so frequently promised to keep and 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<sup>\*</sup> the repeated attacks of 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.<sup>4</sup>

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:<sup>5</sup> 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. 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.<sup>6</sup>

(m) *Ibid.* xxxiii. 21, 28.

<sup>2</sup> 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.

<sup>3</sup> To assign, however, to the common law no other original than this, would be to take an imperfect and erroneous view of the subject. Our system of tenures was chiefly constructed, if not first founded, by the Norman conqueror; our judicial forms and pleadings, while they have nothing in common with the Anglo-Saxon style, are in striking conformity with the Norman; and it has been remarked with great truth that the general language of our jurisprudence and its terms of art are exclusively of French extraction. (*Crag. Jus. Feud. l. 1, d. 7.*) We cannot hesitate, therefore, to recognise in the ancient law of Normandy another parent of the common law, and one from which it has inherited some of its most remarkable features.—STEPHEN.

<sup>4</sup> 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; Selden, in his *Notes on Eadmer*; and of Garberon, editor of the works of Anselm.—J.EE.

<sup>5</sup> 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.—CHRISTIAN.

<sup>6</sup> There is no common law of the country designated geographically as the United States. The Union is composed of sovereign and independent States, each of which may have its local usages, customs, and common law. There is no principle which pervades the Union and has the authority of law that is not embodied in the constitutor and acts of Congress. As the federal government has no powers not specially delegated, and no jurisdiction over the regulation of real and personal property, nor over crimes, except such as relate to federal subjects, the common law neither is, nor could it by legislative adoption be made, a part of the federal system.

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.

68\*] \*I. As to general customs, or the common law, properly so called; this is that law, by which proceedings and determinations in the king's ordinary courts of justice are guided and directed. This, for the most part, settles the course in which lands descend by inheritance; the manner and form of acquiring and transferring property; the solemnities and obligation of contracts; the rules of expounding wills, deeds, and acts of parliament; the respective remedies of civil injuries; the several species of temporal offences, with the manner and degree of punishment; and an infinite number of minuter particulars, which diffuse themselves as extensively as the ordinary distribution of common justice requires. Thus, for example, that there shall be four superior courts of record, the Chancery, the King's Bench, the Common Pleas, and the Exchequer;—that the eldest son alone is heir to his ancestor;—that property may be acquired and transferred by writing;—that a deed is of no validity unless sealed 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 showing 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

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It is true that the common law was the substratum of the jurisprudence of the thirteen States by whom the constitution of the United States was at first adopted. The men by whom it was framed had been educated under that system, and many of them lawyers. No doubt, upon the commonly-received principles of interpretation, the language of that instrument, and the technical terms employed in it, are to be construed by the common law. Of the remaining States, Vermont was formed out of territory originally belonging to New Hampshire, and Maine from Massachusetts. Of the States which have since acceded to the Union, Kentucky, Tennessee, Ohio, Indiana, Mississippi, Illinois, Alabama, Michigan, Wisconsin, Iowa, comprise territory which originally belonged to one or more of the thirteen States and was ceded by them to the United States. Louisiana, Missouri, and Arkansas were formed out of territory ceded to the United States by France by the treaty of April 30, 1803. Florida was formed out of territory ceded by Spain by the treaty of February 22, 1819. Texas, an independent republic, but originally one of the United States of Mexico, was received into the Union by a joint resolution of Congress, approved March 1, 1845. California was formed of part of the territory ceded to the United States by the Mexican Republic by the treaty of Guadalupe Hidalgo, February 2, 1848.

In Texas, Missouri, Arkansas, and California, the common law has been adopted by express legislative enactment, so that Louisiana is the only State in which any other law prevails. In that State the law of France, which is the Roman civil law with such modifications as obtained at the time of her purchase, is the foundation of her jurisprudence; for it is a well-settled principle of international law, that whenever a country is conquered by or ceded to another, the law of that country as it was at the time of its cession or conquest remains until it is changed by its new master.—SHARSWOOD.

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 lucubrations*," which Fortescue<sup>(n)</sup> 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 "*prætorum memoria eventorum*" reckoned up as one of the chief qualifications of those, who were held to be "*legibus patriæ optime instituti*."<sup>(o)</sup> For it is an established rule to abide by former precedents, where the same points come again in litigation: as well to keep the scale of justice even and steady, and not liable to waver with every new judge's opinion; as also because the law in that case being solemnly declared and determined, what before was uncertain, and perhaps indifferent, is now become a permanent rule, which it is not in the breast of any subsequent judge to alter or vary from according to his private sentiments: he being sworn to determine, not according to his own private judgment, but according to the known laws and customs of the land; not delegated to pronounce a new law, but to maintain and expound the old one. Yet this rule admits of exception, where the former determination is most evidently contrary to reason; \*much more if it be clearly contrary [ \*70 to the divine law. But even in such cases the subsequent judges do not pretend to make a new law, but to vindicate the old one from misrepresentation. For if it be found that the former decision is manifestly absurd or unjust,† it is declared, not that such a sentence was *bad law*, but that it was *not law*; that is, that it is not the established custom of the realm, as has been erroneously determined. And hence it is that our lawyers are with justice so copious in their encomiums on the reason of the common law; that they tell us, that the law is the perfection of reason, that 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.<sup>(p)</sup> 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

(\*) Cap. 8.

(o) Seld. Review of Tith. c. 8.

(p) Herein agreeing with the civil law, *Ff. l. 1, §. 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."*

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† 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 rigorously adhered to by the judges in all courts, who are not to assume the characters of legislators. It is their province *ius dicere*, and not *ius 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 inconveniences; 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. Lit. 66*  
—CHRISTIAN.



wantonly broken in upon by statutes or new resolutions, the wisdom of the rule hath in the end appeared from the inconveniences that have followed the innovation.

The doctrine of the law then is this: that precedents and rules must be followed, unless flatly absurd or unjust;<sup>a</sup> for though their reason be not 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

<sup>a</sup> Precedents and rules must be followed even when they are flatly absurd and unjust, if they are agreeable to ancient principles. 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 parliament shall endorse upon it the day upon which it receives the royal assent, and that day shall be the date of its commencement. Many other similar instances might be adduced.

It is therefore justly said in the civil law, that *non omnium, quæ a majoribus constituta sunt, ratio reddi potest; et ideo rationes eorum quæ constituntur, inquiri non oportet: alioquin multa ex his, quæ certa sunt, subvertuntur.* Domat, 8.—CHRISTIAN.

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 of the legislature 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 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.

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, Co. L. 59

rather escheat to the king or other superior lord. Now this is a positive law, fixed and established by custom, which custom is evidenced by judicial decisions, and therefore can never be departed from by any modern judge without a breach of his oath and the law. For herein there is nothing repugnant to [\*71 natural justice,<sup>9</sup> though the artificial reason of it, drawn from the feudal law, may not be quite obvious to everybody.<sup>10</sup> 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.<sup>(q)</sup><sup>11</sup>

(q) "*Si imperialis majestas causam cognitivimulter examina-verit, et partibus, cominus constitutis, sententiam dixerit, hanc esse legem, non solum illi cause pro qua producta est, sed et in omnibus similibus.*" C. 1, 14, 12.  
omnes omnino judices, qui sub nostro imperio sunt, sciunt

<sup>9</sup> 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.—CHRISTIAN.

<sup>10</sup> 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.—CHITTY.

<sup>11</sup> It is not possible to lay down, with mathematical precision, any rule in regard to the authority of precedents. Every judge and every court must consider that their function is *ius dicere* and not *ius dare*. How far previous determinations ought to be regarded as definitely settling any point or principle of law, will depend very much upon circumstances. The character of the court, and of the times in which such decision took place, will have its weight; and not a little, after all, will depend upon the tone and tendency of prevailing opinions. No constitutional lawyer would now think of citing precedents in State trials during the Tudors. The rule anciently applied in actions of slander with ridiculous particularity—*verba sunt accipienda in mitiori sensu*—has been exploded, and a large class of solemn adjudications, made while it prevailed, are of no authority. Thus: "You have poisoned your husband." "Sir Thomas Holt struck his cook on the head with a cleaver, and cleaved her head: the one part lay on one shoulder, and the other on the other:" in both cases held not actionable. 1 Roll. Abr. 71. Cro. Jac. 184. For, though she poisoned her husband, he might not have died: Though he cleaved the cook's head into two parts, the wound might not have been mortal. So in regard to the bar of the statute of limitations. Almost any admission or acknowledgment was greedily caught at to take the case out of the statute. "Prove your debt, and I will pay you: I am ready to account; but nothing is due." Cowp. 548. "As to the matters between you and me, they will be rectified." 2 T. R. 760. "What an extravagant bill you have sent me!" Peake, 93. "I do not consider myself to owe 4 farthing, it being more than six years since I contracted." 4 East. 599. These are some of the acknowledgments held sufficient. These cases are not now considered as authority. Many other changes of the judicial current might be cited illustrative of the position that the declaration of what the law is rests in the sound, conscientious judgment of the court; the weight to be allowed to prior determinations depending altogether upon the circumstances of the case. A recent decision, which has not been frequently recognised nor grown into a landmark, is not entitled to so much respect as one of older date, of which such a remark may be predicated. Hardly a modern report-book appears in which some prior case is not found in express terms overruled. A court or judge

The decisions therefore of courts are held in the highest regard, and are not only preserved as authentic records in the treasuries of the several courts, but are handed out to public view in the numerous volumes of *reports* which furnish the lawyer's library. These reports are histories of the several cases, with a short summary of the proceedings, which are preserved at large in the record; the arguments on both sides, and the reasons the court gave for 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; \*72] and from this time to that of Henry the \*Eighth, were taken by the prothonotaries, or chief scribes of the court, at the expense of the crown, and published *annually*, whence they are known under the denomination of the *year books*. And it is much to be wished that this beneficial custom had, under proper regulations, been continued to this day; for, though king James the First, at the instance of Lord Bacon, appointed two reporters(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,<sup>12</sup> with some others of ancient date; whose treatises are cited as authority, and are evidence that cases have formerly happened in which such and such points were determined, which are now become settled and first principles. One of the last of these methodical writers in point of time, whose works are of any intrinsic authority in the courts of justice, and do not entirely depend on the strength of their quotations from older authors, \*73] is the \*same learned judge we have just mentioned, Sir Edward Coke; who hath written four volumes of institutes, as he is pleased to call them, though they have little of the institutional method to warrant such a title

(r) *Fal. 15, Jac. I. p. 18, 17 Rym. 26.*  
 (s) His reports, for instance, are styled *καρ' εφορν*, 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.

ought to be very cautious even in regard to recent cases, much more in regard to older ones, especially such as have been subsequently recognised and acted on. It is best to err on the safe side; and the safe side is *stare decisis*.—SHARSWOOD.

<sup>12</sup> 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 Henry II., edit. 1780; "Bracton's Treatise of the Laws and Customs of England," written in the reign of Henry 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 "Dissertations," edit. 1635; "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 "Fortescue de Laudibus Legum Angliæ," edit. 1775; "Littleton's Tenures," various edits. "Statham's Abridgment, containing the Cases down to the End of Henry VI.:" only one edit., without date; "Brooke's Grand Abridgment of the Law," 1573; "Fitzherbert's Grand Abridgment of the Law," 1665; "Staundforde's Pleas of the Crown," to which is added an "Exposition of the King's Prerogative," 1607.—CHITTY.

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.(t) 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.(u)

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(v) 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 everybody. For where is the difference, whether the people declare their assent to a law by suffrage, or by a uniform course of acting accordingly?" Thus did they reason while Rome had some remains of her freedom; but, when the imperial tyranny came to be fully established, the civil laws speak a very different language. "*Quod principi placuit legis habet vigorem, cum populus ei et in eum omne 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; which carries this internal evidence of freedom along with it, that it probably was introduced by the voluntary consent of the people.<sup>14</sup>

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

(u) 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 Siderin, and the like.

(v) *FF.* 1, 3, 32.

(w) *FF.* 1, 4, 1.

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

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

<sup>13</sup> 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 eius imperio lata est, populus ei, et in eum omne imperium suum et potestatem concedat. Quodcumque ergo imperator per epistolam constituit; vel cognoscens decrevit, vel edicto præcepit, legem esse constat; hæc sunt, quæ constitutiones appellantur. Planè ex his quædam sunt personales, quæ nec ad exemplum trahuntur quoniam non hoc princeps vult, nam quod alicui ob meritum indulset, vel si quam penam irrogavit, ve si cui sine exemplo subvenit, personam non transgreditur. Aliæ autem, quum generales sint, omnes procul dubio tenent.* Inst. 1, 2, 6.—CHRISTIAN.

<sup>14</sup> 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. Cbm. 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 consensum ventium comprobati legem imitantur.* (Inst. 1, 2, 9.) Of this nature in this country is the law

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.<sup>(2)</sup>

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 \*75] ordains, among other things, \*that not the eldest son only of the father shall succeed to his inheritance, but all the sons alike; and that, though the ancestor be attainted and hanged, yet the heir shall succeed to his estate, without any escheat to the lord.—Such is the custom that prevails in divers ancient boroughs, and therefore called borough-English, that the youngest son shall inherit the estate, in preference to all his elder brothers.—Such is the custom in other boroughs, that a widow shall be entitled, for her dower, to all her husband's lands; whereas, at the common law, she shall be endowed of one-third part only.—Such also are the special and particular customs of manors, of which every one has more or less, and which bind all the copyhold 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 shown, 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.<sup>(a)</sup>

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; <sup>(b)</sup> 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.*"<sup>15</sup>

(2) *Mag. Cart.* 9 Hen. III. c. 9.—1 *Edw. III.* st. 2. c. 9.—14 *Edw. III.* c. 1. c. 1.—and 2 Hen. IV. c. 1.  
(a) 8 *Rep.* 126; *Cro. Car.* 347. (b) *Winch.* 24.

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.

The action in which this rule is applied, viz.: for negligently driving a carriage, by which any one is injured, is as ancient as the common law; but the uniform determination of the judges that the non-observance of this rule is negligence is of modern date.

It is now decided, that, where an injury is done by a man's driving his carriage on the wrong side of the road, the action must be trespass, *vi et armis*. Lord Ellenborough and the court laid down generally, that, where there is an immediate injury from an immediate act of force, the proper remedy is trespass, and wilfulness is not necessary to constitute trespass. 3 *East*, 593.

When two carriages meet, the impact is a reciprocal act of force; but the force of that only is wrongful which is on the wrong side of the way.—CHRISTIAN.

It should be remembered, however, that, when the carriage is driven by a servant, the action against the master must always be trespass *on the case*, unless, indeed, the wrong was committed by the immediate command of the master.—SHARSWOOD.

<sup>15</sup> The *lex mercatoria*, or the custom of merchants, like the *lex et consuetudo parliametu*.

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

\*As to gavelkind, and borough-English, the law takes particular notice of them,<sup>(c)</sup> 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,<sup>(d)</sup> and as well the existence of such customs must be shown, as that the thing in dispute is within the custom alleged. The trial in both cases (both to show 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 show "that the lands in question are within that manor") is by a jury of twelve men, and not by the judges; except the same particular custom has been before tried, determined, and recorded in the same court.<sup>(e)</sup>

The customs of London differ from all others in point of trial: for, if the existence of the custom be brought in question, it shall not be tried by a jury, but by certificate from the lord mayor and aldermen by the mouth of their re-

(c) Co. Litt. 175.  
(d) Litt. § 265.

(e) Dr. and St. 1, 10.

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 has 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.—CHRISTIAN.

That large branch of law which relates to the transactions of commerce is now a part of the municipal law of the country, whether it be found in statutes or codes, or adopted by general reasoning and the authority of the opinions of jurists and civilians. It is taken notice of judicially by the courts, and is not decided by the jury, as a mere custom would be. Mercantile usage is often appealed to in order to explain doubtful words in a contract, but never to contradict or vary any settled rule or principle of law. The sources of the mercantile law are, mainly, the Roman law, the various codes of modern European nations, and the writings of general jurists; but it is not to be denied that these questions were originally treated in England as matters of custom, and were referred to the decision of a jury of merchants. After one point of such custom was ascertained by the verdict of a jury, it was not considered proper to submit the same question to another jury, but it was thereafter judicially noticed and applied by the court. "Before the time of Lord Mansfield," says Mr. J. Buller, "we find that, in courts of law, all the evidence in mercantile cases was thrown together: they were left generally to a jury, and they produced no established principle. From that time, we all know, the great study has been to find out some certain general principles, which shall be known to all mankind, not only to rule the particular case then under consideration, but to serve as a guide for the future. Most of us have heard those principles stated, reasoned upon, enlarged, and explained, till we have been lost in admiration of the strength and stretch of the human understanding. And I should be very sorry to find myself under a necessity of differing from any case, which has been decided by Lord Mansfield, who may be truly said to be the founder of the commercial law of this country." (2 *T. R.* 73.) "The law merchant," said Lord Denman, "forms a branch of the law of England; and those customs which have been universally and notoriously prevalent amongst merchants, and have been found by experience to be of public use, have been adopted as a part of it, upon a principle of convenience, and for the benefit of trade and commerce; and, when so adopted, it is unnecessary to plead and prove them. They are binding on all without proof. Accordingly, we find that usages affecting bills of exchange and bills of lading are taken notice of judicially." 6 *Man. & Gr.* 665.—SHARSWOOD.

order; (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.<sup>16</sup> So that, if any one can show the beginning of it, it is no good custom. For which reason no custom can prevail against an express act of \*77] \*parliament,<sup>17</sup> since the statute itself 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 immemorably 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 account a custom may be good, though the particular reason of it cannot be assigned; for it sufficeth, if no good legal reason can be assigned against it. Thus a custom in a parish, that no man shall put his beasts into the common till the third of October, would be good; and yet it would be hard to show 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-

(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.

(n) Co. Copyh. § 33.

(o) 1 Roll. Abr. 565.

<sup>16</sup> It seems that a custom beginning within any time after the first year of the reign of king Richard I. is bad.—CHITTY.

<sup>17</sup> 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.—CHRISTIAN. 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 declare, 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.—CHITTY.

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*.<sup>18</sup>

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.<sup>(p)</sup>

Next, as to the *allowance* of special customs. Customs, in derogation of the common law, must be construed strictly.<sup>19</sup> Thus, by the custom of gavelkind, an infant of fifteen years \*may, by one species of conveyance, [<sup>\*79</sup> (called a deed of feoffment,) convey away his lands in fee-simple, or forever. Yet this custom does not empower him to use any other conveyance, or even to lease them for seven years; for the custom must be strictly pursued.<sup>(q)</sup><sup>20</sup> And, moreover, all special customs must submit to the king's prerogative. Therefore, if the king purchases lands of the nature of gavelkind, where all the sons inherit equally; yet, upon the king's demise, his eldest son shall succeed to those lands alone.<sup>(r)</sup> And thus much for the second part of the *leges non scriptæ*, or those particular customs which affect particular persons or districts only.<sup>21</sup>

(p) 9 Rep. 58.  
(q) Co. Cop. 2 33.

(r) Co. Litt. 15.

<sup>18</sup> A custom that poor housekeepers 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 can not 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.—CHRISTIAN.

<sup>19</sup> 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, but upon the same authority by which the custom between sisters is supported. 1 T. R. 466.—CHRISTIAN.

<sup>20</sup> There does not appear to be any authority for this; but, on the contrary, Sir Edward Coke, in the same section, says that a custom is not to be confined to literal interpretation; for, if there be a custom within a manor that copyhold lands may be granted in fee-simple, by the same custom they may be granted in tail for life, for years, or any other extent whatever, because *cui licet quod majus non debet quod minus est non licere*.—STEWART.

<sup>21</sup> In some of the States— as in Pennsylvania, for instance—general customs and usage on certain subjects prevailed to such an extent as to produce a distinctive common law. In very few of the States, however, do any mere local customs exist such as are treated of by the commentator in this section. They, however, are to be carefully distinguished from usages of trade or business. These are everywhere allowed their just influence and operation. A usage of trade and business clearly proved to exist, to be ancient, notorious, reasonable, and consistent with law, is permitted to explain the meaning of ambiguous words in written contracts, and to control the mode and extent of their rights where the parties have been silent. But it is never admitted against the expressed agreement of the parties, nor in violation of any statute or well-established rule of law. Perhaps



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,(t) 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, recognise any foreign power as superior or equal to it in this kingdom, or as having the right to give \*80] law to any, the meanest, of its subjects. But all the \*strength that either the papal or imperial laws have obtained in this realm, or indeed in any other kingdom in Europe, is only because they have been admitted and received by immemorial usage and custom in some particular cases, and some particular courts; and then they form a branch of the *leges non 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, recognising no superior under God but only your grace, hath been and is free from subjection to any man's laws, but only to such as have been devised, made, and ordained *within* this realm, for the wealth of the same; or to such other as, by sufferance of your grace and your progenitors, the people of this your realm have taken at their free liberty, by their own consent, to be used among them; and have bound themselves by long use and custom to the observance of the same; not as to the observance of the laws of any foreign prince, potentate, or prelate; but as to the *customed* and ancient laws of this realm, originally established as laws of the same, by the said sufferance, consents, and custom; and none otherwise."

By the civil law, absolutely taken, is generally understood the civil or municipal law of the Roman empire, as comprised in the 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.

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,(u) "*tam immensus aliarum super alias acervatarum legum cumulus*," that they were computed to be many camels' load by an author who preceded Justinian.(v) 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. 428, 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

(s) Hist. C. L. c. 2.  
(t) Hist. C. L. c. 2.

(u) l. 3, c. 34.  
(v) Taylor's Elements of Civil Law, 17.

in some cases the courts have gone further than is here indicated; but the current of judicial decisions of late years has been to restrain and limit the allowance and influence of special usages. —SHARSWOOD

the western part of Europe. All 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 529.

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,<sup>(w)</sup> suddenly gave new vogue and authority to the civil law, introduced it into several nations, and \*occasioned that mighty inundation of voluminous comments, [\*82 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 bulls 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 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 natural canon law, composed of *legatine* and *provincial* constitutions, and adapted only to the exigencies of this church \*and [\*83 kingdom. The *legatine* constitutions were ecclesiastical laws, enacted in national synods held under the cardinals Otho and Othobon, legates from pope Gregory IX. and pope 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<sup>(x)</sup> in the reign of Henry VI. At the dawn of the Reformation, in the reign of king Henry VIII., it was enacted in parliament<sup>(y)</sup> that a review should be had of the canon law; and, till such review should be made, all canons, constitutions, ordinances, and syno-

(w) See § 1, page 18.

(x) Burn's Eccl. Law, pref. viii.

( ) Statute 25 Hen. VIII. c. 19, revised and confirmed by 1 Eliz. c. 1.

dals 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.<sup>22</sup>

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 \*84] entirely upon custom, corroborated in the latter instance by act of \*parliament, ratifying those charters which confirm the customary law of the universities. The more minute consideration of these will fall properly under that part of these commentaries which treats of the jurisdiction of courts. It will suffice at present to remark a few particulars relative to them all, which may serve to inculcate more strongly the doctrine laid down concerning them. (a)

1. And, first, the courts of common law have the superintendency over these courts; to keep them within their jurisdictions, to determine wherein they exceed them, to restrain and prohibit such excess, and, in case of contumacy, to punish the officer who executes, and in some cases the judge who enforces, the sentence so declared to be illegal.

2. The common law has reserved to itself the exposition of all such acts of parliament as concern either the extent of these courts, or the matters depending before them. And therefore, if these courts either refuse to allow these acts of parliament, or will expound them in any other sense than what the common law puts upon them, the king's courts at Westminster will grant prohibitions to restrain and control them.

3. An appeal lies from all these courts to the king, in the last resort; which proves that the jurisdiction exercised in them is derived from the crown of England, and not from any foreign potentate, or intrinsic authority of their own.—And, from these three strong marks and ensigns of superiority, it appears beyond a doubt that the civil and canon laws, though admitted in some cases by custom in some courts, are only subordinate, and *leges sub graviore 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

(\*) Str. 1057.

(a) Hale, Hist. c. 2.

(b) 8 Rep. 20.

<sup>22</sup> 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.—CHRISTIAN.

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)

First, as to their several kinds. Statutes are either *general* or *special*, *public* or *private*. A general or public act is an \*universal rule, that regards the whole community; and of this the courts of law are bound to take notice [ \*86 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 shown and pleaded. Thus, to show 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.<sup>23</sup>

(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 bulls; and, in short, by the whole body of ancient civilians and canonists, among whom this method of citation generally prevailed, not only with regard to chapters, but inferior sections also; in imitation of all which we still call some of our old sta-

tutes by their initial words, as the statute of *quia emptores*, and that of *circumspexerit egatis*. 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. l. § 24.

<sup>23</sup> 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.—1. 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 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 recognised 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

Statutes also are either *declaratory* of the common law, or *remedial* of some defects therein.<sup>24</sup> Declaratory, where the old custom of the kingdom is almost fallen into disuse, or become disputable; in which case the parliament has thought proper, *in perpetuum rei testimonium*, and for avoiding all doubts and difficulties, to declare what the common law is and ever hath been. Thus the statute of treasons, 25 Edw. III. cap. 2, doth not make any new species of treasons, but only, for the benefit of the subject, declares and enumerates those several kinds of offence which before were treason at the common law. Remedial statutes are those which are made to supply such defects, and abridge such superfluities, in the common law, as arise either from the general imperfection of all human laws, from change of time and circumstances, from the mistakes and unadvised determinations of unlearned (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 restraining it \*87] \*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.<sup>25</sup> 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.

Secondly, the rules to be observed with regard to the construction of statutes are principally these which follow.<sup>26</sup>

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.<sup>(e)</sup> 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; 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

(e) 3 Rep. 7; Co. Litt. 11, 42.

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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.—CHRISTIAN.

<sup>24</sup> 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.—CHRISTIAN.

<sup>25</sup> 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.—CHRISTIAN.

<sup>26</sup> 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.—CHRISTIAN.

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 [ \*88 the remedy.

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.<sup>27</sup> So a statute, treating of "deans, prebendaries, parsons, vicars, and others having spiritual promotion," is held not to extend to bishops, though they have spiritual promotion, deans being the highest persons named, and bishops being of a still higher order. (g)

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*,<sup>28</sup> 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.<sup>29</sup>

(f) Co. Litt. 45. 3 Rep. 60. 10 Rep. 58.

(g) 2 Rep. 46.

(h) 2 and 3 Edw. VI. c. 33. Ba. Elem. c. 12.

<sup>27</sup> Modern statutes of importance have what is commonly called a "dictionary clause," the object of which is to define what persons, things, places, &c. shall be included in every general word used in the act. For example, the first section of the Limitation of Actions, act 3 and 4 Wm. IV. c. 27, defines what shall be included in the words "land," "rent," and "person."—HARGRAVE.

<sup>28</sup> 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, 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.—CHRISTIAN.

<sup>29</sup> There are some kinds of statutes in the construction of which the courts have considered themselves bound to adhere more closely to the words than in other cases. This is termed strict construction. The text confines it to penal statutes; but there are other also of this class. As to penal statutes, however, it is to be observed that such laws are not to be construed so strictly as to defeat the obvious intention of the legislature. The *United States vs. Wiltberger*, 5 Wheat. 76. They are to be construed strictly in that sense that the case in hand must be brought within the definition of the law, but not so strictly as to exclude a case which is within its words taken in their ordinary acceptation: that is to say, there is no peculiar technical meaning given to language in penal any more than in remedial laws. *U. S. vs. Wilson*, Baldw. C. C. Rep. 78. *Hall vs. The State*, 20 Ohio, 7. But, besides penal statutes, laws made in derogation of common right are to be construed strictly; as, for instance, statutes for any cause disabling any person of full age and sound mind to make contracts. *Smith vs. Spooner*, 3 Pick. 229. So statutes conferring exclusive privileges on corporations or individuals fall under this rule. *Sprague vs. Birdsall*, 2 Cowen, 419. *Young vs. McKensie*, 3 Kelly, 31. Charters of incorporation are to be construed most strongly against those corporations or persons who claim rights or powers under them, and most favourably for the public. *Mayor vs. Railroad Co.*, 7 Georgia, 221. *Railroad Co. vs. Briggs*, 2 N. Jersey, 623. In the same class are

4. Statutes against frauds<sup>30</sup> are to be liberally and beneficially expounded. This may seem a contradiction to the last rule; most statutes against frauds being in their consequences penal. But this difference is here to be taken, where the statute acts upon the offender, and inflicts a penalty, as the pillory or a fire, it is then to be taken strictly; but when the statute acts upon the offence, by setting aside the fraudulent transaction,<sup>31</sup> here it is to be construed liberally. Upon this footing the statute of 13 Eliz. c. 5, which avoids all gifts of goods, &c. made to defraud creditors *and others*, was \*held to extend by the general words to a gift made to defraud the queen of a forfeiture.(i)<sup>32</sup>

(i) 3 Rep. 82.

statutes which impose restrictions on trade or common occupations, or which levy a tax upon them. *Sewall vs. Jones*, 9 Pick. 412. So a statute conferring authority to impose taxes. *Moseley vs. Tift*, 4 Florida, 402. So laws exempting property from taxation. *Cincinnati College vs. Ohio*, 19 Ohio, 110. So when the liberty of the citizen is involved. *Pierce's Case*, 4 Shipley, 255. The power invested in public bodies to take the lands of private persons for public uses is in derogation of the common law, and ought therefore to receive a rigid interpretation. *Sharp vs. Speir*, 4 Hill, 76. *Sharp vs. Johnson*, *ibid.* 92. Enough has been specified to illustrate the general bearing and application of the principle of strict construction.

By far the most important question, which has ever been agitated, has been in regard to the constitution of the United States. Two schools of constitutional law—the National and State-Rights school—maintain different doctrines upon this subject. The former have always contended that the delegations of power to the federal government ought to receive a large and liberal interpretation; and that at all events, wherever a general object was within the scope of the powers specified, Congress ought to be considered as invested with a large discretion as to the means to be employed for the purpose of giving effect to the power, and especially that there existed no limitation upon their right to appropriate the public money but their own judgment of what would conduce to the “general welfare.” On the other hand, the State-Rights school zealously contend that, the government being conceded to be one of special limited powers, such a principle of construction as that assumed on the other side in effect destroys all limitation; that any thing and every thing can be reached under the power of appropriating money for the “general welfare;” that Congress can employ no means except such as are necessary as well as proper to the end, and have no right to assume a substantive power, not granted, as incidental. *Non nobis tantas componere lites.*—SHARSWOOD.

<sup>30</sup> 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 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.—CHRISTIAN.

<sup>31</sup> 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.—CHRISTIAN.

<sup>32</sup> Some kinds of statutes are held entitled to receive a liberal or favourable interp-

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.<sup>(k)</sup><sup>33</sup>

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 end.<sup>(l)</sup> But if both acts be merely affirmative, \*and the substance such that both may stand together, here the latter does not repeal the former, [ \*90 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*.<sup>(m)</sup><sup>34</sup>

(k) 1 Rep. 47.

(l) Jenk. Cent. 2, 73.

(m) 11 Rep. 63.

tation. Thus, remedial laws are to be so construed as to suppress the mischief and advance the remedy. *Smith vs. Maffott*, 1 Barb. 65. *Franklin vs. Franklin*, 1 Maryl. Ch. 342. *Carey vs. Giles*, 9 Geo. 253. So laws which have reference to the public welfare or the policy of the State, which are intended to encourage her staple productions, to maintain public peace and security, or to extend the blessings of education, *Wolcott vs. Pond*, 19 Conn. 597. *Bryan vs. Dennis*, 4 Florida, 445. In like manner, acts of the legislature relative to the general administration of justice. *Mitchell vs. Mitchell*, 1 Gill, 66. —SHARSWOOD.

<sup>33</sup> But a proviso, (that is, a clause ingrafted upon a preceding and complete enactment, 9 B. & C. 835,) though totally repugnant to the body or provision of the act, shall not be void, but shall stand, being held to be a repeal of the preceding enactment, by analogy to the well-known rule of construction applicable to testamentary instruments, that a later clause, if inconsistent with a former one, expresses the last intention and revokes the preceding expressions. *Fitz. 195*, Bac. Abr. Statute.—HARGRAVE.

<sup>34</sup> Later statutes abrogate prior ones. In affirmative statutes, however, such parts of the prior as may be incorporated into the subsequent one, and are consistent with it, must be considered in force. *Daviess vs. Fairbairn*, 3 Howard U. S. 636. Where two statutes can be construed together so as to allow both to stand, the latter will not be construed a repeal of the former. *Morris vs. Canal Co.*, 4 Watts & Serg. 461. *Canal Co. vs. Railroad Co.*, 4 Gill & John. 1. Statutes which apparently conflict with each other are to be reconciled as far as may be, on any fair hypothesis, and effect given to each if it can be, and especially if it is necessary to preserve the titles to property undisturbed. *Beals vs. Hale*, 4 Howard U. S. 37. The law does not favour repeals by implication. *Bowen vs. Lean*, 5 Hill, 221. *Wyman vs. Campbell*, 6 Porter, 219. *Strut vs. Commonwealth*, 4 W. & S., 209. A subsequent statute, attaching milder and different punishments to offences than are attached to the same offence by a prior statute, is a repeal of such prior statute. *The State vs. Whitworth*, 8 Porter. 434. A general law



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.<sup>(n)</sup><sup>35</sup>

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.<sup>(o)</sup> 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."<sup>(p)</sup>

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 consequence, manifestly contradictory to common reason, they are, with regard to those collateral consequences, void.<sup>36</sup> 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 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

(n) 4 Inst. 325.

(o) 4 Inst. 43.

(p) *Cum lex abrogatur, illud ipsum abrogatur, quo non eam abrogari oporteat.* l. 3, ep. 22.

however, does not operate a repeal of a special law upon the same subject passed previous to the general law. *McFarland vs. The State Bank*, 4 Pike, 410.—SHARSWOOD.

<sup>35</sup> Where a repealing statute is itself repealed, the first or original statute is thereby *ipso facto* revived. *Commonwealth vs. Churchill*, 2 Metc. 118. *Directors vs. Railroad Co.*, 7 W. & S. 236. *Harrison vs. Walker*, 1 Kelly, 32. The repeal of a statute, however, will not be construed to divest rights which have vested under it. *Davis vs. Minor*, 1 Howard, (Miss.,) 183. *James vs. Dubois*, 1 Harr. 285. *Mitchell vs. Doggett*, 1 Branch, 356. The repeal of a prohibitory act does not make valid contracts prohibited by it which were made while it was in force. *Milne vs. Huber*, 3 McLean, 212. Where a statute, reviving a statute which had been repealed, is itself repealed, the statute which was revived stands as it did before the revival. *Calvert vs. Makepeace*, 1 Smith, 86. This rule has been altered in England by St. 12 & 13 Vict. c. 21, s. 5, which enacts that repealed statutes shall not be revived by the repeal of the act repealing them, unless express words be added reviving such repealed acts. The same enactment was made in Virginia in the year 1789.—SHARSWOOD.

<sup>36</sup> 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 that 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.—CHRISTIAN

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.<sup>(g)</sup> 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.<sup>37</sup>

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 [ \*92 them. What equity is, and how impossible in its very essence to be reduced to stated rules, hath been shown 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

(g) 8 Rep. 118.

<sup>37</sup> The following canons of interpretation may be added to those stated in the text:—

11. A statute shall always be so construed as to operate prospectively, and not retrospectively, unless, indeed, the language is so clear as to preclude all question as to the intention of the legislature. *Sayre vs. Wisner*, 8 Wend. 661. *Hastings vs. Lane*, 3 Shep. 134. *Brown vs. Wilcox*, 14 S. & M. 127. *Quackenbush vs. Danks*, 1 Denio, 128. This is a very important rule and frequently called into exercise. The provision in the Federal and most of the State constitutions prohibiting the passage of *ex post facto* laws has been confined by construction to criminal or penal laws; and the power of the legislature to affect injuriously vested rights, when the obligation of contracts is not violated, is generally conceded. Hence the value and necessity of the rule in question.

12. Contemporaneous usage may be resorted to as evidence of the construction put upon a statute by those best acquainted with the mind and intention of the lawmakers. When a particular construction has thus been assumed and acted on at an early day, and especially if many titles depend upon it, the courts will not at a subsequent period disturb it, even if it should appear to be indefensible on principle. *McKeer vs. Delancy*, 5 Cranch, 22. *Chesnut vs. Shane*, 16 Ohio, 519. *Kernion vs. Hills*, 1 Louis. Ann. R. 419.

13. The judicial interpretation of the statute of a State as settled by its own courts is to be received and followed by the courts of other States and by the Federal Judiciary. *Johnston vs. The Bank*, 3 Strobb. Eq. 263. *Hoyt vs. Thompson*, 3 Sandf. Supreme Court, 416. So even the Supreme Court of the United States is held bound by the determination of the State courts upon the construction of their State constitutions, and the validity of State laws as dependent thereon. *Elmendorf vs. Taylor*, 10 Wheat. 152. *Harpending vs. Dutch Church*, 16 Peters, 439.

14. Where there has been a general revision of the statute code of a State, under the authority of the legislature, and the revision has been approved and adopted, a mere change of phraseology introduced by the revisers will not be held to have effected a change, unless such appear clearly to have been the intention. *Chambers vs. Carson*, 2 Whart. 9. *Commonwealth vs. Rainey*, 4 W. & S. 186. In *re Brown*, 21 Wendell, 316 It has been held in some States, however, that where a statute is revised and a provision contained in it is omitted in the new statute, the inference is that a change in the law is intended. If the omission is accidental, it belongs to the legislature to supply it. *Back vs. Spofford*, 31 Maine, 34. *Ellis vs. Paige*, 1 Pick. 43.

15. A statute cannot be repealed by usage or become obsolete by non-user. *Wright vs. Crane*, 13 Serg. & R. 447. *Snowden vs. Snowden*, 1 Bland, 550. When the circumstances or business of a community so materially change that the facts no longer can arise to which a statute was meant to apply, in that sense it may become obsolete. It may, however, so happen that the current of legislation shows that an old statute, never actually repealed, was regarded by the legislature as no longer in force; and in that case it may be regarded as repealed by implication. *Hill vs. Smith*, 1 Morris, 170.—SHARSWOOD

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

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#### 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 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 \*94] styled the conqueror of \*Wales, the line of their ancient princes was abolished, and the King of England's eldest son became, as a matter of course,<sup>1</sup> their titular prince; the territory of Wales being then entirely reannexed (by a kind of feodal resumption) to the dominion of the crown of England; (a) or, as the statute<sup>2</sup> of Rhudlan (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

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

<sup>1</sup> 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.—CHRISTIAN.

<sup>2</sup> 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 manorial 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.—CHRISTIAN.

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 statute 27 Hen. VIII. c. 26, which at the same time gave the utmost advancement to their civil prosperity, by admitting them to a thorough communication of laws with the subjects of England. Thus were this brave people gradually conquered into the enjoyment of true liberty; being insensibly put upon the same footing, and made fellow-citizens with their conquerors. A generous method of triumph, which the republic of Rome practised with great success, till she reduced all Italy to her obedience, by admitting the vanquished states to partake of the Roman privileges.

It is enacted by this statute 27 Henry VIII., 1. That the dominion of Wales shall be forever 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 other, shall \*be used in Wales: besides many other regulations of the police of this principality. And the [\*95 statute 34 and 35 Hen. VIII., c. 26, confirms the same, adds farther regulations, divides it into twelve shires, and, in short, reduces it into the same order in which it stands at this day; differing from the kingdom of England in only a few particulars, and those too of the nature of privileges, (such as having courts within itself, independent of the process of Westminster-hall,) and some other immaterial peculiarities, hardly more than are to be found in many counties of England itself.

The kingdom of Scotland, notwithstanding the union of the crowns on the accession of their King James VI. to that of England, continued an entirely separate and distinct kingdom for above a century 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,<sup>(d)</sup> 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.<sup>3</sup>

(\*) 4 Inst. 345.

<sup>3</sup> 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 these 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 discussor

\*96] 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:

1. That on the first of May, 1707, and forever after, the kingdoms of England and Scotland shall be united into one kingdom, by the name of Great Britain.

2. The succession to the monarchy of Great Britain shall be the same as was before settled with regard to that of England.

3. The united kingdom shall be represented by one parliament.

4. There shall be a communication of all rights and privileges between the subjects of both kingdoms, except where it is otherwise agreed.

9. When England raises 2,000,000*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 of Scotland in parliament, and forty-five members to sit in the House of Commons.<sup>4</sup>

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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 representative 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 quicumque 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.

<sup>4</sup> By the 25th article it is agreed, that all 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

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.<sup>5</sup>

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.—CHRISTIAN.

<sup>5</sup> 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.

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 forever, 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 forever 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."<sup>(e)</sup> 2. That whatever else may be \*98] deemed "fundamental and essential conditions," the preservation of the two churches of England and Scotland in the same state that they were in at the time of the union, and the maintenance of the acts of uniformity which establish our common prayer, are expressly declared so to be. 3. That therefore any alteration in the 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 infringement of these "fundamental and essential conditions," and greatly endanger the union. 4. That the municipal laws of Scotland are ordained to be still observed in that part of the island, unless altered by parliament; and as the parliament has not yet thought proper, except in a few instances, to alter them, they still, with regard to the particulars unaltered, continue in full force. Wherefore

(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 1763 the regents are expressly disabled from assenting to the repeal or alteration of either these or the act of settlement.

(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 lifetime an English peer, and the creation was not affected by the annexation by inheritance of the Scotch peerage. On the 13th of 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.—CHRISTIAN.

the municipal or common laws of England are, generally speaking, of no force or validity in Scotland; and of consequence, in the ensuing Commentaries, we shall have very little occasion to mention, any further than sometimes by way of illustration, the municipal laws of that part of the united kingdoms.

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, 't received from that prince a charter, which (after its subsequent cession by Edward Balliol, to be forever 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.<sup>6</sup>

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 assumed the \*title of king, which is recognised by act of parliament 35 Hen. VIII. c. 3. But, as Scotland and England are now one and the same king- [\*100 dom, 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 parlia-

(f) Hale, Hist. C. L. 193. 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. *Hiberniæ*, 14 Hen. III.

(i) Pryn. on 4 Inst. 249.

(k) 4 Inst. 358. Edm. Spenser's State of Ireland, p. 1513, edit. Hughes.

(l) Vaugh. 294. 2 Pryn. Rec. 85. 7 Rep. 23.

(m) 1 Inst. 141.

<sup>6</sup> See the case of the King vs. 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.—CHRISTIAN.



ment. 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<sup>(n)</sup> and Edward the First<sup>(o)</sup> 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.

\*101] And yet, even in the reign of queen Elizabeth, the \*wild natives still kept and preserved their Brehon law, which is described<sup>(p)</sup> to have been "a rule of right unwritten, but delivered by tradition from one to another, in which oftentimes there appeared great show 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:<sup>(q)</sup> "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 bind them, 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.<sup>(r)</sup>

\*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.<sup>(s)</sup> But an ill use being made of this liberty, particularly by lord Gormanstown, deputy-lieutenant in the reign of Edward IV.,<sup>(t)</sup> a set of statutes were then enacted in the 10 Hen. VII. (Sir Edward Poyning's laws) one of which,<sup>(u)</sup> 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 consideration 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 license 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.<sup>(w)</sup> But as this precluded any law from being proposed, but such as were preconceived 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 nega

(\*) A. R. 30. 1 Rym. Feod. 442.

(o) A. R. 5.—*pro eo quod leges quibus utuntur Hybernici Deo deestabiles existunt, et omni juri dissonant, adeo quod leges censori non debeant;—nobis et consilio nostro satis videtur expedire, eisdem utendum concedere leges Anglicanas.* 3 Frym. Rec. 1218.

(p) Edm. Spenser, *Ibid.*

(q) 20 Hen. VI. 8. 2 Ric. III. 12.

(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. 23.

(u) Cap. 4, expounded by 3 and 4 Ph and M. c. 4.

(w) 4 Inst. 353.

tive 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 application of private persons, receive and transmit such \*heads, or reject them without any transmission to England. And with regard to Poyning's 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) [\*103]

But the Irish nation, being excluded from the benefit of the English statutes, were deprived of many good and profitable laws, made for the improvement of the common law: and the measure of justice in both kingdoms becoming thence no longer uniform, it was therefore enacted by another of Poyning's 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 Poyning's 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 to be disputed by the Irish nation, it became necessary some years ago to declare how that matter really stood: and therefore by statute 6 Geo. I. c. 5, it is declared that the kingdom of Ireland ought to be subordinate to, and dependent upon, the imperial crown of Great Britain, as being inseparably united thereto; and that the king's majesty, with the consent of the lords and commons of Great Britain in parliament, hath power to make laws to bind the people of Ireland.†

Thus we see how extensively the laws of Ireland communicate with those of England: and indeed such communication is highly necessary, as the ultimate resort from the courts of justice in Ireland is, as in Wales, to those in England; a writ of error (in the nature of an appeal) lying from the King's Bench in Ireland to the King's Bench in England,(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 administered by courts of their own, yet that the appeal

(x) Irish stat. 11 Eliz. st. 3, c. 38.

(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, 2."

(c) This was law in the time of Hen. VIII.; as appears by the ancient book, entitled *Diversity of Courts, c. bank le roy.*

† Pryne, 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.

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)<sup>s</sup>

(c) Vaugh. 402.

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.—CHRISTIAN.

<sup>6</sup>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 advisable 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 kingdom of Great Britain and Ireland shall, on the first day of January, 1801, and forever 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 twenty-eight lords temporal of Ireland, elected for life by the peers of Ireland, shall sit in the House of Lords; and one hundred 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 thirty-one 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 twenty-eight, 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 twenty-eight, 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 one hundred 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 one hundred 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

With regard to the other adjacent islands which are subject to the crown of Great Britain, some of them (as the isle of \*Wight, of Port-land, of Thanet, &c.) are comprised 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, afterwards to the kings of Scotland; and then again to the crown of England: and at length we find king Henry IV. claiming the island by right of conquest, and disposing of it to the Earl of Northumberland; upon whose attainder it was granted (by the name of the lordship of Man) to Sir John de Stanley by letters patent 7 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

(e) 4 Inst. 234. 2 And. 116.

(f) Selden, tit. hon. 1, 3.

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 twenty such persons shall be capable of sitting; and if more than twenty such persons shall be returned from Ireland, then the seats of those above twenty 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 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 twenty 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

William his surviving brother: upon which, and a doubt that was started concerning the validity of the original patent,<sup>(g)</sup> 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 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 been long disused, the Earls of Derby, as Lords of Man, had maintained a sort of royal \*106] authority therein; by assenting or \*dissenting to laws, and exercising an appellate jurisdiction. Yet, though no English writ, or process from the courts of Westminster, was of any authority in Man, an appeal lay from a decree of the lord of the island to the King of Great Britain in council.<sup>(h)</sup> 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, 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 bishopric<sup>(i)</sup> 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 Normandy 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*. 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.<sup>(k)</sup> 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.

Besides these adjacent islands, our more distant plantations in America, and elsewhere, are also in some respect subject to the English laws. Plantations \*107] 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 founded upon the law of nature, or at least upon that of nations. But there is a difference between these two species of colonies, with respect to the laws by which they are bound. For it hath

(g) Camden, Eliz. A.D. 1594.

(h) 1 P. Wins. 330.

(i) The bishopric 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.

and mode of electing the twenty-eight temporal peers for life; and it provides that sixty-four county members shall be elected, 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 thirty-one 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.

An Irish peer is now entitled to every privilege except that of sitting in the House of Lords, unless he chooses to waive it, in order to sit in the House of Commons; and therefore Irish peers, who are not members of the House of Commons, are entitled to the letter missive from the court of chancery, when a bill is filed against them. 8 Ves. Jun. 601.—CHRISTIAN.

been held,<sup>(l)</sup> 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,<sup>(m)</sup> 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.<sup>9</sup> 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;<sup>10</sup> 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.<sup>(n)</sup> 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. 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.<sup>11</sup>

(l) Salk. 411, 666.

(m) 2 P. Wms. 75.

(n) 7 Rep. 17, Calvin's case. Show. Parl. c. 31.

<sup>9</sup> 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.—CHITTY.

<sup>10</sup> 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. *Covp.* 204.—CHRISTIAN.

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.)—CHITTY.

<sup>11</sup> Sir William Blackstone considered the British colonies in North America as ceded or conquered countries, and thence concluded that the common law in general had no allowance or authority there. But this was an error. The claim of England to the soil was made by her in virtue of discovery, not conquest or cession. The aborigines were considered but as mere occupants, not sovereign proprietors; and the argument for the justice of taking possession and driving out the natives was rested upon the ground that a few wandering hordes of savages had no right to the exclusive possession and enjoyment of the vast and fertile regions which were opened for the improvement and progress of civilized man by the discovery of the New World. "On the discovery of this immense continent," said C. J. Marshall, in *Johnson vs. McIntosh*, 8 Wheaton, 582, "the great nations of Europe were eager to appropriate to themselves so much of it as they could respectively acquire. Its vast extent offered an ample field to the ambition and enterprise of all; and the character and religion of its inhabitants afforded an apology for considering them as a people over whom the superior genius of Europe might claim an ascendancy. The potentates of the Old World found no difficulty in convincing themselves that they made ample compensation to the inhabitants of the New by bestowing on them civilization and Christianity in exchange for unlimited independence. But, as they were all in pursuit of nearly the same object, it was necessary, in order to avoid conflicting settlements, and consequent war with each other, to establish a principle which all should acknowledge as the law by which the right of acquisition, which they all asserted, should be regulated as between themselves. This prin

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 counties-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,

ciple was, that discovery gave title to the government by whose subjects or by whose authority it was made, against all other European governments, which title might be consummated by possession.

"The exclusion of all other Europeans necessarily gave to the nation making the discovery the sole right of acquiring the soil from the natives, and establishing settlements upon it. It was a right with which no Europeans could interfere. It was a right which all asserted for themselves, and to the assertion of which by others, all assented.

"Those relations which were to exist between the discoverer and the natives were to be regulated by themselves. The rights thus acquired being exclusive, no other power could interpose between them.

"In the establishment of these relations, the rights of the original inhabitants were in no instance entirely disregarded, but were necessarily, to a considerable extent, impaired. They were admitted to be the rightful occupants of the soil, with a legal as well as just claim to retain possession of it, and to use it according to their own discretion; but their rights to complete sovereignty as independent nations were necessarily diminished, and their power to dispose of the soil at their own will to whomsoever they pleased, was denied by the original fundamental principle, that discovery gave exclusive title to those who made it."

It follows, then, that the true principle as regards the British colonies in this country, which subsequently became the United States, is that which the learned commentator has recognised to be the rule of new settlements:—"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, 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."

This expresses accurately and fully the well-settled and repeatedly recognised doctrine of the American courts upon the subject of the extension of the English common law and statutes to this country. Our ancestors brought with them only such parts of the laws of England as were adapted to their new condition, and, we may add as quite important, such only as were conformable to their principles. The original settlers of this country belonged to a stock of men whose history exhibited in a remarkable manner the ascendancy of moral and religious principles, and who were deeply imbued with notions of the right of men to live under governments of their own choice. All the great safeguards of political liberty which were consecrated in England about that period or subsequently, by the Bill of Rights and Act of Settlement, were received and held by

make laws suited to their own emergencies.<sup>12</sup> But it is particularly declared 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.<sup>13</sup>

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

them as fundamental to all free government. Not only so, but their ideas on religious freedom, on the administration of criminal law, and on the process and pleading in courts, were simple, just, and humane. There never was an order of provincial nobility, nor, with one or two unimportant exceptions, an established clergy, in any of the colonies. Thus, not only in regard to the common law, but as to the statutes in force at the time of their settlement, some parts were adopted, some entirely rejected, and some adopted with important modifications. Some British statutes passed subsequent to that date were in some cases silently adopted, without express legislation: the lawyers of the old colonies, having either been educated in England, or deriving their ideas from English books, adopted and introduced into general practice and understanding such improvements as they found to be convenient.

Equally false is the doctrine asserted that these colonies were subject to the control of the parliament. The colonies were never represented in that body; and although the charters were derived from the crown, and all admitted a common allegiance to the same sovereign, it did not therefore follow that they were subject to the legislative authority of the English people. The great principle successfully maintained by the American Revolution was that taxation and representation are inseparable. And although in the early part of the struggle the Americans were ready to concede the power, provided it was used merely for the purpose of regulation, and not for revenue, before the struggle closed all such distinctions were repudiated. It was clearly seen and argued that no such power over the fortunes and industry of the people of the colonies could with safety be trusted to a legislature at so great a distance, in which they had no voice, which could feel no sympathy for them, and was without that accurate and intimate acquaintance with their character, pursuits, and resources, which is necessary to the wise and impartial exercise of such a power.—SHARSWOOD.

<sup>12</sup> Of the American colonies which subsequently became the United States, New Hampshire, New York, New Jersey, Virginia, the Carolinas, and Georgia, were provincial establishments at the period of the Revolution; Maryland, Pennsylvania, and Delaware were proprietary governments; and Massachusetts, Rhode Island, and Connecticut were charter governments.

Mr. Justice Story remarks (1 Com. on the Const., 145) that Blackstone's description of charter governments is by no means just or accurate. They could not be justly considered as mere civil corporations of the realm, empowered to pass by-laws; but rather as great political establishments or colonies, possessing the general powers of government and rights of sovereignty, dependent indeed and subject to the realm of England, but still possessing within their own territorial limits the general powers of legislation and taxation.—SHARSWOOD.

<sup>13</sup> 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.—CHRISTIAN.



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 \*110] with him, and held in conjunction with the English throne; and from Anjou, and its appendages, which fell to Henry the Second by hereditary descent. They had seen the nation engaged for near four hundred years together in ruinous wars for defence of these foreign dominions; till, happily for this country, they were lost under the reign of Henry the Sixth. They observed that, from that time, the maritime interests of England were better understood and more closely pursued: that, in consequence of this attention, the nation, as soon as she had rested from her civil wars, began at this period to flourish all at once; and became much more considerable in Europe than when her princes were possessed of a large territory, and her councils distracted by foreign interests. This experience, and these considerations, gave birth to a conditional clause in the act<sup>(o)</sup> 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 shown hereafter; but they are not subject to the common law.<sup>(p)</sup><sup>14</sup> 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 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.<sup>(q)</sup>

<sup>(o)</sup> Stat. 12 and 13 Will. III. c. 3.  
<sup>(p)</sup> Co. Litt. 260.

<sup>(q)</sup> Finch, L. 78.

<sup>14</sup> The reason given in the text for the dominion of England over the high seas is clearly insufficient; for the courts of admiralty of all nations have jurisdiction thereon. It is now a well-established and recognised principle of international law that no nation has any exclusive dominion over the high seas, which are the highway of all nations, and are subject not to the jurisdiction of any particular country, but to the public law of the whole civilized world. However, the rightfulness of exclusive dominion over the high seas was maintained by Selden in his *Mare clausum*, and controverted by Grotius in his *Mare liberum*; and England has long claimed such a right over the four seas surrounding the British Isles. Every nation has nevertheless exclusive dominion over the sea within a certain distance of her shores,—usually agreed to be as far as a cannon-shot will reach from the land, or a marine league. It has been thought that the United States, owing to her extensive Atlantic coast, has a right to claim all within a line drawn from one headland to another: at least, that she may well claim that the neighbouring ocean within that distance from her shores shall enjoy immunity from the hostilities of other nations. In 1806, the government of the United States thought it would not be unreasonable, considering the extent and shoalness of the coast and the natural indication furnished by the well-defined path of the Gulf Stream, to expect an immunity from belligerent warfare for the space between that limit and the American shore  
! Kent's Com. 30. Bowyer's Const. Law, 30.—SHARSWOOD.

\*The territory of England is liable to two divisions; the one ecclesiastical, the other civil. [\*111

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 bishopric 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. There was then no appropriation of ecclesiastical dues to any particular church; but every man was at liberty to contribute his tithes to whatever priest or church he pleased, provided only that he did it to some; or if he made no special appointment or appropriation thereof, they were paid into the hands of the bishop, whose duty it was to distribute them among the clergy, and for other pious purposes, according to his own discretion.(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 of them perhaps from the truth; [\*112 which will probably be found in the medium between the two extremes. For Mr. Selden has clearly shown(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 cemetery 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 cemetery, 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, though there are often many manors in one parish. \*The lords, as Christianity spread itself, began to build churches [\*113 upon their own demesnes or wastes, to accommodate their tenants in one or two adjoining lordships; and, in order to have divine service regularly

(r) Co. Litt. 94.

(s) Gibbon's *Britain*.

(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.

performed therein, obliged all their tenants to appropriate their tithes to the maintenance of the one officiating minister, instead of leaving them at liberty to distribute them among the clergy of the diocese in general; and this tract of land, the tithes whereof were so appropriated, formed a distinct parish. Which will well enough account for the frequent intermixture of parishes one with another. For, if a lord had a parcel of land detached from the main of his estate, but not sufficient to form a parish of itself, it was natural for him to endow his newly erected church with the tithes of those disjointed lands; especially if no church was then built in any lordship adjoining to those 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 extra-parochial 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,<sup>15</sup> who, to prevent the rapines and disorders which formerly prevailed in the realm, \*114] 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-caldre, being supposed the discreetest man in the borough, town, or tithing. (d)

Tithings, towns, or vills, 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 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

(a) 2 Inst. 647. 2 Rep. 44. Cro. Eliz. 512.

(b) *Fitz.* 1, 47. Thus the laws of king Edward the Confessor, c. 20, very justly entitled, "*summa et maxima securitas, per quam omnes statu firmissimo sustentur;—quæ hinc modo fiebit, quod sub decenniali fidejussione debeant esse unitersi, &c.*"

(c) *Mirr.* c. 1, § 3.

(d) *Finch*, L. 8.

(e) 1 Inst. 115.

<sup>15</sup> 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 a uniform system of jurisprudence. See Whitaker's History of Manchester; Montesquieu, *Esprit des Loix*, tom. 2, p. 376; Stuart's Diss. on the English Constitution, 254; and Henry's History of Great Britain.—CHIRRR.

bishopric be dissolved, as at Westminster,<sup>16</sup> yet it still 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 \*hamlets, which are taken notice of in the statute of Exeter,(i) which [\*115 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 a high constable, or bailiff, and formerly there was regularly held in it the hundred court for the trial of causes, though now fallen into disuse. In some of the more northern counties these hundreds are called wapentakes.(l)<sup>17</sup>

The subdivision of hundreds into tithings seems to be most peculiarly the

(f) Co. Litt. 109.  
(g) Litt. § 164.  
(h) 1 Inst. 116.

(i) 14 Edw. I.  
(k) Gloss. 274.  
(l) Seid. in Fortesc. c. 24.

<sup>16</sup> 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 presentes 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.—CHRISTIAN.

<sup>17</sup> *Et quod Angli vocant hundredum, comitatus Yorkshire, Lincolnshire, Nottinghamshire, Leicestershire, et Northamptonshire, vocant wapentachium*. (11. 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.—CHRISTIAN.

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 \*116] \*indeed something like this institution of hundreds may be traced back as far as the ancient Germans, from whom were derived both the Franks, who became masters of Gaul, and the Saxons, who settled in England; for both the thing and the name, as a territorial assemblage of persons, from which afterwards a territory itself might properly 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 \*117] at least as old as \*the Norman conquest: (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 himself, 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 counties *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 feudal kingdoms in Europe,) (y) were, in all probability, originally granted to the counties of Chester and Dur-

(m) Seld. tit. of honour, 2, 5, 3.

(n) Montesq. Ep. 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. 13 Seld. ibid. Sandford's

sup. Hist. 112. 4 Inst. 204.

(s) Cart. 36 Edw. III. m. 9.

(t) Pat. 61 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 Hong. Magn. c. 2.

(y) Robertson, Cha. V. l. 60.

ham, 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 palatine, \*Pembrokeshire and Hexhamshire, the latter [ \*118 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 heir 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 forever; and should remain, descend, be administered, and governed, in like manner as if he never had attained the regal dignity: and 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 [ \*119 become forfeited to the crown,(d) 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*, forever; 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 Edw. IV., and to vest the inheritance of the whole in the king and his heirs forever, 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)

(z) 4 Inst. 206.

(a) 215.

(b) 4 Inst. 205.

(c) *Parl. 2 Hen. V. n. 30. 3 Hen. V. n. 15.*

(d) 1 Vent. 155.

(e) 1 Vent. 157.

(f) Some have entertained an opinion (Plowd. 220, 1, 2. Lamb. *Archeon.* 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 Henry 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.

\*120] There are also counties *corporate*, which are certain cities and towns, some with more, some with less territory annexed to them; to which, out of special grace and favour, the kings of England have granted the privilege to be counties of themselves, and not to be comprised 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.<sup>18</sup>

<sup>18</sup> By art. i. sec. 8 of the constitution of the United States, "Congress shall have power to exercise exclusive legislation in all cases whatsoever over such district (not exceeding ten miles square) as may by cession of particular States, and the acceptance of Congress, become the seat of the government of the United States, and to exercise like authority over all places purchased by the consent of the legislature of the State in which the same shall be, for the erection of forts, magazines, arsenals, dock-yards, and other needful buildings." Accordingly, the District of Columbia was ceded by the States of Maryland and Virginia to the United States and accepted by Congress.

By art. iv. sec. 3 of the constitution of the United States, "The Congress shall have power to dispose of and make all needful regulations respecting the territory or other property belonging to the United States; and nothing in this constitution shall be so construed as to prejudice any claims of the United States or of any particular State."

It has been often doubted whether the United States have any constitutional power to acquire new territory. However, Louisiana was purchased from France, Florida from Spain, and a very extensive territory was acquired by treaty from Mexico. The North-western territory, acquired previous to the adoption of the federal constitution, by cession from Virginia, was regulated by "An ordinance for the government of the territory of the United States northwest of the river Ohio," adopted by the Old Congress, July 13, 1787. Territorial governments have from time to time been organized out of the other territories of the United States.

The character and extent of the power of Congress over the Territories have been the subject of repeated and excited discussion both in and out of Congress. On this, as on most other questions connected with the authority of the federal government, the National and State-Rights schools have differed.

The former hold that, under the constitution, Congress have absolute and despotic power over the Territories; that whatever they have the power to do, they have the right to do, if in their judgment it will conduce to the "general welfare." Hence they construe the power "to dispose of and make all needful regulations respecting the territory or other property belonging to the United States" as the same in effect as the "power to exercise legislation in all cases whatsoever."

The State-Rights school, on the contrary, hold that the clause in the constitution about the Territories relates to them only as property, and gives no right to Congress to govern them; that their right to government springs from their acquisition of them by cession, and is not therefore absolute. Territory acquired under the right to declare war and make treaties belongs to the States as States, and Congress can only legislate in conformity to the principles of the constitution: their power is limited by the limitations of the constitution. They have the authority to maintain peace and order, and to establish tribunals for the administration of criminal and civil justice according to the law of the land as it existed at the time of the cession; but they can no more change the law of the land in a Territory than they can in a State. They cannot regulate private property or interfere with private rights. In short, the law of the ceded territory on all subjects not within the delegated powers of Congress in the States must continue until changed by the only legitimate authority, when the people of such Territory, with the authority of Congress, form a sovereign State.—SHARSWOOD.

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,<sup>(a)</sup> and after him [ \*122 our Bracton,<sup>(b)</sup> have expressed it, *sanctio justa, iubens honesta et prohibens contraria*, it follows that the primary and principal object 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*, with the means also of acquiring or losing them. 3. *Private wrongs*, or civil injuries, with the means of redressing them by law. 4. *Public wrongs*, or crimes and misdemeanors, with the means of prevention and punishment.<sup>1</sup>

(\*) 11 Philipp. 12.

(†) l. 1, c. 3.

<sup>1</sup> 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



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 municipa' 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*, which man is bound \*124] \*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 society, 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,) then they 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

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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*.—CHRISTIAN.

it by any civil sanction.<sup>2</sup> 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 \*themselves are few and simple: and then such rights as are relative, which, arising from a variety of connections, 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.<sup>3</sup>

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<sup>2</sup> 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 everywhere the guilty action; but punishment can only be the consequence of detection.—CHRISTIAN.

<sup>3</sup> It is truly observed by the commentator that the absolute rights of individuals though occupying less space in codes of law than their relative rights or rights of property, are nevertheless by far the most important. The great end of society is to secure the wealth and happiness of its members; and the vast majority of mankind, depending upon their daily labour for their daily bread, have the most direct and immediate interest in their life, limbs, liberty, and reputation. It is true that the hope of acquiring property and of thus bettering our condition pervades all classes; and no country can prosper, nor be the seat of a contented people, where the fruits of industry and frugality are not fully secured to the possessor, and the relations of men and the enjoyment of their property regulated by wise and equal laws, impartially administered. In popular forms of government, such as prevail in the United States, where the people govern themselves by agents or representatives, chosen at short intervals, personal liberty, the elective and other political franchises, liberty of conscience, of speech, and of the press, and the right of the people peaceably to assemble to consider and discuss their grievances, are rights, which the people naturally cherish with jealousy, and which are able to protect themselves in a great measure from their own democratic affinities. Practically there is, however, not much difference between wresting from a man by force or fraud or governmental exaction, the few dollars, the product or savings of his industry for any period of time, and depriving him of his liberty, or chaining him to a log to work for another during the same period. Hence we ought not to undervalue those guaris, which have been provided for the protection of the rights of property. These are as important parts of our liberties, and should be maintained with as vigilant an eye, as any other.

The constitution of the United States and the constitutions of the several States are accompanied with Bills of Rights, which are intended to declare and set forth the restrictions which the people in their sovereign capacity have imposed upon their agents,—the various governments established by these constitutions. But as the persons composing the different branches of these governments are chosen, directly or indirectly, by a majority of the people, the provisions of these Bills of Rights are really restrictions imposed upon these majorities. They constitute the security of the individual members of society against the acts of the majority. The great bulwark of the reserved rights protected by these restrictions is the judiciary department. They have the unquestioned power of declaring any act of the government, in any of its departments, which infringes any of these rights, to be utterly null and void. That department spreads the broad

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 free will. But every man, when he enters into society, gives up a part of his natural liberty, as the price of so valuable a purchase; and, in consideration of receiving the advantages of mutual commerce, obliges himself to conform to those laws, which the community has thought proper to establish. And this species of legal obedience and conformity is infinitely more desirable than that wild and savage liberty which is sacrificed to obtain it. For no man that considers a moment would wish to retain the absolute and 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.<sup>(c)</sup> Hence we may collect \*126] that the law, which restrains a man from doing \*mischief to his fellow-citizens, though it diminishes the natural, increases the civil liberty of mankind; but 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 more indifference, without any good end in view, are regulations destructive

(c) *Fucillus ejus, quod cuique facere libet, nisi quid jure prohibetur. Inst. 1, 3, 1.*

and impregnable shield of its protection over the life, limbs, liberty, reputation, and property of the citizen, when invaded even by the will of the majority. Our Bills of Rights are therefore not mere enunciations of abstract principles, but solemn enactments by the people themselves, guarded by a sufficient sanction.

The Bill of Rights which accompanies the federal constitution is mainly to be found in the amendments to that instrument. It was strongly urged by those who favoured the adoption of that instrument as it was proposed, that inasmuch as the government established by it was in all respects a limited one,—that it could exercise no powers except such as were expressly granted or necessarily implied,—there was no occasion of any Bill of Rights. But the States were not satisfied with this reasoning. They feared that, as the means of carrying into effect the granted powers were open to the discretion of government, they might still, unless expressly restricted, invade those rights, which ought not, in any event, or by any construction, to be submitted to the power of government. While they proceeded therefore to ratify the constitution as proposed unconditionally, it was in the confidence that such amendments would be adopted as would relieve their fears in this particular. This was accordingly done. The amendments were proposed at the first session of the first Congress of the United States, which was begun and held at the city of New York, on the 4th of March, 1789, and were adopted by the requisite number of States.

It must be remembered that the limitations of power contained in these amendments do not apply to the State governments. The people of the respective States are left to create such restrictions on the exercise of the power of their particular governments as they may think proper; and restrictions by the constitution of the United States on the exercise of power by the individual States in cases not consistent with the objects and policy of the powers vested in the Union are expressly enumerated in art. 1, sect. 10. (1 Kent's Com. 407. *Barron vs. The Mayor and City Council of Baltimore*, 1 Peters, 243.)

The industrious student, by an examination of the constitution of the State in which he resides, and the constitution of the United States, will be able for himself to arrange the various provisions of these instruments under the several heads of this chapter: 1. The Right of Personal Security; 2. The Right of Personal Liberty; and 3. The Right of Private Property. To these the distinguished commentator Chancellor Kent has added a fourth head, which found no place under the English system, but which occupies a most prominent and important one under our American systems:—4. The free exercise and enjoyment of religious profession and worship.—SHARSWOOD.

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.,<sup>(d)</sup> which forbade 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.,<sup>(e)</sup> 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,<sup>(f)</sup> 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.<sup>5</sup>

<sup>(d)</sup> 3 Edw. IV. c. 5.  
<sup>(e)</sup> 30 Car. II. st. 1, c. 3.

<sup>(f)</sup> On Gov. p. 2, § 57.

<sup>5</sup> Repealed by stat. 54 Geo. III. c. 108.—CHITTY.

<sup>6</sup> 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 quilibet 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 tiger, 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 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, per

The idea and practice of this political or civil liberty flourish in their highest \*127] vigour in these kingdoms, where it falls little short of perfection, and can only be lost or destroyed by the folly or demerits of its owner: the legislature, and of course the laws of England, being peculiarly adapted to the preservation of this inestimable blessing even in the meanest subject. Very

haps, 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 egregiè 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 jail can have the exercise and enjoyment of few rights, it is *κατ' ἐξοχήν* 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 rigor, 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 paulè jam adductivus, quam ceteræ 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 quòd 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 suggest 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: *Falsè 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 no 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

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.<sup>6</sup>

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.<sup>7</sup> 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.<sup>8</sup>

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

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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.—CHRISTIAN.

<sup>6</sup> 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.—CHRISTIAN.

The reader may peruse the case of *Forbes vs. Cochrane*, 2 B. & C. 448; 3 D. & 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."—CHITTY.

<sup>7</sup> 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.—CHRISTIAN.

<sup>8</sup> Civil liberty, the great end of all human society and government, is that state in which each individual has the power to pursue his own happiness, according to his own views of his interests and the dictates of his conscience, unrestrained, except by equal, just, and impartial laws. Laws are, therefore, the just and necessary limits of natural liberty. Political liberty, on the other hand, is that state in which the individual enjoys civil liberty with security; a security, as the experience of history shows, only to be attained by the force of public opinion, formed and influenced by an untrammelled press, and by the legislators being at stated intervals chosen by the people and from the people, upon whom their enactments are to operate. The particular form which may assign to the government its denomination in political science may be, and often is, important to this end, but not of the essence of political liberty. It follows, too, from this definition, that some classes or orders of men in a country may enjoy a higher degree of political liberty than others, while some, indeed, may be entirely deprived of it. "The value of any form of government," says Mr. Palgrave, "depends upon the protection which through the law it affords to the individual." The same sentiment has been well expressed by William Penn:—"Any government is free to the people under it, whatever

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 \*128] of the principal grounds of the fundamental \*laws of England. Afterwards by the statute called *confirmatio cartarum*,(*i*) whereby the great

(h) 2 Inst. proem.

(i) 25 Edw. 1.

be the frame, where the laws rule and the people are a party to those laws; and more than this is tyranny, oligarchy, and confusion."

It is certainly true that law in its turn may be a tyrant, whether enacted by the will of one man or of a majority of the people. Laws may justly restrain all classes of actions whose tendencies are to impair individual security, whether those actions are abstractly right or wrong in themselves, useful or noxious in particular instances. The converse of the proposition is true. Whenever laws attempt more than is necessary to secure alike to every man, weak or strong, rich or poor, ignorant or instructed, the right, the moral power, of seeking his own happiness in his own way, they invade that natural liberty of which they ought only to be the bulwark. To this security, it is certainly necessary that violence, fraud, and crime should be prevented, and, as the most efficient means of prevention, *punished*. We may go further, and say *punished* without regard to the preventive effects of punishment, considering the civil ruler in this respect as the sword-bearer of the Deity, and bound to enforce his moral law. Nay, we may still advance a step, and hold that such injuries in a perfect system should in every instance be compensated, either by the community directly, or by its force applied to the offender. To the security of which we speak, it is further necessary that general rules should be established and promulgated, and tribunals erected, whose wisdom, independence, and impartiality should be as carefully provided for as possible, to determine controversies between men, with power to enforce the execution of their judgments. It may be that the means of intercourse with other members of the society inhabiting the same territory, and with other states and countries, for the mutual interchange of kind offices, the products of labour, the works of genius and learning, and the discoveries of science, should be provided for; that public institutions should be founded for the care of the old, sick, and impotent, the forced employment of the idle and imprudent, and for the education of the young, whose education otherwise would be neglected. Perhaps, in the progress of society, it may be found that some of these subjects, important as they appear to be and undoubtedly are, may be safely left to take care of themselves, and that the assumption by government of the imperfect obligations of individuals is never the part of a wise policy. There are, indeed, many subjects in regard to which we may well hesitate in deciding whether or not they fall within the legitimate province of government. This, however, may be safely said, that there is not much danger of erring upon the side of too little law. It is not in the making of laws, but in their stern and impartial execution, that there is danger of failure. Few laws well executed are better than many laws slumbering on the statute-book. These are snares to the unwary; weapons of fraud and injustice in the hands of the astute, reducing government itself to a condition of odium and weakness. The true strength, stability, and glory of every government rest upon the intelligent loyalty of its subjects. The world is notoriously too much governed. Legislators almost invariably aim at accomplishing too much. Representative democracies, so far from being exempt from this vice, are from their nature peculiarly liable to it. Annual legislatures increase the evil. The members fall into the common mistake that their commission is to act, not merely to decide whether action is necessary. They would be blamed and ridiculed if they adjourned without some important act of legislation. Hence the annual volumes of our acts of assembly are fearfully growing in bulk. It is not merely of the extent of local legislation, or of the constantly recurring changes in the most general subjects of interest,—finance, revenue, banking, and pauperism,—that there is reason to complain; but scarce a session of the legislature passes without rash and ill-considered alterations in the civil code, vitally affecting private rights and relations. Such laws are very frequently urged by men having causes pending, who dare not boldly ask that a law should be made for their particular case, but who do not hesitate to impose upon the legislature, by plausible arguments, the adoption of some general rule, which by a retrospective construction will have the same operation. It is a most monstrous practice, which lawyers are bound by the true spirit of their oath of office, and by a comprehensive view of their duty to the constitution and laws which they bear so large a part in administering, to discountenance and prevent. It is to be feared that too often it is the counsel of the party, who recommends and cunningly frames the bill, which, when enacted into a law, \* legislatively to decide the cause. These bills are sometimes appropriately called

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:—

(k) 2 Inst. proem.

*akes.* It is time that a resort to such a measure should be regarded in public estimation as a flagrant case of professional infidelity and misconduct.

It has become a favourite maxim that it is the great duty of government to promote the happiness of the people. The phrase may be interpreted so as to mean well; but it is a very inaccurate and unhappy one. It is the inalienable right of the people to pursue their own happiness; and the true and only true object of government is to secure them this right. The happiness of the people is the happiness of the individuals, who compose the mass. Speaking now with reference to those objects, which human laws can reach and influence, he is the happy man, who sees his condition in life constantly but gradually improving. Even sudden changes of fortune from worse to better hold no comparison with this. Laws, which open the door to the sudden creation of large fortunes by speculation, have no tendency to promote the happiness of the people at large; often, alas! not even the happiness of those for whose benefit they are made. On the contrary, in so far as they operate, as they mostly do, directly or indirectly, to transfer property from the masses to the favoured few, they contract the general limits of private comfort and independence. The intellectual, moral, and religious capabilities enter largely into the account. They too must be in the process of gradual improvement to satisfy the longings of a rational soul,—one of the best signs that it is destined to an immortal existence and growth. It is certainly true, in the broad sense of the word, that the wealth of a community is not necessarily the weal of the community. “A political institution,” says Mr. Austin, “may further the weal of the community, though it checks the growth of its wealth; a political institution, which quickens the growth of its wealth, may hinder the advancement of its weal.” Yet the wealth of individuals, the aggregate of which is the wealth of the state, is notwithstanding one great source of physical, intellectual, and moral advancement, the stimulus and reward of effort and enterprise. Government can protect and promote it but in one way,—by equal and just laws, and the wise and impartial administration of them. It usurps functions, which do not belong to it, and functions which it is not competent to use well, when it undertakes to interpose by directing the pursuits of industry or encouraging its employment in any particular manner. All that a government takes out of the pocket of individuals in the shape of taxes, direct or indirect, for any other than its appropriate and legitimate purposes, is an invasion of their right to the enjoyment of the fruits of their own labour of mind or body. The power of taxation in the legislature is in fact a part of the *eminent domain*,—a power that must necessarily be reposed in the discretion of every government to furnish the very means for its own existence. The unwise and even corrupt exercise of it is undoubtedly to be submitted to by the good citizen; but no effort should be spared in any state to procure the repeal of all such laws, and to reduce government from a complicated to a simple machine, a few general objects steadily kept in view and strictly adhered to. The days of kingcraft and government-craft are passing away. “The people,” as Lord Brougham has well said, “ought to have the greatest liberty they can safely enjoy, and the cheapest government that suffices to regulate their affairs.” (*Political Philosophy*, vol. i. p. 64.) “As all government is made for the benefit of the community, the people have a right not only to be governed, but to be governed as well as possible; that is, with as little expense to their natural freedom and their resources as is consistent with the nature of human affairs. Towards this point of perfection all nations ought constantly to be directing their course.” *Ibid.* p. 27.—SHARSWOOD.



"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<sup>(l)</sup> recognises "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*,<sup>(m)</sup> whereby the crown was limited to his present majesty's illustrious house: and some new provisions were added, at the same fortunate era, for better securing our religion, laws, and liberties; which the statute declares to be "the birthright of the people of England," according to the ancient doctrine of the common law.<sup>(n)</sup>

\*129] \*Thus much for the *declaration* of our rights and liberties. The rights themselves, thus defined by these several statutes, consist in a number of private immunities; which will appear, from what has been premised, to be indeed no other, than either that *residuum* of natural liberty, which is not required by the laws of society to be sacrificed to public convenience; or else those civil privileges, which society hath engaged to provide, in lieu of the natural liberties so given up by individuals. These, therefore, were formerly, either by inheritance or purchase, the rights of all mankind; but, in most other countries of the world being now more or less debased and destroyed, they at present may be said to remain, in a peculiar and emphatical manner, the rights of the people of England. And these may be reduced to three principal or primary articles; the right of personal security, the right of personal liberty, and the right of private property: because, as there is no other known method of compulsion, or abridging man's natural free will, but by an infringement or diminution of one or other of these important rights, the preservation of these, inviolate, may justly be said to include the preservation of our civil immunities in their largest and most extensive sense.

I. The right of personal security consists in a person's legal and uninterrupted enjoyment of his life, his limbs, his body, his health, and his reputation.

1. Life is the immediate gift of God, a right inherent by nature in every individual; and it begins in contemplation of law as soon as an infant is able to stir in the mother's womb. For if a woman is quick with child, and by a potion or otherwise, killeth it in her womb; or if any one beat her, whereby the child dieth in her body, and she is delivered of a dead child; this, though not murder,\* was by the ancient law homicide or manslaughter.<sup>(o)</sup> But the modern law doth not look \*upon this offence in quite so atrocious a light,<sup>10</sup> but merely as a heinous misdemeanour.<sup>(p)</sup>

An infant *in ventre sa mere*, or in the mother's womb, is supposed in law to be born for many purposes.<sup>11</sup> 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;<sup>(q)</sup> and it is enabled to have an estate limited to its use, and to take afterwards by such limi-

(l) 1 W. and M. st. 2, c. 2.

(m) 12 and 13 W. III. c. 2.

(n) Plowd. 55.

(o) *Si aliquis mulierem pregnantem percusserit, vel et venenum dederit, per quod fecerit abortivam; si puerperium*

*jam formatum fuerit, et maxime si fuerit animatum, facti homicidium.* Bracton, l. 3, c. 21.

(p) 3 Inst. 50.

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

\* 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. Post. 302.—CHRISTIAN.

<sup>10</sup> 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 accessories before the fact, and subject to the same punishment as the principal.—CHRISTIAN.

<sup>11</sup> Every legitimate infant *in ventre de sa mere* is considered as born for all beneficial purposes. (Co. Litt. 36. 1 P. Wms. 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 vs. 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.—CHRISTIAN.

tation, as if it were then actually born.(r) 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 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 misdemeanors, as will appear in the fourth book. The constraint a man is under in these circumstances is called in law *duress*, from the Latin *durities*, of which there are two \*sorts: duress of imprisonment, where [\*131 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

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

(s) *Qui in utero sunt, in jure civili intelliguntur in rerum natura esse, cum de eorum commodo agatur.* Ff. 1, 6, 26.

(t) 2 Inst. 483.

(u) l. 2, c. 5.

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.) It takes land by descent, though in that case the presumptive heir may enter and receive the profits for his own use till the birth of the child, (3 Wils. 526,) which seems to be the only interest it loses by its situation.—CHRISTIAN.

"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."—CHITTY.

If the child dies subsequently to birth from wounds received in the womb, it is clearly homicide, even though the child is still attached to the mother by the umbilical cord. It has been said that it is not an indictable offence to administer a drug to a woman, and thereby to procure an abortion, unless the mother is *quick* with child, though such a distinction, it is submitted, is neither in accordance with the result of medical experience, nor with the principles of the common law. The civil rights of an infant in *ventre sa mere* are equally respected at every period of gestation; and it is clear that, no matter at how early a stage, he may be appointed executor, is capable of taking as legatee or under a marriage settlement, may take specifically under a general devise as a child, and may obtain an injunction to stay waste. Wharton's American Crim. Law, 537. See *Comm. vs. Parker*, 9 Metcalf, 263. *State vs. Cooper*, 2 Zabriskie, 57. *Smith vs. State*, 33 Maine, 48.

An infant is in esse from the time of conception, for the purpose of taking any estate which is for his benefit, whether by descent, devise, or under the statute of distributions, provided the infant be born alive and after such a period of fetal existence that its continuance in life may be reasonably expected. The right of an unborn infant to take property by descent or otherwise is an inchoate right, which will not be completed by a premature birth. *Harper vs. Archer*, 4 Smcdes & Marsh. 99. *Marsellis vs. Halkimer*, 2 Paige, Ch. Rep. 35.—SUGARWOOD.

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. And the indulgence shown 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.*<sup>12</sup>

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 comprised in the Theodosian code,(y) were rejected in Justinian's collection.

\*[132] These rights of life and member, can only be determined by the 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 entered 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 counted *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 *natural* life.(d)

(x) 2 Inst. 483.

(y) L. 11, c. 27.

(z) Co. Litt. 133.

(a) This was also a rule in the feudal law, l. 2, c. 21: *denit*

*esse miles seculi, qui factus est miles Christi; nec beneficium pertinet ad eum qui non debet genere officium.*

(b) Litt. § 200.

(c) Co. Litt. 133.

(d) 2 Rep. 48; Co. Litt. 182.

<sup>12</sup> It must be observed that, in modern times, parties have been allowed to rely upon, if not technically to plead, duress in avoidance of their deeds or contracts in cases which do not come up to the rule laid down in the text. Duress of goods will, under certain circumstances of great difficulty and hardship, avoid a contract. Money paid to obtain a delivery of property unlawfully detained, especially if it is paid under protest, may be recovered back. 2 Bay, 211. 9 Johns. 201. 10 Peters, 137. A note given to obtain a release of property from an illegal levy is not void; but it may be considered as an element in a question of fraud. 6 Smedes & Marsh. 13.—SHARSWOOD.

But, \*even in the times of popery, the law of England took no cognizance of *p*rofession 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.<sup>13</sup> [\*13b

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 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;<sup>14</sup> 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 destruat, nisi per legale iudicium parium suorum aut per legem terræ.*" Which words, "*aliquo modo destruat,*" 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 of 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 [\*13d shall be put to death, without being brought to answer by due process of law.

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

(g) Co. Litt. 132.  
(f) 1 Salk. 162.

(g) C. 29.  
(h) 2 Inst. 48.

<sup>13</sup> 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 forever: 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.—CHRISTIAN.

<sup>14</sup> 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.—CHRISTIAN.

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 locomotion, 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 \*135] the great \*charter<sup>(i)</sup> is, that no freeman shall be taken or imprisoned but by the lawful judgment of his equals, or by the law of the land.<sup>15</sup> And many subsequent old statutes<sup>(j)</sup> 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.<sup>16</sup>

(i) C. 29.

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

<sup>15</sup> "For the true sense and exposition of these words," says Lord Coke, (2 Inst. 50.) "see the statute of 37 Eliz. cap. 8, where the words 'by the law of the land' are rendered, *without due process of law*." The amendments to the constitution of the United States use the language, "nor be deprived of life, liberty, or property, without due process of law." And Judge Story observes that "this clause in effect affirms the right of trial according to the process and proceedings of the common law." (3 Story on the Const. 661.) "These terms 'law of the land' do not mean merely an act of the general assembly. If they did, every restriction upon the legislative authority would be at once abrogated." 4 Devereux, 1. 10 Yerger, 59. 19 Wend. 659. "In a state which is governed by a written constitution like ours, if the legislature should so far forget its duty, and the natural rights of an individual, as to take his private property and transfer it to another, where there was no foundation for a pretence that the public was to be benefited thereby, I should not hesitate to declare that such an abuse of the right of *eminent domain* was an infringement of the spirit of the constitution, and therefore not within the general powers delegated by the people to the legislature."—Ch. Walworth, 5 Paige, 137.—SHARSWOOD.

<sup>16</sup> The writ of *habeas corpus* at common law, although a writ of right, is not grantable of course, but only on motion in term-time, stating a probable cause for the application, and verified by affidavit. *Hobhouse's Case*, 3 B. & Ald. 420. The cases in which prisoners have a right to the writ are when they are detained in prison when they are entitled to be admitted to bail. This right is secured to such prisoners by the 31 Car. II. c. 2. Before the passing of that statute, prisoners committed for bailable offences were sometimes kept for a long time in prison without being brought to trial. To prevent this grievous oppression, the *habeas corpus* act directs that if any person be committed or detained for any crime, unless for treason or felony, other than persons convicted or in execution by legal process, he may apply to the lord-chancellor or a judge in vacation, and the person so applied to is to cause such prisoner to be brought before him, and to discharge him from imprisonment, upon his recognizance to appear in the court where his offence is cognizable. In cases which come under this statute, a single judge may perhaps be obliged to grant the writ as of course, but in no other; and the provision of

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 magistrate, \*are less dangerous to the com- [\*136 monwealth 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 jail, 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 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 a while, in order to preserve it forever.

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 duress, and avoid the extorted bond. But if a man be lawfully imprisoned,

(\*) 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 bull *unigenitus*.

(l) 2 Inst. 589.

this law do not apply to writs grantable by the court in term-time. Best, J.: *Ibid.* Passmore Williamson's Case, 26 Penna. State Reg. 9.

In some of the States it is enacted that the judge or court before which the writ is returned shall have authority to revise the cause of commitment, and to examine into the truth of the facts alleged in the return. The English statute of 56 Geo. III. c. 100 conferred the like power. If it appears, on the return, that the prisoner stands committed for a contempt adjudged against him by any tribunal of competent authority, the court or judge awarding the writ cannot examine into the fact of such contempt or bail the prisoner, but must immediately remand him. The adjudication is a conviction, and the commitment an execution. *Murray's Case*, 1 Wilson, 200. *Crosby's Case*, 3 Wilson, 188. *Hobhouse's Case*, 3 B. & Ald. 420.

It is provided by the constitution of the United States that the privilege of the writ of *habeas corpus* shall not be suspended unless when, in cases of rebellion or invasion, the public safety may require it. (Art. I, sec. 9.) The right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures shall not be violated; and no warrants shall issue but upon probable cause supported by oath or affirmation, and particularly describing the place to be searched, and the person or things to be seized. (Amendments, Art. VI.) No person shall be deprived of life, liberty, or property without due process of law. (*Ibid.*, Art. VII.) Excessive bail shall not be required. (*Ibid.* Art. X.) These provisions have been copied almost without exception into the various Bills of Rights, &c. which form parts of the several State constitutions.—

\*137] \*and, either to procure his discharge, or on any other fair account, seals a bond or a deed, this is not by duress of imprisonment, and he is not at liberty to avoid it.<sup>(m)</sup> To make imprisonment lawful, it must either be by process from the courts of judicature, or by warrant from some legal officer having authority to commit to prison; which warrant must be in writing, under the hand and seal of the magistrate, and express the causes of the commitment, in order to be examined into, if necessary, upon a *habeas corpus*.<sup>17</sup> If there be no cause expressed, the jailer is not bound to detain the prisoner;<sup>(n)</sup> 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 regno*, and prohibit any of his subjects from going into foreign parts without license.<sup>(o)</sup> 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.<sup>18</sup> To this purpose the great charter<sup>(p)</sup> declares, that no freeman shall be banished, unless by the judgment of his peers, or by the law of the land. And by the *habeas corpus* act, 31 Car. II. c. 2, (that second *magna carta*, and stable bulwark of our liberties,) it is enacted, that no subject of this realm, who is an inhabitant of England, Wales, or Berwick, shall be sent prisoner into Scotland, Ireland, Jersey, Guernsey, or

\*138] 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.<sup>(q)</sup> For this might, in reality, be no more than an honourable exile.

(m) 2 Inst. 452.  
(n) Ibid. 52, 53.  
(o) F. N. B. 85.

(p) C. 29.  
(q) 2 Inst. 46.

<sup>17</sup> As an arrest is an imprisonment in the large sense of the word, this position, that imprisonment, to be lawful, should be by process or warrant, must be understood with the qualifications pointed out in the Chapter on Arrests, b. iv. ch. 21. A constable or peace-officer has a right to arrest without warrant, upon probable ground of suspicion shown; and even a private person may justify an arrest without warrant, by proof of the guilt of the party arrested.

To constitute duress at law, the arrest must have been originally illegal, or have become so by subsequent abuse of it. 2 Watts, 167. 2 Foster, 303. An arrest for a just cause and under lawful authority, if for an unlawful purpose, will be construed duress of imprisonment. 8 N. Hamp. 386.—SHARSWOOD.

<sup>18</sup> The executive may annex to a pardon any condition, whether precedent or subsequent, not forbidden by law; and it lies on the grantee to perform it. It is not an unlawful condition that the party shall depart or be removed from the country. Flavill's Case, 8 Watts & Serg. 197.—SHARSWOOD.

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 of his liberties, or free \*customs, but by the judgment of his peers, or by [ \*139 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 private rights, as modelled by the municipal law. In this and similar cases the legislature alone can, and indeed frequently does, interpose, and compel the individual to acquiesce. But how does it interpose and compel? Not by absolutely stripping the subject of his property in an arbitrary manner; but by giving him a full indemnification and equivalent for the injury thereby sustained. The public is now considered as an individual, treating with an individual for an exchange. All that the legislature does is to oblige the owner to alienate his possessions for a reasonable price; and even this is an exertion of power, which the legislature indulges with caution, and which nothing but the legislature can perform.<sup>19</sup>

(r) C. 29.

(s) 5 Edw. III. c. 9. 25 Edw. IV. st. 5, c. 4; 28 Edw. III. c. 3.

<sup>19</sup> 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, 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, 85,) 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 empanel a jury, who shall assess



\*140] Nor is this the only instance in which the law of the land has postponed even public necessity to the sacred and inviolable rights of private property. For no subject of England can be constrained to pay any aids or taxes, even for the defence of the realm or the support of government, but such as are imposed by his own consent, or that of his representatives in parliament. By the statute 25 Edw. I. c. 5 and 6, it is provided, that the king shall not take any aids or tasks, but by the common assent of the realm. And what that common assent is, is more fully explained by 34 Edw. I. st. 4, c. 1, which 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 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.<sup>20</sup> But in vain would

(1) See the introduction to the great charter, (*edit. Oxon.*) anno 1297; wherein it is shown that this statute *de tallagio 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.

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.—CHITTY.

The constitution of the United States has provided (Amendments, Art. V.) that private property shall not be taken for public use without just compensation. A similar provision is contained in the several State constitutions. The compensation may be ascertained in any equitable and fair mode, to be provided by law, without the intervention of a jury, inasmuch as trial by jury is only required on issues in fact, in civil and criminal cases in courts of justice. The better opinion is that the compensation or offer of it must precede or be concurrent with the seizure and entry upon private property under the authority of the State. In *Bonaparte vs. Camden & Amboy Railroad Co.*, 1 Baldwin, 205, it was held that a law taking private property for public use without providing compensation was not void; for it may be provided by a subsequent law. But the execution of the law will be prevented by injunction until the provision is made, and the payment ought to be simultaneous with the actual appropriation of the property. It has been determined, however, that it is sufficient if provision be made to ascertain and pay the damages: they need not be actually ascertained and paid previous to the entry and appropriation of the property. *Bloodgood vs. Railroad Co.*, 18 Wendell, 1, 59. This is the construction given to English statutes in like cases, and frequently, as Lord Denman observed, the amount of compensation cannot be ascertained until the work is done. *Lister vs. Lobley*, 7 Ad. & Ell. 124.

There are cases undoubtedly in which the right to destroy property may exist without any remedy by the owner against the public or individuals. Thus it has been held that the right to destroy property in cases of extreme emergency, as to prevent the spread of a conflagration, is not the exercise of the right of eminent domain, nor the taking of it for public use, but is a right existing at common law, founded on the plea of necessity, and may be exercised by individuals. *The American Print Works vs. Laurens*, 1 Zarbriskie, 248. See 2 Kent's Com. 339, notes.—SHARSWOOD.

<sup>20</sup> Chancellor Kent enumerates among the absolute rights of individuals the free exercise and enjoyment of religious profession and worship. Civil and religious liberty generally go hand in hand; and the suppression of either of them for any length of time will terminate the existence of the other. It is ordained by the constitution of the United States (Amendments, Art. I.) that Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; and the same pro-

these rights be declared, ascertained, and protected by the dead letter of the laws, if the \*constitution had provided no other method to secure their actual enjoyment. It has therefore established certain other auxiliary [141 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*,<sup>(u)</sup> spoken in the person of the king, who in judgment of law (says Sir Edward Coke)<sup>(w)</sup> is ever present and repeating them in all his courts, are these; *nulli vendemus, nulli negabimus, aut differemus rectum vel justitiam*: "and therefore every subject," continues the same learned author, "for injury done to him *in bonis, in terris, vel persona*, by any other subject, be he ecclesiastical or temporal, without any exception, may take his remedy by the course of the law, and have justice and right for the injury done to him, freely without sale, fully without any denial, and speedily without delay." It were endless to enumerate all the *affirmative* acts of parliament, \*wherein justice is directed to be done according to the [142 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.

(\*) C. 29.

(w) 2 Inst. 55.

hibition on the State legislature appears in all the State constitutions. The principle is generally announced in them without any kind of qualification or limitation annexed, and with the exclusion of every species of religious test. He adds a brief account of the early charters and laws, so far as they bear on the point, and concludes that it appears from these illustrious examples that various portions of this country became, even in its infant state, distinguished asylums for the enjoyment of the principles of civil and religious liberties by the persecuted votaries of those principles from every part of Europe. 2 Kent's Com. 34.

Another of the absolute rights of individuals, in a state of society, which ought not to be omitted in such an examination, is the freedom of speech and of the press. The constitution of the United States has made the general provision that Congress shall make no "law abridging the freedom of speech or of the press." (Amendment, Art. I.) The State Bills of Rights have clauses of the same character, but more precise and particular. We may take that of Pennsylvania as an instance:—"The printing-presses shall be free to every person, who undertakes to examine the proceedings of the legislature, or any branch of government, and no law shall ever be made to restrain the right thereof. The free communication of thoughts and opinions is one of the invaluable rights of man; and every citizen may freely speak, write, and print on any subject, being responsible for the abuse of that liberty. In prosecutions for the publication of papers investigating the official conduct of officers, or men in a public capacity, or when the matter published is proper for public information, the truth thereof may be given in evidence; and in all indictments for libels the jury shall have a right to determine the law and the facts, under the direction of the court, as in other cases." (Const. Penn., Art. IX, s. 7.) In some constitutions the extension of the right to give the truth in evidence is more at large, and applies to all prosecutions or indictments for libels, without any qualifications annexed in restraint of the privilege. 2 Kent's Com., 23, note — SHARSWOOD.

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*,<sup>(x)</sup> that no freeman shall be outlawed, that is, put out of the protection and benefit of the laws, but according to the law of the land. By 2 Edw. III. c. 8, and 11 Ric. II. c. 10, it is enacted, that no commands or letters shall be sent under the great seal, or the little seal, the signet, or privy seal, in disturbance of the law; or to disturb or delay common right: and, though such commandments should come, the judges shall not cease to do right; 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*.

\*143] 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.<sup>21</sup> In Russia we are told<sup>(y)</sup> 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<sup>22</sup> in the country; and in London by the lord mayor, aldermen, and com-

(x) C. 29.

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

<sup>21</sup> "The right of the people peaceably to assemble and to petition the government for a redress of grievances shall not be prohibited." (Const. U. S. Amendments, Art. III.) This clause was the subject of much discussion in regard to petitions presented to Congress for the abolition of slavery in the District of Columbia; and it was the decision of Congress then that this clause did not imply any duty in the legislature to receive, read, or act upon such petitions.—SHARSWOOD.

<sup>22</sup> 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,

mon 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.

5. The fifth and last auxiliary right of the subject, that I shall at present mention, is that of having arms for their defence, suitable to their condition and degree, and such as are \*allowed by law.<sup>23</sup> 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

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“that it was a clear and fundamental point in the constitution of this country, that the people had a right to petition their representative 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 excitement 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 partisans 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.—CHITTY.

<sup>23</sup> The right of the people to keep and bear arms shall not be infringed; (Const. U. S. Amendments, Art. IV.); and this without any qualification as to their condition or degree, as is the case in the British government. Whoever examines the forest and game laws in the British code will readily perceive that the right of keeping arms is effectually taken away from the people of England. The commentator himself informs us (vol. ii. p. 412) “that the prevention of popular insurrections and resistance to government by disarming the bulk of the people is a reason oftener meant than avowed by the makers of the forest and game laws.” TUCKER.

of petitioning the king and parliament for redress of grievances; and, lastly, to the right of having and using arms for self-preservation and defence. And all these rights and liberties it is our birthright to enjoy entire; unless where the laws of our country have laid them under necessary restraints: restraints in themselves so gentle and moderate, as will appear, upon further 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 our-  
 \*145] selves or our fellow-citizens. So that this review \*of our situation may fully justify the observation of a learned French author, who indeed generally both thought and wrote in the spirit of genuine freedom,(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 further 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."

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## 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 intrust 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  
 \*147] supreme power is divided into \*two branches; the one legislative, to wit, the parliament, consisting of king, lords, and commons; the other executive, consisting of the king alone. It will be the business of this chapter to consider the British parliament, in which the legislative power, and (of course) the supreme and absolute authority of the state, is vested by our constitution.<sup>1</sup>

(z) Montesq. Sp. L. 5.

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<sup>1</sup> It will not, of course, be forgotten by the American student that in the government under which it is his privilege to live, "legislative power," and "the supreme and absolute authority of the state," are not convertible terms. The people of every state alone possess, and can exercise, supreme and absolute authority; the legislature, as the other departments of government, are but the depositaries of delegated powers, more or less limited according to the terms of the letter of attorney, the constitution: their acts, if they transcend their powers or violate their written instructions, are null and void.—SHARSWOOD.

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. 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.<sup>2</sup> It was first applied to general assemblies of the states under Louis VII. in France, about the middle of the twelfth century.<sup>(a)</sup> 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,<sup>(b)</sup> 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;<sup>(c)</sup> 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-gemote*, or great meet-

(a) Mod. Un. Hist. xxiii. 307. The first mention of it in our statute law is in the preamble to the statute of Westminster 1. 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. l. 369.)

<sup>2</sup>The word *parliamentum* was not used in England till the reign of Henry III. (Prynne on 4 Inst. 2.) Sir Henry Spelman, in his Glossary, (*voc. Parl.*) says, *Johannes rex hanc dicam parliamentum, nam hoc nomen non tum emicuit, sed communis concilii regni formam et actionem 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 set 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. 13.) 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 a useful comment upon the original signification of a word. No inconsiderable pains have been bestowed by learned men in analyzing 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 provide redress for the same." (Lamb. Arch. 235.) Whitelocke, 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 *quantite*, *abundance*. 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.—CHRISTIAN.

\*148] ing, and more \*frequently *wittena-gemote*, or the meeting of wise men. It was also styled in Latin *commune concilium regni, magnum concilium regis, curia magna, conventus magnatum vel procerum, assisa generalis*, and sometimes *communitas regni 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 *wittena-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 assize is spoken of as a meeting well known, and its statutes or decisions are put in \*149] \*a manifest contradistinction 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. Edmunds-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 burghesses to parliament. I proceed therefore 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

(d) Glanvil. l. 13, c. 32, l. 9, c. 10. Pref. 9 Rep. 2 Inst.

26.

(e) l. 2, c. 2.

(f) c. 1, § 3.

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(g) *Quanta esse debeat per nullam assisam generikam determinatum est, sed pro consuetudine singulorum comitatum debetur*, l. 9, c. 10.

(h) Year Book, 21 Edw. III. 60

chancery by advice of the privy council, at least forty days before it begins to sit.<sup>3</sup> 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.<sup>(i)</sup> 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.

\*It is true, that by a statute, 16 Car. I. c. 1, it was enacted, that, if the king neglected to call a parliament for three years, the peers might assemble and issue out writs for 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. [\*151

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

(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 dogs 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 magistratus were not admitted. 2. The necessity of having a single person to convok the great council when separated. Mod. Un. Hist. xxvii. 15.

<sup>3</sup> 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.

—CHRISTIAN.

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.—CHITTY.

By the 37 Geo. III. c. 127, fourteen days' notice is sufficient, even though the parliament may have adjourned to a longer day. (39 and 40 Geo. III. c. 14.) And after a dissolution parliament may now meet within thirty-five days after the proclamation.—

STEWART.



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.<sup>(k)</sup> 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 waive 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,<sup>(l)</sup> 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.<sup>4</sup> 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.

\*152] \*It is likewise true, that at the time of the revolution, A.D. 1688, the lords and commons, by their own authority, and upon the summons of the Prince of Orange, (afterwards king William,) met in a convention, and therein disposed of the crown and kingdom. But it must be remembered, that this assembling was upon a like principle of necessity as at the restoration; that is, upon 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 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,<sup>(m)</sup> 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 despatch of business, *if need be*.<sup>5</sup> These last words are so loose and vague, that such of our

<sup>(k)</sup> Stat. 12 Car. II. c. 1.

<sup>(l)</sup> 1 Sid. 1.

<sup>(m)</sup> 4 Edw. III. c. 14. 36 Edw. III. c. 10.

<sup>4</sup> 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.—CHRISTIAN.

<sup>5</sup> 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 word, *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 contemporary 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.

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.<sup>6</sup>

II. The constituent parts of a parliament are the next objects of our 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,<sup>(o)</sup> of which the king is said to be *caput, principium, et finis*. For, upon their coming together, the king meets them,

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

(o) 4 Inst. 1, 2. Stat. Eliz. c. 3. Hale of Parl. I.

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 plesse a nre dit Sr de tenir parlement un foetz par an au 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.)

But I can by no means agree with Mr. Sharp and those who contend that it is the meaning of those records and statutes that there should be an election every year. The word "parliament" at that time did not necessarily include any such idea; for it is everywhere applied to a session, without any distinction, whether it was held after a prorogation or a dissolution. (Rot. Parl. *passim*.) It is true that, for some time after the House of Commons was regularly established, dissolutions were frequent; for at that time the electors were few, and a seat in parliament was considered rather a burden to be avoided than a distinction to be solicited; and the members were not enabled to receive their wages till the king had discharged them from further attendance by putting an end to the parliament. In the first reigns after the representation of the commons was established, the duration and intermissions of parliament were short; but, for several reigns preceding the revolution, both had become extended to such a length that it became necessary for the parliament to interpose its authority and fix some limits to its own existence.

In the following reigns, the longest durations and intermissions were nearly as follows:—Hen. VIII., dur. 6 years, int. 4 years. Edw. VI., dur. 4. Eliz., dur. 11, int. 4. Ja. I., dur. 9, int. 6. Ch. I., dur. 8, int. 12. Ch. II., dur. 17, int. 4. (See the printed report of the committee to examine precedents in impeachments, April 19, 1791, p. 16, *et seq.*) In Ireland, there was no regular meeting of the parliament from 1666 till 1692; and from the reign of Queen Anne, in 1703, it assembled only once in two years till 1783,—since which time it has sat every year, as in England. (*Lord Mountmor.* 419.)—CHRISTIAN.

\* As the Mutiny Act, the Marine Forces Act, and other acts, are passed for one year only, parliament must necessarily be summoned for the despatch of business once in every year; and such has been the practice of the constitution since the revolution in 1688.

The Congress of the United States "shall assemble at least once in every year; and such meeting shall be on the first Monday in December, unless they shall by law appoint a different day."—Const. U. S. art. 1, s. 4.

The President "may on extraordinary occasions convene both houses or either of them; and in case of disagreement between them with respect to the time of adjournment, he may adjourn them to such time as he shall think proper." (*Ibid.* art. 11 s. 3.)—SHARPSWOOD.

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.

\*154] \*It is highly necessary for preserving the balance of the constitution, that the executive power should be a branch, though not the whole, of the 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 \*155] of the English government, that all the parts of it form a mutual \*check upon each other. In the legislature, the people are a check upon the nobility, and the nobility a check upon the people, by the mutual privilege of rejecting what the other has resolved: while the king is a check upon both, which preserves the executive power from encroachments. And this very executive power is again checked and kept within due bounds by the two houses, through the privilege they have of 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 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.<sup>1</sup>

(p) 4 Inst. 6.

(q) Sulla—tribunis plebis sua lege injuriæ faciendæ potestatem ademit, auxilium ferendi reliquit. De LL. 3, 9.

(r) Stat. 12 Car. II. c. 30.

<sup>1</sup>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 co-equal and coordinate powers in the legislature." But the truth and propriety of the learned commentators' 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

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

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 whichever 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*. And attachment to the monarchy, from which they derive their own distinction; the allurement of a court, in the habits and with 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 *not* 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 *domination* which was *odious and intolerable to both*.”—CURRY.

By the constitution of the United States, the President “shall, from time to time, give

and twenty-four bishops,<sup>8</sup> 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)<sup>9</sup> \*156] All these hold, or are supposed to hold, \*certain ancient baronies under the king; for William the Conqueror thought proper to change the spiritual tenure of frankalmoign, or free alms, under which the bishops held their lands during the Saxon government, into the feudal 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)<sup>10</sup> 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 binds 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 Coke,(b)

(\*) Seld. tit. hon. 2, 5, 27.  
 (†) Co. Litt. 97.  
 (‡) Gibb. Hist. Exch. 55. Spelm. W. I. 291.  
 (§) Glanv. 7, 1. Co. Litt. 97. Seld. tit. hon. 2, 5, 19.  
 (¶) Whitelocke on Parliam. c. 72. Warburt. Alliance, b. 2, c. 3.  
 (‡) Dyer, 60.  
 (a) Baronage, p. 1, c. 60. The act of uniformity, 1 Eliz. c. 2, was passed with the dissent of all the bishops, (Gibb.

Codex, 286,) and therefore the style of *lords spiritual* is omitted throughout the whole.

(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.

to Congress information of the state of the Union, and recommend to their consideration such measures as he shall judge necessary and expedient." (Art. 2, s. 3.) "Every bill which shall have passed the House of Representatives and the Senate, shall, before it become a law, be presented to the President of the United States: if he approve, he shall sign it; but if not, he shall return it, with his objections, to that house in which it shall have originated, who shall enter the objections at large on their journal and proceed to reconsider it. If, after such reconsideration, two-thirds of that house shall agree to pass the bill, it shall be sent, together with the objections, to the other house, by which it shall likewise be reconsidered; and if approved by two-thirds of that house, it shall become a law. But in all such cases the votes of both houses shall be determined by yeas and nays, and the names of the persons voting for and against the bill shall be entered on the journal of each house respectively. If any bill shall not be returned by the President within ten days (Sundays excepted) after it shall have been presented to him, the same shall be a law, in like manner as if he had signed it, unless Congress, by their adjournment, prevent its return, in which case it shall not be a law." (Art. 1, s. 7.)

This qualified negative of the President upon the formation of laws is, theoretically at least, some additional security against the passage of improper laws through prejudice or want of due reflection; but it was principally intended to give to the President a constitutional weapon to defend the executive department, as well as the just balance of the constitution, against the usurpations of the legislative power. 1 Kent's Com. 240.—SHARSWOOD.

<sup>8</sup> On the union with Ireland, (stat. 39 and 40 Geo. 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.—CHITTY.

<sup>9</sup> 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.—CHRISTIAN.

<sup>10</sup> The right by which these spiritual lords sit, whether derived under their alleged baronies or from usage, is discussed, Harg. Co. Litt. 135. 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 (Middle 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 ed. p. '49.—CHITTY.

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.

\*The lords temporal consist of all the peers of the realm,<sup>11</sup> (the bishops not being in strictness held to be such, but merely lords of parliament,) (d) by whatever title of nobility distinguished, dukes, marquises, earls, vicounts, or barons; of which dignities we shall speak more hereafter. Some of these sit by descent, as do all ancient peers; some by creation, as do all new-made ones; others, since the union with Scotland, by election, which is the case of the sixteen peers who represent the body of the Scots nobility. Their number is indefinite, and may be 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.<sup>12</sup>

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 ardour, 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

(c) 4 Inst. 25.

(d) Staundford, P. C. 153.

<sup>11</sup> By stat. 39 and 40 Geo. 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.—CHITTY.

<sup>12</sup> All experience has evinced the danger of vesting the entire legislative power in a single body. The legislatures of Pennsylvania and Georgia consisted originally of a single house. In the subsequent reforms of their constitutions, the people were so sensible of the defect, and of the inconvenience they had suffered from it, that in both States a senate was introduced. The history of the French Revolution will show that most of its excesses are to be traced to the same cause. In the constitution of the United States, and in all the State constitutions without exception, the legislature is divided into two branches,—the number of one body being less, and their term of office and, generally, their age, and, in some cases, mode of election, being different from the other.

“The Senate of the United States shall be composed of two senators from each State, chosen by the legislature thereof for six years; and each senator shall have one vote.” (Const. U. S. art. 1, s. 3.) “If vacancies happen by resignation or otherwise during the recess of the legislature of any State, the executive thereof may make temporary appointments until the next meeting of the legislature, which shall then fill such vacancies.” No person shall be a senator who shall not have attained to the age of thirty years and been nine years a citizen of the United States, and who shall not, when elected, be an inhabitant of that State for which he shall be chosen.”—*Ibid.*

It is settled in practice that the election of a senator may be by a joint convention of the two branches of a State legislature; though the opinion has been entertained that the original intention of the constitution was that each branch should possess its ordinary *veto* upon an election by the other.—SHARSWOOD.

destroying its existence, its excesses may be continually restrained by that superior power, from which all honour is derived. Such a spirit, when nationally diffused, gives life and vigour to the community; it sets all the wheels of government in motion, \*which, under a wise regulator, may be directed to any beneficial purpose; and thereby every individual may be made subservient to the public good, while he principally means to promote his own particular views. A body of nobility is also more peculiarly necessary in our mixed and compounded constitution, in order to support the rights of both the crown and the people, by forming a barrier to withstand the encroachments of both. It creates and preserves that gradual scale of dignity, which proceeds from the peasant to the prince; rising like a pyramid from a broad foundation, and diminishing to a point as it rises. It is this ascending and contracting proportion that adds stability to any government; for when the departure is sudden from one extreme to another, we may pronounce that state to be precarious. The nobility, therefore, are the pillars which are reared from among the people more immediately to support the throne; and, if that falls, they must also be buried under its ruins. Accordingly, when in the last century the commons had determined to extirpate monarchy, they also voted the house of lords to be useless and dangerous. And since titles of nobility are thus expedient in the state, it is also expedient that their owners should form an independent and separate branch of the legislature. If they were confounded with the mass of the people, and like them had only a vote in electing representatives, their privileges would soon be borne down and overwhelmed by the popular torrent, which would effectually level all distinctions. It is therefore highly necessary that the body of nobles should have a distinct assembly, distinct deliberations, and distinct powers from the commons.

The commons consist of all such men of property in the kingdom as have not seats in the house of lords; every one of whom has a voice in parliament, either personally, or by his representatives. In a free state every man, who is supposed a free agent, ought to be in some measure his own governor; and therefore a branch at least of the legislative power should reside in the whole body of the people. And this power, when the territories of the state are small and its citizens easily known, should be exercised by the people \*in their aggregate or collective capacity, as was wisely ordained in the petty republics of Greece, and the first rudiments of the Roman state. But this will be highly inconvenient, when the public territory is extended to any considerable degree, and the number of citizens is 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.<sup>(e)</sup> The number of English representatives is 513, and of Scots 45; in all, 558.<sup>13</sup> 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

(e) Mod. Un. Hist. xxxiii. 18.

<sup>13</sup> By stat. 39 and 40 Geo. III. c. 67, one hundred representatives of Ireland must be added to these.—CHITTY.

constituents, but the *common* wealth; to advise his majesty (as appears from the writ of summons)(*f*) "*de communi consilio super negotiis quibusdam a: dvis 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.

\*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*.<sup>14</sup> [\*160

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

(*f*) 4 Inst. 14.  
(*g*) 4 Jan. 1648.

(*h*) 4 Inst. 36.

<sup>14</sup> By the constitution of the United States, "the House of Representatives shall be composed of members chosen every second year by the people of the several States; and the electors in each State shall have the qualifications requisite for electors of the most numerous branch of the State legislature." "No person shall be a representative who shall not have attained to the age of twenty-five years and been seven years a citizen of the United States, and who shall not, when elected, be an inhabitant of that State in which he shall be chosen. Representatives and direct taxes shall be apportioned among the several States which may be included within this Union, according to their respective numbers, which shall be determined by adding to the whole number of free persons (including those bound to service for a term of years, and excluding Indians not taxed) three-fifths of all other persons. The actual enumeration shall be made within three years after the first meeting of the Congress of the United States, and within every subsequent term of ten years, in such manner as they shall by law direct. The number of representatives shall not exceed one for every thirty thousand; but each State shall have at least one representative. When vacancies happen in the representation from any State, the executive authority thereof shall issue writs of election to fill such vacancies." Art. 1, s. 2.

The rule of apportionment of the representatives among the several States according to numbers has been attended with great difficulties in the application, because the relative numbers in each State do not, and never will, bear such an exact proportion to the aggregate that a common divisor for all will leave no fraction in any State. Every decennial apportionment has raised and agitated the embarrassing question. As an absolute exact relative equality is impossible, the principle which has ultimately prevailed is the principle of approximation, by making the apportionment among the several States according to their numbers, *as near as may be*. This is done by allowing to every State a member for every fraction of its numbers exceeding a moiety of the ratio, and rejecting all representation of fractions less than a moiety. 1 Kent's Com. 230.—SHARSWOOD.



somewhere, is intrusted by the constitution of these kingdoms. All mischiefs and \*grievances, operations and remedies, that transcend the ordinary \*161] 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 reign of king Henry VIII. and his three children. It can change and create afresh even the constitution of the kingdom and of parliaments themselves; as was done by the act of union, and the several statutes for triennial and septennial elections. It can, in short, do every thing that is not naturally impossible; and therefore some have not scrupled to call its power, by a figure rather too bold, the omnipotence of parliament. True it is, that what 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,<sup>(i)</sup> "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<sup>(k)</sup> 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,<sup>(l)</sup> 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 \*162] trust \*reposed in them; for, when such trust is abused, it is thereby forfeited, and devolves to those who gave it." But however just this conclusion may be in theory, we cannot 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.<sup>(m)</sup> So long therefore as the English constitution lasts, we may venture to affirm, that the power of parliament is absolute and without control.<sup>15</sup>

(i) Of parliaments, 49.  
(k) Sp. L. 11, 6.

(l) On Govt. p. 2, §§ 149, 227.  
(m) See page 244.

<sup>15</sup> As has been more than once said, the American student will bear in mind that the legislatures in the United States—both State and Federal—are not absolute and without control. In the ordinary course of administration, the validity of their acts may be examined by the judiciary. If they are not within the scope of or if they violate any of the provisions of the constitution, they are pronounced and treated as null and void. But over and beyond this, there is a power of amendment of the constitution reserved in most, if not all, instances, and the mode in which it shall be exercised is prescribed; so that the most fundamental changes may be effected without revolution. Indeed, it is the settled doctrine that, without any such reservation, the people of a State have the inherent and inalienable right to change their form of government. As to the constitution of the United States, it is equally clear that there is no such inherent power. It can only be peaceably and constitutionally changed in the mode prescribed, unless, indeed, by the unanimous consent of all the States composing the Union.

In every case in which a change may take place not under some existing provision, though it may be peaceable, it may nevertheless be properly termed revolutionary,

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,<sup>(\*)</sup> that no one shall sit or

(\*) Whitelocke, c. 50, 4 Inst. 47.

applying that word to any change of fundamental law effected without the sanction of the existing constitution.

The constitution of Pennsylvania of 1790 contained no provision for its own amendment. By an act of the legislature, the question was at several times submitted to the people at the polls whether a convention should be called to amend that constitution. After having failed in this form, which was supposed to vest too absolute a power in a convention, the question submitted, and finally answered in the affirmative by a majority, was that a convention should be called to submit its proceedings to a vote of the people. This was done, and the amendments proposed submitted to the people and adopted by them. Among the amendments thus submitted and adopted was one providing a mode in which future amendments might be proposed by the legislature and submitted to the people at the polls. It is to be observed, however, that the amendments were submitted to the body of electors who had been ascertained by the previous constitution and laws. It was not, then, fully a revolutionary proceeding, as the former constitution was considered so far in force as to govern upon this important point. The decision was acquiesced in, and the amendments of 1838 went peaceably into operation as part of the fundamental law of the State.

A more difficult and intricate question arose in Rhode Island. When the separation from the mother-country took place, Rhode Island did not, like the other States, adopt a new constitution, but continued the form of government established by the charter of Charles II. in 1663, making only such alterations by acts of the legislature as were necessary to adapt it to their condition and rights as an independent State. In this form of government no mode of proceeding was pointed out by which amendments might be made. It authorized the legislature to prescribe the qualifications of voters; and, in the exercise of this power, they had confined the right of suffrage to freeholders. Many of the citizens became dissatisfied with the charter government, and particularly with the restrictions upon the right of suffrage. Memorials were addressed to the legislature upon this subject urging the justice and expediency of a more liberal rule. But they failed to produce the desired effect. Voluntary meetings were held, and a convention assembled. The convention framed a constitution in which the right of suffrage was extended to every male citizen of twenty-one years who had resided in the State for one year and in the town in which he offered to vote for six months next preceding the election. The convention also prescribed the manner in which this constitution should be submitted to the decision of the people, permitting every one to vote on that question who was an American citizen twenty-one years old and who had a permanent residence or home in the State, and directing the votes to be returned to the convention.

Upon the return of the votes, the convention declared that the constitution was adopted and ratified by a majority of the people of the State, and was the paramount law and constitution of Rhode Island. Elections were accordingly held under it, and the legislature under it assembled at Providence, May 3, 1842.

The charter government set itself in opposition to these proceedings. It is unnecessary to trace the history of the contest.

The charter government, at its session in January, 1842, had taken measures to call a convention, by which a new constitution was formed, submitted to the people and ratified by them at the polls; the times and places at which the votes were to be given, the persons who were to receive and return them, and the qualifications of the voters, having all been previously authorized and provided for by law passed by the charter government. This new constitution went into operation in May, 1843, at which time the old charter government formally surrendered all its powers; and this constitution has continued ever since to be the admitted and established fundamental law of Rhode Island.

In all probability, the result of this contest would have been different if the charter government had not, by the timely concession of a convention, yielded to the popular demand, and thus secured on their side all those friends of peace and order who, having thus obtained the substance of their wishes, refused to contend forcibly and by revolution for a mere abstraction.

An action brought against an officer of the charter government, after the adoption of the revolutionary constitution, for an arrest, raised the question of the legality of the authority under which he acted. It was carried, by writ of error, to the Supreme Court of the United States. That tribunal refused to decide the question, holding that it was not a judicial question, but rested solely with the political power of the State. If the question arise between two different governments organized under different constitutions,

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 house.<sup>(o)</sup><sup>16</sup> 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,<sup>17</sup> 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.<sup>18</sup> Aliens, unless naturalized, were likewise by the law of parliament incapable to serve therein:<sup>(p)</sup> and now it is enacted, \*163] by statute 12 and 13 W. III. c. 3, 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:<sup>(q)</sup> and this by the law and custom of parliament.<sup>19</sup>

(o) Com. Jour. 16 Dec. 1690.

(p) 1 Com. Jour. 16 Mar. 1623, 18 Feb. 1625.

(q) Whitelocke of Parl. c. 102. See Lords' Jour. 3 May,

1620; 13 May, 1624; 26 May, 1675. Com. Jour. 14 Feb.

1680; 21 June, 1628; 9 Nov. 21 Jan. 1640; 6 March. 1676;

6 March, 1711; 17 Feb. 1763.

the courts of which are to decide the question? Judicial power presupposes an established government, capable of enacting laws and enforcing their execution, and of appointing judges to expound and administer them. The acceptance of the judicial office is a recognition of the authority of the government from which it is derived. And if the authority of that government is annulled and overthrown, the power of its courts and other offices is annulled with it. And if a State court should enter upon the inquiry proposed, and should come to the conclusion that the government under which it acted had been put aside and displaced by an opposing government, it would cease to be a court, and be incapable of pronouncing a judicial decision upon the question it undertook to try. If it decides at all as a court, it necessarily affirms the existence and authority of the government under which it is exercising judicial power. So far as the government of the United States can intervene for the protection of a State from domestic violence, on the application of the legislature, or of the executive, (when the legislature cannot be convened,) it rests with Congress alone to decide what government is the established one in a State. *Luther vs. Borden et al.* 7 Peters, 1.—SHARSWOOD.

<sup>16</sup> 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.—CHRISTIAN.

<sup>17</sup> The oath of abjuration was altered by 6 Geo. III. c. 53, upon the death of the Pretender.—CHITTY.

<sup>18</sup> Instead of these oaths Roman Catholic members now take that prescribed by stat. 10 Geo. IV. c. 7, s. 2. It is enacted by stat. 7 & 8 Vict. c. 66, s. 6, that no alien, though naturalized under that act by the certificate of a secretary of state, shall be capable of becoming a member of either house of parliament or of the privy council. Jews cannot sit in either house of parliament unless they take the oath of abjuration 6 Geo. III. c. 53, containing the words "upon the true faith of a Christian," which are part of the oath itself, and not merely of the ceremony of administering it.—HARGRAVE.

<sup>19</sup> 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, 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.

For, as every court of justice hath laws and customs for its direction, some the civil and canon, some the common law, others their own peculiar laws and customs, so the high court of parliament hath also its own peculiar law, called the *lex et consuetudo parliamenti*; a law which, Sir Edward Coke(r) observes, is "*ab omnibus querenda a multis ignorata,<sup>20</sup> 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.<sup>21</sup> But the maxims upon which they

(r) 1 Inst. 11. (s) 4 Inst. 50.  
 (t) "To be sought by all, unknown by many, and known by few."  
 (u) 4 Inst. 15.

and ordered a new writ. At the next election, Mr. Luttrell, 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. Luttrell 296. Mr. Wilkes was again returned by the sheriff. On the 15 April, 1769, the house resolved that Mr. Luttrell 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. Luttrell; and on the 8 May, the house resolved that Mr. Luttrell was duly elected. On the 3 May, 1783, it was resolved that the resolutions 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.—CHRISTIAN.

"Each house shall be the judge of the elections, returns, and qualifications of its own members." "Each house may determine the rules of its proceedings, punish its members for disorderly behaviour, and, with the concurrence of two-thirds, expel a member." (Const. U. S. art. 1, s. 5.) Some State constitutions, with the view of meeting expressly such a case as that of Wilkes, provide that a member shall not be expelled a second time for the same cause.—SHARSWOOD.

<sup>20</sup> 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.—CHITTY.

<sup>21</sup> 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 vs. Flower, 8 T. R. 314, and Burdett vs. Abbott, 14 East, 1; Boudell vs. 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 broker open to have execution of their process. It is doubtless within the spirit of the constitution that parliament should have ample means within

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.<sup>21</sup>

\*164] The *privileges* of parliament are likewise very large and indefinite. And therefore when in 31 Hen. VI. the house of lords 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 par-

(x) Seld. Baronage, part 1, c. 4.

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.—CHITTY.

<sup>22</sup> 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 inquire 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.—CHRISTIAN.

In the late case of *Stockdale vs. Hansard*, (7 Car. & Payne, 737; 9 Ad. & El. 1; 11 Ad. & El. 253,) the extent to which the courts of justice can take cognizance of, and even control, the privileges claimed by the house of commons, has undergone much discussion. The circumstances of that case were briefly as follows. The house of commons ordered a certain report to be printed containing matter reflecting upon Stockdale, which, if printed by any private person, would have been a libel. For this publication Stockdale brought an action against Messrs. Hansard, the printers to the house of commons. They pleaded that the documents in question had been published by them under the direction of the house of commons, and that the house had resolved that the power of publishing such of their reports, votes, and proceedings as they thought conducive to the public interest was an essential incident to the constitutional functions of parliament, more especially to the commons house of parliament, as the representative portion of it. Upon demurrer to this plea, the court of queen's bench was called upon to decide whether a court of law is or is not excluded by the law of parliament from the consideration of a privilege claimed by a formal resolution of the house of commons and set up by their printer as a justification of an act otherwise unlawful. After a full and accurate examination of all the authorities on the subject, and the most anxious consideration of the arguments pressed upon them by the attorney-general, the four judges—Denman, C. J., Littledale, Patteson, and Coleridge—were unanimous in overruling the defence set up by Messrs. Hansard. The judgments delivered by these eminent judges carry conviction to every mind; and their legal correctness and the soundness of the constitutional principles on which they are based are now universally acknowledged. In consequence of this decision, a statute (3 & 4 Vict. c. 9) was passed for the special protection of all persons publishing parliamentary reports, votes, or other proceedings by order of either house of parliament.—

HARGRAVE.

liament 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.<sup>23</sup> 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.<sup>24</sup> 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.<sup>25</sup> So likewise are the other privileges, of persons, servants, lands, and goods: which are immunities as ancient 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* [<sup>\*165</sup> *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 servant, 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 Henry IV. c. 6, and 11 Hen. VI. c. 11. Neither can any member of either house be arrested and taken into custody, unless for some indictable offence, without a breach of the privilege of parliament.<sup>26</sup>

But all other privileges which derogate from the common law in matters of

(\*) Cap. 3.

(\*) Steinh. de jure Goth. 3, c. 3.

<sup>23</sup> 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?—CHRISTIAN.

<sup>24</sup> The privileges of domestics, lands, and goods are taken away by 10 Geo. III. c. 50.—CHRISTIAN

The senators and representatives "shall, in all cases except treason, felony, and breach of the peace, be privileged from arrest during their attendance at the session of their respective houses, and in going to and returning from the same; and for any speech or debate in either house they shall not be questioned in any other place." Const. U. S. art. 1, sect. 4.—SHARSWOOD.

<sup>25</sup> But this privilege does not extend to publication of the speech. 1 Sand. 133. The king vs. Creery, 1 M. & S. 273. The king vs. Lord Abingdon, 1 Esp. R. 226.—CHRISTIAN.

<sup>26</sup> 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 Anne, c. 8, art. 22, 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, 419, S. C.) to Irish peers and peeresses. And they are not liable to be attached for the non-payment

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 forever 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 Anne, 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. 34, that any trader, having privilege of parliament, may be served \*166] \*with legal process for any just debt to the amount of 100*l.*, and unless he make satisfaction within two months, it shall be deemed an act of bankruptcy; and that commissions of bankrupt may be issued against such privileged traders, in like manner as against any other.

The only way by which courts of justice could anciently take cognizance 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

(b) 2 Lev. 72.

(c) Dyer, 59. 4 Pryn. Brev. Parl. 757.

(d) Latch. 48. Noy. 83.

(e) Stra. 989.

(f) Com. Jour. 17 Aug. 1641.

of money, pursuant to an order of *nisi prius*, which has been made a rule of court. (Id 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 Wills. 332. Say. Rep. 50, S. C. 1 Bur. 631,) nor does it extend to peeresses by marriage, if they afterwards intermarry with commoners. (Co. Litt. 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. 985. 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. (6 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 members 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.)—CHITTY.

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 misdemeanors, and committed, or prosecuted to outlawry even in the middle of a session;(h) which proceeding has afterwards received the sanction and approbation of parliament.(i) \*To which may be added, that a few years ago the case of writing and publishing seditious [\*167 libels was resolved by both houses(k) not to be entitled to privilege;” and that the reasons upon which that case proceeded(l) extended equally to every indictable offence.<sup>28</sup> 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 accusation, preparatory to a trial by a court martial;(m) and which is recognised 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 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 \*war- [\*168 rant; in view of the forester if he be present, or on blowing a horn if he be absent; that he may not seem to take the king's venison by stealth.

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.<sup>29</sup>

(g) 4 Inst. 25. Com. Jour. 20 May, 1675.

(h) *Mich. 16 Eln. IV. in Scacc.*—Lord Raym. 146L.

(i) Com. Jour. 16 May, 1726.

(j) Com. Jour. 24 Nov. Lords' Jour. 29 Nov. 1763.

(k) Lords' Protest, *ibid.*

(l) Com. Jour. 29 Apr. 1762.

(\*) Particularly 17 Geo. II. c. 6.

(c) C. 11.

(p) Stat. 31 Hen. VIII. c. 10. Smith's Commonw. b. 2, a. 3. Moor, 551. 4 Inst. 4. Hale of Parl. 140.

(q) See Com. Jour. 11 Apr. 1614. 8 Feb. 1620. 10 Feb. 1625. 4 Inst. 48.

<sup>27</sup> 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.

—CHRISTIAN.

<sup>28</sup> 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 privilege generally. See the extracts from the protest, p. 19, Howel's St. Tr. 994.—CHITTY.

<sup>29</sup> 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.—CHRISTIAN.



Another privilege is, that every peer, by license obtained from the king,<sup>30</sup> 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.<sup>31</sup>

All bills likewise, that may in their consequences any way affect the 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.

\*There is also one statute peculiarly relative to the house of lords; \*169] 6 Anne, 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.<sup>32</sup> 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

(r) Seld. Baronsage, p. 1, c. 1.  
(s) 4 Inst. 12.

(t) 4 Inst. 29.

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<sup>30</sup> And which the king has sometimes refused. 6, 27, 39, E. III.—CHITTY.  
This license has long ceased in Ireland; but the proxies in the English house of lords are still entered in Latin *ex licentia regis*. This created a doubt in November, 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 license may be presumed. Proxies cannot be used in a committee. (Ib. 106. 2 Ib. 191.) A proxy cannot sign a protest in England, but he could in Ireland. (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 Stafford's lieutenancy, to correct a like abuse.

There is an instance in Wight, 50, where a proxy is called *litera attorney ad parlamentum*, 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. In ancient times a commoner might have acted as the proxy of a peer in the house of lords. See the memorable case of Sir Thomas Naxey, clerk.—CHRISTIAN.

<sup>31</sup> 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.—CHRISTIAN.

<sup>32</sup> "All bills for raising revenue shall originate in the House of Representatives; but the Senate may propose or concur with amendments, as on other bills." Const U. S., art. 1, sect. 7.—SHARWOOD.

share of property is in the possession of the house of lords; that this property is equally taxable, and taxed, as the property of the commons; and therefore the commons not being the *sole* persons taxed, this cannot be the reason of their having the *sole* right of raising and modelling the supply. The true reason, arising from the spirit of our constitution, seems to be this. The lords being a permanent hereditary body, created at pleasure by the king, are supposed more liable to be influenced by the crown, and when once influenced to continue so, than the commons, who are a temporary, elective body, freely \*nominated by the people. It would therefore be extremely dangerous to give [\*170 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.<sup>33</sup> Yet Sir Matthew Hale(u) mentions one case, founded on the practice of parliament in the reign of Henry VI.,(u) 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 further 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 election of knights, citizens, and burgesses; we may observe that herein consists the exercise of the democratical part of our constitution: for in a democracy there can be no exercise of sovereignty but by suffrage, which is the declaration of the people's will. In all democracies, therefore, it is of the utmost importance to regulate by whom, and in what manner, the suffrages are to \*be given. And the Athenians were so [\*171 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 his 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.

(\*) On Parliaments, 65, 66.

(u) Year Book. 33 Hen. vi. 17. But see the answer to this case by Sir Heneage Finch, Com. Jour. 22 Apr. 1671.

<sup>33</sup> This rule is now extended to all bills for canals, paving, provisions 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 Appendix to the 3d vol.

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.—CHRISTIAN.

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 \*172] Romans. In the method \*by centuries, instituted by Servius Tullius, it was principally property, and not numbers, that turned the scale: in the method by tribes, gradually introduced by the tribunes of the people, numbers only were regarded, and property entirely overlooked. Hence the laws passed by the former method had usually too great a tendency to aggrandize the patricians or rich nobles; and those by the latter had too much of a levelling principle. Our constitution steers between the two extremes. Only such 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 his property be at all diffused, he has probably a right to vote at more places than one, and therefore has many representatives. This is the spirit of our constitution: not that I assert it is in fact quite so perfect(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.<sup>34</sup>

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 14 Geo. III. c. 58,<sup>35</sup>) the knights of the shire shall be chosen of people whereof

(\*) 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 incursions 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.

<sup>34</sup> The representation of the people of England in the house of commons has been much improved by the Reform Act, 2 and 3 Wm. IV. c. 45. Many boroughs were disfranchised which, by lapse of time and loss of trade, had become depopulated, and were generally under the absolute control of the crown or some nobleman or private proprietor, and hence well termed "rotten," and the right given to wealthy and populous places, such as Liverpool and Manchester. The elective franchise was also considerably extended. Much, however, still remains to be done in the way of reform before the house of commons can be truly said to represent the people of England.—SHARSWOOD.

<sup>35</sup> 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. c. 1, 8 Hen. VI. c. 7, and 23 Hen. VI. c. 14.

Yet in the year 1620 it was determined by the house of commons that these statutes are only directory, and not conclusory, and the high-sheriff of Leicestershire was censured for not returning one who had a majority of votes, because he was not resident within the county. The house declared him to be duly elected, and ordered the return to be amended. 6 Com. Jour. 515.—CHRISTIAN.

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.<sup>36</sup> 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 industry, furnish all the necessaries of life, and render the freeholder, if he pleased, an independent man. For Bishop Fleetwood, in his *chronicon preciosum*, [\*173 written at the beginning of the present 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. And, to guard the better against such frauds, it is further 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.<sup>37</sup> 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.<sup>38</sup> 9. That no estate

(y) 7 and 8 W. III. c. 25. 10 Anne, c. 23. 31 Geo. II. c. 14. 3 Geo. III. c. 24. 2 Geo. II. c. 21. 18 Geo. II. c. 18.

<sup>36</sup> In *Asby vs. White*, 2 Ld. Raym. 950, Lord Holt intimated that, before these statutes, to have freehold in the county was necessary.—CHRISTY.

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 & 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 40s. before these taxes are paid, or for which he would receive a rent of 40s. 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 40s., but paid parochial taxes which, added to the rent, amounted to more than 40s., 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 40s., takes away the vote,—though there is an intermediate decision of a committee, in which the contrary was held. Ib. 467.—CHRISTIAN.

<sup>37</sup> 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.—CHRISTIAN.

<sup>38</sup> 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

shall qualify a voter, unless the estate has been assessed to some land-tax aid, at least twelve months before the election.<sup>39</sup> 10. That no tenant by copy of court-roll shall \*be permitted to vote as a freeholder. Thus much for the \*174] electors in counties.<sup>40</sup>

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 40s. 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 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.—CHRISTIAN.

<sup>39</sup> 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 1s. 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.—CHRISTIAN.

<sup>40</sup> 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 postoffice, or in conveying of mails, shall vote at any election, under a penalty of 100%. 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% 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 40s. 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 Anne, 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 Anne, respecting the splitting and multiplication of freeholds and fraudulent conveyances, extend to cities and towns which are

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 expense, then usual, of maintaining their members: four shillings a day being allowed for a knight of the shire, and two shillings for a citizen or burgess; which was the rate of wages established in the reign of Edward III.(z)<sup>41</sup> Hence the members for boroughs now bear above a quadruple pro-

(\*) 4 Inst. 16.

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.

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 further as to the qualification of electors, Com. Dig. Parliament, D. 5 to 10.—CHITTY.

<sup>41</sup> Lord Coke, in the page referred to by the learned judge, says that his 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 Edw. 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 Hen. 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 parlamentum, ibidem morando, et exinde ad propria redeundo*. And when the writs of summons were renewed in the 23d of Edw. 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 Edw. II., when Mr. Prynne finds the "*memorable writs*," which first reduced the expense 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 expense 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

portion to those for counties, and the number of parliament men is increased since Fortescue's time, in the reign of Henry the Sixth, from 300 to upwards of 500, exclusive of those for Scotland. The universities were in general not empowered to send burgesses to parliament; though once, in 28 Edw. I., when a parliament was summoned to consider of the king's right to Scotland, there were issued writs which required the university of Oxford to send up four or five, and that of Cambridge two or three, of their most discreet and learned lawyers for that purpose.<sup>(a)</sup> But it was king James the First who indulged them with the permanent privilege to send constantly two of their own body: to serve for those students who, though useful members of the community, were neither concerned in the landed nor the trading interest; and to protect

(\*) Prynne, Parl. Writs, l. 345.

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 Edw. 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 burges, 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 expense. (Pryn. on 4 Inst. 32.) And it is somewhat remarkable, that from the 33 Edw. III. and uniformly through the five succeeding reigns, the sheriff of Lancashire returned, *non sunt aliquæ civitates seu burgi infra comitatum Lancastræ, de quibus aliqui cives vel burgenses ad dictum parlamentum 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 Edw. IV., who, in the seventeenth year of his reign, granted to the borough of Wenlock the right of sending one burges to parliament, (Sim. 97,) the number 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 Henry VIII. the number of the representatives of the commons is nearly doubled; for, in the 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.

Henry VIII. created or restored by charter	4	See Pref. to Glanv. Rep.
Edw. VI.....	48	
Mary.....	21	
Elizabeth.....	60	
James I.....	27	
Charles I.....	18	
Charles II.....	2	
	<hr/>	
	180	
Parliament has created.....	80	
In the first parliament of Henry VIII. ....	298	
	<hr/>	

In all 558 the present number  
 10 the first parliament of James I. the members of the upper house were 78, of the lower, 370. 5 Parl. Hist. 11.—CHRISTIAN.

in the legislature the rights of the republic of letters. The right of election in boroughs is various, depending entirely on the several charters, customs, and constitutions of the respective places, which has occasioned infinite disputes, though now, by statute \*2 Geo. II. c. 24, the right of voting for the future shall be allowed according to the last determination of the house of commons concerning it.<sup>42</sup> And by the 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.<sup>43</sup>

2. Next, as to the qualifications of persons to be *elected* members of the house of commons. 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 the clergy, (f) for they sit in the convocation; <sup>44</sup> nor persons attainted

(\*) 4 Inst. 47, 48.  
(\*) See page 162.  
(\*) Ibid.

(\*) Com. Jour. 9 Nov. 1605.  
(\*) Com. Jour. 13 Oct. 1553, 8 Feb. 1620, 17 Jan. 1661.

<sup>42</sup> 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 twelve-month, or within fourteen days after the commencement of next session, to oppose such judgment, it is final and conclusive forever. 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.—CHRISTIAN.

<sup>43</sup> This is called the Durham act, and it was occasioned by the corporation of Durham having, upon the eve of an election, in order 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 burghage-tenure boroughs. There are about twenty-nine burghage-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 burghage-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.—CHRISTIAN.

<sup>44</sup> 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



of treason or felony,(g) for they are unfit to sit anywhere. 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)<sup>45</sup> 4. That, in strictness, 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,(m) (viz., commissioners of prizes, transports, sick and wounded, wine licenses, 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 \*176] or Gibraltar; officers of the excise and customs; \*clerks or deputies in the several offices of the treasury, exchequer, navy, victualling, admiralty, pay of the army or navy, secretaries of state, salt, stamps, appeals, wine licenses, hackney coaches, hawkers, and pedlars,) nor any persons that hold any new office under the crown created since 1705,(n) are capable of being elected or sitting as members.<sup>46</sup> 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

(g) Com. Jour. 21 Jan. 1580. 4 Inst. 47.

(h) Bro. Abr. & Parliament, 7. Com. Jour. 25 June, 1604; 14 April, 1614; 22 March, 1620; 2, 4, 15 June, 17 Nov. 1685.

(i) Rule of Parl. 114.

(j) 4 Inst. 48. Whitelocke of Parl. ch. 99, 100, 101.

(k) Stat. 1 Hen. V. c. 1. 23 Hen. VI. c. 15.

(l) Stat. 5 & 6 W. and M. c. 7.

(m) Stat. 11 & 12 W. III. c. 2. 12 & 13 W. III. c. 10. 6 Anne, c. 7. 15 Geo. II. c. 22.

(n) Stat. 6 Anne, c. 7.

(o) Stat. 6 Anne, c. 7. 1 Geo. c. 56.

(p) Stat. 6 Anne, c. 7.

clergy for admission into the house of commons, who reported that there are few instances of return 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.—CHITTY.

<sup>45</sup>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.—CHRISTIAN.

<sup>46</sup>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 Anne, c. 7, s. 26, if a member accept any office of profit from the crown (i. e. 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.—CHITTY.

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 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 ascendancy which the boroughs have gained over the counties, by obliging the trading interest to make choice of landed men; and of this qualification the member must make oath, and give the particulars in writing, at the time of his taking his seat.(s) 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 the common right, and have been declared ineligible for that parliament by vote of the house of commons,(t) or forever by an act of the legislature.(u) 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 should be elected a knight of the shire therein:(x) in return for which, our law books and historians(y) have [\*177 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,<sup>46</sup> in the time of a recess for upwards of twenty days) sends his war-

(q) Stat. 23 Hen. VI. c. 15.

(r) Stat. 9 Anne, c. 5.

(s) Stat. 33 Geo. II. c. 20.

(t) See page 163.

(u) Stat. 7, Geo. I. c. 28.

(w) 4 Inst. 10, 48. Pryn. Plea for Lords, 379. 2 White-

locke, 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 & 6 W. and M. c. 20. 7 W. III. c. 4. 7 & 8 W. III. c. 7, and c. 25. 10 & 11 W. III. c. 7. 12 & 13 W. III. c. 10. 6 Anne, c. 23.

9 Anne, c. 5. 10 Anne, 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. 10 Geo. III. c. 16. 11 Geo. III. c. 42. 14 Geo. III. c. 15. 15 Geo. III. c. 36. 28 Geo. III. c. 62. 32 Geo. III. c. 1. 36 Geo. III. c. 69. 42 Geo. III. c. 84. 47 Geo. III. c. 1, and 53 Geo. 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 & 8 Geo. 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.

<sup>47</sup> 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 forever be condemned to retain their own.—CHITTY.

<sup>48</sup> With regard to a vacancy by death or a peerage during recess, stat. 24 Geo. III. § 2, c. 26, which repeals the former statutes upon this subject, provides that 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 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 despatch 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

rant to the clerk of the crown in chancery; who thereupon issues out writs to the sheriff of every county, for the election of all the members to serve for that county, and every city and borough therein. Within three days after the receipt of this writ, the sheriff is to send his precept, under his seal, to the proper returning officers of the cities and boroughs, commanding them to elect their members: and the said returning officers are to proceed to election within eight days from the receipt of the precept, giving four days' notice of the same; (b) and to return the persons chosen, together with the precept, to the sheriff.

But elections of knights of the shire must be proceeded to by the sheriffs themselves in person, at the next county court \*that shall happen after \*178] the delivery of the writ. The county court is a court held every month or oftener by the sheriff, intended to try little causes not exceeding the value of forty shillings, in what part of the county he pleases to appoint for that purpose; but for the election of knights of the shire it must be held at the most usual place. If the county court falls upon the day of delivering the writ or within six days after, the sheriff may adjourn the court and election to some other convenient time, not longer than sixteen days, nor shorter than ten; but he cannot alter the place, without the consent of all the candidates: and, in all such cases, ten days' public notice must be given of the time and place of the election.

And, as it is essential to the very being of parliament that elections should be absolutely free, therefore all undue influences upon the electors are illegal and strongly prohibited.<sup>49</sup> For Mr. Locke (c) ranks it among those breaches of trust in the executive magistrate, which, according to his notions, amount to a dissolution of the government, "if he employs the force, treasure, and offices of the society, to corrupt the representatives, or openly to 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

(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 Govt. p. 2, § 222.

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.—CHRISTIAN.

<sup>49</sup> By the ancient common law of the land, and by the declaration of rights, 1 W. and M. st. 2, c. 2. The 3d Ed. 1. 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 Jour. 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 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 Jour. 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.—CHRISTIAN

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 elections of commoners; and, by statute, the lord warden of the cinque ports shall not recommend any members there. If any officer of the excise, customs, stamps, \*or certain other branches of the revenue, presume to intermeddle in elections, by persuading any voter or dissuading him, he forfeits 100*l*. [\*179 and is disabled to hold any office.

Thus are the electors of one branch of the legislature secured from any undue influence from either of the other two, and from all external violence and compulsion. But the greatest danger is that in which themselves co-operate, by the infamous practice of bribery and corruption. To prevent which it is enacted, that no candidate shall, after the date (usually called the *teste*) of the writs, or after the vacancy, give any money or entertainment to his electors, or promise to give any, either to particular persons, or to the place in general, in order to his being elected: on pain of being incapable to serve for that place in parliament.<sup>50</sup> And if any money, gift, office, employment, or reward be given or pro-

<sup>50</sup> 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.) Indeed, 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 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.—CHRISTIAN.

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. 182.—CHITTY.

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 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 per-

mised 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 forever disabled from voting and holding any office in any corporation; unless, before conviction, he will discover some other offender of the same kind, and then he is indemnified for his own offence.<sup>(d)</sup> 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,<sup>52</sup> the member was removed, and the officer fined and imprisoned.<sup>(e)</sup> But as this practice hath since taken much deeper and more universal root, it hath occasioned the making of these wholesome statutes; to complete the efficacy of which, there is nothing wanting but resolution, and integrity to put them in strict execution.<sup>53</sup>

\*180] Undue influence being thus (I wish the depravity of mankind would permit me to say, effectually) guarded against, the election is to be proceeded to on the day appointed; the sheriff or other returning officer first taking an oath against bribery, and for the due execution of his office. The

<sup>(d)</sup> 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. <sup>(e)</sup> 4 Inst. 23. Hale of Parl. 112. Com. Jour. 10 and 11 May, 1571.

formance of a contract made in direct violation of the general law of the country. 1 Bos. & Pull. 264.—CHRISTIAN.

And according to the judgment of Eyre, (Ch. J., in that case, and the decision in *Lofhouse vs. 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.—CHITTY.

<sup>51</sup> 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. 50

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.—CHRISTIAN.

<sup>52</sup> Lord Mansfield observed upon this, that there could be no fine set in the house of commons; it must have been in the starchamber, (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.

<sup>53</sup> The legislature has exerted its utmost energies, especially of late years, but ineffectually, to check these dangerous and demoralizing courses. At length, in the year 1854, all existing statutes on the subject were repealed, and other provisions substituted, together with an entirely new mode of conducting elections, by an act entitled "The Corrupt Practices and Prevention Act." This statute defines carefully and comprehensively what constitutes Bribery, Treating, and Undue Influence; imposes serious penalties; totally prohibits acts formerly found to be modes of exercising corrupt influence; and strictly limits legitimate expenses, requiring them to be paid only through an officer called the election auditor, whose accounts are to be published; and finally disables a candidate, declared by an election-committee guilty, by himself or his agents, of bribery, treating, or undue influence, from being elected or sitting in the house of commons, for the place where the offence was committed, during the parliament then in existence. 17 & 18 Vict. c. 102.—WARREN.

candidates likewise, if required, must swear to their qualification; and the electors in counties to theirs; and the electors both in counties and boroughs are also compellable to take the oath of abjuration and that against bribery and corruption. And it might not be amiss, if the members elected were bound to take the latter oath, as well as the former; which in all probability would be much more effectual, than administering it only to the electors.<sup>54</sup>

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 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 10 Geo. III. c. 10,<sup>55</sup> (amended by 11

<sup>54</sup> All electors are compellable before they vote to take the oaths of allegiance and supremacy, 7 & 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.—CHRISTIAN.

<sup>55</sup> 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 of 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 Christmas-day, 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

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. And this abstract of the proceedings at elections of knights, citizens, and burgesses, concludes our inquiries into the laws and customs more peculiarly relative to the house of commons.

\*[181] \*VI. I proceed now, sixthly, to the method of making laws, which is much the same in both houses; and I shall touch it very briefly, beginning in the house of commons. But first I must premise, that for despatch of business each house of parliament has its speaker. The speaker of the house of lords, whose office it is to preside there, and manage the formality of business, is the lord chancellor, or keeper of the king's great seal, or any other appointed by the king's commission: and, if none be so appointed, the house of lords (it is said) may elect. The speaker of the house of commons is chosen by the house;<sup>56</sup> but must be approved by the king.<sup>57</sup> And herein the usage of

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 show 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 thirteen, with the two nominees, constitute the select committee. If there are three parties, they shall alternately strike off one; and in that case the thirteen 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, Christmas-day, 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 thirteen 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.—CHRISTIAN.

<sup>56</sup> 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 Edw. III. No. 87,) that Sir Thomas Hungerford, *chivalier, qui avoit les paroles 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.—CHRISTIAN.

<sup>57</sup> 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



the two houses differ, 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. In each house the act of the majority<sup>66</sup> 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.

speaker, 29 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, 26 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 sacre regie majestati est presentatus, et ita egregie, eleganter, prudenter, et disertè in negotio sibi commisso se gessit, ut omnium presentium plausu et lætitiâ, maximam sibi laudem comparavit, cujus laudè sacra regia majestas non modicum eximium honoris cumulum adjecit, nam presentibus et videntibus dominis spiritualibus et temporalibus et regni communibus cum 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' Jour. 20.—CHRISTIAN.

"The Vice-President of the United States shall be President of the Senate, but shall have no vote unless they be equally divided. The Senate shall choose their other officers, and also a president *pro tempore* in the absence of the Vice-President, or when he shall exercise the office of President of the United States." (Const. U. S. art. 1. s. 3.) "The House of Representatives shall choose their speaker and other officers." *Ib.* art. 1. s. 2.—SHARSWOOD.

<sup>68</sup>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' Jour. 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 the 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.—CHRISTIAN.



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,<sup>59</sup> which were entered upon the *parliament rolls*, with the king's answer thereunto subjoined; not in any settled forms of words, but \*182] <sup>as the circumstances of the case required:</sup>(f) and, at the end of each parliament, the judges drew them into the form of a statute, which was entered on the *statute rolls*. In the reign of Henry V., to prevent mistakes and abuses, the statutes were drawn up by the judges before the end of the parliament; and, in the reign of Henry VI., bills in the form of acts, according to the modern 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 further. The introduction of the bill may be originally opposed, as the bill itself may at either of the readings; and, if the opposition succeeds, the bill must be dropped for that session; as it must also if opposed with success in any of the subsequent stages.

After the second reading it is committed, that is, referred to a committee; which is either selected by the house in matters of small importance, or else, upon a bill of consequence, the house resolves itself into a committee of the whole house. A committee of the whole house is composed of every member; and, to form it, the speaker quits the chair, (another member being appointed chairman,) and may sit and debate as a private member. In these committees the bill is debated clause by clause, amendments made, the blanks filled up, \*183] and sometimes the bill entirely new-modelled. After it <sup>has gone</sup> through the committee, the chairman reports it to the house, with such

(f) See, among numberless other instances, the *articuli cleri*, 9 Edw. II.

<sup>59</sup> 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 Henry 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 leur charge, et le feiblesce de leur poiars et sens.* (Rot. Parl. 1 R. II. No. 4.)

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.<sup>(g)</sup> 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 wool-sack 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 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 amendments, the bill is sent back to the lords by one of the members, \*with a message to acquaint them therewith. The [\*184 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.<sup>(h)</sup> 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.<sup>(i)</sup>

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:<sup>60</sup> 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 désiré*, be it as it is desired." If the king refuses his assent, it is in the gentle language of "*le roy s'avisera*,"<sup>61</sup> the

<sup>(g)</sup> Noy. 64.

<sup>(h)</sup> D'Ewes' Jour. 20, 73. Com. Jour. 17 June, 1747.

<sup>(i)</sup> Com. Jour. 24 July, 1660.

<sup>60</sup> 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.—CHRISTIAN.

<sup>61</sup> 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

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 leur benevolence, et aussi le veut*, the king thanks his loyal subjects, accepts their benevolence, and wills it so to be." In case of an act of grace, which originally proceeds from the crown, and has the royal assent in the first stage of it, the clerk of the parliament thus pronounces the gratitude of the subject: "*les prelates, seigneurs, et commons, en ce present parliament assembleés, au nom de tous vous* \*185] *autres subjects, \*remercient tres humblement votre majesté, et prient a Dieu vous donner en santé 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.<sup>62</sup>

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)

An act of parliament, thus made, is the exercise of the highest authority that

(\*) Rot. Parl. 9 Hen. IV. in Fryn. 4 Inst. 30, 31.

(\*) 3 Inst. 41. 4 Inst. 26.

(l) D'Ewes' Jour. 35.

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will consider of it; as in 37 Ed. III. No. 33. *Quant au ceste article, il demande grand avisement, et parlant 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. (Jour. 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.—CHRISTIAN.

<sup>62</sup> 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.

"Every bill which shall have passed the House of Representatives and the Senate shall, before it becomes a law, be presented to the President of the United States. If he approve, he shall sign it; but if not, he shall return it, with his objections, to that house in which it shall have originated, who shall enter the objections at large on their journal and proceed to reconsider it. If, after such reconsideration, two-thirds of that house shall agree to pass the bill, it shall be sent, together with the objections, to the other house, by which it shall likewise be reconsidered; and, if approved by two-thirds of that house, it shall become a law. But in all such cases the votes of both houses shall be determined by yeas and nays, and the names of the persons voting for and against the bill shall be entered on the journal of each house respectively. If any bill shall not be returned by the President within ten days (Sundays excepted) after it shall have been presented to him, the same shall be a law in like manner as if he had signed it, unless Congress by their adjournment prevent its return, in which case it shall not be a law." Const. U. S. art. 1, s. 7.—SHARSWOOD

this kingdom acknowledges upon earth. It hath power to bind every subject in the land, and the dominions thereunto belonging; nay, even the king himself, if particularly named therein. And it cannot be altered, \*amended, dispensed with, suspended, or repealed, but in the same forms, and by the [\*186 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.<sup>63</sup>

A prorogation is the continuance of the parliament from one session to another, as an adjournment is a \*continuation of the session from day to [\*187 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.<sup>64</sup> Both houses are necessarily prorogued at the same time, it not being a prorogation of the house of lords, or commons, but of the parliament. The session is never understood to be at an end until a proroga-

(\*) Finch, L. 81, 234. Bacon, Elem. c. 19.

(o) 4 Inst. 28.

(p) Com Jour. *passim*; e. g. 11 June, 1572; 5 Apr. 1604; 4

June, 14 Nov. 18 Dec. 1621; 11 July, 1625; 13 Sept. 1663; 25 July, 1667; 4 Aug. 1685; 24 Feb. 1691; 21 June, 1712; 10 Apr. 1717; 3 Feb. 1741; 10 Dec. 1745; 21 May, 1768.

<sup>63</sup> 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.—CHRISTY.

"Neither house, during the session of Congress, shall, without the consent of the other, adjourn for more than three days, nor to any other place than that in which the two houses shall be sitting." Const. U. S. art. 1, s. 3. "The President of the United States has power, in case of disagreement between the two houses with respect to the time of adjournment, to adjourn them to such time as he shall think proper." Ib. art. 2, sect. 3.—SHARSWOOD.

<sup>64</sup> 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 despatch of business, the practice is to prorogue it by a writ of prorogation, as the parliament in 1790 was prorogued twice by writ: (Com. Jour. 26 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 despatch of business, notice is given by a proclamation.—CHRISTIAN.

tion; 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.<sup>65</sup>

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 \*188] \*it is a branch of the royal prerogative that he may (whenever he pleases) prorogue the parliament for a time, or put a final period to its existence. If nothing had a right to prorogue or dissolve a parliament but itself, it might happen to become perpetual. And this would be extremely dangerous, if at any time it should attempt to encroach upon the executive power: as was fatally experienced by the unfortunate king Charles the First, who having unadvisedly passed an act to continue the parliament then in being till such time as it should please to dissolve itself, at last fell a sacrifice to that inordinate power, which he himself had consented to give them. It is therefore extremely necessary that the crown should be empowered to regulate the duration of these assemblies, under the limitations which the English constitution has prescribed: so that, on the one hand, they may frequently and regularly come together, for the despatch of business, and redress of grievances; and may not, on the other, even with the consent of the crown, be continued to an inconvenient or unconstitutional length.

2. A parliament may be dissolved by the demise of the crown. This dissolution formerly happened immediately upon the death of the reigning sovereign: for he being considered in law as the head of the parliament, (*caput principium et finis*.) that failing, the whole body was held to be extinct. But, the calling a new parliament immediately on the inauguration of the successor being found inconvenient, and dangers being apprehended from having no parliament in being in case of a disputed succession, it was enacted by the statutes 7 & 8 W. III. c. 15, and 6 Anne, c. 7, that the parliament in being shall continue for six months after the death of any king or queen, unless sooner prorogued or dissolved by the successor: that, if the parliament be, at the time of the king's death, separated by adjournment or prorogation, it shall, notwithstanding, assemble immediately; and that, if no parliament is then in being, the members of the last parliament shall assemble, and be again a parliament.

\*3. Lastly, a parliament may be dissolved or expire by length or \*189] time. For, if either the legislative body were perpetual, or might last

(q) 4 Inst. 28. Hale of Parl. 38. Hut. 61.

(r) Com. Jour. 21 Oct. 1553.

(s) Ibid. 21 Nov. 1554.

(t) Stat. 12 Car. II. c. 1. 22 & 23 Car. II. c. 1.

(u) Stat. 30 Geo. II. c. 25.

<sup>65</sup> By statutes 37 Geo. III. c. 127 and 39, 40 Geo. 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.—CHITTY.

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 expenses of frequent elections, and the violent heats and animosities consequent thereupon, and for the peace and security of the government, then just recovering from the late rebellion,) this term was prolonged to *seven* years: and, what alone is an instance of the vast authority of parliament, the very same house, that was chosen for three years, enacted its own continuance for seven.<sup>66</sup> 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.

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### 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.<sup>1</sup>

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<sup>66</sup> 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 considering 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 the former statute would have extended their continuance much beyond what was done by the septennial act.—CHRISTIAN.

<sup>1</sup> "The executive power shall be vested in a President of the United States of America. He shall hold his office during the term of four years, and—together with the Vice-President (chosen for the same term)—be elected as follows:—

"Each State shall appoint, in such manner as the legislature thereof may direct, a number of electors equal to the whole number of senators and representatives to which the State may be entitled in Congress; but no senator or representative, or person holding an office of trust or profit under the United States, shall be appointed an elector.

"The electors shall meet in their respective States and vote by ballot for President and Vice-President,—one of whom, at least, shall not be an inhabitant of the same State with themselves; they shall name in their ballots the person voted for as President, and in distinct ballots, the person voted for as Vice-President; and they shall make distinct lists of all persons voted for as President, and of all persons voted for as Vice-President, and of the number of votes for each, which lists they shall sign and certify and transmit, sealed, to the seat of the Government of the United States, directed to the President of the Senate. The President of the Senate shall, in the presence of the Senate and House of Representatives, open all the certificates, and the votes shall then be counted. The person having the greatest number of votes for President shall be the President, if such num-

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.

ber be a majority of the whole number of electors appointed. And if no person shall have such majority, then, from the persons having the highest numbers, not exceeding three on the list of those voted for as President, the House of Representatives shall choose immediately, by ballot, the President; but in choosing the President the votes shall be taken by States, the representation from each State having one vote. A quorum for this purpose shall consist of a member or members from two-thirds of the States, and a majority of all the States shall be necessary to a choice; and, if the House of Representatives shall not choose a President, whenever the right of choice shall devolve upon them, before the fourth day of March next following, then the Vice-President shall act as President, as in the case of the death or other constitutional disability of the President. The person having the greatest number of votes as Vice-President shall be the Vice-President, if such number be a majority of the whole number of electors appointed; and, if no person have a majority, then, from the two highest members on the list, the Senate shall choose the Vice-President. A quorum for the purpose shall consist of two-thirds of the whole number of senators, and a majority of the whole number shall be necessary to a choice. But no person constitutionally ineligible to the office of President shall be eligible to that of Vice-President of the United States.

“Congress may determine the time of choosing the electors, and the day on which they shall give their votes,—which day shall be the same throughout the United States.

“No person except a natural-born citizen, or a citizen of the United States at the time of the adoption of this constitution, shall be eligible to the office of President; neither shall any person be eligible to that office who shall not have attained to the age of thirty-five years and been fourteen years a resident within the United States.

“In case of the removal of the President from office, or of his death, resignation, or inability to discharge the powers and duties of the said office, the same shall devolve on the Vice-President; and Congress may by law provide for the case of removal, death, resignation, or inability both of the President and Vice-President, declaring what officer shall then act as President; and such officer shall act accordingly until the disability be removed or a President shall be elected.

“The President shall, at stated times, receive for his services a compensation, which shall neither be increased nor diminished during the period for which he shall have been elected; and he shall not receive, within that period, any other emolument from the United States or any of them.

“Before he enter on the execution of his office, he shall take the following oath or affirmation:—

“I do solemnly swear (or affirm) that I will faithfully execute the office of President of the United States, and will, to the best of my ability, preserve, protect, and defend the Constitution of the United States.”

“The President shall be commander-in-chief of the army and navy of the United States, and of the militia of the several States, when called into the actual service of the United States. He may require the opinion, in writing, of the principal officer in each of the executive departments upon any subject relating to the duties of their respective offices; and he shall have power to grant reprieves and pardons for offences against the United States, except in cases of impeachment.

“He shall have power, by and with the advice and consent of the Senate, to make treaties, provided two-thirds of the senators present concur; and he shall nominate, and, by and with the advice and consent of the Senate, shall appoint, ambassadors, other public ministers and consuls, judges of the supreme court, and all other officers of the United States whose appointments are not herein otherwise provided for, and which shall be established by law. But Congress may, by law, vest the appointment of such inferior officers as they think proper in the President alone, in the courts of law, or in the heads of departments.

“The President shall have power to fill up all vacancies that may happen during the recess of the Senate, by granting commissions, which shall expire at the end of their next session.

“He shall from time to time give to Congress information of the state of the Union, and recommend to their consideration such measures as he shall judge necessary and expedient. He may on extraordinary occasions convene both houses or either of them; and in case of disagreement between them with respect to the time of adjournment, he may adjourn them to such time as he shall think proper. He shall receive ambassadors and other public ministers. He shall take care that the laws shall be faithfully executed, and shall commission all the officers of the United States.

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

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“The President, Vice-President, and all civil officers of the United States shall be removed from office on impeachment for, and conviction of, treason, bribery, or other high crimes and misdemeanours.” Const. U. S. art. 2.

By the act of Congress Jan. 23, 1845, (5 Story's Laws, 3033,) it is provided that the electors of President and Vice-President shall be appointed in each State on the Tuesday next after the first Monday in the month of November of the year in which they are to be appointed. *Provided* that each State may by law provide for the filling of any vacancy or vacancies, which may occur in its college of electors when such college meets to give its electoral vote. *And provided also*, when any State shall have held an election for the purpose of choosing electors, and shall fail to make a choice on the day aforesaid, then the electors may be appointed on a subsequent day, in such manner as the State shall by law provide.

By the act of Congress March 1, 1792, (1 Story's Laws, 220,) it is provided that the electors shall meet and give their votes on the first Wednesday in December following their appointment, at such place in each State as shall be directed by the legislature thereof. On the second Wednesday in February succeeding every meeting of the electors, the certificates, or so many of them as shall have been received, shall be opened, and the persons, who shall fill the offices of President and Vice-President, ascertained and declared, agreeably to the constitution.

By the same act of March 1, 1792, it is provided that in case of a removal, death, resignation, or inability both of the President and Vice-President of the United States, the President of the Senate *pro tempore*, and, in case there shall be no President of the Senate, then the speaker of the House of Representatives for the time being, shall act as President of the United States until the disability be removed or a President shall be elected.

It also enacts that, whenever the offices of President and Vice-President shall both become vacant, the Secretary of State shall forthwith cause a notification thereof to be made to the executive of every State, and shall also cause the same to be published in at least one of the newspapers printed in each State, specifying that electors of the President of the United States shall be appointed or chosen in the several States within thirty-four days preceding the first Wednesday in December (on the Tuesday next after the first Monday in the month of November. Act of 1845) then next ensuing. *Provided* there shall be the space of two months between the date of such notification and the said first Wednesday in December; but if there shall not be the space of two months between the date of such notification and the first Wednesday in December, and if the term for which the President and Vice-President last in office were elected shall not expire on the third day of March next ensuing, then the Secretary of State shall specify in the notification that the electors shall be appointed or chosen within thirty-four days preceding the first Wednesday in December (on the Tuesday next after the first Monday of November. Act of 1845) in the year next ensuing, within [at] which time the electors shall accordingly be appointed or chosen, and the electors shall meet and give their votes on the said first Wednesday in December, and the proceedings and duties of the said electors and others shall be pursuant to the directions prescribed in this act.

It also provides that the only evidence of a refusal to accept, or of a resignation of, the office of President or Vice-President, shall be an instrument in writing, declaring the same, and subscribed by the person refusing to accept, or resigning, as the case may be, and delivered into the office of the Secretary of State.

And that the term of four years for which a President and Vice-President shall be elected shall in all cases commence on the fourth day of March next succeeding the day on which the votes of the electors shall have been given.—SHERWOOD.



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 connection with each other; as some have very weakly imagined. The titles of David \*192] and Jehu were \*equally *jure divino*, as those of either Solomon or Ahab; and yet David slew the sons of his predecessor, and Jehu his predecessor himself. And when our kings have the same warrant as they had, whether it be to sit upon the 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 connection 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 \*193] would be dutifully acquiesced in by the few who were \*of different opinions. But history and observation will inform us, that elections of every kind (in the present state of human nature) are too frequently brought about by influence, partiality, and artifice: and, even where the case is otherwise, these practices will be often suspected, and as constantly charged upon the successful, by a splenetic disappointed minority. This is an evil to which

all societies are liable; as well those of a private and domestic kind, as the great community of the public, which regulates and includes the rest. But in the former there is this advantage; that such suspicions, if false, proceed no further than jealousies and murmurs, which time will effectually suppress; and, if true, the injustice may be remedied by legal means, by an appeal to the 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 show us are the consequences of elective kingdoms.

2. But, secondly, as to the particular mode of inheritance, it in general corresponds with the feudal 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 [\*194 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 [\*195 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

(a) *In vit. Agricole.*

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.

3. The doctrine of *hereditary* right does by no means imply an *indefeasible* right to the throne. No man will, I think, assert this, that has considered our laws, constitution, and history, without prejudice, and with any degree of attention. It is unquestionably in the breast of the supreme legislative authority of this kingdom, the king and both houses of parliament, to defeat this hereditary right; and, by particular entails, limitations, and provisions, to exclude the immediate heir, and vest the inheritance in any one else. This is strictly consonant to our laws and constitution; as may be gathered from the expression so frequently used in our statute book, of "the king's majesty, his heirs, and successors." In which we may observe, that as the word, "heirs," necessarily implies an inheritance of 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 nowhere be so properly lodged \*196] as in the two houses of parliament, by and with the \*consent of the reigning king; who, it is not to be supposed, will agree to any thing improperly prejudicial to the rights of his own descendants. And therefore in the king, lords, and commons, in parliament assembled, our laws have expressly lodged it.

4. But, fourthly; however the crown 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*;<sup>2</sup> but, as Sir Matthew Hale<sup>(b)</sup> 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 further elucidated, and made clear

(\*) 1 Hist. P. C. 61.

<sup>2</sup> 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.—CHRISTIAN.

beyond all dispute, from a short historical view of the successions to the crown of England, the doctrines of our ancient lawyers, and the several acts of parliament that have from time to time been made, to create, to declare, to confirm, to limit, or to bar, the hereditary \*title to the throne. And in the pursuit of this inquiry we shall find, that, from the days of Egbert, the first [\*197 solo 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 show 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.<sup>(c)</sup> And in pursuance of this maxim there hath ever been, since the union of the heptarchy in king Egbert, a \*general acquiescence under the hereditary monarchy of the West [\*198 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.<sup>3</sup>

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 driven into foreign countries. Here the succession was suspended by actual force, and a new family introduced upon the throne: in whom however this new-acquired throne continued hereditary for three reigns; when, upon the death of Hardiknute, the ancient Saxon line was restored in the person of Edward the Confessor.

He was not indeed the true heir to the crown, being the younger brother of king Edmund Ironside, who had a son Edward, surnamed (from his exile) the outlaw, still living.<sup>4</sup> But this son was then in Hungary; and, the English

(c) Puff. L. of N. and N. b. 8, c. 12, § 6.

<sup>3</sup> 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.—CHITTY.

<sup>4</sup> It has been remarked that Edmund Ironside being illegitimate, Edward the Con-

having just shaken off the Danish yoke, it was necessary that somebody on the spot should mount the throne; and the Confessor was the next of the royal line then in England. On his decease without issue, Harold II. usurped the throne; and almost at the same instant came on the Norman invasion: the right to the crown being all the time in Edgar, surnamed Atheling, (which signifies in the Saxon language *illustrious*, or of royal blood,) who was the son \*199] of Edward the Outlaw, and grandson of Edmund \*Ironside; or as Matthew Paris(*d*) well expresses the sense of our old constitution, "*Edmundus autem latusferreum, rex naturalis de stirpe regum, genuit Eadwardum; et Eadwardus 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 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 Adelia 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 waived, 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 there-

(\*) A.D. 1066.

(*g*) William of Malmsh. l. 3.

(*f*) Hale, Hist. C. L. c. 6. Seld. Review of Tithes, c. 8.

(*e*) See Lord Lyttleton's Life of Henry II. vol. i. p. 467.

fessor the legitimate son of Ethelred the Unready, was the true heir to the crown, at least in preference to Edmund or any child of his.—COLERIDGE.

fore he rather chose to rely on a title by election,<sup>(h)</sup> 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 connection in blood, which endeared \*him still further to the English. He was lineally descended from Edmund Ironside, the last of the Saxon race of hereditary kings. For Edward the Outlaw, the son of Edmund Ironside, had (besides Edgar Atheling, who died without issue) a daughter Margaret, who was married to Malcolm, king of Scotland, and in her the Saxon hereditary right resided. By Malcolm she had several children, and among the rest Matilda the wife of Henry I., who by him had the empress Maud, the mother of Henry II. Upon which account the Saxon line is in our histories frequently said to have been restored in his person, though in reality that right subsisted in the *sons* of Malcolm by queen Margaret; king Henry's best title being as heir to the Conqueror

From Henry II. the crown descended to his eldest son Richard I., who dying childless, the right vested in his nephew Arthur, the son of Geoffrey his next brother; but John, the youngest son of king Henry, seized the throne, claiming, as appears from his charters, the crown by hereditary right;<sup>(i)</sup> that is to say, he was next of kin to the deceased king, being his surviving brother: whereas Arthur was removed one degré further, being his brother's son, though by right of representation he stood in the place of his father Geoffrey. And however flimsy this title, and those of William Rufus and Stephen of Blois, may appear at this distance to us, after the law of descents hath now been settled for so many centuries, they were sufficient to puzzle the understandings of our brave but unlettered ancestors. Nor, indeed, can we wonder at the number of partisans 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,<sup>(k)</sup> 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.<sup>(l)</sup> However, on the death of Arthur \*and his sister Eleanor without issue, a clear and indisputable title vested in Henry III., the son of John; and from him to Richard the [202] Second, a succession of six generations, the crown descended in the true hereditary line. Under one of which race of princes<sup>(m)</sup> 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 forever."

Upon Richard the Second's resignation of the crown, he having no children, he 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 Gaunt, 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 decla-

(h) "Ego Stephanus Dei gratia assensu cleri et populi in regem Anglorum electus, &c." (Cart. A.D. 1136. Ric. de Hastingsald. 314. Hearne ad Guil. Neubr. 711.)

(i) "—Regni Angliæ; quod nobis jure compellit hereditario." Spelm. Hist. R. Joh. apud Wilkins, 354.

(k) Glanv. l. 7. c. 3.

(l) Mod. Un. Hist. xxx. 512.

(m) Stat. 25 Edw. III. st. 2.

ration was also confirmed in parliament.(n) But Henry, duke of Lancaster, the son of John of Gaunt, 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 order to this, he set up a show \*203] 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 Gaunt, 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 unfortunate 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 show 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 \*204] 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 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 Angliæ*"

(\*) Stanford's General Hist. 246.

(o) Hist. C. L. c. 5.

(p) Seld. tit. hon. 1, 3.

(q) *Soit mys et demoege*

(r) 4 Inst. 37, 206.

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 show 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 Gaunt, whose title was now exploded, the claim (such as it was) was through John earl of Somerset, a bastard son, begotten by John of \*Gaunt upon Catherine Swinford. It is true that, [\*205 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)<sup>6</sup>

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 ordinance, whereby a right might seem to be created and conferred upon him; and therefore a middle way was rather chosen, by way (as the noble historian expresses it) of *establishment*, and that under covert and indifferent words, "that the inheritance of the crown should *rest, remain, and abide*, in King Henry VII. and the heirs of his body;" thereby providing for the future, and at the same time acknowledging his present possession; but not determining either way, whether that possession was *de jure* or *de facto* merely. However, he soon after married Elizabeth of York, the undoubted heiress of the Conqueror, and thereby gained (as Sir Edward Coke(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, first, by \*statute 25 Hen. VIII. c. 12, which recites the mischiefs which have and [\*206 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

(\*) 4 Inst. 36.  
(†) Ibid. 37.

(\*) Ibid. 37.

<sup>6</sup> It must be remarked that Blackstone's assertion, on the authority of Coke, (4 Inst 37,) that in the act of legitimation there was an express reservation excluding the right of succession to the throne, has been discovered to be unfounded. In the original rolls of parliament, the exception of the right of succession to the throne is not contained; but it was introduced by interlineation on the patent-roll subsequently to the grant of legitimation, and was included in the confirmation by Henry IV. It is clear the operative grant was the statute of Richard II.; and as that statute legitimated John of Gaunt's children for all purposes, without exception, they were thereby made capable of inheriting the crown. Sir N. Nicholas's Observ. on the State of Historical Literature. p. 176. Bowyer's Const. Law, 105.—SHARSWOOD.



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 forever. 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 Seymour, and his future wives; and, in defect of such children, then with this remarkable remainder, to such persons as the king by letters patent, or last will and testament, should limit and appoint the same: a vast power, but notwithstanding, as it was regularly vested in him by the supreme legislative authority, it was therefore indisputably valid. But this power was never carried into execution; for by statute 35 Hen. VIII. c. 1, the king's two daughters are legitimated again, and the crown is limited to prince Edward by name, after that to the Lady Mary, and then to the Lady Elizabeth and the heirs of their respective bodies; which succession took effect accordingly, being indeed no other than the usual course of the law, with regard to the descent of the crown.

But lest there should remain any doubt in the minds of the people, through this jumble of acts for limiting the succession, by statute 1 Mar. st. 2, c. 1, \*207] queen Mary's hereditary right to the throne is acknowledged and recognised 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 recognised 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, \*208] during the life of the queen, be guilty of high treason; and after her decease shall be guilty of a misdemeanor, 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 that alliance. So that in his person, as clearly as in Henry VIII., centred 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 centred the right of the Saxon monarchs, which had been suspended from the conquest till his accession. For, as 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 his right, and that the finger of Providence was visible in its \*preservation. Whereas, though a wise institution, it was clearly a human institution; and the right inherent in him no natural, but a positive, right. And in this, and no other, light was it taken by the English parliament; who, by statute 1 Jac. I. c. 1, did "recognise 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 anywhere, 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 centred 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 immediately upon the \*decease of our late sovereign lord king Charles, the imperial crown of these realms did by inherent birthright and lawful and undoubted succession descend and come to his most excellent majesty Charles the Second, as being lineally, justly, and lawfully next heir of the blood royal of

(\*) 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 Llewellyn ap Iorwerth

the Great, had the true right to the principality of Wales. Hist. Eng. iii. 705.

(\*) Com. Jour. 8 May, 1660.

\* This position is correct only on the assumption that the will of Henry VIII., whereby he (by virtue of the statute 28 Hen. VIII. c. 7) entailed the crown on the descendants of his youngest sister, Mary, duchess of Suffolk, before those of Margaret, queen of Scots, is not authentic and valid; for there were descendants of Mary living at the decease of queen Elizabeth. Bowyer's Const. Law, 103. Hallam, vol. i. p. 395.—SHARSWOOD.

this realm: and thereunto they most humbly and faithfully did submit and oblige themselves, their heirs, and posterity forever."

Thus I think it clearly appears, from the highest authority this nation is acquainted with, that the crown of England hath been ever an hereditary crown, though subject to limitations by parliament. The remainder of this chapter will consist principally of those instances wherein the parliament has asserted or exercised this right of altering and limiting the succession; a right which, we have seen, was before exercised and asserted in the reigns of Henry IV., Henry VII., Henry VIII., queen Mary, and queen Elizabeth.

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

\*211] The true ground and principle upon which that memorable event proceeded was an entirely new case in politics, which had never before happened in our history,—the abdication of the reigning monarch, and the vacancy of the throne thereupon. It was not a 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<sup>(b)</sup> came to this resolution:—"That king James the Second, having endeavoured to subvert the constitution of the kingdom, by breaking the original contract between king and people; and, by the advice of jesuits and other wicked persons, having violated the fundamental laws; and having withdrawn himself out of this kingdom; has abdicated the government, and that the throne is thereby vacant." Thus ended at once, by this sudden and unexpected vacancy of the throne, the old line of succession; which from the conquest had lasted above six hundred years, and from the union of the heptarchy in king Egbert almost nine hundred. The facts themselves thus appealed to, the king's 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.<sup>1</sup> For, when-

(<sup>b</sup>) Com. Jour. 7 Feb. 1688.

<sup>1</sup> 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

ever a question arises between the society at large and any magistrate vested with powers originally delegated by that society, it must be decided by the voice of the society itself: there is not upon earth any other tribunal to resort to. And that these consequences were fairly deduced from these facts, our ancestors have solemnly determined, in a full parliamentary convention representing the whole society. The \*reasons upon which they decided may be found at large in the parliamentary proceedings of the times; and [ \*212 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.<sup>8</sup> The idea, that the consciences of posterity were concerned in the rectitude of their ancestors' decisions, gave birth to those dangerous political heresies, which so long distracted the state, but at length are all happily extinguished. I therefore rather choose to consider this great political measure upon the solid footing of authority, than to reason in its favour from its justice, moderation, and 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.<sup>9</sup>

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 era commenced, in which the bounds of prerogative and liberty have been better defined, the principles of government more thoroughly

(c) See chap 7.

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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.—CHRISTIAN.

<sup>8</sup> 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 recognises "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.—CHITTY.

<sup>9</sup> This is not the only instance in which the learned commentator's abstract love of liberty, 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 demonstrations 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.—CHITTY.

examined and understood, and the rights of the subject more explicitly guarded by legal provisions, than in any other period of the English history. In particular it is \*worthy observation that the convention, in this their judgment, avoided with great wisdom the wild extremes into which the visionary theories of some zealous republicans would have led them. They held that this misconduct of king James amounted to an *endeavour* to subvert the constitution; and not to an actual subversion, or total dissolution, of the government, according to the principles of Mr. Locke: (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 postulatam, 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 representatives of the nation.<sup>19</sup> For there are no other hands in which it can so properly be intrusted; and there is a necessity of its being intrusted somewhere, else the whole frame of government must be dissolved and perish. The lords and commons having therefore determined this main fundamental article, that there was a vacancy of the throne, they proceeded to fill up that vacancy in such manner as they \*judged the most proper. And this was done by their declaration of 12 February, 1688, (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

(d) On Govt. p. 2, c. 19.

(e) Law of forfett, 118, 119.

(f) Com. Jour. 12 Feb. 1688.

<sup>19</sup> 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."—

of such issue, it was limited to the princess Anne, king James's second daughter, and her issue; and lastly, on failure of that, to the issue of king William, who was the grandson of Charles the First, and nephew as well as son-in-law of king James the Second, being the son of Mary his 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 by way of donation or *purchase*, as the \*lawyers call it; by which they mean any method of [\*215 acquiring an estate otherwise than by descent. The new settlement did not merely consist in excluding king James, and the person pretended to be prince of Wales, and then suffering the crown to descend in the old hereditary channel: for the usual course of descent was in some instances broken through; and yet the convention still kept it in their eye, and paid a great, though not total, regard to it. Let us see how the succession would have stood, if no abdication had happened, and king James had left no other issue than his two daughters, queen Mary and queen Anne. It would have stood thus: queen Mary and her issue; queen Anne and her issue; king William and his issue. But we may remember, that queen Mary was only nominally queen, jointly with her husband, king William, who alone had the regal power; and king William was 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 further 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 forever incapable to inherit, possess, or enjoy the crown: and that in such case the people should be absolved from their allegiance, and the crown should descend to such persons, being protestants, as would have inherited the same, in case the person, so reconciled, holding communion, professing, or marrying, were naturally dead. To act therefore consistently with themselves, and at the same \*time pay as much [\*216 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.<sup>(g)</sup> For, upon the impending extinction of the protestant posterity of Charles the First, the old law of legal 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 & 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

(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 succession. And indeed it is now again made highly penal to dispute it: for by the statute 6 Anne, 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*.

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.<sup>11</sup>

\*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.

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<sup>11</sup> From him again it descended to his eldest son, king George IV., who, dying without issue, was succeeded by William IV., the third son of George III.,—the second son, Frederick Augustus, duke of York, having previously died without issue. On the death of William IV. without legitimate issue, the inheritance descended to the only child of Edward, duke of Kent, the fourth son of George III., who is the present queen Victoria.

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.<sup>1</sup> 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 era.(c) She is also capable of taking a grant from the king, which no other wife is from her husband; and in this particular she agrees with the *Augusta*, or *piissima regina conjux divi imperatoris* of the Roman laws; who, according to Justinian,(d) was equally \*capable of making a grant to, and receiving one from, the emperor. The queen of England hath separate courts and 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.<sup>2</sup> She may also have a separate property in goods, as well as lands, and has a right to dispose of them by will.<sup>3</sup> 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

(\*) 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 Mercians, 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.

<sup>1</sup> 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.—CHRISTIAN.

<sup>2</sup> 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 Geo. III. c. 88, §§ 8, 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 Geo. III. c. 1; 15 Geo. III. c. 33; 47 Geo. III. st. 2, c. 45.—CHITTY.

<sup>3</sup> 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. Co. Litt. 3. a. 133. a. Finch, 86. 1 Roll. Abr. 912.—CHITTY.



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 distinct 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, grants, licenses, pardons, or \*220] is due in the proportion of one-tenth part or 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 wool for her majesty's use,(o) to purchase oil for her lamps,(p) or to furnish her attire from head to foot,(q) which was frequently very costly, as one single \*221] robe in the fifth year of Henry II. \*stood the city of London in upwards of fourscore pounds.(r) A practice somewhat similar to that of the eastern countries, where whole cities and provinces were specifically assigned to purchase particular parts of the queen's apparel.(s) And for a further addition to her income, this duty of queen-gold is supposed to have been originally granted; those matters of grace and favour, out of which it arose, being frequently obtained from the crown by the powerful intercession of the queen. There are traces of its payment, though obscure ones, in the book of domesday, and in the great pipe-roll of Henry the First.(t) In the reign of Henry the Second the manner of collecting it appears to have been well understood, and it forms a distinct head in the ancient dialogue of the exchequer,(u) written in the time of that prince, and usually attributed to Gervase of Tilbury. From that time downwards it was regularly claimed and enjoyed by all the queen consorts of England till the death of Henry VIII.; though, after the accession of the Tudor family, the collecting of it seems to have been much neglected: and there being no queen consort afterwards till the accession of James I., a period of near sixty years, its very nature and quantity became then a matter of doubt; and, being referred by the king to the chief justices and chief baron, their report of it was so very unfavourable,(v) that his consort queen Anne (though she claimed

(i) *Ff. l. 3. § 31.*

(j) *Fryn. Aur. reg. 2.*

(k) 12 Rep. 21. 4 Inst. 358.

(l) *Ibid. Fryn. 6. Madox, Hist. Exch. 242.*

(m) *Bedefordshire. Maner. Lestone redd. per annum xxvii lib. dec.; ad opus reginæ vi uncias auræ.—Herefordshire. In Lene, &c. consuetud. ut prepositus manerii veniente domina sua (regina) in maner. presentaret ei xviii oras denar. ut esset ipsa laico antino.* Fryn. Append. to Aur. Reg. 2. 3.

(n) *Causa coadunarum lanam reginæ. Domesd. ibid.*

(o) *Civitas London. Pro oleo ad lampad. reginæ. (Mag. 14. p. temp. Hen. II. ibid.)*

(p) *Viccomes Berkeschire, 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.)*

(q) *Pro roba ad opus reginæ, quater xx l. et vi s. viii d. (Mag. rot. 5 Hen. II. ibid. 250.)*

(r) *Solere aiunt barbaros reges Persiarum ac Syrorum, usoribus civitates attribvere, hoc modo; hæc civitas mulierum redimiculum præbeat, hæc in collum, hæc in crines, &c. (Cæ. in Verrem, lib. 3. cap. 33.)*

(s) See Madox, *Diæceptat. Epistolæ. 74. Fryn. Aur. Reg. Append. 5.*

(t) *Lab. 2. c. 26.*

(v) Mr. Prynne, with some appearance of reason, insists that their researches were very superficial. (*Aur. Reg. 125.*)

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 military tenures, and the fines that were consequent upon them, the little that legally remained of this revenue was reduced [\*222 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 observatur, quod rex illum habeat 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.<sup>4</sup>

But further, 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, it trespassing too strongly as well on natural justice as female modesty.<sup>5</sup> 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 Anne Boleyn was in 28 Hen. VIII.<sup>6</sup>

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;<sup>7</sup> but, in the instance of conjugal infidelity, he is not subjected to the same penal \*re- [\*223 strictions: 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;

(w) 19 Rym. Flet. 721.

(y) Pryn. Aur. Reg. 127.

(x) Bracton, l. 3, c. 3. Britton, c. 17. Flet. l. 1, c. 45 et.

(z) Stat. 33 Hen. VIII. c. 21.

<sup>4</sup>The reason is more whimsical than the division; for the whalebone lies entirely in the head.—CHRISTIAN.

<sup>5</sup>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 Edw. VI. c. 12, which abrogated all treasons created since the memorable statute in the 25 Edw. III.—CHRISTIAN.

<sup>6</sup>Anne 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. vol. xi. p. 10.

Articles of impeachment were prepared against queen Catherine Parr for heresy, in 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.—CHRISTIAN.

<sup>7</sup>The act of naturalization of his Royal Highness Prince Albert (3 & 4 Vict. c. 2) required, in the usual form, that he should take the oath of allegiance and supremacy.—SHARSWOOD.

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 license 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.<sup>8</sup> But she, though an alien born, shall still be entitled to dower after the king's demise, which no other alien is.<sup>(b)</sup> 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.<sup>9</sup> 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.<sup>(c)</sup>

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 \*224] of the king is also alone inheritable<sup>10</sup> to the \*crown, on failure of issue male, and therefore more respected by the laws than any of her younger sisters,<sup>11</sup> 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<sup>12</sup> is usually made

(*a*) 2 Inst. 18. See Riley's Plac. Parl. 72.  
(*b*) Co. Litt. 31.

(*c*) Inst. 50.

<sup>8</sup> 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.—CHRISTIAN.

<sup>9</sup> The foregoing proposition is not really illustrated by the case of Catherine, inasmuch as her marriage with Tudor was carefully concealed, and not discovered till after her burial,—when it produced great public excitement and uproar, as she left four children. It is needless to remind the reader that Tudor proved the ancestor of a new dynasty of British sovereigns.—WARREN.

<sup>10</sup> This should read "inheritable alone;" that is, not in coparcenary with her sisters.—COLERIDGE.

<sup>11</sup> 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.—CHRISTIAN.

<sup>12</sup> 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 honour has been appropriated only to the eldest sons or eldest daughters of the kings of England. 2 Hume, 243.—CHRISTIAN.

prince of Wales and earl of Chester<sup>13</sup> by special creation and investiture;<sup>14</sup> but, being the king's eldest son,<sup>15</sup> he is by inheritance duke of Cornwall, without any new creation.(d)<sup>16</sup>

(\*) 8 Rep. 1. Seld. tit. of hon. 2, 5.

<sup>13</sup> Selden tells us "that 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 Henry IV., although the earldom hath usually been since given with the principality of Wales." Seld. tit. of hon. 2, 5, § 1.—CHRISTIAN.

<sup>14</sup> That is, by letters patent under the great seal of England.—CHRISTIAN.

<sup>15</sup> 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 vs. 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 Collir'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 leurs 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 eaines des rois d'Engleterre, c'est assavoir, ceux qui serroient heirs prochains du roialme d'Engleterre, fuissent ducs de Corneuaile*. 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 natiuitatis suæ die majoris atque perfectæ præsumuntur ætatis, sic quod liberationem dicti ducatus 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 parlamento*.—CHRISTIAN.

Lord Hardwicke, in the case of *Lomax vs. Holmden*, 1 Ves. sen. 294, concurs in that free interpretation of the word *primogenitus* which Blackstone, Selden, lord Bacon, lord Ellesmere, and Fitzherbert, all adopted, but which Mr. Christian, following the *otiter dictum* of lord Coke, disapproves.—HOVEDEN.

<sup>16</sup> The king's eldest living son and heir-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 acces-

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 further, 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 further 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.

\*225] This is done by the statute 31 Hen. VIII. c. 10, \*which enacts that no person, except the king's children, shall presume to sit or have place at the side of the cloth of estate in the parliament chamber; and that certain great officers therein named shall have precedence above all dukes, except only such as shall happen to be the king's son, brother, uncle, nephew, (which Sir Edward Coke(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 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

(e) See *Essay on Collateral Consanguinity*, in *Law Tracts*, 4to, *Oxon.* 1771.

(f) 4 *Inst.* 362.

(g) *Tracts*, p. 301.

(h) *Lords' Jour.* 24 *Apt.* 1760.

(i) *Lords' Jour.* 10 *Jan.* 1765.

sion 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 *Geo. 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.—*CHITTY.*

the earls' 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.<sup>(k)</sup> 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 the opinion,<sup>(l)</sup> 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 \*further [ \*226 than nephews and nieces;<sup>(m)</sup> but examples are not wanting of its reaching to more distant collaterals.<sup>(n)</sup> 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:<sup>18</sup>—"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."<sup>(o)</sup> 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 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*.<sup>19</sup>

(k) Fortesc. Al. 401-440.

(l) Lords' Jour. 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, 644. To first cousins: under Edward II. 5 Rym. 177. To second and third cousins: under Edward III. 6 Rym. 729; under Richard II. 7 Rym. 225; under Henry VI. 10 Rym. 323; under Henry VII. 12 Rym. 529; under queen Elizabeth, Cambd. Ann. A.D. 1562. To fourth cousins: under Henry VII. 12 Rym. 329. To the *blood-royal* in general: under Richard II. 7 Rym. 787.

(o) Rul. Plac. Parl. 672.

<sup>17</sup> 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. vol. xi. 295.—CHRISTIAN.

<sup>18</sup> The occasion of this statute was the marriage of Catherine, mother to Henry VI., with Owen Tudor, a private gentleman. See p. 223.—CHRISTIAN.

<sup>19</sup> Accordingly, on the death of the late duke of Sussex, the fifth son of king George III., who had been married at Rome in 1792 by a minister of the Church of England, and shortly afterwards again in England, according to the rules of the Church of England, it was held that his peerage did not pass to the only son of the marriage, Sir Augustus d'Este, but that the statute extended to prohibit contracts for and to annul any marriages contracted in violation of its provisions wherever the same might be contracted or solemnized. The Sussex Peerage Case, 11 Clark & Fin. 85.—SHARSWOOD.

## 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.<sup>1</sup>

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 hundreds of years. But, though there had not so long before been an instance, nor has there been any since, of assembling them in so solemn a manner, yet in cases of emergency our princes have at several times thought proper to call for and consult as many of the nobility as could easily be got together; as was particularly the case with king James the Second, after the landing of the prince of Orange, and with the prince of Orange himself, before he called that convention-parliament, which afterwards called him to the throne.

Besides this general meeting, it is usually looked upon to be the right of each

(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.

<sup>1</sup> "The President of the United States shall have power, by and with the advice and consent of the Senate, to make treaties, provided two-thirds of the senators present concur; and he shall nominate and, by and with the advice and consent of the Senate, shall appoint ambassadors, other public ministers, and consuls, judges of the Supreme Court, and all other officers of the United States, whose appointments are not otherwise provided for by the constitution. He may likewise require the opinion, in writing, of the principal officer in each of the executive departments, upon any subject relating to the duties of their respective offices." Const. U. S. art. 11.

The heads of the different executive departments constitute the Cabinet of the President. They are the Secretaries of State, of the Treasury, of War, of the Navy, of the Interior, the Postmaster-General, and the Attorney-General.—SHARSWOOD.

particular peer of the realm to demand an audience of the king, and to lay before him, with decency and respect, such matters as he shall judge of importance to the public weal. And therefore, in the reign of Edward II., it was made an article of impeachment in parliament against \*the two Hugh Spencers, father and son, for which they were banished the kingdom, [\*229 "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 st. 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)<sup>2</sup>

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 [ \*230 Second, 1679, limited it to thirty; whereof fifteen were to be the principal officers of state, and those to be counsellors, *virtute officii*; and the other fifteen were composed of ten lords and five commons of the king's choosing.(k) But since that time the number has been much augmented, and now continues indefinite.<sup>3</sup> At the same time, also, the ancient office of lord president of the

(f) 4 Inst. 53.  
(g) 1 Inst. 110.  
(h) 3 Inst. 125.

(i) 4 Inst. 63.  
(k) Temple's Mem. part 3.

<sup>2</sup>The king's power to consult the judges extra-judicially, although not without precedent in former times, is now much disputed, and has of late rarely been exercised.—STEWART.

The passage referred to in the 3 Inst. is no authority for the interpretation given to the word "council" in the statute of Richard; for it is a comment on the statute of præmunire, 27 Edw. III. st. 1. c. 1, where the word seems used in the same sense as in the first-mentioned statute, and in which lord Coke states that it cannot mean the judges. The truth is, I believe, that the council here mentioned was a court of very extensive equitable jurisdiction both in civil and criminal matters, the fountain from which in process of time the courts of chancery and starchamber were derived. Its history has never been satisfactorily traced, nor its jurisdiction and functions clearly distinguished from those of the council of the peers or the great council in parliament. Perhaps it is too late to expect that this can ever be now done so as to free the subject from all doubts; but I have reason to hope that very great light will be thrown upon it, and therein upon the origin of all equitable jurisdiction in this country, by a gentleman who is devoting himself to the legal antiquities of the country with an industry and intelligence that promise to overcome great difficulties.—COLERIDGE.

Subsequent researches have fully justified Mr. Justice Coleridge's opinion. Reports of the Committee on the Privileges of the Peerage, *passim*. Sir Harris Nicolas's "Proceedings and Ordinances of the Privy Council of England," printed under the direction of the Commissioners of the Public Records. Hallam's Const. Hist. vol. i. ch. p. 1.—KEER.

<sup>3</sup>No inconvenience arises from the extension of their numbers, as those only attend



council was revived in the person of Anthony, earl of Shaftsbury, an officer that, by the statute of 31 Hen. VIII. c. 10, has precedence next after the lord chancellor and lord treasurer.

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.<sup>4</sup> But, in order to prevent any person 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,<sup>(l)</sup> 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,<sup>(m)</sup> 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, reward, doubt, or dread. 3. To keep the king's council secret. 4. To avoid corruption. 5. To help and strengthen the execution of what shall be there resolved. 6. To withstand all persons who shall attempt the contrary. And, lastly, in general, 7. To observe, keep, and do all that a good and true counsellor ought to do to his sovereign lord.

(l) Stat. 12 and 13 Will. III. c. 2.

(m) 4 Inst. 54.

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.—CHRISTIAN.

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 control 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.—CHITTY.

<sup>4</sup> 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 magna Elizabethâ.*—CHRISTIAN.

<sup>5</sup> The sacramental test, as a qualification for certain offices, is repealed by the stat. 9 Geo. IV. c. 17, and stat. 2 Gul. IV. c. 7, and a declaration substituted in lieu thereof, by which the party professes, upon the true faith of a Christian, that he will never exercise any power, authority, or influence which he may possess, by virtue of his office, to injure or weaken the protestant church as it is by law established in England, or to disturb the said church, or the bishops and clergy of the said church, in the possession of any rights or privileges to which such church, or the said bishops and clergy, are or may be by law entitled.

By the statute of 10 Geo. IV. c. 7 the necessity of making any declaration against transubstantiation, invocation of saints, and the sacrifice of the mass as practised in the church of Rome, as a qualification for the exercise or enjoyment of any office or civil right, is repealed; and instead of the oaths of allegiance, supremacy, and abjuration, as qualifications for holding civil or military offices, Roman Catholics are required to take the oath set forth in the said act.—HOVEDEN.

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 entitled to their *habeas corpus* by statute 16 Car I. c. 10, as much as if committed by an ordinary justice of the peace. And, by the same statute, the court of star-chamber, and the court of requests, both of which consisted of privy counsellors, were dissolved; and it was declared illegal for them to take cognizance of any matter of property belonging to the subjects of this kingdom. But in plantation or admiralty causes, which arise out of the jurisdiction of this kingdom; and in matters of lunacy 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. 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 feudal sovereignty. And so likewise when any person claims an island or a province, in the nature of a feudal 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 usually exercises its judicial authority in a committee [\*232 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.\*

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 Anne, c. 16, goes further, 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.

The *dissolution* of the privy council depends upon the king's pleasure; and he

(n) 3 P. Wms. 108.

(o) See page 405.

(p) 3 Inst. 38.

\* 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 vs. 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.—CHRISTIAN.

The jurisdiction and power of the privy council were entirely remodelled by 3 & 4 Wm. IV. c. 41, which created "the judicial committee of the privy council." This committee is composed of the president of the council, the lord chancellor, the two chief justices and chief baron, master of the rolls, vice-chancellor, and other judicial officers. It has jurisdiction over all appeals made to the king in council from the courts of admiralty or any other court in the plantations of America, and other his majesty's dominions abroad.—HARRIS.

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 Anne, c. 7 that the privy council shall continue for six months after the demise of the crown, unless sooner determined by the successor.

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## 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.<sup>1</sup>

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 the principles of \*234] 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

(a) 7 Rep. 5.

(b) *Tac. de mor. Germ. c. 7.*

(c) *L. 1, c. 8.*

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<sup>1</sup> The duties of the President of the United States are summarily prescribed in the constitution. Art. 2, s. 3:—"He shall from time to time give to the Congress information of the state of the Union, and recommend to their consideration such measures as he shall judge necessary and expedient. He may, on extraordinary occasions, convene both houses, or either of them; and, in case of disagreement between them with respect to the time of adjournment, he may adjourn them to such time as he shall think proper. He shall receive ambassadors and other public ministers. He shall take care that the laws be faithfully executed; and shall commission all the officers of the United States." And by sec. 1, § 8, "before he enter on the execution of his office, he shall take the following oath or affirmation:—I do solemnly swear (or affirm) that I will faithfully execute the office of President of the United States, and will to the best of my ability preserve, protect, and defend the constitution of the United States."

It is unnecessary to remind the American student that the chief executive magistrate is but the agent or servant by whom the will of the States and people, as expressed in the constitution and the laws made in pursuance thereof, is carried into effect. It is a fundamental error, into which Blackstone as well as other political writers, have fallen to consider the social or original contract as an agreement to which the parties are the governors of the one part and the governed of the other part. It is a compact between the different members composing the society, individuals if the society forms a state, states if it is a confederacy; and the governors are but agents, whose mode of appointment, continuance, powers, and duties are prescribed in the frame of government.—SHARSWOOD.

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,<sup>(d)</sup> "the king also hath a superior, namely God, and also the law, by which he was made a king." Thus Bracton; and Fortescue also,<sup>(e)</sup> having first well distinguished between a monarchy absolutely and despotically regal, which is introduced by conquest and violence, and a political or civil monarchy, which arises from mutual consent, (of which last species he asserts the government of England to be,) immediately lays it down as a principle, that "the king of England must rule his people according to the decrees of the laws thereof: inso-much that he is bound by an oath at his coronation to the observance and keeping of his own laws." But, to obviate all doubts and difficulties concerning this matter, it is expressly declared by statute 12 & 13 W. III. c. 2, "that the laws of England are the birthright of the people thereof: and all the kings and queens who shall ascend the throne of this realm ought to administer the government of the same according to the said laws; and all their officers and ministers ought to serve them respectively according to the same: and therefore all the laws and statutes of this realm, for securing the established religion, and the rights and liberties of the people thereof, and all other laws and statutes of the same now in force, are 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 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 the churches committed to their charge, all such rights and privileges as by law do or shall appertain unto them, or any of them?" *King or queen:*—"All this I promise to do." *After this the king or queen, laying his or her hand upon the holy gospels, shall say,*—"The things which I have here before promised I will perform and keep: so help me God:" and then shall kiss the book.\*

This is the form of the coronation oath, as it is now prescribed by our laws; the principal articles of which appear to be at least as ancient as the mirror of justices,<sup>(f)</sup> and even as the time of Bracton;<sup>(g)</sup> but the wording of it was changed at the revolution, because (as the statute alleges) the oath itself \*had been framed in doubtful words and expressions with relation to

(d) L. 2, c. 16, § 3.  
(e) C. 9, 34.

(f) Cap. 1, § 2.  
(g) L. 3, tr. 1, c. 9.

\*This is also well and strongly expressed in the year-books:—*La ley est le plus haute inheritance que le roy ad; car par la ley il même et tous 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.—CHRISTIAN.

\*And it is required both by the bill of rights, 1 W. and M. st. 2, c. 2, and the act of settlement, 12 & 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.—CHRISTIAN.

ancient laws and constitutions at this time unknown.<sup>(h)</sup> However, in what form soever it be conceived, this is most indisputably a fundamental and original express contract, though doubtless the duty of protection is impliedly as much incumbent on the sovereign before coronation as after: in the same manner as allegiance to the king becomes the duty of the subject immediately on the descent of the crown, before he has taken the oath of allegiance, or whether he ever takes it at all. This reciprocal duty of the subject will be considered in its proper place. At present we are only to observe, that in the king's part of this original contract are expressed all the duties that a monarch can owe to his people; viz., to govern according to law; to execute judgment in mercy; and to maintain the established religion. And, with respect to the latter of these three branches, we may further remark that, by the act of union, 5 Anne, 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.

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## CHAPTER VII.

### OF THE KING'S PREROGATIVE.

It was observed in a former chapter<sup>(a)</sup> 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 further on our *natural* liberties, than is expedient for the maintenance of our *civil*.<sup>1</sup>

<sup>(h)</sup> In the old folio abridgment of the statutes, printed by Letton and Machlinia in the reign of Edward IV., (*penes me*), there is preserved a copy of the old coronation oath, which, as the book is extremely scarce, I will here transcribe:—*Ceo est le serement que le roy jurre a soun coronement: que il gardera et meintenera les droites et les franchises de seynt esglise, grauntez auancienment des droites roys Christiens d'Engleterre, et quil gardera toutes ses terres honours et dignitez droiturelx et franks del coron du roialme d'Engleterre es tout maner denferte sanz null maner d'amenusement, et les droites dispergez dilapidez ou perduz de la corone a soun poiair reappeller en laancien estate, et quil gardera le peas de*

*seyns esglise et al clergie et al peuple de bon accorde, et quil face faire en toutes ses jugementes ovel et droit justice oue discrecion et misericorde, et quil grauntera a tenure les leys et custumes du roialme, et a soun poiair les face garder et affirmer que les gentes du peuple avont faites et esliez, et les maleoys leys et custumes de tout oustera, et ferme peas et establie al peuple de soun roialme en ceo garde esgardera a soun poiair: come Dieu luy aide. (Tit. sacramentum regis, fol. m. ii.) 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.)*

<sup>(a)</sup> Chap. I. page 141.

<sup>1</sup> 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 be guarded on account of the public; they are not to be extended further 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 vs. 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

There cannot be a stronger proof of that genuine freedom, which is the boast of this age and country, than the power of discussing and examining, with decency and respect, the limits of the king's prerogative; a topic, that in some former ages was thought too delicate and sacred to be profaned by the pen of a subject. It was ranked among the *arcana imperii*: and, like the mysteries of the *bona dea*, was \*not suffered to be pried into by any but such as were [ \*238 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 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,

(b) Dewes, 479.

(c) Ibid. 645.

(d) King James's Works, 557, 531.

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; everywhere present, that these duties may nowhere 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 misspend 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 coexisting 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 is from time to time delegated by statute to the privy council, as the granting licenses, &c.; and acts are passed regulating foreign and domestic concerns, weights, measures, &c.—CHITTY.

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 \*239] of any wrong."<sup>(e)</sup> *Nihil enim aliud potest rex, nisi id solum quod de jure potest.*<sup>(f)</sup> 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.*"<sup>(g)</sup> 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.*"<sup>(h)</sup> 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 eccentric; 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<sup>(i)</sup> 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 positive substantial parts of the royal character and \*authority, as are rooted in and \*240] spring from the king's political person, considered merely by itself, without reference to any other extrinsic circumstance; as, the right of sending ambassadors, of creating peers, and of making war or peace. But such prerogatives as are *incidental* bear always a relation to something else, distinct from the king's person; and are indeed only exceptions, in favour of the crown, to those general rules that are established for the rest of the community; such as, that no costs shall be recovered against the king; that the king can never be a joint-tenant; and that his debt shall be preferred before a debt to any of his subjects. These, and an infinite number of other instances, will better be understood, when we come regularly to consider the rules themselves, to which these incidental prerogatives are exceptions. And therefore we will at present only dwell upon the king's substantive or direct prerogatives.

These substantive or direct prerogatives may again be divided into three kinds: being such as regard, first, the king's royal *character*; secondly, his royal *authority*; and, lastly, his royal *income*. These are necessary, to secure reverence to his person, obedience to his commands, and an affluent supply for the ordinary expenses of government; without all of which it is impossible to maintain the executive power in due independence and 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

<sup>(e)</sup> Finch, L. 84. 85.

<sup>(f)</sup> Bracton, l. 3, tr. 1, c. 9.

<sup>(g)</sup> Nov. 117, § 2.

<sup>(h)</sup> Ff. 32, 1, 23.

<sup>(i)</sup> Finch, L. 85

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 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 feudal 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 ab 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 carry on the business of government. This is what I understand by the royal dignity, the several branches of which we will now proceed to examine.

I. And, first, the law ascribes to the king the attribute of *sovereignty*, or pre-eminence. "*Rex est vicarius,*" says Bracton,(l) "*et minister Dei in terra: omnis quidem sub eo est, et ipse \*sub nullo, nisi tantum sub Deo.*"<sup>2</sup> 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

(k) *Peregrin, de jure fisci*. l. 1, c. 1, num. 9.  
(l) *L. 1, c. 8.*

(m) *Seld. tit. of hon.* l. 2.  
(n) See also 24 Geo. II. c. 24. 5 Geo. III. c. 27.

<sup>2</sup> 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 Rege, 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."—CHRISTIAN.



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 \*243] the pope, the independence of the kingdom would be no more; and, if such a power were vested in any domestic \*tribunal, there would soon be an end of the constitution, by destroying the free agency of one of the constituent parts of the sovereign legislative power.\*

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

And, first, as to private injuries: if any person has, in point of property, a just demand upon the king, he must petition him in his court of chancery, where his chancellor will administer right as a matter of grace, though not upon compulsion. (q)<sup>4</sup> 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 govern-

(o) *Rez allegavit, quod ipse omnes libertates haberet in regno suo, quas imperator vindicabat in imperio.* (M. Paris, A.D. 1095.)

(p) Finch, L. 83.

(q) Finch, L. 255. See b. iii. c. 17.

(r) Law of N. and N. b. viii. c. 10.

(s) On Govt. p. 2, § 205.

\* The constitution of the United States not only supposes a President may be fallible, but also criminal. It prescribes the mode in which he shall be tried upon an impeachment, (art. 1, s. 3;) and expressly declares that he shall be removed from office on impeachment for and conviction of treason, bribery, or other high crimes and misdemeanours. Art. 11.—SHARSWOOD.

<sup>4</sup> It is well settled that an individual cannot maintain an action against the State, unless in pursuance of some special law authorizing it. 3 Richardson, 372. 1 Texas, 764. No direct suit can be maintained against the United States without the authority of an act of Congress; nor can any direct judgment be awarded against them for costs. 6 Wheaton, 411. 8 Peters, 444. 3 Hall's Law Jour. 128. 2 Wash. C. C. Rep. 161. Opinions of the Attorney-General, vol. ii. 967. But if an action be brought by the United States to recover money in the hands of a party, he may, by way of defence, set up any legal or equitable claim he has against the United States, and need not, in such case, be turned round to an application to Congress. Act of Congress, March 3, 1797. 6 Wheaton, 135. 9 Wheaton, 651. 7 Peters, 16. 8 Peters, 163, 436. 9 Peters, 319. 10 Peters, 125. 15 Peters, 377.—SHARSWOOD.

ment, 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 vitals of the constitution are not attacked, the law hath also assigned a remedy. [\*244 For, as the 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.<sup>(t)</sup> For, wherever the law expresses its distrust of abuse of power, it always vests a superior coercive authority in some other hand to correct it; the very notion of which destroys the idea of sovereignty. If therefore, for example, the two houses of parliament, or either of them, had avowedly a right to animadvert on the king, or each other, or if the king had a right to animadvert on either of the houses, that branch of the legislature, so subject to animadversion, would instantly cease to be part of the supreme power; the balance of the constitution would be overturned, and that branch or branches, in which this jurisdiction resided, would be completely sovereign. The supposition of *law* therefore is, that neither the king nor either house of parliament, collectively taken, is capable of doing any wrong: since in such cases the law feels itself incapable of furnishing any adequate [\*245 \*remedy. For which reason all oppression 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.

\*II. Besides the attribute of sovereignty, the law also ascribes to the king, in his political capacity, absolute *perfection*. The king can do [\*246

(t) See these points more fully discussed in the *Considerations of the Law of Forfeiture*, 3d edit. pages 109-126, wherein

the very learned author has thrown many new and important lights on the texture of our happy constitution.

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 any injury: it is created for the benefit of the people, and therefore cannot be exerted to their prejudice.<sup>(u)</sup><sup>5</sup>

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.

\*247] Yet still, notwithstanding this personal perfection, which the law attributes to the sovereign, the constitution has allowed a latitude of supposing the contrary, in respect to both houses of parliament, each of which, in its turn, hath exerted the right of remonstrating and complaining to the king even of those acts of royalty, which are most properly and personally his own; such as messages signed by himself, and speeches delivered from the throne. And yet, such is the reverence which is paid to the royal person, that though the two houses have an undoubted right to consider these acts of state in any light whatever, and accordingly treat them in their addresses as personally proceeding from the prince, yet among themselves, (to preserve the more perfect decency, and for the greater freedom of debate,) they usually suppose them to flow from the advice of the administration. But the privilege of canvassing thus freely the personal acts of the sovereign (either directly or even through the medium of his reputed advisers) belongs to no individual, but is 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<sup>(v)</sup> 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,<sup>(w)</sup> 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."

In further pursuance of this principle, the law also determines that in the king can be no negligence, or *laches*, and therefore no delay will bar his right. *Nullum tempus occurrit regi* has been the standing maxim upon all occasions; for the law intends that the king is always busied for the public good, and

(\*) Flowl. 437.

(\*) Com. Jour. 18 Nov. 1685.

(\*) Ibid. 4 Dec. 1717.

<sup>4</sup> 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.—CHRISTIAN.

therefore has not leisure to assert his right within the times limited to subjects.<sup>(y)</sup><sup>6</sup> In the king also can be no stain or corruption of \*blood; for, [ \*248 if the heir to the crown were attainted of treason or felony, and afterwards the crown should descend to him, this would purge the attainer *ipso facto*.<sup>(z)</sup> 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.<sup>(a)</sup> 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 hath 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.<sup>(b)</sup><sup>7</sup>

(y) Finch, L. 82. Co. Litt. 90.

(z) Finch, L. 82.

(a) Co. Litt. 43. 2 Inst. proem. 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. 68,) 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. Hen. V., on his death-bed, named a regent and a guardian for his infant son Hen. VI., then nine months old; but the parliament altered his disposition, and appointed

<sup>6</sup>This rule is now subject to various exceptions, both at common law and by statute. See Thomas's Co. Litt. vol. i. 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 vs. Baldwin, East, 488.*—CHITTY.

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 misdemeanors. 2 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.—CHRISTIAN.

This maxim is held applicable as well to the United States as to the several States. *Nullum tempus occurrit reipublice*. A statute of limitation bars not the rights of the public. *Johnston vs. Irwin, 3 S. & R. 291.* *Kemp vs. Commonwealth, 1 Hen. & Mun. 85.* *Lindsay vs. Miller, 6 Peters, 666.* *People vs. Gilbert, 18 Johns. 227.* It runs, however, against municipal corporations. Nothing less than sovereignty exempts the party from the statute. *Cincinnati vs. First Presb. Church, 8 Hammond, 298.* From long uninterrupted possession grants will be presumed. *Crooker vs. Pendleton, 10 Shep. 339.* *Barclay vs. Howell, 6 Peters, 498.* *Hanes vs. Peck, Mart. & Yerg. 228.* *Jarbor vs. McAtee, 7 B. Monroe, 279.* I conceive, however, that this is true only when it arises in a controversy between private persons, and not in a direct claim by government for land or property in the possession of a private person. No presumption of payment from lapse of time runs against the government. *United States vs. Williams, 4 McLean, 567.*

It is a general rule in the interpretation of legislative acts not to construe them to embrace the sovereign power of government, unless expressly named or intended by necessary implication. *The State vs. Milburn, 9 Gill, 105.*—SHARSWOOD.

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

\*249] \*III. A third attribute of the king's majesty is his *perpetuity*. The law ascribes to him in his political capacity an absolute immortality. The king never dies. Henry, Edward, or George may die; but the king survives them all. For immediately upon the decease of the reigning prince in his natural capacity, his kingship or imperial dignity, by act of law, without any *interregnum* or interval, is vested at once in his heir, who is, *eo instanti*, king to all intents and purposes. And so tender is the law of supposing even a possibility of his death that his natural dissolution is generally called his *demise*; *demissio regis, vel coronæ*: an expression which signifies merely a transfer of property; for, as is observed in Plowden,<sup>(c)</sup> 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.<sup>(d)</sup><sup>8</sup>

\*250] \*We are next to consider those branches of the royal prerogative, which invest this our sovereign lord, thus all-perfect and immortal in his kingly capacity, with a number of authorities and powers, in the exertion whereof consists the executive part of government. This is wisely placed in a single hand by the British constitution, for the sake of unanimity, strength, and despatch. 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, magis-

a protector and council, with a special limited authority. Both these princes remained in a state of pupillage till the age of twenty-three. Edward V., at the age of thirteen, was recommended by his father to the care of the duke of 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 counsellors 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

elect 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 Geo. II., residing in the 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.

<sup>(c)</sup> Plowd. 177, 234.

<sup>(d)</sup> M. 49 Hen. VI. pl. 1-8.

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.—  
CHITTY.

<sup>8</sup> The constitution of the United States and the law made in pursuance thereof have, it is presumed, made effectual provision for the uninterrupted continuation of the executive office in the United States, without recurring to this maxim of the British government. "In case of the removal of the President from office, or of his death, resignation, or inability to discharge the powers and duties of the said office, the same shall devolve on the Vice-President; and the Congress may by law provide for the case of removal, death, resignation, or inability both of the President and Vice-President, declaring what officer shall then act as President, and such officer shall act accordingly until the disability be removed or a President shall be elected." Const. U. S. art. 11, s. 6. "In case of removal, death, resignation, or inability both of the President and Vice-President of the United States, the President of the Senate *pro tempore*, and, in case there shall be no President of the Senate, then the speaker of the House of Representatives for the time-being, shall act as President of the United States until the disability be removed or a President shall be elected." Act of Congress, March 1, 1792, s. 9. When the Vice-President succeeds, he continues to act as President during the whole of the term for which he was elected. When, however, it is one of the other persons named, provision is made that an election shall be held at the proper time in the same year, provided that two months shall intervene between the notice and election; if not, then the year next ensuing. Act of Congress, March 1, 1792, s. 10.—SHARSWOOD.

trate 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 reipublicæ vis atque majestas per cumulatas magistratum 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 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 further. For otherwise the power of the crown would indeed be but a name and a shadow, insufficient for the ends of government, if, where its jurisdiction is clearly established and allowed, any man or body of men were permitted to disobey it, in the ordinary course of law: I say in the *ordinary* course of law; for I do not \*now speak of those *extraordinary* recourses to first [\*25] 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 of 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 eccentric 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 his advisers \*to a [\*25] 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 con

sidering them) respect either this nation's intercourse with foreign nations, or its own domestic government and civil polity.

With regard to foreign concerns, the king is the delegate or representative of his people. It is impossible that the individuals of a state, in their collective capacity, can transact the affairs of that state with another community equally numerous as themselves. Unanimity must be wanting to their measures, and strength to the execution of their counsels. In the king therefore, as in a centre, all the rays of his people are united, and form by that union a consistency, splendour, 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,<sup>(g)</sup> 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, \*253] so far as \*relates to the making this offence high treason, yet still it remains a very great offence against the law of nations, and punishable by our laws, either capitally or otherwise, according to the circumstances of the case.

I. The king therefore, considered as the representative of his people, has the sole power of sending ambassadors to foreign states, and receiving ambassadors at home. This may lead us into a short 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;<sup>(h)</sup> who is bound either to do justice upon him, or avow himself the accomplice of his crimes.<sup>(i)</sup> 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.<sup>(k)</sup> Our law seems to have formerly taken \*254] in the restriction, as well as the general exemption. \*For it has been held, both by our common lawyers and civilians,<sup>(l)</sup> 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;<sup>(m)</sup> and that therefore, if an ambassador conspires the death of the king in whose land he is, he may be condemned and executed for treason; but if he commits any other species of treason, it is otherwise, and he must be sent to his own kingdom.<sup>(n)</sup> And these positions seem to be built upon good appearance of reason. For since, as we have formerly shown, 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

(g) 4 Inst. 152.

(h) As was done with Count Gyllenberg, the Swedish minister to Great Britain, A.D. 1716.

(i) Sp. L. 28, 21.

(k) Van Leeuwen in Ff. 50, 7, 17. Barbeyrac's Puff. l. 8, c. 9, § 9, 17. Van Bynkershoek *de foro legator*, c. 17, 18, 19.

(l) 1 Roll. Rep. 175. 3 Bulstr. 27.

(m) 4 Inst. 153.

(n) 1 Roll. Rep. 185.

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.<sup>9</sup>

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 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 [\*255 coach in London,(r) for a debt of fifty pounds which he had there contracted. Instead of applying 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

(o) Forster's Reports, 188.

(p) *Securitas legatorum utilitati quæ ex pœna est præponenda. De jure, l. 6. p. 18, 4, 4.*

(q) 4 Inst. 153.

(r) 21 July, 1708. Doyer's Annals of Queen Anne.

(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.

<sup>9</sup> 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." Vol. vii. p. 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 quamvis visi sunt commississe, 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, *fil reus magis ex æquo bonoque quam ex jure gentium*. Bell. Jug. c. 35.—CHRISTIAN.

It is said that the true ground of the judgment against Don Pataleon Sa was that he failed to prove his connection with the embassy.—STEWART.



afterwards argued before the judges; which question was never determined.<sup>10</sup> 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.<sup>(w)</sup> 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."<sup>(x)</sup> 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,<sup>(y)</sup> and afterwards passed into a law,<sup>(z)</sup> 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<sup>(a)</sup> was commissioned to appear at Moscow,<sup>(b)</sup> who declared "that though her majesty could not inflict such a punishment as \*256] was required, \*because of the defect 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 further prosecution.

This statute<sup>(c)</sup> 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 executing such process, shall be deemed violators of the law of nations, and disturbers of the public repose; and shall suffer such penalties and corporal punishment as the lord chancellor and the two chief justices, or any two of them, shall think fit. But it is expressly provided, that no trader, within the description of the bankrupt laws, who shall be in the service of any ambassador, shall be privileged or protected by this act; nor shall any one be punished for arresting an ambassador's servant, unless his name be 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,<sup>(d)</sup> as observed in the most civilized countries. And in consequence of this statute, thus declaring and \*257] enforcing the law of nations, these privileges are \*now held to be part of the law of the land, and are constantly allowed in the courts of common law.<sup>(e)</sup><sup>11</sup>

(\*) 17 Sept. 1708. Ibid.

(\*) 11 Jan. 1708. Ibid. Mod. Un. Hist. xxxv. 451.

(\*) Com. Jour. 23 Dec. 1708.

(\*) 21 Apr. 1709. Boyer, *ibid.*

(\*) Mr. Whitworth.

(\*) 8 Jan. 1709. Boyer, *ibid.*

(\*) 7 Anne, c. 12.

(\*) *Sepe questum est an comitum numero et jure habendi sunt, qui legatum comitantur, non ut instructor fiat legatio,*

*sed unice ut lucro suo consulant, institores forte et mercatores. Et, quamvis hos sepe defenderint et comitum loco habere voluerint legati, apparet tamen satis eo non pertinere, qui in legati legationis officio non sunt. Quum autem ea res nonnunquam turbas dederit, optimo exemplo in quibusdam aulis olim receptum fuit, ut legatus teneretur exhibere nomenclatorum comitum suorum.* Van Bynkerk. c. 15, *prope finem.*

(\*) Fitzg. 200. Stra. 797.

<sup>10</sup> 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 misdemeanour, 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."—CHRISTIAN.

<sup>11</sup> And the exceptions are said to be agreeable to, and taken from, the law of nations. *Lockwood vs. Coysgarne*, 3 Burr. 1676, cited in Mr. Christian's note.

A person claiming the benefit of the 7 Anne, c. 12, as domestic servant to a public

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,

(f) Puff. L. of N. b. 8, c. 9, § 6.

minister, must be really and bona fide his servant at the time of the arrest and must clearly show 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 Burr. 1676,) and not only to servants lying in the 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 & 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 Burr. 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 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 Burr. 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 vs. Toogood*, 1 Bar. & Cres. 554. This act does not extend to consuls, who are therefore liable to arrest. *Viveart vs. Becker*, 3 Maule & Sel. 284. See 1 Chitty's Com. L. 69, 70.—CHITTY.

In the case of *Viveart vs. Becker*, 3 M. & S. 284, this statute was brought under the consideration of the court of King's Bench on behalf of a resident merchant of London who had been appointed consul to the duke of Sleswick Holstein Oldenburgh. Lord Ellenborough delivered a luminous judgment in the name of the court, and, on the principle that the statute was only declaratory of the common law and the law of nations, determined that a consul was not a public minister, and therefore not within its protection.

With regard to the exceptions in the statute, the foreign ministers resident in England when it passed remonstrated against them as unpractised in foreign courts. 6 Parl. Hist. 793. The passage, however, cited by the author from Van Bynkershoek seems an answer to such an assertion; and lord Mansfield says expressly that there is not an exception in the act but what is agreeable to and taken from the law of nations. 3 Burr. 1676.—COLERIDGE.

By the act of Congress, April 30, 1790, (1 Story, 38,) it is provided that if any writ or process shall, at any time hereafter, be sued forth or prosecuted, by any person or persons, in any of the courts of the United States, or in any of the courts of a particular State, or by any judge or justice therein respectively, whereby the person of any ambassador or other public minister of any foreign prince or state, authorized and received as such by the President of the United States, or any domestic or domestic servant of any such ambassador or other public minister, may be arrested or imprisoned, or his or their goods or chattels be distrained, seized, or attached, such writ or process shall be deemed and adjudged to be utterly null and void to all intents, constructions, and purposes whatever. That in case any person or persons shall sue forth or prosecute any such writ or process, such person or persons, and all attorneys or solicitors prosecuting or soliciting in such case, and all officers executing any such writ or process, being thereof convicted, shall be deemed violators of the laws of nations and disturbers of the public repose, and imprisoned not exceeding three years, and fined at the discretion of the court. *Provided, nevertheless*, that no citizen or inhabitant of the United States who shall have contracted debts prior to his entering into the service of any ambassador or other public minister, which debts shall be still due and unpaid, shall have, take, or receive any benefit of this act; nor shall any person be proceeded against by virtue of this act for having arrested or sued any other domestic servant of any ambassador or other public

*quoad hoc*, is vested in the person of the king. Whatever contracts therefore he engages in, no other power in the kingdom can legally delay, resist, or annul. And yet, lest this plenitude of authority should be abused to the detriment of the public, the constitution (as was hinted before) hath here interposed a check, by the means of parliamentary impeachment, for the punish-

minister, unless the name of such servant be first registered in the office of the Secretary of State, and by such secretary transmitted to the marshal of the district in which Congress shall reside, who shall upon receipt thereof affix the same in some public place in his office, whereto all persons may resort and take copies without fee or reward.

It is observable that, while both the English and American statutes prohibit process of arrest of the person or attachment of the goods, neither of them forbids that of summons, so familiar to both codes. It is unnecessary to suppose that this material omission was unintentional. "It may be," remarks Mr. C. J. Ingersoll, (4 American Law Mag. 307,) "that the summons was deemed a harmless measure against persons not resident, according to legal fiction, when proceeded against; against whom therefore judgment would be of no avail there, and no more available as the foundation of fresh suits against them elsewhere. As the commencement of an action to lead to any profitable results, summons is incompatible with privilege." It is agreed, however, on all hands that the privilege does not rest on the statute, but on the law of nations, the statute only adding certain penalties to secure its observance. A minister is therefore as much privileged from the service of a summons as any other writ. It is laid down, however, by many eminent writers that the exemption from the jurisdiction of the local tribunals and authorities does not apply to the *contentious* jurisdiction, which may be conferred on those tribunals by the minister voluntarily making himself a party to a suit at law. Hence perhaps it was that, in the constitution and laws of the United States, jurisdiction is conferred on the federal courts in all suits brought by ambassadors or other public ministers, and also in such suits and proceedings against ambassadors or other public ministers as a court of law can have or exercise consistently with the law of nations. Const. U. S. art. III. s. 2. Act of Sept. 24, 1789. (1 Story, 58.)

The exemption extends to the goods and chattels of a public minister, but not to real property possessed by an ambassador in his private capacity; nor does it extend to stock in trade. According to Bynkershoek, if on petition a sovereign will not compel his ambassador to satisfy his creditors, their remedy is by suit in the courts of his own country, or by action *in rem* where he possesses property not privileged and the law allows that form of proceeding. The act of Congress, however, expressly prohibits attachment of goods and chattels, without drawing any distinction between such as are or are not privileged; and as to debts due the minister and real property, though not within the statute so far as penalty is concerned, it is difficult to avoid the conclusion that they are within the intent and spirit so far as illegality is concerned.

In 1844 a controversy arose between Prussia and the United States in regard to the right of a landlord to seize the goods of a public minister for the rent of a house which he had leased. The act of Congress of 1790 expressly prohibits such distress. As regards foreign ministers in this country, therefore, as long as this law exists there would be no question. But of course that act is in that respect merely expressive of the sense of its framers, and, though it could be decidedly urged against us, cannot be pleaded in our favour as evidence of what is the law of nations. The proprietor of the house in which the United States minister at Berlin resided claimed the right, under an article of the Prussian code, of detaining the goods of the minister found on the premises at the expiration of his lease, in order to secure the payment of damages alleged to be due on account of injuries done to the house during the contract. The Prussian government contended that the general exemption under international law of the personal property of foreign ministers from the local jurisdiction did not extend to this case, where the right of detention was created by the contract itself and by the legal effect given to it by the local law. Of course the principle of this decision includes the case of distress for rent. The controversy in question was terminated as between the parties by the proprietor of the house restoring the effects which had been detained, on the payment of a reasonable compensation for the injury done to the premises. The correspondence terminated, however, without either party yielding its opinions; so that it still remains an open question. The whole negotiation has been ably reviewed by a distinguished French jurist, (M. Fœlix,) who maintains the American side of the question. Wheaton's International Law, p. 287. *Revue du Droit Français et Étranger*, tome ii. p. 31.

It is provided by the act of Congress, April 30, 1790, (1 Story's Laws, 89,) that if any person shall assault, strike, wound, imprison, or in any other manner infract the law of nations, by offering violence to the person of an ambassador or other public minister, such person so offending, on conviction, shall be imprisoned not exceeding three years, and fined at the discretion of the court.—SHARSWOOD.

ment 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.<sup>12</sup> 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 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 the offending state, until satisfaction \*be made, wherever they happen to be found. And indeed this custom of reprisals seems dictated by nature herself; [\*259

(g) Puff. b. 8, c. 6, § 8, and Barbeyr. *in loc.*

(h) *Ibid.* l. 3, c. 2, §§ 4, 5.

(i) *Ff.* 50, 16, 118.

(j) Dufresne, tit. *Marca.*

(k) *De jure, b. de p.* l. 3, c. 3, § 11.

<sup>12</sup>The Congress of the United States have power "to declare war, grant letters of marque and reprisal, and make rules concerning captures on land and water." (Const U. S. art. 1, s. 8.) The President has power, "by and with the advice and consent of the Senate, to make treaties, provided two-thirds of the senators present concur." (*Ibid.* art. 2, s. 1.) "This constitution, and the laws of the United States which shall be made in pursuance thereof, and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every State shall be bound thereby, any thing in the constitution or laws of any State to the contrary notwithstanding." *Ibid.* art. 6, s. 2.—SHARSWOOD.

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 be 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.<sup>13</sup>

(\*) 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

Nelus, 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 equally divided among the other creditors.

<sup>13</sup> 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 aggrieved. 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.—CHRISTIAN.

If, during war, a subject without a commission from the crown should take an enemy's ship, the prize would belong, not to the captor, but to the sovereign, or to the admiral as his grantee. In order therefore to encourage the fitting out of armed ships in time of war, the lord high admiral, or the commissioners of the admiralty, are authorized by several statutes to grant commissions to private persons fitting out such ships, which are thence called privateers. The prizes captured by such vessels are divided according to the contract entered into between the owners and the master and crew of the privateer; but the crown has still the prerogative of releasing any prize captured by such ships at any time previously to condemnation. Letters of *marque*, as these commissions are called, are valid only during the war, and may be vacated either by express revocation, or by the misconduct of the parties, as, for example, by their cruelty.

The conference which met at Paris in 1856, after the war with Russia, closed its labours by recommending to the established governments of the world the entire abolition of the system of privateering, and that in time of war neutral flags and neutral goods should be inviolable. The conference was of opinion that the abolition of privateering and the acknowledgment of neutral rights were alike desirable and necessary for improving our system of war and bringing it into harmony with the ideas and principles of modern civilization. This proclaimed opinion of several of the great powers of Europe may therefore lead, ere long, to treaties by which the prerogative of the crown in issuing letters of *marque* will become merely matter of history.—KERR.

The government of the United States did not respond favourably to this proposal of the conference of Paris. The Secretary of State, William L. Marcy, proposed, however, what would still more bring the system of war into harmony with the ideas and principles of modern civilization, and at the same time be more just to states not possessing a powerful public marine.—the entire immunity of private property on the ocean from capture. Such has long been the established law of war in regard to property on land; and there exists no reason why it should not be extended to maritime warfare.—SHARWOOD

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.<sup>14</sup> 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 coast by necessity, or by any cause that deserves pity or compassion. Great tenderness is shown by our laws, not only to foreigners in distress, (as will appear when we come to speak of shipwrecks,) but with regard also to the admission of strangers who come spontaneously. For so long as their nation continues at peace with ours, and they themselves behave peaceably, they are under \*the king's protection, though liable to be sent home [\*260 whenever the king sees occasion. But no subject of a nation at war with us can, by the law of nations, come into the realm, nor can travel himself upon the high seas, or send his goods or merchandise from one place to another, without danger of being seized by our subjects, unless he has letters of safe-conduct; which, by divers ancient statutes,(o) must be granted under the king's great seal and enrolled 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 licenses from his ambassadors abroad, are now more usually obtained, and are allowed to be of equal validity.<sup>15</sup>

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 beforehand) shall have safe-conduct to depart from, to come into, to tarry in, and to go through, England, for the exercise of merchandise, 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

(n) Law of N. and N. b. 3, c. 3, § 9.

(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.

<sup>14</sup> By the act of Congress April 30, 1790, s. 27, (1 Story's Laws, 88,) it is enacted that if any person shall violate any safe-conduct or passport duly obtained and issued under the authority of the United States, such person so offending, on conviction, shall be imprisoned not exceeding three years, and fined at the discretion of the court.—SHARSWOOD.

<sup>15</sup> By the act of Congress July 6, 1798, (1 Story's Laws, 521,) it is enacted that in case of war between the United States and any foreign nation, and in case of actual or threatened invasion, all native citizens, denizens, or subjects of the hostile nation aged fourteen years and upwards, not actually naturalized, shall be liable to be apprehended, restrained, secured, and removed as alien enemies. And the President is authorized by proclamation to direct the conduct to be observed on the part of the United States towards such aliens; the manner and degree of the restraint to which they shall be subject, and in what cases, and upon what security, their residence shall be permitted; and to provide for the removal of those who, not being permitted to reside within the United States, shall refuse or neglect to depart therefrom; and to establish any other regulations which shall be found necessary in the premises and for the public safety. It provides, however, that such aliens not being chargeable with actual hostility shall be allowed the full time to remove stipulated in any existing treaty with the nation to which they belong; (see act of July 6, 1812, 2 Story's Laws, 1275,) or, when no such treaty exists, the President may ascertain and declare such reasonable time as may be consistent with the public safety and according to the dictates of humanity and national hospitality. All courts, State or Federal, are authorized to carry the provisions of this law into effect.—SHARSWOOD.

king and his natural-born subjects; which occasions the learned Montesquieu \*261] to remark with a degree of admiration, "that the English have made the protection of *foreign* merchants one of the articles of their *national* liberty."<sup>(r)</sup> But indeed it well justifies another observation which he has made,<sup>(s)</sup> "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:<sup>(t)</sup> and equally different from the bigotry of the canonists, who looked on trade as inconsistent with Christianity,<sup>(u)</sup> 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.<sup>(w)</sup>

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.<sup>(x)</sup> I shall only further remark, that the king is not bound by any act of parliament, unless he be named therein by special and particular words. The most general words that can be devised ("any person or persons, bodies politic or corporate, &c.") affect not him in the least, if \*262] they may tend to restrain or diminish any of his rights or interests.<sup>(y)</sup>

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:<sup>(z)</sup> and, likewise, the king may take the benefit of any particular act, though he be not named.<sup>(a)</sup>

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 eniisting 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 forts and places of strength, ever was and is the

(\*) Sp. L. 20, 13.

(\*) Ibid. 23, 6.

(\*) *Nobiliores natalibus, et honorum luce conspicuos, et patrimonio ditiores, perniciosum urbidus mercimonium exercere prohibemus.* C. 4, 63, 3.

(\*) *Homo mercator vir aut nunquam potest Deo placere: et ideo nullus Christianus debet esse mercator: aut si voluerit esse, proficiatur de ecclesia Dei.* Decret. 1, 63, 11.

(\*) *Falsa sit penitentia [laici] cum peccatis ab officio curiali vel negotiali non recedit, quae sine peccatis agi vult ratione non preceat.* Act. Concil. apud Baron. c. 16.

(\*) Ch. 2, page 154.

(\*) 11 Rep. 74.

(\*) Ibid. 71.

(\*) 7 Rep. 32.

\*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.<sup>(a)</sup> [\*263

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, 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 Hen. II., 1115 castles subsisting in England. The inconveniences of which, when granted out to private subjects, the lordly barons of those times, was severely felt by the whole kingdom; for, as William of Newburgh remarks in the reign of king Stephen, "*erant in Anglia quodammodo tot reges vel potius tyranni, quot domini castellarum.*:" 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 license 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 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 feudal 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 merchandise 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 & 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 merchandise.

The erection of beacons, light-houses, and sea-marks, is also a branch of the

(a) 2 Inst. 30.

(b) Cowel's Interpr. tit. *castellarum operatio*. Seld. Jan.

Angl. 1, 42.

(c) 2 Inst. 31.

(d) 1 Inst. 5.

(e) 2 Feud. l. 56. Crag. 1, 15, 15.

(f) F. N. B. 113.

(g) Dav. 9, 56.

(h) Madox, Hist. Exch. 530.

(i) 4 Inst. 148.

14 "The President shall be commander-in-chief of the army and navy of the United States, and of the militia of the several States when called into the actual service of the United States." Const. U. S. art. 2, s. 2.—SHARSWOOD.



\*265] 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 empowered to set up any beacons or sea-marks wherever they shall think them necessary; and if the owner of the land or any other person shall destroy them, or shall take down any 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.

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 license; 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 license obtained; among which were reckoned all peers,

\*266] on account of their being counsellors of \*the crown; all knights, 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 license; *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 everybody has, or at least assumes, the liberty of going abroad when he pleases. Yet undoubtedly if the king, by writ of *ne exeat regnum*, under his great seal or privy seal, thinks proper to prohibit him from so doing; or if the king sends a writ to any man, when abroad, commanding his return; and, in either case, the subject disobeys; it is a high contempt of the king's prerogative, for which the offender's lands shall be seized till he return; and then he is liable to fine and imprisonment.(r)<sup>11</sup>

(k) 3 Inst. 204. 4 Inst. 148.

(l) Rot. Claus. 1 Ric. II. m. 42. Pryn. on 4 Inst. 136.

(m) Sid. 158. 4 Inst. 149.

(n) F. N. B. 85.

(o) C. 123.

(p) 3 Inst. 175.

(q) 5 Ric. II. c. 2.

(r) 1 Hawk. P. C. 22.

<sup>11</sup> 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 showing 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

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*.<sup>(s)</sup> 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 [ \*267 large; but, as it would be impracticable to render complete justice to every individual, by the people in their collective capacity, therefore every nation has committed that power to certain select magistrates, who with more ease and expedition can hear and determine complaints; and in England this authority has immemorially been exercised by the king or his substitutes. He therefore has alone the right of erecting courts of judicature; for, though the constitution of the kingdom hath 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 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 depositories of the fundamental laws of the kingdom, and have gained a known and stated jurisdiction, regulated by certain established rules, which the crown itself cannot now alter but by act of parliament.<sup>(t)</sup> 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*,<sup>(u)</sup> and their salaries ascertained and established; but that it may be lawful to remove them on the ad-

(s) *Ad hoc autem creatus est et electus, ut justitiam faciat universis.* Bract. l. 3, tr. 1, c. 9.

(\*) During pleasure; as long as they shall conduct themselves properly.

(t) 2 Hawk. P. C. 2.

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 of equity for a demand, for which the defendant cannot be arrested in an action at law, upon the 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. The affidavit must state sufficient proof of the intention of the party to go abroad, and the plaintiff must swear that the defendant is indebted to him a certain sum, which sum is marked upon the writ, and for which security must be found. 3 Bro. 370. And if the sum is paid into court, the writ will be discharged. 1 Ves. Jun. 96.—CHRISTIAN.

This writ of *ne exeat* has in modern times been applied as a civil remedy in chancery, to prevent debtors escaping from their creditors. It amounts, in ordinary civil cases, to nothing more than process to hold to bail or compel a party to give security to abide the decree. In this country, the writ of *ne exeat* is not in use except in chancery, for civil purposes, between party and party. No citizen can be sent abroad, or under the existing law of the land prevented from going abroad, except in those cases in which he may be detained by civil process or upon a criminal charge. The constitutions of several of the United States have declared that all people have a natural right to emigrate from the State, and have prohibited the interruption of that right. 2 Kent's Com. 34.—SHARSWOOD

dress of both houses of parliament. And now, by the noble improvements of that law, in the statute of 1 Geo. III. c. 23, enacted at the earnest recommendation of \*the king himself from the throne, the judges are continued  
 \*268] in their offices during their good behaviour, notwithstanding any demise of the crown, (which was formerly held(w) immediately to vacate their seats,)<sup>18</sup> 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."<sup>(x)</sup><sup>19</sup>

In criminal proceedings, or prosecutions for offences, it would still be a higher absurdity if the king personally sat in judgment; because, in regard to these, he appears in another capacity, that of *prosecutor*. All offences are either against the king's peace, or his crown and dignity; and are so laid in every indictment. For though in their consequences they generally seem (except in the case of treason, and a very few others) to be rather offences against the kingdom than the king, yet as the public, which is an invisible body, has delegated all its power and rights, with regard to the execution of the laws, to one visible magistrate, all affronts to that power, and breaches of those rights, are immediately offences against him to whom they are so delegated by the public. He is therefore the proper person to prosecute for all public offences and breaches of the peace, being the person injured in the eye of the law. And this notion was carried so far in the old Gothic constitution, (wherein the king was bound by his coronation oath to conserve the peace,) that in case of any forcible injury offered to the person of a fellow-subject, the offender was accused

(w) Lord Raym. 747.

(x) Com. Jour. 3 Mar. 1761.

<sup>18</sup> All their commissions became vacant upon the demise of the crown, till they were continued for six months longer by 1 Anne, 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."—CHRISTIAN.

<sup>19</sup> The learned commentator considerably exaggerates the "noble improvement" in the law effected by 1 Geo. III. c. 23. "The independence of the judges," says Mr. Hallam, "we owe to the act of settlement, not, as ignorance and adulation have perpetually asserted, to George III." Const. Hist. iii. 262.—HARGRAVE.

But though the act of settlement rendered the judges independent of the king, they remained dependent upon the successor, in case of the demise of the crown, for reappointment. It ought not therefore to be doubted that the statute Geo. III. accomplished a valuable object.

"The judicial power of the United States shall be vested in one supreme court, and in such inferior courts as Congress may from time to time ordain and establish. The judges, both of the supreme and inferior courts, shall hold their offices during good behaviour, and shall at stated times receive for their services a compensation, which shall not be diminished during their continuance in office." Const. U. S. art. 3, s. 1. "The judges are appointed by the President, by and with the advice and consent of the Senate." Ibid. art. 2, s. 2.

Judge Story has remarked that the salaries of judicial officers may from time to time be altered as occasion shall require, yet so as never to lessen the allowance with which any particular judge comes into office, in respect to him. 3 Story on the Const. 493. It was evidently his opinion that when the salary of a judge had been increased after his appointment the legislature might again reduce it. Chancellor Kent evidently sides with this view, and cites The Federalist, No. 79. 1 Kent's Com. 295. The contrary, however, has been solemnly adjudged by the Supreme Court of Pennsylvania in the case of Commonwealth vs. Mann, 5 Watts & Serg. 403. Such an act is within the letter of the constitution, and within its spirit, if we must allow that the great object of the provision was to secure the independence of the judges.—SHARSWOOD.

of a kind of perjury in having violated the king's coronation oath, *dicebatur freyisse juramentum regis juratum.*(y) And hence also arises another [\*269] branch of the prerogative, that of *pardoning* offences; for it is reasonable that he only who is injured should have the power of forgiving.<sup>20</sup> Of prosecutions and pardons I shall treat more at large hereafter, and only mention them here in this cursory manner to show the constitutional grounds of this power of the crown, and how regularly connected all the links are in the vast chain of prerogative.

In this distinct and separate existence of the judicial power in a peculiar body of men, nominated indeed, but not removable 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 and a minister of state. And, indeed, that the absolute power claimed and exercised in a neighbouring nation is more tolerable than that of the eastern empires, is in great measure owing to their having vested the judicial power in their parliaments, a body separate and distinct from both the legislative and executive; and, if ever that nation recovers its former liberty, it will owe it to the efforts of those assemblies. In Turkey, where every thing is centred in

(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 freyisse. Rot. Parl.* 25 *Edw.* III.

<sup>20</sup> "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. Litt.* 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 vs. 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.—*CHITTY*.

"The President shall have power to grant reprieves and pardons for offences against the United States, except in cases of impeachment." *Const. U. S.* art. 2, s. 2.—*SHARWOOD.*

\*270] 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.<sup>(z)</sup> 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;<sup>(a)</sup> for a nonsuit is the desertion of a suit or action by the non-appearance of the plaintiff in court.<sup>21</sup> 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.<sup>(b)</sup>

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)<sup>(c)</sup> 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,<sup>(d)</sup> 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 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 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.<sup>(e)</sup><sup>22</sup>

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 encour-

(z) Fortesc. c. 8. 2 Inst. 186.

(a) Co. Litt. 139.

(b) Finch, 1, 81.

(c) 3 Inst. 162.

(d) 4 Mod. 177, 179.

(e) Stat. 1 Edw. VI. c. 12.

<sup>21</sup> But the attorney-general may enter a *non vult prosequi*, which has the effect of a nonsuit. Co. Litt. 139.—CHRISTIAN.

<sup>22</sup> 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.—CHITTY.

aged 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 him with 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 and knighthood, and other titles, are received by immediate grant from the crown: either expressed in writing, by writs or letters patent, as in the creations of peers and baronets, or by corporeal investiture, as in the creation of a simple knight. [\*272

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.<sup>(f)</sup> 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.<sup>23</sup>

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,<sup>24</sup> as shall seem good to his royal wisdom:<sup>(g)</sup> or such as converting aliens, or persons born out of the king's dominions, into denizens; whereby some very considerable privileges of natural-born subjects are conferred upon them. Such also is the prerogative of erecting corporations; whereby a number of private persons are united and knit together, and enjoy many liberties, powers, and immunities in their politic \*capacity, which they were utterly incapable of in their natural. Of aliens, denizens, [\*273 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.<sup>25</sup>

(f) 2 Inst. 533.

(g) 4 Inst. 361.

<sup>23</sup> No title of nobility can be granted by any State or by the United States; and no person holding any office of profit or trust under them shall, without consent of Congress, accept of any present, emolument, office, or title of any kind whatever, from any king, prince, or foreign state. Const. U. S. art. 1, s. 9, 10. In case any alien, applying to be admitted to citizenship, shall have borne any hereditary title or been of any of the orders of nobility in the kingdom or state from which he came, he shall at the time of his admission make an express renunciation of his title or order of nobility in the court where his application is made, which shall be recorded in the said court. Act of Congress 14 April, 1802, s. 1.

The power of appointment to office under the United States is vested in general in the President, by and with the advice and consent of the Senate; the right of nomination being in the President. But Congress may by law vest the appointment of such inferior officers as they may think proper in the President alone, in the courts of law, or in the heads of department. Const. U. S. art. 2, s. 2.—SHARSWOOD.

<sup>24</sup> 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.—CHRISTIAN.

<sup>25</sup> The power to establish a uniform rule of naturalization is vested in Congress. Const. U. S. art. 2, s. 8. The prevailing opinion is that this power is exclusive, in other words, that when Congress have exercised it the States are precluded from doing the same thing. 1 Kent's Com. 424. There is no express power in Congress to erect corporations.

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.<sup>(h)</sup>

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 merchandise; 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.<sup>(i)</sup><sup>28</sup>

\*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.<sup>(k)</sup> The limitation of these public resorts to such time and such place as may be most convenient for the neighbourhood, forms a part of economics, or domestic polity, which, considering the kingdom as a large family, and the king as the master of it, he clearly has a right to dispose and order as he pleases.

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.<sup>(l)</sup> This standard was originally kept at

(\*) *Disputare de principali judicio non oportet; sacrilegii enim instar est, dubitare an it dignus sit, quem elegerit imperator.* C. 9, 29, 3.

(i) Co. Litt. 172. Id. Raym. 181. 1642.

(k) 2 Inst. 220.

(l) *Gr. Custom.* c. 16.

A proposition to delegate to them such a power was rejected in the federal convention. Whether Congress can grant a charter as an incident to the powers granted, and a means of carrying them into execution, is a much-vexed question, upon which the constitutionality of a federal bank depends.—SHARSWOOD.

<sup>28</sup> "Congress have power to regulate commerce with foreign nations, and among the several States, and with the Indian tribes." Const. U. S. art. 1, s. 8. Whether this is or is not a power exclusive of the several States, is a question which does not yet appear to be fully settled. The Passenger cases, 7 Howard, S. C. Rep. 285.—SHARSWOOD

Winchester, and we find in the laws of king Edgar, (m) near a century before the conquest, an injunction that one measure, which was kept at Winchester, should be observed throughout the realm. Most nations have regulated the standard of measures of length by \*comparison with the parts of the human body; as the palm, the hand, the span, the foot, the cubit, the ell, (*ulna*, or arm,) the pace, and the fathom. But, as these are of different 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 & 12 W. III. c. 20. In king John's time, this ordinance of king Richard was \*frequently dispensed with for money, (p) which occasioned a provision to be made for enforcing it, in the great charters 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. †

(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.  
 (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.

† 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 seizing 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 & 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.—CHRISTIAN.

The power to fix the standard of weights and measures is in Congress. Const. U. S. art. 1, s. 8 This power has not as yet been exercised except in regard to the custom-houses of the United States, and by distributing a complete set of all the weights and



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 merchandise 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 \*277] three centuries; and the quantity is daily increasing. \*The consequence is, that more money must be given now for the same commodity than was given a 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 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.<sup>28</sup>

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measures adopted as standards for the use of the several custom-houses, to be delivered to the governor of each State in the Union or such person as he may appoint, for the use of the States respectively, to the end that a uniform standard of weights and measures may be established throughout the United States. Resolution of Congress, June 14, 1836. 4 Story's Laws, 2519.—SHARSWOOD.

<sup>28</sup> In considering the prices of articles in ancient times, regard must always be had to the weight of the shilling, or the quantity of silver which it contained at different periods. From the conquest till the 20th year of Edw. III. a pound sterling was actually a pound troy-weight of silver, which was divided into twenty shillings; so if ten pounds at that time were the price of a horse, the same quantity of silver was paid for it as is now given, if its price is thirty pounds.

This therefore is one great cause of the apparent difference in the prices of commodities in ancient and modern times. About the year 1347, Edward III. coined twenty-two shillings out of a pound; and five years afterwards he coined twenty-five shillings out of the same quantity. Henry V., in the beginning of his reign, divided the pound into thirty shillings, and then of consequence the shilling was double the weight of a shilling at present. Henry VII. increased the number to forty, which was the standard number till the beginning of the reign of Elizabeth. She then coined a pound sterling of silver into sixty-two shillings. And now by 56 Geo. III. c. 68, the pound troy of standard silver, eleven ounces two pennyweights fine, &c., may be coined into sixty-six shillings. See "Money," in the Index to Hume's Hist. Dr. Adam Smith, at the end of his first volume, has given tables specifying the average prices of wheat for five hundred and fifty years back, and has reduced for each year the money of that time into the money of the present day. But in his calculation he has called the pound since Elizabeth's time sixty shillings. Taking it at that rate, we may easily find the equivalent in modern money of any sum in ancient time, if we know the number of shillings which weighed a pound, by this simple rule: As the number of shillings 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

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,<sup>(v)</sup> 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. 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.<sup>29</sup>

As to the impression, the stamping thereof is the unquestionable prerogative of the crown: for, though divers bishops and monasteries had formerly the privilege of coining money, yet, as Sir Matthew Hale observes,<sup>(w)</sup> this was usually done by special grant from the king, or by prescription, which supposes one; and therefore was derived from, and not in derogation of, the royal prerogative. Besides that, they had only the profit of the coinage, and not the power of instituting either the impression or denomination; [\*278 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,<sup>(x)</sup> and called esterling or sterling metal; a name for which there are various reasons given,<sup>(y)</sup> but none of them entirely satisfactory.<sup>30</sup> 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

<sup>(v)</sup> 2 Inst. 577.

<sup>(w)</sup> 1 Hist. P. C. 191.

<sup>(x)</sup> 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 21s. 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.

<sup>(y)</sup> Spelm. Gloss. 293. Dufresne, tit. 165. The most plausible opinion seems to be that adopted by those two etymologists, that the name was derived from the *Esterlingi*, or *Esterlinge*, 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.

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.—CHRISTIAN.

<sup>29</sup> 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.—CHRISTIAN.

<sup>30</sup> Dr. Adam Smith, in his inestimable work, the "Inquiry into the Nature and Causes of the Wealth of Nations," vol. i. p. 39, tells us that "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."—CHRISTIAN.

value,(z) though Sir Matthew Hale(a) appears to be of another opinion.<sup>31</sup> 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 deery, or cry down, any coin of the kingdom, and make it no longer current.(c)<sup>32</sup>

VI. The king is, lastly, considered by the laws of England as the head and supreme governor of the national church.

To enter into the reasons upon which this prerogative is founded is matter rather of divinity than of law. I shall therefore only observe that, by statute 26 Hen. VIII. c. 1, (reciting that the king's majesty justly and rightfully is and ought \*to be the supreme head of the church of England; and so had \*279] been recognised 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.

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 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)<sup>33</sup> This constitution is said to be owing to the policy of

(a) 2 Inst. 577.

(b) 1 Hal. P. C. 194.

(c) *Ibid.* 197.

(d) 1 Hal. P. C. 197.

(e) 4 Inst. 322, 323.

(f) 12 Rep. 72.

(g) In the diet of Sweden, where the ecclesiastics form one of the branches of the legislature, the chamber of the clergy resembles the convocation of England. It is composed of the bishops and superintendents, and also of deputies, one of which is chosen, by every ten parishes or rural deanery. *Mod. Un. Hist.* xxxiii. 18.

<sup>31</sup> 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 of sterling money, and had given a bond to repay it on a certain future day. In the mean time, queen Elizabeth, 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 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.—CHRISTIAN.

<sup>32</sup> Congress have power "to coin money, regulate the value thereof and of foreign coin, and to provide for the punishment of counterfeiting the securities and current coin of the United States." Const. U. S. art. 1, s. 8.—SHARSWOOD.

<sup>33</sup> And by stat. 8 Hen. 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 pope, *temp.* Edw. I., to have arrogated that elevated dignity,) yet, as king of England, we find a remarkable exercise of power delegated by him to the bishops:—"An<sup>d</sup>

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 introduced a method of taxing ecclesiastical benefices, by consent of convocation.(g)<sup>34</sup> [ \*280

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 shown hereafter.<sup>35</sup>

(g) Gibb. Hist. of Exch. c. 4

the kyng hath grantyd to all byshopps that twyse in a yere they may curse all men doying aynth these artycles." *The grete Abregement of the Statutys of Englonde untill the xxij. yere of Kyng Henry the VIII.* 257. This clause is in effect found in the statute, or rather charter, *Statutum de tallagio non concedendo.* 34 Edw. I. c. vi.—CHRIST.

<sup>34</sup> 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 would bind themselves individually to contribute as bounty. This statute is cited 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.—CHRISTIAN.

<sup>35</sup> 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.—CHRISTIAN.

"No religious test shall ever be required as a qualification to any office or public trust under the United States." Const. U. S. art. 6, s. 3. "Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof." *Ibid.* Amendments, art. 1.—SHARSWOOD.

## 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 I must be obliged to recount, \*282] as part of the royal revenue, what lords of manors and other subjects \*frequently look upon to be their own absolute inherent rights; because they are and have been vested in them and their ancestors for ages, though in reality originally derived from the grants of our ancient princes.

I. The first of the king's ordinary revenues, which I shall take notice of, is of an ecclesiastical kind; (as are also the three succeeding ones) viz. the custody of the temporalities of bishops: by which are meant all the lay revenues, lands, and tenements, (in which is included his barony,) which belong to an archbishop's or bishop's see. And these upon the vacancy of the bishopric are immediately the right of the king, as a consequence of his prerogative in church matters; whereby he is considered as the founder of all archbishoprics and bishoprics, to whom during the vacancy they revert. And for the same reason, before the dissolution of abbeys, the king had the custody of the temporalities of all such abbeys and priories as were of royal foundation (but not of those founded by subjects) on the death of the abbot or prior.(a) Another reason may also be given, why the policy of the law hath vested this custody in the king; because as the successor is not known, the lands and possessions of the see would be liable to spoil and devastation, if no one had a property therein. Therefore the law has given the king, not the temporalities themselves, but the *custody* of the temporalities, till such time as a successor is appointed; with power of taking to himself all the intermediate profits, without any account of the successor; and with the right of presenting (which the crown very frequently exercises) to such benefices and other preferments as fall within the time of vacation.(b) This revenue is of so high a nature, that it could not be granted out to a subject, before, or even after, it accrued: but now by the statute 15 Edw. III. st. 4, c. 4 and 5, the king may, after the vacancy, lease the temporalities to the dean and chapter; saving to himself all advowsons, escheats, and the like. Our ancient kings, and particularly William \*283] Rufus, were not only remarkable for keeping the bishoprics a long time \*vacant, for the sake of enjoying the temporalities, but also committed horrible waste on the woods and other parts of the estate; and to crown all, would never, when the see was filled up, restore to the bishop his temporalities again, unless he purchased them at an exorbitant price. To remedy which, king Henry the First(c) granted a charter at the beginning of his reign, pro-

(a) 2 Inst. 15.

(b) Stat. 17 Edw. II. c. 14. F. N. B. 32.

(c) Matt. Paris.

missing neither to sell, nor let to farm, nor take any thing from, the domains of the church, till the successor was installed.<sup>1</sup> And it was made one of the articles of the great charter, (d) that no waste should be committed in the temporalities of bishoprics, neither should the custody of them be sold. The same is ordained by the statute of Westminster the 1st; (e) and the statute 14 Edw. III. st. 4, c. 4, (which permits, as we have seen, a lease to the dean and chapter,) is still more explicit in prohibiting the other exactions. It was also a frequent abuse, that the king would for trifling, or no causes, seize the temporalities of bishops, even during their lives, into his own hands: but this is guarded against by statute 1 Edw. III. st. 2, c. 2.

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 temporalities 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.<sup>2</sup> It is, I apprehend, now fallen into total disuse; though Sir Matthew Hale says (h) that it is due of common right,<sup>3</sup> and [\*284 that no prescription will discharge it.

III. The king also, as was formerly observed, (i) is entitled to all the tithes arising in extra-parochial 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 extra-parochial 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)<sup>4</sup> The tenths, or *decimæ*, were

(d) 9 Hen. III. c. 5.

(e) 3 Edw. I. c. 21.

(f) Co. Litt. 67, 341.

(g) F. N. B. 230.

(h) Notes on F. N. B. above cited.

(i) Page 113.

(j) 2 Inst. 647.

(k) F. N. B. 176.

(l) 3 Inst. 154.

<sup>1</sup> But queen Elizabeth kept the see of Eli vacant nineteen years, in order to retain the revenue. Strype, vol. iv. 351.—CHRISTIAN.

<sup>2</sup> So where the foundation was not royal, it was usual for the founders 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.—CURRY.

<sup>3</sup> The right to a corody does not seem peculiar to the prerogative, and it might be not only for life and years, but in fee, (2 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.—CURRY.

<sup>4</sup> There are several errors in the text, which Mr. Justice Coleridge has pointed out. The correct account is as follows:—In 1252 pope Innocent IV. granted all the first-fruits

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,<sup>(n)</sup> that the Levites "should offer the tenth part of their tithes as a heave-offering to the Lord, \*285] and give it to Aaron the *high* priest." But \*this claim of the pope met with a vigorous resistance from the English parliament; and a variety of acts were passed to prevent and restrain it, particularly the statute 6 Hen. IV. c. 1, which calls it a horrible mischief and damnable custom. But the popish clergy, blindly devoted to the will of a foreign master, still kept it on foot; sometimes more secretly, sometimes more openly and avowedly: so that in the reign of Henry VIII. it was computed, that in the compass of fifty years 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.<sup>5</sup>

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.<sup>6</sup> 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.<sup>7</sup>

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

(\*) Numb. xviii. 26.

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and tenths to Henry III. for three years, which occasioned a taxation in the following year, sometimes called the Norwich taxation and sometimes Innocent's valuation. In 1288, Nicholas IV. (not III., as in the text) granted the tenths to Edward I. for six years; and a new valuation was commenced in the same year by the king's precept, which valuation was, so far as it extended over the province of Canterbury, finished in 1291, and, as to York, also in the following year: the whole being under the direction of John, bishop of Winton, and Oliver, bishop of Lincoln. In 1318, a third taxation, entitled *Nova Taxatio*, was made, but this only extended over some part of the province of York. It became necessary chiefly in consequence of the Scottish invasion of the border counties, which rendered the clergy of those districts unable to pay tenths and first-fruits according to the higher valuation. It was made by virtue of royal mandate directed to the bishop of Carlisle.—HARGRAVE.

<sup>5</sup> 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.—CHRISTIAN.

<sup>6</sup> 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.—CHRISTIAN.

<sup>7</sup> 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 encumbrance 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.—CHRISTIAN.

of queen Anne restored to the church what had been \*thus indirectly [\*286 taken from it. This she did, not by remitting the tenths and first-fruits entirely; but, in a spirit of the truest equity, by applying these superfluities of the larger benefices to make up the deficiencies of the smaller. And to this end she granted her royal charter, which was confirmed by the statute 2 Anne, c. 11, whereby all the revenue of first-fruits and tenths is vested in trustees forever, to form a perpetual fund for the augmentation of poor livings. This is usually called queen Anne's bounty, which has been still further regulated by subsequent statutes.(o)<sup>8</sup>

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, *terre 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, honours, and lordships: the tenants of which had very peculiar pri

(\*) 5 Anne, c. 24. 6 Anne, c. 27. 1 Geo. I. st. 2, c. 10. 3 Geo. I. c. 10.

<sup>8</sup> These trustees were erected into a corporation, and have authority to make rules and 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 forever 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 excites 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.—CHRISTIAN.



vileges, as will be shown 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, <sup>(p)</sup> whereby all future grants or leases from the crown for any longer term than thirty-one years, or three lives, are declared to be void; except with regard to houses, which may be granted for fifty years. And no reversionary lease can be made, so as to exceed, together with the estate in being, the same term of three lives, or thirty-one years: that is, where there is a subsisting lease, of which there are twenty years still to come, the king cannot grant a future interest to commence after the expiration of the former, for any longer term than eleven years. The tenant must also be made liable \*287] 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. <sup>(q)</sup> The misfortune is, that this act was made too late, after almost every valuable possession of the crown had been granted away forever, or else upon very long leases; but may be of some benefit to posterity, when those leases come to expire.<sup>9</sup>

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 the 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. <sup>(r)</sup> 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, \*288] 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 provider 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. <sup>(s)</sup> And, with us in England, having fallen into disuse during the suspension of monarchy, king Charles at his resto-

<sup>(p)</sup> 1 Anne, st. 1, c. 7.

<sup>(q)</sup> 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.

<sup>(r)</sup> 4 Inst. 273.

<sup>(s)</sup> Mod. Un. Hist. xxxiii. 220.

<sup>9</sup> 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 rent.—CHRISTIAN.

ration 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 forever, the hereditary excise of fifteen pence per barrel on all beer and ale sold in the kingdom, and a proportionable sum for certain other liquors. So that this hereditary excise, the nature of which shall be further 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 licenses, or the rents payable to the crown by such persons as are licensed to sell wine by retail throughout England, except in a few privileged places. These were first settled on the crown by the statute 12 Car. II. c. 25; and, together with the hereditary excise, made up the equivalent in value for the loss sustained by the prerogative in the abolition of the military tenures, and the right of pre-emption and purveyance; but this revenue was abolished by the statute 30 Geo. II. c. 19, and an annual sum of upwards of 7000*l.* *per annum*, issuing out of the new stamp duties imposed on wine licenses, was settled on the crown in its stead.

\*VIII. An eighth branch of the king's ordinary revenue is usually reckoned to consist in the profits arising from his forests. Forests are waste grounds belonging to the king, replenished with all manner of beasts of chase or venary; which are under the king's protection, for the sake of his royal recreation and delight: and to that end, and for preservation of the king's game, there are particular laws, privileges, courts, and 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 amercedments or fines levied for offences against the forest laws. But as few, if any, courts of this kind for levying amercedments(*t*) have been held since 1632, 8 Car. I.<sup>10</sup> and as, from the accounts given of the proceedings in that court by our histories and law-books,<sup>(u)</sup> nobody would now wish to see them again revived, it is needless, at least in this place, to pursue this inquiry any further.

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 amercedments 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 recompense for the trouble he undertakes for the public. These, in process of time, have been almost all granted out to private persons, or else appropriated to certain particular uses: so that, though our law-proceedings are still loaded with their payment, very little of them is now returned into the king's exchequer; for a part of whose royal maintenance they were originally intended. All future grants of them, however, by the statute 1 Anne, st. 1, c. 7, are to endure for no longer time than the prince's life who grants them.

X. A tenth branch of the king's ordinary revenue, said to be grounded on the consideration of his guarding and protecting the seas from pirates and robbers, is the right to *royal fish*, which are whale and sturgeon: and these, when either thrown ashore, or caught near the 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;<sup>(w)</sup> and

(*t*) Roger North, in his life of lord keeper North, (43, 44,) mentions an eyre, or *ter*, 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, 293.

(*v*) Plowd. 315.

(*w*) Stiernh. *de jure Sueonum*, l. 2, c. 8. *Gr. Custom*, cap. 17.

<sup>10</sup> This was one of the odious modes adopted by Car. I. to raise a revenue without the aid of parliament.—CHRISTIAN.

from one of these it was probably derived to our princes. It is expressly claimed and allowed in the statute *de prerogativa regis*:(x) and the most ancient treatises of law now extant make mention of it,(y) though they seem to have made a distinction between whale and sturgeon, as was incidentally observed in a former chapter.(z)

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 those 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.(a) But this was undoubtedly adding sorrow to sorrow, and was consonant neither \*291] to reason nor humanity. Wherefore it was first \*ordained by king Henry I. that if any person escaped alive out of the ship, it should be no wreck;(b) and afterwards king Henry II. by his charter(c) 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,(d) not only established these concessions, by ordaining that the owner, if he was shipwrecked and escaped, "*omnes res suas liberat et quietas haberet*,"(e) 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.(f) 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.(g) 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 Westminster, the first,(h) 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;(i) 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;(j) for it is now held(k) that not only if any live thing escape, but if proof can be made \*292] of 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,(l) 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,(m) 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.(n) This revenue of wrecks is frequently granted out to lords of manors as a royal fran-

(x) 17 Edw. II. c. 11.

(y) Bracton, l. 3, c. 3. Britton, c. 17. Fleta, l. 1, c. 45 and 46. *Memorand. Seacch. H.* 24 Edw. I. 37, prefixed to Maynard's Year Book of Edward II.

(z) Ch. 4, page 223.

(a) Dr. and St. d. 2, c. 51.

(b) Spelm. *Cod. apud* Wilkins, 305.

(c) 26 May, A.D. 1174. 1 Rym. *Foed.* 86.

(d) Rog. Hoved. in *Ric. I.*

(e) "Should have all his goods freed and undisturbed."

(f) In like manner Constantine the Great, finding that by the imperial law the revenue of wrecks was given to the emperor's treasury or *fiscus*, re-ordained it by an edict, (Cod. II.

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 accipatur?*"

(g) Bract. l. 3, c. 3.

(h) 3 Edw. I. c. 4.

(i) *Gr. Coutum.* c. 17.

(j) Flet. l. 1, c. 44. 2 Inst. 167. 5 Rep. 107.

(k) Hamilton vs. Daviea. Trin. 11 Geo. III. R. R.

(l) § 28.

(m) 2 Inst. 168.

(n) Plowd. 166.

chise; 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.(o)

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.(p) 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;(q) much less can things *ligan* be supposed to be abandoned, since the owner has done all in his power to assert and retain his property. These three are therefore accounted so far a distinct thing from the former, that by the \*king's grant [\*293 to a man of wrecks, things *jetsam*, *flotsam*, and *ligan* will not pass.(r)

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.*"(s) For, by the statute 27 Edw. III. c. 13, if any ship be lost 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*. And 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.(t) And by statute 12 Anne, st. 2, c. 18, confirmed by 4 Geo. I. c. 12, in order to assist the distressed and prevent the scandalous illegal practices on some of our sea-coasts, (too similar to those on the Baltic,) it is enacted, that all head officers and others of towns near the sea, shall, upon application made to them, summon as many hands as are necessary, and send them to the relief of any ship in distress, on forfeiture of 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 [\*294 making holes in her, stealing her pumps, or otherwise, they are guilty of felony, without benefit of clergy. Lastly, by the statute 26 Geo. II. c. 19, plundering any vessel either in distress or wrecked, and whether any living creature be on board or not, (for, whether wreck or otherwise, it is clearly not the property of the populace,) such plundering, I say, or preventing the escape of any person that 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 salu

(o) 2 Inst. 168. Bro. Adr. tit. Wreck.

(p) 5 Rep. 106.

(q) *Quæ enim res in tempestate, levandæ navis causa ejiciuntur, hæc dominorum permanent. Quæ ita palam est, eas non eo animo ejicit, quod quis habere noñit.* Inst. 2. l. 1. § 48.

(r) 5 Rep. 108.

(s) Stiernh. *de jure Sueon.* l. 3, c. 5.

(t) F. N. B. 112.

tary regulations are made for the more effectually preserving ships of any nation in distress.(u)<sup>11</sup>

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.(v) By the old common law, if gold or silver be found in mines of base metal, according to the opinion of some, the whole was a royal mine, and belonged to the king; though others held that it only did so, if the quantity of gold or silver was of greater value than the quantity of base metal.(w) But now by the statutes 1 W. and M. st. 1, c. 30, and 8 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 quantities; but that the king or \*persons claiming royal mines under his authority, may have the ore, (other than tin ore in the counties of Devon and Cornwall,) paying for the same a price stated in the act. This was an extremely reasonable law; for now private owners are not discouraged from working mines, through a fear that they may be claimed as royal ones; neither does the king depart from the just rights of his revenue, since he may have all the precious metal contained in the ore, paying no more for it than the value of the base metal, which it is supposed to be; to which base metal the land-owner is by reason and law entitled.

XIII. To the same original may in part be referred the revenue of treasure-trove, (derived 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, 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.(x)<sup>12</sup> 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.(y) So that it seems it is the *hiding*, and not the *abandoning* of it, that gives the king a property: Bracton(z) 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

(\*) 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 plun-

dered any goods cast on shore. Lindenbrog. *Ord. LL. an. 619* 146, 715.

(\*) 2 Inst. 577.

(\*) Plowd. 326.

(\*) 3 Inst. 132. Dalt. of Sheriffs, c. 16.

(\*) Britt. c. 17. Finch, L. 177.

(\*) L. 3, c. 3, § 4.

<sup>11</sup> By act of Congress, 3 March, 1825, the penalty of a fine not exceeding \$5000, and confinement at hard labour not exceeding ten years, according to the aggravation of the offence, is imposed on any person who shall plunder any wreck or hold out false lights.

It has been settled that the owner of the sea-shore has a title to the possession of wreck thrown thereon and never reclaimed by the owner, and may maintain an action against a stranger for taking it, and recover its value as damages. *Baker vs. Bates*, 13 Pickering, 255. It has also been decided that the States have jurisdiction to regulate wrecks, and that a wreck-sale made by authority of the statute laws of a State is valid to pass the title to the property, when there is no owner or agent present to protect or claim the property. 5 Mason, 465.

A liberal construction of the revenue-laws has always been made in favour of wrecked property. Thus, it has been decided by the Supreme Court of the United States (4 Cranch, 347) that goods saved from a wreck and landed are not liable to forfeiture because unaccompanied by such marks and certificates as are required by law, nor because they were removed without the consent of the collector of the district, before the quantity and quality were ascertained and the duties paid; nor even if the goods thus landed are sold and enter into the consumption of the country. 3 Story's Rep. 68.—SHARSWOOD

<sup>12</sup> In this country the proprietor of the soil is entitled to it as against all the world except the real owner. Whether the real owner of the treasure may reclaim it would seem to depend upon whether it was originally hidden in the earth with the express or implied consent of the owner of the land. See 2 Kent's Com. 358.—SHARSWOOD.

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,<sup>13</sup> unless the owner appear and assert his right, which \*then proves that the loss was by accident, and not with an intent [\*296 to renounce his property.

Formerly all treasure-trove belonged to the finder;(a) as was also the rule of the civil law.(b) 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,(c) "*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,(d) 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.(e)

XIV. Waifs, *bona waviata*, are goods stolen, and waved or thrown away by the thief in his flight, for fear of being apprehended. These are given to the king by the law, as a punishment upon the owner for not himself pursuing the felon and taking away his goods from him.(f) And therefore \*if the [\*297 party robbed do his diligence immediately to follow and apprehend the thief, (which is called making fresh *suit*), or do convict him afterwards, or procure evidence to convict him, he shall have his goods again.(g) 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.(h) If the goods are hid by the thief, or left anywhere 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.(i) The goods of a foreign merchant, though stolen and thrown away in flight, shall never be waifs:(j) 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.<sup>14</sup>

XV. Estrays are such valuable animals as are found wandering in any manor

(a) Bracton, l. 3, c. 3. 3 Inst. 133.  
 (b) Ff. 41, l. 31.  
 (c) De Jur. d. & p. l. 2, c. 8, § 7.  
 (d) Glanv. l. 1, c. 2. Crag. l. 16, 40.  
 (e) 3 Inst. 133.

(f) Cro. Eliz. 694.  
 (g) Finch, l. 212.  
 (h) Ibid.  
 (i) 5 Rep. 109.  
 (j) Fitz. Abr. tit. Estray, l. 3 Bulstr. 19.

<sup>13</sup> This certainly is true, though it cannot be reconciled with the learned judge's doctrine, that all *bona vacantia* belong to the king.—CHRISTIAN.

<sup>14</sup> This prerogative of the crown was placed at the common law under so many checks, and it is so unjust in itself, that it may perhaps be considered as never adopted in the United States as against the real owner, and never put in practice as against the finder; though, as against him, I apprehend the title of the state would be deemed paramount. 2 Kent, 358. In the absence of express statute regulation, perhaps goods waved, if found on the highway, would belong to the finder as against all but the real owner; if on private property, to the proprietor of the land.—SHARSWOOD.

or lordship, and no man knoweth the owner of them; in which case the law gives them to the king as the general owner and lord paramount of the soil, in recompense for the damage which they may have done therein:<sup>15</sup> 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; (k) even though the owner were a minor, or under any other legal incapacity. (l) 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* \*298] *proxima \*villa vel pago, postremo coram ecclesia vel iudicio;*" and the space of a year was allowed for the owner to reclaim his property. (m) If the owner claims them within the year and day, he must pay the charges of finding, keeping, and proclaiming them. (n)<sup>16</sup> 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. (o) 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 (p) 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; (q) whence they are said to be royal fowl. The reason of which distinction seems to be, that, cattle and swans being of a reclaimable nature, the owner's property in them is not lost merely by their temporary escape; and they also, from their intrinsic value, are a sufficient pledge for the expense of the lord of the franchise in keeping them the year and day. For he that takes an estray is bound, so long as he keeps it, to find it in provisions and preserve it from damage; (r) and may not use it by way of labour, but is liable to an action for so doing. (s) Yet he may milk a cow, or the like; for that tends to the preservation, and is for the benefit, of the animal (t)<sup>17</sup>

(h) *Mirr.* c. 3, § 19.

(i) 6 *Rep.* 103. *Bro. Abr. tit. Estray*, Cro. Eliz. 716.

(\*) *Stiernh. de jur. Gohor.* L. 3, c. 5.

(\*) *Dalt. Sh.* 79.

(c) *Finch*, L. 177.

(f) *L. 1*, c. 43.

(g) 7 *Rep.* 17.

(r) 1 *Roll. Abr.* 889.

(s) *Cro. Jac.* 147.

(t) *Cro. Jac.* 148. *Noy* 119

<sup>15</sup> 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.—CHRISTIAN.

<sup>16</sup> 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.—CHRISTIAN.

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.—CHITTY.

<sup>17</sup> Estrays, when unreclaimed, are disposed of generally in the United States by the officers of the township where the estray is taken up, for the use of the poor or other public purposes. In the absence of statute regulation, if found on the highway, they

Besides the particular reasons before given why the king should have the several revenues of royal fish, shipwrecks, treasure-trove, waifs, and estrays, there is also one general reason which holds for them all; and that is, because they are *bona vacantia*, or goods in which no one 'else can claim a property. And therefore by the law of nature they belonged to the first occupant or finder; and so continued under the \*imperial law. But, in settling the [\*299 modern constitutions of most of the governments in Europe, it was thought proper (to prevent that strife and contention, which the mere title of occupancy is apt to create and continue, and to provide for the support of public authority in a manner the least burdensome to individuals) that these rights should be annexed to the supreme power by the positive laws of the state. And so it came to pass that, as Bracton expresses it, *(u) hæc quæ nullius in bonis sunt, et olim fuerunt inventoris de jure naturali, jam efficiuntur principis de jure gentium.* (v)<sup>18</sup>

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 consists 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-

(\*) L. 1, c. 12.

(v) "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."

belong to the finder against all but the real owner; if on private property, they are subject to distress, *damage freasant*, and may be held as a pledge until the owner makes good the damage. But if they have strayed through defect of the fences of the proprietor of the soil, the owner may reclaim them. One whose chattel has been wrongfully taken from him may enter upon the land of the taker peaceably, for the purpose of retaking, without subjecting himself even to nominal damages as a trespasser. 2 Watts & Serg. 225. All the books agree that, where an animal escapes from the possession of its owner by his consent, exclusive negligence, or other default, he cannot pursue it into the close of another without becoming a trespasser by his entry.—Ibid.

A person who takes up an estray cannot levy a tax upon it but by way of amends or indemnity. This is the doctrine of the common law. 1 Roll. Abr. 879, c. 5. Noy. Rep. 144. Salk. 686. And the Roman lawyers equally denied to the finder of any lost property a reward for finding it. "*Non probe petat aliquid*," says the Digest. Dig. 47, 2, 43, 9 Amory vs. Flynn, 10 Johns. 102.—SHARSWOOD.

<sup>18</sup> 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 vs. 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 superfluous to have instanced *averia*, and the sentence would certainly have been erroneous.—CHRISTIAN.



tion of the movables or personal estate; and in many cases a perpetual, in others only a temporary, loss of the offender's immovables or landed property, and have vested them both in the king, who is the person supposed to be offended, being the one visible magistrate in whom the majesty of the public resides. The particulars of these forfeitures will be more properly recited when we treat of crimes and misdemeanors. I therefore only mention them here, \*300] for \*the sake of regularity, as a part of the *census regalis*; and shall postpone for the present the further consideration of all forfeitures, excepting one species only, which arises from the misfortune rather than the crime of the owner, and is called a *deodand*.

By this is meant whatever personal chattel is the immediate occasion of the death of any reasonable creature: which is forfeited to the king, to be applied to pious uses, and distributed in alms by his high almoner; (w) 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: (x) 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: (y) 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 or 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 standing still. \*301] 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; (z) 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: (a) "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, (b) whatever was the cause of a man's death, by falling upon him, was exterminated or cast out of the dominions of the republic." Where a thing not in motion, is the occasion of a man's death, that part only which is the immediate cause is forfeited; as if a man be climbing up the wheel of a cart, and is killed by falling from it, the wheel alone is a deodand: (c) 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

(w) 1 Hal. P. C. 419. Fleta, l. 1, c. 25.

(x) Fitzh. *Abr. tit. Enditementi*, pl. 27. Staunf. P. C. 20, 21.

(y) 3 Inst. 57. 1 Hal. P. C. 422.

(z) *Omnia, que movent ad mortem, sunt Deo danda.* Bracton, l. 3, c. 5. "All things which while in motion cause death are to be offered to God." [This passage is cited

in a great many authors, but I cannot find it in Bracton.—COLERIDGE.]

(a) Exod. xxi. 28.

(b) *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. l. Coronæ*, 418.

(c) 1 Hal. P. C. 422.

<sup>19</sup> This was one of Draco's laws; and perhaps we may think the judgment, that a statue should be thrown into the sea for having 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.—CHRISTIAN.

the wound more dangerous, (as the cart and loading, which increase the pressure of the wheel,) are forfeited.(d) 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(e) as an accursed thing.(f) 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.(g) No deodands are due for accidents happening upon the high sea, that being out of the jurisdiction of the common law: but if a \*man falls from a boat or ship [\*302 in fresh water, and is drowned, it hath been said, that the vessel and cargo are in strictness of law a deodand.(h) 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.(i)<sup>20</sup>

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.<sup>21</sup>

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

XVIII. I proceed therefore to the eighteenth and last branch of the king's ordinary revenue; which consists in the custody of idiots, from whence we shall be naturally led to consider also the custody of lunatics.

An idiot, or natural fool, is one that hath had no understanding from his nativity; and therefore is by law presumed never likely to attain any. For which reason the custody of \*him and of his lands was formerly vested in the lord of the fee;(j) (and therefore still, by special custom, in some manors the lord shall have the ordering of idiot and lunatic copyholders;)(k)

(d) 1 Hawk. P. C. c. 26.

(e) A similar rule obtained among the ancient Goths. *Sic quis, me nesciente, quocunque meo telo vel instrumento in perniciem suam abutatur; vel ex sedibus meis cadat, vel in cataractum, et sub molendino meo confringatur, ipse aliqua mulcta plectatur; ut in parte infelicitatis mee numeretur, habuisse vel edificasse aliquid quo homo periret.* Stiernhook *de jure Goth.* l. 3, c. 4.

(f) Dr. and St. d. 2, c. 51.

(g) 3 Inst. 57.

(h) 3 Inst. 58. 1 Hal. P. C. 423. Molloy, *de Jur. Maritim* 2, 225.

(i) Foster of Homicide, 266.

(j) Flet. l. 1, c. 11, § 10.

(k) Dyer, 302. Hutt. 17. Noy. 27.

<sup>20</sup> 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?—CHITTY.

<sup>21</sup> Forfeiture of estate and corruption of blood, under the laws of the United States, and including cases of treason, are abolished. Act of Congress, April 20, 1790, s. 24, 1 Story's Laws, 88. Forfeiture of property in cases of treason and felony was a part of the common law, and must exist at this day in the jurisprudence of those States where it has not been abolished by their constitutions or by statute. Several of the State constitutions have provided that no attainder of treason or felony shall work corruption of blood or forfeiture of estate except during the life of the offender: and some of them have taken away the power of forfeiture absolutely, without any such exception. There are other State constitutions which impliedly admit the existence or propriety of the power of forfeiture, by taking away the right of forfeiture expressly in cases of suicide and deodand, and preserving silence as to other cases; and in one instance (Const. of Maryland) forfeiture of property is limited to the cases of treason and murder. 2 Kent's Com. 386.--SHARSWOOD.

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.(l) 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)(m) 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 alienating their lands, and their heirs from being disinherited.<sup>22</sup>

By the old common law there is a writ *de idiota inquirendo*, to inquire wheth a man be an idiot or not:(n) 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.(o) 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 feudal tenures, which has been since abolished.(p) 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] <sup>q</sup>A man is not an idiot if he hath any glimmering of reason, so that he can tell his parents, his age, or the like common matters. But a man who is born deaf, dumb, and blind is looked upon by the law as in the same state with an idiot:(r) he being supposed incapable of any understanding, as wanting all those senses which furnish the human mind with ideas.<sup>23</sup>

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.(s) A lunatic is indeed properly one that hath lucid intervals; sometimes enjoying his senses, and sometimes not, and that frequently depending upon the change of the moon.<sup>24</sup> But under the general name of *non compos mentis* (which Sir Edward Coke says is the most legal name)(t) are comprised not only lunatics, but persons

(l) F. N. B. 232.

(m) 4 Rep. 123. *Memorand. Scacch. 20 Edw. I.* (prefixed to Maynard's Year-Book of Edw. II.) fol. 20, 24.

(n) F. N. B. 232.

(o) 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*.

(p) 4 Inst. 203. Com. Jour. 1610.

(q) F. N. B. 233.

(r) Co. Litt. 42. *Fleta*, l. 6, c. 40.

(s) *Idiota a casu et infirmitate.* (*Mem. Scacch. 20 Edw. I.* in Maynard's Year-Book of Edw. II. 20.)

(t) 1 Inst. 246.

<sup>22</sup>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.—CHRISTIAN.

<sup>23</sup>In *Yong vs. Saut*, Dyer, 56, a., it was held that one who had become deaf, dumb, and blind by accident, not having been born so, was to be deemed *non compos mentis*. The presumption that a person deaf, dumb, and blind from his nativity is an idiot is only a legal presumption, and is, therefore, open to be rebutted by evidence of capacity. 1 Chitt. Med. Jur. 301, 345.—HARGRAVE. To the same effect are *Brown vs. Fisher*, 4 Johns. Ch. Rep. 441. *Christmas vs. Mitchell*, 3 Iredell Ch. 535.

In most of the United States, by the provisions of express statutes, an habitual drunkard is placed in the same class with lunatics, and the management of his property taken out of his hands. The proceedings to ascertain the fact, and the legal consequences, are in general the same as in the case of idiocy and lunacy.—SHARSWOOD.

<sup>24</sup>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.—CHITT.

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 purpose. For the law always imagines that these accidental misfortunes may be removed; and therefore only constitutes the crown a trustee for the unfortunate persons, to protect their property, and to account to them for all profits received, if they recover, or after their decease to their representatives. And therefore it is declared by the statute 17 Edw. II. c. 10, that the king shall provide for the custody and sustentation of lunatics, and preserve their lands and the profits of them for their use, when they come to their right mind; and the king shall take nothing to his own use: and, if the parties die in such estate, the residue shall be distributed for their souls by the advice of the ordinary, and of course (by the subsequent amendments of the law of administration) shall now go to their executors or administrators.

\*On the first attack of lunacy, or other occasional insanity, while 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.<sup>25</sup> 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. [ \*305

The method of proving a person *non compos* is very similar to that of proving him an idiot. The lord chancellor, to whom, by special authority from the king, the custody of idiots and lunatics is intrusted,<sup>(u)</sup> 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.<sup>26</sup> 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.<sup>(v)</sup> The heir is generally made the manager or committee of the estate, it being clearly his interest by good management to keep it in condition; accountable, however, to the court of chancery, and to the *non compos* himself, if he recovers, or otherwise to his administrators.

In this 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,

(\*) 3 P. Wms. 108.

(\*) 2 P. Wms. 638.

<sup>25</sup> 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 license 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*.—CHITTY.

<sup>26</sup> This rule, that the next of kin of a lunatic, if entitled to his estate upon his death, must not be committee of the person, has long ceased to be adhered to. 7 Ves. 591. If no one will accept the office of committee, a receiver of the lunatic's estate must be appointed with a salary, but who should be considered as committee and give proper security as such. 10 Ves. 622. 1 T & W. 639.—HARGRAVE.

The court may appoint a receiver of the lunatic's estate before the return of the inquisition under a commission of lunacy. In the matter of Kenton, 5 Binn. 613. The acts of a lunatic before office found are not void, but voidable. Jackson vs. Gumace, 2 Cowen, 552. After office found they are void. Pearl vs. McDowell, 3 T. T. Marsh, 658. An inquisition finding one a lunatic is only *prima facie*, not conclusive, evidence against a person not a party to it. Hutchinson vs. Sandt, 4 Rawle, 234. Drew vs. Clark, 5 Halst. 17.—SHARSWOOD.

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.(w) And, by the laws of Solon, such prodigals were branded with perpetual infamy.(x) But with us, when a man on an inquest of idiocy hath been \*returned an *unthrif*t, and not an *idiot*,(y) no further proceedings \*306] 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 every \*gentleman in the kingdom was \*307] to be stripped of such of his lands as were formerly the property of the crown; was to be again subject to the inconveniences of purveyances and pre-emption, the oppression of forest laws, and the slavery of feudal 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,(z) some part of his property in order to enjoy the rest

(w) *Solent prætores, si talem hominem invenerint, qui neque tempus neque finem expensarum habet, sed bona sua dilanderando et dissipando profundit, curatorem et dote, exemplo furiosi: et tandem erunt modo in curatore, quamdiu vel*

*furiosus sanitate, vel ille bonos mores, receperit. Ff. 27 10. 1.*

(x) Potter, *Antiq. h. l. c. 26.*

(y) Bro. *Ab. tit. Idiot. 4.*

(z) Page 232.

These extraordinary grants are usually called by the synonymous names of aids, subsidies, and supplies; and are granted, as we have formerly seen,<sup>(a)</sup> 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 looked upon as the peculiar province of the chancellor of the exchequer) may propose such scheme of [\*308 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 moneyed 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.<sup>27</sup>

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,<sup>(b)</sup> 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 movables belonging to the subject; when such movables, or personal estates, were a very different and a much less considerable thing than what they usually are at this day. Tenths are said to have been first granted under Henry the Second, who took advantage of the fashionable zeal for croisades, to introduce this new taxation, in order to defray the expense of a pious expedition to Palestine, which he really or seemingly had projected against Saladine, emperor of the Saracens; whence it was originally denominated the Saladine tenth.<sup>(c)</sup> But afterwards fifteenths were more usually granted than tenths. Originally the amount of these taxes was \*uncertain, being levied by assessments new made at every fresh grant of [\*309 the commons, a commission for which is preserved by Matthew Paris:<sup>(d)</sup> 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 Eng-

(a) Page 163.

(b) 2 Inst. 77. 4 Inst. 34.

(c) Hoved. A.D. 1158. Cartæ, l. 719. Hume, l. 32.

(d) A.D. 1232.

<sup>27</sup> "Representatives and direct taxes shall be apportioned among the several States which may be included within this Union, according to their respective numbers, which shall be determined by adding to the whole number of free persons, including those bound to service for a term of years and excluding Indians not taxed, three-fifths of all other persons." Const. U. S. art. 1, s. 2. "No capitation or other direct tax shall be laid, unless in proportion to the census or enumeration hereinbefore directed to be taken." Ibid. s. 9. It was decided by the Supreme Court of the United States that a duty laid upon carriages for the conveyance of persons was not a direct tax required to be apportioned among the several States according to numbers. The better opinion seems to be that the direct taxes contemplated by the constitution were only two,—viz.: a capitation or poll tax, and a tax on land. 3 Dallas, 171. A direct tax, if laid at all, must be laid on every State conformably to the census; and therefore Congress has no power to exempt any State from its due share of the burden. But Congress is not obliged to extend a tax to the District of Columbia and to the Territories; though, if they are taxed, the constitution gives the rule of assessment. 5 Wheaton, 317.—SHARSWOOD.

lan' 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:(e) 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 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*,(f) 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(g) 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,(h) 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.(i) But they all gradually fell into disuse upon the introduction of subsidies, about the time of king Richard II. and king Henry IV. These were a tax, not immediately imposed upon property, but upon persons in respect of their reputed estates, after the nominal rate of 4s. in the pound for lands, and 2s. 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,(j) 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 \*311] \*commons, to be levied in three 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 further 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, talliaiges, 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

(e) See the second book of these Commentaries.

(f) Cap. 14.

(g) 5 Hen. III. c. 37.

(h) 25 Edw. I. c. 5 and 6. 34 Edw. I. st. 4, c. 1. 14 Edw. III. st. 2, c. 1.

(i) Madox, Hist. Exch. 480.

(j) 4 Inst. 33.

(k) Hist. b. 2.

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,<sup>(l)</sup> 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 recompense for which the beneficed clergy have from that period been allowed to vote at the election of knights of the shire;<sup>(m)</sup> and thenceforward also the practice of giving ecclesiastical subsidies hath fallen into total disuse.<sup>28</sup>

The lay subsidy was usually raised by commissioners appointed by the crown, or the great officers of state; and therefore in the beginning of the civil wars between Charles I. and his parliament, the latter, having no other sufficient revenue to support themselves and their measures, introduced [312 the practice of laying weekly and monthly assessments<sup>(n)</sup> 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.<sup>(o)</sup> 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 temporality, 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.<sup>29</sup> 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.<sup>(p)</sup> 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 1s. in the pound of the value of the estates given in. And according to this enhanced valuation, from the year 1693 to the present, a period of above fourscore years, the land-tax has continued an annual charge upon the subject; above half the time at 4s. in the pound, sometimes at

(l) 4 Inst. 33.

(m) Dalt. of Sheriffs, 418. Gilb. Hist. of Exch. c. 4.

(n) 29 Nov. 4 March, 1542.

(o) One of these bills of assessment, in 1656, is preserved in Scobell's Collection, 400.

(p) Com. Jour. 26 June, 9 Dec. 1678.

<sup>28</sup> 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.—CHRISTIAN.

<sup>29</sup> 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 & 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.

To those who have leisure and opportunity it might afford entertainment to inquire what was the difference of the assessments returned into the exchequer in the years 1656, 1670, and 1692. For besides the present disproportion in the assessment, necessarily arising from a more improved cultivation of land in some counties, it is commonly supposed that there was an original inequality in the valuation of estates, from the liberality or fraud of the owners and assessors in their representations of the value, according to their attachment or aversion to the new government.—CHRISTIAN.



8s., sometimes at 2s., twice(q) at 1s., but without any total intermission. The modicum has been 2s. 3d. in the pound, being equivalent with twenty-three \*313] 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.

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, 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;<sup>30</sup> 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.<sup>31</sup>

The perpetual taxes are,

I. The customs; or the duties, toll, tribute, or tariff, payable upon merchandise exported and imported. The considerations upon which this revenue (or the more ancient part of it, which arose only from exports) was invested in the king, were said to be two:(r) 1. Because he gave the subject leave to depart the kingdom, and to carry his goods along with him. 2. Because the king was bound of common right to maintain and keep up the ports and havens, and to protect the merchants 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 shown,(t) that the king's first claim to them was \*314] by \*grant of parliament 3 Edw. I., though the record thereof is not now extant.<sup>32</sup> And indeed this is in express words confessed by statute 25

(q) In the years 1732 and 1733.  
(r) Dyer, 165.

(s) Dyer, 43, pl. 24.  
(t) 2 Inst. 58, 59.

<sup>30</sup> 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, 9½*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.—CHRISTIAN.

<sup>31</sup> Though the land-tax is supposed, and stated in the annual act, to raise, at 4s. in the pound, an income of 1,989,673*l.* 7s. 10½*d.* for England; and 47,954*l.* 1s. 2*d.* for Scotland; making in all 2,037,627*l.* 9s. 0½*d.*; yet Sir John Sinclair shows, 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 —CHRISTIAN.

<sup>32</sup> 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 et vendendum sine omnibus malis tolnetis, per antiquas et rectas consuetudines*; and he says these are subsidies or customs granted by common consent *pro bono publico*. 2 Inst. 53. 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

Edw. I. c. 7, wherein the king promises to take 10 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 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 woollens, 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 3d. in the pound, due from merchant strangers only, for all commodities, as well imported as exported; which was usually called the alien's duty, and was first granted in 31 Edw. I.(w) But these ancient hereditary customs, especially those on wool and woollens, 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 of wine from every [\*315 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 2s. 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 12d. in the pound, on all other merchandise 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. 10) express it, for the defence of the realm, and the keeping and safeguard of the seas, and for the intercourse of merchandise safely to come into and pass out of the same. They were at first usually granted only for a stated term of years: as, for two years in 5 Ric

(u) Dav. 9.

(v) This appellation seems to be derived from the French word *custum* or *coutum*, 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. 526, 532.

(y) Dav. 8. 2 Bulst. 251. Stat. Estr. 16 Edw. II. Com. Jour. 27 April, 1689.

(z) Dav. 11, 12.

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, shows 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.—CHRISTIAN.

II.;(a) but in Henry the Sixth's time they were granted him for life by a statute in the thirty-first year of his reign; and again to Edward IV. for the term of his life also; since which time they were regularly granted to all his successors for life, sometimes at the first, sometimes at other subsequent par-  
\*316] liaments, till the reign of Charles the \*First; when, as the noble historian expresses it,(b) his ministers were not sufficiently solicitous for a renewal of this legal grant. And yet these imposts were imprudently and unconstitutionally levied and taken, without consent of parliament, for fifteen years together; which was one of the causes of those unhappy discontents, justifiable at first in too many instances, but which degenerated at last into causeless rebellion<sup>33</sup> and murder. For as in every other, so in this particular case, the king (previous to the commencement of hostilities) gave the nation ample satisfaction for the errors of his former conduct, by passing an act,(c) whereby he renounced all power in the crown of levying the duty of tonnage and poundage without the express consent of parliament; and also all power of imposition upon any merchandises whatever. Upon the restoration, this duty was granted to king Charles the Second for life, and so it was to his two immediate successors; but now by three several statutes, 9 Anne, c. 6, 1 Geo. I. c. 12, and 3 Geo. I. c. 7, it is made perpetual, and mortgaged for the debt of the public. The customs thus imposed by parliament are chiefly contained in two books of rates, set forth by parliamentary authority;(d) one signed by Sir Harbottle Grimston, speaker of the house of commons in Charles the Second's time; and the other an additional one signed by Sir Spenser Compton, speaker in the reign of George the First; to which also subsequent additions have been made.<sup>34</sup> Aliens pay a larger proportion than natural subjects, which is what

(a) Dav. 12.

(b) Hist. Rebell. b. 3.

(c) 10 Car. I. c. 8.

(d) Stat. 1<sup>o</sup> Car. II. c. 4. 11 Geo. I. c. 7.

<sup>33</sup> The causes of resistance were numerous, and to the last hour of the pending treaty of Uxbridge some of them existed. Not one of the supposed prerogatives against the future exertion of which security was sought by the treaty, but had operated some grievance upon the subject. The king, at a meeting on the occasion of that treaty, had actually agreed to sign it; but as the discussion of its several items had been long and late, the mere signing was adjourned to eight o'clock the next morning. The unfortunate king appeared to part with the commissioners in excellent temper, and with seeming good will towards them; they anticipating nothing less than the completion of the treaty. But the event showed that they were not justified in placing any reliance upon the monarch, who, it appears, could not rely upon himself. In the night he received letters from the queen, announcing French aid at hand; and, at the time appointed in the morning for that purpose, the king refused to sign the treaty. The house was sitting when the news of the refusal arrived; disappointment and regret clouded every brow. The event is too well known. The king lost his life, but he was not murdered. It became a question of self-preservation and of power, and Cromwell and his supporters prevailed. If it be conceded that the death of the first Charles shall rightly be called a murder, how are the 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 to those of 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.—CHITTY.

<sup>34</sup> 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

is now generally understood by the alien's duty; to be exempted from which is one principal cause of the frequent applications to parliaments for acts of naturalization.<sup>35</sup>

These customs are then, we see, a tax immediately paid by the merchant, although ultimately by the consumer. And yet these are the duties felt least by the people; and, if prudently managed, the people hardly consider that they pay them at all. For the merchant is easy, being sensible he does not pay them for himself; and the consumer, who really \*pays them, confounds [\*317 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 upon the sale of slaves, though he only transferred it from the buyer to the seller: so that it was, as he expresses it, "*remissum magis specie, quam vi: quia, cum venditor pendere juberetur, in partem pretii 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 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,

(c) Hist. l. 13.

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, besides 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 merchandises, 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 draw-back 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 in 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.—CHRISTIAN.

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.—CHITTY.

<sup>35</sup> 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.—CHRISTIAN.

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,<sup>(f)</sup> 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 merchandise, 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 \*318] \*which he 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 further in any mechanical or more complicated branch of trade.<sup>36</sup>

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.<sup>37</sup> 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 the power of entering and searching the houses of such as deal in excisable commodities at any hour of the day, and, in many cases, of the night likewise. And the proceedings in case of transgressions are so summary and sudden, that a man may be convicted in two days' time in the penalty of many thousand pounds by two commissioners or justices of the peace, to the total exclusion of the trial by jury, and disregard of the common

(f) Montesq. Sp. L. b. 13, c. 8.

<sup>36</sup> "Congress shall have power to lay and collect taxes, duties, imposts, and excises, to pay the debts and provide for the common defence and general welfare of the United States; but all duties, imposts, and excises shall be uniform throughout the United States." Const. U. S. art. 1, s. 8. "No tax or duty shall be laid on articles exported from any State. No preference shall be given, by any regulation of commerce or revenue, to the ports of one State over those of another; nor shall vessels bound to or from one State be obliged to enter, clear, or pay duties in another." Id. s. 9. "No State shall, without the consent of Congress, lay any imposts or duties on imports or exports, except what may be absolutely necessary for executing its inspection laws; and the nett produce of all duties and imposts laid by any State on imports or exports shall be for the use of the treasury of the United States; and all such laws shall be subject to the revision and control of Congress. No State shall, without the consent of Congress, lay any duty on tonnage." Id. s. 10.—SHARSWOOD.

<sup>37</sup> Sir John Sinclair has calculated that the expense of collecting the duties of excise is  $5\frac{1}{2}$  per cent., the customs  $10\frac{1}{2}$ , stamps  $3\frac{1}{2}$ , salt  $6\frac{1}{2}$ , and the land-tax less than 3 per cent. and that the average expense of collecting the whole revenue is  $7\frac{1}{2}$  per cent. Hist. Rev 3 part, 162.—CHITTY.

law.<sup>38</sup> For which reason, though lord \*Clarendon tells us,<sup>(g)</sup> that to his knowledge the earl of Bedford (who was made lord treasurer by king [ \*319 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."<sup>(h)</sup> However, its original<sup>(i)</sup> 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 or vendors of beer, ale, cider, and perry,<sup>(k)</sup> 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.<sup>(l)</sup> 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,<sup>(m)</sup> signifying, "that they had proceeded in the excise to many particulars, and intended to go on further; but that it \*would be necessary to use the people to it by little [ \*320 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;"<sup>(n)</sup> 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 feudal tenures and other oppressive parts of the hereditary revenue. But, from its first original to the present time, its very name has been odious to the people of England. It has nevertheless been imposed on abundance of other commodities in the reign of king William III. and every succeeding prince, to support the enormous expenses occasioned by our wars on the continent. Thus brandies and other spirits are now excised at the distillery; printed silks and linens, at the printer's; starch and hair-powder, at the maker's; gold and silver wire, at the wiredrawer's; plate in the hands of the vendor, who pays yearly for a license to sell it; lands and goods sold by auction, for which a pound-rate is payable by the auctioneer, who also is charged with an annual duty for his license; and coaches and other wheel-carriages, for which the occupier is excised, though not with the same circumstances of arbitrary strictness as in most of the other instances. To these we may add coffee and tea,

(g) Hist. b. 3.

(h) Com. Jour. 8 Oct. 1642.

(i) The translator and continuator of Petavius's Chronological History (Lond. 1659, fol.) informs us that it was first moved for, 23 March, 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. 1643; 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. Jour. 17 May, 1643.

(l) Lord Clar. b. 7.

(m) 30 May, 1643. Dugdale, of the Troubles, 120.

(n) Ord. 14 Aug. 1649, c. 50. Scobell, 72. Stat. 1656, c. 19 Scobell, 453.

<sup>38</sup> 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.—CHRISTIAN.

chocolate and cocoa-paste, for which the duty is paid by the retailer; all artificial wines, commonly called sweets; paper and pasteboard, first when made, and again if stained or printed; malt, as before mentioned; vinegars; and the manufacture of glass; for all which the duty is paid by the manufacturer: hops, for which the person that gathers them is answerable; candles and soap, which are paid for at the maker's; malt liquors brewed for sale, which are excised at the brewery; 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 further increased.

\*321] \*III. I proceed therefore to a third duty, namely, that upon salt; which is another distinct branch of his majesty's extraordinary revenue, and consists in an excise of 3s. 4d. *per* bushel imposed upon all salt, by several statutes of king William and other subsequent reigns. This is not generally called an excise, because under the management of different commissioners: but the commissioners of the salt duties have by statute 1 Anne, c. 21 the same powers, and must observe the same regulations, as those of other excises. This tax had usually been only temporary; but by statute 26 Geo. II. c. 3 was made perpetual.

IV. Another very considerable branch of the revenue is levied with greater cheerfulness, as, instead of being a burden, it is a manifest advantage to the public. I mean the post-office, or duty for the carriage of letters. As we have traced the original of the excise to the parliament of 1643, so it is but justice to observe that this useful invention owes its first legislative establishment to the same assembly. It is true, there existed postmasters in much earlier times: but I apprehend their business was confined to the furnishing of post-horses to persons who were desirous to travel expeditiously, and to the despatching of extraordinary packets 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,<sup>(o)</sup> 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.<sup>(p)</sup> 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:<sup>(q)</sup> 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 \*322] with horses at the rate of 2½d. a mile. \*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.<sup>(r)</sup> 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;<sup>(s)</sup> and afterwards appointed postmaster by an ordinance of both the houses,<sup>(t)</sup> in the execution of which office he first established a *weekly* conveyance of letters into *all* parts of the nation;<sup>(u)</sup> 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,<sup>(w)</sup> 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.<sup>(x)</sup> But, in 1657, a regular post-office

(o) Latch. Rep. 87.

(p) 19 Rym. Fed. 385.

(q) Ibid. 650. 20 Rym. 192.

(r) 20 Rym. 429.

(s) Com. Jour. 23 March, 1642.

(t) Ibid. 7 Sept. 1644.

(u) Ibid. 21 March, 1649.

(v) Ibid. 24 March, 1649.

(w) Scobell, 358.

was erected by the authority of the Protector and his parliament,<sup>39</sup> 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 further regulations added, by the statutes 9 Anne, c. 10, 6 Geo. I. c. 21, 26 Geo. II. c. 12, 5 Geo. III. c. 25, and 7 Geo. III. c. 50, and penalties were enacted, in order to confine the carriage of letters to the public office only, except in some few cases: a provision which is absolutely necessary; for nothing but \*an exclusive right can support an office of this sort: many rival independent offices would [\*323 only serve to ruin one another. The privilege of letters coming free of postage, to and from members of parliament, was claimed by the house of commons in 1660, when the first legal settlement of the present post-office was made;(z) but afterwards dropped,(a) upon a private assurance from the crown, that this privilege should be allowed the members.(b)<sup>40</sup> And accordingly a warrant was constantly issued to the postmaster-general,(c) directing the allowance thereof, to the extent of two ounces in weight: till at length it was expressly confirmed by statute 4 Geo. III. c. 24; which adds many new regulations, rendered necessary by the great abuses crept into the practice of franking;“ whereby the an-

(y) Com. Jour. 9 June, 1657. Scobell, 511  
 (z) Com. Jour. 17 Dec. 1660.  
 (a) Ibid. 22 Dec. 1660.

(b) Ibid. 16 Apr. 1735.  
 (c) Ibid. 26 Feb. 1734.

<sup>39</sup> The preamble of the ordinance states that the establishing one general post-office, besides the benefit to commerce and the convenience of conveying public despatches, “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 Anne, 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.—CHRISTIAN.

<sup>40</sup> The following account of it in the 23 vol. Parl. Hist. p. 56, is curious, and proves what originally were the sentiments of the two houses respecting this privilege. “Colonel Titus reported the bill for the settlement of the post-office, with the amendments; Sir Walter Carle delivered a proviso for the letters of all members of parliament to go free during their sitting: Sir Heneage Finch said it was a *poor mendicant proviso, and below the honour of the house*. Mr. Prynne spoke also against the proviso: Mr. Bunckley, Mr. Boscawen, Sir George Downing, and Serjeant Charlton, for it; the latter saying, ‘The council’s letters went free.’ The question being called for, the speaker, Sir Harbottle Grimstone, 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 engrossed.” This proviso the lords disagreed to, and left it out of the bill; and the commons agreed to their amendment. 3 Hats. 82.—CHRISTIAN.

<sup>41</sup> And that the great loss to the public revenue by the exercise of this privilege might be further 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. But in case of bodily infirmity a member may authorize another person to write the superscription.

By the 35 Geo. III. c. 53, the privilege of franking is still further restrained. By that statute, no letter directed by or to any member shall go free, which shall exceed one ounce in weight, nor any letter directed by a member, unless he is within twenty miles of the post-town from which it is to be sent on the day, or the day before the day, on which it is put into the post-office. And no member shall send more than ten or receive more than fifteen letters in one day free from postage. Single letters sent and received by the non-commissioned officers and private men in the navy and army, under certain



nual amount of franked letters had gradually increased, from 23,600*l.* in the year 1715, to 170,700*l.* in the year 1763.<sup>(d)</sup> There cannot be devised a more eligible method than this of raising money upon the subject: for therein both the government and the people find a mutual benefit. The government acquires a large revenue; and the people do their business with greater ease, expedition, and cheapness, than they would be able to do if no such tax (and of course no such office) existed.<sup>42</sup>

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 licenses for retailing wines, letting horses to hire, and for certain other purposes; and upon all almanacs, 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, yet, if moderately imposed, is of service \*324] to the public in general, by authenticating \*instruments, and rendering it much more difficult than formerly to forge deeds of any standing; since, as the officers of this branch of the revenue vary their stamps frequently, by marks perceptible to none but themselves, a man that would forge a deed of king William's time must know and be able to counterfeit the stamp of that date also. In France and some other countries the duty is laid on the contract itself, not on the instrument in which it is contained; (as, with us too, besides the stamps on the indentures, a tax is laid by statute 8 Anne, 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 are sure to have the advantage.<sup>(e)</sup><sup>43</sup> Our general method answers the purposes of the state as well,

(d) *Ibid.* 23 March, 1764.

(e) *Sp. of L. b. xiii. c. 9.*

restrictions, shall be subject only to the postage of one penny each. By 42 Geo. III. c. 63, these acts are extended to the members of the united kingdom. It has been decided that under these statutes a Roman Catholic peer is not entitled to send or receive letters free from postage. *Lord Petre vs. Lord Auckland*, postmaster-general. 2 Bos. & Pull. 139.—CHRISTIAN.

As commerce and education increased, the charge made by the government for conveying letters from one part of the kingdom to another was felt to be unnecessarily high with reference to the expense of conveying and distributing letters, and at the same time to lead to numerous petty frauds and evasions of the statutes relating to the post-office. The result of a long inquiry and full discussion in parliament was the establishment, in 1840, of the existing system of a uniform rate, beginning at one penny and increasing according to weight. The privilege of members of parliament was at the same time abolished. 2 & 3 Vict. c. 52; 3 & 4 Vict. c. 96; 10 & 11 Vict. c. 85. Facilities are also now given for the transmission of printed periodical publications and other works at still lower rates. Newspapers, which were formerly liable to a stamp duty and were carried free by the post-office, are now charged with postage in lieu of the abolished stamp duty. 18 & 19 Vict. c. 27.—KERR.

<sup>42</sup> 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, postmaster-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. *Cowp.* 754.

For this reason it is recommended, by the secretary of the post-office, to cut bank-notes 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 postage. 5 *Burr.* 2709. 2 *Bl. Rep.* 906. *Cowp.* 182.—CHRISTIAN.

<sup>43</sup> It is considered a rule of construction of revenue acts, in ambiguous cases, to lean in

and consults the ease of the subject much better. The first institution of the stamp duties was by statute 5 & 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.<sup>(f)</sup> But the first parliamentary establishment of it in England was by statute 13 & 14 Car. II. c. 10, whereby an hereditary revenue of 2s. for every hearth, in all houses paying to church and poor, was granted to the king forever. And, by subsequent statutes for the more regular assessment of this tax, the constable and two other substantial inhabitants of the parish, to be appointed yearly, (or the surveyor, appointed by the crown, together with such constable or other public officer were, once in every \*year, empowered to view the inside of every house in the parish. But, upon the revolution, by statute 1 W. and M. [\*325 st. 1, c. 10, hearth-money was declared to be "not only a great oppression to the poorer sort, but a badge of slavery upon the whole people, exposing every man's house to be entered into, and searched at pleasure, by persons unknown to him; and therefore, to erect a lasting monument of their majesties' goodness in every house in the kingdom, the duty of hearth-money was taken away and abolished." This monument of goodness remains among us to this day: but the prospect of it was somewhat darkened, when in six years afterwards, by statute 7 W. III. c. 18, a tax was laid upon all houses (except cottages) of 2s., now advanced to 3s., *per annum*, and a tax also upon all windows, if they exceeded nine, in such house. Which rates have been from time to time<sup>(g)</sup> varied, being now extended to all windows exceeding six: and power is given to surveyors, appointed by the crown, to inspect the outside of houses, and also to pass through any house two days in the year, into any court or yard, to inspect the windows there. A new duty from 6d. to 1s. in the pound, was also imposed by statutes 18 Geo. III. c. 26, and 19 Geo. III. c. 59, on every dwelling-house inhabited, together with the offices and gardens therewith occupied: which duty, as well as the former, is under the direction of the commissioners of the land-tax.

VII. The seventh branch of the extraordinary perpetual revenue is a duty of 21s. *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 a 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.<sup>44</sup>

VIII. An eighth branch is the duty arising from licenses 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.<sup>(h)</sup> By statute 13 & 14 Car. II. c. 2, four hundred were licensed; and the money arising thereby was applied to repairing the streets.<sup>(i)</sup> This number was increased to seven hundred by statute 5 W. and M. c. 22, and the duties vested in the crown: and by statute 9 Anne,

<sup>(f)</sup> Mod. Un. Hist. xxiii. 463. Spelm. Gloss. tit. *Fuage*.

<sup>(h)</sup> Scobell, 313.

<sup>(g)</sup> Stat. 20 Geo. II. c. 3. 31 Geo. II. c. 22. 2 Geo. III. c.

<sup>(i)</sup> Com. Jour. 14 Feb. 1661.

a. 6 Geo. III. c. 38.

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.—CHRISTIAN.

<sup>44</sup> Re-enacted by 48 Geo. III. c. 55 and 52 Geo. III. c. 93, and reduced to its present rate by the 41 Geo. IV. c. 11. By the 4 & 5 W. IV. c. 73, § 3, for male servants under eighteen years of age no duty is paid.—STEWART.

c. 23, and other subsequent statutes for their government,(j) there are now a thousand licensed coaches and four hundred chairs. 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.

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 1s. 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 net 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. 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 debts.

In order to take a clear and comprehensive view of the nature of this national debt, it must first be premised, that after the revolution, when our new connections with Europe introduced a new system of foreign politics, the expenses of the nation, not only in settling the new establishment, but in maintaining long wars, as principals, on the continent, for the security of the Dutch barrier, reducing the French monarchy, settling the Spanish succession, supporting the house of Austria, maintaining the liberties of the Germanic body, and other purposes, increased to an unusual degree: insomuch that it was not thought advisable to raise all the expenses of any one year by taxes to be levied within that year, lest the unaccustomed weight of them should create murmurs among the people. It was therefore the policy of the times to anticipate the revenues of their posterity, by borrowing immense sums for the current service of the state, and to lay no more taxes upon the subject than would suffice to pay the annual interest of the sums so borrowed: by this means converting

\*327] \*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) 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:<sup>45</sup> to pay the interest of which, together

(j) 10 Anne, c. 19, § 158. 12 Geo. I. c. 15. 7 Geo. III. c. 41. 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 augetur.* Aretin. See Mod. Un. Hist. xxxvi. 116.

<sup>45</sup> 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.—CHITTY.

The capital of the national debt (funded and unfunded) amounted at the close of the

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 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 nowhere 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.<sup>46</sup>

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year 1856 to upwards of seven hundred and seventy-five millions; and the interest and the charges of management to upwards of twenty-seven millions and a half.—KERR.

<sup>46</sup> 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 war. On the contrary, the principal of the debt is the exact amount of the property which the nation has lost from its capital forever. 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 naturally 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 pay 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

The only advantage that can result to a nation from the 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 encumbrances 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 merchandise. For, as its effect is to multiply the cash of the kingdom, and this to such an extent that much must remain un-

\*329] employed, that cash (which is the \*universal measure of the respective values of all other commodities) must necessarily sink in its own value,<sup>(m)</sup> 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.<sup>41</sup> The interest we now pay for our

(\*) See page 276.

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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 learned 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.—CHRISTIAN.

<sup>41</sup>The last is certainly a serious and unanswerable 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 shown 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;

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 interest of such part of the national debt as was advanced by that company and its annuitants. Whereby the separate funds, which were thus united, are become mutual securities for each other; and the whole produce of them, thus aggregated, liable to pay such interest or annuities as were formerly charged upon each distinct fund; the faith of the legislature being moreover engaged to supply any casual deficiencies. [\*330

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 of the sums borrowed on their respective credits is charged on and payable out of the produce of the sinking fund. However, the net 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 encumbrance. 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.<sup>48</sup>

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for, without such confidence, the nation would soon be reduced to a state of bankruptcy and ruin.—CHRISTIAN.

<sup>48</sup> 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

But, before any part of the aggregate fund (the surpluses whereof are one of the chief ingredients that form the sinking \*fund) can be applied to diminish the principal of the public debt, it stands mortgaged by parliament to raise an annual sum for the maintenance of the king's household and the civil list. For this purpose, in the late reigns, the produce of certain branches of the excise and customs, the post-office, the duty on wine licenses, the revenues of the remaining crown lands, the profits arising from courts of justice, (which articles include all the hereditary revenues of the crown,) and also a clear annuity of 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 aggregate 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, produce 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*, net 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

(\*) Stat. 1 Geo. III. c. 1.

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.*—CHRISTIAN.

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.—CHITTY.

average \*may be calculated at more than two millions and a quarter, and, added to the preceding sum, make the clear produce of the taxes (exclusive of the charge of collecting) which are raised yearly on the people of this country, amount to about ten millions sterling. [\*332

The expenses defrayed by the civil list are those that in any shape relate to the 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(o) 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.

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;(p) that of king Charles I. was(q) 800,000*l.*,<sup>49</sup> and the revenue voted for king Charles II. was(r) 1,200,000*l.*, though complaints were made (in the first years at least) that it did not amount to so much.(s) 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 800,000*l.*, which was ten times \*more than before the former troubles.(t) The same revenue, subject to the same charges, was settled on king James II.;(u) [\*333 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,(v) 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,<sup>50</sup> a civil list revenue

(o) See page 327.

(p) Lord Clar. Continuation, 163.

(q) Com. Jour. 4 Sept. 1660.

(r) Ibid.

(s) Com. Jour. 4 June, 1663. Lord Clar. Continuation, 163.

(t) Lord Clar. 165.

(u) Stat. 1 Jac. II. c. 1.

(v) Ibid. c. 3 and 4.

(w) Com. Jour. 1 March, 20 March, 1688.

<sup>49</sup> 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 burdens of the people are not necessarily lightened by a change in the government.—CHRISTIAN.

The mere money burdens 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 that 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.—CURRY.

<sup>50</sup> This great principle, that parliamentary grants may be appropriated by the parliament, and if appropriated can only be applied by the treasury to the specified items of expenditure, was introduced in the reign of Charles II., and, with the exception of the parliament of 1685, has been universally followed by succeeding parliaments. The lords of the treasury, by a clause annually repeated in the appropriation act of every session, are forbidden, under severe penalties, to issue any warrants ordering the payment of any



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 feudal hardships, and other odious branches of the prerogative. And though complaints have sometimes been made of the increase of the civil list, yet if we consider the sums that have been formerly granted, the limited extent under which it is now established, the revenues and prerogatives given up in lieu of it by the crown, the numerous branches of the present royal family, and, above all, the diminution of the value of money, compared with what it was worth in the last century, we must acknowledge these complaints to be void of any rational foundation; and that it is impossible to support that dignity, which a king of Great Britain should maintain, with an income in any degree less than what is now established by parliament.

\*This finishes our inquiries into the fiscal prerogatives of the king, or  
\*334] his revenue, both ordinary and extraordinary. We have therefore now chalked out all the principal outlines of this vast title of the law, the supreme executive magistrate, or the king's majesty, considered in his several capacities and points of view. But, before we entirely dismiss this subject, it may not be improper to take a short comparative review of the power of the executive magistrate, or prerogative of the crown, as it stood in former days, and as it stands at present. And we cannot but observe, that most of the laws for ascertaining, limiting, and restraining this prerogative, have been made within the compass of little more than a century past; from the petition of right in 3 Car. I. to the present time. So that the powers of the crown are now to all appearance greatly curtailed and diminished since the reign of king James the First; particularly by the abolition of the starchamber 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

(\*) *Ibid.* 14 March, 1701.

(\*) Stat. 1 Geo. II. c. 1.

(\*) *Ibid.* 17 March, 1701; 11 Aug. 1714.

moneys out of the exchequer, except for the purposes to which such moneys had been appropriated by the parliament, the officers of the exchequer being also forbidden to obey any such warrant if issued. In time of war, or when the house is apprehensive of war breaking out during the recess of parliament, it has not been very uncommon to grant considerable sums on a vote of credit, to be applied by the crown at its discretion. Mr. Hallam remarks (*Const. Hist.* iii. 159) that it is to this transference of the executive government (for the phrase is hardly too strong) from the crown to the house of commons that we owe the proud attitude which England has maintained in the eyes of Europe since the revolution, so extraordinarily dissimilar to her condition under the Stuarts; the supplies, which were meted out with niggardly caution by former parliaments to sovereigns whom they could not trust, having flowed with redundant profusion when parliament could judge of their necessity and direct their application.—HARGRAVE.

It is provided by the constitution of the United States (art. 1, s. 9, s. 6) that "no money shall be drawn from the treasury but in consequence of appropriations made by law."—

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, in the first parliament after his accession, has by long usage a truly royal addition to his hereditary revenue settled upon him for his life; and has never any occasion to apply to parliament for supplies, but upon some public necessity of the whole realm. This restores to him that constitutional independence which at his first accession seems, it must be owned, to be wanting. And then, with regard to power, we may find perhaps that the hands of government are at least sufficiently strengthened; and that an English monarch is now in no danger of being overborne by either the nobility or the people. The instruments of power are not perhaps so open and avowed as they formerly were, and therefore are the less liable to jealous and invidious reflections, but they are not the weaker upon that account. In short, our national debt and taxes (besides the inconveniences before mentioned) have also in their natural consequences thrown such a weight of power into the executive scale of government as we cannot think was intended by our patriot ancestors, who gloriously struggled for the abolition of the then formidable parts of the prerogative, and, by an unaccountable want of foresight, established this system in their stead. The entire collection and management of so vast a revenue, being placed in the hands of the crown, have given rise to such a multitude of new officers created by and 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 postmasters, and their servants, planted in every town, and upon every public road; the commissioners of the stamps, and their distributors, which are full as scattered, and full as numerous; the officers of the salt duty, which, though a species of excise, and conducted in the same manner, are yet made a distinct corps from the ordinary managers of that revenue; the surveyors of houses and windows; the receivers of the land-tax; the managers of lotteries, and the commissioners of hackney coaches; all which \*are either mediately or immediately appointed by the crown, and 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 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 \*337] carried to the sinking \*fund, is first deposited in the royal exchequer, and thence issued out to the respective offices of payment. This revenue the people can never refuse to raise, because it is made perpetual by act of parliament: which also, when well considered, will appear to be a trust of great delicacy and high importance.

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

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## CHAPTER IX.

### OF SUBORDINATE MAGISTRATES.

IN a former chapter of these commentaries<sup>(a)</sup> 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 majesty's great officers of state, the lord treasurer, lord chamberlain, the principal secretaries, or the like; because I do not know that they are in that capacity in any considerable degree the objects of our laws, or have any very important share of magistracy conferred upon them: except that the secretaries of state are allowed the power of commitment, in order to bring offenders to trial.<sup>(b)</sup> 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

(a) Ch. ii. page 146.  
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(b) 1 Leon. 7<sup>n</sup> 2 Leon. 175. Comb. 143. 5 Mod. 84. Salk. 347. Carth. 201

any minute disquisitions, with regard to the rights and dignities of mayors and \*aldermen, or other magistrates of particular corporations; because these are mere private and strictly municipal rights, depending entirely upon the domestic constitution of their respective franchises. But the magistrates and officers, whose rights and duties it will be proper in this chapter to consider, are such as are generally in use, and have a jurisdiction and authority dispersedly throughout the kingdom: which are, principally, sheriffs, coroners, justices of the peace, constables, surveyors of highways, and overseers of the poor. In treating of all which I shall 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, *ŕeife ġenera*, 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. In confirmation of which it was ordained by statute 28 Edw. I. c. 8, that the people should have election of sheriffs in every shire, where the shrievalty is not of inheritance. For anciently in some counties the sheriffs were hereditary; as I apprehend they were in Scotland<sup>1</sup> till the statute 20 Geo. II. c. 43; and still continue in the county of Westmoreland to this day:<sup>2</sup> \*the city of London having also the inheritance of the shrievalty of Middlesex vested in their body by charter.<sup>(d)</sup><sup>3</sup> 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 india-

(c) Dalton of Sheriffs, c. 1.

(d) 3 Rep. 72.

<sup>1</sup> 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 ad 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 courts of judicatory 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.—CHRISTY.

<sup>2</sup> 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.—CHRISTIAN.

<sup>3</sup> The election of the sheriffs of London and Middlesex was granted to the citizens of London forever, 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 by-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.—CHRISTIAN.

pensable 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, 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 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 sufficient. And the custom now is (and has been at least \*341] \*ever since the time of Fortescue,(h) who was chief justice 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.<sup>4</sup>

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

(e) Montesq. Sp. L. b. 2, c. 2.

(f) Stiernh. *de jure Goth.* l. 1, c. 3.

(g) Stat. 12 Edw. IV. c. 1.

(h) *De L. L.* c. 24.

<sup>4</sup> 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 encumbered, 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.—CHRISTIAN

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,<sup>(i)</sup> he transcribed from the council book of 3 March, 34 Henry VI. and which is in substance as follows.<sup>5</sup> The king had of his own authority appointed a man sheriff of Lincolnshire, which office he refused to take upon him: whereupon the opinions of the judges were taken, what should be done in this behalf. And the two chief justices, Sir John Fortescue and Sir John Prisot, delivered the unanimous opinion of them all: "that the king did an error when he made a person sheriff, that was not chosen and presented to him according to the statute; that the person refusing was liable to no fine for disobedience, as if he had been one of the *three* persons chosen according to the tenor of the statute;<sup>6</sup> that they would advise the king to have recourse to the *three* persons that were chosen according to the statute, or that some other thrify 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 the statute 34 & 35 Hen. VIII. c. [ \*342 26, §61, which expressly recognises this to be the law of the land, some of our writers<sup>(j)</sup> 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.<sup>(k)</sup> 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

(i) 2 Inst. 559.  
(j) Jenkins, 229.

(k) Dyer, 225.

<sup>5</sup> 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 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.—CHRISTIAN.

<sup>6</sup> In the *King vs. 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.—CHITTY.

reign of his present majesty; in which, I believe, few (if any) compulsory instances have occurred.<sup>1</sup>

<sup>1</sup> When the king appoints a person sheriff, who is not one of the three nominated to 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. 55, 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.—CHRISTIAN.

The sheriff, after nomination to his office, and before delivery to him of his patent, 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 panels, &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 abjuration, in one of the courts at Westminster, or the general or quarter session where he resides, between nine and twelve in the 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

Sheriffs, by virtue of several old statutes, are to continue in their office no longer than one year: and yet it hath been said<sup>(l)</sup> that a sheriff may be appointed *durante bene placito*, or during the king's pleasure; and so is the form of the royal writ.<sup>(m)</sup> Therefore, till a new sheriff be named, his office cannot be determined, unless by his own death, or the demise of the king; in which last case it was usual for the successor to send a new writ to the old sheriff;<sup>(n)</sup> but now by statute 1 Anne, st. 1, c. 8, all officers appointed by the \*pre- [ \*343  
ceding king may hold their offices for six months after the king's de-  
mise, unless sooner displaced by the successor. We may further 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.<sup>o</sup>

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.<sup>(o)</sup> 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 qualifications 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.<sup>(p)</sup> He may apprehend, and commit to prison, all persons who break the peace, or attempt to break it; and may bind any one in recognizance to keep the king's peace.<sup>q</sup> 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:<sup>(q)</sup> and this summons every person above fifteen years old, and under the degree of a peer, is bound to attend upon warning;<sup>(r)</sup> \*under [ \*344  
pain of fine and imprisonment.<sup>(s)</sup> But though the sheriff is thus the  
principal conservator of the peace in his county, yet by the express directions of the great charter,<sup>(t)</sup> he, together with the constable, coroner, and certain other officers of the king, are forbidden to hold any pleas of the crown, or, in

(l) 4 Rep. 32.  
(m) Dalt. of Sheriffs, 8.  
(n) Dalt. of Sheriffs, 7.  
(o) Dalt. c. 4.  
(p) 1 Roll. Rep. 237.

(q) Dalt. c. 95.  
(r) Lamb. Eren. 315.  
(s) Stat. 2 Hen. V. c. 8.  
(t) Cap. 17.

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 starchamber; 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, (Cath. 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.—CHITTY.

<sup>o</sup> 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.—CHRISTIAN.

<sup>q</sup> 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

<sup>1</sup> Taunt. 146.—CHITTY.



other words, to try any criminal offence. For it would be highly unbecoming, that the executioners of justice should be also the judges; should impose, as well as levy, fines and amercements; should one day condemn a man to death, and personally execute him the next. Neither may he act as an ordinary justice of the peace during the time of his office:(*w*) 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.<sup>10</sup> 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*)

\*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 50*l.*(*y*)<sup>11</sup>

(\*) 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.

<sup>10</sup> By the common law, sheriffs are to some purposes considered as officers of the courts, as the constable is of the justices of the peace. Salk. 175. 2 Lord Ray. 1195. Fortesc. 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 show 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 Edw. VI. c. 4. 13 & 14 Car. II. c. 21. 3 Geo. I. c. 15, and see Com. Dig. tit Viscount, G.—CHIRFF.

<sup>11</sup> 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 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, redissisin, 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

The under-sheriff usually performs all the duties of the office;<sup>11</sup> 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;<sup>(z)</sup> 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:<sup>(a)</sup> 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,<sup>(b)</sup> 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.<sup>12</sup> Bailiffs of hundreds are officers appointed over those respective districts by the sheriffs, to collect fines therein; to summon juries; to attend the judges and justices at the assizes, and quarter sessions; and also to execute writs and pro-

(<sup>11</sup>) Stat. 42 Edw. III. c. 9.  
(<sup>12</sup>) Stat. 1 Hen. V. c. 4.

(<sup>a</sup>) Of Sheriffs, c. 115.

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 from 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 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.—CHITTY.

<sup>11</sup> 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.—CHITTY.

<sup>12</sup> 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 Hen. V. 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.—CHITTY

cess 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 dexterity in hunting and seizing their prey. The sheriff being \*answerable for the misdemeanors<sup>14</sup> 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.<sup>15</sup> Their business is to keep safely all such persons as are committed

<sup>14</sup> See *Drake vs. Sykes*, 7 T. R. 113. *Doe d. James vs. Brawn*, 5 B. & 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.—CHITTY.

The term "misdemesnor" is not used here in its strict legal sense of criminal misfeasance or non-feasance: at least, it must not be understood that the sheriff is criminally answerable for any thing done or left undone by his bailiffs. Civilly he is responsible for the misconduct of his officer when charged by him with the execution of the law, but then he must in every particular case be connected with the bailiff by evidence: it will not be enough to show that the person doing the act held the office of sheriff's bailiff, but he must be proved to have been employed by the sheriff in this particular instance. The rule is otherwise with the under-sheriff: he is the general deputy of the sheriff; and his acts for all civil purposes are the acts of the sheriff, without showing his appointment or any special authority in each particular case. *Drake vs. Sykes*, 7 T. R. 113. *James vs. Brawn*, 5 B. & A. 243.—COLERIDGE.

There are two kinds of deputies of a sheriff; a general deputy or under-sheriff, who, by virtue of his appointment, has authority to execute all the ordinary duties of the office, and a special deputy, who is officer *pro hac vice*, to execute a particular writ on some certain occasion. *Allen vs. Smith*, 7 Halst. 159. No deputy can transfer his general powers, but he may constitute a servant or bailiff to do a particular act: hence an under-sheriff may depute a person to serve a writ. *Hunt vs. Burrel*, 5 Johns. 137. The sheriff is liable for the acts of his deputies, and it is not necessary to show a particular warrant to the officer, nor that the sheriff adopts the deputy's acts. *Hazard vs. Israel*, 1 Binn. 240. This liability extends to all acts done under colour of his office, as in seizing the goods of one man under an execution against another. *Wilbur vs. Strickland*, 1 Rawle, 458. *Satterwhite vs. Carson*, 3 Iredell, 549. *Knowlton vs. Bartlett*, 1 Peck, 271. But for personal torts, though committed while about the execution of official duties, the deputy alone is liable. *Smith vs. Joiner*, 1 Chip. 62. *Harrington vs. Fuller*, 6 Shep. 277. The admissions or declarations of a deputy are evidence against the sheriff, where they accompany the official acts of the deputy or tend to charge him. *The State vs. Allen*, 5 Iredell, 36. The declarations of an under-sheriff are evidence to charge the high-sheriff only where his acts might be given in evidence to charge him, and then rather as *actus* than as declarations, his declarations being considered as part of the *res gestæ*. *Wheeler vs. Hambright*, 9 S. & R. 390.—SHARSWOOD.

<sup>15</sup> 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 *Ld. Raym.* 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. Litt.* 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 practi

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.<sup>16</sup> The abuses of gaolers

(c) Law. Lib. 4 Rep. 34.

(d) 9 Edw. II. st. 2. 2 Edw. III. c. 4. 4 Edw. III. c. 9  
5 Edw. III. c. 4. 13 & 14 Car. II. c. 21, § 7.

able, he must see every, and at least inspect every, cell once in every twenty-four hours; and in visiting females he must be attended by the 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 the 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 sect. 14, gaolers shall attend quarter sessions, to report actual state of prisons; sect. 19, returns are to be made at the several assizes, by keepers of prisons, of the persons sentenced to hard labour. By sect. 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 sect. 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. sect. 22. By sect. 34, books are to be kept, in which the visits, &c. of the chaplain, &c. shall be entered, and the 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 fault of a deputy. 1 Salk. 272. note. 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 misprison. 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 deputy, 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 intentment of the 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.—CHURCH.

<sup>16</sup> 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

and sheriff's officers, towards 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.

The vast expense, which custom has introduced in serving the office of high-sheriff, was grown such a burden to the subject, that it was enacted by statute 13 & 14 Car. II. c. 21, that no sheriff (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 in England and twelve in Wales; upon forfeiture, in any of these cases, of 200*l*.<sup>18</sup>

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.<sup>(e)</sup> And in this light the lord chief justice of the King's Bench is the principal coroner in the kingdom; and may, if he pleases, exercise the jurisdiction of a coroner in \*347] any part of the realm.<sup>(f)</sup> But \*there are also particular coroners for every county of England; usually four, but sometimes six, and sometimes fewer.<sup>(g)</sup> This office<sup>(h)</sup> 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,<sup>19</sup> as by the policy

(<sup>e</sup>) 2 Inst. 31. 4 Inst. 271.  
(<sup>f</sup>) 4 Rep. 57.

(<sup>g</sup>) F. N. B. 163.  
(<sup>h</sup>) Mirror, c. 1, § 3.

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. *Viccom.* 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.—CHRISTIAN.

<sup>18</sup> Sheriffs are, in the United States, officers appointed or elected under the constitutions and laws of the several States, and are the principal conservators of the peace in the counties to which they belong, and execute the process of the several courts within their jurisdiction. Their powers, duties, and liabilities correspond generally with those of sheriffs at common law, and they have additional duties and responsibilities by various statutes. The sheriff may take the power of the county,—*posse comitatus*,—if necessary, to execute process; and every man is bound to be aiding and assisting, upon order or summons, in preserving the peace and apprehending offenders, and is punishable if he refuses. 10 Johns. 85.

The federal officers under the government of the United States corresponding in their functions to sheriffs are denominated marshals. They are appointed for each judicial district by the President and Senate for the term of four years, but are removable by the President at pleasure. It is the duty of the marshal to attend the district and circuit courts, and to execute within the district all lawful precepts directed to him, and to command all requisite assistance in the execution of his duty. There are also various special duties assigned by statute to the marshals. The appointment of deputies is a power incident to the office, and the marshal is responsible *civilliter* for their conduct, and they are removable not only at his pleasure, but they are also by statute made removable at the pleasure of the district or circuit courts. Act of Congress, Sept. 24, 1789. 1 Story's Laws, 62. 1 Kent's Com. 309.—SHARSWOOD.

<sup>19</sup> Stat. 28 E. I. c. 3 recognises the coroner of the king's house, and consequently, he is not so chosen. Coroners so chosen are called coroners *virtute carte 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

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*;(j) 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(k) 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.(l)<sup>m</sup> But it seems it is now sufficient if a man hath lands enough to be made a knight,<sup>n</sup> whether he be really knighted or not:(m) 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;(n) and if he hath not enough to answer, his fine shall be levied on the county, as the punishment for electing an insufficient officer.(o) Now indeed, through the culpable neglect of gentlemen of property, this office has been suffered to fall into disrepute, and get into low and indigent hands; so that, although formerly no 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 [\*348 of a great forfeiture to the king; yet for many years past they have only desired to be chosen for the sake of their perquisites; being allowed fees for their attendance by the statute 3 Henry VII. c. 1, which Sir Edward Coke complains of heavily;(p) though, since his time, those fees have been much enlarged.(q)<sup>r</sup>

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 ascer-

(i) 2 Inst. 558.

(j) F. N. B. 163.

(k) 3 Edw. I. c. 10.

(l) 2 Inst. 32.

(m) F. N. B. 163, 164.

(n) Ibid.

(o) Mirr. c. 1, § 3. 2 Inst. 175.

(p) 2 Inst. 210.

(q) Stat. 25 Geo. II. c. 29.

(r) F. N. B. 163, 164.

ord mayor by charter. (For the most ample information on this subject, see "Jervis on the Office and Duties of Coroners.")—CHITTY.

<sup>m</sup> That this was an office of high dignity in ancient times, appears from Chaucer's description of the Frankelin:—

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 & 3, s. 4, observes that some copies have it *coronour*, others *countour*. But the office of an accountant is perfectly inconsistent with the character described, unless a countour signified an escheator.—CHRISTIAN.

<sup>n</sup> Which, by the *statutum de militibus*, 1 Edw. II., were lands to the amount of 20*l.* per annum.—CHRISTIAN.

<sup>r</sup> Some cases, as to the right to fees, will be found 7 T. R. 52; 2 B. & A. 203. By the first, it may appear that coroners for a franchise cannot be paid out of the county rates provided by this statute. By the second case, he is not entitled to expenses 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 mileage for his travelling expenses for more than one inquisition. 8 D. & R. 147. And at an inquest taken upon a dead body, under stat. 25 Geo. II. c. 29, the inquest must, in order to entitle the coroner to his fee, be signed by all the jurors. *The King vs. Norfolk Justices*, Nol. 141.—CHITTY.

tained 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)<sup>23</sup> for, if the body be not found, the coroner cannot sit. (t) 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 further 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

(c) 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 caesum. Potest enim homo etiam ex aliqua causa subito mori.*" Sliernhook *de jure Gothor.* l. 3, c. 4.

<sup>23</sup> When an unnatural death happens, the township are bound, under pain of amercement, 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 putrefy, 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. 4, c. b. 1. As to form of inquisition, see 2 Lord Ray, 1305. Burn, J. 1 vol. 25 ed. 787, 789. If the constable 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 to 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 him, 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 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.—CHITTY.

It seems probable that in ancient times the whole inquisition was taken with the body lying before the coroner and jury,—or, at least, that the body was not buried till the inquisition was concluded. Now, however, it is sufficient if the coroner and jury have together a view of the body, (such a view as enables them to ascertain whether there are any marks of violence on it or any appearances explanatory of the cause of the death,) and, if the latter, are there sworn by the former in the presence of the body. These two, however, are indispensable conditions to a proceeding by the coroner. See *R. vs. Ferrand*, 3 B. & A. 260. When, therefore, circumstances render a compliance with them impossible, the coroner cannot inquire, unless, indeed, he have a special commission for the purpose; but justices of the peace, or of Oyer and Terminer, may. 2 Hawk. P. C. c. 9, s. 25.—COLERIDGE.

A justice of the peace has no authority to hold an inquisition *super visum corporis*. *Ex parte Schultz*, 6 Whart. 269. In taking an inquisition of death, the coroner, as a public agent, has authority to order a *post mortem* examination by medical men, at the public charge. *Alleghany County vs. Watt*, 3 Barr. 462. *Commonwealth vs. Harmon*, 4 *ibid.* 269.—SHARSWOOD.

It has been doubted in a recent case by a great authority (lord Abinger, *Jewison vs. Dyson*, 9 Mee. & W. 585) whether the coroner can be properly called a judicial officer, or his court a court of record; but it had been previously held expressly by lord Tenterden (*Garnett vs. Ferrand*, 6 Barn. & C. 625) that "the court of the coroner is a court of record, of which the coroner is the judge;" and it was then decided, moreover, that it is for the coroner alone to determine whether he will conduct the inquiry openly or privately, so as best to further the ends of justice, which may be utterly frustrated by premature publicity.—WARREN.

inquire whether any deadand has accrued to the king, or the \*lord of the franchise, by this death; and must certify the whole of this inquiry, (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 or 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)<sup>24</sup>

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 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: [350 hence it is usually called the king's peace. The lord chancellor, or keeper, the lord treasurer, the lord high steward of England, the lord mareshal, the lord high constable of England, (when any such officers are in being,) and all the justices of the court of King's Bench, (by virtue of their offices,) and the master of the rolls, (by prescription,) are general conservators of the peace throughout the whole kingdom, and may commit all breakers of it, or bind them in recognizances to keep it:(x) the other judges are only so in their own courts. The coroner is also a conservator of the peace within his own county;(y) as is also the sheriff;(z) and both of them may take a recognizance or security for the peace. Constables, tithing-men, and the like, are also conservators of the peace within their own jurisdictions, and may apprehend all breakers of the peace and commit them, till they find sureties for their keeping it.(a)<sup>25</sup>

Those that were, without any office, simply and merely conservators of the

(\*) Stat. 33 Hen. VIII. c. 12. 1 & 2 P. and M. c. 13. 2 West. Symbol. § 310. Crompt. 264. Tremaln P. C. 621.

(†) 4 Inst. 271.

(‡) Lambard, Eirenarch, 12.

(§) Lamb. 12.

(¶) Britton, 3.

(‡) F. N. B. 81.

(§) Lamb. 14.

<sup>24</sup> By the act of Congress Sept. 24, 1789, (1 Story's Laws, 63,) it is provided that, in all causes wherein the marshal or his deputy shall be a party, the writs and precepts therein shall be directed to such disinterested person as the court, or any justice or judge thereof, may appoint; and the person so appointed is hereby authorized to execute and return the same.—SHARSWOOD.

<sup>25</sup> The judges of the Supreme Court and of the several district courts of the United States, and all judges and justices of the courts of the several States, having authority by the laws of the United States to take cognizance of offences against the constitution and laws thereof, shall respectively have the like power and authority to hold to security of the peace and for good behaviour, in cases arising under the constitution and laws of the United States, as may or can be lawfully exercised by any judge or justice of the peace of the respective States, in cases cognizable before them. Act of Congress, 16 July, 1790: s. 1. 1 Story's Laws, 556.—SHARSWOOD.



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 disturbances 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 manner of his obtaining the crown; to wit, that it was done *ipsius patris bene placito*: 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 commission.(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 misdemeanors: in which number some particular justices, or one of them, are directed to be always included, and no business to be done without their presence; the words of the commission running thus, "*quorum aliquem vestrum, A. B. C. D. &c. unum esse volumus;*" whence the persons so named are usually called justices of the *quorum*. And formerly it was customary to appoint only a select number of justices, eminent for their skill and discretion, to be of the *quorum*; but now the practice is to advance almost all of them to that dignity, naming them all over again in the *quorum* clause, except perhaps only some one inconsiderable \*352] person for the sake of propriety; and no exception is now allowable, \*for not expressing in the form of warrants, &c. that the justice who issued them is of the *quorum*.(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

(b) Lamb. 15.

(c) Lamb. 17.

(d) Lamb. 16.

(e) Hist. A.D. 1327.

(f) Stat. 1 Edw. III. c. 16.

(g) Lamb. 20.

(h) Lamb. 20.

(i) Stat. 4 Edw. III. c. 2. 18 Edw. III. st. 2. c. 2.

(j) Lamb. 23.

(k) Lamb. 43.

(l) See the form itself, Lamb. 35. Burn. tit. Justices, § 1.

(m) Stat. 26 Geo. II. c. 27. See also stat. 7 Geo. III. c. 21

(n) Lamb. 34.

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. And because, contrary to these statutes, men of small substance had crept into the commission, whose poverty made them both covetous and contemptible, it was enacted by statute 18 Hen. VI. c. 11, that no justice should be put in commission if he had not lands to the value of 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* clear of all deductions;<sup>26</sup> and, if he [ \*353 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.

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)<sup>27</sup> 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 an-

(\*) See Bishop Fleetwood's calculations in his *Chronicon Pretiosum*.

(\*) Stat. 18 Geo. II. c. 20.

(\*) Stat. 1 Anne, c. 8.

(\*) Stat. 1 Geo. III. c. 18.

(\*) Stat. 7 Geo. III. c. 9.

(\*) Lamb. 67.

(\*) Stat. 1 Mar. st. 1, c. 8.

<sup>26</sup> By the 18 Geo. II. c. 20, a party to become a justice of the peace must have in possession, either in 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 encumbrances, &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 sect. 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.—CHITTY.

<sup>27</sup> A sheriff cannot act as a justice during the year of his office; but neither the statute 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.—CHRISTIAN.

swering the description of the commission: but now<sup>(u)</sup> it is provided, that, notwithstanding a new title of dignity, the justice on whom it is conferred shall still continue a justice.

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  
\*354] 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, of which more will be said in its proper place. And as to the powers, given to one, two,<sup>28</sup> 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 shown to him in the courts of law; and there are many statutes made to protect him in the upright discharge of his office;<sup>(v)</sup> which, among other privileges, prohibit such justices from being sued for any oversights without notice beforehand;<sup>29</sup> and stop all suits begun, on tender

(\*) Stat. 1 Edw. VI. c. 7.

(\*) Stat. 7 Jac. I. c. 5; 21 Jac. I. c. 12; 24 Geo. II. c. 44.

<sup>28</sup> 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. But it has been held, that an order of removal signed by two justices separately is not void but voidable, and can only be avoided by an appeal to the sessions. 4 T. R. 596.—CHRISTIAN.

<sup>29</sup> 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 vs. Clutterbuck, M. T. 1824. J. B. Moore's Rep. C. P.;) and if he corruptly and maliciously, without due ground, convict a party, (Rex vs. Price, Caldecot, 305,) or refuse a license, 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 871. So an information will be granted for improperly *granting* an ale license. See 1 T. R. 692. J. 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, the other set meet, and grant licenses 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 found on investigation to be strictly right or not, but whether it proceeded from an unjust, oppressive, or corrupt motive, (among which fear and favour are generally included,) or from mistake or error only. In the latter

made of sufficient amends. 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 entitled to double costs.<sup>30</sup>

It is impossible upon our present plan to enter minutely into the particulars of the accumulated authority thus committed to the charge of these magistrates. I must therefore refer myself at present to such subsequent parts of these commentaries, as will in their turns 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 which have gone before, and of more confined jurisdiction; but still such as are [\*355] universally in use through every part of the kingdom.

IV. Fourthly, then, of the constable. The word *constable* is frequently said to be derived from the Saxon, *koning-ſcapel*, 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

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 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 showing 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 show 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.—CHITTY.

<sup>30</sup> That is, where the judge certifies in court that the injury was wilful and malicious.—CHRISTIAN.

Of course, the question very often arises, under what circumstances a magistrate is entitled to these protections; in other words, when he can be said to have done the act complained of "in the execution of his office." It is obvious that these words must not be construed strictly, because the statutes contemplate protection to persons who have unintentionally done wrong and exceeded the jurisdiction of their office. Accordingly, it has been held in many cases, that if the defendant honestly intended to act as a magistrate, and the act done was in a matter within the jurisdiction of magistrates, he is within the protection of the statutes, though he exceeded his powers and transgressed the law. *Briggs vs. Evelyn*, 2 H. Black. 114. *Weller vs. Take*, 9 East, 364.—COLERIDGE.

An action will not lie against a justice of the peace for an act done judicially and within the scope of his jurisdiction, unless he acts corruptly or from impure motives. *Gregory vs. Brown*, 4 Bibb, 28. *Little vs. Moore*, 1 Southard, 74. If, however, a justice of the peace issues an order or warrant of arrest contrary to the provisions of the constitution or for a matter over which he has no jurisdiction, and the party is arrested, the justice is liable in an action of trespass, nor is he entitled to notice of such a suit. *Johnson vs. Tompkins*, 1 Baldwin, 571. *Spencer vs. Perry*, 4 Shep. 255. Where the act done is entirely foreign to the magistrate's jurisdiction, notice is not necessary; but where he has a general jurisdiction over the subject-matter and intended to act as a magistrate, he is entitled to notice. *Jones vs. Hughes*, 5 S. & R. 301.—SHARSWOOD.

were performed on horseback.<sup>21</sup> 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 constableness was first drawn and fetched, and is, as it were, a very finger of that hand. For the statute of Winchester,(z) which first appoints them, directs that, for the better keeping of the peace, two constables in every hundred and franchise shall inspect all matters relating to *arms and armour*.<sup>22</sup>

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 \*356] removable by the same authority that \*appoints them.(a)<sup>23</sup> The petty constables are inferior officers in every town and parish, subordinate to the

(\*) Phillip's Life of Pole, ii. 111.

(y) Of Constables, 5.

(z) 13 Edw. I. c. 6.

(a) Salk. 150.

<sup>21</sup> 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 læsæ majestatis, seu ipsius occasione, cæterisque causis quibuscunque, summarie et de plano, sine strepitu et figurâ judicii, solâ facti veritate inspectâ.* Rym. Fœd. tom. xi. p. 582.—CHRISTIAN.

<sup>22</sup> Constables have 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's Law Dictionary, title Constable.—CHIRRY.

<sup>23</sup> 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 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 33 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 40s.; 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, inso-much 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

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 antient, the other modern. Their antient office is that of headborough, tithing-man, or borsholder, of whom we formerly spoke, (c) and who are as antient 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 antient 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.<sup>4</sup> 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

(b) Spelm. Gloss. 148.  
(c) Page 115.  
(d) Lamb. 9.

(e) Stat. 14 & 15 Car. II. c. 12.  
(f) Dalt. Just. c. 104.

the demand, by showing the warrant, 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 sec. 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, 69.

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.—CHITTY.

<sup>4</sup> 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!—CHRISTIAN.

A constable may justify an arrest for reasonable cause of suspicion alone; and in this respect he stands on more favourable ground than a private person, who must show, in addition to such cause, that a felony was actually committed. *Russell vs. Shuster*, 8 W & S. 308.—SHARSWOOD.

\*357] ancestors *wacht* or *wacta*),(g) and it \*begins at the time when ward ends and ends when that begins; for, by the statute of Winchester, in walled towns the gates shall be closed from sunsetting to sunrise, 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.<sup>35</sup>

V. We are next to consider the surveyors of the highways. Every parish is bound of common right to keep the highroads 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 réparation 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 such their neglect: but it was \*358] not then \*incumbent on any particular officer to call the parish together and set them upon this work: for which reason, by the statute 2 & 3 Ph. and M. c. 8, surveyors of the highways were ordered to be chosen in every parish.(i)

These surveyors were originally, according to the statutes 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 for 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

(g) *Excubias et explorationes quas wactas vocant. Capitular. Hincoc. Piv, cap. 1, A.D. 815.*

(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.*

<sup>35</sup> The peace of the kingdom is now preserved, especially in towns, by well-organized and efficient bodies of police, which originated in the metropolis, in the year 1829, under the auspices of Sir Robert Peel, (stat. 10 Geo. IV. c. 44,) and has been ever since gradually and rapidly extending throughout the three kingdoms.—WARREN.

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 expense of the parish, to the breadth of thirty feet. 3. The surveyors 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 [ \*359 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)

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.\* 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. 55, I find no compulsory method chalked out for this purpose; but the poor seem to have been left to such relief as the humanity of their neighbours would afford them. The monasteries were, in particular, their principal resource; and, among other bad effects which attended the monastic institutions, it was not perhaps one of the least (though frequently esteemed quite otherwise) that they supported and fed a very numerous and very idle poor, whose sustenance depended upon what was daily distributed in alms at the gates \*of the religious houses. But, upon the total dissolution of [ \*360 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 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.

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. They must be substantial householders, and so expressed to be in the appointment of the justices. (n)

(k) Stat. 14 Geo. III. c. 14, 36, 57, 82. 16 Geo. III. c. 39.  
18 Geo. III. c. 23.

(l) C. 1, § 3.

(m) Stra. 1123.

(n) 2 Lord Raym. 1394.

\*The poor in Ireland, to this day, have no relief but from private charity. 2 Ld Mountm. 118.—CHRISTIAN



Their office and duty, according to the same statute, are principally these: first, to raise competent sums for the necessary relief of the poor, impotent, old, blind, and such other, being poor and not able to work: and secondly, to provide work for such as are able, and cannot otherwise get employment. but this latter part of their duty, which, according to the wise regulations of that salutary statute, should go hand in hand with the other, is now most shamefully neglected. However, for these joint purposes, they are empowered to \*361] \*make and levy rates upon the several inhabitants of the parish, by the same act of parliament; which has been further explained and enforced by several subsequent statutes.

The two great objects of this statute seem to have been, 1. To relieve the impotent poor, and them only. 2. To find employment for such as are able to work; and this principally, by providing stocks of raw materials to be worked up at their separate homes, instead of accumulating all the poor in one common workhouse; a practice which puts the sober and diligent upon a level (in point of their earnings) with those who are dissolute and idle, depresses the laudable emulation of domestic industry and neatness, and destroys all endearing family connections, the only felicity of the indigent. Whereas, if none were relieved but those who are incapable to get their livings, and that in proportion to their incapacity; if no children were removed from their parents, but such as are brought up in rags and idleness; and if every poor man and his family were regularly furnished with employment, and allowed the whole profits of their labour;—a spirit of busy cheerfulness would soon diffuse itself through every cottage; work would become easy and habitual, when absolutely necessary for daily subsistence; and the peasant would go through his task without a murmur, if assured that he and his children, when incapable of work through infancy, age, or infirmity, would then, and then only, be entitled to support from his opulent neighbours.

This appears to have been the plan of the statute of queen Elizabeth; in which the only defect was confining the management of the poor to small parochial districts; which are frequently incapable of furnishing proper work, or providing an able director. However, the laborious poor were then at liberty to seek employment wherever it was to be had: none being obliged to reside in the places of their settlement, but such as were unable or unwilling to \*362] work; and those places of settlement being only such where they \*were born, or had made their *abode*, originally for three years,<sup>(o)</sup> and afterwards (in the case of vagabonds) for one year only.<sup>(p)</sup>

After the restoration, a very different plan was adopted, which has rendered the employment of the poor more difficult, by authorizing the subdivisions of parishes; has greatly increased their number, by confining them all to their respective districts; has given birth to the intricacy of our poor-laws, by multiplying and rendering more easy the methods of gaining settlements; and, in consequence, has created an infinity of expensive law-suits between contending neighbourhoods, concerning those settlements and removals. By the statute 13 & 14 Car. II. c. 12, a legal settlement was declared to be gained by *birth* or by *inhabitaney*, *apprenticeship*, or *service*, for forty days: within which period all intruders were made removable from any parish by two justices of the peace, unless they settled in a tenement of the annual value of 10*l*. The frauds, naturally consequent upon this provision, which gave a settlement by so short a residence, produced a 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

(o) Stat. 19 Hen. VII. c. 12. 1 Edw. VI. c. 8. 3 Edw. VI. c. 4.  
 (p) Stat. 39 Eliz. c. 4.

• 16. 14 Eliz. c. 5.

settlement by any length of residence whatever, unless in two particular excepted cases; which makes parishes very cautious of giving such certificates, and of course confines the poor at home, where frequently no adequate employment can be had.

The law of settlements may be therefore now reduced to the following general heads; or, a settlement in a parish may be acquired, 1, By *birth*; for, whosoever a child is first known \*to be, that is always *prima facie* the place of settlement, until some other can be shown.(g) This is also generally [\*363 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) A new settlement may be acquired several ways; as, 3, by *marriage*. For a woman marrying a man that is settled in another parish changes her own settlement: the law not permitting the separation of husband and wife.(u) 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.(v) 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 to be 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*. 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 [\*364 of the yearly value of ten pounds, 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. 6. Being charged to and paying the public *taxes* and levies of the parish; excepting those for scavengers, highways,(y) and the duties on houses and windows:(z) and, 7, Executing, when legally appointed, any public parochial *office* for a whole year in the parish, as church-warden, &c. are both of them equivalent to notice, and gain a settlement,(a) if coupled with a residence of forty days. 8. Being *hired* for a year, when unmarried and childless, and *servng* a year in the same service; and 9, Being bound an *apprentice*, gives 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, &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 10*l.*, 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,

(g) Carth. 433. Comb. 364. Salk. 485. 1 Lord Raym. 567.

(r) See page 459.

(s) Salk. 427.

(t) Salk. 528. 2 Lord Raym. 1473.

(u) Stra. 544.

(v) Foley, 249, 251, 252. Burr Set. C. 370.

(w) Stat. 13 & 14 Car. II. c. 12 1 Jac. II. c. 17. 3 & 4 W.

ud M. c. 11

(x) Stat. 13 & 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 & 4 W. and M. c. 11.

(b) Stat. 3 & 4 W. and M. c. 11. 8 & 9 W. III. c. 10. 18 Geo. II. c. 11.

(c) Salk. 524.

(d) Stat. 9 Geo. I. c. 7.

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 \*365] of 10*l.* per annum, or living in an \*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)

These are the general heads of the laws relating to the poor, which, by the resolutions of the courts of justice thereon within a century past, are branched into a great variety.<sup>37</sup> And yet, notwithstanding the pains that have been taken about them, they still remain very imperfect, and inadequate to the purposes they are designed for: a fate that has generally attended most of our statute laws, where they have not the foundation of the common law to build on. When the shires, the hundreds, and the tithings were kept in the same admirable order in which they were disposed by the great Alfred, there were no persons idle, consequently none but the impotent that needed relief: and the statute of 43 Eliz. seems entirely founded on the same principle. But when this excellent scheme was neglected and departed from, we cannot but observe with concern what miserable shifts and lame expedients have from time to time been adopted, in order to patch up the flaws occasioned by this neglect. There is not a more necessary or more certain maxim in the frame and constitution of society, than that every individual must contribute his share in order to the well-being of the community: and surely they must be very deficient in sound policy, who suffer one half of a parish to continue idle, dissolute, and unemployed, and at length are amazed to find that the industry of the other half is not able to maintain the whole.

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## CHAPTER X.

### OF THE PEOPLE, WHETHER ALIENS, DENIZENS, OR NATIVES.

HAVING, in the eight preceding chapters, treated of persons as they stand in the public relations of *magistrates*, I now proceed to consider such persons as fall under the denomination of the *people*. And herein all the inferior and subordinate magistrates treated of in the last chapter are included.

The first and most obvious division of the people is into aliens and natural-born subjects.<sup>1</sup> Natural-born subjects are such as are born within the dominions

(e) Salk. 472.  
(f) Stat. 8 & 9 W. III. c. 30.

(g) Stat. 12 Anne, c. 18.

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<sup>37</sup> For a full and complete knowledge of this extensive subject, recourse must be had to Burn's Justice, by Chitty, and Mr. Const's valuable edition of Bott, and the reporters there referred to.—CHRISTIAN.

<sup>1</sup> 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 by the *common law*, but also, under various statutes, all persons, though born abroad, whose father and grandfather by the *father's* side were natural-born subjects at common law, unless the father or paternal grandfather, through whom the claim is ma

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 feudal 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 granted him, and, on the \*other hand, that the vassal should be faithful [\*367 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 feudal 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 confined to the person of the king alone. By an easy analogy, the term of allegiance was soon brought to signify all other engagements which are due from subjects to their prince, as well as those duties which were simply and merely territorial. And the oath of allegiance, as administered for [\*368 \*upwards of six hundred years, (e) contained a promise "to be true and faithful to the king and his heirs, and truth and faith to bear of life and limb and terrene honour, and not to know or hear of any ill or damage intended him,

(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.

(e) Mirror, c. 3, § 35. Fleta, 3, 16. Britton, c. 29. 7 Rep. Calvin's case, 6.

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. & Cres. 779. 4 D. & R. 394, S. C.—CHITTY.

without defending him therefrom." Upon which Sir Matthew Hale<sup>(f)</sup> makes this remark, that it was short and plain, not entangled with long or intricate clauses or declarations, and yet is comprehensive of the whole duty from the subject to his sovereign. But, at the revolution, the terms of this oath being thought perhaps to favour too much the notion of non-resistance, the present form was introduced by the convention parliament, which is more general and indeterminate than the former; the subject only promising "that he will be faithful and bear true allegiance to the king," without mentioning "his heirs," or specifying in the least wherein that allegiance consists. The oath of supremacy is principally calculated as a renunciation of the pope's pretended authority; and the oath of abjuration, introduced in the reign of king William,<sup>(g)</sup> very amply supplies the loose and general texture of the oath of allegiance; it recognising the right of his majesty, derived under the act of settlement; engaging to support him to the utmost of the juror's power; promising to disclose all traitorous conspiracies against him; and expressly renouncing any claim of the descendants of the late pretender, in as clear and explicit terms as the English language can furnish. This oath must be taken by all persons in any office, trust, or employment; and may be tendered by two justices of the peace to any person whom they shall suspect of disaffection.<sup>(h)</sup> And the oath of allegiance may be tendered<sup>(i)</sup> to all persons above the age of twelve years, whether natives, denizens, or aliens, either in the court-leet of the manor, or in the sheriff's tourn, which is the court-leet of the county.

But, besides these express engagements, the law also holds that there is an \*369] implied, original, and virtual allegiance, \*owing from every subject to his sovereign, antecedently to any express promise; and although the subject never swore any faith or allegiance in form. For as the king, by the descent of the crown, is fully invested with all the rights, and bound to all the duties, of sovereignty, before his coronation; so the subject is bound to his prince by an intrinsic allegiance, before the superinduction of those outward bonds of oath, homage, and fealty, which were only instituted to remind the subject of this his previous duty, and for the better securing its performance.<sup>(k)</sup> The formal profession, therefore, or oath of subjection, is nothing more than a declaration in words of what was before implied in law; which occasions Sir Edward Coke very justly to observe,<sup>(l)</sup> that "all subjects are equally bounden to their allegiance as if they had taken the oath; because it is written by the finger of the law in their hearts, and the taking of the corporal oath is but an outward declaration of the same." The sanction of an oath, it is true, in case of violation of duty, makes the guilt still more accumulated, by superadding perjury to treason; but it does not increase the civil obligation to loyalty; it only strengthens the *social* tie by uniting it with that of *religion*.

Allegiance, both express and implied, is, however, distinguished by the law into two sorts or species, the one natural, the other local; the former being also perpetual, the latter temporary. Natural allegiance is such as is due from all men born within the king's dominions immediately upon their birth.<sup>(m)</sup> 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.<sup>(n)</sup> An Englishman who \*370] removes to France, or to China, owes the same allegiance \*to the king of England there as at home, and twenty years hence as well as now. For it is a principle of universal law,<sup>(o)</sup> 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

(f) 1 Hal. P. C. 63.

(g) Stat. 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.

(m) 7 Rep. 7.

(n) 2 P. Wms. 124.

(o) 1 Hal. P. C. 63.

devested without the concurrent act of that prince to whom it was first due.<sup>2</sup> 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.<sup>3</sup>

<sup>2</sup> 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 divest 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 King's Bench, it has been determined that the treaty virtually prevented Americans adhering to the crown from inheriting lands in America. See the English case, *Doe v. Thomas vs. Acklam*, 2 B. & C. 729, which cites 7 Wheaton's R. 535. See also 1 Peters's C. C. R. 159.—CHITTY.

<sup>3</sup> 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.—CHRISTIAN.

The writers on public law have spoken rather loosely, but generally in favour, of the right of a subject or citizen to abandon his native country, unless there be some positive restraint by law or he is at the time in possession of a public trust, or unless his country be in distress or at war, or stands in need of his assistance. It is plain that any exceptions destroy the rule, especially such as those just mentioned. It amounts to saying that, when a society has no reason, the removal of a member ought not to be opposed. Cicero regarded it as one of the firmest foundations of Roman liberty that the Roman citizen had the privilege to stay or renounce his residence at pleasure; but this is different from the unqualified right of expatriation. The question has been frequently discussed in the courts of the United States; and, though never expressly decided, Chancellor Kent, from a historical review of these discussions, concludes that the better opinion is that a citizen cannot renounce his allegiance without permission to be declared by law, and that, as there is no existing legislative regulation in the case, the rule of the English common law—*nemo potest exuere patriam*—remains unaltered. 2 Kent's Com. 449. Judge Patterson expressed the opinion, that though the legislature of a particular State should by law specify the lawful causes of expatriation and prescribe the manner in which it might be effected, the emigration could only affect the local allegiance of the party, and would not draw after it a renunciation of the higher allegiance due to the United States. 3 Dallas, 133. Professor Tucker takes an entirely different view, and has come to a different conclusion. Tucker's Blackstone, Appendix, note K.

There are practical difficulties which, in all probability, will ever prevent any legislative action. However, as for all commercial purposes, even in time of war, the national character is determined exclusively by domicile, without regard either to natural or acquired allegiance, and as it would offend the sense of humanity of enlightened nations at present to treat as criminals, persons who, by the silent acquiescence, and therefore the presumed consent, of the country of their birth, had removed their fortunes and assumed new duties of obedience in other countries, if even they should be taken in arms against their native country, the question is not of immediate practical moment. Though Great Britain has never formally, yet she has really in fact, abandoned her once asserted right to impress her native subjects on board of foreign merchantmen: the right of visitation and search of public national armed vessels for that purpose was never asserted.

In case, however, of revolutions, it is recognised as law—at least in this country—that persons dissatisfied with the change have a right to remove with their effects, provided that right be exercised within a reasonable time. The sound and prevailing doctrine

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.\* Natural allegiance is therefore perpetual, and local temporary only; and that for this reason, evidently founded upon the nature of government, that allegiance is a debt due from the subject, upon an implied contract with the prince, that so long as the one affords protection, so long the other will demean himself faithfully. As therefore the prince is always under a constant tie to protect his natural-born subjects, at all times and in all countries, for this reason their allegiance due to him is equally universal and permanent. But, on the other hand, as the prince affords his protection to an alien only during his residence in this realm, the allegiance of an alien is confined, in point of time, to the duration or 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 a usurper of the crown, yet it is treason for any \*371] 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, 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 a 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.<sup>5</sup>

(p) 7 Rep. 6.  
(q) 1 Hal. P. C. 60.

(r) 1 Hal. P. C. 67.

now is, that by the treaty of peace of 1783, Great Britain and the United States became respectively entitled, as against each other, to the allegiance of all persons who were at the time adhering to the governments respectively, and that those persons became aliens in respect to the government to which they did not adhere. Of course all persons born in the United States had the right to adhere or not to the new government, as they might elect.

There is this difference between the decisions of the English and American courts,—a difference which seems naturally to result from their different national positions in reference to the question. The former adopt the date of the definitive treaty of peace by which the independence of the United States was acknowledged, viz. Sept. 3, 1783, as the period when the change took place. The American courts assume the date of the Declaration of Independence, July 4, 1776, as that period. 2 Barnwell & Cress. 729. 5 *ibid.* 771. 3 Peters, 99. 1 Dallas, 53. 2 Cranch, 279. 4 *ibid.* 209.—SHARSWOOD.

\* Mr. J. Foster informs us that it was laid down in a meeting of all the judges, that “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.” Post, 185.—CHRISTIAN.

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 he 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.—CHITTY.

<sup>5</sup> 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

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 criteria of time and locality; natural-born subjects having a great variety of rights, which they acquire by being born within the king's ligeance, and can never forfeit by any distance of place or time, but only by their own misbehaviour: the explanation of which rights is the principal subject of the two first books of these commentaries. The same is also in some degree the case of aliens; though their rights are much more circumscribed, being acquired only by residence here, and lost whenever they remove. I shall, however, here endeavour to [\*372 chalk out some of the principal lines, whereby \*they are distinguished from natives, descending to further 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)<sup>6</sup> 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.<sup>7</sup> Wherefore by the civil law such contracts were also made void:(t)

(\*) Co. Litt. 2.

(†) Cod. l. 11, tit. 55.

ever be wasted upon a sovereign who might be unacquainted with his people's wrongs until he should hear of them in their remonstrances!—CHITTY.

<sup>6</sup> A woman alien cannot be endowed, unless she marries by the license 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 curtesy. 7 Co. 25.—CHRISTIAN.

As to an alien's disability respecting lands, see 1 Chitty's Com. 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 misdemeanour 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.—CHITTY.

<sup>7</sup> 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



but the prince had no such advantage of forfeiture thereby, as with us in England. Among other reasons which might be given for our constitution, it seems to be intended by way of punishment for the alien's presumption, in attempting to acquire any landed property; for the vendor is not affected by it, he having resigned his right, and received an equivalent in exchange. Yet an alien may acquire a property in goods, money, and other personal estate, or may hire a house for his habitation: (u)<sup>8</sup> for personal estate is of a transitory and movable nature; and, besides, this indulgence to strangers is necessary for the advancement of trade. Aliens also may trade as freely as other people, only they are subject to certain higher duties at the custom-house;<sup>9</sup> and there are also some obsolete statutes of Hen. VIII. prohibiting alien artificers to work for themselves in this kingdom; but it is generally held that they were virtually repealed by statute 5 Eliz. c. 7.<sup>10</sup> Also, an alien may bring an action concerning personal property, and may make a will, and dispose of his personal estate: (w) not as it is in France, where the king at the death of an alien is entitled to all he is worth, by the *droit d'aubaine* or *jus albinatus*, (x) unless he has a peculiar exemption.<sup>11</sup> When I mention these rights of an alien, I must be understood \*373] for alien friends only, or such whose countries are in peace with ours; for alien enemies have no \*rights, no privileges, unless by the king's special favour, during the time of war.<sup>12</sup>

When I say that an alien is one who is born out of the king's dominions, or allegiance, this also must be understood with some restrictions. The common law, indeed, stood absolutely so, with only a very few exceptions; so that a particular act of parliament became necessary after the restoration, (y) "for the naturalization of the children of his majesty's English subjects, born in foreign countries during the late troubles." And this maxim of the law proceeded upon a general principle, that every man owes natural allegiance where he is born, and cannot owe two such allegiances, or serve two masters, at once. Yet the children of the king's ambassadors born abroad were always held to be natural subjects: (z) for as the father, though in a foreign country, owes not even a local allegiance to the prince to whom he is sent; so, with regard to the son also, he was held (by a kind of *postliminium*) to be born under the king of England's allegiance, represented by his father the ambassador. To encourage also foreign commerce, it was enacted by statute 25 Edw. III. st. 2, that all children born abroad, provided *both* their parents were at the time of the birth in allegiance

(u) 7 Rep. 17.

(w) Lutw. 34.

(x) A word derived from *alibi natus*. Spelm. Gl. 24.

(y) Stat. 29 Car. II. c. 6.

(z) 7 Rep. 18.

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 Kosciuszko, it fell an easy prey to her rapacity.—CHITTY.

<sup>8</sup> But a lease of lands will be forfeited to the king. Co. Litt. 2.—CHRISTIAN.

<sup>9</sup> Repealed, except as to some city duties, by stat. 24 Geo. II. st. 2. c. 16.—CHITTY.

<sup>10</sup> Mr. Hargrave says the statute 32 Hen. VIII. c. 16, however contrary it may seem to good policy and the spirit of commerce, still remains unrepealed. Co. Litt. 2. n. 7. See also 1 Woodd. 373.—CHRISTIAN.

<sup>11</sup> The Constituent Assembly in 1790 and 1791 entirely abolished the *droit d'aubaine*; but the code civil has restrained the operation of these laws to the nations of those countries in which no such right exists against Frenchmen. See Code Civil, l. 1. tit. 1, s. 11.—COLERIDGE

<sup>12</sup> Until all ransoms of captured ships and property were prohibited by 22 Geo. III. c. 25, an alien enemy could sue in our courts upon a ransom bill. Lord Mansfield, in a case of that kind, declared that "it was sound policy, as well as good morality, to keep faith with an enemy in time of war. This is a contract 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. 625.—CHRISTIAN.

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 further taken off: so that all children, born out of the king's ligeance, 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.<sup>13</sup> 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.<sup>14</sup>

The children of aliens, born here in England, are, generally speaking, natural-born subjects,<sup>15</sup> 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)<sup>16</sup> [\*374

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.<sup>17</sup> And, upon a

(a) Cro. Car. 601. Mar. 91. Jenk. Cent. 3.

(b) 7 Anne, 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

<sup>13</sup> 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 Durore vs. Jones*, 4 T. R. 300.—CHRISTIAN.

<sup>14</sup> Persons heretofore born, or hereafter to be born, out of the limits and jurisdiction of the United States, whose fathers were or shall be at the time of their birth citizens of the United States, shall be deemed and considered, and are hereby declared to be, citizens of the United States. *Provided, however*, that the rights of citizenship shall not descend to persons whose fathers never resided in the United States.

Any woman who might lawfully be naturalized under the existing laws, married, or who shall be married, to a citizen of the United States, shall be deemed and taken to be a citizen. Act of Congress 10 Feb. 1855. 10 Stat. at Large, 604, stat. 7 & 8 Vict. c. 60, makes the same provision as to women.

The children of a British mother married to a foreigner are aliens, if born abroad. *Durore vs. Jones*, 4 T. R. 300. The language of the act of Congress implies the same —SHARSWOOD.

So much doubt, however, hangs over this subject that a case arose a few years ago in which a party, whose grandfather had been born out of the British dominions, wished to establish his rights as a British subject; and the opinions of the most eminent lawyers in the country were taken on the question, five of whom thought that he could inherit, and five that he could not. On the other hand, the earl of Athlone, seventh in descent from Godart de Gincheff, created by king William in March, 1691-92, earl of Athlone, and who claimed to take his seat in the Irish house of peers in 1795, (more than a century after the family had left these kingdoms to reside in Holland,) was admitted by that assembly to be a native-born subject of the British crown, and he took his inheritance within the ligeance of the king accordingly. *Vide* Report on the Laws affecting Aliens, June, 1843.—HARGRAVE.

<sup>15</sup> Unless the alien parents are acting in the realm as enemies; for my lord Coke says, it is not *cælum nec solum*, but their being born within the allegiance and under the protection of the king. 7 Co. 18, a.—CHRISTIAN.

<sup>16</sup> But now a child born in France of foreign parents may, within a year after attaining twenty-one years, claim the character of a Frenchman, declaring, if not then resident in France, his intention to fix there, and actually fixing there within a year from such declaration. Code Civil, l. i. tit. 1, s. 9.—COLERIDGE.

"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.—CHITTY.

<sup>17</sup> By the 11 & 12 W. III. c. 6, natural-born subjects may derive a title by descent

like defect of hereditary blood, the issue of a denizen, born *before* denization, cannot inherit to him; but his issue born *after* may. (f) A denizen is not excused (g) from paying the alien's duty, and some other mercantile burdens. And no denizen can be of the privy council, or either house of parliament, or have any office of trust, civil or military, or be capable of any grant of lands, &c. from the crown. (h)<sup>18</sup>

Naturalization cannot be performed but by act of parliament: for by this an alien is put in exactly the same state as if he had been born in the king's ligeance; except only that he is incapable, as well as a denizen, of being a member of the privy council, or parliament, holding offices, grants, &c. (i)<sup>19</sup> No

(f) Co. Litt. 8. Vaugh. 285.  
(g) Stat. 22 Hen. VIII. c. 8.

(h) Stat. 12 W. III. c. 3.  
(i) Ibid.

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 seized 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.—CHRISTIAN.

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 has been since determined. Harg. Co. Litt. 8, a.—CHITTY.

<sup>18</sup> As to denization in general, see 1 Chitty's Com. L. 120. The right of making denizens is not exclusively vested in the king, for it may be by parliament; but it is scarcely ever exercised by any but the royal power. It may be effected by conquest. 7 Co. 6, a. 2. Vent. 6 Com. Dig. Aliens, D. 1. The king cannot delegate this right to another. 7 Co. 25, b. Com. Dig. Aliens, D. 1. See form of letters of denization, 2 Chitty's Com. L. appendix, 327.

The British law protects denizens made so by this country, but also respects the rights of those who have been declared denizens of foreign states. Thus a natural-born subject of England having been admitted a denizen of the United States of America, is entitled as such denizen to the benefit of the treaty between England and the United States, which authorizes the trade of Americans to the territories of the British East India Company, though as an English subject he would not have been permitted to carry on such a commerce. 8 T. R. 31. 1 B. & P. 430.—CHITTY.

<sup>19</sup> Therefore a person naturalized is not even eligible to the office of constable. 5 Burr. 2788.

As to naturalization in general, see Chalm. Col. Op. 382. Com. Dig. Aliens, B. 2. 1 Chitty's Com. Law, 123 to 130, and see form of acts of naturalization, 2 Chitty's Com. L. appendix, 324 to 327.

A person may become naturalized ipso facto by complying with the conditions pointed out in certain general statutes.

Naturalization cancels all defects, and is allowed to have a retrospective energy, which simple denization has not, (Co. Litt. 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. Litt. 33, a.

There seems to be no case in favour of this dictum of lord Coke. Naturalization is retrospective when it does not affect third persons, if the words of the act give them that effect; so if a man be naturalized, his brother or his son born before may inherit, if they be natives. See 1 Vent. 419; also vol. 2, p. 132, n. 24, and p. 250; Co. Litt. 129, a.; 2 Rol. 93.

Naturalization is not, as denization may be, merely for a time, but is absolutely forever, 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 Wooddeson, 282. Naturalizations in a foreign country, without license, 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

bill for naturalization can be received in either house of parliament without such disabling clause in it:(j) nor without a clause disabling the person from obtaining any immunity in trade thereby in any foreign country, unless he shall have resided in Britain for seven years next after the commencement of the session in which he is naturalized.(k) Neither can any person be naturalized or restored in blood unless he hath received the sacrament of the Lord's supper within one month before the bringing in of the bill; and unless he also takes the oaths of allegiance and supremacy in the presence of the parliament.(l) But these provisions have been usually dispensed with by special acts of parliament, previous to bills of naturalization of any foreign princes or princesses.(m)

\*These are the principal distinctions between aliens, denizens, and natives: distinctions, which it hath been frequently endeavoured since [\*375 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 Anne, c. 5; but this, after three years' experience of it, was repealed by the statute 10 Anne, 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 afterwards 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 statute 7 Jac. I. It is not my intention to revive this controversy again; for the act lived only a few months, and was then repealed:(r) therefore peace be now to its *manes*.<sup>20</sup>

(j) Stat. 1 Geo. I. c. 4.

(k) Stat. 14 Geo. III. c. 84.

(l) Stat. 7 Jac. I. c. 2.

(m) Stat. 4 Anne, c. 1    7 Geo. II. c. 3.    9 Geo. II. c. 24.  
4 Geo. III. c. 4.

(n) Stat. 13 Geo. II. c. 3.

(o) Stat. 13 Geo. II. c. 7.    20 Geo. III. 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. 25.

(r) Stat. 27 Geo. II. c. 1.

state, he shall, while abroad, pay such impositions as aliens do. 14 & 15 Hen. VIII. c. 4.—CHITTY.

The second mode of naturalization recently provided (7 & 8 Vict. c. 66, s. 7, 12) is much more simple. This may be obtained by every alien coming to reside in any part of Great Britain or Ireland, with intention to settle therein, upon a memorial first presented to one of the secretaries of state, who may, if he shall see fit after proper inquiries, issue a certificate granting to the memorialist, upon his taking the oath of allegiance and supremacy in the act set forth within sixty days from the day of the date of such certificate, all the rights and privileges of a natural-born British subject, except the capacity of being a member of the privy council or a member of either house of parliament, and except the rights and capacities, if any, specially excepted in obtaining such certificate.—STEWART.

<sup>20</sup> Congress is vested with power "to establish an uniform rule of naturalization." Const. U. S. art. 1, s. 8. A mere grant of power in affirmative terms to Congress does not *per se* delegate an exclusive power. This arises only when the constitution has in express terms given an exclusive power to Congress or has prohibited the exercise of a like power by the States, or where there is a direct repugnancy or incompatibility in the

## CHAPTER XI.

## OF THE CLERGY.

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

This venerable body of men, being separate and set apart from the rest of

exercise of it by the States. In this last class must be reckoned the power to establish a uniform rule of naturalization. 1 Kent's Com. 390. "The citizens of each State shall be entitled to all privileges and immunities of citizens in the several States." Const. U. S. art. 4, s. 2. It is evident that no rule of naturalization would be uniform unless the power in Congress were held to be exclusive.

By the provisions of various acts of Congress, any alien, being a free white person, may be admitted to become a citizen of the United States, or any of them, on the following conditions, and not otherwise:—

1. He shall have declared on oath or affirmation before a circuit, district, or territorial court of the United States, or any court of record of any individual State having common law jurisdiction and a seal and clerk, or prothonotary, or before the clerks of either of the said courts, two years at least before his admission, that it was *bona fide* his intention to become a citizen of the United States, and to renounce forever all allegiance and fidelity to any foreign prince, state, or sovereignty whatever, and particularly by name the prince, potentate, state, or sovereignty whereof such alien may at the time be a citizen or subject.

2. He shall, at the time of his application to be admitted, declare on oath or affirmation, before some one of the courts aforesaid, that he will support the constitution of the United States, and that he doth absolutely and entirely renounce and abjure all allegiance and fidelity to every foreign prince, potentate, state, or sovereignty whereof he was before a citizen or subject; which proceedings shall be recorded by the clerk of the court.

3. The court admitting such alien shall be satisfied that he has resided within the United States five years at least, and within the State or Territory where such court is at the time held one year at least; and it shall further appear to their satisfaction that during that time he has behaved as a man of good moral character, attached to the principles of the constitution of the United States, and well disposed to the good order and happiness of the same: *Provided*, that the oath of the applicant shall in no case be allowed to prove his residence.

4. In case the alien applying to be admitted to citizenship shall have borne any hereditary title or been of any of the orders of nobility in the kingdom or state from which he came, he shall, in addition to the above requisites, make an express renunciation of his title or order of nobility, in the court to which his application shall be made; which renunciation shall be recorded in the said court.

5. Any alien, being a free white person and a minor under the age of twenty-one years, who shall have resided in the United States three years next preceding his arriving at the age of twenty-one years, and who shall have continued to reside therein to the time he may make application to be admitted a citizen thereof, may, after he arrives at the age of twenty-one years, and after he shall have resided five years within the United States, including the three years of his minority, be admitted a citizen of the United States without having made any previous declaration of intention: he shall, however, make the declaration at the time of admission, and shall further declare on oath, and prove to the satisfaction of the court, that for three years next preceding, it has been the *bona fide* intention of such alien to become a citizen of the United States, and shall in all other respects comply with the laws in regard to naturalization.

6. When any alien who shall have declared his intentions shall die before he is actually naturalized, the widow and the children of such alien shall be considered as citizens of the United States, and shall be entitled to all rights and privileges as such upon taking the oaths prescribed by law.

7. The children of persons duly naturalized under any of the laws of the United States, or who, previous to the passing of any law on that subject by the government of the United States, may have become citizens of any one of the said States, under the laws thereof,

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,

being under the age of twenty-one years at the time of their parents being so naturalized or admitted to the rights of citizenship, shall, if dwelling in the United States, be considered as citizens of the United States; and the children of persons who now are or have been citizens of the United States shall be considered as citizens of the United States: *Provided*, that the right of citizen shall not descend to persons whose fathers have never resided within the United States. The naturalization of a father *ipso facto* makes his son then residing in the United States, and under twenty-one years of age, a citizen. 1 English, 621. This provision is prospective in its operation, and applies to subsequent as well as precedent naturalization. 8 Paige, 433.

8. No alien who shall be a native, citizen, denizen, or subject of any country, state, or sovereign with whom the United States shall be at war at the time of his application, shall be then admitted to be a citizen of the United States.

Acts of Congress, 14 April, 1802, (2 Story's Laws, 850,) 26 March, 1804, (id. 942,) 26 May, 1824, (3 id. 1973,) 24 May, 1828, (4 id. 2145.)

It is not necessary that the record of naturalization shall state that all the legal prerequisites were complied with, the judgment of the court admitting the applicant being conclusive of the fact of such compliance. 7 Cranch, 420. 4 Peters, 406. 13 Wendell, 524.

There are two classes of persons residing in the United States whose status is somewhat peculiar,—negroes and Indians. In regard to the former, it has been held in some of the State courts, (*Amy vs. Smith*, 1 Litt. 334; *Crandall vs. The State*, 10 Conn. 340; *State vs. Claiborne*, 1 Meigs, 331; *Hobbs vs. Fogg*, 6 Watts, 553,) and now finally settled in the Supreme Court of the United States, (*Dred Scott vs. Sandford*, 19 Howard, 393,) that they are not, and cannot under the existing constitution and laws be, citizens of the United States. It is admitted that the constitution and laws of any particular State may confer upon them the most important civil and political rights,—even the elective franchise,—as they may do in regard to aliens; but it is not in their power to make them technically citizens, so as to give them the right to sue in the Federal courts or to claim those privileges in every State which appertain to the citizens of such State. At the time of the adoption of the Federal constitution, they were not recognised as the citizens of any of the States, and subsequently to that period the power of naturalization was exclusively in Congress. They are not, however, aliens; and the power granted to Congress to establish a uniform rule of naturalization is, by the well-understood meaning of the word, confined to persons born in a foreign country under a foreign government. It is not a power to raise to the rank of a citizen any one born in the United States who, from birth or parentage, by the laws of the country belongs to an inferior and subordinate class. "The situation of this population," says C. J. Taney, "was altogether unlike that of the Indian race. The latter, it is true, formed no part of the colonial communities, and never amalgamated with them in social connections or in government. But, although they were uncivilized, they were yet a free and independent people, associated together in nations or tribes, and governed by their own laws. Many of these political communities were situated in territories to which the white race claimed the ultimate right of dominion. But that claim was acknowledged to be subject to the right of the Indians to occupy it as long as they thought proper; and neither the English nor colonial governments claimed or exercised any dominion over the tribe or nation by whom it was occupied, nor claimed the right to the possession of the territory, until the tribe or nation consented to cede it. These Indian governments were regarded and treated as foreign governments as much as if an ocean had separated the red man from the white; and their freedom has constantly been acknowledged, from the time of the first emigration to the English colonies to the present day, by the different governments which succeeded each other. Treaties have been negotiated with them, and their alliance sought for in war; and the people who compose these Indian political communities have always been treated as foreigners not living under our government. It is true that the course of events has brought the Indian tribes within the limits of the United States under subjection to the white race; and it has been found necessary, for their sake as well as our own, to regard them as in a state of pupilage, and to legislate to a certain extent over them and the territory they occupy. But they may, without doubt, like the subjects of any other foreign government, be naturalized by the authority of Congress and become citizens of a State and of the United States; and, if an individual should leave his nation or tribe and take

they attempted a total exemption from every secular tie. But it is observed by Sir Edward Coke,<sup>(a)</sup> 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:<sup>(b)</sup> but if a layman is \*summoned \*377] on a jury, and before the trial takes orders, he shall notwithstanding appear and be sworn.<sup>(c)</sup> 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.<sup>(d)</sup> During his attendance on divine service he is privileged from arrests in civil suits.<sup>(e)</sup> 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:<sup>3</sup> in both which particulars he is dis-

<sup>(a)</sup> 2 Inst. 4.

<sup>(b)</sup> F. N. B. 160. 2 Inst. 4.

<sup>(c)</sup> 4 Leon. 190.

<sup>(d)</sup> Finch, L. 88.

<sup>(e)</sup> Stat. 60 Edw. III. c. 5. 1 Ric. II. c. 16.

up his abode among the white population, he would be entitled to all the rights and privileges which would belong to an emigrant from any other foreign people." 19 Howard, 403. It is to be observed, however, that, under our present naturalization act, 14 April, 1802, the right of becoming citizens is confined to aliens "being free white persons."

In reference to the clause of the constitution which declares that "the citizens of each State shall be entitled to all privileges and immunities of citizens in the several States," it is proper to observe that it establishes not a full but a limited intercommunication of privileges. A citizen of one State must have all the requisites to the exercise of any civil or political rights which are established by the constitution or laws of that State in regard to their own citizens. If a property-qualification or a period of residence is required in order to vote, it must be fulfilled. *Campbell vs. Morris*, 3 Harr. & McH. 554. *Murray vs. McCarty*, 2 Munf. 398.

It is a common error to connect the elective franchise inseparably with citizenship, as if elector and citizen were convertible terms. In regard to the persons who shall exercise this franchise in each State, it is determined entirely by the constitution and laws of the State. They may confer the privilege on aliens, negroes, Indians, women, and children. Even in regard to the choice of representatives in Congress and electors of President of the United States, the Federal constitution leaves the matter entirely in the hands of the State. As to representatives, it is provided that "the electors in each State shall have the qualifications requisite for electors of the most numerous branch of the State legislature." Art. 1, s. 2. And, as to the Presidential electors, "each State shall appoint, in such manner as the legislature thereof may direct, a number of electors," &c. Art. 2, s. 1.—SHARSWOOD.

<sup>1</sup> There is no established church in the United States. Freedom of conscience, and exemption from the support of any church or ministry unless by the free consent of the individual, is guaranteed in all our constitutions. "*Liberty to all, but preference to none*," says C. J. Tilghman,— "this has been our principle and this our practice. But although we have had no established church, yet we have not been wanting in that respect, nor niggards of those privileges, which seem proper for the clergy of *all religious denominations*. It has not been our custom to require the services of clergymen in the offices of constables, overseers of the highways or of the poor, jurors, or others of a similar nature. Not that this exemption is founded on any act of assembly, but on a universal tacit consent. In the nature of things, it seems fit that those persons who devote their lives to the service of God and the religious instruction of their brethren should be freed from the burden of temporal offices, which would but distract their attention, and may be better filled by others." *Guardians of the Poor vs. Green*, 5 Binn. 555.—SHARSWOOD.

<sup>2</sup> That is, for a reasonable time, *eundo, redeundo, et morando*, to perform divine service. 10 Co. 100.—CHRISTIAN.

<sup>3</sup> 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

tinguished from a layman.(f) But as they have their privileges, so also they have their disabilities, on account of their spiritual avocations. Clergymen, we have seen,(g) are incapable of sitting in the house of commons; and, by statute 21 Hen. VIII. c. 13, are not, in general, allowed to take any lands or tenements to farm, upon pain of 10*l.* per month, and total avoidance of the lease;<sup>4</sup> nor upon like pain to keep any tanhouse or brewhouse; nor shall engage in any manner of trade, nor sell any merchandise, under forfeiture of the treble value: 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 license 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 \*emperors and other sovereigns of the respective kingdoms of Europe took the appointment, in some de- [ \*378  
gree, 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 Laturan,(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 bishoprics is said to have been in the crown of England(k) (as well as other kingdoms in Europe) even in the Saxon times; because the rights of confirmation and investiture were in effect, though not in form, a right of complete donation.(l) But when, by length of time, the custom of making elections by the clergy only was fully established, the popes

(f) 2 Inst. 637. Stat. 4 Hen. VII. c. 13, and 1 Edw. VI. c. 12.

(g) Page 175.

(h) *Per clericum et populum.* Palm. 25. 2 Roll. Rep. 102. M. Paris, A.D. 1095.

(i) *Decret.* 1 *Dist.* 63, c. 22.

(k) Palm. 23.

(l) "*Nulla electio prelatorum (sunt verba Ingulphi) erat mere libera et canonica; sed omnes dignitates tam episcoporum, quam albatum, per annulum et baculum regis curia pro sua complacentia conferebat.*" *Fenes clericos et monachos fuit electio, sed electum a rege postulabant.* Selden, *Jan. Ang.* l. 1, § 39.

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.—CHRISTIAN.

Benefit of clergy, with respect to persons convicted of felony, is entirely abolished, by the statute of 7 & 8 Geo. IV. c. 28, s. 6.—HOVEDEN.

<sup>4</sup> By stat. 57 Geo. 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.—CHITTY.



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.<sup>(m)</sup>

\*379] This was a bold step towards effecting the plan then adopted by the Roman see, of rendering the clergy entirely independent of the civil authority: and long and eager were the contests occasioned by this 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 temporalities, instead of investing them by the ring and crosier; the court of Rome found it prudent to suspend for a while its other pretensions.<sup>(n)</sup>

This concession was obtained from king Henry the First in England, by means of that obstinate and arrogant prelate, archbishop Anselm:<sup>(o)</sup> 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 temporalities during the vacancy; the form of granting a license 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.<sup>(p)</sup> This grant was expressly recognised and confirmed by king John's *magna carta*,<sup>(q)</sup> 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;<sup>5</sup> it being enacted, that at every future avoidance of a bishopric, the king may send the dean and chapter his usual license to proceed to election; which is always to be accompanied with a letter missive from the king, containing the name of the person whom he would have them elect: and if the dean and chapter delay their election above twelve days, the

\*380] 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 temporalities, shall make oath to the king and none other, and shall take restitution of his secular possessions out of the king's hands only. And if such dean and chapter do not elect in the manner by this act appointed, or if such archbishop or bishop do refuse to confirm, invest, and consecrate such bishop elect, they shall incur all the penalties of a *præmunire*.<sup>6</sup>

<sup>(m)</sup> *Decret.* 2 *caus.* 16, *qu.* 7, c. 12 and 13.

<sup>(n)</sup> *Mod. Un. Hist.* xxv. 363, xxix. 115.

<sup>(o)</sup> *M. Paris*, A.D. 1107.

<sup>(p)</sup> *M. Paris*, A.D. 1214. 1 *Rym. Fisd.* 198.

<sup>(q)</sup> *Cap. L. Edit. Occen.* 1769.

<sup>5</sup> This statute was afterwards repealed by 1 Edw. VI. c. 2, which enacted that all bishoprics 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'eslire* 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 bishoprics of the new foundation were always donative. *Harg. Co. Litt.* 1, 4. As also are all the Irish bishoprics by the 2 Eliz. c. 4. *Irish Statutes*.—CHRISTIAN.

<sup>6</sup> It is directed by the form of consecrating bishops, confirmed by various statutes

An archbishop is the chief of the clergy in a whole province,<sup>1</sup> and has the inspection of the bishops of that province, as well as of the inferior clergy, and

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 Eboracensem 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 archbishopric of York. Hoc sedente episcopus Sancti Andreae 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 illa Scotiæ sit metropolitanus, qui propter crebra inter Scotos ac Anglos bella, Scotis plerumque hostis sit capitalis.* Godw. Comm. de Præsul. 693.—CHRISTIAN.

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 archbishoprics, to wit, Canterbury and York, and twenty-four bishoprics, (besides the bishopric 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. Litt. 94.

Westminster was one of the new bishoprics 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 bishopric 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 again displaced by prelacy; and finally, by acts 1689, c. 3, and 1690, c. 5, 29, presbytery was re-established, and has since continued.—CHURCH.

<sup>1</sup>The archbishop of Canterbury hath the precedence 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. Litt. 94. 1 Ought. Ord. Jud. 486.

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,

may deprive them on notorious cause.(r)<sup>8</sup> 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 temporalities; and he executes all ecclesiastical jurisdiction therein. If an archiepiscopal see be vacant, the dean and chapter are the spiritual guardians, ever since the office of prior of Canterbury was abolished at the reformation.(t) The archbishop is entitled to present by lapse to all the ecclesiastical livings in \*381] the disposal of his \*diocesan bishops, if not filled 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.<sup>9</sup> The prerogative itself seems to be derived from the legatine power formerly annexed by the popes to the metropolitan of Canterbury.(w) And we may add, that the papal claim itself (like most others of that encroaching see) was probably set up in imitation of the imperial prerogative called *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 coronies 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.<sup>10</sup> 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 licenses to marry at any

(r) Lord Raym. 541.

(s) 4 Inst. 322, 323.

(t) 2 Roll. Abr. 22.

(u) Cowell's Interp. tit. *Option*.

(v) Sherlock of Options, 1.

(w) Goldast *Constit. Imper. tom. 3, page 406.*

(x) Dufresne V. 806. Mod. Univ. Hist. xxix. 5.

(y) *Rez, d. salutem. Scribatis Episcopo Karl quod—Roberto de Icard pensionem suam, quam ad preces regis predicto Roberto concessit, de cetera solvat: et de proxima ecclesia vacatura de collatione predicti episcopi, quam ipse Robertus acceptaverit, respiciat. Brev. II Edw. I. 3 Fryn. 1264.*

(z) Ch. viii. page 234.

as also before all the great officers of state except the lord chancellor. Godw. 14.—CHITTY.

<sup>8</sup> 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 Raym. 541. 1 Burn's Ec. L. 212.—CHRISTIAN.

<sup>9</sup> 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.—CHRISTIAN.

<sup>10</sup> 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.—CHRISTIAN.

place or time, to hold two livings, and the like;<sup>11</sup> and on this also is founded the right he exercises of conferring degrees,<sup>12</sup> in prejudice of the two universities.(b)

\*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.<sup>13</sup> 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;<sup>14</sup> 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. [ \*382

Archbishoprics and bishoprics may become void by death, deprivation for any gross and notorious crime, and also by resignation. All resignations must be made to some superior.(d) Therefore a bishop must resign to his metropolitan, but the 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:<sup>15</sup> but in those chapters, that were founded by Henry VIII. out of the spoils of the dissolved monasteries,<sup>16</sup> the deanery is donative, and the installation \*merely by the king's letters-patent.(g) The chapter, consisting of canons or [ \*383

(b) See the bishop of Chester's case, Oxon. 1721.  
(c) Stat. 37 Hen. VIII. c. 17.  
(d) Gibs. Cod. 822.

(e) 3 Rep. 75. Co. Litt. 103, 300.  
(f) Page 113, 114.  
(g) Gibs. Cod. 173.

<sup>11</sup> 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.—CHRISTIAN.

<sup>12</sup> 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.—CHRISTIAN.

<sup>13</sup> A bishop has three powers:—1st. Of ordinations, which he acquires on his consecration, and thereby he may confer orders, &c. in any place throughout the world. 2d. Of jurisdiction, which is limited and confined to his see. 3d. 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 licenses for marriage, makes probates of wills, &c. Co. Litt. 96. 2 Roll. Ab. 230. Powers and duties invested in bishops in appointing curates, &c. by 57 Geo. III. c. 99.—CHITTY.

<sup>14</sup> 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.—CHITTY.

<sup>15</sup> See a very learned note, containing a full history of the election, presentation, or donation to deaneries, by Mr. Hargrave, in Co. Litt. 95.—CHRISTIAN.

<sup>16</sup> The new deaneries and chapters to old bishoprics are eight,—viz., Canterbury, Norwich, Winchester, Durham, Ely, Rochester, Worcester, and Carlisle; and five new

prebendaries, are sometimes appointed by the king, sometimes by the bishop, and sometimes elected by each other.<sup>17</sup>

The dean and chapter are, as was before observed, the nominal electors of a bishop. The bishop is their ordinary<sup>18</sup> 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.<sup>(h)</sup>

Deaneries and prebends may become void, like a bishopric, by death, by deprivation, or by resignation to either the king or the bishop.<sup>(i)</sup> 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.<sup>(j)</sup>

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.<sup>19</sup> He is usually appointed by the bishop himself; and hath a kind of episcopal authority, originally derived from the bishop, but now independent and distinct from his.<sup>(k)</sup><sup>20</sup> 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,<sup>(l)</sup> but almost grown out of use; though their deaneries still subsist as an ecclesiastical division \*384] of the diocese, or archdeaconry. They seem to have been deputies of the \*bishop, planted all round his diocese, the better to inspect the conduct of the parochial clergy, 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.<sup>(m)</sup><sup>21</sup>

(<sup>a</sup>) Co. Litt. 103.

(<sup>b</sup>) Plowd. 498.

(<sup>c</sup>) Bro. Abr. t. Presentation, 3, 61. Cro. Eliz. 542, 790. 2

Boll. Abr. 352. 4 Mod. 200. Salk. 137.

(<sup>d</sup>) 1 Burn. Eccl. Law, 68, 69.

(<sup>e</sup>) Kennet, Par. Antiq. 633.

(<sup>f</sup>) Gibb. Cod. 972, 1550.

bishoprics, with new deaneries and chapters annexed, were created,—viz., Peterborough, Chester, Gloucester, Bristol, and Oxford. Harg. Co. Litt. 95, n. 3.—CHRISTIAN.

<sup>17</sup> A dean who is solely seized 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.—CHITTY.

<sup>18</sup> 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.—CHRISTIAN.

<sup>19</sup> 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 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 & 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 thirty-nine articles. Wats. c. 15.

An archdeacon is a ministerial officer, and cannot refuse to swear a church-warden elected by the parish. Lord Raym. 138. The King vs. Bishop Winchester, K. B. T. T. 1825.—CHITTY.

<sup>20</sup> 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 with 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 Raym. 123.—CHITTY.

<sup>21</sup> But this office, *decanus ruralis*, is wholly extinguished, if it ever had separate existence; and now the archdeacon and chancellor of the diocese execute the authority formerly attached to it. See 1 Nels. Abr. 506–507.—CHITTY.

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, show 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.<sup>(n)</sup> 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 distributed in a fourfold division: one, for the use of the bishop; another, for maintaining \*the fabric of [ \*385 the church; a third, for the poor; and the fourth, to provide for the incumbent. When the sees of the bishops became otherwise amply endowed, they were prohibited from demanding their usual share of these tithes, and the division was into three parts only. And hence it was inferred by the monasteries, that a small part was sufficient for the officiating priest; and that the remainder might well be applied to the use of their own fraternities, (the endowment of which was construed to be a work of the most exalted piety,) subject to the burden of repairing the church and providing for its constant supply. And therefore they begged and bought, for masses and obits, and sometimes even for money, all the advowsons within their reach, and then appropriated the benefices to the use of their own corporation. But, in order to complete such appropriation effectually, the king's license, 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.<sup>(o)</sup> 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.<sup>(p)</sup>

This appropriation may be severed, and the church become disappropriate, two ways: as, first, if the patron or appropriator presents a clerk, who [ \*386 is instituted and inducted \*to the parsonage; for the incumbent so instituted and inducted is to all intents and purposes complete parson; and the appropriation, being once severed, can never be reunited again, unless by a repetition of the same solemnities.<sup>(q)</sup> And, when the clerk, so presented,<sup>r</sup> is dis-

(n) Co. Litt. 300.  
(o) Plowd. 496-500.

(p) Hob. 307.  
(q) Co. Litt. 46.

<sup>r</sup> 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 improprator

inct from the vicar, the rectory thus vested in him becomes what is called a *sinecure*:<sup>23</sup> 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 made at this day:<sup>24</sup> and thus were most, if not all, of the appropriations at present existing originally made; being annexed to bishoprics, 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 vicegerent of the appropriator, and therefore called *vicarius*, or *vicar*. His stipend was at the discretion of the appropriator, who was however bound of common right to find somebody, *qui illi de temporalibus, episcopo de spiritualibus, debeat respondere*.(w)<sup>25</sup> 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

(\*) *Sinecures* might also be created by other means. 2 Burn's Eccl. Law, 347.

(s) Seld. Review of Tith. c. 9. Spelm. Apology, 35.

(t) 2 Inst. 584.

(\*) 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. xl. 1.

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.—CHRISTIAN.

<sup>23</sup> 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.—CHRISTIAN.

<sup>24</sup> 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.—CHRISTIAN.

<sup>25</sup> 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.—CHRISTIAN.

forced to interpose: and accordingly it is enacted by statute 15 Ric. II. c. 6, that in all appropriations of churches, the diocesan bishop shall ordain, in proportion to the value of the church, a competent sum to be distributed among the poor parishioners annually; and that the vicarage shall be *sufficiently* endowed. It seems the parish were frequently sufferers, not only by the want of divine service, but also by withholding those alms, for which, among other purposes, the payment of tithes was originally imposed: and therefore in this act a pension is directed to be distributed among the poor parochians, as well as a sufficient stipend to the vicar. But he, being liable to be removed at the pleasure of the appropriator, was not likely to insist too rigidly on the legal sufficiency of the stipend: and therefore, by statute 4 Hen. IV. c. 12, it is ordained, that the vicar shall be a secular person, not a member of any religious house; that he shall be vicar perpetual, not 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.<sup>26</sup> 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 [\*388 called *privy* or small tithes; the 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.<sup>27</sup> 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.<sup>28</sup>

<sup>26</sup> 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 impropiator, 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.—CHRISTIAN.

<sup>27</sup> 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.—CHRISTIAN.

<sup>28</sup> In the year 1836, by stat. 6 & 7 Will. IV. c. 71, followed by various others, a great



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 holy orders of deacon and priest according to the liturgy and canons, (x) is foreign to the purpose of these commentaries; any further than as they are necessary requisites to make a complete parson or vicar. By common law, a deacon of any age might be instituted and inducted to a parsonage or vicarage; but it was ordained by statute 13 Eliz. c. 12, that no person under twenty-three years of age, and in deacon's orders, should be presented to any benefice with cure; and if he were not ordained priest within one year after his induction, he should be *ipso facto* deprived; and now, by statute 13 & 14 Car. II. c. 4, no person is capable to be admitted to any benefice, unless he hath been first ordained a priest;<sup>29</sup> and then he is, in the language of the law, a clerk in orders. But if he obtains orders, or a license \*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, 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 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

(\*) See 2 Burn, Eccl. Law, 103.

(\*) Stat. 31 Eliz. c. 6.

(\*) A layman may also be presented; but he must take priest's orders before his admission. 1 Burn, 103.

(\*) 2 Roll. Abr. 355.

(\*) Gianv. L. 13, c. 20.

(\*) 2 Roll. Abr. 356. 2 Inst. 632. Stat. 3 Ric. II. c. 3. 7 Ric. II. c. 12.

(\*) 6 Rep. 58.

(\*) 2 Inst. 632.

(\*) 2 Inst. 632.

change was effected in the law of tithes, which the legislature considered to stand on a most unsatisfactory footing,—to be unjust, vexatious, and irritating alike to the tithe-owner and the tithe-payer. Tithes were then commuted into a rent-charge, adjusted to the average price of corn; and this commutation may be either voluntary or compulsory, under the superintendance and by the agency of "The Tithe-Commissioners of England and Wales."—WARREN.

<sup>29</sup> 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.—CHRISTIAN.

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; for the maxim of law is, that *vicarius non habet vicarium*: and, as the non-residence of the appropriators was the cause of the perpetual establishment of vicarages, the law judges it very improper for them to defeat the end of their constitution, and by absence to create the very mischiefs which they were appointed \*to remedy: especially as, if any profits are [\*391 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 imparsoned. (k)

The rights of a parson or vicar, in his tithes and ecclesiastical dues, fall more properly under the second book of these commentaries: and as to his duties, they are principally of ecclesiastical cognizance; those only excepted which are laid upon him by statute. And those are indeed so numerous, that it is impracticable to recite them here with any tolerable conciseness or accuracy. Some of them we may remark, as they \*arise in the progress of our [\*392 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, upon the supposition of which the law doth style every parochial minister an incumbent. By statute 21 Hen. VIII. c. 12, 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: and also except (n) all heads of houses, magistrates, and professors in the

(g) 5 Rep. 53. 3 Lev. 313.

(h) 2 Inst. 632.

(i) Co. Litt. 314.

(k) Co. Litt. 300.

(l) These are very numerous, but there are few which can be relied on with certainty. Among these are Bishop Gib-

son's *Codex*, Dr. Burn's *Ecclesiastical Law*, and the earliest 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.

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,<sup>(o)</sup> 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.

We have seen that there is but one way whereby one may become a parson or vicar: there are many ways by which one may cease to be so. 1. By death. 2. By cession, in taking another benefice. For, by statute 21 Hen. VIII. c. 13, if any one having a benefice of *8l. per annum* or upwards (according to the present valuation in the king's books)<sup>(p)</sup> accepts any other, the first shall be adjudged void, unless he obtains a dispensation, which no one is entitled to have, but the chaplains of the king<sup>30</sup> and others therein mentioned, the brethren and the sons of lords and knights, and doctors and bachelors of divinity and law,<sup>31</sup> *admitted by the universities* of this realm. And a vacancy thus made, for want of a dispensation, is called cession.<sup>32</sup> 3. By consecration; for, as was mentioned before, when a clerk is promoted to a bishopric, all his other \*pre-ferments are void the instant that he is consecrated. But there is a method, by the favour of the crown, of holding such livings *in commendam*. *Commenda*, or *ecclesia commendata*, is a living commended by the crown to the care of a clerk, to hold till a proper pastor is provided for it. This may be temporary for one, two, or three years; or perpetual: being a kind of dispensa-

(o) 6 Rep. 21.

(p) Cro. Car. 456.

<sup>30</sup> 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 a knight of the garter, three; a duchess, marchioness, countess and baroness, being widows, two. The king's treasurer, comptroller, secretary, dean of the chapel, almoner, 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.—CHRISTIAN.

<sup>31</sup> 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 Henry VIII., in the twenty-seventh 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 cujuscumque 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.—CHRISTIAN.

<sup>32</sup> 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.—CHRISTIAN

tion to avoid the vacancy of the living, and is called a *commenda retinere*.<sup>33</sup> 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)<sup>34</sup> 5. By deprivation; 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 non-feasance or neglect, or else some malfeasance 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, instead of the proper incumbent. Though \*there are what are called *perpetual* curacies, [\*394 where all the tithes are appropriated, and no vicarage endowed, (being [394 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)<sup>35</sup>

(q) Hob. 144.

(r) Cro. Jac. 198.

(s) Dyer, 108. Jenk. 210.

(t) Fitz. Abr. tit. Trial, 54.

(u) Stat. 31 Eliz. c. 6. 12 Anne, 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.

(\*) Stat. 1 Eliz. c. 2.

(†) Stat. 1 W. and M. c. 26.

(‡) 6 Rep. 29, 30.

(§) 1 Burn's Eccl. Law, 427.

(¶) Stat. 28 Hen. VIII. c. 11.

(‡) Stat. 12 Anne, st. 2, c. 12.

<sup>33</sup> 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 bishopric, 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. vol. ii. p. 710.—CHRISTIAN.

<sup>34</sup> 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 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 show sufficient cause; and another observed, if he could not be compelled, he might prevent any incumbent from accepting an Irish bishopric, as no one can accept a bishopric 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

—CHRISTIAN.

<sup>35</sup> It was provided in 1603, by canon 33, that if a bishop ordains any person not pro

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. Church-wardens are the guardians or keepers of the church, and representatives of the body of the parish.<sup>(d)</sup> They are sometimes appointed by the minister, sometimes by the parish, sometimes by both together, as custom directs. They are taken, in favour of the church, to be for some purposes a kind of corporation at the common law; that is, they are enabled by that name to have property in goods and chattels, and to bring actions for them, for the use and profit of the parish. Yet they may not waste the church goods, but may be removed by the parish, and then called to account by action at the common law; but there is no method of calling them to account but by first removing them; for none can legally do it but those who are put in their place.

\*As to lands, or other real property, as the church, 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. They are also joined with the overseers in the care and maintenance of the poor. They are to levy<sup>(e)</sup> 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 church-warden may justify the pulling off a man's hat, without being guilty of either an assault or trespass.<sup>(f)</sup> There are also a multitude of other petty parochial powers committed to their charge by divers acts of parliament.<sup>(g)</sup>

VIII. Parish clerks, and sextons, are also regarded by the common law as persons who have freeholds in their offices; and therefore, though they may be punished, yet they cannot be deprived by ecclesiastical censures.<sup>(h)</sup> The parish clerk was formerly very frequently in holy orders, and some are so to this day. He is generally appointed by the incumbent, but by custom may be chosen by the inhabitants; and, if such custom appears, the court of King's Bench will grant a *mandamus* to the archdeacon to swear him in, for the establishment of the custom turns it into a temporal or civil right.<sup>(i)</sup>

<sup>(d)</sup> In Sweden they have similar officers, whom they call *Körckiewarjantandes*. Stiernhook, l. 3, c. 7.

<sup>(e)</sup> Stat. 1 Eliz. c. 2.

<sup>(f)</sup> 1 Lev. l. 6.

<sup>(g)</sup> See Lambard of Church-wardens, at the end of his *Ecclesiastica*; and Dr. Burn, tit. *Church, Church-wardens, Visitations*.

<sup>(h)</sup> 2 Roll. Abr. 234.

<sup>(i)</sup> Cro. Car. 589.

vided 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 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 *bona fide* as a curate, and to grant him a certain allowance till he obtain 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 dismissal 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.—CHRISTIAN.

## 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.<sup>1</sup> 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)<sup>2</sup>

\*1. A *duke*, though he be with us, in respect of his title of nobility, 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 *hepctoga*; (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,<sup>3</sup> 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 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.

(a) 4 Inst. 263.

(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 *herzog*, the ancient appellation of dukes in that country. Seld. Tit. Hon. 2, 1, 12.

(e) Camden, Britan. tit. *Ordines*. Spelman, Gloss. 101.

1 "No title of nobility shall be granted by the United States; and no person holding any office of profit or trust under them shall, without the consent of Congress, accept of any present, emolument, office, or title, of any kind whatever, from any king, prince, or foreign state." Const. U. S. art. 1, s. 9. "No State shall grant any title of nobility." Ibid s. 10.

2 A superior degree of nobility does not extinguish the inferior. 2 Inst. 6. Com. Dig. Dignity, b. 6.—CHITTY.

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. vol. viii. p. 135, 8vo edition.—CHITTY.

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 marches, 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.<sup>(f)</sup>

\*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,<sup>(g)</sup> 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.*"<sup>(h)</sup> 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 connection 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.<sup>(i)</sup><sup>4</sup>

\*399] 5. A *baron's* is the most general and universal title of nobility; for originally every one of the peers of superior rank \*had also a barony annexed to his other titles.<sup>(j)</sup><sup>5</sup> But it hath sometimes happened that, when an

<sup>(f)</sup> 2 Inst. 5.

<sup>(g)</sup> Britan. tit. Ordines.

<sup>(h)</sup> Bracton, l. 1, c. 8. Flet. l. 1, c. 5.

<sup>(i)</sup> 2 Inst. 5.

<sup>(j)</sup> 2 Inst. 5, 6.

<sup>4</sup> But this peer, if so he might be deemed, never sat in parliament, by reason that his creation was never recognised 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 occur these remarkable words:—"—— ejustem parliamenti de gratia sua speciali et ex certa scientia sua, ac de *advisamento et consensu* ducia Gloucester et cardinalis Winton ac cæterorum dominorum spiritualium et temporalium in parliamento." Rot. Parl. 11 Hen. VI. p. 1, m. 16.—CHITTY.

<sup>5</sup> 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

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 has 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.<sup>6</sup> It may be collected from king John's *magna carta*,<sup>(k)</sup> 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

(k) Cap. 14.

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 further 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 Ric. II., when the practice of creating peers by letters-patent first commenced.

In that year John de Beauchamp, steward of the household to Ric. 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.—CHRISTIAN.

<sup>6</sup> Lords of manors, who had granted to others by subinfeudation part of that estate 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 a complete a baron as a lord of a manor.—CHRISTIAN.



parliament.<sup>(l)</sup> 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.<sup>(m)</sup>

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  
\*400] which were, in right of those estates, allowed to be \*peers of the realm, and were summoned to parliament to do suit and service to their sovereign; and, when the land was alienated, the dignity passed with it as appendant. Thus the bishops still sit in the house of lords in right of succession to certain ancient baronies annexed, or supposed to be annexed, to their episcopal lands:<sup>(n)</sup> and thus, in 11 Hen. VI. the possession of the castle of Arundel was adjudged to confer an earldom on its possessor.<sup>(o)</sup> 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:<sup>(p)</sup> and therefore the most usual, because the surest, way is to grant the dignity by patent, which enures to a man and his heirs, according to the limitations thereof, though he never himself makes use of it.<sup>(q)</sup> Yet it is frequent to call up the eldest son of a peer to the house of lords by writ of summons in the name of his father's barony; because in that case there is no danger of his children's losing the nobility in case he never takes his seat; for they will succeed to their grandfather.<sup>r</sup> Creation by writ has also one advantage over that by  
\*401] patent: for a person created by writ holds the dignity to him *and his*  
\*heirs,<sup>s</sup> without any words to that purport in the writ; but in letters

(l) Glib. Hist. of Exch. c. 3. Seld. Tit. of Hon. 2, 5, 21.

(m) 1 Inst. 9 Seld. Jan. Angl. 2, § 68.

(n) Glanv. l. 7, c. 1.

(o) Seld. Tit. of Hon. b. 2, c. 9, § 5.

(p) Whitlocke of Parl. ch. 144.

(q) Co. Litt. 16.

<sup>r</sup> Lord Coke, Co. Litt. 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 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.—*CHITTY*.

<sup>s</sup> 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. Dom. Proc. 17 June, 1782.—*CHRISTIAN*.

<sup>t</sup> But every claimant of the title must be descended from the person first ennobled

patent there must be words to direct the inheritance, else the dignity enures only to the grantee for life.<sup>(r)</sup> 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.<sup>10</sup>

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.<sup>11</sup>

(r) Co. Litt. 9, 16.

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.—CHITTY.

<sup>10</sup> 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 marquis, earl, &c. Co. Litt. 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. Litt. 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 if 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, 86, 87. 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.—CHITTY.

But the grant of a peerage for life merely does not make the grantee a lord of parliament. Wensleydale Peerage, Sept. 1855-56.—KERR.

<sup>11</sup> But this is only in treason, felony, and misprision of the same. See magna carta, 9 Henry 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. 64. And if he refuses 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 misdemeanours, as libels, riots, perjury, conspiracies, &c., a peer is tried like a commoner, by a jury. 3 Inst. 30. Hawk. P. C. b. 2, ch. 44, sects. 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 subpoena, 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. Litt. 156. 2 Inst. 48. Lex. Const. 80, 81.

The peers of Scotland and 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

The great are always obnoxious to popular envy: were they to be judged by the people, they might be in danger from the prejudice of their judges; and would, moreover, be deprived of the privilege of the meanest subject, 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.<sup>(s)</sup><sup>12</sup> 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<sup>(t)</sup> 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.<sup>13</sup> If a woman, noble in her own right, marries a commoner, she still remains noble,<sup>14</sup> 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.<sup>(u)</sup><sup>15</sup> Yet if a duchess dowager marries a baron, she continues a \*402] duchess still; for all the nobility are  *pares*, and therefore it is no degradation.<sup>(v)</sup> A peer, or peeress, either in her own right or by marriage, cannot be arrested in civil cases:<sup>(w)</sup> and they have also many peculiar privileges annexed to their peerage in the course of judicial proceedings.<sup>16</sup> A peer, sitting

(s) 3 Inst. 30, 31.

(t) Moor, 769. 2 Inst. 60. 6 Rep. 52. Staundf. P. C. 152.

(u) 2 Inst. 50.

(v) Finch, l. 355. 1 Ventr. 298.

(w) Dyer, 79. Co. Litt. 16.

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.—CHITTY.

<sup>12</sup> 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.—CHITTY.

<sup>13</sup> The last peeress tried was the late duchess of Kingston, for bigamy. See 20 H. St. Tr. 355.—CHITTY.

<sup>14</sup> 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.—CHRISTIAN.

<sup>15</sup> 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 Powes deceased. Dyer, 79.—CHRISTIAN.

<sup>16</sup> See Tidd, 8 ed. 194. This privilege is extended, by the act of union with Scotland, to Scotch peers and peeresses, (5 Anne, c. 8, art. 23; and see Fort. 165. 2 Stra. 990.) and, by the act of union with Ireland, to Irish peers and peeresses. 30 & 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. Litt. 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 subpoena 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 subpoena issues, then an order to show cause why a sequestration should not go;

in judgment, gives not his verdict upon oath, like an ordinary juryman, but upon his honour: (x) he answers also to bills in chancery upon his honour, and not upon his oath; (y) but, when he is examined as a witness either in civil or criminal cases, he must be sworn: (z)<sup>17</sup> 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*. (a) 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. (b)

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, (c) on account of his poverty, which rendered him unable to support his dignity. (d) But this is a singular instance, which serves at the same time, by having happened, to show the power of parliament; and, by having happened but once, to show how tender the parliament hath been, in exerting so high a power. It hath been said indeed, (e) that if a baron wastes his estates so that he is not able to support the degree, the king may degrade him: but it is expressly held by later authorities, (f) that a peer cannot be degraded but by act of parliament.

\*The commonalty, like the nobility, are divided into several degrees; and, as the lords, though different in rank, yet all of them are peers in respect of their nobility, so the commoners, though some are greatly superior to others, yet all are in law peers, in respect of their want of nobility. (g) [\*403

The first name of dignity, next beneath a peer, was anciently that of *vidames*, *vice-domini*, or *valvasors*: (h) who are mentioned by our ancient lawyers (i) as *virī magnæ dignitatis*; and Sir Edward Coke (j) 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. (k) 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. (l) 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. (m) Else he ranks after *baronets*, who are the next order: which title

(\*) 2 Inst. 49.

(\*) 1 P. Wms. 146.

(\*) Salk. 512.

(\*) Cro. Car. 64.

(\*) 3 Edw. I. c. 34. 2 Ric. II. st. 1, c. 5. 12 Ric. II. c. 11.

(\*) 4 Inst. 355.

(\*) The preamble to the act is remarkable:—"Forasmuch as oftentimes it is seen that when any lord is called to high estate, and hath not convenient livelihood to support the same dignity, it induceth great poverty and indigence, and causeth oftentimes great extortion, embracery, and main-

tenance to be had; to the great trouble of all such countries where such estate shall happen to be; therefore," &c.

(\*) Moor, 678.

(\*) 12 Rep. 107. 12 Mod. 66.

(\*) 2 Inst. 29.

(\*) Camden, *Britan. t. Ordines*.

(\*) Bracton, l. 1, c. 8.

(\*) 2 Inst. 667.

(\*) Seld. Tit. of Hon. 2, 5, 41.

(\*) Ibid. 2, 11, 3.

(\*) 4 Inst. 6.

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.—CHRISTY.

<sup>17</sup> 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 Starmont) in that of Mr. Hastings.—CHRISTIAN.

Now, by the statute of 3 & 4 Gul. IV. c. 49, it is enacted that all Quakers and Moravians shall be permitted to make an affirmation instead of taking an oath, in all places and for all purposes whatsoever where an oath is or shall be required, either by common or statute law.

Declarations have been substituted, by the statute of 5 & 6 Gul. IV. c. 62, in many cases where oaths were formerly required.—HOVEDEN.

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;<sup>18</sup> for which reason all baronets have the arms of Ulster superadded to their family coat.<sup>19</sup> Next follow *knights of the bath*; an order instituted by king Henry IV., \*and revived by king George the First. They are so called \*404] from the ceremony of bathing the night before their creation.<sup>20</sup> The last of these inferior nobility are *knights bachelors*;<sup>21</sup> the most ancient, though the lowest, order of knighthood amongst us;<sup>22</sup> for we have an instance(n) 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.(o) 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,(p) that almost all nations call their knights by some appellation derived from a horse.<sup>23</sup> They are also called in our law *milites*, because they formed a part of the royal army, in virtue of their feudal 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(q) 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;<sup>24</sup> 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,(r) are all the names of *dignity* in this kingdom, esquires and gentlemen being only names of *worship*. But before these

(\*) Will. Malmsb. lib. 2.  
(o) Tac. de Morib. Germ. 13.  
(p) Camd. ibid. Co. Litt. 74.

(q) Stat. de Milit. 1 Ed. II.  
(r) 2 Inst. 667.

<sup>18</sup> One hundred gentlemen advanced each one thousand pounds, for which this title was conferred upon them. 2 Rap. 185, fo.—CHRISTIAN.

<sup>19</sup> The arms of Ulster are a hand *gules*, or a bloody hand, in a field *argent*.—CHRISTIAN.

<sup>20</sup> 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.—CHITTY.

<sup>21</sup> 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.—CHRISTIAN.

<sup>22</sup> 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.—CHITTY.

<sup>23</sup> It does not appear that the English word *knight* has any reference to a horse; for *knight*, or *cnih* in the Saxon, signified *puer*, *servus*, or *attendant*. 2 Seld. Tit. Hon. c. 5, § 33.—CHRISTIAN.

<sup>24</sup> 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 expense 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." Vol. vi. 296.—CHRISTIAN.

last(s) the heralds rank all \*colonels, serjeants at law, and doctors in the three learned professions. [\*405

\*Esquires and gentlemen are confounded together by Sir Edward Coke, who observes,(t) 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:(u) 1. The eldest sons of knights, and their eldest sons, in perpetual succession:(v) 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*.(w) 3. Esquires created

(v) 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.<sup>25</sup>
- \* Lord Chancellor or Keeper, if a baron.
- \* Archbishop of York.
- \* Lord Treasurer,
- \* Lord President of the Council, } if barons.
- \* Lord Privy Seal,
- \* Lord Great Chamberlain. But see }  
private stat. 1 Geo. I. c. 3, }  
} above all peers }  
} of their own }  
} degree.
- \* 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.
- † 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.
- † Chief Justice of the King's Bench.<sup>26</sup>
- † 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.
- † Barons.
- † Knights Bannerets.
- † Knights of the Bath.
- † Knights Bachelors.
- † Barons' eldest sons.
- † Knights' eldest sons.
- † Barons' 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.
- (f) 2 Inst. 688.
- (g) 2 Inst. 688.
- (h) 2 Inst. 667.
- (i) Gloss. 43.

<sup>25</sup> 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. Com. 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.—CHRISTIAN.

<sup>26</sup> Vice-chancellor, by stat. 53 Geo. III. c. 24.—CHITTY.

by the king's letters-patent, or other investiture;<sup>17</sup> 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.<sup>18</sup> 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.(x)<sup>19</sup> As for *gentlemen*, says Sir Thomas Smith,(y) they be made good cheap in this kingdom: for whosoever 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.<sup>20</sup> A *yeoman* is he that hath free land of forty shillings by the year; who was anciently \*407] thereby qualified to serve on juries, vote for knights of the \*shire, and do any other act, where the law requires one that is *probus et legalis homo*.(z)

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;<sup>21</sup> 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.<sup>22</sup>

(\*) 3 Inst. 30. 2 Inst. 667.

(y) Commonw. of Eng. b. 1, c. 20.

(z) 2 Inst. 668.

<sup>17</sup> 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.—CHRISTIAN.

<sup>18</sup> 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.—CHRISTIAN.

<sup>19</sup> It is rather remarkable that the learned 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 a usurpation; for Sir Henry Spelman, with some spleen, informs us, *certè altero hinc sæculo nominatissimus in patriâ jurisconsultus, etate provector, 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.—CHRISTIAN.

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."—CHITTY.

<sup>20</sup> 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.—CHRISTIAN.

<sup>21</sup> Informations in the nature of *quo warranto* are not within the statute of additions 1 Wils. 244.—CHRISTIAN.

Now, however, no indictment, information, writ, or pleading, is vitiated by the omission of such addition. 14 & 15 Vict. c. 100.—KERR.

<sup>22</sup> 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

## 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.<sup>1</sup>

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.

The 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 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.—CHRISTIAN.

<sup>1</sup> "A well-regulated militia being necessary to the security of a free state, the right of the people to keep and bear arms shall not be infringed." Const. U. S. Amendments,



In the time of our Saxon ancestors, as appears from Edward the Confessor's laws,<sup>(a)</sup> 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 unlimited power; "*prout eis* \*409] *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 intrusted with such power as if abused might tend to the oppression of the people, that power was delegated to him by the vote of the people themselves.<sup>(b)</sup> So too, among the ancient Germans, the ancestors of our Saxon forefathers, they had their dukes, as well as kings, with an independent power over the military, as the kings had over the civil state. The dukes were elective, the kings hereditary: for so only can be consistently understood that passage of Tacitus,<sup>(c)</sup> "*reges ex nobilitate, duces ex virtute sumunt;*" in constituting their kings, the family or blood royal was regarded, in choosing 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.<sup>(d)</sup> 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 duke Harold on the death of Edward \*410] 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 feudal 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,

(a) *C. de Herelochits.*

(b) "*Iti vero viri eliguntur 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.*" LL. Edw. Confest. *ibid.* See also Bede Eccl. Hist. l. 5, c. 10.

(c) *De Morib. Germ. 7.*

(d) "*Quum bellum civitas aut illatum, defendit aut infert, magistratus qui et bello præsent deliguntur.*" *De Bell. Gall.* l. 6, c. 22.

art. 2. "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." *Ib.*

art. 3. "Congress shall have power to raise and support armies; but no appropriation of money to that use shall be for a longer time than two years: to provide and maintain a navy; to make rules for the government and regulation of the land and naval forces; to provide for calling forth the militia to execute the laws of the Union, suppress insurrections, and repel invasions; 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 United States, reserving to the States respectively the appointment of the officers, and the authority of training the militia according to the discipline prescribed by Congress." *Ib.* art. 1, s. 8. "No State shall, without the consent of Congress, keep troops or ships of war in the time of peace, or engage in war, unless actually invaded, or in such imminent danger as will not admit of delay." *Ib.* s. 10. "The President shall be commander-in-chief of the army and navy of the United States, and of the militia of the several States, when called into the actual service of the United States." *Ib.* art. 2, s. 2

-- SHARSWOOD.

in number above sixty thousand; and for every knight's fee a knight or soldier, miles, was bound to attend the king in his wars, for forty days in a year;<sup>2</sup> 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 feodis et tenementis suis de jure nobis facere.*" This personal service in process of time degenerated into pecuniary commutations or aids, and at last the military part<sup>3</sup> of the feudal 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 arms, enacted 27 Hen. [411 \*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 & 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 & 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

(e) The Poles are, even at this day, so tenacious of their ancient constitution, that their populace, 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.

(g) Hoved. A. b. 1131.

(h) 13 Edw. I. c. 6.

(i) Stat. 1 Jac. I. c. 25. 21 Jac. I. c. 28.

(j) Rashworth, part 3, pages 662, 667. See 8 Rym. 374.

(k) Stat. 1 Edw. III. st. 2, c. 6 and 7. 25 Edw. III. st. 6, c. 8.

(l) 15 Rym. 75.

(m) Brit. 103, edit. 1594.

<sup>2</sup> 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.—CHRISTIAN.

<sup>3</sup> 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.—CHRISTIAN.

by any statute, and founded only upon immemorial usage. This question, long agitated with great heat and resentment on both sides, became at length the immediate cause of the fatal rupture between the king and his parliament: the two houses not only denying this prerogative of the crown, the legality of which 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.<sup>4</sup>

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 recognise 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, 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 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.<sup>5</sup> The necessity of order and discipline in an army is the

(p) 13 Car. II. c. 6. 14 Car. II. c. 3. 15 Car. II. c. 5.

(q) Stat. 16 Geo. III. c. 8.

(r) 2 Geo. III. c. 20. 9 Geo. III. c. 42. 16 Geo. III. c. 3. 18 Geo. III. c. 14 and 59. 19 Geo. III. c. 72.

(s) Hist. C. L. c. 2.

<sup>4</sup> The constitution of the United States declares that Congress shall have power "to provide for calling forth the militia to execute the laws of the Union, suppress insurrections, and repel invasions," and 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 United States." Art. I, s. 8. The act of Congress of 28th Feb. 1795 has provided "that whenever the United States shall be invaded, or be in imminent danger from any foreign nation or Indian tribe, it shall be lawful for the President of the United States to call forth such number of the militia of the State or States most convenient to the place of danger or scene of action as he may judge necessary to repel such invasion; and to issue his order for that purpose to such officer or officers of the militia as he shall think proper." And like provision is made for the other cases stated in the constitution. The Supreme Court have held that the power to provide for repelling invasions includes the power to provide against the attempt and danger of invasion, as the necessary and proper means to effectuate the object, and that the authority to decide whether the exigency has arisen belongs exclusively to the President, and that his decision is conclusive upon all other persons. This construction necessarily results from the nature of the power itself, and from the manifest object contemplated by the act of Congress. The power itself is to be exercised upon sudden emergencies, upon great occasions of state, and under circumstances which may be vital to the existence of the Union. *Martin vs. Mott*, 12 Wheat. 29.—SHARSWOOD.

<sup>5</sup> 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

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 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.(f) 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 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.<sup>6</sup>

(f) 2 Brad. Append. 59.

(g) 3 Inst. 52.

(h) Cap. 29.

(i) 3 Car. I. See also stat. 31 Car. II. c. 1.

(k) Thus in Poland no soldier can be quartered upon the

gentry,—the only freemen in that republic. Mod. Univ. Hist. xxxiv. 23.

(v) Stat. 1 W. and M. st. 2. c. 2.

(w) Robertson, Cha. V. l. 94.

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 partisan 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.—CHITTY.

There is a great distinction, though often lost sight of, between *military* and *martial* law, the former affecting the troops or forces only, to which its terms expressly apply equally in peace and war, by previously defined regulations; the latter extending to all the inhabitants of the district where it is in force, being wholly arbitrary, and emanating entirely from a state of intestine commotion or actual war.—WARREN.

By the fifth amendment of the constitution of the United States, it is declared that "no person shall be held to answer for a capital, or otherwise infamous, crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia when in actual service in time of war or public danger."—SHARSWOOD.

<sup>6</sup> It is perfectly lawful to employ soldiers to preserve the public peace at home; but this should be done with great caution, and not without an absolute necessity. "Magistrates," said lord chancellor Hardwicke, "have a power to call any subject to their assistance to preserve the peace and execute the process of the law; and why not soldiers as well as other men? Our soldiers are our fellow-citizens. They do not cease to be so by putting on a red coat and carrying a musket." The military act, on such occasions, not

To prevent the executive power from being able to oppress, says baron Montesquieu,<sup>(a)</sup> it is requisite that the armies with which it is intrusted 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 likewise \*415] passes, "to punish mutiny and desertion, \*and for the better payment of the army and their quarters." This regulates the manner in which they are to be dispersed among the several innkeepers and victuallers throughout the kingdom; and establishes a law martial for their government. By this; among other things, it is enacted, that if any officer 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.

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<sup>(b)</sup> (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.<sup>(c)</sup> 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.<sup>(d)</sup> "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! \*416] These are indeed forbidden to be inflicted, \*except for crimes declared to be so punishable by this act; which crimes we have just enumerated, and among which we may observe that any disobedience to lawful commands is one. Perhaps in some future revision of this act, which is in many respects hastily penned, it may be thought worthy the wisdom of parliament to ascertain the limits of military subjection, and to enact express articles of war for the government of the army, as is done for the government of the navy: especially as, by our present constitution, the nobility and gentry of the kingdom, who

(a) Sp. L. 11, 8.

(b) Stat. 18 Hen. VI. c. 19. 2 & 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."

*qua* military, but simply in aid of, and in obedience to, the civil power, which "calls them in,"—to quote again lord chancellor Hardwicke,—"*as armed citizens*, often saving the effusion of innocent blood and preserving the dominion of the law."—WARREN.

serve their country as militia officers, are annually subjected to the same arbitrary rule during their time of exercise.<sup>7</sup>

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,<sup>(e)</sup> 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.<sup>8</sup> 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,<sup>(f)</sup> 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 their slaves; while in absolute and despotic governments, where no real liberty exists, and consequently no invidious [\*417] 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.

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

(e) 4 Inst. 352.

(f) Sp. L. 15, 12.

<sup>7</sup> 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 dismissal from the service of a subaltern who shall have succeeded in establishing charges of moment against his superior officer, which dismissal 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.—CHITTY.

<sup>8</sup> 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.—CHITTY.

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.<sup>9</sup> 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.<sup>(g)</sup> 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.<sup>(h)</sup> And thus much for the military state, as acknowledged by the laws of England.<sup>10</sup>

The maritime state is nearly related to the former, though much more agreeable to the principles of our free constitution. \*The royal navy of England hath ever been its greatest defence and ornament; it is its ancient and natural strength; the floating bulwark of the island; an army from which, however strong and powerful, no danger can ever be apprehended to liberty; and accordingly it has been assiduously cultivated even from the earliest ages. To so much perfection was our naval reputation arrived in the twelfth century, that the code of maritime laws, which are called the laws of Oleron, and are received by all nations in Europe as the ground and substraction of all their 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.<sup>(i)</sup> And yet, so vastly inferior were our ancestors in this

(g) Stat. 29 Car. II. c. 3. 5 W. III. c. 21, § 6.

(h) *Si miles quid in clypeo literis sanguine suo rutilantibus annotaverint, aut in pulvere inscripserint gladio suo, ipso tempore quo, in prelio, vitæ sortem derelinquunt, hujusmodi voluntatem stabilem esse oportet.* Cod. 6, 21, 15.

(i) 4 Inst. 144.  *Coutumes de la Mer, 2.*

<sup>9</sup> By the 42 Geo. III. c. 60, all officers, soldiers, and mariners who have been employed in the king's service since 1784, 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.—CHRISTIAN.

<sup>10</sup> 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.—CHRISTIAN.

<sup>11</sup> The French writers attribute these 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. xxvii.—CHITTY.

It is not a matter of such clear admission that Richard was the first compiler of these celebrated laws. Most of the French writers on marine law claim the first draft of them as a French code, framed under the direction of Eleanor his mother for the use of his continental subjects. In the introduction to Mr. Justice Park's System of Marine Insurance, p. xxvii., an abstract of their argument is given with a reference to Selden, who maintains the position in the text. Mare Cl. 2, c. 24.—COLERIDGE.

A translation of the laws of Oleron is to be found in the appendix to 1 Peters's Adm. Decision. The learned author of that work ascribes the origin of these laws to Eleanor, but argues that the code was improved by Richard, who introduced it into England. It forms the basis of the celebrated ordinances of Louis XIV. of France, and it is admitted as authority in the courts of common law as well as the admiralty courts of England. The learned and sagacious Macpherson, the author of the Annals of Commerce, who, as a Scotsman, was probably impartial, rejects both the English and French hypotheses, as not only destitute of historical proof, but as inconsistent with facts that history records. He affirms that the oldest manuscript of these laws bears the date of 1266,—more than half a century after the death of queen Eleanor and her son,—and that there is no evidence of their publication at an earlier period. "On these litigated questions," says Judge Duer, "I shall hazard no opinion, but shall only say that, at whatever time, and by whatever authority, the laws of Oleron were first published, their internal evi

point to the present age, that, even in the maritime reign of queen Elizabeth, Sir Edward Coke<sup>(k)</sup> thinks it a matter of boast that the royal navy of England then consisted of *three and thirty* ships. The present condition of our marine is in great measure owing to the salutary provisions of the statutes called the navigation acts; whereby the constant increase of English shipping and seamen was not only encouraged, but rendered unavoidably necessary. By the statute 5 Ric. II. c. 3, in order to augment the navy of England, then greatly diminished, it was ordained that none of the king's liege people should ship any 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,<sup>(l)</sup> 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;<sup>(m)</sup> and at the same time to clip the wings of those our opulent and aspiring neighbours. This prohibited all ships of foreign nations from trading with any English plantations \*without license [\*419 from the council of state. In 1651<sup>(n)</sup> 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 merchandise 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.<sup>12</sup>

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 shown, by Sir Michael Foster,<sup>(o)</sup> 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.<sup>(p)</sup> 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 detained 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,<sup>(q)</sup> 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,<sup>(r)</sup> no fisherman shall be taken by the queen's commission to serve as a mariner; but the commission shall be first brought to two justices of the peace, inhabiting near the sea-coast where the mariners are to be taken, to the intent that the

(k) 4 Inst. 50.  
 (l) Scobell, 132.  
 (m) Mod. Un. Hist. xli. 289.  
 (n) Scobell, 176.

(o) Rep. 154.  
 (p) See also Comb. 245. Barr. 344.  
 (q) Stat. 2 & 3 Ph. and M. c. 16.  
 (r) Stat. 5 Eliz. c. 5.

dence compels me to believe that they were intended to apply exclusively to French vessels and French navigation." Duer on Marine Insurance, vol. i. p. 39.—SHARSWOOD.

<sup>12</sup> The navigation acts, constituting a protective privilege for British shipping and commerce as against those of foreign countries, have been very recently repealed; and both foreign and British shipping are now placed on the same footing, down even to the coasting-trade of the united kingdom. It is, however, sought to secure a reciprocity, by arming the queen with retaliatory powers, by order in council, against those countries who will not follow our example. See 16 & 17 Vict. c. 107, ss. 324, 325, 326, and 17 & 18 Vict. c. 5.—WARREN



\*420] justices may \*choose out and return such a number of able-bodied men, as in the commission are contained, to serve her majesty. And by others(s) special 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 anywhere, 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.<sup>13</sup>

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 Anne, c. 21.

2. The method of ordering seamen in the royal fleet, and keeping up a regular discipline there, is directed by certain express rules, articles, and orders, first enacted by the authority of parliament soon after the restoration;(y) but since

(\*) See stat. 7 & 8 W. III. c. 12. 2 Anne, c. 6. 4 & 5 Anne, c. 19. 13 Geo. II. c. 17. 2 Geo. III. c. 15. 11 Geo. III. c. 38. 19 Geo. III. c. 75, &c.

(†) Sav. 14.

(‡) Stat. 2 Anne, c. 6.

(§) Stat. 31 Geo. II. c. 10.

(¶) Stat. 13 Geo. II. c. 3.

(‡) Stat. 7 & 8 W. III. c. 21.

(y) Stat. 13 Car. II. st. 1, c. 9.

<sup>13</sup> 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 vs. 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 exceptions, therefore, which such persons may claim, must depend upon the positive provisions of statutes. 5 T. R. 276.—CHRISTIAN.

In addition to these authorities, many more are collected by Barrington, (in his Observations on Ancient Statutes, p. 334, 5 ed.,) who shows 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 (Aurifrabos) *impress pro apparatus 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 Camp. 320.—CHITTY.

There is nothing (says judge Tucker) in the constitution of the United States which warrants a supposition that such a power as that of impressment can ever be authorized or exercised under the government of the United States. On the contrary, the principles of the constitution and the nature of our government strongly militate against the assumption or countenancing of such a power.—SHARWOOD.

\*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, 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, 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 the royal hospital at Greenwich; with regard also to the exercise of trades, and the power of making nuncupative testaments; and, further,(a) 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.

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## 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.

\*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.

(\*) Stat. 22 Geo. II. c. 23, amended by 19 Geo. III. c. 17

(\*) Stat. 31 Geo. II. c. 10.

I. As to the several sorts of servants: I have formerly observ'd (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 anywhere. 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 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 \*124] contracts to serve or work for another, is very just: but when applied to strict slavery, in the sense of the 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 nature*, 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.<sup>1</sup> Yet, with regard to any right which the master may have lawfully acquired to the perpetua<sup>l</sup>

(a) Page 127.

(b) *Servi aut fiunt, aut nascuntur: fiunt jure gentium, aut jure civili: nascuntur ex ancillis nostris.* Inst. 1, 3, 4.

(c) Montesq. Sp. L. xv. 2.

(d) Stat. 3 & 4 Edw. VI. c. 16.

(e) Salk. 666.

<sup>1</sup> 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. CHITTY.

service of John or Thomas, this will remain exactly in the same state as \*before: for this is no more than the same state of subjection for life, [\*425 which every apprentice submits to for the space of seven years, or sometimes for a longer term.<sup>2</sup> Hence too it follows, that the infamous and unchristian practice of withholding baptism from negro servants, lest they should thereby gain their liberty, is totally without foundation, as well as without excuse. The law of England acts upon general and extensive principles: it gives liberty, rightly understood, that is, protection, to a Jew, a Turk, or a heathen, as well as to those who profess the true religion of Christ; and it will not dissolve a civil 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.<sup>3</sup>

<sup>2</sup> Though personal slavery be unknown in England, so that one man cannot sell nor confine and export another as his property, yet the claim of imported slaves for wages without a special promise does not seem to receive the same protection and support as that of a freeman. 2 Kent, 248. Alfred vs. Marquis of Fitz-James, 3 Esp. Cas. 3. King vs. Thomas Ditton, 4 Doug. 300. When a West India slave accompanied her master to England and voluntarily returned to the West Indies, it was held that the residence in England did not finally emancipate her, and she became a slave on her return, though no coercion could be exercised over her while in England. The Slave Grace, 2 Hagg. Adm. Rep. 94. A state of slavery is a mere municipal regulation; and no nation is bound to recognise its existence as to foreign slaves within its territory. Frigg vs. The Commonwealth, 16 Peters, 539.—SHARSWOOD.

<sup>3</sup> 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. Raym. 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 laden 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 recognise 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.—CHRISTIAN.

Somersett's case, (Lofft, 1. 20 State Trials, 1,) in which lord Mansfield decided that personal slavery was not lawful in England, was not determined until 1772. Villenage in gross was certainly as pure personal slavery as ever existed in any country,—even if a distinction be made as to villeins regardant, or such as were annexed to the land. It appears to have gradually died out before it was expressly abolished.

Mr. Barrington, who has given a very strong picture of the degradation and oppression of the tenants under the English tenure of pure villenage, is of opinion that predial servitude really existed in England so late as the reign of Elizabeth, and that the observation of Lilburn, that the air of England was at that time too pure for a slave to breathe in, was not true in a point of fact. Barrington on Stat. 232. 2 Kent's Com. 249. It is

I. The first sort of servants, therefore, acknowledged by the laws of England, are *menial servants*; so called from being *intra mania*, 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,

(f) Co. Litt. 42.

evident that at the time of the original settlement of this country slavery was a part of the common law of England, and as such was brought into and incorporated with the laws of all the colonies. The famous case of *Somerset*, whilst it determined that negroes could not be held as slaves in England, recognised the existence of slavery in the colonies, as did the whole legal policy of that country and of France for many years before and after that time. The first introduction of negro slavery was by a Dutch ship, which arrived in Virginia, in 1620, from the coast of Africa, having twenty negroes on board, who were sold as slaves. In the year 1638 they are found in Massachusetts. They were introduced into Connecticut soon after the settlement of that colony; that is to say, about the same period. The climate of the Northern States, less favourable to the constitution of the natives of Africa than the Southern, proved alike unfavourable to their propagation and to the increase of their numbers by importation. 2 Tucker's Blackst. App. 33. Their numbers and value gradually diminished in the Northern States, so that about, or soon after, the Revolution, it became comparatively easy and safe to provide for the complete emancipation, gradually or otherwise, of those who still remained in servitude. In those States in which it still continues, the right of property in them is protected by art. 4, s. 3, of the constitution of the United States, which provides that "no person held to service or labour in one State, under the laws thereof, escaping into another, shall, in consequence of any law or regulation therein, be discharged from such service or labour, but shall be delivered up on the claim of the party to whom such service or labour may be due."

In regard to the lawfulness of slavery, which is alluded to in the text, it may be sufficient to quote from the opinion of C. J. Marshall upon the subject of the slave-trade, as presenting alike sound and moderate views, (10 Wheat, 120:)—"That it is contrary to the law of nature will scarcely be denied; that every man has a natural right to the fruits of his own labour is generally admitted; and that no other person can rightfully deprive him of those fruits, and appropriate them against his will, seems to be the necessary result of this admission. But from the earliest times war has existed; and war confers rights in which all have acquiesced. Among the most enlightened nations of antiquity, one of these was that the victor might enslave the vanquished. This, which was the usage of all, could not be pronounced repugnant to the law of nations, which is certainly to be tried by the test of general usage. That which has received the assent of all must be the law of all. Slavery, then, has its origin in force; but, as the world has agreed that it is a legitimate result of force, the state of things which is thus produced by general consent cannot be pronounced unlawful."

As to the abstract morality of property in the service of a man, no matter how originally acquired, wherever it is sanctioned by law, it is perhaps sufficient to observe that power or property in itself has no moral quality, is neither right nor wrong. It is the use or abuse of it which alone attaches responsibility in a moral point of view to the possessor. The expediency of the law permitting one or another species of power or property is another and entirely different question, depending upon other and different principles. No other view consists with the moral and political code of the Old Testament, or with the practical teachings of the New Testament on this subject.

The laws of the Southern States, remarks chancellor Kent, are doubtless as just and mild as is deemed by those governments to be compatible with the public safety, or with the existence and preservation of that species of property; and yet, in contemplation of their laws, slaves are considered in some respects, though not in criminal prosecutions, as things or property rather than persons, and are vendible as personal property. They cannot take property by descent or purchase, and all they hold belongs to the master. They cannot make lawful contracts, and they are deprived of civil rights. They are assets in the hands of executors, for the payment of debts, and cannot be emancipated by will or otherwise, to the prejudice of creditors. Their condition is more analogous to that of the slaves of the ancients than to that of the villeins of feudal times, both in respect to the degradation of the slaves and the full dominion and power of the master. The statute regulations follow the principles of the civil law in relation to slaves, and are extremely severe; but the master has no power over life or limb; slaves are still regarded as human beings, under moral responsibility as to crimes; and the severe letter of the law is softened and corrected by the humanity of the age and the spirit of Christianity. 2 Kent's Com. 253.—SHARSWOOD.

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)<sup>4</sup> but the contract may be made for any larger or smaller term. All single men between twelve years old and sixty, and married ones under thirty years of age, and all single women between twelve and forty, not having any visible livelihood, are compellable by two justices to go out to service in husbandry or certain specific trades, for the promotion of honest industry; 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 \*reasonable cause, to be allowed by a justice of the peace: (h)<sup>5</sup> but they may part by consent, or make a special bargain.<sup>6</sup>

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)

(g) F. N. B. 168.  
 (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 & 9 W. and M. c. 30. 2 & 3 Anne, c. 6. 4 Anne, s. 19. 17 Geo. II. c. 5. 18 Geo. III. c. 47. Apprentices enter into the enactments of numerous other statutes. The 32, c.

57; 33, c. 55; 42, cc. 46 and 73; 51, c. 80; 54, cc. 96 and 107; 56, c. 139; all Geo. 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.

\* 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. Falk. 65. S. C. 6 T. R. 320, S. P.; also the case of *Writh vs. Viner*, in *Vin. Abr.* vol. 3, p. 8, tit. Apportionment, per Ashurst, J., in *Cutter vs. Powell*, 6 T. R. 326. "With regard to the common case of a 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 misconducts 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.—CHITTY.

<sup>6</sup> 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. 356. 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.—CHITTY.

<sup>7</sup> The provisions of the English statutes have not been adopted in this country. It depends upon the contract of the parties, or, in the absence of that, upon the custom of the country, what notice shall or may be given by either. If the servant hired for a definite term leaves the service before the end of it without reasonable cause, or is dismissed for such misconduct as justifies it, he loses his right to wages for the period he has served. A servant so hired may be dismissed by the master before the expiration of the term either for immoral conduct, wilful disobedience, or habitual neglect. If hired to labour for a specific time, and he serves part of the time, and is disabled by sickness, or other cause, without fault on his part, he is entitled to be paid *pro rata*. Such, too, seems to be the case whenever the contract is put an end to by mutual consent. 2 Kent's Com. 258, and notes.—SHARPSHOOD.

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) 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 within seven years after the expiration of his original contract.(p)<sup>8</sup>

3. A third species of servants are *labourers*, who are only hired by the day or <sup>427</sup> the week, and do not live *intra mania*, 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.

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) 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. 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

(l) Salk. 57. 491.

(m) Stat. 5 Eliz. c. 4. 43 Eliz. c. 2. Cro. Car. 179.

(n) Stat. 5 Eliz. c. 4.

(o) Salk. 67.

(p) Stat. 20 Geo. II. c. 19.

(q) Stat. 6 Geo. III. c. 26.

(r) Stat. 5 Eliz. c. 4. 6 Geo. III. c. 26.

(s) See page 264.

(t) Stat. 5 Eliz. c. 4. § 31.

<sup>8</sup> The parish officers, with the assent of two justices, may bind a parish apprentice to a person who resides out of the 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.—CHRISTIAN.

<sup>9</sup> Covenants for personal service cannot in general be specifically enforced. But in the case of apprentices provision is made for it in the statute law, and the mode and process of its enforcement. The power of the master is derived from that of the parent. The contracts of soldiers and sailors may, in like manner, by virtue of statutes, be specifically enforced; provisions which evidently spring from national policy.

A free woman of colour, above twenty-one years of age, bound herself by indenture, for a valuable consideration, to serve the obligee as a menial servant for twenty years: held that a specific performance of the contract could not be enforced, and that upon a writ of *habeas corpus* she had a right to be discharged from custody. *Mary Clark's case*, 1 Blackf. 122.—SHARSWOOD.

as monopolies. This reason indeed only extends to such trades, \*in the exercise whereof skill is required. But another of their arguments [\*428 goes much further; viz., that apprenticeships are useful to the commonwealth, by employing of youth, and learning them to be early industrious; but that no one would be induced to undergo a seven years' servitude, if others, though equally skilful, were allowed the same advantages without having undergone the same discipline: and in this there seems to be much reason. However, the resolutions of the courts have in general rather confined than extended the restriction. No trades are held to be within the statute but such as were in being at the making of it:(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)\* 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)<sup>10</sup>

(\*) Lord Raym. 514.  
 (\*\*) 1 Vent. 51. 2 Keb. 553.  
 (\*\*\*) Lord Raym. 1179. *Wallen qui tam vs. Holton*. Tr. 33  
 Geo. II. (by all the judges.)

(\*) 1 Hawk. P. C. 130. Lamb Eiren. 127. Cro. Ca. 179.  
 2 Show. 289.  
 (y) F. N. B. 168. Bro. Abr. t *Labourers*, 51. *Tresspass*.  
 349.  
 (z) Stat. 5 Eliz. c. 4.

\* 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 remain 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, pp. 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.—CHITTY.

<sup>10</sup> 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 Edw. III. s. 5, c. 2, s. 2.

To prevent masters being imposed upon by the giving of false characters, the 3. 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.

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 non-feasance. 2 Lord Raym. 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.



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.<sup>11</sup>

(\*) 2 Jones, 47.

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 40s., 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 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. 13. 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 & 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.—*CHITTY.*

<sup>11</sup> The statutes authorizing the interference of the magistrate in such matters are repealed by stat. 53 Geo. III. c. 40.

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 note 5, *ante*. 6 T. R. 320. *Worth vs. 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

III. Let us, lastly, see how strangers may be affected by this relation of master and servant: or how a master may \*behave towards others [ \*429 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)<sup>12</sup> 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)<sup>13</sup> 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.<sup>14</sup>

(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.

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 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 Camp. 10. 1 Stark. 136.—CHITTY.

<sup>12</sup> Trespass, or trespass on the case, lies by a master for debauching his female servant; and in such action the slightest acts of service are sufficient to establish the relation of master and servant. *Moran vs. Dawes*, 4 Cowen, 412.—SHARSWOOD.

<sup>13</sup> The case of *Tickell vs. Read* (Lofft, R. 215,) obviated all previous doubts upon these positions.—CHITTY.

<sup>14</sup> 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

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: \*430] *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; *nam, qui non prohibet, cum prohibere possit, jubet.*<sup>15</sup> So likewise if the drawer at a tavern

(g) 4 Inst. 109.

(h) Noy's Max. c. 43.

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. Litt. 117, a. n.; and 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 Camp. 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, 557. 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. Abr. tit. Master and Servant, O. 3. Bla. Rep. 142. 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 any 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, 279;) 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. 329,) 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. Abr. 49. 1 Ves. Sen. 359. 1 B. & A. 59.—CHITTY.

<sup>15</sup> 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.—CHRISTIAN.

But the innkeeper 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 Ear. & A. 59.—CHITTY.

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.

In the same manner, whatever a servant is permitted to do in the usual course of his business, is equivalent to a general command. If I pay money to a banker's servant, the banker is answerable for it: if I pay it to a clergyman's or a physician's servant, whose usual business it is not to receive money for his master, and he embezzles it, I must pay it over again. If a steward lets a lease of a farm, without the owner's knowledge, the owner must stand to the bargain; for this is the steward's business. A wife, a friend, a relation, that use to transact business for a man, are *quoad hoc* his servants; and the principal must answer for their conduct: for the law implies, that they act under a general command; and without such a doctrine as this no mutual intercourse between man and man could subsist with any tolerable convenience. If I usually deal with a tradesman by myself, or constantly pay him ready money, I am not answerable for what my servant takes up upon trust; for here is no implied order to the tradesman to trust my servant; but if I usually send him upon trust, or sometimes on trust and sometimes with ready money, I am answerable for all he takes up; for the tradesman cannot possibly distinguish when he comes by my order, and when upon his own authority. (k)<sup>16</sup>

(i) 1 Roll. Abr. 95.

(k) Dr. and Stud. d. 2, c. 42. Noy's Max. c. 44.

<sup>16</sup> 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 familie*, 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. Abr. 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 the 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. 253. 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.

\*431] \*If a serv<sup>ant</sup>, lastly, by his negligence does any damage to a stranger; the master shall answer for his neglect: if a smith's serv<sup>ant</sup> lames a horse while he is shoeing him, an action lies against the master, and not

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 serv<sup>ant</sup> contracting on behalf of government, (1 T. R. 172, 674. 1 East, 135, 582;) so if a serv<sup>ant</sup> does not pursue the principal's authority so as to charge the principal, he will be personally liable, (1 Eg. Abr. 308. 3 T. R. 361;) or where he acts under an authority which he knows the master cannot give, (Cwp. 565, 566;) so where a serv<sup>ant</sup> 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 serv<sup>ant</sup> 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 serv<sup>ant</sup> is considered to hold it on the party's account. 14 East, 590. 2 Roll. Rep. 441. 1 B. & A. 36. 1 J. B. Moore, 74. 3 Price, 58. 16 Vesey, 443. 5 Esp. 247. 4 Taunt. 24. 7 Stark. 123, 143, 150, 372. 1 H. Bla. 218. But if the third party by his conduct shows he does not consider the serv<sup>ant</sup> 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 serv<sup>ant</sup> for the recovery of damages for the non-performance 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 serv<sup>ant</sup> of another who had no right thereto, and has not paid it over, an action may be sustained against the serv<sup>ant</sup> 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 serv<sup>ant</sup> is not liable, (Cwp. 565. Burr. 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. Cwp. 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 endorsed 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 Camp. 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. R. 172, 674. 1 East, 135. 3 B. & A. 47. 2 J. B. Moore, 627,) and unless 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 serv<sup>ant</sup> 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

against the servant.<sup>17</sup> But in these cases the damage must be done, while he is actually employed in the master's service; otherwise the servant shall answer for his own misbehaviour. Upon this principle, by the common law,<sup>(l)</sup> 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 his 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 Anne, 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.<sup>(m)</sup><sup>18</sup> 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:<sup>(n)</sup> for the master hath the superintendence and charge of all his household. And this also agrees with the civil law;<sup>(o)</sup> which holds that the *pater familias*, in this and similar cases, "*ob alterius culpam tenetur, sive servi, sive liberi.*"<sup>19</sup>

(l) Noy's Max. c. 44.

(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.

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.—CHITTY.

<sup>17</sup> The latter part of this position seems questionable; for how can it be a justification of the servant, in an action brought against him by a stranger, that the injury was sustained in consequence of his negligent performance of the lawful orders of his master? In 1 Roll. Abr. 95, it is said that if the servant of a tavern sell bad wine knowingly, no action lies against him, for he only did it as servant. But this seems certainly not to be relied on; for, as this case is put, the act of the servant is a wilful wrong, which no order of his master will justify him in committing. It is clear that the negligent servant is liable to his master for the damages which the master may have paid in an action brought against *him* for the consequences of his negligence; and it would be extraordinary if the master's supposed commands were a justification as against third persons and not against himself.—COLERIDGE.

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.—CHITTY.

<sup>18</sup> Repealed by stat. 14 Geo. III., which re-enacted the provision found in stat. 6 Anne, c. 3.—CHITTY.

<sup>19</sup> 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. Abr. 95, 1, 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 em

\*432] \*We may observe, that in all the cases here put, the master may be frequently a loser by the trust reposed in his servant, but never can be a gainer; he may frequently be answerable for his servant's misbehaviour, but never can shelter himself from punishment by laying the blame on his agent.

ployment, 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 vs. 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 drives 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 Roll. Abr. 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 Camp. 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 non-feasance 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. 484. Say. 41. Roll. Abr. 94, pl. 5. Cowp. 403. 6 Moore, 47. So a servant is not liable for deceit in the sale of goods, or for a false warranty. Com. Dig. Action sur case for deceit, B. 3 P. W. 379. Roll. Abr. 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. Abr. 90;) and this though the servant acted in total ignorance of his master's right. 12 Mod. 448, and *supra*. 2 Roll. Abr. 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 Raym. 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 R. & P. 405, 411. Cowp 406. 2 B. & P. 438. 6 Moore, 47. 2 P. & R. 33.—CHURCH.

A master is civilly responsible for injuries occasioned by the tortious acts of his servant in the course of his employment, although in disobedience of the master's orders, (*Philadelphia and Reading Railroad vs. Derby*, 14 Howard, 468,) if not done in wilful disregard of those orders. *Southwick vs. Estes*, 7 Cushing, 385.

To render an employer responsible for the fault or negligence of his employee, the injury complained of must arise in the course of the execution of some service lawful in itself, but negligently or unskillfully performed. For the wanton violation of law by a servant, although occupied about the business of his employer, such servant is alone responsible. *Moore vs. Sanborne*, 2 Michigan, 519.

Where a master uses due diligence in the selection of competent and trusty servants, and furnishes them with suitable means to perform the service in which he employs them, he is not answerable to one of them for an injury received by him in consequence of the carelessness of another, while both are engaged in the same service. *Farwell vs. Boston and Worcester Railroad*, 4 Metc. 49. *Brown vs. Maxwell*, 6 Hill, 592. *Hayes vs. Western Railroad*, 3 Cush. 270. *Coose vs. Syracuse and Utica Railroad*, 1 Selden, 492. *Sherman vs. Railroad*, 15 Barbour, 574. *Walker vs. Bulling*, 22 Alabama, 294.

In *Bush vs. Steinman*, 1 Bos. & Pull. 404, A. contracted with B. to repair a house, and B. contracted with C. to do the work, and C. contracted with D. to furnish the materials, and the servant of D. brought a quantity of lime to the house and placed it in the road, by which the plaintiff's carriage was overturned: it was held that A. was answerable for the damage, on the ground that all the contracting parties were in his employment.

The authority of this last-cited case has been much questioned, both in England and this country. The difficulty lies in determining with certainty and precision where the relation of master and servant exists. The line has not yet been drawn satisfactorily. It is clear that, if I employ a mechanic or manufacturer to do a specific piece of work for me,—as a tailor to make me a coat, or cabinet-maker to make me a chair or table, —for which I am to pay him when finished and delivered, he is not my servant in such a sense that I am responsible for injuries to third persons from his negligence while

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.

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 older 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.<sup>1</sup>

doing the work. On the other hand, if I hire a man to drive my carriage or to dig my garden, it matters not how he is paid, he is my servant, and I am liable for him. *Quarman vs. Burnett*, 6 M. & W. 499. *Blake vs. Ferris*, 1 Selden, 48. Wherever the employee exercises a distinct independent employment, as that of a public licensed drayman or hackman, and is not under the immediate control, direction, or supervision of the employer, the latter is not liable. *De Forrest vs. Wright*, 2 Michigan, 368. On the other hand, a railroad corporation has been held responsible for the negligence of workmen, although they were employed by an individual who had contracted to construct a portion of the road for a stipulated sum, the work being done by the direction of the corporation. *Lowell vs. Boston and Lowell Railroad*, 23 Pick. 24. It has been supposed, however, that a distinction is to be made in regard to the management of real estate, and that the owner thereof ought to be held responsible for injuries resulting from negligence about it, though occasioned by others not standing to him in the relation of servants. But this view has not met with general approbation. See cases cited in the last edition of Kent, vol. 2, p. 282, note. The case of *Bush vs. Steinman* can only be sustained on the ground of a nuisance, an obstruction to the highway, for which undoubtedly the owner is responsible civiliter.

The general owner of real estate is not answerable for acts of carelessness or negligence committed upon or near his premises to the injury of others, if the conduct of the business which caused the injury was not on his account, nor at his expense, nor under his orders and efficient control. *Earle vs. Hall*, 2 Metc. 353.—SHARSWOOD.

<sup>1</sup>Therefore an *action* is sustainable for a breach of *promise to marry* where the contract to marry was mutual. 1 Roll. Abr. 22, 1, 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 Raym.* 316. *Bull. 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 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 perform



The *holints* of the matrimonial state is left entirely to the ecclesiastical law: the temporal courts not having jurisdiction to consider unlawful marriage as a sin, but merely as a civil inconvenience. The punishment therefore, or annulling, of incestuous or other unscriptural marriage, 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.<sup>2</sup>

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 pre-contract; consanguinity, or relation by blood; and affinity, or relation by marriage; and some particular corporal infirmities. And these canonical disabilities are either grounded upon the express words of the divine law, or are consequences plainly deducible from thence: it therefore being sinful in the persons who labour under them, to attempt to contract matrimony together, they are properly the object of the ecclesiastical magistrate's coercion; in order to separate the offenders, and inflict penance for the offence, *pro salute ani-*

(\*) Salk. 121.

(b) *Ff.* 50, 17, 30.

(c) *Co. Litt.* 33.

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ance 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 show 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 procurement of marriage are void, at least in equity (1 Ch. Rep. 47. 3 Ch. Rep. 18. 3 Lev. 411. 2 Chan. Ca. 176. 1 Vern. 412. 1 Ves. 503. 3 Atk. 566. Show. P. C. 76. 4 Bro. P. C. 144, 8vo ed. Co. Litt. 206, b. Forrest Rep. 142,) and seeme 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.—CURRY.

<sup>2</sup> Any words of assent in the present tense constitute a valid marriage, unless there exists some positive statute; nor need a clergyman or magistrate be present. It is complete if there is full, free, and mutual consent between parties capable of contracting, though not followed by cohabitation. *Hantz vs. Sealy*, 6 Binn. 405. *Fenton vs. Reed*, 4 Johns. 52. *Jackson vs. Winne*, 7 Wend. 47.

For all civil purposes, reputation and cohabitation are sufficient evidence of marriage. In cases of prosecutions for bigamy, and in action for criminal conversation, however, strict proof is demanded. *Sensee vs. Brown*, 1 Penna. Rep. 450. *Fenton vs. Reed*, 4 Johns. 52. *Jackson vs. Clare*, 15 Johns. 346. *The State vs. Hodgskins*, 1 App. 1555. *Weaver vs. Cryer*, 1 Deo. 337. *Taylor vs. Shemwell*, 4 B. Monr. 575. *Taylor vs. Robinson*, 29 Maine, 323. *State vs. Winkley*, 14 N. Hamp. 450. *Tarpley vs. Poage*, 2 Texas. 139.—SHARWOOD.

*marum*. 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.<sup>3</sup> 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.<sup>(d)</sup> 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 [\*435 of King's Bench granted a prohibition *quoad hoc*; but permitted them to proceed to punish the husband for incest.<sup>(e)</sup> 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;<sup>4</sup> 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;<sup>5</sup> the furthest of which is that between uncle and niece.<sup>(f)</sup> By the same statute, all impediments arising from precontracts to other persons, were abolished and declared of none effect, unless they had been consummated with bodily knowledge: in which case the canon law holds such contract to be a marriage *de facto*. But this branch of the statute was re-

(<sup>d</sup>) Co. Litt. 33.  
(<sup>e</sup>) Salk. 548.

(<sup>f</sup>) Gilb. Rep. 158.

<sup>3</sup> *Elliot vs. 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, 333.—CHRISTY.

<sup>4</sup> 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.—CHRISTY.

<sup>5</sup> See table of Levitical degrees, Burn. Ecc. L. tit. Marriage, I. The prohibited degrees are all those which are under the fourth 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 fourth degree; but between collaterals it is universally true that all who are in the fourth or any higher degree are permitted to marry; as first-cousins are in the fourth degree, and therefore may marry, and nephew and great-aunt, or niece and great-uncle, are also in the fourth 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.—CHRISTIAN.

pealed by statute 2 & 3 Edw. VI. c. 23. How far the act of 26 Geo. II. c. 33,<sup>4</sup> 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.<sup>7</sup>

The other sort of disabilities are those which are created, or at least enforced, by the municipal laws. And, though some of them may be grounded on natural law, yet they are regarded by the laws of the land, not so much in the light of any moral offence, as on account of the civil inconveniences they draw after \*436] them. These civil disabilities make the contract void *ab initio*, and not merely voidable; not that they \*dissolve a contract already formed, but they render the parties incapable of forming any contract at all: they do not put asunder those who are joined together, but they previously hinder the junction. And, if any persons under these legal incapacities come together, it is a meretricious, and not a matrimonial, union.<sup>8</sup>

1. The first of these legal disabilities is a prior marriage, or having another husband or wife living; in which case, besides the penalties consequent upon it as a felony, the second marriage is to all intents and purposes void: (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.*"

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, his marriage is only inchoate and imperfect;<sup>9</sup> and, when either of them comes to the age of consent aforesaid, they may disagree and declare the marriage void, without any divorce or sentence in the spiritual court. This is founded on the civil law. (i) But the canon law pays a greater regard to the constitution, than the age, of the parties; (j) for if they are *habiles ad matrimonium*, it is a good marriage, whatever their age may be. And in our law it is so far a marriage, that, if at the age of consent they agree to continue together, they need not be married again. (k) If the husband be of years of discretion, and the wife

(g) Bro. Abr. tit. *Bastardy*, pl. 8.

(h) Inst. 1, 10, 6.

(i) Leon. Constit. 109.

(j) Decretal. l. 4, tit. 2, qu. 3.

(k) Co. Litt. 79.

<sup>4</sup> The statute is repealed by subsequent acts; but the last statute, repealing a very unadvised and objectionable intermediate act passed 3 Geo. IV. c. 75, is stat. 4 Geo. IV. c. 76. —CHITTY.

<sup>7</sup> A contract *per verba de presenti 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 —CHRISTIAN.

<sup>8</sup> A marriage between parties, one of whom has no capacity to contract marriage at all, or where there is a want of age or understanding, or a prior marriage still subsisting, is void absolutely and *ab initio*; and as between the parties themselves and those claiming under them, no rights whatever are acquired by such marriage. And whether the marriage was void or not may be inquired into by any court in which rights are asserted under it, although the parties to the marriage are dead. *Guthings vs. Williams*, 5 Iredell, 487. —SHARSWOOD.

<sup>9</sup> The ecclesiastical court will annul the marriage by *license* 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 and R. Cro. C. 48.* —CHITTY.

under twelve, when she comes to years of discretion he may disagree as well as she may : for in contracts the obligation must be mutual ; both must be bound, or neither :<sup>10</sup> and so it is, *vice versa*, when the wife is of years of discretion, and the husband under.(l)

\*3. Another incapacity arises from want of consent of parents or guardians. By the common law, if the parties themselves were of the [437 age of consent, there wanted no other concurrence to make the marriage valid. and this was agreeable to the canon law. But, by several statutes,(m) penalties of 100*l.* are laid on every clergyman who marries a couple either without publication of banns, which may give notice to parents or guardians, or without a license, to obtain which the consent of parents or guardians must be sworn to. And by the statute 4 & 5 Ph. and M. c. 8, whosoever marries any woman child under the age of sixteen years, without consent of parents or guardians, shall be subject to fine, or five years' imprisonment : and her estate during the husband's life shall go to and be enjoyed by the next heir.<sup>11</sup> The civil law indeed required the consent of the parent or tutor at all ages, unless the children were emancipated, or out of the parents' power:(n) and if such consent from 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)<sup>12</sup> and in Holland, the sons are at their own disposal at twenty-five, and the daughters at twenty.(s)<sup>13</sup> 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,<sup>14</sup> whereby it is enacted, that all mar

(l) Co. Litt. 79.

(m) 6 & 7 W. III. c. 6. 7 & 8 W. III. c. 35. 10 Anne, c. 19.

(n) *Ff.* 23, 2, 2, and 18.

(o) *Ff.* 1, 5, 11.

(p) *Obz.* 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, § 10.

<sup>10</sup> 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 vs. Ward Clarendieux*, Str. 937. S. C. *Fitzg.* 175, 275.—CHRISTIAN.

<sup>11</sup> 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.—CHRISTIAN.

<sup>12</sup> This is now altered to twenty-five in sons and twenty-one 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.—CHITTY.

<sup>13</sup> 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.—CHITTY.

<sup>14</sup> 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 twenty-one 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

\*438] riages celebrated by license (for banns suppose notice) where either of the parties is under twenty-one, (not being \*a widow or widower, who are supposed emancipated,) without the consent of the father, or, if he be not living, of the mother or guardians, shall be absolutely void.<sup>15</sup> 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.<sup>16</sup> Much may be, and much has been, said both for and against this innovation upon our ancient laws and constitution. On the one hand, it prevents the clandestine marriages of minors, which are often a terrible inconvenience to those private families wherein they happen. On the other hand, restraints upon marriages, especially among the lower class, are evidently detrimental to the public, by hindering the increase of the people; and to religion and morality, by encouraging licentiousness and debauchery among the single of both sexes; and thereby destroying one end of society and government, which is *conubitu prohibere vago*. And of this last inconvenience the Roman laws were so sensible, that at the same time that they forbade marriage without the consent of parents or guardians, they were less rigorous upon that very account with regard to other restraints: for, if a parent did not provide a husband for his daughter, by the time she arrived at the age of twenty-five, and she afterwards made a slip in her conduct, he was not allowed to disinherit her upon that account: "*quia non sua culpa, sed parentum, id commisisse cognoscitur.*"<sup>(t)</sup><sup>17</sup>

(t) Nov. 115, § 11.

marriages to be by banns or license; and, by three judges, a marriage of an illegitimate minor, had by *license* with the consent of her mother, is void by the 11th section,—the words father and mother in that section meaning legitimate parents. *Priestly vs. Hughes*, 11 East, 1. In the case of *Horner vs. 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 license, 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 license with the consent of such guardian. 1 Roper, 340.—CHITTY.

<sup>15</sup> A matter of such importance deserves to be more particularly stated: the party under age marrying by *license*, 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. I have been inclined to think that the words *lawfully appointed* comprehend a guardian appointed by the father, a guardian appointed by the court of chancery, and also, where such guardian can exist, a socage guardian, he being a guardian of the person of the ward appointed by the law itself.—CHRISTIAN.

<sup>16</sup> But a provision for this will be found in the 4 Geo. IV. c. 76, s. 17, by which it is enacted, that in case the father of the party under age be *non compos mentis*, or the guardian or mother, or any of them whose consent is made necessary, in the 16th section mentioned, 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.—CHITTY.

<sup>17</sup> The commentator's profound observation as to this effect of those restraints put upon marriage has been, and is, amply confirmed; but stat. 3 Geo. 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.—CHITTY.

The statute 26 Geo. II. c. 33 is repealed by the 3 Geo. IV. c. 75; and the 4 Geo. IV. c. 76 is now the existing marriage act. The great distinction between the policy of the

4. A fourth incapacity is want of reason; without a competent share of which, as no other, so neither can the matrimonial contract, be valid. (u) It was formerly adjudged, that the issue of an idiot was legitimate, and consequently that his marriage was valid. A strange determination! since consent is absolutely requisite to matrimony, and neither idiots nor lunatics are capable of consenting to any thing. And therefore the civil law judged much more sensibly when it made such deprivations of reason a previous impediment; \*though [\*459 not a cause of divorce, if they happened after marriage. (v) And modern resolutions have adhered to the reason of the civil law, by determining (w) that the marriage of a lunatic, not being in a lucid interval, was absolutely void. But as it might be difficult to prove the exact state of the party's mind at the actual celebration of the nuptials, upon this account, concurring with some private family (x) reasons, the statute 15 Geo. II. c. 30, has provided that the marriage of lunatics and persons under phrenzies, if found lunatics under a commission, or committed to the care of trustees by any act of parliament, before they are declared of sound mind by the lord chancellor or the majority of such trustees, shall be totally void.<sup>18</sup>

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.<sup>19</sup> 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,

(\*) 1 Roll. Abr. 357.

(v) *Ff.* 23, *tit.* 1, l. 8, and *tit.* 2, l. 16.

(\*) Morrison's case, *coram Delegat.*

(\*) See private acts, 23 Geo. II. c. 6.

former and the latter statute is, that the latter reverts to the old principle of punishing clandestine marriages by loss of property, &c., but does not violently make void a contract actually entered into. It therefore abounds in provisions for securing an assurance before marriage that the parties are of proper age and have proper consent, and with punishments where such provisions are broken through; but these irregularities are not allowed to avoid the marriage when solemnized.—COLERIDGE.

The statute 6 & 7 Wm. IV. c. 85 (explained by the 1 Vict. c. 22, and 3 & 4 Vict. c. 12) was passed for the relief of those who scrupled at joining in the services of the established church, and was the result of a long and arduous struggle carried on for many years in and out of parliament. It provides for places of religious worship other than the churches and chapels of the establishment, being registered for the solemnization of marriages therein; and it also enables persons who wish to do so to enter into this contract without any religious ceremony whatever. It is, therefore, no longer essential to the validity of a marriage, either that it should be solemnized in a parish-church or public chapel, or be performed by a person in holy orders; but whether celebrated in *facie ecclesie*, or (under the provisions of the above-mentioned statute) in a place of religious worship, or in the presence merely of the superintendent registrar of births, deaths, and marriages, the officer before whom civil marriages may be performed, the contract must be preceded and accompanied by certain circumstances of publicity, or entered into in virtue of a license obtainable only on proof by affidavit that there is no legal impediment to the marriage.—KERR.

<sup>18</sup> Till the 2 & 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 & 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 all the other reforms in the church, was repealed by queen Mary, and it was not revived again till the 1 Jac. 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 & 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.—CHRISTIAN.

<sup>19</sup> Fraud will sometimes be a ground for annulling the marriage; as on account of bans having been published, or license 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.—CHITTY.

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 ecclesie*. 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,<sup>20</sup> unless by dispensation from the archbishop of Canterbury. It must also be preceded by publication of banns, or by license from the spiritual judge. Many other formalities are likewise prescribed by the act; the neglect of which, though penal, does not invalidate the marriage. It is held to be also essential to a marriage, that it be performed by a person in orders;(z) though the intervention of a priest to solemnize this contract is merely *juris positivi*, and not *juris naturalis aut divini*: it being said that pope Innocent the Third was the first who ordained the celebration of marriage in the church;(a) \*410] 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 license,—between single persons,—consenting,—of sound mind,—and of the age of twenty-one years;—or of the age of fourteen in males and twelve in females, with consent of parents or guardians, or without it, in case of widowhood. And no marriage is *voidable* by the ecclesiastical law, after the death of either of the parties; 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.

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.<sup>21</sup> For in cases of total divorce, the marriage is declared null, as having been absolutely unlawful *ab initio*: and the parties are therefore separated *pro salute animarum*: for which reason, as was before observed, no divorce can be obtained, but during the life of the parties. The issue of such marriage as is thus entirely dissolved, are bastards.(c)<sup>22</sup>

(y) Stat. 26 Geo. II. c. 33.

(z) Salk. 119.

(a) Moor, 170.

(b) "From the bands of matrimony."

(c) Co. Litt. 235.

<sup>20</sup> The marriage act requires that the marriage shall be celebrated in some parish-church or public chapel where banns had been usually published; *i.e.* before the 25th of 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.—CHRISTIAN.

<sup>21</sup> 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.—CURRY.

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.—CHRISTIAN.

<sup>22</sup> 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

Divorce *a mensa et thoro* is when the marriage is just and lawful *ab initio*, and therefore the law is tender of dissolving \*it; but, for some supervenient cause, it becomes improper or impossible for the parties to live together: [\*441 as in the case of intolerable ill temper,<sup>23</sup> 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.<sup>24</sup> 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

(d) Matt. xix. 9.

(e) Nov. 117.

(f) Cod. 5, 17, 8.

(g) Moor, 683.

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 jactationis maritaggi*. Carth. 225. And if the parties die, an examination will not be allowed to prove an heir contrary. Cro. J. 186. 7 Co. 43.—CHITTY.

<sup>23</sup> It may be doubted whether ill temper alone is a ground for a divorce *a mensa et thoro*: the policy of the law is to consider marriage indissoluble, and the court is slow to interfere, except where something appears which renders cohabitation unsafe or is likely to be attended with injury to the person or to the health of the party applying. It is no less truly than beautifully said by Sir W. Scott, in the case of *Evans vs. Evans*, 1 Hagg. Rep. 36, that "though in particular cases the repugnance of the law to dissolve the obligations of matrimonial cohabitation may operate with great severity upon individuals, yet it must be carefully remembered that the general happiness of the married life is secured by its indissolubility. When people understand that they *must* live together, except for a very few reasons known to the law, they learn to soften by mutual accommodation that yoke which they know they cannot shake off. They become good husbands and good wives from the necessity of remaining husbands and wives; for necessity is a powerful master in teaching the duties which it imposes. If it were once understood that upon mutual disgust married persons might be legally separated, many couples who now pass through the world with mutual comfort, with attention to their common offspring and to the moral order of civil society, might have been at this moment living in a state of mutual unkindness, in a state of estrangement from their common offspring, and in a state of the most licentious and unreserved immorality. In this case, as in many others, the happiness of some individuals must be sacrificed to the greater and more general good."—COLERIDGE.

<sup>24</sup> 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 vs. 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 Doves's 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 the deed should be void on that account. 2 Bar. & Cres. 547. 4 D. & R. 11 S. C.—CHITTY.



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)*<sup>25</sup> However divorces *a vinculo matrimonii*, for adultery, have of late years been frequently granted by act of parliament.<sup>26</sup>

In case of divorce *a mensa et thoro*, the law allows alimony to the wife: which is that allowance which is made to a woman for her support out of the husband's estate: being settled at the discretion of the ecclesiastical judge, on consideration of all the circumstances of the case. This is sometimes called her *estovers*,<sup>27</sup> for which, if he refuses payment, there is, besides the ordinary process of excommunication, a writ at common law *de estoveriis habendis*, in order to recover it. *(j)* \*442] It is generally proportioned to the rank and quality of the parties. But in case of elopement, and living with an adulterer, the law allows her no alimony. *(k)*

III. Having thus shown how marriages may be made, or dissolved, I come now, lastly, to speak of the legal consequences of such making, or dissolution.

By marriage, the husband and wife are one person in law: *(l)* that is, the very being or legal existence of the woman is suspended during the marriage, or at least is incorporated and consolidated into that of the husband: under whose wing, protection, and cover, she performs every thing; and is therefore called in our law-french a *feme-covert*, *fæmina viro co-operta*; is said to be *covert-baron*, or under the protection and influence of her husband, her *baron*, or lord; and her condition during her marriage is called her *coverture*.<sup>28</sup> Upon this principle, of

<sup>(h)</sup> 2 Mod. 314.

<sup>(i)</sup> Can. 1803, c. 105.

<sup>(j)</sup> 1 Lev. 6.

<sup>(k)</sup> Cowel, tit. Alimony.

<sup>(l)</sup> Co. Litt. 12.

<sup>25</sup> With respect to confessions of adultery, the rule in the ecclesiastical courts seems now to be that they are very objectionable grounds for a sentence of divorce, and to be received with the greatest caution; but that when proved to the satisfaction of the court to be perfectly free from all suspicion of collusion, they may be sufficient. See 1 Haggard's Rep. 304. 3 id. 189, 316.—COLERIDGE.

<sup>26</sup> For the purpose of obtaining this divorce by a bill in parliament, it is necessary that on the petition for the bill to the house of lords (where such bill usually originates) that an official copy of the proceedings and definitive sentence of divorce *a mensa et thoro* in the ecclesiastical courts, at the suit of the petitioner, shall be delivered at the bar on oath. Upon the second reading of the bill, the petitioner must attend the house to be examined at the bar, if the house think fit, whether there is any collusion respecting the act of adultery, or the divorce, or any action for crim. con.; and whether the wife was living apart from her husband under articles of separation. In all divorce bills must be contained a clause, prohibiting the offending parties from intermarrying with each other, (but this clause is generally struck out in the committee, and the act passed without it,) and evidence must be given in the committee of the house of commons on the bill, that an action for damages has been brought against the seducer, and judgment for the plaintiff had thereon, or a sufficient reason given why such action was not brought, or judgment obtained. See the standing orders of the two houses. The proof of a verdict at law may be dispensed with where the circumstances are such that the adultery of the wife can be proved by satisfactory evidence, and where at the same time it is impossible 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 upon 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 before 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 reason, that she may not be driven by want to continue in a course of vice. Per Best, J. 4 D. & R. 17.—CHITTY.

<sup>27</sup> A word used by Bracton to signify any kind of aliment. And stat. 6 Edw. I. c. 1 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.—CHITTY

<sup>28</sup> Whatever may be the origin of *feme-covert*, it is not perhaps unworthy of observation, that it nearly corresponds in its signification to the Latin word *nupta*; for that is derived from *nuberdo*, *i. e.* *tegendo*, because the modesty of the bride, it is said, was so much consulted

a union of person in husband and wife, depend almost all the legal rights, duties, and disabilities, that either of them acquire by the marriage. I speak not at present of the rights of property, but of such as are merely *personal*. For this reason, a man cannot grant any thing to his wife, or enter into covenant with her :*(m)* for the grant would be to suppose her separate existence; and to covenant with her, would be only to covenant with himself: and therefore it is also generally true, that all compacts made between husband and wife, when single, are voided by the intermarriage.*(n)*<sup>29</sup> A woman indeed may be attorney for her

(<sup>m</sup>) Co. Litt. 112.

(<sup>n</sup>) Cro. Car. 551.

by the Romans upon that delicate occasion, that she was led to her husband's house covered with a veil.—CHRISTIAN.

<sup>29</sup> The husband and wife being one person in law, the former cannot, after marriage, by any conveyance of common law, give an estate to the wife, (Co. Litt. 112, a., 187, b.,) nor the wife to the husband. Co. Litt. 187, b. But the husband may grant to the wife by the intervention of trustees, (Co. Litt. 30;) and he may surrender a copyhold to her use. A husband cannot covenant or contract with his wife, (Co. Litt. 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. Litt. 3,) except by will. Litt. s. 168. 2 Vern. 385. 3 Atk. 72. 1 Fonblanque on Eq. 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. Litt. 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. Litt. 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. Litt. 112, a.

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 Raym. 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 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 præsentis, 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, 481. 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 Fonb. on Eq. 102, 103.—CURRIT.

When husband and wife join, according to the provisions of a statute law, in conveying the wife's land to a third person, and such third person reconveys to the husband, the husband acquires a title in his own right. Jackson vs. Stevens, 16 Johns. 110. Meriam

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)<sup>30</sup> The husband is bound to provide his wife with necessaries by law, as much as himself; and, if she contracts debts for them, he is obliged to pay them; (q) but for any thing besides necessaries he is not chargeable. (r) Also if a wife elopes, \*443] and lives with another man, the husband is \*not chargeable even for necessaries; (s) at least if the person who furnishes them is sufficiently apprized of her elopement. (t)<sup>31</sup> If the wife be indebted before marriage, the

(o) F. N. B. 27.  
(p) Co. Litt. 112.  
(q) Salk. 118.

(r) 1 Sid. 120.  
(s) Stra. 647.  
(t) 1 Lev. 6.

vs. Harson, 2 Barb. Ch. Rep. 232. A husband cannot convey land directly to his wife, but he may convey it to trustees for her use. *Abbott vs. Hurd*, 7 Blackf. 510. A married woman who, by virtue of any statute, joins her husband in the conveyance of her land by deed, is nevertheless not bound personally by any of the covenants contained therein, further than they may operate by way of estoppel. *Fowler vs. Sheane*, 7 Mass. 14. *Aldridge vs. Burleson*, 3 Blackf. 201. *Den vs. Crawford*, 3 Halst. 90. *Wadleigh vs. Glines*, 6 N. Hamp. 17. *Shelton vs. Deering*, 10 B. Mon. 405. So if she have a power of appointment for her separate use and disposal, she may execute the same for the benefit of her husband. *Hoover vs. The Samaritan Society*, 4 Whart. 445.—SHARSWOOD.

<sup>30</sup> 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.—CHITTY.

<sup>31</sup> I do not imagine that the liability of the husband to discharge the contracts of his wife depends on the principle of a union of person, but on that of authority and assent expressed or implied. This principle borne in mind is a clew to almost all the decisions: thus, first, during cohabitation, it may be presumed that the husband authorizes his wife to contract for all necessaries suitable to his degree; and no misconduct of hers during cohabitation, not even adultery, which he must therefore be supposed to be ignorant of or to have forgiven, can have any tendency to destroy that presumption of authority. But if that presumption be removed, either by the unreasonable expensiveness of the goods furnished, or by direct warning, the liability falls to the ground. Secondly, cohabitation may cease either by consent, the fault of the husband or of the wife: in the first case, if there be an agreement for a separate allowance to the wife, and that allowance be paid, it operates as notice that she is to be dealt with on her own credit, and the husband is discharged; if there be no allowance agreed on, or none paid, then it must be presumed that she has still his authority to contract for her necessaries, and he remains liable. In the second case, in which it is improbable that any allowance should be made, the husband is said to send his wife into the world with general credit for her reasonable expenses. This is upon the general principle that no one shall avail himself of his own wrong: by the common law, the husband is bound to maintain his wife, and when he turns her from his house he does not thereby discharge himself of that liability, which, still remaining, is a ground for presuming an authority from him to her to contract for reasonable necessaries. Against this presumption no general notice not to deal with her shall be allowed to prevail; but where there is an express notice to any particular individual, that person cannot sue upon contracts afterwards entered into with her. In the last case there is no ground for the presumption of authority: the law does not oblige a husband to maintain an adulteress who has eloped from him, and whose situation has thus become public; and therefore it will not be inferred that he has given her authority to bind him by contracts, and there will be no necessity for notice to rebut an inference which does not arise. See the cases collected and arranged, 1 Selw. N. P. 275, 284.—COLERIDGE.

If a wife elopes from her husband, though not with an adulterer, the husband is not liable for any of her contracts, though the person who gave her credit for necessaries had no notice of the elopement. But if she offers to return, and her husband refuses to receive her, his liability upon her contracts for necessaries is revived from that time, notwithstanding notice not to trust. *McCutchen vs. McGahay*, 11 Johns. 281. *Cunningham vs. Irvin*, 7 S. & R. 247. *McGahay vs. Williams*, 12 Johns. 293. *Kimball vs. Keeps*, 11 Wend. 33. *Hunter vs. Boucher*, 3 Pick. 289. *Brown vs. Patton*, 3 Humph. 135. *Fredd vs. Eyes*, 4 Harring. 385. The authority and assent of the husband to the contract of the wife for necessaries are implied where the conduct of the husband prevents cohabitation. *Cary vs. Patton*, 2 Ashmead, 140. *Billing vs. Pilcher*, 7 B. Monroe, 458. If the wife carry on business with the knowledge of the husband, it will be presumed to be with his consent, and he will be responsible on her contracts made in the course of it. *McKinley vs. McGregor*, 3 Wharton, 369. The power of a wife to bind her husband by her contracts depends upon the fact of agency alone, express or implied,—she having, as wife, no

husband is bound afterwards to pay the debt; for he has adopted her and her circumstances together.(u)<sup>32</sup> If the wife be injured in her person or her property, she can bring no action for redress without her husband's concurrence, and in his name, as well as her own:(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.<sup>33</sup> In criminal prosecutions, it is true, the wife may be indicted and punished separately;(y) for the union is only a civil union.<sup>34</sup> But in trials of any sort they are not allowed to be witnesses for, or against, each other:(z) partly because it is impossible their testimony should be indifferent, but principally because of the union of person; and therefore, if they were admitted to be witnesses for each other, they would contradict one maxim of law, "*nemo in propria causa testis esse debet*;"(a) and if against each other, they would contradict another maxim, "*nemo tenetur seipsum accusare*."(b)<sup>35</sup> But, where the

(u) 3 Mod. 1, 6.  
 (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. Antiq. b. 1, c. 21.

(x) Co. Litt. 133.  
 (y) 1 Hawk. P. C. 3.  
 (z) 2 Hawk. P. C. 431.  
 (a) "No one is allowed to be a witness in his own cause"  
 (b) "No one is bound to accuse himself"

original and inherent power to bind him by any contract. *Sawyer vs. Cutting*, 23 Verm. 486.—SHARSWOOD.

<sup>32</sup> 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 contracted before marriage, either at law or in equity, unless there be some part of her personal property which he did not reduce into his possession before her death, which he must afterwards 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 coverture. 1 P. Wms. 468. 3 P. Wms. 409. Rep. T. Talb. 173.—CHRISTIAN.

He is liable for her debts *dum sola*, even though he be an infant, but not liable after her death or after divorce, unless they have been prosecuted to judgment against him before that. *Roach vs. Quick*, 9 Wend. 238. *Waul vs. Kirkman*, 13 S. & M. 599. *Morrow vs. Whitesides*, 10 B Monr. 411. After the coverture has ceased, a woman may be proceeded against at law for a debt which she owed previous to the marriage. *Clarke vs. Windham*, 12 Ala. 798.—SHARSWOOD.

<sup>33</sup> A mere temporary absence of the husband does not subject his wife to be sued as a *feme sole*. *Robinson vs. Reynolds*, 1 Aiken, 174. *Rogers vs. Phillips*, 3 Eng. 366. An absence of seven years, which raises a presumption of his death, does. *Boyer vs. Owens*, 1 Hill S. C. 8. *King vs. Paddock*, 18 Johns. 141. So also if the husband actually deserts the wife without the intention of returning. *Gregory vs. Paul*, 15 Mass. 31. *Starrett vs. Wynn*, 17 S. & R. 130. *Gregory vs. Peirce*, 4 Metc. 478. *Arthur vs. Broadnax*, 3 Ala. 557. *James vs. Stewart*, 9 *ibid.* 855. So in case of a divorce *a mensa et thoro*. *Pierce vs. Burnham*, 4 Metc. 303.—SHARSWOOD.

<sup>34</sup> In many inferior misdemeanours 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 vs. Taylor*, 3 Burr. 1681. Where a wife, by her husband's order and procurement, 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.—CHITTY.

<sup>35</sup> The statute 16 & 17 Vict. c. 83 enacts that husbands and wives of parties shall be competent and compellable to give evidence on behalf of either party; but neither can be compelled to disclose any communication during marriage, and neither is a competent witness in a criminal proceeding, or in any proceedings instituted in consequence of adultery.—STEWART.

In a suit to which the trustee of a married woman is a party, her husband, although

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 such her husband, in order to convict him of felony. For in this case she can with no propriety be reckoned his wife; because a main ingredient, her consent, was wanting to the contract: and also there is another maxim of law, that no man shall take advantage of his own wrong; which the \*ravisher here would do, if, by \*444] forcibly marrying a woman, he could prevent her from being a witness who is perhaps the only witness to that very fact.

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)

But though our law in general considers man and wife as one person, yet there are some instances in which she is separately considered; as inferior to him, and acting by his compulsion. And therefore all deeds executed, and acts done, by her, during her coverture, are void; 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)<sup>36</sup> 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.<sup>37</sup>

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

(c) State Trials, vol. I. Lord Audley's case. Stra. 633.

(d) Cod. 4, 12, 1.

(e) 2 Roll. Abr. 298.

(f) Litt. §§ 669, 670.

(g) Co. Litt. 112.

(h) 1 Hawk. P. C. 2.

(i) Ibid. 130.

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he has no interest in the subject of the trust, cannot be a witness for the trustee, because his wife has an interest. *Burrell vs. Bull*, 3 Sandf. Ch. Rep. 15. *Hodges vs. The Bank*, 13 Alabama, 455. *Footman vs. Pendergrass*, 2 Strob. 317.

The widow is not as such disqualified as a witness in a case in which her husband had an interest. She may testify to any fact within her personal knowledge, but not to any thing disclosed by his communications with her. As to all communications thus made in the close confidence of the marriage relation, the law stops her mouth forever. *Edgell vs. Burnett*, 7 Verm. 506, 534. *Pike vs. Hayes*, 14 N. Hamp. 19. It has been held, however, that after a wife has been divorced from her husband, she will not be permitted to testify against him in respect to transactions which took place prior to the divorce and during the coverture. *Barnes vs. Camack*, 1 Barbour, 392. *Cooke vs. Grange*, 48 Ohio, 526.—SHARSWOOD.

<sup>36</sup> A married woman, with the assent of her husband, may make a will, by way of appointment, of the personal property at her disposal. She cannot, even with the assent of her husband, make a devise of lands, so as to render the will effectual against her heir, unless it be in virtue of the provisions of some statute, or of a power granted to her in the original creation of the estate. Nor does the circumstance of her surviving her husband render valid the will of a married woman, unless she republishes it after his death. *Osgood vs. Breed*, 12 Mass. 525. *Banks vs. Stone*, 13 Pick. 420. *Marston vs. Norton*, 5 N. Hamp. 205. *Thomas vs. Folwell*, 2 Whart. 11. *Newlin vs. Freeman*, 1 Iredell, 514. A husband may revoke his assent to a will made by his wife of her personal estate; but it must be done before the probate of the will. *Wagner's Estate*, 2 Ashm. 448.—SHARSWOOD.

<sup>37</sup> The wife is not indictable for offences committed by the command of or in company with her husband, unless the crime is *malum in se*, or where the wife may be presumed to be the principal agent. If, however, she commit any indictable offence without the presence or coercion of her husband, she alone is responsible. *Commonwealth vs. Neal*, 10 Mass. 152. *Commonwealth vs. Lewis*, 1 Metc. 151. *State vs. Parkerson*, 1 Strob. 169. *Davis vs. The State*, 15 Ohio, 72. If a married woman commits a misdemeanour with the concurrence of her husband, the husband is liable. *Williamson vs. The State*, 16 Alabama, 431.—SHARSWOOD.

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 causâ regiminis et castigationis uxoris suæ, licite et rationabiliter pertinet*. The civil law gave the husband the \*same, or a larger, authority over his wife: allowing him, for some misdemeanours, *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.<sup>88</sup>

(j) Moor, 784.

(k) Nov. 117, c. 14, and Van Leeuwen *in loc.*

(l) 1 Sid. 113. 3 Kebb. 433.

(m) 2 Lev. 123.

(n) Stra. 1207.

(o) Stra. 478, 875.

<sup>88</sup> 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 shown 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 & 4 W. and M. c. 9, they received sentence of death, 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 curtesy 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

## 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.

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 the 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 *σφοδρῆ*, 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,

(a) *Ff.* 2, 4, 5.  
(d) *L. of N.* 14, c. 11.

(c) *Sp. L.* b. 23, c. 2.  
(e) *Ff.* 25, 3, 5.

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.--CHRISTIAN.

and, if he refuses, "*judex de ea re cognoscet.*" Nay, it carries this matter so far, that it will not suffer a parent at his death totally to disinherit his child, without expressly giving \*his reason for so doing; and there are four- [ \*448  
 teen 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 dis-inheriting 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 man to provide for those descended from his loins; and the manner in which this obligation shall be performed is thus pointed out. (r)<sup>1</sup> The father and mother,

(e) Nov. 115.

(f) L. 4, c. 11, § 7.

(g) *De J. B. & P.* l. 2, c. 7, n. 3.

(h) Raym. 500.

(i) Stat. 43 Eliz. c. 2.

<sup>1</sup> 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 sufficient 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 20s. a month, or 13l. 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 20s. a month. And if the party disobey the order to pay that sum, though exceeding 20s. 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 and 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



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 church-wardens and overseers of the parish shall seize his rents, goods, and chattels, and dispose of them toward their relief. By the interpretations which the courts of law have made upon these statutes, if a mother or grandmother marries again, and was before such second marriage of sufficient ability to keep \*449] the child, the husband shall be charged to \*maintain it: (l) for this, being a debt of hers when single, shall like others extend to charge the husband.'

(\*) Stat. 5 Geo. I. c. 5.

(l) Styles, 283. 2 Bulst. 346.

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 while 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.

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.—CHRISTY.

It has lately been decided that the authorities here relied upon by the learned commentator never were law, and that 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.—CHRISTIAN.

The son's father is not compellable to maintain the son's wife. 2 Stra. 995.—CHRISTY.

But at her death, the relation being dissolved, the husband is under no further obligation.<sup>3</sup>

No person is bound to provide a maintenance for his issue, unless where the children are impotent and unable to work, either through infancy, disease, or accident, and then is only obliged to find them with necessaries, the penalty on refusal being no more than 20s. a month.<sup>4</sup> For the policy of our laws, which are ever watchful to promote industry, did not mean to compel a father to maintain his idle and lazy children in ease and indolence: but thought it unjust to oblige the parent, against his will, to provide them with superfluities, and other indulgences of fortune; imagining they might trust to the impulse of nature, if the children were deserving of such favours. Yet, as nothing is so apt to stifle the calls of nature as religious bigotry, it is enacted,<sup>(m)</sup> 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.<sup>(n)</sup><sup>5</sup> But this gave occasion<sup>(o)</sup> to another statute,<sup>(p)</sup> 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.<sup>6</sup>

Our law has made no provision to prevent the disinheriting of children by will; leaving every man's property in his \*own disposal, upon a principle of liberty in this as well as every other action: though perhaps it had not been amiss if the parent had been bound to leave them at 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

(\*) Stat. 11 & 12 W. III. c. 4.  
(\*) Lord Raym. 699.

(\*) Com. Jour. 18 Feb. 12 March, 1701.  
(\*) 1 Anne, st. 1, c. 30.

<sup>3</sup> A father-in-law is not obliged to maintain the children which his wife may have had by a former husband. *Commonwealth vs. Hamilton*, 6 Mass. 273. *Worcester vs. Marchant*, 14 Pick. 510. *Williams vs. Hutchinson*, 3 Comst. 312.—SHARSWOOD.

<sup>4</sup> A parent is bound by the common law to support his children as long as he has any means whatever to do it. He cannot therefore charge their separate estate with the expense of their maintenance and education. *Hillsborough vs. Deering*, 4 N. Hamp. 86. *Harland's Accounts*, 5 Rawle, 323. *Addison vs. Bowie*, 2 Bland, 606. *Dupont vs. Johnson*, 1 Bailey, Ch. R. 274.

Although courts of equity recognise the common law liability of a father to support and educate his child, yet in a case where he has not ability to do so according to their station in life, assistance will be granted him from the estate of the child. *Newport vs. Cook*, 2 Ashm. 332. *Cawls vs. Cawls*, 3 Gilman, 435. *Godard vs. Wagner*, 2 Strob. Eq. 1.

A parent is bound to provide his children with necessaries; and, if he neglect to do so, a third person may supply them and charge the parent with the amount. *Van Valkinburgh vs. Watson*, 13 Johns. 480. *Stanton vs. Willson*, 3 Day, 37. *Pidgin vs. Comm.* 8 N. Hamp. 350.

If a father abandon his duty, so that his infant child is forced to leave his house, he is liable for a suitable maintenance; but where the son voluntarily leaves his father's house, the authority of the father to purchase necessaries is not implied. *Owen vs. White*, 5 Porter, 435. *Hunt vs. Thompson*, 3 Scam. 179. *Raymond vs. Loyd*, 10 Barb. Sup. Ct. 483. *Watts vs. Steele*, 19 Ala. 656.—SHARSWOOD.

<sup>5</sup> 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.—CHRISTIAN.

<sup>6</sup> Both these statutes are now repealed by 9 & 10 Vict. c. 50.—SHARSWOOD.

ambiguous words; there being required the utmost certainty of the testator's intentions to take away the right of an heir.(g)<sup>7</sup>

From the duty of maintenance we may easily pass to that of *protection*, which is also a natural duty, but rather permitted than enjoined by any municipal laws: nature, in this respect, working so strongly as to need rather a check than a spur. A parent may by our laws maintain and uphold his children in their lawsuits, without being guilty of the legal crime of maintaining quarrels.(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 the 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)<sup>8</sup> Such indulgence does the law show 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)<sup>451</sup> it is not \*easy to imagine or allow, that a parent has conferred any considerable benefit upon his child by bringing him into the world, if he afterwards entirely neglects his culture and education, and suffers him to grow up like a mere beast, to lead a life useless to others, and shameful to himself. Yet the municipal laws of most countries seem to be defective in this point, by not constraining the parent to bestow a proper education upon his children. Perhaps they thought it punishment enough to leave the parent, who neglects the instruction of his family, to labour under those griefs and inconveniences which his family, so uninstructed, will be sure to bring upon him. Our laws, though their defects in this particular cannot be denied, have in one instance made a wise provision for breeding up the rising generation: since the poor and laborious part of the community, when past the age of nurture, are taken out of the hands of their parents, by the statutes for apprenticing poor children,(w)

(g) 1 Lev. 130.

(r) 2 Inst. 564.

(s) 1 Hawk. P. C. 131.

(t) Cro. Jac. 296. 1 Hawk. P. C. 83.

(u) L. of N. b. 6, c. 2, § 12.

(w) See page 426.

<sup>7</sup> 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.—CHITTY.

<sup>8</sup> This case should not be read without the comment of Mr. J. Foster on it: he says the case as reported by lord Coke always appeared to him very extraordinary. The two children had been fighting: the prisoner's son is worsted and returns home bloody; the father takes a staff, runs three-quarters of a mile and beats the other boy, who dies of the beating. "If," says he, "upon provocation such as this, the father, after running three-quarters of a mile, had despatched the child with an hedge-stake or any other deadly weapon, or by repeated blows with his cudgel, it must, in my opinion, have been murder, since any of these circumstances would have been a plain indication of malice."

He then adverts to Coke's report of the case, and to the remarks made on it by lord Raymond in *R. vs. Oneby*, 2 Ld. Raym. 1498; from which he infers that the accident happened by a single stroke with a *small* cudgel, not likely to destroy, and that death did not immediately ensue. So that the ground of the decision was the absence of any fact showing malice, rather than indulgence shown to parental passion. Foster, 294.—

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and are placed out by the public in such a manner, as may render their abilities, in their several stations, of the greatest advantage to the commonwealth. The rich, indeed, are left at their own option, whether they will breed up their children to be ornaments or disgraces to their family. Yet in one case, that of religion, they are under peculiar restrictions; for(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 family, in order to be instructed, persuaded, or confirmed in the \*popish religion, or shall contribute any [\*452 thing towards their maintenance when abroad by any pretext whatever, the person both sending and sent shall be disabled to sue in law or equity, or to be executor or administrator to any person, or to enjoy any legacy or deed of gift, or to bear any office in the realm, and shall forfeit all his goods and chattels, and likewise all his real estate for life.\*

2. The power of parents over their children is derived from the former consideration, their duty: this authority being given them, partly to enable the parent more effectually to perform his duty, and partly as a recompense for his care and trouble in the faithful discharge of it. And upon this score the municipal laws of some nations have given a much larger authority to the parents than others. The ancient Roman laws gave the father a power of life and death over his children; upon this principle, that he who gave had also the power of taking away.(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.<sup>9</sup> He may lawfully correct his child, being under age, in a reasonable manner;(d) for this is for the benefit of his education.<sup>11</sup> The consent or concurrence of the parent to the marriage

(\*) Stat. 1 Ja. I. c. 4, and 3 Ja. I. c. 5.

(y) Stat. 11 & 12 W. III. c. 4.

(z) Stat. 3 Car. I. c. 2.

(\*) Ff. 28, 2, 11. Cod. 8, 47, 10.

(c) Ff. 48, 9, 5.

(d) Inst. 2, 9, 1.

(d) 1 Hawk. P. C. 130.

<sup>9</sup> These restrictions on education in the Roman Catholic religion are removed by 10 Geo. IV. c. 7, the statute for the emancipation of the Roman Catholics.—SHARSWOOD.

<sup>10</sup> 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, 59. 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.—CHITTY.

The father is in the first instance entitled to the custody of the children; but the courts will exercise a sound discretion for the benefit of the children, and in some cases will order them into the custody of a third person, when both parents are immoral, grossly ignorant, and unfit to be intrusted with their care and education. *Commonwealth vs. Nutt*, 1 Browne, 143. *United States vs. Green*, 3 Mason, 482. *Commonwealth vs. Addick*, 2 S. & R. 174. *Matter of Rottman*, 2 Hill, S. C. 363. *The People vs. Mercein*, 3 Hill, 399. *The State vs. Paine*, 4 Humph. 523. *Ex parte Schumpert*, 6 Rich. 344. *Smith, petitioner*, 13 Illinois, 138.—SHARSWOOD.

<sup>11</sup> A parent is punishable for an excessive punishment of his child, and what consti

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.<sup>(e)</sup> And this \*153] 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.<sup>12</sup> 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.<sup>13</sup> The legal power of a father,—for a mother, as such, is entitled to no power, but only to reverence and respect;<sup>14</sup> the power of a father, I say, over the persons of his children ceases at the age of twenty-one: for they are then enfranchised by arriving at years of discretion, or that point which the law has established, as some must necessarily be established, when the empire of the father, or other guardian, gives place to the empire of reason. Yet, till that age arrives, this empire of the father continues even after his death; for he may by his will appoint a guardian to his children. He may also delegate part of his

(e) Stat. 26 Geo. II. c. 33.

tutes excess is a question of fact for the jury. *Johnson vs. The State*, 2 Humph. 283.—SHARSWOOD.

<sup>12</sup> 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, 85. 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.—CHRISTIAN.

The father, as guardian by nature, has no right to receive the rents and profits of his child's lands; nor is he authorized to receive payment of a legacy to his child. *Jackson vs. Combs*, 7 Cowen, 36. *Miles vs. Boyden*, 3 Pick. 213. *Isaacs vs. Boyd*, 5 Port. 388. *Hyde vs. Stone*, 7 Wend. 354.—SHARSWOOD.

<sup>13</sup> A parent is entitled to the earnings of his minor child, where there is no agreement, express or implied, that payment may be made to the child; and an action for the work, labour, and service of such child must be brought in the name of the parent. *Benson vs. Remington*, 2 Mass. 113. *Gale vs. Parrot*, 1 N. Hamp. 28. *United States vs. Meste*, 2 Watts, 406. *Morse vs. Wilton*, 6 Conn. 547. *Stovall vs. Johnson*, 17 Ala. 14. If a parent contract for the services of his minor child, in consideration of a remuneration to the father, the contract is valid, and will enable the child to maintain an action for the breach of it, in his own name. *Ewbanks vs. Peak*, 2 Bailey, 497. *Chase vs. Smith*, 5 Verm. 556. Where a minor son makes a contract for services on his own account, and his father knows of it and makes no objection, there is an implied assent that the son shall have his earnings. *Cloud vs. Hamilton*, 11 Humph. 104. *Whiting vs. Earle*, 3 Pick. 201. The right of a father to the fruit of the child's labour has its foundation in his obligation to support and educate the child, and if he abandons the child he forfeits his right to his earnings. *The Atna Ware*, 462. *Stone vs. Pulsipher*, 16 Verm. 428. *Godfrey vs. Hays*, 6 Ala. 501. Marriage of a minor son is a legal emancipation, and entitles him to his own earnings. *Dicks vs. Grisson*, 1 Freeman, Ch. 428.—SHARSWOOD.

<sup>14</sup> Now, however, by the statute 2 & 3 Vict. c. 54, commonly called Talfourd's Act, an order may be made on petition to the court of chancery, giving mothers access to their children, and, if such children are within the age of seven years, for delivery of them to their mother until they attain that age. No mother, however, against whom adultery has been established, is entitled to the benefit of the act.

In New York and some other States by statute, and in other parts of the Union by common law, the courts are vested with the power, in the exercise of a sound discretion with a view to the welfare of the child, of determining to which parent the custody shall be committed, and, in some cases, of denying such custody to either parent.

An infant owes reverence to his mother; but she has no legal authority over him and no legal right to his services. *Commonwealth vs. Murray*, 4 Binn. 487. *Whipple vs. Dow* 2 Mass. 415.—SHARSWOOD.

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.<sup>15</sup>

3. The *duties* of children to their parents arise from a principle of natural justice and retribution. For to those who gave us existence we naturally owe subjection and obedience during our minority, and honour and reverence ever after: they who protected the weakness of our infancy are entitled to our protection in the infirmity of their age; they who by sustenance and education have enabled their offspring to prosper, ought in return to be supported by that offspring, in case they stand in need of assistance. Upon this principle proceed all the duties of children to their parents which are enjoined by positive laws. And the Athenian laws(*f*) carried \*this principle into practice with a scrupulous kind of nicety; obliging all children to provide for their [\*454 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 burden, 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 shown the greatest tenderness and parental piety.<sup>16</sup>

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

1. Who are bastards. A bastard, by our English laws, is one that is not only begotten, but born, out of lawful matrimony. The civil and canon laws do not allow a child to remain a bastard, if the parents afterwards intermarry:*(i)* and herein they differ most materially from our law; which, though not so strict as to require that the child shall be *begotten*, \*yet makes it an indispensable condition, 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

(*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. l. 4, t. 7, c. 1.

<sup>15</sup> This power must be temperately exercised; and no schoolmaster should feel himself at liberty to administer chastisement coextensively 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. & 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 Geo. III. c. 139, § 1.—CHRISTIAN.

<sup>16</sup> The words of the statute are "the father and grandfather, mother and grandmother, and children, of every poor and impotent person, &c.;" from which words and a former statute, Dr. Burn is inclined to think, even contrary to the opinion of lord Holt, that a grandchild is not compellable to relieve an indigent grandfather; but I should entertain no doubt but the court of King's Bench would determine the duty to be reciprocal, and would construe any ambiguous expression in favour of the discharge of such a natural and moral obligation.—CHRISTIAN.

A child is not liable at common law for the support of an infirm and indigent parent. The liability rests altogether upon statute provisions. *Edward vs. Davis*, 16 Johns. 281 —SHARSWOOD.

Roman, if we consider the principal end and design of establishing the contract of marriage, taken in a civil light, abstractly 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 ar  
\*456] 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.<sup>(k)</sup><sup>17</sup>

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.<sup>(l)</sup><sup>18</sup> And this gives occasion to a proceeding at common

<sup>(k)</sup> 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 Anglię mutare, quę hucusque usitate sunt et approbate. Stat. 20 Hen. III. c. 9. See the introduction to the great charter, edit. Ozon. 1759, sub anno 1253.

<sup>(l)</sup> Cro. Jac. 541.

<sup>17</sup> And so strict is this rule that where a person born a bastard becomes, by the subsequent marriage of his parents, legitimate according to the laws of the country in which he was born, he is still a bastard, so far as regards the inheritance of lands in England. Doe d. Birdwhistle vs. Vardill, 6 Bingh. N. C. 358.—KERR.

<sup>18</sup> The following information from Dr. Hunter will be found in Harg. & B. Co. Litt. 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 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 iv. 221, n. a. So where the child was born forty weeks and eleven days after the death of the first husband. 18 Ric. II. Hale's MSS. Cro. Jac. 541. Godb 281. See also 2 Stra. 925. Roll. Abr. 356.—CHITTY.

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)<sup>19</sup> 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 of either \*husband; in this case [\*457 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)<sup>20</sup> 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 shown;(w) which is such a negative as can only be proved by showing him to be elsewhere: for the general rule is, *presumitur pro legitimatione*.(x)<sup>21</sup> In a divorce *a mensa et thoro*,(y) if the

(m) *Stiernhook de Jure Gothor.* l. 3, c. 5.

(n) *Co. Litt.* 3. *Bract.* l. 2, c. 32.

(o) *Ff.* 25, tit. 4, *per tot.*

(p) *Britton*, c. 60, page 166.

(q) *Co. Litt.* 3.

(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. Cnut.* c. 71.

(u) "Without the four seas."

(v) *Co. Litt.* 244.

(w) *Salk.* 125. 3 P. W. 276. *Str.* 925.

(x) 5 *Rep.* 98. "It is presumed for legitimation."

(y) "From table and from bed."

<sup>19</sup> 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.—CHITTY.

<sup>20</sup> "Brooke," says Mr. Hargrave, in his note on the passage cited from *Co. Litt.* in support of this position, "questions this doctrine; from which it seems as if he thought it reasonable that the circumstances of the case, instead of the choice of the issue, should determine who is the father."—COLERIDGE.

<sup>21</sup> It used to be held, that, 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, 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 show 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 in 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.—CHRISTIAN.

The presumption of law is in favour of the legitimacy of children born in wedlock;



wife breeds children, they are bastards; for the law will presume the husband and wife conformable to the sentence of separation, unless access be proved; but, in a voluntary separation by agreement, the law will suppose access, unless the negative be shown.<sup>(z)</sup> So also, if there is an apparent impossibility of procreation on the part of the husband, as if he be only eight years old, or the like, there the issue of the wife shall be bastards.<sup>(a)</sup> Likewise, in case of divorce in \*458] the spiritual court, *a vinculo matrimonii*,<sup>(b)</sup> all the issue born during the coverture are bastards;<sup>(c)</sup> because such divorce is always upon \*some cause that rendered the marriage unlawful and null from the beginning.

2. Let us next see the duty of parents to their bastard children, by our law; which is principally that of maintenance. For, though bastards are not looked upon as children to any civil purposes, yet the ties of nature, of which maintenance is one, are not so easily dissolved: and they hold indeed as to many other intentions; as, particularly, that a man shall not marry his bastard sister or daughter.<sup>(d)</sup> The civil law, therefore, when it denied maintenance to bastards begotten under certain atrocious circumstances,<sup>(e)</sup> was neither consonant to nature nor reason, however profligate and wicked the parents might justly be esteemed.

The method in which the English law provides maintenance for them is as follows.<sup>(f)</sup> When a woman is delivered, or declares herself with child, of a bastard, and will by oath before a justice of peace charge any person as having got her with child, the justice shall cause such person to be apprehended, and commit him till he gives security, either to maintain the child, or appear at the next quarter-sessions to dispute and try the fact. But if the woman dies, or is married before delivery, or miscarries, or proves not to have been with child, the person shall be discharged; otherwise the sessions, or two justices out of sessions, upon original application to them, may take order for the keeping of the bastard, by charging the mother or the reputed father with the payment of money or other sustentation for that purpose. And if such putative father, or lewd mother, run away from the parish, the overseers, by direction of two justices, may seize their rents, goods, and chattels, in order to bring up the said bastard child. Yet such is the humanity of our laws, that no woman can be compulsively questioned concerning the father of her child till one month after her delivery; which indulgence is, however, very frequently a hardship upon parishes, by giving the parents opportunity to escape.<sup>22</sup>

(z) Salk. 122.

(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 & 14 Car. II. c. 12. 7 Geo. II. c. 31.

but this presumption may be rebutted by placing the fact of non-access of the husband beyond reasonable doubt. It is not necessary to show that access was impossible, though probability of non-access is not sufficient to overthrow the presumption. *Stegall vs. Stegall*, 2 Brock. 256. *Cross vs. Cross*, 3 Paige, C. R. 139. *Wright vs. Hicks*, 12 Georgia, 155. However, in the Supreme Court of the United States the more stringent rule has been adopted, that, when once a marriage has been proved, nothing can impugn the legitimacy of the issue short of the proof of facts showing it to be impossible that the husband could be the father. *Patterson vs. Gaines*, 6 How. U. S. 550. A child born in wedlock, though born within a month or a day after marriage, is presumed to be legitimate; and when the mother was visibly pregnant at the marriage, it is a presumption *juris et de jure* that the child was the offspring of the husband. *The State vs. Heman*, 13 Iredell, 502.—SHARSWOOD.

<sup>22</sup> In the technical treatises on the poor-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 recognised and established. 5 East, 221. See also 1 B. & 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.—CHITTY.

But by the poor-law act, 4 & 5 W. IV. c. 76, all previous statutes on this subject are repealed: and it is enacted that every child which shall be born a bastard, after the pas-

\*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; [ \*459 for he can *inherit* nothing, being looked upon as the son of nobody; and sometimes called *filius nullius*, sometimes *filius populi*.(g) Yet he may gain a surname by reputation,(h) though he has none by inheritance.<sup>23</sup> 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.*

ing of the act, shall follow the settlement of the mother until he shall attain sixteen, or shall acquire a settlement in his own right; and such mother shall be bound to maintain such child as part of her family until sixteen, and such liability on marriage is to attach to her husband. And now, by 7 & 8 Vict. c. 101, s. 6, (amended by 8 & 9 Vict. c. 10,) if such child shall become chargeable to the parish, the mother is liable to be punished under the vagrant act; and if the mother is not of sufficient ability, the justices in petty session, or one justice within the metropolitan district, under 8 & 9 Vict. c. 10, s. 9, may make an order on the putative father for maintenance, provided the evidence of the mother be corroborated by other testimony; but such order shall in no case continue in force after the child shall attain thirteen years, or die, or the mother be married.—

STEWART.

<sup>23</sup> A bastard having gotten a name by reputation may purchase by his reputed or known name to him and his heirs, (*Co. Litt. 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 Raym. 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 consideration of blood, a 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. Litt. 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 *Bulst. 195.* 1 *Lord Raym. 1152.* 1 *Prest. Est. 468, 479, 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 *Woodd. 397, 398.* 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, 28.*—CHITTY.

for pregnant women, are settled in the parishes to which the mothers belong.<sup>(l)</sup> The incapacity of a bastard consists principally in this, that he cannot be heir to any one, neither can he have heirs, but of his own body; for, being *nullius filius*, he is therefore of kin to nobody, and has no ancestor from whom any inheritable blood can be derived. A bastard was also, in strictness, incapable of holy orders; and, though that were dispensed with, yet he was utterly disqualified from holding any dignity in the church:<sup>(m)</sup> 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.<sup>(n)</sup> A bastard may, lastly, be made legitimate, and capable of inheriting, by the transcendent power of an act of parliament, and not otherwise:<sup>(o)</sup> as was done in the case of John of Gaunt's bastard children, by a statute of Richard the Second.

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## CHAPTER XVII.

### OF GUARDIAN AND WARD.

THE only general private relation, now remaining to be discussed, is that of guardian and ward;<sup>1</sup> 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;<sup>(a)</sup> as it is always in our law with regard to minors, though as to lunatics and idiots it is commonly kept distinct.

\*461] <sup>Of the several species of guardians, the first are guardians by nature:</sup> 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.<sup>(b)</sup> And, with regard to daughters, it seems

(l) Stat. 13 Geo. III. c. 82.  
(m) Fortesc. c. 40. 5 Rep. 58.  
(n) Cod. 6, 57, 5.

(o) 4 Inst. 36.  
(a) Ft. 26, 4, 1.  
(b) Co. Litt. 88.

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<sup>1</sup> 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 Br. c. Abr. may be consulted, and also in Tomlin's Law Dictionary.—CHRISTY.

<sup>2</sup> 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.—CHRISTIAN.

This guardianship confers no right to intermeddle with the property of the infant, but is a mere personal right in the father or other ancestor to the custody of the person of his heir apparent or presumptive until attaining twenty-one years of age. See 5 Mod 224. Co. Litt. 88, n. 63, 71.—HARGRAVE.

Mr. Francis Hargrave, the learned annotator on Co. Litt., holds that the term natural guardian or guardian by nature, when not applied to an heir-apparent, signifies only that nature points out the parent as the proper guardian where positive law is silent.—

by construction of statute 4 & 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)<sup>3</sup> 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 persons to take care of the infant's personal estate, and to provide for his maintenance and education.(f)<sup>4</sup> Next are guardians *in socage*;<sup>5</sup> (an appellation which will be fully explained in the second book of these commentaries,) who are also called guardians *by the common law*. These take place only when the minor is entitled to some estate in lands, and then by the common law the guardianship devolves upon his next of kin, to whom the inheritance cannot possibly descend; as, where the estate descended from his father, in this case his uncle by the mother's side cannot possibly inherit this estate, and therefore shall be the guardian.(g) For the law judges it improper to trust the person of an infant in his hands, who may by possibility become heir to him; that there may be no temptation, nor even suspicion of temptation, for him to abuse his trust.(h) The Roman laws proceed on a quite contrary principle, committing the care of the minor to him who is the next to succeed to the inheritance, presuming that the next heir would take the best care of an estate, to which he has a prospect of succeeding: and this they boast to be "*summa providentia*."(i) But in the mean time they seem to have forgotten, how much it is the \*guardian's interest to re- [\*462

(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 hereditate clamare.* Glanv. l. 7, c. 11.

(i) *Ff.* 26, 4, 1.

<sup>3</sup> See Bac. Abr. Guardian, A. 1. It has been considered that the power of a father to appoint a guardian under the act 4 & 5 Ph. and 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. Abr. Guardian, A. 1 Jac. and 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. Swinb. p. 3, c. 12. 2 Fonbl. on Eq. 5 ed. 246, 247. 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.—CHITTY.

<sup>4</sup> It might be questionable whether the ordinary would be permitted to interfere further 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 vs. 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* Kneec, 1 N. R. 148. And habeas corpus lies at her instance. See *The King vs. 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.—CHITTY.

This power of the ecclesiastical court to appoint guardians is questionable. Lord Hardwicke expressly denied it; and lord Mansfield seems to have considered it as limited to the appointment of a guardian *ad litem*, where an infant was a party to a suit in the court. 3 Atkins, 631. 3 Burr. 1436.—COLERIDGE.

The guardianship by nurture, like that by nature, has no reference to the infant's property, but relates merely to his person.—KERR. *Kline vs. Beebe*, 6 Conn. 494. *Perkins vs. Dyer*, 6 Geo. 401.—SHARSWOOD.

<sup>5</sup> 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 gains 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.*—CHITTY.

is supposed to have so great a regard.<sup>(k)</sup> And this affords Fortescue,<sup>(l)</sup> and Sir Edward Coke,<sup>(m)</sup> an ample opportunity for triumph; they affirming, that to commit the custody of an infant to him that is next in succession is "*quasi agnum committere lupo, ad devorandum.*"<sup>(n)</sup> These guardians in socage, like those for nurture, continue only till the minor is fourteen years of age; for then, in both cases, he is presumed to have discretion, so far as to choose his own guardian. This he may do, unless one be appointed by the father, by virtue of the statute 12 Car. II. c. 24, which, considering the imbecility of judgment in children of the age of fourteen, and the abolition of guardianship *in chivalry*, (which lasted till the age of twenty-one, and of which we shall speak hereafter,) enacts that any father, under age or of full age, may by deed or will dispose of the custody of his child, either born or unborn, to any person, except a popish recusant, either in possession or reversion, till such child attains the age of one-and-twenty years.<sup>7</sup> These are called guardians *by statute*, or *testamentary* guardians. There are also special guardians *by custom* of London, and other places;<sup>(o)</sup> but they are particular exceptions, and do not fall under the general law.<sup>8</sup>

<sup>(k)</sup> The Roman satirist was fully aware of this danger when he puts this private prayer into the mouth of a selfish guardian:—

—*pupillum o ulnam, quem proximus heres  
Impello, expungam.* Pers. 1, 12.

<sup>(l)</sup> C. 44.

<sup>(m)</sup> 1 Inst. 88.

<sup>(n)</sup> See stat. *Hibern.* 14 Hen. III. This policy of our English law is warranted by the wise institutions of Solon,

who provided that no one should be another's guardian who was to enjoy the estate after his death. Potter's Antiq. b. 1, c. 28. 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, l. 7.*

<sup>(o)</sup> Co. Litt. 88.

<sup>6</sup> Lord chancellor Macclesfield has vehemently condemned the rule of our law, that the next of kin, to whom the land cannot descend, is to be the guardian in socage; and has 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.—CHRISTIAN.

<sup>7</sup> 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.

A father cannot appoint guardians under this statute to a natural child; but where he has named guardians by his will to an illegitimate child, the court of chancery will appoint the same persons guardians, without any reference to a master for his approbation. 2 Bro. 583.—CHRISTIAN.

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 is necessary to create the appointment. Swinb. p. 3, c. 12. See 2 Fonbl. on Eq. 5 ed. 246, 247, 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.—CHITTY.

<sup>8</sup> The king is also a 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

The power and reciprocal duty of a guardian and ward are the same, *pro*

without them. Bac. Abr. 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. Wms. 698. 2 P. Wms. 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. Abr. 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.—CHURCH.

On the subject of guardians of different kinds, I refer the student to a series of notes by Mr. Hargrave on the passage of Co. Litt. so often referred to in the margin, as well as to a note by Mr. Ames, on Fortescue, c. 44, and Fonblanque's Treat. of Equity, b. 11, p. 2, ch. 2, s. 2. The guardianship to which it is practically the most important to attend is that by testament, of which a sufficiently accurate outline is drawn in the text. I will mention only one or two circumstances that seem to have been omitted. In the first place, the statute empowers fathers only to make the appointment: this was probably an unintentional omission; but the consequence is, that, where a mother is the surviving parent, the children, upon her death, will be left to find guardians according to the provisions of the common law. In this case, where none other can be found, the jurisdiction of the chancellor arises on the part of the crown to protect the infant subject, and he will delegate the care to some proper person. As to the origin of this jurisdiction, see vol. 3, p. 427.

*tempore*, as that of a father and child; and therefore I shall not repeat them, but shall only add, that the guardian, when the ward comes of age, is bound to give

The effect of the appointment by testament is rather more extensive than the text implies, because the statute annexes to the office the custody and management of the infant's real and personal estate, and empowers the guardian to bring all such actions relating thereto as a guardian in socage might. On the other hand, this appointment, as stated in the text, does not so far supersede the general duty and power of the chancellor, as delegate of the crown, to protect infants, but that he may interfere in cases of gross misconduct, or legal incapacity, such as that of lunacy or bankruptcy, to control or even to remove him.—COLERIDGE.

The jurisdiction of the court of chancery, whatever may have been its origin, is now firmly established and beyond the reach of controversy,—it being a settled maxim that the sovereign is the universal guardian of all the infants in the kingdom. This court, therefore, will appoint a suitable guardian for an infant where there is no other or no other who will or can act; for if there are testamentary guardians the court has no jurisdiction to do so. It will also in general abstain from interference unless the infant has property,—not from any want of jurisdiction, but from the want of means to exercise its authority with effect. When, however, guardians are appointed, and their nomination is entirely a matter of discretion, they are treated as officers of the court and held responsible accordingly.

The court of chancery will not only remove guardians appointed by its own authority, but it will also remove guardians at the common law, and even testamentary or statute guardians, whenever sufficient cause can be shown for so doing. For guardianship is always looked upon by the courts of equity as a delegated trust for the benefit of the infant; and 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. The court will sometimes also require security to be given by the guardian, and, on the other hand, will assist him in the performance of his duties, as well in obtaining the custody of the person of the ward as otherwise.

The jurisdiction of the court of chancery extends to the care of the person of the infant so far as is necessary for his protection and education, and to the care of his property, for its management and preservation and proper application for his maintenance. It is upon the former ground that the court interferes with the ordinary rights of parents as guardians by nature or by nurture; for whenever a father is guilty of gross ill treatment of or cruelty to his children, or is in constant habits of drunkenness and blasphemy or low and gross debauchery, or professes atheistical or irreligious principles, or his domestic associations are such as tend to the corruption and contamination of his children, the court will interfere and deprive him of the custody of the infants, appointing at the same time a suitable person to act as guardian and superintend their education. And this interference may be obtained on the petition of the infant himself, or of any of his friends or relatives: nay, a mere stranger may at any time set the machinery of the court in motion. In most instances, however, its jurisdiction arises from a suit being actually pending relative to the person or property of the infant; and in such cases, although not under the care of any guardian appointed by the court, the infant is treated as a ward.

And a ward in chancery is in all cases under the special protection of the court; for no act can be done affecting the minor's person, property, or estate unless under its express or implicit direction, every act done without such direction being considered a contempt, exposing the offender to be attached and imprisoned. Thus, it is a contempt to conceal or withdraw the person of the infant from the proper custody, or to disobey any order of the court relative to its maintenance or education, or to marry the infant without the approbation of the court. For the court, in approving a person to be guardian, usually gives him express direction how to exercise the powers which it has conferred; prescribes the residence and settles a scheme for the education of the infant, and regulates, if necessary, his choice of a profession or trade; approves or prohibits the minor's marriage; and performs all the other duties of guardians by nature or for nurture. With respect to the property of the ward, the court not only superintends its management during the owner's minority, but directs a proper settlement on the marriage of its ward; and this protection is not always removed upon the minor's attaining twenty-one, but is, for some purposes, continued afterwards, especially with regard to the marriage of female wards. In these and other respects, therefore, guardians appointed by the court of chancery have extensive delegated powers,—this species of guardianship being one far more capable of adaptation to the various requirements of modern society, the intentions of testators, the wants and wishes of the infants themselves, and the different kinds of property which may call for administrative care, than all or any of the other guardianships known to the law.—KERR.

\*him an account of all that he has transacted on his behalf, and must answer for all losses by his wilful default or negligence.\* In order therefore to prevent disagreeable contests with young gentlemen, it has become a practice of 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

<sup>9</sup>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. Litt. 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 his diligence and fidelity. Co. Litt. 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, 236;) 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.—CHITTY.

Guardians are regarded with great liberality by the courts. Common skill, common prudence, and common caution are all that are required of them in the administration of their trust. Ordinary men are to be compared with, and judged by, the standard of ordinary men. *Konigmacher vs. Kimmel*, 1 Penna. Rep. 207. So guardians, like other trustees, are not answerable for the acts of agents necessarily employed by them, where proper care has been taken in their selection, unless there is an omission of ordinary diligence on their part in compelling their agents to perform their duties. *Hennessey vs. The Western Bank*, 6 W. & S. 300. A guardian using the money of his ward, or neglecting to invest it, is chargeable with interest; and the method of ascertaining the amount is to strike a balance of the money in the guardian's hands every six months, and charge simple interest thereon, allowing a reasonable sum to remain in his hands to meet expenses. *Say vs. Barnes*, 4 S. & R. 112. *Karr vs. Karr*, 6 Dana, 3. *Bryant vs. Craig*, 12 Ala. 354. *White vs. Parker*, 8 Barb. 48. A guardian should keep his ward's property separate from his own; otherwise he will make it his own so far as to be accountable for it if lost. If he takes notes or other securities for money belonging to his ward in his own name, he converts the property to his own use and is *prima facie* accountable for it. He cannot trade with himself on account of his ward, nor buy or use his ward's property for his own benefit. If he attempts to do so, and the business is unsuccessful, all the loss shall be his own, and he shall be liable to his ward for the capital with interest; if, on the other hand, it turn out to be profitable, all the profit shall belong to the ward. The guardian cannot convert the personal estate of his ward into real. If he buys land with the ward's money, the ward, at full age, may, at his election, take the land with its rents and profits, or the money with interest. *White vs. Parker*, 8 Barb. 48.—SHARSWOOD.



his trust, the court will check and punish him; nay, sometimes will proceed to the removal of him, and appoint another in his stead.<sup>(p)</sup><sup>10</sup>

<sup>(p)</sup> 1 Sid. 424. 1 P. Wll. 763.

<sup>10</sup> 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, 705. 2 Fonbl. 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 Eq. Ca. Abr. 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 discontinued. 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. 177; and cases cited in 2 Fonbl. 5 ed. 232;) but quære if such a child must not be a ward of the court. 4 Bro. C. C. 101, 102.

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 mesne profits, as he is from an action of account at common law. Prec. Ch. 518; and see 1 Scho. & Lef. 352. 2 Fonbl. 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 will, appointing his brothers and also a clergyman of the church of England guardians to his three infant daughters, and died, having sent his eldest daughter to his next brother, and the clergyman got possession of his two other daughters, and placed them at boarding-school, where they were educated according to the church of England, and then filed a bill to have the eldest daughter placed out with the other daughters; and the three presbyterian brothers brought their bill to have the two daughters delivered to them, offering parol evidence that the testator directed that he would have his children bred up presbyterians, but the court declared that no proof out of the will ought to be admitted in the case of a devise of a testamentary guardianship, any more than in a case of a devise of land, and that the decision of the majority of the guardians ought not to govern; and directed that the master should inquire whether the school at which the two youngest daughters were placed was proper; and as to the eldest, who was of the age of sixteen, she was brought into court, and asked where she desired to be, and, on her declaring her wish to be with one of her uncles, it was ordered accordingly. 3 P. Wms. 51. 2 Ves. 56. 1 P. Wms. 703.

Marrying a ward of the court of chancery without the consent of the court is a contempt, 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 appear that they were apprized of the party's being a ward. 2 Atk. 157. 16 Ves. 259.

A marriage in fact is sufficient to ground the contempt, though the validity of the marriage be questionable. 6 Ves. 572.

2 Let us next consider the ward or person within age, for whose assistance and support these guardians are constituted by law; or who it is, that is said to be within age. The ages of male and female are different for different purposes. A male at *twelve* years old may take the oath of allegiance; at *fourteen* is at years of discretion, and therefore may consent or disagree to marriage, may choose his guardian, and, if his discretion be actually proved, may make his testament of his personal estate; at *seventeen* may be an executor; and at *twenty-one* is at his own disposal, and may aliene his lands, goods, and chattels. A female also at *seven* years of age may be betrothed or given in marriage; at *nine* is entitled to dower; at *twelve* is at years of maturity, and therefore may consent or disagree to marriage, and, if proved to have sufficient discretion, may bequeath her personal estate; at *fourteen* is at years of legal discretion, and may choose a guardian; at *seventeen* may be executrix; and at *twenty-one* may dispose of herself and her lands. So that full age in male or female is twenty-one years, which age is completed on the day preceding the anniversary of a person's birth,<sup>(g)</sup> who till that time is an infant, and so styled in law. Among the ancient Greeks and Romans, women were never \*of age, but subject to perpetual guardianship,<sup>(r)</sup> unless when married, "*nisi convenissent in manum viri:*"<sup>(s)</sup> and, when that perpetual tutelage wore away in process of time, we find that, in females as well as males, full age was not till twenty-five years.<sup>(t)</sup> Thus by the constitution of different kingdoms, this period, which is merely arbitrary, and *juris positivi*, is fixed at different times. Scotland agrees with England in this point; both probably copying from the old Saxon constitutions on the continent, which extended the age of minority "*ad annum vigesimum primum, et eo usque juvenes sub tutelam reponunt;*"<sup>(u)(v)</sup> 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:<sup>(w)</sup> but he may sue either by his guardian, or *prochein amy*, his next friend who is not his guardian. This *prochein amy* may be any person who will undertake the infant's cause, and it frequently happens, that an infant, by his *prochein amy*, institutes a suit in equity against a fraudulent guardian. In criminal cases an infant of the age of *fourteen* years

(g) Salk. 44, 625. Lord Raym. 480, 1096. Toder vs. Sansam, Dom. Proc. 27 Feb. 1775.

(r) Rott. Antiq. b. 4, c. 11. Cic. pro Muren. 12.

(s) "Unless when they shall come into the power of a husband."

(t) 1 Inst. 1, 23, 1.

(\*) "To the one-and-twentieth year; and, until then, the young remain under guardianship."

(v) Stiernhoek de Jure Sueomem, l. 2, c. 2. This is also the period when the king, as well as the subject, arrives at full age in modern Sweden. Mod. Un. Hist. xxxiii. 220.

(w) Co. Litt. 135.

To clear such a contempt, a proper settlement must be made on the ward. 1 Ves Jun. 154. But the making such settlement does not necessarily cure the contempt 6 Ves. 74. It is not cleared by the ward's attaining the age of twenty-one. 3 Ves. 89 4 id. 386.—CHRISTY.

<sup>11</sup> 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.—CHRISTIAN.

A person is of full age the day before the twenty-first anniversary of his birthday The State vs. Clarke, 3 Harring. 557. Hamlin vs. Stevenson, 4 Dana, 597.—SHARSWOOD.

<sup>12</sup> This is incorrectly expressed. 1st. The infant is sued in his own name alone, as any other person; but he appears to defend his cause by guardian, being supposed, without discretion, to appoint an attorney for that purpose. 2d. He does not necessarily appear by his regular guardian, as the text implies, but by any person whom the court shall appoint guardian *ad litem* to defend that particular suit. It is within the province of every court to appoint a guardian *ad litem*, where a party in a suit is an infant. See vol. iii. p. 427.—COLERIDGE.

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 puberty or \*465] \*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 etatem*. 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.

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 an advowson, may present to the benefice when it becomes void.(b) For the law in this case dispenses with one rule, in \*466] order to maintain others of far \*greater consequence: it permits an infant to present a clerk, who, if unfit, may be rejected by the bishop, rather than either suffer the church to be unserved till he comes of age, or permit the infant to be debarred of his right by lapse to the bishop. An infant may also purchase lands, but his purchase is incomplete: for, when he comes to age, he may either agree or disagree to it, as he thinks prudent or proper, without alleging any reason; and so may his heirs after him, if he dies without having completed his agreement.(c) It is, further, 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:<sup>13</sup> yet he may bind himself to pay for his necessary meat, drink, apparel, physic, and such other necessaries;<sup>14</sup> and like-

(x) 1 Hal. P. C. 25.

(y) Ibid. 26.

(z) Foeter, 72.

(a) Stat. 7 Anne, 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.

<sup>13</sup> 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, (2 Camp. 562, 563. 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. Abr. 286.—CHITTY.

<sup>14</sup> 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

wise for his good teaching and instruction whereby he may profit himself afterwards.(f) And thus much, at present, for the privileges and disabilities of infants.<sup>15</sup>

(f) Co. Litt. 172.

*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. Regiments 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 an infant but such as concern his person. 2 Roll. Rep. 271. But in equity, an agreement by an infant to pay compound interest on mortgage to prevent foreclosure is binding. 1 Eq. C. Abr. 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 him to trade with as were consumed as necessaries in his own family. 1 Car. Rep. 94.—CHITTY.

<sup>15</sup> The general rule is that the contracts of an infant are voidable by him. Oliver vs. Houdlet, 13 Mass. 237. Whitney vs. Dutch, 14 ibid. 457. Yet there are some contracts so clearly prejudicial that they are held to be not merely voidable, but absolutely void. Such is the contract of suretyship. Maples vs. Wightman, 4 Conn. 376. So a negotiable note, as such, is merely void, though the contract which forms the consideration of the note may be otherwise. The infant cannot be precluded (as is the maker of a negotiable note as against an endorser or *bona fide* holder) from going into an examination of the consideration. Earle vs. Reed, 10 Metc. 387. McMinn vs. Richmond, 6 Yerg. 9. Although it be true that all the contracts of an infant are voidable, it would be manifestly unjust to allow him to retain the consideration received by him and reclaim that which he has parted with. Therefore, if an infant sell goods and receive the money for them, he shall not be permitted to recover back the goods without returning the money Badger vs. Phinney, 15 Mass. 359. Kitchen vs. Lee, 11 Paige, 107. Bailey vs. Barnberger, 11 B. Monroe, 113.

Infants are liable for their torts in the same manner as persons of full age. Bullock vs. Babcock, 3 Wend. 391. Wherever, however, the inducement to the action is a contract, and the gravamen is fraud in the contract, the infant cannot be ousted of his privilege by an election of a form of action *ex delicto*. Thus, infancy is a good bar to an action founded upon a false and fraudulent warranty upon the sale of a horse. West vs. Moore, 14 Verm. 447.

An infant is liable in trover, although the goods were delivered to him under a contract, and although they were not actually converted to his own use. Vasse vs. Smith, 6 Cranch, 226. Lewis vs. Littlefield, 3 Shep. 233. When property is bailed to an infant, his infancy is a protection to him for any non-feasance so long as he keeps within the terms of the bailment; but when he departs from the object of it, it amounts to a conversion of the property, and he is liable to the same extent as if he had taken it in the first instance without permission. Towne vs. Wiley, 23 Verm. 355. An infant who has represented himself to be of full age, and thus procured a credit, is not estopped by such representation from setting up his infancy in avoidance of the contract. Burley vs. Russell, 10 N. Hamp. 184. He is answerable, however, to the party injured in action on the case in damages. Fitts vs. Hall, 9 N. Hamp. 441. Wallace vs. Morss, 5 Hill, 391.

An infant may, however, be liable for the debts contracted by his wife before marriage; for, as he is competent by law to enter into the marriage relation, he must also be competent to bear all the responsibilities of such relation. It is evident that, as the wife's personal property becomes his, though an infant, the creditor of the adult wife would be deprived of all remedy if the husband could set up his infancy as a bar to the action. Butler vs. Brick, 7 Metc. 164.

An infant who has a guardian or parent who supplies his wants cannot bind himself for necessaries. Guthrie vs. Murphy, 4 Watts, 80. Wailing vs. Toll, 9 Johns 141. Angel vs. McLellan, 16 Mass. 28.

If a minor is supplied—no matter from what quarter—with necessaries suitable to his estate and degree, a tradesman cannot recover for any other supply made to the minor

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 forever 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 show 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, \*468] so long as they could agree to do so: but they \*could neither frame, nor receive, any laws or rules of their conduct; none, at least, which would have any binding force, for want of a coercive power to create a sufficient obligation. Neither could they be capable of retaining any privileges or immunities: for, if such privileges be attacked, which of all this unconnected assembly has the right, or ability, to defend them? And, when they are dispersed by death or otherwise, how shall they transfer these advantages to another set of students, equally unconnected as themselves? So also, with regard to holding estates or other property, if land be granted for the purposes of religion or learning to twenty individuals not incorporated, there is no legal way of continuing the property to any other persons for the same purposes, but by endless conveyances from one to the other, as often as the hands are changed. But when they are consolidated and united into a corporation, they and their successors are then considered as one person in law: as one person, they have one will, which is collected from the sense of the majority of the individuals: this

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just after. The rule of law is that no man may deal with a minor: the exception to it is that a stranger may supply him with necessaries proper for him, in default of supply by any one else; but his interference with what is properly the guardian's business must rest on an actual necessity,—of which he must judge in a measure at his peril. It is the tradesman's duty to know not only that the supplies are unexceptionable in quantity and sort, but also that they are actually needed. When he assumes the business of the guardian for purposes of present relief, he is bound to execute it as a prudent guardian would, and, consequently, to make himself acquainted with the ward's necessities and circumstances. The credit which the negligence of the guardian gives to the ward ceases as his necessities cease; and, as nothing further is requisite when these are relieved, the exception to the rule is at an end. Gibson, C. J. *Johnson vs. Lines*, 6 W. & S. 82. *Kline vs. L'Amoureux*, 2 Paige, 419. *Perrin vs. Wilson*, 10 Missouri, 451.

The promise of an infant cannot be enforced against him upon a mere acknowledgment, nor upon a partial payment after he comes of age. A direct promise to pay is necessary, or an express agreement to ratify his contract. Yet no new consideration is necessary. The moral obligation resting upon him to pay a just debt—or, perhaps more accurately, to compensate a benefit actually received and enjoyed—is sufficient consideration to sustain an express promise to pay. *Whitney vs. Dutch*, 14 Mass. 457. *Thompson vs. Lay*, 4 Pick. 48. *Wilcox vs. Roath*, 12 Conn. 550. *Curtis vs. Patton*, 11 S. & R. 305. *Ordinary vs. Wherry*, 1 Bailey, 28. *Hinely vs. Margarite*, 3 Barr. 423.—SHARES

one will may establish rules and orders for the regulation of the whole, which are a sort of municipal laws of this little republic; or rules and statutes may be prescribed to it at its creation, which are then in the place of natural laws: the privileges and immunities, the estates and possessions, of the corporation, when once vested in them, will be forever vested, without any new conveyance to new successions; for all the individual members that have existed from the foundation to the present time, or that shall ever hereafter exist, are but one person in law, a person that never dies: in like manner as the river Thames is still the same river, though the parts which compose it are changing every instant.

The honour of originally inventing these political constitutions entirely belongs to the Romans. They were introduced, as Plutarch says, by Numa; who, finding, upon his accession, the city torn to pieces by the two rival factions of Sabines and Romans, thought it a prudent and politic measure to subdivide these two into many smaller ones, by instituting separate societies of every manual trade and profession. They were afterwards much considered [\*469 by the civil law;(a) in which they were called *universitates*, as forming one whole out of many individuals; or *collegia*, from being gathered together: they were adopted also by the canon law, for the maintenance of ecclesiastical discipline; and from them our spiritual corporations are derived. But our laws have considerably refined and improved upon the invention, according to the usual genius of the English nation: particularly with regard to sole corporations, consisting of one person only, of which the Roman lawyers had no notion; their maxim being that "*tres faciunt collegium.*"(b) Though they held, that if a corporation, originally consisting of three persons, be reduced to one, "*si universitas ad unum redit,*" it may still subsist as a corporation, "*et stet nomen universitatis.*"(c)

Before we proceed to treat of the several incidents of corporations, as regarded by the laws of England, let us first take a view of the several sorts of them; and then we shall be better enabled to apprehend their respective qualities.<sup>1</sup>

The first division of corporations is into *aggregate* and *sole*. Corporations aggregate consist of many persons united together into one society, and are

(a) *Ff. l. 3, t. 4, per tot.*

(b) *Ff. 50, 16, 8.* "Three form a corporation."

(c) *Ff. 3, 4, 7.*

<sup>1</sup> Corporations are public or private. Public corporations are such as have been created for the purposes of municipal government, including all the inhabitants within a certain district or territory: such are cities, towns, boroughs, &c. Private corporations include, properly, all others,—religious, literary, charitable, manufacturing, insuring, or money-lending associations, as well as railway, canal, bridge, and turnpike companies,—with which in number and variety no country so abounds as the United States. Charters of incorporation granted by the legislatures of the States to all private corporations are considered as executed contracts within the protection of art. 1, s. 10 of the constitution of the United States, which declares that "no State shall pass any law impairing the obligation of contracts." The Trustees of Dartmouth College *vs.* Woodward, 4 Wheat. 518. In the popular meaning of the term, nearly every corporation is public, inasmuch as they are all created for the public benefit. Yet if the whole interest does not belong to the government, or if the corporation is not created for the administration of political or municipal power, it is a private corporation. Thus, all bank, bridge, turnpike, railroad, and canal companies are private corporations. In these and other similar cases the uses may, in a certain sense, be called public; but the corporations are private, as much so as if the franchises were vested in a single person. The state, by virtue of its right of eminent domain, may take private property for public purposes upon making compensation. It may delegate this power to a private corporation, by reason of the benefit to accrue to the public from the use of the improvements to be constructed by the corporation. But such delegation of power to be used for private emolument as well as public benefit does not clothe the corporation with the inviolability or immunity of public officers performing public functions. Grier, J. *Randle vs. The Delaware & Raritan Canal*, 1 Wallace, C. C. Rep. 290.

There are some persons and associations who have a corporate capacity only for particular specified ends, but who can in that capacity sue and be sued as an artificial person. These bodies are termed *quasi corporations*. Yet, as it is not essential to a corporation that it should be vested with all the usual powers of corporations, but only that it should be clothed with perpetual succession and be recognised by the law as an artificial person, such bodies really are corporations.—SHARSWOOD.

kept up by a perpetual succession of members, so as to continue forever; of which kind are the mayor and commonalty of a city, the head and fellows of a college, the dean and chapter of a cathedral church. Corporations sole consist of one person only and his successors, in some particular station, who are incorporated by law, in order to give them some legal capacities and advantages, particularly that of perpetuity, which in their natural persons they could not have had. In this sense, the king is a sole corporation; (d) so is a bishop; so are some deans, and prebendaries, distinct from their several chapters; and so is every parson and vicar. And the necessity, or at least use, of this institution \*470] will be very apparent, if we consider the case of \*a parson of a church. At the original endowment of parish churches, the freehold of the church, the churchyard, the parsonage house, the glebe, and the tithes of the parish, were vested in the then parson by the bounty of the donor, as a temporal recompense to him for his spiritual care of the inhabitants, and with intent that the same emoluments should ever afterwards continue as a recompense for the same care. But how was this to be effected? The freehold was vested in the parson; and, if we suppose it vested in his natural capacity, on his death it might descend to his heir, and would be liable to his debts and encumbrances: or, at best, the heir might be compellable, at some trouble and expense, to convey these rights to the succeeding incumbent. The law therefore has wisely ordained, that the parson, *quatenus* parson, shall never die, any more than the king; by making him and his successors a corporation. By which means all the original rights of the parsonage are preserved entire to the successor: for the present incumbent, and his predecessor who lived seven centuries ago, are in law one and the same person; and what was given to the one was given to the other also.

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 \*471] dignity. Other lay corporations are erected for the good government of \*a town or particular district, as a mayor and commonalty, bailiff and burgesses, or the like: some for the advancement and regulation of manufactures and commerce; as the trading companies of London, and other towns: and some for the better carrying on of divers special purposes; as church-wardens, 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 pur-

(\*) Co. Litt. 33.

(d) Such as Manchester, Eton, Winchester, &c.

poses: 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,<sup>(f)</sup> and although they in some things partake of the nature, privileges, and restrictions of ecclesiastical bodies.<sup>2</sup>

\*Having thus marshalled the several species of corporations, let us next proceed to consider, 1. How corporations in general may be created. [\*472  
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*.<sup>(g)</sup> 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.<sup>(h)</sup> 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, church-wardens, and some others; who by common law have ever been held, as far as our books can show 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 [\*473 rights to his successors at the same time. Another method of implication, whereby the king's consent is presumed, is as to all corporations by *prescription*, such as the city of London, and many others,<sup>(i)</sup> 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 show 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:<sup>(j)</sup> 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.,<sup>(k)</sup> which charter was afterwards confirmed in parliament;<sup>(l)</sup> 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,<sup>(m)</sup> and the society of the British Fishery.<sup>(n)</sup> So that the immediate creative act was usually performed by the king alone, in virtue of his royal prerogative.<sup>(o)</sup><sup>3</sup>

<sup>(f)</sup> 1 Lord Raym. 6.

<sup>(g)</sup> *Ef. 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. Ef. 3, 4, 1.*

<sup>(h)</sup> Cities and towns were first erected into corporate communities on the continent, and endowed with many valuable privileges, about the eleventh century, (1 Rob. C. V. 30.) to which the consent of the feudal sovereign was absolutely

necessary, as many of his prerogatives and revenues were thereby considerably diminished.

<sup>(i)</sup> 2 Inst. 330.

<sup>(j)</sup> 10 Rep. 29. 1 Roll. Abr. 512.

<sup>(k)</sup> 8 Rep. 114.

<sup>(l)</sup> 14 & 15 Hen. VIII. c. 5.

<sup>(m)</sup> Stat. 5 & 6 W. and M. c. 20.

<sup>(n)</sup> Stat. 23 Geo. II. c. 4.

<sup>(o)</sup> See page 272.

<sup>2</sup> They are lay corporations, because they are not subject to the jurisdiction of the ecclesiastical courts, or to the visitation of the ordinary or diocesan in their spiritual characters.—CHRISTIAN.

<sup>3</sup> The charter of a private corporation is inoperative until it is accepted. So is the extension of a charter beyond its original term. But it is not essential to show a formal



All the other methods, therefore, whereby corporations exist, by common law, by prescription, and by act of parliament, are of the most part reducible to this of the king's letters-patent, or charter of incorporation. The king's creation may be performed by the words "*creamus, erigimus, fundamus, incorporamus,*" or the like. Nay, it is held, that if the king grants to a set of men to \*474] have *gildam mercatoriam*, a \*mercantile meeting or assembly,(p) this is alone sufficient to incorporate and establish them forever.(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 further 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 instances before mentioned, it was done, as Sir Edward Coke observes,(r) to avoid the charges of incorporation and licenses 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; and by that \*475] 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)<sup>4</sup>

(p) *Gild* signified among the Saxons a fraternity, derived from the verb *gildan*, 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. Viner. *Prerog.* 88, pl. 16.

(t) Year-book, 2 Hen. VII. 13.

(u) 10 Rep. 33.

(v) 10 Rep. 122.

(w) *Gild. Hist.* C. P. 182.

(x) 10 Rep. 28.

acceptance. It will be presumed from lapse of time and the continued exercise of corporate powers. *Bank vs. Richardson*, 1 Greenl. 81. *Russell vs. McLellan*, 14 Pick. 63. *Bank of the United States vs. Dundridge*, 12 Wheat. 71.—SHARSWOOD.

<sup>4</sup> As to necessity for a name, see Bac. Abr. Com. Dig. Franchises, F. 9. Bac. Abr. 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. A 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 Roll. 572, l. 55. So a change of name or new charter does not merge the ancient privileges. 4 Co. 87, b. Raym. 439. And it retains the privileges and possessions it had before. 1 Roll. 513, l. 2. 1 Saund. 339. But they ought to prescribe by their ancient name till such a day, and show how it was then changed, and not by their last name. Hard. 504. Lut. 1498. 1 Saund. 340, n. 2. A misnomer of the corporation name in a grant under the corporate seal is immaterial. 2 Marsh. 174. 6 Taunt. 467, S. C. And where in ejectment the demise was laid to be by the mayor, &c. of the

II. After a corporation is so formed and named, it acquires many powers, rights, capacities, and incapacities, which we are next to consider. Some of these are necessarily and inseparably incident to every corporation; which incidents, as soon as a corporation is duly erected, are tacitly annexed, of course. (y)<sup>5</sup> As, 1. To have perpetual succession. This is the very end of its incorporation: for there cannot be a succession forever without an incorporation; (z) and therefore all aggregate corporations have a power necessarily implied of electing members in the room of such as go off. (a) 2. To sue or be sued, implead or be impleaded, grant or receive, by its corporate name, and do all other acts as natural persons may. 3. To purchase lands, and hold them, for the benefit of themselves and their successors; which two are consequential to the former.<sup>6</sup> 4. To have a common seal. For a corporation, being an invisible body, cannot manifest its intentions by any personal act or oral discourse: it therefore acts and speaks only by its common seal. For, though the particular members may express their private consent to any acts, 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,

(y) 10 Rep. 30. Hob. 211.  
(z) 10 Rep. 26.

(\*) 1 Roll. Abr. 514.

borough town of M., and on the trial it turned out, from the charter, that the name of the corporation was "the mayor," &c. omitting "of the borough town" of M., it was held that this was no variance, it appearing from the charter that M. was a borough town, (1 B. & A. 699;) and, in general, a variance of this nature in pleading must be taken advantage of by plea in abatement. 1 B. & P. 30. 3 Camp. 29. 1 Saund. 340, a. The words in the instrument of incorporation must be sufficient in law to make a corporation, (10 Co. Rep. 29, 123. 3 Co. 73;) but there need not be any precise words: the words fundare, erigere, &c. are not of necessity to be used in making corporations, (10 Co. 28,) but other words equivalent are sufficient; and anciently the inhabitants of a town were incorporated when the king granted to them to have gildam mercatoriam. 2 Danv. Abr. 214. 1 Roll. 513, l. 10.

If the king grants lands to the inhabitants of B., *their heirs and successors* rendering a rent for any thing touching these lands, this is a corporation, though not to other purposes; but if the king grants lands to the inhabitants of B., and they be not incorporated before, if no rent be reserved to the king, the grant is void. 2 Danv. 214.

If the king grants to the men of Islington to be discharged of toll, this is a good corporation to this intent, but not to purchase, &c. And by special words the king may make a limited corporation, or a corporation for a special purpose. Id.

Where the words of a charter are doubtful, they may be explained by contemporaneous usage. 3 T. R. 271, 288, n. 4 East, 338.

A corporation may be constituted of persons natural or political. 10 Co. 29, b. It may be composed out of another corporation, (1 Roll. 512,) if the other be a corporation by prescription. 1 Sid. 291.

So a corporation aggregate may be without a head. Bro. Corp. 43. 10 Co. 30, b.—CHITTY.

<sup>5</sup> A corporation has no power except what is given by its charter, either expressly or as incidental to its existence and purposes. It can act only in the manner prescribed by the act of incorporation which gives it existence. It is the mere creature of the law, and derives all its powers therefrom. *Head vs. The Providence Ins. Co.*, 2 Cranch, 127. A corporation can make such contracts only as are allowed by the act of incorporation. (*Hosler vs. Georgetown*, 6 Wheat. 597. The exercise of the corporate franchise, being restrictive of individual rights, cannot be extended beyond the letter and spirit of the act of incorporation. *Beaty vs. The Lessee of Knowles*, 4 Peters, 168. A contract made with a corporation for the loan of money, as well as the security taken on the loan, is void, if the power to loan money be not expressly given or necessarily incident to the powers given to the corporation by its charter. *Beach vs. Fulton Bank*, 3 Wend. 573. A corporation created to construct a road has the power to borrow money, as one of the implied means necessary and proper to carry into effect its specified powers. *Union Bank vs. Jacobs*, 6 Humph. 515. *Burr vs. Phoenix Glass Co.*, 14 Barb. 358. A corporation may avail itself of its want of authority to make the contract sought to be enforced against it, though it has received and enjoyed the consideration on which it was made. *Elysvill Co. vs. Okisko Co.*, 1 Maryland Ch. Dec., 392.—SHARSWOOD.

<sup>6</sup> All corporations must have a license from the king to enable them to purchase and hold lands in mortmain. Co. Litt. 2. 7 & 8 W. 3, c. 37.—CHRISTIAN.

and makes one joint assent of the whole.(b)' 5. To make by-laws or private statutes for the better \*government of the corporation; which are \*476] binding upon themselves, unless contrary to the laws of the land, and then they are void.<sup>8</sup> 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 assize 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 testify his sole assent, and to make statutes for the regulation of his own conduct.

There are also certain privileges and disabilities that attend an aggregate corporation, and are not applicable to such as are sole; the reason of them ceasing, and of course the law. It must always appear by attorney,<sup>9</sup> for it cannot ap-

(b) Dav. 44, 48.  
(c) Hob. 211.

(d) *Societas legem quam volent, dum ne quid ex publica lege corrumpant, sibi ferunt.*

(e) Stat. 19 Hen. VII. c. 7. 11 Rep. 54.

'The doctrine laid down in the text is now repudiated everywhere in the United States, if not in England. Corporations, through their officers and agents, may do valid acts and make valid contracts within the scope of the corporate powers, either oral or in writing, without seal; and, indeed, contracts may be implied as against corporations just as they may be against individuals. "The technical doctrine," says Judge Story, "that a corporation could not contract, except under its seal, or, in other words, could not make a promise, if it ever had been fully settled, must have been productive of great mischiefs. Indeed, as soon as the doctrine was established that its regularly appointed agent could contract in its name without seal, it was impossible to support it; for otherwise the party who trusted such contract would be without remedy against the corporation. Accordingly, it would seem to be a sound rule of law, that wherever a corporation is acting within the scope of the legitimate purposes of its institution, all parol contracts made by its authorized agents are *express* promises of the corporation, and all benefits conferred at their request raise *implied* promises, for the enforcement of which an action may well lie." *Bank of Columbia vs. Patterson's Administrators*, 7 Cranch, 306. The reason assigned for the old notion was, that, a corporation being incorporeal, and consequently incapable of speaking, it was impossible that it should enter into a parol contract. But, upon reflection, this reason has been thought insufficient; for, if pursued to its full extent, it would prove that a corporation could not act at all. It has no hand to affix a seal, and must therefore employ an agent for the purpose. But this agent must receive his authority previous to his affixing the seal. It is necessary, therefore, that the corporation should have the power to act without seal, so far as respects the appointment of a person to affix the seal. Now, if it can appoint an agent without seal for one purpose, there is no reason why it may not for another. *Turnpike Co. vs. Rutter*, 4 S. & R. 16. *Hamilton vs. Lycoming Ins. Co.*, 5 Barr. 339. It is true that a corporation, being an *ens legis*, has no inherent power to act, or indeed any power at all beyond what is necessary to accomplish the end of its being; but it is also true that within the scope of its legitimate functions it may act as a natural person might. In defining its powers, it would be impracticable to enumerate them specifically or to do more than circumscribe the field of its action, leaving it to exercise all those that are incidental and necessary to the purposes of its creation. *Cumberland Valley R. R. Co. vs. Baab*, 9 Watts, 460.—SHARWOOD.

<sup>8</sup> 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 vs. Spencer*, *Ld. Mansfield*, 3 Burr, 1837.—CHRISTIAN.

<sup>9</sup> 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.* It may, with its head, give a personal command without attorney. *Com. Dig. Fran-*

pear n person, being, as Sir Edward Coke says,(f) invisible, and existing only in intendment and consideration of law.<sup>10</sup> It can neither maintain, nor 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)<sup>11</sup> Neither is it capable of suffering a \*traitor's or felon's punishment, for it is not liable to corporal penalties, nor to attainder, forfeiture, or corruption of blood. It cannot be executor or administrator, or perform any personal duties; for it cannot take an oath for the due execution of the office. It cannot be seized of lands to the use of another;(j) for such kind of confidence is foreign to the end of its institution.<sup>12</sup> 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 enforced by spiritual censures: a consideration which, carried to its full extent, would alone demonstrate the impropriety of these courts interfering in any temporal rights whatsoever.

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 movable property is liable to be lost or embezzled, and would

(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.

chises, F. (12.) Any natural person may be this attorney, though he be a member of the same corporation. Bro. Corp. 4.—CHITTY.

<sup>10</sup> Yet a corporation may acknowledge a deed before a judge in the charter-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.—CHITTY.

<sup>11</sup> Corporations are liable in the actions of trespass, trover, case, for torts commanded or authorized by them; and the acts of their agents are considered as their acts. *Hawkins vs. Steamboat Co.*, 2 Wend. 452. *McCready vs. Guardians*, 9 S. & R. 94. *Kneass vs. The Schuylkill Bank*, 4 Wash. C. C. 106. A corporation is liable for an injury caused by its servants wherever, under similar circumstances, an individual would be liable. *Church vs. Railroad*, 5 Barb. 79. *Watson vs. Bennett*, 12 Barb. 196. A public municipal corporation, like the city of New York, is responsible for injuries resulting from the negligence of persons employed by its officers in repairing the public sewers. *Lloyd vs. The Mayor*, 1 Selden, 369. *Ross vs. Madison*, 1 Carter, 281. An action for malicious prosecution, slander, false imprisonment, or assault and battery, may be maintained against a corporation. *Goodspeed vs. East Haddam Bank*, 22 Conn. 530. *Quiggle vs. Railroad Co.*, 21 Howard, (S. C.) 202. *Vance vs. Erie Railway Co.*, 3 Vroom, (N. J.) 334. *Brokaw vs. Railroad Co.*, *Ibid.* 328.—SHARSWOOD.

<sup>12</sup> A corporation cannot be seized of land in trust for purposes foreign to its institution. *Jackson vs. Hartwell*, 8 Johns. 422. *Trustees vs. Peaslee*, 15 N. Hamp. 317. A corporation may take and hold property in trust in the same manner and to the same extent that a private person may do. If the trust be repugnant to, or inconsistent with, the proper purpose for which the corporation was created, it may not be compelled to execute it, but the trust (if otherwise unexceptionable) will not be void, and a court of equity will appoint a new trustee to enforce and protect the objects of the trust. Neither is there any positive objection, in point of law, to a corporation taking property upon a trust not strictly within the scope of the direct purposes of its institution, but collateral to them. *Vidal vs. Philadelphia*, 2 Howard, S. C. 127.—SHARSWOOD.

raise a multitude of disputes between the successor and executor, which the law is careful to avoid.<sup>13</sup> In ecclesiastical and eleemosynary foundations, the king or the founder may give them rules, laws, statutes, and ordinances, which they are bound to observe: but corporations merely \*lay, constituted for civil purposes, are subject to no particular statutes;<sup>14</sup> 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 constitutions 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 charter-house, London, who have no president or superior, but are all of equal authority. In aggregate corporations, also, the act of the major part is esteemed the act of the whole.(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.<sup>15</sup>

(o) Lord Raym. 8.  
(p) Co. Litt. 263, 264.  
(q) 10 Rep. 30.

(r) Bro. Abr. tit. Corporation, 31, 34.  
(s) Ff. 3, 4, 3.

<sup>13</sup> 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.—CHRISTIAN.

<sup>14</sup> Their charters or immemorial usages, which are equivalent to the express provisions of a charter, are in fact their statutes.—CHITTY.

<sup>15</sup> 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 *guardianus et major pars sociorum*, or *magister*, or *præpositus et major pars*; and it has been determined by the court of King's Bench, (Cowp. 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.

In 1 Strange, 54, the court of King's Bench declared that in the case of the city of London the mayor and common council have power to do acts, and yet the act of the majority of the common council is good, though the mayor dissents.

*Major pars*, or more than one-half, must be present to make a corporate meeting: they are then divided into two parts, present and absent.—CHRISTIAN.

Where the directors of a corporation have power to bind it by their contracts, a majority of the directors may do it. Cram vs. Bangor House, 3 Fairf. 354. In corporations aggregate, the principle of election is a majority, and not a plurality, unless otherwise specified. The State vs. Wilmington, 3 Harring. 294. Members of a corporation cannot vote by proxy, unless they are empowered so to do by the act of incorporation. Philips vs. Wickham, 1 Paige, 590.

To render valid the vote of a private corporation, the meeting at which it was passed must have been called in the mode prescribed by the charter or the by-laws, or, if there be no mode so prescribed, by personal notice to the members. Stow vs. Wise, 7 Conn. 214. Wiggins vs. The Church, 8 Metc. 301. So when a charter, or other statute, positively requires that a certain number of persons shall be present at the consummation

We before observed, that it was incident to every corporation to have a capacity to purchase lands for themselves and \*successors: and this is regularly true at the common law.(*t*) But they are excepted out of the [\*479 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. II. c. 36. And also, by a great variety of statutes,(*x*) their privilege even of purchasing from any living grantor is much abridged: so that now a corporation, either ecclesiastical or lay, must have a license 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 to this single one, that of acting up to the end or design, whatever it be, for which they were created by their founder. [\*480

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, there is no other founder but

(*t*) 10 Rep. 30.

(*u*) 34 Hen. VIII. c. 5.

(*w*) Hob. 136.

(*x*) 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, hereditatem capere non posse, dubium non est.* Cod. 6. 24. 8.

(*z*) 1 Inst. 2.

(*a*) 10 Rep. 31.

of an act, the act is not valid, though it be begun while all are present, if one of the persons depart, though wrongfully, before it is consummated. Ex parte Rogers, 7 Cowen, 526.—SHARSWOOD.

the king; but in eleemosynary foundations, such as colleges and hospitals, where there is an endowment of lands, the law distinguishes, and makes two \*481] 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 an appeal \*482] 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 appellants, 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 popish clergy, as of mere ecclesiastical jurisdiction: however, the law of the land judged otherwise; and, with regard to hospitals, it has long been held, (d) that if the hospital be spiritual, the bishop shall visit; but if lay, the patron. This right of lay patrons was indeed abridged by statute 2 Hen. V. c. 1, which ordained, that the ordinary should visit *all* hospitals founded by subjects; though the king's right was reserved to visit by his commissioners such as were of royal foundation. But the subject's right was in part restored by statute 14 Eliz. c. 5, which directs the bishop to visit such hospitals only where no visitor is appointed by the founders thereof: and all the hospitals founded by virtue of the

(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 ap-

pointed. 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.<sup>16</sup>

(d) Year-book, 8 Edw. III. 28. 8 Ass. 29.

<sup>16</sup> 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.—CHRISTIAN.

statute 39 Eliz. c. 5, are to be visited by such persons as shall be nominated by the respective founders. But still, if the founder appoints nobody, the bishop of the diocese must visit.<sup>(e)</sup>

Colleges in the universities (whatever the common law may now, or might formerly, judge) were certainly considered by the popish clergy, under whose direction they were, as *ecclesiastical*, or at least as *clerical*, corporations; and therefore the right of visitation was claimed by the ordinary of the \*diocese. This is evident, because in many of our most ancient colleges, where the founder had a mind to subject them to a visitor of his own nomination, he obtained for that purpose a papal bull to exempt them from the jurisdiction of the ordinary; several of which are still preserved in the archives of the respective societies. And in some of our colleges, where no special visitor is appointed, the bishop of that diocese, in which Oxford was formerly comprised, has immemorably exercised visitatorial authority; which can be ascribed to nothing else but his supposed title as ordinary to visit this, among other ecclesiastical foundations. And it is not impossible that the number of colleges in Cambridge, which are visited by the bishop of Ely, may in part be derived from the same original.<sup>18</sup>

But whatever might be formerly the opinion of the clergy, it is now held as established common law, that colleges are lay corporations, though sometimes totally composed of ecclesiastical persons; and that the right of visitation does not arise from any principles of the canon law, but of necessity was created by the common law.<sup>(f)</sup> And yet the power and jurisdiction of visitors in colleges was left so much in the dark at common law, that the whole doctrine was very unsettled till the famous case of *Phillips and Bury*.<sup>(g)</sup> In this the main question was, whether the sentence of the bishop of Exeter, who, as visitor, had deprived Doctor Bury, the rector of Exeter College, could be examined and redressed by the court of King's Bench. And the three puisne judges were of opinion, that it might be reviewed, for that the visitor's jurisdiction could not exclude the common law; and accordingly judgment was given in that court. But the lord chief justice Holt was of a contrary opinion; and held, that by the common law the office of visitor is to judge according to the statutes of the college, and to expel and deprive upon just occasions, and to hear all appeals of course: and that from him, and him only, the party grieved ought to have redress; the founder having reposed in him so entire a confidence, that he \*will administer justice impartially, that his determinations are final, and examinable in no other court whatsoever. And upon this a writ of error being brought 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.<sup>(h)</sup> Also it is said,<sup>(i)</sup> 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.<sup>19</sup>

(e) 2 Inst. 725.

(f) Lord Raym. 8.

(g) Lord Raym. 5. 4 Mod. 106. Show. 85. Skinn. 407.

Salk. 408. Carth. 180.

(h) Stra. 797.

(i) 2 Lutw. 1566.

<sup>18</sup> That is, the bishop of Lincoln, from whose diocese that of Oxford was taken.—CHRISTIAN.

<sup>19</sup> In the university of Cambridge I am inclined to think that 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. He without doubt was fixed upon from the dignity of his station and the proximity of his residence.—CHRISTIAN.

<sup>20</sup> 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



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.<sup>(k)</sup><sup>20</sup> But the body politic

(\*) 11 Rep. 98.

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 control. Lord Mansfield has declared that "the visitatorial power, if properly exercised, without expense or delay, is useful 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.

It has been determined that, where the founder of a college or eleemosynary corporation has appointed no special visitor, if his heirs become extinct, or if they cannot be found, the right of visitation devolves to the king, to be exercised by the chancellor in the same manner as when the king himself is the founder. 4 T. R. 233. 2 Ves. Jun. 609.—CHRISTIAN.

<sup>20</sup> Every member or officer of a corporation may *resign* his place or office, (2 Roll. 456, l. 10. 1 Sid. 14. Sembl. Cont. 1 Roll. 137. Pop. 134. 2 Roll. 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. Raym. 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 Raym. 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 Roll. 409. So if he removes from the borough and refuses attendance without lawful excuse. 4 Mod. 36. Semb. Show. 259. 4 Burr. 2087; 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, 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 Roll. 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. Sembl. Cont. Ray. 466. A

may also itself be dissolved in several ways, which dissolution is the civil death of the corporation; and in this case their lands and tenements shall revert to the person, or his heirs, who granted them to the corporation: for the law doth annex a condition to every such grant, that, if the corporation be dissolved, the grantor shall have the lands again, because the cause of the grant faileth.<sup>(1)</sup> The grant is, indeed, only during the life of the corporation; which may endure forever: 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

(1) Co. Litt. 13.

defect in original qualification is no cause for removal, (Doug. 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. Raym. 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. J. 540. 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 Raym. 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 shown. Cowp. 502, 3, 4. Doug. 149. To this power of amotion the power of holding a corporate meeting for that purpose is necessarily incident. Doug. 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. Doug. 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 with out summons or hearing of him, &c. 1 Sid. 15. 1 Lev. 291. In general, the summons should show 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.—CHITTY.

<sup>21</sup> On the dissolution of a corporation, as by the expiration of the period of its charter, the debts due to and from it are extinguished, and it is not in the power of the legislature, by renewing the charter, to revive the liabilities to the corporation. *Commercial Bank vs. Lockwood*, 2 Haring. 8. The President of *Port Gibson vs. Moore*, 13 S. & M. 157. The personal property of the corporation vests in the state, and its real estate reverts to its grantor and his heirs. *White vs. Campbell*, 5 Humph. 38. After the dissolution of a corporation, the interests of the several stockholders become equitable rights to a proportional share of the assets after payment of the debts. *James vs. Woodruff*, 2 Denio, 574.—SHARSWOOD.

other grant for life.<sup>22</sup> 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)<sup>23</sup> agreeable to that maxim of the civil law, "*si quid universitati debetur, singulis non debetur; nec, quod debet universitas, singuli debent.*" (n)

\*185] \*A corporation may be dissolved, 1. By act of parliament, which is boundless in its operations.<sup>24</sup> 2. By the natural death of all its members, in case of an aggregate corporation.<sup>25</sup> 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.<sup>26</sup> 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.<sup>27</sup>

(m) 1 Lev. 237.  
(n) Ff. 3, 4, 7.

(o) Stat. 2 W. and M. c. 8.  
(p) Stat. 11 Geo. I. c. 4.

<sup>22</sup> But if a corporation have granted over their possessions to another before their dissolution, they do not return to the donor. 1 Roll. 816, l. 10, 20; and vide the cases collected in Bac. Abr. 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.—CHITTY.

<sup>23</sup> But a debt due to a corporation still remains, though their name is changed by a new charter. 3 Lev. 238.—CHITTY.

<sup>24</sup> The king cannot by his prerogative destroy a corporation. *Rex vs. Amley*, 2 Term R. 532.—CHITTY.

<sup>25</sup> 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. Roll. 524. Bac. Abr. 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, is 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.—CHITTY.

<sup>26</sup> 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. Abr. Corp. G. As to the effect of this judgment, see 2 T. R. 515. 4 T. R. 122. 2 Kyd. 496. Bac. Abr. Corp. G.—CHITTY.

<sup>27</sup> A private corporation aggregate may be dissolved by the death of all its members, or by the loss of an integral part when it is rendered unable to do any corporate act or

to restore itself by a new election ; or it may be dissolved by a surrender of its franchises to the State, or its assent to an act of the legislature repealing the charter. It may also be dissolved by a forfeiture of its charter, through abuse or neglect of its franchises, as if for condition broken ; but not every non-user is sufficient ground of forfeiture. Where dissolved by either of the two former methods, no judgment of dissolution is necessary ; but where there is an existing corporation, capable of acting, which has been guilty of such neglect or abuse of its franchises, or of the powers committed to its trust, as to amount to a cause of forfeiture, such forfeiture must be judicially ascertained and declared. *Canal Co. vs. Railroad Co.*, 4 Gill & Johns. 1. *Arthur vs. Bank*, 9 S. & M. 394. By common law a forfeiture of charter can only be exacted in a court of law by *scire facias* or *quo warranto*. *State vs. Merchants Insurance & Trust Co.*, 8 Humph. 235. An act of incorporation being a compact between the State and the corporators, it seems that the corporation cannot dissolve itself by its own act merely, and that a dissolution can only be effected by the assent of both the parties to the compact, or by the judgment of a court of competent jurisdiction. *Town vs. Bank*, 2 Doug. 530. *Norris vs. Smithville*, 1 Swan. 164.—SHARSWOOD.



COMMENTARIES  
ON  
THE LAWS OF ENGLAND.

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BOOK THE SECOND.

Of the Rights of Things.

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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, 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 reason 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.

\*5] and over the fowl of the air, and over every living thing that moveth \*upon the earth.”(a) This is the only true and solid foundation of man’s dominion over external things, whatever airy metaphysical notions may have been started by fanciful writers upon this subject. The earth, therefore, and all things therein, are the general property of all mankind, exclusive of other beings, from the immediate gift of the Creator. And, while the earth continued bare of inhabitants, it is reasonable to suppose that all was in common among them, and that every one took from the public stock to his own use such things as his immediate necessities required.

These general notions of property were then sufficient to answer all the purposes of human life; and might perhaps still have answered them had it been possible for mankind to have remained in a state of 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 those 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 aught 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,

\*4] and contrary to the law of nature, to have driven him by force: but the instant that he \*quitted the use or occupation of it, 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 occupation of the same thing, or disputing which of them had actually gained it. As human life also grew more and more refined, abundance of conveniences were devised to render it more easy, commodious, and agreeable; as, habitations for shelter and safety, and raiment for warmth and decency. But no man would be at the trouble to provide either, so long as he had only an 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

\*5] seem to have been originally mere \*temporary huts or movable cabins, suited to the design of Providence for more speedily peopling the earth,

(\*) Gen. I. 28.

(b) Justin. I. 43, c. 1.

(c) Barbeyr. Puff. I. 4, c. 4.

(d) *Quemadmodum theatrum, cum commune sit, recte tamen dicitur potest ejus esse eum locum quem quisque occupavit. De Fin. I. 3, c. 20.*

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 movables 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 ameliorated 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."<sup>(e)</sup> And Isaac, \*about ninety years afterwards, reclaimed that as his father's property, and after much contention with the Philistines was suffered to enjoy it in peace.<sup>(f)</sup> [\*6

All this while the soil and pasture of the earth remained still in common as before, and open to every occupant: except perhaps in the neighbourhood of towns, where the necessity of a sole and exclusive property in lands (for the sake of agriculture) was earlier felt, and therefore more readily complied with. Otherwise, when the multitude of men and cattle had consumed every convenience on one spot of ground, it was deemed a natural right to 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.<sup>(g)</sup> We have also a striking example of the same kind in the history of Abraham and his nephew Lot.<sup>(h)</sup> 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 preoccupied by other tribes. "And Lot lifted up his eyes, and beheld all the plain of Jordan, that it was well watered everywhere, 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."

\*Upon the same principle was founded the right of migration, or sending colonies to find out new habitations when the mother-country was over- [\*7

(e) Gen. xxi. 30.  
(f) Gen. xxvi. 15, 18, &c.

(g) *Colunt discreti et diversi; ut fons, ut campus, ut nemus placuit. De mor. Germ. 16.*  
(h) Gen. c. xiii.



charged 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 connection and consequence, introduced and established the idea of a more permanent property in the soil than had hitherto been received and adopted. It was clear that the earth would not produce her fruits in sufficient quantities without the assistance of tillage; but who would be at the pains of tilling it, if another might watch an opportunity to seize upon, and enjoy the product of his industry, art, and labour? Had not therefore a separate property in lands as well as movables been vested in some individuals, the world must have continued a forest, and men have been mere animals of prey, \*8] which, according to some philosophers, is the genuine state of nature. \*Whereas now (so graciously has Providence interwoven our duty and our happiness together) the result of this very necessity has been the ennobling of the human species, by giving it opportunities of improving its *rational* faculties, as well as of exerting its *natural*. Necessity begat property; and, in order to insure that property, recourse was had to civil society, which brought along with it a long train of inseparable concomitants,—states, government, laws, punishments, and the public exercise of religious duties. Thus connected together, it was found that a part only of society was sufficient to provide, by their manual labour, for the necessary subsistence of all; and leisure was given to others to cultivate the human mind, to invent useful arts, and to lay the foundations of science.

The only question remaining is, how this property became actually invested. 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 everybody, but particularly to nobody. And, as we before observed that occupancy gave the right to the temporary *use* of the soil, so it is agreed upon all hands, that occupancy gave also the original right to the permanent property in the *substance* of the earth itself; which excludes every one else but the owner from the use of it. There is indeed some difference among the writers on natural law concerning the reason why occupancy should convey this right, and invest one with this absolute property: Grotius and Puffendorf insisting that this right of occupancy is founded 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.<sup>1</sup> However, both sides agree in this, that occupancy is the

<sup>1</sup> 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 ther. he removes out of the state that nature hath

thing by which the title was in fact originally 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.<sup>2</sup>

Property, both in lands and movables, 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 shows 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.<sup>(i)</sup>

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

(i) See book I. p. 295.

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 Govt. 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 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.—CHRISTIAN.

<sup>2</sup> All the writers on international law concur in the doctrine that actual occupancy is essential to perfect the title to land newly discovered and vacant. Puff. l. 4, c. 4. Vat. l. 1, c. 15. Grotius, l. 2, c. 3. It is important to remark that, so far at least as regards land, the first discoverer and occupant acquires no title to himself, but to the nation to which he belongs or under whose flag he sails. All private property in land is derived from the sovereign of the country, either directly or remotely. Among the aboriginal inhabitants of North America there was no private property in land; but the territory or hunting-grounds belonged to the tribe, who alone had the power to dispose of them. In the confederacy of the Six Nations, this power was vested in the general council-fire, so that the separate tribes had no right to sell or transfer. Something like this is discoverable in the earliest accounts we have of the laws of the savage inhabitants of ancient Europe. Property in land was first in the nation or tribe, and the right of the individual occupant was merely usufructuary and temporary. 2 Kent's Com. 320.—SHARSWOOD.

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.<sup>3</sup>

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 \*11] neglects to dispose of it, or is not permitted to make any disposition at all, the municipal law of the country then steps in, and declares who shall be the successor, representative, or heir of the deceased; that is, who alone shall have a right to enter upon this vacant possession, in order to avoid that confusion which its becoming again common would occasion. And further, 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

(\*) 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.

<sup>3</sup> Upon whatever principle the right of property is founded, the power of giving and 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.

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.<sup>4</sup> It is true, that the transmission of one's possessions to posterity has an evident tendency to make a man a good citizen and a useful member of society; it sets the passions on the side of duty, and prompts a man to deserve well of the public, when he is sure that the reward of his services will not die with himself, but be transmitted to those with whom he is connected by the dearest and most tender affections. Yet, reasonable as this foundation of the right of inheritance may seem, it is probable that its immediate original arose not 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 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."<sup>(1)</sup> [\*12

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 movables from his wife and children; and, in general, no will was permitted of lands till the reign of Henry the Eighth;

(1) Gen. xv. 3.

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<sup>4</sup> 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 show (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 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 the deceased parent.

*Hæredes successorisque 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. xv.—CHRISTIAN.

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.<sup>5</sup>

Wills therefore and testaments, rights of inheritance and successions, are all of them creatures of the civil or municipal laws, and accordingly are in all respects regulated by them; every distinct country having different ceremonies and requisites to make a testament completely valid: neither does any thing vary more than the right of inheritance under different national establishments.<sup>\*13]</sup> In England particularly, this diversity is carried to such a length, as if it had been meant to point out the power of the laws in regulating the succession to property, and how futile every claim must be, that has not its foundation in the positive rules of the state. In personal estates the father may succeed to his children; in landed property he never can be their immediate heir, by any the remotest possibility:<sup>6</sup> 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,<sup>\*14]</sup> to go to some particular person, who from the result of certain local constitutions, appears to be the heir at law. Hence it follows, that where the appointment is regularly made, there cannot be a shadow of right in

<sup>5</sup> 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.—CHRISTIAN.

<sup>6</sup> Mr. Preston, commenting upon the passage in the text, says, "By it must be understood that the father cannot succeed to his son merely in the character and relation of father. In any other sense, it is not by any means accurate to say the father cannot, 'by any the remotest possibility,' succeed to the son as his immediate heir. It seems to have been Blackstone's intention to deny that there were any possible means by which the father could succeed as immediate heir to his son. A contrary doctrine, however, is clearly established. It has been held that the father may be immediate heir to his son as the second-cousin of the son. When a father would be entitled to be heir as cousin to the son if he did not sustain the relation of father, he is not excluded merely on the ground that he is the father. Suppose, then, two cousins to intermarry, and that there is issue of that marriage a son, who purchases lands and dies; in inquiring for the heir to the son, it is a decisive objection to the claim of the father that he is the father, as often as the question is whether he shall be preferred to the uncle or great-uncle of the son, on the part of the father. But let the paternal line fail, and then recourse must be had to the maternal line. In that line the father may succeed as a cousin to his son." Essay on Abst. ii. 449.

Since this note was first published, it has been enacted by the statute of 3 & 4 Gul. IV. c. 106, that every lineal ancestor shall be capable of being heir to any of his issue, and be preferred to collaterals.—HOVEDEN.

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 *feræ naturæ*, or of a wild and untamable 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 voluntarily 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 and quarrels \*would frequently arise [\*15 among individuals, contending about the acquisition of this species of property by first occupancy, the law has therefore wisely cut up the root of dissension, by vesting the things themselves in the sovereign of the state: or else in his representatives appointed and authorized by him, being usually the lords of manors. And thus the legislature of England has universally promoted the grand ends of civil society, the peace and security of individuals, by steadily pursuing that wise and orderly maxim, of assigning to every thing capable of ownership a legal and determinate owner.

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## 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 immovable, which cannot be carried out of their place; as lands and tenements: *things personal* are goods, money, and all other movables; which may attend the owner's person wherever he thinks proper to go.<sup>1</sup>

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<sup>1</sup> Mr. Stephen justly remarks that it is more correct and convenient to keep separate the idea of the subjects in which property may be acquired from the idea of the estate or interest that may be acquired in these subjects. There is a distinction between things and the estate in things. *Things real* are land, structure thereon, fixtures thereto, and rights issuing out of, annexed to, or exercisable within, land. There may be a personal estate in a thing real, as a term of years, a mortgage, &c. *Real estate* is such an interest, not held as merely collateral to a debt or personal duty, in a thing real, as is of uncertain duration and which by possibility may last for life. There cannot be a real estate in a thing personal. Sir Richard Pepper Arden, in *Buckeridge vs. Ingram*, 2 Ves. Jr. 651, has

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.<sup>2</sup> *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 \*17] still greater extent, and though in its vulgar accep<sup>t</sup>tation it is only applied to houses and other buildings, yet, in its original, proper, and legal sense, it signifies every thing that may be *holden*, provided it be of a permanent nature; whether it be of a substantial and sensible, or of an unsubstantial ideal kind.<sup>3</sup> Thus *uberum tenementum*, frank tenement, or freehold, is applicable not

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given a definition of real property which has been followed by the Supreme Court of Pennsylvania in the case of Meason's estate, 4 Watts, 346. "Wherever a perpetual inheritance is granted which arises out of land, or is in any degree connected with it, or, as it is emphatically expressed by lord Coke, exercisable within it, it is that sort of property which the law denominates real property." This definition, though true as far as it goes, is yet not entirely accurate. There is certainly no reason for confining it to the case of a *perpetual inheritance*. Surely an estate for life in land is real estate. It is not every interest in it which is. A chattel real is personal estate. It will not do to substitute "interests for an indefinite or uncertain duration" for the words "perpetual inheritance," without more; because the estates of tenants by *statute merchant*, *statute staple*, and *elegit*, though of this character, are chattels, and not freeholds. A mortgage, though giving an interest in real estate even in fee-simple, and which may, by proceedings at law or in equity, be converted into an absolute indefeasible estate, is nothing, for all practical purposes, but a chattel. It is to be remarked, however, that these instances are all cases in which the estates are held as mere security for debts and follow the nature of the debts to which they are accessory.

When the owner of land has by his will, or by a trust, directed that it shall be sold for money, courts of equity, which always consider that as actually done which ought to be done, will treat the land so directed to be sold as money; and so, *vice versa*, money directed to be laid out in land will in equity be considered as land.

An interest in realty, by being mingled in an undistinguished mass of property held in common with personalty, may have the latter character impressed upon it. Thus, shares of stock in a bank or other corporation are personal estate, without reference to the nature of the subjects in which these shares give an interest. This is the general doctrine of American law. 2 Kent, 340, n. In England, shares in companies associated for the purpose of acting on land exclusively, as railroad, canal, and turnpike companies, are real estate. *Drybutter vs. Bartholomew*, 2 P. Wms. 127. *Buckeridge vs. Ingram*, 2 Ves. Jr. 651. It is so held in Kentucky also. *Price vs. Price*, 6 Dana, 107. It is most convenient, however, to consider the share as a transmissible and assignable franchise of the personal kind, giving the proprietor a right to his proportion of the profits in money in the shape of annual dividends, and to a return of his capital in money upon the dissolution of the corporation or expiration of the charter.—SHARES-WOOD.

<sup>2</sup>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.—CHITTY.

<sup>3</sup>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 message, 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 acceptance 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. & 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 message, without the words "*with the appurtenances*," the garden and curtilage will pass, and, where the intent is apparent, even other

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 movable: 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)<sup>4</sup>

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: 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 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 movable, 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 immovable: and therefore in this I may have a certain substantial property; of which the law will take notice, and not of the other.<sup>5</sup>

(a) Co. Litt. 6.  
(b) Ibid. 10, 20.  
(c) 1 Inst. 6.

(d) 3 Rep. 2.  
(e) 1 Inst. 4.  
(f) Brownl. 142.

adjacent property. See cases, 2 Saund, 401, note 2. 1 Barr. & 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*, 318.—CHITTY.

<sup>4</sup> By a condition is here meant a qualification or restriction annexed to a conveyance of land, whereby it is provided that in case a particular event does or does not happen, or a particular act is done or omitted to be done, an estate shall commence, be enlarged or defeated. As an instance of the condition here intended, suppose A. to have enfeoffed B. of an acre of ground upon condition that if his heir should pay the feoffee 20s. he and his heir should re-enter: this condition would be an hereditament descending on A.'s heir after A.'s death; and if such heir after A.'s death should pay the 20s. he would be entitled to re-enter, and would hold the land, as if it had descended to him. Co. Litt. 201, 214, b.—COLERIDGE.

<sup>5</sup> "The right to the use of water rests upon clear and settled principles. *Prima facie* the proprietor of each bank of a stream is the proprietor of half the land covered by the stream; but there is no property in the water. Every proprietor has an equal right to



Land hath also, in its legal signification, an indefinite extent, upwards as well as downwards. *Cujus est solum, ejus est usque ad cælum*, 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,\* 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,

use the water which flows in the stream; and, consequently, no proprietor can have the right to use the water to the prejudice of any other proprietor. Without the consent of the other proprietors who may be affected by his operations, no proprietor can either diminish the quantity of water which would otherwise descend to the proprietors below, or throw the water back upon the proprietors above. Every proprietor, who claims a right either to throw the water back above or to diminish the quantity of water which is to descend below, must, in order to maintain his claim, either prove an actual grant or license from the proprietors affected by his operations, or must prove an uninterrupted enjoyment of twenty years." Sir John Leach, (1 Sim. & Stu. 190.) *Weston vs. Alden*, 8 Mass. 136. *Buddington vs. Bradey*, 10 Conn. 213. *Aqua currit et debet currere ut currere solebat* is the language of the law. Though the proprietor may use the water while it runs over his land as an incident to the land, he cannot unreasonably detain it or give it another direction, and he must return it to its ordinary channel when it leaves his estate. 3 Kent, 537. *Norton vs. Valentine*, 14 Verm. 239. *Arnold vs. Foot*, 12 Wend. 330. *Wadsworth vs. Tillotson*, 15 Conn. 366. The water-power to which a riparian owner is entitled consists of the fall in the stream when in its natural state, as it passes through his land or along the boundary of it; or, in other words, it consists of the difference of level between the surface where the stream first touches his land and the surface where it leaves it. This natural power is as much the subject of property as is the land itself, of which it is an accident; and it may, in the same way, be occupied in whole, or in part, or not at all, without endangering the right or restricting the mode of its enjoyment, unless where there has been an actual adverse occupancy or enjoyment for a period commensurate with that required by the statute of limitations; and, as to a right by prior appropriation, that has regard to the quantum of water withdrawn from a stream common to both parties, and not to the quantum of fall. The latter can be augmented only by subtracting from the proprietor above, by swelling back on him; or by appropriating a part of the adjoining proprietor's fall below, by excavating the channel within his boundary and carrying out the bottom on a level to some point in the inclined line of the natural descent. C. J. Gibson, in *McCalmont vs. Whitaker*, 3 Rawle, 90.—SHARWOOD.

\*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 vs. Holworthy*, 19 Ves. 214, S. C. 4 Maul. & Sel. 340,) it is neither lawful for the customary tenant or copyholder to dig and open new mines without the license 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 vs. Knight*, 1 P. Wms. 408. And see, as to the latter point, the opinion of two judges against one, in the *Lord of Rutland vs. 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 vs. 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 shown 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 vs. The Duke of Northumberland*, 13 Ves. 237. 17 Ves. 282; and S. P., at law, under the title of *Bourne vs. 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 vs. Gibson*, 2 T. R. 705.—CHITTY.

or over it.<sup>7</sup> And therefore, if a man grants all his lands, he grants thereby all his mines of metal and other fossils, his woods, his waters, and his houses, as well as his fields and meadows. Not but the particular names of the things are \*equally sufficient to pass them, except in the instance of water; by a grant of which, nothing passes but a right of fishing:(g)<sup>8</sup> but the capital [\*19 distinction is this, that by the name of a castle,<sup>9</sup> messuage,<sup>10</sup> toft,<sup>11</sup> croft,<sup>12</sup> 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)

(g) Co. Litt. 4.

(h) Co. Litt. 4, 5, 6.

<sup>7</sup> "I recollect a case where I held that firing a gun loaded with shot into a field was a breaking of the close. Would trespass lie for passing through the air in a balloon over the land of another?" Per lord Ellenborough, 1 Stark. 58. In the case of mines, custom has in many places made an exception to this rule. See Bainbridge on Mines, ch. 2. Of course, any portion of the space between the centre of the earth and the sky may be severed from the rest and be capable of a distinct ownership. Thus, a man may have a several inheritance in the upper story of a house or in a private box at a theatre. 2 Gal. & D. 435.—SWEET.

<sup>8</sup> 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.—ЧИТТИ.

<sup>9</sup> 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.—CHRISTIAN.

"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 vs. Grange, 1 Plowd. 168, 170.—ЧИТТИ.

<sup>10</sup> A *messuage*, in intendment of law, *primâ facie* comprehends land; and it will be presumed that a curtilage, at least, belongs thereto. Scholes vs. Hargreaves, 5 T. R. 48. Hockley vs. Lamb, 1 L. Raym. 726. Scanler vs. Johnson, T. Jones, 227. Patrick vs. Lowre, 2 Brownl. 101. It should be observed, however, that North vs. Coe, Vaugh. 253, is *contra*. Rights of common, and even of several, pasturage, may be appurtenant to a messuage, (Potter vs. Sir Henry North, 1 Ventr. 390,) or to a cottage, (Emerton vs. 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 vs. 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 vs. Baker, Cro. Eliz. 16. Wilson vs. Armourer, T. Raym. 207. Loftes vs. Barker, Palm. 376. And by the devise of a messuage, a garden and the curtilage will pass, without saying *cum pertinentiis*. Carden vs. Tuck, Cro. Eliz. 89. For this purpose the word *messuage* seems formerly to have been thought more efficacious than the word *house*. Thomas vs. Lane, 2 Cha. Ca. 27. S. P. Keilway, 57. But the subtlety of such a distinction has been since disapproved. Doe vs. 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 vs. 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 vs. Nurton, 1 Bos. & Pull. 57. Ongley vs. Chambers, 1 Bingh. 498. Press vs. Parker, 2 Bingh. 462.—ЧИТТИ.

<sup>11</sup> "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 vs. Grange, 1 Plowd. 170.—ЧИТТИ.

<sup>12</sup> *Croft* is a small enclosure near to the homestead.—ЧИТТИ.

## CHAPTER III.

## OF INCORPOREAL HEREDITAMENTS.

AN incorporeal hereditament is a right issuing out of a thing corporeal (whether real or personal) or concerning, or annexed to, or exercisable within, the same.<sup>(a)</sup> It is not the thing corporate itself, which may consist in lands, houses, jewels, or the like; but something collateral thereto, as a rent issuing out of those lands or houses, or an office relating to those jewels. In short, as the logicians speak, corporeal hereditaments are the substance, which may be always seen, always handled: incorporeal hereditaments are but a sort of accidents, which inhere in and are supported by that substance; and may belong or not belong to it, without any visible alteration therein. Their existence is merely in idea and abstracted contemplation; though their effects and profits may be frequently objects of our bodily senses. And indeed, if we would fix a clear notion of an incorporeal hereditament, we must be careful not to confound together the profits produced, and the thing, or hereditament, which produces them. An annuity, for instance, is an incorporeal hereditament:<sup>1</sup> 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 produce 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 shown 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.

I. Advowson is the right of presentation to a church, or ecclesiastical 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,<sup>(b)</sup> 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.<sup>(c)</sup>

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,

(a) *Ibid.* 19, 20.

(b) Book I. page 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, l. 12, c. 2. Nov. 118, c. 23.

<sup>1</sup> 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 vs. Tindal*, 11 Mod. 90.

nor can corporeal possession be \*had of it. If the patron takes corporeal possession of the church, the churchyard, the glebe, or the like, he intrudes on another man's property; for to these the parson has an exclusive right. The patronage can therefore be only conveyed by operation of law, by verbal grant,<sup>2</sup> either oral or written, which is a kind of invisible mental transfer: and being so vested it lies dormant and unnoticed, till occasion calls it forth: when it produces a visible corporeal fruit, by 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,<sup>3</sup> 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.<sup>4</sup> An advowson *col-*

(d) Co. Litt. 199.

(e) Ibid. 121.

(f) Ibid. 307.

(g) Ibid. 120.

(h) Ibid.

<sup>2</sup>The late learned Vinerian professor, Mr. Wooddeson, has taken notice of this inaccuracy, and has observed that "advowsons, merely as such, [*i.e.* in gross,] could never, in any age of the English law, pass by oral grant without deed." 2 Woodd. 64. Lord Coke says expressly that "grant is properly of things incorporeal, which cannot pass without deed." 1 Inst. 9. But before the statute of Frauds, 29 Car. II. c. 3, any freehold interest in corporeal hereditaments might have passed by a verbal feoffment, accompanied with livery of seisin. Litt. § 59. And by such a verbal grant of a manor, Mr. Wooddeson justly observes, before the statute, an advowson *appendant* to it might have been conveyed. But he who has an advowson or a 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.—CHRISTIAN.

<sup>3</sup>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 *vs.* 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 reunited by law, the advowson which was once severed is now *appendant* again. Sir Moyle Finch's case, 6 Rep. 64, b. Hartop *vs.* 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. Hartox *vs.* Cock, Hutt. 89, 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. Illisfield case, Dyer, 259, a. pl. 19.—CHRISTY.

<sup>4</sup>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 salable, but not the presentation when the living is void. 1 Leon. 205. Therefore, the mort

*lative* is where the bishop and patron are one and the same person; in which case the bishop cannot present to himself; but he does, by the one act of collation, or con\*ferring the benefice, the whole that is done in common \*23] cases, by both presentation and institution. An advowson *donative* is when the king, or any subject by his license, 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 *prava consuetudo*, as he calls it, of investiture conferred by the patron only, this however shows 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

(i) Co. Litt. 344.

(k) Seld. Tith. c. 12, § 2.

(l) *Decretal.* l. 3, t. 7, c. 3.

(m) A.D. 1239.

gagor 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, 151. 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 expressly reserved by the grantor, especially as it has been decided that a conveyance of an advowson, though 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.—CURRY.

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 feudal dominion over ecclesiastical benefices, and, in consequence of that, began to claim and exercise the right of institution universally as a species of spiritual investiture.

However this may be, if, as the law now stands, the true patron *once* waives this privilege of donation, and presents to the bishop, and his clerk is admitted and instituted, the advowson is now become forever presentative, and shall never be donative any more.<sup>(n)</sup> For these exceptions to general [\*24] 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 forever; and will therefore reduce it to the standard of other ecclesiastical livings.<sup>5</sup>

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:<sup>6</sup> the first species being usually called *predial*, as of corn, grass, hops, and wood:<sup>(o)</sup> the second *mixed*, as of wool, milk, pigs, &c.,<sup>(p)</sup> 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.<sup>(q)</sup>

It is not to be expected from the nature of these general commentaries, that I should particularly specify what things are tithable, and what not; the time

(n) Co. Litt. 344. Cro. Jac. 63.  
(o) 1 Roll. Abr. 635. 2 Inst. 642.

(p) Ibid.  
(q) 1 Roll. Abr. 656.

<sup>5</sup> 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.—CHRISTIAN. 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.—CHITTY.

<sup>6</sup> 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 mixed and personal tithes it does not at all apply. See the 4th ch. of Toller on Tithes.

Wood is one of the instances to show that predial tithe may be payable in respect of an article of which the renewal is not annual. *Silva cædua* is tithable when it is felled; and between the falls several years commonly (and a great many years not unfrequently) intervene. *Page vs. Wilson*, 2 Jac. & Walk. 523. *Walton vs. Tryon*, 1 Dick. 245. *Chichester vs. Sheldon*, Turn. & Russ. 249.—CHITTY.

<sup>7</sup> 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 immediately 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 and 3 Ed. VI. c. 23, per Macdonald, Ch. B. 3 Anstr. 763. *Personal* tithes are so termed because they arise entirely from the *personal* industry of man. Mirehouse, 1 and 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 lands of owner, but by special custom may be due. Com. Dig. Dismes, H. 4, 16. Owen, 34 Gwin. 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.—CHITTY.

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

1. As to their original, I will not put the title of the clergy to tithes upon any divine right; though such a right certainly commenced, and I believe as certainly ceased, with the Jewish theocracy. Yet an honourable and competent maintenance for the ministers of the gospel is, undoubtedly, *jure divino*; whatever the particular mode of that maintenance may be. For, besides the positive precepts of the New Testament, natural reason will tell us, that an order of men, who are separated from the world, and excluded from other lucrative professions, for the sake of the rest of mankind, have a right to be furnished with the necessaries, conveniences, and moderate enjoyments of life, at their expense for whose benefit they forego the usual means of providing them. Accordingly all municipal laws have provided a liberal and decent maintenance for their national priests or clergy: ours in particular have established this of tithes, probably in imitation of the Jewish law: and perhaps, considering the degenerate state of the world in general, it may be more beneficial to the English clergy to found their title on the law of the land, than upon any divine right whatsoever, unacknowledged and unsupported by temporal sanctions.<sup>s</sup>

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,<sup>(s)</sup> 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<sup>(t)</sup> France, and made that famous division of them into four parts; one to maintain the edifice of the church, the second to support the poor, the third the bishop, and the fourth the parochial clergy.<sup>(u)</sup><sup>p</sup>

(r) 2 Inst. 651.  
(s) Seld. c. 8, § 2.  
(t) A.D. 778.

(\*) Book I. ch. 11. Seld. c. 6, § 7. Sp. of Laws, b. 31, c. 12.

<sup>s</sup> 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 tenth 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 moduses.—CHITTY.

<sup>p</sup> With respect to the quadripartite division of tithes mentioned in the text, Toller (p. 6) thinks it was not only more ancient than the law of Charlemagne upon the subject, but also conformable to some very old canon or usage. He draws this inference, reason-

The next authentic mention of them is in the *fœdus 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.<sup>10</sup> 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*) which [*\*2*] 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 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 forever 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

(\*) Wilkins, page 51.

(\*) Cap. 6.

(\*) Cap. 1.

(\*) Book I. Introd. § 4.

(\*) Inst. 646. Hob. 236.

(\*) Seld. c. 9, § 4.

(\*) LL. *Elgar.* c. 1 and 2. *Canut.* v. 11.

(\*) Seld. c. 11.

ably enough, from the answer returned to Augustin, 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.—CHURCH.

<sup>10</sup> 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 thirty or twenty 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. ii. 226. 1 Anst. 311. Gwil. 1513.—CHURCH.



Innocent(e) the 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 \*28] reasonable and just, (and, he might have \*added, being correspondent to the ancient law,) it was allowed of, and so became *lex terræ*. 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<sup>11</sup> when an agreement is made between the owner

(e) *Opera Innocent. III. tom. 2 page 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. pp. 113, 284.

<sup>11</sup> 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, 166, 7, 159; but see 5 Ves. Jr. 187.

With respect to *compositions* entered into 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, ch. 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 tithes 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 vs. Lytton, per Plummer, 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

of the land 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 showing that even this caution was ineffectual, and \*the possessions of the church being, by this and other means, every day diminished, [ \*29 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.

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 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.

\*To make a good and sufficient *modus*, the following rules must be observed. [ \*30 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 *bona fide* make a composition to receive less than his due in the same species of tithe; and therefore the law will not suppose it possible for such composition to have existed. 4. One cannot be discharged from payment of one species of tithe by paying a *modus* for another. (q) Thus a *modus* of 1d. 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*

(m) 2 Inst. 490. Regiat. 33. 13 Rep. 40.  
(n) 1 Keb. 602.  
(o) 1 Roll Abr. 649.

(p) 1 Lev. 179.  
(q) Cro. Eliz. 486. Salk. 677

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.—СПИТТ

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 :<sup>(r)</sup> 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*: 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.<sup>(s)</sup> 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.<sup>(t)</sup> 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 show that it once did exist, and that

\*31] 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;<sup>(u)</sup><sup>12</sup> and any custom may be destroyed by evidence of non-existence in any part of the long period from that time to the present;<sup>13</sup> wherefore, as this real composition is supposed to have been an equitable contract, or the full value of the tithes, at the time of making it, if the *modus* set up is so rank and large, as that it beyond dispute exceeds the value of the tithes in the time of Richard the First, this *modus* is (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.<sup>14</sup>

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.<sup>(v)</sup> So a vicar shall pay no tithes to the rector, nor the rector to the vicar, for *ecclesia decimas non solvit ecclesie*.<sup>(w)</sup><sup>15</sup> 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 tithable.<sup>(x)</sup> And, generally speaking, it is an established rule, that, in *lay* hands, *modus de*

<sup>(r)</sup> 2 P Wms. 462.

<sup>(s)</sup> 11 Mod. 60.

<sup>(t)</sup> Pyke vs. Dowling, III. 19 Geo. III. C. B.

<sup>(u)</sup> 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 sixty years, it

seems unaccountable that the date of legal prescription or memory should still continue to be reckoned from an era so very antiquated. See Litt. § 170. 34 Hen. VI. 37. 2 Roll Abr. 269, pl. 16.

<sup>(v)</sup> Cro. Eliz. 511.

<sup>(w)</sup> Cro. Eliz. 479, 511. Sav. 3. Moor, 910.

<sup>(x)</sup> Cro. Eliz. 479.

<sup>12</sup> The modern statutes relating to prescription have now, in almost all cases, obviated the necessity of carrying back proof to this remote date.—KERR.

<sup>13</sup> But though it is essential to the validity of a prescription or custom that it should have existed before the commencement of the reign of Richard 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.—CHITTY.

<sup>14</sup> 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 Richard I.; and therefore no *modus* for hops, turkeys, or other things *eo nomine*, introduced into England since that time, can be good. Bunb. 307.

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.—CHRISTIAN.

Bedford vs. Sambell, M. 16 Geo. III. Scacc. 3 Gwm. 1058. Twells vs. Welby, H. 20 Geo. III. Scacc. 3 Gwm. 1192. Mirehouse, 180 to 186.—CHITTY.

<sup>15</sup> 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 vs The Dean, 4 Pr. 77, 78.—CHITTY.

*non decimando non valet.*(y)<sup>16</sup> 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 by this unity of possession: 4. By [\*32 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 those exemptions from tithes would have fallen with them, and the lands become tithable again, had they not been supported and upheld by the statute 31 Hen. VIII. c. 13, which enacts, that all persons who should come to the possession of the lands of any abbey then dissolved, should hold them free and discharged of tithes, in as large and ample a manner as the abbeys themselves formerly held them.<sup>17</sup> 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 show his lands to have been such abbey-lands, and also immemorably discharged of tithes by any of the means before mentioned, this is now a good prescription, *de non decimando*.<sup>18</sup> But he must show 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.<sup>19</sup>

III Common, or right of common, appears from its very definition to be an

(y) Ibid. 511.

(z) Hob. 309. Cro. Jac. 308.

(\*) 2 Rep. 44. Seld. Tith. c. 13, § 2.

<sup>16</sup> 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, *prescriptio* is the more proper word, as the commencement of the paragraph shows 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.—CHITTY.

<sup>17</sup> 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.—CHRISTIAN.

<sup>18</sup> 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 show the ground of discharge by deducing title from some ecclesiastical person and thus showing the origin of the exemption. 2 Co. 44. Peake on Evid. 470, 471. 4 ed. Bunb. 325, 345. 3 Anst. 762, 945. Mirehouse, 152, 156, 157. And the same rule applies when the claim of exemption is against a lay improprorator, 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 vs. Calland*, 5 Ves. Jr. 186, *contra* see *Mirehouse*, 159.—CHITTY.

<sup>19</sup> Tithes have already to a considerable extent, and will soon have entirely, become mere matter of history, through the operation of the tithe commutation acts. The first general statute of this class (for private acts for the same purpose had in particular cases been obtained) was the statute 6 & 7 Wm. IV. c. 71, which has been amended by several subsequent statutes. The same principle of legislation has also been extended to Ireland by 1 & 2 Vict. c. 109. The chief object of these statutes is to substitute the payment of an annual rent of defined amount for the render of a tenth of the tithable produce of the land or the payment of an arbitrary composition. To effect this, the gross amount of the annual sums to be payable by way of rent-charge in substitution for the tithes is first ascertained. One-third of the amount, when ascertained and settled, is to be represented by such a quantity of wheat, another third by such a quantity of barley, and the remaining third by such a quantity of oats, as the rent-charge, if invested in the purchase of these three species of grain, would have purchased at their average prices per bushel during seven years ending Christmas, 1835. The tithe rent-charge is therefore in the nature of a corn-rent, but the payment is made in money, and varies annually, according to the average septennial value of the above three species of grain. on the Thursday preceding Christmas-day in every year, as the same is published in the "London Gazette" in the month of January.—KERR.

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.<sup>(b)</sup> And hence common is chiefly of four sorts; common of pasture, of piscary, of turbarry, and of estovers.<sup>20</sup>

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.<sup>(c)</sup>

\*33] <sup>c</sup>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,<sup>(d)</sup> not only for the encouragement of agriculture, but for the necessity of the thing. For, when lords of manors granted out parcels of land to tenants, for services either done or to be done, these tenants could not plough or manure the land without beasts; these beasts could not be sustained without pasture: and pasture could not be had but in the lords' wastes, and on the unenclosed 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.<sup>(e)</sup> Common *appurtenant* ariseth from no connection of tenure, nor from any absolute necessity: but may be annexed to lands in other lordships,<sup>(f)</sup> 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,<sup>(g)</sup> which the law esteems sufficient proof of a special grant or agreement for this purpose. Common *because of vicinage*, or neighbourhood, is where the inhabitants of two townships, which lie contiguous to each other, have usually intercommoned with one another; the beasts of the one straying mutually into the other's fields, without any molestation from either.<sup>21</sup> 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

(<sup>b</sup>) Finch, Law. 157.  
(<sup>c</sup>) Co. Litt. 122.  
(<sup>d</sup>) 2 Inst. 86.

(<sup>e</sup>) Stiernh. *de jure Sueonum*, l. 2, c. 6.  
(<sup>f</sup>) Cro. Car. 482. 1 Jon. 397.  
(<sup>g</sup>) Co. Litt. 121, 122.

<sup>20</sup> As to rights of common in general, see Com. Dig. tit. Common; Bac. Abr. tit. Common; 3 Com. Dig. 92 to 118; Selw. N. P. tit. Common; Saunder's Rep. by Patterson, index, tit. Com. 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 infected 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 enclosure 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.—CHITTY.

<sup>21</sup> 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 a 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.—CHITTY.

a right to put his beasts originally \*into the other's common: but if they [ \*34  
 escapo, and stray thither of themselves, the law winks at the trespass. (h)  
 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.<sup>22</sup> 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.<sup>23</sup>

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.<sup>24</sup> By the statute of Merton, however, and other subsequent statutes, (i)  
 the lord of the manor may enclose so much of the waste as he pleases for tillage  
 or woodland, provided he leaves common sufficient for such as are entitled  
 thereto. This enclosure, when justifiable, is called in law "*approving*," an an-  
 cient expression signifying the same as "*improving*." (j)<sup>25</sup> The lord hath the

(\*) Ibid. 122.

(i) 20 Hen. III. c. 4. 29 Geo. II. c. 36, and 31 Geo. II. c. 41.

(j) 2 Inst. 474.

<sup>22</sup> 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. Pl. 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 inheri-  
 tance. 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. 1804,) and so for a *cattle-gate*. 2 T. R. 452. 2 Stra. 1804. 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 imme-  
 morial a fold-course; that is, common of pasture for any number of sheep not exceeding  
 three hundred, 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 to be levant and couchant on the manor. 1 Roll. Abr.  
 402, pl. 3. Cro. Car. 432. Sir W. Jones, 375.—CHITTY.

<sup>23</sup> Common appendant and appurtenant are limited as to the number of cattle either  
 to an express number, or by levancy and couchancy, sometimes termed common with-  
 out 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 cer-  
 tain 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 vs. Benstead, Selw. Ni. Pri. tit. Common. There  
 fore 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 Roll. 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 Roll. 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.—CHITTY.

<sup>24</sup> The notion of this species of common is exploded. A right of common without  
 stint cannot exist in law. Bennet vs. Reeve, Willes, 232. 8 T. R. 396.—CHITTY.

<sup>25</sup> 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

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.<sup>(k)</sup><sup>26</sup>

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.<sup>(l)</sup><sup>27</sup> There is also a common of digging for coals, minerals, stones, and the like. All these bear a resemblance to common of pasture in many respects: though in one point they go much 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.

\*35] \*4. Common of estovers or *estouviers*,<sup>28</sup> that is, *necessaries*, (from *estoffer* to furnish,) is a liberty of taking necessary wood, for the use or furnitur

(k) 9 Rep. 113.

(l) Co. Litt. 122.

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 improvement 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 act 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.

—CHRISTIAN.

<sup>26</sup> Common appurtenant or appendant can be apportioned. But the land which gives a right of common to the owner shall not be so alienated as to increase the charge or burden on the land out of which common is to be taken. Therefore if the owner of the land entitled to common purchase a part of the land subject to common, the common shall be extinct; and *vice versa*. Where the right is extinguished or gone as to a portion of the land entitled to common, it is extinct as to the whole; for in such case common appurtenant cannot be extinct in part, and be *in esse* for part, by the act of the parties. *Livingston vs. Ten Broeck*, 16 Johns. 14.—SHARSWOOD.

<sup>27</sup> 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 vs. Warren, 3 Atk. 189,) not sold. *Valentine vs. Penny, Noy*, 145. So, it seems, an alleged custom for the tenants of the manor to be entitled to cut and carry away from the wastes therein an indefinite quantity of turf, covered with grass, fit for the pasturage 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 vs. Willes*, 7 East, 127.—CHITTY.

<sup>28</sup> 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 vs. 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. *Luttrell'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 vs. Maynard*, Cro. Eliz. 820. *Pomfret vs. Ricroft*, 1 Saund. 322. *Douglass vs. Kendal*, Cro. Jac. 256; *S. C. Yelv.* 187; which last case illustrates the distinction between the *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 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.<sup>(m)</sup><sup>29</sup>

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.<sup>30</sup> I speak not here of 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 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 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 he justify taking another person in his company.<sup>(n)</sup><sup>31</sup> A way may be also by *prescription*; as if all the inhabitants of such a hamlet, or all the owners and occupiers of

(m) Co. Litt. 41.

(n) Finch, Law, 31.

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 & Cracherode's case, 4 Rep. 32. North vs. Coe, Vaugh. 256.—CHITTY.

<sup>29</sup> Common of estovers cannot be apportioned; and, where a farm entitled to estovers is divided by the act of the parties among several tenants, neither of them can take estovers: the right to them is extinguished. But where common of estovers devolves upon several, by operation of law, though they cannot enjoy the right in severalty, yet they may, by uniting in a conveyance, vest the right in an individual. Van Rensselaer vs. Radcliffe, 10 Wend. 639. Livingston vs. Ketchum, 1 Barbour, 592.—SHARSWOOD.

<sup>30</sup> As to *highways* in general, see Com. Dig. tit. Chimin; Bac. Abr. 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.

With respect to *private ways*, see in general Com. Dig. Chimin, D. Bac. Abr. Highways, C. Selw. N. P. Trespass, iv. 7. 1 Saunders by Patterson, 323, note 6, id. index, Ways.—CHITTY.

<sup>31</sup> The way by grant also includes a reservation, which is in effect a granting back of the right of way by the grantee. The grant or reservation assures the right of way, as appurtenant to every part of the land to which it is attached, and the grantee of any part is entitled to it. Watson vs. Bioren, 1 S. & R. 227. Underwood vs. Carney, 1 Cushing, 285. Unless every person to whom any part is conveyed has a right to the way, the right is totally extinguished by an alienation of part of the premises to which it is appurtenant, because it cannot be said that the owner of one part has better right than the owner of the other: consequently, if both could not have the right, the whole would be gone. The grantee of a right of way, however, has no title to use it as a passage to other land than that to which it was attached; nor can the owner of the soil, who had granted the right of way to a stranger, use it for such a purpose. The use of a way must be according to the grant or occasion of it, and not exceed it: so that a right of way over another's ground to a particular place will not justify the use of it to go beyond that place Kirkham vs. Sharp, 1 Whart. 323. The grantee of a right of way is bound to keep it in repair. Wynkoop vs. Burger, 12 Johnson, 222. The grant of a right of way may be implied as well as expressed. If one sells to another a lot carved out of a larger lot belonging to the vendor, agreeably to a plan upon which are laid out certain space-ways



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.<sup>32</sup> 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 to it; and I may cross his land for that purpose without trespass.<sup>(o)</sup> For when the law doth give any thing to one, it giveth impliedly whatsoever is necessary for enjoying the same.<sup>(p)</sup><sup>33</sup> 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.<sup>(q)</sup><sup>34</sup>

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

(o) Ibid. 63.  
(p) Co. Litt. 56.

(q) Lord Raym. 725. 1 Brownl. 212. 2 Show. 28. 1 Jon 297.

or passages over the proprietor's ground adjacent to the lot, contemplating at the same time that the vendee will erect brick buildings, to which such space-ways and passages are immediately necessary or useful, it must be considered as intending the grant of the right to the vendee to use those space-ways in common with the proprietor of the adjacent lot. *Selden vs. Williams*, 9 Watts, 13. *Van Metz vs. Nankinson*, 6 Whart. 307.—SHARSWOOD.

<sup>32</sup> Prescription rests upon the presumption of a grant. But, to authorize such a presumption, the user must be adverse and under a claim of right. The period of twenty years has been adopted in England, in analogy to the statute of limitation in relation to land, which bars an entry after twenty years' adverse possession. In Pennsylvania the period of limitation is twenty-one; and the same period has been adopted to give rise to the presumption. *Dyer vs. Depui*, 5 Whart. 584. So where a way has originally existed, it may be rebutted by evidence of non-user for the same period which gives rise to a presumption of extinguishment. But where it has been acquired expressly by grant or reservation, it will not be lost by non-user, unless there were a denial of title or other act on the adverse part to quicken the owner in the assertion of his right. *Bute vs. Ibrie*, 1 Rawle, 218. Twenty-one years' actual occupation of land, adverse to a right of way and inconsistent with it, bars the right. *Yeakle vs. Nace*, 2 Whart. 123.—SHARSWOOD.

<sup>33</sup> These are termed ways of necessity. It is always of strict necessity; and this necessity must not be created by the party claiming the right of way. It never exists where a man can get to his property through his own land. That a road through his neighbour's would be a better road, more convenient, or less expensive, is not to the purpose. That the passage through his own land is too steep or too narrow does not alter the case. It is only where there is no way through his own land that the right of way over the land of another can exist. A right of way from necessity only extends to a single way. That a person claiming a way of necessity has already one way is a good plea, and bars the plaintiff. *McDonald vs. Lindall*, 3 Rawle, 492. It is founded on an implied grant, according to the legal maxim, *quando lex aliquid alicui concedit, concedere videtur et id sine quo res ipsa esse non potest*. *Nichols vs. Luce*, 24 Pick. 102. But whereabouts shall be the way? The owner of the land over which it exists has a right to locate it in the first instance, with this limitation, that it must be a convenient way. If he fails or refuses to locate, or makes an inconvenient or unreasonable location, the right devolves upon the grantee of the way. *Russell vs. Jackson*, 2 Pick. 274. The right of way of necessity ceases with the necessity which gave rise to it; so that if a public road is opened, or the grantee purchases other land which gives him a way over his own land, the first right of way ceases. *Collins vs. Prentice*, 15 Conn. 39. *Pierce vs. Selleck*, 18 Conn. 321. *New York Life Ins. & Trust Co. vs. Milnor*, 1 Barbour Ch. Rep. 353.—SHARSWOOD.

<sup>34</sup> Lord Mansfield took notice of the inaccuracy of this passage in the case of *Taylor vs. Whitehead*, Doug. 716, in which it was determined that if a man has a right of way over another's land, unless the owner of the land is bound by prescription or his own grant to repair the way, he cannot justify going over the adjoining land when the way is impassable by the overflowing of a river; but if public highways are foundrous, passengers are justified, from principles of convenience and necessity, in turning out upon the land next the road.—CHRISTIAN.

The same law is laid down in *Miller vs. Bristol*, 12 Pick. 550. *Williams vs. Safford*, 7 Barbour, 309.—SHARSWOOD.

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.<sup>(r)</sup> 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;<sup>(s)</sup> for those may be executed by deputy.<sup>35</sup> 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 will, by bribery, extortion, or other unlawful means, make his purchase good, to the manifest [ \*37 detriment of the public.<sup>36</sup>

VI. Dignities bear a near relation to offices. Of the nature of these we treated at large in the former book;<sup>(t)</sup> it will therefore be here sufficient to mention them as a species of incorporeal hereditaments, wherein a man may have a property or estate.<sup>37</sup>

VII. Franchises are a seventh species. Franchise and liberty are used as synonymous terms; and their definition is<sup>(u)</sup> 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.<sup>(w)</sup>

To be a county palatine is a franchise, vested in a number of persons. It is likewise a franchise for a number of persons to be incorporated, and subsist as a body politic; with a power to maintain perpetual succession, and do other corporate acts: 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:

(<sup>r</sup>) 9 Rep. 97.

(<sup>s</sup>) 11 Rep. 4.

(<sup>t</sup>) See book 1. ch. 12.

(<sup>u</sup>) Finch, l. 164.

(<sup>w</sup>) 2 Roll. Abr. 191. Keilw. 196.

<sup>35</sup> 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.—CHRISTIAN.

<sup>36</sup> The 49 Geo. III. c. 126 extends the provisions of this statute to other offices.—CHITTY

<sup>37</sup> 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 vs. 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. *Nevill'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 vs. Purbeck*. Show. P. C. 1. Law of Forfeiture, 86, 87.—CHITTY.

to have a bailiwick, or liberty exempt from the sheriff of the county; \*38] \*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 *feræ naturæ*, every one had a right to kill as he could;

\*39] but upon \*the introduction of the forest laws, at the Norman conquest, as will be shown 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 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)<sup>28</sup> 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 feudal 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

(x) 2 Inst. 220.

(y) 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, coney, and roes; the fowls are either *campestres*, as partridges, rails, and qualls, 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.

(c) Salk. 637.

(d) Bro. Abr. tit. Warren, 3.

(e) Seld. Mar. Claus. I. 24. Dufresne, V. 503. Crag. de Jur. feud. II. 8, 15.

(f) Cap. 47, edit. Oxon.

(g) Cap. 20.

(h) 9 Hen. III. c. 16.

<sup>28</sup> 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 which such a grant is presumed. Manw. Warren. Forrest, pl. 43.—CHRISTIAN.

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,<sup>(i)</sup> 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 right, the common of piscary is not so: [\*40 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.<sup>(k)</sup> 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.<sup>(l)</sup> 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<sup>(m)</sup> 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.<sup>39</sup>

VIII. Corodies are a right of sustenance, or to receive certain allotments of victual and provision for one's maintenance.<sup>(n)</sup> In lieu of which (especially when due from ecclesiastical persons) a pension or sum of money is sometimes substituted.<sup>(o)</sup> And these may be reckoned another species of incorporeal hereditaments; though not chargeable on, or issuing from, any corporeal inheritance, but only charged on the person of the owner in respect of such his inheritance. To these may be added,

IX. Annuities, which are much of the same nature; only that these arise from temporal, as the former from spiritual, persons. An annuity is a thing very distinct from a rent-charge, with which it is frequently confounded: a rent-charge being a burden imposed upon, and issuing out of, *lands*, whereas an annuity is a yearly sum chargeable only upon the *person* of the grantor.<sup>(p)</sup> 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

(i) M. 17 Edw. IV. 6 P. 18 Edw. IV. 4 T. 10 Hen. VII.

24, 26. Salk. 637.

(k) F. N. B. 88. Salk. 637.

(l) 2 S. & L. 8.

(\*) See them well digested in Hargrave's notes on Co. Litt. 122.

(\*) Finch, l. 162.

(\*) See book l. ch. 8.

(\*) Co. Litt. 144.

<sup>39</sup> A free fishery is not an exclusive fishery. *Melvin vs. Whiting*, 7 Pick. 79. In rivers where the tide ebbs and flows, as well as in the sea, the right of taking fish is common to all the citizens. *Parker vs. Cutter Mill-Dam Co.*, 7 Shep. 353. A *several* fishery in an arm of the sea, where the tide ebbs and flows, may be derived from prescription; but such prescription must be clearly proved: every presumption is against it. *Gould vs. James*, 6 Conn. 369. A prescriptive right cannot be acquired by mere uninterrupted exercise and use, no matter for how long a time; because the person so fishing exercises, *prima facie*, only a right which belongs to him in common with all others. *Challen vs. Dickerson*, 1 Conn. 382. *Collins vs. Benbury*, 5 Iredell, 118. In order to raise the presumption of a grant of an exclusive right in any person, it should appear that all others have been kept out by him and his grantees. *Ibid.* *Delaware and Maryland Railroad Co. vs. Stump*, 8 Gill & Johns. 479. *Day vs. Day*, 4 Maryland, 262.

In North Carolina, waters which are capable in fact of affording a passage to common sea-vessels are to be considered as navigable. *Collins vs. Benbury*, 5 Iredell, 118. So in Pennsylvania. *Carson vs. Blazer*, 2 Binn. 475. The owners of land on the banks of the Susquehanna and other principal rivers have not an exclusive right to fish in the river immediately in front of their land; but the right to fisheries in these rivers is vested in the State and open to all. *Ibid.* *Shrunk vs. Schuylkill Navigation Co.*, 14 S. & R. 71.

The right to fish in unnavigable rivers belongs exclusively to the owners of the lands adjoining, extending to the middle of the river, under such restraints as government may impose,—the right of regulating the taking of fish, whether in navigable or other streams, residing in the State. *Commonwealth vs. Chapin*, 5 Pick. 199. *Waters vs. Lillay* 4 Pick. 145. *Ingram vs. Threadgill*, 3 Den. 59.—SHARSWOOD.

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.<sup>40</sup>

(q) Co. Litt. 2.

<sup>40</sup> 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 vs. Buckley, 2 Ves. Sen. 177. Holdernes vs. Carmarthen, 1 Br. 382. Aubin vs. 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 I.:—"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 vs. Turner, Ambl. 782.—CHITTY.

For the doctrine that a man may have a real estate in an annuity, though his security is merely personal, the commentator cites no authority. The only semblance of authority is in some old cases in which the assignability of an annuity was discussed. Having perpetual continuance, the better opinion seems to have been that it could be assigned, provided the consideration was executed and the word "assigns" contained in the original grant: neither of which circumstances would be of any account if it were real estate proper. 1 Inst. 144, b. Hargrave's note. Gerrard vs. Boden, Hetl. 80. Maund's case, 7 Rep. 28, b. Brooke, tit. Annuity, 37, 39. Perk. s. 101. Baker vs. Broke, Mo. 5, n. 18. Mr. Wooddesson says that the assignability of an annuity is rested on the ground of its amphibious nature and its not being mere personalty. Taking it for settled, however, that an annuity is assignable, it does not follow that it is not personal. If it proves any thing, it only proves that it is not a chose in action. Properly speaking, perhaps the annuity itself does not lie in action; for it is a question whether debt or writ of annuity lies unless arrearages are due and unpaid. It is not, like a bond payable in future, *debitum in presenti, solvendum in futuro*. In annuity there is no present subsisting debt or duty: the debt or duty accrues only as the terms of payment elapse. Bro. Annuity, pl. 43. Digg's case, Mo. 133, n. 279. Doctr. Pl. 36, Annuity. Bodwell vs. Bodwell, Jones, 214.

In all other respects except that of descending to the heir, it bears none of the incidents and characteristics of real estate. Of this kind of inheritance a husband is not entitled to be tenant by the curtesy, nor the wife to be endowed. A grant of it to a corporation is not mortmain. 1 Inst. 32, a. 2, 6. It cannot be conveyed by way of use, though "hereditaments" is a word used in the statute of uses, for want of the necessary seisin. Jones, 127. Gilbert on Uses, 281. 2 Wils. 224. It cannot be entailed within the statute *de donis*, (1 Inst. 20, a.) and the reason is, according to lord Coke, that it concerneth no land, nor savoureth of the realty. Though *tenement* be the only word used in the statute *de donis*, yet it includeth not only all corporate inheritances, but also all inheritances issuing out of any of those inheritances, or concerning, or annexed to, or exercisable within, the same, though they lie not in tenure. If the grant be of an inheritance merely personal or to be exercised about chattels, and is not issuing out of land nor concerning any land or some certain place, such inheritance cannot be entailed. A grant of an annuity of inheritance to a man and the heirs of his body creates a fee-simple conditional at common law, and, after issue had, the grantee may alien so as to bar the possibility of reverter. Stafford vs. Buckley, 2 Ves. Sen. 170. It is not within the statute of frauds so far as that affects real property. It will pass by a will not executed according to that statute. It cannot be barred, as a rent may, by suffering a recovery. An assize does not lie for it. Nor does it escheat. Nor is it liable to the same kind of execution or judgments as real estate. Being a hereditament, however, descendible to the heir, it

\*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.<sup>(r)</sup> 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.<sup>(s)</sup> 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;<sup>(t)</sup> 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 of the thing granted.<sup>(u)</sup> 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.<sup>(w)</sup> 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:<sup>(x)</sup> though it doth not affect the inheritance, and is no legal rent in contemplation of law.<sup>41</sup>

There are at common law<sup>(y)</sup> three manner of rents, rent-service, rent-charge, and rent-seck. *Rent-service* is so called \*because it hath some corporeal service incident to it, as at the least fealty or the feudal oath of fidelity.<sup>(z)</sup> 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.<sup>(a)</sup> 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.<sup>(b)</sup> *Rent-seck, reditus siccus*, or barren-

(\*) Co. Litt. 144.

(†) Ibid. 142.

(‡) Ibid. 47.

(§) Plowd. 13. 8 Rep.

(¶) Co. Litt. 144.

(\*) Ibid. 47.

(†) Litt. 2 213.

(‡) Co. Litt. 142.

(§) Litt. 2 215.

(¶) Co. Litt. 143.

does not go to or form assets for the payment of debts in the hands of the executor or administrator. Doct. & Stud. Dial. I., c. 30. 1 Roscoe on Real Actions, 68, 35. 2 Woodd. 73. The case, however, which seems entirely conclusive in relation to this matter is *Aubin vs. Daly*, 4 B. & Ald. 59, where by letters-patent the king granted to the use of A., his heirs and assigns forever, an annuity of one thousand pounds to be paid out of his revenue of 4½ per cent. at Barbadoes and the Leeward Islands: it was held that this annuity was personal property and passed under a will which purported to bequeath "all the rest, residue, and remainder of the testatrix's personal estate."<sup>41</sup>—SHARSWOOD.

<sup>41</sup> 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.—CHRISTIAN.

<sup>42</sup> A clear rent-charge must be free from the land-tax. *Bradbury vs. Wright*, Doug. 625 — CHRISTIAN.

rent, is, in effect, nothing more than a rent reserved by deed, but without any clause of distress.<sup>43</sup>

There are also other species of rents, which are reducible to these three. Rents of *assize* 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 \*43] baser money, which were called *\*reditus nigri*, or *black-mail*. (e) *Rack-rent* is only a rent of the full value of the tenement, or near it. A *fee-farm* rent is a rent-charge issuing out of an estate in fee, of at least one-fourth of the value of the lands, at the time of its reservation: (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.<sup>44</sup>

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 assize, and chief-rents, as in case of rents reserved upon lease. (g)<sup>45</sup>

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)<sup>46</sup>

(c) 2 Inst. 19.

(d) In Scotland this kind of small payment is called *blanch-holding*, or *reditus albos firmæ*.

(e) 2 Inst. 19.

(f) Co. Litt. 143.

(g) Stat. 4 Geo. II. c. 28.

(h) Co. Litt. 201.

(i) 4 Rep. 73.

(j) Co. Litt. 302. 1 Anders. 253.

(k) 1 Saund. 287. Prec. Chanc. 555. Salk. 578.

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.—CHITTY.

<sup>43</sup> The description of a rent-charge is correct as applied to England, where the statute of *quia emptores* forbade subinfeudation; for there is therefore no connection of tenure between the grantor and grantee. In Pennsylvania, however, this statute was never in force; and although the connection of tenure is merely nominal,—although the whole possibility of reverter upon failure of heirs is now vested in the commonwealth,—yet that mere transfer has not altered the character of the estate or the legal incidents thereto annexed. In Pennsylvania, therefore, a *rent-service* is not only where there is a reversion in the owner of the rent, as where a man grants an estate for life or years, reserving a rent, but also where he parts with the whole fee-simple, reserving a rent. Distress is incident thereto of common right. A *rent-charge* is confined to the cases where the owner of land grants a rent thereout to a stranger, and by a special clause grants him also a right to distrain for the rent if it should be in arrear: without such a clause it would be a *rent-seck*. *Ingersoll vs. Sergeant*, 1 Whart. 337. *Franciscus vs. Reigart*, 4 Watts, 98. *Kenege vs. Elliott*, 9 Watts, 262.—SHARSWOOD.

<sup>44</sup> 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*. Doug. 627. n. 1.—CHRISTIAN.

A *fee-farm* rent is not necessarily a rent-charge. Mr. Hargrave indeed thought that it *could only be a rent-service*, and that the quantum of the rent was immaterial. Co. Litt. 143. n. 235. But in the case of *Bradbury vs. Wright*, Douglas Rep. 4 ed. 627, are notes by the reporter himself and the late learned editor, which explain the mistake both of Blackstone and Hargrave, and show, I think, satisfactorily, that the former is correct in his account of the rent, except in calling it a rent-charge, which it may, but need not necessarily, be.—COLERIDGE.

<sup>45</sup> That is, for such as has 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.—CHRISTIAN.

<sup>46</sup> If the lessor dies before sunset on the day upon which the rent is demandable, it is

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.

It is impossible to understand, with any degree of accuracy, either the civil constitution of this kingdom, or the laws which regulate its landed property, without some general acquaintance with the nature and doctrine of feuds, or the feudal law: a system so universally received throughout Europe upwards of twelve centuries ago, that Sir Henry Spelman<sup>(a)</sup> does not scruple to call it the law of nations in our western world.<sup>1</sup> 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 scholarlike, scientific 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<sup>(b)</sup> had its original from the military policy [ \*45 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,<sup>(c)</sup> 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.<sup>(d)</sup> These allotments were called *feoda*, feuds, fiefs, or fees; which last appellation in the

(\*) Of Parliaments, 57.

(b) See Spelman, of feuds, and Wright, of tenures, *per tot.*

(c) *De jure feud.* 19, 20.

(d) Wright, 7.

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, 178.

—CHRISTIAN.

<sup>1</sup>An intimate acquaintance with the feudal 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 feudal 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.—CHRISTIAN.

But Mr. Preston shows, 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.—CHITTY.



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*)<sup>2</sup> and in case of the breach of this condition and oath, by not performing the stipulated service, or by deserting the lord in battle, the lands were again to revert to him who granted them.(*h*)

Allotments, thus acquired, mutually engaged such as accepted them to defend \*46] 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 feudal connection was esta-

(*e*) Spelm. Gloss. 216.

(*f*) Pontoppidan, in his History of Norway, page 290, observes that in the northern languages *odh* signifies *proprietas* and *allotum*. Hence he derives the *odal* 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, *aloth*,<sup>3</sup> 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,) *feodh* or *feodum* will denote stipendiary property.

(*g*) See this oath explained at large in *Feud. l. 2, t. 7.*

(*h*) *Feud. l. 2, t. 24.*

<sup>2</sup> 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; and therefore foreign jurists frequently consider them as synonymous. But in our law, whilst *both* continued, they were in some respects 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 (he 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. II. st. 3, which enactment abundantly proves the distinct nature of the two acknowledgments at that time.—CHITTY.

<sup>3</sup> This is the same as *all-hood* in English, and is suggested as the derivation of *allodium* in Woll. Religion of Nat. del. p. 136.

This unquestionably is the true etymology, though Dr. Robertson adopts the derivation of *allodium* from *an* and *lot*, or allotment,—the mode of dividing what was not granted as stipendiary property; and he relates the memorable story of the fierce soldier who refused to grant a sacred vase to his general, Clovis, the founder of the French monarchy, who wished to return it, at the request of the bishop, to the church from which it had been taken as spoil, by striking it violently with his battle-axe, and declaring that "you should have nothing but that to which the lot gives you a right." Hist of Ch. V., 1 vol. notes<sup>7</sup> and 8.—CHRISTIAN.

blished, 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.<sup>4</sup>

The universality and early use of this feudal 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 era. They demanded of the Romans, "*ut martius populus aliquid sibi terrae daret, quasi stipendium; cæterum, 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 Sali, Burgundians, and Franks broke in upon Gaul, the Visigoths on \*Spain, and the Lombards upon Italy; [\*47 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 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, on condition of receiving military service from them and their heirs forever.

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 feudal obligations of military fealty.(m)

(i) Wright, 8.

(k) L. Florus. l. 3, c. 3.

(l) "*Sola, quæ de hostibus capta sunt limitaneis ducibus et militibus donavit; ita ut eorum ita essent, si hæredes illorum militarent, nec unquam ad privatos pertinerent; dicens aliter illos militaturos, si etiam sua rura defenderent.* Ad-

*didit sane his et animalia et servos, ut possent colere quod acceperant; ne per inopiam hominum vel per senectutem desererentur rura vicina barbariæ, quod turpissimum illis ducebat.*" EL. Lamprid. in vita Alex. Severi.

(m) Wright, 10.

<sup>4</sup> Mr. Hallam's account of the origin of the feudal system is different from that in the text. His idea is that the first division of lands was allodial; but that, the sovereign gradually granting out his lands as *beneficia*, with the mutual obligation of protection and defence, the allodial proprietor soon found his condition an insecure one in the state of society which then existed, and willingly came under the obligation of rendering feudal services in exchange for the powerful protection of the sovereign. "Mr. Hallam mentions a custom," says Mr. Justice Coleridge, "which, as occasioned by the same state of society, certainly adds some credit to this theory: I mean the custom of commendation. This was a kind of personal feudism. The lord was bound to protect the person and his lands who so commended himself to him, for which he received a stipulated sum of money, called *salvamentum*. The vassal performed homage; but the connection had no reference to land, was not always burdened with the condition of military service, and seems to have been capable of dissolution at the pleasure of the vassal." This judicious annotator gives his assent to Mr. Hallam's account, and adds, "It is not surprising, however, that English lawyers should have adopted an opposite theory; because, in England, the system, as a whole, was introduced at once by a powerful and politic sovereign, who made it—what they assert it always was—a great political measure of military defence. William received the fealty not only of his own vassals,—those who held of him in chief,—but of their vassals also; and thenceforward the oath of fealty to a subject in England was accompanied with the reservation to be found in Littleton's Precedent, given in s. 85, *Salve la foy, que jeo doy a nostre seigneur le roy.*"—SHARSWOOD.

And thus, in the compass of a very few years, the feudal constitution, or the doctrine of tenure, extended itself over all the western world.<sup>5</sup> Which alteration of landed property, in so very material a point, necessarily drew after it an alteration of laws and customs: so that the feudal laws soon drove out the Roman, which had hitherto 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.*(n)

\*48] But this feudal polity, which was thus by degrees established over all the continent of Europe, seems not to have been received in this part of our island, at least not universally, and as a part of the national constitution, till the reign of William the Norman.(o) Not but that it is reasonable to believe, from abundant traces in our history and laws, that even in the times of the Saxons, who were a swarm from what Sir William Temple calls the same northern hive, something similar to this was in use; yet not so extensively, nor attended with all the rigour that was afterwards imported by the Normans. For the Saxons were firmly settled in this island, at least as early as the year 600: and it was not till two centuries after, that feuds arrived at their full vigour and maturity, even on the continent of Europe.(p)

This introduction however of the feudal tenures into England, by king William, does not seem to have been effected immediately after the conquest, nor by the mere arbitrary will and power of the conqueror; but to have been gradually established by the Norman barons, and others, in such forfeited lands as they received from the gift of the conqueror, and afterwards universally consented to by the great council of the nation, long after his title was established. Indeed, from the prodigious slaughter of the English nobility at the battle of Hastings, and the fruitless insurrections of those who survived, such numerous forfeitures had accrued, that he was able to reward his Norman followers with very large and extensive possessions: which gave a handle to the monkish historians, and such as have implicitly followed them, to represent him as having by right of the sword 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 feudal acceptation signifies no more than *acquisition*;<sup>6</sup> and this has led many hasty writers into a strange historical mis-

(n) Gravin. *Orig.* l. 1, § 139.

(o) Spelm. *Gloss.* 218. Bract. l. 2, c. 16, § 7.

(p) Crag. l. 2, t. 4.

<sup>5</sup> The feudal constitutions and usages were first reduced to writing about the year 1150, by two lawyers of Milan, under the title of *consuetudines feudorum*, and have been subjoined 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.—CHITTY.

<sup>6</sup> 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

take, and on which, upon the slightest examination, will \*be found to be most untrue. However, certain it is, that the Normans now began [\*49 to gain very large possessions in England; and their regard for the feudal 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, which was finished in the next year: and in the latter end of that very year the king was attended by all his nobility at Sarum; where all the principal landholders submitted their lands to the yoke of military tenure, became the king's vassals, and did homage and fealty to his person.(s) This may possibly have been the era of formally introducing the feudal 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 [50 words:—"Statuimus, ut omnes liberi homines federe et sacramento affirmant, 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 feudal: for, first, it requires the oath of fealty, which made, in the sense of the feudists, every man that took it a tenant or vassal: and, secondly, the tenants obliged themselves to defend their 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 feudal 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 prædicti."

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 pre-

(q) A.D. 1085.

(r) *Rez tenuit magnum concilium, et graves sermones habuit cum suis proceribus de hac terra; quo modo incoleretur, et a quibus hominibus.* Chron. Sax. *ibid.*(s) *Omnes prædicia tenentes, quotquot essent notæ melioris per totam Angliam, ejus homines facti sunt, et omnes se illi**subdidere, ejusque facti sunt vasalli, ac ei fidelitatis jura-menta præstiterunt, se contra alios quoscumque illi ad- futuris.* Chron. Sax. A.D. 1086.

(t) Cap. 52. Wilk. 228.

(u) Tenures, 66.

(w) Cap. 58. Wilk. 288.

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.—CHITTY.

viously 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)<sup>1</sup> The only difference between this change of tenures in France, and \*51] that in England, was, that the former was effected gradually \*by the consent of private persons; the latter was done at once, all over England: by the common consent of the nation.(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 feudal services." For this being the real case in pure, original, proper feuds, other nations who adopted this system were obliged to act upon the same supposition, as a substraction and foundation of their new polity, though the fact was indeed far otherwise. And, indeed, by thus consenting to the introduction of feudal tenures, our English ancestors probably meant no more than to put the kingdom in a state of defence by establishing a military system; and to oblige themselves (in respect of their lands) to maintain the king's title and territories, with equal 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 feudal constitutions, and well understanding the import and extent of the feudal 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, but had barely \*52] 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 feudal 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 feudal 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 further 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

(\*) 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 fut en luy, et vint de luy at commencement. M. 2<sup>e</sup> Éd. III. 65.*

(\*) Spelm. of feuds, c. 28.

(y) Wright, 81.

(c) L. L. Hen. I. c. 1.

(d) 9 Hen. III.

<sup>1</sup> I do not understand Montesquieu, in the chapter cited, to say that all the allodial lands in France were surrendered up into the king's hands and taken again as fiefs. Down to a late period, the presumption of law in the southern provinces of France as to land was that it was allodial until the contrary was shown. See Hallam's Middle Ages, ch. 2, part 1.—COLERIDGE.

granted: but this, properly considered, will show, not that the acquisitions under John were small, but that those under Charles were greater. And from hence also arises another inference; that the liberties of Englishmen are not (as some arbitrary writers would represent them) mere infringements of the king's prerogative, extorted from our princes by taking advantage of their weakness; but a restoration of that ancient constitution, of which our ancestors had been defrauded by the art and finesse of the Norman lawyers, rather than deprived by the force of the Norman arms.

\*Having given this short history of their rise and progress, we will next consider the nature, doctrine, and principal laws of feuds; wherein [ \*53 we shall evidently trace the groundwork of many parts of 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 feudal tenure is this: that all lands were originally granted out by the sovereign, and are therefore holden, either mediately or immediately, of the crown. The grantor was called the proprietor, or *lord*: being he who retained the dominion or ultimate property of the feud or fee; and the grantee, who had only the use and possession, according to the terms of the grant, was styled the 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.<sup>8</sup> 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 era of the new acquisition, at a time when the art of writing was very little known; and therefore the evidence of property was reposed in the memory of the neighbourhood; who, in case of a disputed title, were afterwards called upon to decide the difference, not only according to external proofs, adduced by the parties litigant, but also by the internal testimony of their own private knowledge.

Besides an oath of *fealty*,<sup>9</sup> or profession of faith to the lord, which was the

<sup>8</sup> 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.—CHRISTIAN.

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?—CHITTY.

<sup>9</sup> See *ante*, note 2 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 tenant the homage was scarce of less importance; for, anciently, every kind of homage, when received, but not before, bound the lord to keep

parent of our oath of allegiance, the vassal or tenant upon investiture did usually *homage* to his lord; openly and humbly kneeling, being ungirt, un\*54] covered,\*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 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 twofold; 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 court 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 feudal 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 reserving to themselves\*55] (in \*almost every feudal government) the right of appeal from those subordinate courts in the last resort. The military branch of service consisted in attending the lord to the wars, if called upon, with such a retinue, and for such a number of days, 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 for the *life* of the feudatory.(k) But still feuds were not yet *hereditary*; though frequently

(e) Litt. § 85.

(f) It was an observation of Dr. Arbuthnot that tradition was nowhere 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, 58. 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 *basilinda* of Julius Pollux, *Onomastic*, l. 9, c. 7) the ceremonies and language of feudal 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 coherunt, quantum eis et quo loco vitium est, attribunt agri, atque anno post alio transire cogunt.*"

(k) Feud. l. 1, t. 1.

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 *uncestrel* Hargrave's note to Co. Litt. 67, b.—CHITTY.

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 of performing the services: (l) and therefore infants, women, and professed monks, who were incapable of \*bearing arms, were also incapable of succeeding to a genuine feud. But the heir, when admitted to the feud which his ancestor possessed, used generally to pay a fine or 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 \*a divisible nature, but could only be inherited by the eldest 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 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

(l) Wright, 14.

(m) Ibid. 17.

(n) Ibid. 183.

(o) Feud. 2, t. 55.

(p) Wright, 32.

(q) Ibid. 23.

(r) Ibid. 30.



distraction: which returns, or *reditus*, were the original of rents, and by these means the feudal polity was greatly extended; these inferior feudatories (who held what are called in the Scots law "re-re-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 \*58] 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 license; 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)

But as soon as the feudal system came to be considered in the light of a civil establishment, rather than as a military plan, the ingenuity of the same ages, which perplexed all theology with the 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.<sup>10</sup>

(s) Wright, 20.

(t) Feud. 2, t. 7.

<sup>10</sup> This, for so concise a treatise, is perhaps the most luminous that has been written upon the subject of the feudal system. However, in addition to it, I should strongly recommend to the student's perusal the treatise on feuds and tenures by knight-service among the posthumous works of Sir Henry Spelman, Dalrymple on Feudal Property, and a very elaborate note upon the subject by Mr. Butler, among his annotations upon Coke Littleton. Co. Litt. 191, a.—ARCHBOLD.

Upon the subject of the feudal system, its rise and decline, its spirit, and the comparative evils and benefits of which it was the cause, I cannot do better than refer the reader to Mr. Hallam's masterly disquisition, Middle Ages, ch. 2, part 2.—COLERIDGE.

Upon the subject of this and the following chapters the student is recommended to study the excellent Essay on Feudal Property, by Sir John Dalrymple, an author who, notwithstanding some errors on antiquarian points of little importance, cannot be too highly praised for the philosophical accuracy and elegance with which he has treated a subject that most writers contrive to render extremely obscure and repulsive.—SWEET.

I may be allowed to add that Sullivan's Lectures on Feudal Law is a work copious in detail, and exhibiting ably, among other topics, the influence of the feudal system upon the modern law of tenures. Sir Martin Wright's Introduction to the Law of Tenures is one of the most accurate and profound of the essays on this topic, and is worthy of the most attentive study. Craig de Feudis, lord Mansfield thought, was much to be preferred to any juridical work which England had then produced. The thirtieth and thirty-first books of Montesquieu's Spirit of Laws may be read with advantage, as also Robertson's History of Charles V., and an excellent Lecture on Feudal Law—Lect. X.—in Hoffman's Legal Outlines.—SHARSWOOD.

CHAPTER V.

OF THE ANCIENT ENGLISH TENURES

In this chapter we shall take a short view of the ancient tenures of our English estates, or the manner in which lands, tenements, and hereditaments, might have been holden, as the same stood in force, till the middle of the last century. In which we shall easily perceive, that all the particularities, all the seeming and real hardships, that attended those tenures, were to be accounted for upon 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,<sup>1</sup> and, thus partaking of a middle nature, were called *mesne*, or middle, lords. So that if the king granted a manor to A., and he granted a portion of the land to B., now B. was said to hold \*of A., and A. of the king; or, in other words, B. held his lands immediately of A., but mediately of the king. The king therefore was styled lord paramount; A. was both tenant and lord, or was a *mesne lord*: and B. was called tenant *paravail*, or the lowest tenant; being he who was supposed to make avail, or profit of the land.<sup>(a)</sup> In this manner are all the lands of the kingdom holden, which are in the hands of subjects: for, according to Sir Edward Coke,<sup>(b)</sup> in the law of England we have not properly *alodium*; which, we have seen,<sup>(c)</sup> 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.<sup>(d)</sup> This distinction 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 nature 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 a freeman to perform; \*as to serve under his lord in the wars, to pay a sum of money, and the like. *Base* services

(a) 1 Inst. 206.

(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 the *immediate states* of the empire,—all other landholders being denominated *mediate* ones. Mod. Un. Hist. xliii. 61.

<sup>1</sup> 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 show that they still retained the *dominium directum* in themselves. Madox, Hist. Exch. c. 10. Craig de Feud. l. 1, c. 9.—CHITTY.

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 any 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 tenure in \*62] *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 *villanous* 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 *certainity*, 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.

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 *Mirroure*. (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 feudal establishment in England. To make a tenure by knight-service, a determinate quantity of land was necessary, which was called a knight's fee, *feodum militare*; the measure of which in 3 Edw. I. was estimated at twelve plough-lands, (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*.<sup>2</sup> And he who held this proportion of land (or a whole fee) by

(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) Villenagium aliud purum, aliud privilegiatum. Qui tenet in puro villenagio facit quicquid ei preceptum fuerit, et semper tenetur ad incerta. Aliud genus villenagi dicitur

villanum socagium; et hujusmodi villani socmanni—villana faciunt servitia, sed certa, et determinata. § 5.

(h) Spelm. Gloss. 219.

(i) G. 2, § 27.

(k) Pusch. 3 Edw. I. Co. Litt. 60.

(l) 2 Inst. 596.

(m) Stat. Westm. 1, c. 36. Stat. de milit. 1 Edw. II. Co. Litt. 69.

<sup>2</sup> 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 everywhere of the same value.—CHRISTIAN.

Upon the questions of the extent and value of a knight's fee there are many opinions, and it seems hardly possible in the present day to arrive at any certainty. With regard to the value it varied undoubtedly; but it can hardly be said to have varied "with the

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, that this service was the whole that our ancestors [\*63 meant to subject themselves to; the other fruits and consequences of this tenure being fraudulently superinduced, as the regular (though unforeseen) appendages of the feudal system.

This tenure of knight-service had all the marks of a strict and regular feud: it was granted by words of pure donation, *dedi et 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 show to be of feudal original.<sup>3</sup>

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 feudal 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 feudal 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 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 \*their income [\*64 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 encumbrances.<sup>4</sup> 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

(\*) See writs for this purpose in *Memorand. Scacch.* 36, prefixed to Maynard's Year-book, Edw. II.

(\*) Litt. § 95.

(\*) Co. Litt. 9.

(\*) *Auzilia fiunt de gratia, et non de jure,—cum depen-*

*deant ex gratia tenentium, et non ad voluntatem dominorum* Bracton, l. 2, tr. 1, c. 16, § 8.

(\*) *Feud. l. 2, t. 21.*

(\*) 2 Inst. 233.

(\*) Phillip's Life of Pole, l. 223.

times," if the writs as cited by lord Coke (2 Inst. 596) can be depended upon. The fluctuation in them is so uncertain and extraordinary that it cannot be accounted for by any change in the times. With regard to the extent, we can have no hesitation in assenting to the doctrine that it varied with the goodness of the land: at the same time the measure might be the same, as twelve plough-lands of rich soil would contain a less space than the same number in a lighter and less productive soil. There might, therefore, be always the same number of plough-lands, though the number of acres might vary; nor is it at all inconsistent with this that there might be appendant to the plough-lands wood, meadow, and pasture; for the arable land was the principal thing considered in all ancient agriculture; wood, meadow, and pasture were appendages, furnishing the estovers and botes of the tenant of the arable land.—COLERIDGE.

<sup>3</sup> 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.—CHRISTIAN.

<sup>4</sup> By the statute Westm. 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.—CHITTY.

particular the great resemblance which the lord and vassal of the feudal law bore to the patron and client of the Roman republic; between whom also there subsisted a mutual fealty, or engagement of defence and protection. 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 feudal 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 any wise 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. I, 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.

2. Relief, *relevium*, was before mentioned as incident to every feudal 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 respectively; and if the latter had no arms, they should pay 100s. William Rufus broke through this composition, and again demanded arbitrary uncertain reliefs, as due by the feudal 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, \*66] \*and ordained that the relief to be paid 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 100s. 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.

(u) *Erat autem hæc inter utrosque officiorum vicissitudo— ut clientes ad collocandas senatorum filias de suo conferrent; ut æris alieni dissolutionem gratulam pecuniam erogarent; et ab hostibus in bello captos redimerent.* Paul Manutius de *Senatu Romano*, c. 1.

(v) Cap. 12, 13.

(w) *Ibid* 15.

(x) *Ibid* 14.

(y) Wright, 99.

(z) C. 22, 23, 24.

(a) 2 Roll. Abr. 51a

(b) "*Hæres non redimet terram suam sicut faciebat tempore fratris mei, sed legitima et justa relevatione relevabit eam.*" Text. Roffens. cap. 34.

(c) Glanv. l. 9, c. 4. Litt. § 112.

3. *Primer seisin* was a feudal 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 seized 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.<sup>(d)</sup> This seems to be little more than an additional relief, but grounded upon this feudal 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.<sup>(e)</sup> 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 seisin* was expressly declared, under Henry III. and Edward II., to belong to the king by prerogative, in contradistinction to other lords.<sup>(f)</sup> The king was entitled to enter and receive the \*whole profits of the land, [\*67 till livery was sued; which suit being commonly made within a year and day next after the death of the tenant, in pursuance of the strict feudal rule, therefore the king used to take as an average the *first-fruits*, that is to say, one year's profits, of the land.<sup>(g)</sup> And this afterwards gave a handle to the popes, who claimed to be feudal 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 *primitiæ*, 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,<sup>(h)</sup> 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.<sup>(i)</sup>

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

<sup>(d)</sup> Co. Litt.

<sup>(e)</sup> Feud. l. 2, t. 24,

<sup>(f)</sup> Stat. Marib. c. 16, 17 Edw. II. c. 3.

<sup>(g)</sup> Staundf. Prerog. 12.

<sup>(h)</sup> Litt. § 103.

<sup>(i)</sup> Litt. § 103.

<sup>5</sup> According to lord Coke, (2 Inst. 204,) it is not quite correct to say that the lord might keep her *in ward* for two additional years: he had the land by the statute, but the guardianship was at an end. The distinction was not merely a verbal one; for, being no longer guardian, he was not liable to the actions in respect of the lands which, as guardian, he must have answered. For example, the widow of the last tenant could not bring her writ of dower against him. On the other hand, he had not all the established rights of a guardian against the heir; and therefore, if he tendered her a marriage during the two years and she contracted a marriage elsewhere, there lay no forfeiture of the value of the marriage against her.

It is necessary, also, to make another qualification of the text; for the statute did not apply if the heir-female was married, though under fourteen, the two years being given to the lord ostensibly not so much for his benefit as that during that time he might find his ward a proper husband; and therefore if he married her within the two years he immediately lost the land. 2 Inst. 203. On the other hand, the capability of marriage at fourteen, and the performance of the service by the husband, were not the sole reasons for limiting his wardship to that age, because by law she might marry at twelve; and if she had so done, and her husband were able to perform the service, still, the lord would have the wardship of the land till her age of fourteen. Co. Litt. 79.—COLERIDGE.

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

\*68] by the lord, that he might out of the profits thereof provide a fit person \*to supply the infant's services, till he should be of age to perform them himself.\* 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 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 profit 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 \*69] fortune) the value of his estate, the tenure by which it was \*holden, and who and of what age his heir was; thereby to ascertain the relief and value of the primer seisin, or the wardship and livery accruing to the king thereupon. A manner of proceeding that came in process of time to be greatly abused, and at length an intolerable 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 heroic 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

(\*) Co. Litt. 77.

(†) 9 Hen. III. c. 3.

(\*) Co. Litt. 77.

(\*) Hoveden, *sub Ric. I.*

(\*) 4 Inst. 198.

(\*) Stat. 32 Hen. VIII. c. 45

\* 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 third chapter of Magna Charta. 2<sup>d</sup> Inst. 11, 12. Sir Drew Drury's case, 6 Rep. 74, 75.—Chirry.

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 feudal knighthood. (r) This prerogative, of compelling the king's vassals<sup>1</sup> to be knighted, or to pay a fine, was expressly recognised in parliament by the statute *de militibus*, 1 Edw. 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 \*that unhappy [\*70 prince, before the fatal recourse to arms, he agreed to divest himself of this undoubted power 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 feudal sense signifies the power which the lord or guardian in chivalry had of disposing of his infant ward in matrimony. For, while the infant was in ward, the guardian had the power of tendering him or her a suitable match, without *disparagement* or inequality; which if the infants refused, they forfeited the value of the marriage, *valorem maritagi*, 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 maritagi*. (u)<sup>8</sup> 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 feudal original; the most probable account of it seeming to be this: that by the custom of Normandy the lord's consent was necessary to the marriage of his *female* wards; (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 give, provided such female ward were not \*married to his enemy. But this, among other beneficial parts of that [\*71 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, "*hæredes maritentur absque disparagatione*:" meaning certainly, by

(q) Book. i. p. 404.

(r) "*In ipso concilio vel principum aliquis, vel pater, vel propinquus, scuto frameaque juvenem ornant. Hæc apud illos toga, hic primus juvenis honos: ante hoc domus pars videtur; mox reipublicæ.* De Mor. Germ. cap. 13.

(s) Litt. § 110.

(t) Stat. Mert. c. 6. Co. Litt. 82.

(w) Litt. § 110.

(x) Bract. 1. 2. c. 37, § 6.

(y) Gr. Coust. 95.

(z) Cap. 6, edit. Ozon.

(a) Cap. 3, ibid.

(c) Cap. 6.

<sup>1</sup> I do not find that this prerogative was 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. Fœd. 124 and 493. See 16 Car. I. c. 20. 2 Rushw. 70; and book i. p. 404.—CHRISTIAN.

<sup>8</sup> That is, after a suitable match had been tendered by the lord; but female heirs were not subject to the *duplex valor maritagi*. Co. Litt. 82, b.—CHRISTIAN.



*hered.*s, heirs female, as there are no traces before this to be found of the lord's claiming the marriage(*b*) of heirs-male; and as Glanville(*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 femina*, 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.<sup>9</sup>

6. Another attendant or consequence of tenure by knight-service was that of *fin*es 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 feudal connection; 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 \*72] feo\*dal obligation was considered 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 license to their tenant to aliene, without a fine being paid; apprehending that, if it was reasonable for the heir to pay a fine or relief on the renovation of his paternal estate, it was much more reasonable that a stranger should make the same 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 license: but as to common persons, they were at liberty by *magna carta*(*g*)<sup>10</sup> and the statute of *quia emptores*(*h*) (if not

(b) The words *maritare* and *martagium* seem *ex vi termini* to denote the providing of a husband.

(c) L. 9, c. 9 and 12, and l. 9, c. 4.

(d) L. 2, c. 38, § 1.

(e) Wright, 97.

(f) 2 Hen. III. c. 6.

(g) Cap. 32.

(h) 18 Edw. I. c. 1.

<sup>9</sup> 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 Unfraville, 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 salable 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 era in the history of our law and liberty.—CHRISTIAN.

<sup>10</sup> Our author has the high authority of lord Coke in support of his opinion that the right of the tenants of common persons to aliene their lands without a license was recognised by *magna carta*. 1 Inst. 43, a. 2 Inst. 65, 501. This recognition, however, is not distinctly expressed in the charter, and the construction of lord Coke and of Blackstone 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. o. Eng. 171. Wright's Law of Ten. 158. Sullivan's Lect. 385.—CHITTY

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 license; for if they did, it was in ancient strictness an absolute forfeiture of the land,<sup>(i)</sup> 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 license of alienation; but if the tenant presumed to aliene without a license, a full year's value should be paid.<sup>(k)</sup><sup>11</sup>

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,<sup>12</sup> whereby every inheritable quality

(i) 2 Inst. 66.

(k) *Ibid.* 67.

<sup>11</sup> This is not quite correctly stated. The chapter of *magna carta* was made in restraint of a practice which tenants had got into of aliening a part or whole of their fees to *hold of themselves*; and it enacts that for the future no man shall aliene more of his *land* than that of the residue of the services due to the lord for the whole *fee* may be sufficiently answered. The construction of this was (see Sir M. Wright, p. 157) that the part allowed to be aliened was to be holden of the alienor and not of the lord: indeed, upon feudal principles, the services of the feoffee naturally resulted to his feoffor; the tenure was of him, and there were good feudal reasons for not violating those principles: so long as the part aliened was held of the alienor, no new tenant was obtruded on the lord; and as the lord's seignory was originally reserved over the whole land, he might still distrein over the whole, or in any part, though aliened, for the whole undivided services. While the feudal system was more strictly regarded with reference to its proper objects, these advantages counterbalanced the disadvantages in respect of pecuniary fruits, which flowed from the practice of subinfeudation, but which in their turn, as the system grew more lax, prevailed, and gave occasion to the statute of *quia emptores*. The policy of this statute was contrary to that of the chapter of *magna carta* above cited: it was found (see *post*, p. 91) that the process of alienation with the tenure reserved to the alienor very sensibly diminished the value of the lord's escheat, marriage, and wardship; because they operated beneficially to him only on the portion of land reserved, and not on that granted out, while the alienor derived all these fruits as they arose from the portion so granted out. It was then thought by the lords better to submit to the inconvenience of new tenants being obtruded on them without their consent, which was grown to be imaginary only, than, for the sake of retaining a nominal tenant, to lose the substantial fruits of the tenure. It was now too late to restrain alienation entirely; and therefore the only course which remained was that adopted,—to permit it in whole or in part, with a reservation only of the tenure to the next immediate lord (2 Inst. 501) by the same services and customs by which it had been before held by the alienor.

With respect to the question of forfeiture, it is curious that lord Coke should be cited apparently in support of the opinion that alienation by the tenants *in capite* without license involved a forfeiture; for at 2 Inst. 66, stating both opinions, he declares his own to be in the negative; and, as Sir M. Wright thinks, (p. 154,) erroneously. This gives me occasion to say that it is of the utmost importance, in discussing any point relating to the feudal system, to determine the *time* which is spoken of: thus, according to feudal principles, and *while* those principles were *strictly* maintained, alienation without license must have involved forfeiture; for the tenant of course could not have compelled the lord to receive the homage and fealty of a new tenant, and by his own act he had renounced his own holding. But it is obvious that there was always a struggle in the advancing spirit of the age to loosen the bonds of feudal tenure; and it may not be possible to fix the period at which the *practice* of alienation became too strong for the law, and, being first winked at, was finally legalized.

Under the statute 1 Eliz. c. 12, the fines in both cases were to be paid by the alienee.—  
COLERIDGE.

<sup>12</sup> 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.—CHITTY.

\*73] 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 feudal 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, showed 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's service proper, which was to attend the king in his wars. There were also some other species of knight's 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's service proper, and because they were attended with similar fruits and consequences. Such was the tenure by *grand serjeanty*,<sup>13</sup> *per 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;<sup>14</sup> 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 \*74] 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*,<sup>15</sup> which was to wind a horn when the Scots or other enemies entered the land, in order to warn

(l) Co. Litt. § 13.

(m) Feud. l. 2, t. 86.

(n) 2 Inst. 192.

(o) Litt. § 153.

(p) Ibid. § 153.

(q) 2 Inst. 233.

(r) Litt. § 158.

(s) Ibid. § 154.

<sup>13</sup> Mr. Hargrave (note 1 to Co. Litt. 108, a.) observes that the tenure by grand serjeanty still continues, though it is so regulated by the 12th of Car. 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.—CHITTY.

<sup>14</sup> Perhaps, more correctly, "to do some special honorary service in person to the king;" the general rule being that it was to be done personally by the tenant, if able, though there are many instances in which it was not to be done to the king in person. This may explain why he who held by grand serjeanty paid no escuage. The devout attachment to the lord's person, which was so much fostered by the feudal system, is in none of its minor consequences more conspicuous than in the nature of the personal services which the haughtiest barons were proud to render to their lord paramount. To be the king's butler or carver, are familiar instances. Mr. Madox mentions one more singular,—of a tenure in grand serjeanty by the service of holding the king's head in the ship which carried him in his passage between Dover and Whitsand. Baronia, 3, c. 5.—COLERIDGE.

<sup>15</sup> "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.—CHITTY.

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.<sup>16</sup> 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 Henry II. seem to have been made arbitrarily, and at the king's pleasure. Which prerogative being greatly abused by his successors, it became matter of national clamour; and king John was obliged to consent, by his *magna carta*, that no scutage should be imposed without consent of parliament.(u) But this clause was omitted in his son Henry III.'s charter, where we 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 scutago 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 feudal constitution were de-

(t) Litt. § 156.  
 (u) *Nullum scutagium ponatur in regno nostro, nisi per commune consilium regni nostri.* Cap. 12.  
 (v) Cap. 37.  
 (w) See book I. p. 140.

(x) Old Ten. tit. *Escuage*.  
 (y) § 103.  
 (z) Wright, 122.  
 (a) *Pro feodo militari reputatur.* Flet. L 2, c. 14, § 7.  
 (b) Litt. § 97, 120.

<sup>16</sup> 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.—CHRISTIAN.

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.—CHRIST.

stroyed, and nothing but the hardships remained. Instead of forming a national militia composed of barons, knights, and gentlemen, bound by their interest, their honour, and their oaths, to defend their king and country, the whole of this system of \*tenures now tended to nothing else but a wretched means \*76] 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 further, he was yet to pay half a year's profits as a fine for suing out his *livery*; and also the price or value of his *marriage*, if he refused such wife as his lord and guardian had bartered for, and imposed upon him; or twice that value if he married another woman. Add to this the untimely and expensive honour of *knighthood*, to make his poverty more completely splendid. And when, by these deductions, his fortune was so shattered and ruined that perhaps he was obliged to sell his patrimony, he had not even that poor privilege allowed him, without paying an exorbitant fine for a *license 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 \*77] \*proceeded not to effect; in like manner as he had formed a scheme, and begun to put it in execution, for removing the feudal grievance of heritable jurisdiction in Scotland,(f) which has since been pursued and effected by the statute 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." And that all sorts of tenures, held of the king or

(d) Commonw. l. 3, c. 3.

(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 ward-holding (equivalent to the knight-service of England) is forever abolished in Scotland.

<sup>11</sup> 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. 103, 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

others, be turned into free and common socage; save only tenures in frankalmoign, copyhold, 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 than 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.

## 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 feudal 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 feudal 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.<sup>1</sup>

*capite* are not only turned into a tenure in socage, (though that alone will forever 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." Jour. Dom. Proc. 11 vol. 234.—CHRISTIAN.

<sup>1</sup>The tenure prescribed in all the early colonial charters or patents of this country was free and common socage, being "according to the free tenure of lands in East Greenwich in the county of Kent, in England; and not *in capite* or by knight's service." See the great patent of New England, granted by king James in 1620; the charter of Massachusetts, in 1629; the prior charter of Virginia, in 1606; the charter of the Province of Maine, in 1639; the Rhode Island charter, in 1663; the Connecticut charter, in 1662; the Maryland charter, in 1632: the act of the General Assembly of the Colony of New York of 13th May, 1691; (Bradford's edit. of Colony Laws, printed 1719;) the charter of Pennsylvania, in 1681; the patent of 1662 of Carolina; the charter of Georgia, in 1732. These charters, or the substance of them, are to be seen in most of our early colonial documentary collections, annalists, and historians; and the substance of them is accurately condensed and stated in Story's Commentaries on the Constitution of the United States, vol. 1. Kent, vol. 3, 571, note.

In those States in which, by express legislative enactment, lands have not been declared allodial, while tenure exists it is only in theory. All lands are supposed to be held mediately or immediately, of the State, which has succeeded by the Revolution to the feudal position of paramount lord before that period occupied by the crown. Escheat in most of the States is regulated by statute. In *Cornell vs. Lamb*, 2 Cowen, 652, it was declared by Woodworth, J., that fealty was not in fact due on any tenure in the State of New York, and had become altogether fictitious. In Pennsylvania, it has been decided that the statute of *quia emptores* was never in force, and subinfeudation always lawful; and though there are some opinions that tenures fell with the Revolution, yet all agree that they existed before, and the better opinion appears to be that they still exist. The principles of the feudal system, in truth, underlie all the doctrines of the common law in regard to real estate, and wherever that law is recognised recourse must be had to feudal principles to understand and carry out the common law. The necessity of words of limitation in deeds,—the distinction between words of limitation and words of purchase,—the principle that the freehold shall never be in abeyance, that a remainder must vest during the continuance of a particular estate or *eo instanti* that it determines, that the heir cannot take as a purchaser an estate the freehold of which by the same deed is vested in the ancestor,—and many more rules and principles of very great practical im-

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 an absolute certainty: And this tenure not \*79] 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 serjeantry, "*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 magnæ serjantiæ 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 whatsoever 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 20s. rent; or, by homage, fealty, and 20s. 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-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 \*80] to speak; and this, both in the \*nature of its service, and the fruits and consequences appertaining thereto, was always by much the most free and independent species of any. And therefore I cannot but assent to Mr. Somner's etymology of 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

(a) L. 2, c. 16, § 9.

(b) L. 3, c. 14, § 9.

(c) § 117.

(d) § 118.

(e) L. 147.

(f) Litt. 117, 118, 119.

(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 any man is infeft freely," &c.

(k) Litt. § 119.

(l) § 118.

importance, and meeting us at every turn in the American as well as the English law of real estate,—are all referrible to a feudal origin. "The principles of the feudal system," said chief-justice Tilghman, "are so interwoven with our jurisprudence that there is no removing them without destroying the whole texture." *Lyle vs. Richards*, 9 S. & R. 333. "Though our property is allodial," said chief-justice Gibson, "yet feudal tenures may be said to exist among us in their consequences and the qualities which they originally imparted to estates; as, for instance, in precluding every limitation founded on an abeyance of the fee." *McCall vs. Neely*, 3 Watts, 71. See *Ingersoll vs. Serjeant*, 1 Whart. 337. *Hubley vs. Vanhorne*, 7 S. & R. 188. *Hileman vs. Bonsbaugh*, 1 Harris, 351.—

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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 esouage, 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.<sup>(m)</sup> 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*,<sup>(n)</sup> 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 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.<sup>2</sup>

(\*) Litt. § 93, 120.

(n) C. 66.

<sup>2</sup>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, eorem veniã fusiùs a me jam monitum in tractatu de gavelkind, cap. 4, Somn. Gloss. Socæ.* 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. Our most ancient writers derive it from *soca* or *soccus*, a plough; and *soc*, in some parts of the north of England, is the common name for a ploughshare to this day. The following description of *socage* is given by Bracton:—*Dici poterit socagium à socco, et inde tenentes sokmanni, eo quod deputati sunt, ut videtur, tantummodo ad culturam, et quorum custodia et maritugia 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 ignobue, plebæum vulgare Gall. fief roturier nobili opponitur, et propriè dicimus, quod ignobilibus et rusticis competit, nullo feudali privilegio ornatum, nos socagium dicimus.* Gloss. voc. Feod. And *socagium* he explains by *Gall. roturie, fief roturier. Heretages en roturie.* 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 everywhere 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 non-age, 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 connections, their marriages therefore were an object of indifference to them. Hence.



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 tending to some purpose relative to \*82] the king's person. *Petit serjeanty*, as defined by Littleton,(p) consists in holding lands of the king by the service of rendering to him annually some small implement of war, as a bow, a sword, a lance, an arrow, or the like. This, he says,(q) is but 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*.\*

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 site 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

(o) Wright, 211.

(p) § 159.

(q) § 160.

(r) Cap. 27.

(s) Lib. 7, cap. 3.

(t) § 162.

(u) Litt. §§ 162, 163.

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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.—CHRISTIAN.

\* The tenure of *petit serjeanty* is not named in 12 Car. 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. Haig. 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.—CHITTY.

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 tenants must have been citizens or burghers, the situation 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 burghage: the principal and most remarkable of which is that called *Borough English*,<sup>4</sup> so named in contradistinction as it were to the Norman customs, and which is taken notice of by Glanvil,<sup>(w)</sup> and by Littleton;<sup>(x)</sup> viz., that the youngest son, and not the eldest, succeeds to the burghage tenement on the death of his father. For which Littleton<sup>(y)</sup> 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<sup>(z)</sup> have indeed given a much stranger reason for this custom, as if the lord of the fee had antiently 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.<sup>(a)</sup> 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 father, which one became his heir.<sup>(b)</sup> 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 burghage tenures; as that, in some, the wife shall be endowed of all her husband's tenements,<sup>(c)</sup> 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,<sup>(d)</sup> which, in general, was not permitted after the conquest till the reign of Henry the Eighth; though in the Saxon times it was allowable.<sup>(e)</sup> A pregnant proof that these liberties of socage tenure were fragments of Saxon liberty.<sup>5</sup>

(w) *Ubi supra.*

(x) § 165.

(y) § 211.

(z) § Mod. Pref.

(a) Seld. Tit. of Hon. 2, 1, 47. *Reg. Mag.* l. 4, c. 31.

(b) *Pater cunctos filios adultos a se pellebat, prater unum quem heredem sui juris relinquebat.* *Walsingh. Upod-gm. Neustr.* c. 1.

(c) Litt. § 166.

(d) § 167.

(e) Wright, 172.

<sup>4</sup> See Bac. Abr. 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.—CHITTY.

<sup>5</sup> Custom, if properly pleaded and proved, seems to be conclusive in all questions as to descent in borough English. In *Chapman vs. 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 vs. Malster*, W. Jones, 3<sup>d</sup>); and see Append. to Robins. on Gavelk.;) and it may extend to fee-tail, or any other inheritance. Lord Coke says, (1 Inst. 110, b.,) "If lands of the

The nature of the tenure in *gavelkind*<sup>d</sup> 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.<sup>7</sup> 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."<sup>8</sup>(*i*) 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 \*85] sons together;(l) which was indeed anciently the most usual \*course of descent all over England,(*m*) though in particular places particular customs prevailed.<sup>9</sup> These, among other properties, distinguished this tenure in a

(*f*) Stat. 32 Hen. VIII. c. 29. Kitch. of Courts, 200.

(*g*) *In toto regno, ante ductis adentum, frequens et usitata fuit: postea ceteris adempta, sed privatim quorundam locorum consuetudinibus alii postea regraminans: Cantianis solum integra et inviolata remansit. Analect. l. 2, c. 7.*

(\*) Lamb. Peramb. 614.

(*h*) Lamb. 634.

(*i*) F. N. B. 198. Cro. Car. 561.

(*k*) Litt. § 210.

(*m*) Glanvil. l. 7, c. 3.

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 vs. Stevens*, Cro. Jac. 198. *Reve vs. 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 vs. 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 vs. 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 common law will take it, and not the customary heir. For the remainder, being newly created, could not be considered within the old custom. *Couden vs. Clerk*, Hob. 31. On the other hand, if a man seized 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. *Chester vs. 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 vs. Dixwell*, 1 Atk. 609. *Starkey vs. Starkey*, 7 Bac. Abr. 179. And all gavelkind and borough-English lands are now devisable; but since the statute of frauds (29 Car. II. c. 3) the devise of these, as of other lands, must be in writing.—CHITTY.

<sup>6</sup> See in general *Robinson on Gavelkind*; Bac. Abr. 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*.—CHITTY.

<sup>7</sup> The best historians show 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. Abr. *Gavelkind*, A.—CHITTY.

<sup>8</sup> 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.—CHITTY.

<sup>9</sup> *Gavelkind* and borough English, being customs already acknowledged by law, need

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, which is a service in its nature certain.<sup>(n)</sup> Wherefore by a charter of king John,<sup>(o)</sup> 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*. 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 show that this also partakes very strongly of the feudal nature. Which may probably arise from its ancient Saxon original; since (as was before observed)<sup>(p)</sup> 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 insignificance; 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; till by successive charters of enfranchisement granted to the tenants, which are particularly mentioned by Britton,<sup>(q)</sup> their number and value began [\*86 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 feudal 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 feudal 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.<sup>(r)</sup> Which oath of fealty usually draws after it suit to the lord's court. And this oath every lord, of whom tenements are holden at this day, may and ought to call upon his tenants to take in his court-baron; if it be

(n) Wright, 211.

(o) Spelm. col. vet. leg. 355.

(p) Page 48.

(q) C. 66.

(r) Litt. 22 117, 131.

not be pleaded: it is sufficient to show 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 vs. 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.—CHITTY.

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 \*87] the son and marrying the eldest daughter,(u) which were fixed by the statute of Westm. I, c. 36 at 20s. 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 *quædam præstatio 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 feudal 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 \*88] lord of the fee; because in this tenure, no military or other personal service being required, there was no occasion for the lord to take the profits in order to provide a proper substitute for his infant tenant; but his nearest relation (to whom the inheritance cannot descend) shall be his guardian in 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,<sup>10</sup> as was fully explained, together with the reasons for

(s) Litt. § 130.

(t) *Ex maxime præstandum est, ne dubium reddatur jus domini et vetustate temporis obscuretur. Corvin. jus feud. l. 2. l. 7.*

(u) Co. Litt. 91.

(v) Litt. § 126.

(w) L. 2. c. 37, § 8.

(x) Litt. § 127.

(y) 3 Lev. 145.

(z) Co. Litt. 77.

<sup>10</sup> 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 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 vs. 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,

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 of 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 what they *might*, receive on the infant's behalf; \*lest by some collusion the guardian should have received the value [\*89 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 distinc-

(b) Book I. page 461.  
(c) Litt. § 123. Co. Litt. 89.

(d) Litt. § 123.  
(e) 1 Inst. 73. 2 Inst. 65, 66, 67

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 *vs.* The Duke of Beaufort, 1 Russ. 19; and see Lyons *vs.* Bleakin, Jacob's Rep. 262. Shelley *vs.* Westbrook, *ibid.* 266. De Manneville *vs.* De Manneville, 10 Ves. 61. Whitfield *vs.* 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 recognise the chancellor as the constitutional depository 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.—CHITTY.

tion: 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 *villanage*, as contradistinguished from *liberum tenementum*, or frank tenure. And this (we may remember) he subdivided into two classes, *pure* and *privileged* villanage, from whence have arisen two other species of our modern tenures.

\*III. From the tenure of pure villanage have sprung our present *copy-hold* 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 are in substance as ancient as the Saxon constitution, though perhaps different 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*,<sup>11</sup> because the usual residence of the owner, seems to have been a district of ground held by lords or great personages; who kept in their own hands so much land as was necessary for the use of their families, which were called *terræ 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;(h) 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 villanage, 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 are still lordships: and each lord or baron was empowered to hold a domestic court, called the court-baron, for redressing misdemeanors and nuisances within the manor, and for settling disputes of property among the tenants. This court is an inseparable ingredient of every manor; and if the number \*of suitors should so fail as not to leave sufficient to make a jury

\*91] or homage, that is, two tenants at least, the manor itself is lost.<sup>12</sup>

(f) Wright, 210.

(g) Co. Cop. §§ 2 and 10.

(h) Co. Cop. § 3.

<sup>11</sup> Mr. Watkins, (1 Treat. of Copyh. 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.—CHITTY.

<sup>12</sup> They must be two freeholders, holding of the manor subject to escheat. 3 T. R. 147. 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 gamekeeper. 1 Inst. 259. Watkins on Copyhold, 3 ed. 21, 22.—CHITTY.

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 feudal 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 feudal 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 the fee, of whom such feoffor himself held it.<sup>13</sup> 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 [\*92 subsequent 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 villenago, this was a species of tenure neither strictly feudal, 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 feudal 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 villenago, and the tenants villeins, either from the word *villis*, 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 were consigned; their rugged

(*i*) See the Oxford editions of the charters.

(*k*) Wright, 215.

(*l*) Introd. Hist. Eng. 59.

(*m*) Wright, 217.

(*n*) 1 Inst. 116.

<sup>13</sup> 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."—CHITTY.



masters, like our northern ancestors, esteeming war the only honourable employment of mankind.

\*93] These villeins, belonging principally to lords of manors, were either villeins *regardant*, that is, annexed to the manor or land: or else they were *in gross*, or at large, that is, annexed to the person of the lord and transferable 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 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 \*94] the same state of bondage with their parents; 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*. But no bastard could be born a villein, because by 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.<sup>15</sup> 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

(o) Litt. § 181.

(p) Ibid. § 172.

(q) *Ille qui tenet in villenagio faciet quicquid ei preceptum fuerit, nec scire debet sero quid facere debet in crastino, et imper tenebitur ad incerta.* Bracton, l. 4, tr. 1, c. 28.<sup>14</sup>

(r) C. 8.

(s) *De jure sueonum*, l. 2, c. 4.

(t) Litt. § 177.

(u) Co. Litt. 140.

(v) Litt. § 202.

(w) Ibid. § 18.

(x) Ibid. §§ 187, 188.

(y) Ibid. §§ 189, 194.

(z) Ibid. § 190.

(a) Ibid. § 204.

(b) §§ 204, 205, 206.

<sup>14</sup> This is an eloquent description of slavery. 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. What a degraded condition for a being endowed with reason!—CHRISTIAN.

<sup>15</sup> 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. § 194.—CURRY.

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 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. [\*95 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.

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 show 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.<sup>16</sup> Which \*affords a very substantial reason for the great [\*96 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 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, monas-

(d) Litt. § 208.  
(e) F. N. B. 12.

(f) Cop. § 32.  
(g) Commonwealth. b. 3, c. 10.

<sup>16</sup> In the second note to the case of *Grant vs. Astle* (Doug. 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 Doug. 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.—CHITTY.

teries, 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."<sup>17</sup> 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.<sup>(h)</sup>

\*97] \*As a further 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.<sup>18</sup>

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.<sup>19</sup>

(A) 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. Maner. 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 demeane lands, and are attended by music during all the time of their labour. *Mod. Un. Hist.* xvi. 429.

(i) *Co. Litt.* 68.

<sup>17</sup> 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.—CHRISTIAN.

<sup>18</sup> See this point considered (1 Watkins on Copyhold) in the very able edition of that work by Vidal, tit. Grants, pages 33, 51, &c. According to 3 Bos. & Pul. 346, 2 M. & S. 504, 2 Bar. & Ald. 189, and 2 Camp. 264, 265, 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.—CHITTY.

<sup>19</sup> 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 seized 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 into the lord's hands for want of a tenant, (Watkins on Copyhold, 239. H. Chitty's Descents, 165. 1 Keb. 287. Kitch. 246. 1 Leon. 100. 3 id. 221. 4 id. 30. 1 Scriv. 341, 342;) 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 be 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

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,<sup>(j)</sup> 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 seized 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. Like that [ \*98 in chivalry, the lord is the legal guardian;<sup>20</sup> 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.<sup>21</sup> Of fines, some are in the

(j) See ch. 23.

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. Copyh. 281. Cro. Car. 16. Co. Copyh. 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. Copyh. 124.—

CHITTY.

<sup>20</sup> The statute of 9 Geo. I. c. 29 in relation to the 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 attorneys, (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 *vs.* 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."

This authority of the lord must be by virtue of a special custom in a manor; for by the 12 Car. II. c. 24, s. 8 and 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, 105.—

CHITTY.

<sup>21</sup> There is some obscurity as to this point; but I imagine the account given of it in the text cannot be the correct one. As the tenure clearly savoured more of socage than chivalry, the lord, without a special custom warranting it, cannot well be supposed to be the guardian, but the nearest relation to whom the inheritance cannot descend. And, accordingly, in 2 Rolle's Abr. tit. Garde, P. pl. 1, it is laid down by the court that "if a copyhold descend to an infant within the age of fourteen, his *prochein amy*, to whom the land cannot descend, shall have the custody of it, as he would of a freehold, unless there be a custom appointing it to another. If there be such a custom, that will still operate and is not affected by the statute of Car. II. See *ante*, p. 88. But the present question is, Who shall now be guardian where there is no custom? Whether, though the statute

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 the estate.<sup>22</sup> 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.<sup>(k)</sup> From this instance we may judge of the favourable disposition that the law of England (which is a law of liberty) hath always shown 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 *villain-socage*. This, \*99] he tells us,<sup>(l)</sup> is such as has been held of the kings of England from the conquest \*downwards; that the tenants herein "*villana faciunt servitia, sed certa et determinata*;" that they cannot aliene 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 *antient 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*.

Antient demesne consists of those lands or manors which, though now perhaps granted out to private subjects, were actually in the hands of the crown in the time of Edward the Confessor, or William the Conqueror; and so appear to have been by the great survey in the exchequer called *domesday-book*.<sup>(m)</sup> The tenants of these lands, under the crown, were not all of the same order or degree. Some of them, as Britton testifies,<sup>(n)</sup> 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.<sup>(o)</sup> Others 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 villen services, but those determinate and certain: as, to plough the king's land

(k) 2 Ch. Rep. 134.

(l) L. 4, tr. 1, c. 23.

(m) F. N. B. 14, 56.

(n) C. 66.

(o) F. N. B. 228.

will not operate to defeat a custom, it shall take place in the absence of any custom? Mr. Watkins is of opinion that it will; and even where there is a custom he thinks that the father, by will under the statute, may appoint a guardian of the body of his child. It is desirable that the law should be as he states it, but I am not aware that any decision to that effect has taken place. See 2 Watk. on Copyholds, 104.—COLERIDGE.

<sup>22</sup> 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 by 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 coparceners are entitled to be admitted to copyhold tenements as one heir, and upon payment of one set of fees. 3 Bar. & C. 173.—CHITTY.

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 antient demesne, by a peculiar process, denominated a writ of *right close*; (q)<sup>23</sup> 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)

\*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 antient demesne." And the same name is also given them in Fleta. (u) Hence Fitzherbert observes, (w) that no lands are antient 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 antient 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 special mark and tincture of villenage, noted by Bracton, and remaining to this day, viz., that they cannot be conveyed from man to man by the general common-law conveyances of feoffment, and the rest; but must pass by surrender, to the lord or his steward, in the manner of common copyholds; \*yet with this distinction, (x) that in the surrender of these lands in antient demesne, it is not used to say, [\*101 "*to hold at the will of the lord*" in their copies, but only, "*to hold according to the custom of the manor*."<sup>24</sup>

(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.  
 (v) N. B. 13.  
 (w) Kitchen on Courts, 194.

<sup>23</sup> 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. 2 Burr. 1046.—CHITTY.

<sup>24</sup> 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, often, as in the text, but erroneously, called tenants in ancient demesne, who hold of a manor which is ancient demesne, but 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 questions respecting the tenure in ancient demesne. See Scriven on Copyholds, 656.—CHITTY.

It is only the freeholders of the manor who are truly tenants in ancient demesne; and their lands pass by common-law conveyances. They form the court of ancient demesne, which is analogous to the court-baron. The copyholders form the customary court. See Third Real Property Report, p. 13. 3 B. & P. 382.

There are some estates held according to the custom of a manor, but not by copy of court-roll nor at the will of the lord. "These customary estates, known by the denomination of *tenant-right*, are peculiar to the northern parts of England, in which border-services against Scotland were anciently performed before the union of England and Scotland under the same sovereign. And although these appear to have many qualities

Thus have we taken a compendious view of the principal and fundamental points of the doctrine of tenures, both antient and modern, in which we cannot but remark the mutual connection and dependence that all of them have upon each other. And upon the whole it appears, that whatever changes and alterations these tenures have in process of time undergone, from the Saxon era to 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 forever.(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 antient 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 \*102] reformation, altered, and made conformable to the purer doctrines of the church of England. It was an old Saxon tenure; and continued under the Norman revolution, through the great respect that was shown to religion and religious men in antient 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 antient 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 feudal, but merely spiritual. For if the service be neglected, the law gives no remedy by distress or otherwise to the lord of whom the lands are holden; but merely a complaint to the ordinary or visitor to correct it.(e) Wherein it materially differs from what was called *tenure by divine service*: in which the tenants were obliged to do some special divine services in certain; as to sing so many masses, to distribute such a sum in alms, and the like; which, being expressly defined and prescribed, could with no kind of propriety be called *free alms*; especially as for this, if unperformed, the lord might distress, without any complaint to the visitor.(f) All such donations are indeed now out of use: for, since the statute of *quia emptores*, 18 Edw. I., 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.,

(y) Litt. § 133.

(z) Ibid. § 131.

(a) Ibid. § 135.

(b) Bracton, l. 4, tr. 1, c. 28, § 1.

(c) Seid. Jan. 1, 42.

(\*) *Cæsar de Bell. Gall.* l. 6, c. 13.

(\*) Litt. § 136.

(\*) Ibid. 137.

(\*) Ibid. 140.

and incidents which do not properly belong to villenage tenure, either pure or privileged, (and out of one or other of these species of villenage all copyhold is derived,) and also have some which savour more of military service by escuage uncertain,—which, according to Litt. s. 99, is knights' service; and although they seem to want some of the characteristic qualities and circumstances which are considered as distinguishing this species of tenure, viz., the being holden at the will of the lord, and also the usual evidence of title by copy of court-roll; and are alienable, also, contrary to the usual mode by which copyholds are aliened, viz., by deed and admittance thereon, (if, indeed, they could be immemorably aliened at all by the particular species of deed stated in the case, viz., a bargain and sale, and which at common law would only have transferred the user;) I say, notwithstanding all these anomalous circumstances, it seems to be now so far settled in courts of law that these customary tenant-right estates are not freehold, but that they in effect fall within the same consideration as copyholds, that the quality of their tenure in this respect cannot properly any longer be drawn into question." Per lord Ellerborough, C. J., 4 East, 288. See 2 Bos. & P. 378. 4 Per. & D. 579; *infra*, p. 148.—SWEET.

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.

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## CHAPTER VII.

### OF FREEHOLD ESTATES OF INHERITANCE.

THE next objects of our disquisitions are the nature and properties of *estates*. An *estate* in lands, tenements, and hereditaments, signifies such *interest* as the tenant 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.<sup>(a)</sup> It is called in Latin *status*; it signifying the condition or circumstance in which the owner stands with regard to his property. And to ascertain this with proper precision and accuracy, estates may be considered in a threefold view:—*first*, with regard to the *quantity of interest* which the tenant has in the tenement: *secondly*, with regard to the *time* at which that quantity of interest is to be enjoyed: and, *thirdly*, with regard to the *number* and *connections* 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 forever. And this occasions the primary division of *\*estates* into such as are *freehold*, and such as are *less than freehold*. [\*104

An estate of freehold, *liberum tenementum*, or franktenement, is defined by Britton<sup>(b)</sup> to be “the *possession* of the soil by a freeman.” And St. Germyn<sup>(c)</sup> 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 as the feudal 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,<sup>(d)</sup> that where a freehold shall pass, it behooveth 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.<sup>1</sup>

Estates of freehold (thus understood) are either estates of *inheritance*, or estates *not of inheritance*. The former are again divided into inheritances *abs-*

(\*) Co. Litt. 315.  
(b) C. 32.

(c) Dr. & Stud. b. 2, d. 22.  
(d) § 59.

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<sup>1</sup> 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.—CHRISTIAN.

As to copyholders having a freehold interest, but not a freehold tenure, see 1 Prest on Estate, 212. 5 East, 51.—CHITTY.



*lute* 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) is he that hath lands, tenements, or hereditaments, to hold to him and his heirs forever: (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 \*105] its original sense it is \*taken in 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 *dominio 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 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 forever: 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*. But (as Sir Martin Wright very justly observes) (l) the doctrine, "that all lands are holden," having been for so many ages a fixed and undeniable axiom, our English lawyers do very rarely (of late years especially) use the word *fee* in this its primary original sense, in contradistinction to *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 a feud: and when the term is used simply, without any other adjunct, or has the adjunct of *simple* annexed to it, (as a fee, or a fee-simple,) it is used in contradistinction to a fee-conditional at the common law, or a fee-tail by the statute; importing an absolute inheritance, clear of any condition, limitation, or restrictions to particular heirs, but descendible to the heirs general, whether male or female, lineal or collateral. And in no other sense than this is the king said to be seised in fee, he being the feudatory of no man. (m)

Taking therefore *fee* for the future, unless where otherwise explained, in this its secondary sense, as a state of inheritance, it is applicable to, and may be had in, any kind of hereditaments either corporeal or incorporeal. (n) But there is this distinction between the two species of hereditaments: that, of a corporeal

(e) Litt. 21.

(f) See pp. 45, 47.

(g) Of Feuds, c. 1.

(h) Co. Litt. 1.

(i) *Prædium domini regis est directum dominium, cujus*

(k) Co. Litt. 1.

(l) Of Ten. 148.

(m) Co. Litt. 1.

(n) *Feodum est quod quis tenet sibi et heredibus suis, sive sit tenementum, sive redditus, &c. Plot. l. 5. c. 5. § 7.*

*manus est auctor nisi Deus. Ibid.*

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*.<sup>(o)</sup> For, as incorporeal hereditaments are in their nature collateral to, and issue out of, lands and houses,<sup>(p)</sup> their owner hath no property, *dominium*, or demesne, in the *thing* itself, but hath only something derived out of it; resembling the *servitudes*, or services, of the civil law.<sup>(q)</sup> The *dominium* or 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*. [\*107]

The fee-simple or inheritance of lands and tenements is generally vested and resides in some person or other; though divers inferior estates may be carved out of it. As if one grants a lease for twenty-one years, or for one or two lives, the fee-simple remains vested in him and his heirs; and after the determination of those years or lives, the land reverts to the grantor or his heirs, who shall hold it again in fee-simple. Yet sometimes the fee may be in *abeyance*, that is, (as the word signifies,) in expectation, remembrance, and contemplation 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.<sup>2</sup> 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.<sup>(r)</sup><sup>3</sup> 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.<sup>(s)</sup> 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.<sup>(t)</sup><sup>4</sup>

(o) Litt. § 10.

(p) See page 20.

(q) *Servitus est jus, quo res mea alterius rei vel personae*

*util. ff. 8, 1, 1.*

(r) Co. Litt. 342.

(s) Litt. § 646.

(t) *Ibid.* § 647.

<sup>2</sup> This rule and its exceptions are thus distinctly stated by Mr. Preston in his treatise on Estates, 1 vol. 216, 217:—"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 shown 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."—CURRY.

<sup>3</sup> The inheritance or remainder in such a case has been said to be in abeyance, or *in nubibus*, or *in gremio legis*: but Mr. Fearné, with great ability and learning, has exposed the futility of these expressions and the erroneous ideas which have been conveyed by them. Mr. Fearné 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." Fearné Cont. Rem. 513, 4th edit.

But although, as Mr. Fearné observes, "different opinions have prevailed in respect to the admission of this doctrine in conveyances at common law," (*id.* 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.—CHRISTIAN.

<sup>4</sup> Mr. Fearné 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,

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 forever, or to him and his assigns forever, this vests in him but an estate for life.<sup>(u)</sup> This very great nicety about the insertion of the word "heirs," in all feoffments and grants, in order to vest a fee, is plainly a relic of the feudal strictness; by which we may remember<sup>(w)</sup> it was required \*that the form of the donation should be punctually pursued; or that, as Cragg<sup>(x)</sup> expresses it in the words of Baldus, "*donationes 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.<sup>(y)</sup>

For, 1. It does not extend to devises by will;<sup>z</sup> in which, as they were intro-

(u) Co. Litt. § 1.  
(w) See page 56.

(x) L. 1 c. 9, § 17.  
(y) Co. Litt. §, 10.

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.

—CHRISTIAN.

The case put of the glebe during the vacancy of the church is not perhaps easy of solution. That which Mr. Christian proposed in a note on this passage is not entirely satisfactory. He would place the freehold in the future successor, who is to be brought into view and notice by institution and induction. But if it is in him, it is not there usefully for either of the purposes for which alone the law requires it to be in any one: the services are not performed, and there is no one to answer the *præcipe* of a stranger. The same objection, indeed, applies if we place it in the heir of the founder or the ordinary. Perhaps it may be thought not unreasonable to admit this to be an exception to the general rule: an estate altogether is the creature of legal reasoning, to be moulded, raised, or extinguished accordingly; and it may be fairly argued that, as the freehold can exist in no one to any useful legal purpose, during the vacancy of the church, it may not exist at all. This is a conjecture, hazarded with great diffidence, but which may be allowed in a question of more curiosity than practical importance.—COLERIDGE.

<sup>b</sup> See *post*, the 23d 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 vs. 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 vs. 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 vs. 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. *Timewell vs. Perkins*, 2 Atk. 103. And the same doctrine was held in *Goodtitle vs. 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 *Loveseres vs. Blight*, Cowp. 357) to carry the fee; for the testator had charged the estate with the payment of an annuity, which negated the idea that by the word *freely* he only meant to give the estate *free of encumbrances*: 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 vs. 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 vs. Thorley*, 16 East. 443;

duced at the time when the feudal rigour was apace wearing out, a more liberal construction is allowed: and therefore by a devise to a man forever, or to one and his assigns forever, or to one in fee-simple, the devisee hath an estate of inheritance; for the intention of the devisor is sufficiently plain from the words

and see *infra*. This, it will at once be obvious, is by no means inconsistent with what was laid down in *Timewell vs. Perkins*, as before cited. The distinction is pointed out in *Tomlinson vs. Dighton*, 1 P. Wms. 171. Thus, where a power is given, with a peculiar 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 vs. Standen*, 2 Ves. Jr. 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 vs. 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 vs. Coghill*, 7 Ves. 506. *Jones vs. Curry*, 1 Swanst. 73. *Reid vs. 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 vs. Westcott*, 13 Ves. 453. *Anderson vs. Dawson*, 15 Ves. 536. *Barford vs. Street*, 16 Ves. 139. *Nannock vs. Horton*, 7 Ves. 398. *Irvin vs. 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 vs. Nenny*, 3 Ves. 470. And the word "estate," when used by a testator, and not restrained to a narrower signification by the context of the will, (*Doe vs. Hurrell*, 5 Barn. & Ald. 21,) is sufficient to carry real estate, (*Barnes vs. Patch*, 8 Ves. 608. *Woollam vs. 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 vs. Wright*, 7 East, 268. *Right vs. Sidebotham*, 2 Doug. 763. *Chorlton vs. Taylor*, 3 Ves. & Bea. 163. *Pettward vs. Prescott*, 7 Ves. 545. *Nicholls vs. 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 vs. Beckwith*, Ca. temp. Talb. 160. *Goodright vs. Stocker*, 5 T. R. 13. *Doe vs. Buckner*, 6 T. R. 612. *Gulliver vs. Poyntz*, 3 Wils. 143. *Smith vs. Coffin*, 2 H. Bla. 450. But, though slight circumstances may be admitted to explain obscurities, (*Randall vs. 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, (*Keily vs. 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 vs. Churchill*, 3 Ves. & Bea. 67. *Hampson vs. Brandwood*, 1 Mad. 388. *Leigh vs. Norbury*, 13 Ves. 344. *Doe vs. 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 vs. Smith*, 17 Ves. 33. *Doe vs. Clayton*, 8 East, 144. *Denn vs. 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 vs. Haynes*, 8 Ves. 590. *Barker vs. Lea*, 3 Ves. & Bea. 117. *S. C.* 1 Turn. & Russ. 416. *Jones vs. Colbeck*, 8 Ves. 42. *Parsons vs. Baker*, 18 Ves. 478. *Thackeray vs. 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.

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 deviser 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. (2) 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 are *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 the successor from the predecessor.\* Nay, in a grant to a bishop, or other sole spiritual corporation, in *frankalmoign*, the word

\*109]

(\*) Co. Litt. 9.

Denn vs. 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 deviser. *Goodtitle vs. Maddern*, 4 East, 500. *Doe vs. Holmes*, 8 T. R. 1. *Doe vs. Clarke*, 2 New Rep. 349. *Roe vs. Daw*, 3 Mau. & Sel. 522. *Baddeley vs. 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 vs. 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 vs. 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 vs. Canning*, *Mosely*, 242, it was considered as quite settled by the decision in *Hopewell vs. 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 vs. Moore*, in its previous stages of litigation, 3 Anstr. 787. 5 T. R. 563. As also *Pocock vs. The Bishop of London*, 3 Brod. & Bing. 33.

Mr. Preston, in page 42 (4) of the second 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.—CHITTY.

\* 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 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 words "*heirs*" in the one case, and "*successors*" in the other, come within this rule. Co. Litt. 9, a.—CHITTY.

“*frankalmoin*” 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, 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,<sup>8</sup> the grant is entirely defeated. So, 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\* is a fee, because by possibility it may endure forever [\*110 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 par

(a) See book I. p. 434.

(b) See book I. p. 249.

(c) Co. Litt. 27.

<sup>1</sup> Two other classes of cases may be mentioned as exceptions to the rule that the word *heirs* is necessary to raise an estate in fee.

1. Where, by reference, another instrument which does contain the word *heirs* is incorporated with and made part of the conveyance. Nothing short of this, however clear the intent to do so may be, will enlarge a life-estate to a fee, not even if the reference be to a *will*, which, according to the liberal principles of interpretation adopted by the courts as to *wills*, creates a fee without words of inheritance. *Lytle vs. Lytle*, 10 Watts, 259. By the deed in that case the grantor conveyed to the grantee “all his part of the estate left to him by his father’s last will and testament;” and the will referred to ran thus:—“The remainder of my real and personal property I will to be equally divided betw<sup>x</sup>t my children.” It was held that nothing but a life-estate passed to the grantee. If the will had contained a clause giving the property to him and his heirs, it would have come within the reason of the case. A fee-simple is conveyed, because by reference the other instrument is incorporated and made part of the conveyance; and if that should contain the essential word *heirs*, it is adjudged good as a conveyance of the fee.

2. A mere executory agreement to sell and convey land (which, however, if in writing or within the provisions of the statute of frauds, a chancellor will decree to be specifically performed by the execution of a regular and formal deed) need not contain the word *heirs* in order to convey in equity a fee. If the vendee, having paid the consideration-money, has a right in equity to call on the vendor to convey, he has the equitable estate; and if the intention of the parties was to buy and sell a fee, he has an equitable fee-simple, though the word *heirs* were not used. *Defraunce vs. Brooks*, 8 W. & S. 67. In executory contracts, equity supplies words of inheritance, and implies a fee when the consideration evinces that not less than a fee was intended.—SHARWOOD.

<sup>8</sup> Even for a short period, and they afterwards 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.—ARCHBOLD.

<sup>9</sup> 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.—CHITTY.

ticular heirs, exclusive of others: "*donatio stricta et coarctata*;" (d) *sicut certis hæredibus 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.<sup>10</sup> 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.<sup>11</sup> 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 unconditional.<sup>12</sup> So that, as soon as the grantee had any issue born, his estate was supposed to become absolute, by the performance of the condition; at least, for these three purposes: 1. To enable the tenant to 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 encumbrances, so as to bind his issue. (i) And this was thought

(\*) Flet. l. 3, c. 3, § 5.

(\*) Plowd. 241.

(f) *Si quis terram hæreditariam habeat, eam non vendat a cognatis hæredibus suis, si illi viro probatum sit, qui eam*

*ab initio acquisivit, ut ita facere nequeat. LL. Æfred. c. 37.*

(g) Co. Litt. 19. 2 Inst. 233.

(h) Co. Litt. 19. 2 Inst. 234.

(i) Co. Litt. 19.

<sup>10</sup> In the passage above quoted from Fleta, Mr. Preston, in his Essay on Estates, p. 258, says he understands Fleta as speaking of estates-tail, and not of fees-conditional at common law; and he says (p. 285) that before the statute *de donis* a gift to a man and his heirs males of his body, or to a man and his heirs females of his body, would not have been allowed at common law. The word *males* in the one case, and the word *females* in the other, would have been rejected as repugnant to the estate.—ARCHBOLD.

<sup>11</sup> In the great case of Willion vs. 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 aliene, 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. pp. 242, 245.—CHITTY.

<sup>12</sup> Where the person to whom a conditional fee was limited had issue, and suffered it to descend to such issue, he might aliene it. But, if they did not aliene, 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 vs. 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.—CHITTY.

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 in 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,<sup>(k)</sup> though they seem antient, 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.

\*The inconveniences which attended these limited and fettered inheritances, were probably what induced the judges to give way to this [\*112 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<sup>(l)</sup> (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 antient feudal restraints which were originally laid or alienations, by enacting, that from thenceforth the will of the donor be observed; and that the tenements so given (to a man and the heirs of his body) should at all events go to the issue, if there were any; or, if none, should revert to the donor.

Upon the construction of this act of parliament, the judges determined that the donee had no longer a conditional fee-simple, which became absolute and at his own disposal the instant any issue was born; but they divided the estate into two parts, leaving in the donee a new kind of particular estate, which they denominated a *fee-tail*; <sup>(m)</sup> 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.<sup>(n)</sup><sup>u</sup> And hence it is that Littleton tells us<sup>(o)</sup> that tenant in fee-tail is by virtue of the statute of Westminster the second.

Having thus shown the *original* of estates-tail, I now proceed to consider what things may, or may not, be entailed \*under the statute *de donis*. [\*113 Tenements is the only word used in the statute: and this Sir Edward Coke<sup>(p)</sup> 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

<sup>(k)</sup> 1 Inst. 19.

<sup>(l)</sup> 13 Edw. I. c. 1.

<sup>(m)</sup> The expression *fee-tail*, or *feodum talliatum*, was borrowed from the feudists, (see Crag. l. 1, t. 10, §§ 24, 25,) among whom it signified any mutilated or truncated inheritance, from which the heirs-general were cut off, being

derived from the barbarous verb *taliare*, to cut, from which the French *tailleur* and the Italian *tagliare* are formed. Spelm. Gloss. 531.

<sup>(n)</sup> 2 Inst. 335.

<sup>(o)</sup> § 13.

<sup>(p)</sup> 1 Inst. 19, 20.

<sup>u</sup> The gift thus remains to the donee until there is a failure of such heirs as the gift describes. But still there is another manner in which the estate-tail may be determined; for if it be derived out of a determinable fee, the event which determines the original estate at the same time determines the estate-tail, although there have not been a failure of issue, (Preston on Est. 264, 265;) and for this reason, if the person who created the estate-tail had but a determinable fee, the recovery of tenant in tail will give him but a determinable fee. 1 Preston on Conv. 1, 2. Preston on Est. 266.—ARCHBOLD.



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.(g) 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)<sup>14</sup> An estate to a man and his heirs for 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 ascertain<sup>d</sup> 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)<sup>15</sup> Tenant in tail special is where

(g) 7 Rep. 33.  
(r) Co. Litt. 19, 20.  
(s) 2 Vern. 225.

(t) 3 Rep. 8.  
(u) Litt. 22 14, 15.

<sup>14</sup> 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. Fearn, 345, 3d ed. Roper on Legacies, ch. xvii. See *post*, 398.—CHRISTIAN.

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 it 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 vs. Turner*, 1 Br. 325. *S. C. Ambl. 782*. *Earl of Stafford vs. Buckley*, 2 Ves. Sr. 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 now 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 vs. Duke of Newcastle*, 12 Ves. 225. *Keiley vs. 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 instrument to different descriptions of property governed by different rules. *Forth vs. Chapman*, 1 P. Wms. 667. *Elton vs. Fason*, 19 Ves. 77. Thus, the same words which would only give an estate-tail in free hold property will carry the absolute interest in leasehold or other personal property *Green vs. Stevens*, 19 Ves. 73. *Crooke vs. De Vandes*, 9 Ves. 203. *Tothill vs. Pitt*, 1 Mad. 509.—CURRY.

<sup>15</sup> 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

the gift is restrained to certain heirs of the donee's body, and does not go to all of them in general. And this may \*happen several ways.(w) I shall [\*114 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 further 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 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)

As the word heirs is necessary to create a fee, so in further limitation of the strictness of the feudal donation, the word body, or some other words of procreation, are necessary to make it a fee-tail, and ascertain to what heirs in particular \*the fee is limited. If, therefore, either the words of inheritance, or words of procreation, be omitted, albeit the others are inserted in the grant, this will not make an estate-tail. As, if the grant be to a man and his 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)<sup>16</sup> [\*115

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 *frank-marriage*. 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 *frank-marriage* is expressed, the donees shall have the tenements to them and the heirs of their two bodies begotten; that is, they are tenants in special tail. 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

(w) Litt. §§ 16, 26, 27, 28, 29.

(x) Ibid. §§ 21, 22.

(y) Ibid. § 24.

(z) Co. Litt. 25.

(a) Co. Litt. 20.

(b) Litt. § 31. Co. Litt. 27.

(c) Co. Litt. 9, 27.

(d) Litt. § 17.

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.—ARCHBOLD.

<sup>16</sup> 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 show an intention to restrain the inheritance to the descendants of the devisee. See 381, *post* — CHRISTIAN.

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 the wife of the tenant in tail shall have \*116] 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 a tenant in tail could have charged his 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 \*117] year of Edward IV.; which were then openly declared 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 *pie fraud*, 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 du-

(e) Litt. 22 19, 20.

(f) Co. Litt. 224.

(g) Com. Recov. 5.

(h) 1 Rep. 131.

(i) Co. Litt. 19. Moor, 156. 10 Rep. 38.

(j) 1 Rep. 131. 6 Rep. 40.

(k) 10 Rep. 37 38.

(l) Pigott 8.

(m) Year-book. 12 Edw. IV. 14, 19. Fitzh. Abr. tit. *faux recov.* 20 Bro. Abr. ibid. 30; tit. *recov. in value*, 19; tit. *tail*, 38.

(n) 11 Hen. VII. c. 20. 7 Hen. VIII. c. 4. 34 & 35 Hen. VIII. c. 20. 14 Eliz. c. 8. 4 & 5 Anne, c. 16. 14 Geo. II. c. 20.

ration, 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 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. [\*118

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(*g*) 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 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. [\*119

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 law, (*t*) they are also subjected to be sold for the debts contracted by a bankrupt. And, by the construction put on the statute 43 Eliz. c. 4, an appointment (*u*) by tenant in tail of the lands entailed, to a charitable use, is good without fine or recovery.<sup>17</sup>

(*p*) 26 Hen. VIII. c. 13.

(*g*) 4 Hen. VII. c. 24.

(*r*) Co. Litt. 372.

(*s*) 33 Hen. VIII. c. 39, § 75.

(*t*) Stat. 21 Jac. I. c. 19.

(*u*) 2 Vern. 453. Chan. Prec. 16.

<sup>17</sup> But the most extensive and effectual relaxation is that lately introduced by 3 & 4 Wm. IV. c. 74, enabling the tenant in tail, by an ordinary deed of conveyance, (if duly enrolled,) and without resort to the indirect and operose expedient of a fine or recovery, (which the statute wholly abolishes,) to aliene in fee-simple absolute, or for any less estate, the lands entailed, and thereby to bar himself and his issue and all persons having any ulterior estate therein. Yet this is subject to an important qualification, designed for the protection of family settlements; for in them it is usual to settle a life estate (which is a freehold interest) on the parent, prior to the estate limited to the children; and the nature of a *recovery* (by which alone interests ulterior to the estate-tail could formerly be barred) was such as to make the concurrence of the immediate tenant of the freehold indispensable to its validity. In order therefore to continue to the parent (or other prior taker) a control of the same general description, the act provides that when under the same settlement which created the estate-tail a prior estate of freehold or for years determinable with life shall have been conferred, it shall not be competent for the tenant in tail to bar any estate taking effect upon the determination of the

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.<sup>18</sup>

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## CHAPTER VIII.

### OF FREEHOLDS, NOT OF INHERITANCE.

WE are next to discourse of such estates of freehold as are not of inheritance, but *for life* only. And of these estates for life, some are *conventional*, or expressly created by the act of the parties; others merely *legal*, or created by construction and operation of law.<sup>(a)</sup> We will consider them both in their order.

1. 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

(\*) Wright, 190.

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estate-tail, without consent of the person to whom such prior estate was given, who receives for that reason the appellation of *protector of the settlement*. But the object not being to restrain the power of the tenant in tail over the estate-tail itself, (which he could have barred before the statute, by *fine*, without any other person's concurrence,) his alienation (in the manner prescribed in the act) is allowed to be effectual even without the consent of the protector, so far as regards the barring of himself and his issue.

Even subsequently to the passing of this act, however, one of the ancient and justly-obnoxious immunities of an estate-tail still remained without disturbance,—viz., its exemption from liability for ordinary debts not contracted by a trader in the course of commerce. But this has been at length removed by 1 & 2 Vict. c. 110, which provides that a judgment entered up against the debtor in any of the superior courts at Westminster shall operate as a charge upon all lands, tenements, or hereditaments of which he shall be seized or possessed for any estate or interest in law or equity or over which he shall have any disposing power; and shall be binding as against him and the issue of his body and all claimants whatever whom he was competent, without the assent of any other person, to have barred.—STEPHEN.

<sup>18</sup> Estates-tail were introduced into this country with the other parts of the English jurisprudence, and they subsisted in full force before our Revolution, subject equally to the power of being barred by a fine or common recovery. But the doctrine of estates-tail and the complex and multifarious learning connected with it have become quite obsolete in most parts of the United States. In Virginia, estates-tail were abolished as early as 1776; in New Jersey, estates-tail were not abolished until 1820, and in New York as early as 1782; and all estates-tail were turned into estates in fee-simple absolute. So, in North Carolina, Kentucky, Tennessee, and Georgia, estates-tail have been abolished by being converted by statute into estates in fee-simple. In the States of South Carolina and Louisiana they do not appear to be known to their laws or ever to have existed; but in several of the other States they are partially tolerated and exist in a qualified degree. 4 Kent, 14. In Pennsylvania, by the act of Assembly of April 27, 1855, it was provided that whenever hereafter, by any gift, conveyance, or devise, an estate in fee-tail would be created according to the existing laws of the State, it shall be taken and construed to be an estate in fee-simple, and as such shall be inheritable and freely alienable.—SHARSWOOD.

holds the estate by the life of another, he is usually called tenant *pur auter vie*.(b) These estates for life are, like inheritances, of feudal 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 feudal 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.

\*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 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)<sup>1</sup>

\*The *incidents* to an estate for life are principally the following; which are applicable not only to that species of tenants for life, which are expressly created by deed; but also to those which are created by act and operation of law. [<sup>\*122</sup>

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

(b) Litt. 256.

(c) Page 55.

(d) Co. Litt. 42.

(e) Co. Litt. 42.

(f) Ibid. 36.

(g) Ibid. 42. 3 Rep. 20.

(h) 2 Rep. 48.

(i) See book L. p. 132.

(k) See p. 35.

(l) Co. Litt. 41.

<sup>1</sup> It is to be observed that an estate for life may also be determined before the termination of the natural life of the tenant, by *forfeiture*. This arises whenever the tenant assumes to convey the land in fee or fee-tail by such a conveyance as transfers the land directly, and passes more than the alienor has; which is therefore termed a *torious conveyance*. Such are feoffments with livery of seisin and common recoveries. *Redfern vs. Middleton*, 1 Rice, 459. *Lyle vs. Richards*, 9 S. & R. 370. *Stump vs. Findlay*, 2 Rawle, 168. Yet, when the tenant for life conveys by an ordinary deed of bargain and sale, though he may assume to convey a fee, it works no forfeiture; for no greater estate is in fact conveyed than an estate for the life of the grantor. *McKee vs. Pfoutz*, 3 Dall. 489. *Pendleton vs. Vandiveer*, 1 Wash. 381. *Rogers vs. Moore*, 11 Conn. 553. *Bell vs. Twilight*, 2 Foster, 500. A tenant for life, unless restrained by conditions, may alienate his whole estate, or any less estate; and if he convey without limitation, he passes an estate for his own life. *Jackson vs. Van Hoesen*, 4 Cow. 325.—SHARWOOD.

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.<sup>1</sup>

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) Therefore if a tenant for his own life sows the lands, and dies before harvest, his executors shall have the *emblemments*, 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*.<sup>2</sup> The representatives, therefore, of the tenant for life shall have the emblemments to compensate for the labour and expense of tiling, manuring, and sowing the lands; and also for the encourage-

(m) Co. Litt. 53.

(n) Ibid. 55.

<sup>1</sup> Tenant for life cannot dig up the soil and make bricks for sale, nor use the wood for that purpose. *Livingston vs. Reynolds*, 2 Hill, 157.—SHARSWOOD.

<sup>2</sup> As to emblemments in general, what they are, and who shall have them, see Com. Dig. Biens, G. 1, 2; Vin. Abr. Emblemments and Executors, U.; Bac. Abr. Executors, H. 3; Co. Litt. 55, a., b.; Toller's Law of Executors, book 2, ch. 4, &c.; 3 Atk. 16. Emblemments 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 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 emblemments, but belong to the remainderman or heir. Com. Dig. Biens, G. 1. Toller, b. 2, ch. 4.

With respect to who is entitled to emblemments, 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 deviser in favour of the devisee. But this again may be rebutted by words which show 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 emblemments, 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 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. Abr. Notice, pl. 15. Vin. Abr. 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 remainderman. 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 emblemments 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 out-going 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 determine his estate by his own act, he shall not have emblemments; as if lessee at will sow, and afterwards determines the will before severance. Co. Litt. 55, b.

ment 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 feudal law, if a tenant for life died between the beginning of September and the end of February, the lord, who was entitled to the reversion, was also entitled to the profits of the whole year; but if he died between the beginning of March and the end of August, the heirs of the tenant received the whole.<sup>(o)</sup> From hence our law of [\*123 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 *pur auter vie* shall have the emblements. The same is also the rule, if a life-estate be determined by the *act of law*. Therefore if a lease be made to husband and wife during coverture, (which gives them a determinable estate for life,) and the husband sows the land, and afterwards they are divorced *a vinculo matrimonii*, the husband shall have the emblements in this case; for the sentence of divorce is the act of law.<sup>(p)</sup> 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.<sup>(q)</sup> 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.<sup>(r)</sup> For when a man plants a tree, he cannot be presumed to plant

(o) *Feud. l. 2, t. 28.*  
(p) 5 Rep. 116.

(q) Co. Litt. 55.  
(r) Co. Litt. 55, 56. 1 Roll. Abr. 728.

5 Co. 116. Cro. Eliz. 461. So if an estate determine by forfeiture for condition broken. Co. Lit. 55, b. 1 Roll. 726, l. 33, 36. Com. Dig. Biens, G. 2.—CHITTY.

<sup>1</sup> The commentator has lord Coke's authority for ranking annual roots among emblements, and this appears to be the better opinion; but both Godolphin (pt. 2, c. 14, s. 1) and Wentworth (p. 152) assert that carrots, turnips, and other annual roots belong to the heir, because the executor is not at liberty to break the soil to reach them. In *Evans vs. Roberts*, (5 B. & C. 832,) Bayley, J., founded his judgment on the assumption that potatoes were emblements. Artichokes, it is clear, not being a strictly annual produce, are not emblements. Went. Off. Ex. 63.

Emblements are such crops as in the ordinary course of things return the labour and expense bestowed upon them strictly within the year. Thus, if the tenant plant hops, he will not be entitled to the first crop unless produced within the year; but, as hops will not bear without labour annually bestowed in manuring, making of hills, and setting of poles, the tenant is entitled to the year's crop, although it proceed from ancient roots. Cro. Car. 515. 2 Freem. 210. Co. Litt. 55, 56. On the other hand, as fruit-trees will bear although no labour is bestowed upon them within the year, the tenant is not entitled to the fruits as emblements. And where the tenant had sown clover with barley in the spring, according to a practice by which the benefit of the clover would not be realized within the year, it was held that he could not claim any advantage that accrued after the expiration of a year from the time of sowing. 2 Nev. & M. 725. 5 B. & Ad. 129.

Corn, peas, beans, tares, hemp, flax, saffron, melons, and, according to the better opinion, annual roots, such as potatoes, &c., are emblements. Grass is not, even when it arises from seed, (Com. Dig. Biens, G. 1;) but the artificial grasses, such as sainfoin, clover, &c., which are annually renewed like any other crop, seem to fall within the description of emblements. 2 Nev. & M. 725. Burn, Ecc. L. 297. Lord Coke, in his commentary on the statute of Merton, says, "*Blada* significeth corn or grain while it groweth, or grain while it is in herba, dum seges in herba, but it is taken for all manner of corn or grain, or things annual, coming by the industry of man, as hemp, flax, &c." 2 Inst. 81. The word "emblemment" comes from *emblem* or *emblemment*, to sow with corn; whence the old law-phrase to *emblem* land, or sow it for an annual crop.

Emblements are considered for most purposes as goods and chattels: they go, as has been seen, to the executor. They may be taken in execution under a *fiery facias*, and contracts relating to them have been held not to be contracts relating to any interest in land within the statute of frauds, (29 Car. II. c. 3, s. 4,) in contradistinction to contracts relating to growing grass, crops of fruit, &c. 2 Brod. & B. 368. 5 B. & Cr. 829. 8 Dowl & Ry. 611. 4 Nev. & W. 343. A dictum in Fitzh. Abr. pl. 59, that at common law em



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. 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 \*124] tenants for life. The same; for the law of estovers and emblements \*with regard to the tenant for life, is also law with regard to his under-tenant, who represents him and stands in his place(s) and greater; for in those cases where tenant for life shall not have the emblements, because the estate determines by his own act, the exception shall not reach his lessee, who is a third person. As in the case of a woman who holds *durante viduitate*; her taking husband is her own act, and therefore deprives her of the emblements; but if she leases her estate to an under-tenant, who sows the land, and she then marries, this her act shall not deprive the tenant of his emblements, who is a stranger, and could not prevent her.(t)<sup>4</sup> 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 anybody for the occupation of the land since the last quarter-day, or other day assigned for payment of rent.(u) To remedy which, it is now enacted(v) that the executors or administrators of tenant for life, on whose death any lease determined, shall recover of the lessee a ratable proportion of rent from the last day of payment to the death of such lessor.<sup>5</sup>

(t) Co. Litt. 55.

(u) Cro. Eliz. 461. 1 Roll. Abr. 727.

(v) 10 Rep. 127.

(w) Stat. 11 Geo. II. c. 19, § 15.

blements cannot be granted without deed, if not overruled by these cases, must be rested on the ground that a *grant*, as distinguished from a contract for sale, includes the right of ingress, egress, and regress, which is an easement. The landlord could not distress emblements until that power was given him by the statute 11 Geo. II. c. 19. 1 Roll. Abr. 666. 8 Taunt. 431, 742.—SWEET.

<sup>4</sup> The law relating to emblements has been very recently much modified in England; for it has been enacted by 14 & 15 Vict. c. 25, s. 1, that on the determination of leases or tenancies under landlords holding as tenants for life or for any uncertain interests, instead of claims to emblements, the tenants shall hold until the expiration of the current year, paying to the succeeding landlord a fair proportion of the rent.—STEWART.

<sup>5</sup> 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 Mad. 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 Mad. 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 apportionment 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 die 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 person who has received a composition for tithes jointly accruing in the lifetime of the deceased incumbent. 8 Ves. Jr. 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 autre 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

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, that 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*, that \*would not have distinguished him from others; and besides, he has no longer an estate of [\*125 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) or, he is tenant in tail, with many of the restrictions of a tenant

(w) Litt. § 32.

(x) Roll. Rep. 184. 11 Rep. 80.

(y) Co. Litt. 28.

(z) Litt. § 34. Co. Litt. 28.

(a) Co. Litt. 27.

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;) 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. Jr. 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.—CHITTY.

It was doubted whether the statute of Geo. II. applied strictly to tenants for life, or whether persons who were exposed to a similar hardship could claim the benefit of it. Thus, it was frequently questioned whether the statute extended to tenants in tail after possibility of issue extinct. These doubts are now set at rest by the statute 4 W. IV. c. 22, s. 1, which, after reciting that doubts have been entertained whether the provisions of the statute of Geo. II. apply to every case in which the interests of tenants determine on the death of the person by whom such interests have been created, enacts that rents reserved on leases which shall determine on the death of the person making them shall be considered to be within the meaning of the act, although such person was not strictly tenant for life.—STEWART.

\*See *post*, chapter xviii. of this book, p. 283. All authorities agree that tenant in tail after possibility of issue extinct is punishable 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 for waste in cutting down trees upon the land he holds as such tenant, yet he cannot have the absolute interest in the

for life; as to forfeit his estate, if he alienes it in fee-simple: (c) 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 possi-  
 \*126] bility of issue be extinct. But, in general, the law looks upon this estate

(b) Co. Litt. 23.

trees, and, if he sells them, cannot retain the price. This *dictum* is noticed by Mr. Hargrave in his 2d note to Co. Litt. 27, b., and is countenanced by another *dictum* in *Abraham vs. 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 doctrine imputed to C. J. Wray and the *obiter dictum* in *Abraham vs. 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 vs. 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 vs. 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 vs. Cotton*, 1 Dick. 209,) if it was understood to be the law that he could not commit waste of any kind. *Attorney-General vs. 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 vs. 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 vs. 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 vs. Smythe*, 2 Swanst. 252. *Brydges vs. Stevens*, 2 Swanst. 152, n. *Coffin vs. 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 remainderman. *Chamberlayne vs. Dammer*, 2 Br. 549. *Cholmeley vs. Paxton*, 3 Bing. 212. *Lord Tamworth vs. 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 vs. 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 vs. 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 vs. 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 vs. Paxton*, 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 sizable tree and put the produce into his pocket. *Doran vs. 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.—CHITTY.

as equivalent to an estate for life only; and, as such, will permit this tenant to exchange his estate with a tenant for life, which exchange can only be made, as we shall see hereafter, of estates that are equal in their nature.

III. Tenant *by the curtesy of England* is where a man marries a woman seised of an estate of inheritance, that is, of lands and tenements 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 *Mirror*(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.<sup>1</sup> 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 Almain or Germans.(i) And yet it is not generally apprehended to have been a consequence of feudal tenure,(k) though I think some substantial feudal reasons may be given for its introduction. For if a woman seised of lands hath issue by her husband, and dies, the husband is the natural guardian of the child, and as such is in reason entitled to \*the profits of the lands [\*127 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,<sup>8</sup> but an actual possession, which is a seisin in deed.<sup>9</sup> And therefore a man shall not be tenant by the curtesy of a remainder or reversion.<sup>10</sup> But of some incor-

(c) Litt. 235, 52.

(d) C. 1, § 3.

(e) Crag. 1, 2, c. 19, § 4.

(f) Litt. 290. Co. Litt. 30, 67.

(g) Stat. 11 H. III. m. 30 in 2 Bac. Abr. 659.

(h) *Grand Coustum.* c. 119.

(i) *Lindembrog. LL. Alman.* l. 92.

(j) Wright, 234.

(k) F. N. B. 143.

(l) Co. Litt. 30.

<sup>1</sup> I should rather think, with Mr. Wooddesson, that this estate took its name from its peculiarity to England, and that it was afterwards introduced into Scotland and Ireland. 2 Woodd. 18. Tenant by the *curtesy* of England perhaps originally signified nothing more than tenant 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.—CHITTY.

<sup>2</sup> 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. Wms 108. Lord Redesdale, on 2 Sch. & 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.—CHITTY.

<sup>8</sup> 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.—CHITTY.

<sup>10</sup> A man will not be entitled to tenancy by the curtesy of, nor a woman to dower out

poral hereditaments a man may be tenant by the curtesy, though there have been no actual seisin of the wife: as in case of an advowson, where the church has not become void in the 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)<sup>11</sup> 3. The issue must be born alive.

(n) Co. Litt. 29.

(o) Co. Litt. 30. Plowd. 263.

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 vs. Leigh*, 1 Taunt. 410;) for the possession of the tenant for years constitutes a legal seisin of the freehold in reversion. *De Gray vs. Richardson*, 3 Atk. 470. *Goodtitle vs. Newman*, 3 Wils. 521.—CHITTY.

<sup>11</sup>The words "*actual seisin or possession of the lands*" are satisfied by the possession of a tenant for years; for if the land is demised for a term of years, his possession is the possession of the wife, and there may be curtesy, though she dies before entry or even receipt of rent. Co. Litt. 29. Harg. n. 162. But if the lands were not let, and descended on the wife, who died before entry, there could be no curtesy. Co. Litt. 29.

With respect to the case of the advowson, if the author means, as his words seem to import, that a husband shall be tenant by the curtesy of it under the circumstances stated, because from the nature of the hereditament, it is impossible to have actual seisin of it at any time, he seems not to be warranted by the law or his authority. Presentation gives seisin of an advowson; and all that lord Coke says is, that he shall be tenant, even though there has been no vacancy, because he could by no industry attain to any other seisin; that is, he could not bring about a vacancy at any time that he pleased.

The position which follows, respecting the husband of an idiot, has been questioned. Lord Coke's argument, as well as that in Plowden, is that the titles of the tenant by curtesy and of the king begin at one instant, (the office which finds her an idiot having relation back to her first seisin,) and then that the title of the king shall be preferred. Upon this it has been remarked that there is not any such concurrence of titles; the husband's title not being consummate till the wife's death, when the king's title determines. Co. Litt. 30. Harg. n. 175. The argument in the text, that an idiot can never be rightfully seised of lands, is directly at variance with that just stated, which assumes the seisin of the idiot. Lord Coke reckons idiots among those who have power to purchase and retain lands or tenements, (Co. Litt. 3, b.,) or to be grantees of a copyhold estate. Co. Cop. s. 35. Indeed, the old writ *de idiota inquirendo et examinando* proceeded upon the same assumption, and the king took the custody of the lands as of lands of which the idiot had been seised. F. N. B. 232.

But the same conclusion may be rested upon the principle that there can have been no valid marriage with an idiot—a principle which it is the more remarkable that the author should have overlooked here, as only three pages later he makes use of it to exclude the wife of an idiot from dower.

In vol. 1, p. 302, an idiot is defined to be one who hath had no understanding *from his nativity*. If that definition be correct, there can be no question but that such a person could never contract a valid marriage. But I imagine that a person born sane might, from external injury, or internal disease gradually aggravated, be reduced to idiocy, as opposed to lunacy or madness, if such a case would come within the legal notion of idiocy; still, a marriage contracted while the person was sane, and seisin then had, with issue, ought on principle to entitle the husband to curtesy; because in such a case no one of the principles of exclusion would apply: the husband's title would be prior to the king's, there would have been sufficient seisin, and the marriage would not have been invalid.—COLERIDGE.

In Connecticut, Pennsylvania, and some other States, actual seisin is not necessary in any case to entitle the husband to curtesy. It is sufficient that the wife had title and a potential seisin or right of seisin; that is, the right to demand and recover the immediate possession thereof. *Bush vs. Bradley*, 4 Day, 298. *Kline vs. Beebe*, 6 Conn. 494. *Stoolfors vs. Jenkins*, 8 S. & R. 175. *Day vs. Cochran*, 24 Miss. 261. The rule requiring that the wife should have actual seisin is not applied in this country to wild and uncultivated lands. When she is owner of such lands, she is deemed in possession, so as to entitle her husband to become tenant by the curtesy, though there has been no actual possession by either of them during the coverture, (*Jackson vs. Sellick*, 8 Johns. 262. *Davis vs. Mason*, 1 Peters, S. C. 506. *Guion vs. Anderson*, 8 Humph. 298. *Wells vs. Thompson*, 13 Ala

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 [\*128 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) 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,<sup>12</sup> 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, 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.(v) 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)<sup>13</sup>

(p) Dyer, 25. 1 Rep. 34.

(q) Co. Litt. 29.

(r) Ibid. 30.

(s) Litt. § 56.

(t) Co. Litt. 29.

(\*) Co. Litt. 40.

(v) Ibid. 29.

(x) Ibid. 30.

(y) Ibid.

793,) except in Kentucky. *Neely vs. Butler*, 10 B. Mon. 48. And it seems that the rule requiring actual seisin applies only to cases in which the seisin is not complete until entry is made; as when the estate descends or is devised to the wife, and not when it is acquired by deed, and is transferred into possession by the statute of uses. *Jackson vs. Johnson*, 5 Cowen, 74. It is not necessary that there should be seisin and issue at the same time; and therefore, if the wife become seised of lands during the coverture, and then be disseised and then have issue, the husband shall be tenant by the curtesy of those lands. So if the wife become seised after issue born, though the issue die before her seisin. *Jackson vs. Johnson*, 5 Cowen, 74. A mere naked seisin by the wife as trustee will not suffice to make the husband tenant by the curtesy, though she has the beneficial interest in the reversion. Therefore, where a woman held a ground-rent in fee in trust for another during his life, and she afterwards married and died, and then the *cestuy que trust* died, the husband was held not to be entitled to the rent as such tenant. *Chew vs. Southwark*, 5 Rawle, 160. A husband is not entitled to an estate by the curtesy out of land devised to a trustee for the sole and separate use of the wife in fee-simple. *Cochran vs. O'Hern*, 4 W. & S. 95. *Stokes vs. McKibbin*, 1 Harris, 267. A husband who has conveyed land to another in trust for his wife is not entitled on her death to a tenancy by the curtesy in the trust-estate. *Rigler vs. Cloud*, 2 Harris, 361.—SHARSWOOD.

<sup>12</sup> 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.—CHITTY.

<sup>13</sup> It may be necessary to observe, 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, suppose 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

\*129] \*IV. Tenant in *dower* is where the husband of a woman is seised of an estate of inheritance, and dies: in this case, the wife shall have the third<sup>a</sup> 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.<sup>15</sup> Yet some(c) have ascribed the introduction of dower to the Normans, as a branch of *their* local tenures; though we cannot expect any feudal reason for its invention, since it was not a part of the pure, primitive, simple law of feuds, but was first of all introduced into that system (wherein it was called *triens*, *tertia*,(d) and *dotalitium*) by the emperor Frederick the Second;(e) who was contemporary with our king Henry III. It is possible, therefore, that it might be with us the relic of a Danish 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 \*130] the Danish ladies, who sold all their \*jewels to ransom him when taken prisoner by the Vandals.(f) However this be, the reason which our law gives for adopting it, is a very plain and 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<sup>16</sup> of the party at the

(a) Litt. § 36.

(b) Wilk. 75.

(c) Somner, Gavelk. 51. Co. Litt. 33. Bro. *Dower*, 70.

(d) Wright, 192.

(e) Craig. l. 2, c. 22, § 9.

(f) Ibid.

(g) Mod. Un. Hist. xxxii. 91.

(e) Bract. l. 2, c. 39. Co. Litt. 30.

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.—ARCHBOLD.

The Real Property Commissioners, in their first Report, proposed to make some alterations in the law of curtesy, the principal of which were to abolish the rule that the issue must be born alive, and to restrict the estate to an undivided moiety of the lands; and a bill was brought in, in the session of 1831, to carry these recommendations into effect. It was, however, suffered to drop; and it may therefore be considered that the law on this subject will not be unsettled.—STEWART.

<sup>14</sup> 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 vs. Hay*, Cro. Eliz. 15.—CHITTY.

<sup>15</sup> 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 seised during the coverture. *Godwin vs. 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.—CHITTY.

<sup>16</sup> 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 vs. Crutchley*, 2 Wils. 125. But when the marriage has not been had within any of our bishop's dioceses, or where, from

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.<sup>17</sup> 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 antient 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) revived this severity against the widows of traitors, [\*131 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. An alien also cannot be endowed,<sup>18</sup> unless she be queen-consort; for no alien is capable 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 inquire, 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)<sup>19</sup> Therefore, if a man seised in fee-simple hath a son by his first wife,

(h) Bract. l. 2, c. 39, § 4.

(i) Co. Litt. 32.

(j) Yet, among the ancient Goths, an adulteress was punished by the loss of her *dotalitius et trentis ex bonis mobilibus viri.* Stiernh. l. 3, c. 2.

(k) 13 Edw. I. c. 34.

(l) Co. Litt. 31.

(m) P. C. b. 3, c. 3.

(n) C. 110.

(o) 5 & 6 Edw. VI. c. 11.

(p) Stat. 5 Eliz. c. 11. 18 Eliz. c. 1. 8 & 9 W. III. c. 20. 15 & 16 Geo. II. c. 23.

(q) Co. Litt. 31.

(r) Litt. § 36.

(s) L. 2, c. 9, § 3.

(t) Litt. § 36.

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 vs. Ilderton*, 2 H. Bla. 156. The same doctrine, founded on obvious good sense, had been previously laid down in the case of *The Protector vs. Ashfield*, Hardr. 62.—CHITTY.

<sup>17</sup> 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 misdemeanour.—CHITTY.

<sup>18</sup> This statement is too general. Alien women, whose marriage with Englishmen has not taken place with license from the king, are not capable of acquiring dower, for the reason 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 license 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, (see vol. 1, p. 374;) but, if she be only made a denizen, she will have no claim to dower out of lands which he aliened before her denization. *Menville's case*, 13 Rep. 23.—CHITTY.

<sup>19</sup> The word "sole" should be inserted before "seised" in this description, because, if the husband is seised jointly with another person, that other person's interest, being derived from the original grant to the husband and herself, is prior to the wife's claim:



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 \*132] of the husband, for a *transitory instant* \*only, when the same act which gives him the estate conveys it also out of him again, (as where, by a fine, land is granted to a man, and he immediately renders it back by the same fine,) such a 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)<sup>20</sup> And, in short, a

(v) *Ibid.* 353.

(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.

and therefore she shall not be endowed. *Litt. s.* 45. *Co. Litt.* 37. The principle of this rule is founded on the nature of the interest of joint-tenants, (see *post*, 182.) from which survivorship is a necessary consequence, and not an arbitrary rule of law. During the life of the husband, his joint-tenant's interest pervaded the *whole* of the land: now, the tenant in dower would come in as tenant in common, and be entitled to hold the third of one moiety by a distinct title. The survivor's interest would therefore be changed; he would be obliged to recede entirely from that third in which before he had a joint-interest, and he would be put to this change by one whose title was posterior to his own. The maxim of law is that *jus accrescendi preferitur oneribus*.—COLERIDGE.

Yet it would not be accurate to say "sole seised;" for a tenant in common is not sole seised: yet his wife shall be endowed. We cannot expect the statement of a general rule always to express all the exceptional or anomalous cases which may exist. In truth, however, joint-tenants make together but one tenant: for this reason, the survivor may plead the feoffment by which the joint-tenancy was created as made to himself alone, without naming his companion. *Co. Litt.* 185, a.—SHARWOOD.

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.—ARCHBOLD.

<sup>20</sup> The student may reasonably be puzzled to distinguish between the "transitory instant" of one example and the "single moment" of the other. In fact, the space of time is no essential ingredient in the case: it is the *interest* of the husband. In the first example, the cognisee of the fine takes absolutely no interest at all by the grant: he is, to use the expression of the text, (p. 364,) a mere instrument or conduit-pipe to carry an estate to the cognisor, or, it may be, to a stranger; he is simply to perform a contract made by himself with the cognisor, or between the cognisor and a stranger. Upon this ground it is, I conceive, that the wife would not be dowable. In the second example, the land is supposed to be abiding in the husband as his own.—COLERIDGE.

See *Ballard vs. Bowers*, 10 N. Hamp. 500. *Stanwood vs. Dunning*, 2 Shep. 290. *Randolph vs. Doss*, 3 Howard. (Miss.) 205.

In the United States, the rule generally adopted is that a wife is dowable of an equity of redemption, and, indeed, of a trust-estate generally. The anomalous distinction of the English courts between dower and curtesy in this respect has been repudiated. *Shoemaker vs. Walker*, 2 S. & R. 554. *Coles vs. Coles*, 15 Johns. 319. *Fish vs. Fish*, 1 Conn. 559. *McMahan vs. Kimball*, 2 Blackf. 1. *Reed vs. Morrison*, 12 S. & R. 18. *Lewis vs. James*, 8 Humph. 537. The truth is that the doctrine of seisin is little known here, because it is inconsistent with the genius and spirit of our laws, which give a free scope

widow may be endowed of all her husband's lands, tenements, and hereditaments, corporeal or incorporeal,<sup>21</sup> under the restrictions before mentioned; unless there be some special reason to the contrary. Thus a woman shall not be endowed of a castle built for defence of the realm : (z) 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)<sup>22</sup>

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.<sup>23</sup> 1. Dower by the *common law*; or that which is before da

(\*) Co. Litt. 31. 3 Lev. 401.

(\*) Co. Litt. 32. 1 Jon. 315.

(\*) 4 Rep. 22.

(\*) Co. Litt. 32.

(\*) Ibid. §§ 43, 49.

to the alienation and transfer of property, untrammelled with the feudal doctrine of investiture and its concomitants; and with us seisin is, for many substantial purposes, the beneficial interest and right of ownership. Where the husband's fee, however, is determined by recovery, condition, or collateral limitation, the wife's dower determines with it. The case of a tenant in tail—in which the wife is endowed notwithstanding the estate-tail is determined by the death of the tenant in tail without issue—is an exception arising from an equitable construction of the statute *de donis*; and the cases of dower of estates determinable by executory devise and springing use owe their existence to the circumstance that these limitations are not governed by common-law principles. Preston on Abst., 3 vol. p. 372. Before the statute of wills there was no executory devise, and before the statute of uses there was no springing use. Like estates-tail, which were created by the statute *de donis*, and of which there is constantly dower, though tenant in tail claims *per formam doni*, it was the benign temper of the judges who moulded the limitations of the estate introduced by them, whether original or derivative, so as to relax the severer principles of the common law; and, among other things, to preserve curtesy and dower from being barred by determinations of the original estate, which could not be prevented. Gibson, C. J., in *Evans vs. Evans*, 9 Barr, 190. Where the grantor of an estate on a condition enters for condition broken, the dower of the wife of the grantee falls with the estate of the husband. *Beardslee vs. Beardslee*, 5 Barb. S. C. 324.—SHARSWOOD.

<sup>21</sup> 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 vs. Ingram*, 2 Ves. Jr. 664.—CHITTY.

<sup>22</sup> 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.—CHITTY.

It is now provided in England, by the statute 3 & 4 W. IV. c. 105, that when a husband shall die beneficially entitled to any land for an interest which shall not entitle his widow to dower out of the same at law, and such interest, whether wholly equitable or partly legal and partly equitable, shall be an estate of inheritance in possession or equal to an estate of inheritance in possession, (other than an estate in joint-tenancy,) then his widow shall be entitled to dower out of the same land; and that when a husband shall have been entitled to a right of entry or action in any land, and his widow would be entitled to dower out of the same if he had recovered possession thereof, she shall be entitled to dower out of the same, although her husband shall not have recovered possession thereof, provided that such dower be sued for or obtained within the period during which such right of entry or action might be enforced; also that widows shall not be entitled to dower out of any land which shall have been absolutely disposed of by their husbands in their lifetime or by their wills.—STEWART.

<sup>23</sup> The dower *de la plus belle* was shortly this. If a man holding lands in chivalry and in socage died leaving a widow and an heir under fourteen, the lord was entitled to the custody of the lands holden in chivalry, and the widow, as mother, of the lands in socage; but, as she would have to account for the profits of the lands so held by her, there was no provision for herself by way of dower. If then she brought a writ of dower against the lord to be endowed from the lands holden by him, he might plead all these facts

scribed. 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 \*133] 3. Dower *ad ostium ecclesiæ*; (f) which is where tenant in fee-simple of full age, openly at the church door, where all marriages were formerly celebrated, after affiance made and (Sir Edward Coko, in his translation of Littleton, adds) troth plighted between them, doth endow the wife with the whole, or such quantity as he shall please, of his lands; at the same time specifying and ascertaining the same; on which the wife, after her husband's death, may enter without further ceremony. 4. Dower *ex assensu patris*; (g) which is only a species of dower *ad ostium ecclesiæ*, 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 ecclesiæ et ad ostium ecclesiæ; non enim valent facta in lecto mortali, nec in camera, aut alibi ubi clandestina fuerint 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 ecclesiæ* 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 feudal rigour, was the husband allowed to endow her *ad ostium ecclesiæ* 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 feudal \*134] profits. (m) But if no specific dotation was made at the church porch, then she was endowed by the common law of the third part (which was called her *dos rationabilis*) of such lands and tenements as the husband was seised of at the time of the espousals, and no other; unless he specially engaged before the priest to 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

(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, dorem suam habebit;—si vero uxor cum liberis remanserit, dorem quidem habebit, dum corpus suum legitime servaverit.* Cart. Hen. I. A.D. 1001. Intro. to great charter, edit. Ozon. page iv.

(k) l. 6, c. 1 and 2.

(l) Gr. Const. m. c. 101.

(m) Bract. l. 2, c. 39, § 6.

(n) *De questu suo.* (Glanv. lb.)—*de terris acquisitis et acquirendis.* Bract. lb.

(o) Glanv. c. 2.

(p) When special endowments were made *ad ostium ecclesiæ*, the husband, after affiance made and troth plighted, used to declare with what specific lands he meant to endow his wife, (*quod dotam eam de tali manerio cum pertinentiis, &c.* Bract. *Ibid.*;) and therefore, in the old York ritual (Seid.

*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 terris et tenementis.* Bract. lb.) 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 further 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. Ozon.

and pray that she might be adjudged to endow herself of the *fairest* of the lands held by her as guardian. And if judgment to that effect was given, the chivalry lands during the wardship were quit of dower, and she, in the presence of her neighbours, (perhaps a jury,) endowed herself by metes and bounds of the fairest part of the socage lands, to the value of a third part of the whole of both tenements.

This dower may be considered as another of the feudal hardships, which relieved the lord in chivalry of his share of a burthen commonly incident to all lands, and threw it unfairly upon the socage lands,—in other words, upon the ward.—COLERIDGE.

neld in his lifetime :(r) yet in case of a specific endowment of less *ad ostium ecclesie*, 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 \*expressly, that a woman may be endowed *ad ostium ecclesie* 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 ecclesie* and *ex assensu patris*, have since fallen into total disuse.<sup>24</sup>

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 feudal exactions, a woman could not be endowed without a fine paid to the lord; neither could she marry again without his license; lest she should contract herself, and so convey part of the feud, to the lord's enemy.(x) This license the lords took care to be well paid for; and, as it seems, would sometimes force the dowager to a second marriage, in order to gain the fine. But, to remedy these oppressions, it was provided, first by the charter of Henry I.,(y) and afterwards by *magna carta*,(z) that the widow shall pay nothing for her marriage, nor shall be distreined to marry afresh, if she chooses to live without a husband; but shall not, however, marry against the consent of the lord; and further, 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, and the widow is immediate tenant to the heir, by [136 a kind of subinfeudation, or under-tenancy, completed by this investiture or assignment; which tenure may still be created, notwithstanding the statute of *quia emptores*, because the heir parts not with the fee-simple, but only with an estate for life. If the heir or his guardian do not assign her dower within the term of quarantine, or do assign it unfairly, she has her remedy at law, and the sheriff is appointed to assign it.(c) 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 ecclesie*, which had

(r) *Assignetur autem ei pro dote sua tertia pars totius terre mariti sui que sua fuit in vita sua, nisi de minori & tata fuerit ad ostium ecclesie.* C. 7, *ibid.*

(s) *Bract. ubi supra.* Britton, c. 101, 102. Flet. I. 5, c. 23, N 11, 12.

(t) F. 7 Hen IV. 13, 14.

(u) § 89. F. N. B. 150.

(v) § 141.

(w) *Mirr.* c. 1, § 3.

(x) *Ubi supra.*

(y) Cap. 7.

(z) 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.

(a) Co. Litt. 34, 35.

(b) *Ibid.*

(c) F. N. B. 143. Finch, L. 314. Stat. Westm. 2. 13 Edw. I. c. 7.

(d) Co. Litt. 32.

<sup>24</sup>The dowers *ad ostium ecclesie* and *ex assensu patris* have long since fallen into total disuse, and were lately abolished by the 3 & 4 W. IV. c. 105, § 13.—STEWART.

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. A widow may be barred of her dower not only by elopement, divorce, being an alien, the treason of her husband,<sup>25</sup> and other disabilities before mentioned, 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 \*157] dower, she forfeits it *ipso facto*, and the heir may recover it by action.<sup>26</sup> A woman also may be barred of her dower, by levying a fine, or suffering a recovery of the lands, during her coverture. (*h*)<sup>27</sup> But the most usual method of barring dowers is by jointures, as regulated by the statute 27 Hen VIII. c. 10.

A jointure, which, strictly speaking, signifies a joint estate, limited to both husband and wife, but in common acceptation extends also to a sole estate, limited to the wife only, is thus defined by Sir Edward Coke; (*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 the 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 settle-

(*f*) Co. Litt. 39.  
(*g*) 6 Edw. I. c. 7.

(*h*) Pig. of Recov. 66.  
(*i*) 1 Inst. 26.

<sup>25</sup> 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.—CHITTY.

<sup>26</sup> "The mischief before the making of the statute (Gloucester, 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 tenant 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 alienating for *her own life*; for such an estate wrought no wrong. Ibid.—CHITTY.

<sup>27</sup> In some States dower is barred by a sale on execution for the debts of the husband. Davidson vs. Frew, 3 Dec. 3. Gardiner vs. Miles, 5 Gill. 94. Reed vs. Morrison, 12 S. & R. 18. London vs. London, 1 Humph. 1. A sale of land under a testamentary power for the payment of debts discharges the land from the dower of the testator's widow. Mitchell vs. Mitchell, 8 Barr, 126. An assignment in insolvency by a debtor under a compulsory process, and a conveyance by his trustee, do not divest his wife's right of dower, (Eberle vs. Fisher, 1 Harris, 326;) nor a voluntary assignment in trust to pay debts, and the subsequent sale and conveyance by his assignees. Helfrich vs. Obermyer, 3 Harris, 113.

Where a devise or bequest to the widow in lieu of dower is accepted by her, it is a good bar to an action of dower; and that a devise was intended to be in lieu of dower may be *inferred* from the provisions of the will, as where it is inconsistent with the claim of dower; but the inconsistency must be plain. Jackson vs. Churchill, 7 Cow. 287. Allen vs. Pray, 3 Fairf. 138. Webb vs. Evans, 1 Binn. 565. Kennedy vs. Mills, 13 Wend. 553. Cauffman vs. Cauffman, 17 S. & R. 16. Whit vs. Whit, 1 Harris, 202.—SHARWOOD.

ment 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,<sup>28</sup> all wives would have become dowable of such lands as were held to the use of their husbands, and also entitled at the same time to any special lands that might be settled in jointure: had not the same statute provided, that \*upon making such [\*138 an estate in jointure to the wife before marriage, she shall be forever 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.<sup>29</sup> 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<sup>30</sup> in satisfaction of her whole dower, and not of any

(\*) 4 Rep. 1, 2.

<sup>28</sup> It is established doctrine now that a wife is not dowable of a *trust-estate*, (*Godwin vs. Winsmore*, 2 Atk. 526;) for dower is entirely a *legal demand*. Attorney-General vs. Scott, Ca. temp. Talb. 139. Yet a man may be tenant by the courtesy of his deceased wife's trust-estate, (*Watts vs. 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 vs. 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 vs. Scarfe*, 2 Jac. & Walk. 200. *Dixon vs. 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 vs. 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 vs. Earl of Winchelsea*, 1 P. Wms. 278. *Hinton vs. Hinton*, 2 Ves. Sen. 634. *Noel vs. 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 vs. Bates*, 1 Lord Raym. 327. See *Ante*. note 20.

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 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.

--CHRISTIAN.

<sup>29</sup> 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.--CHRISTIAN.

<sup>30</sup> 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 *rauds*, which expressly enacts that no estates or interests of freehold shall be surren-

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 ecclesiæ*, and may either accept it, or refuse it and betake herself to her dower at common law; for she was not capable of consenting to it during coverture. And if, by any fraud or accident, a jointure made before marriage proves to be on a bad title, and the jointress is evicted, or turned out of possession, she shall then (by the provisions of the same statute) have her dower *pro tanto* at the common law. (l)<sup>31</sup>

There are some advantages attending tenants in dower that do not extend to jointresses; and so *vice versa*, jointresses are in some respects more privileged than tenants in dower. Tenant in dower by the old common law is subject to no tolls or taxes; and hers is almost the only estate on which, when derived from the king's debtor, the king cannot distress for his debt; if contracted \*139] during the coverture. (m) But, on the other \*hand, a widow may enter at once, without any formal process, on her jointure land; as she also might have done on dower *ad ostium ecclesiæ*, which a jointure in many points resembles; and the resemblance is 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 ecclesiæ*, the most eligible species of any. <sup>32</sup>

(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. 15) has given us the terms of a marriage settlement among the Gauls, as nicely calculated as any modern jointure:—"Viri, quantum pecunias ab uxoris dotis nomine acceperunt, tantas ex suis bonis, æstimatone facta, cum dotibus communicant. Hujus omnis pecunie conjunctim ratio habetur,

*fructusque servantur. Uter eorum vilita superavit, ad eum pars utriusque cum fructibus superiorum temporum pertinet."* The dauphin's commentator on Cæsar supposes that this Gaulish custom was the ground of the new regulation 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.

(m) Co. Litt. 31, a. F. N. B. 150.

(n) Co. Litt. 36.

(o) Ibid. 37.

dered 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 vs. Andrews*, 9 Mod. 152. *Tinney vs. 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 vs. 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 vs. Lord Effingham*, Coop. 323.—CHITTY.

<sup>31</sup> As to the first requisite, I have ventured to insert two or three words (the jointure must (be limited to) take effect, &c.) in the text, because lord Coke, from whom the passage is taken, (Co. Litt. 36,) is express that it is not enough that in fact and by accident the jointure takes effect immediately on the death of the husband, as if an interposed remainderman for life should die before the husband, but that the limitation of the deed must be to the wife immediately after the husband's death, where the estate is not joint. As to the third, though the position is true at law, yet it is now settled that a trust-estate, being equally certain and beneficial as a legal estate, is a good equitable jointure to bar dower. *Hargrave's note*, 226. Co. Litt. 36. As to the fourth, lord Coke says it must either be expressed or *averred* to be so; and in 4 Rep. 3 it is laid down that it need not be expressed, but may be averred to be, &c.; that is, the deed being pleaded, and being silent as to its object, or stating one not inconsistent with this, this may be stated and averred supplementally to have been the object or part of the object.—COLERIDGE.

<sup>32</sup> Besides the method of jointures, the ingenuity of modern times devised other modes of preventing the wife from acquiring a title to dower. One of these has been most extensively employed, and is still applicable to the case of widows who were married on or before the 1st day of January, 1834, (the date fixed by the statute 3 & 4 W. IV. c. 105.) Under the old law, if an estate were conveyed simply to a man in fee-simple or in fee-tail, the title of his widow to dower, in the absence of any bar by way of jointure, im-

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* 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)<sup>1</sup> 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.<sup>2</sup>

(\*) We may here remark, once for all, that the terminations of “—or” and “—ce” 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. 53.

(c) Ibid. 67.

mediately attached, and he could not again sell the estate discharged of this claim without the concurrence of the wife in a fine or recovery, or, since the statute abolishing these modes of assurance, in a statutory deed of disposition or release. To avoid this inconvenience, it became usual, in the conveyance of estates, to limit the lands to the purchaser for his natural life, with remainder to a trustee in trust for him during his life, in case of his life-estate becoming forfeited or determined by any means during his lifetime, with remainder to the purchaser in fee. It followed, from the construction put upon these limitations by the courts of law, that the husband during his lifetime never had an estate of inheritance in possession in the lands, and consequently the wife's title to dower never attached. Through the medium of the statute of uses, hereafter to be explained, the purchaser was also clothed with a power of appointment, by which he could at once dispose of the fee-simple in any manner he pleased, and which effectually defeated the wife's claim. This plan, known among conveyancers as the limitation to uses to bar dower, is still used whenever it is necessary to convey lands to a married man whose marriage took place on or before the 1st of January, 1834.

But, with regard to purchasers married since that day, this device, although sometimes employed for the purpose of obviating future questions as to the date of the marriage, is no longer necessary. For now a husband, whether he become entitled to an estate by actual conveyance or by inheritance or devise, may absolutely dispose of it either in his lifetime or by his will, or may charge or encumber it as he pleases, to the exclusion of his wife's title to dower. He may, either at the time of taking a conveyance to himself of the estate, or at any time thereafter, and either by deed or by his will, declare that his wife shall not be entitled to dower out of his estates; or he may declare that she shall be entitled to it out of some portion only of the property. The widow's right to dower may also, by the husband's will, be made subject to any condition, restriction, or direction which he chooses to impose; and her right will be defeated by a devise to her of lands, or of any estate or interest therein, out of which she would otherwise be dowerable, unless a contrary intention shall be declared by the will.—KERR.

<sup>1</sup>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 vs. Barnardiston*, 1 P. Wms. 509. *Hitchens vs. Hitchens*, 2 Vern. 404. *S. C.* 2 Freem. 242. *Doe vs. Simpson*, 5 East, 171. *Doe vs. 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. *Barry vs. Askham*, 2 Vern. 26. *Sheldon vs. Dormer*, 2 Vern. 311. *Green vs. Belchier*, 1 Atk. 506. *Allan vs. Backhouse*, 1 Ves. & Bea. 75. *Bootle vs. Blundell*, 1 Meriv. 233.—CHITTY.

<sup>2</sup> In estimating the language which is necessary to constitute a lease, the form of words



The space of a *year*<sup>3</sup> is a determinate and well-known period, consisting com-

used is of no consequence. It is not necessary that the term *lease* should be used. Whatever is equivalent will be equally available. If the words assume the form of a license, covenant, or agreement, and the other requisites of a lease are present, they will be sufficient. *Moore vs. Miller*, 8 Barr, 283. *Watson vs. O'Kern*, 6 Watts, 368. *Offerman vs. Starr*, 2 Barr, 394. *Grenough's Appeal*, 9 Barr, 18. *Mashier vs. Reding*, 3 Fairf. 478. It is necessary that the contract should have reference to, and include, the possession of the premises by the tenant. An agreement by the owner of lands or farms, in possession, with a person to cultivate and sow the land, or some portion thereof, with corn or grain of some sort, on condition of the latter having a certain portion of the grain grown thereon, does not make such person a tenant. *Greber vs. Kleckner*, 2 Barr, 289. *Caswell vs. Districh*, 15 Wend. 379. *Haywood vs. Miller*, 3 Hill, 90. An agreement for a lease will be construed to be a present demise, if no future formal lease be contemplated, and especially if possession be taken under it. *Jenkins vs. Eldridge*, 3 Story, 325—SHARSWOOD.

<sup>3</sup>As to time, and the mode of computing it in general, see Com. Dig. tit. Ann. and tit. Temps; Vin. Abr. tit. Time; Bac. Abr. Leases, E. 2 and 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 calendar was used, and much inaccuracy and inconvenience resulted, which occasioned the introduction of the *new style* 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. Litt. 135. 2 Roll. 521; 1. 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 twelvemonth, 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 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 and 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 a 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 Bingham. Rep. 307. In general, when a statute speaks of a month without adding "calendar," or other words showing 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 Bingham. 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

monly of 365 days; for though in bis\*sextile or leap years it consists properly of 366, yet by the statute 21 Hen. III. the increasing day in the [\*141

computation prevails; the term, therefore, is taken in that sense which is conformable to the subject-matter to which it is applied, (2 Roll. Abr. 521, 51. Hob. 179. 1 Bla. R. 450. 1 M. & S. 117. 1 Bingh. R. 307. Com. Dig. Ann. R.;) 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 Burr. 1455. 1 Bla. R. 450. Doug. 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 lord 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 *feri 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 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. Doug. 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 the 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 enrolment within a specified time after date of the instrument. Hob. 139. 2 Camp. 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 Camp. 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

leap year, together with the preceding day, shall be accounted for one day only. That of a *month* is more ambiguous: there being, in common use, two ways of calculating months; either as lunar, consisting of twenty-eight days, the supposed revolution of the moon, thirteen of which make a year: or, as calendar months of unequal lengths, according to the Julian division in our common almanacs, commencing at the calends of each month, whereof in a year there are only twelve.<sup>4</sup> A month in law is a lunar month, or twenty-eight days, unless otherwise expressed; not only because it is always one uniform period, but because it falls naturally into a quarterly division by weeks. Therefore a lease for "twelve months" is only for forty-eight weeks; but if it be for "a twelvemonth" in the singular number, it is good for the whole year.<sup>(d)</sup> 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.<sup>(e)</sup> 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 considered as the bailiffs or servants of the lord, \*142] 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 antient law, be at any time defeated by a common recovery suffered by the tenant of the freehold;<sup>(f)</sup> 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<sup>(g)</sup> that by the antient 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

<sup>(d)</sup> 6 Rep. 61.  
<sup>(e)</sup> Co. Litt. 135.

<sup>(f)</sup> Co. Litt. 46.  
<sup>(g)</sup> Mirror, c. 2, § 27. Co. Litt. 45, 46.

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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 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. Jr. 248.—CURRIV.

<sup>4</sup>The calendar of the Romans had a very peculiar arrangement. They gave particular names to three days of the month. The first day was called the *calends*. In the four months of March, May, July, and October the 7th, and in the others the 5th, day was called the *nones*; and in the four former the 15th, in the rest the 13th, day was called the *ides*. The other days they distinguished in the following manner. They counted from the above-mentioned days backwards, observing to reckon also the one from which they began. Thus the 3d of March, according to the Roman reckoning, would be the 5th day before the *nones*, which in that month fall upon the 7th. The 8th of January, in which month the *nones* happen on the 5th and the *ides* on the 13th, was called the 6th before the *ides* of January. Finally, to express any of the days after the *ides*, they reckoned in a similar manner from the calends of the following month. American Encyc., Calendar.—SHARSWOOD.

observe in Madox's collection of antient instruments, some less than 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 [\*143] rules of succession, \*and with the same inferiority to freeholds, as when they were little better than tenancies at the will of the landlord.<sup>5</sup>

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

(*h*) Madox *Formulare Anglican.* n<sup>o</sup>. 239, fol. 140. Demise for eighty years, 21 Ric. II. . . . Ibid. n<sup>o</sup>. 245, fol. 146, for the like term, ad. 1429. . . . Ibid. n<sup>o</sup>. 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.

<sup>5</sup> It is the duty of the tenant to maintain the title of his landlord. It results from the fealty which is incident to every tenure. It is one of the best-settled principles of the law that neither the tenant, nor any one claiming under him nor by collusion with him, shall be permitted to controvert his landlord's title. In an action of covenant on the demise, the tenant cannot plead *nil habuit in tenementis*; in an action of ejectment, he cannot set up a title in himself or an outstanding title in another. If he has acquired a better title than the landlord, he is bound to surrender the possession at the termination of his lease, though he may afterwards prosecute his better title. *Rankin vs. Tenbrook*, 6 Watts, 386. *Cooper vs. Smith*, 8 Watts, 536. *Stewart vs. Roderick*, 4 W. & S. 188. *Naglee vs. Ingersoll*, 7 Barr, 185. *Jackson vs. Stewart*, 6 Johns. 34. *Chambers vs. Pleak*, 6 Dana, 426.

There are some exceptions, however, to this general principle, important to be noticed. The rule that a lessee cannot controvert the title of his lessor is founded on the presumption of the lease being taken without fraud, force, or illegal behaviour on the part of the lessor; and wherever this is not the case it does not apply. *Hamilton vs. Marsden*, 6 Binn, 45. *Miller vs. McBrier*, 14 S. & R. 382. So where a person goes to one in possession, and, upon the false and fraudulent representation that he is the true owner, induces him to take a lease, the tenant is not estopped. *Hall vs. Benner*, 1 Penna. R. 402. *Gleim vs. Rise*, 6 Watts, 44. If one who has no right comes and induces him in possession to become his tenant, it must be by some misrepresentation of fact or law; and it matters not whether the deception practised originates in voluntary falsehood or in simple mistake, for the immunity it confers springs not so much from the fraud of the usurper as from the wrong which the deception would otherwise work upon the rights of the lessee. *Hockenbury vs. Snyder*, 2 W. & S. 240. *Baskin vs. Seechrist*, 6 Barr, 154.

Another class of exceptions to this general principle is where the tenant has a good title, and a stranger purchases it *bona fide* and receives possession without any knowledge of the tenancy. *Dikeman vs. Parrish*, 6 Barr, 210. *Thompson vs. Clark*, 7 Barr, 62.

And so an exception exists when the title of the landlord has expired or been divested subsequently to the creation of the tenancy. As, if the landlord hold by a defeasible title or by an estate less than a fee, or he sells, or his title is divested by a judicial sale, the tenant may attain to the true owner. *Jackson vs. Rowland*, 6 Wend. 666. *Lansford vs. Turner*, 5. J. J. Marsh, 104. *Kinney vs. Doe*, 8 Blackf. 550. *Bowser vs. Bowser*, 10 Humph. 49.—SHARSWOOD.

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*, though a lease for life cannot.  
 \*144] As, if I grant lands to Titius to hold from Michaelmas next for \*twenty years, this is good; but to hold from Michaelmas next for the term of his natural life, is void. For no estate or freehold can commence *in futuro*,<sup>6</sup> 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.<sup>7</sup> 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*)<sup>8</sup>

(*q*) Co. Litt. 45.  
 (*r*) Ibid. 46.  
 (*s*) 5 Rep. 94.

(*q*) Co. Litt. 46.  
 (*r*) Ibid. 45.

<sup>6</sup> 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 interest undisposed of will be a resulting trust. Sand. on U. & T., 1 vol. 128, 2 vol. 7.—CHITTY.

<sup>7</sup> As to this point, see Bac. Abr. Leases, M.

<sup>8</sup> The term may end by forfeiture or re-entry for condition broken, either express or implied. A forfeiture may be incurred either by a breach of those conditions which are always implied or understood to be annexed to the estate, or those which may be agreed upon between the parties and expressed in the lease. The lessor, having the *jus disponendi*, may annex whatever conditions he pleases, provided they be not illegal, unreasonable, or repugnant to the grant itself, and upon breach of these conditions may avoid the lease. Any act of the lessee by which he disaffirms or impugns the title of his lessor comes within the first class; for to every lease the law tacitly annexes a condition that, if the lessee do any thing which may affect the interest of the lessor, the lease shall be void and the lessor may re-enter. Every such act necessarily determines the relation of landlord and tenant; since to claim under another, and at the same time to convert his title,—to affect to hold under a lease, and at the same time to destroy the interest out of which the lease arises,—would be most palpable inconsistency. So where the tenant does an act which amounts to a disavowal of the title of the lessor, no notice to quit is necessary; as where the tenant has attorned to some other person, or answered an application for rent by saying that his connection as tenant with the party applying has ceased. In such cases as the tenant sets his landlord at defiance, the landlord may consider him either as his tenant or as a trespasser. *Newman vs. Rutter*, 8 Watts, 51. *Willison vs. Watkins*, 3 Pet. 49. *Jackson vs. Vincent*, 4 Wend. 633. Where there is a condition of re-entry reserved in a lease for non-payment of rent, the landlord must demand the precise amount due on the day it becomes due, at such a convenient time before sunset that the sum could be counted and on the most notorious part of the land,

Tenant for term of years hath incident to and inseparable from his estate, unless by special agreement, the same estovers which we formerly observed<sup>(u)</sup> that tenant for life was entitled to; that is to say, house-bote, fire-bote, plough-bote, and hay-bote;<sup>(w)</sup> terms which have been already explained.<sup>(x)</sup><sup>9</sup>

\*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 [ \*145 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.<sup>(y)</sup> 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 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.<sup>(z)</sup> 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.<sup>(a)</sup><sup>10</sup>

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 ob-

(\*) Page 122.  
(\*) Co. Litt. 45.  
(\*) Page 35.

(\*) Litt. § 68.  
(\*) Co. Litt. 56.  
(\*) Ibid. 55.

though it be vacant. *McCormick vs. Conell*, 6 S. & R. 151. *Jackson vs. Harrison*, 17 Johns. 66. *Jackson vs. Kipp*, 3 Wend. 230. *Conner vs. Bradley*, 1 How. U. S. 211. *Jones vs. Reed*, 15 N. Hamp. 68.—SHARSWOOD.

<sup>9</sup>The tenant is bound to commit no waste, and to make fair and tenantable repairs, such as putting in windows or doors that have been broken by him, so as to prevent waste and decay of the premises; but not to make substantial and lasting repairs, such as putting on new roofing. He is not liable for general repairs; nor is he compellable to restore premises if burned down or become ruinous by any other accident without any default on his part. And in all cases there is an implied agreement, arising out of the relation of landlord and tenant, to use the premises in an ordinary and proper manner. If a tenant chooses to put permanent repairs on the leased property without the consent of the landlord, he cannot charge them in account with him. *Long vs. Fitzsimons*, 1 W. & S. 530. *Mumford vs. Brown*, 6 Cowen, 475. *Vai vs. Weld*, 17 Missouri, 232. But when the repairs are made with the assent and by the authority of the landlord, the law is otherwise; for in that case the expense may be thrown upon the landlord,—and that without any express promise to pay. If it was with his assent and for his benefit, the law will imply an undertaking to pay for them. Merely standing by without objecting will not suffice: there must be some act and encouragement from the landlord to entitle the tenant to charge the landlord. *Cornell vs. Vanartsdalen*, 4 Barr, 364. *City Council vs. Moorhead*, 2 Rich. 430. There is no implied covenant or warranty on the part of a lessor of a dwelling-house that the premises are tenantable. *Cleves vs. Willoughby*, 7 Hill, 83. *Neidelt vs. Wales*, 16 Missouri, 214. It is implied from the letting a farm for agricultural purposes that the tenant will cultivate the land according to the rules of good husbandry. *Lewis vs. Jones*, 5 Harris, 262.—SHARSWOOD.

<sup>10</sup>What was recognised as a good particular custom in England, in *Wigglesworth vs. Dallison et al.*, 1 Dough. 201, that a tenant, whether by parol or deed, after the expiration of his term, shall have the way-going crop, and the right to enter, cut and carry it away, is the common law of Pennsylvania. *Stultz vs. Dickey*, 5 Binn. 285. In the nature of the thing it is reasonable that, where a lease commences in the spring of one year and ends in the spring of another, the tenant should have the crop of winter grain sown by him the autumn before the lease expired; otherwise he pays for the land one whole year without having the benefit of a winter crop. It is confined, however, to the winter grain. The tenant has no right to a crop of grain sown in the spring before his lease expires. *Demi vs. Bossler*, 1 Penna. R. 224. The straw is a constituent part of the way-going crop. *Craig vs. Dale*, 1 W. & S. 509. *Iddings vs. Nagle*, 2 W. & S. 22. So in New Jersey. *Van Doren vs. Everitt*, 2 South. 460.—SHARSWOOD.

tains 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 connection with the other at his own pleasure.(c) Yet this \*146] must be understood with some restriction. \*For if the tenant at will sows his land, and the landlord, before the corn is ripe, or before it is reaped, puts him out, yet the tenant shall have the emblements, and free ingress, egress, and regress, to cut and carry away the profits.(d) And this for the same reason upon which all the cases of emblements turn; viz. the point of uncertainty: since the tenant could not possibly know when his landlord would determine his will, and therefore could make no provision against it; and having sown the land, which is for the good of the public, upon a reasonable presumption, the law will not suffer him to be a loser by it. But it is otherwise, and upon reason equally good, where the tenant himself determines the will; for in this case the landlord shall have the profits of the land.(e)

What act does, or does not, amount to a determination of the will on either side, has formerly been matter of great debate in our courts. But it is now, I think, settled, that (besides the express determination of the lessor's will, by declaring that the lessee shall hold no longer; which must either be made upon the land,(f) or notice must be given to the lessee)(g) the exertion of any act of ownership by the lessor, as entering upon the premises and cutting timber,(h) taking a distress for rent and impounding 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 \*147] appears in the case of \*emblements before mentioned; and, by a parity of reason, the lessee, after the determination of the lessor's will, shall have reasonable ingress and egress to fetch away his goods and utensils.(n) And if rent be payable quarterly, or half-yearly, and the lessee determines the will, the rent shall be paid to the end of the current quarter or half year.(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<sup>11</sup>

(b) Litt. 268.

(c) Co. Litt. 55.

(d) Ibid. 56.

(e) Ibid. 55.

(f) Ibid.

(g) 1 Vent. 248.

(h) Co. Litt. 55.

(i) Ibid. 57.

(j) 1 Roll. Abr. 860. 2 Lev. 88.

(k) Co. Litt. 55.

(l) 5 Rep. 116. Co. Litt. 57, 62.

(m) Litt. 269.

(n) Salk. 414. 1 Sid. 339.

<sup>11</sup> 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

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.<sup>(p)</sup><sup>14</sup>

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,<sup>(g)</sup> was in its original and foundation nothing better than a mere estate at will. But the kindness and indulgence of successive lords of manors having permitted these estates to be enjoyed by the tenants and their heirs, according to particular

<sup>(p)</sup> 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. Tr. 13 Hen. VIII. 15, 16.

<sup>(g)</sup> Page 93.

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 will 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 Camp. 510.—CHITTY.

<sup>14</sup> 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 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 notice to quit, the service and waiver thereof, Adams on Ejectment, 96 to 140. 1 Saunders, by Patteson & Williams, 276, note a.—CHITTY.

It may be considered as now definitively settled that a general letting for no determinate period of time, but by which an annual rent is reserved, payable quarterly or otherwise, is a lease from year to year so long as both parties please. *Lesley vs. Randolph*, 4 Rawle, 123. *Squires vs. Huff*, 3 A. K. Marsh, 17. *Sullivan vs. Enders*, 3 Dana, 66.

Though a parol demise for more than three years is void by the statute, or enures as a lease at will only, yet it is construed as a tenancy from year to year. *Schuyler vs. Leggett*, 2 Cowen, 660. *Strong vs. Crosby*, 21 Conn. 398.

Where a tenant for a term certain holds over, the landlord may elect to consider him as a tenant from year to year on the terms of the original lease. *Diller vs. Roberts*, 13 S. & R. 60. *Bacon vs. Brown*, 9 Conn. 334. *Brown vs. Knapp*, 1 Pick. 332. *Fronty vs. Wood*, 2 Hill, S. C. 367. *Conway vs. Starkweather*, 1 Denio, 113. *De Young vs. Buchanan*, 10 Gill & Johns. 149. *Hemphill vs. Flynn*, 2 Barr, 144.

Where the lease is for a term certain which has expired, the landlord may enter at once without legal process and dispossess the tenant, provided he can do so without personal violence or a breach of the peace. *Overdeer vs. Lewis*, 1 W. & S. 90. He may bring ejectment at once without having given any notice to quit. *Bedford vs. McElheron*, 2 S. & R. 50. *Evans vs. Hastings*, 9 Barr, 273. *Durell vs. Johnson*, 17 Pick. 263. *Allen vs. Jaquish*, 21 Wend. 628. In case, however, of a tenancy at will or from year to year, the relation cannot be terminated on the part of the landlord without a notice to quit,—six months in England, and generally in this country to expire with the expiration of the year. *Fahnestock vs. Faustenaur*, 5 S. & R. 174. In England the same thing holds true *à converso* of the tenant,—that he cannot put a legal period to the tenancy without a similar notice to his landlord. But see *Cook vs. Neilson*, 5 Lightly Rep. 463. S. C. 10 Barr, 41.—SHARSWOOD.



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 \*148] custom as a tenant at will; the custom \*having arisen from a series of uniform wills. And therefore it is rightly observed by Calthorpe,<sup>(r)</sup> 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 antient 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,<sup>(s)</sup> who hath granted out the use and occupation, but not the corporal 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 \*149] tenant in fee-\*simple and also tenant at the lord's will, seems to have arisen from the nature of villenage tenure; in which a grant of any estate of freehold, or even for years absolutely, was an immediate enfranchisement of the villein.<sup>(t)</sup> 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 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 forever, yet he is also *sail* to hold at another's will. But with regard to certain other copy-

<sup>(r)</sup> On copyholds, 51, 54.

<sup>(s)</sup> Litt. § 51. 2 Inst. 325.

<sup>(t)</sup> Mirr. c. 2, § 28. Litt. 2, 21, 22, 23.

holders of free or privileged tenure, which are derived from the ancient tenants in villein-socage,<sup>(u)</sup> 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 to whom they are holden, but in the tenants themselves;<sup>(v)</sup> who are sometimes called *customary freeholders*, being allowed to have a freehold *interest*, though not a freehold *tenure*

\*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.<sup>13</sup> [\*150

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.<sup>(w)</sup><sup>14</sup> But no man can be tenant at sufferance against the king, to whom no *laches*, or neglect in not entering and ousting the tenant, is ever imputed by law; but his tenant, so holding over, is considered as an absolute intruder.<sup>(x)</sup> But, in the case of a subject, this estate may be destroyed whenever the true owner shall make an actual entry on the

(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 Vent. 143. Carth. 432. Lord Raym. 1225.

(w) Co. Litt. 57.

(x) Ibid.

<sup>13</sup> Copyhold or customary tenure may be put an end to by a grant from the lord of the freehold or of his seignorial rights. This is called *enfranchisement*, and the tenant by this means become seised in common socage of the lands, which he thenceforth holds as tenant to the superior lord of whom the lord held before the grant. If again copyhold and freehold titles become united in one person, *extinguishment* takes place, the copyhold interest merging and becoming extinguished in the superior one. Formerly the granting of enfranchisement to a tenant was entirely within the breast of the lord, and the tenant had no means of obtaining an alteration in his tenure. Where the fine imposed by the lord upon the change of a tenant is arbitrary instead of certain, the position of the copyholder is a very disadvantageous one; and the legislature has of late years been disposed to look upon the impediments thus opposed to the free alienation of lands as a public grievance. Accordingly, several acts have been passed during the present reign (Victoria) with the object of facilitating enfranchisement, the last of which (15 & 16 Vict. c. 51) has enabled tenants to compel the lord to grant enfranchisement, and the lord, if he pleases, to compel tenants to accept it,—in either case, on terms which in case of dispute are fixed by the commissioners appointed for this purpose by the statute.—KERR.

<sup>14</sup> 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 Camp. 8. 13 East, 210. 2 M. & S. 8.

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 Inst. 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.—CURRY.

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, and land-  
\*151] lords are obliged in these cases to make formal entries upon their lands, (z) and recover possession by the legal process of ejectment;<sup>15</sup> 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 the statute 4 Geo. II. c. 23, 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.<sup>16</sup>

## CHAPTER X.

### OF ESTATES UPON CONDITION.

BESIDES the several divisions of estates, in point of interest, which we have considered in the three preceding chapters, there is also another species still remaining, which is called an estate *upon condition*;<sup>1</sup> being such whose existence depends upon the happening or not happening of some uncertain event, whereby

(y) Co. Litt. 57.

(z) 5 Mod. 384.

<sup>15</sup> 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 Bingham 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 pleaded in bar. Therefore a person who wrongfully holds over cannot distress the cattle of the landlord put on the premises, (7 T. R. 471,) or sue him in trespass for his entry. 1 Bingham Rep. 158.—CHITTY.

<sup>16</sup> A more summary proceeding still is given by statute 1 & 2 Vict. c. 74, where possession is unlawfully held over after the determination of the tenancy, where there is no rent, or where the rent does not exceed 20*l.* a year. In such cases the landlord may give the tenant or occupier notice of his intention to proceed to recover possession under the authority of the act; and if the tenant does not appear, or fails to show cause why he does not give possession, two justices of the peace, acting for the district, may issue a warrant under their hands and seals, directing the constables to give the landlord possession. And now, by statute 9 & 10 Vict. c. 94, s. 122, so soon as the term and interest of the tenant of any house or land where the value of the premises or the rent did not exceed 50*l.* per annum, and on which no fine had been paid, shall have ended, or be duly determined by a legal notice to quit, and the tenant shall refuse to quit, the landlord may enter a plaint in the county court and obtain possession through a bailiff of the county, who may be empowered to enter on the premises, with such assistants as he shall deem necessary, and give possession accordingly.—STEWART.

<sup>1</sup> As to things executed (a conveyance of lands, for instance,) a condition, to be valid

the estate may be either originally created, or enlarged,<sup>2</sup> or finally defeated.(a)<sup>3</sup>

(\*) 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 Shep. 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 by 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. 2d. When it is compulsory upon the feoffee, donee, or lessee. 3d. When it proceeds from the part of the feoffor, donor, or lessor, and declares *his* intention, (but, as to this point, see *Whichcote vs. 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 vs. 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 distress 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 vs. The Earl of Pembroke*, Moor, 707, S. C. Cro. Eliz. 306, 560. *Browning vs. 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. Shep. Touch. 123.—CHITTY.

<sup>2</sup> 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.—CHITTY.

<sup>3</sup> It is a rule of law that a condition the effect of which is to defeat or determine an

And these conditional estates I have chosen to reserve till last, because they are indeed more properly qualifications of other estates, than a distinct species of themselves; seeing that any quantity of interest, a fee, a freehold, or a term of years, may depend upon these provisional restrictions. Estates, then, upon condition thus understood, are of two sorts: 1. Estates upon condition *implied*: 2. Estates upon condition *expressed*: under which last may be included, 3. Estates held *in vadio, gage, or pledge*: 4. Estates by *statute merchant, or statute staple*: 5. Estates held by *legit*.

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,<sup>(b)</sup> on breach of which condition \*it is lawful for the grantor, or his heirs, to oust him, \*153] and grant it to another person.<sup>(c)</sup> 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.<sup>(d)</sup> 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 unremitting 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.<sup>(e)</sup>

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.<sup>(f)</sup> 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 where an \*154] 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.<sup>(g)</sup>

<sup>(b)</sup> Litt. § 378.

<sup>(c)</sup> Ibid. § 379.

<sup>(d)</sup> Co. Litt. 233.

<sup>(e)</sup> 9 Rep. 50.

<sup>(f)</sup> Co. Litt. 215.

<sup>(g)</sup> Ibid. 201.

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 vs. 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.—CHITTY.

<sup>4</sup> It is only, however, such an alienation by feoffment with livery of seisin or by suffering a common recovery which works a forfeiture. Deeds under the statute of uses,—ordinary deeds of bargain and sale,—though they may assume to grant a greater estate, really convey no greater interest than the grantor had, and have not the operation alluded to in the text.—SHARWOOD.

<sup>5</sup> 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 conditions 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

These conditions are therefore either *precedent*, or *subsequent*.<sup>6</sup> 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 time 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 any of these \*subsequent conditions, by the failure of these [\*155 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.

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

(*h*) Show. Parl. Cas. 83, &c.

(*i*) Co. Litt. 217.

(*k*) Litt. § 325.

(*l*) See pages 109, 110, 111.

(*m*) § 330. 1 Inst. 234.

Cruise's Dig. 10, 11, 13. 4 Cruise, 506. Adams, Ejectm. index, Covenant. 2 Saunders, by Patteson & Williams, index, Forfeiture.—CHITTY.

<sup>6</sup> 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 vs. The East India Company*, 1 T. R. 645. *Acherley vs. Vernon*, Willes, 150. 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 deed, their precedency must depend upon the order of time in which the intent of the transaction requires their performance. *Jones vs. Barkley*, 2 Doug. 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 vs. Pretty*, stated from Reg. Lib. in 3 Meriv. 120. *Clarke vs. Parker*, 19 Ves. 12. *D'Aguilar vs. 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. *Chauncy vs. Graydon*, 2 Atk. 619. *Fry vs. Porter*, 1 Mod. 314. *Burgess vs. Robinson*, 3 Meriv. 9. *Phillips vs. Bury*, Show. P. C. 50. Infancy will be no excuse in such case for non-performance of the condition. *Bertie vs. 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 vs. Homfray*, Ambl. 259.—CHITTY

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 \*156] a \*condition:(*q*) because if it were a condition, then, upon the breach thereof, only A. or his representatives could avoid the estate by entry, and so D.'s remainder might be defeated by their neglecting to enter; but, when it is a limitation, the estate of B. determines, and that of D. commences, 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 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 forever, 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 creation, or afterwards become impossible by the act of God or the act of the feoffor himself, or if they be *contrary to law*, or *repugnant* to the nature of the estate, \*157] are void. In any of which cases, if they be conditions *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

(*n*) 10 Rep. 41.

(*o*) Ibid. 42.

(*p*) Litt. § 347. Stat. 32 Hen. VIII. c. 34.

(*q*) 1 Vent. 202.

(*r*) Cro. Eliz. 205. 1 Roll. Abr. 411.

(*s*) Co. Litt. 42.

(*t*) Co. Litt. 206.

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 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 mort- [\*158 gagee 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,<sup>1</sup> in case of non-payment at the time limited, forever 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 encumbrances, 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 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 forever dead. But here again the courts of equity interpose; and, though a mortgage be thus forfeited, and the \*estate absolutely vested in the mortgagee at the common law, yet they will consider the real value of [\*159 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;<sup>2</sup> paying to the mortgagee his principal,

(u) Co. Litt. 205.  
(w) Ibid. 205.  
(x) Litt. 232.

(y) Ibid. 257. Cro. Car. 191.  
(z) Hardr. 466.

<sup>1</sup> 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.—CHITTY.

<sup>2</sup> 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 shown to have been treated as a pledge, so long there is a recognition of the mortgagor's title, (*Hodley vs. Healey*, 1 Ves. & Bea. 540, S. C. 6 Mad. 181. *Grubb vs. 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 vs. Hardy*, 18 Ves. 459. *Ord vs. 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 for



interest, and expenses: for otherwise, in strictness of law, an estate worth 1000*l.* might be forfeited for non-payment of 100*l.* or a less sum. This reasonable advantage, allowed to mortgagors, is called the *equity of redemption*: and this enables a mortgagor to call on the mortgagee, who has possession of his estate, to deliver it back and account for the rents and profits received, on payment of his whole debt and interest; thereby turning the *mortuum* into a kind of *vivum vadium*. But, on the other hand, the mortgagee may either compel the sale of the estate, in order to get the whole of his money immediately; or else call upon the mortgagor to redeem his estate presently, or, in default thereof, to be forever *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,<sup>(a)</sup> the fraudulent mortgagor forfeits all equity of redemption whatsoever.<sup>9</sup> 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,<sup>10</sup> and take the land into his own hands

(c) Stat. 4 & 5 W. and M. c. 16.

feited by his own *laches*. Marquis of Cholmondeley *vs.* Lord Clinton, 2 Jac. & Walk. 180 *et seq.* Whiting *vs.* White, Coop. 4, S. C. 2 Cox, 300. Barren *vs.* Martin, 19 Ves. 327. But to show 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 *vs.* Postlethwaite, Coop. 170. Perry *vs.* Marston, cited 2 Cox., 295. Edsell *vs.* Buchanan, 2 Ves. Jr. 84.

In the case of Montgomery *vs.* 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 *vs.* 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 *vs.* Morgan, 1 Br. 368. Palmer *vs.* 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 *vs.* Clinton, 12 Ves. 58. Cholmondeley *vs.* 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 *vs.* Clinton, 12 Ves. 59. Reynolds *vs.* Lowe, cited from Forrester's MS. in 1 Hovenden's Suppl. to Ves. Jr. 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. Purefoy *vs.* Purefoy, 1 Vern. 29. Shuttleworth *vs.* Laycock, 1 Vern. 245. Pope *vs.* 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 *vs.* Smith, 2 Ves. Jr. 376. Cator *vs.* Charlton, and Collett *vs.* Munden, cited 2 Ves. Jr. 377.—CHURCH.

<sup>9</sup> By the 4 & 5 W. and 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 encumbrance 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.—CHURCH.

<sup>10</sup> 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 *vs.* 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.

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.<sup>(b)</sup> 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 ejection; but may be compelled to reassign his securities. In Glanvil's time, when the universal method of conveyance was by livery of seisin \*or corporal tradition of the lands, no gage or pledge of lands was good unless possession was also delivered to the creditor; "*si non sequatur ipsius vadii traditio, cui in 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 inradiari.*"<sup>(c)</sup> 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.<sup>12</sup>

<sup>(b)</sup> *Pignoris appellatione eam proprie rem contineri dicimus, que simul etiam traditur, creditori. At eam, que sine traditione nuda conventiono tenetur, proprie hypothecae appellatione contineri dicimus. Inst. l. 4, l. 6. § 7.*  
<sup>(c)</sup> L. 10, c. 8.

If the mortgagor grants a lease after the mortgage, the mortgagee may recover the possession of the premises in an ejection against the tenant in possession without a previous notice to quit. 3 East, 449. Keech vs. Hall, 1 Doug. 21.—CHRISTIAN.

But if the landlord mortgages pending a yearly tenancy, the tenant is entitled to six months' notice from the mortgagee. 1 T. R. 378.—CHITTY.

It may be shown in equity, by parol evidence, that an absolute deed was intended by the parties merely as a security for money, and therefore a mortgage. Hiester vs. Madeira, 3 W. & S. 384. Walton vs. Cronly, 14 Wend. 63. Blakemore vs. Byrnside, 2 English, 505. And even where the intention of the parties is evidenced neither by written nor oral declarations at the time, wherever the concomitant circumstances show a deed to have been really meant as a pledge only, it will be treated as a mortgage. Hasnet vs. Dundas et al., 4 Barr, 178. Wharf vs. Howell, 5 Binn. 499. Even if the parties have expressly agreed that it shall not be a mortgage, but an absolute deed, to become wholly so if the money be not paid at the time stipulated, it is nevertheless a mortgage. Rankin vs. Mortimere, 7 Watts, 372. If the instrument or transaction be settled to be a mortgage, all restraints upon the equity of redemption are void, as oppressive and against the policy of the law. Johnston vs. Gray, 16 S. & R. 361.

There may, however, be a sale of land with an agreement that the vendor may repurchase within a stipulated period of time at a fixed price; and such an arrangement is not a mortgage. In different cases we find different particulars stated as being *criteria* by which to distinguish whether the instrument be a mortgage or an absolute sale. Each of these may have weight, but it is not safe to designate the insertion or omission of any one clause or circumstance as conclusive; for that would be adopted by the rapacious and submitted to by the needy, and the wholesome rule now established would become useless. The cases, however, seem to admit the possibility of a deed absolute on its face, and a defeasance agreeing to reconvey if the money be paid on a certain day, and that the latter may be unavailing unless the money be paid at the time specified. Among the considerations which weigh are the value of the property, and whether there arises from the transaction a debt for which the grantor would be liable if the land, from failure of title or otherwise, proves worthless. So it seems the agreement to reconvey must be a subsequent and distinct matter, not in the contemplation of the parties when the sale was made and deed delivered. In such case the agreement to reconvey will amount only to an executory agreement. Dates and papers of this kind may be affected if it can be shown that the whole was merely a scheme or contrivance, that in reality it was a loan merely, and that the defeasance was understood and agreed on in the original arrangement, and the discrepancy of dates was merely accidental or with a sinister design. Kerr vs. Gilmore, 6 Watts, 405. Kelly vs. Thompson, 7 Watts, 401. Colwell vs. Woods, 3 Watts, 188. Stower vs. Stower, 9 S. & R. 434. Bennock vs. Whipple, 3 Fairf. 346. Hillhouse vs. Dunning, 7 Conn. 143. Russell vs. Southard, 12 How. U. S. 139.—SHARSWOOD.

<sup>12</sup> 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 of, or if he part with, the title-deed of the mortgaged property, with a view to enable the mortgagor to commit frauds upon third

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,<sup>(d)</sup> 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 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

<sup>(d)</sup> See book I. c. 8.

persons, he will be postponed to encumbrancers 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 vs. Bicknell*, 6 Ves. 190. *Martinez vs. Cooper*, 2 Russ. 216. *Barnett vs. Weston*, 12 Ves. 133. *Bailey vs. Fermor*, 9 Pr. 267. *Peter vs. Russell*, Gilb. Eq. Rep. 123;) and, of course, a prior encumbrancer, to whose charge on the estate possession of the title-deeds is not a necessary incident cannot be postponed to subsequent encumbrancers because he is not in possession of the title-deeds. *Harper vs. Faulder*, 4 Mad. 138. *Tourle vs. 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 encumbrances must be paid according to their priority in point of time. *Brace vs. Duchess of Marlborough*, 2 P. Wms. 495. *Clarke vs. Abbot*, Bernard Ch. Rep. 460. *Earl of Pomfret vs. Lord Windsor*, 2 Ves. Sen. 486. *Maundrell vs. Maundrell*, 19 Ves. 260. *Mackreth vs. 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 with 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 encumbrance, 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 encumbrance as well as the first. *Wortley vs. Birkhead*, 2 Ves. Sen. 573. *Morret vs. Paske*, 2 Atk. 53. *Frere vs. Moore*, 8 Pr. 487. *Barnett vs. 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 vs. 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 vs. Symmons*, 15 Ves. 335. Indisputably, a mortgagee purchasing the mortgagor's equity of redemption, or a *resne* encumbrancer, cannot set up a prior mortgage of his own (nor, consequently, a mortgage which he has got in) against *mesne* encumbrances of which he had notice. *Toulmin vs. Steere*, 3 Meriv. 224. *Mocatta vs. Murgatroyd*, 1 P. Wms. 393. *Morret vs. Paske*, 2 Atk. 62. Upon analogous principles, if the first mortgagee stood by, without disclosing his own encumbrance 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 recompense 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 vs. Cordley*, 1 Br. 357. *Berrisford vs. Milward*, 2 Atk. 49. Part of this note is extracted from 2 Hovenden on Frauds, 183, 196.

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 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 *bona 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* [\*161 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 feudal 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.

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 assize) 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 [\*162 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, 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.

(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 "*quise porter bref de noie disseisme auzi, sicum di franktenement.*"

(k) Co. Litt. 42.

## CHAPTER XI.

## ESTATES IN POSSESSION, REMAINDER, AND REVERSION.

HITHERTO we have considered estates solely with regard to their duration, or the *quantity of interest* which the owners have therein. We are now to consider them in another view; with regard to the *time of their enjoyment*, when the actual permanency 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*.<sup>1</sup>

I. Of estates in *possession*, (which are sometimes called estates *executed*, whereby a present interest passes to and resides in the tenant, not depending on any subsequent circumstance or contingency, as in the case of estates *executory*) there is little or nothing peculiar to be observed. All the estates we have hitherto spoken of are of this kind; for, in laying down general rules, we usually apply them to such estates as are then actually in the tenant's possession. But the doctrine of estates in expectancy contains some of the nicest and most abstruse learning in the English law. These will therefore require a minute discussion, and demand some degree of attention.

II. An estate then in *remainder* may be defined to be, an estate limited to \*164] take effect and be enjoyed after another estate is determined. \*As if a man seised in fee-simple granteth lands to A. for twenty years, and, after the determination of the said term, then to B. and his heirs forever: 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 forever: 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 re-

(a) Co. Litt. 143.

<sup>1</sup> 1. An estate in possession gives a present right of present enjoyment.

2. A vested remainder is an estate to take effect after another estate for years, life, or in tail, which is so limited, that if that particular estate were to expire or end in any way, at the present time, some certain person would become thereupon entitled to the immediate enjoyment.

3. A contingent remainder is where either the person to whom or the event upon which the future estate is to be enjoyed is at present uncertain.

4. An executory devise is a future estate limited by will which would not be valid in a conveyance at common law, owing to the fact of its being limited on a fee, or not having a sufficient particular estate to support it, or to its respecting personal property.

5. A contingent use is where a future estate is limited to arise in a conveyance to uses which would not be good in a conveyance at common law for the same reasons as have been stated in regard to executory devises.—SHARWOOD.

remainder can be limited after the grant of an estate in fee-simple; (b) because a fee-simple is the highest and largest estate that a subject is capable of enjoying; and he that is tenant in fee hath in him the *whole* of the estate: a remainder therefore, which is only a portion, or residuary *part*, of the estate, cannot be reserved after the whole is disposed of. A particular estate, with all \*the [ \*165 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. 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 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 [ \*166 lands could pass without livery of seisin; which must operate either immediately, or not at all. It would therefore be contradictory, if an estate, which is not to commence till hereafter, could be granted by a conveyance which imports an immediate possession. Therefore, though a lease to A. for seven years, to commence from next Michaelmas, is good; yet a conveyance to B. of lands, to hold to him and his heirs forever from the end of three years next ensuing, is void.<sup>2</sup> 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

(b) Plowd. 29. Vaugh. 269.  
(c) Co. Litt. 49. Plowd. 25.

(d) Raym. 151.  
(e) 5 Rep. 94.

<sup>2</sup> 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.—ARCHBOLD.

The Real Property Commissioners propose to abolish this distinction between the rule of the common law and the rule under the statute of uses, and to enact that estates may at common law be conveyed or created to commence at a future time, whether certain or uncertain. If this be done, the first rule laid down by Blackstone will, so far as it relates to future estates, be abolished, and in effect a remainder may then be created without any particular estate to support it.—STEWART.

term of years. The whole estate passes at once from the grantor to the grantees, and the remainderman is seised of his remainder at the same time that the termor is possessed of his term. The enjoyment of it must indeed be deferred till hereafter; but it is to all intents and purposes an estate commencing *in presenti*, though to be occupied and enjoyed *in futuro*.

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 \*167] which it is made: (g) or if the remainder be a chattel interest, though perhaps 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) as where the particular estate is an estate for the life of a 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) 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)

\*3. A third rule respecting remainders is this: that the remainder \*168] must vest in the grantee during the continuance of the particular estate, or *eo instanti* that it determines. (p) 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 forever. (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

(f) 8 Rep. 75.

(g) Dyer, 18.

(h) Raym. 151.

(i) Co. Litt. 298.

(k) 2 Roll. Abr. 415.

(l) 1 Jon. 58.

(m) Litt. 2 671. Plowd. 25.

(n) Litt. 2 60.

(o) Co. Litt. 49.

(p) Plowd. 25. 1 Rep. 66.

(q) 1 Rep. 133.

same instant of time, either during the continuance of the first estate, or at the very instant when that determines, so that no other estate can possibly come between them. For there can be no intervening estate between the particular estate, and the remainder supported thereby: (r) the thing supported must fall to the ground, if once its support be severed from it.<sup>3</sup>

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, remainder to B. in fee; here B.'s is [\*169] 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)<sup>4</sup>

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.

(r) 3 Rep. 21.

(s) Ibid. 20.

<sup>3</sup> 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 contingent *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 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 vs. Vincent*, 2 Ves. Jr. 233. *Gale vs. Gale*, 2 Cox, 153. *Hopkins vs. Hopkins*, Ca. *temp.* Talb. 151.—*CHITTY*.

<sup>4</sup> 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 or 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 Cont. Rem.* 216, 7 ed. 2 Ves. Jr. 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*.—*CHITTY*.

It is the uncertainty of the right which renders a remainder contingent, not the uncertainty of the actual enjoyment. *Williamson vs. Field*, 2 Sandf. Ch. Rep. 513—*HARSWOOD*.



Though, if A. had died before the contingency happened, that is, before B.'s son was born, the remainder would have been absolutely gone; for the particular estate was determined before the remainder could vest. Nay, by the strict rule of law, if A. were tenant for life, remainder to his 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.<sup>(t)</sup> But, to remedy this hardship, it is enacted by statute 10 & 11 W. III. c. 16, that posthumous children shall be capable of taking in remainder, in the same manner as if they had been born in their father's lifetime: that is, the remainder is allowed to vest in them, while yet in their mother's womb.<sup>(u)</sup><sup>5</sup>

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 determines.<sup>(w)</sup> As if an estate be

(f) Salk. 288. 4 Mod. 232.

(\*) See book I. p. 130.

(w) 2 Rep. 51.

<sup>5</sup> The case of *Reeve vs. Long*, (1 Salk. 227,) which gives 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 vs. 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 vs. Woodford*, (4 Ves. 342,) lord Rosslyn said, the case of *Reeve vs. 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 shown 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 *Verdet vs. 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 vs. Basset*, 3 Atk. 203. *Thelluson vs. 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 vs. Newman*, 3 Wils. 526. Co. Litt. 11, b., note 4.—CHITTY.

Where an estate is given to a person for life, with remainder to after-born children, upon the birth of a child the estate vests in him, subject to open and let in after-born children. *Macomb vs. Miller*, 9 Paige, Ch. Rep. 265. *Williamson vs. Berry*, 8 Howard, 17 495.—SHARSWOOD

\*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 hæres viventis*: but if B. dies first, the remainder then immediately vests in his heir, who will be entitled to the land on the death of A. This is a good contingent remainder, for the possibility of B.'s dying before A. is *potentia 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)<sup>6</sup> A limitation of a remainder to a bastard before it is born, is not good:(a)<sup>7</sup> 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,

(\*) Co. Litt. 378.  
(\*) Hob. 33.

(\*) 5 Hep. 51.  
(\*) Cro. Eliz. 509.

<sup>6</sup> It is not merely there being two contingencies to happen, or what lord Coke calls a possibility on a possibility, in order to the vesting of the estate, which will make the possibility too remote; but there must be some legal improbability in the contingencies. Mr. Butler mentions a case (*Routledge vs. Darril*, 2 Ves. Jr. 357) where limitations of a money-fund were held valid, and yet, to entitle one of the objects to take under it, 1st, The husband and wife must have had a child; 2d, That child must have had a child; 3d, The last-mentioned child must have been alive at the decease of the survivor of his grandfather and grandmother; 4th, If a boy, he must have attained twenty-one; if a girl, that age or married. *Fearne, Cont. Rem.* 251, n. c. 7th ed.—COLERIDGE.

Mr. Preston is of opinion that a remainder to an unborn son of a particular name would be valid. 1 *Abstr.* 129.—SHARSWOOD.

<sup>7</sup> 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 vs. Edwards* (the case in question) turned out to be actually born in lawful wedlock. See *Co. Litt.* 3, b. and Mr. Hargrave's note I. However, lord Parker, (afterwards *Macclesfield*), in the case of *Methan vs. 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 vs. 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 vs. Snelham*, 1 Sim. & Stu. 81. 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 bequest, 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 latter cases of *Gordon vs. Gordon*, 1 Meriv. 153, and *Evans vs. 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 vs. Adam*, 1 Ves. & Bea. 468. *Arnold vs. Preston*, 18 Ves. 288.—CHITTY.

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 forever gone; but if A. dies first, the remainder to B. becomes vested.

\*171] \*Contingent remainders of either kind, if they amount to a freehold, cannot be limited on an estate for *years*, or any other particular estate, less than a freehold. Thus if land be granted to A. for ten years, with remainder in fee to the right heirs of B., this remainder is void; (b) but if granted to A. for life, with a like remainder, it is good. For, unless the freehold passes out of the grantor at the time when the remainder is created, such freehold remainder is void: it cannot pass out of him, without vesting somewhere; and in the case of a contingent remainder it must vest in the particular tenant, else it can vest nowhere: 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.<sup>8</sup>

Contingent remainders may be *defeated*, by destroying or determining the particular estate upon which they depend, before the contingency happens whereby they become vested. (c) Therefore when there is tenant for life, with divers remainders in contingency, he may, not only by his death, but by alienation, surrender, or other methods, destroy and determine his own life-estate before any of those remainders vest: the consequence of which is, that he utterly defeats them all.<sup>9</sup> 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.<sup>10</sup> If therefore his estate for life determines otherwise than by his death, the estate of the trustees, for the residue of his natural life, will \*172] 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,

(b) 1 Rep. 130.  
(c) Ibid. 66, 135.

(\*) See Moor. 486. 2 Roll. Abr. 797, pl. 12. 2 Sid. 159.  
2 Chan. Rep. 170.

<sup>8</sup> But although every contingent freehold remainder must be supported by a preceding freehold, 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 of entry to such preceding estate at the time the remainder should vest. As if A. be tenant for life, with contingent remainders over, and be disseised, the right of entry, while it remains in him, will support the contingent remainders; but if the disseisor should die, and the property should descend on his heir-at-law during the life of A., A. would lose his right of entry and have only a right of action, which would not be enough to support the contingent remainders; for in that case it is a question whether the particular estate on which the remainders depend subsists or not, another estate being protected by the law till that question is decided. Fearn, Cont. Rem. p. 286, 7th ed.—COLERIDGE.

<sup>9</sup> 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.—CHITTY.

<sup>10</sup> Trustees to support contingent remainders are not essential in copyhold, the lord's estate sufficing. 10 Ves. 282. 16 East, 406.—CHITTY.

these 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.<sup>11</sup>

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.<sup>12</sup> I must not 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.<sup>13</sup> It differs from a remainder in three very material points: 1. That it needs not any particular estate to support it. 2. That by it a fee-simple, or other less estate, may be limited after a fee-simple. 3. That by this means a remainder may be limited of a chattel interest, after a particular estate for life created in the same. [\*173]

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.<sup>(e)</sup> 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

(e) 1 Sid. 153.

<sup>11</sup> Equitable contingent remainders could never be destroyed by any act of the tenant for life; and the Real Property Commissioners proposed to establish the same rule with respect to legal contingent remainders. And now, by stat. 8 & 9 Vict. c. 106, § 8, it is enacted that a contingent remainder vesting at any time after Dec. 31, 1844 shall be, and if created after the passing of the act, shall be deemed to have been capable of taking effect, notwithstanding the determination, by forfeiture, surrender, or merger, of any preceding estate of freehold, in the same manner in all respects as if such determination had not happened.—STEWART.

<sup>12</sup> The student will now be prepared to understand the celebrated rule of law commonly called *The Rule in Shelley's Case*, on account of the following distinct announcement of it which occurred in that case. 1 Rep. 104, a.:—"It is a rule in law, when the ancestor by any gift or conveyance takes an estate of freehold, and in the same gift or conveyance an estate is limited mediately or immediately to his heirs in fee or in tail, that always in such cases 'the heirs' are words of limitation of the estate, and not words of purchase." And this is a strict rule of law, which cannot be prevented by any expression of intention to the contrary. Thus, if a limitation is made to Jane Wood for life, remainder to B. for life, remainder to C. in tail, remainder to the heirs of Jane Wood, she takes an estate for life with the ultimate remainder to herself in fee; and such remainder descending to her heir would be descendible from him to the heirs *ex parte materna*.—SWEET.

<sup>13</sup> Mr. Fearne observes, upon the inaccuracy of a similar definition to this, that it is capable of comprehending more than the thing defined; for a contingent remainder created by will would exactly answer to it. He defines an executory devise thus:—"Such a limitation of a future estate or interest in lands or chattels (though in the case of chattels personal it is more properly an executory bequest) as the law admits in the case of a will, though contrary to the rules of limitation in conveyances at common law." Cont Rem. 386, 7th ed.—COLERIDGE.

why it cannot commence *in futuro* in other cases, is the necessity of actual seisin, which always operates *in presenti*. 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.<sup>(f)</sup>

2. By executory devise, a fee, or other less estate, may be limited after a fee. And this happens where a deviser 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.<sup>(g)</sup> 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 \*174] more life or lives in being, or within a moderate term of years, for which the law abhors:<sup>(h)</sup> because by perpetuities, (or the settlement of an interest, which shall go in the succession prescribed, without any power of alienation,)<sup>(i)</sup> 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 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.<sup>(k)</sup><sup>14</sup>

<sup>(f)</sup> Cro. Jac. 593.

<sup>(g)</sup> 2 Mod. 239.

<sup>(h)</sup> 12 Mod. 287. 1 Vern. 164.

<sup>(i)</sup> Salk. 229.

<sup>(k)</sup> Fort. 232.

<sup>14</sup> 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 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 vs. 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.—CHRISTIAN.

Peter Thelusson, Esq., an eminent merchant, devised the bulk of an immense property to trustees for the purpose of accumulation during the lives of three sons, and of all their sons who should be living at the time of his death or be born in due time afterwards, and during the life of the survivor of them. Upon the death of this last, the fund is directed to be divided into three shares,—one to the eldest male lineal descendant of each of his three sons: upon the failure of such a descendant, the share to go to the descendants of the other sons; and upon failure of all such descendants, the whole to go to the sinking-fund. When he died, he had three sons living, who had four sons living; and two twin-sons were born soon after. Upon calculation, it appeared that at the death of the survivor of these nine the fund would probably exceed nineteen millions; and upon the supposition of only one person to take and a minority of ten years, that it would exceed thirty-two millions. It is evident that this extraordinary will was strictly within the limits laid down in the text; and it was accordingly sustained both in the court of chancery and in the house of lords. See 4 Ves. Jr. 227. 11 Ves. Jr. 112. 1 New Rep. 357.—COLERIDGE.

The 39 & 40 Geo. III. c. 98 enacts that no person shall, by any deed, will, or by any

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.<sup>(l)</sup> And, at first, the courts were tender, even in the case of a will, of restraining the devisee for life from aliening the term; but only held, that in case he died without exerting that act of ownership, the remainder over should then take place:<sup>(m)</sup> 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,<sup>(n)</sup> that the devisee for life hath no power of aliening the term, so as to bar the remainderman: yet, in order to prevent the danger of perpetuities, it was settled,<sup>(o)</sup> that though such remainders may be limited to as many persons successively as the deviser thinks proper, yet they must all be *\*in esse* during the life of the first devisee; [ \*175 ultimate remainder is in reality only to that remainderman 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.<sup>(p)</sup><sup>15</sup>

(l) 8 Rep. 95.

(m) Bro. tit. *chattelcs*, 23. Dyer, 74.

(n) Dyer, 358. 8 Rep. 96.

(o) 1 Sid. 451.

(p) Skinn. 341. 3 P. Wms. 253.

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. Jr. 127.—CHITTY.

<sup>15</sup> A future estate will always be construed to be a remainder when it can be, in preference to a springing use or executory devise. The reason is an obvious one: in the latter case the future estate cannot be barred, and the land is completely withdrawn from commerce. So between remainders the law favours their vesting, because that combines the interests of a free commerce in land with the rights of the proprietors. *Wager vs. Wager*, 1 S. & R. 374. *Minnig vs. Baldorff*, 5 Barr, 503. *Den vs. Demarest*, 1 New Jersey, 525. It is an inflexible rule that no limitation shall be deemed an executory devise if it may by any practicable construction be sustained as a contingent remainder: for the all-sufficient reason that these executory devises, being inconsistent with the policy of the common law, which, on account of its abhorrence of estates commencing *in futuro*, requires all the precedent parts of the fee to pass out of the grantor at the same instant, are barely tolerated, and only in favour of the explicit declaration of one who may have been compelled to dispose of his estates when unassisted by counsel. They are therefore to be sustained only in cases of clear necessity. *Stehman vs. Stehman*, 1 Watts, 466. *Dunwoodie vs. Read*, 4 S. & R. 435. *Wil's vs. Beecher*, 3 Wash. C. C. 369. *Hawley vs. Northampton*, 8 Mass. 3. *Wolfe vs. Van Nostrand*, 2 Comst. 436. *Johnson vs. Valentine*, 4 Sandf. S. C. 36.

It is the received doctrine of the courts, both in England and America, that when a devise is made to A. in fee, and if A. should die without issue then to B. in fee, the limitation over to B. as an executory devise would be void for its remoteness, as it depends upon an indefinite failure of the issue of A. Such a devise is construed to be an estate-tail in A. and vested remainder in B. Any words which indicate an intention in the testator to confine the failure of issue to a dying without issue living at the death of the first taker will be sufficient to rebut the construction of an indefinite failure of issue. *Hall vs. Chaffee*, 14 New Hamp. 215. *Toman vs. Dunlop*, 6 Harris, 72. *Flinn vs. Davis*, 18 Ala. 132. *Jackson vs. Dashiell*, 3 Maryland Ch. Dec. 257. In the case of such a limitation of personalty, however, it vests the entire and absolute estate in the first taker, and the limitation over is void. The smallest circumstance will be laid hold of

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.<sup>(g)</sup> Sir Edward Coke<sup>(r)</sup> 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 transferable, when actually vested, being both estates *in presenti*, though taking effect *in futuro*.

The doctrine of reversions is plainly derived from the feudal 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, \*176] the feud was determined, and resulted back to the \*lord or proprietor, to be again disposed of at his pleasure. And hence the usual *incidents* to reversions are said to be *fealty* and *rent*. When no rent is reserved on the particular estate, fealty however results of course, as an incident quite inseparable, and may be demanded as a badge of tenure, or 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.<sup>(s)</sup> 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.*"<sup>(t)</sup>

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 seized of a paternal estate in fee makes a lease for life, with remainder to himself and his heirs, this is properly a mere reversion,<sup>(u)</sup> 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:<sup>(w)</sup> for it is the old estate, which was originally in him, and never yet was out of him. And so likewise, if a man grants a lease for life to A., reserving rent, with reversion to B. and his heirs, B. hath a remainder descendible to his heirs general, and not a reversion to which the rent is incident; but the grantor shall be entitled to the rent, during the continuance of A.'s estate.<sup>(x)</sup>

\*177] <sup>(y)</sup>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 Anne, 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

(g) Co. Litt. 22.  
(r) 1 Inst. 142.  
(s) Co. Litt. 143.  
(t) Ibid. 151, 152.

(w) Cro. Eliz. 321.  
(x) 3 Lev. 407.  
(y) 1 And. 23.

to limit the failure of issue to the death of the first taker. *Dashiell vs. Dashiell*, 2 Har. & Gill, 127.—SHARWOOD.

estate may enter upon and hold the lands and tenements, till the party shall appear to be living

Before we conclude the doctrine of remainders and reversions, it may be proper to observe, that whenever a greater estate and a less coincide and meet in one and the same person, without any intermediate estate,<sup>(y)</sup> the less is immediately annihilated; or, in the law phrase, is said to be *merged*,<sup>16</sup> that is, sunk or drowned in the greater. Thus, if there be tenant for years, and the reversion in fee-simple descends to or is purchased by him, the term of years is merged in the inheritance, and shall never exist any more. But they must come to one and the same person in one and the same right; else, if the freehold be in his own right, and he has a term in right of another, (*en autre droit*;) there is no merger.<sup>17</sup> 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.<sup>(z)</sup> 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.<sup>(a)</sup> For estates-tail are protected and preserved from merger by the \*operation 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

(y) 3 Lev. 437.

(z) Plowd. 418. Cro. Jac. 275. Co. Litt. 338.

(a) 3 Rep. 61. 8 Rep. 74.

<sup>16</sup> 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 vs. 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 vs. Vernon*, 9 Mod. 147. *Plunkett vs. Holmes*, 1 Lev. 12. *Archer's case*, 1 Rep. 66;) in the second class of cases, it does merge them. *Hartpole vs. Kent*, T. Jones, 77, S. C. 1 Ventr. 307. *Hooker vs. Hooker*, Rep. temp. Hardw. 13. *Doe vs. Scudamore*, 2 Bos. & Pull. 294; and see *Fearne*, p. 343, 6th ed., with Serjt. Williams'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's 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 vs. 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 vs. Kemish*, 2 Freem. 208. S. C. 2 Vern. 352. *Saunders vs. Bournford*, Finch, 424.—CHITTY.

<sup>17</sup> Mr. Preston questions this position. 3 Conv. 277.—SHARWOOD.



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.

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## CHAPTER XII.

### OF ESTATES IN SEVERALTY, JOINT-TENANCY, COPARCENARY, AND COMMON.

We come now to treat of estates, with respect to the number and connections of their owners, the tenants who occupy and hold them. And, considered in this view, estates of any quantity or length of duration, and whether they be in actual possession or expectancy, may be held in four different ways; in severalty, in joint-tenancy, in coparcenary, and in common.<sup>1</sup>

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 *joint-tenancy* is where lands or tenements are granted to two or more persons, to hold in fee-simple, fee-tail, for life, for years, or at will. 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 a 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*.

I. The *creation* of an estate in joint-tenancy depends on the wording of the deed or devise, by which the tenants claim title: for this estate can only arise by purchase or grant, that is, by the act of the parties, and never by the mere act of law. Now, if an estate be given to a plurality of persons, without adding any restrictive, exclusive, or explanatory words,<sup>2</sup> as if an estate be granted to

(b) Cro. Eliz. 302.  
(c) See page 116.

(e) Litt. 277.  
(f) See page 137.

<sup>1</sup> This is not true as to coparcenary. See *post*, p. 188.—COLERIDGE.

<sup>2</sup> For if an estate in fee be given to A. and B. and to the survivor of them and, to the heirs of such survivor, they are not joint-tenants in fee. They have only a joint-estate of free

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.<sup>2</sup> For,

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.

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hold during their joint lives, with a contingent remainder in fee to the survivor. Yet in the creation of an estate for life it is otherwise; for when an estate is given to A. and B. and to *the survivor of them*, this is a joint-tenancy for life, and the words "*survivor of them*" are but surplusage. See further upon this subject, Co. Litt. 191, a., n. 1.—ARCHBOLD.

Joint-tenancy is at this day so far from being favoured, that the courts think themselves justified in exercising their ingenuity against it. In most instances it operates contrary to the opinion and intent of the parties. Even in deeds, therefore, the inconvenience of joint-tenancy has induced the courts to seize on any expression which indicates an intention to give a separate interest to each. Galbraith vs. Galbraith, 3 S. & R. 392. Bambaugh vs. Bambaugh, 11 S. & R. 191.

Independently of the words creating the estate, there certainly are cases in which equity will consider joint-tenants as tenants in common; and one of these cases is where a purchase of land is made by two persons with a view of expending large sums in the improvement of it. Duncan vs. Forrer, 6 Binn. 193.—SHARSWOOD.

<sup>3</sup> 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 vs. 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. 301. 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 lord Holt and lord 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 Abr. 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, 194, 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. & 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 survivorship. 1 M. & S. 428. 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 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

\*181] *\*First*, they must have one and the same *interest*.<sup>4</sup> 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)<sup>5</sup> 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:<sup>6</sup> 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)<sup>7</sup> *Secondly*, joint-tenants must also have a 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 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 a unity of *time*; their estates must be vested at one

(c) Co. Litt. 188.  
(d) Litt. § 277.

(e) Ibid. § 285.  
(f) Ibid. § 278.

share by survivorship, but are considered as trustees for the deceased's representative. 1 Eq. Ca. Abr. 291.—CHITTY.

<sup>4</sup> 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 vs. Cook*, 2 Vern. 544. *Cray vs. 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. 182, b.—CHITTY.

<sup>5</sup> 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. Litt. 180, b. 2 Cruise Digest, 498.—CHITTY.

<sup>6</sup> 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, *eo 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*.—CHITTY.

<sup>7</sup> Blackstone's expression is that "A. has the *remainder* in severalty in these cases." But Littleton says, "one hath a freehold and the other a fee-simple;" and lord Coke, that "they are joint-tenants for life, and the fee-simple or estate-tail is in one of them;" and, though he afterwards speaks of "him in remainder," his remarks show that it is not a remainder properly so called, and that though a joint-tenancy for life subsists with all the usual incidents, yet the estate of the joint-tenant who has the fee is for many purposes (particularly that of alienation) an entire inheritance, not broken into a particular estate and remainder thereon. Vide Co. Litt. 184, b., and note 2 by Hargr.; et vide *Wiscot's case*, 2 Rep. 50, b.—STEPHEN.

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 was made to the use of a man, and such wife as [182 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)<sup>9</sup> 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.<sup>9</sup> Lastly, in joint-tenancy there must be a 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 common: 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)<sup>10</sup>

(g) Co. Litt. 183.

(h) Dyer, 340. 1 Rep. 101.

(i) Litt. § 288. 5 Rep. 10.

(j) *Quilibet totum tenet et nihil tenet: scilicet, totum in communem, et nihil separatim per se.* Bract. l. 6, tr. 5, c. 26  
(k) Litt. § 668. Co. Litt. 187. Bro. Abr. t. cui in vita, 8. 2 Vern. 123. 2 Lev. 39.

<sup>9</sup> 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 *ius 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 vs. 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 Blamforde vs. Blamforde, 3 Bulstr. 101. Earl of Sussex vs. Temple, 1 Lord Raym. 312. Aylor vs. Chep, Cro. Jac. 259. S. C. Yelv. 183. Oates vs. Jackson, 2 Str. 1172. Hales vs. 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 vs. Lee, Noy, 124. Sammes's 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 vs. Best, 2 Br. 240.

—CHITTY.  
<sup>9</sup> But a grant to (not to the use of) a man and to such wife as he should afterwards marry vests the whole in the man; and when he afterwards marries, no estate whatever vests in the wife. 1 Rep. 101. 1 And. 42, 316. 5 Dy. 190, pl. 17, 18.—ARCHBOLD.

<sup>10</sup> 5 Term Rep. 654. And if a grant is made of a joint-estate to husband and wife

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)<sup>11</sup> 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)<sup>12</sup> But if two or more joint-tenants be seised of an advowson, and they present different clerks, the bishop

(l) Co. Litt. 214.  
(m) Ibid. 192.  
(n) Ibid. 49.

(o) Ibid. 319, 364.  
(p) Ibid. 195.

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. § 231. 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 vs. Moody, Amb. 649. 2 Cru. Dig. 511. 5 ib. 448.—CHITTY.

According to Mr. Preston's definition, tenancy by entireties is where husband and wife take an estate to themselves jointly by grant, or devise, or limitation of use made to them during coverture, or by a grant, &c. which is *in fieri* at the time of the marriage and completed by livery of seisin or attornment during the coverture. 1 Preston on Estates, 131. So, if an estate be conveyed to husband and wife and a stranger, the husband and wife will only take one moiety between them, and the stranger will take the other moiety. Litt. s. 291. Johnson vs. Hart, 6 W. & S. 319. This estate has several peculiarities. Says C. J. Montague, in Plowd. 58, "The husband has the entire use and the wife the entire use; for there are no moieties between husband and wife." Hence it is termed tenancy by entireties. The husband cannot forfeit or alien so as to sever the tenancy. They are seised *per tout* and not *per my*. Neither can sever the jointure, but the whole must accrue to the survivor. As the husband and wife cannot sue each other, they are not compellable to make partition. But where an estate is conveyed to a man and 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. There is nothing, therefore, in the relation of husband and wife which prevents them from being tenants in common. There are great opinions in favour of the position that husband and wife may by express words be made tenants in common by a gift to them during coverture. 2 Prest. on Abstr. 41. 1 Prest. on Estates, 132. 4 Kent, 363. 1 Reed's Blackst. 470. The case of Stuckey vs. Keefe's Exrs., 2 Casey, 397, holds a contrary doctrine.

The acts of the legislatures of the various States abolishing joint-tenancies and converting them into tenancies in common have been construed not to extend to tenancies by entireties. Shaw *et al.* vs. Hearnay *et al.*, 5 Mass. 521. Jackson vs. Stevens, 16 Johns. 110. Den d. Hardenbergh vs. Hardenbergh, 5 Halst. 42. Thornton vs. Thornton, 3 Rand. 179.—SHARSWOOD.

<sup>11</sup> 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.* —CHITTY.

<sup>12</sup> 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.—CHITTY.

Until very recently, the possession of one joint-tenant was the possession of the other or others; but this is altered by the 3 & 4 W. IV. c. 27, s. 12, by which it is enacted that where one or more of several persons entitled to any land or rents as joint-tenants have been in possession or receipt of the entirety, or more than his or their undivided share or shares of such land or of the profits thereof, or of such rent, for his or their own benefit, or for the benefit of any person or persons other than the person or persons entitled to the other share or shares of the same land or rent, such possession or receipt shall not be deemed to be the possession or receipt of or by such person or persons or any of them.—STEWART.

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.(g) 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;<sup>13</sup> as to let leases, or to grant copyholds:(s) and 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 Anne, 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.<sup>14</sup>

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)<sup>15</sup> 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

(g) Co. Litt. 185.  
(r) 3 Leon. 262.  
(s) 1 Leon. 231.

(t) 2 Inst. 403.  
(u) Co. Litt. 200.  
(w) Litt. §§ 280, 281.

<sup>13</sup> 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 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. *Whitlock vs. Horton*, Cro. Jac. 91. *Clerk vs. Turner*, 2 Vern. 323 —CHITTY.

<sup>14</sup> 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 and 4 E. Mitf. 109.—CHRISTIAN.

<sup>15</sup> 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 vs. Jackson*, 9 Ves. 596.—CHITTY.

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 divested 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.<sup>16</sup>

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 ultimam 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.<sup>17</sup>

\*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-tenant's 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.

(\*) Bracton, l. 4, § 3, c. 9, § 3. Fleta, l. 3, c. 4.

(y) Co. Litt. 190. Finch, l. 83.

(z) 2 Lev. 12.

(x) Co. Litt. 188, 193.

(b) Litt. § 290.

<sup>16</sup> It is very well settled that real estate may, by special agreement between partners in trade, be brought into the common stock and considered as personal property, so far as concerns themselves and their heirs and personal representatives. *McDermot vs. Lawrence*, 7 S. & R. 438. In partnership, the *jus accrescendi* never existed in equity as between the partners. The legal title is still held to vest in the survivor. He is entitled to the possession of all the property of the partnership, is alone entitled to sue for and recover choses in action belonging to the partnership; yet he is a trustee for the estate of his deceased partner as to his share, and may be compelled to account. *Deloney vs. Hutcheson*, 2 Randolph, 183. *McAllister vs. Montgomery*, 3 Heyw. 94.—SHARWOOD.

<sup>17</sup> 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.—CHITTY.

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.<sup>18</sup> But a devise of one's share by will \*is no severance of the jointure:<sup>19</sup> for 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)<sup>20</sup> 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.

(c) Thus, by the civil law, *nemo inritus compellitur ad communionem*. Ff. 12, 6, 26, § 4. And again, *Si non omnes qui rem communem habent, sed certi ex his, dividere desiderant; hoc judicium inter eos accipi potest*. Ff. 10, 3, 8.

(d) Litt. § 292.

(e) *Jus accrescendi præfertur ultimæ voluntati*. Co. Litt. 185.

(f) Litt. § 287.

(g) Cro. Eliz. 470.

(h) 2 Rep. 60. Co. Litt. 162.

(i) Litt. §§ 302, 303.

(k) *Nihil de re accrescit et, qui nihil in re quando jus accresceret habet*. Co. Litt. 188.

(l) Litt. § 294.

(m) Ibid. § 304.

<sup>18</sup> When an estate is devised to A. and B., who are strangers to, and have no connection 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 alone cannot by his own conveyance, without joining his wife, divest 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.—CHITTY.

<sup>19</sup> A covenant by a joint-tenant to sell, though it does not sever the joint-tenancy at law, will do so in equity, (*Browne vs. Raindle*, 3 Ves. 257. *Hinton vs. Hinton*, 2 Ves. Sr. 639;) provided the agreement for sale be one of which a specific performance could be enforced. *Patriche vs. Powlett*, 2 Atk. 54. *Hinton vs. Hinton*, 2 Ves. Sr. 634.—CHITTY.

<sup>20</sup> 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.—CHITTY.



\*187] \*In general it is advantageous for the joint-tenants to dissolve the jointure; since thereby the right of survivorship is taken away, and each may transmit his own part to his own heirs. Sometimes, however, it is disadvantageous to dissolve the joint-estate: as if there be joint-tenants for life, and they make partition, this dissolves the jointure; and, though before they each of them had an estate in the whole for their own lives and the life of their companion, now they have an estate in a moiety only for their own lives merely; and on the death of either, the reversioner shall enter on his moiety.(n) And therefore if there be two joint-tenants for life, and one grants away his part for the life of his companion, it is a forfeiture:(o) for, in the first place, by the severance of the jointure he has given himself in his own moiety only an estate for his own life; and then he grants the same land for the life of another; which grant, by a tenant for his own life merely, is a forfeiture of his estate:(p) for it is creating an estate which may by possibility last longer than that which he is legally entitled to.

III. An estate held in *coparcenary* is where lands of inheritance descend from the ancestor to two or more persons. It *arises* either by common law or particular custom. By common law: as where a person seised in fee-simple or in fee-tail dies, and his next heirs are two or more females, his daughters, sisters, aunts, cousins, or their representatives: in this case they shall all inherit, as will be more fully shown when we treat of descents hereafter; and these co-heirs are then called *coparceners*; or, for brevity, *parceners* only.(q) Parceners by particular custom are where lands descend, as in gavelkind, to all the males in equal degree, as sons, brothers, uncles, &c.(r) And, in either of these cases, all the parceners put together make but one heir, and have but one estate among them.(s)

\*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 a *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 survivorship between them: for each part descends severally to their respective heirs, though the unity of possession continues. And as long as the lands continue in a course of descent, and united in possession, so long are the tenants therein, whether male or female, called \*189] parceners. But if \*the possession be once severed by partition, they are no longer parceners, but tenants in severalty; or if one parcener

(\*) 1 Jones, 55.  
 (†) 4 Leon. 237.  
 (‡) Co. Litt. 252.  
 (§) Litt. § 241, 242.  
 (¶) Ibid. § 265.  
 (‡) Co. Litt. 163.

(§) Ibid. 164.  
 (¶) Ibid. 188, 243.  
 (‡) 2 Inst. 403.  
 (§) Litt. § 254.  
 (¶) Co. Litt. 164, 174.  
 (‡) Ibid. 163, 164.

aliones her share, though no partition be made, then are the lands no longer held in *coparcenary*, but in *common*.(a)<sup>21</sup>

Parceners are so called, saith Littleton,(b) because they may be constrained to make *partition*.<sup>22</sup> 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)<sup>23</sup> 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 impanelled, and assign to each of the parceners her part in severalty.(e) But there are some things \*which are in their nature impartible. The man- sion-house, common of estovers, common of piscary uncertain, or any [190 other common without stint, shall not be divided; but the eldest sister, if she pleases, shall have them, and make the others a reasonable satisfaction in other parts of the inheritance: or, if that cannot be, then they shall have the profits of the thing by turns, in the same manner as they take the advowson.(f)

There is yet another consideration attending the estate in coparcenary; that if one of the daughters has had an estate given with her in *frankmarriage* by her ancestor, (which we may remember was 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

(\*) 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

(f) Co. Litt. 161, 165.

(g) See page 115.

(h) Bracton, l. 2, c. 34. Litt. § 266 to 273.

(i) L. 2, t. 14, c. 15.

<sup>21</sup> By the 3 & 4 W. IV. c. 27, § 12, the same provision is made with respect to the possession of one coparcener as has already been mentioned with respect to that of a joint-tenant. *Ante*, p. 182, n.—STEWART.

<sup>22</sup> *Coparceners* may convey to each other both by feoffment and by release, because their seisin to some intents 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 enfeoff 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. Jr. 125. Cruise's 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.—CHITTY.

<sup>23</sup> 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, 2 vol. 15.—CHITTY.

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 \*191] was presumed to be 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* are such as hold by several and distinct titles, but by unity of possession ; because none knoweth his own severalty, and therefore they all occupy promiscuously.(*p*) This tenancy therefore happens where there is 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 \*192] \*necessary unity of interest : one may hold by descent, the other by purchase ; or the one by purchase from A., the other by purchase from B. ; so that there is no unity of title ; one's estate may have been vested fifty years, the other's but yesterday ; so there is no unity of time. The only unity there is, is that of possession : and for this Littleton gives the true reason, because no man can certainly tell which part is his own : otherwise even this would be soon destroyed.

Tenancy in common may be created, either by the destruction of the two other estates, in joint-tenancy and coparcenary, or by special limitation in a deed. By the destruction of the two other estates, I mean such destruction as does not 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

(*k*) Britton, c. 72.

(*l*) § 267.

(*m*) Litt. § 268.

(*n*) Ibid. § 274.

(*o*) Ibid. § 275.

(*p*) Ibid. 282.

(*q*) Ibid. 283.

(*r*) Ibid. 285.

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 \*purchase, but descent. In short, whenever an [\*193 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) because the divisible services issuing from land (as rent, &c.) are not divided, nor the entire services (as fealty) multiplied, by joint-tenancy, as they must necessarily be upon a tenancy in common. Land given to two, to be holden the one 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)<sup>24</sup> (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 deviser may be presumed to have meant what is most beneficial to both the devisees, though his meaning is imperfectly expressed.<sup>25</sup> And this nicety in the wording of grants makes it the most usual as well as the safest way, when a tenancy in common \*is [\*194 meant to be created, to add express words of exclusion as well as

(s) Litt. 309.  
 (t) Ibid. 283.  
 (u) Salk. 392.  
 (v) Litt. 298.  
 (w) Ibid. 299.

(y) See page 182.  
 (z) Poph. 52.  
 (a) 1 Eq. Ca. Abr. 291.  
 (b) 1 P. Wms. 17.  
 (c) 3 Rep. 39. 1 Ventr. 32.

<sup>24</sup> In *Gaskin vs. Gaskin*, M. 18 Geo. III., as reported in Cowper, Aston, J., said that the words "*equally to be divided between them*" had been adjudged a tenancy in common even in a deed.—ARCHBOLD.

<sup>25</sup> In ancient times joint-tenancy was favoured by the courts of law, because it was more convenient to the lord and more consistent with feudal principles; but these reasons have long ceased, and a joint-tenancy is now everywhere regarded, as lord Cowper says it is in equity, as an odious thing. 1 Salk. 158. In wills, the expressions *equally to be divided*, *share and share alike*, *respectively*, *between* and *amongst*, have been held to create a tenancy in common. 2 Atk. 121. 4 Bro. 15. 1 Cox's P. Wms. 14. I should have but little doubt but the same construction would now be put upon the word *severally*, which seems peculiarly to denote separation or division. But these words are only evidence of intention, and will not create a tenancy in common when the contrary from other parts of the will appears to be the manifest intention of the testator. 3 Bro. 215.

The words *equally to be divided* make a tenancy in common in surrenders of copyholds, and also in deeds, which derive their operation from the statute of uses. 1 P. Wms. 14. 1 Wils. 341. 2 Ves. 257. And though lord Hardwicke seems to be of opinion, in 1 Ves. 165, 2 Ves. 257, that these words are not sufficient to create a tenancy in common-law conveyances, yet I am inclined to think that in such a case nothing but invincible authority would now induce the courts to adopt that opinion and to decide in favour of a joint-tenancy.—CHRISTIAN.

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.<sup>26</sup> 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 Anne, 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)<sup>27</sup> But, as for other incidents of joint-tenants, which arise from the privity of title, or the union and entirety of interest, (such as joining or being joined in actions, (g) unless in the case where some entire or indivisible thing is to be recovered, (h) these are not applicable to tenants in common, whose interests are distinct, and whose titles are not joint but several.<sup>28</sup>

(\*) Pages 185 and 189.  
(\*) Co. Litt. 199.  
(\*) Ibid. 200.

(\*) Litt. § 311.  
(\*) Co. Litt. 197.

<sup>26</sup> 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.—CHITTY.

<sup>27</sup> 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 distress for his share. Harrison vs. Ornbly, 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.—CHITTY.

<sup>28</sup> 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.—CHITTY.

By the 3 & 4 W. IV. c. 27, s. 12, the same provision is made with respect to the possession of one tenant in common as has already been mentioned with respect to that of a joint-tenant. *Ante*, p. 182, n.; and see as to the construction of this clause Doe d. Calley vs. Taylorson, 3 Per. & Dav. 539.—STEWART.

An entry or possession by one tenant in common enures to the benefit of his co-tenants, not only as concerns themselves, but as concerns strangers. Caruthers vs. Dunning, 3 S. & R. 381. There may be cases, however, in which the entry or possession of one tenant in common may amount to an ouster, so as to give him on the one hand the advantage of an adverse holding, and, on the other hand, entitle his co-tenant to treat him as a stranger and trespasser. What, then, amounts to such an ouster? It must be by some clear, positive, and unequivocal act, amounting to an open denial of their right

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 partitions 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*.

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### 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

(\*) 1 Inst. 345.

and putting them out of the seisin. Such ouster will not be presumed merely from his taking the rents and profits, (unless after the lapse of a very great length of time,) but must be proved by decisive acts of a hostile character. *Watson vs. Gregg*, 10 Watts, 289. Mere declarations will not answer the purpose. *Hall vs. Matthias*, 4 W. & S. 331. A mere entry by one co-heir into the land of his ancestor, claiming it all, and taking the rents and profits for twenty-one years, is no disseisin of the other heirs: to make it such, there must be some plain, decisive, and unequivocal act or conduct on the part of the heir so entering amounting to an adverse and wrongful possession in himself and disseisin of the others. *Hart vs. Gregg*, 10 Watts, 185. *Batton vs. Hamilton*, 2 W. & S. 294. *Lloyd vs. Gordon*, 2 Har. & McHen. 254. *Jackson vs. Tibbitts*, 9 Cowen, 241. *McClung vs. Ross*, 5 Wheat. 116. Where land is devised by their common ancestor to several persons in common, and one of them purchases an outstanding or adverse title, such purchase will enure to the common benefit, subject to a ratable contribution to the expense. *Van Horne vs. Fonda*, 5 Johns. C. R. 388. *Lee vs. Fox*, 6 Dana, 171. *Thurston vs. Masterson*, 9 Dana, 228. One joint-tenant or tenant in common cannot erect buildings or make improvements on the common property without the consent of the rest, and then claim to hold until reimbursed a proportion of the moneys expended; nor can he authorize this to be done by a third person. This is the rule at law. There are, however, cases in which an owner of land standing by and permitting another to spend his money in improving it has in equity been deemed a delinquent, and has been compelled to surrender his right on receiving compensation, or else to pay for the improvement. But in these cases there is always some ingredient which would make it a fraud in the owner of the land to insist on his legal right. *Crest vs. Jack*, 3 Watts, 238. *Green vs. Putnam*, 1 Barbour, 500. As between tenants in common or joint-tenants of a house or mill which falls into decay, and the one is willing to repair but the other is not, he that is willing shall have a writ *de reparatione facienda*; and the writ saith *ad reparationem et sustentationem ejusdem domus tenetur*; whereby it appeareth, as Sir Edward Coke saith, that owners are in that case bound *pro bono publico* to maintain houses and mills which are for the use and habitation of men. But it is only to houses and mills already erected and in being that this right extends, and not to woodland or arable lands; for there the one has no remedy against the other to make enclosure or reparation for the safeguard of the wood or corn. *Gregg vs. Patterson*, 9 W. & S. 197.—

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 \*196] ancestor and before the entry of \*the heir, or after the death of a particular tenant and before the entry of him in remainder or reversion, a stranger may contrive to get possession of the vacant land, and hold out him that had a right to enter. In all which cases, and many others that might be here suggested, the wrongdoer has only a mere naked possession, which the rightful owner may put an end to, by a variety of legal remedies, as will more fully appear in the third book of these commentaries. But in the mean time, till some act be done by the *rightful* owner to divest this possession and assert his title, such actual possession is, *prima facie*, evidence of a legal title in the possessor; and it may, by *length of time*, and negligence of him who hath the right, by degrees ripen into a perfect and indefeasible title.<sup>1</sup> 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 seized by his own unlawful act, and the same descends to his heir; now, by the common law the heir hath obtained an *apparent* right, though the *actual* right of possession resides in the person disseised; and it shall not be lawful for the person disseised to divest this apparent right by mere entry or other act of his own, but only by an action at law: (b) for, until the contrary be proved by legal demonstration, the law will rather presume the \*197] right to \*reside in the heir whose ancestor died seized, 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 feudal 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 feudal 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 feudal 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

(\*) Litt. § 385.

(\*) Glb. Ten. 18.

<sup>1</sup> 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 show 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. Jr. 119. But, according to *Allan vs. Rivington*, 2 Saund. 111, a., and 4 Taunt. 548, n. a., 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.—CHITTY.

means the ancestor became seised, he will then by sentence of law recover that possession, to which he hath such actual right.<sup>2</sup> Yet, if he omits to bring this his possessory action within a competent time, his adversary may imperceptibly gain an actual right of possession, in consequence of the other's negligence. And by this, and certain other means, the party kept out of possession may have nothing left in him, but what we are next to speak of; viz.

III. The mere *right of property*, the *jus proprietatis*, without either possession or even the right of possession. This is frequently spoken of in our books under the name of the *mere right*, *jus merum*; and the estate of the owner is in such cases said to be totally divested, 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 [\*198 a 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 showing the absolute right of property to reside in another person. The heir therefore in this case has only a *mere right*, and must be strictly held to the proof of it, in order to recover the lands. Lastly, if by accident, neglect, or otherwise, judgment is given for either party in any *possessory* action, (that is, such wherein the right of possession only, and not that of property, is contested,) and the other party hath indeed in himself the right of property, this is now turned to a *mere right*; and upon proof thereof in a subsequent action, denominated a writ of right, he shall recover his seisin of the lands.<sup>3</sup>

(d) Co. Litt. 345.

<sup>2</sup> It has recently been enacted that no descent, cast, or discontinuance which shall have happened after the 31st day of December, 1833, shall defeat any right of entry for the recovery of land. 3 & 4 W. IV. c. 17, s. 39.—STEWART.

<sup>3</sup> But a writ of right is now abolished by the 3 & 4 W. IV. c. 27, s. 36; and by the same act (s. 2) one period of limitation is established for all lands and rents, it being enacted that after the 31st of December, 1833, no person shall make an entry or distress, or bring an action to recover any land or rent, but within twenty years next after the time at which the right to make such entry or distress, or to bring such action, shall have first accrued to some person through whom he claims, or if such right shall not have accrued to any person through whom he claims, then within twenty years next after the time at which the right to make such entry or distress, or to bring such action, shall have first accrued to the person making or bringing the same. Persons under the disabilities of infancy, lunacy, coverture, or beyond seas, and their representatives, are allowed ten years from the termination of their disability or death, (s. 16;) but no entry, action, or distress shall be brought beyond forty years after the right of action accrued, (s. 17.)—STEWART.

The effect of the statute 3 & 4 W. IV. c. 27 is to do away with this multiplicity of distinctions. A man may now have either the bare possession of land without the right of property, or he may have the right of property without possession, or he may have possession and right of property united. The statute which has been just mentioned, and which was passed for the "limitation of actions and suits relating to real property, and



Thus, if a disseisor turns me out of possession of my lands, he thereby gains a *mere naked possession*, and I still retain the *right of possession*, and *right of property*. If the disseisor dies, and the lands descend to his son, the son gains an *apparent right of possession*; but I still retain the *actual right* both of *possession* and *property*. If I acquiesce for thirty years, without bringing any action to recover possession of the lands, the son gains the *actual right of possession*, and \*199] I retain \*nothing but the *mere right of property*. And even this right of property will fail, or at least it will be without a remedy, unless I pursue it within the space of *sixty years*. So also if the father be tenant in tail, and alienes the estate-tail to a stranger in fee, the alienee thereby gains the *right of possession*, and the son hath only the *mere right or right of property*. And hence it will follow, that one man may have the *possession*, another the *right of possession*, and a third the *right of property*. For if a tenant in tail enfeoffs 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,<sup>(e)</sup> 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*.<sup>(f)</sup> And when to this double right the actual possession is also united, when there is, according to the expression of Fleta,<sup>(g)</sup> *juris et seisinæ conjunctio*, then, and then only, is the title completely legal.<sup>4</sup>

## CHAPTER XIV.

### OF TITLE BY DESCENT.

THE several *gradations* and *stages*, requisite to form a *complete title* to lands, tenements, and hereditaments, having been briefly stated in the preceding chapter, we are next to consider the several *manners*, in which this complete title (and therein principally the right of *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

<sup>(e)</sup> Mirr. l. 2, c. 27.

<sup>(f)</sup> Co. Litt. 266. Bract. l. 5, t. 3, c. 5.

<sup>(g)</sup> L. 3, c. 15, § 5.

for simplifying the remedies for trying rights thereto," enacts (s. 35) that at the determination of the period which it limits for making an entry, or a distress, or bringing a *quare impedit*, (which is the remedy for the recovery of an advowson,) or other action or suit, the *right and title* of the person who might within the time limited have had such remedies for the recovery of land, rent, or advowsons, *shall be extinguished*; and to recover that which has ceased to have any existence, no remedy can remain. In this point the present statute differs from the earlier limitation acts; for they barred the remedies only, without destroying the right.—KERR.

<sup>4</sup> The mere student may be misled by the use of the term "actual possession" all through this chapter. The author means only possession of the freehold which a man may have, either by his own personal occupation or that of his lessee for years or at will.—COLERIDGE.

by prescription or immemorial usage, another man has either parted with his right by an ancient and now forgotten grant, or has forfeited it by the supineness or neglect of himself and his ancestors for ages: and so, in case of forfeiture, the tenant by his own misbehaviour or neglect has renounced his interest in the estate; whereupon it devolves to that person who by law may take advantage of such default: and, in alienation by common assurances, \*the two considerations of loss and acquisition are so interwoven, and so constantly contemplated together, that we never hear of a conveyance, without at once receiving the ideas as well of the grantor as the grantee. [\*201

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.<sup>(a)</sup><sup>1</sup>

Descent, or hereditary succession, is the title whereby a man on the death of his ancestor acquires his estate by right of representation, as his heir at law. An heir therefore is he upon whom the law casts the estate immediately on the

(\*) Co. Litt. 18.

<sup>1</sup> 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 that taken by descent, the distinction is important. See *post*, pages 241, 243.—CHRISTIAN.

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. Abr. 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. 93. 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.

Mr. Hargrave (in his second 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 Inst. 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 Inst. 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 Inst. 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 the curtesy or in dower.

The division made by Blackstone seems the clearest when we are considering the law of descents *alone*.—CHITTY.

death of the ancestor:<sup>2</sup> 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<sup>(b)</sup> 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<sup>(c)</sup> copiously handled; and it has been seen that the descent in tail is restrained and regulated according to the words of the original donation, and does not entirely pursue *the common-law doctrine of inheritance*; which, and which only, it will now be our business to explain.

And, as this depends not a little on the nature of kindred, and the several degrees of consanguinity, it will be previously necessary to state, as briefly as possible, the true notion of this kindred or alliance in blood.<sup>(d)</sup>

Consanguinity, or kindred, is defined by the writers on these subjects to be "*vinculum personarum ab eodem stipite descendantium*:" the connection 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 between 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

<sup>(b)</sup> See book I. pp. 74, 75. Book II. pp. 83, 85.

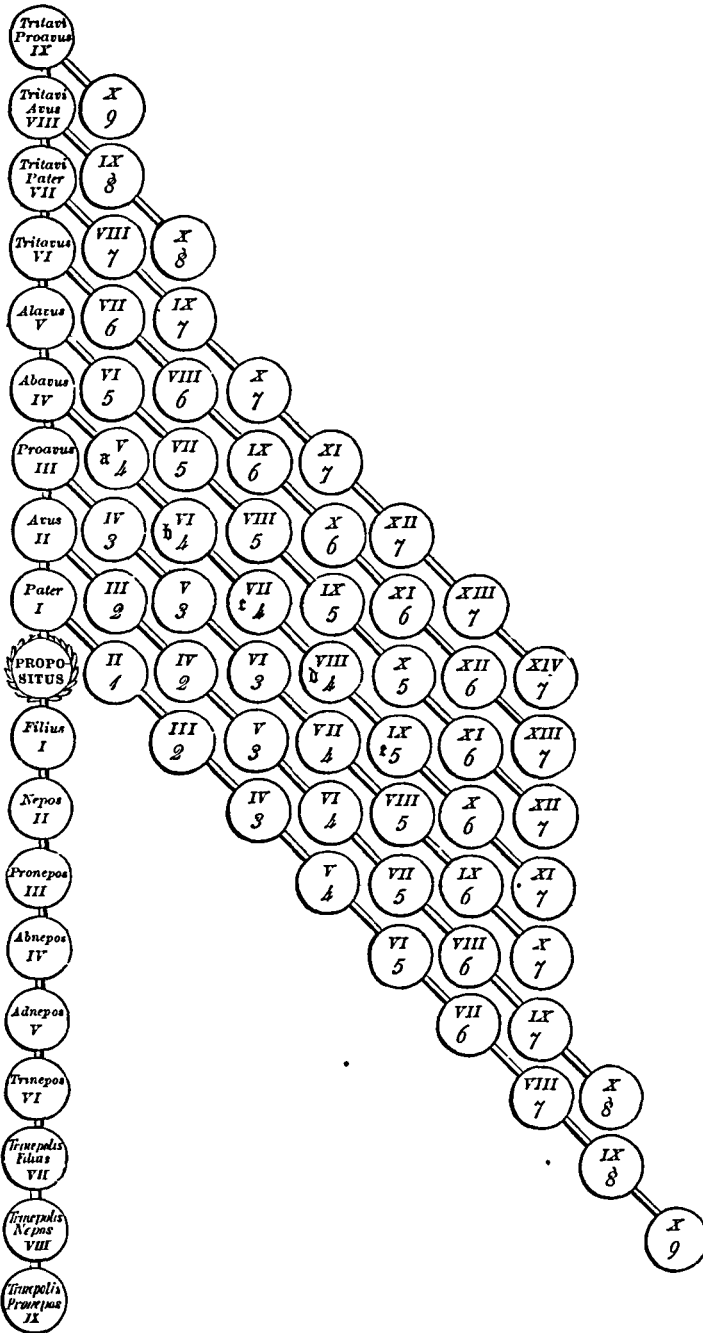
<sup>(c)</sup> See page 112, &c.

<sup>(d)</sup> For a fuller explanation of the doctrine of consan-

guinity 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.

<sup>2</sup> 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 seisinam 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, 228.—CHITTY.

# TABLE OF CONSANGUINITY.





in the direct line, and therefore universally obtains, as well in the civil(e) and canon(f) as in the common law.(g)

The doctrine of lineal consanguinity is sufficiently plain and obvious; but it is at the first view astonishing to consider the number of lineal ancestors which every man has, within no very great number of degrees; and so many different bloods(h) is a man said to contain in his veins as he hath lineal ancestors. Of these he hath two in the first ascending degree, his own parents; he hath four in the second, the parents of his father and the parents of his mother; he hath eight in the third, the parents of his two grandfathers and two grandmothers, and, by the same rule of progression, he hath an hundred and twenty-eight in the seventh; a thousand and twenty-four in the tenth: and at the twentieth degree, or the distance of twenty generations, every man hath above a million of ancestors, as common arithmetic will demonstrate.(i) This lineal consanguinity, we may observe, falls strictly within the definition of *vinculum \*personarum ab eodem stipite descenditum*; since lineal relations are such as descend one from the other, and both of course from the same [\*204 common ancestor.

Collateral kindred answers to the same description: collateral relations agreeing with the lineal in this, that they descend from the same stock or ancestor; but differing in this, that they do not descend 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 John Stiles hath two sons, who have \*each a numerous issue; both these issues are lineally descended [\*205 from John Stiles as their common ancestor; and they are collateral [\*205 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

(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

Lineal Degrees.	Number of Ancestors.
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 forty 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 or this incredible increase of relatives. This is noticed afterwards by Blackstone, as to collateral relatives.

such a supposition, the human species must be daily diminishing;) we shall find that all of us have now subsisting near two hundred and seventy millions of kindred in the fifteenth degree, at the same distance from the several common ancestors as ourselves are; besides those that are one or two descents nearer to or farther from the common stock, who may amount to as many more.*(k)* And if this calculation should appear incompatible with the number of inhabitants on the earth, it is because, by intermarriages among the several descendants from the same ancestor, a hundred or a thousand modes of consanguinity may be consolidated in one person, or he may be related to us a hundred or a thousand different ways.

\*206] *The method of computing these degrees in the canon law, (l) which our law has adopted, (m) is as follows: we begin at the common ancestor and reckon downwards: and in whatsoever degree the two persons, or the most remote of them, is distant from the common ancestor, that is the degree in which they are related to each other. Thus, Titius and his brother are*

\*207] *related in the first degree; for from the father to each of them is counted only one; Titius and his nephew are related in the second degree; for the nephew is two degrees removed from the common ancestor; viz., his own grandfather, the father of Titius. Or, (to give a more illustrious instance from our English annals,) king Henry the Seventh, who slew Richard the Third in the battle of Bosworth, was related to that prince in the fifth degree. Let the *propositus* therefore in the table of consanguinity represent*

*(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.<sup>3</sup>

Collateral Degrees.	Number of Kindred.
12 .....	4194304
13 .....	16777216
14 .....	67108864
15 .....	268435456
16 .....	1073741824
17 .....	4294967296
18 .....	17179869184
19 .....	68719476736
20 .....	27487906944

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.

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

(l) *Decretal* 4, 14, 3 and 9.  
(m) *Co. Litt.* 23.

<sup>3</sup> 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 thirty-two third cousins on my father's side, and thirty-two on my mother's,—in all, sixty-four. 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 connection 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 connection

—CHRISTIAN.

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 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 John duke of Somerset, seven; to Margaret countess of Richmond, eight; to king Henry the Seventh, nine.<sup>(n)</sup><sup>4</sup>

\*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. [ \*208

I. 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*.<sup>5</sup> 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

(\*) 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.

<sup>4</sup>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 fourteenth 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.—CHRISTIAN.

<sup>5</sup>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 vs. 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. Abr. 449. 8 Rep. 1. Seld. Tit. Hon. ii. 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



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 divested and taken away by the birth of a posthumous child; and, in the latter, it shall also be totally divested by the birth of a posthumous son.<sup>(o)</sup>

\*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:<sup>(p)</sup> 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,<sup>(q)</sup> 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.<sup>3</sup> Which notoriety had succeeded in the place of the ancient feodal in-

(o) Bro. tit. *Descent*. 58.

(p) Co. Litt. 15.

(q) *Ibid.* 11.

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's 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, Jr. Prerog.* 404 and 376, and n. (h) Bro. Abr. 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, Jr.'s Prerog. of the Crown, p. 404. H. Chit. Desc. 15, n.—CHITTY.

\*But, besides the case of a posthumous 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 divest 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 divested 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.—CHRISTIAN.

This 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, 297, 298.—CHITTY.

It seems doubtful whether receiving rent reserved on a freehold lease is equivalent to corporal seisin of the lands. Upon comparing the passage in lord Coke cited as an authority with Co. Litt. 32, a. and 3 Rep. 42, a., it would seem that his opinion was in the negative. The same point was ruled in cases cited from Hale's MSS. and Mr. J. Glyn's MS. Rep. by Mr. Hargrave, Co. Litt. 15, a., n. 83; and in *Doe vs. Keen*, 7 T. R. 390, lord Kenyon certainly understands him so to have thought, and adopts it as a rule that, to give such seisin, rent must have been received *after the expiration* of the freehold lease. In *Doe vs. Wichelo*, 8 T. R. 213, I understand him to lay down the same rule, though there is some little ambiguity of expression.—COLERIDGE.

\*The nature of the seisin which a person acquires, and which will render such person

vestiture, 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 feudal 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

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 corporal 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. Litt.* 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 deviser, 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. Litt.* 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 corporal 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.* 93, 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 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. Litt.* 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, 37, 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. Abr.* "Lease," I. 5. 2 *Stra.* 1086.—*Currry*.

which all future inheritance by right of blood must be derived: which is very briefly expressed in this maxim, *seisina facit stipitem.*(r)

\*210] \*When therefore a person dies so seised, the inheritance first goes to his issue: as if there be Geoffrey, John, and Matthew, grandfather, father, and son; and John purchases 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)<sup>9</sup>

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. 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;(u) though by the law of the twelve tables the mother was originally, on account of her sex, excluded.(v) 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 further than the life of the present possessor: after which the land by the law of nature would again become common, and liable to be seized 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 feudal tenures. For it was an express rule of

(r) Flet. l. 6, c. 2, § 2.

(s) Litt. § 3.

(t) Seld. *de success. Ebræor.* c. 12.

(v) *Ff.* 38, 15, l. Nov. 118, 127.

(\*) Inst. 3, 3, 1.

(w) Craig. *de jur. feud.* l. 2, t. 13, § 15. Locke on Govt part 1, § 90.

<sup>9</sup> 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 vs. Winke*, 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. § 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. § 3. Co. Litt. 10, b. 11, a. 3 Rep. 40, b. 1 Ventr. 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 - CHITTY.

the feudal 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)<sup>10</sup> 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 *hæreditas nunquam ascendit*; which has remained an invariable maxim ever since. These circumstances evidently show this rule to be of feudal original; and taken in that light, there are some arguments in its favour, besides those which are drawn \*merely from the reason of the thing. For if the feud of which [\*212 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) 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 feudal 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 feudal 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.<sup>11</sup>

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 law-givers have somewhat uncomplaisantly expressed it, the worthiest of [\*213 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

(x) Feud. 50.

(y) Domat, p. 2, l. 2, t. 2. Montesq. L. 1, 3, 1, c. 33.

(z) LL. Hen. 1. c. 70.

(a) L. 7, c. 1.

(b) 1 Feud. 20.

(c) *Descendit itaque jus, quasi ponderosum quid cadens deorsum recta linea, et nunquam reascendit.* L. 3, c. 29.

(d) 1 Inst. 11.

(e) Numb. c. xxvii.

(f) Petit. LL. Attic. 1 6, t. 6.

(g) Inst. 3, 1, 6.

(h) Hal. H. C. L. 235.

<sup>10</sup> This is now altered; and where a party dies leaving no lineal descendants, nor brothers or sisters or lineal descendants from them, the inheritance is equally divided between the two ascending lines. The nearest in degree in each takes one-half; and if there are more than one in the same degree the moiety of that line is divided *per capita*. Code Civil, l. 3, tit. i. 746.—COLERIDGE.

<sup>11</sup> 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.—CHRISTIAN.

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 feudal law. For though our British ancestors, the Welsh, appear to have given a preference to males,<sup>(i)</sup> 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.<sup>(k)</sup> But the feudal law of the Saxons on the continent (which was probably brought over hither, and first altered by the law of king Canute) gives an evident preference of the male to the female sex. "*Pater aut mater defuncti, filio non filie hereditatem relinquunt. . . . Qui defunctus non filios sed filias reliquerit, ad eas omnis hereditas pertineat.*"<sup>(l)</sup> 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 the customs of gavelkind, \*214] and as, in the \*charter or laws of king Henry the First, it is not (like many Norman innovations) given up, but rather enforced.<sup>(m)</sup> The true reason of preferring the males must be deduced from feudal principles: for, by the genuine and original policy of that constitution, no female could ever succeed to a proper feud,<sup>(n)</sup> 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.<sup>12</sup>

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.<sup>(o)</sup>

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;<sup>(p)</sup> in the same manner as with us, by the laws of king Henry the First,<sup>(q)</sup> the eldest son had the capital fee or principal feud of his father's possessions, and no other pre-eminence; and \*as the eldest daughter \*215] had afterwards the principal mansion, when the estate descended in coparcenary.<sup>(r)</sup> The Greeks, the Romans, the Britons, the Saxons, and even

(i) Stat. Wall. 12 Edw. I.

(k) LL. Canut. c. 68.

(l) Tit. 7, § 1, 4.

(m) C. 70.

(n) 1 Feud. 8.

(o) Litt. § 5. Hale, H. C. L. 238.

(p) Selden, de success. Ebr. c. 5.

(q) C. 70.

(r) Glanvil, l. 7, c. 3.

<sup>12</sup> 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, 38. See also Watk. D. 159, n. (b.) Bro. Abr. Desc. pl. 20. 1 Roll. Abr. 627. Hale C. L. c. 11, *post*, p. 231. H. Chit. Desc. 78, 79.—CHITTY.

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 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,<sup>(s)</sup> or (as they styled them) *feuda individua*, and in consequence descendible to the eldest son alone. This example was further 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.<sup>(t)</sup> These reasons occasioned an almost total change in the method of feudal 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 feudal 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<sup>(u)</sup> wrote, in the reign of Henry the Second; and it is mentioned in the Mirror<sup>(w)</sup> 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<sup>(x)</sup> 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 Kent, where they gloried in the preservation of their antient gavelkind tenure, of which a principal branch was a joint inheritance of all the sons;<sup>(y)</sup> 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 antient 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;<sup>(z)</sup> 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.<sup>(a)</sup><sup>13</sup> In which disposition is preserved a strong trace

(s) 2 Feud. 55

(t) Hale, II. C. L. 221.

(u) L. 7, c. 3.

(w) C. 1, § 3.

(x) L. 3, c. 30, 31.

(y) Somner, Gavelk. 7.

(z) Co. Litt. 165.

(a) Ibid.

<sup>13</sup> 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. 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 antient law of feuds, before the 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 descendants, \*217] *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 grandchildren 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 principals, \*218] 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 Titus be six nieces, three by one sister, two by another, and one by a third; his inheritance by the Roman law was divided into six parts, and one given to each of the nieces: whereas the law of England in this case would still divide it only into three parts, and distribute it *per stirpes*, thus: one-third to the three children who represent one sister, another third to the two who represent the second, and the remaining third to the one child who is the sole representative of her mother.

This mode of representation is a necessary consequence of the double preference given by our law, first to the male issue, and next to the 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 pre-

(b) 1 Feud. 1.

(c) Hale, H. C. L. 236, 237.

(d) Selden, de success. Ebr. c. 1.

(e) Nov. 110, c. 3. Inst. 3, 1, 6.

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 Jour. Dom. Proc. May 25, 1781.—CHRISTIAN.

tenders, 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; [\*219 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*.<sup>14</sup>

Yet this right does not appear to have been thoroughly established in the time of Henry the Second, when Glanvil wrote: and therefore, in the title to the crown especially, we find frequent contests between the younger (but surviving) brother and his nephew (being the son and representative of the elder deceased) in regard to the inheritance of their common ancestor: for the uncle is certainly nearer of kin to the common stock, by one degree, than the nephew; though the nephew, by representing his father, has in him the right of primogeniture. The uncle also was usually better able to perform the services of the fief; and besides had frequently superior interest and strength to back his pretensions, and crush the right of his nephew. And even to this day, in the lower Saxony, proximity of blood takes place of representative primogeniture; that is, the younger surviving brother is admitted to the inheritance before the son of an elder deceased: which occasioned the disputes between the two houses of Mecklenburg Schwerin and Strelitz in 1692.<sup>(f)</sup> Yet Glanvil, with us, even in the twelfth century, seems<sup>(g)</sup> to declare for the right of the nephew by representation; provided the eldest son had not received a provision in lands from [\*220 his father, or (as the civil law would call it) had not been \*foris-familiated, in his lifetime. King John, however, who kept his nephew Arthur on the throne, by disputing this right of representation, did all in his power to abolish it throughout the realm:<sup>(h)</sup> 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,<sup>(i)</sup> and so it has continued ever since. And thus much for lineal descents.<sup>15</sup>

(f) Mod. Un. Hist. xli 334.  
(g) L. 7, c. 3.

(h) Hale, H. C. L. 217, 229.  
(i) Bracton, l. 2, c. 30, § 2.

<sup>14</sup> 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. Litt. 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, 379.—CHITTY.

<sup>15</sup> 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.



V. A fifth rule is that on failure of lineal descendants, or issue, of the person last seized, the inheritance shall descend to his collateral relations, being of the blood of the first purchaser;<sup>16</sup> subject to the three preceding rules.<sup>17</sup>

"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 further 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 uncles' or cousins' 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.

"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 riveted 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.—CHITTY.

<sup>16</sup>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.—CHITTY.

<sup>17</sup>It should here be noticed, that though it is necessary that a person who would suc-

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 purchaser of this family.<sup>(k)</sup> The first purchaser, *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 further 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<sup>(l)</sup> agrees with our law in this respect: nor indeed is that agreement to be wondered at, since the law of descents in both is of feodal original; and this rule or canon cannot otherwise be accounted for than by recurring to feodal principles.

When feuds first began to be hereditary, it was made a necessary qualification of the heir, who would succeed to a feud, that he should be of the blood of, that is, lineally descended from, the first feudatory or purchaser. 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 hærede defuncto, in beneficio quod eorum patris fuit succedat: sin autem unus e fratribus a domino feudum acceperit, eo defuncto sine legitimo hærede, frater ejus in feudum non succedit.*”<sup>(m)</sup> 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 hæredis, in prima investitura expressum, tantum ad descendentes ex corpore primi vasalli extenditur; et non ad collaterales, nisi ex corpore primi vasalli sive stipitis descendant;*”<sup>(n)</sup> 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

<sup>(k)</sup> Co. Litt. 12.  
<sup>(l)</sup> Gr. Custom. c. 25.

<sup>(m)</sup> 1 Feud. 1, § 2.  
<sup>(n)</sup> Craig. l. 1, t. 9, § 36.

ceed must show himself to be of the blood of the first purchaser, yet, where the persons who inherit succeed or derive title to the inheritance by virtue of remote and intermediate descents from the purchaser, it will be sufficient if they are related by half-blood only to the purchaser, 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 purchaser, 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.—CHRISTY.

<sup>18</sup> 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 purchaser 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.—CHRISTIAN.

method was invented to let in the collateral relations of the grantee to the inheritance, by granting him a *feudum novum* to hold *ut feudum antiquum*; that is, with all the qualities annexed of a feud derived from his ancestors; and then the collateral relations were admitted to succeed even *in infinitum*, because they might have been of the blood of, that is, descended from, the first imaginary purchaser.

\*222] 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 purchaser: 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 purchaser) 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 lands might have possibly been purchased, are capable of being called to the inheritance.<sup>19</sup>

Yet, when an estate hath *really descended* in a course of inheritance to the person last seised, the strict rule of the feudal law is still observed; and none are admitted but the heirs of those through whom the inheritance hath passed: for all others have demonstrably none of the blood of the first purchaser in them, and therefore shall never succeed.<sup>20</sup> 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

\*223] his father's father, George Stiles; the relations of \*his father's mother, Cecilia Kempe, shall for the same reason never be admitted, but only those of his father's father.<sup>21</sup> This is also the rule of the French law,<sup>(o)</sup> which is derived from the same feudal 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

(c) Domat, part 2, pr.

<sup>19</sup> 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. Desc. 222, 223.—CHITTY.

<sup>20</sup> 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 vs. Wells, Doug. 771. And in the late case of Langley vs. 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 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.—CHITTY.

<sup>21</sup> 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, before, these four estates will descend to four different heirs.—CHRISTIAN.

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 purchaser; 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) 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 *\*in feudis vere antiquis* has in process of time been forgotten, and is supposed so to be [\*224 in feuds that are held *ut antiquis*.

VI. A sixth rule or canon therefore is, that the collateral heir of the person last seized must be his next collateral kinsman of the *whole blood*.<sup>22</sup>

First, he must be his next collateral kinsman either personally or *jure representationis*;<sup>23</sup> 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

(p) M. 12 Edw. IV. 14.  
(r) Abr. t. descent. 2.

(q) Ibid. 38.  
(s) II. C. L. 243.

<sup>22</sup> 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 seized 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 seized, and of the blood of the first purchaser, 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 purchaser. Per Leach, vice-chancellor, *Hawkins vs. 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 purchaser 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 seized 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 seized;" 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 seized, must always be the worthiest and nearest of such of the relatives of the whole blood of the person last seized as are of the blood and consanguinity of the purchaser, and such as are not incapacitated by the first rule of descent." Rob. Inh. 46, 47.—CHRISTY.

<sup>23</sup> 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.—CHRISTIAN.

one hand, and in the canon and common laws on the other. The civil law regards consanguinity principally with respect to successions, and therein very naturally considers only the person deceased, to whom the relation is claimed: it therefore counts the degrees of kindred according to the number of persons through whom the claim must be derived from him; and makes not only his great-nephew but also his first-cousin to be both related to him in the fourth degree; because there are three persons between him and each of them. The canon law regards consanguinity principally with a view to prevent incestuous marriages between those who have a large portion of the same blood running in their respective veins; and therefore looks up to the author of that blood, or the common ancestor, reckoning the degrees from him: so that the great-nephew is related in the third canonical degree to the person proposed, and the first-cousin in the second; the former being distant three degrees from the common ancestor, (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 \*225] civil, it may seem as if it ought \*to proceed according to the civil computation. But as it 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*.<sup>24</sup> This allowance was absolutely

<sup>24</sup> 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 connection 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

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 the 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:—" *heredes successoresque, sui cuique liberi, et nullum testamentum: si liberi, non sunt, proximus gradus in possessione, fratres, patru, avunculi.*" (t)

\*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. (v) 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

(t) Tacitus de Mor. Germ. 21.  
(u) Numb. c. xxvii.

(v) Selden, de success. Ebr. c. 12.

*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 purchaser 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 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 connection 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

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.<sup>(x)</sup> 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 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 \*227] to the sex, \*primogeniture, and representation, that have before been laid down with regard to lineal descents from the person of the last proprietor.

But, secondly, the heir need not be the nearest kinsman absolutely, but only *sub modo*; that is, he must be the nearest kinsman of the *whole* blood; for if there be a much nearer kinsman of the *half-blood*, a distant kinsman of the whole blood shall be admitted, and the other entirely excluded; nay, the estate shall escheat to the lord, sooner than the half-blood shall inherit.<sup>25</sup>

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 hæredem*. Yet, had A. died without entry, then B. might have inherited; not as \*heir to A. his half \*228] brother, but as heir to the common father, who was the person last actually seised.<sup>(y)</sup><sup>26</sup>

(\*) Sid. 196. 1 Vent. 423. 1 Lev. 60. 12 Mod. 619.

(y) Hale, H. C. L. 233.

<sup>25</sup> It may be observed that it is always intended or presumed that a person is of the whole blood until the contrary be shown. Kitch. 225, a. Plowd. 77, a. Trin. 19, H. 8. pl. 6, p. 11, b. Watk. Desc. 75, n. (u.)—CHITTY.

<sup>26</sup> The meaning of the maxim is, that the 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

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 purchaser, that is, derived in a lineal descent from him; it was originally requisite, as upon gifts in tail it still is, to make out the pedigree of the heir from the first donee or purchaser, and to show that such heir was his lineal representative. But when, by length of time and a long course of descents, it came (in those rude and unlettered ages) to be forgotten who was really the first feudatory or purchaser, and thereby the proof of an actual descent from him became impossible; 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 purchaser; and only requires, in lieu of it, that the claimant be next of the whole blood to the person last in possession, (or derived from the same couple of ancestors;) which will probably answer the same end as if he could trace his pedigree in a direct line from the first purchaser. 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<sup>27</sup> of that standing requisite in the law, that he be derived from the blood of the first purchaser.

(\*) Tenures, 186.

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. L. 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 Woodd. 256. Fearne, 448. 2 Wils. 29.—CHRISTIAN.

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.

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.—CHITTY.

<sup>27</sup>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 purchaser 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*, p. 231;) and more—almost innumerable 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 purchaser) cannot inherit. And it is plain the law does not consider the point as hanging 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.—CHITTY.



\*229] \*To illustrate this by example. Let there be John Stiles, and Francis, brothers, by the same father and mother, and another son of the same mother by Lewis Gay, a second husband. Now, if John dies seised of lands, but it is uncertain whether they descended to him from his father or mother; in this case his brother Francis, of the whole blood, is qualified to be his heir; for he is sure to be in the line of descent from the first purchaser, 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 purchaser, 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 purchaser, 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 purchaser (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 purchaser, though only of the half-blood, must thus be disinherited, and a more remote relation of the whole blood admitted, merely upon a supposition and fiction of law: since it is only upon a like supposition and fiction that brethren of purchasers (whether of the whole or half blood) are entitled to inherit at all; for we have seen that in *feudis stricte novis* neither \*230] brethren nor any other collaterals were admitted. As \*therefore in *feudis antiquis* we have seen the reasonableness of excluding the half-blood, if by a fiction of law a *feudum novum* be made descendible to collaterals as if it was *feudum antiquum*, it is just and equitable that it should be subject to the same restrictions as well as the same latitude of descent.

Perhaps by this time the exclusion of the half-blood does not appear altogether so unreasonable as at first sight it is apt to do. It is certainly a very fine-spun and 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 purchaser, without some proof of which (according to our fundamental maxim) there can be no inheritance allowed of. And this purpose it answers, for the most part, effectually enough. I speak with these restrictions, because it does not, neither can any other method, answer this purpose entirely. For though all the ancestors of John 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, \*from those in \*231] 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 connection in blood with him. Therefore the much less probability of the half-blood's descent from the first purchaser, compared with that of the whole blood, in the several degrees, has occasioned a general exclusion of the half-blood in all.

But, while I thus illustrate the reason of excluding the half-blood in general, I must be impartial enough to own, that, in some instances, the practice is carried further 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<sup>28</sup> 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 proprietor. (a) This, it must be \*owned, carries a hardship with it, even upon feodal principles: for the rule was introduced only to supply the proof of a descent from the first purchaser; but here, as this estate notoriously descended from the father, and as both the brothers confessedly sprung from him, it is demonstrable that the half-brother must be of the blood of the first purchaser, who was either the father or some of the father's ancestors. When, therefore, there is actual demonstration of the thing to be proved, it is hard to exclude a man by a rule substituted to supply that proof when deficient. So far as the inheritance can be evidently traced back, there seems no need of calling in this presumptive proof, this rule of probability, to investigate what is already certain. Had the elder brother, indeed, been a purchaser, there would have been no hardship at all, for the reasons already given; or had the *frater uterinus* only, or brother by the mother's side, been excluded from an inheritance which descended from the father, it had been highly reasonable.

Indeed, it is this very instance, of excluding a *frater consanguineus*, or brother by the father's side, from an inheritance which descended a *patre*, that Craig (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

(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 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. Constitum.* c. 25.  
(d) L. 2, c. 30, § 3.  
(e) L. 6, c. 1, § 14

<sup>28</sup> 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.—CHRISTIAN.

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 further than this: *frater fratri uterino non succedet in hereditate 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 purchaser, or (in the feudal 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.<sup>29</sup> 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 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, is not for me to determine.<sup>30</sup>

The rule then, together with its illustration, amounts to this: that, in order

(f) *De laud. LL. Angl.* 5.  
(g) *Plowd.* 245. *Co. Litt.* 15.

(h) *12 Wm. III. c. 2.*  
(i) *Litt.* §§ 14, 15.

<sup>29</sup> 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* -CHRISTIAN.

<sup>30</sup> The learned judge has exerted great ability and ingenuity in apologizing for the exclusion of the half-blood. But whatever ingenuity may have been exerted in its favour, I conceive nothing more in effect can be said for it than this, viz., that if the half-blood were universally admitted to inherit, an estate might pass out of one family into another, between whom there was no union of blood. As where a son inherits an estate from his father, and his mother marries again and has a child by her second husband; if this child could inherit from his half-brother it would acquire the estate of the first husband, to whom it is not related by blood; and in order to avoid this inconvenience, the half-blood is universally excluded. But surely 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.—CHRISTIAN.

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.

\*But here another difficulty arises. In the second, third, fourth, and every superior degree, every man has many couples of ancestors, [\*234 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.

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.<sup>31</sup> And in this the English law is not singular, but warranted by the examples of the Hebrew and

(k) See page 20.

(l) Litt. § 4.

<sup>31</sup> 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-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 vs. Brooke*, Plowd. 442. And so great is the preference shown 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 Harg. note 5. Co. Litt. 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. iii. 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.—CHITTY.

Athenian laws, as stated by Selden,<sup>(m)</sup> and Petit;<sup>(n)</sup> though among the Greeks in the time of Hesiod,<sup>(o)</sup> 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<sup>(p)</sup> abolished all distinction between them. It is also conformable to the customary law of Normandy,<sup>(q)</sup> which indeed in most respects agrees with our English law of inheritance.

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 purchaser. For, when such first purchaser 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 purchaser 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 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 purchaser. 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.

\*<sup>236</sup> That this was the true foundation of the preference of the *agnati*, or male stocks, in our law, will further 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 purchaser. 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 purchaser. The greatest probability of finding such was among those descended from the male ancestors; but, upon failure of issue there, they may possibly be found among those derived from the females.<sup>22</sup>

(<sup>m</sup>) *De success. Ebraeor.* c. 12.

(<sup>n</sup>) *LL. Aftic.* l. 1, §. 6.

(<sup>o</sup>) *Geayor*, 608.

(<sup>p</sup>) Nov. 118.

(<sup>q</sup>) *Gr. Coustum.* c. 25.

<sup>22</sup> 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 consor 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 *vs.* Langford, 1 Salk. 92. And the same in the case of feoffment and re-ineffment, or even

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 first purchaser: but as males have not been *\*perpetually admitted*, but only *generally preferred*; as females have not been *utterly excluded*, but only *generally postponed* to males; the [\*237 tracing the inheritance up through the male stocks will not give us absolute demonstration, but only a strong probability, of arriving at the first purchaser; which, joined with the other probability, of the wholeness of entirety of blood, will fall little short of a certainty.<sup>33</sup>

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 search for the heir of a person, as *John Stiles*, who dies seized 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 those, the issue of *George* and *Cecilia Stiles*, his father's

(r) See the table of descents annexed.

if a man seized *ex parte materna* make feoffment in fee reserving rent, the rent shall descend to the heirs *ex parte paterna*. Co. Litt. 12, b.—CHITTY.

<sup>33</sup> Very important alterations have been made in the law of descents in England by the statute 3 & 4 Wm. IV. c. 106. From the provisions of this statute the following have been framed as the existing canons of descent in that country:—

1. The descent shall be traced from the purchaser, the person last entitled to the land being considered to have been the purchaser, unless he be proved to have inherited it.

This rule it appears is not to be applied unless the circumstances of the case and the nature of the title require it, so that when a person dies *leaving issue* it need not be inquired whether he or she took by inheritance or by purchase.

2. Inheritances shall descend lineally to the issue of the purchaser.

3. On failure of issue of the purchaser, the inheritance shall go to his nearest lineal ancestor, or the issue of such ancestor,—the ancestor taking in preference to his or her issue. Thus, if the purchaser dies without issue, the father takes before the brothers or sisters of that purchaser, and a grandfather, not before the father or the father's issue, but before the uncles or aunts or their issue.

4. Paternal ancestors and their descendants shall be preferred to maternal ancestors and their descendants, male paternal ancestors and their descendants to female paternal ancestors and their descendants, and male maternal ancestors and their descendants to female maternal ancestors and their descendants, and the mother of a more remote female ancestor on either side and her descendants to the mother of a less remote female ancestor and her descendants. Thus, the mother of the paternal grandfather and her issue shall be preferred to the father's mother and her issue.

5. The male issue shall be admitted before the female.

6. When there are two or more males in equal degree, the eldest only shall inherit, but the females all together.

7. Relations of the half-blood shall be capable of inheriting,—those who are related *ex parte paterna* taking next in order to the relations, male and female, of the same degree of the whole blood; those who are related *ex parte materna* taking next in order after their mother.

8. The lineal descendants, *in infinitum*, of any person deceased shall represent their ancestor,—that is, shall stand in the same place as the person himself would have done had he been living. Thus, the issue of a deceased eldest son, in whatever degree, will precede in order of inheritance the living younger sons.—KERR.

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*

\*238] *infinitum*: till both the \*immediate bloods 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,) Willises, (n° 17,) Thorpes, (n° 18, 19,) and Whites, (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 doctrine 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. 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)<sup>4</sup> to give the preference to n° 10 before n° 11; for the following reasons: 1. Because this point was not the principal question in the case of Clere and Brooke: but the law concerning it is delivered *obiter* only, and in the course of argument by justice Manwoode; though afterwards said to be confirmed by the three other justices in separate, extrajudicial conferences with the reporter. 2. Because the chief justice, Sir James Dyer, in reporting the resolution of the court in what seems to be the same case,(w) takes no notice of this doctrine. 3. Because it appears from Plowden's report

\*239] that very many gentlemen of the law were dissatisfied \*with this position of justice Manwoode; since the blood of n° 10 was derived to the purchaser 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° 17, 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

(s) Plowd. 450.

(t) Elem. c. 1.

(u) H. C. L. 240, 244.

(w) Dyer, 314.

(x) Pages 236, 236, 237.

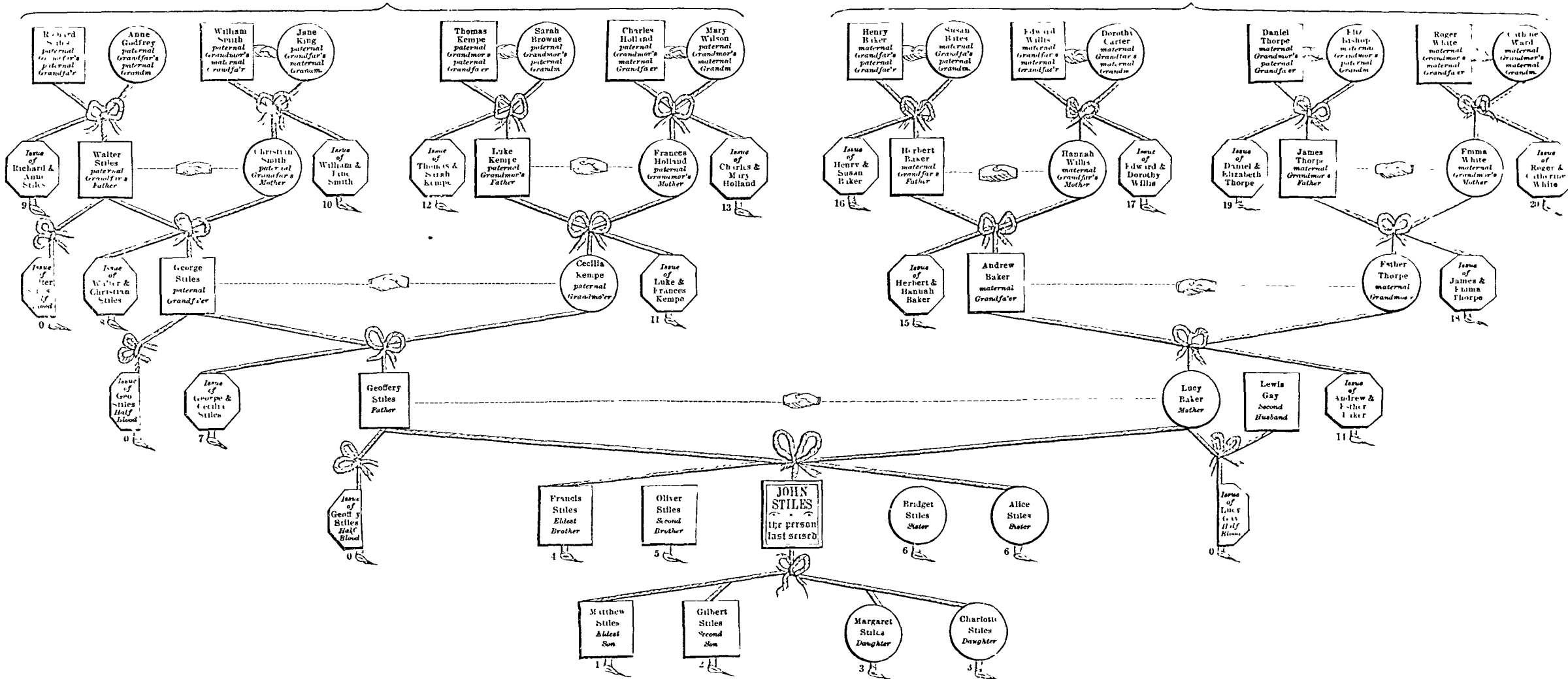
(y) Law of Inheritance, 2d edit. pp. 30, 31, 61, 62, 66.

<sup>4</sup> Mr. Cruise states that a case exactly in point arose in the Midland circuit in 1805, and was intended to have been argued in Westminster Hall, but was compromised. "Several eminent counsel 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.—CHITTY.

# TABLE OF DESCENTS.

## PATERNAL LINE.

## MATERNAL LINE.







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 Stileses (*alias Fairfields*) fail. Now the blood of the Stileses 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."<sup>35</sup> Now, it is settled, by the resolution of Clere \*and Brooke, that n° 10 should have inherited before n° 11 to Geoffrey Stiles, the father, had he been the person last seised; [ \*240 and therefore n° 10 ought also to be preferred in inheriting to *John Stiles*, the son.

In case *John Stiles* was not himself the purchaser, but the estate in fact came to him by descent from his father, mother, or any higher ancestor, there is this difference: that the blood of that line of ancestors, from which it did not descend, can never inherit: 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.<sup>36</sup>

(z) Co. Litt. 12. Hawk. abr. *in loc.*

(b) Fitzh. Abr. tit. *descent*. 2. Bro. Abr. tit. *descent*. 3.

(c) See page 223.

(y) Hist. C. L. 248.

(d) See page 236.

<sup>35</sup> 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.—CHITTY.

<sup>36</sup> 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. Wooddesson, 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, 128. See Cruise, Dig. vol. 3, p. 430.—CHITTY.

## CHAPTER XV.

## OF TITLE BY PURCHASE.

## 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 purchaser, (c) and falls within Littleton's definition, for he comes to the estate by his own agreement; that is, he consents to the gift. A man who has his father's estate settled upon him in tail, before he was born, is also a purchaser; 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 nor a \*242] 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 encumbrances: (f) this being for the benefit of creditors, and others, who have demands on the estate of the ancestor.<sup>1</sup> If a remainder be limited to the heirs of

(\*) § 12.  
(b) Co. Litt. 18.  
(c) Ibid.

(d) Lord Raym. 728.  
(e) 1 Roll. Abr. 626.  
(f) Salk. 241. Lord Raym. 728.

<sup>1</sup> See further, on this point, Com. Dig. Descent, A. B. Bac. Abr. 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 deviser 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 Roll. 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. Plowd. 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.

Sempronius, here Sempronius himself takes nothing; but if he dies during the continuance of the particular estate, his heirs shall take as purchasers.<sup>(g)</sup> But if an estate be made to A. for life, remainder to his right heirs in fee, his heirs shall take by descent: for it is an ancient rule of law, that whenever 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*.<sup>(h)</sup> 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.<sup>(i)</sup> The ancestor, during his life, beareth in himself all his heirs;<sup>(k)</sup> 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 ancestor from a tenancy for life to a fee-simple.<sup>2</sup> And had it been otherwise, had the heir (who is uncertain till the death of the ancestor) been allowed to take as a purchaser 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 feudal 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 *conquests*, *conquæstus*, or *conquisitio*:<sup>(l)</sup> 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:<sup>(m)</sup> as it was among the Norman jurists, who styled \*the first purchaser (that is, he who brought the estate into the family who at [\*243 present owns it) the conqueror or *conquereur*.<sup>(n)</sup> 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 *conquæstus*, and himself *conquæstor* or *conquisitor*;<sup>(o)</sup> 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 feudal 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.<sup>(p)</sup>

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

(g) 1 Roll. Abr. 627.

(h) 1 Rep. 104. 2 Lev. 60. Raym. 334.

(i) Shelley's case, 1 Rep. 98.

(k) Co. Litt. 22.

(l) Craig. l. 1, t. 10, § 18.

(m) Dalrymple of Feuds, 210.

(n) Gr. Custom. Gloss. c. 25, p. 40.

(o) Spelm. Gloss. 145.

(p) See book I. ch. 3.

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.)—CURRY.

The doctrine laid down in the text—that when a devise of lands to the heir-at-law makes no alteration in the nature or limitation of the estate, the heir will take, not by purchase under the will, but by his preferable title by descent—is no longer law. The statute of 3 & 4 Gul. IV. c. 106 enacts that an heir to whom land is devised by his ancestor shall take as devisee, and not by descent; and that a limitation of land, by any assurance, to the grantor and his heirs shall create an estate by purchase.—HOVEDEN.

<sup>2</sup> This is the rule or maxim known among lawyers as "the rule in Shelley's case." 1 Co. 38. See Harg. & Butl. Co. Litt. 376, b., n. 1. Fearn, Cont. Rem. 28. Preston on Estates, 1 vol., 263 to 419, *per tot.*—CURRY.

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)(*g*) had any estate of inheritance \*244] vested in him by descent \*from, (or any estate *pur 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 actor 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 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*)<sup>3</sup>

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. 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 feudal tenure.<sup>4</sup> 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, (being vested in him by act of law, and not by his own \*245] 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

(*g*) Stat. 29 Car. II. c. 3, § 10.

(*r*) *Ibid* § 12.

(*s*) 1 P. Wms. 777.

(*t*) Stat. 3 & 4 W. and M. c. 14.

(*u*) Finch, Law, 119.

(*v*) Finch, Rep. 86.

(*w*) See page 72.

(*x*) *Eschet*, or *échet*, formed from the verb *eschoir*, or *échoir* 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.

<sup>3</sup> Copyhold estates are not liable as assets, either in law or equity, to the testator's debts, further than he subjected them thereto. *Aldrich vs. Cooper*, 8 Ves. 393.—CHITTY.

<sup>4</sup> 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 signiory, 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 signiory descends, or from the encumbrances of the last tenant. *Earl of Bedford's case*, 7 Rep. 6. *Smalman vs. Agborough*, 1 Roll. Rep. 402 —

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,<sup>(c)</sup> and therefore taking by purchase; yet, on the other hand, the lord is more frequently considered as being *ultimus hæres*, 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 feudal 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.<sup>(d)</sup> But both these species may well be \*comprehended under the first denomination only; for he that is [ \*246 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 Flota,<sup>(e)</sup> "*dominus capitalis feodi loco hæredis 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 purchaser is certainly, in the other it is probably, at an end; and therefore in all of them the law directs that the land shall escheat to the lord of the fee; for the lord would be manifestly prejudiced, if, contrary to the inherent condition tacitly annexed to all feuds, any person should be suffered to succeed to 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.<sup>5</sup>

(c) 1 Inst. 215.

(d) Co. Litt. 13, 92.

(e) L. 6, c. 1.

<sup>5</sup>The important case of *Burgess vs. 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 was 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 vs. 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 claims. *Williams vs. lord Lonsdale*, 3 Ves. 757. And clearly, a trustee not having the legal estate in lands purchased with the trust-moneys cannot hold against the crown claiming by escheat. *Walker vs. Denne*, 2 Ves. Jr. 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. Copy-

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, \*247] although it hath deformity in any part of its body, 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 purchaser: 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 \*248] inheritance;(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.\*

(f) Co. Litt. 7, 8.

(g) *Qui contra formam humani generis converso more procreantur, ut si mulier monstrosam vel prodigiosam enixa sit, inter liberos non computantur. Partus tamen, cui natura aliquantulum addiderit vel diminuerit, ut si seze 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, and l. 5, l. 5, c. 30.

(h) *Ff.* 1, 5, 14.

(i) *Ff.* 50, 16, 135. Paul. 4, sent. 9, § 73.

(k) Co. Litt. 23.

(l) See book I. ch. 16.

(m) Co. Litt. 8.

(n) Finch, Law, 117.

(o) Nov. 59, c. 8.

(p) *Ibid.* c. 12.

(q) Cod. 6, 57, 5.

holds 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."—CHITTY.

By the statute 4 & 5 W. IV. c. 23, repealed, but re-enacted by 13 & 14 Vict. c. 60, this rule of the common law is entirely altered; it being enacted (s. 15) that where any person seised of any land upon any trust dies without an heir, the court of chancery may make an order vesting such land in such person as the court shall direct, and the order shall have the effect of a conveyance.—STEWART.

\*The law of Scotland allows a person born out of wedlock to be legitimate if his parents subsequently intermarry, without any marriage of either with a third person intervening. 7 Cl. & Fin. 817, 842. But although the status as to legitimacy of a person is for most purposes determined by the law of the domicile of his parents, yet for the purpose of inheriting land in England a bastard so legitimated, by the law of Scotland and is not allowed by the English law to be legitimate. *Doe d. Birtwhistle vs. Vardell*, 5 B. & C. 238. 2 Scott, N. R. 821. 9 Bligh, 32. 7 Cl. & Fin. 859. Legitimacy according to the law of the domicile, as well as according to the law of the place where the land lies, is necessary to entitle an heir; for a child born out of wedlock of parents domiciled in England, who afterwards married there, was not allowed to inherit lands in Scotland. 5 Bligh, 468. See 2 Ves. & B. 127.

As to the status of bastards during the Middle Ages and on the Continent, see *Butl* *On* *Tit.* 243, b.—SWEET.

There is, indeed, one instance, in which our law has shown them some 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, whereby the inheritance descends to his issue; in this case the *mulier puisnè*, and all other heirs, (though minors, feme-coverts, 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.<sup>8</sup> 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 shown 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)<sup>9</sup>

\*As bastards cannot be heirs themselves, so neither can they have any heirs but those of their own bodies. For, as all collateral kindred consists [249 in being derived from the same common ancestor, and 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 purchase land and dies seised thereof without issue, and intestate, the land shall escheat to the lord of the fee.(u)

6. Aliens,(v) 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 feudal. 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.<sup>10</sup>

As aliens cannot inherit, so far they are on a level with bastards; but as they

(r) L. 7, c. 1.  
(s) Litt. § 393. Co. Litt. 244.  
(t) Litt. § 400.

(u) Bract. l. 2, c. 7. Co. Litt. 244.  
(v) See book 1. ch. 10.  
(w) Co. Litt. 8.

<sup>1</sup> 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 encoint with a son, the mulier enter, the son is born, the issue of the bastard is barred. Ibid. Broke, tit. Descent, 41. Plowd. 57, a., 372, a.—CHITTY.

<sup>8</sup> 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 vs. Earls of Bath and Montague*, 1 Salk. 120.—CHITTY.

<sup>9</sup> It would seem that this privilege of the *bastard eignè* no longer exists, in consequence of statute 3 & 4 W. IV. c. 27 having enacted (s. 39) that no descent cast shall defeat any right of entry.—KERR.

<sup>10</sup> There is one exception to the general law against aliens, founded on the treaty of 1794 between this country and the United States of America, by the 9th article of which treaty it was stipulated that British subjects who then held lands in the United States, or American subjects who then held lands in Great Britain, "might grant, sell, or devise the same to those whom they should please, in like manner as if they were natives, and that neither they, nor their heirs nor assigns, should, so far as might respect the said lands and the legal remedies thereto, be regarded as aliens;" and this stipulation was confirmed by the statute 39 Geo. III. c. 97, s. 24. See 1 Russ. & M. 663 —SWEET.



are also disabled to hold by purchase,(x)<sup>11</sup> they are under still greater disability. 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 further, if an alien be made a denizen by the king's letters-patent, and then purchases land, (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; \*250] but by denization it acquires \*an hereditary quality, which will be transmitted to his subsequent posterity. Yet if he had been naturalized by act of parliament, such *eldest son* might then have inherited; for that cancels all defects, and is allowed to have a *retrospective energy*, which simple *denization* has not.(z)<sup>12</sup>

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 père, doit inheriter al fils*: but also because we have seen that the only feudal 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, that all persons, being natural-born subjects of the king, may inherit and make their titles by descent from any of their ancestors lineal or collateral; although their father or mother, or other ancestor, by, from, through, or under whom they derive their pedigrees, were born out of the king's allegiance. But inconveniences were afterwards apprehended, in case persons should thereby gain a future capacity to inherit, who did not exist at the death of the person last seized. As, if Francis the 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.

(x) Co. Litt. 2.

(y) Co. Litt. 2. 1 Lev. 59.

(z) Co. Litt. 129.

(a) 1 Inst. 8.

(b) See pages 223 and 239.

(c) 1 Vent. 413. 1 Lev. 59. 1 Sid. 193.

(d) See page 226.

<sup>11</sup> If the purchase be made with the king's license, it seems that he may hold. See 14 Hen. IV. 20. Harg. Co. Litt. 2, b., n. 2.—CHITTY.

<sup>12</sup> Letters of denization are now rarely, if ever, obtained; the statute 7 & 8 Vict. c. 66 having provided a simple and inexpensive mode by which aliens may obtain all the privileges of natural-born subjects except those of sitting in the legislature or being members of the privy council.—KERR.

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.

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 to the feudal 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 antient and superior law of forfeiture. [ \*252

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 feudal 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 forever. In this situation the law of feudal escheat was brought into England at the conquest; and in general superadded to the antient law of forfeiture. In consequence of which corruption and extinction of hereditary blood, the land of all felons would immediately revert in the lord, but that the superior law of forfeiture intervenes, and intercepts it in its passage: in case of treason, forever; 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 have done to the heir of the felon in case the feudal 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)

\*As a consequence of this doctrine of escheat, all lands of inheritance immediately reverting 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 antient 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.<sup>13</sup> [ \*253

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 further. For the blood of the tenant being utterly corrupted and extinguished, it follows not only that all that he now has

(e) See pages 208 and 214.

(f) *LL Ælfred. 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.

(j) Somner. 33. Wright, Ten. 118.

<sup>13</sup> "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.—CHITTY.

shall escheat from him, but also that he shall be incapable of inheriting any thing for the future. This may further 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.<sup>(k)</sup> 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.<sup>(l)</sup>

There is yet a further consequence of the corruption and extinction of hereditary blood, which is this: that the person \*attainted shall not only be \*254] 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 antient 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.<sup>(m)</sup> 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,<sup>(n)</sup> at least on the part of their attainted father.

This corruption of blood cannot be absolutely removed but by authority of parliament. The king may excuse the public punishment of an offender, but cannot abolish the private right which has accrued or may accrue to individuals as a consequence of the criminal's attainder. He may remit a forfeiture, in which the interest of the crown is alone concerned; but he cannot wipe away the corruption of blood; for therein a third person hath an interest, the lord who claims by escheat. If, therefore, a man hath a son, and is attainted, and afterwards pardoned by the king; this son can never inherit to his father, or father's ancestors; because his paternal blood, being once 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.<sup>(o)</sup>

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 \*255] and therefore we have \*seen that an alien elder brother shall not impede the descent to a natural-born younger brother. But in attainders it is otherwise: for if a man hath issue a son, and is attainted, and afterwards pardoned, and then hath issue a second son, and dies; here the corruption of blood is not removed from the eldest, and therefore he cannot be heir; neither can the youngest be heir, for he hath an elder brother living, of whom the law takes notice, as he once had a possibility of being heir: and therefore the younger brother shall not inherit, but the land shall escheat to the lord: though had the elder died without issue in the life of the father, the younger son born after the pardon might well have inherited, for he hath no corruption of blood.<sup>(p)</sup> 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.<sup>(q)</sup> Sir Edward Coke in this case allows<sup>(r)</sup> that if the ancestor be attainted, his sons born before the attainder

(k) Co Litt. 13.

(l) 3 Inst. 47.

(m) Van Leeuwen. in 2 Feud. 31.

(n) Co. Litt. 391.

(o) Ibid. 392.

(p) Ibid. 8.

(q) Dyer, 48.

(r) Co. Litt. 8.

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 overruled)(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 feudal property, is blotted out, corrupted, and extinguished forever: 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 feudal principles, but perhaps extended further than even those principles will warrant, has been long looked upon as a peculiar hardship: because the oppressive part of the feudal tenures being now in general abolished, it seems unreasonable to reserve one of their most inequitable consequences; namely, that the children should not only be reduced to present poverty, (which, however severe, is sufficiently justified upon reasons of public policy,) but also be laid under future difficulties of inheritance, on account of the guilt of their ancestors. And therefore in most (if not all) of the new felonies created by parliament since the reign of Henry the Eighth, it is declared that they shall not extend to any corruption of blood: and by the statute 7 Anne, 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 further 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.<sup>14</sup> [\*256]

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 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. [\*257]

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,<sup>15</sup>

(s) 1 Hal. P. C. 357.

(t) Co. Litt. 13.

<sup>14</sup> And now corruption of blood is almost entirely abolished; for by the statute 54 Geo. III. c. 145, corruption of blood was abolished in all cases except the crimes of treason or murder; and by the 3 & 4 W. IV. c. 106, s. 10, it is enacted that when any person from whom the descent of any land is to be traced shall have had any relation who, having been attainted, shall have died before such descent shall have taken place, then such attainder shall not prevent any person from inheriting such land who would have been capable of inheriting the same by tracing his descent through such relation if he had not been attainted, unless such lands shall have escheated in consequence of such attainder before the 1st of January, 1834.—STEWART.

<sup>15</sup> 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

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 into religion, and became a monk professed, was incapable of inheriting lands, both in our own(*u*) and the feudal 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 *civilitur mortuus*; he did not impede the descent to others, but the next heir was entitled to his or his ancestor's estate.<sup>16</sup>

These are the several deficiencies of hereditary blood, recognised by the law of England; which, so often as they happen, occasion lands to escheat to the original proprietary or lord.

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## 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, . . . 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, recognised 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*)

\*259] <sup>\*This seems to have been recurring to first principles, and calling in</sup> 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*)

(\*) Co. Litt. 132.

(\*\*) 2 Feud. 21.

(\*) See pages 3 and 8.

(\*) Ff. 41, 1, 3.

(\*) Co. Litt. 41.

(d) Bract. l. 2, c. 9, l. 4, t. 3, c. 9, § 4. Flet. l. 3, c. 12, § 6, l. 5, c. 5, § 15.

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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.—CHRISTIAN.

<sup>16</sup> But these disabilities of papists were removed by the statute 18 Geo. III. c. 60; 31 Geo. III. c. 32; and 43 Geo. III. c. 80, on condition only of their taking the oath of allegiance and making a declaration of their profession of faith; and now, by the Roman Catholic Relief Bill, (10 Geo. IV. c. 7, s. 23,) it is enacted that no oath shall be required to be taken by Roman Catholic subjects for enabling them to hold or enjoy any real or personal property, other than such as by law may be required to be taken by other subjects.—KERR.

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 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 *hæreditas 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, the tenant *pur auter vie* may devise it \*by will, or it shall go to the executors or administrators, and be assets in their hands for payment of debts:<sup>1</sup> the other, that of 14 Geo. II. c. 10, [\*260

(e) Co. Litt. 41.

(f) Vaugh. 201.

(g) Bract. ibid. Flet. ibid.

<sup>1</sup> 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 the hands of the 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. Wms. 266, n. E., and *Grey vs. Mannock*."

It has been held 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 estates *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

which enacts that the surplus of such estate *pur auter vie*, after payment of debts, shall go in a course of distribution like a chattel interest.

By these two statutes the title of *common* occupancy is utterly extinct and abolished; though that of *special* occupancy by the heir-at-law continues to this day; such heir being held to succeed to the ancestor's estate, not by descent, for then he must take an estate of inheritance, but as an occupant specially marked out and appointed by the original grant. 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.<sup>2</sup> 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 real estate could ever be acquired by occupancy.<sup>3</sup>

(*h*) Co. Litt. 41. Vaugh 201.

(*i*) But see now the statute 5 Geo. III. c. 17, which makes any *elemosynary* corporation, of tithes or other incorporeal hereditaments, as good and effectual to all intents and purposes as leases of corporeal possessions.

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 personally. 4 T. R. 224, 229.—CHITTY.

<sup>2</sup> 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.

In p. 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.—CHRISTIAN.

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 vs Barcroft*, 1 Sid. 347.—CHITTY.

<sup>3</sup> But, by the recent act for amending the law relating to wills, (1 Vict. c. 26, s. 1,) these statutes, except so far as relates to wills executed before Jan. 1, 1838, are repealed, but re-enacted (s. 3) that an estate *pur auter vie*, of whatever tenure, and whether it be a corporeal or incorporeal hereditament, may in all cases be devised by will; and (s. 6) that if no disposition by will shall be made of any estate *pur auter vie* of a freehold nature, the same shall be chargeable in the hands of the heir if it shall come to him by reason of special occupancy, as assets by descent,—as in the case of freehold land in fee-simple; and in case there shall be no special occupant of any estate *pur auter vie*, whether freehold or customary freehold, tenant-right, customary or copyhold, or of any other tenure, and whether a corporeal or incorporeal hereditament, it shall go to the

\*This, I say, was the only instance; for I think there can be no other case devised, wherein there is not some owner of the land appointed by the law. In the case of a sole corporation, as a parson of a church, when he dies or resigns, though there is no *actual* owner of the land till a successor be appointed, yet there is a *legal, potential* ownership, subsisting in contemplation of law; and when the successor is appointed, his appointment shall have a retrospect and relation backwards, so as to entitle him to all the profits from the instant that the vacancy commenced. And, in all other instances, when the tenant dies intestate, and no other owner of the lands is to be found in the common course of descents, there the law vests an ownership in the king, or in the subordinate lord of the fee, by escheat.

So also in some cases, where the laws of other nations give a right by occupancy, as in lands newly created, by the rising of an island in 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,<sup>(f)</sup> 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.<sup>(k)</sup> 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,<sup>(l)</sup> 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,<sup>(m)</sup> yet ours gives it to the king.<sup>(n)</sup> \*And as to lands gained from the sea, either by *alluvion*, by the washing up of sand and earth, so [ \*262 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.<sup>(o)</sup> 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.<sup>(p)</sup> 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.<sup>4</sup> In the same manner if a river, running between two

(f) L. 2, c. 2.

(g) Inst. 2, 1, 22.

(h) Salk. 637. See page 39.

(i) Inst. 2, 1, 2.

(\*) Bract. l. 2, c. 2. Callis of Sewers, 22.

(\*) 2 Roll. Abr. 170. Dyer, 326.

(\*) Callis, 24, 28.

executor or administrator of the party that had the estate thereof by virtue of the grant; and if the same shall come to the executor or administrator, either by reason of a special occupancy or by virtue of this act, it shall be assets in his hands, and shall go and be applied and distributed in the same manner as the personal estate of the testator or intestate.—STEWART.

<sup>4</sup> 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, relict 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, relict 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 relict property belongs to the owners of the neighbouring estates." Schultes on Aquatic Rights, 138. See further, Com. Dig. Prerog. D. 61. Bac. Abr. Prerog. 3 Bar. & C. 91. 5 B. & A. 268. From the late case of *The King vs. Lord Yarborough*, 3 Bar. & Cres. 91, (though the decision



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.(g) 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* increase, 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.

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## CHAPTER XVII.

### III. OF TITLE BY PRESCRIPTION.

A THIRD method of acquiring real property by purchase is that by *prescription*; as when a man can show 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 show 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)<sup>1</sup> As for example; if there be a usage in the parish of Dale, that all the inhabitants of that parish may dance on a certain close, at all times, for their recreation, (which is held(c) to be a lawful usage;) this is strictly a custom, for

(a) Callis, 23.

(r) Inst. 2, 1, 20, 21, 22, 23, 24.

(s) See book 1. page 398.

(g) See book 1. page 75, &c.

(b) Co. Litt. 113.

(c) 1 Lev. 176.

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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, 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 increment 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 increments 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, 137.—CHITTY.

<sup>1</sup> In order to determine whether rights are holden as a custom or as a prescription, it is necessary to advert merely to the manner in which they are holden,—whether as a local usage, or as a personal claim, or dependent on a particular estate. All rights which may be holden as a custom may be holden as a prescription, but not *vice versa*. Perley vs. Langley ~ N. Hamp. 233.—SHARWOOD.

it is applied to the *place* in general, and not to any particular *persons*: but if the \*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 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, 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.<sup>2</sup> 3. A prescription cannot be for a

(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 *usui rem capere*.

(g) Dr. and St. Dial. 1, c. 8. Finch, 132.

(h) 4 Rep. 31, 32.

<sup>2</sup> 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. 346. This is termed prescribing in a *que estate*, from the words in italic. Id. note 2. 4 T. R. 718, 719. 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

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.<sup>3</sup> 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)<sup>4</sup> 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 franchise 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, 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 connection; but, if he prescribes in himself and his ancestors, he may prescribe for any thing whatsoever that lies in grant; not only things that are appurtenant, but also such 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

(i) 1 Ventr. 357.

(k) Co. Litt. 114.

(l) Litt. § 183. Finch, L. 104.

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, 461. 1 Saund. 349.—CHITTY.

<sup>3</sup> 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;) 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 show 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.—CHITTY.

<sup>4</sup> The use or possession on which a title by prescription is founded must be uninterrupted and adverse, or of a nature to indicate that it is claimed as a right, and not the effect of indulgence or of any thing short of a grant. An uninterrupted adverse use and enjoyment of an easement for a period of twenty years, unexplained, is sufficient to warrant the presumption of a grant by a jury. *Gayetty vs. Bethune*, 14 Mass, 49. *Kirk vs. Smith*, 9 Wheat. 241. *Rowland vs. Wolfe*, 1 Bailey, 56. *Hogg vs. Gill*, 1 McMullan, 329. Twenty years adverse user of a way under claim of right is sufficient to authorize the presumption of a grant. And that it was adverse may be presumed if the user was notorious and in the ordinary manner, and not under circumstances showing it to have been by leave and favour, or by the courtesy of the owner. *Esling vs. Williams*, 10 Barr, 126. The bare non-user for the legal period of presumption of an easement charged upon land does not necessarily raise a presumption of its extinguishment, unless there be some act done by the owner of the land charged inconsistent with, or adverse to, the existence of the right. *Buckholder vs. Sigler*, 7 W. & S. 154. Public rights cannot be destroyed by long-continued encroachments: at least, the party who claims the exercise of any right, inconsistent with the free enjoyment of a public easement or privilege, must put himself upon the ground of prescription, unless he has a grant or some valid autho-

\* A toll *traverse* is expressly defined to be "a payment of a sum of money for passing over the private soil of an other, or in a way not being a high street." A toll *thorough* is taken for passing over a highway, where the owner of the toll claims nothing in the soil.—SHARWOOD.

appendant, then he can only prescribe in his ancestors. So also a man may prescribe in a *que estate* for a common *appurtenant* to a manor; but, if he would prescribe for a common *in gross*, he must prescribe in himself and his ancestors. 6. Lastly,<sup>5</sup> 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, i. 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.<sup>6</sup>

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rity from the government. *Arundel vs. McCullough*, 10 Mass. 70. *Commonwealth vs. McDonald*, 10 S. & R. 401. *Commonwealth vs. Alburger*, 1 Whart. 486.—SHARSWOOD.

<sup>5</sup> 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. Abr. Common A.—CHITTY.*

<sup>6</sup> Immemorial usage, or usage from time whereof the memory of man runneth not to the contrary, was formerly held to be when such usage had commenced not later than the beginning of the reign of Richard I. But as in most cases it was impossible to bring proof of the existence of any usage at this early date, the courts were wont to presume the fact upon proof only of its existence for some reasonable time back, as for a period of twenty years or more, unless indeed the person contesting the usage were able to produce proof of its non-existence at some period subsequent to the beginning of the reign of Richard I., in which case the usage necessarily fell to the ground. The proof even of a shorter continuance than for twenty years was enough to raise the presumption, if other circumstances were brought in corroboration, indicating the existence of an ancient right. But the prescription was defeated by proof that the enjoyment, whether for twenty years or any other period within time of legal memory, took place by virtue of a grant or license from the party interested in opposing it, or that it was without the knowledge of him or his agents during the whole time that it was exercised. *Bright vs. Walker*, 4 Tyr. 509. To remedy the inconvenience and injustice which sometimes followed from this state of the law, the prescription act, 2 & 3 W. IV. c. 71, was passed, which is entitled "an act for shortening the time of prescription in certain cases." The first section enacts that no claim which may be lawfully made, at the common law, by custom, prescription, or grant, to any *right of common or other profit or benefit* to be taken or enjoyed from or upon any land of the sovereign or parcel of the duchies of Lancaster and Cornwall, or of any ecclesiastical or lay person, (excepting certain matters to be referred to immediately,) and except tithes, rents, and services, shall, when such right shall have been enjoyed without intermission for thirty years, be defeated or destroyed by showing only that such right was first enjoyed at any time prior to such period of thirty years; but such claim may be defeated in any other way by which it is now liable to be defeated: and when such right shall have been enjoyed for sixty years, it shall be deemed indefeasible, unless it appear that it was enjoyed by some consent or agreement expressly made for the purpose by deed in writing. The matters excepted in the first section are,—1. Claims to any way or other easement, or to any water-course, or the use of any water, for which a precisely similar enactment is made, except that, instead of the terms of thirty and sixty years, the shorter terms of twenty and forty years are made sufficient to support such claim; and, 2. Claims to the use of light, for which an enjoyment of twenty years constitutes an indefeasible title, unless it appear that the right was enjoyed by agreement expressly made for that purpose by deed in writing. It is also enacted by section 5 that, where formerly it would have been necessary in pleading to allege the right to have existed from time immemorial, it shall be sufficient to allege the enjoyment as of right during the periods mentioned in the act as applicable to the case, and without claiming in the name or right of the owner of the fee, as formerly was, and still is usually, done.—KERR.

## CHAPTER XVIII.

## IV. OF TITLE BY FORFEITURE.

FORFEITURE is a punishment annexed by law to some illegal act, or negligence, in the owner of lands, tenements, or hereditaments; whereby he loses all his interest therein, and they go to the party injured, as a recompense for the wrong which either he alone, or the public together with himself, hath sustained.

Lands, tenements, and hereditaments may be forfeited in various degrees and by various means: 1. By crimes and misdemeanors. 2. By alienation contrary to law. 3. By non-presentation to a benefice, when the forfeiture is denominated *a lapse*. 4. By simony. 5. By non-performance of condition. 6. By waste. 7. By breach of copyhold customs. 8. By bankruptcy.

I. The foundation and justice of forfeitures for *crimes and misdemeanors*, and the several degrees of those forfeitures proportioned to the several offences, have been hinted at in the preceding book;<sup>(a)</sup> 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

\*268] of lands and tenements to the crown are principally the following six: 1. Treason. 2. Felony. 3. Misprision of treason. 4. *Præmunire*. \*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.<sup>1</sup> But at what time they severally commence, how far they extend, and how long they endure, will with greater propriety be reserved as the object of our future inquiries.<sup>2</sup>

II. Lands and tenements may be forfeited by *alienation*, or conveying them to another, contrary to law. This is either alienation in *mortmain*, alienation to an *alien*, or alienation by *particular tenants*; in the two former of which cases the forfeiture arises from the incapacity of the alienee to take, in the latter from the incapacity of the alienor to grant.

1. Alienation in *mortmain*, in *mortua manu*, is an alienation of lands or tenements to any corporation, sole or aggregate, ecclesiastical or temporal. But these purchases having been chiefly made by religious houses, in consequence whereof the lands became perpetually inherent in one dead hand, this hath occasioned the general appellation of *mortmain* to be applied to such alienations,<sup>(b)</sup> 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 feudal restraints of alienation were worn away. Yet, in consequence of these it was always, and is still

(a) Book I. page 299.

(b) See book I. page 479.

<sup>1</sup> But the statutes of recusancy are now repealed by 31 Geo. III. c. 32, provided papists take the oath prescribed therein.—CHITTY.

<sup>2</sup> "No attainder of treason against the United States shall work corruption of blood or forfeiture, except during the life of the person attainted." Const. U. S. art. 3. And when Congress undertook to declare the punishment of treason, and to pass an act for the punishment of crimes against the United States, in which act treason, murder, man slaughter, piracy, larceny, and some other crimes, when committed within the jurisdiction of the United States, were comprehended, they subjoined a clause to the act, declaring that no conviction or judgment for any of the offences therein mentioned shall work corruption of blood or any forfeiture of estate. L. U. S. 1 Cong. 2 sess. c. 9, § 24 1 Story's Laws U. S. 88.—SHARSWOOD.

necessary,(c) for corporations to have a license in mortmain \*from the crown, to enable them to purchase lands; for as the king is the ultimate lord of every fee, he ought not, unless by his own consent, to lose his privilege of escheats, and other feudal profits, by the vesting of lands in tenants that can never be attainted or die. And such licenses of mortmain seem to have been necessary among the Saxons, above sixty years before the Norman conquest.(d) But, besides this general license 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 license also (upon the same feudal principles) for the alienation of the specific land. And if no such license was obtained, the king or other lord might respectively enter on the land, so aliened in mortmain, as a forfeiture. The necessity of this license 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 license could not be obtained) their contrivance seems to have been this: that, as the forfeiture for such alienations accrued in the first place to the immediate lord of the fee, the tenant who meant to alienate, first conveyed his lands to the religious house, and instantly took them back again to hold as tenant to the monastery; which kind of instantaneous seisin was probably held not to occasion any forfeiture: and then, by pretext of some other forfeiture, surrender, or escheat, the society entered into those lands in right of such their newly-acquired signiory, as immediate lords of the fee. But, when these dotations began to grow numerous, it was observed that the feudal 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 \*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) [ \*269

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. [ \*270

This seemed to be a sufficient security against all alienations in mortmain: but as these statutes extended only to gifts and conveyances between the parties, the religious houses now began to set up a fictitious title to the land, which it was intended they should have, and to bring an \*action to recover it against the tenant; who, by fraud and collusion, made no defence, and [ \*271

(c) F. N. B. 121.

(d) Selden, Jan. Angl. I. 2, § 45.

(e) *Ecclesiarum de feudo domini regis non possunt in perpetuum dari, absque assensu et consensione ipsius*, c. 2, A. D. 1164

(f) See book 1. page 284.

(g) A. D. 1217, cap. 43, edit. Ozon.

(h) *Non licet alicui de cetero dare terram suam alicui domui*

*religiosæ, ita quod illam resumat tenendam de eadem domo; nec liceat alicui domui religiose terram alicujus sic accipere, quod tradat illum ei a quo ipsam recepit tenendam: si quis autem de cetero terram suam domui religiose sic dederit, ut super hoc convincatur, domum suam penitus cassetur, ut terra illa domino suo illius feodi i scurratur.* Mag. Cart. 9 Hen. III. c. 36.

(i) 2 Inst. 75.

thereby judgment was given for the religious house, which then *recovered* the land by sentence of law upon a supposed prior title. And thus they had the honour of inventing those fictitious adjudications of right, which are since become the great assurance of the kingdom, under the name of *common recoveries*. But upon this the statute of Westminster the second, 13 Edw. I. c. 32, enacted, that in such cases a jury shall try the true right of the demandants or plaintiffs to the land, and if the religious house or corporation be found to have it, they shall still recover seisin; otherwise it shall be forfeited to the immediate lord of the fee, or else to the next lord, and finally to the king, upon the immediate or other lord's default. And the like provision was made by the succeeding chapter,<sup>(k)</sup> in case the tenants set up crosses upon their lands (the badges of knights templars and hospitallers) in order to protect them from the feudal 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,<sup>(l)</sup> a proviso was inserted<sup>(m)</sup> that this should not extend to authorize any kind of alienation in mortmain. And when afterwards the method of obtaining the king's license by writ of *ad quod damnum* was marked out, by the statute 27 Edw. I. st. 2, it was further provided by statute 34 Edw. I. st. 3 that no such license 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 \*272] the *possession* and the *use*, and receiving \*the actual profits, while the seisin of the land remained in the nominal feoffee; who was held by the courts of equity (then under the direction of the clergy) to be bound in conscience to account to his *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 license 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 churchyards, such subtle 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, chauntries, 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 license 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 \*273] the revolution how far such license was valid,<sup>(n)</sup> since the kings had no power to dispense with the statutes of mortmain by a clause of *non*

<sup>(k)</sup> Cap. 33.  
<sup>(l)</sup> 2 Inst. 501

<sup>(m)</sup> Cap. 3.  
<sup>(n)</sup> 2 Hawk. P. C. 391.

*obstante*, (o) which was the usual course, though it seems to have been unnecessary: (p) and as, by 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 licenses to aliene 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. and M. c. 8, and during that time any lands or tenements were allowed to be granted to any spiritual corporation without any license 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 license 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, a 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 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.<sup>3</sup>

(\*) Stat. 1 W. and M. st. 2, c. 2.  
(p) Co. Litt. 92.

(q) Stat. 2 & 3 Anne, c. 11.  
(r) Rep. 24.

<sup>3</sup> 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 vs. Parsons*, 8 Ves. 191. *Attorney-General vs. Munby*, 1 Meriv. 345. *Corbyn vs. 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 vs. Grimmet*, Ambl. 212. *S. C. 1 Dick. 251*. *Kirkbank vs. Hudson*, 7 Price, 217. *Curtis vs. Hutton*, 14 Ves. 539. *Attorney-General vs. Goddard*, 1 Turn. & Russ. 350. But, where the testator has used the 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 vs. George*, 2 Ves. & Bea. 378. *Paul vs. Compton*, 8 Ves. 380. *Parsons vs. 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 vs. Case*, 1 Ves. Jr. 550.

In the *Attorney-General vs. 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 vs. Brown*, 6 Ves. 403. *Attorney-General vs. Davies*, 9 Ves. 544;) but, where the testator has expressly directed 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 vs. 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 two universities, their colleges, and the scholars upon the foundation of the colleges of Eton, Winchester, and Westminster, are excepted out of this act: but such exemption was granted with this proviso, that no college shall be at

the bequest may be sustained, (*Attorney-General vs. Parsons*, 8 Ves. 191. *Johnson vs. Swan*, 3 Mad. 467;) but it seems such hiring must not be on *lease*, or it would be an acquisition, by the testator's directions, of such an interest in lands, tenements, or hereditaments as the third section of the statute prohibits. *Blandford vs. Thackerell*, 2 Ves. Jr. 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 vs. Nash*, 2 Brown, 588, 595.

Charitable legacies secured by mortgages on lands, (*Currie vs. Pye*, 17 Ves. 464. *Attorney-General vs. Meyrick*, 2 Ves. Sen. 46,) or on turnpike-tolls, (*Corbyn vs. French*, 4 Ves. 380. *Howse vs. Chapman*, 4 Ves. 545,) or by an assignment of poor-rates or county-rates, (*Finch vs. Squire*, 10 Ves. 44. *The King vs. Bates*, 3 Price, 358,) are all void, as is a bequest of navigation-shares to charitable uses, (*Buckeridge vs. Ingram*, 2 Ves. Jr. 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 vs. 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 vs. Tyndall*, 2 Eden, 210. *Waller vs. Childs*, Ambl. 526. *Foster vs. Blagden*, Ambl. 704. *Ridges vs. 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 vs. Stewart*, 2 Meriv. 161) or in Scotland. *Mackintosh vs. 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 vs. 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 vs. Graves*, Ambl. 158; and see *Pickering vs. Lord Stamford*, 2 Ves. Jr. 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 vs. Davies*, 9 Ves. 543. *Chapman vs. Brown*, 6 Ves. 410. *Attorney-General vs. 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 vs. Hinxman*, 2 Jac. & Walk. 277. *Vezey vs. Jamson*, 1 Sim. & Sta. 71. *Grieves vs. Case*, 1 Ves. Jr. 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 vs. Stepney*, 10 Ves. 29. *Waite vs. 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 vs. Tonner*, 2 Ves. Jr. 7. *Chapman vs. 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 enrolled or by will, any real or personal property for the augmentation of queen Anne's bounty.

liberty to purchase more advowsons than are equal in number to one moiety of the fellows or students, upon the respective foundations.<sup>4</sup>

2. Secondly, alienation *to an alien* 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 divest 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 for the life of another, or in tail, or in fee;<sup>5</sup> 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.(v)<sup>6</sup> For which there seem to be two reasons. First, because such alienation amounts to a renunciation of the feudal connection and dependence; it implies 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 divest the remainder or reversion expectant: as [ \*275 therefore that is put in jeopardy by such act of the particular tenant, it is but

(\*) See pages 249, 250.  
(†) Book i. page 372.

(\*) Co. Litt. 251.  
(†) Litt. § 415.

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 churchyards or (with certain restrictions) glebes. If such gift exceed the prescribed limits, it is not therefore void: the lord-chancellor may reduce it. The greater part of this note is extracted from 2 Hoveden on Frauds, 308, 312.—  
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<sup>4</sup> 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 license from the crown is still necessary when a college purchases an advowson. Many colleges are provided with licenses to purchase to a specified extent, and they have been held valid.

A corporation has, from its nature, a right to purchase lands though the charter contains no license to that purpose. And in this respect the statutes of mortmain have not altered the law, except in case of superstitious uses. But since those statutes, it is necessary, in order to enable a corporation to retain lands which it has purchased, to have a license for that purpose: otherwise, in England, the next lord of the fee may enter within a year after the alienation; and, if he do not, then the next immediate lord, from time to time, has half a year to enter; and for default of all the mesne lords, the king takes the land so aliened forever. But in Pennsylvania, where there are no mesne lords, the right would accrue immediately to the commonwealth. *Leazure vs. Hillegas*, 7 S. & R. 313. The statutes of mortmain have been extended to that State only so far as they prohibit dedications of property to superstitious uses and grants to corporations without a statutory license. *Methodist Church vs. Remington*, 1 Watts, 218. "We have not," says Chancellor Kent, "in this country re-enacted the statutes of mortmain, or generally assumed them to be in force; and the only legal check to the acquisition of lands by corporations consists in those special restrictions contained in the acts by which they are incorporated, and which usually confine the capacity to purchase real estate to specified and necessary objects, and in the force to be given to the exception of corporations, out of the statute of wills, which declares that all persons other than bodies politic and corporate may be devisees of real estate." 2 Kent's Com. 282.

—SHARSWOOD.

<sup>5</sup> 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.—ARCHBOLD.

<sup>6</sup> But the abolition of fines and recoveries, and the recent enactment (8 & 9 Vict. c. 106, s. 4) that no feoffment shall have a tortious operation, have, it seems, made this cause of forfeiture impossible.—KERR.

just that, upon discovery, the particular estate should be forfeited and taken from him, who has shown 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 remainderman, 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 feudal. And so likewise, if in any court of record the \*particular tenant does any act which amounts to a virtual disclaimer; \*276] 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 \*277] \*exclusive of the day of the avoidance.(k) 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 person. And also if the bishop doth not collate his own clerk immediately to the living, and the patron presents, though after the six months are elapsed, yet his presentation is good, and the bishop is bound

(\*) See book III. ch. 10.

(\*) Litt. 2 595, 596, 597.

(\*) Co. Lit. 283.

(\*) Finch. 270, 271.

(\*) Co. Litt. 252.

(\*) Ibid. 253.

(\*) 2 Roll. Abr. 336, pl. 10.

(\*) Bract. l. 4, l. 2, c. 3.

(\*) See page 23.

(\*) Bro. Abr. tit. *Qu. Imped.* 3 Cro. Jac. 518.

(\*) Stat. 1 Geo. I. st. 2, c. 10.

(\*) Stat. 17 Edw. II. c. 8. 2 Inst. 273.

(\*) 6 Rep. 62. Regist. 42.

(\*) 2 Inst. 361.

(\*) Gibs. Cod. 769.

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 has also 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 forever, 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)

\*In case the benefice becomes void by death, or cession through plurality of benefices, there the patron is bound to take notice of the vacancy at his own peril; for these are matters of equal notoriety to the patron and ordinary: but in case of a vacancy by resignation, or canonical deprivation, or if a clerk presented be refused for insufficiency, these being matters of which the bishop alone is presumed to be cognizant, here the law requires him to give notice thereof to the patron, otherwise he can take no advantage by way of lapse.(q) Neither shall any lapse thereby accrue to the metropolitan or to the king; for it is universally true, that neither the archbishop nor 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)

IV. By *simony*, the right of presentation to a living is forfeited, and vested *pro hac vice* in the crown. Simony is the corrupt presentation of any one to an ecclesiastical benefice for money, gift, or reward. 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 devert the corrupt patron of the right of presentation, and vest a new right in the crown.

(m) 2 Inst. 273.

(n) 2 Roll. Abr. 368.

(o) Dr. and St. Di. v. 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.

(u) 3 Inst. 150.

(w) Moor. 564

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, 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.<sup>(x)</sup> But if the presentee dies, without being convicted of such simony in his lifetime, it is enacted by stat. 1. W. and 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 Anne, 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:<sup>(y)</sup> 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:<sup>(z)</sup> and now, by that statute, to purchase, either in his own name or another's, the \*280] next presentation, and 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.<sup>(a)</sup> 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.<sup>(b)</sup> 5. That bonds given to pay money to charitable uses, on receiving a presentation to a living, are not simoniacal,<sup>(c)</sup> provided the patron or his relations be not benefited thereby;<sup>(d)</sup> 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;<sup>(e)</sup> 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.<sup>(f)</sup> 7. Lastly, general bonds to resign at the patron's request are held to be legal:<sup>(g)</sup> for they may possibly be given for one of the legal considerations before mentioned; and where there is a possibility that a transaction may be fair, the law will not suppose it iniquitous without proof.<sup>1</sup> But, if the party can prove the contract to have been a corrupt one, such proof will be admitted, in order to show the bond simoniacal, and therefore void. Neither will the patron be suffered to make an

(x) For other penalties inflicted by this statute see book iv. ch. 4.

(y) Cro. Eliz. 778. Moor. 914.

(z) Hob. 165.

(a) Cro. Eliz. 656. 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.

<sup>1</sup> In the great case of The Bishop of London vs. 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

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)

\*V. The next kind of forfeitures are those by *breach* or non-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) [\*281

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)<sup>8</sup>

Waste is either *voluntary*, which is a crime of commission, as by pulling down a house; or it is *permissive*,<sup>9</sup> 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)<sup>10</sup> If a house

(\*) 1 Vern. 411. 1 Eq. Ca. Abr. 86, 87. Stra. 534.

(i) Helt. 35.

(j) See ch. x. page 152.

(\*) 4 Rep. 64.

(k) Co. Litt. 53.

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 vs. Ffytche is reported at length in Cunningham's Law of Simony, p. 52.—CHITTY.

<sup>8</sup> 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 vs. Bullock*, 1 Ves. Jr. 484. *Whitfield vs. 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 he will have no right to the timber, he will have an interest in the mast and shade of the trees. So, trustees to preserve contingent remainders may maintain a suit for a similar injunction, even though the contingent remaindermen have not come into *esse*. *Perrot vs. Perrot*, 3 Atk. 95. *Stansfield vs. Habergam*, 10 Ves. 281. *Garth vs. 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 remainderman. *Marquis of Lansdowne vs. Marchioness Dowager of Lansdowne*, 1 Mad. 140. *Bishop of Winchester vs. Knight*, 1 P. Wms. 407. *Anonym.* 1 Ves. Jr. 93.—CHITTY.

<sup>9</sup> Where an estate is given for life, without impeachment of waste *other than wilful waste*, this will excuse *permissive* waste. *Lansdowne vs. 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 vs. Wickham*, 19 Ves. 423. S. C. Cooper, 290;) but, from the case of *Williams vs. Williams*, (12 East, 220,) it should appear that the tenant for life would have the entire property in timber so cut down.—CHITTY.

<sup>10</sup> 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

be destroyed by tempest, lightning, or the like, which is the act of Providence, it is no waste: but otherwise, if the house be burned by the carelessness or negligence of the lessee: though now, by the statute 6 Anne, c. 31, no action will

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. Abr. Executor, H. 3. 3 Esp. 11. 2 East, 88. It has been so held in the case of cider-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 vs. 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.—CHURCH.

In the time of lord Coke the general rule was, that whatever was once annexed to the freehold became part thereof, and could not afterwards be separated but by him who was entitled to the inheritance: to have taken it away would have been waste in any other person. Indeed, the law is thus laid down in all the old, and recognised to have been so in the more modern, cases. This rule, however, has been relaxed, especially in cases between landlord and tenant, and is made more favourable to the latter. When a man, for instance, rents a house, a mill, or a shop, and, for his own convenience, puts stoves in the house, or a packing-press, or elevators in the mill, or a crane and pulley, or other like thing, in the shop, the tenant may remove any of the articles thus put up for his own convenience or advantage. *White vs. Arndt*, 1 Whart. 91. *Raymond vs. White*, 7 Cowen, 319. However, even as between landlord and tenant, fixtures erected by the latter, and which he is entitled to remove, must be removed during the term: after the expiration of the term the tenant can neither remove them nor recover their value from the landlord. *Shepard vs. Spaulding*, 4 Metcalf, 416. The leading English case on this subject is *Elwes vs. Maw*, 3 East, 52. Lord Ellenborough's opinion has always been referred to with approbation, as settling the principles of the law in regard to fixtures. He says, "Questions respecting the right to what are ordinarily called fixtures principally arise between three classes of persons. 1st. Between different descriptions of representatives of the same owner of the inheritance, viz., between his *heir* and *executor*. In this first case, i.e. as between heir and executor, the rule obtains with the most rigour in favour of the inheritance, and against the right to disannex therefrom, and to consider as personal chattel, any thing which has been affixed thereto. 2dly. Between the *executors of tenant for life or in tail* and the *remainderman or reversioner*,—in which case the right to fixtures is considered more favourably for executors than in the preceding case between heir and executor. The third case, and that in which the greatest latitude and indulgence has always been allowed in favour of the claim to having any particular article considered as personal chattels as against the claim in respect to freehold or inheritance, is the case between landlord and tenant."

The privilege of removing fixtures does not hold in general between the owner of the soil and third persons having a vested interest. The owner may, of course, at any time disannex fixtures from the freehold, and by that act make them personalty, but not as against creditors who had acquired a lien upon it as realty. *Gray vs. Holdship*, 17 S. & R. 413. *Morgan vs. Arthurs*, 3 Watts, 140. So between vendor and vendee a steam-engine with its fixtures, used to drive a bark-mill, and pounders to break hides in a tannery, pass by a sale of the freehold. *Oves vs. Ogilby*, 7 Watts, 106. *Despatch Line vs. Belamy Manufacturing Co.*, 12 N. Hamp. 205. Indeed, there are some things used with, and necessary to the enjoyment of, the freehold, which form a part of it, though not annexed to it, such as keys; and on the same principle it has been held in many cases that machinery which is a constituent part of a manufactory, for the purpose of which the building has been adapted, without which it would cease to be such manufactory, is part

lie against a tenant for an accident of this kind.<sup>11</sup> Waste may also be committed in ponds, dove-houses, warrens, and the like; by so reducing the number of the creatures therein, that there will not be sufficient for the reversioner when he comes to the inheritance.(n) Timber also is part of the inheritance.(o) Such are oak, ash, and elm in all places; and in some particular countries, by local custom, where other trees are generally used for building, they are 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)<sup>12</sup> But underwood the tenant may cut down at any seasonable time \*that he pleases;(q) [ \*282 and may take sufficient estovers of common right for house-bote and cart-bote; unless restrained (which is usual) by particular covenants or exceptions.(r) The conversion of land from one species to another is waste. To convert wood, meadow, or pasture into arable; to turn arable, meadow, or pasture into woodland; or to turn arable or woodland into meadow or pasture, are all of them waste.(s) For, as Sir Edward Coke observes,(t) it not only changes the course of husbandry, but the evidence of the estate; when such a close, which is conveyed and described as pasture, is found to be arable, and *e converso*. And the same rule is observed, for the same reason, with regard to converting one species of edifice into another, even though it is improved in its value.(u) To open the land to search for mines of metal, coal, &c. is waste; for that is a detriment to the inheritance:(v)<sup>13</sup> but if the pits or mines were open be-

(\*) Co. Litt. 53.

(\*) 4 Rep. 62.

(\*) Hob. 296.

(p) Co. Litt. 53.

(\*) 1 Inst. 53.

(q) 2 Roll. Abr. 817.

(\*) 1 Lev. 309.

(r) Co. Litt. 41.

(\*) 5 Rep. 12.

of the freehold though it be not actually fastened to it. Whether fast or loose, all the machinery of a manufactory which is necessary to constitute it, and without which it would not be a manufactory at all, must be regarded as realty and a part of the freehold. *Voorhis vs. Freeman*, 2 W. & S. 116. *Pyle vs. Pennock*, 2 W. & S. 390. *Butler vs. Page*, 7 Metcalf, 40. *Rice vs. Adams*, 4 Harrington, 332. The old and stricter rule, which looks to annexation as the criterion in such cases, has been adhered to in many other cases. *Cresson vs. Stout*, 17 Johns. 116. *Vanderpoel vs. Allen*, 10 Barbour, S. C. 157. *Taffe vs. Warwick*, 3 Blackf. 111. *Bush vs. Baxter*, 3 Missouri, 207.—SHARSWOOD.

<sup>11</sup> 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.—CURRY.

<sup>12</sup> A lessee for life or years, without special covenant, is responsible to his lessor for all injuries amounting to waste done to the premises during his term, by whomsoever those injuries may have been done, with the exception of the acts of God, public enemies, and the acts of the lessor himself. *White vs. Wagner*, 4 Har. & Johns. 373. *Fay vs. Brewer*, 3 Pick. 203. It is not waste for a tenant for life to cut down timber-trees for the purpose of making necessary repairs on the estate, and to sell them and purchase boards with the proceeds for such repairs, provided this be proved to be the most economical mode of making the repairs. *Loomis vs. Wilbur*, 5 Mason, 13. So where land is annexed to a furnace, cutting wood sufficient to supply the furnace is not waste. *Den vs. Kinney*, 2 South, 552.

What would in England be waste is not always so in the United States. A lessee of wild, uncultivated land has a right to fell part of the timber, so as to fit the land for cultivation; but he cannot destroy *all* the timber and thereby essentially and permanently diminish the value of the inheritance. Good sense and sound policy, as well as the rules of good husbandry, require that the lessee should preserve so much of the timber as is indispensably necessary to keep the fences and other erections upon the farm in proper repair. In England, that species of wood which is denominated *timber* shall not be cut down, because felling it is considered as an injury done to the inheritance, and therefore *waste*. Here, from the different state of many parts of our country, *timber* may and must be cut down to a certain extent, but not so as to cause an irreparable injury to the reversioner. *Jackson vs. Brownson*, 7 Johns. 227. *Owen vs. Hyde*, 6 Yerg. 334. *Chase vs. Hazelton*, 7 N. Hamp. 171. *Kidd vs. Dennison*, 6 Barb. Sup. Ct. 9. *Davis vs. Gilliam*, 5 Ired. Eq. 308. *McCullough vs. Irvine*, 1 Harris, 438.—SHARSWOOD.

<sup>13</sup> It is in order to prevent irremediable injury to the inheritance that the court of



fore, 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

(w) Hob. 295.

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 vs. Brymer*, 9 Ves. 356. But, although lord Nottingham (in *Tonson vs. 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:) a hypothetical or disputed title will not do. *Davis vs. Leo*, 6 Ves. 787. *Whitelegg vs. 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 stated, states himself out of court. *Pillsworth vs. Hopton*, 6 Ves. 51. This *dictum* may perhaps admit occasional qualification, (see *Norway vs. Rowe*, 19 Ves. 154. *Kinder vs. Jones*, 17 Ves. 110. *Hodgson vs. 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 vs. Jones*, 3 Meriv. 174. *Smith vs. 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 vs. 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 vs. White*, 8 Ves. 36. But an exception to this rule is made in cases of alleged irremediable waste, (*Potter vs. Chapman*, Ambl. 99,) and in cases analogous to waste, (*Peacock vs. Peacock*, 16 Ves. 51. *Gibbs vs. 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 vs. Jones*, 19 Ves. 351. *Norway vs. Rowe*, 19 Ves. 153. *Countess of Strathmore vs. 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 vs. 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 vs. 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 vs. Goode*, 3 Meriv. 11. *Jefferies vs. Smith*, 1 Jac. & Walk. 300. *Barrett vs. Tickell*, Jacob's Rep. 155. *Taggart vs. 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 shown to call for it. *Hannay vs. M'Entire*, 11 Ves. 54. *Coffin vs. 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 privy of estate, waste, strictly speaking, could not be alleged against him. *Mortimer vs. 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 vs. Dors*, 6 Ves. 147. *Hanson vs. Gardiner*, 7 Ves. 309. *Twort vs. Twort*, 16 Ves. 130. *Earl Cowper vs. Baker*, 17 Ves. 128. *Thomas vs. Oakley*, 18 Ves. 186.

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 feudal 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 \*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 [\*283] 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 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 tenant shall lose and forfeit the place wherein the waste is committed, and also treble damages to him that hath the inheritance. The expression of the statute is, "he shall forfeit the *thing* which he hath wasted;" and it hath been determined that under these words the *place* is also included.(g) And if waste be done *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 it is impracticable for the reversioner to enjoy only the identical places wasted, [\*284]

(e) Wright, 44.

(f) It was, however, a doubt whether waste was punishable at the common law in a tenant by the curtesy. Regist. 12. Bro. Abr. tit. *waste*, 88. 2 Inst. 301.

(g) 2 Inst. 299.

(h) Co. Litt. 27. 2 Roll. Abr. 820, 823.

(\*) Co. Litt. 54.

(e) F. N. B. 58.

(f) 2 Inst. 146.

(g) *Ibid* 300.

(h) 9 Hen. III. c. 4.

(i) 2 Inst. 303.

(\*) Co. Litt. 54.

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 vs. 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 \*hereby enabling him to gain a property in timber, so as to defeat contingent remaindermen; 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 vs. Habergham*, 10 Ves. 278. *Oxenden vs. Lord Compton*, 2 Ves. Jr. 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 vs. Duchese of Bolton*, 3 Ves. 377. *Williams vs. Duke of Bolton*, 1 Cox, 73.—CHITTY.

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)<sup>14</sup>

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 seize 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 feudal dominion continue much the strongest upon this mode of property. Most of the offences, which occasioned a resumption of the fief by the feudal law, and were denominated *feloniae, per quas vasallus amitteret feudum*,(l) still continue to be causes of forfeiture in many of our modern copyholds. As, 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, \*285] *si pares veritatem noverint, et dicant 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, quæ sit laudanda*(a) *per judicium parium suorum*.<sup>15</sup>

VIII. The eighth and last method whereby lands and tenements may become forfeited, is that of *bankruptcy*, or the act of becoming a bankrupt: which unfortunate person may, from the several descriptions given of him in our statute law, be thus defined; a trader who secretes himself, or does certain other acts tending to defraud his creditors.

Who shall be such a trader, or what acts are sufficient to denominate him a bankrupt, with the several connected consequences resulting from that unhappy situation, will be better considered in a subsequent chapter; when we shall en-

(i) 2 Inst. 304.

(j) 2 Ventr. 33. Cro. Eliz. 439.

(k) *Feud. l. 2, t. 26, in calc.*

(l) 3 Leon. 108. Dyer, 211.

(m) *Feud. l. 1, t. 21.*

(n) Co. Copyh. § 57.

(o) *Feud. l. 2, t. 34, and t. 26, § 3.*

(p) Plowd. 372.

(q) *Feud. l. 2, t. 24.*

(r) 8 Rep. 99. Co. Copyh. § 57.

(s) *Feud. l. 2, t. 22.*

(t) Co. Copyh. § 57.

(u) *Feud. l. 2, t. 28.*

(v) Co. Copyh. § 58.

(w) *Feud. l. 2, t. 21.*(x) *Ibid. t. 22.*(y) *i.e. arbitranda, definienda.* Du Fresne, iv.

<sup>14</sup> But this remedy at common law has long fallen into disuse, the ends of justice being found to be better answered by a court of equity, which grants an injunction to restrain waste, and an account of the profits made; and very recently, by the 3 & 4 Wm. IV. c. 27, § 36, the writ of waste has been abolished. An injunction to restrain waste will be granted at the suit not only of a remainderman in fee-simple or fee tail, but also of a remainderman for life, or of trustees to preserve contingent remainders. *Perrott vs. Perrott*, 3 Atk. 95. *Stansfield vs. Habergham*, 10 Ves. 281. This is perhaps the only reason why it is in some cases desirable to have trustees since stat. 8 & 9 Vict. c. 106, § 8, cited *ante*, p. 172, n.—STEWART.

<sup>15</sup> It is rather singular that in every instance in which lord Coke on copyholds is cited in this paragraph his authority is directly contradictory of the text. In his fifty-seventh chapter he divides forfeitures into those which operate *eo instante* and those which must be presented, and then enumerates those of the former class. Under this he ranges, among many others, disclaimer, not appearing after three proclamations, and refusing when sworn to present the truth. In his fifty-eighth chapter he enumerates the second class, and under it places treason, felony, and alienation. It is observable also that the references to Dyer, 211, and 8 Rep. 99, are not in point.—COLERIDGE.

deavour 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 [\*286 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 enrolled, 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, further 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 and enrolled, any lands or tenements of the bankrupt, wherein he shall be seised of an estate-tail in possession, remainder, or reversion, unless the remainder or reversion thereof shall be in the crown; and that such sale shall be good against all such issues in tail, remaindermen, and reversioners, whom the bankrupt himself might have barred by a common recovery, or other means; and that all equities of redemption upon mortgaged estates shall be at the disposal of the commissioners; for they shall have power to redeem the same as the bankrupt himself might have done, and after redemption to 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 purchaser *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.<sup>16</sup>

(b) 1 Jac. I. c. 15.

<sup>16</sup> By the Bankrupt Law Consolidation Act, 1849, 12 & 13 Vict. c. 106, when any person has been adjudged a bankrupt, all lands, tenements, and hereditaments (except copy or customary hold) in any of her majesty's dominions to which he is entitled, and any disposable interest he may have in any such property, or which may descend or come to him before he obtains his certificate of discharge, become vested in the assignees appointed on behalf of the creditors, in the manner directed by law, by virtue of such appointment alone, and without any deed or conveyance. As for his copy or customary hold lands, power is given to the commissioners in bankruptcy to sell them; and the commissioner is enabled by the Fines and Recoveries Act to bar any estate-tail which the bankrupt may have in any lands, as far as the bankrupt himself might have done the same.

A ninth method of forfeiture—that by insolvency—is of the same nature as that by bankruptcy. By insolvency is here meant generally the inability of a person to satisfy the demands of his creditors. Assignees are appointed either by the Court for the Relief of Insolvent Debtors in London, or by a judge of the county court, to be the depositaries of the estate and effects of the insolvent, and his whole real estate, immediately on such appointment, becomes vested in them without any conveyance in trust for the benefit of the creditors.—KERR.

## CHAPTER XIX.

## V. OF TITLE BY ALIENATION.

THE most usual and universal method of acquiring a title to real estates is that of alienation, conveyance, or purchase in its limited sense; under which may be 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 feudal law, (a) a pure and genuine feud could not be transferred from one feudatory to another without the consent of the lord; lest thereby a feeble or suspicious tenant might have been substituted and imposed upon him to perform the feudal services, instead of one on whose abilities and fidelity he could depend. Neither could the feudatory then subject the land to his debts; for, if he might, the feudal 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 antient \*288] feoffments to express that the alienation was 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 feudal 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 purchaser, 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 feudal severity is worn off; and experience hath shown 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 \*289] been transmitted to him in a course of descent from his ancestors: (h) \*a doctrine which is countenanced by the feudal constitutions themselves: (i) but he was not allowed to sell the whole of his own acquisitions, so as totally to disinherit his children, any more than he was at liberty to aliene his paternal

(a) See page 37.

(b) Feud. l. 1, t. 27.

(c) Co. Litt. 94. Wright, 168.

(d) Madox, Formul. Angl. N<sup>o</sup> 316, 319, 427.

(e) Gilb. Ten. 75.

(f) The same doctrine and the same denomination prevailed in Bretagne—*possesiones in jurisdictionalibus non aliter apprehendi posse, quam per allournances 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. 2 551.

(h) *Emptiones vel acquisitiones suas del cui magis voluit Terram autem quam ei parentes dederunt, non mittat extraneam suam.* LL. Hen. I. c. 70.

(i) Feud. l. 2, t. 39.

estate.(j) 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:(k) and also he might part with one-fourth of the inheritance of his ancestors without the consent of his heir.(l) By the great charter of Henry III.,(m) no subinfeudation was permitted of part of the land, unless sufficient was left to answer the services due to the superior lord, which sufficiency was probably interpreted to be one-half or moiety of the land.(n) But these restrictions were in general removed by the statute of *quia emptores*,(o) 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.(p) 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.(q) 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 license, and were relieved from other feudal 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(r) 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 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 tenures. The doctrine of *attornments* continued still later than any of the rest, and became extremely troublesome, though many methods were invented to evade them; till at last they were made no longer necessary to complete the grant or conveyance, by statute 4 & 5 Anne, 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.<sup>1</sup>

(j) *Si questum tantum habuerit is, qui partem terre sue donare voluerit, tunc quidem hoc ei licet: sed non totum questum, quia non potest filium suum hæredem exheredare.* Glanvil. l. 7, c. 1.

(k) *Mirr. c. 1, § 3.* This is also borrowed from the feudal law. *Frod. l. 2, l. 48.*

(l) *Mirr. ibid.*

(m) 9 Hen. III. c. 32.

(n) Dalrymple of Feuds, 95.

(o) 18 Edw. I. c. 1.

(p) See pages 72, 91.

(q) 2 Inst. 67.

(r) 13 Edw. I. c. 18.

<sup>1</sup> An attornment at the common law was an agreement of the tenant to the grant or the seignior 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, §§ 9, 10, and 11 Geo. II. c. 19, § 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 vs. 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 *cestuy 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. A. though the first-mentioned act renders an attornment unnecessary, yet it is still useful for a purchaser 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, 267,) though the tenant would still be at liberty to show that he had attorned by mistake. 6 Taunt. 202.—CHITTY.

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.<sup>2</sup> 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.<sup>(s)</sup><sup>3</sup> Yet reversions and vested remainders may be

(s) (Co. Litt. 214.

<sup>2</sup> But it is a rule of law that no person can vest an estate in another against his will; and consequently, if a grantee, lessee, or devisee refuses the estate intended to be vested in him, the grant, lease, or devise will be void. *Thompson vs. Leech*, 2 Vent. 198. An estate granted or devised to a person for his own benefit is seldom disclaimed; but it often happens that persons who are made grantees or devisees in trust for others decline to act, in which case they may disclaim by deed. See *Nicolson vs. Wordsworth*, 2 Swanst. 372. *Townson vs. Tickell*, 3 B. & A. 31. *Smith vs. Smith*, 6 B. & C. 112. *Begbie vs. Crook*, 2 Bing. N. C. 70.—COLERIDGE.

The doctrine maintained by the masterly argument of justice Ventris in *Thompson vs. Leach*, (2 Vent. 201,) and eventually established by the decision of that case in the house of lords, is, that a common-law conveyance put into the hands of an agent for transmission to the grantee takes effect the instant it is parted with, and vests the title, though the grantee be ignorant of the transaction; and that the rejection of such a grant has the effect of revesting the title in the grantor, it would seem, by a species of reverter. It has been held, therefore, that whenever the conveyance in such a case is in trust, and the grantee refuses to accept, equity, which always protects, where it can without disturbing a legal right, the interests of a *cestuy que trust* from the acts of the trustee, will support the trust as sufficiently created, and appoint a trustee in the place of him who has refused to accept. *Read vs. Robinson*, 6 Watts & Serg. 329. Where the grantee does accept, his title relates back to the execution of the deed, and in every case, whether the transfer is to the grantee beneficially or in trust, his acceptance will be presumed until the contrary appear. *Wilt vs. Franklin*, 1 Binn. 502.—SHARWOOD.

<sup>3</sup> 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. & 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."—CHITTY.

But now, by statute 8 & 9 Vict. c. 106, contingent, executory, and future interests and possibilities, coupled with an interest in any tenements or hereditaments of any tenure, whether the object of the gift or limitation of such interest or possibility be or be not ascertained, and rights of entry, whether vested or contingent, may be disposed of by deed; and, by statute 1 Vict. c. 26, estates contingent as to the person, and rights of action and entry, which before were not devisable, may now pass by will.—KERR.

The ancient policy, which prohibited the sale of pretended titles, and held the conveyance to a third person of lands held adversely at the time to be an act of maintenance, was founded upon a state of society which does not exist in this country. A right of

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,<sup>4</sup> 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.<sup>(t)</sup><sup>5</sup>

Persons attainted of treason, felony, and *præmunire* are incapable of conveying, from the time of the offence committed, provided attainder follows:<sup>(u)</sup> for such conveyance by them may tend to defeat the king of his forfeiture, or the \*lord of his escheat. But they may *purchase* for the benefit of the crown, [ \*291 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.<sup>(w)</sup> So also corporations, religious or others, may purchase lands; yet, unless they have

(t) Sheppard's Touchstone, 238, 239, 322. 11 Mod. 152.  
1 P. Wms. 574. 1 tra. 132.

(u) Co. Litt. 42.  
(w) Ibid. 2.

entry was not assignable at common law, because, said lord Coke, "under colour thereof, pretended titles might be granted to great men, whereby right might be trodden down and the weak oppressed." The repeated statutes which were passed in the reigns of Edward I. and Edward III. against champerty and maintenance arose from the embarrassments which attended the administration of justice in those turbulent times, from dangerous influence and oppression of men in power.

The doctrine that a conveyance by a party out of possession and with an adverse possession against him is void, prevails equally in Connecticut, Massachusetts, Vermont, Maryland, Virginia, North Carolina, Tennessee, Kentucky, Mississippi, Alabama, Indiana, and probably in most of the other States. In some States—such as New Hampshire, Pennsylvania, Ohio, Illinois, Missouri, and Louisiana—the doctrine does not exist; and a conveyance by a disseisee would seem to be good, and pass to the third person all his right of possession and of property, whatever it might be. 4 Kent Com. 457.—SHARSWOOD.

<sup>4</sup> It is now well established, as a general rule, that possibilities (not meaning thereby mere hopes of succession, *Carleton vs. Leighton*, 3 Meriv. 671. *Jones vs. 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 vs. Phelps*, 1 Ves. Jr. 254. *Scawen vs. Blunt*, 7 Ves. 300. *Moor vs. 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 vs. 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 vs. Tomkinson*, 2 Mau. & Sel. 170.—CHITTY.

<sup>5</sup> Mr. Ritso remarks that, independently of thus confounding contingencies and mere possibilities, as if they were in *pari ratione*,—which they certainly are not,—there is here a great mistake; first, in describing mere possibilities to be such as may be released or devised by will, &c.; and, secondly, in supposing devisable possibilities to be incapable of being assigned to a stranger. For, in the first place, there is this wide difference between contingencies (which import a present interest of which the future enjoyment is contingent) and mere possibilities, (which import no such present interest,) namely, that the former may be released in certain cases, and are generally descendible and devisable, but not so the latter. Suppose, for instance, lands are limited (by executory devise) to A. in fee, but if A. should die before the age of twenty-one, then to C. in fee: this is a kind of possibility or contingency which may be released or devised, or may pass to the heir or executor, because there is a *present interest*, although the enjoyment of it is future and contingent. But where there is no such present interest as the hope of succession which the heir has from his ancestor in general, this, being but a *nude* or *naked* possibility, cannot be released or devised, &c. *Fearne*, 366.

Secondly, contingencies or possibilities which may be released or devised, &c. are also assignable in equity, upon the same principle; for an assignment operates by way of agreement or contract, which the court considers as the engagement of the one to transfer and make good a right and interest to the other. As where A., possessed of a term of 1000 years, devised it to B. for 50 years, *if she should so long live*, and after her decease to C., and died; and afterwards C. assigned to D.; now, this was a good assignment, although the assignment of a possibility to a stranger. The same point was determined, in the case of *Theobald vs. Duffay* in the house of lords, March, 1729-30. Ritso, *Introd.* 48.--SHARSWOOD



a license to hold in mortmain, they cannot retain such purchase, out it shall be forfeited to the lord of the fee.

Idiots and persons of non-sane memory, infants and persons under duress, are not totally disabled either to convey or purchase, but *sub modo* only. For their conveyances and purchases are voidable, but not actually void. 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 suæ, 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 assize 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 assize; 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 remember the release, if out of his senses \*292] when he gave it.(b) Under 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)\* And, clearly, the next heir, or other person interested, may, after the death of the idiot or *non compos*, take advantage of his incapacity and avoid the grant.(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 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

(\*) Co. Litt. 247.

(y) Britton, c. 23, fol. 60.

(z) Fol. 22b. See also *Memorand. Scacc.* 22 Edw. I. (pre-  
fixed to Maynard's Year-book, Edw. II.) fol. 23.

(\*) 5 Edw. III. 70.

(\*) 35 Assis. pl. 10.

(\*) 39 Hen. VI. 42.

(\*) F. N. B. 202.

(\*) Litt. § 405. Cro. Eliz. 398. 4 Rep. 123. Jenk. 40.

(\*) Com. 469. 3 Mod. 310, 311. 1 Eq. Ca. Abr. 279.

(\*) Perkins, § 21.

(\*) Co. Litt. 2.

(\*) Ibid.

\* This doctrine does not seem to prevail in our ecclesiastical courts; for in *Turner vs. Meyers*, 1 Hagg. 414, lord Stowell annulled a marriage by reason of insanity of the husband, the husband himself being the promovent in the suit: and his lordship says expressly, "It is, I conceive, perfectly clear in law that a party may come forward to maintain his own past incapacity." This case is entitled to the more consideration because the suit had been first instituted by Turner's father, probably with a view to this very objection, and lord Stowell then dismissed it.

And the student will understand the rule even in our common-law courts to be restrained to the party's specially pleading his own insanity on the record; because I imagine it to be quite clear that any one may show himself in evidence to have been in such a state at the time of an act done as that the act itself is void. As if A., a lunatic, seals a bond and is sued upon it, when he recovers his intellect he may plead that it is not his bond, and show his incapacity at the time of sealing it.—COLERIDGE.

The party himself may set up as a defence and in avoidance of his contract that he was *non compos mentis* when it was alleged to have been made. The principle advanced by Littleton and Coke that a man shall not be heard to stultify himself has been properly exploded, as being manifestly absurd and against natural justice. 4 Kent Com. 451.—SHARWOOD.

ceased.(j) 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.<sup>4</sup>

The case of a feme-covert is somewhat different. She may purchase an estate without the consent of her husband, and the conveyance is good during the coverture, till he avoids \*it by some act declaring his dissent.(k) And, though [ \*293 he does nothing to avoid it, or even if he actually consents, the feme-covert herself may, after the death of her husband, waive or disagree to the same: nay, even her heirs may waive it after her, if she dies before her husband, or if in her widowhood she does nothing to express her consent or agreement.(l) But the 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.<sup>9</sup>

(j) 2 Inst. 483. 5 Rep. 119.  
(k) Co. Litt. 3.

(l) Co. Litt. 3.  
(m) Perkins, § 154. 1 Sid. 120.

<sup>1</sup> 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 pushed 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 vs. —*, 16 Ves. 159, citing *Lady Strathmore vs. Bowes*, 1 Ves. Jr. 22. When the execution of a deed is prevented or compelled by force or artifice, equity will give relief (*Middleton vs. Middleton*, 1 Jac. & Walk. 96) in favour of a volunteer, and even, in some cases, as against innocent parties, (*Mastaer vs. 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 had derived from the fraud, imposition, or undue influence practised by others. *Huguenin vs. Bazeley*, 14 Ves. 289. *Stillwell vs. Wilkins*, *Jacobs's Rep.* 282. Still, it would be pushing this principle too far to extend it to innocent purchasers, (*Lloyd vs. 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 vs. 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 vs. Saunders*, 2 Ves. Jr. 457.—*CURRY.*

<sup>2</sup> 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 ancient 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.—*CURRY.*

<sup>3</sup> 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 vs. Cockell*, 9 Ves. 375. *Fettiplace vs. Gorges*, 1 Ves. Jr. 49. *Tappenden vs. Walsh*, 1 *Philim.* 352. *Grigby vs. Cox*, 1 Ves. Sen. 518. *Bell vs. 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 covert* 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 vs. Smith*, 1 Ves. Jr. 194. *Parkes vs. White*, 11 Ves. 221, 222. *Jackson vs. Hobhouse*, 2 *Meriv.* 487. *Nantes vs. Corrock*, 9 Ves. 189. *Sperling vs. Rochfort*, 8 Ves. 175. *Sturgis vs. Corp.*, 13 Ves. 190. *Glyn vs. Baxter*, 1 *Younge & Jerv.* 332

The case of an alien born is also peculiar. For he may purchase any thing; but after purchase he can *hold* nothing<sup>10</sup> except a lease for years of a house for

Acton *vs.* 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 *vs.* Atkins, 14 Ves. 547. Brown *vs.* Like, 14 Ves. 302. Pybus *vs.* Smith, 1 Ves. Jr. 194.

So, as Mr. Sugden, in the 3d 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 *vs.* Staple, 2 T. R. 695. Tomlinson *vs.* Dighton, 1 P. Wms. 149. Hearle *vs.* Greenbank, 3 Atk. 711. Peacock *vs.* Monk, 2 Ves. Sen. 191. Wright *vs.* Englefield, Ambl. 473. Driver *vs.* 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 *vs.* Wilkinson, 2 East, 557. Perkins, ch. i. § 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 *vs.* Harris, 9 Ves. 497. Nantes *vs.* Corrock, 9 Ves. 189. Heatley *vs.* 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 *vs.* Noble, 3 Mad. 94. Stuart *vs.* Lord Kirkwall, 3 Mad. 389. Hulme *vs.* Tennant, 1 Brown, 20. Sperling *vs.* 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 *vs.* 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 *vs.* Atkins, 14 Ves. 547;) or rather, perhaps, it may be more correctly put to say, that although a *feme covert* 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 *vs.* 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 recognised. Power *vs.* Bailey, 1 Ball. & Bent. 52. She can enter into no contract affecting her person: the remedy must be against her property. Sockett *vs.* Wray, 4 Brown, 485. Francis *vs.* Widville, 1 Mad. 263.

Where her husband is banished for life, (Countess of Portland *vs.* Prodggers, 2 Vern. 104,) or, as it seems, is transported beyond the seas, (Newsome *vs.* Bowyer, 3 P. Wms. 38. Lean *vs.* Schutz, 2 W. Bla. 1198,) or is an alien enemy, (Deerly *vs.* 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*.—CURRY.

A married woman might formerly have conveyed an interest in lands by fine or recovery. Under the statute 3 & 4 Wm. IV. c. 75, she is enabled to dispose of lands by deed, and to release or extinguish any interest therein, as effectually as if she were a *feme sole*. But no such disposition can be made without the concurrence of her husband; and the deed, when made, must be acknowledged by her before a judge of the superior or county courts, or before a commissioner appointed for the purpose of taking such acknowledgments, by whom she is examined apart from her husband as to her voluntary consent to the deed. The court of chancery has also long recognised the power of a *feme covert* to deal at her own pleasure with property vested in trustees for her separate use, provided the settlement itself does not restrain her from alienation; and equity also recognises her contracts relating to such property.—KERR.

It has been held, however, wherever the wife has a separate estate secured to her by a deed of trust she can exercise no power over the estate except what is clearly given to her by the deed. The Methodist Episcopal Church *vs.* Jaques, 3 Johns. Ch. Rep. 108. Lancaster *vs.* Dolan, 1 Rawle, 231.—SHARSWOOD.

<sup>10</sup> "If," says lord Coke, (Co. Litt. 2, a. b., Com. Dig. Aliens, C. 2, see the reasons, Bac. Abr. 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

convenience of merchandise, in case he be an alien friend;<sup>11</sup> all other purchases (when found by an inquest of office) being immediately forfeited to the crown.<sup>(n)</sup><sup>12</sup>

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, 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.<sup>(o)</sup><sup>13</sup>

II. We are next, but principally, to inquire *how* a man may aliene or convey; which will lead us to consider the several modes of conveyance.

In consequence of the admission of property, or the giving a separate right by the law of society to those things which by the law of nature were in common, there was necessarily some means to be devised, whereby that separate right or exclusive property should be originally acquired; \*which, we [ \*294 have more than once observed, was that 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 seized, 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 persons 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

(\*) Co. Litt. 2.

(c) 1 P. Wms 354.

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. Abr. 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 reason 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 vs. Pace*, 1 Ventr. 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, 372.—CHITTY.

<sup>11</sup> 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. Abr. Aliens, C.—CHITTY.

<sup>12</sup> But not before the inquest, (5 Co. 52, b. ;) and if the purchase be made with the king's license, there can be no forfeiture. 14 Hen. IV. 20. Harg. Co. Litt. 2, b., n. 2.—CHITTY.

But alien friends are now, by stat. 7 & 8 Vict. c. 66, enabled to take and hold lands, for residence or business, for twenty-one years; and a person born out of the kingdom whose mother is a natural-born subject, is enabled to take any estate by devise, purchase, inheritance, or succession.—KERR.

<sup>13</sup> But these disabilities have now been entirely swept away. 10 Geo. IV. c. 7. 2 & 3 Wm. IV. c. 115.—KERR.

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.

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## CHAPTER XX

### OF ALIENATION BY DEED.

In treating of deeds, I shall consider, first, their general nature; and, next, the several sorts or kinds of deeds, with their respective incidents. And in explaining the former, I shall examine, first, what a deed is; secondly, its requisites; and, thirdly, how it may be avoided.

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' ἐξουχίαν*, 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 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 \*296] leave half the word on \*one part and half on the other. Deeds thus made were denominated *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

(a) Co. Litt. 171.

(b) Plowd. 434.

(c) Lyndew. l. 1, f. 10, c. 1.

(d) Mirror, c. 2, § 27.

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.<sup>1</sup>

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 purchasers *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)<sup>2</sup> The consideration may be either \*a good or a valuable one. A good consideration [ \*297 is such as that of 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.<sup>3</sup>

(g) Mirror, c. 2, § 27. Litt. § 371, 372.  
 (h) Co. Litt. 35.  
 (i) Stat. 13 Eliz. c. 8.  
 (k) Stat. 27 Eliz. c. 4.

(l) Stat. 13 Eliz. c. 5.  
 (m) Perk § 533.  
 (n) 3 Rep. 83.

<sup>1</sup> Now a deed purporting to be an indenture shall have the effect of an indenture, and an immediate estate or interest in any tenements or hereditaments, and the benefit of a covenant or of a condition, may be taken, although the taker thereof be not named a party to the indenture. 8 & 9 Vict. c. 106, s. 5.—STEWART.

<sup>2</sup> This sentence is not quite accurately worded. From the expression “deed, or other grant,” it might be inferred that a deed was a species of grant; whereas a grant is only one mode of conveyance by deed. Next, it is not true that all deeds or all grants made without consideration are of no effect; for, 1st. As to all deeds which operate at common law or by transmutation of possession, I imagine that they will be valid at law to pass the estates they profess to pass as against the grantor, though made without any consideration; and, 2d. As to deeds which operate under the statute of uses, they create a use which results to the grantor. To all appearance, indeed, no change is made in the grantor’s title or rights by such a deed; yet that it is without effect in law cannot be said, because it works such an alteration in the grantor’s estate from that which he had before, that any devise of the lands made before the date of the deed will take no effect unless the will be republished,—that is, in fact, new-made.—COLERIDGE.

<sup>3</sup> This, I conceive, is only true 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. But, otherwise, a voluntary conveyance is good both in law and equity against the party himself. Tr. of Eq. b. 1, c. 5, s. 2. It used to be thought 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. But it was determined by lord Mansfield and the court that there must be some circumstance of *fraud* to vacate the first conveyance, the want of consideration alone not being sufficient. See Cowp. 705. But it has since been decided (9 East, 59) that a *voluntary* settlement of lands, made even in *consideration of natural love and affection*,—even as a provision for the nearest relations, parents or children,—is void as against a subsequent purchaser for a *valuable* consideration, although such purchaser had notice of the prior settlement. If a person is indebted at the time of making a voluntary grant, or becomes so soon afterwards, it will be considered fraudulent and void with respect to creditors under the 13 Eliz. c. 5. And if a person makes a voluntary grant, and afterwards becomes bankrupt, whether he was indebted or not at the time, it will be void by the 1 Jac. c. 15, and the estate granted may be conveyed by the commissioners to the assignees for the benefit of the creditors. 1 Atk. 93.—CHRISTIAN.

Thirdly, the deed must be *written*, or I presume *printed*,<sup>4</sup> 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.<sup>(m)</sup> 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.<sup>5</sup>

(\*) Co. Litt. 229. F. N. B. 122.

The better American doctrine seems now to be that voluntary conveyances of land *bonâ fide* made and not originally fraudulent are valid against subsequent purchasers with notice either actual or constructive. *Jackson vs. Town*, 4 Cowen, 603. *Richer vs. Ham*, 14 Mass. 139. *Cathcart vs. Robinson*, 5 Peters, S. C. Rep. 280. 4 Kent's Com. 463.

There are some deeds to the validity of which a consideration need not have been stated. It was not required at common law in feoffments, fines, and leases, in consideration of the fealty and homage incident to every such conveyance. The law raised a consideration from the tenure itself and the solemnity of the act of conveyance. The necessity of a consideration came from the courts of equity, where it was held requisite to raise a use; and, when uses were introduced at law, the courts of law adopted the same idea, and held that a consideration was necessary to the validity of a deed of bargain and sale. It has been long the settled law that a consideration expressed or proved was necessary to give effect to a modern conveyance to uses. *Lloyd vs. Spillet*, 2 Atk. Rep. 148. *Jackson vs. Alexander*, 3 Johns. 491. *Preston on Abst.* vol. 3, 13, 14. The consideration need not be expressed in the deed; but it must exist. *Fink vs. Green*, 5 Barb. S. C. Rep. 455. The mention of the consideration in a deed was to prevent a resulting trust; but it is only *prima facie* evidence of the amount, and may be varied by parol proof. *Meeher vs. Meeher*, 16 Conn. 383. 4 Kent Com. 465.—SHARWOOD.

<sup>4</sup> 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. 288.—CHITTY.

<sup>5</sup> 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 vs. Lyster*, (Colles's 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 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 vs. Peachy*, 2 Atk. 256, 257. *Willis vs. 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 vs. Butler*, 1 Sch. & Lef. 20. *O'Rourke vs. Percival*, 2 Ball. & Beat. 62. Lord Hardwicke and Sir Wm. Grant held a different doctrine. *Backhouse vs.*

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 law to determine.<sup>(n)</sup> For [ \*298 it is not absolutely necessary in law to have all the formal parts that are usually drawn out in deeds, so as there be sufficient words to declare clearly and legally the party's meaning. But, as these formal and orderly parts are calculated to convey that meaning in the clearest, distinctest, and most effectual manner, and have been well considered and settled by the wisdom of successive ages, it is prudent not to depart from them without good reason or urgent necessity; and therefore I will here mention them in their usual(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.<sup>(p)</sup>

2, 3. Next come the *habendum* and *tenendum*.<sup>(q)</sup> 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 forever," or *vice versa*; here A. has an estate-tail, and a fee-simple expectant thereon.<sup>(r)</sup> But, had it been in the premises "to him and his heirs;" *habendum* "to him for life," the *habendum* would be utterly void;<sup>(s)</sup> as an estate of inheritance is vested in him before the *habendum* comes, and shall not afterwards be taken away or divested by it. The *tenendum*, "and to hold," is now of very little use, and is only kept in by custom. It was sometimes formerly \*used to signify the tenure by which the estate granted was to be [ \*299 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 Edw. I., it was also sometimes used to denote the lord of whom the land should be holden: but tha'

(n) Co. Litt. 225.

(o) Ibid. 6.

(p) See Appendix, N<sup>o</sup> II. § 1, page v.

(q) Ibid.

(r) Co. Litt. 21. 2 Roll. Rep. 19, 23. Cro. Jac. 476.

(s) Rep. 23. 8 Rep. 56.

Mohun, 3 Swanst. 435. Fowle vs. Freeman, 9 Ves. 354. Western vs. Russell, 3 Ves. & Bea. 192. Lord Eldon, without expressly deciding the point, seems to have leaned to lord Redesdale's view of the question, (Huddleston vs. 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 vs. Mitchell, 2 Jac. & Walk. 428.—CHITTY.

By statute 8 & 9 Vict. c. 106, s. 4, a feoffment made after the 1st of October, 1845, other than a feoffment made under a custom by an infant, shall be void at law unless evidenced by deed; and it is also enacted that a partition and an exchange of any hereditaments not being copyhold, and a lease, required by law to be in writing, of any hereditaments, and an assignment of a chattel interest not being copyhold in any hereditaments, and a surrender in writing of any interest therein not being a copyhold interest, and not being an interest which might by law have been created without writing, made after the 1st day of October, 1845, shall also be void at law, unless made by deed. STEWART.

<sup>6</sup> 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. Doug. 384.—CHITTY.

<sup>7</sup> The maxim in pleading in favour of following approved precedents, "*nam 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.—CHITTY.



statute directing all future purchasers to hold, not of the immediate grantor, but of the chief lord of the fee, this use of the *tenendum* hath been also antiquated; though for a long time after we find it mentioned in ancient charters that the tenements shall be holden *de capitalibus dominis feodi*; (t) but as this expressed nothing more than the statute had already provided for, it gradually grew out of use.

4. Next follow the terms 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 feudal 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 antient 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 \*300] mortgagee \*500*l.* upon such a day, the whole estate granted shall determine;" and the like. (z)

6. Next may follow the clause of *warranty*; whereby the grantor doth, for himself and his heirs, warrant and secure to the grantee the estate so granted. (a) By the feudal 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 antient law, if before the statute of *quia emptores* a man enfeoffed another in fee, by the feudal 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 auncestral*), this also bound the lord to warranty; (d) the homage being an evidence of such a feudal grant. And, upon a similar principle, in case, after a partition or exchange of lands of inheritance, either party or his heirs be evicted of his share, the other and his heirs are bound to warranty, (e) because they enjoy the equivalent. And so, even at this day, upon a gift in tail or lease for life, rendering<sup>g</sup> 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 in 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 antient services) resulting back to the superior lord of the fee. And in other \*301] forms of alienation, gradually introduced since that statute, \*no warranty whatsoever is implied; (h) they bearing no sort of analogy to the original feudal donation. And therefore in such cases it became necessary to add an express clause of warranty to bind the grantor and his heirs; which is a kind of covenant real, and can only be created by the verb *warrantizo* or *warrant*. (i)

These express warranties were introduced, even prior to the statute of *quia emptores*, in order to evade the strictness of the feudal doctrine of non-alienation

(t) Appendix, N<sup>o</sup> I. Madox. *Formul. passim.*

(\*) Ibid. N<sup>o</sup> II. § 1, page iii

(\*) See page 41.

(\*) Plowd. 13. 8 Rep. 71.

(\*) Appendix, N<sup>o</sup> I. page I.

(\*) Ibid. N<sup>o</sup> II. § 2, page viii.

(\*) Ibid. N<sup>o</sup> I. page I.

(\*) Feud. l. 2, l. 8 and 25.

(\*) Co. Litt. 384.

(\*) Litt. § 143.

(\*) Co. Litt. 174.

(\*) Ibid. 384.

(\*) Ibid.

(\*) Ibid. 102.

(\*) Litt. § 733.

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 cause 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 [\*302 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 of such tortious warrantor.(n)

In both lineal and collateral warranty, the obligation of the heir (in case the warrantee was evicted, to yield him other lands in their stead) was only on condition that he had other sufficient lands by descent 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. \*to make the same pro- [\*303 vision 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. 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 also be heir to the wife. And by statute 4 & 5 Anne, 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 whc

(k) Co. Litt. 373.  
 (l) Litt. §§ 703, 706, 707.  
 (m) Ibid. §§ 705, 707  
 (n) Ibid. §§ 698, 702.

(o) Co. Litt. 102.  
 (p) Litt. §§ 711, 712.  
 (q) Co. Litt. 373.

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 remainderman 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 land 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 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.<sup>8</sup>

\*304] \*7. After warranty usually follow *covenants*,<sup>9</sup> or conventions, which are clauses of agreement contained in a deed, whereby either party may stipulate for the truth of certain facts, or may bind himself to perform, or give, something to the other. Thus the grantor may covenant that he hath a right to convey; or for the 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

(r) Litt. § 712. 2 Inst. 293.  
(s) Page 116.

(t) Co. Litt. 374. 2 Inst. 335.  
(u) Appendix, N<sup>o</sup> II. § 2, page viii.

<sup>8</sup> But now, by the statute 3 & 4 W. IV. c. 74, all warranties entered into after the 31st December, 1833, by a tenant in tail, shall be void against the issue in tail and remainderman. By the statute 3 & 4 W. IV. c. 27, s. 39, the effect of warranty in tolling a right of entry was taken away; and by the same statute the writ of *warrantia chartæ* and the writ of *voucher*, by the help of which the party wishing to obtain the protection of warranty might have defended himself, were also abolished. So that warranties of real estate, which have indeed been long disused, cannot now have any practical operation.—KERR.

<sup>9</sup> 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 vs. 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 usual 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. & Pul. 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, assigns, &c. 1 Chitty on Pl. 10. 11, 13 38, 39, 42.—CHITTY.

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.<sup>10</sup> 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)<sup>11</sup>

I proceed now to the *fifth* requisite for making a good deed; the *reading* of it. This is necessary wherever any of the parties desire it; and, if it be not done on his request, the deed is void as to him. If he can, he should read it himself: if he be blind or illiterate, another must read it to him. If it be read falsely, it will be void; at least for so much as is misrecited: unless it be agreed by collusion that the deed shall be read false, on purpose to make it void; for in such case it shall bind the fraudulent party. (y)

\*Sixthly, it is requisite that the party, whose deed it is, should *seal*,<sup>12</sup> and now in most cases I apprehend should *sign* it also.<sup>13</sup> The use of [\*305 seals, as a mark of authenticity to letters and other instruments in writing, is extremely antient. We read of it among the Jews and Persians in the earliest

(w) Appendix, N<sup>o</sup> II. § 2, page xii.  
(x) Co. Litt. 46. Dyer, 23.

(y) 2 Rep. 3, 9. 11 Rep. 27.

<sup>10</sup> 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.—CHRISTIAN.

This is not a correct description of a covenant real, which is that whereby an obligation to pass something real is created, as lands or tenements, or the obligation of which is so connected with the realty that he who has the latter is either entitled to the benefit of, or liable to perform, the other. Fitz. N. B. 145. Shep. Touch. c. 7, p. 161. Thus, a warranty is a real covenant, a covenant to levy a fine, &c. The heirs of the covenantor, with assets descended, may be sued for the breach of any covenant, whether real or personal, to the performance of which they are expressly bound. On the other hand, executors and administrators are bound by all covenants of the testator, whether named or not, except the thing which was the object of the covenant related to the realty or was something to be performed personally by the covenantor, the obligation to perform which, of course, ended with his life. Cro. Eliz. 553.—COLERIDGE.

<sup>11</sup> 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 Edward II. and Edward III.—CHRISTIAN.

Where a deed purported to bear date on the 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 Lord Raym. 1076. And see Bac. Abr. Leases, I. 1. Com Dig. Fait, B. 3.—CHITTY.

<sup>12</sup> See in general, Com. Dig. Fait, A. 2. Sealing may be averred in pleading. 1 Saund. 29), 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.—CHITTY.

<sup>13</sup> Signing seems unnecessary, unless in cases under the statute of frauds, and deeds executed under powers. Com. Dig. Fait, B. 1. 17 Ves. Jr. 459.—CHITTY.

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 a 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 the same insurmountable reason, the Normans, a brave \*306] 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.<sup>14</sup>

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,

(\*) 1 Kings, c. xxi. Daniel, c. vi. Esther, c. viii.

(a) "And I bought the field of Manasse, 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. xxxii.

(b) Inst. 2, 10, 2 and 3.

(c) 1 Inst. 7.

(d) "Propria manu pro ignorantia literarum signum

sanctæ 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.

(e) Lamb. Archaion. 51.

(f) "Normanni chirographorum confectionem, cum crucibus aureis, aliisque signaculis sacris, in Anglia firmari solitam, in eorum impressam mutant, modumque scribendi Anglicum rejiciunt." Ingulph.

(g) Stat. Exon. 11 Edw. I.

<sup>14</sup> As a seal is requisite to a deed, the definition and the character of it are well settled. The common law intended by a seal an impression upon wax or wafer, or some other tenacious substance capable of being impressed. According to lord Coke, a seal is wax with an impression: *sigillum est cera impressa, quia cera sine impressione non est sigillum*. The common-law definition of a seal, and the use of rings and signets for that purpose and by way of signature and authenticity, is corroborated by the usages and records of all antiquity, sacred and profane. In the Eastern States, sealing, in the common-law sense, is requisite; but in the Southern and Western States, from New Jersey inclusive, the impression upon wax has been disused to such an extent as to induce the courts to allow (but with certain qualifications in some of the States) a flourish with the pen at the end of the name, or a circle of ink, or scroll, to be a valid substitute for a seal. 4 Kent. Com. 452.

In Alabama, an instrument which in the body of it purports to be under seal will be considered a deed, though no seal or scroll be annexed to the signature. *Shelton vs Armor*, 13 Ala. 165.—SHARSWOOD.

"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.<sup>(h)</sup><sup>15</sup>

A seventh requisite to a good deed is, that it be *delivered*<sup>16</sup> by the party himself or his certain attorney, which therefore is \*also expressed in the attestation; "sealed and *delivered*."<sup>17</sup> A deed takes effect only from this tra- [\*307 dition or delivery; for if the date be false or impossible, the delivery ascertains the time of it.<sup>18</sup> And if another person seals the deed, yet if the party delivers it himself, he thereby adopts the sealing,<sup>(i)</sup> 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 scrawl 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.<sup>(j)</sup><sup>19</sup>

(h) 3 Lev. 1. Stra. 764.

(i) Perk. § 130.

(j) Co. Litt. 36.

<sup>15</sup> In *Ellis vs. Smith*, (1 Ves. Jr. 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 *usquam dicta*, but barely the words of the reporters." And see, to the same effect, *Smith vs. Evans*, 1 Wils. 213.—CHITTY.

<sup>16</sup> 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. Jr.* 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 vs. 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.—CHITTY.

<sup>17</sup> Proof of the handwriting of the witnesses, or, if that cannot be had, of the grantor of a deed, with the fact that it is in the possession of the grantee or those claiming under him, is *prima facie* evidence of delivery. *Sicars's Lessee vs. Davis*, 6 *Peters*, 124. *Chandler vs. Temple*, 4 *Cush.* 285. *Green vs. Yarnall*, 6 *Missouri*, 326. *Williams vs. Springs*, 7 *Iredell*, 384. The registry of a deed, at the request of the grantor, for the use of the grantee, and the grantee's subsequent assent to the same, are equivalent to an actual delivery. *Hodge vs. Drew*, 12 *Pick.* 141. *Scrugham vs. Wood*, 15 *Wend.* 545. The grantor's placing a deed on record is only *prima facie*, not conclusive, evidence of its delivery. *Rigler vs. Cloud*, 2 *Harris*, 361. *Harrison vs. Phillips Academy*, 12 *Mass.* 456. *Barns vs. Hatch*, 3 *N. Hamp.* 304. *Gilbert vs. North American Ins. Co.*, 23 *Wend.* 43.—SHARSWOOD.

<sup>18</sup> In general, a deed will be considered as having been executed on the day on which it bears date, unless the contrary be shown. *Colquhoun vs. Atkinson*, 6 *Munf.* 550. *Breckelridge vs. Todd*, 3 *Monroe*, 52. *Sweetser vs. Lowell*, 33 *Maine*, 446. That the acknowledgment before a magistrate is of a subsequent date does not affect this presumption. *Ford vs. Gregory*, 10 *B. Monroe*, 175. Where the date in the body of a deed was exactly one year before the date at the foot, it was held that the latter should be considered as the true date of the execution of the deed. *Morrison vs. Caldwell*, 5 *Monroe*, 426.—SHARSWOOD.

<sup>19</sup> But an escrow, when justice requires it, may take effect by relation back to the first delivery, so as to give it the effect of a deed duly delivered from that time. If this were not the case, manifest injustice would frequently happen by the occurrence of events between the first and second delivery. There is no other rule on the subject

The last requisite to the validity of a deed is the *attestation*, or execution of it in the presence of witnesses;<sup>(\*)</sup> though this is necessary, rather for preserving the evidence, than for constituting the essence of the deed. Our modern deeds are in reality nothing more than an improvement or amplification of the *brevia testata* mentioned by the feudal writers,<sup>(k)</sup> which were written memorandums, introduced to perpetuate the tenor of the conveyance and investiture, when grants by parol only became the foundation of frequent dispute and uncertainty. To this end they registered in the deed the persons who attended as witnesses, which was formerly done without their signing their names, (that not being always in their power,) but they only heard the deed read; and then the clerk or scribe added their names, in a sort of memorandum: thus:—“*hijis testibus Johanne Moore, Jacobo Smith, et aliis, ad hanc rem convocatis.*”<sup>(l)</sup> This, like all other solemn transactions, was originally done only *coram paribus*,<sup>(m)</sup> and frequently when assembled in the court-baron, hundred, or county-court; which was then expressed in the attestation, *teste comitatu, hundredo, &c.*<sup>(n)</sup> Afterwards

\*308] the attestation of other witnesses was allowed, the trial 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;<sup>(o)</sup> 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 *hijis 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.<sup>(p)</sup> But in the king's common charters, writs, or letters-patent, the style is now altered: for at present the

(\*) Feud. l. 1, t. 4.

(k) Co. Litt. 7.

(m) Feud. l. 2, t. 32.

(\*) Spelm. Gloss. 228. Madox, Formul. N<sup>o</sup> 21, 322, 660.

(o) Co. Litt. 6.

(p) 2 Inst. 37.

than the general one by which it may be considered as taking effect from either period so as best to effectuate the purposes of justice. But this fiction can never be made to prevail against the truth and justice of the case. 1 Johns. Ch. Rep. 288. If a *feme sole* execute a deed and marry before it cease to be an escrow by a second delivery, it is necessary to give the deed effect from the first delivery; otherwise it would be void. So a delivery to a third person for and on behalf of the grantee, or with directions that it is to be delivered by him to the grantee on the happening of a particular event, is valid from the beginning after the event and acceptance have occurred, the third person being in such case considered a trustee for his use. 6 Mod. Rep. 217. 2 Mass. Rep. 452. When a deed for a valuable consideration is executed in the absence of the grantee, if for his benefit, it may take immediate effect, without any agency in a third person to accept it; for his assent will be presumed. 5 S. & R. 320. 9 S. & R. 244. And it is a matter of no importance if the deed be suffered to remain in the possession of the grantor. If both parties be present, and the usual formalities of execution take place, without any conditions or qualifications annexed, it is a complete and valid deed, notwithstanding it be left in the hands of the grantor. 1 Johns. Ch. Rep. 240. 2 Barnewall & Cressw. 671.—REED.

If a deed be delivered to the grantee, to become absolute on a contingency, such condition is void and the delivery absolute. There cannot be a delivery as an escrow to the grantee himself. *Foley vs. Cowgill*, 5 Blackf. 18. *Graves vs. Tucker*, 10 Smedes & Marsh. 9. *Lawton vs. Sager*, 11 Barbour, S. C. 349. *Johnson vs. Branch*, 11 Humph. 521. *Jordan vs. Pollock*, 14 Geo. 145.—SHARSWOOD.

<sup>20</sup> 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 handwriting of the defendant himself; and where the subscribing witness denied any recollection of the execution, proof of his handwriting 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 the memorandum of attestation when, in fact, the deed has been duly attested.—CURRY.

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,<sup>(g)</sup> but not commonly used till about the beginning of the fifteenth century; nor the clause of *hijis testibus* entirely discontinued till the reign of Henry the Eighth:<sup>(r)</sup> which was also the era of discontinuing it in the deeds of subjects, learning being then revived, and the faculty of writing more general; and therefore ever since that time the witnesses have usually subscribed their attestations, either at the bottom or on the back of the deed.<sup>(s)</sup>

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.<sup>(t)</sup> 2. By breaking off, or defacing the seal.<sup>(u)</sup> 3. By delivering it up to be cancelled; \*that is, to have lines drawn over it in the form of lattice-work or *cancelli*: though the [\*309

(g) Madox, *Formul.* N<sup>o</sup> 515.  
(r) *Ibid.* Dissert. fol. 32.  
(s) 2 Inst. 78. See page 378.

(t) 11 Rep. 27.  
(u) 5 Rep. 23.

<sup>21</sup> 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 interlineation did not affect A., the conveyance to C. was valid. 4 B. & A. 675.—CHITTY.

It must not be inferred from the text that every alteration not noted at the time of execution avoids a deed. If the alteration was made before execution, it need not be noted; although it is advisable always to have it done. *Rockafella vs. Rea*, 7 Halst. 180. It is well settled that a material alteration or interlineation fraudulently made by a party after the execution of the deed avoids it. *Heffelfinger vs. Shutz*, 16 S. & R. 44. *Miller vs. Stewart*, 4 Wash. C. C. 26. *Lewis vs. Payn*, 8 Cowen, 71. *Pequawket Bridge vs. Mather*, 8 N. Hamp. 139. It is not so well settled whether, when a deed appears on its face to be altered, such alteration is presumed *prima facie* to have been made before or after execution. That it is incumbent on the party producing a writing to explain any apparent alteration in it, is decided in *Acker vs. Ledyard*, 8 Barb. S. C. 514; while that the presumption shall always be in favour of honesty until the contrary appears, is asserted in *Simpson vs. Stackhouse*, 9 Barr. 186. *Beaman vs. Russell*, 20 Vermont, 205. *Boothby vs. Stanly*, 34 Maine, 115. A memorandum at the foot is valuable in preventing the question from arising. Alterations, however, may be made subsequently to the execution, by the authority or consent of the parties given before or after execution; and such authority or consent may be proved by oral evidence. *Kirwin's case*, 8 Cowen, 118. *Speake vs. The United States*, 9 Cranch, 28. If blank spaces be left to be filled after execution, the consent of the party executing that they shall be afterwards filled is to be implied. *Wiley vs. Moon*, 17 S. & R. 438. *Smith vs. Crooker*, 5 Mass. 538. *Boardman vs. Gore*, 1 Stewart, 517. *Bank vs. Curry*, 2 Dana, 142. An alteration by a stranger, though material, will not render the instrument inoperative. *Nichols vs. Johnson*, 10 Conn. 192.

It does not follow that the title of the grantee is destroyed where the estate passed by the deed. *Barret vs. Thorndike*, 1 Greenl. 73. *Herrick vs. Malin*, 22 Wend. 388. It is its executory character alone which is affected. No action can be maintained by the fraudulent party upon any of the covenants contained in the deed. *Jackson vs. Jacoby*, 9 Cowen, 125. *Lewis vs. Payn*, 8 Cowen, 71. *Wallace vs. Harmstead*, 3 Harris, 462. Where, however, a deed separately acknowledged by a married woman to pass her estate is fraudulently altered, the title of the grantee is destroyed, because by law the deed is essential to convey her interest.—SHARSWOOD.

<sup>22</sup> 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



phrase is now used figuratively for any manner of obliteration or defacing it.<sup>24</sup> 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 starchamber, and now of the chancery:<sup>25</sup> when it appears that the deed was obtained by fraud, force, or other foul practice; or is proved to be an absolute forgery.<sup>(w)</sup> In any of these cases the deed may be avoided, either in part or totally, according as the cause of avoidance is more or less extensive.

And, having thus explained the general nature of deeds, we are next to consider their several species, together with their respective incidents. And herein I shall only examine the particulars of those which, from long practice and experience of their efficacy, are generally used in the alienation of *real* estates: for it would be tedious, nay 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, some may be called *original* or *primary* conveyances; which are those by means whereof the benefit or estate is created or first arises; other 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.

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*.<sup>(x)</sup> It is the most antient 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 antient feudal donation; for though it may be performed by the word "*enfeoff*" or "*grant*," yet the aptest word of feoffment is "*do* or *dedi*."<sup>(y)</sup> And it is still directed and governed by the same feudal rules; insomuch that the principal rule relating to the extent and effect of the feudal grant, "*tenor est qui legem dat feudo*," is in

(w) Toth. numo. 24. 1 Vern. 348.

(x) Co. Litt. 9.

(y) Ibid.

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.—COLERIDGE.

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.—CHITTY.

<sup>23</sup> 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.—CHITTY.

While the cancellation of a deed by the parties will destroy the deed so far as it is executory, and annul whatever covenants, express or implied, may be contained in it, it should be borne in mind, as well-established law, that it will not divest from the grantee and revest in the grantor an estate which has once vested. *Chipman vs. Whittemore*, 23 Pick. 231. *Morgan vs. Elam*, 4 Yerger, 375. *Schutt vs. Large*, 6 Barb. S. C. 373. *Raynor vs. Wilson*, 6 Hill, 469. *Mallery vs. Stodder*, 6 Ala. 301. *Jordan vs. Pollock*, 14 Geo. 145.—SHARSWOOD.

<sup>24</sup> 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.—CHITTY.

other words become the maxim of our law with relation to feoffments, *‘modus legem dat donationi.’*(z) And therefore, as in pure feudal 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 præsumatur 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 inducements to the feoffment, the feoffee’s estate ought to be confined to his person, and subsist only for his life; unless the feoffor, by express provision in the creation \*and constitution of the estate, hath given it a longer con- [\*311 tinuance. 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 forever; 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 feudal investiture, or delivery of corporal 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 seisinæ conjunctio.’*(g)<sup>25</sup>

Investitures, in their original rise, were probably intended to demonstrate in conquered countries the actual possession of the lord; and that he did not grant a bare litigious right, which the soldier was ill qualified to prosecute, but a peaceable and firm possession. And at a time when writing was seldom practised, a mere oral gift, at a distance from the spot that was given, was not likely to be either long or accurately retained in the memory of bystanders, who were very little interested in the grant. Afterwards they were retained as a public and notorious act, that the country might take notice of and testify the transfer of the estate; and that such, as claimed title by other means, might know against whom to bring their actions.

In all well-governed nations some notoriety of this kind has been ever held requisite, in order to acquire and ascertain \*the property of lands. In [\*312 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 com-

(z) Wright, 21.

(a) Page 108.

(b) Co. Litt. 42.

(c) See Appendix, N<sup>o</sup> I.

(d) Co. Litt. 9.

(e) Litt. 366.

(f) Wright, 37.

(g) L. 3, c. 14, § 5.

(h) *Nam apiscimur 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 quantilibet partem ejus fundi intrare. Ff. 41, 2, 3. And again: traditioibus dominia rerum, non nudis pactis, transferuntur. Cod. 2, 3, 20.*

<sup>25</sup> Lord Mansfield (in *Taylor vs. 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 is 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 endorsed on the deed of feoffment, will be presumed where the possession has gone according to the feoffment for a great length of time. *Jackson vs. Jackson*, Fitz-Gib. 147. *Throckmorton vs. 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 vs. Attfield*, as stated from Reg. Lib. in Mr. Raithby’s note to 1 Vern. 40. *Burgh vs. Francis*, 1 Eq. Ca. Abr. 320.—CHITTY.

pletely in the new proprietor; who, according to the distinction of the canonists, (i) acquires the *jus ad rem*, or inchoate and imperfect right, by nomination and institution; but not the *jus in re*, or complete and full right, unless by corporal possession. Therefore in dignities possession is given by 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 seisinam, facit stipitem.* (l)

Yet the corporal tradition of lands being sometimes inconvenient, a symbolical delivery of possession was in many cases antiently allowed; by transferring something near at hand, in the presence of credible witnesses, which by agreement should serve to represent the very thing designed to be conveyed; and an occupancy of this sign or symbol was permitted as equivalent to 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 purchaser 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 absolute unlimited dominion. \*Written deeds were therefore introduced, in order to specify and perpetuate the peculiar purposes of the party who conveyed; yet still, for a very long series of years, they were never made use of, but in company with the more antient 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

(i) Decretal, l. 3, l. 4, c. 40.

(k) See Regs 209, 227, 228.

(l) Vlet. l. 1, c. 2, § 2.

(m) Ch. iv., 7.

(n) Sternhook, *de jure Sueon.* l. 2, c. 4.

(o) Hickee, *Dissert. Epistol.* 85.

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 præsenti*, or not at all.(q)<sup>26</sup>

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 remainderman \*himself, by consent of the lessee for years; for without his consent [\*31b no livery of the possession can be given;(t) partly because such forcible livery would be an ejectment of the tenant from his term, and partly for the reasons before given(u) for introducing the doctrine of attornments.

Livery of seisin is either in *deed* or in *law*. Livery in *deed* is thus performed. The feoffor, lessor, or his attorney, together with the feoffee, lessee, or his attorney, (for this may as effectually be done by deputy or attorney as by the principals themselves in person,)<sup>27</sup> come to the land, or to the house; and there, in the presence of witnesses, declare the contents of the feoffment or lease, on which livery is to be made. And then the feoffor, if it be of land, doth deliver to the feoffee, all other persons being out of the ground, a clod or turf, or a twig, or bough there growing, with words to this effect: "I deliver these to you in the name of seisin of all the lands and tenements contained in this deed." But if it be of a house, the feoffor must take the ring or latch of the door, the house being quite empty, and deliver it to the feoffee in the same form; and then the feoffee must enter alone, and shut to the door, and then open it, and let in the others.(w) If the conveyance or feoffment be of divers lands, lying scattered in one and the same county, then in the feoffor's possession, livery of seisin of any parcel in the name of the rest, sufficeth for all;(x) but if they be in several counties, there must be as many liveries as there are counties. For if the title to these lands comes to be disputed, there must be as many trials as there are counties, and the jury of one county are no judges of the notoriety of a fact in another. Besides, antiently this seisin was obliged to be delivered *coram paribus de vicineto*, before the peers or freeholders of the neighbourhood, who attested such delivery in the body or on the back of the deed; according to the rule of the feudal law,(y) *pares debent interesse investituræ feudi, et non alii*: for which this reason is expressly given: because \*the peers or vassals of the lord, [\*31c 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*

(p) Co. Litt. 46.  
(q) See page 165.  
(r) Page 167.  
(s) Co. Litt. 49.  
(t) Ibid. 48.

(\*) Page 288.  
(w) Co. Litt. 48. West. Symb. 251.  
(x) Litt. § 414.  
(y) Feud. l. 2, l. 68.  
(z) See page 307.

<sup>26</sup> 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. 123, 129. 4 Taunt. 20. Willes, 682. 2 Wils. 75.—CHITTY.

<sup>27</sup> 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. Abr. 8 R. pl. 4, 5. Co. Litt. 52, b.—CHITTY.

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 liveryes 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)<sup>28</sup>

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) \*And this is the only distinction \*317] 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 acceptance gifts are frequently confounded with the next species of deeds: which are,

3. Grants, *concessionēs*; 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 incorporeales, quæ sunt ipsum jus rei vel corpori inhærens, 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."<sup>29</sup>

(a) Glib. 10, 35.

(b) Dyer, 18.

(c) See Appendix, N<sup>o</sup> I.

(d) Litt. § 421, &c.

(e) Co. Litt. 42.

(f) Ibid. 52.

(g) West Symbol 256.

(h) Litt. § 59.

(i) § 57.

(j) Co. Litt. 9.

(k) Ibid. 172.

(l) L. 2, c. 18.

<sup>28</sup> A feoffment has of late been generally resorted to in practice rather for its peculiar powers and effects than as a simple mode of assurance from one person to another. Thus, a feoffment by a particular tenant, until recently, destroyed the contingent remainders depending on the particular estate, and, if made by a tenant in tail in possession, discontinued the estate-tail; and at one time it seemed quite settled that a feoffment might be employed to convey a fee to the feoffee by disseisin, whatever might have been the estate of the feoffor, provided he had possession of the lands enfeoffed. See the authorities referred to in Butl. Co. Litt. 330, b., n. (l.) 2 Saund. Us. and Tr. 15. 2 Prest. Abst. 293. But this doctrine has for some time been greatly shaken; and it has been considered that a feoffment had no longer this effect, (Doe d. Maddock vs. Lynes, 3 B. & C. 388. Doe d. Dormer vs. Moody, 2 Prest. Conv. Pref. 32. Doe vs. Hall, 2 Dowl. & Ry. 38. 1 Saund. Us. 40. Jerritt vs. Weare, 3 Pri. 575; and see Reynolds vs. Jones, 2 Sim. & Stu. 106;) and by stat. 8 and 9 Vict. c. 106, § 4, a feoffment made after the 1st of October, 1845, shall not have any tortious operation, and is now to be ranked among what are called *innocent* conveyances.—STEWART.

<sup>29</sup> Which words, it is to be observed, in any deed executed after the 1st of October

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; *demisi, concessi, et ad firmam tradidi.*" *Farm*, or *feorme*, is an old Saxon word signifying provision: (n) and it came to be used instead of rent or render, because antiently 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 feudal 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, have made leases for years, or for life, estates in tail, or in fee, without any limitation or control. 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, other-

(\*) Spelm. Gloss. 229.

(o) Co. Litt. 41.

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1845, shall, by the late act (8 & 9 Vict. c. 106, s. 4) not imply any covenant in law in respect of any hereditaments, except so far as the words "give" or "grant" may by force of any act of parliament imply a covenant. But by the same act an important alteration of the law has now been made. Great inconveniences arose in the conveyance of corporeal hereditaments from the necessity of *livery of seisin* to perfect a feoffment, and various contrivances were used to evade its necessity. These are no longer needful; for by the statute 8 & 9 Vict. c. 106, s. 2, all corporeal hereditaments shall, as regards the conveyance of the immediate freehold thereof, be deemed to lie in *grant* as well as in *livery*. By this useful provision the conveyance of corporeal hereditaments is much simplified.

wise such leases are not binding.<sup>(p)</sup> 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.<sup>30</sup> 3. If there be any old lease in being, it must be first absolutely surrendered, or be within a year of expiring. 4. It must be *either* for twenty-one years, or three lives, and not for both. 5. It must not exceed the term of three lives, or twenty-one years, but may be for a shorter term. 6. It must be of corporeal hereditaments, and not of such things as lie merely in grant; for no rent can be reserved thereout by the common law, as the lessor cannot resort to them to distress.<sup>(q)</sup> 7. It must be of \*320] \*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.

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.<sup>(r)</sup><sup>31</sup> But by

<sup>(p)</sup> Co. Litt. 44.

<sup>(q)</sup> 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 eleemo-

synary corporation, and the successor shall be entitled to recover the rent by an action of debt, which (in case of a free hold lease) he could not have brought at the common law.

<sup>(r)</sup> Co. Litt. 45.

<sup>30</sup> 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 encumbered 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 Roll. 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 vs. Duke of Leeds, Cowp. 714. Freeman vs. West, 2 Wils. 165.—CHRISTIAN.

<sup>31</sup> 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 had made a lease for twenty-one years, under the 32 Henry 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 coexist 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. Abr. tit. "Leases and Terms for Years," E. Rule 3.—CHIRRY.

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 on bishops, to certain other inferior corporations, both sole and aggregate. From laying all which [\*321 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.

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)<sup>32</sup> 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)

\*There is yet another restriction with regard to college leases, by [\*322 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 6s. 8d., or a quarter of malt for every 5s.; 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 have 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

(\*) 11 Rep. 71.

(†) Co. Litt. 45.

(w) Co. Litt. 41.

(x) Ibid. 45.

(y) Strype's Annals of Eliz.

<sup>32</sup> 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 Bingham. Rep. 24.

—CHITTY.



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.<sup>33</sup>

The leases of beneficed clergymen are further restrained, in case of their non-residence, by statutes 13 Eliz. c. 20, 14 Eliz. c. 11, 18 Eliz. c. 11, and 43 Eliz. c. 9,<sup>34</sup> which direct, that if any beneficed clergyman be absent from his cure above fourscore days in any one year, he shall not only forfeit one year's profit of his benefice, to be distributed among the poor of the parish, but that all leases made by him of the profits of such benefice, and all covenants and agreements of like nature, shall cease and be void:<sup>35</sup> 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 \*323] forty days in any one year. And thus much for leases, with their several enlargements and restrictions.(y)

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)<sup>36</sup> 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)<sup>37</sup>

(y) For the other learning relating to leases, which is very curious and diffusive, I must refer the student to 3 Bac. Abr. 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) Page 300.

<sup>33</sup> The colleges receiving a quarter of wheat, or its value, for every 13s. 4d. 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.—CHRISTIAN.

<sup>34</sup> 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 and 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 40s. for every day they so hold over.—CHITTY.

<sup>35</sup> But by the 57 Geo. III. c. 99, all these statutes which vacate leases by non-residence are repealed.—CHITTY.

<sup>36</sup> 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.—ARCHBOLD.

<sup>37</sup> But although this warranty and right of re-entry are incident to an exchange at common law it has been considered doubtful by some whether they are incident to an exchange effected by mutual conveyances under the statute of uses. Mr. Cruise appears to think that they are so incident. But where mutual conveyances are used, the one is

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, [\*324 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, 29 Car. II. c. 3, hath now abolished this distinction, and made a deed in all cases necessary.<sup>38</sup>

These are the several species of *primary* or *original* conveyances. Those which remain are of the *secondary* or *derivative* sort; which presuppose some other conveyance precedent, and only serve to enlarge, confirm, alter, restrain, restore, or transfer the interest granted by such original conveyance. As,

7. Releases; which are a discharge or a conveyance of a man's right in lands or tenements, to another that hath some former estate in possession.<sup>39</sup> The words generally used therein are "remised, released, and forever quit-claimed." (h) And these releases may enure either, 1. By way of *enlarging an estate*, or *enlarger l'estate*:<sup>40</sup> as if there be tenant for life or years, remainder to another in fee, and he in remainder releases all his right to the particular tenant and his heirs, this gives him the estate in fee.(i) But in this case the releesee must be in *possession*<sup>41</sup> of some estate, for the release to work upon; for if there be lessee for

(g) Litt. § 250. Co. Litt. 169.

(h) Litt. § 445.

(i) Ibid. § 465.

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consideration of the other, the incidents of an exchange may be avoided and the objects retained, but in such cases the word "exchange" need not, and should not, be used. By 8 & 9 Vict. c. 106, s. 3, however, an exchange to be binding *et law* must be by deed; and, by s. 4, an exchange of any hereditaments made by deed executed after the 1st of October, 1845, shall not imply any *condition in law*.—STEWART.

The general enclosure act, 8 & 9 Vict. c. 118, contains a provision by which the enclosure commissioners are enabled to effect exchanges of lands. On the application in writing of the persons interested in the lands proposed to be exchanged, the commissioners may direct inquiries whether the proposed exchange would be beneficial to the owners; and if they come to be of that opinion, they may frame an order of exchange, with a map or plan of the lands to be both given and taken in exchange; and such order is not to be impeached by reason of any infirmity of estate of the persons on whose application it shall be made. The chief advantage attending this method of exchange is, that the land on each side taken in exchange remains and enures to the same uses, trusts, intents, and purposes, and is subject to the same changes, as the land given in exchange. Thus, each owner holds the newly-acquired lands upon precisely the same title as he held what he had before, and none of the inconvenient consequences of the old common-law title by exchange can arise. Persons having but limited interests in the land may, by the help of the statute I have mentioned, effect exchanges which may be a great benefit to the estate, and which it would have been impossible for them to bring about in any other way.—KERR.

<sup>38</sup> Now, by statute 8 & 9 Vict. c. 106, a deed is in all cases necessary. Partition may be effected in the same way as exchanges under the authority of the enclosure commissioners.—KERR.

<sup>39</sup> Actual possession is not necessary if the estate of the party who is to take the release be itself preceded by an estate in possession: thus, if A. be tenant for life, with remainder to B. for life, with remainder to C. in fee, C. may release to B., whose estate, though vested, is not in possession.—SWEET.

<sup>40</sup> But this must be the immediate remainder, or reversion; for if A. have a term for years, remainder to B. for years, remainder or reversion in fee to C., C. cannot release to A. for want of privity, on account of the intermediate term in B. Co. Litt. 273, b.—ARCHBOLD.

<sup>41</sup> A *virtual* possession will suffice, if the releesee has an estate actually vested in him, at the time of the release, which would be capable of enlargement by such release if he had the *actual* possession. Thus, if a tenant for twenty years make a lease to another for five years, who enters, a release to the first lessee is good, for the possession of his lessee was his possession. So, if a man makes a lease for years, remainder for years, and the

years, and, before he enters and is in possession, the lessor releases to him all his right in the reversion, such release is void for want of possession in the releesee.(k)<sup>42</sup> 2. By way of *passing an estate*, or *mitter l'estate*: as when one of \*325] two coparceners releaseth all her \*right to the other, this passeth the fee-simple of the whole.(l)<sup>43</sup> And in both these cases there must be a privity of estate between the releasor and releesee;(m) that is, one of their estates must be so related to the other, as to make but one and the same estate in law. 3. By way of *passing a right*,<sup>44</sup> or *mitter le droit*: as if a man be disseised, and releaseth to his disseisor all his right, hereby the disseisor acquires a new right, which changes the quality of his estate, and renders that lawful which before was tortious or wrongful.(n)<sup>45</sup> 4. By way of *extinguishment*: as if my tenant for life makes a lease to A. for life, remainder to B. and his heirs, and I release to A.; this extinguishes my right to the reversion, and shall enure to the advantage of B.'s remainder as well as of A.'s particular estate.(o)<sup>46</sup> 5. By way

(k) Litt. 2 465.

(l) Co. Litt. 273.

(m) Ibid. 272, 273.

(n) Litt. 2 466.

(o) Ibid. 2 470.

first lessee enters, a release to the person in remainder for years is good to enlarge his estate. Mr. Hargrave's note 3 to Co. Litt. 270, a.—CHITTY.

<sup>42</sup> This is not accurately expressed. It is necessary that the releesee should have a vested estate, but it is not necessary that such estate should be in possession; as if there be tenant for life, remainder to B. for life, remainder to C. in fee, B. may take a release from C., although his own estate is in remainder. An estate at will is sufficient to found a release upon, (Litt. s. 460,) although the reversion upon such estate does not lie in grant.—SWEET.

<sup>43</sup> If one joint-tenant assign to the other, it operates as a release, and must be so pleaded. 2 Cruise, 527.—CHITTY.

<sup>44</sup> There must be a privity of estate between the releasor and the releesee in the first species of release mentioned, (see *ante*;) but in this release per mitter le droit there is not, indeed there cannot be, any such privity, (Co. Litt. 274, a., n. 1;) nor is there any occasion for words of inheritance. Litt. 470, and Co. Litt. 273, b.—ARCHBOLD.

<sup>45</sup> No privity is necessary when a *release* of a right is made to one who hath an estate of freehold, in deed or in law; but a release cannot enure by way of *passing a right*, unless it is made to one having a fee-simple; for the person to whom a right is *passed* must have the *whole* right: to a person not having the fee, therefore, a release of right operates as it were, by extinguishment in respect of him that made the release, which extinguishment shall enure to him in remainder, though the right is not extinct in deed. 1 Inst. 275, a., 279, b. If a release of all *actions* be made to a tenant for life, the person in remainder, after the death of the tenant for life, shall have no benefit from this release. 1 Inst. 275, b., 285, b. Edward Altham's case, 8 Rep. 302. Lampet's case, 10 Rep. 51.—CHITTY.

<sup>46</sup> Blackstone has here unaccountably stated from Littleton a case which has nothing to do with extinguishment. The lease for life to A., with remainder to B. and his heirs, is understood to be by feoffment, and so a discontinuance of the original reversion; and, the reversioner's estate being thus put to a right, his release *passes* it for the benefit of the wrongful lessee for life and remainderman, as in any other case of disseisin. *Dormi aliquando jus, mortur nunquam*. For of such high estimation is right in the eye of the law, that the law preserveth it from death and destruction: trodden down it may be, but never trodden out. Co. Litt. 279, a. And this consideration explains the distinction between a release by extinguishment and a release that passes a right. Under the latter, the releesee has the same right which his releasor had, and that only; by the former, the releasor puts an end, as against all the world, to some hereditament different from that which the releesee has, and which cannot exist with it in the same person. "Releases," says Littleton, "which enure by way of extinguishment against all persons, are where he to whom the release is made cannot have that which to him is released: as, if there be lord and tenant, and the lord release to the tenant all the right which he hath in the seignior, or all the right which he hath in the land, &c., this release goeth by way of extinguishment against all persons, because that the tenant cannot have service to receive of himself. In the same manner it is of a release made to the tenant of the land of a rent-charge, or common of pasture, &c., because the tenant cannot have that which to him is released, &c.: so such releases shall enure by way of extinguishment in all ways." Sects. 479, 480.

There is this distinction between an extinguishment and the passing of a right. a right cannot be passed by release to one who has merely a right: it must be to him who has the estate; and yet privity is no element in such a release, but the contrary. On the

of *entry* and *feoffment*: as if there be two joint disseisors, and the disseisee releases to one of them, he shall be sole seised, and shall keep out his former companion which is the same in effect as if the disseisee had entered, and thereby put an end to the disseisin, and afterwards had enfeoffed one of the disseisors in fee. (p) And hereupon we may observe, that when a man has in himself the possession of lands, he must at the common law convey the freehold by feoffment and livery; which makes a notoriety in the country: but if a man has only a right or a future interest, he may convey that right or interest by a mere release to him that is in possession of the land: for the occupancy of the releasee is a matter of sufficient notoriety already.<sup>47</sup>

8. A confirmation is of a nature nearly allied to a release. Sir Edward Coke defines it (q) to be a conveyance of an estate or right *in esse*, whereby a voidable<sup>48</sup> estate is made sure and unavoidable, or whereby a particular estate is increased: and the words of making it are these: "have given, granted, ratified, approved, and confirmed." (r) An instance of the first branch of the definition is, if tenant for life leaseth for forty years, and dieth during that term: here the lease for years is voidable by him in reversion: yet, if he \*hath confirmed the estate of the lessee for years, before the death of tenant for life, it is no longer voidable, but sure. (s) The latter branch, or that which tends to the increase of a particular estate, is the same in all respects with that species of release which operates by way of enlargement.

(p) Co. Litt. 278.  
(q) 1 Inst. 295.

(r) Litt. §§ 515, 531  
(s) Ibid. § 516.

other hand, a release by way of extinguishment may be made to one who has privity but no estate. Thus, a lord may release his seigniorial rights to his tenant after he has been disseised; as a rent-charge, as distinguished from a rent-service, can only be released to the actual tenant, because the charge is only on the land and implies no personal privity Co. Litt. 268, a.—SWEET.

<sup>47</sup> Mr. Ritso objects strongly to this explanation of releases; first, because it does not point out the proper distinction between a release *per mitter le droit* and a release *per extinguisher le droit*,—viz., that in the former case the release can, but in the latter that it cannot, hold out every other. For example, a release *per mitter le droit* is where the releasee can hold out every other. The release of the disseisee to the disseisor is of this description; and so it is if A. disseised by B. and C. releases to B.; for B. shall now hold out C. in the same manner as if A. had regularly entered upon B. and C., as he might have lawfully done, and then made a separate feoffment to B. But if A. is disseised by B., who enfeoffs C. and D., and afterwards A. releases to one of them, this is a release *per extinguisher le droit* of A. for the benefit of the two feoffees equally; for the one to whom the release is made cannot hold out the other. Upon the same principle, if the disseisee releases to the lessee of the disseisor, this also is a release *per extinguisher le droit* of the disseisee, and of which the reversioner as well as the lessee shall have advantage; for they have both of them but one estate in law, and therefore the confirmation of the particular estate is equally the confirmation of the reversion. And so it is if a patron is usurped upon by two and afterwards releases to one of them: it operates, by way of extinguishment, for the benefit of both equally, because the admission and institution are quasi a legal adjudication of the title. Secondly, because the releases which are here described *per mitter le droit*, and by way of entry and feoffment, are not exactly different species of releases, but only one and the same species, differing no otherwise than in circumstance; for every release which operates by way of entry and feoffment is in fact a release *per mitter le droit*; and if the disseisee releases, whether to one disseisor alone, or to one of two disseisors, it operates equally in both cases, *per mitter and vester le droit of the disseisee*, and *by way of entry and feoffment*; that is to say, the releasee has the same title in both cases as if the disseisee had actually revested his former estate by his entry, and afterwards made a feoffment with livery of seisin to the releasee, and *he shall now hold out every other*. And, thirdly, because there is another distinct species of release of which no notice whatever is here taken,—namely, a release *per extinguisher le estate*; as from the grantee of a rent-charge to the owner of the land, or a release of the services from the lord to the tenant, or a release of common of pasture, &c. Co. Litt. 230, a., 307, b. If the lord sells the freehold of the inheritance of the copyhold to another, and afterwards the copyholder releases to the purchaser, this also is a release *per extinguisher le estate*, and the copyhold interest becomes extinct. 1 Leon. 102, Wakeford's case. Ritso's Introd. p. 39.—SHARSWOOD.

<sup>48</sup> The distinction between voidable and void must not be lost sight of here, for it has no operation whatever upon a void estate. Gilb. Ten. 75.—CHITTY.

9 A surrender, *sursumredditio*,<sup>49</sup> or rendering up, is of a nature directly opposite to a release; for, as that operates by the greater estate's descending upon the less, a surrender is the falling of a less estate into a greater. It is defined (*t*) a yielding up of an estate for life or years to him that hath the immediate reversion or remainder, wherein the particular estate may merge or drown, by mutual agreement between them. It is done by these words: "hath surrendered, granted, and yielded up."<sup>50</sup> The surrenderor must be in possession; (*u*) and the surrenderee must have a higher estate, in which the estate surrendered may merge; therefore tenant for life cannot surrender to him in remainder for years. (*w*) In a surrender there is no occasion for livery of seisin; (*x*) for there is a privity of estate between the surrenderor and the surrenderee; the one's particular estate and the other's remainder are one and the same estate: and livery having been once made at the creation of it, there is no necessity for having it afterwards. And, for the same reason, no livery is required on a release or confirmation in fee to tenant for years or at will, though a freehold thereby passes: since the reversion of the lessor, or confirmor, and the particular estate of the lessee, or confirmer, are one and the same estate; and where there is already a possession, derived from such a privity of estate, any further delivery of possession would be vain and nugatory. (*y*)<sup>51</sup>

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 \*327] years. And it differs from a lease only in this: that by a lease one grants an interest less \*than his own, reserving to himself a reversion; in assignments he parts with the whole property, and the assignee stands to all intents and purposes in the place of the assignor.<sup>52</sup>

(<sup>49</sup>) Co. Litt. 367.

(<sup>50</sup>) Ibid. 338.

(<sup>51</sup>) Perk. § 589.

(<sup>49</sup>) Co. Litt. 50.

(<sup>52</sup>) Litt. § 460.

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<sup>49</sup> See, in general, Com. Dig. Surrender. 1 Saund. index, Surrender. When a tenant for life and the remainderman in fee join in making a lease, it should not be pleaded as the lease of both in its inception; for, living the tenant for life, it is only his lease and the confirmation of the remainderman's. 6 Co. 14, b., 15, a. Cases and Opinions, 2 vol. ii. 148, edit. 1791.—CHITTY.

<sup>50</sup> But these words are not *essential* to a surrender. See Wils. 127. Cro. Jac. 169.—CHITTY.

<sup>51</sup> This is a surrender by deed; but there 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.—ARCHBOLD.

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.—CHITTY.

There may also be an indirect surrender, or surrender in law, as it is called, by the acceptance by the tenant of a new estate inconsistent with his prior estate. Thus, a new lease made to a person in possession under an old lease, and accepted by him, operates as a surrender in law of the old one; for from such acceptance the law implies his intention to yield up the estate which he had before, though he may not by express words of surrender have declared as much. Shep. Touchst. 300. Joe's case, 5 Rep. 116. And where a tenant from year to year underlet the premises to another, and the original landlord, with the assent of the original tenant, accepted the under-lessee as his tenant, a surrender in law was held to have taken place of the first tenant's interest. Thomas vs. Cook, 2 B. & A. 119. Surrenders thus implied by law are not touched by the recent statute 8 & 9 Vict. c. 106, which, we may remember, enacts that any surrender *in writing* of an interest in lands, not being a copyhold interest and not being an interest which might have been created without writing, shall be void in law unless made by deed.—KERR.

<sup>52</sup> This is far from being 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

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, of which no seisin could be had till the time of payment;) and so also annuities, conditions, warranties, and the like, were always liable to be recalled by defeazances made subsequent to the time of their creation.(b)<sup>53</sup>

II. There yet remain to be spoken of some few conveyances, which have their force and operation by virtue of the *statute of uses*.

*Uses and trusts* are in their original of a nature very similar, or rather exactly

(\*) From the French verb *defaire, infectum reddere.*

(†) *Ibid.* 237.

(c) *Co. Litt.* 226.

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 anywhere *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 under-lease is made even for a day less than the whole term, the under-lessee is not liable for rent or covenants to the original lessor, like an assignee of the whole term. *Doug.* 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.—CHRISTIAN.

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.—CHITTY.

By 8 & 9 *Vict. c.* 106, § 3, any assignment made after the 1st of October, 1845, of a chattel interest in any hereditament not being copyhold shall be void at law unless made by deed.—STEWART.

<sup>53</sup> According to this mode of reasoning (says Mr. Ritso) there should be no after-made defeasance allowed of a recognizance, or of a judgment, or of any other executory conveyance of record, which are all equally solemn with a feoffment. Lord Coke expressly tells us that there can be no after-made defeasance of a feoffment, because it is an *executed* conveyance, in contradistinction to those which are executory. *Co. Litt.* 204, a. In the case of a feoffment, the estate in the land is finally vested or executed in the feoffee, by the act of livery of seisin, at the instant it is made; and consequently the feoffor can no otherwise have the land again than by a reconveyance *de novo*. *Quod semel factum est, non potest infectum reddi*. But otherwise it is in the case of statutes, recognizances, obligations, judgments, and the like; for these are but *executory*; that is to say, they remain to be completed by a further act still to be done,—*viz.*, the process of execution; and, consequently, till that is had, they may of course be defeated or discharged at any time. And so it is of all other matters which are in their nature executory, such as rents, annuities, conditions, warranties, &c. *Co. Litt.* 204, a. *Ritso, Intro.* 50.

The student ought not to infer that such a defeasance, if in pursuance of the intention of the parties when the conveyance is made or otherwise founded upon sufficient consideration, may not be available, and give the grantor a right, on compliance with the terms and conditions agreed upon, to go into a court of equity and compel the grantee to reconvey the estate. Until such reconveyance, however, the estate does not revert at law: the grantor has only what is termed an equitable estate. Indeed, without any written defeasance at all, when an absolute deed is shown to have been originally made to the grantee only as a security for loan of money, or, in other words, was really a *mortgage*, a court of equity will so consider it, and allow the grantor to redeem and have a reconveyance of the estate, on the ground that the written defeasance has been omitted by fraud, caprice, or mistake. 4 *Kent's Com.* 142.—SHARWOOD.

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 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 \*328] one, in confidence that he \*should convey it or dispose of the profits at the will of another. And it was the business of a particular magistrate, the *prætor 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 *prætor*, 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, \*329] yet if a testator had enfeoffed another to his own use, and so was \*possessed 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 attained the other. Wherefore, about the reign of Edw. IV., (before whose time, lord Bacon remarks,(k) there are not six cases to be found relating to the doctrine of uses,) the courts of equity began to reduce them to something of a regular system.

Originally it was held that the chancery could give no relief, but against the very person himself intrusted for *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 purchaser for a valuable consideration, without notice, might hold the land discharged of any trust or confidence. And

(c) *Ff.* 7, 1, 1.(d) *Inst.* 2, tit. 23.(e) *Ff.* 43, 2<sup>a</sup>, 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) Stat. 50 Edw. III. c. 6.

(A) See page 271.

(B) Page 272.

(C) On Uses, 313.

(D) Keilw. 42. Year-book, 22 Edw. IV. 6.

(E) *Ibid.* 46. Bacon on Uses, 312.

also it was held, that neither the king nor queen, on account of their dignity royal,(n) nor any corporation \*aggregate, on account of its limited capacity,(o) could be seised to any use but their own; that is, they [\*330 might hold the lands, but were not compellable to execute the trust.<sup>54</sup> 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, *que 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)<sup>55</sup> 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 *æquitas sequitur legem*, and cannot establish a different rule of property from that which the law has established. 4. Uses might be assigned by secret deeds between the parties,(x) or be devised by last will and testament;(y) for, as the legal estate in the soil was not transferred by these transactions, no livery of seisin was necessary; \*and, as the intention of the parties was the leading principle in this species of property, [\*331 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 feudal 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

(\*) Bro. Abr. tit. *Feoffm. al uses*, 31. Bacon of Uses, 346,

847.

(\*) Bro. Abr. tit. *Feoffm. al uses*, 40. Bacon, 347.

(\*) 1 Rep. 122.

(\*) 1 Jon. 127.

(\*) Cro. Eliz. 401.

(\*) See page 226.

(\*) 1 And. 37.

(\*) Moor. 684.

(\*) 2 Roll. Abr. 780.

(\*) Bacon of Uses, 312.

(\*) Ibid. 308.

(\*) Stat. 1 Ric. III. c. 1.

(\*) Bro. Abr. *ibid.* 23.

<sup>54</sup> In fact, there was not, nor is there, any method of compelling the king to execute the trust; for no court has jurisdiction over him, (see 1 vol. 242;) and, for this reason, although the use has been transferred into possession by the statute of uses, yet the king shall even now hold the estate discharged of the use; because the statute transfers the use into possession only in cases where the trust could have been enforced in equity before the statute. And not only the king, but the alienee of the crown also, hold the estate thus discharged of the use. *Ante*, vol. 1, p. 242.—ARCHBOLD.

<sup>55</sup> In the second section of the 3d 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 *Cave vs. 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's Cent.* 6, case 36. *Mildmay's case*, 1 Rep 176 2 Roll's Abr. 790.)—CURRY.



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 further 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 subtle disquisitions) deduced from this child of the imagination; when once a departure was permitted from the plain simple rules of property established by the antient law. These principal outlines will be fully sufficient to show 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 \*332] had cause to sue for land knew not against whom to \*bring his action, or who was the owner of it. The wife was defrauded of her thirds; the husband of his curtesy; the lord of his wardship, relief, heriot, and escheat; the creditor of his extent for debt; and the poor tenant of his lease." To remedy these inconveniences, abundance of statutes were provided, which made the lands liable to be extended by the creditors of *cestuy que use*,(g) allowed actions for the freehold to be brought against him if in the actual permanency 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 feudal 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 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 "when any person shall be *seised* of lands, &c., to the use, confidence, or trust \*333] of any other person or body \*politic, the person or corporation entitled 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

(b) Jenk. 190.

(c) 4 Rep. 1. 2 And. 75.

(d) See page 137.

(e) Broc. Abr. tit. *executions*, 90.

(f) Use of the law, 153.

(g) Stat. 50 Edw. III. c. 6. 2 Ric. II. sess. 2, c. 3. 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.

(j) Stat. 1 Ric. III. c. 1.

(k) Stat. 4 Hen. VII. c. 17. 19 Hen. VII. c. 15.

(l) 1 Ric. III. c. 5.

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 purchaser discharged of the use, nor be liable to dower or curtesy on account of the seisin of such feoffee; because the legal estate never rests in him for a moment, but is instantaneously transferred to *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.

\*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 mean while the antient 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,<sup>(n)</sup> or to the use of A. and his heirs till E. shall pay him a sum of money, and then to the use of B. and his heirs.<sup>(o)</sup> Which doctrine, when devised by will were again introduced, and considered as equivalent in point of construction to declaration of uses, was also adopted in favour of *executory devises*.<sup>(p)</sup> But herein these, which are called *contingent* or *springing* uses,<sup>66</sup> differ

(\*) 2 Roll. Abr. 791. Cro. Plz. 483.

(o) Bro. Abr. tit. *Fluffm. ul uses*, 30.

(p) See page 173.

<sup>66</sup> 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. 2dly, *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. 3dly, *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, be

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 forever: (g) 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 executed, 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.

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.<sup>51</sup>

(g) 1 Rep. 134, 138. Cro. Eliz. 439.

(r) Pollexf 78. 10 Mod. 423.

(s) Bro. Abr. tit. *Feoffm. al uses*, 30.

(t) Bacon of Uses, 351.

(w) Ibid. 350. 1 Rep. 120.

(x) See page 327.

(y) Co. Litt 237.

(z) On Uses, 316.

cause 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 settler 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 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 vs Stowel*, 1 Mod. 226, 237. 2 Mod. 207. *Goodtitle vs. Billington*, Doug 758.—CHITTY.

<sup>51</sup> With respect to what shall be said to be a use executed by the statute of 37 Her

But one or two technical scruples, which the judges found it hard to get over, restored it with tenfold increase. They held, in the first place, that "no use could be limited on a use;" (z) and that when a man bargains and sells his land for money, which raises a use by implication to the bargainee, the limitation of

(y) Dyer, 155.

VIII. c. 10, or a trust-estate now not executed, it is held that *where a use is limited upon a 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. Wms. 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 Lord 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 a use executed by the statute, or a bare trust for the wife; and the court held it to be a trust only, and not a use executed by the statute. 1 Vern. 415. And again, in a late case where a devise 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 a 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 vs. 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 Eq. Ca. Abr. 383, 384;) and this decree was affirmed in the house of lords. 3 Bro. C. P. 458. See 3 Bos. & Pul. 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.

\*336] a further 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

(\*) 1 And. 37, 136.

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. Ca. 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 lords Say and Seal *vs.* 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 Vez. 143, S. C. 2 Atk. 246, 570. And it was taken for granted in 2 Vez. 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 *vs.* 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 the consent of the trustees, might make a jointure on his wife, it was held that this was a 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 word "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. 673. 2 Salk. 679. And the same distinction was taken by lord Kenyon in the case of Doe, on the demise of Woolley *vs.* Pickard, Stafford summer assizes, 1797, and by Mr. Justice Lawrence in Jones *vs.* 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

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*.<sup>58</sup> 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)<sup>59</sup>

Of the two more antient 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 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 jurisdiction, have wisely avoided in a great degree those mischiefs which made uses [ \*337 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: the courts now consider a trust-estate (either when expressly declared or resulting by such implication) as

(b) Bacon's Law of Uses, 335. Jenk. 244.  
(c) Poph. 76. Dyer, 369. 2 T. R. 448.  
(d) 1 Eq. Ca. Abr. 383, 384.

(e) 1 Hal. P. C. 248.  
(f) Vaugh. 50. Atk. 591.

assigns, held that A. and C. took as tenants in common. Cro. Car. 230. *Jenkins vs. 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 vs. 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.—CHRITTY.

<sup>58</sup> 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.—CHRISTIAN.

<sup>59</sup> I should be inclined to think that the case, as expressed by the learned judge, would be construed a use executed by the statute. In the authority referred to in 1 Eq. Ca. Abr. 383, the trustees were first to pay legacies and annuities and then to pay over the surplus to a married woman for her separate use. To prevent a trust from being executed by the statute in cases of this kind, it seems necessary that the trustees should have some control and discretion in the application of the profits of the estate,—as to make repairs, or to provide for the maintenance of the *cestuy que trust*. 1 Bea. 75. 2 T. R. 444. Where there is no such special circumstance in the grant, it appears to be equivalent to a direction to the trustees to permit the *cestuy que trust* to take the profits of the estate, which is fully established to be a use executed. 1 Eq. Ca. Abr. 383.

But if it is to permit a married woman to take the rents and profits for her separate use, the legal estate will be vested in the trustees, in order to prevent the husband from receiving the same subject to no control. 7 T. R. 652.—CHRISTIAN

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 purchaser 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,) <sup>60</sup> to forfeiture, to leases, and other encumbrances, 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. <sup>61</sup> 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.

The only service, as was before observed, to which this statute is now con- signed, 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 antient 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*.<sup>62</sup> by which a man, seised of lands, covenants in consideration of

(g) 2 Freem. 43.

(h) 1 Chanc. Rep. 254. 2 P. Wms. 640.

(i) Hard. 494. Burgess & Wheat, Hill. 32 Geo. II. in Canc.

<sup>60</sup> 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.—CHITTY.

<sup>61</sup> 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 connection by blood. *Goodright vs. Wells*, Doug. 771.

Before the statute of uses there was neither dower nor tenancy by the curtesy of a 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.—CHRISTIAN.

But this distinction is accounted for by lord Redesdale in 2 Sch. & Lif. 388; and see 2 Saund. 26, note v.—CHITTY.

The statute 3 & 4 Will. IV. c. 105 gives to widows, whose marriage took place since December 31, 1833, dower out of lands to which their husbands were beneficially entitled in equity for an estate of inheritance.—KERR.

<sup>62</sup> See, in general, 2 Saund. Rep. 42, c. 96, b., *et seq.*, and *id.* index, tit. Covenants. On the authority of *Roe vs. 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 & 1. 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 vs. Faustenatch*. 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

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,<sup>(k)</sup> 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 bargainer, 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;<sup>(l)</sup> or, as it hath been well expressed,<sup>(m)</sup> 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 common-law assurances were calculated to give; to prevent, therefore, clandestine conveyances of freeholds, it was enacted in the same session of parliament, by statute 27 Hen. VIII. c. 16, that such bargains and sales should not enure to pass a freehold, unless the same be made by indenture, and enrolled within six months in one of the courts of Westminster hall, or with the *custos rotulorum* of the county. Clandestine bargains and sales of chattel interests, or leases for years, were thought not worth regarding, as such interests were very precarious, till about six years before:<sup>(n)</sup> which also occasioned them to be overlooked in framing the statute of uses: and therefore such bargains and sales are not directed to be enrolled. But how impossible is it to \*fore-see, and provide against, all the consequences of innovations! This [\*339 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.<sup>(o)</sup> 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 bargainer 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 invests the possession. He therefore, being thus in possession,<sup>33</sup> is capable of receiving a release of the

(\*) Bacon, Use of the Law, 151.

(l) Ibid. 150.

(m) Cro. Jac. 696.

(n) See page 142.

(o) 2 Mod. 252.

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.—CHITTY.

It is not by the words, but by the nature of the instrument, that this and the next species of conveyance—viz., bargain and sale—are to be distinguished; for the words “covenant 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 purchaser. 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, so little are the words “bargain and sell” necessary to it. 1 Prest. Conv. 38.—ARCHBOLD.

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.—CHITTY.

<sup>33</sup> It must be borne in mind that in this 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



freehold 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)<sup>64</sup>

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.<sup>65</sup>

(p) Page 324.  
(q) See Appendix, N° II. §§ 1, 2.  
(r) Co. Litt. 270. Cro. Jac. 604.

(s) Page 335.  
(t) See Appendix, N° II. page xi.  
(u) Co. Litt. 237.

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 ed. 578, note e.—CHITTY.

<sup>64</sup> But the lease for a year is now rarely or ever actually made, as it has been enacted by statute 4 Vict. c. 21, s. 1, that every deed of release which shall be enacted after the 15th of May, 1841, and which shall be expressed to be made in pursuance of this act, shall be as effectual for the purposes therein expressed—and shall take effect as a conveyance to uses or otherwise, and shall operate in all respects, both at law and equity—as if the releasing party or parties who shall have executed the same had also executed in due form a lease for a year, although no such deed shall be executed. And by s. 2, the recital or mention of a lease for a year, executed before the passing of this act, is to be evidence of the execution of such lease for a year. The effect of this act, therefore, is to dispense with the lease for a year; and a release operating by virtue of the act will have the same effect as lease and release. It is to be observed, however, that a lease for a year may still be employed if the parties desire it. Since the statute 8 & 9 Vict. c. 106, the grant has been usually preferred, and is now the assurance most commonly adopted for the conveyance as well of corporeal as of incorporeal hereditaments.—STEWART.

<sup>65</sup> Mr. Ritso, among his other grounds of complaint against Blackstone, states that he does not with sufficient distinctness explain the difference between *droiturel* and *tortious* conveyances.

*Droiturel* conveyances are of the right only, and not of the possession, and are either primary or secondary. Of the first description are all original conveyances of things which lie only in grant and not in livery, and of which no visible possession can be delivered, as advowsons, rents, commons, reversions, and other incorporeal hereditaments. Those of the second class are where there is already such subsisting privity of estate between the parties that any further delivery of possession would be vain and nugatory, as in the case of release, confirmation, and surrender. Conveyances which are thus made can be evidently no other than *droiturel*,—that is to say, they cannot enure to pass more than may be innocently or rightfully conveyed; for the transfer of a right becomes a mere nullity when exercised beyond the subsisting right to transfer: *nemo potest plus juris ad alium transferre quam ipse habet*. On the other hand, all original or primary conveyances which are wrongfully made of things in livery, as of lands or tenements, (of which the corporal possession is made over by the act of livery of seisin, without any reference to the right,) are said to be *tortious*. Thus, if A., tenant in tail, leases to C. for life, remainder to D. in fee, the discontinuance is in fee; for both estates are created by one and the same livery. But if A., having leased to C. for his life, had afterwards granted the reversion to D. in fee, the discontinuance would have been then for life only, and not in fee: for the reversion lies in “grant,” and not in “livery.” And so it is of a bargain and sale enrolled, a lease and release, a covenant to stand seised, and the like. They are all of them *droiturel* or innocent conveyances, because they operate upon the right only, and not by transmutation of the possession, and consequently can convey no more than may be rightfully and lawfully conveyed. Co. Litt. 271, b., 309, b.

Again, if tenant in tail makes a feoffment it is a discontinuance, because the feoffor's

\*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 encumber, lands, and to discharge them again: of which nature are obligations or bonds, recognizances, and defeazances upon them both.<sup>66</sup> [\*340

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.<sup>67</sup> How it affects the personal property of the obligor will be more properly considered hereafter.<sup>68</sup>

If the condition of a bond be impossible at the time of making it, or be to do a thing contrary to some rule of law that is merely positive, or be uncertain, or insensible, the condition alone is void, and the bond shall stand single, and unconditional; for it is the folly of the obligor to enter into such an obligation, from which he can never be released. If it be to do a thing that is *malum in se*, the obligation itself is void: for the whole is an unlawful contract, and the obligee shall take no advantage from such a transaction. And if the condition be possible at the time of making it, and afterwards \*becomes impossible by the act of God, the act of law, or the act of the obligee himself, there [\*341 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 the 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

(v) See Appendix, N<sup>o</sup> III. page xiii.

(w) Co. Litt. 206.

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estate is created by livery of seisin, and is of a greater quantity of estate than can be lawfully carved out of an estate-tail. But if the tenant in tail is disseised, and releases in fee to the disseisor, albeit the fee is not his to release, yet it is no discontinuance; for there is no transmutation of the possession or freehold by the release, but only a transfer of the right. Co. Litt. 42, a., 212, a. Ritso's Introd. 102.—SHARSWOOD.

<sup>66</sup> A bond is here erroneously classed among deeds which charge lands. It has no such effect at law, either before or after the death of the obligor. It merely creates a debt which binds the heirs of the obligor (if heirs are named in the instrument) to the extent of the value of the real assets descended to them; but it does not bind the lands themselves, either in the hands of the obligor, or in those of his heirs, or of a purchaser from either of them. In equity, indeed, under the doctrine of tacking and after the death of the obligor, a bond may have the effect of imposing an additional charge upon land already charged.—SWEET.

<sup>67</sup> 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 encumbrance 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* purchaser. Bull. N. P. 175.—CHRISTIAN.

<sup>68</sup> Obligees may now, under the statute 11 Geo. IV. and 1 W. IV. c. 47, maintain an action of debt against the heirs or devisees of obligors, though such heirs or devisees may have aliened the lands or hereditaments descended or devised to them before process sued out against them; and they are answerable for the bond debts of their ancestors or devisors to the value of the land so descended or devised. And now, by the 3 and 4 W. IV. c. 104, it is enacted that, when any person shall die seized of any real estate, whether freehold or copyhold, the same shall be assets for the payment of all his just debts, as well due on simple contract as on specialty.—STEWART.

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 & 5 Anne, 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.<sup>69</sup>

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 assizes, to keep the peace, to pay a debt, or the like. It is in most respects like another bond: the difference being chiefly this: that the bond is the creation of a fresh debt or obligation *de novo*, the recognizance is an 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," with 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 \*342] deed, though the effects of it are greater than a \*common obligation,<sup>70</sup> being allowed a priority in point of payment, and binding the lands of the cognizor, from the time of enrolment on record. (z)<sup>71</sup> 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 shown to be a charge upon real property.

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 disencumbers 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

(x) 2 Keb. 553, 555. Salk. 596, 597. 6 Mod. 11, 60, 101.

(y) Bro. Abr. tit. *recognizance*, 8-14.

(z) Stat. 29 Car. II. c. 3. See page 161.

(a) See page 160.

(b) Co. Litt. 237. 2 Saund. 47.

<sup>69</sup> 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. 1 Burr. 434. 4 Burr. 1963. And in some cases, under particular circumstances, even a less time may found a presumption. 1 T. R. 271. Cowp. 109. 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.—ARCHBOLD.

<sup>70</sup> 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 vs. Hibbins, Cro. Eliz. 793. Searle vs. Lane, 2 Freem. 104. S. C. 2 Vern. 89. Perry vs. Phelps, 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 vs. Earl of Oxford, 3 P. Wms. 401, n. Joseph vs. Mott, Prec. in Cha. 79. Morrice vs. Bank of England, 3 Swanst. 577.—CHITTY.

<sup>71</sup> 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 speciality. Bothomly vs. 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 vs. Kendrick, 2 Vern. 234.—CHITTY.

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 purchasers 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 antient feudal 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 encumbrances, 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 stars or mortgages made to \*Jews, in the *capitula de Ju-* [ \*343 *Jais*, 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.<sup>72</sup>

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*<sup>1</sup> are, especially of late years, become a very com-

(a) Hickes, *Dissertat. Epistol. 9.*

(d) Dalrymple on Feodal Property, 262, &c.

(e) Stat. 2 & 3 Anne, c. 4. 6 Anne, c. 35. 7 Anne, c. 20

8 Geo. II. c. 6.

<sup>72</sup> 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.—CHRISTIAN.

<sup>1</sup> See, in general, Com. Dig. Parliament, R. 7. Bac. Abr. Statute, F. Vin. Abr. 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 and 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

mon 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 ordinary courts of justice. In these, or other cases of \*the like kind, \*345] the transcendent power of parliament is called in, to cut the Gordian knot; and by a particular law, enacted for this very purpose, to unfetter an estate; to give its tenant reasonable powers; or to assure it to a purchaser, against the remote or latent claims of infants or disabled persons, by settling a proper equivalent in proportion to the interest so barred.<sup>2</sup> 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,<sup>(a)</sup> 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,<sup>(b)</sup> 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.<sup>(c)</sup>

(a) Lord Clar. Contin. 162.

(b) *Ibid.* 163.

(c) Co. 133. Godb. 171.

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 vs. White*, 4 Gwill. 1387. A private act may be relieved against if obtained upon fraudulent suggestions, (2 Bl. Com. 346. 2 Harg. per argum. 392. Canc. 8, 1773. *M'Kenzie vs. Stuart*, Dom. Proc. 1754. *Biddulph vs. 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. 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.—CHITTY.

<sup>2</sup> 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.*—CHITTY.

\*A law thus made, though it binds all parties to the bill, is yet looked upon rather as a private conveyance, than as the solemn act of the legislature. It is not therefore allowed to be a *public*, but a mere *private* statute; it is not printed or published among the other laws of the session; 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)<sup>3</sup> 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 forever preserved as a perpetual testimony of the conveyance or assurance so made or established.<sup>4</sup> [\*316]

(<sup>3</sup>) Richardson vs. Hamilton, *Canc.* 8 Jan. 1773. McKen-  
zie vs. Stuart, *Dom. Proc.* 13 March, 1754.

(<sup>4</sup>) 4 Rep. 12.

<sup>3</sup> It is easy enough to understand that, as to private acts, the courts adopt the construction that no merely general language shall extend to affect the right or title of strangers to the act, nor receive an interpretation which shall make it unreasonable or unjust. It is not so easy to understand how any act of king, lords, and commons, public and private, can be declared void because contrary to reason and law. See vol. 1, p. 91, and note. The authority here relied on is Lord Cromwell vs. Denny, 4 Rep. 12, which was an action of *scandalum magnatum* upon the statute 2 Ric. II. c. 5. The plaintiff in his count had misrecited the statute, so as to make it provide that whoever should act contrary to the prohibitions of the statute should incur the penalty. The judges thought that this meant that the innocent should be punished, and arrested the judgment on account of the misrecital. It was argued that the statute 2 Ric. II. c. 5 was a private act, of which the judges could not take notice without pleading, and they must receive it as recited. But, in answer to this, it was resolved by the court that the statute 2 Ric. II. c. 5 was not a private but a public statute. This resolution entirely disposed of the case. It is true, another resolution is added, that if it were a private act, and such as alleged by the plaintiff, it would be contrary to law and reason, and therefore void. This second resolution, founded on a mere supposition, can only be regarded as a mere extrajudicial dictum. There is no case in which an act of parliament, public or private, has ever been declared void as contrary to law and reason. The act itself must be the highest evidence of what is law; and it is plainly not competent for any court to set up its reason against the reason of the highest authority in the land. No man can doubt the power of parliament to repeal or alter Magna Charta; and if they can alter the constitution of either house, or change the succession of the crown, as they have done, surely their power over a mere private estate must be without limit. In the United States, the bills of rights contained in the various State constitutions impose real and effective limitations upon legislation; and an act may be declared void, not because it is against reason, but because it is in violation of the constitution. In most, if not all, these bills of rights is contained the provision that no man can be deprived of his property unless by the judgment of his peers or the law of the land; and by "law of the land" is meant some general law establishing a rule for the community at large. Property can only be taken for a public use, and that upon compensation made. It is not competent to the legislature to take the property of A. and give it to B. *Hoke vs. Henderson*, 4 Devereux, N. C. Rep. 1 *Jones's Heirs vs. Perry et al.* 10 Yerger, 59. In the matter of John and Cherry Streets, 19 Wendell, 659. *Wilkinson vs. Leland et al.* 2 Peters, 627. *Norman vs. Heist*, 5 W. & S. 171. Private acts of the legislature are, however, frequently obtained to enable trustees to convert real into personal property, or, in general, to change investments; and such acts have been held to be constitutional and valid. *Norris vs. Clymer*, 2 Barr, 277. In these cases a change of the subject-matter, for the benefit of all interested, is effected, but no change in the right or title of any of the parties. Whenever such a change has been attempted, the act has been declared unconstitutional and void. *Norman vs. Heist*, 5 W. & S. 171. *Bumberger vs. Clipping*, 5 W. & S. 311. *Rogers vs. Smith*, 4 Barr, 93. *Brown vs. Hummel*, 6 Barr, 86.—SHARSWOOD.

<sup>4</sup> A recent statute (19 & 20 Vict. c. 120) will probably render private acts of parliament much less frequent than they have hitherto been. This act empowers the court of chancery, with the consent of certain parties interested, to authorize leases and sales of settled estates. When there is a tenant in tail of full age, the consent of such tenant in tail, and the first of them, if more than one, and of all persons in existence having beneficial interests prior to the estate-tail, and of all trustees having interests in behalf of unborn children prior to the estate-tail, is necessary. In all other cases, all persons whatsoever having beneficial interests under the settlement, and trustees having interests in behalf of unborn children, are required to consent. An order may, however, be made without consent, saving the rights of non-consenting parties. No application can be made under the statute when a similar application has been already rejected by parliament; nor may

II The *king's grants* are also matter of public record. For as St. Germyon says,<sup>(f)</sup> the king's excellency is so high in the law, that no freehold may be given to the king, nor derived from him but by matter of record. And to this end a variety of offices are erected, communicating in a regular subordination one with another, through which all the king's grants must pass, and be transcribed and enrolled; that the same may 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 aught besides, are contained in charters, or letters-*patent*, that is, open letters, *literæ patentæ*: 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*, *literæ clausæ*, 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*: which is prepared by the \*347] 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.*"<sup>(g)</sup> 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.*"<sup>(h)</sup> 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.<sup>(i)</sup> 2. A subject's grant shall be construed to include many things, besides what are expressed, if necessary for the operation of the grant. Therefore, in a private grant of the profits of land for one year, free ingress, egress, and regress, to cut and carry away those profits, are also inclusively granted:<sup>(j)</sup> and if a feoffment of land was made by a lord to his villein, this operated as a manumission;<sup>(k)</sup> 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 \*348] grants land to an alien, it operates nothing; for \*such grant shall not also enure to make him a denizen, that so he may be capable of taking

(f) Dr. and Stud. b. 1, d. 8.

(g) 9 Rep. 18.

(h) Ibid. 2 Inst. 555.

(i) Finch. L. 100. 10 Rep. 112

(j) Co Litt. 56.

(k) Litt. 2 206.

the court authorize any act which would not have been authorized by the settler. The working of this act remains to be seen. In many of the more usual cases of difficulty arising from the accidental omission in settlements of powers of sale or of powers to grant leases, the statute may be found to provide a simple and inexpensive remedy.—KERR.

<sup>5</sup> But now, under the statute 14 & 15 Vict. c. 82, which abolished the offices of the clerk of the signet and privy seal, a warrant under the sign manual may be addressed to the lord chancellor, commanding him to cause letters-*patent* to be passed under the great seal. This warrant must be prepared by the attorney or solicitor general, setting forth the proposed letters-*patent*, and must be countersigned by one of the principal secretaries of state, and sealed with the *privy seal*.—KERR.

by grant.(l) 3. When it appears, from the face of the grant, that the king is mistaken, or deceived, either in matter of fact or matter of law, as in case of false suggestion, misinformation, or misrecital of former grants; or if his own title to the thing granted be different from what he supposes; or if the grant be informal; or if he grants an estate contrary to the rules of law: in any of these cases the grant is absolutely void.(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 grants 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.

III. We are next to consider a very usual species of assurance, which is also of record; viz., a *fine* of lands and tenements. In which it will be necessary to explain, 1. The nature of a fine; 2. Its several kinds; and 3. Its force and effect.

1. A fine is sometimes said to be a feoffment of record:(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 thereof in a court of record, however fictitious, inducing [ \*349 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 Angliæ providetur, vel est, aliqua securitas major vel solennior, per quam aliquis statum certiores habere possit, neque ad statum suum 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 Henry 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, commences an action or suit at law against the other, \*generally an action of covenant,(v) by suing out a writ of *præcipe*, called a writ of covenant:(w) [ \*350 the foundation of which is a supposed agreement or covenant, that the on

(l) Bro. Abr. tit. *Patent*, 62. Finch, L. 110.

(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.

(s) L. 8, c. 1.

(t) L. 5, l. 5, c. 28.

(u) Plowd. 369.

(v) A fine may also be levied on a writ of *mesne*, of *war rantia chartæ*, or *de consuetudinibus et servitiis*. Finch, l. 278.

(w) See Appendix, No. IV. § 1.



shal' 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 antient 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 license, 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 antient 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 deforciant (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, \*351] the party levying the fine is called the *cognizor*, and he to whom it is levied the *cognizee*. This acknowledgment must be made either openly in the court of common pleas,<sup>6</sup> or before the lord chief-justice of that court; or else before one 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*,<sup>7</sup> 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.

(x) 2 Inst. 511.

(y) Appendix, No. IV. § 2. In the times of strict feudal 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. l. 31.

(z) 5 Rep. 39. 2 Inst. 511. Stat. 32 Geo. II. c. 14.

(a) Appendix, No. IV. § 3.

(b) Comb. 71.

(c) Appendix, No. IV. § 4.

<sup>6</sup> 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 & 35 Hen. VIII. c. 26. 43 Eliz. c. 15. 2 & 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's 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, 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 King's Bench, it is voidable only, not void. Co. Read. 8. 9 Vin. Abr. Fine, 217.—CHITTY.

<sup>7</sup> 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.—CHITTY.

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, "*hæc 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.<sup>8</sup>

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,<sup>9</sup> by 27 Edw. I. \*c. 1, the note of the fine shall be openly read [ \*352 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 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 endorsed 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 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. [ \*353 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

(d) Ibid. § 5.

(e) Appendix, No. IV. § 6.

(f) This is that sort of which an example is given in the Appendix, No. IV.

<sup>8</sup> 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.—CHITTY.

<sup>9</sup> 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. CHITTY.

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 a 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.<sup>10</sup> But, in general, the first species of fine, *sur cognizance de droit come ceo*, &c., is the most used, as it conveys a clean and absolute freehold, and gives the cognizee a seisin in law, without 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 antient common law, with respect to this \*354] point, \*is very forcibly declared by the 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 make 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.<sup>11</sup>

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,

(g) Moor. 622.

(h) West. Symb. p. 2, § 95.

(i) West. p. 2, § 66.

(j) Salk. 340.

(k) *Sur la pie*, as it is in the Cotton MS., and not *pur le pie*, as printed by Berthelet, and in 2 Inst. 511. There were then four methods of claiming, so as to avoid being con-

cluded 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.

<sup>10</sup> The estate so rendered makes the conusor a new purchasor as much as a feoffment and refoffment at common law. Thus, if before the fine the estate descended *ex parte materna*, it is afterwards descendible in the paternal line. 1 Salk. 337. Dy. 237, b. Co Litt. 316.—CHRISTY.

<sup>11</sup> 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.—CHRISTIAN.

in order to unfetter the more easily the estates of his powerful nobility, and lay \*them more open to alienations; being well aware that power will always accompany property. But doubts having arisen whether they [\*355 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:<sup>12</sup> 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 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*.

(\*) See statute 11 Hen. VII. c. 20.

<sup>12</sup> The operation of a fine levied by a tenant in tail, when he has the reversion in himself and there are no intermediate remainders, is by letting the reversion into possession; but, if he suffers a recovery in the like case, it operates to defeat the reversion. As, for example, B. was tenant in tail by descent, with reversion to himself in fee of certain lands, of which A. (his ancestor) had granted leases, with covenants for further renewal. Now, in the first place, although the tenant in tail is empowered under the enabling statute (32 Hen. VIII. c. 28) to grant leases for twenty-one years or three lives, pursuant to the directions of the statute, he has plainly no power, either by the statute or by the common law, to bind the issue in tail to a further renewal; and, consequently, whatever covenants A. might have made to that effect, they would not be binding upon the heir in respect of the estate-tail. Secondly, with respect to the reversion in fee, which also descended at the same time from A. to B., this was *hereditas infructuosa* as long as the estate-tail subsisted; and although the covenants of the ancestor are said to descend as an *onus* upon the heir, whether he inherits any estate or not, yet they lie dormant, and are not compulsory until he has assets by descent from or through that same ancestor. But a reversion or a remainder expectant upon an estate-tail is not assets, because it is always in the power of the tenant in tail in possession to bar it at his pleasure. Let us then suppose that, under these circumstances, B. levies a fine, with proclamations, under the statute 4 Hen. VII. c. 24, and 32 Hen. VIII. c. 36, (which is said to be the mode usually resorted to in such cases when there are no intervening remainders,) for the sake of quieting the possession, or in order to prepare for making a new settlement. Now, by the operation of the fine, in the first instance, the conusor takes a fee-simple qualified, determinable upon the death and failure of issue of the tenant in tail, and which is afterwards reconveyed by the deed to lead the uses of the fine to B. himself, who consequently becomes tenant of the fee-simple qualified, together with the old reversion to himself in fee-simple absolute. But it is a maxim in law that, when two estates in succession are vested in the same person, the less estate always merges in the greater; and though an estate-tail does not merge, because of the statute *de donis*, which would otherwise be of no effect, there is no such exception with respect to the qualified or base fee extracted out of the estate-tail, and which therefore instantly merges in the old reversion in fee-simple; and, consequently, the *hereditas infructuosa* being now reduced into possession, the heir has assets by descent from the same ancestor who entered into the covenants, and is of course bound by those covenants. And so it was adjudged in the case of *Kellow vs. Rawdon* (Carth. 129) the reversion in fee expectant upon an estate-tail in possession was not assets; but no sooner was the estate-tail become extinct, and the reversion vested in possession in the heir by the operation of the fine, than it thereupon became assets and liable to all the encumbrances of the ancestor.

We have here, then, the principle upon which the fine operates to let the reversion into possession and to make the heir chargeable in such case, in respect of assets descended, who was not so before. But in the case of a recovery it is otherwise. Why? Because the estate conveyed by the recovery is that of fee-simple absolute, of which the recoveror acquires seisin, not by compromise, as in the case of a fine, but by adjudication of an adverse possession grounded upon an older and better title; and consequently the operation of the recovery is to defeat the reversion, together with all the mesne estates and encumbrances, precisely in the same manner as if the recoveror had actually recovered in a really adverse suit. *Ritso's Introd.* 204.—SHARSWOOD.

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,) it is therefore the usual and almost the only safe method whereby she can join in the sale, settlement, or encumbrance, of any estate.<sup>13</sup>

*Privies* to a fine are such as are any way related to the parties who levy the fine, and claim under them by any right of blood or other right of representation. Such as are the heirs general of the cognizor, the issue in tail since the statute of Henry the Eighth, the vendee, the devisee, and all others who must make title by the persons who levied the fine. For the act of the \*356] 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 Anne, 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.<sup>14</sup>

(p) 3 Rep. 87.

(q) Co. Litt. 372.

<sup>13</sup> The uses of a fine, in the modern practice, are, first, to extinguish dormant titles which are barred after five years' non-claim by the statutes 18 Edw. I. and 4 Hen. VII. c. 24. Or, secondly, to bar the issue in tail under the statutes 4 Hen. VII. c. 24, and 32 Hen. VIII. c. 36. Or, thirdly, to pass the estates of *femes covertes* in the inheritance or freehold of lands and tenements. In the last instance, the fine is supposed by Blackstone to be binding upon the *feme covert*, because she is privately examined as to her voluntary consent. But, if that were indeed the principal reason, any other mode of conveyance to which the same form of private examination were superadded would be as binding as a fine. It seems that the fine is binding in such case because it is the conclusion of a real action commenced by *original v rit.*—without which preliminary, even at this day, a fine would be a nullity. In the ancient practice, the recovery of the estate of the wife in a real action was held to be binding notwithstanding the coverture. Upon the same principle, the fine is held to be binding in the present instance, because of the supposed depending of a real action: (of which the fine is an amicable composition by agreement,) and not because of the form of private examination, which is only a circumstance in the mode of levying the fine, and a merely secondary incident introduced to prevent compulsion. And, although fines and recoveries are now no more than *feigned* proceedings, or, as they are usually called, *common assurances*, yet, in point of bar and conclusion, they are still governed by the same principles as if they were really adverse suits. Co. Litt. 121, a., n. Ritso's Jntrod. 204, n.—SHARSWOOD.

<sup>14</sup> 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, 242. 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

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 remainderman or reversioner,<sup>(r)</sup> 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,<sup>(s)</sup> the estate is forever barred by it. Yet where a *stranger*, whose presumption cannot be thus punished, officiously interferes in an estate which in no wise belongs to him, \*his fine is of no effect, and may at any time [ \*357 be set aside (unless by such as are parties or privies thereunto)<sup>(t)</sup> 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.<sup>(u)</sup> 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,<sup>(v)</sup> and create a new freehold by disseisin.<sup>35</sup> 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.<sup>16</sup>

(r) Co. Litt. 251.

(s) 2 Lev. 52.

(t) Hob. 334.

(u) 5 Rep. 123. Hardr. 401.

(v) Hardr. 402. 2 Lev. 52.

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 vs. Tancred*, Vent. 241. See also 3 Co. 78, b. Or if A. have two *distinct* estates in the same land, as an estate for 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.—CHITTY.*

A fine and five years' non-claim are conclusive evidence of title in the cognizee against all persons not under a legal disability; and a fine alone is sufficient to support an action of ejectment against a person who has entered during the five years without title. *Jackson vs. Smith*, 13 Johns. 426. *Roseboom vs. Van Vechten*, 5 Denio, 414.—*SHARSWOOD.*

<sup>15</sup> 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 vs. Vincent*, (cited in *Lord Pomfret vs. 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 remainderman, 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.—*CHITTY.*

<sup>16</sup> 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 remainderman may enter. *Mashell vs. Clarke*, 2 Lord Rym. 778. *Doe vs. Whitehead*, 3 Burr. 704. *Doe vs. Rivers*, 7 T. R. 276. *Doe vs. Wichelo*, 8 P. 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 al'

IV. The fourth species of assurance, by matter of record, is a *common recovery*. Concerning the original of which it was formerly observed,<sup>(w)</sup> 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 of 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 \*358] is not yet acquainted \*with the course of judicial proceedings; which cannot be thoroughly explained till treated of at large in the third book of these commentaries. However, I shall endeavour to state its nature and progress, as clearly and concisely as I can; avoiding, as far as possible, all technical terms and phrases not hitherto interpreted.

Let us, in the first place, suppose David Edwards<sup>(x)</sup> 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 *præcipe 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.<sup>(y)</sup> The subsequent proceedings are made up into a record or recovery-roll,<sup>(z)</sup> 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, \*359] who is now the recoveree; \*and Edwards has judgment to recover of Jacob Morland lands of equal value, in recompense for the lands so warranted by him, and now lost by his default; which is agreeable to the doctrine of warranty mentioned in the preceding chapter.<sup>(a)</sup> This is called the recompense, or *recovery in value*. But Jacob Morland having no lands of his own, being usually the crier of the court, (who, from being frequently thus vouched, is called

(w) Pages 117, 271.

(x) See Appendix, No. V.

(y) § 1.

(z) § 2.

(a) Page 301.

the encumbrances 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. 5 T. R. 103. 1 Cru. 274. A recovery suffered by any tenant in tail lets in all the encumbrances 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. Fig. 120. 2 Cru. 287.—CHRISTIAN.

A person holding land by deforcement cannot levy a fine so as to affect or bar a stranger to it. *Lion vs. Burtris*, 20 Johns. 483.—SHARSWOOD.

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 further 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 *præcipe* 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.<sup>17</sup>

(b) See Appendix, page xviii.

(c) Bro. Abr. tit. *Tail*, §2. Plowd. 8.

<sup>17</sup> Mr. Ritso has the following note upon the distinction between single and double voucher:—

“In the case of a recovery with single voucher, supposing the *præcipe* upon which the recovery is grounded to be brought immediately against the tenant in tail himself, who appears and vouches over the common vouchee to warranty, it is then the estate-tail of which he is actually seised at the time which is defeated; and, consequently, remainders and reversions, together with all latent droits and interests, are not barred. Secondly, if the tenant in tail levies a fine—as he usually does—preparatory to the recovery, now, the estate-tail being thus divested by the operation of the fine, the recovery which is had thereon is no longer of the old fee-tail, but of the new fee-simple which has been extracted out of it. In this case, however, as well as in the former, a sufficient recovery cannot be had with single voucher, but only with double voucher at least, though not exactly for the same reason; for in the former case, in which the recoveree or tenant to the *præcipe* was actually seised at the time of an estate-tail, the recovery was necessarily of that estate and nothing more; but in the latter case, in which the estate-tail was previously divested or discontinued by the fine and turned to a droit, the recoveree or tenant to the *præcipe* had a fee-simple, the recovery of which is good against him by way of estoppel, (Co. Litt. 352, a.,) but upon his death may be avoided by the issue by defeating the discontinuance under which it was created. As, for example, when the tenant in tail levies a fine, it operates in the first instance as a discontinuance. Suppose, then, the estate created under the discontinuance to be immediately reconveyed to the tenant in tail himself, who thereupon suffers a recovery. Now, it is clear that this recovery is not of the estate-tail, but of the estate created under the discontinuance. By the same rule, then, if the heir in tail defeats the discontinuance, (which he may well do by action, though not by entry,) the discontinuance being defeated, the tortious fee simple which the discontinuance gave rise to is necessarily determined, and consequently the recovery avoided. Co. Litt. 389, a. But when the tenant in tail is brought in as vouchee to the warranty, as in the case of a recovery with double voucher, the heir is then barred by warranty, and so are all they in remainder or reversion. For the law always supposes, upon a principle of equity, that the first vouchee recovers other lands of equal value against the second vouchee, which descend in the same course of inheritance as the estate passed by the recovery would have descended. Upon this presumption of law, which is uniformly admitted in order to give effect to common recoveries, the warranty of the ancestor not only binds the heir and bars every latent right and interest he may have in the lands recovered, but also defeats, at the same time, the remainders over. But where the ancestor has entered into no such warranty (with double voucher) there is evidently no bar to the heir so as to preclude him from his latent droit in tail, which is *above* the recovery. And so, in all cases where there are several and distinct



\*360] This supposed recompense in value is the reason why the issue in tail is held to be barred by a common recovery. For if the recoveree should 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* remaindermen and reversionsers; 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 forever, the remainders or reversions expectant on the determination of such an estate-tail can never take place.<sup>18</sup>

To such awkward shifts, such subtle 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 unriveting the fetters of estates-tail, which were attended with a legion of mischiefs to the commonwealth: but, while we applaud the end, we cannot 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 fettered inheritances are now generally seen \*and allowed, \*361] 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.

(d) Dr. and St. b. 1, Dial. 26.

(e) Of Com. Recov. 13, 14.

(f) See page 376.

(g) See page 236.

estates passed by the recovery, it is necessary that the parties should be all severally vouched to warranty in order to insure a good title." Ritso, Introd. 207.—SHARSWOOD.

<sup>18</sup> Fines and recoveries are now considered as mere forms of conveyances or common assurances, the theory and original principles of them being little regarded. Chief-justice Willes has declared that "Mr. Pigot has confounded himself, and everybody else who reads his book, by endeavouring to give reasons for, and explain, common recoveries. I only say this," he adds, "to show 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.—CHRISTIAN.

2. The *force* and *effect* of common recoveries may appear, from what has been said, to be an absolute bar not only of all estates-tail, but of remainders and reversions expectant on the determination of such estates. So that a tenant in tail may, by this method of assurance, convey the lands held in tail to the recoveror, his heirs and assigns, absolutely free and discharged of all conditions and limitations in tail, and of all remainders and reversions. But by statute 34 & 35 Hen. VIII. c. 20, no recovery had against tenant in tail, of the king's gift, whereof the remainder or reversion is in the king, shall bar such estate-tail, or the remainder or reversion of the crown. And by the statute 11 Hen. VII. c. 20, no \*woman, after her husband's death, shall suffer a recovery of lands settled on her by her husband, or settled on her husband and her by any of his ancestors.<sup>19</sup> And by statute 14 Eliz. c. 8, no tenant for life, of any sort, can suffer a recovery, so as to bind them in remainder or reversion. For which reason, if there be tenant for life, with remainder in tail, and other remainders over, and the tenant for life is desirous to suffer a valid recovery; either he, or the tenant to the *præcipe* by him made, must *vouch* the remainderman in tail, otherwise the recovery is void; but if he does vouch such remainderman, 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 *præcipe*, it is as effectual to bar the estate-tail as if he himself were the recoveree.<sup>(h)</sup><sup>20</sup>

In all recoveries it is necessary that the recoveree, or tenant to the *præcipe*, as he is usually called, be actually seised of the freehold, else the recovery is void.<sup>(i)</sup> 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 fabulæ*, 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 *præcipe*, is removed by the provisions of the statute 14 Geo. II. c. 20, which enacts, with a retrospect and conformity to the antient rule of law,<sup>(j)</sup> 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 *præcipe*;—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 *præcipe* and declare the uses of the recovery shall, \*after a possession of twenty years, be sufficient evidence, on behalf of a purchaser for valuable consideration, that such recovery was duly suffered. And this may suffice to give the student a general idea of common recoveries, the last species of assurance by matter of record. [ \*362 [ \*363

Before I conclude this head, I must add a word concerning deeds to *lead*, or to *declare*, the *uses* of fines, and of recoveries. For if they be levied or suffered without any good consideration, and without any uses declared, they, like other conveyances, enure only to the use of him who levies or suffers them.<sup>(k)</sup> And

(h) Salk. 571.  
(i) Pigot, 28.

(j) Pigot, 41, &c. 4 Barr. I. 115.  
(k) Dyer, 18.

<sup>19</sup> But the act does not prevent her levying a fine jointly with her husband, or after his death with the consent of the remainderman, such consent appearing on record or by deed enrolled. Cro. Jac. 474. Cruise on Recov. 160.—CHITTY.

<sup>20</sup> If a tenant in tail, to whom the estate has descended *ex parte maternâ*, 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.—CHRISTIAN.

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 designations is very often expedient,) unless their force and effect were subjected to the direction of other more complicated deeds, wherein particular uses can be more particularly expressed. The fine or recovery itself, like a power once gained in mechanics, may be applied and directed to give efficacy to an infinite variety of movements in the vast and intricate machine of a voluminous family settlement. And if these deeds are made previous to the fine or recovery, they are called deeds to *lead* the uses; if subsequent, deeds to *declare* them. As if A., tenant in tail, with 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 this \*364] 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.<sup>(1)</sup> 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 Anne, 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.<sup>21</sup>

(1) This doctrine may perhaps be more clearly illustrated by example. In the deed or marriage settlement, in the Appendix, N<sup>o</sup> 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, 167) that, in order to make a good tenant of the freehold or tenant to the *præcipe* 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 *præcipe*, 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 page viii.); and in consequence thereof the fine and recovery are had and suffered (N<sup>o</sup> IV. and N<sup>o</sup> V.) of which this conveyance is a deed to *lead* the uses.

<sup>21</sup> Fines and recoveries continued, however, to flourish in unabated exuberance till the reign of William IV., when a strong impulse in favour of law-reform was communicated to the legislature. Among the many acts passed at the commencement of that reign having this object in view, none has been found more successful in operation, or has obtained greater credit as a triumph of legislative skill, than the Fines and Recoveries Act, (3 & 4 W. IV. c. 74,) of which I shall now proceed to give an account.

The first enactment is that after the 31st of December, 1833, no fine shall be levied or recovery suffered except when the preliminary proceedings necessary for these purposes had been before that day actually commenced. The statute next provides for the fulfilment of covenants entered into previous to the day specified for the levying of fines and suffering recoveries, and by a legislative fiat heals all errors and defects in those already completed, thus drying up at once a prolific source of doubts and difficulties which formerly encumbered the titles of estates. It also declares that all warranties of lands made by tenants in tail after December 31st, 1833, shall be absolutely void against the issue in tail and those in remainder.

The ground being thus, as it were, cleared, a general enabling clause follows, enacting

## CHAPTER XXII.

## OF ALIENATION BY SPECIAL CUSTOM.

WE are next to consider assurances by special custom, obtaining only in particular places, and relative only to a particular species of real property. This therefore is a very narrow title; being confined to copyhold lands, and such customary estates as are holden in antient demesne, or in manors of a similar

that after the 31st December, 1833, (the day named for the cessation of fines and recoveries,) every actual tenant in tail, whether in possession, remainder, contingency, or otherwise, shall have full power to dispose of the lands entailed either for a fee-simple absolute, or any less estate, as against all persons claiming either under the entail or in remainder or reversion, including the crown, saving the rights of all persons having estates prior to the estate-tail so disposed of, and all others except those against whom the disposition is by the act authorized to be made. A similar power of disposition, as against remaindermen or reversioners, is given to the tenant in tail, whose estate has been converted into a base fee, so as to enlarge such base fee into a fee-simple absolute.

Thus is the tenant in tail, whether actual or one whose estate has been converted into a base fee, placed in most respects on a par with the tenant in fee-simple, as far as disposing power is concerned. But his power, as we shall now see, is attended with certain limitations. For where there is in existence any estate for years determinable on the dropping of a life or lives, or any greater estate (not being an estate for years) prior to the estate-tail, and created by the same settlement as created the entail, the consent of the owner of such prior estate, or the first of such owners, if more than one, is made necessary to enable the tenant in tail (unless he be entitled to the immediate reversion expectant upon his own estate-tail) to make a complete disposition of the fee. Without such consent he can but bar his own estate-tail, converting it into a base fee, and cannot bar those in remainder. The person whose consent is thus made requisite is called by the act the protector of the settlement; and he is endowed with the most absolute discretion as to giving or refusing his consent. He is not bound by any agreement which he may have entered into to withhold his consent, nor is his office to be treated as a trust; so that no court of equity can control or interfere with him, whether to restrain or compel his consent. Under the old system of recoveries, a check similar to that which is now secured by the office of protector arose from the necessity of obtaining the concurrence of the person entitled to the immediate freehold prior to the estate-tail, in order to make a tenant to the *præcipe* or writ of entry: this was found to operate in restraint of imprudent alienation, and to favour the retention of estates in one family through a succession of generations. The new plan has this advantage over the old. The owner of the prior estate is now only a *consenting*, not a *conveying*, party: he may therefore concur in barring the estate without affecting the powers or interests incident to his own estate, and without letting in the encumbrances of the remainderman, which in some cases was a consequence of the old system.

Having imparted a general disposing power, under such conditions as we have seen, to the tenant in tail, the statute next enacts that the disposition shall be effected by some one of the assurances (not being a will) by which the same disposition might have been made if the tenant in tail had been tenant in fee-simple. But such disposition (except the land be of copyhold tenure) must be made or evidenced by deed; and no disposition resting merely in contract, notwithstanding it be evidenced by deed, shall be good under the act, either at law or in equity. In this respect, therefore, as under the old law, the heir in tail and remainderman are more favoured than the heir-at-law of the tenant in fee-simple; whom the ancestor's contract binds, and whom he may bar by his will.

No assurance will have any operation under the act (except a lease at rack-rent for less than twenty-one years) unless enrolled in chancery within six calendar months after its execution. The consent of the protector may be given by the same deed, or by a separate deed, provided it be executed on or before the day when the disentailing deed is executed; and the separate consenting deed must be likewise enrolled at or before the time when the other deed is enrolled. A tenant in tail of lands held by copy of court-roll, if his estate be a legal one, and not merely an estate in equity, must dispose of his lands by surrender in the usual way. If, however, his estate be but an equitable one, he may dispose of it either by surrender or by deed: and, if by deed, such deed must be entered on the court-rolls, as must also the deed by which the protector (if there be one) consents to the disposition. But if the disposition be made by surrender, the pro

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 seignior, 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.<sup>1</sup> 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; \*366] and the like. The process in most manors is, that \*the tenant comes to the steward, either in court, (or, if the custom permits, out of court,) or else to two customary tenants of the same manor, provided there be also a cus-

(c) Litt. § 74.

(b) Moor. 637.

tor may give his consent to the person taking the surrender. The statute further enables the commissioners of bankruptcy to dispose by deed of the lands of a bankrupt tenant in tail to as large an extent as the bankrupt himself might have done.

One of the purposes to which fines were formerly applied was to pass the estates and interests of married women, which could not, on account of the incapacity arising from coverture, have been otherwise effectually bound. The act, therefore, provides that it shall be lawful for every married woman (in every case except that of being tenant in tail, which is otherwise provided for by the act, as we have already seen) by deed to dispose of lands of any tenure, and money subject to be invested in the purchase of lands, and to dispose of, release, surrender, or extinguish any estate which she alone, or she and her husband in her right, may have in any such lands or money, and to release and extinguish any power which she may have over such lands or money, as effectually as though she were a feme sole. But her husband must concur in the deed, which must also be produced and acknowledged by her before a judge of one of the superior courts of Westminster, or a county-court judge, (19 & 20 Vict. c. 108, s. 73,) or before one of the commissioners appointed by the lord chief-justice of the Common Pleas for the purpose of taking such acknowledgments. On this occasion she is examined, apart from her husband, as to her knowledge of the deed, and whether she voluntarily and freely consents to it,—a ceremony which, as we have previously seen, was used when a married woman was cognizor in a fine. If the disposition intended to be made be of lands of copyhold tenure to which the married woman is entitled for an estate at law, it must be done by way of surrender into the hands of the lord; an equitable estate in copyhold may be disposed of in the same way, or by deed. Whenever it is done by surrender, the married woman is to be separately examined, by the person taking the surrender, as to the voluntary nature of the act.

Such are briefly the provisions of this important statute, by which estates-tail may now be absolutely alienated or barred and converted into estates in fee, and by which the interests of married women may be passed. That which was formerly effected by a series of tedious forms, with perpetual danger of errors or omissions which might vitiate the whole transaction, is now accomplished by a simple deed, the same in form as that by which any other owner might convey his interest, or, in cases of copyhold tenure, by surrender,—the only additional requisites being that these acts be done with the consent of certain proper parties, who are clearly defined, that the deed be enrolled, and, in the case of a married woman, that it be acknowledged by her in the manner prescribed by the act.—KERR.

<sup>1</sup> 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 vs. 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."—CHITTY.

tom to warrant it; and there, by delivering up a rod, a glove, or other symbol, as the custom directs, resigns into the hands of the lord, by the hands and acceptance of his said steward, or of the said two tenants, all his interest and title to the estate; in trust to be again granted out by the lord to such persons and for such uses as are named in the surrender, and the custom of the manor will warrant. If the surrender be made out of court, then at the next or some subsequent court, the jury or homage must present and find it upon their oaths; which presentment is an information to the lord or his steward of what has been transacted out of court. Immediately upon such surrender in court, or upon presentment of a surrender made out of court, the lord by his steward grants the same land again to *cestuy que use*, (who is sometimes, though rather improperly, called the surrenderee,) to hold by the antient 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.<sup>2</sup> 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.<sup>3</sup>

In this brief abstract of the manner of transferring copyhold estates we may plainly trace the visible footsteps of the feudal 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 alienation of a copyhold had merely *jus fiduciarium*, for which \*there was no remedy at law, but only by *subpœna*, in chancery.(c) When therefore the lord had [\*367 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 license of alienation. Add to this the plain feudal investiture, by delivering the symbol of seisin in the presence of the other tenants in open court; "*quando hasta vel aliud corporeum quidlibet porrigitur a domino se investituram facere dicente; qua saltem coram duobus vasallis solemniter fieri debet.*"(e) and, to crown the whole, the oath of fealty is annexed, the very bond of feudal subjection. From all which we may fairly conclude, that, had there been no other evidence of the fact in the rest of our tenures and estates, the very existence of copyholds, and the manner in which they are transferred, would incontestably prove the very universal reception which this northern

(\*) Cro. Jac. 568.

(d) Bro. Abr. tit. *Tenant per copie*, 10.

(e) Feud. l. 2, l. 2.

<sup>2</sup> 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.—CHITTY.

<sup>3</sup> Femmes-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 femmes-covert for not appearing, or refusing to pay fines. 9 Geo. I. c. 29.—CHITTY.

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 \*368] accordingly. If I would devise a copyhold, I must surrender \*it to the use of my last will and testament;<sup>(f)</sup> and in my will I must declare my intentions, and name a devisee, who will then be entitled to admission.<sup>(f)</sup> 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,<sup>(g)</sup> which is defined in the old book of tenures<sup>(h)</sup> 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.<sup>(i)</sup>

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,<sup>6</sup> by an admittance subsequent whereto the conveyance is to

(f) Co. Copyh. § 36.

(g) Old Nat. Brev. l. *Briefe de recto clauso*. F. N. B. 13.

(h) *T. tenir en franke fee*.

(i) See book iii. page 166.

<sup>4</sup>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., 12th 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.—CHITTY.

By the Wills Act, 1 Vict. c. 26, all copyhold lands are made devisable, whether there is or is not a custom to that effect.—KERR.

<sup>5</sup>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 Conv. 266, 267; and see 3 T. R. 162.—CHITTY.

<sup>6</sup>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 therefrom. 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, 185. 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

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 encumbrance than it was subject to at the time of the surrender. But no manner of legal interest is vested in the nominee before admittance. If he enters, he is a trespasser, and punishable in an action of trespass: and if he surrenders to the use of another, such surrender is merely void, and by no matter *ex post facto* can be confirmed. For though he be admitted in pursuance of the original surrender, and thereby acquires afterwards a sufficient and plenary interest as absolute owner, yet his second surrender previous to his own admittance is absolutely void *ab initio*; because at the time of such surrender he had but a possibility of an interest, and could therefore transfer nothing: and no subsequent admittance can make an act good which was *ab initio* void. Yet, though upon the original surrender the nominee hath but a possibility, it is however such a possibility as may whenever he pleases be 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 chancery, or a *mandamus*:(k)\* and the surrenderor can in [\*369 no wise defeat his grant; his hands being forever bound from disposing of the land in any other way, and his mouth forever stopped from revoking or countermanding his own deliberate act.(l)<sup>8</sup>

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 presented; 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

(k) 2 Roll. Rep. 107.

(l) Co. Copyh. § 37.

(m) Ibid. § 40.

(n) Co. Litt. 62.

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.—CHITTY.

<sup>7</sup> The surrenderer 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.—CHITTY.

<sup>8</sup> 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 his own subsequent admittance. Hargrave's note to Co. Litt. 62, a.—CHITTY.



the lord, and them that took the surrender, in chancery, and shall there find relief.(o)<sup>9</sup>

\*370] \*3. Admittance<sup>10</sup> is the last stage, or perfection, of copyhold assurances. And this is of three sorts: first, an admittance upon a voluntary grant from the lord; secondly, an admittance upon surrender by the former tenant; and, thirdly, an admittance upon a descent from the ancestor.

In admittances, even upon a *voluntary grant* from the lord, when copyhold lands have escheated or reverted to him, the lord is considered as an instrument. For though it is in his power to keep the lands in his own hands; or to dispose of them at his pleasure, by granting an absolute fee-simple, a freehold, or a chattel interest therein; and quite to change their nature from copyhold to 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 antient 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 antient rent, nor make any the minutest variation in other respects:(p) nor is the tenant's estate, so granted, subject to any charges or encumbrances 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 encumbrances 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 \*371] the death of the ancestor, the lord \*is used as a mere instrument; and, as no manner of interest passes into him by the surrender or the death of his tenant, so no interest passes out of him by the act of admittance. And therefore neither in the one case nor the other is any respect had to the quantity or quality of the lord's estate in the manor. For whether he be tenant in fee or for years, whether he be in possession by right or by wrong, it is not material; since the admittances made by him shall not be impeached on account of his title, because they are judicial, or rather ministerial, acts, which every lord in possession is bound to perform.(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

(o) Co. Copyh. § 40.

(p) Ibid. § 41.

(q) 8 Rep. 63.

(r) 4 Rep. 27. Co Litt. 59.

(s) 4 Rep. 27. 1 Rep. 140

<sup>9</sup> But now, by the statute 4 & 5 Vict. c. 35, every surrender and deed of surrender which the lord shall be compellable to accept or shall accept, and every will and codicil a copy of which shall be delivered to the lord, his steward or deputy steward, out of court, or at a court in the absence of a homage, shall be entered in the court-rolls by such lord, steward, or deputy, and such entry shall be of equal effect with an entry made in pursuance of a presentment; and presentment of the surrender, will, or other matter on which an admittance is founded shall not be essential to the validity of the admittance. The statute also declares the ceremony of presentment to be not essential to the validity of an admittance, and further enacts that admittance may be made at any time or place without holding any court for the purpose.—KERR.

<sup>10</sup> The admittance of the particular tenant is the admittance of the remainderman; 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 free-bench. 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 showing that the legal estate was not in the lord at the time of admittance. 5 B. & A. 626. 1 Dowl. & R. 243

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) may, upon satisfying the lord for his fine due upon the descent, may surrender into the hands of the lord to whatever use he pleases.<sup>11</sup> 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 be defrauded of his fine. [\*372 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 enforced, 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"<sup>12</sup>

CHAPTER XXIII.

OF ALIENATION BY DEVISE.

THE last method of conveying real property is by *devise*, or disposition contained in a man's last will and testament. And, in considering this subject, I shall not at present 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 feudal 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 antient 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

(f) 4 Rep. 23.

(g) Copyh. 3 41.

(e) Wright of Tenures, 172.

(h) See page 57.

(i) Tacit. de Mor. Germ. c. 21.

<sup>11</sup> 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. 147. 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 *surrenderer* 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, 406. But the surrenderor may bring an action for refusal to admit. 3 Bulst. 217.—CHITTY.

<sup>12</sup> 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.—CHITTY.

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 \*374] that the same man is heir to many others, though by art and management he may frequently become their devisee. Thus the antient 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 feudal times: but it should always be strongly discouraged in a commercial country, whose welfare depends on the number of moderate fortunes engaged in the extension of trade.

However this be, we find that, by the common law of England since the conquest, no estate, greater than for term of years, could be disposed of by testament;(e) except only in Kent, and in some antient burghs, and a few particular manors, where their Saxon immunities by special indulgence subsisted.(f) And \*375] though the feudal restraint on alienations \*by deed vanished very early, yet this on wills continued for some centuries after: from an apprehension of infirmity and imposition on the testator *in extremis*, which made such devises suspicious.(g) Besides, in devises there was wanting that general notoriety, and public designation of the successor, which in descent 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 sat 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;<sup>1</sup> 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,

(d) Plutarch. *in vita Solon.*

(e) 2 Inst. 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, 147

<sup>1</sup> This is not quite correct. By means of a limitation to such uses as the owner should by his will appoint, the land might have been, and frequently is, devised, notwithstanding, or rather by the aid of, the statute of uses, and independently of any statute of wills, in the same manner as copyholds were made devisable by means of a surrender —  
SWEET

that all persons being *seised in fee-simple*<sup>2</sup> (except feme-coverts,<sup>3</sup> infants, idiots, and persons of non-sane memory) 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 extension of gifts in mortmain; but now, by construction \*of the statute 43 Eliz. c. [\*376 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)

With regard to devises in general, experience soon showed 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 handwriting 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.<sup>4</sup> 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.<sup>4</sup>

(\*) Ch. Prec. 272.

(†) Gilb. Rep. 45. 1 P. Wms. 248.

(‡) Duke's Charit. Uses, 84.

(\*) Moor. 690.

(†) 2 Vern. 453. Ch. Prec. 16.

(‡) Dyer, 72. Cro. Eliz. 100.

<sup>2</sup> 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 and 322,) unless the terms of the surrender require the will to be signed. Id. *ibid.* 2 P. Wms. 258. 2 Atk. 37.—CHRISTY.

<sup>3</sup> Where lands are conveyed to trustees, a married woman 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 though the contrary has been held, yet 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. and Wife, 180. See the valuable note to 1 Hoveden's Supplement to Ves. Jr. Rep. 21. 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. Scho. & Lefr. 60. 1 Dick. 165.—CHRISTIAN.

<sup>4</sup> A number which, by the Wills Act, (1 Vict. c. 26,) has been reduced to two.—KERR.

<sup>5</sup> 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

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.<sup>(g)</sup><sup>6</sup>

In the construction of this last statute, it has been adjudged that the

(g) Christopher vs. Christopher, *Schach.* 6 July, 1771. Spragge vs. Stone, at the Cockpit, 27 March, 1773, by Wilmot, de Grey, and Parker. See page 502.

3 B. & A. 489. But where the testator threw his will into the fire, out of which it was snatched by a bystander and preserved without the testator's knowledge, the will was held to be cancelled. 2 Bla. R. 1043.—CHITTY.

<sup>6</sup> Marriage, and the birth of a posthumous child, amount to a revocation. 5 T. R. 49. 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 vs. 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 intention 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. Jr. 656. By the Roman law, if the child born after the will died before the testator, the testament was restored to its force and effect. 2 Domat, 40.—CHRISTIAN.

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. Jr. 348. Cowp. 812. 4 East, 419. 2 N. R. 491, and *post*, "Title by Testament," 489, *et seq.*—CHITTY.

Formerly, marriage and the birth of a child were considered a sufficient ground for implying the revocation of a will. The stat. 1 Vict. c. 26, s. 19 expressly provides that no will shall be revoked by any presumption of an intention on the ground of an alteration in circumstances, but makes marriage an absolute revocation.—KERR.

<sup>7</sup> 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 that 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 vs. Stanley*, 3 Lev. 1, 1 Eq. Ca. Abr. 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 name: 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 vs. Price*, Doug. 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 the 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 vs. Price*, the will was prepared in five sheets, and a

testator's name, written with his own hand, at the beginning of \*his will, as, "I, John Mills, do make this my last will and testament," is a [\*377 sufficient signing, without any name at the bottom; (r) though the other is the

(r) 3 Lev. 1.

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. Jr. 197. 9 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 resigned, 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's 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. Wms. 253. 2 Ves. 454. 1 Ves. Jr. 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. Jr. 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 5 Salk. 395. And lord Thurlow, in 1 Bro. C. C. 99, relying upon the authority in 2 Salk. 688,

safer way.<sup>8</sup> 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.(s) But they must all subscribe their names as witnesses *in his presence*, lest by any possibility they should mistake the instrument.(t) And, in one case determined by the court of King's Bench,(u) the judges were ex-

(s) Freem. 486. 2 Ch. Ca. 109. Pr. Ch. 185.

(u) Stra. 1233.

(t) 1 P. Wms. 740.

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. Doug. 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 vs. Parson, Prec. Ch. 185. Jones vs. Lake, cited 2 Atk. 177. Bond vs. 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 vs. Grix, 8 Ves. 504. Ellis vs. Smith, 1 Ves. 11. As to the attestation by a marksman, see Harrison vs. 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. 68.—CHITTY.

<sup>8</sup> I conceive 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.—CHRISTIAN.

See Doug. 241. 1 Meriv. 503. The will is now required to be signed at the foot or end thereof. Stat. 7 W. IV. and 1 Vict. c. 26, s. 9.—SWEET.

But now, by the statute 1 Vict. c. 26, the testator's signature must be at the *foot* or *end* of the will, and must be made by him, or by some other person by his direction in his presence; and such signature must be made or acknowledged by him in the presence of two witnesses present at the same time, and they must attest and subscribe in the presence of the testator. But no particular form of attestation is necessary.

Several questions have arisen on the meaning of the words *foot* or *end* of the will; and it has been thought necessary to pass an act (15 Vict. c. 24) to define, as far as may be the meaning of these words. The statute enacts that the signature of the testator shall be deemed valid if the same shall be so placed at, or after, or following, or under, or beside, or opposite to, the end of the will, that it shall be apparent on the face of the will that the testator intended to give effect by such his signature to the writing signed as his will; and that no such will shall be affected by the circumstance that the signature shall not follow or not be immediately after the foot or end of the will, or by the circumstance that the signature shall be placed among the words of the *testimonium* clause, or the clause of attestation, or shall follow or be after or under the clause of attestation, either with or without a blank space intervening, or shall follow or be after or under or beside the names or one of the names of the subscribing witnesses, or by the circumstance that the signature shall be on a side or page or other portion of the paper or papers containing the will, whereon no clause or paragraph or disposing part of the will shall be written above the signature, or by the circumstance that there shall appear to be sufficient space on or at the bottom of the preceding side or page or other portion of the same paper on which the will is written to contain the signature. Each of the circumstances enumerated has reference to some actual case in which the ecclesiastical courts had found a difficulty in interpreting the simple words *foot* or *end*.—KERR.

tremely strict in regard to the credibility, or rather the competency, of the witnesses: for they would not allow any legatee, nor by consequence a creditor, where the legacies and debts were charged on the real estate, to be a competent witness to the devise, as being too deeply concerned in interest not to wish the establishment of the will; for, if it were established, he gained a security for his legacy or debt from the real estate, whereas otherwise he had no claim but on the personal assets. This determination, however, alarmed many purchasers and creditors, and threatened to shake most of the titles in the kingdom, that depended on devises by will. For, if the will was attested by a servant to whom wages were due, by the apothecary or attorney, whose very attendance made them creditors, or by the minister of the parish who had any demand for tithes or ecclesiastical dues, (and these are the persons most likely to be present in the testator's last illness,) and if in such case the testator had charged his real estate with the payment of his debts, the whole will, and every disposition therein, so far as related to real property, were held to be utterly void. This occasioned the statute 25 Geo. II. c. 6, which restored both the competency and the credit of such *legatees*, by declaring void all legacies<sup>9</sup> 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 \*and jury before whom such will shall be contested. And [\*378 in a much later case(v) the testimony of three witnesses who were [378 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 were said to be insufficient.<sup>10</sup>

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. and 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

(c) M. 31 Geo. II. 4 Burr. l. 450.

<sup>9</sup>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.—CHITTY.

<sup>10</sup>A person who signs his name as witness to a will, by this act of attestation solemnly 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 vs. Shelley, 1 T. R. 300. Lowe vs. Jolliffe, 1 W. Bla. 366, S. C. 1 Dick. 389. Goodtitle vs. 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 vs. Blundell, 19 Ves. 504. Howard vs. 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 vs. Harrison, 2 Phillim. 499; and see Burrows vs. Locke, 10 Ves. 474.—CHITTY.

The statute 1 Vict. c. 26 repeals the act 25 Geo. II. c. 6 (except as it affects the colonies) and re-enacts and extends some of its provisions. It makes void devises and bequests not only to an attesting witness, but to the husband or wife of such witness, and expressly provides that the incompetency of a witness to be admitted to prove the execution of a will shall not render it invalid. The statute further enacts that any *creditor*, or the wife or husband of any creditor, whose debt is charged upon the property devised or bequeathed by the will, may be admitted to prove the execution thereof as an attesting witness, and that an *executor* of a will may be admitted to prove its execution,—a point on which some doubts had previously existed.—KERR.



only) be deemed to be fraudulent and void: and that such creditors may maintain their actions jointly against both the heir and the devisee.<sup>11</sup>

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. 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)<sup>12</sup> Where-

(\*) See pages 307, 308.

(\*) 1 P. Wms. 575. 11 Mod. 148.

<sup>11</sup> 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 seized 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 *specialty*; 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 debtors, 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. and M. c. 14, see the decisions, Bac. Abr. 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. Jr. 323.—CHITTY.

This statute has been repealed; but the payment of simple contract, as well as specialty debts, out of the real estate of the deceased debtor, has been provided for by other statutes. See 11 Geo. IV. and 1 Wm. IV. c. 47; 3 & 4 Wm. IV. c. 104; and 2 & 3 Vict. c. 60.—KERR.

<sup>12</sup> Lord Mansfield has declared that this does not turn upon the construction of the statute 32 Hen. 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. Jr. 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 seized 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-

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)<sup>13</sup> [\*379]

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,

(y) Moor. 255. 11 Mod. 127.  
(z) 1 Ch. Ca. 39. 2 Ch. Ca. 144.

(a) Salk. 238.

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 vs Duchess of Chandos, 2 Ves. Jr. 417.

A similar decision was also made in the courts of Common Pleas and King's Bench, in the case of Goodtitle vs. 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 payments 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. Jr. 428.—CHRISTIAN.

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. Jr. 654.—CHITTY.

<sup>13</sup> See most of the cases collected, 1 Saund. 277, n. 4; and see the principle, Gilb. U. & T. 116, 117. 1 Co. 105, 106. 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. White vs. White, 6 T. R. 418. 1 Bro. 219. Doug. 330.

A father devised his estate to his eldest son and the heirs of his body, and, upon failure of his issue, to his second son in like manner in tail. The eldest son died before the father, leaving several children; and the father, supposing that the eldest of them would take under the devise, made no alteration in his will. The consequence was that the devise lapsed, and the second son was entitled by the will to an estate-tail in exclusion of the children of the eldest brother, the first objects of the father's bounty and regard. The court of King's Bench in Ireland decided in favour of the grandson; but that decision was reversed by the King's Bench and house of lords here, the question being too clear to admit a doubt. 6 T. R. 518. 1 Bro. 219. Doug. 330.—CHRISTIAN.

It was long a prevailing opinion that, if a man devised particular lands by name, which he had not at the time, but afterwards purchased, or devised all lands which he should die seised of, that such devises would be valid. And it is curious that chief-justice Saunders, a consummate lawyer, under this impression devised "all lands which he had or afterwards should have in Fulham." His executors were Holt and Pollexfen, chief-justices, and serjeant Maynard, who differed as to the validity of the devise, the serjeant holding the opinion which is now established, and the two chief-justices that which has been determined not to be law. Lawrence vs. Dodwell, 1 Lord Raym. 438. Holt, however, lived to change his opinion; and the law is now settled as laid down in the text.—COLERIDGE.

But the statute 1 Vict. c. 26 has abolished this distinction, and all property, of whatever kind, or of which a man is possessed or entitled at the time of his death, passes by his will: as the instrument now, with reference to the real and personal estate comprised in it, speaks and takes effect as if executed immediately before the testator's death, unless a contrary intention appears by the document itself.—KERR.

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 haret in litera, haret 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 \*380] disjointed parts of it. "*Nam ex antecedentibus et consequentibus fit optima interpretatio*." *(g)* And \*therefore that every part of it be (if possible) made to take effect: and no word but what may operate in some shape or other. *(h)* "*Nam verba debent intelligi cum effectu, ut res magis valeat quam 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-poll, executed only by the grantor, they are the words of the grantor only, and shall be taken most strongly against him. *(k)*<sup>14</sup> 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.<sup>15</sup> Yet in both cases we should rather attempt to reconcile them. *(p)*

<sup>(b)</sup> And. 60.

<sup>(c)</sup> 1 Bulstr. 175. Hob. 304.

<sup>(d)</sup> 2 Saund. 157.

<sup>(e)</sup> Hob. 27.

<sup>(f)</sup> 10 Rep. 133. Co. Litt. 223. 2 Show. 334.

<sup>(g)</sup> 1 Bulstr. 101.

<sup>(h)</sup> 1 P. Wms. 457.

<sup>(i)</sup> Plowd. 156.

<sup>(j)</sup> Co. Litt. 42.

<sup>(k)</sup> Co. Litt. 134.

<sup>(l)</sup> Bacon's Elem. c. 3.

<sup>(m)</sup> Co. Litt. 42.

<sup>(n)</sup> Hardr. 94.

<sup>(o)</sup> Co. Litt. 112.

<sup>(p)</sup> Cro. Eliz. 420. 1 Vern. 30.

<sup>14</sup> But this distinction does not appear to be recognised at the present day, and the rule of construing most strictly against the grantor has frequently been applied to indentures. 1 M. & W. 556. 5 B. & C. 842.—KERR.

<sup>15</sup> 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.—CHRISTIAN.

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 committed 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)<sup>16</sup> By 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.<sup>17</sup> 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 devises:(u)<sup>18</sup> and, in general, where any implication<sup>a</sup>

(q) See page 108.

(r) See page 115.

(s) II. 13 Hen. VII. 17. 1 Ventr. 376.

(t) Freem. 484.

(u) Cro. Jac. 655. 1 Ventr. 224. 2 Show. 139.

<sup>16</sup> In the celebrated case of *Perrin vs. 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, 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 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 introduce 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 Bla. Rep. 672. 4 Burr. 2579. Doug. 329. Fearn, 113. Harg. Tracts, 351, 490.—CHRISTIAN.

<sup>17</sup> 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 vs. Wilkinson*, 2 T. R. 209.—CHITTY.

<sup>18</sup> 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 he-

\*382] are allowed, they must be such as are *necessary* (or at least highly *\*probable*) and not merely *possible* implications.(w) And herein there is no distinction between the rules of law and of equity; for the will, being considered in both courts in the light of a limitation 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.<sup>19</sup>

(\*) Vaugh. 262.

(\*) Fitzg. 236. 11 Mod. 153.

tween 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. vs. White, Cowp. 777, 797. 4 T. R. 710.* And the editor conceives that cross-remainders would be raised in every case in which it appears to be the testator's intention that the subsequent devisee shall take nothing till the issue of all the first devisees are extinct. *Cowp. 777, 797. 4 T. R. 710.*

In a case where cross-remainders were created by a deed, lord Kenyon declared that "no technical precise form of words is necessary to create cross-remainders,—though in the verbosity of conveyancers an abundance of words is generally introduced in deeds for this purpose." 5 T. R. 431. But cross-remainders cannot be created in a deed, as in a will, by implication, not even where the ultimate limitation is given "in default of all such issue," which words would probably create cross-remainders amongst any number in a will. 5 T. R. 521. 1 East, 416.

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.—CHRISTIAN.

<sup>19</sup> Upon this subject lord Eldon has expressed himself thus:—"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." 1 Ves. & Bea. 466. Therefore, if the devise were to a stranger after the death of the wife, the wife would not take any thing by implication; for then it might as well be supposed that the testator meant his heir-at-law to take during the wife's life, as the wife; and, where it is so, the obvious title of the heir-at-law will be preferred. *Smartle vs. Scholar, 2 Lev. 207.*—COLERIDGE.

A branch of this subject has been treated with consummate ability in Mr. (now Sir James) Wigram's work on "The Admission of Extrinsic Evidence in aid of the Interpretation of Wills." The learned author has deduced from the authorities the following seven propositions, which, though he has confined his inquiry to the subject of wills, seem to be equally applicable to the interpretation of deeds and other instruments:—

I. "A testator is always presumed to use the words in which he expresses himself according to their strict and primary acceptation, unless from the context of the will it appears that he has used them in a different sense; in which case the sense in which he thus appears to have used them will be the sense in which they are to be construed."

II. "Where there is nothing in the context of a will from which it is apparent that a testator has used the words in which he has expressed himself in any other than their strict and primary sense, and when his words, so interpreted, are *sensible with reference to extrinsic circumstances*, it is an inflexible rule of construction that the words of the will shall be interpreted in their strict and primary sense, and in no other, although they may be capable of some popular or secondary interpretation, and although the most conclusive evidence of intention to use them in such popular or secondary sense be tendered."

III. "Where there is nothing in the context of a will from which it is apparent that a testator has used the words in which he has expressed himself in any other than their strict and primary sense, but his words so interpreted are *insensible with reference to extrinsic circumstances*, a court of law may look into the extrinsic circumstances of the case, to see whether the meaning of the words be sensible in any popular or secondary sense of which, *with reference to these circumstances*, they are capable."

IV. "Where the characters in which a will is written are difficult to be deciphered, or the language of the will is not understood by the court, the evidence of persons skilled in deciphering writing, or who understand the language in which the will is written, is admissible to *declare* what the characters are, or to inform the court of the proper meaning of the words."

V. "For the purpose of determining the object of a testator's bounty, or the subject of disposition, or the quantity of interest intended to be given by his will, a court may inquire into every *material* fact relating to the person who claims to be interested under the will, and to the property which is claimed as the subject of disposition, and to the

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 connections of the persons entitled to hold them: we have examined the *tenures*, both antient 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 property in every light wherein they are contemplated by the laws of England. A system of laws, that differs much from every other system, except those of the same feudal 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 course of seven centuries, without any order or \*method; and the multiplicity of acts of parliament which have amended, [\*383 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.”

(y) Proeme to 1 Inst.

circumstances of the testator and of his family and affairs, for the purpose of enabling the court to identify the person or thing intended by the testator, or to determine the quantity of interest he has given by his will.

“The same (it is conceived) is true of every other disputed point respecting which it can be shown that a knowledge of extrinsic facts can in any way be made ancillary to the right interpretation of a testator’s words.”

[In commenting on this proposition, a *material* fact is defined to be any fact which, according to the ordinary rules of evidence, tends to show which of the propositions II. and III. the *circumstances* of the case render applicable; in other words, whether the words, being strictly construed, have or have not a definite and reasonable meaning with reference to the actual circumstances.]

VI. “Where the words of a will, aided by evidence of the material facts of the case, are insufficient to determine the testator’s meaning, no evidence will be admissible to prove what the testator intended, and the will (*except in certain cases*, see prop. VII.) will be void for uncertainty.”

VII. “Notwithstanding the rule of law which makes a will void for uncertainty where the words, aided by evidence of the material facts of the case, are insufficient to determine the testator’s meaning, courts of law, in certain special cases, admit extrinsic evidence of *intention* to make certain the *person* or *thing* intended, where the description in the will is insufficient for the purpose.

## CHAPTER XXIV.

## OF THINGS PERSONAL.

UNDER the name of things *personal* are included all sorts of things *movable*, which may attend a man's person wherever he goes;<sup>1</sup> and therefore, being only the objects of the law while they remain within the limits of its jurisdiction, and being also of a perishable quality, are not esteemed of so high a nature, nor paid so much regard to by the law, as things that are in their nature more permanent and *immovable*, as 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 feudal ages. Hence it was, that a tax of the *fifteenth, tenth*, or sometimes a much larger proportion, of all the movables of the subject, was frequently laid without scruple, and is mentioned with much unconcern by our antient historians, though now it would justly \*385] alarm our opulent merchants and stockholders. And hence \*likewise may be derived the frequent forfeitures inflicted by the common law, of all a man's goods and chattels, for misbehaviours and inadvertencies that at present hardly seem to deserve so severe a punishment. Our antient law-books, which are founded upon the feudal provisions, do not therefore often condescend to regulate this species of property. There is not a chapter in Britton or the Mirror, 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

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"These cases may be thus defined: Where the object of a testator's bounty or the subject of disposition (*i.e.* the *person* or *thing* intended) is described in terms which are applicable indifferently to more than one *person* or *thing*, evidence is admissible to prove which of the persons or things so described was intended by the testator."—SWEET.

<sup>1</sup> See, in general, as to what is personal property, Com. Dig. Biens; Vin. Abr. Property; and 2 Roper on Legacies, ch. 16, sect. 1. See 387, *post*. "Chattels" are real or personal. Co. Litt. 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; coney, 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 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 the 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 :I. Toller's L. Ex. 195, 196.—CURRY

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 antient usages, and a certain feudal tincture, which is still to be found in some branches of personal property.

But things personal, by our law, do not only include things *movable*, but also something more: the whole of which is comprehended under the general name of *chattels*, which Sir Edward Coke says<sup>(a)</sup> 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 applied to all movables in general.<sup>(b)</sup> In the *grand coutumier* of Normandy<sup>(c)</sup> a *chattel* is described as a mere movable, but at the same time it is set in opposition to a fief or feud : so that not only goods, but whatever was not a feud, were accounted chattels. \*And it is in this [\*386 latter, more extended, negative sense, that our law adopts it: the idea of goods, or movables 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 *coutumier*<sup>(d)</sup> 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*.<sup>(e)</sup>

1. Chattels *real*, saith Sir Edward Coke,<sup>(f)</sup> 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 feudal 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.<sup>(g)</sup> A freehold, which alone is a real estate, and seems (as has been said) to answer to the fief in Normandy, is conveyed by corporal investiture and \*livery [\*387 of seisin; which gives the tenant so strong a hold of the land, that it never after can be wrested from him during his life, but by his own act of voluntary transfer, or of forfeiture; or else by the happening of some future contingency, as in estates *pur auter vie*, and the determinable freeholds mentioned in a former chapter.<sup>(h)</sup> 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

(a) 1 Inst. 118.

(b) Dufresne, li. 409.

(c) C. 87.

(d) *Il conviendrait quil fust non mouuable et de duree a tous vours*, fol 107, a.

(e) So too in the Norman law, *Catruz sont meubles et immovables: et comme vrais meubles sont qui transporter se*

*peuvent, et ensuivre le corps; immovables sont choses qui ne peuvent ensuivre le corps, ni estre transportees, et tout ce qui n'est point en heritage. LL. Will. Nothi, 4, apud Dufresne* li. 409.

(f) 1 Inst. 118.

(g) See page 142.

(h) Page 120.



for years must necessarily fail at the end and completion of the term; the next presentation to a church is satisfied and gone the instant it comes into possession, that is, by the first avoidance and presentation to the living; the conditional estates by statutes and *elegit* are determined as soon as the debt is paid; and so guardianships in chivalry 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.<sup>2</sup>

2. Chattels *personal* are, properly and strictly speaking, things *movable*; 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 \*388] the former chapters, which were \*employed upon real estates; that kind of property being of a mongrel amphibious nature, originally endowed with one only of the 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.

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## CHAPTER XXV.

### OF PROPERTY IN THINGS PERSONAL.

PROPERTY in chattels personal may be either in *possession*; which is where a man hath not only the right to enjoy, but hath the actual enjoyment of, the thing; or else it is in *action*; where a man hath only a bare right, without any occupation or enjoyment. And of these the former, or property in *possession*, is divided into two sorts, an *absolute* and a *qualified* property.

I. First, then, of property in *possession absolute*,<sup>1</sup> which is where a man hath, solely and exclusively, the right, and also the occupation, of any movable 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 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

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<sup>2</sup> It is a rule of the law of England, in common with that of most other nations, that the title by succession to personal property, wherever it is situated, shall be determined by the law of the domicile of the deceased owner. 1 H. Bla. 670. 5 Ves. 750. 5 B. & C. 451. 1 Hagg. 474, 498. 8 Sim. 310. But it has been denied by a justly-esteemed writer that this rule extends to chattels *real*, on the ground that the treatment of such property as personalty is peculiar to our own law. 1 Jarm., Wills, 4. 2 id. 740. The point appears to be unaffected by decision, and is perhaps open to argument on both sides. See 2 P. Wms. 622.—SWEET.

<sup>1</sup> 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.—CURRY.

motion, and (unless particularly confined) can convey themselves from one part of the world to another, there is a great difference made with respect to \*their several classes, not only in our law, but in the law of nature and of all civilized nations. They are distinguished into such as are *domitæ* [\*390 and such as are *feræ naturæ*: 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 *feræ naturæ* a man can have no absolute property.

Of all tame and domestic animals, the brood belongs to the owner of the dam or mother; the English law agreeing with the civil, 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 prægnantem 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 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. [\*391

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 show how this species of property may subsist in such animals as are *feræ naturæ*, 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 *feræ naturæ*, either *per industriam, propter impotentiam, or propter privilegium*.

1. A qualified property may subsist in animals *feræ naturæ per industriam hominis*:<sup>2</sup> 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,

(\*) 2 Mod. 319.

(\*) Vin in Inst. l. 2, tit. 1, § 15.

(\*) 1 Hal. P. C. 511, 512.

(\*) Bro. Abr. tit. *propertæ*, 23.

(\*) Ff. 6, 1, 5.

(\*) L. of N. 1, 4, c. 7.

(\*) 7 Rep. 17.

<sup>2</sup> See, in general, the observations of Mr. Justice Bayley in *Hannam vs. 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. Jac. 262;) but indictment does not lie for stealing a tamed ferret. Russ. & R. C. C. 350.—CHITTY.

between such animals as we generally see tame, and are therefore seldom, if ever, found wandering at large, which it calls *domitæ naturæ*: and such creatures as are usually found at liberty, which are therefore supposed to be more \*392] emphatically *feræ natu\*ra*, though it may happen that the 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 enclosed 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 return.ng.(h)<sup>3</sup> 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 further than the mere manual occupation; for my tame hawk that is pursuing his quarry in my presence, though he is at liberty to go where he pleases, is nevertheless my property; for he hath *animum revertendi*. So are my pigeons, that are flying at a distance from their home, (especially 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 *feræ naturæ*; but, when hived and reclaimed, a man may have a qualified property in them, by the law \*393] of nature, as well as by the civil law.(m) \*And to the same purpose, not 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 property in them till I have hived them than I have in the birds which make their nests thereon, and therefore if another hives them, he shall be their proprietor: but a swarm, which fly from and out of my hive, are mine so long as I can keep them in sight, and have power to pursue them; and in these circumstances no one else is 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.<sup>4</sup>

(A) Bract. L 2, c. 1. 7 Rep. 17.

(h) Inst. 2, 1, 15.

(i) Finch, L. 177.

(k) Crompt. of Courts, 167. 7 Rep. 16.

(\*) Puff. L 4, c. 6, § 5. Inst. 2, 1, 14.

(\*) L. 2, c. 1, § 3.

(o) Bro. Abr. tit. *propertie*, 37, cites 45 Edw. III. 24.

(p) 9 Hen. III. c. 13.

<sup>3</sup> As to pigeons, see 1 Chitty's Game Laws, 135 to 143. The killing or taking a dove house pigeon, *anywhere*, subjects the party to a twenty-shillings penalty. 2 Geo. III. c. 29.—CHITTY.

<sup>4</sup> 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 *feræ naturæ*, 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 vs. Mockett*, 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 driven 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

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 antient 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 *feræ naturæ* 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. It is also as much felony by common law to steal such of them as are fit for food,<sup>5</sup> as it is to steal tame animals:(*q*) but not so, if they are only kept for pleasure, curiosity, or whim, as dogs, bears, cats, apes, parrots, and singing-birds:(*r*) because their value is not intrinsic, but depending only on the caprice of the owner:(*s*) though it is such an invasion of property as may \*amount to a civil injury, and be redressed by a civil action.(*t*) Yet to steal a reclaimed hawk is felony both by common law and statute;(u) [\*394 which seems to be a relic of the tyranny of our antient sportsmen. And among our elder ancestors the antient 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

(*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.

mode of employing his land, and was considered by lord Holt as a description of trade. *Keeble vs. 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.—CHITTY.

Almost all the writers on general jurisprudence agree that the animal must have been brought within the power of the pursuer before the property in it vests. Actual taking may not in all cases be requisite; but all agree that mere pursuit, without bringing the animal within the power of the party, is not sufficient. The possession must be so far established, by the aid of nets, snares, or other means, that it cannot escape. It was accordingly held in *Pierson vs. Post*, 3 Caine's Rep. 175, that an action would not lie against a person for killing and taking a fox which had been pursued by another, and was then actually in the view of the person who had originally found, started, and chased it. The mere pursuit and being within view of the animal did not create a property, because no possession had been acquired; and the same doctrine was afterwards declared in the case of *Buster vs. Newkirk*, 20 Johns. Rep. 75. 2 Kent Com 349.

The civil law contained the same principle. It was a question in the Roman law whether a wild beast belonged to him who had wounded it so that it might easily be taken. The civilians differed on the question; but Justinian adopted the opinion that the property in the wounded wild beast did not attach until the beast was actually taken. Inst. 2, 1, 13. Dig. 41, 1, 5, 2. So, if a swarm of bees had flown from the hive of A., they were reputed his so long as the swarm remained in sight and might easily be pursued; otherwise they became the property of the first occupant. Inst. 2, 1, 14. Merely finding a tree on the land of another containing a swarm of bees, and marking it, does not vest the property of the bees in the finder. *Gillet vs. Mason*, 7 Johns. Rep. 16. Bees which swarm upon a tree do not become private property until actually lived. Inst. 2, 1, 14. *Wallis vs. Mease*, 3 Binn. 546. Bees which take up their abode in a tree belong to the owner of the soil, if unreclaimed; but if reclaimed and identified, they belong to their former possessor. *Goff vs. Kilts*, 15 Wend. 550. 2 Kent Com. 349.—SHARSWOOD.

<sup>5</sup> But it is not a 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. 16, s 41. Hawk. b. 1, c. 83. s. 26.—CHITTY.

there was a very peculiar forfeiture.(w)<sup>6</sup> And thus much of qualified property in wild animals, reclaimed *per industriam*.

2. A QUALIFIED property may also subsist with relation to animals *feræ naturæ*, *ratione impotentia*, on account of their own inability. As when hawks, herons, or other birds build in my trees, or coneyes 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 *feræ naturæ*, *propter privilegium*: that is, he may have the privilege of hunting, taking, and killing \*395] them, in \*exclusion of other persons. Here he has a transient property in these animals, usually called game, so long as they continue within his liberty;(z) and may restrain any stranger from taking them therein: but the instant they depart into another liberty, this qualified property ceases. The manner in which the privilege is acquired, will be shown in a subsequent chapter.

The qualified property which we have hitherto considered extends only to animals *feræ naturæ*, 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 antient 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 antient watercourse that used to run to the other's mill or meadow;(d) the law will animadvert hereon as an injury, and protect the party injured in his possession. But the property in them ceases the instant they are out of possession; for, when no man is engaged in their actual occupation, they become again common, and every man has an equal right to appropriate them to his own use.

These kinds of qualification in property depend upon the peculiar circumstances of the subject-matter, which is not capable of being under the absolute dominion of any proprietor. But property may also be of a qualified or special nature, on account of the peculiar circumstances of the owner, when the thing \*396] itself is very capable of absolute 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

(w) "Si quis falem, horrei regni custodem, occiderit vel furto abduxerit, felis summa cauda suspendatur, capite aream attingente, et in eam grana tritici effundantur, usqueadum summimas caudæ tritico co-operiatur." Wotton. *L.L. Will. I.* c. 5, § 5. An amerement similar to which, Sir Edward Coke tells us, (7 Rep. 18,) there antiently 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 Moo. 144.

(a) 9 Rep. 58.

(b) 9 Rep. 59. Lut. 92.

(c) 9 Rep. 59.

(d) 1 Leon. 273. Skin. 389.

<sup>6</sup> And stealing any dog, bird, or other beast, not the subject of larceny at common law, and ordinarily kept in a state of confinement, is now, by statute 7 & 8 Geo. IV. c. 29, punishable with fine and imprisonment for a second offence. By statute 8 & 9 Vict. c. 4<sup>th</sup> also, dog-stealing is a misdemeanour. —KERR.

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) So also in case of goods pledged or pawned upon condition, either to repay money or otherwise; both the pledger and pledgee have a qualified, but neither of them an absolute, property in them: the pledger'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 distrainor, or party distrained 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 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 [ \*397 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 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 wrong-doer 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

(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, "*æque bonis adnumerabitur etiam, si quid est in actombus, petitiombus, percutiombus. Nam et hæc in bonis esse videntur."* Ff. 50, 16, 49.

† It is certainly an error to say that all property in action depends upon contracts express or implied. There is a very large class of choses in action which arise *ex delicto*. My claim to compensation for an injury done to my person, reputation, or property is as truly a chose in action as where it is grounded on a breach of covenant or contract. It is true that, in general, an action for a tort to my person or reputation, if not prosecuted to judgment in the lifetime of the parties, dies,—*actio personalis moritur cum persona*; but as to torts to the property, by various statutes generally adopted in the United States, it is not so. Stat. 4 Edw. III. c. 7. 3 & 4 W. IV. c. 42. The statute 9 & 10 Vict. c. 93 also gives to the executors and administrators of a person who has met with his death by the wrongful act or default of another, an action against the wrong-doer, the damages in such case being distributed among the family of the deceased. Similar statutes have been enacted in several of the United States. —SHARSWOOD.

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 \*398] have as \*absolute 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*. By the rules of the antient 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 shown 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 deviser. 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<sup>6</sup>.

\*399] \*Next, as to the *number* of *owners*.<sup>9</sup> Things personal may belong to their owners, not only in severalty, but also in joint-tenancy, and in

(<sup>l</sup>) Eq. Ca. Abr. 360.  
(<sup>k</sup>) Mar. 106.

(<sup>i</sup>) 2 Freem. 206.  
(<sup>m</sup>) 1 P. Wms. 290.

<sup>6</sup> Although they cannot be entailed in the strict sense of the word, yet a disposition in the nature of an entail may be made of them by devise or deed of trust, and they may thereby be rendered unalienable for as long a time as if they were absolutely entailable; provided it be not attempted to render them unalienable beyond the term of lives in being and twenty-one years after, or, in case of a posthumous child, perhaps a few months longer; for, if the executory limitations of personalty be upon contingencies too remote, the whole property would be in the first taker. See Mr. Hargrave's note to Co. Litt. 20. a., n. 5.—ARCHBOLD.

<sup>9</sup> 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. Wms. 347, 529. 4 Bro. C. C. 15. 3 Ves. Jr. 628, 632. 6 Ves. Jr. 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. Jr. 519. 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. Jr. 265, 634. 3 Ves. Jr. 205, 450. 4 Ves. Jr. 551. 5 Ves. Jr. 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,

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.<sup>(n)</sup> 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.<sup>(o)</sup> 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;<sup>(p)</sup> as we have formerly seen<sup>(q)</sup> 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.<sup>(r)</sup><sup>10</sup>

(n) Litt. § 282. 1 Vern. 482.

(o) Litt. § 321.

(p) 1 Eq. Ca. Abr. 292.

(q) Page 193.

(r) 1 Vern. 217. Co. Litt. 182.

if it can be further extended with propriety: therefore in several cases such bequests 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. Amb. 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; and see p. 193, *ante*.—CHITTY.

<sup>10</sup> As between partners 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, *inter mercatores jus accrescendi locum non habet*. Co. Litt. 3, 282, 182, a. 1 Vern. 217. 1 Meriv. 564. 1 Ld. Raym. 281. Vin. Abr. 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. & 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. Jr. 435; see, further, 3 Chit. Com. L. 235, 236. 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 in 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. Abr. Partner, B.—CHITTY.



## CHAPTER XXVI.

## OF TITLE TO THINGS PERSONAL BY OCCUPANCY.

WE are next to consider the *title* to things personal, or the various means of *acquiring* and of *losing* such property as may be had therein; both which considerations of gain and loss shall be blended together in one and the same view, as was done in our observations upon real property; since it is for the most part impossible to contemplate the one without contemplating the other also. And these methods of acquisition or loss are principally twelve:—1. By occupancy. 2. By prerogative. 3. By forfeiture. 4. By custom. 5. By succession. 6. By marriage. 7. By judgment. 8. By gift 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, \*401] where such \*things are found without any other owner, they for the most part belong to the king by virtue of his prerogative; except in some few instances, wherein the original and natural right of occupancy is still permitted to subsist, and which we are now to consider.

1. Thus, in the first place, it hath been said, that anybody may seize to his own use such goods as belong to an alien enemy. (b)<sup>1</sup> For such enemies, not being looked upon as members of our society, are not entitled, during their state of enmity, to the benefit or protection of the laws; and therefore every man that has opportunity is permitted to 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.<sup>2</sup> 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

(\*) See pages 3, 8, 258.

(b) Finch, L. 178.

(c) Freem. 40.

(\*) Bro Abr. tit. *propertie*, 33; *forfeiture*, 57.

(e) *Ibid.*

<sup>1</sup> 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 vs. Eden, Doug. 594. For the law respecting seizures and captures, and the modes of acquiring and losing property thereby, see the admiralty decisions of Sir William Scott, collected and arranged in 1 Chitty's Commercial Law, 377 to 512, and 2 Wooddes. 435 to 457.—CHITTY.

<sup>2</sup> And, by modern decisions, the right to sue upon contracts made with him during peace is only suspended, not forfeited, by war. 13 Ves. Jr. 71. 3 B. & P. 191. 6 Taurt 239 1 Chitty's Com. L. 423 to 426.—CHITTY.

time of Grotius, (f) even with regard to captures made at sea; which were held to be the property of the captors after a possession of twenty-four hours; though the modern authorities (g) require, that before the property can \*be changed, the goods must have been brought into port, and have continued a night *intra presidia*, in a place of safe custody, so that all hope of recovering them was lost.<sup>3</sup>

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)<sup>4</sup> And this doctrine seems to have been extended to negro-servants, (j) 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. (k)

2. Thus again, whatever movables 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,

(f) *De j. b. et p. l. 3, c. 6, § 3.*  
 (g) *Bynkersh. quest. jur. publ. l. 4 Rocc. de Assetur. not. 66.*  
 (h) *Bro. Abr. tit. proprietie, 18.*  
 (i) We meet with a curious writ of trespass in the register, (102,) for breaking a man's house, and setting such his prisoner at large. "*Quare domum ipsius A. apud. W. (in quod*

*idem A. quendam H. Scotum per ipsum A. de guerra captum tanquam prisonem sumum, quousque sibi de centum libris, per quas idem H. redemptionem suam cum prefato A. pro rita sua salvanda fecerut satisfactum fore, delinuit) fregit, et ipsum H. cepit et abduxit, vel quo voluit aliter permisit, &c."*  
 (j) 2 Lev. 201.  
 (k) *Carth. 396. Id. Raym. 147. Salk. 667.*

<sup>3</sup> 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 William Scott, in the case of the *Flad Oyen*, 1 Rob. Rep. 139. See, also, 3 Rob. Rep. 97 and 236, 237, 238. *Goss vs. Withers*, 2 Burr. 683. *Assivedo vs. 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. L.* 433, 434. 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 Bla. 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 William 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 beneficial 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. 47. 1 Edw. Rep. 68. —CHITTY.

<sup>4</sup> 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, ss. 34, 35, 36. 42 Geo. III. c. 72.—CHITTY

or wreck, or hidden treasure; for these, we have formerly seen,<sup>(2)</sup> are vested by law in the king, and form a part of the ordinary revenue of the crown.<sup>5</sup>

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 antient window<sup>6</sup> overlooking my neighbour's ground, he may not erect any blind to obstruct the light: but if I build my house close to his wall, which darkens it, I cannot compel him to demolish his wall; for there the first occupancy is rather in him than in me

(1) Book i. ch. 7.

<sup>5</sup> Chancellor Kent says, "It is requisite that the former owner should have completely relinquished the chattel, before a perfect title will accrue to the finder; though he has in the mean time a special property sufficient to maintain an action for an injury to it, or to recover possession from any but the true owner. *Armor vs. Delamire*, 1 Stra. 505. *Branden vs. Huntsville Bank*, 1 Stewart, 320. He is not even entitled to a reward from the owner for finding a lost article, if none has been promised. He has no lien on the article found for his trouble and expense; and he is only entitled to indemnity against his necessary and reasonable expenses incurred on account of the chattel. *Armory vs. Flynn*, 10 Johns. 102. *Binstead vs. Buck*, 3 Sir Wm. Bl. 1117. *Nicholson vs. Chapman*, 2 H. Bla. 254. *Etter vs. Edwards*, 4 Watts, 63. It is considered in the two last cases to be still an unsettled point whether the finder of lost property can recover a compensation for the labour and expense voluntarily bestowed upon lost property found. In *Reeder vs. Anderson*, 4 Dana, 193, it was held that the finder was entitled, under an implied assumpsit, for his indemnity at least against his expenditure of time or money in the successful recovery of lost property. Mr. Justice Story (*Bailment*, p. 391, 2d ed.) gives a strong opinion in favour of compensation (or what he in admiralty-law language calls *salvage*) to the 'mere finders of lost property on land,' beyond a full indemnity for their reasonable and necessary expenses. I beg leave to say that it appears to me that such findings have no analogy in principle to the cases of hazardous and meritorious sea or coast salvage under the admiralty law, and that the rule of the common law as illustrated by chief-justice Eyre in *Nicholson vs. Chapman*, as to these mere land findings, is the better policy." 2 Com. 356.—SHARSWOOD.

<sup>6</sup> 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 Esq. 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 Camb. 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 purchaser 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 purchaser 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. *Rayn. vs. Moodys*, Rep. 24. 2 Saund. 144, n. 4. But if an ancient window has been completely blocked up above twenty years, it loses its privilege, (3 Camb. 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 Camb. 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 Esq. R. 69. *Chilton vs. Sir 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. 2 Camb. 82.—CHITTY.

If my neighbour \*makes a tan-yard, so as to annoy and render less salubrious the air of my house or garden, the law will furnish me with a [\*403 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.<sup>7</sup>

4. With regard likewise to animals *feræ naturæ*, 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 inhabitants 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 seized 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, aerial, or aquatic animals as go under the denomination of *game*; the taking of which is made the exclusive right of the prince, and such of his subjects to whom he has granted the same royal privilege. But those animals which are not expressly so reserved, are still liable to be taken and appropriated by any of the king's subjects, upon their own territories; in the same manner as they might have taken even game itself, till these civil prohibitions were issued: there being in nature no distinction between one species of wild animals and another, between the right of acquiring property in a hare or a squirrel, in a partridge or a butterfly: but the difference, at present made, arises merely from the positive municipal law.

5. To this principle of occupancy also must be referred the method of acquiring a special personal property in corn growing on the ground, or other *emblems*,<sup>8</sup> by any *possessor* \*of the land who hath sown or planted it, whether he [\*404 be owner of the inheritance, or of a less estate: which emblems are distinct from the real estate in the land, and subject to many, though not all,

<sup>7</sup> 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. & Ry. 583, S. C. The owner of lands 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's Rep. 1 and 2 Chitty on Pl. 788.—CHITTY.

<sup>8</sup> The right to emblems 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.—CHRISTIAN.

the incidents attending personal chattels. They were devisable by testaments before the statute of wills,<sup>(m)</sup> 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;<sup>(n)</sup> and by the statute 11 Geo. II. c. 19, though not by the common law,<sup>(o)</sup> they may be distrained for rent arrear.<sup>9</sup> The reason for admitting the acquisition of this special property, by tenants who have temporary interests, was formerly given;<sup>(p)</sup> 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 distrainable 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.<sup>(q)</sup>

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:<sup>(r)</sup> 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.<sup>(s)</sup><sup>10</sup> And these doctrines are implicitly copied and adopted by our Bracton,<sup>(t)</sup> and have since been \*confirmed by many resolutions of the courts.<sup>(u)</sup> It hath even been held, that if one takes away and clothes un-

(m) Perk. § 512.

(n) Bro. Abr. tit. *emblements*, 21. 5 Rep. 116.

(o) 1 Roll. Abr. 666.

(p) Pages 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 and 3.

(u) Bro. Abr. tit. *propertie*, 23. Moor. 20. Poph. 35

<sup>9</sup> 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 distress for rent on purchasers 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 and 7.—CHITTY.

<sup>10</sup> This also has long been the law of England; for it is laid down in the year-books 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.—CHRISTIAN.

The cases referred to (Bro. Abr. *Propertie*, 23 Moor. 20, Poph. 38) are very explicit. See also 2 Campb. 576. Com. Dig. *Pleader*, 3 M. 28. Bac. Abr. *Tresp. E. 2.*—CHITTY.

If the materials of one person are united to the materials belonging to another, by the labour of the latter, who furnishes the principal materials, the property in the joint product is in the latter by the right of accession. *Merritt vs. Johnson*, 7 Johns. 473. *Stevens vs. Briggs*, 5 Pick. 177. *Glover vs. Austin*, 6 Pick. 209. *Barr vs. St. John*, 16 Conn. 322. *Pulcifer vs. Page*, 32 Maine, 404. Where one by his labour on another's property wrongfully or by mistake changes its form, he gains thereby no title to it, but the owner may seize it in its new shape, if he can prove the identity of the original materials. *Betts vs. Lee*, 5 Johns. 348. *Silsbury vs. McCoon*, 4 Denio, 332. Thus, where one cut down the trees of another and made them into shingles, it was held that the property in the shingles was in the owner of the trees. *Chandler vs. Edson*, 9 Johns. 362. So where coals were made out of another's wood. *Curtis vs. Groat*, 6 Johns. 168. *Riddle vs. Driver*, 12 Ala. 590. And where one converts the materials of another, at his request, into a different article by manufacturing process, the property in the manufactured article is in the owner of the original material. *Babcock vs. Gill*, 10 Johns. 287. *Eaton vs. Lynde*, 15 Mass. 242. *Worth vs. Northam*, 4 Iredell, 102. Where a manufacturer or mechanic agrees to construct a particular article out of his own materials, or where he is to furnish the principal part of the materials, the property of the article until its completion and delivery is in the maker. *Gregory vs. Stryker*, 2 Denio, 268.—

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other'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, 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)<sup>11</sup>

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.<sup>12</sup> 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 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

(w) Moor. 214.

(x) Inst. 2, 1, 27, 28. 1 Vern. 217.

(y) 2 Inst. 2, 1, 28.

(z) Poph. 38. 2 Bulstr. 325. 1 Hal. P. C. 513. 2 Ver. 518.

(a) On Govt. part. 2, ch. 5.

(b) See page 8.

<sup>11</sup> Where one so confounds another's property with his own that it cannot be distinguished, he must bear all the loss caused by the confusion, (Brackenridge vs. Holland, 2 Blackf. 377. Nast vs. Ten Eyck, 2 Johns. C. R. 62. Haseltine vs. Stockwell, 30 Maine, 237. Bryant vs. Ware, ib. 295,) but not where the confusion has arisen from mere negligence, and not from fraud or design. Pratt vs. Bryant, 30 Verm. 333. If the mortgagor of personal property mix other property of his own with the mortgaged goods, without the consent of the mortgagee, such goods become subject to the lien and operation of the mortgage. Dunning vs. Stearns, 9 Barb. Sup. Ct. 630.

But the rule in regard to confusion of goods is carried no further than necessity requires; and if goods can be easily distinguished and separated, as articles of furniture, for instance, then no change of property takes place. Colwill vs. Reeves, 2 Campb. 575. Holbrook vs. Hyde, 1 Verm. 286. So if the corn or flour mixed together were of equal value, then the injured party takes his given quantity, and not the whole. This is lord Eldon's construction of the cases in the old law. Lupton vs. White, 15 Ves. 442. But if the articles were of different value or quality, and the original value not to be distinguished, the party takes the whole. It is for the party guilty of the fraud to distinguish his own property satisfactorily or lose it. No court of justice is bound to make the discrimination for him. 2 Kent's Com. 365.—SHARSWOOD.

<sup>12</sup> The right to the exclusive use of particular *distinctive trade-marks*, or of a particular partnership firm, (7 Sim. 421,) for enabling the public to know if it is dealing with or buying the manufactures of a particular person, is somewhat analogous to literary copyright, and, though partially founded on the notion of protecting the public from fraud, (3 Myl. & Cr. 338. 8 Sim. 477,) is an example of a right much more evidently arising out of occupancy. See 3 Doug. 293. 3 B. & Cr. 541. 2 Ves. & B. 218. 2 Keen, 210. 3 Myl & Cr. 1, 338. 5 Scott, N. R. 562.—SWEET.

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 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 subtle and substantial 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 \*407] it directed the \*scribe to receive a satisfaction; 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 antient 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.<sup>13</sup>

(c) *Si in chartis membranise tuis carmen vel historiam vel orationem Titius scripserit, hujus corporis non Titius sed tu dominus esse videris.* Inst. 2, 1, 33. See page 404.

(d) *Ibid.* § 34.

(e) *Prolog. in Eunuch.* 20.

(f) *Epiqr.* i. 67, iv. 72, xiii. 3, xiv. 194.

(g) *Jur.* vii. 82.

(h) Since this was first written, it was determined in the case of *Miller vs. Taylor*, in *B. R. Rusch.* 9 Geo. III. 1769, that an exclusive and permanent copyright in authors subsisted by the common law; but afterwards, in the case of *Donaldson vs. Becket*, before the house of lords, 22d Feb. 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.

<sup>13</sup> 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.

But whatever inherent copyright might have been supposed to subsist by the common law, the statute 8 Anne, c. 19 (amended by statute 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 further, 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: (4) and a similar privilege is extended to the inventors of prints and engrav-

(5) By statute 15 Geo. III. c. 53, some additional privileges in this respect are granted to the universities and certain other learned societies.

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 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 describes 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."—CHRISTIAN.

In *Wheaton vs. Peters*, 8 Peters, 591, the question of copyright was discussed by counsel with great learning and ability, and a majority of the Supreme Court held that an author had no common-law copyright in his published works; that if such a common-law right ever existed in England, yet there was no common law of the United States on the subject; and that there was no evidence or presumption that any such common-law right had ever been introduced or adopted in Pennsylvania where the controversy in that case arose; and that as in England, since the statute of 8 Anne, an author's exclusive right of literary property in his published works was confined to the period limited by the statute, so in that case the author's right depended upon the acts of Congress of 1790 and 1802. 2 Kent's Com. 376, n.—SHARSWOOD.

(4) 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 inquiry 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 books; and every 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



ings, 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,

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 copy-right, 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 *vs.* Johnston, 2 Meriv. 29. Hogg *vs.* Kirby, 8 Ves. 225. Stockdale *vs.* Onwhyne, 5 Barn. & Cress. 177.) or *music*, (Platt *vs.* Button, 19 Ves. 447. Clementi *vs.* Walker, 2 Barn. & Cress. 861,) or *prints*, or *charts*, (Blackwell *vs.* Harper, Barnard, Cha. Rep. 120. Wilkins *vs.* Aikin, 17 Ves. 425. Harrison *vs.* Hogg, 2 Ves. Jr. 323. Longman *vs.* Winchester, 16 Ves. 271. Newton *vs.* 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 *vs.* Smith, Jacob's Rep. 472. Walcot *vs.* Walker, 7 Ves. 2. Southey *vs.* Sherwood, 2 Meriv. 440. Lord and Lady Percival *vs.* Phipps, 2 Ves. & Bea. 26. Gee *vs.* Pritchard, 2 Swanst. 415. The plaintiff must also, in order to entitle him to an injunction, show 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 *vs.* 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 *vs.* Stockdale, 12 Ves. 273, 276. Butterworth *vs.* Robinson, 5 Ves. 709. Tonson *vs.* 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 *vs.* Faden, 5 Ves. 26;) and such additions and corrections may properly be made the subject of copyright. Cary *vs.* 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 *vs.* Aikin, 17 Ves. 424;) for, although an abstract or fair abridgment of a publication is allowable, (Dodsley *vs.* Kinnersley, Ambl. 403. Gyles *vs.* Wilcox, Barnard, Cha. Rep. 368. Bell *vs.* Walker & Debrett, 1 Br. 451. Whittingham *vs.* Wooler, 2 Swanst. 431,) a colourable abstract will be restrained. Butterworth *vs.* Robinson, 5 Ves. 709. Carnan *vs.* Bowles, 1 Cox, 285. Macklin *vs.* Richardson, Ambl. 696. Gyles *vs.* Wilcox, 2 Atk. 142.

No property can be acquired in any article copied, in the same language, from a prior work, (Barfield *vs.* Nicholson, 2 Sim. & Stu. 1;) but a translation is as much entitled to protection as an original production. Wyatt *vs.* Bernard, 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 *vs.* 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 *vs.* 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 *vs.* Button, 19 Ves. 448. Rundell *vs.* 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 *vs.* Walker, 2 Barn. & Cress. 866, 870.

which allows a royal *patent* of privilege to be granted for fourteen years to any inventor of a new manufacture, for the sole working or making of the same; by

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 vs Walker*, 3 Mau. & 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 vs. 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 vs. Doig*, 2 Ves. Jr. 487. *Berke vs. Harris*, Hardr. 337.

In cases of alleged piracy of literary property, a reference is usually directed to the Master, (— *vs. Leadbetter*, 4 Ves. 681. *Nicol vs. Stockdale*, 3 Swanst. 689;) but, in order to save expense, the court itself will sometimes compare the two works. *Whittingham vs. Wooller*, 2 Swanst. 431.

Parts of this note and the next are extracted from 2 Hoveden 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."—CURRY.

But this act has now been repealed; and, by several recent statutes, the law of copyright has been placed upon a different footing. By the statute 5 & 6 Vict. c. 45, the protection of the law is extended to the period of *forty-two* years from the first publication of a work or the period of the life of the author, and seven years following, whichever of these two terms may be the longer. And the copyright of a book published after the author's death endures for *forty-two* years from the publication. With regard to encyclopædias, reviews, and periodicals, the act provides that the copyright of articles supplied to such works shall belong to the proprietors of the works for the same period as is given to the authors of books whenever the article has been written on the terms that the copyright shall belong to the proprietor; but the copyright does not vest until payment has been actually made.

In the absence of any agreement, after twenty-eight years from the publication of an article the right of publishing it in a separate form reverts to the author for the remainder of the term of forty-two years given by the statute. During the twenty-eight years thus allowed to the publisher in the absence of an agreement, the consent of the author or his assigns must be obtained to enable the proprietor of the encyclopædia, review, or periodical to publish the article in a separate form. The statute also reserves to the author of any dramatic piece or musical composition, and to his assigns, the sole right of representation or performance in public for the same term as is appointed for the duration of copyright in books. These rights extend to foreigners residing in this country. It has also been decided that a foreigner residing abroad is entitled to the copyright of a work composed by him which has been first published in this country. *Boosey vs. Davidson*, 13 Q. B. 257. *Boosey vs. Jeffries*, 6 Ex. 580.—KERR.

By the act of Congress 4 Feb. 1831, (4 Stat. 436. 4 Story's Laws, 2221,) which has superseded and repealed all former laws on the subject, the authors of books, maps, charts, and musical compositions, and the inventors and designers of prints, cuts, and engravings, being citizens of the United States or residents therein, are entitled to the exclusive right of printing, reprinting, publishing, and vending them for the term of twenty-eight years from the time of recording the title thereof; and if the author, inventor, or designer, or any of them, where the work was originally composed and made by more than one person, be living, and a citizen of the United States, or resident therein at the end of the term, or, being dead, shall have left a widow or child or children, either or all of them living, she or they are entitled to the same exclusive right for the further term of fourteen years on complying with the terms prescribed by the act of Congress 2 Kent's Com. 373.—SHARSWOOD.

virtue whereof it is held, that a temporary property therein becomes vested in the king's patentee.(k)<sup>15</sup>

(\*) 1 Vern. 62.

<sup>15</sup> 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 recompense 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 vs. Plane*, 14 Ves. 132. *Universities of Oxford and Cambridge vs. Richardson*, 6 Ves. 707. *Williams vs. 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 vs. 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 vs. 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 vs. James*, 2 Meriv. 451. *Ex parte Fox*, 1 Ves. & Bea. 67. *Turner vs. Winter*, 1 T. R. 605. *Harmer vs. Plane*, 11 East, 107.

The enrolment of a patent cannot be dispensed with upon the ground that, if the specification is made public, foreigners may take advantage of the invention; for the king's subjects have a right to see the specification. *Ex parte Kooops*, 6 Ves. 599. Nor can the date of the 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 Kooops, 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 vs. Thompson*, 3 Meriv. 629. *Harmer vs. 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. 37. 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 vs. Plane*, 14 Ves. 134.—CHITTY.

The Patent-Law Amendment Act (15 & 16 Vict. c. 83) now regulates the terms upon which letters-patent may be granted. By this statute, the fees which it was formerly necessary to pay upon obtaining a patent have been greatly reduced, and the payment of them is spread over the space of several years; so that, if an invention be not found lucrative, the patent may be discontinued and the fees saved. Letters-patent granted under this act contain a condition that the same shall be void at the end of three years unless a fee of 40*l.*, with 10*l.* stamp duty, be then paid; and again at the end of seven years from the grant, unless a fee of 80*l.* and 20*l.* stamp duty be paid.

The statute 5 & 6 Will. IV. c. 83 authorized a prolongation of the original term, not exceeding seven years, to be given, on the recommendation of the Judicial Committee of the privy council; and, by statute 7 & 8 Vict. c. 69, a further term, not exceeding fourteen years, may be granted, if it be shown that the inventor has not been remunerated during the former period for the expense and labour incurred in perfecting his invention.—KERR.

By the act of Congress of July 4, 1836, c. 357, (4 Story's Laws, 2504,) all former laws of the United States on the subject of patents are repealed, and the patent system re-

## 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 antient grant.

Such, in the first place, are all *tributes, taxes, and customs*, whether constitutionally inherent in the crown, as flowers of the prerogative and branches of the *census regalis* or antient 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 antient prerogative, or by particular modern statutes: which revenues created by statute do always assimilate, or take the same nature, with the antient 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 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,<sup>(a)</sup> 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;<sup>(b)</sup> 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.<sup>(c)</sup> 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

(a) See page 164.

(b) Fitz. Abr. t. *attte*, 38. Plowd. 243.

(c) Cro. Eliz. 263. Plowd. 323. Finch, Law, 178. 10 Mod 245.

enacted with important amendments. The Patent-Office is now attached to the Department of the Interior, (Act March 3, 1849. 9 Statutes, 395,) and a Commissioner of Patents appointed. Applications for patents are to be made in writing to the commissioner by any person having discovered or invented any new and useful art, machine, manufacture, or composition of matter, or any new and useful improvement on any art, machine, manufacture, or composition of matter not known or used by others before his discovery or invention thereof, and not, at the time of his application for a patent, in public use or sale, with his consent or allowance as the inventor or discoverer. It must be accompanied with specifications, drawings, specimens of ingredients, and models, according to the nature of the case. It is the duty of the commissioner to examine the alleged new invention or discovery, and, if satisfied that the applicant is entitled under the law, he is to issue a patent in the name of the United States to him, his heirs, executors, administrators, or assigns, for the exclusive right of making, using, and vending the same for a term not exceeding fourteen years. The patent may, in special cases and in the discretion of the board of commissioners, be renewed and extended to the further term of seven years. If the application be rejected and the applicant persist in his claim, he is to make his oath or affirmation anew; and, if the specification and claim be not so modified as to remove the objection, the applicant may appeal to a board of three examiners, to be appointed by the Secretary of the Interior; and the Commissioner of Patents is to be governed by their decision. 2 Kent's Com. 367.—SHARPSWOOD.

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 circumstance.

This doctrine has no opportunity to take place in certain other instances of title by prerogative, that remain to be mentioned; as the chattels thereby vested are originally and solely vested in the crown, without any transfer or derivative assignment either by deed or law from any former proprietor. Such is the acquisition of property in wreck, in treasure-trove, in waifs, in estrays, \*110] 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* 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.<sup>2</sup>

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 *feræ naturæ* as are known by the denomination of *game*, with the right of pursuing, taking, and destroying them: which is vested in the king alone, and from him derived to such of his subjects as have received the grants of a chase, a park, a free warren, or free fishery. This may lead us into an

(\*) Co. Litt. 30.

<sup>1</sup> 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 Shakspeare; and it is not improbable that he intended to ridicule this legal logic by the reasoning of the grave-digger in Hamlet upon the drowning of Ophelia. See Sir J. Hawkins's note in Stephen's edition.—CHRISTIAN.

<sup>2</sup> However, it seems to be agreed now that both the Bible and statutes may be printed by others than those deriving the right from the grant of the crown, provided such editions comprise *bona fide* notes; but, with this exception, the sole right to print these works is now vested in the Universities of Oxford and Cambridge and the patentees of the crown. Basket vs Cambridge University, 2 Burr. 661.—KERR.

inquiry concerning the original of these franchises, or royalties, on which we touched a little in a former chapter: (*f*) the \*right itself being an incorporeal hereditament, though the fruits and profits of it are of a personal nature. [\*111

In the first place, then, we have already shown, 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 *feræ naturæ*, 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:—" *Feræ igitur bestiæ, et volucres, et omnia animalia quæ 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 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 consequence of universal license. 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.<sup>3</sup> 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. [\*112

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; 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 pro-*

(*f*) Pages 38, 39.  
(*g*) Inst. 2, 1, 12.

(*h*) Puff. L. b. 1, 4, c. 6, § 5.  
(*i*) Warburton's Alliance, 324.

<sup>3</sup> 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 —

*hberi 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 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 on \*a saying of \*413] 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)<sup>4</sup>

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 feudal 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 behooved 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 \*414] use of nets, snares, or other engines for destroying the game. \*This exclusive privilege well suited the martial genius of the conquering troops, who delighted in a sport(q) which, in its pursuit and slaughter, bore some resemblance to war. *Vita omnis* (says Cæsar, speaking of the antient 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 effeminate, and having no other learning than was couched in such rude ditties as were sung at the solemn carousals which succeeded these antient huntings. And it is remarkable that, in those nations where the feudal policy remains the most uncorrupted, the forest or game laws continue in their highest rigour. In France

(k) Inst. 2, l. 1, § 12.

(l) Decretal. l. 5, t. 24, c. 2.

(m) Decretal. part. 1, dist. 34, l. 1.

(n) Cap. 64.

(o) 4 Inst. 309.

(p) Feud. l. 2, t. 27, § 5.

(q) In the laws of Jenghiz Khan, founder of the Mogul

and Tartarian empire, published A.D. 1205, there is one which prohibits the killing of all game from March to October, that the court and soldiery might find plenty enough in the winter, during their recess from war. Mod. Univ. Hist. iv. 468.

(r) De Bell. Gall. l. 6, c. 20.

(s) C. 15.

<sup>4</sup> When archbishop Abbot, by an unfortunate accident, had killed a park-keeper in shooting at a deer with a cross-bow, 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.—CHRISTIAN.

all game is properly the king's;<sup>5</sup> 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 time 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 with [ \*415 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,(u) and of Edward the Confessor:(v) "*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 antient law of the Scandinavian continent, from whence Canuto 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 feudal 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 anywhere; 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 antient forests, but in the new ones which the conqueror made, by [ \*416 laying together vast \*tracts of country depopulated for that purpose, and reserved solely for the king's royal diversion; in which were exercised the most horrid tyrannies and oppressions, under colour of forest law, for the sake of preserving the beasts of chase: to kill any of which, within the limits of the forest, was as penal as the death of a man. And, in pursuance of the same principle, king John laid a total interdict upon the *winged* as well as the *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 feudal 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

(t) *Mattheus de Crimin.* c. 3, l. 1. *Carpov. Practic. Saxonic.* p. 2, c. 84.  
(u) C. 77.  
(v) C. 36.

(w) *Stiernhook de jure Svecon.* l. 2, c. 9  
(x) M. Paris, 303.  
(y) 9 Hen. III.

\*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.--  
CHITTY.



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 license 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 antient chase or park; unless they be also beasts of prey.

\*As to all inferior species of game, called beasts and fowls of warren, \*417] 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, that, by the acquiescence of the crown, the frequent grants of free warren in antient 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 \*418] well *qualified* he \*may vulgarly be esteemed, has a right to encroach on the royal prerogative by the killing of game, unless he can show 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: \* the other by 5 Anne, c. 14, which

(\*) Cap. 10.

(\*) See page 38.

(b) *Mirr.* c. 5, § 2. See page 40.

\* 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 Ric. 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

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 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.<sup>7</sup>

\*Upon the whole it appears, that the king, by his prerogative, and [\*419 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 *feræ naturæ*, while living; which is said to be vested in them, as was observed in a former chapter, *propter privilegium*.<sup>8</sup> And it must also be remembered, that such persons as may

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 coney, nor other *gentlemen's* game, upon pain of one year's imprisonment."

This statute clearly admits and restrains the 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 daytime, 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 constitution vested the sole property of all the game in England in the king alone. Ib. 415.—CHRISTIAN.

<sup>7</sup> By statute, 1 & 2 W. IV. c. 32 the arbitrary distinctions of *qualification* have been done away with; and now the right to kill game upon any land is vested in the owner or occupier thereof, (in the absence of a reservation of the right by the landlord,) and any person with permission of the owner may kill game on any land. But the act requires all persons killing or taking game to take out a yearly certificate; and persons selling it must also obtain a yearly license. The effect of this act seems to be virtually to vest the property in game in the owner of the land wherever it is found, although he cannot avail himself of such right of property without the required certificate.—KERR.

\* Mr. Christian, in a note on this passage, has, I think, successfully controverted the general doctrine laid down by the author. He has pointed out that it cannot follow that the king and his grantees have a sole right to take game, either from feudal principles, because he is the ultimate proprietor of all land, nor from the fact that animals *feræ naturæ* are *bona vacantia*. And he has cited a good deal of authority to show that at common law every person *ratione soli* had a right to take game on his own lands.

The question is not of much practical importance. On the one hand, it is clear that by statute law a person unqualified cannot kill the game even on his own estate; on the other, it is equally clear by common law that he may preserve it, and that no man, however qualified or whatever ultimate rights he may have in the soil, unless he has the franchise of chase or free warren, can enter to destroy game without subjecting himself

thus lawfully hunt, fish, or fowl, *ratione privilegii*, have (as has been said) only a qualified property in these animals; it not being absolute or permanent, but lasting only so long as the creatures remain within the limits of such respective franchise or liberty, and ceasing the instant they voluntarily pass out of it. It is held, indeed, that if a man starts any game within his own grounds, and follows it into another's, and kills it there, the property remains in himself.(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.<sup>9</sup>

\*120] \*III. I proceed now to a third method, whereby a title to goods and chattels may be acquired and lost, viz., by *forfeiture*; as a punishment for some crime or misdemeanour 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 misdemeanours; 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 40s. per month by the statute 5 Eliz. c. 4 for exercising a trade without having served seven years as an apprentice thereto;<sup>10</sup> and the forfeiture of 10l. by 9 Anne, c. 23<sup>11</sup> for printing an almanac without a stamp. I shall therefore confine myself to those offences only, by which *all* the goods and chattels of the offender are forfeited: referring the student for such, where pecuniary mulcts of different quantities are inflicted, to their several proper heads, under which very many of them have been or will be mentioned; or else to the collections of Hawkins, and Burn, and other laborious compilers. Indeed, as most of these forfeitures belong to the crown, they may seem as if they ought to have been referred to the preceding method of acquiring personal pro-

(c) 11 Mod. 75.

(d) Puff. L. N. l. 4, c. 6.

(e) Lord Raym. 151. 2 Salk. 555. 3 Salk. 290. Comb. 450; and see 14 East, 249.

(f) Lord Raym. 251.

(g) Farr. 18. Lord Raym. 251.

(h) See page 267.

to an action of trespass. Even the lord of a manor cannot enter on his copyholder's land without the same consequence.—COLERIDGE.

<sup>9</sup> 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 aequali jure potior est conditio possidentis* must have prevailed.

These distinctions I have heard recognised 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.—CHRISTIAN.

<sup>10</sup> This forfeiture is abolished by the 54 Geo. III. c. 96.—CHITTY.

<sup>11</sup> This forfeiture is also abolished, and persons uttering or exposing to sale unstamped almanacs are punishable with three months' imprisonment. 30 Geo. II. c. 19, s. 26.

—CHITTY.

perty, namely, by prerogative. But as, in the instance of partial forfeitures, a moiety often goes to the informer, the poor, or sometimes to other persons; and as one total forfeiture, namely, that by a bankrupt who is guilty of felony by \*concealing his effects, accrues entirely to his creditors, I have therefore [\*421 made it a distinct head of transferring property.

Goods and chattels then are totally forfeited 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 *præmunire*; by *pretended prophecies*, upon a second conviction; by *owling*; by the *residing abroad of artificers*;<sup>12</sup> 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.<sup>13</sup>

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## 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 which may entitle a man to a chattel interest in different parts of the kingdom; I shall therefore content myself with making some observations on three sorts of customary interests, which obtain pretty generally throughout most parts of the nation, and are therefore of more universal concern; viz., *heriots*, *mortuaries*, and *heir-looms*.

1. Heriots,<sup>1</sup> which were slightly touched upon in a former chapter,(a) are

(1) Co. Litt. 391. 2 Inst. 316. 3 Inst. 320.

(\*) Page 97.

<sup>12</sup> By the 5 Geo. IV. c. 97, all the laws relative to artificers going into foreign parts are repealed.—CHITTY.

<sup>13</sup> 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.—CHITTY.

<sup>1</sup> As to heriot-service and custom in general, see Com. Dig. Copyhold, K. 18. Bac. Abr. 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 vs. 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 reunited 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 vs. Jekyll*, 2 Bingh. Rep. 273, C. J. Best observing that the authority which appeared to govern the court in the former case (*Fitz. Abr. 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

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 *heregates* or heriots specified which were then exacted by the king on the death of divers of his subjects, according to their respective dignities; from the highest *eorle* down to the most inferior *thegne* or land holder. These, for the most part, consisted in arms, horses, and habiliments of war; which the word itself, according to Sir Henry Spelman,(e) signifies. 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 feudal 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 feudal 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 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 villeinage, when all his goods and chattels were quite at the mercy of the lord; and

\*424] 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 discretionary piece of gratitude into a permanent duty. An heriot may also appertain to free land, that is held by service and suit of court; in which case it is most commonly a copyhold enfranchised, whereupon the heriot is still due by custom. Bracton(i) speaks of heriots as frequently due on the death of both species of tenants:—"est quidem alia præstatio quæ nominatur herietum; 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.

This heriot is sometimes the best live beast, or *averium*, which the tenant

(b) 2 Saund. 166.

(c) Co. Cop. § 24.

(d) C. 69.

(e) Of Feuds, c. 18.

(f) Page 65.

(g) *L.L. Gull. Cong.* c. 22, 23, 24.

(h) Lambard, *Peramb. of Kent*, 492.

(i) *L. 2, c. 36, § 9.*

(k) *L. 3, c. 18.*

(l) C. 69.

In any book, or in any modern treatise, that goes the length of showing 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 reunited, all the heriots are to be paid after the reunion of the several estates that were paid whilst it was divided. We say there is no such law, no such doctrine." 2 Bingham, 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, *quere* 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.—CHITTY.

dies possessed of, (which is particularly denominated the villein's relief in the twenty-ninth law of 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 antient 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 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, optimo cui de jure fuerit debitum reservato, ecclesie 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 (ꝛaplꝛceat) 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 movables.(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 antiently usual in this kingdom to bring the mortuary to church along with the corpse when it came to be buried; and thence(u) it is sometimes called a *corse-present*: a \*term which bespeaks it to have been [ \*426 once a voluntary donation. However, in Bracton's time, so early as Henry III., we find it riveted into an established custom: insomuch that the bequests of heriots and mortuaries were held to be necessary ingredients in every testament of chattels. "*Imprimis autem debet quilibet, qui testamentum fecerit, dominum 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 the mortuary or corse-present was due, upon the death of every clergy-

(\*) Hob. 60.

(\*) Keilw. 84. 4 Leon. 239.

(\*) Co. Cop. § 31.

(\*) Co. Lit. 185.

(\*) Provinc. l. 1, tit. 3.

(\*) C. 13.

(\*) Panormitan, ad Decretal. l. 3, t. 20, c. 32.

(\*) Sp. L. b. 28, c. 41.

(\*) Selden, Hist. of Tithes, c. 10.

(\*) Bracton, l. 2, c. 26. Flet. l. 2, c. 57.

\* And, indeed, heriots themselves will in course of time cease to be exigible, one of the Copyhold Enfranchisement Acts (15 & 16 Vict. c. 51, § 27) having enabled either lord or tenant to compel the extinguishment of this ancient feudal burden.—KERR.

man, to the bishop of the diocese; till abolished, upon a recompense given to the bishop, by the statute 12 Anne, 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 to six things: the \*427] \*bishop's best horse or palfrey, with his furniture; his cloak or gown, and tippet; his cup and cover; his basin and ewer; his gold ring; and, lastly, his *muta canum*, his mew or kennel of hounds; as was mentioned in the preceding chapter.(z)

This variety of customs, with regard to mortuaries, giving frequently a handle to exactions on the one side, and frauds or expensive litigations on the other; it was thought proper, by statute 21 Hen. VIII. c. 6, to reduce them to some kind of certainty. For this purpose it is enacted, that all mortuaries or corse-presents to parsons of any parish, shall be taken in the following manner; unless where by custom less or none at all is due; viz., for every person who does not leave goods to the value of ten marks, nothing: for every person who leaves goods to the value of ten marks and under thirty pounds, 3s. 4d.; if above thirty pounds and under forty pounds, 6s. 8d.; if above forty pounds, of what value soever they may be, 10s. 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<sup>s</sup> are such goods and personal chattels as, contrary to the nature

(\*) Cro. Car. 237.

(y) 2 Inst. 491.

(z) Page 413.

<sup>3</sup> 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 vs. Lord Scarborough*, 1 Swanst. 546. *Boon vs. Cornforth*, 2 Ves. Sen. 280. *Wythe vs. 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 settling 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 vs. Grosvenor*, Barnard, 56, 63, S. C. 5 Mad. 338, 349. *Trafford vs. 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 vs. 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 vs. Lord Errol*, 14 Ves. 487. And lord Hardwicke himself admitted that, in the case of *Gower vs. Grosvenor*, he went to the utmost allowable extent of construction in favour of heir-looms. *Duke of Bridgewater vs. 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 vs. 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,

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 shall vest in the executor. (b)\* But deer in a real \*authorized 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 antient 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,<sup>5</sup> 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 ædibus 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 movable among those of the immovable kind, calling them by a very particular appellation, *prædia 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 ædibus, aliisque prædiis, compareantur; quod solidiora mobilia ipsis ædibus ex destinatione patrisfamilias coherere videantur, et pro parte ipsarum ædium æstimentur*." (i)

Other personal chattels there are, which also descend to the heir in the nature of heir-looms, as a monument or tombstone in a church, or the coat-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) Pews<sup>6</sup> in the church are somewhat of the same nature, which

(a) Spelm. Gloss. 277.

(b) Co. Litt. 388.

(c) Ibid. 8.

(d) Ibid. 18.

(e) Bro. Abr. tit. *chattles*, 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.

as far as the law will permit them, all articles which their testator intended to have treated as heir-looms. *Clarke vs. 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 vs. Lord Ferrars*, 5 Ves. 806.—CHITTY.

\* 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.—CHRISTIAN.

<sup>5</sup> 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.—CHITTY.

<sup>6</sup> 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



may descend by custom immemorial (without any ecclesiastical concurrence) from the ancestor to the heir.<sup>(l)</sup> 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;<sup>(m)</sup> for the property thereof remains in the executor, or whoever was at the charge of the funeral.<sup>7</sup>

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,<sup>(n)</sup> even by a tenant in fee-simple.<sup>8</sup> 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.<sup>9</sup>

(l) 3 Inst. 202. 12 Rep. 105.  
(\*) 3 Inst. 110. 12 Rep. 113. 1 Hal. P. C. 515.

(n) 1 Co. Litt. 185.

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. 316.

In an action upon the case for a disturbance of the enjoyment of a pew, 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. 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.—CHRISTIAN.

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.—CHITTY.

The owner of a pew has a right to the exclusive use of it on all occasions when the church is open, whether for worship or any other purpose, can put a fastening on the door and maintain trespass against any person who enters against his will. Jackson *vs.* Rounseville, 5 Met. 127. Shaw *vs.* Beveridge, 3 Hill, 26. If the church be pulled down and rebuilt, the parish or corporation does not subject itself to any liability to the proprietors of pews in the old edifice. Fassett *vs.* Boylston, 19 Pick. 361. Kellogg *vs.* Dickinson, 18 Vermont, 266.—SHARSWOOD.

It has been determined that stealing dead bodies, though for the improvement of the science of anatomy, is an indictable offence as a misdemeanour; 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.

Though a philosopher may be regardless of his own body after death, yet he must be destitute of the feelings of humanity if he could bear without concern that the body of a beloved wife, daughter, or sister had been exposed to public view and mangled by the dissector's knife.

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 famęque dandum sit, id curent vivi.* Cic. 1 Tusc. n. 108.—CHRISTIAN.

<sup>7</sup> That is, if the inheritance to which they are attached be allowed to descend to him; but if that be devised away, the heir-looms, I conceive, would go with it to the devisee.

—COLERIDGE.

<sup>8</sup> Co. Litt. 185, 186. The law, as here laid down on the authority of lord Coke, is supported by many other authorities, though it has been questioned in Woodd. Vin. Lect. vol. 11, p. 389.

The term of heir-loom is often applied in practice to the case where certain chattels -- for example, pictures, plate, or furniture—are directed by will or settlement to follow the limitations thereby made of some family mansion or estate. But the word is not here employed in its strict and proper sense, nor is the disposition itself beyond a certain point effectual; for the articles will in such case belong absolutely to the first person who, under the limitations, would take a vested estate of inheritance in them

## 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*: which is, in strictness of law, only applicable to *corporations aggregate* of many, as dean and chapter, mayor and commonalty, master and fellows, and the like; in which one set of men may, by succeeding another set, acquire a property in all the goods, movables, 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 corporation [\*431] 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 antient 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 forever. This is not the case in corporations aggregate, where the right

(\*) 4 Rep. 65.

(b) Bro. Abr. tit. *Estates*, 90. Cro. Eliz. 464.

(c) Dyer, 43. Cro. Eliz. 464.

(d) Co. Litt. 46.

(e) Brownl. 132.

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supposing them to be real estate, and, if he dies intestate, will pass to his personal representative and not to his heirs. *Gower vs. Grosvenor*, Barnard Ch. Rep. 54. Co. Litt. oy Hargrave, note 18, b n. 7.—STEPHEN.

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: 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 \*433] 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.

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 the same powers as the wife when sole had over them.

This depends entirely on the notion of a 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.

There is therefore a very considerable difference in the acquisition of this \*434] species of property by the husband, \*according to 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

(f) Co. Litt. 46.

(g) Ibid. 40.

(h) 4 Rep. 65. Cro. Eliz. 682

(i) See book I. c. 15.

(k) Co. Litt. 46.

(l) Plowd. 263.

(m) Co. Litt. 351.

(n) Ibid. 300.

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.<sup>1</sup> And upon such receipt or recovery they are absolutely and

(c) Poph. 5. Co. Litt. 351.

<sup>1</sup> 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 endorse 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. and 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 Mad. 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.—CHURCH.

Where the wife's interest is an equitable one, or where from any circumstances the assistance of a court of equity is required in order to reduce the property into possession, the court will not render its assistance except on the terms of some part, or in some cases the whole, being settled to the use of the wife and children. This is the *wife's equity* ; and this equity has been administered even against the assignees in insolvency of the husband, claiming during the joint lives of the husband and wife the entire benefit of a legal estate vested in the wife for life. *Sturgis vs. Champneys*, 5 Myl. & C. 97. *Hanson vs. Keating*, 4 Hare, 1.—KERR.

It is not every reduction to possession which will vest the property absolutely in the husband. The ownership follows the husband's will ; for the law will not cast it on him against his consent. *Hind's estate*, 5 Whart. 138. *Barron vs. Barron*, 24 Vern. 375. Reduction to possession is in all cases *prima facie* evidence of conversion to the husband's use, because it is accompanied in a vast majority of cases with that intent ; but that presumption of intent, like every other which is founded on experience of the current of human transactions, may be repelled by disproof of the fact in the particular instance. A husband's disclaimer of conversion to his own use at the time of reducing his wife's chose in action to possession may be established by his subsequent admissions ; but they must be clear and positive. *Gay's estate*, 1 Barr, 327.

The assignment or release of the husband, in order to be effectual to bar the wife's survivorship, must be express and for value. *Skinner's Appeal*, 5 Barr, 262. *Tuttle vs. Fowler*, 22 Conn. 58. Where it is as collateral security only for a precedent debt, it will not avail for this purpose. *Hartman vs. Dowdell*, 1 Rawle, 279. It has been held, too, that a transfer for value is a reduction to possession, whether as to choses presently reducible, reversionary interests, or bare possibilities. *Webb's Appeal*, 9 Harris, 248.

It is a result of the principles which have been settled on this subject that the choses in action of the wife, not vested in the husband by some act of reduction to possession indicative of the intention to convert them to his own use, cannot be reached or attached for his debts. *Dennison vs. High*, 2 Watts, 90. *Robinson vs. Woelpper*, 1 Whart. 179. And although, in an action by the husband alone for his wife's legacy, his bond due to the estate out of which the legacy is payable may be set off, (*Wishart vs. Downey*, 15 S. & R. 77. *Lowman's Appeal*, 3 W. & S. 349,) yet where the debt due by the husband is not set off in his lifetime against the legacy or other chose in action of the wife, it cannot be after his death without her consent. *Krider vs. Boyer*, 10 Watts, 54. *Flory vs. Becker*, 2 Barr, 471.

The rule is, that if the husband appoints an attorney to receive the money, and he receives it, or if he mortgages the wife's *choses in action*, or assigns them without reservation for a valuable consideration, or if he recovers her debt by a suit in his own name, or if he releases the debt for value or reverts it by taking a new security in his own name,—in all these cases, upon his death, the right of survivorship in the wife to the

entirely his own; and shall go to his executors or administrators, or as he shall bequeath them by will, and shall not revert in the wife. But if he dies before he has recovered or reduced them into possession, so that at his death they shall 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.<sup>(p)</sup> 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;<sup>(q)</sup> for the husband never exerted the right he had, which right determined with the coverture. Thus, in both these species of property the law is the same in case the wife survives the husband; but, in case the husband survives the wife, the law is very different \*135] with respect to *chattels real* and *choses in action*: for he shall have *the chattel real* by survivorship, but not the *chose in action*;<sup>(r)</sup> 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. 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.<sup>2</sup>

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 revert in the wife or her representatives.<sup>(s)</sup>

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 her *paraphernalia*, \*136] *which is a term borrowed from the civil law*,<sup>(t)</sup> 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 peccress usually worn

<sup>(p)</sup> Co. Litt. 351.  
<sup>(q)</sup> Ibid.  
<sup>(r)</sup> 3 Mod. 186.

<sup>(s)</sup> Co. Litt. 351.  
<sup>(t)</sup> *Ff.* 23, 3, 9, § 3.

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property ceases. And if the husband obtains a judgment or decree as to money to which he was entitled in right of his wife, and the suit was in his own name alone, the property vests in him by the recovery. If the suit was in their joint names, and he dies before actually receiving the money, the judgment survives to the wife. *McDowl vs. Charles*, 6 Johns. Ch. Rep. 132. *Searing vs. Searing*, 9 Paige, 283. A general assignment in bankruptcy, or under insolvent laws, passes the wife's choses; but if the husband dies before the assignees have reduced them to possession, they survive, for the assignees only stand in the husband's shoes and possess his power. It is different with an assignee for value. *Epps vs. Van Deusen*, 4 Paige, 64. *Mitford vs. Mitford*, 9 Ves. 87. *Paine vs. Thornely*, 2 Simon's Rep. 167. *Outrail vs. Van Winkle*, 1 Green, N. J. 516. 2 Kent's Com. 137, 138.—SHARSWOOD.

<sup>2</sup> 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 178 1 Mod. 231 *Butler's Co. Litt.* 351. 1 Wils. 168.—CHITTY.

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) 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)<sup>3</sup>

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.<sup>4</sup> \*But there is also a species of property to which a [ \*437

(u) Moor. 213.

(w) Cro. Car. 343. 1 Roll. Abr. 911. 2 Leon. 166.

(x) Noy's Max. c. 49. *Graham vs. Ld. Londonderry*, 24th Nov. 1746. *Cauc.*

(y) 1 P. Wms. 730.

(z) Noy's Max. c. 49.

<sup>3</sup> 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* to 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.—CHRISTIAN.

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 vs. Herbert*, Prec. Ch. 44. 3 P. Wms. 337. 2 Eq. Ca. Abr. 156, in marg. except as against creditors, Prec. 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 vs. Hobhouse*, 2 Meriv. 483. 11 Ves. 222. 1 Ves. Jr. 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. Jr. 196. 12 Ves. 67,) unless by fraud of the husband he prevents the agreement from being reduced to writing. *Montacute vs. Maxwell*, 1 P. Wms. 620. 1 Stra. 236, S. C.—CHITTY.

<sup>4</sup> If the owner of a chattel bring an action of trespass or trover against one unlawfully in possession, or, waiving the tort, an action to recover the price or value of it, and recovers judgment, such judgment, while it vests a title to the damages in the plaintiff, operates at the same time as a transfer to the defendant of the plaintiff's title to the thing. It results from the conclusiveness of the judgment as a bar to any other action by the plaintiff, or any one claiming under him, against the defendant, or those deriving their title through him. The authorities are not harmonious upon the question whether a mere judgment without satisfaction or payment of the amount recovered by the defendant will produce the effect. See 2 Kent's Com. 388, 389. The learned chancellor expresses the opinion that the negative is the better doctrine. But if the ground of the rule that the judgment transfers the title to the defendant be that before stated in this note, then it is plain that payment or satisfaction of the judgment is not necessary. *Nemo debet bis vezari pro eadem causa*. A prior judgment, whether paid or not, can be set up as a conclusive bar to any subsequent action for the same cause between the same parties or their respective privies. *Floyd vs. Brown*, 1 Rawle, 121. *Marsh vs. Pier*, 4 Rawle, 273. *Merrick's Estate*, 5 W. & S. 17. *Morrell vs. Johnson*, 1 Hen. & Munf. 499

man has not any claim or title whatsoever, till after suit commenced and judgment obtained in a court of law: where the right and the remedy do not follow each other, as in common cases, but accrue at one and the same time: and where, before judgment had, no man can say that he has any absolute property, either in possession or in action. Of this nature are,

1. Such penalties as are given by particular statutes, to be recovered in 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 everybody 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 anything 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 \*438] interest. This therefore is one instance, 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.

\*3. Hither also may be referred, upon the same principle, all title to \*439] 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

(\*) 2 Lev. 141. Stra. 1169. Combe vs. Pitt, B. R. Tr. 3 Geo. III.

(b) Stat. 4 Hen. VII. c. 20.

(c) Cro. Eliz. 133. 11 Rep. 65.

Rogers vs. Moon, 1 Rice, 60. Carlisle vs. Burley, 3 Greenl. 250. That satisfaction is necessary, on the other hand, is supported by Curtis vs. Groat, 6 Johns. 168. Osterhout vs. Roberts, 8 Cowen, 43. Sanderson vs. Caldwell, 2 Aiken, 203. Jones vs. McNeil, 2 Bailey, S. C. 466.—SHARSWOOD.

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.

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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*, 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*,<sup>1</sup> are the act of transferring the right and the possession of them; whereby one man renounces, and another man immediately acquires, all title and interest therein; which may be done either in writing, or by word of mouth, (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

(\*) Perk. § 57.

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<sup>1</sup> 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, 1044. 1 Camp. 333, 334. 5 Taunt. 212. As to the notoriety of the sale, 2 B. & P. 59. 8 Taunt. 83E. 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 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.—CHITTY.



to the use of the donor, shall be void: because otherwise persons might be tempted to commit treason or felony, without danger of forfeiture; and the creditors of the donor might also be defrauded of their rights. And by statute 13 Eliz. c. 5, every grant or gift of chattels, as well as lands, with an intent to defraud creditors or others,<sup>(b)</sup> 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; 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.<sup>2</sup>

A true and proper gift or grant is always accompanied with delivery of possession, and takes effect immediately:<sup>3</sup> 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:<sup>(c)</sup> 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 \*442] immediate possession, it is then not properly a gift, but a contract; \*and this a man cannot be compelled to perform but upon good and sufficient consideration; as we shall see under our next division.

IX. A contract, which usually conveys an interest merely in action, is thus defined:—"an agreement, upon sufficient consideration, to do or not to do a particular thing." From which definition there arise three points to be contemplated

(\*) See 3 Rep. 82.

(†) Jenk. 109.

<sup>2</sup> 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. Abr. 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.—CHITTY.

<sup>3</sup> And now, by the statute 17 & 18 Vict. c. 36, s. 1, bills of sale, which is the usual denomination of a grant of chattels personal, must be filed with the clerk of dockets and judgments in the court of Queen's Bench within twenty-one days after the making or giving them; otherwise any such grant will, as against assignees in bankruptcy or insolvency, or creditors, be null and void.—KERR.

The leading case on the construction of 13 Eliz. c. 5 is Twyne's case, (3 Rep. 81,) in which it was decided that if the grantor be allowed to retain the possession it is a badge of fraud. In the army of cases which have followed this leader, both in England and this country, there is in many respects great discordance, especially upon the important question whether the retention of possession be *per se* and in law fraudulent, or whether it be only an evidence of fraud to be submitted to the jury. In Edwards vs. Harben, (2 T. R. 587,) the court of King's Bench laid down the principle emphatically, that if the vendee took an absolute bill of sale to take effect immediately by the face of it, and agreed to leave the goods in the possession of the vendor for a limited time, such an absolute conveyance, without the possession, was such a circumstance *per se* as made the transaction fraudulent in point of law. It was admitted, however, that if the want of immediate possession be consistent with the deed, as it was in Bucknal vs. Roiston (Frec. in Ch. 285) and Cadogan vs. Kennet, (Cowp. 432,) and as it is if the deed be conditional and the vendee is not to have possession until he has performed the condition, the sale was not fraudulent, for then possession accompanied and followed the deed within the meaning of the rule. 2 Kent's Com. 518. Chancellor Kent admits, however, that under subsequent English decisions it has become difficult to determine when the circumstance of possession not accompanying and following the deed is *per se* a fraud in the English law, or only presumptive evidence of fraud resting upon the facts to be disclosed at the trial. I subjoin a few leading American cases on this subject on both sides of the question. Holding that retention of possession is a fraud *per se* are Hamilton vs. Russell, 1 Cranch, 309. Clayton vs. Anthony, 6 Rand. 285. Laughlin vs. Ferguson, 6 Dana, 117. Sibley vs. Hood, 3 Missouri, 290. Newland vs. Dews, R M. Charlt. 386. Babb vs. Clemson, 10 S. & R. 419. Thornton vs. Davenport, 1 Seamm. 296. Contra, that it is evidence of fraud for the jury, are Smith vs. Henry, 2 Bailey, S. C. Rep. 118. Muncy vs. Killough, 7 Yerger, 440. Bissell vs. Hopkins, 3 Cowen, 166.—SHARSWOOD.

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,<sup>(d)</sup> 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 acceptance 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:<sup>(e)</sup> 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.<sup>(f)</sup><sup>4</sup>

\*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*.<sup>(g)</sup>

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 *executed* (which differs

(\*) Co. Litt. 214.

(d) Dyer, 30. Bro. Abr. tit. *chose in action*, 1 and 4.

(f) 3 P. Wms. 199.

(g) Inst. 3, 14, 2.

<sup>4</sup> To this rule of the common law there are several exceptions. *Bills of exchange* by the law-merchant may be transferred by endorsement and sued on by the assignee, who is then called the endorsee; and the statute 3 & 4 Anne, c. 9 places *promissory notes* on the same footing. This statute was passed in consequence of the refusal of lord Holt (in *Clesh vs. Martin*, 2 Ld. Raym. 757) to yield to the custom which had sprung up among merchants of treating promissory notes as *negotiable* in the same way as bills of exchange. His lordship treated the attempt of the merchants with great indignation, saying "that it proceeded from the opinionativeness of the merchants, who were endeavouring to set the law of Lombard Street against the law of Westminster Hall." *Drafts on bankers* are equally negotiable. *Bills of lading* constitute a fourth exception. These are transferred by endorsement; and not only is the property in the goods thereby passed to the endorsee, but also all *rights of suit*, and *all the liabilities* of the original contractors, the shipper and the ship-owner. 18 & 19 Vict. c. 111.—KERR.

nothing from a grant) conveys a *chose in possession*; a contract *executory* conveys only a *chose in action*.

Having thus shown the general nature of a contract, we are, *secondly*, to proceed to the *consideration* upon which it is founded; or the reason which moves \*444] the contracting party to \*enter into the contract. "It is an agreement, upon *sufficient consideration*." The civilians hold, that in all contracts, either express or implied, there must be something given in exchange, something that is mutual or reciprocal.<sup>(h)</sup> 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,<sup>(i)</sup> 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.<sup>(j)</sup> 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.<sup>5</sup>

<sup>(h)</sup> *In omnibus contractibus, sive nominatis, sive innominatis, permutatio continetur.* Grav. l. 2, § 12.

<sup>(i)</sup> Page 237.  
<sup>(j)</sup> 3 Rep. 83.

<sup>5</sup> 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 Swanst. 329. But if there be such an inadequacy as to show 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. C. C. 167. 2 Bird. 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 2s. 6d. paid and 4l. 17s. 6d. 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, Powell, 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 refunded the 2s. 6d. 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, 159. Bridgm. index, tit. Inadequacy of Price or Consideration.—CHITTY.

In bonds, covenants, and instruments under seal, a consideration between the parties is implied conclusively. The seal imports it. A voluntary bond is both at law and in equity a gift of the money. Such a bond must be postponed until *creditors* are paid: it is fraudulent and void as to them, but it is always good against the party himself, and against heirs, legatees, and others who stand in no higher equity. *Sherk vs. Endress*, 3 Watts & Serg. 255. *Candor & Henderson's Appeal*, 3 Casey, 119. Bills of exchange and promissory-notes *prima facie* import consideration. As between the original parties to these instruments, they may be rendered ineffectual by proving want of consideration; though as to an endorsee or holder *bona fide* in the usual course of business this is unavailing. In an ordinary parol contract, whether oral or written, the consideration must be averred in the plaintiff's declaration, and must either appear on its face, or be shown affirmatively by him who seeks to recover on it.

A consideration may be briefly defined to be any benefit, delay, or loss to either party. More fully, a consideration is something that is either a benefit to the party promising, or some trouble or prejudice to the party to whom the promise is made. Any damage or suspension or forbearance of a right will be sufficient to sustain a promise. It is not essential that the consideration should be adequate in point of actual value. The law does not weigh the *quantum* of consideration, having no means of deciding upon that matter; and it would be unwise to interfere with the facility of contracting and the free exercise of the judgment and will of the parties. The law allows them to be the sole judges of the benefits to be derived from their bargain, provided there be no incompe-

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 on both sides; \*as, that in consideration that A. will not trade to Lis- [\*445 bon, B. will not trade to Marseilles; so as to avoid interfering with each other. 3. The third species of consideration is *facto, 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. As when a servant hires himself to his master for certain wages or an agreed sum of money: here the servant contracts to do his master's service, in order to earn that specific sum. Otherwise, if he be hired generally; for then he is under an implied contract to perform this service for what it shall be reasonably worth. 4. The fourth species is, *do, ut facias*: which is the direct counterpart of the 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)<sup>6</sup> 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

(l) *Ff.* 19, 5, 5.(l) *Dr. and St. D.* 2, c. 24.

tency to contract, and the agreement violates no rule of law. There is no case where mere inadequacy of price, independent of other circumstances, has been held sufficient to set aside a contract between parties standing on equal ground and dealing with each other without any imposition or oppression. Such an inequality as would amount to fraud, and avoid the contract on that score, must be so strong and manifest as to shock the conscience and confound the judgment of common sense. *Hind vs. Holdship*, 2 Watts, 104. *Silvis vs. Ely*, 3 Watts & Serg. 428. This legal principle as to the extent of consideration is in some measure practically modified by an equitable one, which relieves the parties to a contract in equity wherever the consideration of it fails; as where a contract was made upon the expectation of an actual benefit which has not been realized, and that without the fault of the party seeking relief. *Bellas vs. Hays*, 5 Serg. & R. 427. *Miles vs. Stevens*, 3 Barr, 21.—SHARSWOOD.

<sup>6</sup> 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.* 303, 309. 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.*—CHITTY.

compel the execution of what he had no visible inducement to engage for: and therefore our law has adopted<sup>(m)</sup> the maxim of the civil law,<sup>(n)</sup> 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*.<sup>7</sup> And as this rule was principally established, to avoid the inconvenience that would arise from setting up mere verbal promises, for  
 [446] which no good reason could \*be assigned,<sup>(o)</sup> it therefore does not hold in some cases, where such promise is authentically proved by written documents. For if a man enters into a voluntary bond, or gives a promissory note, he shall not be allowed to aver the want of a consideration in order to evade the payment: for every bond from the solemnity of the instrument,<sup>(p)</sup> and every note from the subscription of the drawer,<sup>(q)</sup> 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

(\*) Bro. Abr. tit. *delle*, 79. Salk. 129.  
 (\*\*) Cod. 2, 3, 10, and 5, 14, 1.  
 (†) Plowd. 308, 309.

(p) Hardr. 200. 1 Ch. R. 157.  
 (q) Ld. Raym. 760.

<sup>7</sup> 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 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. Bla. 116. See further, on this subject, 3 vol. Ch. C. L. 72.—CHRISTIAN.

<sup>8</sup> 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 endorsee; 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 endorsee 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. Rep. 46. The most important authority respecting the consideration of written contracts is the case of *Rann vs. Hughes* before the house of lords, in which lord chief-baron Slynner 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 speciality 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.—CHRISTIAN.

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*.<sup>(r)</sup> 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 a 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 Machpelah;<sup>(s)</sup> though the practice of exchange still subsists among several of the savage nations. But with regard to the law of \*sales and exchanges, there is no difference. I shall therefore treat of [\*447 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,<sup>(t)</sup> 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,<sup>(u)</sup> and any subsequent sale was fraudulent; but the law was thus altered in favour of *purchasers*, though it still remains the same between the *parties*; and therefore if a defendant dies after the awarding and before the delivery of the writ, his goods are bound by it in the hands of his executors.<sup>(v)</sup><sup>9</sup>

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.<sup>(w)</sup><sup>10</sup> But if any part of the price is paid down, if it be but a

(r) Noy's Max. c. 42.  
(s) Gen. xxii. 16.  
(t) 29 Car. II. c. 3.

(u) 8 Rep. 171. 1 Mod. 188.  
(v) Comb. 33. 12 Mod. 5. 7 Mod. 95.  
(w) Hob. 41. Noy's Max. c. 42.

<sup>9</sup> 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.—CHRISTIAN.

<sup>10</sup> The authorities cited do not support this sentence. It is true that there is no right in the vendee to recover possession of the goods without payment or tender of the price; but that is another thing from saying there is no contract. Nor is what follows true,—that, independently of the statute of frauds, part payment or earnest is necessary in such a case to bind the bargain. The statute 29 Car. II. ch. 3, s. 17 (the provisions of which prevail in most of the United States) declares that no contract for the sale of goods for the price of 10*l.* or upwards shall be good, except the buyer shall accept part of the goods so sold and actually receive the same, or give something in earnest to bind the bargain or in part payment, or unless some note or memorandum in writing of the bargain be made and signed by the parties to be charged, or their agents thereunto lawfully authorized. It is true that, if nothing of this kind takes place, it is no contract and the owner may dispose of his goods as he pleases. But at common law, when the terms of sale are agreed on and the bargain is struck, and every thing that the seller has to do with the goods is complete, the contract of sale becomes absolute as between the parties without actual payment or delivery, and the property and the risk of acci

penny, or any portion of the goods delivered by way of *earnest*, (which the civil law calls *arrha*, and interprets to be "*emptiois venditionis \*contracta \*448] 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*)<sup>11</sup> And such regard does the law pay to earnest as an evidence of a contract, that, by the same statute, 29 Car. II. c. 3, no contract for the sale of goods, to the value of 10*l.* or more, shall be valid, unless the buyer actually receives part of the goods sold by way of earnest on his part; unless he gives part of the price to the vendor by way of earnest to bind the bargain, or in part of payment; or unless some note in writing be made and signed by the party, or his agent, who is to be charged with the contract. And with regard to goods under the value of 10*l.* no contract or agreement for the sale of them shall be valid, unless the goods are to be delivered within one year, or unless the contract be made in writing, and signed by the party, or his agent, who is to be charged therewith.<sup>12</sup> Antiently, 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 *hand-sale*, "*venditio per mutuum 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*)<sup>13</sup> But if he tenders the money to

(\*) Inst. 3, tit. 24.  
(y) Noy, *ibid.*

(\*) *Stiernhook de jure Goth. l. 2, c. 5.*  
(\*) Hob. 41.

dent to the goods vest in the buyer. 2 Kent's Com. 492. The sale is complete when the terms are either certainly fixed or a rule adopted from which they can be ascertained by measurement or calculation, and when the subject-matter of the sale is definitively and certainly ascertained and distinguished. A sale is defined to be a transmutation of property from one man to another in consideration of some price or recompense in value. When the name of the vendee is written, by his direction or by the direction of his agent, on the articles sold, or the goods are made up to be delivered, or are otherwise separated from a larger quantity of goods of which they formed a part, with a view to deliver, or when the vendee, by the consent of the vendor, deals with the property as his own, it has been construed to be evidence of a delivery so as to enable the vendor to maintain an action for the price, as of goods actually sold and delivered. A man, buying a hat, selects the article which suits him. It is put aside; but, for some reason, it is inconvenient for him to take it with him. He is to send for it, or the vendor is to send it to his lodgings. From that moment there is a change of property: the bargain is complete, and the vendee becomes the owner. Rogers, J., in *Parker vs. Donaldson*, 2 Watts & Serg. 9. *Smyth vs. Craig*, 3 Watts & Serg. 14. *Scott vs. Wells*, 6 *ibid.* 357.—SHARSWOOD.

<sup>11</sup> 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 Camp. 426.—CHRISTIAN.

<sup>12</sup> And this enactment is, by lord Tenterden's act, (9 Geo. IV. c. 14,) extended to all contracts for the sale of goods of the value of 10*l.* sterling or upwards, notwithstanding the goods may be intended to be delivered at some future time, or may not, at the time of the contract, be actually made, or provided, or ready for delivery, or some act may be requisite for the making or completing thereof or rendering the same fit for delivery.—KERR.

<sup>13</sup> When, however, the sale is complete and the title vested in the buyer, it is still in the power of the seller to reclaim the possession of the goods in case of the insolvency of the purchaser, provided they have not come to his actual possession. This is called the vendor's right of *stoppage in transitu*. It does not proceed upon the ground of rescinding the contract. It assumes its existence and continuance; and, as a consequence, the

the vendor, and he refuses it, the vendee may seize the goods, or have an action against the vendor for detaining them. And by a regular sale, without delivery, the property is so absolutely vested in the vendee, that if A. sells a horse to B for 10*l.*, and B. pays him earnest, or signs a note in writing of the bargain, and afterwards, before the delivery of the horse, or money paid, the horse dies in the vendor's custody, still he is entitled to the money, because by the \*contract the property was in the vendee.(b) Thus may property in goods [ \*149 be transferred by sale where the vendor *hath* such property in himself.<sup>14</sup>

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*, (that is, open,) shall not only be good between the parties, but also be binding on all those that have any right or property therein. And for this purpose, the Mirror 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.

(b) Noy, c. 42.

(c) 2 Inst. 713.

(d) C. 1, § 3.

(e) LL. Eitel. 10, 12. LL. Fudg. Wilk. 180.

(f) Cro. Jac. 68.

(g) Godb. 131.

(h) 5 Rep. 83. 12 Mod. 521.

vendee or his assignees may recover the goods on payment or tender of the price, notwithstanding they have been stopped, and the vendor may sue for and recover the price, notwithstanding the stoppage, provided he be ready to deliver the goods upon payment. If he has been paid in part, he may exercise the right for the balance. There must be actual payment of the whole price before the right to stop *in transitu*, in case of failure of the vendee, ceases. Though a bill or note has been taken and endorsed away for the price, even that will not destroy the right. This right is so strongly maintained that while the goods are on the transit and the insolvency of the vendee occurs, the vendor may seize and take them by any means not criminal. It is not necessary, however, that he should obtain actual possession before they come to the hands of the vendee: nor is there any specific form requisite in which to exercise the right. A demand of the goods of the carrier, or notice to him to stop the goods, or an assertion of the vendor's right by an entry of the goods at the custom-house, or a claim made to the possessor whoever he may happen to be, is equivalent to an actual stoppage of the goods, and vests the vendor with the right to recover possession. *Hodgson vs. Loy*, 7 T. R. 445. *Kymer vs. Sawercropp*, 1 Camp. 109. *Feise vs. Wray*, 3 East, 93. *Newhall vs. Vargas*, 13 Maine, 93. 2 Kent's Com. 541.—SHARSWOOD.

<sup>14</sup> By the custom of merchants, which is part of the *lex mercatoria*, a bill of lading is transferable by endorsement, and by this endorsement the right of property in the goods passes to the endorsee. The consignor of the goods has a right to stop the goods *in transitu* upon the insolvency or bankruptcy of the consignee; but he cannot do so against an assignee for value of the bill of lading, who had no notice of the insolvency. *Lickbarrow vs. Mason*, 2 T. R. 683. This doctrine is at variance with the general principle of our law, which does not permit any one to transfer a greater right than he has himself.

And here I may add that, by the statute 18 & 19 Vict. c. 111, s. 3, it is enacted that every consignee named in a bill of lading, and every endorsee of a bill of lading, to whom the property therein mentioned shall pass upon or by reason of such consignment or endorsement, shall have transferred to and vested in him all rights of suit, and be subject to the same liabilities in respect of such goods as if the contract contained in the bill of lading had been made with himself.—KERR.



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) \*450] will in no case bind him; though it binds infants, feme-coverts, 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.<sup>(i)</sup><sup>15</sup> 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.<sup>(j)</sup> 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.<sup>(k)</sup> 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.<sup>(l)</sup> 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.

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.<sup>(m)</sup> 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 \*451] brought by both the vendor and vendee to the book-keeper of such fair or market, that toll be 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<sup>(n)</sup> 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

(i) Bacon's Use of the Law, 158.

(j) 2 Inst. 713, 714.

(k) Perk. § 93.

(l) 2 Inst. 713.

(m) 2 Inst. 719.

(n) Ff. 21, 2, 1.

<sup>15</sup> 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 misdemeanour been stolen, taken, obtained, or converted.—CHITTY.

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)<sup>16</sup> 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.<sup>17</sup>

(o) Cro. Jac. 474. 1 Roll. Abr. 90.

(p) F. N. D. 94.

(q) 2 Roll. Rep. 5.

<sup>16</sup> In the case of *Jones vs. Bright*, (decided in the court of Common Pleas in Easter Term last, but not yet reported,) the plaintiff, a ship-owner, 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 guarding against those defects, whereas the purchaser must necessarily be altogether ignorant of them.—CHITTY.

<sup>17</sup> There is an inaccuracy in this statement of the law. The vendor, in general, is not bound to answer when the goods turn out to be different in quality merely from what he represented them to the buyer, unless he made such representation fraudulently, knowing it to be false. *Chandler vs. Lopus*, Cro. Car. 4. It has been held in Pennsylvania that there is an implied warranty that the article is what it is sold for,—the article it is represented to be; and that even though the sale be by sample. Thus, where a person sold an article as *blue paint*, and it was so described in the bill of parcels, it was held to amount to a warranty that the article delivered should be blue paint, and not a different article. *Borrekins vs. Bevans*, 3 Rawle, 23. *Fraley vs. Bispham*, 10 Barr, 320. It is well settled with regard to the *quality* of goods that the vendor is not answerable unless he expressly warrant them, or there has been a false and fraudulent representation or affirmation of a quality known by the vendor to be false. *Jackson vs. Wetherill*, 7 Serg & Rawle, 482. The rule is expressed by the phrase *caveat emptor*,—let the buyer beware. His eyes are his market. And though the seller is answerable to the buyer that the article sold shall be in specie the thing for which it was sold, yet if there be only a partial adulteration, which does not destroy the distinctive character of the thing, the buyer is bound by his bargain; and in doubtful cases there is no practical test but that of its being merchantable under the denomination affixed to it by the seller. *Jennings vs. Gratz*, 3 Rawle, 168. In Massachusetts it seems to be settled that on a sale of goods with a bill of parcels describing or clearly designating the goods sold, there is a warranty that the goods are as described or designated in the bill. *Heashan vs. Robins*, 9 Metcalf, 86. Still, a bare representation and no warranty will not afford an action, if the vendor believes the representation to be true in part. *Stone vs. Denney*, 4 Metcalf, 151. The New York case maintains the general rule of *caveat emptor*, except where there is a warranty or fraud. *Seixas vs. Wood*, 2 Caine's Rep. 48. *Welsh vs. Carter*, 1 Wendell, 185. *Hart vs. Wright*, 17 Wendell, 267. There are some cases in that State which hold to an implied warranty that the article is merchantable. *Gallagher vs. Waring*, 9 Wendell, 20. The recent English cases of *Gray vs. Cox*, 4 Barnw. & Cressw. 108, *Jones vs. Bright*, 5 Bingh. 533, and *Shepherd vs. Pybus*, 3 Mann. & Gr. 868, give countenance to the same doctrine.

But the rule of *caveat emptor* fitly applies only where the article was equally open to the inspection and examination of both parties, and the purchaser relied on his own information and judgment without requiring any warranty of the quality; and it does not apply to those cases where the purchaser has ordered goods of a certain character, or goods of a certain described quality are offered to sale without being open for examination, and when delivered they do not answer the description directed or given in the contract. If the article be sold by sample, and it be a fair specimen of the article, and there be no deception or warranty on the part of the vendor, the vendee cannot object on the score of the quality. It amounts to an implied warranty that the article is in bulk of the same kind and equal in quality with the sample. If the article should turn out not to be merchantable from some latent principle of inferiority in the sample, as well as in the bulk of the commodity, the seller is not responsible. The only warranty is that the whole quantity answers to the sample. 2 Kent's Com. 481.—SHARPSWOOD.

2. Bailment, from the French *bailler*, to deliver, is a delivery of goods in trust, upon a contract, expressed or implied, that the trust shall be faithfully executed on the part of the bailee. As if cloth be delivered, or (in our legal dialect) bailed, to a tailor to make a suit of clothes, he 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 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 \*152] \*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 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 pledger 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 distrainers, 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 \*453] bailor to the bailee, together with the possession. It is not an absolute property, because of his \*contract for restitution; 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 tailor, the carrier, the innkeeper, the agisting farmer, the pawnbroker, the distrainer, and the general bailee, may all of them vindicate, in their own right,

(r) 1 Vern. 268.

(s) 12 Mod. 482.

(t) Cro. Eliz. 622.

(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 Stjernhook, "*dolum præsumunt, si una non pereant*." *De jure Sueom. l. 2, c. 5.*

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 without 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. Bla. 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 show that the seller knew of the horse's imperfections at the time of the sale.—CHRISTIAN.

this their possessory interest, against any stranger or third person (b) For being responsible to the bailor, 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.<sup>18</sup> They are both contracts, whereby the possession and a transient property is transferred for a particular time or use, on condition 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)

\*There is one species of this price or reward, the most usual of any, [\*451 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 conscientiæ*. 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 indistinguishably 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 the purposes of exchange, yet the laws of any state \*may be well [\*455 justified in permitting it to be turned to the purposes of profit, if the

(b) 13 Rep. 69.

(c) Yelv. 172. Cro. Jac. 236.

(d) *Polit. l. 1, c. 10.* This passage hath been suspected to be spurious.

(e) *Decretal. l. 5, tit. 19.*

(f) *Deut. xxlii. 20.*

<sup>18</sup> The learned commentator has here followed lord Holt, who has treated a *commo-datium* 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.—CHRISTIAN.

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 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 \*156] \*distinction must therefore be made between a moderate and exorbitant profit; to the former of which we usually give the name of interest, to the latter the truly odious appellation of usury: the former is necessary in every civil state, if it were but to exclude the latter, which ought never to be tolerated in any well-regulated society. For, as the whole of this matter is well summed up by 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.<sup>19</sup>

(g) *De j. b. d. p. l. 2, c. 12, § 22.*

<sup>19</sup> It is not the amount of money circulating in a country which determines the rate of interest. Money is but the representative of value. The effect of a larger or smaller currency is to depress or raise the prices of all commodities. What is really the subject

\*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*, (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 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 *fenus 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 moneys lent on

(h) Moll. *de jur. mar.* 361. Malynes, *lex mercat.* b. 1, c. 31  
Bacon's *Essays*, c. 41. Cro. Jac. 2*o*S. Bynkersh. *quest. jur. privat.* l. 3, c. 16.

(i) 1 Sid. 27.  
(j) Molloy, *ibid.* Malynes, *ibid.*

which produces interest is not the money, but what it will purchase. No man borrows money to hoard. He borrows it to employ in productive industry. He is willing to pay such an interest as the profits in the business in which he invests it will enable him to pay, and compensate him besides for his risk and trouble. The capitalist who has money to lend is willing to take such a sum as will equal the average rate of profits less the trouble and risk of employing it in that way. It will be seen that the actual rate of interest depends on the demand for, and supply of, capital; and its necessary rate—that centre about which it oscillates—is the average rate of profits on capital. It is proper to remark, in order to avoid a very common mistake upon this subject, that the rate of profits in all employments of capital is nearly the same, allowing for the effect of certain circumstances of convenience or inconvenience, honour or dishonour, which often make a great apparent difference, but which form no element in that which determines the interest of money. A large nominal rate of profits often includes compensation for skill and responsibility, as, for example, in the business of the apothecary or druggist. Another remark is, that in periods of great mercantile pressure there often arises a sudden demand for capital, which makes interest run up very high. This is because merchants willingly incur large sacrifices, and will give much more than money is really worth to them in any investment, in order to avoid the ruinous consequences of mercantile dishonour.—SHARSWOOD.

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;<sup>(k)</sup> 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 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.<sup>20</sup>

Secondly, a policy of *insurance* is a contract between A. and B., that upon A.'s paying a premium equivalent to the hazard run, B. will indemnify or insure him against a particular event. This is founded upon one of the 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 \*459] vessel, 100*l.* at the rate of *eight per cent.* For by a loan I should 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 against the extraordinary hazard. And

(\*) See book I. page 294.

<sup>20</sup> 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, 627. 1 M. & S. 30.—CHRISTIAN.

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.—CHITTY.

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 \*inserted; and nothing more shall be recovered thereon than the amount of the interest [ \*460 of the insured.

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. 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 further 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 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, [ \*461 above the value of his bottomry, or *respondentia* bond.

Thirdly, the practice of purchasing *annuities for lives* at a certain price or premium, instead of advancing the same sum on an ordinary loan, 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 *bona fide* (and not colourably)(1) 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

(1) Carth. 67.



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;<sup>21</sup> and, in case of collusive practices, \*462] respecting the 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 *centesimæ, 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 *centesimæ*, 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 \*463] *per cent.* 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 hazard, 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 of 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 Anne, 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.<sup>22</sup> But yet, if a contract which

(\*) Cod. 4, 32, 28. 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 Pisonem*, 325.

*Romani pueri longis rationibus assent  
Discunt in partes centum ducere. Dicit  
Filius Allani, si de quincunce remota est  
Uncia, quid superest? poterat dixisse, triens; et,  
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 a *hundred* parts, one of which they allowed to be taken monthly; and this, which was the highest rate of interest permitted, they called *usuræ centesimæ*, amounting yearly to twelve *per cent.* Now, as the *as* or Roman pound was commonly used to express any integral sum, and was divisible into twelve parts or *uncia*, therefore these twelve monthly payments or *uncia* 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 multiples

of the *uncia*, or duodecimal parts of the *as*, were known by different names, according to their different combinations; *sextans, quadrans, triens, quincunx, semis, septunx, les duobus, sextans, denus*, containing respectively 2, 3, 4, 5, 6, 7, 8, 9, 10, 11 *uncia*, or duodecimal parts of an *as*. *FF.* 28, 6, 60, § 2. Gravin. *Orig. jur. cr. 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.
<i>Asses, sive centesimæ</i> .....	<i>Integer</i> .....	12 <i>per cent</i>
<i>Denus</i> .....	11-12ths.....	11
<i>Denunces, vel decunces</i> ...	5-6 .....	10
<i>Dodranes</i> .....	3-4 .....	9
<i>Besses</i> .....	2-3 .....	8
<i>Septunces</i> .....	7-12 .....	7
<i>Semis</i> .....	1-2 .....	6
<i>Quincunces</i> .....	5-12 .....	5
<i>Trientes</i> .....	1-3 .....	4
<i>Quadrantes</i> .....	1-4 .....	3
<i>Sextunces</i> .....	1-6 .....	2
<i>Uncæ</i> .....	1-12 .....	1

(\*) *De jur. b. & p. l. 2, 22.*

(o) *Essays*, c. 41.

<sup>21</sup> 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.—CHITTY.

<sup>22</sup> 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 Blore. Rep. 792 1 Camp. 149. Exorbitant discount to induce the acceptor

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.<sup>(p)</sup> Thus, Irish, American, Turkish, and Indian interest, have\*been allowed in our courts to the amount of even twelve *per cent.*: for the moderation or exorbitance of interest depends upon local circumstances; and the refusal to enforce such contracts would put a stop to all foreign trade.<sup>2</sup> 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.<sup>24</sup>

(p) 1 Eq. Ca. Abr. 209. 1 P. Wms. 395.

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 *prima 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 shown 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. Jac. 508. 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 *bona 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 Barr & 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 *bona 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.—CHITTY.

<sup>23</sup> By the 13 Geo. III. c. 63, s. 30, no subject of his majesty in the East Indies shall take more than twelve *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 twelve *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, 396. 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.—CHITTY.

<sup>24</sup>To remove doubts which have 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

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.<sup>(g)</sup> This may be the counterpart of, and arise from, any of the other species of contracts. As, in case of a sale, where the price is not paid in ready money, the vendee becomes indebted to the vendor for the sum agreed on; and the vendor has a property in this price, as a *chose* in action, by means of this contract of debt. In bailment, if the bailee loses or detains a sum of money bailed to him for any special purpose, he becomes indebted to the bailor in the same numerical sum, upon his implied contract that he 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 \*465] comprehends a great variety of \*acquisition; being usually divided into debts of *record*, debts by *special* and debts by simple contract.<sup>25</sup>

(g) F. N. B. 119.

was executed in England reserving 6l. per cent., it was held usurious. 3 T. R. 425.—  
CHITTY.

By the statute 3 & 4 W. IV. c. 98, some relaxation of the usury laws was made in favour of trade, and it was enacted that no person taking more than the rate of legal interest for the loan of money on any bill or note not having more than three months to run should be subject to any penalty or forfeiture. Shortly afterwards, the statute 5 & 6 W. IV. c. 41 enacted that bills or other securities should not be totally void because a higher rate of interest than was allowed by the statute 12 Anne, s. 2, c. 16 had been received thereon. The statute 1 Vict. c. 80 next enacted that bills of exchange payable at or within twelve months should not, for a limited time, be liable to the laws for the prevention of usury; and this statute was followed by six others, extending from time to time the original enactment. The statute 2 & 3 Vict. c. 37 enacted that no bill of exchange or promissory note made payable at or within twelve months after the date thereof, or not having more than twelve months to run, nor any contract for the loan or forbearance of money above the sum of 10l., should, by reason of any interest taken thereon or secured thereby, or any agreement to buy or receive or allow interest in discounting, negotiating, or transferring any such bill or note, be void, nor any person so lending be liable to the penalties of the usury-laws; but it was provided that this relaxation should not extend to the loan or forbearance of any money on the security of lands. The public mind, having thus slowly advanced in the direction of the policy advocated by Bacon above two centuries ago, at length became prepared for a still wider measure, and the statute 17 & 18 Vict. c. 90, after laconically reciting in the preamble that "it is expedient to repeal the laws at present in force relating to usury," proceeds to repeal wholly, or in part, eleven English, five Scotch, and four Irish acts, on which the whole penalties of usury previously vested. Among these acts are included those relating to annuity-transactions. The natural laws which regulate the terms on which money can be borrowed are therefore now left to operate freely, and borrowers and lenders are amenable to no other rules than those which govern contracts in general. The act, however, does not affect the rights, remedies, or liabilities of any person in respect of any thing done previously to its passing.—KERR.

<sup>25</sup> 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 threefold,—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*.

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

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, 223. 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 show 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 coextensive 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 show that it was executed with a different intent or object to that which the deed itself imports, (Hayne vs. 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. Abr. 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. and M. c. 14. Bac. Abr. 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 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, 38. 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, 619. 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, 259. 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, 177. 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 show such fraud, so as to prevent themselves from being prejudiced by it, (13 Eliz. c. 5. 2 Marsh. 392. 7 Taunt

Debts upon recognizance are also a sum of money, recognised 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 showed that it is a creation 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 \*466] unsealed, which are capable of a more easy proof, and (therefore only) better, than a verbal promise. It is easy to see into what a vast variety of obligations this last class may be branched out, through the numerous contracts for money, which are not only expressed by the parties, but virtually implied in law. Some of these we have already occasionally hinted at; and the rest, to avoid repetition, must be referred to those particular heads in the third book of these commentaries, where the breach of such contracts will be considered. I shall only observe at present, that by the statute 29 Car. II. c. 3 no executor or administrator shall be charged upon any special promise to answer damages out of his own estate, and no person shall be charged upon any promise to answer for the debt 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 a writing, and signed by the party himself, or by his authority.

But there is one species of debts upon simple contract, which, being a transaction now introduced into all sorts of civil life, under the name of *paper credit*, deserves a more particular regard. These are debts by *bills of exchange*, and *promissory notes*.

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. Doug. 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, 798. But notwithstanding, since the act of union, an Irish judgment is a record, yet it is only provable 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 docketed binds the land as against subsequent purchasers, (Tidd, 6th edit. 966, 967;) 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.—CHITTY.

A *bill of exchange* is a security, originally invented among merchants in different countries, for the more easy remittance of money from the one to the other, which has since spread itself into almost all pecuniary transactions. It is an open letter of request from one man to another, desiring him to pay a sum named therein to a third person on his account; by which means a man at the most distant part of the world may have money remitted to him from any trading country. If A. lives in Jamaica, and owes B., who lives in Eng'and, 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 hither. Thus does B. receive his debt, at any distance of place, by transferring it to C.; who carries over his money \*in paper credit, without danger of robbery or loss. This method is said to have [†167 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 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*; *foreign*, when drawn by a merchant residing abroad upon his correspondent in England, or *vice versa*;<sup>26</sup> 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 Anne, c. 9, inland bills of exchange are put upon the same footing as foreign ones; what was the law and custom of merchants with the 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.<sup>27</sup>

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,

(\*) 2 Carte Hist Eng. 203, 206.  
(†) Mod. Un Hist. iv. 499.

(r) Roll Abr. 6.

<sup>26</sup> The different States which compose the United States are sovereign and independent and foreign to each other in all respects not provided for by the terms of the federal compact,—the constitution. Hence a bill drawn in one State upon a person residing or doing business in another has been invariably held to be a foreign bill of exchange. *Buchner vs. Finley*, 2 Peters, 586. *Phoenix Rank vs. Hussey*, 12 Pick. 483. *Wells vs. Whitehead*, 15 Wend. 527. *Rice vs. Hogan*, 8 Dana, 133. *Brown vs. Ferguson*, 4 Leigh. 37. *Carter vs. Burley*, 9 N. Hamp. 558.—SHARSWOOD.

<sup>27</sup> 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 endorsers, 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 endorsers; 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.—CHRISTIAN.

In *Windle vs. Andrews*, 2 Barn. & Ald. 701, it was decided that although the endorsee of an inland bill of exchange has no remedy for interest under the statute of Anne, 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.—CHITTY.

by the same statute 3 & 4 Anne, c. 9, are made assignable and endorsable in like manner as bills of exchange. But, by statute 15 Geo. III. c. 51, all promissory \*468] 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.<sup>28</sup>

The payee, we may observe, either of a bill of exchange or promissory note, has clearly a property vested in him (not indeed in possession, but in action) by the *express* contract of the drawer in the case of a promissory note, and, in the case of a bill of exchange, by his *implied* contract, viz., that, provided the drawee 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 show 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 endorsement, 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 endorsee; 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 endorsement, and \*469] payment thereof may be demanded by any bearer \*of it.(v) But in case of a bill of exchange, the payee, or the endorsee, (whether it be a general or particular endorsement,) 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,<sup>29</sup> the payee or endorsee 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

(v) *Str.* 1212.

(w) 2 *Show.* 235. *Grant vs. Vaughan.* T. 4 *Geo. II.* B. R.

(\*) *Str.* 1000.

<sup>28</sup> By the statute of 7 *Geo. IV.* c. 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.—*CHITTY.*

<sup>29</sup> No authority is cited by the learned commentator for the qualification here expressed; and I have been unable to trace it. I can find no statute which confines a protest for non-acceptance to bills of the value of 20*l.* and upward and expressed to be for value received. Bills for the payment of less than 20*s.* are void by statute 15 *Geo. III.* c. 51. I have supposed that this was a mistake of pounds for shillings; but every edition has it 20*l.* Again, although some advantages were formerly held to arise from a bill or note being expressed to be for value received,—such as that it was necessary to raise the presumption of value, or estopped the maker from denying consideration,—yet all distinctions of that character are now exploded; and all the incidents of negotiable paper attach as fully to bills and notes which are not, as to those which are, expressed to be for value received. *White vs. Ledwick*, 4 *Doug.* 427. *Grant vs. Da Costa*, 3 *M. & S.* 351. *Benjamin vs. Fillman*, 2 *McLean*, 213. *Townsend vs. Derby*, 3 *Metcalf*, 365. *Hubble vs. Fogartie*, 3 *Rich.* 413.—*SHARPE & WOOD.*

of two credible witnesses; and notice of such protest must, within fourteen days after, be given to the drawer.<sup>30</sup>

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 endorsee 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 endorsee, not only the amount of the said bills, (which he is bound to do within a reasonable time after non-payment, without any protest, by the rules of the common law,)(x) but also interest and all charges, to be computed from the time of making such protest. But if no protest be made or notified to the drawer, and any damage accrues by such neglect, it shall fall on the holder of the bill. The bill, when refused, must be demanded of the drawer as soon as conveniently may be: for though, when one draws a bill of \*exchange, he subjects himself to the payment if the person on whom it is drawn refuses either to [ \*470 accept or pay, yet that is with this limitation, that if the bill be not paid when due, the person to whom it is payable shall in convenient time give the drawer notice thereof; for otherwise the law will imply it paid: since it would be prejudicial to commerce if a bill might 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 endorsed bill, and the endorsee cannot get the drawee to discharge it, he may call upon either the drawer or the endorser, or, if the bill has been negotiated through many hands, upon any of the endorsers; for each endorser is a warrantor for the payment of the bill, which is frequently taken in payment as much (or more) upon the credit of the endorser as of the drawer. And if such endorser, so called upon, has the names of one or more endorsers prior to his own, to each of whom he is properly an endorsee, he is also at liberty to call upon any of them to make him satisfaction; and so upwards. But the first endorser has nobody to resort to but the drawer only.<sup>31</sup>

What has been said of bills of exchange is applicable also to promissory notes, that are endorsed 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-

(\*) Lord Raym. 933.

(y) Salk. 127.

<sup>30</sup> 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 *still the case 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 endorser; and each endorser is allowed a day) must be given to the drawer and endorsers, or they will be discharged from responsibility. Upon non-acceptance, the holder may immediately sue the drawer (2 Camp. 458) and endorsers, (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.—CURRY.

<sup>31</sup> The holder of the bill may bring actions against the acceptor, drawer, and all the endorsers, 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.—CHRISTIAN.



payment by the drawer, the several endorsees of the promissory note have the same remedy, as upon bills of exchange, against the prior endorsers.

## 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; a title which we before lightly touched upon,<sup>(a)</sup> so far as it related to the transfer of the real estate of the bankrupt. At present we are to treat of it more minutely, as it principally relates to the disposition of chattels, in which the property of persons concerned in trade more usually consists, than in lands or tenements. Let us, therefore, first of all consider, 1. *Who* may become a bankrupt: 2. *What acts* make a bankrupt: 3. *The proceedings* on a commission of bankruptcy: 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<sup>(b)</sup> 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;<sup>(c)</sup> and in this spirit we are told by Sir Edward Coke,<sup>(d)</sup> that we have \*472] fetched as well the name, as the wickedness, \*of bankrupts from foreign nations.<sup>(e)</sup> But at present the laws of bankruptcy are considered as laws calculated for the benefit of trade, and founded on the principles of humanity as well as justice; and to that end they confer some privileges, not only on the creditors, but also on the bankrupt or debtor himself. On the creditors, by compelling the bankrupt to give up all his effects to their use, without any fraudulent concealment: on the debtor, by exempting him from the rigour of the general law, whereby his person might be confined at the discretion of his creditor, though in reality he has nothing to satisfy the debt: whereas the law of bankrupts, taking into consideration the sudden and unavoidable accidents to which men in trade are liable, has given them the liberty of their persons, and some pecuniary emoluments, upon condition they surrender up their whole estate to be divided among their creditors.

In this respect our legislature seems to have attended to the example of the Roman law. I mean not the terrible law of the twelve tables; whereby the creditors might cut the debtor's body into pieces, and each of them take his proportionable share: if, indeed, that law, *de debitore in partes secundo*, is to be understood in so very butcherly a light; which many learned men have with reason doubted.<sup>(f)</sup> 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 creditors; and sometimes selling him, his wife and children, to perpetual foreign slavery *trans Tiberim*:<sup>(g)</sup> an oppression which produced so many \*173] \*popular insurrections, and secessions to the *mons sacer*. But I mean the law of *cession*, introduced by the Christian emperors; whereby, if a

(a) See page 255.

(b) *Ibid.*

(c) Stat. 1 Jac. I. c. 15, § 17.

(d) 4 Inst. 277.

(e) The word itself is derived from the word *bancus* or *banque*, which signifies the table or counter of a tradesman. (Dufresne, 1969, and *ruptus*, broken,—denoting thereby one whose shop or place of trade is broken and gone; though others 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. 1 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*.

(f) Taylor, Comment. in L. Decemviral. Bynkersh. Observ. Jur. I. l. 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. 128.

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.*"<sup>(h)</sup> For, as the emperor justly observes,<sup>(i)</sup> "*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,<sup>(k)</sup> 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 debts of any [\*474 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. 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 merchandise*, in gross or by retail, by way of bargaining, exchange, rechange, bartering, chevisance,<sup>(l)</sup> or otherwise; or have *sought their living by buying and selling*. And by statute 21 Jac. I. c. 19, persons using the trade or profession of a *scrivener*, receiving other men's moneys 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, [\*475 of the law, are extended as well to *aliens* and *denizens* as to natural-born subjects; being intended entirely for the protection of trade, in which aliens are often as deeply concerned as natives. By many subsequent statutes, but lastly by statute 5 Geo. II. c. 30,<sup>(m)</sup> *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 cre-

(h) Cod. 7, 71, *per tot.*

(i) Inst. 4, 6, 40.

(k) Nov. 135 c. 1.

(l) That is, making contracts. Dufresne, II. 569.

(m) § 33.

ditors; 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 merchandise of money, in the same manner as other merchants do of goods and other movable chattels. But by the same act,<sup>(n)</sup> 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,<sup>(o)</sup> 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,<sup>(p)</sup> 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.* 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.<sup>1</sup>

\*[476] In the interpretation of these several statutes, it hath been held, that buying only, or selling only, will not qualify a man to 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*,<sup>2</sup> who is one that buys and sells any thing. But no handicraft

(n) § 40.

(o) *Ibid.*

(p) § 32.

<sup>1</sup> But all these statutes have been superseded by the Bankrupt Law Consolidation Act, 1849, (12 & 13 Vict. c. 106,) by which all previous acts are repealed; and by sect. 65 it is enacted that all alum-makers, apothecaries, auctioneers, bankers, bleachers, brokers, brickmakers, builders, calenderers, carpenters, carriers, cattle or sheep salesmen, coach-proprietors, cow-keepers, and persons using the trade or profession of a scrivener, receiving other men's moneys or estates into their trust or custody, and persons insuring ships or their freight, or other matters, against peril of the sea, warehousemen, wharfingers, packers, builders, carpenters, shipwrights, victuallers, keepers of inns, taverns, hotels, or coffee-houses, dyers, printers, fullers, and all persons using the trade of merchandise by way of bargaining, exchange, commission, consignment, or otherwise, in gross or by retail, all persons who, either for themselves or as agents or factors for others, seek their living by buying and selling, or by buying and letting for hire, or by the workmanship of goods or commodities, and some others expressly mentioned in the section, shall be deemed 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 incorporate, commercial, or trading companies established by charter or act of parliament, shall be deemed, as such, a trader, liable by virtue of this act to become bankrupts.—STEWART.

By the act of Congress August 19, 1841, (5 Story, 2829,) there were two classes of bankrupts. First, those who became so upon their voluntary petition; and this class comprehended all persons whatsoever residing in any State, District, or Territory of the United States owing debts, which shall not have been created in consequence of a defalcation as a public officer, or as executor, administrator, guardian, or trustee, or while acting in any other fiduciary capacity. Second, persons declared bankrupts upon the petition of one or more of their creditors, to whom they owe debts amounting in the whole to not less than five hundred dollars; and this class comprehended all persons being merchants or using the trade of merchandise, all retailers of merchandise, and all bankers, factors, brokers, underwriters, or marine insurers, owing debts of not less than two thousand dollars. This act was repealed by the act of March 3, 1843, (5 Story, 2978,) with a proviso that the repeal should not affect any case or proceeding in bankruptcy commenced before the passage of the repeal, or any pains, penalties, or forfeitures incurred under the original act, but every such proceeding may be continued to its final consummation.—SHARSWOOD.

<sup>2</sup> 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

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.(g) Also an innkeeper cannot, as such, be a bankrupt:(r) for his gain or livelihood does not arise from buying and selling in the way of merchandise, 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 salable commodities, as shoemakers, 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;<sup>3</sup> 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 merchandise, within the intent of the statute, by which a profit may be fairly made.(u) Neither will buying and selling under particular restraints, or for particular purposes; as, if \*a commissioner of the navy uses to buy victuals for the fleet, and dispose of the surplus and refuse, he is not [ \*477 thereby made a trader within the statutes.(w) An infant, though a trader, cannot be made a bankrupt; for an infant can owe nothing but for necessaries: and the statutes of bankruptcy create no new debts, but only give a speedier and more effectual remedy for recovering such as were before due: and no person can be made a bankrupt for debts which he is not liable at law to pay.(x) But a feme-covert in London, being a sole trader according to the custom, is liable to a commission of bankrupt.(y)

(g) Cro. Car. 31.

(r) Cro. Car. 549. Skinn. 291.

(s) Skinn. 292. 3 Mod. 330.

(t) Cro. Car. 31. Skinn. 292.

(\*) 2 P. Wms. 308.

(w) 1 Salk. 110. Skinn. 292.

(x) Lord Raym. 443.

(y) La Vie vs. Phillips, M. 6 Geo. III. B. R.

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 vs. Small*, 2 Brod. & Bing. 27. S. C. 2 Wils. Cha. Ca. 86.—CHITTY.

<sup>3</sup> 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 vs. Gwynne*, 2 Taunt. 176. *Newland vs. 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 vs. Birch*, 3 Camp. 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 pitmen, 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 vs. Vaughan*, 1 T. R. 573. *Wright vs. Bird*, Price. 22.—CHITTY

2. Having thus considered who may, and who may not, be made a bankrupt, we are to inquire, secondly, by what *acts* a man may become a bankrupt. A bankrupt 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 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 \*478] courts thereon. \*Among these may therefore be reckoned, 1. Departing from the realm, whereby a man withdraws himself from the jurisdiction and coercion of the law, with intent to defraud his creditors.(z) 2. Departing from his own house with intent to secrete himself and avoid his creditors.(a) 3. Keeping in his own house privately, so as not to be seen or spoken with by his creditors, except for just and necessary cause; which is likewise construed to be an intention to defraud his creditors by avoiding the process of the law.(b) 4. Procuring or suffering himself willingly to be arrested, or outlawed, or imprisoned, without just and lawful cause; which is likewise deemed an attempt to defraud his creditors.(c) 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) 7. Procuring any protection, not being himself privileged by parliament, in order to screen his person from arrests; which also is an endeavour to elude the justice of the law.(f) 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 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 \*479] which cases it is high time for his creditors to look to themselves, \*and compel a distribution of his effects. 10. Escaping from prison after an arrest for a just debt of 100*l.* or upwards.(i) For no man would break prison who 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)\*

(z) Stat. 13 Eliz. c. 7.

(a) Ibid. 1 Jac. I. c. 15.

(b) Stat. 13 Eliz. c. 7.

(c) Ibid. 1 Jac. I. c. 15.

(d) Stat. 1 Jac. I. c. 15.

(e) Ibid.

(f) Stat. 21 Jac. I. c. 19.

(g) Ibid.

(h) Ibid.

(i) Ibid.

(k) Stat. 4 Geo. III. c. 33.

\*The English Bankrupt Law Consolidation Act of 1849 (12 & 13 Vict. c. 106, s. 69) has increased the number of enumerated cases to fifteen, and modified six of these as set forth in the text. It is not deemed necessary to encumber the note with them. By the act of Congress Aug. 19, 1841, (5 Story, 2329,) the enumerated acts on which a mar-

These are the several acts of bankruptcy expressly defined by the statutes relating to this title: which being so numerous, and the whole law of bankrupts being an innovation on the common law, our courts of justice have been tender of extending or multiplying acts of bankruptcy by any construction or implication. And therefore Sir John Holt held<sup>(l)</sup> that a man 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:<sup>(m)</sup> but, if he goes to prison, and lies there two months, 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 affect the bankrupt himself. And these depend entirely \*on the several statutes of bankruptcy; all which I shall endeavour to blend together and [\*480 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.*, which debts must be proved by *affidavit*;<sup>(n)</sup> upon which he grants a *commission* to such discreet persons as to him shall seem good, who are then styled commissioners of bankrupt.<sup>(o)</sup> The petitioners, to prevent malicious applications, must be bound in a security of 200*l.* to make the party amends in case they do not prove him a bankrupt. And if, on the other hand, they receive any money or effects from the bankrupt as a recompense for suing out the commission, so as to receive more than their ratable dividends of the bankrupt's estate, they forfeit not only what they shall have so received, but their whole debt. These provisions are made, as well to secure persons in good credit from being damnified by malicious petitions, as to prevent knavish combinations between the creditors and bankrupt, in order to obtain the benefit of a commission. When the commission is 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. And no commission of bankrupt shall abate or be void upon any demise of the crown.<sup>(p)</sup>

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

(l) Lord Raym. 725.

(m) 7 Mod. 139.

(n) Stat. 5 Geo. II. c. 30.

(o) 3 Stat. 13 Eliz. c. 7.

(p) Stat. 5 Geo. II. c. 30.

could be declared a bankrupt by the action of his creditors were,—1. Departing from the State, District, or Territory of which he is an inhabitant, with intent to defraud his creditors. 2. Concealing himself to avoid being arrested. 3. Willingly or fraudulently procuring himself to be arrested, or, 4. His goods and chattels, lands or tenements, to be attached, distrained, sequestered, or taken in execution. 5. Removing his goods, chattels, and effects, or concealing them to prevent their being levied upon or taken in execution, or by other process. 6. Making any fraudulent conveyance, assignment, sale, gift, or other transfer of his lands, tenements, goods, or chattels, credits, or evidences of debt: with a proviso, however, that any person so declared a bankrupt, at the instance of a creditor, shall be entitled, if he demands it, to a trial by jury.—SHARSWOOD.

\*481] \*part in value of the 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 furthest, 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*)

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*)

\*482] \*The bankrupt, upon this examination, is bound upon pain of death to make a full discovery of all his estate and effects, as well in expectancy as possession, and how he has disposed of the same; together with all books and writings relating thereto: and is to deliver up all in his own power to the commissioners, (except the necessary apparel of himself, his wife, and his children;) or, in case he conceals or embezzles any effects to the amount of 20*l*., or withholds any books or writings, with intent to defraud his creditors, he shall be guilty of felony without benefit of clergy, 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 further reward as the assignees and commissioners shall think proper. And any trustee wilfully concealing the estate of any bankrupt, after the expiration of two-and-forty days, shall forfeit 100*l*., and double the value of the estate concealed, to the creditors.(*w*)

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, (but none of them creditors for less than 20*l*.,)

(*q*) Stat. 5 Geo. II. c. 30.

(*r*) Stat. 5 Geo. II. c. 30.

(*s*) Stat. 21 Jac. I. c. 19.

(*t*) Stat. 5 Geo. II. c. 30.

(*u*) Stat. 5 Geo. II. c. 30. By the laws of Naples, all fraudulent bankrupts, particularly such as do not surrender them-

selves 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.

will sign a certificate to that purport; the commissioners are then to authenticate such certificate under their hands and seals, and to transmit it to the lord chancellor; and he, or two of the judges whom he shall appoint, on oath \*made by the bankrupt that such certificate was obtained without fraud, may allow the same; or disallow it, upon cause shown by any of the [\*483 creditors of the bankrupt.(x)

If no cause be shown to the contrary, the certificate is allowed of course; and then the bankrupt is entitled to a decent and reasonable allowance out of his effects, for his future support and maintenance, and to put him in a way of honest industry. This allowance is also in proportion to his former good behaviour in the early discovery of the decline of his affairs, and thereby giving his creditors a larger dividend. For, if his effects will not pay one-half of his debts, or ten shillings in the pound, he is left to the discretion of the commissioners and assignees to have a competent sum allowed him, not exceeding *three per cent.*; but if they pay ten shillings in the pound, he is to be allowed *five per cent.*; if twelve shillings and sixpence, then *seven and a half per cent.*; and if fifteen shillings in the pound, then the bankrupt shall be allowed *ten per cent.*; provided that such allowance do not in the first case exceed 200*l.*, in the second 250*l.*, and in the third 300*l.*(y)

Besides this allowance, he has also an indemnity granted him of being free and discharged forever 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 [\*484 becomes a clear man again; and, by the assistance of his allowance and his own industry, may become a useful member of the commonwealth; which is the rather to be expected, as he cannot be entitled to these benefits 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 the value of 100*l.* by stock-jobbing. Also, to prevent the too common practice of frequent or 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 they pay full \*fifteen shillings in the pound, are only [\*485 thereby indemnified as to the confinement of their bodies; but any future

(\*) Stat. 5 Geo. II. c. 30.

(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 misericordie*

*causa ei fuerit relicta, puto menstruum vel annum, alii mentorum nomine, non oportet propter hoc bona ejus iterum renundari: nec enim fraudandus est alimentis collatantis* Ibid. l. 6.

(z) Stat. 5 Geo. II. c. 30.

(a) Stat. 24 Geo. II. c. 57



estate they shall acquire remains liable to their creditors, excepting their necessary apparel, household goods, and the tools and implements of their trades.(b)

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 shown 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 broken 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 \*486] meant, that a plain direct act of bankruptcy once \*committed cannot be purged or explained away by any subsequent conduct, as a dubious, equivocal act may be;(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) Inasmuch that all transactions of the bankrupt are from that time absolutely null and void, either with regard to the alienation of his property or the receipt of his debts from such as are privy to his bankruptcy; for they are no longer his property, or his debts, but those of the future assignees. And if an execution be sued out, but not served and executed on the bankrupt's effects till after the act of bankruptcy, it is void as against the assignees. But the king is not bound by this fictitious relation, nor is 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) In France, this doctrine of relation is carried to a very great length; for there every act of a merchant, for ten days *precedent* to the act of bankruptcy, is presumed to be fraudulent, and 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 the course of trade, even after an

(b) Stat. 5 Geo. II. c. 30.

(c) Page 235.

(d) Stat. 1 Jac. I. c. 15. 21 Jac. I. c. 10.

(e) 12 Mod. 324.

(f) Salk. 110.

(g) 4 Burr. 32.

(h) 1 Atk. 262.

(i) Viner, Abr. tit. *Creditor and Bankrupt*, 104.

(k) Sp. L. b. 29, c. 16.

\* By the act of Congress August 19, 1841, (5 Story, 2830,) it was provided that all the property and rights of property, of every name and nature, and whether real, personal, or mixed, of every bankrupt, except as presently mentioned, who shall be declared to be a bankrupt, shall by mere operation of law, *ipso facto*, from the time of such decree, be deemed to be divested out of such bankrupt, without any other act, assignment, or other conveyance whatsoever. The exception referred to is necessary household and kitchen furniture, and such other articles and necessaries of the bankrupt as the assignee shall designate or set apart, having reference in the amount to the family, condition, and circumstances of the bankrupt, but altogether not to exceed in value, in any case, the sum of three hundred dollars; and also the wearing-apparel of such bankrupt, and that of his wife and children.—SHARSWOOD.

act of bankruptcy done, shall be liable to be refunded. Nor, by statute 1 Jac. I. c. 15, shall any debtor of a bankrupt, that pays him his debt without knowing of his bankruptcy, be liable to account for it again; the intention of this relative power being only to reach fraudulent transactions, and not to distress the fair trader.

The assignees may pursue any *legal* method of recovering this property so vested in them, by their own authority; but \*cannot 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) [\*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 dividend or distribution; at which time they must produce their accounts, and verify them upon oath if required. And then the commissioners shall direct a dividend to be made, at so much in the pound, to all creditors who have before proved, or shall then prove, their debts. This dividend must be made equally and in a ratable proportion to all the creditors, according to the *quantity* of their debts; no regard being had to the *quality* of them. Mortgages, indeed, for which the creditor has a real security in his own hands, are entirely safe; for the commission of bankrupt reaches only the equity of redemption. (m) So are also personal debts, where the creditor has a chattel in his hands as a pledge or pawn for the payment, or has taken the debtor's lands or goods in execution. And, upon the equity of the statute 3 Anne, c. 11, (which directs that upon all executions of goods being on any premises demised to a tenant, one year's rent, and no more, shall, if due, be paid to the landlord,) it hath also been held that, under a commission of bankrupt, which is in the nature of a statute-execution, the landlord shall be allowed his arrears of rent to the same amount in preference to other creditors, even though he had neglected to distrein 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) But, otherwise, judgments and recognizances, (both which are debts of record, and therefore at other times have a priority,) and also bonds and obligations by deed or special instrument, (which are called debts by specialty, and are usually the next \*in order,) these are all put on a level with debts by mere simple contract, and all paid *pari passu*. (o) Nay, so far is this matter carried, that, by the express provision of the statute, (p) debts not due at the time of the dividends 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*, *bona 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) [\*488

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) 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 jus-

(l) Stat. 5 Geo. II. c. 30

(m) Finch, Rep. 486.

(n) 1 Atk. 103, 104.

(o) Stat. 21 Jac. I. c. 10.

(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. Ca. 144.

tice 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.

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## 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, show who is capable of making a last will and testament; shall, thirdly, consider the nature of a testament and its incidents; shall, fourthly, show what an executor and administrator are, and how they are to be appointed; and, lastly, shall select some few of the general heads of the office and duty of executors and administrators.

First, as to the *original* of testaments and administrations. We have more than once observed that, when property came to be vested in individuals by the right of occupancy, it became necessary for the peace of society that this occupancy should be continued, not only in the present possessor, but in those persons to whom he should think proper to transfer it, which introduced the doctrine and practice of alienations, \*gifts, and contracts. But these precautions would be very short and imperfect if they were confined to the life only of the occupier; for then, upon his death, all his goods would again become common, and create an infinite variety of strife and confusion. The law of very many societies has therefore given to the proprietor a right of continuing his property after his death in such persons as he shall name; and, in defect of such appointment or nomination, 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 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 show 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)

(w) 1 Atk. 214.

(\*) Puff. L. of N. b. 4, c. 10.

(b) Ibid. b. 4, c. 11.

(c) Barbeyr. Puff 4 10, 4. Godolph. Orph. Leg. 1. 1.

(d) Gen. xv.

(e) 72

(\*) Taylor's Elem. Civ. Law, 517.

(f) See page 12.

(g) Selden, *de succ. Ebr.* c. 24.

(h) Gen. xlviii.

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, which first gave the right of bequeathing: (l) and among the northern nations, particularly among the Germans, (m) testaments were not received into use. And this variety may serve to evince that the right of making wills and disposing of property after death is merely a creature of the civil state, (n) which has permitted it in some countries and denied it in others; and even where it is permitted by law, it is subjected to different formalities and restrictions in almost every nation under heaven. (o)

With us in England, this power of bequeathing is 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 heredi nomine) sibi assumit. Verum possessiones uxori, liberis, et cognatione proximis, pro suo cuique jure, distribuuntur.*" (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 informs 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 [ \*492 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

(i) Plutarch in vita Solon.

(k) Pott. Antiq. l. 4, c. 15.

(l) Inst. 2, 22, 1.

(m) Tacit. de Mor. Germ. 21.

(\*) See page 13.

(n) Sp. L. b. 27, c. 1. Vinnius in Inst. l. 2, tit. 10.

(p) LL. Canut. c. 68.

(q) l. 2, c. 5.

<sup>1</sup> 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 quædam 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, presentibus, et eo qui familiæ emptor dicebatur. Sed illa quædam priora duo genera testamentorum ex veteribus temporibus in desuetudinem abierunt: quod vero per æs et libram fiebat, diutius permansit.*" 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 mediæ juris-prudentiæ comitiis testari desitum fuisse. Immo, latis tabulis xii. desisse testamenta in comitiis calatis fieri, verisimillimum est. Quis enim voluisset voluntatem suam submittere populi suffragiis, quum libere suoque arbitrio testari posset? Et quis maluisset publice et palam heredem nuncupare, quam jure uti xii. tabularum concessio?*"—CHITTY

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 opinion that \*493] 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 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 ancient 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. and M. c. 2, explained by 2 & 3 Anne, 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.

\*494] \*In case a person made no disposition of such of his goods as were testable, whether that were only part or the whole of them, he was, and is, said to die intestate; and in such case 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,

(r) Bracton, L. 2, c. 2<sup>o</sup> Fc: . 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 hæcenus usitatum et approbatum, uxores delenti et solent a tempore, &c. habere suam rationabilem partem bonorum maritorum suorum; ita videlicet, quod si nullus habuerint liberorum, 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.

(a) Dalrymp. of Feud. Property, 145.

(b) Page 428.

(c) 9 Rep. 33.

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 of the prelate, whose right of distributing his chattels for the good of his soul was effectually superseded thereby.

\*The goods of the intestate being thus vested in the ordinary upon the most solemn and conscientious trust, the reverend prelates were, [\*495 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 decedentium 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 intrusted 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 shall 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 \*dependents: and therefore the statute 31 [\*496 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.

(d) 9 Rep. 37.

(e) § 486.

(f) Finch, Law, 173, 174.

(g) Plowd. 277.

(h) Ibid.

(i) L. 2, c. 67, § 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 archdeaconry 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 Edw. I. c. 19.

(n) 9 Rep. 39.

Upon this footing stands the general law of administrations at this day. I shall, in the further 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 show 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. And this law<sup>(o)</sup> is entirely prohibitory; for, regularly, every person hath full power and liberty \*497] 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 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.<sup>(p)</sup> For, though some of our common lawyers have held that an infant of any age (even four<sup>d</sup> years old) might make a testament,<sup>(q)</sup> and others have denied that under eighteen he is capable,<sup>(r)</sup> 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, persons grown childish by reason of old age or distemper,<sup>3</sup> such as have their senses besotted with drunkenness,<sup>4</sup>—all these are incapable, by reason of mental disability, to make any will so long as such disability lasts. To this class also may be referred such persons as are *born* deaf, blind, and dumb; who, as they have always wanted the common inlets of understanding, are incapable of having *animum testandi*, and their testaments are therefore void.

2. Such persons as are intestate for want of liberty or freedom of will are, by the civil law, of various kinds; as prisoners, captives, and the like.<sup>(s)</sup> But the law of England does not make such persons absolutely intestate; but only leaves it to the discretion of the court to judge, upon the consideration of their

<sup>(o)</sup> Godolph. Orph. Leg. p. 1, c. 7.  
<sup>(p)</sup> Godolph. p. 1, c. 8. Wentw. 212. 2 Vern. 104, 469.  
Gillb. Rep. 74.

<sup>(q)</sup> Perkins, § 503.  
<sup>(r)</sup> Co. Litt. 89.  
<sup>(s)</sup> Godolph. p. 1, c. 9.

\* This has been thought an error of the press in Perkins, and that four by mistake was printed for fourteen. 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. 99.—CHRISTIAN.

However, by the late Wills Act, statute 1 Vict. c. 26, §§ 7, 34, it is enacted that no will made after the first day of January, 1838, by any person under the age of twenty-one years, shall be valid.—STEWART.

<sup>3</sup> See Swinburne, pt. 2, sect. 5. Old age alone does not justify a presumption of the party's incapacity, (*Lewis vs. Pead*, 1 Ves. Jr. 19;) but, when accompanied by great infirmity, it will be a circumstance of weight in estimating the validity of any transaction, (*Griffiths vs. 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 vs. Saunderson*, 19 Ves. 283. *Ridgway vs. Darwin*, 8 Ves. 67. *Ex parte Cranmer*, 12 Ves. 449.—CHITTY.

<sup>4</sup> 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 vs. Wright*, 2 Burr. 109f, a rule was made upon the defendants to show cause why a criminal information should not be exhibited against them for the misdemeanour 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.—CHITTY.

particular circumstances of duress, whether or no such person 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 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, [\*498 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.(u) Yet by her husband's license she may make a testament:(v) and the husband, upon marriage, frequently covenants with her friends to allow her that license: but such license 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 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 her 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) But, if a feme-sole makes her will, and afterwards marries, such [\*499 subsequent marriage is esteemed a revocation in law, and entirely vacates the will.(e)

3. Persons incapable of making testaments, on account of their criminal conduct, are, in the first place, all traitors and felons, from the time of conviction; for then their goods and chattels are no longer at their own disposal, but forfeited to the king.<sup>5</sup> 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)<sup>6</sup> Outlaws also, though it be but for debt, are incapable of making a will, so long as the outlawry subsists, for their goods and chattels are forfeited during that time.(g) As for persons guilty of other crimes short of felony, who are by the civil law precluded from making testaments, (as usurers, libellers, and others

(t) *Ff.* 31, l. 77.

(u) 4 Rep. 51.

(v) *Dr. and St. d.* 1, c. 7.

(w) *Bro. Abr. tit. Devote*, 34. *Str.* 891.

(x) *The King vs. Bettesworth*, T. 13 Geo. II. B. R.

(y) *Cro. Car.* 376. 1 Mod. 211.

(z) *Ff.* 28, l. 6.

(a) *Ff.* 39, 6, 25.

(b) *Co. Litt.* 133.

(c) *Godolph.* 1, 10.

(d) *Proc. Chan.* 44.

(e) 4 Rep. 60. 2 P. Wms. 624.

(f) *Plowd.* 261.

(g) *Fitz. Abr. tit. Descent*, 16.

<sup>5</sup> But in this case the will is of no effect, not from the incapacity of the testator, but because he has no goods to bequeath. And a similar observation applies to the other instances given by Blackstone,—that of a *felo de se*, whose goods and chattels are forfeited by the act and manner of his death, although he may make a devise of his lands, for they are not subjected to any forfeiture. *Plowd.* 261. Thus, also, outlaws, though it be but for debt, “are said to be” incapable of making a will; for their goods and chattels are forfeited during the time (*Fitz. Abr. tit. Descent*, 16) the outlawry subsists.—KERR

<sup>6</sup> 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.—CHITTY.



of a worse stamp,) by the common law their testaments may be good.(h) And in general the rule is, and has been so at least ever since Glanvil's time,(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 \*500] legal declaration of a man's intentions, \*which he wills to be performed after his death." 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 styled his *will*: it is *justa sententia*; that is, drawn, attested, and published, with all due solemnities and forms of law: it is *de eo, quod quis post mortem suam fieri 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*, *codicillus*, a little book or writing, is a supplement to a will, or an addition made by the testator, and annexed to, and to be taken as part of, a testament; being for its explanation, or alteration, or to make some addition to, or else some subtraction from, the former disposition of the testator.(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;† 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 Anne, c. 16, must be such as are admissible upon trials at common law. 2. That no nuncupative will shall in any wise be good, where the estate bequeathed exceeds 30*l.*, unless proved by three such witnesses, present at the making thereof, (the Roman law requiring seven,)(n) and unless they \*501] or some of them were specially required to bear \*witness thereto by the testator himself; and unless it was made in his last sickness, in his own 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

(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.

(m) Godolph. p. 1, c. 1, § 3.

(n) Inst. 2, 10, 14.

† 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 codicil of that which is not disposed of by the written will.—CHITTY.

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,<sup>8</sup> and is hardly ever heard of, but in the only instance where favour ought to be shown 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 bystanders 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.<sup>9</sup>

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, unknown to the feudal or common law, and not under the same jurisdiction as personal testaments. But a testament of chattels, written in the testator's own hand, though it has neither his name nor seal to it, nor witnesses present at its publication, is good, provided sufficient proof can be had that it is his handwriting.<sup>(o)</sup> And though \*written in another man's hand, and never signed by the testator, yet, if proved to be according to his instructions and approved by him, it hath been held a good

(o) Godolph. p. 1, c. 21. Gilb. Rep. 200.

<sup>8</sup> 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 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 vs. Jackson*, 1 Phillim. 191. *Parsons vs. 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 vs. 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 vs. The Parish of St. Clement's Danes*, 1 Eq. Ca. Abr. 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.—CHITTY.

<sup>9</sup> But nuncupative wills, if made after the 1st of January, 1838, are no longer valid at all; for by the Wills Act, 1 Vict. c. 26, s. 9, the 29 Car. II. c. 3 is repealed to this extent, and it is enacted that no will shall be valid unless it shall be in writing; but, by s. 9, the wills of soldiers and mariners, being in actual military service or at sea, may dispose of their personal estate as they might have done before the act; and, by s. 12, the act is not to affect certain provisions of stat. 11 Geo. IV. and 1 W. IV. c. 60, with respect to the wills of petty officers and seamen of the royal navy and marines so far as relates to their wages, prize-money, or allowances.—STEWART.

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.<sup>10</sup>

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)<sup>11</sup> And therefore, if there be many testaments, the 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)<sup>12</sup>

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)<sup>13</sup> 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:

(p) Comyns, 452, 453, 454.  
 (q) L. 2, c. 26.  
 (r) Co. Litt. 1.  
 (s) Litt. § 168. Perk. 478.  
 (t) Perk. 479.

(w) 8 Rep. 82.  
 (x) Elem. c. 19.  
 (y) Lord Raym. 441. 1 P. Wms. 204.  
 (z) See book i. c. 16.  
 (v) Inst. 2, 18, 1.

<sup>10</sup> But this distinction between wills of real and personal estate is now entirely abolished so far as it relates to wills made after the 1st of January, 1838; for by s. 9 of stat. 1 Vict. c. 26 it is enacted that no will shall be valid unless it shall be signed at the foot by the testator, or by some other person in his presence or by his direction; and such signature shall be made or acknowledged by the testator in the presence of two or more witnesses at the same time, and such witnesses shall attest and shall subscribe the will in the presence of the testator; but no form of attestation shall be necessary; and, by s. 12, any will executed in this manner shall be valid without any other publication.—STEWART.

<sup>11</sup> This, lord Loughborough observed, was the most general maxim he knew, (*Matthews vs. Warner*, 4 Ves. 210:) it is essential to every testamentary instrument that it may be altered even in *articulo mortis*, (*Balch vs. Symes*, 1 Turn. & Russ. 92:) irrevocability would destroy its essence as a last will. *Hobson vs. Blackburn*, 1 Addams, 278. *Reid vs. Shergold*, 10 Ves. 379.—CHITTY.

<sup>12</sup> Republication of a will makes the will speak as of the time of such republication. *Long vs. Aldred*, 3 Addams, 51. *Goodtitle vs. 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.—CHITTY.

<sup>13</sup> But by 1 Vict. c. 26, s. 19, no will shall be revoked by any presumption of an intention on the ground of an alteration in circumstances: it is, however, expressly provided (s. 18) that a will shall be revoked by marriage, but that no will shall be revoked otherwise, or but by another will or codicil executed in the manner hereinbefore mentioned or by some writing declaring an intention to revoke the same and executed in the manner in which a will is required to be executed; or by burning, tearing, or otherwise destroying the same by the testator, or by some person in his presence, with the intention of revoking the same; and, by s. 21, no alteration in a will shall have any effect unless executed as a will; and, by s. 22, no will revoked shall be revived otherwise than by a re-execution or a codicil to revive it.—STEWART.

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.<sup>14</sup>

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<sup>15</sup> and infants: nay, even infants unborn, or *in ventre sa 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 etate*.(b) In like manner as it may be granted *durante absentia*, or *pendente lite*; when the executor is out of the realm,(c) or when a suit is commenced in the ecclesiastical court touching the validity of the will.(d) This appointment of an executor is essential to the making of a will:(e) and it may be performed either by express words, or such as strongly imply the same.<sup>16</sup> 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 *cum testamento annexo*(f) to some other person; and then the duty of the administrator, [\*504 as also when he is constituted only *durante minore etate*, &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)

(a) West. Symb. p. 1, § 635.

(b) West. Off. Ex. c. 18.

(c) 1 Lutw. 342.

(d) 2 P. Wms. 539, 590.

(e) West. c. 1. Flowd 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. 38.

(i) Salk. 36. Stra. 532.

(j) See page 496.

(k) Prec. Chanc. 593.

<sup>14</sup> 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 vs. Brown*, 2 *Addams*, 449. *Dev vs. Clerk*, 3 *Addams*, 207.—CHITTY.

<sup>15</sup> But a *feme covert* 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 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 vs. Allen*, 2 *Atk.* 213.—CHITTY.

<sup>16</sup> *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 vs. Towers*, *Ambl.* 364.—CHITTY

and not of the canonists, which the law of England adopts in the descent of real estates:(*m*) because in the civil computation the intestate himself is the *terminus, a quo* the several degrees are numbered, and not the common ancestor, according to the rule of the canonists. And therefore in the first place the children, or (on failure of children) the parents, of the deceased, are entitled to the \*505] administration; both which are indeed in the first degree; but \*with us(*n*) the children are allowed the preference.(*o*) Then follow brothers,(*p*) grandfathers,(*q*) uncles 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. 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 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 letters- \*506] \*patent, or other authority from the king; 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 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

(*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 Arensburg, 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. 23.

(*p*) Harris in Nov. 18, c. 2

(*q*) Prec. Chan. 527. 1 P. Wms. 41.

(*r*) Atk. 455.

(*s*) 1 Ventr. 425.

(*t*) Aleya, 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. 274.

(*d*) Bro. Abr. tit. Administrator, 7.

(*e*) Styl. 225.

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 shown what is and who may be an executor or administrator, I proceed now, *fifthly* and lastly, to inquire into some few of [ \*507 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)<sup>17</sup> but an administrator may do nothing<sup>18</sup> till letters of administration are issued; for the former derives his power from the will and not from the probate;(h) the latter owes his entirely to the appointment of the ordinary. If a stranger takes upon him to act as executor, without any just authority, (as by intermeddling with the goods of the deceased,(i) and many other transactions),(k) he is called in law an executor of his own wrong, (*de son tort*),<sup>19</sup> 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)<sup>20</sup> 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 superior degree,(q) \*himself [ \*508 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

(f) 1 Roll. Abr. 908. Godolph. p. 2, c. 30. Salk. 36.

(g) Wentw. ch. 3.

(h) Comyns, 151.

(i) 5 Rep. 33, 34.

(j) Wentw. ch. 14. Stat. 43 Eliz. c. 8.

(k) Dyer, 160.

(l) Bro. Abr. tit. *Administrator*, 8.

(m) 5 Rep. 31.

(n) 12 Mod. 471.

(o) Dyer, 166.

(p) 1 Ch. Ca. 33.

(q) 5 Rep. 30. Moor. 52.

(r) 12 Mod. 441, 471.

<sup>17</sup> Before he proves the will, he may lawfully perform most acts incident to the office. *Wankford vs. 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 vs. 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, 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 vs. Humphreys*, 3 P. Wms. 351.—CHITTY.

<sup>18</sup> 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 vs. 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 vs. Lutwidge*, *Barnard*, Ch. Rep. 320. S. C. 2 Atk. 120.—CHITTY.

<sup>19</sup> 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 vs. Priest*, 2 T. R. 99.—CHITTY.

<sup>20</sup> 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 vs. Vernon*, 3 T. R. 590.—CHITTY.

the rightful executor may be prevented from satisfying his own debt.(t)<sup>21</sup> 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,(u) and not to the creditors or legatees of the deceased.

2. The executor, or the administrator *durante minore etate*, 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 styled the *probate*. In defect of any will, the person entitled to be administrator must also, at this period, take out letters of administration under the seal of the ordinary, whereby an executorial power to collect and administer, that is, dispose of the goods of the deceased, is vested in him: and he must, by statute 22 & 23 Car. II. c. 10, enter into a bond with sureties faithfully to execute his trust. If all the goods of the deceased lie \*509] within the same jurisdiction, a probate before the \*ordinary, or an administration granted by him, are the only proper ones: but if the deceased had *bona notabilia*, or chattels to the value of a *hundred shillings*, in two distinct dioceses or jurisdictions, then the will must be proved or administration taken out before the metropolitan of the province, by way of special prerogative;(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*d.* This will account for what is said in our ancient books, that *bona notabilia* in the diocese of London,(z) and indeed everywhere 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 a hundred and fifty nobles, we shall extend the present amount of *bona notabilia* to nearly 70*l.* But the makers of the canons of 1603 understood this ancient rule to be meant of the shillings current in the reign of James I., and have therefore directed(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 col-

(t) Wentw. ch. 14

(u) Salk. 198. Godolph. p. 2, c. 26, § 2.

(w) Godolph. p. 1, c. 20, § 4.

(x) 4 Inst. 335.

(y) Provinc. l. 3, t. 13, c. item. v. centum. etc. statutum - laicis.

(z) 4 Inst. 335. Godolph. p. 2, c. 22.

(a) Plowd. 281.

(b) Can. 92.

<sup>21</sup> 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.—CHRISTIAN.

lect any goods of the deceased other than such as lay within their \*own dioceses, beyond which their episcopal authority extends not. But it would be extremely troublesome if as many administrations were to be granted as there are dioceses within which the deceased had *bona notabilia*; besides the uncertainty which creditors and legatees would be at, in case different administrators were appointed, to ascertain the fund out of which their demands are to be paid. A prerogative is, therefore, very prudently vested in the metropolitan of each province, to make in such cases one administration serve for all. This accounts very satisfactorily for the reason of taking out administration to intestates, that have large and diffusive property, in the prerogative court; and the probate of wills naturally follows, as was before observed, the powers 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.<sup>22</sup>

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,<sup>(d)</sup> 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;<sup>(e)</sup> but in case of administrators it is otherwise.<sup>(f)</sup><sup>23</sup> Whatever is so recovered, that is of a salable nature and may be converted into ready money, is called *assets* in the hands of the executor or administrator;<sup>(g)</sup> that is, sufficient or enough (from the French *assez*) to make him chargeable to a creditor or legatee, so far as such goods and chattels extend. \*What- ever 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 speciality.<sup>(h)</sup> Thirdly, such debts as are by particular statutes to be preferred to all others: as the forfeitures for not burying in woollen,<sup>(i)</sup> money due upon poor-rates,<sup>(k)</sup> for letters to the post-office,<sup>(l)</sup> and some others. Fourthly, debts of record; as judgments, (docketed according to the statute 4 & 5 W. and M. c. 20,) statutes and recognizances.<sup>(m)</sup><sup>24</sup> 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.

(j) Stat. 17 Geo. II. c. 38.

(k) Stat. 9 Anne. c. 10.

(l) 4 Rep. 60. Cro. Car. 363.

<sup>22</sup> The ecclesiastical courts do not compel all executors to give an inventory, and always inquire 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 vs. Bignell*, 1 Phillim. 240. *Myddleton vs. Rushout*, *ibid.* 247. —CHITTY.

<sup>23</sup> It has been determined, since the decision of *Hudson vs. Hudson*, 1 Atk. 460, both in law and equity, that there is no distinction in this respect between executors and administrators: one of the latter has all the power which one of the former has. *Willand vs. Fenn*, cited in *Jacomb vs. Harwood*, 2 Ves. Sen. 267. —COLERIDGE.

<sup>24</sup> A final decree for payment of a debt, or other personal demand, is equal to a judgment. *Gray vs. Chiswell*, 9 Ves. 125. *Goate vs. 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 execu-



tracts; as for rent, (for which the lessor has often a better remedy in his own hands by distressing,) or upon bonds, covenants, and the like, under seal.(n) Lastly, debts on simple contracts, viz., upon notes unsealed, and verbal promises. Among these simple contracts, servants' wages are by some(o) with reason preferred to any other: and so stood the ancient law, according to Bracton(p) and Fleta,(q) who reckon among the first debts to be paid, *servita 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: 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 \*512] 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 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,<sup>25</sup> yet it were unfair to defraud the testator's creditors of their just debts by a release which is absolutely voluntary.(u)<sup>26</sup> Also, if no

(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.  
 (u) Salk. 303. 1 Roll. Abr. 921.

tion, under a bill filed by other creditors. *Rush vs. Higgs*, 4 Ves. 643. *Martin vs. 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 vs. Bowen*, 1 Sch. & Lef. 299. *Paxton vs. Douglas*, 8 Ves. 521. Between decrees and judgments the right to priority of payment is determined by their *real* priority of date.—CHITTY.

<sup>25</sup> Such is certainly the rule at common law; and it has been questioned, formerly, whether it did not hold in equity. *Brown vs. Selwyn*, 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 vs. 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 vs. Rumsey*, Yelv. 150. *Hudson vs. Hudson*, 1 Atk. 461. Lord Thurlow (in *Casey vs. Goodinge*, 3 Br. 111) and Sir William Grant (in *Berry vs. Usher*, 11 Ves. 90) treated this as a point perfectly settled; and lord Erskine (in *Simmons vs. 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 vs. 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*."—CHITTY.

<sup>26</sup> The rule of law is correctly laid down upon the principle that a debt is merely a right to recover something by way of action; and, as the executor cannot sue himself, it must be taken that the testator meant to release the debt when he appointed as executor a person who could not sue for it. Upon the same principle, if a debtor should be appointed administrator, the legal remedy would be suspended during his lifetime, but no longer; because, when the technical difficulty ceases, there does not remain the same presumption of intention to release the debt forever; and therefore upon his death an administrator *de bonis non* may sue his representative. *Lockin vs. Smith*, 1 Sid. 79. Nor is this principle inconsistent with the latter part of the rule,—that the testator's creditors are not to be disappointed of their just debts by this voluntary release: the right of action is, indeed, gone; but the law will presume that the executor, in his individual capacity, has paid the debt to himself in his representative, and will consider

suit is commenced against him,<sup>27</sup> the executor may pay any one creditor in equa.

the amount assets in his hands for which he will be personally liable to the action of any creditor; because the non-production of the same to answer the demand will, upon that presumption, be proof of a wasting of the testator's estate.

The doctrine of the courts of equity upon this subject is in effect very different; but, commencing upon principles very analogous, they seem gradually to have departed more and more widely from the practice of the courts of law. At one time, looking to the intention of the testator, they considered the appointment as turning the debt into a legacy, or specific bequest, and, as such, they in general sustained it against the other legatees, because any specific bequest given to any other person would have been so sustained. But, as no legacies—not even specific—could stand against the demands of creditors, so this presumed legacy in the hands of the executor became a trust; and he was held answerable for it to them if the other assets were not sufficient.

Upon the same ground of intention, if it appeared upon the will that the testator did not intend to discharge his executor,—as if he should have left a legacy and directed it to be paid out of the sum due from the executor,—in any such case the executor became, as to all the legatees, general and specific, a trustee to the amount of his debt, and was not discharged. *Flud vs. Rumsey*, *Yelv.* 160. *Carey vs. Goodinge*, 3 Bro. Ch. Rep. 110.

Now, however, the general rule is that the executor is to be considered as a trustee for the legatees; or, if they have been satisfied by other assets, for the persons entitled to the residue of the testator's personal estate under the will. See *Berry vs. Usher*, 11 Ves. 90, and the cases collected in the note there. *Simmons vs. Gutteridge*, 13 Ves. 262.

—COLERIDGE.

<sup>27</sup> It is not enough that a suit has been *commenced*, (*Sorrell vs. 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 vs. Russell*, 2 Sim. & Stu. 228. *Perry vs. Philips*, 10 Ves. 39. 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 vs. Merrer*, 1 T. R. 690. *Davis vs. Monkhouse*, *Fitz-Gib.* 77. *Britton vs. 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 vs. Hibbins*, *Cro. Eliz.* 793. *Searle vs. Lane*, 2 Freem. 104, S. C. 2 Vern. 37.

Since the statute of 3 Will. and Mary, c. 14, simple contract-debts are let 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 vs. Coussmaker*, 12 Ves. 154. But this rule seems to have been of earlier date than the statute. *Foly's case*, 2 Freem. 49. *Hickson vs. Witham*, *ibid.*, c. 12, in appendix to 2d ed. 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 vs. Lutwidge*, 8 Ves. 30. *Bailey vs. Ekins*, 7 Ves. 323. *Clay vs. 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 thereof as to make them equal and upon the level of the creditors by specialty in respect of what *they* received out of the personal estate. *Hasleywood vs. 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 vs. Pensou*, 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 vs. Chitters*, *Ambl.* 308. *Newton vs. Bennet*, 1 Br. 137. *Clay vs. 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.

degree his whole debt, though he has nothing left for the rest: for, without a suit commenced, the executor has no legal notice of the debt.<sup>(w)</sup><sup>28</sup>

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.<sup>(x)</sup>

(\*) Dyer, 32. 2 Leon. 60.

(\*) 2 Vern. 434. 2 P. Wms. 25. 2 Freem. 134. 2 Atk. 171

and there could be no marshalling as against them. *Sharpe vs. 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 show that the real estate is charged therewith: he must satisfactorily show that the personal estate is discharged. *Tower vs. Lord Rous*, 18 Ves. 138. *Bootle vs. Blundell*, 19 Ves. 548. *Watson vs. Brickwood*, 9 Ves. 454. *Barnewall vs. Lord Cawdor*, 3 Mad. 456. Still, where such an intention is plainly made out, it will prevail, (*Greene vs. Greene*, 4 Mad. 127. *Burton vs. Knowlton*, 3 Ves. 108;) and parties entitled by descent or devise to real estate cannot claim to have the encumbrance thereon discharged out of their ancestor's or deviser's personal estate, so as to interfere with specific, or even with general, legatees, (*Bishop vs. Sharpe*, 2 Freem. 278. *Tipping vs. Tipping*, 1 P. Wms. 730. *O'Neale vs. Meade*, *ibid.* 694. *Davis vs. Gardiner*, 2 P. Wms. 190. *Rider vs. Wager*, *ibid.* 335;) and, *a fortiori*, they could not maintain such a claim when it would go to disappoint creditors. *Lutkins vs. Leigh*, *Ca. temp. Talb.* 54. *Goree vs. 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 vs. 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 vs. King*, 3 P. Wms. 360. *Cope vs. Cope*, 2 Salk. 449. The mere form of devising a mortgaged estate, *subject to the encumbrance 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 vs. St. Eloy*, 2 P. Wms. 386. *Bootle vs. 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 vs. Evelyn*, 2 P. Wms. 664. *Earl of Tankerville vs. Fawcett*, 1 Cox, 239. *Basset vs. Percival*, 1 Cox, 270. *Parsons vs. Freeman*, *Ambl.* 115. *Tweddel vs. 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 vs. 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 vs. Lord Stamford*, 2 Freem. 124. *Grise vs. 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 vs. Augier*, 12 Ves. 416.—CHITTY.

<sup>28</sup> The rules laid down in the text as to the order of payment apply only to what are called *legal* assets,—that is, such things as the executor takes as executor, and as are subject to the testator's debts *generally* by rule of law, and independently of any direction to that effect in his will. But there are also *equitable* assets,—which are such things as the testator has made subject to his debts *generally*, but which without his act would either not have been subject to any of his debts, or only to debts of a special nature. These the executor takes, not as executor, but as trustee; and they are to be distributed, not according to the rule of law, but of equity,—that is, equally among all the creditors. What are legal and what equitable assets is often a disputed question; but, the principle of distribution of the latter being consonant to natural justice, the leaning of the courts has long been to extend their range. See 2 Fonblanque, 397.—COLERIDGE.

It may be added here also that, by statute 11 Geo. IV., and 1 W. IV. c. 47 and 3 & 4 W. IV. c. 104, real estate, whether freehold or copyhold, and whether devised (unless devised for payment of, or charged with, the debts) or descended, is made assets to be administered in equity for payment of simple contract-debts; so that a simple contract-creditor, instead of proceeding at law against the executor and running the risk of a plea of *plene administravit*, may at once appeal to the court of chancery and have his claim paid from the real estate of the deceased. The statutes which enable a simple contract-creditor to take this step expressly reserve a priority to specialty creditors.—KERE.

A legacy is a bequest, or gift, of goods and chattels by testament; and the person to whom it was given is styled the legatee: which every person is capable of being, unless particularly disabled by the common law or statutes, as traitors, papists,<sup>29</sup> 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;<sup>30</sup> and it is his business first of all to see whether there is a sufficient fund left to pay the debts of the testator: the rule of equity being, that a man must be just before he is permitted to be generous; or, as Bracton expresses the sense of our ancient law,(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 *general* legacies must abate proportionably, in order to pay the debts; \*but a *specific* legacy [ \*515 (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)<sup>31</sup>

(y) Co. Litt. 111. Aleyn. 39.

(z) L. 2, c. 25.

(\*) 2 Vern. 111.

<sup>29</sup> This ground of disability no longer disgraces the statute-book.—CURRY.

<sup>30</sup> 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 *vs.* The Bank of England, 2 Cox, 179;) though a different practical construction has been put on the statute creating government-annuities, (Bank of England *vs.* 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. Franklyn *vs.* The Bank of England, 1 Russ. 597. Bank of England *vs.* Moffat, 3 Br. 262.

The assent of the executor is equally necessary whether a legacy be specific or merely pecuniary, (Flanders *vs.* Clarke, 3 Atk. 510. Abney *vs.* Miller, 2 Atk. 598:) a court of equity, indeed, will compel the executor to deliver the specific article devised, (Northey *vs.* Northey, 2 Atk. 77:) but, as a general rule, no action at law can be maintained for a legacy, (Deeks *vs.* Strutt, 5 T. R. 692,) or for a distributive share under an intestacy. Jones *vs.* Tanner, 7 Barn. & Cress. 544. It was held, however, in Doe *vs.* 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.—CURRY.

<sup>31</sup> 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 *vs.* Waite, 1 Swanst. 557. Barington *vs.* 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 *vs.* 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 *vs.* 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 *vs.* McGuire, 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 *vs.* 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 *vs.* Potter, 2 Cox, 182. Humphreys *vs.* 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 *vs.* Morris, 9 Ves. 363. Barker *vs.* Rayner, 5 Mad. 217. Where,

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.<sup>(b)</sup> And this law is as old as Bracton and Fleta, who tell us,<sup>(c)</sup> "*si plura sint debita, vel plus legatum fuerit, ad quæ catalla defuncti non sufficiant, fiat ubique defalcatio, excepto regis privilegio.*"

If a legatee dies before the testator, the legacy is a lost or *lapsed* legacy, and shall sink into the *residuum*.<sup>32</sup> 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.<sup>(d)</sup><sup>33</sup> But a legacy to one, to be paid when he attains the age of twenty-one years, is a *vested* legacy; an interest which commences *in præsentia*, although it be *solvendum in futuro*: and if the legatee dies before that age, his representative 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.<sup>34</sup>

<sup>(b)</sup> *Ibid.* 205.

<sup>(c)</sup> *Bract. l. 2, c. 26. Flet. l. 2, c. 57, § 11.*

<sup>(d)</sup> *Dyer, 59. 1 Eq. Ca. Abr. 295.*

indeed, the identical *corpus* is not given, (*Selwood vs. 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 vs. Adderley*, 15 Ves. 389. *Sibley vs. Perry*, 7 Ves. 529. *Kirby vs. Potter*, 4 Ves. 751. *Le Grice vs. Finch*, 3 Meriv. 52. *Fowler vs. 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 vs. 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 vs. Beech*, 4 Ves. 566. *Innes vs. Johnson*, *ibid.* 573. *Kirby vs. Potter*, *ibid.* 572. *Sibley vs. Perry*, 7 Ves. 529. *Webster vs. Hale*, 8 Ves. 413.

The greater part of this note is extracted from 1 Hovenden's Suppl. to Ves. Jun. Reports, 312.—CHITTY.

<sup>32</sup> Except that, by the statute 1 Vict. c. 26, s. 33, a gift to a child or other issue of the testator will not lapse in case of the death of the legatee, leaving issue which survives the testator, but shall take effect as if the death of such person had happened immediately after the death of the testator, unless a contrary intention shall appear by the will.—KERR.

<sup>33</sup> 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 vs. 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 vs. Parsons*, 5 Ves. 582. *Sansbury vs. Read*, 12 Ves. 78. *Errington vs. 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 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 vs. Killitt*, 1 Br. 123. *Duke of Chandos vs. Talbot*, 2 P. Wms. 613. *Mackell vs. Winter*, 3 Ves. 543. *Bolger vs. Mackell*, 5 Ves. 509. *Hanson vs. 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 vs. Lea* 3 T. R. 42. *Boraston's case*, 3 Rep. 21.—CHITTY.

<sup>34</sup> 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 forth

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)<sup>35</sup> for, with regard to devises affecting lands, the ecclesiastical court hath no concurrent jurisdiction.<sup>36</sup> And, in case of a vested legacy, due immediately, and charged on land or money in the funds, which yield an immediate profit, \*interest shall be payable thereon from the testator's death;<sup>37</sup> but if charged only on the personal estate, which cannot be [ \*514

(e) *Ff.* 35, 1, 1 and 2.(f) 1 *Eq. Ca. Abr.* 205.(g) 2 *P. Wms.* 601.

with, provided a year has elapsed since the death of the \*original testator. *Crickett vs. Dolby*, 3 *Ves.* 13. *Cloberry vs. Lampen*, 2 *Freem.* 25. *Anonym.* *ibid.* 64. *Anonym.* 2 *Vern.* 199. *Green vs. Pigot*, 1 *Br.* 105. *Fonnereau vs. 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 vs. Painter*, 2 *P. Wms.* 338. *Hanson vs. Graham*, 6 *Ves.* 249. *Roden vs. 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 vs. Williams*, 2 *P. Wms.* 480. *Crickett vs. Dolby*, 3 *Ves.* 16. —CHITTY.

<sup>35</sup> Unless there be something in the will to show an intention to the contrary, as if there be a residuary devise. For, by the Wills Act, (1 *Vict. c.* 26, s. 25.) unless a contrary intention appears by the will, such real estate or interest therein as shall be comprised in a lapsed devise, or in a devise which fails as being contrary to law (as where given to a charity) or otherwise incapable of taking effect, shall be included in the residuary devise (if any) contained in such will.—KERR.

<sup>36</sup> Where legacies are charged upon land, or if the gift at all savours of the *realty*, the trusts must be carried into execution with analogy to the common law. *Scott vs. Tyler*, 2 *Dick.* 719. *Long vs. 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 vs. Aston*, 1 *Atk.* 378, 379, *S. C. Willes*, 91. *Harrison vs. Naylor*, 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 vs. Condon*, 2 *Atk.* 128. *Dawson vs. Killet*, 1 *Br.* 123. *Godwin vs. Munday*, *ibid.* 194. *Smith vs. Partridge*, *Ambl.* 267. *Sherman vs. Collins*, 3 *Atk.* 320.—CHITTY.

<sup>37</sup> 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 vs. 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 vs. 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 vs. Chalie*, 10 *Ves.* 13. *Wood vs. Penoyre*, 13 *Ves.* 333,) cannot apply to the case of legacies not dependent on the getting in of the

immediately got in, it shall carry interest only from the end of the year after the death of the testator.<sup>(h)</sup><sup>38</sup>

(h) 2 P. Wms. 26, 27.

personal estate, and charged upon lands only: in such case interest, it has been said, must be chargeable from the death of the testator, or not at all. *Pearson vs. Pearson*, 1 Sch. & Lef. 11. *Spurway vs. Glyn*, 9 Ves. 486. *Shirt vs. Westby*, 16 Ves. 396.—  
CHITTY.

<sup>38</sup> 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 vs. Greenbank*, 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 vs. 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 vs. Waite*, 1 Swanst. 557. *Beckford vs. 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 vs. Potter*, 4 Ves. 751. *Barrington vs. 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 vs. Lowndes*, 15 Ves. 304. *Heath vs. Perry*, 3 Atk. 102. *Mitchell vs. 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 vs. Askew*, 1 Cox, 244. *Harvey vs. 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 vs. Wynch*, 1 Cox, 435. *Ellis vs. Ellis*, 1 Sch. & Lef. 5. *Tyrrel vs. 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 vs. Waite*, 1 Swanst. 588;) nor, as illegitimate children are no more in legal contemplation than strangers, (*Lowndes vs. Lowndes*, 15 Ves. 304,) will interest be allowed by way of maintenance for such legatees, (*Perry vs. Whitehead*, 6 Ves. 547,) unless it can be satisfactorily collected from the will that the testator intended to give interest. *Beckford vs. Tobin*, 1 Ves. Sen. 310. *Ellis vs. Ellis*, 1 Sch. & Lef. 6. *Newman vs. 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 vs. Dolby*, 3 Ves. 12. *Collis vs. 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 vs. Whitehead*, 6 Ves. 547. *Rawlins vs. Goldtrap*, 5 Ves. 443. *Hill vs. 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 vs. 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 vs. 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 be entitled to the fund, so as to make each a compensation for taking from him part, it will grant an allowance for maintenance, (*Errat vs. Barlow*, 14 Ves. 203. *Marshall vs. 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 vs. Green*, 10 Ves. 48. *Greenwell vs. Greenwell*, 5 Ves. 199. *Errat vs. Barlow*, 14 Ves. 204. *Haley vs. 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 main-

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 accompanied with this implied trust, that, if the donor lives, the property thereof shall revert to himself, being only given in contemplation of death, or *mortis causa*.<sup>39</sup> This method of donation might

(9) Prec. Cha. 269. 1 P. Wms. 406, 441. 3 P. Wms. 357.

tenance might be in effect to give to one person the property of another. Marshall vs. 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 vs. Robinson, 12 Ves. 461. Lowndes vs. Lowndes, 15 Ves. 304. Raven vs. Waite, 1 Swanst. 559.

Great part of this note is extracted from 1 Hovenden's Suppl. to Ves. Jr. Rep. 144, 145.—CHITTY.

<sup>39</sup> A *donatio mortis causâ* has many of the properties of a legacy: it is liable to debts, and dependent on survivorship. Tate vs. Hilbert, 2 Ves. Jr. 120. Jones vs. Selby, Prec. in Cha. 303. Miller vs. 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 vs. 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 vs. Turner, 2 Ves. Sen. 435. Ashton vs. 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 vs. 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 vs. 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 vs. Elwes, 1 Sim. & Stu. 244. Ward vs. Turner, 2 Ves. Sen. 443. The greater number of cases upon this subject have turned on the question 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 debatable ground. Tate vs. Hilbert, 2 Ves. Jr. 120. Lawson vs. 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 vs. Williams, cited in 2 Ves. Sen. 434. Jones vs. 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 vs. Parker, 3 Mad. 185.) though there may of a bond, (Snellgrove vs. Bailey, 3 Atk. 214;) for, notwithstanding it is a *chose en action*, some property is conveyed by the delivery. Ward vs. 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 vs. Elwes, 1 Sim. & Stu. 244. A check drawn by the donor on a banker, (Tat vs. Hilbert, 4 Br. 291,) or a promissory note payable to him, (Miller vs. 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 check 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



have subsisted in a state of nature, being always accompanied with delivery of actual possession;(k) and so far differs from a testamentary disposition: but

(k) Law of Forfeiture, 16.

the subject of a *donatio mortis causâ*. *Miller vs. 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 vs. Markham*, 7 Taunt. 232, S. C. 2 Marsh, 539.—CHITTY.

It was a disputed point among the Roman lawyers whether this donation was to be resembled to a proper gift or a legacy. It appears to have been settled finally in favour of its testamentary character. It resembles a legacy in some respects, but has many points peculiar to itself. Like a legacy, it is revocable at the will of the donor, and, in general, the mere resumption of possession by the donor will amount to such a revocation. It is liable to the debts of the donor, but it would seem, upon principle, although no decision or even dictum to that effect is to be found in the books, it shall wait till all the assets of the testator, including specific and pecuniary legacies, are exhausted, before it is made liable for the debts. Indeed, no case has occurred involving directly the question of its liability for debts; but the law seems clear on this point. It reverts to the donor on the death of the donee before him. It differs from a legacy in the circumstance of immediate tradition of the subject-matter to the donee, or some one for his use. It is a gift *in præsentî* to become absolute *in futuro*. It does not require probate in the ecclesiastical court. It does not wait for the assent of the executor; nor need it be proved by more than one witness. The civil law, however, required five witnesses; but a plurality of witnesses to a fact is not consistent with the analogy of the common law, and is necessary in no civil case except by the express requirement of some statute. It differs from a gift *inter vivos* in its revocable character and its being subject to debts, which a *bonâ fide* gift, accompanied by delivery of possession by a person not indebted at the time, is not. It is distinguished also by the peculiar condition, which is indispensable to its taking effect in this particular form, that if the donor recover, or escape the impending peril, whether it be sickness, battle, or sea-voyage, it shall revert. Such a condition arises by presumption of law whenever the gift is made *in extremis*. By the civil law, in case the donor recovered, it returned to him with the immediate profits. *Nam deficiente conditione, a principio nihil actum fuisse videtur*. The gift is but inchoate, not perfect, until death: the condition failing, it is as though the gift had never been. In *Nicholas vs. Adams* (2 Whart. 17) it was decided that it was not necessary that the donor should be *in extremis*, as in the case of a nuncupative will. "I would briefly define a *donatio causâ mortis* to be a conditional gift, dependent on the contingency of expected death. There may, doubtless be a conditional gift when death is not expected; but in that case the condition would have to be expressed and the contingency specified: in the *donatio causâ mortis* both are implied from the occasion. But it certainly is not requisite that the donor be in such extremity as is requisite to give effect to a nuncupation, which is sustained from necessity merely where the donor was prevented, by the urgency of dissolution, from making a formal bequest. Between these ways of disposition there is not an approximating line. *Donatio causâ mortis* is sometimes spoken of as being distinct from a gift *inter vivos*,—the former having sometimes been supposed to be made in reference to the donor's death, and not to vest before it, but inaccurately, as it seems to me; as this gift, like every other, is not executory, but executed in the first instance by delivery of the thing, though defeasible by reclamation, the contingency of survivorship, or deliverance from the peril. The donee would certainly not be bound to make compensation for the immediate use of the thing; and, evidently, because the immediate ownership was vested in him. The gift is consequently *inter vivos*. All agree that it has no property in common with a legacy, except that it is revocable in the donor's lifetime and subject to his debts in the event of a deficiency. The first is, not because the gift is testamentary, but because such is the condition annexed; and the second, not because it is in the nature of a legacy, but because it would otherwise be fraudulent as to creditors; for no man may give his property who is unable to pay his debts. It is decisive that the subject is not within the jurisdiction of the ecclesiastical courts; and the donee consequently takes paramount to the executor or a legatee. For this reason it is that a subsequent will which becomes operative only when the period of reclamation is past, and when the gift has become absolute by the event of the contingency, is not an effective act of revocation." C. J. Gibson. A mere gift by parole made in the prospect of death, and professing to pass to the donee *all* of the property of the decedent, is not valid as a *donatio causâ mortis*, though accompanied by delivery. *Headley vs. Kirby*, 6 Harris, 326. If, however, the words of donation have reference only to the things given and delivered, and do not extend to other things, it is a good *donatio*, though it may, in fact, be all the donor had in the world. *Michener vs. Dale*, 11 Harris, 59.—SHARWOOD.

seems to have been handed to us from the civil lawyers,<sup>(l)</sup> who themselves borrowed it from the Greeks.<sup>(m)</sup>

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.<sup>(n)</sup> But, whatever ground there might have been formerly for this opinion, it seems now to be understood<sup>(o)</sup> with this restriction; that although where the executor had no legacy at all the *residuum* shall in general be his own, yet wherever there is sufficient \*on the face of a will (by means of a competent legacy or otherwise) [\*515 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,<sup>40</sup> the

(l) Inst. 2, 7, 1. *Ff.* 1, 39, 1. 6.

(m) There is a very complete *donatio mortis causa* 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, 523.

(o) *Proc. Cha.* 323. 1 P. Wms. 1, 544. 2 P. Wms. 338. 3 P. Wms. 43, 194. *Stra.* 599. *Lawson vs. Lawson*, Dom. Proc. 28 April, 1777.

<sup>40</sup> 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 vs. Yapp*, 5 Mad. 59. *Lynn vs. Beaver*, 1 Turn. & Russ. 68. *Langham vs. Sandford*, 2 Meriv. 17. *Giraud vs. Hanbury*, *ibid.* 153. *Pratt vs. Sladden*, 14 Ves. 197. *Walton vs. 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. *Frimmer vs. Bayne*, 7 Ves. 518. *Pole vs. Lord Somers*, 6 Ves. 32. See also *Ustricke vs. Bowden*, 2 Addams, 128. *Langham vs. 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 a 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 vs. Clarke*, 18 Ves. 254, 255. *Urquhart vs. 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 vs. Gardner*, *Gilb. Eq. Rep.* 184. *Lord North vs. 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 it may be wholly uncertain *what* disposition the testator may have intended to make of that residue. *Mence vs. Mence*, 18 Ves. 351. *Mordaunt vs. 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 vs. Sandford*, 17 Ves. 451. *The Bishop of Cloyne vs. Young*, 2 Ves. Sen. 95. *Nourso vs. Finch*, 1 Ves. Jr. 361. It is true that in the case of *Clennel vs. Lewthwaite*, (2 Ves. Jr. 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 vs. Hamilton*, 12 Ves. 309. *Seely vs. Wood*, 10 Ves. 75. *Langham vs. 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 vs. Compton*, 8 Ves. 380. *Taylor vs. George*, 2 Ves. & Bea. 378. *Parsons vs. Baker*, 13 Ves.

executor then standing upon exactly the same footing as an administrator, concerning whom indeed there formerly was much debate,<sup>(p)</sup> 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.<sup>(q)</sup> 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)<sup>(r)</sup> shall, after the expiration of one full year from the death of the intestate, be distributed in the following manner:—One-third shall go to the widow of the intestate, and the residue in equal proportions to his children, or, if dead, to their representatives; that is, their lineal descendants: if there are no children or legal representatives subsisting, then a moiety shall go to the widow, and a moiety to the next of kindred in equal degree and their representatives: if no widow, the whole shall go to the children: if neither widow nor children, the whole shall be distributed among the next of kin in equal degree and their representatives: but no representatives are admitted, among collaterals, further than the children of the intestate's brothers and sisters.<sup>(s)</sup> The next of kindred, here referred to, are to be investigated by the same rules of consanguinity as those who are entitled to \*516] letters of administration; of whom we have sufficiently spoken.<sup>(t)</sup> \*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. 27, 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.<sup>u</sup>

(p) Godolph. p. 2, c. 32.

(q) 1 Lev. 233. Cart. 125. 2 P. Wms. 447.

(r) Stat. 29 Car. II. c. 3. § 25.

(s) Raym. 496. Lord Raym. 571.

(t) Page 504.

476. *Kirkbank vs. 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 vs. The Bishop of Durham*, 9 Ves. 405. *James vs. Allen*, 3 Meriv. 19. *Vezev vs. Jamson*, 1 Sim. & Stu. 71. *Paice vs. 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 vs. 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 giving unequal legacies to several, the testator may only have intended a preference *pro tanto*. *Rawlings vs. Jennings*, 13 Ves. 46. *Langham vs. Sandford*, 2 Meriv. 22. *Griffiths vs. Hamilton*, 12 Ves. 309.

Sir Wm. Grant, in the case of *Seely vs. 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 vs. Beaver*, 1 Turn. & Russ. 69

—CHITTY.  
But now, by statute 11 Geo. IV. and 1 W. IV. c. 40, unless it appear by the will or codicil thereto that the executor was intended to take beneficially, he shall be held to be but a trustee for the person entitled to the residue under the statute of distributions.

—KERR.

<sup>u</sup> The next of kin, who are to have the benefit of the statute of distributions. must be

It is obvious to observe how near a resemblance this statute of distributions bears to our ancient English law, *de rationabili parte bonorum*, spoken of at the beginning of this chapter; (u) and which Sir Edward Coke (w) himself, though

(u) Page 492.

(w) 2 Inst. 33. See 1 P. Wms. 8.

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. 702. No difference is made between the whole and half blood in the distribution of intestate personal property.

A curious question was agitated some time ago respecting the right to the administration. General Stanwix and an only daughter were lost together at sea; and it was contended that it was a rule of the civil law that, where a parent and child perish together, and the priority of their death is unknown, it shall be presumed that the child survives the parent. And by this rule the right to the personal estate of the general would have vested in the daughter, and by her death in her next of kin, who on the part of the mother was a different person from the next of kin to her father.

But this being only an application for the administration, and not for the interest under the statute of distributions, the court declined giving a judgment upon that question. 1 Bla. R. 640. And it does not appear that that point was ever determined in the spiritual courts. But I should be inclined to think that our courts would require more than presumptive evidence to support a claim of this nature. And in 6 East, 82, it is said that lord Mansfield required the jury to find whether the general or his daughter survived; but it is not stated upon what occasion. Some curious cases *de commorientibus* may be seen in *Causas Célèbres*, 3 tom. 412, *et seq.*, in one of which, where a father and son were slain together in a battle, and on the same day the daughter became a professed nun, it was determined that her civil death was prior to the death of her father and brother, and that the brother, having arrived at the age of puberty, should be presumed to have survived his father.—CHRISTIAN.

In a recent case, where a husband and wife were drowned at sea, having been washed off the side of the ship by the same wave, and there was no direct evidence of the survivorship of either, it was held that there was no *presumption* in favour either of the survivorship of the husband or the wife, the medical evidence only amounting to a probability either way. *Underwood vs. Wing*, 4 De G. Mar. N. & G. 633. By the civil law, where two persons died together and there was no evidence which of them died first, the presumption was in favour of the younger having been the survivor if he were *above* puberty, the elder being held to have been the survivor if the younger were below puberty. *Ff. xxxiv. 5, 5, §§ 22, 23*. This rule is very precise, but quite inconsistent with what would probably take place; and accordingly, in framing the French Code, another rule was adopted,—viz., that, failing all proof, the person above fifteen and under sixty years of age shall be held to survive those under fifteen or above sixty. The presumption can, of course, only be given effect to in the absence of *all* circumstances tending to show the facts. Thus, if two persons were to perish by shipwreck, and, the vessel being discovered water-logged, one body was found drowned in the hold and the other dead on the mast, the presumption would certainly be that he whose body was found in the hold perished first. In one case, where a father and son had been executed for sheep-stealing, and it became important to discover who was the last survivor, evidence was given as to which showed signs of vitality longest on the scaffold.—KERR.

It may be added to the statement of the French Code in the above note, that if the parties were between the ages of fifteen and sixty, and of different sexes, the male shall be presumed to have been the survivor, provided the ages were within a year of each other; if of the same sex, then the youngest of the two is presumed to have survived. *Toullin Droit Civil Français*, tom. iv. No. 76. *Burgé's Com. on Colonial and Foreign Laws*, vol. iv. pp. 11–29. The case of *Pell vs. Ball*, on the same subject, occurred in the court of chancery in South Carolina, and was decided in January, 1840. 1 *Cheves's Eq. Rep.* 99. The husband and wife both perished, with many others, in the dreadful destruction of the steamer *Pulaski* by explosion of a boiler, in the night of June 14, 1838, on her passage from Charleston to New York. The wife (Mrs. Ball) was seen alive on the wreck for a short time after the explosion; but the husband was not seen after the explosion. Chancellor Johnston decided, upon that fact, in favour of the survivorship of the wife. 2 *Kent*, 436, n. See *Fearne, Posth. Works*, p. 37. *Sillich vs. Booth*, 1 *Young & Collyer, Rep.* 121.—SHARSWOOD.

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, and 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 any part of the surplusage \*517] with their \*brothers and sisters; but, 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 coparcenary, 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 representationis*, 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)<sup>42</sup>

(\*) 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.

(b) Sir Walter Walker. Lord Raym. 574.

(c) *Ff.* 37, 6, 1.

(\*) See ch. xii. page 191.

(b) See ch. xiv. page 217.

(c) *Preced. Ch.* 54.

<sup>42</sup> Representations of lineal descendants are admitted to the remotest degree, (*Carter vs. 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 vs. Crawley*, before cited, and was admitted in *Pett vs. Pett*, (*Comyns*, 87; *S. C.* 1 P. Wms. 27,) in the Anonymous case in Appendix to 2 *Freem.* 298, and in *Bowers vs. 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 Car. II., be preferred to a more unequal lineal relation in the ascending line; but, between relatives in equal degree, a unequal will be preferred to a collateral claimant. *Blackborough vs. Davis*, 1 P. Wms. 50.

The statute of distributions expressly excepts and reserves the customs of the city of London, of the province of York, \*and of all other places having [\*518 peculiar customs of distributing intestates' effects. So that, though in those places the restraint of devising is removed by the statutes formerly mentioned, (d) their ancient customs remain in full force with respect to the estates of intestates. I shall, therefore, conclude this chapter, and with it the present book, with a few remarks on those customs.

In the first place, we may observe that, in the city of London, (e) and 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 ancient 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 bedchamber, 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 1800*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 statute; and the remaining fourth shall go by the statute to the next of kin. It is also to be observed that if the wife [\*519 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, 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)

(\*) Page 493.

(\*) Lord Rayn. 1329.

(\*) 2 Burn, Eccl. Law, 746.

(\*) Ibid. 782.

(\*) 1 P. Wms. 541. Salk. 246.

(\*) 2 Show. 175.

(\*) 2 Freem. 85. 1 Vern. 133.

(\*) 2 Vern. 665. 3 P. Wms. 16.

(\*) 1 Vern. 15. 2 Cha. Rep. 252.

(\*) 2 Freem. 279. 1 Eq. Ca. Abr. 155. 2 P. Wms. 520.

(\*) 2 P. Wms. 527.

<sup>43</sup> Advances which an intestate has made to any of his children are *never* brought into hotchpot for the benefit of his widow, (*Kirkcudbright vs. Kirkcudbright*, 8 Ves. 64,) but solely with a view to equality as among the children, (*Gibbons vs. 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 vs. 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 vs. Thornton*, 2 Eden, 121. *Morris vs. Burrows*, 2 Atk. 629. *Read vs. Snell*, *ibid.* 644,) and will not go to increase what is called "the dead man's part," (*Medcalfe vs. Ives*, 1 Atk. 63,) to a distributive share of which the widow would be entitled notwithstanding she had compounded for her customary part, (*Whithill vs. 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 vs. 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 vs. Greenwood*, 1 P. Wms. 531.—CURRY.

Thus far in the main the customs of London and of York agree; but, besides certain other less material variations, there are two principal points in which they considerably differ. One is, that in London the share of the children (or orphanage-part) is not fully vested in them till the age of twenty-one, before which they cannot dispose of it by testament:(*p*) and if they die under that age, whether sole or married, their share shall survive to the other children; but after the age of twenty-one it is free from any orphanage-custom, and, in case of intestacy, shall fall under the statute of distributions.(*q*) The other, that, in the province of York, the heir at common law, who inherits any 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 advantages given to the widow) it very considerably differs; though it is not improbable that the resemblances which yet remain may be owing to the Roman usages introduced in the time of Claudius 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 emperor 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. Cha. 537.

(*r*) 2 Burn, 754.

(*s*) Tacit. Annal. l. 12, c. 32.

(*t*) Selden, in Fletam, cap. 4, § 3.

# APPENDIX.

## No. I.

### VETUS CARTA FEOFFAMENTI.

SCIANT presentes et futuri, quod ego Willielmus, filius Willielmi de <sup>Premises.</sup> 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 Te-* <sup>Habendam acra Tenendum</sup> *nendam* 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 <sup>Redden dum.</sup> inde debita et consueta: *Et* ego predictus Willielmus, et heredes mei, et <sup>Warranty</sup> 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 <sup>Conclusio</sup> huic presenti carte sigillum meum apposui: *His* testibus, Nigello de Saleford, Johanne de Seybroke, Radulpho clerico de Saleford, Johanne molendario de eadem villa, et alis. *Data* apud Saleford die Veneris proximo ante festum sancte Margarete virginis, anno regni regis EDWARDI filii regis EDWARDI SEXTO.

(L. S.)

MEMORANDUM, quod die et anno infrascriptis plena et pacifica seisina acre infraspacificate, eum 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.

Livory of ~~some~~  
endorsed.

## No. II.

### MODERN CONVEYANCE BY LEASE AND RELEASE.

#### SECT. 1. LEASE OR BARGAIN AND SALE, FOR A YEAR.

THIS INDENTURE, made the third day of September, in the twenty-first <sup>Premises.</sup> 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 <sup>Consideration</sup> 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 <sup>Bargain and sale</sup> David Edwards and Francis Golding, their executors, administrators, 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 <sup>Parcels.</sup>



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 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, tenements, hereditaments, and all and singular other the premises herein-before 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: *Yielding* and paying therefor 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* 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 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	}	ABRAHAM BARKER. (L. S.)
GEORGE CARTER.		CECELIA BARKER. (L. S.)
WILLIAM BROWNE.		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 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 Catherine 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 and solemnized between the said John Barker and Catherine Edwards:

**Consideration.** *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 Catherine 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 ensailing and delivery hereof, being the marriage portion of the said Catherine 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

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parcel thereof, they, the said Abraham Barker, John Barker, and Catherine Edwards do, and each of them doth, release, acquit, and discharge the said David Edwards, his executors and administrators, forever, by these presents: and for providing a competent jointure and provision of maintenance for the said Catherine 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 ensailing 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 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, 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 Catherine Edwards, his intended wife, for and during the term of her natural life for her jointure, and in lieu of, and satisfaction of her dower

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 preserve contingent remainders: Remainder to the wife for life, for her jointure, in lieu of dower.

No. II. and thirds at common law, which she can or may have or claim, or 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 seized of any estate of freehold or inheritance: and from and after the decease of the said Catherine 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 Catherine 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 Catherine 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 Catherine 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 forever. *And* as to, for, and concerning the term of five hundred years hereinbefore 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 Catherine 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 portions 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 said children

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 maintenance at the rate of four per cent.

and benefit of survivorship.

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, If no such child that in case there shall be no such child or children of the said John Barker on the body of the said Catherine his intended wife begotten, besides an eldest or only son; or in case all and every such child or children shall or if all die, 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 or if the portions be raised, 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 aforementioned; or in case the same by such or paid, 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 secured by the person next in remainder; the residue of the term to cease. 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 Condition, that the uses and estates hereby granted shall be void on settling other lands of equal value to be recompense. 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, hereinbefore 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 forever; and to and for no other use, intent, or purpose whatsoever; any thing herein contained to the contrary thereof in any wise notwithstanding. Covenant to levy a fine: *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, executor, 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 ensuing 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

## No. II.

in order to make  
a tenant to the  
precept, that a  
recovery may be  
suffered;

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 herein-after 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 attorneys 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 provisos, limitations, and agreements hereinbefore 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 provisos, limitations, and agreements hereinbefore 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

to enure

to the preceding  
uses in this deed.

Other covenants;  
for quiet enjoyment,

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 encumbrances 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 hereinbefore 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 Catherine 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 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.

No. II.

free from onrum  
brances;

and for further  
assurances

Power of revoca-  
tion.

Conclusion.

Sealed and delivered, being first duly }  
stamped, in the presence of }

GEORGE CARTER.  
WILLIAM BROWN

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.)  
CATHERINE EDWARDS. (L. S.)

No. III

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 } DAVID EDWARDS. (L.S.)  
 GEORGE CARTER.  
 WILLIAM BROWNE.

No. IV.

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 show 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.

David's return } Pledges of } JOHN DOE.  
 prosecution. } RICHARD ROE. } Summoners of the within-named Abraham, Cecilia, and John. } JOHN DEN.  
 RICHARD FEN

SECT. 2. THE LICENSE TO AGREE.

Norfolk, } DAVID EDWARDS, esquire, gives to the lord the king ten to wit. } marks, for license 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 forever. 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 forever. 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, } BETWEEN David Edwards, esquire, complainant, and Abraham Barker, esquire, and Cecilia his wife, and John Barker, esquire, deforciant, 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 forever. 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 forever. 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, } THIS IS THE FINAL AGREEMENT, made in the court of the lord to wit, } 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, deforciant, 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 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 forever. 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 forever. 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 P'RCIPE.

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 show 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.

The D's return.

Pledges of	}	JOHN DOE.	Summoners of the	{	JOHN DEN.
prosecution.		RICHARD ROE.	within-named David.		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 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 behoove him], and thereupon voucheth to warranty "John Barker, esquire, who is present here in court in his proper person, and the tenements 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 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 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 afore-

Return.  
Demand against  
the tenant.

Count.

Esplees.

Defence of the  
tenant.  
Voucher.  
"Warranty."Demand against  
the vouchee."

"Count."

"Defence of the  
vouchee."  
"Second vouch-  
er."  
Warranty.  
Demand against

\* Note, that, if the recovery be had with single voucher, the parts marked "thus" in sect. 2 are omitted.

† The clauses between hooks are no otherwise expressed in the record than by an "&c."

APPENDIX.

said. 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. *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.

No. V.

the common  
vouchee.  
Count.  
Defence of the  
common vouchee

Plea, *nil disseisin.*

Imparluce.  
Default of the  
common vouchee

Judgment for the  
demandant.

Recovery in  
value.

Amercement.

Award of the writ  
of seisin, and re-  
turn.

Exemplification  
continued.

*Teste.*

COOKE.

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