THE HISTORY OF THE COMMON LAW:

BY

SIR MATTHEW HALE.

THE FIFTH EDITION,

(WITH CONSIDERABLE ADDITIONS)

ILLUSTRATED WITH

NOTES AND REFERENCES,

AND

SOME ACCOUNT OF THE LIFE OF THE AUTHOR.

By CHARLES RUNNINGTON,

SERJEANT AT LAW.

> Of Law no leſs can be acknowledged, than that her ſeat is the boſom of God; her voice the harmony of the world; all things in heaven and earth do her homage; the very leaſt, as feeling her care, and the greateſt, as not exempted from her power.
>
> HOOKER.

IN TWO VOLUMES.

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1794.

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PREFACE.

THOUGH the approbation of Sir MATTHEW HALE was of itſelf ſufficient to inſure ſucceſs to any production, yet this Hiſtory was diſmiſſed from the cloſet without ſoliciting indulgence by a prefatory diſcourſe, or claiming reſpect from the authority of his name. It were needleſs to mention the rapid ſucceſs which attended, or the generous applauſe which was beſtowed on its publication; it is ſufficient to remark, that it has ever been juſtly held in the higheſt eſtimation; and, like the virtue of its author, been univerſally admired. Here the ſtudent finds a valuable guide;—the advocate a learned aſſiſtant;—the court an indiſputable authority. The impoſſibility of adding to its celebrity cannot but be acknowledged. I have only to hope (vain as the hope may be) that my labours may promote inquiry and reward attention;

tion; for (without aſſuming the merit of even diligence or accuracy) I can with truth aſſert, that I have applied the utmoſt of my ability faithfully to execute the taſk of Editor.

C. RUNNINGTON.

ADVERTISEMENT

TO THIS EDITION.

SINCE the publication of the fourth edition of this work, the EDITOR hath endeavoured to make his labours lefs reprehenfible. He frankly confeffes, that, on revifion, he found fome parts requiring emendation, and others capable of improvement. Many faults he has corrected, and fome deficiencies he has fupplied. In truth, though the Additions are confiderable, he truſts that the Profeffion, in its candour, will not think they have been improvidently accumulated.

Serjeants Inn, May 1, 1794.

SOME

ACCOUNT

OF THE

LIFE

OF

SIR MATTHEW HALE.

——— *quid virtus, et quid ſapientia poſſit,*
Utile propoſuit nobis exemplar. ———

HOR. Epiſt.

SIR MATTHEW HALE was born at Alderley, in Glouceſterſhire, on the firſt of November 1609. During his minority, nothing tranſpired of ſufficient conſequence to merit either obſervation or recital. In the ſeventeenth year of his age he was entered of Magdalen-hall, in the Univerſity of Oxford; and on the 8th of November 1629 was admitted of Lincoln's Inn; where, if the authority of Burnet may be relied on, he ſtudied many years at the rate of ſixteen hours

a-day *(a)*. Be that as it may, the diligence with which he purſued his ſtudies is evident from his ſucceſs. The juriſprudence of his own country, though the firſt, was by no means the ſole object of his attention. He applied himſelf with great avidity to the contemplation of the Roman law; and though he preferred our mode of deciſion by jury to that of the civilians, who entruſt too much to the judge, yet he often affirmed, that the principles of juriſprudence were ſo well delivered in the Digeſts, that law could not be underſtood as a ſcience without firſt reſorting to them for information. This may in ſome degree be diſputable; it is not however ſo ſelf-evident, but it may, with deference, be doubted. Admitting that the knowledge of the civil law has deſervedly been conſidered as no ſmall acquiſition to the Engliſh ſtudent; yet is it, in reality, eſſential to the underſtanding of our own municipal ſyſtem, which, ſanctified as it is, requires not aſſiſtance from any foreign code, however admirable, or however juſt? "We muſt not" (ſays the learned and elegant Commentator) "carry our "veneration ſo far, as to ſacrifice our Alfred and "Edward to the manes of Theodoſius and Juſ-"tinian; we muſt not prefer the edict of the præ-"tor, or the reſcript of the Roman emperor, to "our own immemorial cuſtoms, or the ſanctions

(a) The human mind is incapable of ſuch exertion for any great length of time: a milder mode meets with the approbation of the laborious Sir Edward Coke.—Co. Lit. 64. b.

"of

" of an Engliſh parliament, unleſs we can alſo
" prefer the deſpotic monarchy of Rome and
" Byzantium, for whoſe meridian the former were
" calculated, to the free Conſtitution of Britain,
" which the latter are adapted to perpetuate *(b)*."

GREAT improvement is, in general, the reſult of intenſe application. In the revolution of a few years, HALE had obtained not only a high profeſſional reputation, but was allowedly well verſed in ſcholaſtic knowledge. That he was perfectly converſant with the diſcoveries of the age in which he lived, is evident from the treatiſe which he wrote on the rarefaction and condenſation of air; a treatiſe which ſhews as great accuracy, and as much ſubtilty, as the principles to which he adhered would admit. Ancient hiſtory, chronology, and philoſophy, amuſed him in the moments of relaxation; and, through his intimacy with Mr. Selden, he underſtood the moſt curious points of rabbinical learning.

WHERE different ſciences are purſued at the ſame time, if one be abſtracted and unpleaſant, the other ſhould be leſs abſtruſe and more entertaining; for when pleaſure ſucceeds the labour of application, the fatigue of meditation is borne with unditurbed tranquillity:—thus, while a dull and heavy hour is relieved by ſome alluring employ-

(b) Blac. Comm. oct. vol. i. p. 5.

ment of the mind, diverſion enriches the underſtanding, and pleaſure is turned to advantage. Such was the opinion of HALE, who, when wearied with ſtudying either law or divinity, would, to uſe his own words, "recreate himſelf with philoſophy "or mathematics." In his opinion, no man could be maſter of any profeſſion, without having ſome ſkill in all the ſciences. The mathematics, indeed, reward attention with demonſtration, and when purſued with inflexible application, ſtrengthen and enlarge the powers, while they confine the luxuriance of the human mind; but though they render us more ſcientific, yet they neither increaſe our virtue, nor facilitate our happineſs. HALE, however proficient in the ſcience, uſed it only as ſubſervient to more ſerious avocations.

HE ſeemed particularly attached to the ſtudy of divinity; and thoſe who read his religious diſquiſitions, may conclude, that the ſcience of theology engaged the principal part of his attention. Here it is but juſtice to remark, that ſo averſe was he from the diſſipation of time, that he would not even correſpond with his friends, except on neceſſary buſineſs, or matters of learning. Like Boerhaave, he loſt none of his hours, but, when he had attained one ſcience, attempted another. In ſhort, he made every human aid contribute in advancing him to a ſuperior degree of knowledge and of wiſdom.

SOON

Soon after his appearance at the bar, the Civil War commenced; and when the Earl of Strafford and Archbiſhop Laud (who had eſpouſed the cauſe of Charles I.) were tried, he was aſſigned their counſel *(c)*: he had afterwards the honour of being aſſigned to officiate in that character for the king himſelf; but was not in this inſtance permitted to plead, becauſe Charles had refuſed ſubmiſſion to the juriſdiction which had aſſumed the power of trying him.

The brief recital of the trial of a ſovereign, in whoſe defence it may rationally be ſuppoſed Hale was from principle intereſted, added to a conjecture, not altogether improbable, that he furniſhed the objections which Charles ſo pointedly applied, will neither, I truſt, obtrude on the attention, nor weary the patience, of the reader.

"The dignity of this tranſaction" (ſays the philoſophic hiſtorian) "correſponded to the greateſt "conception that is ſuggeſted in the annals of hu-

(c) Burnet affirms that he was retained for Strafford and Laud, yet it does not by the trial appear that Hale was retained for the earl, whoſe counſel were Mr. Lane, Mr. Gardiner, Mr. Loe, and Mr. Lightfoot. Stat. Tr. vol. i. p. 759, Hale attended as counſel for his grace, and in the conduct of that important cauſe was aſſiſted by Mr. Hern and Mr. Gerard. The former indeed took the lead, and in defence of his client "delivered his argument "very freely and ſtoutly, proving, that nothing which his "client had either ſaid or done, "according to the charge, was "treaſon, by any known eſtabliſhed law of the kingdom." This argument was not Mr. Hern's, but Mr. Hale's. Ib. 938, where the argument is reported at large.

" man-kind; the delegates of a great people ſit-
" ting in judgment upon their ſupreme magiſtrate,
" and trying him for his miſgovernment. The ſo-
" licitor, in the name of the commons, repre-
" ſented, that Charles Stuart, being admitted king
" of England, and entruſted with a limited power,
" yet, out of a wicked deſign to erect an unlimited
" government, had traitorouſly levied war againſt
" the parliament, and the people whom they re-
" preſented, and was therefore impeached as a
" public and implacable enemy to the common-
" wealth. After the charge was finiſhed, the pre-
" ſident (ſerjeant Bradſhaw) directed his diſcourſe
" to the king, and told him that the court ex-
" pected his anſwer.

" THE king, though long detained a priſoner,
" and now produced as a criminal, ſuſtained the
" majeſty of a monarch. With great dignity he
" declined the authority of the court, and refuſed
" to ſubmit himſelf to its juriſdiction. He repre-
" ſented, that, having been engaged in treaty
" with his parliament, and having finiſhed almoſt
" every article, he had expected to be brought to
" his capital in another manner, and to have been
" reſtored to his power, as well as to his liberty:
" that he could not perceive any appearance of
" the upper houſe, ſo eſſential a member of the
" conſtitution; and had learned that even the
" commons, whoſe authority was pretended, were
" ſubdued by lawleſs force, and were bereaved of

" their

" their liberty: that he himſelf was their native,
" hereditary king; nor was the whole authority of
" the ſtate, though free and united, intitled to try
" him, who derived his dignity from the Supreme
" Majeſty of Heaven: that admitting thoſe extra-
" vagant principles which levelled all orders of
" men, the court could plead no power dele-
" gated by the people, unleſs the conſent of every
" individual, down to the meaneſt and moſt ig-
" norant peaſant, had been firſt obtained: that he
" acknowledged without ſcruple, that he had a
" truſt committed to him, a truſt moſt ſacred and
" inviolable; he was entruſted with the liberties
" of his people, and would not betray them,
" by recognizing a power founded on the moſt
" atrocious uſurpation: that having taken arms,
" and frequently expoſed his life, in defence of
" the conſtitution, he was willing, in this laſt and
" moſt ſolemn ſcene, to ſeal with his blood thoſe
" precious rights, for which, though in vain, he had
" ſo long contended: that thoſe who arrogated a
" title to ſit as his judges, were born his ſubjects,
" and born ſubjects to thoſe laws which determined
" that the king can do no wrong: that he was not
" reduced to the neceſſity of ſheltering himſelf
" under that general maxim, which guards every
" Engliſh Monarch, even the leaſt deſerving; but
" was able, by the moſt ſatisfactory reaſons, to
" juſtify thoſe meaſures in which he had been en-
" gaged: that, to the whole world, and even to
" them his pretended judges, he was deſirous, if

"called upon in another manner, to prove the "integrity of his conduct, and aſſert the juſtice of "thoſe defenſive arms, to which, unwillingly and "unfortunately, he had recourſe: but that, in or-"der to preſerve an uniformity of conduct, he "muſt, at preſent, forego the apology of his in-"nocence; leſt by ratifying an authority no better "founded than that of robbers and pirates, he be "juſtly branded as the betrayer, inſtead of being "applauded as the martyr, of the conſtitution *(d)*."

HALE was alſo counſel for the duke of Hamilton *(e)*, the lords Holland *(f)*, Capel, and Craven: but when he ſtepped forth the advocate of the latter, he pleaded with ſuch perſuaſive eloquence, that the very enemies of his client were charmed into admiration, and all who heard him were convinced. The attorney-general indeed ſo far neglected his own character, as to threaten him for

(d) Hume. Stat. Tr. vol. i. from folio 986 to 1044. Sir John Dalrymple ſlightly notices the conduct of the commons againſt Charles:—"The republican and puritanical commons (ſays Sir John), with a democratical ſpirit, brought their ſovereign, under the forms of juſtice, like a common member of the community, to a public trial, and a public execution. With the ſame levelling hand, they laid the peerage, the church, the parliament, and the law itſelf, in the duſt." Mem. Gr. Br. vol. i. p. 18.

(e) Mr. Chute, Mr. Hale, Mr. Parſons, and Doctor Walker, were aſſigned counſel for his Grace, Stat. Tr. vol. ii. p. 2. See alſo Dr. Burnet's Memoirs of the Duke of Hamilton, p. 385, &c. and Clarend. Hiſt. vol. iii. p. 204. 209—The duke was tried by a new high court of juſtice, as earl of Cambridge in England.

(f) No party lamented the death of the earl of Holland; his ingratitude to the king was a great ſtain on his memory.

appearing

appearing againſt government: regardleſs of conſequences, HALE, with that becoming warmth which is the general attendant on honeſt confidence, anſwered,—"I am pleading in defence of "laws which you are bound to maintain; I am "doing juſtice to my client, and am not to be "intimidated."

HIS legal qualifications had now rendered him eminently conſpicuous, and the rectitude of his conduct had gained him univerſal eſteem. Cromwell, ſeeing the extent of his practice, knowing the tranſcendency of his abilities, and pleaſed perhaps with the boldneſs of his integrity, determined on advancing him to the bench. Incapable of hypocriſy, and unmoved by the honour intended him, HALE at firſt declined to accept the commiſſion. Surpriſed at a conduct ſo extraordinary, Cromwell condeſcended to inquire his reaſons for refuſing ſo high an office. HALE candidly informed him, "that he was not ſatisfied about his authority, and "therefore ſcrupled to accept the commiſſion." Cromwell, who was a friend to juſtice, though his public conduct has been ſaid to have been one continued violation of it, replied, "that as he "had gotten poſſeſſion of the government, he was "reſolved to maintain it; I will not" (continued the Protector, with what probability the reader will determine, for I mean not to vouch for the truth of the relation) "be argued out of it.—It "is my deſire to rule according to the laws of the

"land,

" land, for which purpoſe I have pitched upon you;
" but if you won't let me govern by red gowns, I
" am reſolved to govern by red coats (g)."—HALE, commiſerating the temper of the times, added to a reflection that juſtice ought, at all events, to be ſupported, was on matureſt conſideration convinced, that nothing criminal could be imputed to the unbiaſſed inſtrument of its impartial adminiſtration. This reflection, confirmed by the ſolicitation of his friends, induced him to yield to the propoſal of Cromwell. The importunity of the republicans was equally urgent. By the promotion of HALE, whoſe political ſentiments were widely different from their own, they affected to deſpiſe every idea of private advantage. To gain popularity, it was inſinuated that their importunity aroſe only from a fervent zeal for the public good. " We will truſt (ſaid they) men of
" eminent virtue, of what perſuaſion ſoever re-
" ſpecting political matters." HALE's reverence for right ſtill interpoſed itſelf;—he queſtioned the propriety of his ſitting in judgment upon criminals;—conceiving it to be highly improper, if not wholly unjuſtifiable, to paſs ſentence under an authority which was derived from uſurpation; however, in 1653, he accepted the commiſſion which conſtituted him one of the judges of the court of common pleas. In the *rota* of criminal deciſion, he ſat ſome few times on the crown ſide; but on

(g) I doubt whether at that time the army had any regular uniform; and if they had, that it was ſcarlet.

further

further conſideration refuſed to ſit there any more, becauſe, "in matters of blood, he was always to "chuſe the ſafer ſide." The heart of a good man cannot but recoil at the thought of puniſhing a ſlight injury with death; and he who knows not how often rigorous laws produce total impunity, and how many crimes are concealed and forgotten for fear of hurrying the offender to that ſtate in which there is no repentance, has converſed very little with mankind. "And whatever epithets of "reproach or contempt this compaſſion may incur "from thoſe who confound cruelty with firmneſs, "I know not (ſays Dr. Johnſon) whether any wiſe "man would wiſh it leſs powerful or leſs extenſive."

WITHIN a ſhort time after his preferment, in a cauſe depending before him, the jury were returned by the expreſs order of Cromwell. Aſtoniſhed at the atrocity and incenſed at the illegality of the act, HALE, with a ſpirit becoming his character, diſmiſſed the jury, and would not try the cauſe. Hurt by the diſappointment, and offended with the conduct, the Protector ſaid to him in anger, "You are not fit to be a judge."—HALE modeſtly anſwered, "It is true."

NOTWITHSTANDING this, he continued to adminiſter juſtice until the death of Cromwell, when he not only refuſed the mourning ſent for him and his domeſtics, but alſo to accept the new commiſſion offered him by Richard; and though all the

judges

judges preſſed it, and employed others to ſolicit him, yet he rejected every importunity, ſaying, "I can act no longer under ſuch authority."

FROM this time, until the *parliament* aſſembled(g) which called home Charles II. he ſedulouſly ſecluded himſelf from his profeſſion and the world; but being now returned a member for the county of Glouceſter, his privacy was in conſequence diſturbed;—contemplation changed into action, and the ſweets of retirement gave way to the calls of his country.

AVERSE as he was from thoſe principles which actuated the government of Cromwell, he nevertheleſs avoided the extremities into which the temerity of the royaliſts too often precipitated them. Faction and party he equally deſpiſed: nay, attached as he was to monarchy and his ſovereign, he was not, on the Reſtoration (of which he was a conſiderable promoter), for receiving Charles without reaſonable reſtrictions; conceiving this to be, of all other incidents, the moſt opportune to limit that prerogative which had given riſe to ſuch recent and unparalleled calamities.

WE are taught under every form of government to apprehend uſurpation, either from the

(g) May, 1660.—Or *Convention*, as it came afterwards to be called, becauſe it was not ſummoned by the king's writ. Burnet's Hiſt. oct. vol. i. p. 122.

abuſe

abuſe or from the extenſion of the executive power; and though it be no advantage to a prince to enjoy more power than is conſiſtent with the good of his ſubjects, yet this maxim is but a feeble ſecurity againſt the paſſions and follies of men. Thoſe who are intruſted with power in any degree, are diſpoſed, from the mere diſlike of conſtraint, to remove oppoſition *(b)*. Senſible of ſuch truths, HALE moved the commons, that "a committee "might be appointed to look into the propo- "ſitions which had been made, and the conceſ- "ſions which had been offered by the late king, "that from thence they might digeſt ſuch pro- "poſitions as they ſhould think fit to be ſent "over to the king *(i)*." This motion, through the influence of general Monk, failed of ſucceſs; it ſhewed, however, that HALE entertained a warm regard for the public, a high reſpect for its laws, and that he was no friend to thoſe opinions which tended to ſupport the indefeaſible right of prerogative. The motives which determined the fate of this motion, were the reverſe of, and equally in extreme with, thoſe which influenced the commons againſt Charles the Firſt. The general opinion now ſeemed to condemn all jealous capitulations with the ſovereign. Harraſſed with convulſions men ardently wiſhed for repoſe, and were terrified at the mention of negociation or delay.

(b). Ferguſon on Civil Society. *(i)* Burnet's Hiſt. oct. vol. i. p. 122.

Added

Added to this, the paſſion for liberty, having produced ſuch horrid commotions, began to give place to a ſpirit of loyalty and obedience *(k)*. Why Monk ſhould diſapprove the impoſition of rational conditions, is not eaſily to be accounted for; he ſeemed reſolved, however, that the crown, which he intended to reſtore, ſhould be conferred on the king entirely free and unincumbered *(l)*. He knew not, perhaps, that liberty is never in greater danger, than when we meaſure national felicity by the bleſſings which a prince may beſtow, or by the mere tranquillity which may attend an equitable adminiſtration. The ſovereign may dazzle with his heroic qualities; he may protect his ſubjects in the enjoyment of every animal advantage or pleaſure: but the benefits ariſing from liberty are of a different ſort; they are not the effects of a virtue and of a goodneſs which operate in the breaſt of one man, but the communication of virtue itſelf to many; and ſuch a diſtribution of functions in civil ſociety, as gives to numbers the exerciſes and occupations which pertain to their nature *(m)*.

CHARLES II. immediately after his reſtoration, came to the houſe of peers, and in the moſt earneſt terms preſſed an act of general indemnity; he urged not only the neceſſity of it, but the obliga-

(k) Hume. *(l) Id.* *(m)* Dr. Ferguſon.

tion

tion of a promiſe which he had formerly given; a promiſe which he would ever regard as ſacred, ſince to that he probably owed the ſatisfaction of meeting his people in parliament.—This meaſure of the king, though irregular *(n)*, was received with great ſatisfaction; and the commons, after ſome debate, appointed a committee to forward the generous purpoſe *(o)*.

OUR author, then Serjeant HALE, had the honour of being nominated one of the committee *(p)*: and now, in the execution of this high truſt, he exerted all the powers of his mind, and all the goodneſs of his heart, to terminate thoſe evils which had too long and too ſucceſsfully prevailed. Prudence and humanity dictated, that the ſooner the bill paſſed, the ſooner the bleſſings of peace would be diffuſed. With an aſſiduity to be equalled only by his philanthropy, he framed, carried on, and ſupported the bill.

INDISPOSED as his manners were to that verſatility of conduct which recommends to notice and preferment, yet ſuch was his reputation, that (to uſe the words of Mr. Emlyn), "it was thought

(n) By his taking notice of a bill which depended before the houſes.

(o) Parl. Hiſt. vol. ii. p. 290.

(p) Sir John Dalrymple obſerves, that "Charles privately promoted the ſucceſs of the bill of indemnity in the houſe of commons, and publicly checked the ſeverity of the houſe of lords in their proceedings upon it." Mem. Gr. Br. p. 21. and Macph. Hiſt. vol. ii. p. 35.

"an

" an honour to his majeſty's government to ad-
" vance him to the ſtation of lord chief baron *(q)*."
When the earl of Clarendon notified to him the appointment, he was pleaſed to expreſs himſelf in a peculiar manner :—" If the king" (ſaid the chancellor) " could have found an honeſter or an
" abler man for the employment, he would not
" have advanced you to it; he prefers you, be-
" cauſe he knows no one who ſo well deſerves
" it."

UNAMBITIOUS, diffident, and reſerved, HALE ſtudiouſly avoided the honour of knighthood, uſually conſequent on ſuch a promotion; he declined every occaſion of waiting on the king; but the chancellor one day introducing him as " the
" modeſt chief baron," his majeſty immediately knighted him.

HE preſided eleven years in the court of exchequer with ſuch ſingular propriety, that he not only raiſed the reputation of the court, but merited and received the approbation of the public.

MURMURS were indeed heard, invidiouſly and induſtriouſly inſinuating that he did not decide with ſufficient quickneſs. Admitting that ſome

(q) Nov. 7, 1662. Vide i. Sid. 4.

circum-

circumſtances might apparently have juſtified the imputation, yet on the moſt ſcrupulous examination it is evident, that it could not have ariſen either from ignorance or neglect. Solicitude alone induced him to deliberate in deciſion; which had this good effect, that whatever he had once determined, was ſeldom, if ever, heard again.

BURNET remarks, that "nothing was more admirable in him than his patience: that he would bear with the meaneſt, and give every man his full ſcope, thinking it much better to loſe time than patience. In ſumming up of an evidence to a jury, he would always require the bar to interrupt him, if he did miſtake, and to put him in mind of it if he did forget the leaſt circumſtance: ſome judges (adds the biſhop) have been diſturbed at this as a rudeneſs, which he always looked upon as a ſervice and reſpect done to him." Juſtice, it has been ſaid, ſhould ſpeedily be adminiſtered. Though the poſition cannot be queſtioned, yet is there a wiſe or a good man who would not prefer the deciſion of one judge, whoſe opinion, though ſlow, is the effect of deliberation, to that of a thouſand who determine haſtily, and of courſe hazardouſly? Thoſe who think diſpatch the great excellence of juſtice, will doubtleſs admire the quickneſs of a Turkiſh ſuit; and be inclined to prefer the determination of a Cadi, ſuch as Shaw and Norden have deſcribed,

ſcribed, to the adminiſtration of juſtice in their own country. The ſpeedineſs, as well as ſeverity, of juſtice in Turkey, is openly avowed on this principle, that it is better two innocent men ſhould die, than one guilty live. We glory in adopting the very reverſe of this principle; a greater caution therefore, in conformity to the principle, neceſſarily produces a greater length in the enquiry *(s)*.

HALE's adminiſtration of juſtice was not confined to the court in which he preſided; he was one of the principal judges who ſat in Clifford's-inn, to adjuſt the diſputes between the landlords and their tenants, after the dreadful conflagration; and was the firſt who offered to accommodate the differences reſpecting the rebuilding of the city. In truth, the peaceable adjuſtment of that great undertaking was, in no ſmall degree, owing to his care and judgment. Without detracting from the merit of the other judges, it muſt be acknowledged, that he was moſt inſtrumental in the completion of that beneficent deſign; inaſmuch as he not only aſſiſted at all the determinations, but contrived the rules by which they were accompliſhed *(t)*.

THE

(s) Eunomus, vol. iii. p. 203. Sir William Temple's Eſſay on Heroic Virtue, fol. edit. p. 225.

(t) On the 18th September, 1666, the parliament met, and immediately paſſed an act for erecting

THE following precepts (from the original under his own hand) he rigidly obſerved, as

"THINGS NECESSARY TO BE CONTINUALLY HAD
"IN REMEMBRANCE."

"THAT in the adminiſtration of juſtice, I am
"entruſted for God, the king and country;
"therefore, that it muſt be done uprightly, deli-
"berately, reſolutely.

"THAT I reſt not on my own underſtanding or
"ſtrength, but implore and reſt upon the direc-
"tion and ſtrength of God.

erecting a court of judicature, and for ſettling all differences between landlords and tenants, with reſpect to houſes which had been deſtroyed by the fire. At the ſame time they appointed the juſtices of the king's bench and common pleas, and the barons of the exchequer, to be judges of that court. Theſe judges conducted themſelves with ſuch ſtrict juſtice, that they gained the general eſteem of the citizens, who, as a teſtimony of reſpect, cauſed their portraits to be hung up in Guildhall.—The portrait of Sir Matthew Hale was painted by one Michael Wright.

Mr. Granger enumerates the following portraits of Sir Matthew Hale; viz. Sir Matthew Hale, Lord Chief Juſtice of the King's Bench; M. Wright p. G. Vertue ſc. 1735; h. ſh.

Mattheus Hale, miles, &c. R. White ſc. a roll in his right hand; large h. ſh.—A copy by Van Hove.

Sir Matthew Hale; large h. ſh.—Copied from White.

Mattheus Hale, miles, &c. Van Hove ſc. ſitting in an elbow chair; h. ſh.

Matthæus Hale, &c. Van Hove ſc. ſitting; 8vo.

Matthæus Hale, &c. Clarke ſc. ſitting; 8vo.

Lord Chief Juſtice Hale; ſmall 4to. printed with the "Sum of Religion," in a large half-ſheet. Grang. Biogr. Hiſt. vol. iii. 8vo. 365.

" THAT in the execution of judgment, I care-
" fully lay aſide my own paſſions, and not give
" way to them, however provoked.

" THAT I be wholly intent upon the buſineſs I
" am about, remitting all other cares and thoughts
" as unſeaſonable and interruptions.

" THAT I ſuffer not myſelf to be prepoſſeſſed
" with any judgment at all, till the whole buſineſs
" and both parties be heard.

" THAT I never engage myſelf in the beginning
" of any cauſe, but reſerve myſelf unprejudiced
" 'till the whole be heard.

" THAT in buſineſs capital, though my nature
" prompt me to pity; yet, to conſider that there
" is alſo a pity due to the country.

" THAT I be not too rigid in matters purely
" conſcientious, where all the harm is diverſity of
" judgment.

" THAT I be not biaſſed with compaſſion to
" the poor, or favour to the rich, in point of
" juſtice.

" THAT popular, or court applauſe, or diſ-
" taſte, have no influence in any thing I do, in
" point of diſtribution of juſtice.

" NOT

" Not to be ſolicitous what men will ſay or
" think, ſo long as I keep myſelf exactly accord-
" ing to the rule of juſtice.

" If in criminals it be a meaſuring caſt, to in-
" cline to mercy and acquittal.

" In criminals that conſiſt merely in words,
" when no more harm enſues, moderation is no
" injuſtice.

" In criminals of blood, if the fact be evident,
" ſeverity is juſtice.

" To abhor all private ſolicitations, of what
" kind ſoever, and by whomſoever, in matters
" depending.

" To charge my ſervants not to interpoſe in
" any buſineſs whatſoever; not to take more than
" their known fees; not to give any undue pre-
" cedence to cauſes; not to recommend counſel.

" To be ſhort and ſparing, at meals, that I
" may be the fitter for buſineſs."

With what ſpirit he conformed to the moſt eſ-
ſential of theſe rules, may be readily collected from
the following inſtances.

A NOBLE duke, having a ſuit depending, came to him with a view to explain the circumſtances which had given riſe to it, that he might the better underſtand it when in court: the chief baron, ſuddenly interrupting the narration, ſaid, "You "do not deal fairly to come about ſuch affairs, "for I never receive any information of cauſes "but in open court, where both parties are to "be heard alike;" and would not ſuffer him to proceed. His grace departed, not a little diſſatisfied, and formally made mention of it to the king; who ſilenced him by obſerving, "I verily "believe he would have uſed me no better had I "gone to ſolicit him in any of my own cauſes*."

THE following anecdote, which ſome have conſidered as an honour to his memory, has, by others, been cenſured, as a reflection on his underſtanding; imputing that to affectation, which

(u) "I remember (ſays "Dryden) a ſaying of king "Charles II. on Sir MATTHEW HALE (who was "doubtleſs an uncorrupt and "upright man), that his ſervants were ſure to be caſt "on a trial which was heard "before him; not that he "thought the judge was poſſible to be bribed, but that "his integrity might be too "ſcrupulous, and that the "cauſes of the crown were "always ſuſpicious when the "privileges of ſubjects were "concerned *."

* Dedic. of Tranſ. from Juvenal.

evi-

evidently reſulted from a ſtrict obſervance of his duty. A gentleman having a cauſe to try before him, ſent him a buck; but he would not proceed in the trial until the buck was paid for, which induced the plaintiff to withdraw his record: in which if there be not much to commend, there is ſurely nothing to blame.

At Saliſbury, the dean and chapter, in conformity with an eſtabliſhed cuſtom, preſented him with ſix ſugar-loaves; he made his ſervants pay for them before he would try a cauſe in which the dean and chapter were concerned.

Melancholy is the truth, that the frequency of envy renders it ſo familiar, that it even eſcapes our notice; nor do we reflect upon its turpitude, until we have felt its influence. To ſpread ſuſpicion requires neither labour, courage, nor expence; it is eaſy for the author of a lie, however malignant, to eſcape detection, and infamy needs very little induſtry to aſſiſt its circulation. Whether Hale had excited malice by his eminence, I cannot determine; experience, no doubt, convinced him, that the mention of a name which diſtinction had rendered eminent, only provoked the aſperity of the envious and the animoſity of the malignant: that his children therefore might not indulge their credulity at the expence of

another's reputation, he with great wiſdom cautions them againſt it in the following Letter; a letter which may with truth be deemed a valuable literary relick, and a ſtrong proof of the attention which he paid to the morals and the manners of his children.

A Letter from Sir Matthew Hale to his Children, January 19, 1660.

Children,

I THANK God I came well to Farrington this Saturday about five of the clock, and becauſe I have ſome leiſure time at my inn, I could not ſpend that time more to my own contentment, and your benefit, than by my letter to give you all good counſel; the ſubject whereof at this time ſhall be concerning *ſpeech*; becauſe much of the good or evil that befalls perſons, doth occaſionally happen by the well or ill managing of that part of humane converſation. I ſhall, as I have leiſure and opportunity at other times, give you my directions concerning other ſubjects. Firſt, as concerning the former, obſerve theſe directions:

Observe and mark as well as you may, what is the temper and diſpoſition of thoſe perſons, whoſe ſpeeches you hear; whether they be grave, ſerious, ſober,

ſober, wiſe, diſcreet perſons: if they be ſuch, their ſpeeches commonly are like themſelves, and well deſerve your attention and obſervation. But if they be light, impertinent, vain, paſſionate perſons, their ſpeech is for the moſt part according, and the beſt advantage that you will gain by their ſpeech, is but thereby to learn their diſpoſitions, to diſcern their failings, and to make yourſelves the more cautious both in your converſation with them, and in your own ſpeech and deportment, for in the unſeemlineſs of their ſpeech you may better diſcern and avoid the like in yourſelves.

If any perſon, that you do not very well know to be a perſon of truth, ſobriety, and weight, relate ſtrange ſtories, be not too ready or eaſy to believe them, nor report them after him; and yet, unleſs he bé one of your familiar acquaintance, be not too forward to contradict him; or if the neceſſity of the occation require you to declare youre opinion of what is ſo reported, let it be modeſtly and gently, not too bluntly or coarſly; by thiſs means, on the one ſide you ſhall avoid being abuſed by your too much credulity; on the other ſide, you ſhall avoid quarrels and diſtaſte.

If any man ſpeak any thing to diſadvantage or reproach of one that is abſent, be not too ready to believe it, only obſerve and remember it; for it may be it is not true, or it is not all true, or

ſome

ſome other circumſtances were mingled with it, which might give the buſineſs reported a juſtification, or at leaſt an allay; an extenuation or a reaſonable excuſe: in moſt actions, if that which is bad alone, or ſeems to be ſo, be reported, omitting that which is good, or the circumſtances that accompany it, any action may be eaſily miſrepreſented; be not too haſty therefore to believe a reproach, 'till you know the truth, and the whole truth.

If any perſon report unto you ſome injury done to you by another, either in words or deeds, do not be over-haſty in believing it; nor ſuddenly angry with the perſon ſo accuſed; for it is poſſible it may be faulſe or miſtaken; and how unſeemly a thing will it be, when your creduelity and paſſion ſhall perchance cary you, upon a ſuppoſed injury, to do wrong to him that hath done you none; or at leaſt, when the bottom and truth of the accuſation is known, you will be aſhamed of your paſſion. Believe not a report till the accuſed be heard; and if the report be true, yet be not tranſported either with paſſion, haſty anger, or revenge, for that will be your own torment and perturbation. Even when a perſon is accuſed or reported to have injured you, before you give yourſelf leave to be angry, think with yourſelf, Why ſhould I be angry before I am certain it is true? or, if it be true, How can I tell how much I ſhould be angry, till I know

know the whole matter? Though it may be he hath done me wrong, yet poſſibly it is miſrepreſented, or it was done by miſtake, or it may be he is ſorry for it: I will not be angry till I know there be cauſe, and if there be cauſe, yet I will not be angry till I know the whole cauſe; for till then, if I muſt be angry at all, yet I know not how much to be angry; it may be it is not worth my anger, or if it be, it may be it deſerves but a little. Thiſs will keep your mind and carriage upon ſuch occaſions in a due temper and order; and will diſappoint malicious or oficious tale-bearers.

If a man whoſe integrity you do not very well know, makes you great and extraordinary profeſſions and promiſes, give him as kind thanks as may be, but give not much credit to it: caſt about with yourſelf what may be the reaſon of thiſs wonderful kindneſs; it is twenty to one but you will find ſomething that he aims at, beſides kindneſs to you; it may be he hath ſomething to beg or buy of you, or to ſell you, or ſome ſuch bargain that ſpeaks out at laſt his own advantage, and not yours; and if he ſerve his turn upon you, or if he be diſappointed, his kindneſs will grow coul.

If a man flatter and commend you to your face, or to one that he thinks will tell you of it, it

it is a thouſand to one either he hath deceived and abuſed you ſome way, or means to do ſo. Remember the fable of the fox commending the ſinging of the crow, when ſhe had ſomewhat in her mouth that the fox liked.

If a perſon be cholerick, paſſionate, and give you ill language, remember, rather to pity him than to be mov'd into anger and paſſion with him, for moſt certainly that man is in a diſtemper and diſorder; obſerve him calmly, and you ſhall ſee in him ſo much perturbation and diſturbance, that you will eaſily believe he is not a pattern to be imitated by you, and therefore return not choler for anger; for you do but put yourſelf into a kind of frenzy becauſe you ſee him ſo. Be ſure you return not railing, reproaching, or revileing, for revileing; for it doth but kindle more heat, and you will find ſilence, or at leaſt very gentle words, the moſt exquiſite revenge of reproaches that can be; for either it will cure the diſtemper in the other, and make him ſee and be ſorry for his paſſion, or it will torment him with more perturbation and diſturbance. But howſoever, it keeps your innocence, gives you a deſerved reputation of wiſdom and moderation, and keeps up the ſerenity and compoſure of your mind; whereas paſſion and anger do make a man unfit for any thing that becomes him as a man, or as a Chriſtian.

SOME men are excellent in knowledge of husbandry, some of planting, some of gardening, some in the mathematicks, some in one kind, some in another; in all your conversation, learn as near as you can wherein the skill and excellence of any person lies, and put him upon talk of that subject, and observe it, and keep it in memory or writing; by this means you will glean up the worth and excellence of every person you meet with, and at an easie rate put together that which may be for your use upon all occasions.

CONVERSE not with a lyar or a swearer, or a man of obscene or wanton language; for either he will corrupt you, or at least it will hazard your reputation to be one of the like making; and if it doth neither, yet it will fill your memory with such discourses, that will be troublesome to you in after time, and the returns of the remembrance of the passages which you long since heard of this nature, will haunt you, when your thoughts should be better imployed.

Now as concerning your own speech, and how you are to manage it, something may be collected out of what goes before; but I shall add some things else.

LET your speech be true; never speak any thing for a truth, which you know or believe to be faulse: it

it is a great ſin againſt God, that gave you a tounge to ſpeak your offence againſt humanity itſelf, for where there is no truth there can be no ſafe ſociety between man and man. And it is an injury to the ſpeaker, for, beſides the baſe diſreputation it caſts upon him, it doth in time bring a man to that baſeneſs of mind, that he can ſcarce tell how to tell truth or to avoid lying, even when he hath no colour of neceſſity for it; and it comes to ſuch a paſs, that as another man cannot believe he tells a truth, ſo he himſelf ſcarce knows when he tells a lye: and obſerve it, a lye ever returns with diſcovery and ſhame at the laſt.

As you muſt be careful not to lye, ſo you muſt avoid coming near it; you muſt not equivocate; you muſt not ſpeak that abſolutely which you have but by hearſay or relation; you muſt not ſpeak that as upon knowledge, which you have but by conjecture or opinion only.

Let your words be few, eſpecially when your betters, or ſtrangers, or men of experience, or underſtanding, are in place; for you do yourſelf at once two great miſchiefs: *firſt*, you betray and diſcover your own weakneſs and folly; *ſecondly*, you rob yourſelf of that opportunity which you might otherwiſe have to gain knowledge, wiſdom, and experience, by hearing thoſe that you ſilence by your impertinent talking.

Be not over-earneſt, lowd, or violent in talking, for it is unſeemly; and earneſt and lowd talking make you overſhoot and loſe your buſineſs: when you ſhould be conſidering and pondering your thoughts, and how to expreſs them ſignificantly, and to the purpoſe, you are ſtriveing to keep your tounge going, and to ſilence an opponent, not with reaſon but with noiſe.

Be careful not to interrupt another in his talk; hear him out; you will underſtand him the better, and be able to give him the better anſwer; it may be, if you will give him leave, he will ſay ſomewhat more than you have yet heard, or well underſtood, or that which you did not expect.

Allways before you ſpeak, eſpecially where the buſineſs is of moment, conſider beforehand; weigh the ſence of your mind, which you intend to utter; think upon the expreſſions you intend to uſe, that they be ſignificant, pertinent, and unoffenſive; and whereas it is the ordinary courſe of inconſidirate perſons to ſpeak their words, and then to think, or not to think till they ſpeak; think firſt and ſpeak after, if it be in any matter of moment or ſerioufneſs.

Be willing to ſpeak well of the abſent, if you do not know they deſerve ill: by thiſs means you ſhall make yourſelf many friends, and ſometimes an

an undeſerved commendation is not loſt to the party to whom it is given. I have known ſome men that have met with an undeſerved commendation, out of ſhame of being worſe than they have been reported, ſecreatly to take up practiſes anſwerable to their commendation, and ſo make themſelves as good as they were reported.

Be ſure you give not an ill report to any that you are not ſure deſerves it. And in moſt caſes, though a man deſerves ill, yet you ſhould be ſparing to report him ſo; in ſome caſes indeed you are bound, in honeſty and juſtice, to give that account concerning the demerit or default of a perſon that he deſerves: as namely, when you are called to give teſtimony for the ending of a controverſie, or when the conceiling of it may harden and encourage a perſon in an evil way, or bring another into danger; in ſuch caſes, the very duty of charity binds you to ſpeak your knowledge, nay your probable fear or ſuſpition of ſuch a perſon, ſo it be done for prevention of greater inconveniencies and in love; and eſpecially if the diſcovery be made to a perſon that hath the ſuperintendence, care, or authority over the perſon complained of, for this is an act of love and duty. But for any perſon maliciouſly, buſily, and with intent to ſcandaliſe another, to be whiſpering tales and ſtories to the prejudice of others, this is a fault: if you know any good of any perſon, ſpeak it as you have opportunity;

portunity: if you know any evel ſpeak it, if it be realy and prudently done for the good of him, and the ſafety of others; otherwiſe rather chuſe to ſay nothing, than to ſay any thing reproachfuly, maliciouſly, or officiouſly, to his prejudice.

Avoid ſwearing in your ordinary communication, unleſs called to it by the magiſtrate; and not onely the groſſer oaths, but the leſer: and not onely oaths, but imprecations, earneſt and deep proteſtations: as you have the commendable example of good men to juſtify a ſolemn oath before a magiſtrate, ſo you have the precept of Our Saviour forbidding it otherwiſe.

Avoid ſcoffing, and bitter and biteing jeering and jeſting; eſpecially at the condition, credit, deformity, or natural defects of any perſon; for theſe leave a deep impreſſion, and are a moſt aparant injuſtice; for were you ſo uſed, you would take it inwardly and amiſs; and many times ſuch an injury coſts a man dear, when he little thinks of it.

Be very careful that you give no reproachful, bitter menacing, or ſpightful words to any perſon, nay not to ſervants or other perſons of an inferiour condition; and that upon theſe conſiderations:

1. There is not the meaneſt perſon but you may ſtand in need of him in one kind, or at ſome time or another: good words make friends, bad words make enemies; it is the beſt prudence in the

world to make as many friends as honeſtly you can, eſpecially when it may be done at ſo eaſie rate as a good word; and it is the greateſt folly that can be, to make an enemy by ill words, which do not at all any good to the party that uſeth them. 2. Ill words provoke ill words again, and commonly ſuch ill words as are gained by ſuch a provocation, eſpecially of an inferiour, ſtick cloſer, and wound deeper, than ſuch as come unprovoked by ill language, or from an equal. 3. Where faults are committed, they may, and by a ſuperiour muſt, be reproved; but let it be done without reproaches, or bitterneſs; otherwiſe it loſeth its due end and uſe, and inſtead of reforming the offence, exaſperates the offender, and makes him worſe, and gives him the cudgel to ſtrike againe; becauſe it diſcovers your own weakneſs when you are reprehending another, and lays you juſtly open to his reproof, and makes your own but ſcorned and diſeſteemed. I preſs thiſs the rather, becauſe moſt ordinarily ill language is the folly of children, and of weak and paſſionate people.

If there be occaſion for you to ſpeak in any company, always be careful if you ſpeak at all, to ſpeak lateſt, eſpecially if ſtrangers are in company; for by thiſs means you will have the advantage of knowing the ſence, judgment, temper, and relations of others, which may be a great light and help to you in ordering your ſpeech, and you will better know the inclination of the company, and

ſpeak

ſpeak with more advantage and acceptation, and with more ſecurity againſt giveing offence.

BE careful that you commend not yourſelves; it is the moſt unuſeful and ungrateful thing that can be: you ſhould avoid flattery from others, but eſpecially decline flattering of yourſelves; it is a ſign your reputation is ſmall and ſinking, if your own toungs muſt be your flatterers or commenders, and it is a fulſom and unpleaſing thing for others to hear it.

ABHOR all foul, unclean and obſcene ſpeeches; it is a ſign that the heart is corrupt; and ſuch kind of ſpeeches will make it worſe; it will taint and corrupt yourſelves and thoſe that hear it, and brings diſreputation to thoſe that uſe it.

NEVER uſe any profane ſpeeches, nor make jeſts of ſcripture-expreſſions; when you uſe the names of God or Chriſt, or any paſſages or words of the holy ſcripture, uſe them with reverence and ſeriouſneſs, and not lightly or ſcurrilouſly; for it is a taking of the name of God in vain.

IF you hear of any unſeemly expreſſions uſed in religious exerciſes, you muſt be careful to forget and not to publiſh them; or if you at all mention them, let it be with pity and ſorrow, not with deriſion or reproach.

Do not upbraid any, or deride any man for a pious, ſtrict, or religious converſation; for if he be ſincere, you diſhonour God and injure him: if he be an hipocrite, yet it is more than you know; or if you know him to be ſuch, yet his external piety and ſtrictneſs is not his fault, but his diſſimulation and hipocriſie; and though his hipocriſie be to be deteſted, external piety and religion is to be commended, not derided.

HAVE as little converſation as is poſſible with hereticks, or perſons obſtinately perverted on matters of religion; as Papiſts, Quakers, Anabaptiſts, Antinomians, Enthuſiaſts, and the like: but eſpecially converſe not with them on matters of religion; for inſtead of converting them by your perſwaſions to the truth, you ſhall but harden them the more, and endanger yourſelf. They are to be dealt with all in theſe matters onely by perſons of great abilities; for a perverted, corrupted mind, or obſtinate ſpirit, carries in it a contagion, as infectious and much more dangerous than the plague in the body, where their opinions meet with a young opponent.

AND thus, children, as the time and my remembrance would give me leave, I have ſet down ſome obſervations concerning thiſs ſubject, for your direction and practiſe; what is wanting you may abundantly ſupply by reading the wiſe counſel of Solomon, in his book of Proverbs. Read theſe

my

my directions often; think of them ſeriouſly, and practiſe them diligently; though they ſeem but dry and ordinary things, yet you will find them uſeful in your converſation, which will be every day more evident unto you, as your judgment, underſtanding and experience increaſe.

I HAVE but little more to write at thiſs time, but to wiſh and command you to remember my former counſels, that I have often given you. Begin and end the day with private prayers to God, upon your knees; read the ſcriptures often and ſeriouſly; be attentive to the publick worſhip of God in the church; keep yourſelves ſtill in ſome good imployment, for idleneſs is the devil's opportunity, and the nurſery of vain and ſinful thoughts, which corrupt the mind, and diſorder the life.

LET the girls take care of ſuch buſineſs of my family as is proper for them; and their recreation may be walking abroad in the fields in fair or froſty mornings; ſome work with their needles; reading of hiſtory or herbals; ſetting of flowers or herbs; practiſing of their muſick, and ſuch innocent and harmleſs exerciſes. Let the boys be diligent at their books, and when they have performed their taſks, I do not deny them ſuch recreations as may be healthy, ſafe, and harmleſs.

BE you all kind and loveing one to another; honouring your miniſter; not bitter nor harſh to

my ſervants. Be reſpectful to all. Bear my abſence patiently, cherefully and faithfully. Do all things as if I were preſent among you and beheld you, for you have a greater Father than I am, that always and in all places beholds you, and knows your hearts and thoughts: ſtudy to requite the love and care and expence of your father for you, with dutifulneſs, obſervance and obedience to him; and account it an honour, that God hath given you an opportunity in my abſence, by your care, faithfulneſs and induſtry, to pay ſome part of that debt, that by the laws of nature and gratitude you owe unto me. Be frugal in my family; but let there be no want. Provide conveniently for the poor that come to my door. And I pray God to fill all your hearts with his grace, fear and love; and to let you ſee the advantage and comfort of ſerving him; and his bleſſing, and preſence, and comfort, and direction, and providence be with you and over you all! I am

Your ever loving father,

MATTHEW HALE.

On the 18th of May 1671, Sir Matthew Hale was promoted to the dignity of lord chief juſtice of England.—Within five years from this his laſt promotion, he was attacked by the diſorder of which he died. From the firſt moment of his illneſs, he viſibly and haſtily declined; and tho' ſo debilitated that he could ſcarce, even when ſupported, walk, much leſs endure the fatigue of his profeſſion,

yet

yet with painful induſtry he pertinaciouſly diſcharged the different functions of his high office.

His diſorder being increaſed by application, he at length reſolved to retire from the labours of his profeſſion (a profeſſion which few have ſtrength enough to bear, and which none can bear long), and therefore ſolicited the acceptance of his reſignation. The king, unwilling to comply with the requiſition, was deſirous that he ſhould continue chief juſtice, on condition that he would tranſact in his chamber as much of the buſineſs as he poſſibly could. He declined the offer; adding, "I cannot with a good conſcience con-
"tinue in office, ſince I am no longer able to diſ-
"charge the duty belonging to it." His majeſty, not well knowing how to deny the requeſt, delayed, however, to comply with it; and the chancellor, tho' often requeſted by Sir Matthew, would not move the king to accept his reſignation. Thus ſituated, Sir Matthew on the 21ſt of February 1675-6, went before a maſter in chancery, with a written inſtrument drawn and engroſſed by himſelf, which he there formally ſealed and delivered, requiring it might be enrolled: he afterwards produced the original to the chancellor, reſigning his office in the following manner:—"Omnibus Chriſti fideli-
"bus ad quos præſens ſcriptura pervenerit, Mat-
"thæus Hale, miles, capitalis juſticiarius domini
"regis ad placita coram ipſo rege tenenda aſſigna-
"tus, ſalutem in Domino ſempiternam: Noveritis

"me præfatum Matthæum Hale militem, jam "ſenem factum, et variis corporis mei ſenilis mor- "bis et infirmitatibus dirè laborantem et adhuc "detentum, hâc chartâ meâ reſignare, et ſurſum "reddere ſereniſſimo domino noſtro Carolo ſecun- "do, Dei gratiâ Angliæ, Scotiæ, Franciæ, et Hi- "berniæ, regi, fidei defenſori, &c. prædictum "officium capitalis juſticiarii ad placita coram ipſo "rege tenenda, humillimè petens quòd hoc ſcrip- "tum irrotaletur de recordo. In cujus rei teſti- "monium huic chartæ meæ reſignationis, ſigillum "meum oppoſui, dat' viceſimo primo die Febru- "arii, anno regni dict' dom. regis nunc viceſimo "octavo."

THIS he did to teſtify (as himſelf aſſerted) not only his concurrence in the removal, but to obviate an objection, that a chief juſtice, being placed by writ, was not removeable at pleaſure, as judges by patent were (*x*).

To thoſe who are unacquainted with our hiſtory, it may ſeem ſtrange, but it is no more ſo than true, that the judges were formerly dependent on the caprice of the crown. Prerogative, no doubt,

(*x*) 2. Inſt. 26. 4. Inſt. 75. Cro. Car. 1.—The Earl of Mansfield, "whoſe conſpicuous "and exalted talents conferred "dignity upon the profeſſion, "whoſe enlightened and regu- "lar adminiſtration of juſtice "made its duties leſs difficult "and laborious, and whoſe "manners rendered them plea- "ſant and reſpectable"—after having been thirty-two years chief juſtice of the king's-bench, reſigned his office in a ſimilar manner. See *Ann. Reg.* for 1788, p. 241.

thought

thought it neceſſary, but the ſubject found it partial and oppreſſive. Before the cloſe of the ſeventeenth century, and anterior to the glorious Revolution, men of pliant diſpoſitions were raiſed to the bench, while thoſe who diſtributed juſtice were removed:—even-handed juſtice gave way to wicked policy;—objects the moſt precious were by vicious conſtructions, without ceremony and without fear, ſacrificed by thoſe whoſe duty it was to protect and to preſerve them. Sad and melancholy muſt have been the proſpect! for when the channels of public juſtice are corrupted, when juſtice itſelf is converted into the means of revenge, political miſery is arrived at its height. From the numerous inſtances which might be educed in ſupport of the aſſertion, the following one is ſufficient to eſtabliſh it beyond doubt or contradiction. In the year 1683, on the trial of Lord Ruſſell, Jeffreys, in his ſpeech to the jury, turned the untimely fate of Eſſex into a proof of the conſpiracy in which he and Ruſſell had been engaged. Pemberton, who preſided as chief juſtice, behaved to the priſoner with a candour and decorum ſeldom found in the judges of that reign, or the ſucceeding one. But before Sidney was brought to his trial, Pemberton was removed from the head of the King's Bench, and even from the privy council, and Jeffreys put in his place (y), in order by the

(y) Jeffreys did not immediately ſucceed Sir Francis Pemberton, whoſe immediate ſucceſſor was Sir Edmund Saunders, a man of too extraordinary a complection to be paſſed over

the fierceneſs of his manners to cope with a man, the vigour of whoſe ſpirit was known throughout Europe *(z)*.

In the year 1691, a bill paſſed both houſes to make the ſalaries and offices of the judges for life; but the king, even at that great æra of liberty, refuſed his aſſent, "leaving room for a ſucceeding "monarch to give unaſked to the wiſhes of his "people what William refuſed to their prayers." However, to maintain the dignity and independence of the judges, it was ſoon after enacted, that their commiſſions ſhould be made (not, as formerly, *durante bene placito*, but) QUAMDIU BENE

over in ſilence. He was originally a ſtrolling beggar about the ſtreets, without either known parents or relations. He came often to beg ſcraps at Clement's Inn, where he was taken notice of for his uncommon ſprightlineſs; and as he expreſſed a ſtrong inclination to learn to write, one of the attorney's clerks taught him, and ſoon qualified him for an hackney-writer. He took all opportunities of improving himſelf, by reading ſuch books as he borrowed of his friends; and in the courſe of a few years became an able attorney, and a very eminent counſel. His practice in the court of King's-Bench was exceeded by none: his art and cunning were equal to his knowledge; and he carried many a cauſe by laying ſnares. If he was detected, he was never out of countenance, but evaded the matter with a jeſt, which he had always at hand. He was much employed by the king againſt the city of London, in the buſineſs of the *quo warranto*. His perſon was as heavy and ungain as his wit was alert and ſprightly. He is ſaid to have been "a mere "lump of morbid fleſh:" the ſmell of him was ſo offenſive, that people uſually held their noſes when he came into court. One of his jeſts on this occaſion was, that "none could "ſay he wanted iſſue, for he had "no leſs than nine in his back." Sir George Jeffreys ſucceeded him September 29th, 1683. Grang. Biog. Hiſt. Vol. III. oct. p. 367.

(z) Dalrym. Mem. Gr. Br. p. 91. 95.

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SE GESSERINT;—their ſalaries were alſo aſcertained and eſtabliſhed, and their removal declared lawful on the addreſs of both houſes of parliament, 13. Will. III. c. 2. (*a*) This law has been ſince improved. His preſent majeſty in the beginning of his reign (*b*) declared from the throne, 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;" and therefore earneſtly recommended to parliament, that the judges might be continued in their offices DURING THEIR GOOD BEHAVIOUR, NOTWITHSTANDING ANY DEMISE OF THE CROWN. This the parliament immediately took into conſideration, and, with all poſſible diſpatch, paſſed a law in every reſpect conformable with the recommendation (*c*).

CHARLES, wearied with applications, at length, but with the greateſt reluctance, accepted Sir Matthew's reſignation; at the ſame time aſſuring him, that "he ſhould ſtill look on him as his ora"cle, and have recourſe to his advice when his "health would permit, and that he ſhould con-

(*a*) Charles the firſt, at the requeſt of his parliament, inſtead of the patents during pleaſure, gave all the judges patents during their good behaviour. May, p. 107.

(*b*) March 3, 1761. See *Ann. Reg.* for 1761. p. 243.

(*c*) 1. Geo. 3. c. 23.

"tinue

" tinue his ſalary during life." This inſtance of beneficence exceeding Sir Matthew's opinion of his own deſerts, he wrote to the lord treaſurer, requeſting that his ſalary might be continued only during pleaſure; but the king inſiſted on beſtowing it for life, and it was of courſe ſo granted.

Sir Richard Rainsford, who was but a ſecondary character in his profeſſion, had the diſadvantage of ſucceeding Sir Matthew, who was confeſſedly at the head of it. The merit of Rainsford, eclipſed by the ſuperior luſtre of his predeceſſor, appeared to be much leſs than in reality it was.—Let it not however be forgotten, that he as much excelled Sir William Scroggs, who ſucceeded him, in point of integrity, as he was below Sir Matthew Hale in point of learning. When the commiſſion was delivered to Rainsford, the chancellor reminded him—that the very labours of the place, the weight and fatigue which attended it, were no ſmall diſcouragements; " for," continued the chancellor, " what ſhoulders may not juſtly fear the burthen, " which made him ſtoop who went before you? " Yet I confeſs, you have a greater diſcouragement " than the mere burthen of the place, in the in- " imitable example of your predeceſſor: a chief of " indefatigable induſtry, invincible patience, ex- " emplary integrity and magnanimity, and ſo ab- " ſolute a maſter in the ſcience of law."

To

To this encomium chief juſtice Rainsford anſwered, "I have been witneſs to the greatneſs of "his learning, which charmed his auditors to re- "verence and attention. He is a perſon of whom "I may boldly ſay, that as former ages cannot "ſhew any ſuperior, ſo I am confident ſucceeding "times will never ſhew an equal. Theſe conſi- "derations, heightened by what I have heard "from your lordſhip, make me anxious how I "ſhall ſucceed ſo good, ſo great a man; one who "will be eminently famous to all poſterity."

THE hope that relaxation would inſure repoſe, proved flattering and deluſive. In truth, Sir Matthew Hale's diſorder rather increaſed than diminiſhed from the time of his reſignation; inſomuch that within a ſhort time afterwards his recovery became impoſſible. He, nevertheleſs, ſupported himſelf with uncommon equanimity. In the excruciating moments of pain he forbore complaint, and when at his devotions was fervent and compoſed. The divine who attended, acquainted him that the ſacrament was to be adminiſtered at the church; but that as he could not (the preſſure of diſeaſe conſidered) attend, it ſhould be adminiſtered to him in his own houſe. "No," (exclaimed Sir Matthew) my heavenly "Father has prepared a feaſt for me, and I will "go to my Father's houſe to partake of it!" He was carried thither, where, with the other communicants, he participated of the ſacrament.

HIS

His whole powers were now engroſſed by the contemplation of another ſtate, and all converſation was now tedious which had not ſome tendency to diſengage him from human avocations, and expand his proſpects into futurity. That he had ſome unaccountable preſage of his death, is (if credit may be given to epiſcopal authority) unqueſtionably true. But an aſſertion of this kind, in an age liberal and enlightened like the preſent, may appear problematical.—Burnet has been bold enough to publiſh it:—few perhaps will give credence to the learned biſhop; and tho' every one may be allowed to be ſomewhat ſceptical on the ſubject, yet nothing could juſtify the ſuppreſſion of ſo ſingular an anecdote.

"He had (ſays Burnet) ſome ſecret unaccount-
"able preſages of his death; for he ſaid, that if he
"did not die on ſuch a day (which fell to be the
"25th of November), he believed he ſhould live
"a month longer; and he died that very day
"month."

Henry the Great had a ſimilar preſcience, which the Duke of Sully, who cannot be thought either a credulous or a weak man, has noticed in a particular manner (*d*). Other inſtances, equally cogent, might no doubt be ſelected; but in ſuch points, it is better to reſt in the prudent ſtate of

(*d*) Mem. de Sul. tom. iii. 4to. 226.

neutrality,

neutrality, without engaging aſſent to either the one ſide or the other. Such an hovering faith as this, which refuſes to ſettle upon any determination, is abſolutely neceſſary in a mind that is careful to avoid errors and prepoſſeſſions. When the arguments preſs equally on both ſides in matters which are indifferent, the ſafeſt method is to give up ourſelves to neither *(e)*.

Consonant with the prediction, if ſuch a prediction ever was declared, all that was mortal of Sir Matthew Hale expired on the 25th of December, 1676.

His remains were depoſited in the cemetery of Alderly, among thoſe of his anceſtors. This was done in conformity with his own ſentiments. He did not approve of the mode of burying in churches; becauſe, as he was often heard to declare, "churches are for the living, and church-yards "for the dead." On his monument is this inſcription:—

HIC INHUMATUR CORPUS
MATTHEI HALE, MILITIS,
ROBERTÆ HALE, ET JOANNÆ
UXORIS EJUS, FILII UNICI;
NATI IN HAC PAROCHIA DE ALDERLY,
PRIMO DIE NOVEMBRIS;
A. D. 1609.

DENA-

(e) Spectator, No. cxvii.

DENATI VERO IBIDEM
VICESIMO QUINTO DIE DECEMBRIS,
A. D. 1676.
ÆTATIS SUÆ LXVII. (f)

VIRTUES which once were envied, becauſe they eclipſed thoſe of others, can no longer obſtruct reputation; no one can now have any intereſt in the ſuppreſſion of his praiſe.

SIR Matthew Hale was of a middle ſtature, ſtrong and well-proportioned; his countenance engaging; his converſation affable and entertaining; his elocution eaſy and perſuaſive; his temper warm, open and generous; affectionate to his family; ſincere to his friends. However engaged in the ſervice of his country, he neglected not the minds and manners of his children. To form their manners and direct their talents; to promote in them the practice of virtue and of piety—to ſhield them from imprudence, indigence, and misfortune, were the important objects of his inſtruction (g).

HE ſeemed from his youth to have acquainted himſelf with wiſdom and with knowledge; his virtue was not inferior to his learning; and as humility always accompanied the former, modeſty

(f) Though there be the utmoſt ſimplicity in the words of this inſcription, yet there appears a certain air of dignity in them, owing to the feet that compoſe them, which are all of the moſt generous quality. MASON.

(g) See the letter to his children, ante.

was ever attendant on the latter; and notwithſtanding the variety of his avocations, he daily preſſed nearer to perfection by a devotion, which tho' elevated was rational, and tho' regular was warm.

In his profeſſion, his judgment was clear, his opinion was authority; and notwithſtanding he conſcientiouſly diſcharged the duties of his profeſſion, he at the ſame time diſregarded the profits which reſulted from it. When at the bar, nothing could induce him to proſtitute his abilities; and tho' while there civil war raged with all the violence of contention, yet he not only preſerved his integrity, but lived in eaſe and ſecurity. Actuated by the example of Pomponius Atticus, he walked thro' times of the moſt turbulent diſtraction uncenſured, unhurt.—On the bench he reign'd "a pure intelligence." There he was all patience; and tho' the temper of the times too often made innovations in the profeſſion, yet he never gave way to injuſtice, however formidable: Nothing could alarm, nor anything allure him. Looking forwards to the laſting, incorruptible judgment of poſterity, without fear, and above temptation, he became a ſhield to his fellow-citizens, and a ſupport to his profeſſion, and the ſtate. He held equity to be, not only part of the common law, but alſo one of its principal grounds; for which reaſon he reduced

it to principles, that it might be ſtudied as a ſcience (*b*).

His abilities were ſo extenſive, that it is almoſt incredible that one man, in no great ſpace of time, ſhould acquire ſuch variety of knowledge; but when we reflect that his parts were lively, and his apprehenſion quick; that his memory was retentive, his judgment ſound, and his application indefatigable; the myſtery is unravelled, and admiration increaſes, as incredulity paſſes away.

With ſuch virtues and ſuch abilities, had he been inſenſible to the applauſe which was juſtly and liberally beſtowed upon him, it might have been adduced either as an inſtance of weakneſs or affectation: on the contrary, he had a becoming ſenſe of the eſteem in which he was held, attended with that ſelf-approbation which ever accompanies the accompliſhment of worthy actions. For this, however, he is repreſented as a vain perſon by Mr. Roger North (*i*), who by endeavouring to depreciate an exalted, eſtabliſhed character, has only degraded his own.

(*b*) See his Analyſis.

(*i*) In the reign of *Charles* II. *North* was a barriſter of diſtinguiſhed abilities, and in the ſucceeding reign was made Attorney General. He was a near relation of the Lord Keeper *Guildford*, with whom he chiefly ſpent the active part of his life. He was author of the lives of *Francis* Lord *Guildford*, Lord Keeper; of Sir *Dudley North*; and of Dr. *John North*, Maſter of *Trinity College*, *Cambridge*.

Though

THOUGH religion be the moſt animating perſuaſion which the mind of man can embrace—tho' it gives ſtrength to our hopes and ſtability to our reſolutions—tho' it ſubdues the inſolence of proſperity, and draws out the ſting of affliction; yet ſuch was the profligacy of the reign of Charles the ſecond—ſo far removed from ſound policy and good manners, that, at this period of eaſe and politeneſs, religion was not only groſsly neglected, but was daily exhibited as an object for the exerciſe of ridicule. To leſſen the veneration that is due to religion, is a kind of zeal which no epithet is ſufficient to ſtigmatize;—it is attacking the ſtrongeſt hold of ſociety, and attempting to deſtroy the firmeſt guard of human ſecurity. So alarming was this advance of impiety to Sir Matthew, that he often deplored it with unaffected ſorrow.—Were it neceſſary to evince his abhorrence of it, I might content myſelf with appealing to the bright example of his life; but, however ſufficient that might be for the purpoſe, it would yet be doing great injuſtice to his memory not to mention, that he employed ſome time in elegant inſtructive diſquiſition on the moſt intereſting topics of the chriſtian religion. Minutely obſervant of the rituals of devotion, he was, perhaps, ſingular in his deportment; but he for a long time concealed the conſecration of himſelf to the ſtricter duties of religion, leſt by ſome adventitious action he ſhould bring piety into diſgrace. In truth, he taught the theory of chriſtianity by his precepts, and the

practice by his example. The faith which influenced his own actions, he religiouſly communicated to others; he improved devotion where he found it, and kindled it where he found it not. May thoſe who ſtudy his writings, imitate his life; and thoſe who endeavour after his knowledge, aſpire likewiſe to his piety!

By being ingenuous, he not only ſecured his independency, but raiſed himſelf above flattery or reproach, above menace or misfortune. Thus the rectitude of his conduct, added to the greatneſs of his abilities and the eaſe of his deportment, not only gained him univerſal reſpect, but rendered him more conſpicuous than any of his contemporaries.

POSTSCRIPT.

IT is laudable to reſpect ſuch as are nobly deſcended, not merely from gratitude to thoſe who have benefited ſociety, but that others may be animated by their example. Laudable as ſuch an attention moſt unqueſtionably is, yet as it is an honour from courteſy, and not of right, it muſt be received and cannot be demanded. Burnet, ſpeaking of Sir MATTHEW HALE, ſays, "in after time "it is not to be doubted but it will be reckoned "no ſmall honour to derive from him;" which induced me to ſubjoin the ſucceeding narrative.

HALE was twice married. His firſt wife was Ann, daughter of Sir Henry Moore, of Fawley in Berkſhire, grand-child to Sir Francis Moore, ſerjeant at law. By her he had ten children (*k*).

HIS eldeſt ſon (Robert) married Frances, daughter of Sir Frances Chock, of Avington, in Berkſhire; by whom he had five children; Matthew, Gabriel, Ann, Mary, and Frances.

HIS ſecond ſon (Matthew) married Ann, daughter of Mr. Matthew Simmonds, of Hilſley in Glocesterſhire; by whom he had one ſon, named Matthew.

(*k*) Four of them died young.

His third ſon (Thomas) married Rebekah, daughter of Mr. Chriſtian le Brune, a Dutch merchant; but died without iſſue.

His fourth ſon (Edward) married Mary, daughter of Edmond Goodyere, Eſq. of Heythorp, in Oxfordſhire; by whom he had two ſons and three daughters.

His eldeſt daughter (Mary) married Edward Alderly, Eſq. of Inniſhannon in the county of Cork in Ireland, who dying, left her with two ſons and three daughters. She afterwards married Edward Stevens, Eſq. of Cherrington in Gloceſterſhire.

His youngeſt daughter (Elizabeth) married Edward Webb, Eſq. barriſter at law; ſhe died, leaving two children.

His ſecond wife was Ann, the daughter of Mr. Joſeph Biſhop of Fawley, in Berkſhire, by whom he had not any iſſue.

It may not be improper alſo to mention, that Sir Matthew gave to the ſociety of Lincoln's Inn the moſt valuable of his manuſcripts. As they are principally profeſſional, and perhaps unknown to many, no apology is neceſſary for enumerating them, or tranſcribing that part of the will which relates to the bequeſt.

"Item,

"ITEM, as a teſtimony of my honour and re-
"ſpect to the ſociety of Lincoln's-Inn, where I had
"the greateſt part of my education, I give and
"bequeath to that honourable ſociety, the ſeveral
"manuſcript books contained in a ſchedule an-
"nexed to my will: they are a treaſure worth
"having and keeping, which I have been near
"forty years in gathering with very great induſtry
"and expence. My deſire is, that they be kept
"ſafe and all together, in remembrance of me;
"they were fit to be bound in leather and chained,
"and kept in archives: I deſire they may not be
"lent out or diſpoſed of: only if I happen here-
"after to have any of my poſterity, of that ſociety,
"that deſires to tranſcribe any book, and give
"very good caution to reſtore it again in a pre-
"fixed time, ſuch as the benchers of that ſociety
"in council ſhall approve of; then, and not
"otherwiſe, only one book at one time may be
"lent out to them by the ſociety; ſo that there be
"no more but one book of thoſe books abroad
"out of the library at one time. They are a trea-
"ſure that are not fit for every man's view; nor
"is every man capable of making uſe of them;
"only I would have nothing of theſe books
"printed, but entirely preſerved together for the
"uſe of the induſtrious learned members of that
"ſociety."

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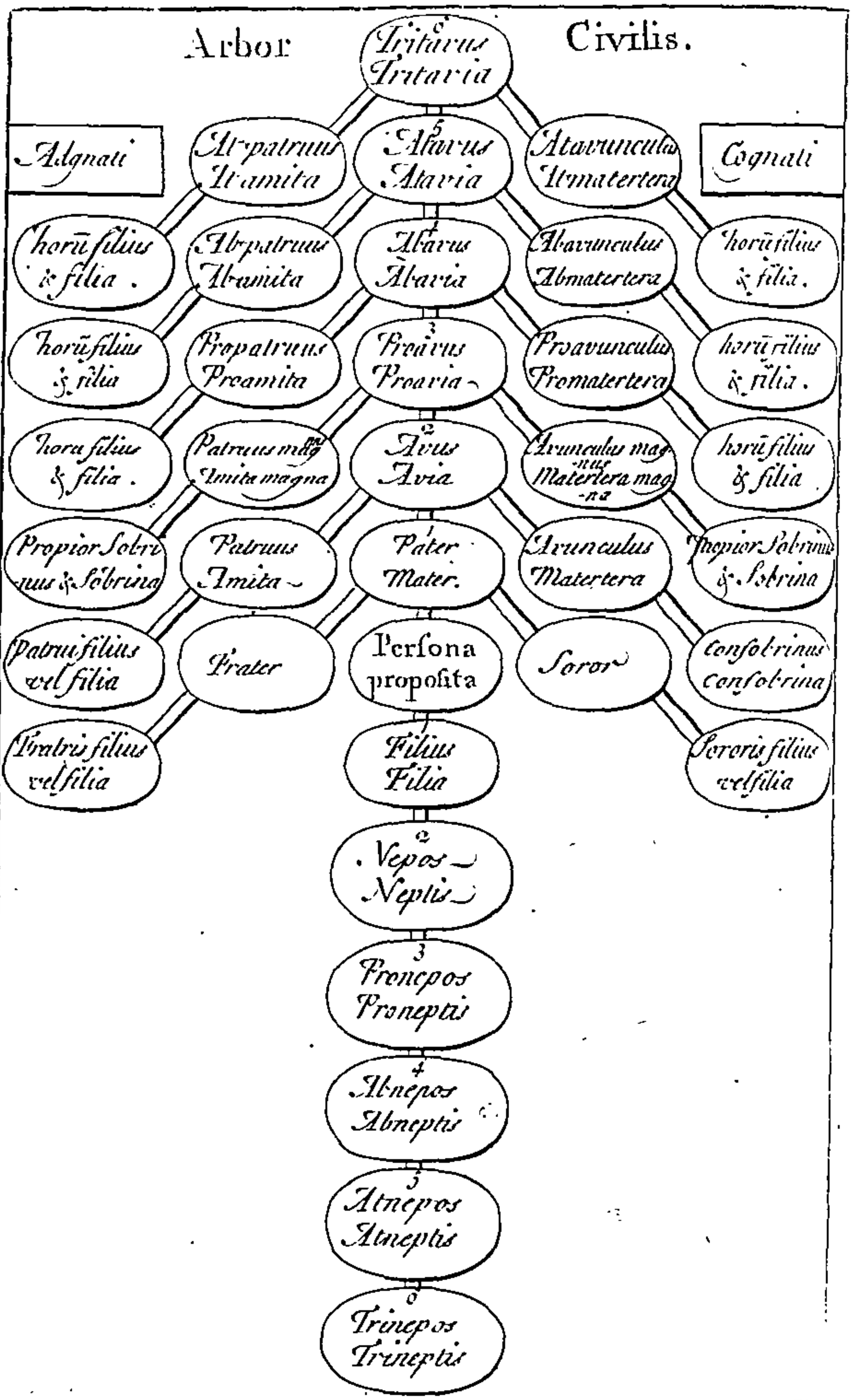
DE alchymiæ ſcriptoribus.

THE black book of the new law, collected by me, and digeſted into alphabetical titles, written with my own hand, which is the original copy.

(Signed)

Matthew Hale.

Arbor Civilis.



THE

HISTORY

OF THE

COMMON LAW

OF

ENGLAND.

CHAP. I.

Concerning the diſtribution of the laws of ENGLAND *into Common law and Statute law. And firſt, concerning the Statute law, or Acts of parliament.*

THE laws of England may aptly enough be divided into two kinds, viz.

Lex ſcripta, the written law;

and,

Lex non ſcripta, the unwritten law *(a)*.

For although, as ſhall be ſhewn hereafter, all the laws of this kingdom have ſome monuments or memorials thereof in writing,

(a) Conſtat autem jus noſtrum, quo utimur, aut ſcripto, aut ſine ſcripto; ut apud Græcos Τῶν δὲ μὲν γράφοι, οἱ δὲ ἄγραφοι. Inſt. l. 1. t. 2. ſ. 3. Et non ineleganter in duas ſpecies jus civile diſtributum eſſe videtur; nam origo ejus ab inſtitutis duarum civitatum, Athenarum ſcilicet et Lacedæmoniorum, fluxiſſe videtur. In his enim civitatibus ita agi ſolitum erat, ut Lacedæmonii quidem ea, quæ pro legibus obſervabant, memoriæ mandarent: Athenienſes vero ea, quæ in legibus ſcripta comprehendiſſent, cuſtodirent. Id. ſ. 10. Indeed under thoſe two comprehenſive heads, all laws have been claſſed by antient writers. See Ariſtotle's diſtinction of laws, 1. Rhet. c. 3. and the Antigone of Sophocles, v. 459. But ſee Dr. Taylor's Elements of the Civil Law, 247. ſeq. and Dr. Adams' Roman Antiquities, a book which not only facilitates the acquiſition of claſſical learning, but accelerates the communication of uſeful knowledge.

writing, yet all of them have not their original in writing. For ſome of thoſe laws have obtained their force by immemorial uſage or cuſtom; and ſuch laws are properly called *leges non ſcriptæ*, or unwritten laws or cuſtoms.

THOSE laws, therefore, that I call *leges ſcriptæ*, or written laws, are ſuch as are uſually called ſtatute laws, or acts of parliament, which are originally reduced into writing before they are enacted, or receive any binding power—every ſuch law being in the firſt inſtance formally drawn up in writing, and made, as it were, a tripartite indenture between the king, the lords, and the commons. For without the concurrent conſent of all thoſe three parts of the legiſlature, no ſuch law is, or can be made. But the kings of this realm, with the advice and conſent of both houſes of parliament, have power to make new laws, or to alter, repeal, or enforce the old. And this has been done in all ſucceſſion of ages. (A).

Now,

knowledge. Sir John Forteſcue (who was chancellor to Henry the ſixth) remarks, quod omnia jura humana aut ſunt lex naturæ, conſuetudines, vel ſtatuta, quæ et conſtitutiones appellantur. De laud. leg. Angl. c. 15.

(A) The high court of parliament * conſiſts of the king, in his royal political capacity; of the lords ſpiritual †, who ſit there by ſucceſſion, in reſpect of their baronies; of the lords temporal, who ſit there in conſequence of their reſpective dignities, which they enjoy either by deſcent or creation ‡; who are called to this high and omnipotent court by a writ of ſummons §; of knights, citizens, and burgeſſes, who are reſpectively elected by the different counties, cities, and boroughs of the kingdom, by virtue of a writ which

* *Parliamentum*—Curia apud nos ſuprema: magnum trium ordinum regni concilium, vel conventus, ut cum rege de rebus arduis conſultent. Colloquium quandoq; dictum, et propriè; nam a Gallico (parler) venit, quod loqui ſignificat. Vox huc a Normannis advecta, nec antea Anglis nota, quibus Concilium illud interdum MICHEL GEMOT, i. e. Synodus magna; interdum WITENA GEMOT, i. e. ſapientum Conventus; item, MICHEL SINOTH, et ſimiliter nuncupatum. Somner. Tyrrell. 9. Co. Præf.

† In number twenty ſix

‡ The number of the lords temporal is unlimited; it being in the power of the king to create as many as he may think proper.

§ 4. Inſt. 1. 5 44, 45. 47.

Co.

Now, ſtatute laws, or acts of parliament, are of two kinds. Firſt, thoſe ſtatutes which were made before time

of

which is iſſued for that purpoſe ‖. Theſe conſtitute the parliament of Great Britain—"the higheſt and moſt honourable, and abſolute "court of juſtice ¶" in the kingdom. For its laws uſages and powers conſult Com. Dig. 5. v. tit. Parliament. Sir Edward Coke, in treating of the high court of Parliament, ſays, "there is no act of "parliament but muſt have the conſent of the lords, the commons, "and the royal aſſent of the king; and as it appeareth by records * "and our books, whatſoever paſſeth in parliament by this threefold "conſent, hath the force of an act of parliament †."

If there be the conſent of one or two of them, it is only an ordinance; for the difference between an act of parliament and an ordinance is, "for that the ordinance wanteth the threefold conſent, "and is ordained by one or two of them ‡." Elſynge ſtates the diſtinction thus: "what begun in the commons was only termed a pe-"tition (for they had no power to ordain); and what begun in the "lords was ſtyled an ordinance. *Actus Parliamenti* was an act made "by the lords and commons; and it became *Statutum* when it re-"ceived the king's conſent." This paſſage is omitted in the late edition of Elſynge (1768, 12mo.); for himſelf eraſed it from the MS. from which that edition is printed §.

If an act *appears* to be paſſed without the aſſent of the commons, it is void. Mo. 824. Or, without the aſſent of the lords, or, of the king. Pl. Com. 79. H. Parl. 32. So, if it be by the aſſent of the king, the lords *ſpiritual* ONLY, and the commons, it is but an *ordinance*, and no act of parliament. Or, by the king, the lords *temporal*, and commons. 4. Inſt. 25. But it is not neceſſary, that *any* of the lords ſpiritual *aſſent*; if there be a MAJORITY of the lords ASSEMBLED in parliament. Seld. 3. v. 2. p. 1528. So, if all the ſpiritual lords aſſent *conditionally*; for, the condition is void. 4. Inſt. 35. Or, if the ſpiritual lords are abſent. 3. Ruſh. 1344. So, it is *not material*, that the aſſent of the king, lords, and commons, be *particularly* expreſſed: for PER ASSENSUM PARLIAMENTI comprehends the aſſent

of

‖ Co. Lit. 109. b. 4. Inſt. 1. 6. Cot. Abr. præf. 13. b. The number of knights, citizens and burgeſſes, ſince the Union, amounts to five hundred and fifty-eight.

¶ Sir Edw. Coke.

* 14. R. 2. nu. 15. and 13. H. 4. nu. 25.

† 4. Inſt. 25. cites 4. H. 7. 18. B. p. touts les juſtices. 7. H. 7. 14. 16. 11. H. 7. 27. a. Brooke prerogative, 134. Forteſcue fo. 20. cap. 18. Dier 1. Mar. 92. Vide alſo 2. Inſt. 157. 8. Co. 20. the Prince's caſe. Pl. Com. 79. a. Ha. parl. 31.

‡ 4. Inſt. 25. cites Rot. parl. 25. E. 3. nu. 16, &c. 39. E. 3. 12. 22. E. 3. 3. 8. H. 6. cap. 29. Dier 4 Mar. 144. 39. E. 3. 7. Thorp male erravit. Rot. Parl. 37. E. 3. nu. 39. 1. R. 2. nu. 56. diverſity between acts of parliament and ordinances, 2. R. 2. ſtat. 2. nu. 28.

§ Barr. on Stat. 41.

of memory; and, ſecondly, thoſe ſtatutes which were made within or ſince time of memory. Wherein obſerve, that, according to a juridical account and legal ſignification, time within memory, is the time of limitation in a writ of right; which by the ſtatute of Weſtminſter I. c. 39. *(b)* was ſettled and reduced to the beginning of the reign of king Richard I. or *ex primâ coronatione regis Ricardi primi (c)*; who began his reign the ſixth of July 1189, and was crowned the third of September following. So that whatſoever was before that time, is before time of memory. What is ſince that time, is, IN A LEGAL SENSE, ſaid to be WITHIN, or ſince the time of memory.

of ALL. Jon. 104. So, if by the roll it appears, that the bill was ſent to the lords, by the commons, *with a proviſo annexed*, and no proviſo is extant upon the record, yet it will be a good ſtatute. Hob. 110. And, if the journal of parliament vary from the record, it will not prejudice, for *that* is no record. Hob. 110, 111. So, it is *not* material in what *form* it is expreſſed; for it may be in the form of a charter. Co. Lit. 98. 8. Co. 18, 19. Or, by way of a GRANT, by the king in parliament. Co Lit. 98.—And therefore, if the king grants PER CONSILIUM FIDELIUM SUBDITORUM, and it has always had the reputation of an act of parliament, it is SUFFICIENT. 8. Co. 20. a. Jon. 103. So, if the act be penned, DE CONCILIO PRÆLATORUM, COMITUM, BARONUM, ET ALIORUM DE REGNO NOSTRO STATUIMUS, &c. 8. Co. 20. So, if it be *certified* as an act of parliament by the chancellor, when *nul tiel record* is pleaded, and a *certiorari* goes to him to certify; though the royal aſſent be not expreſſed. 3. Keb. 587.

GENERAL

(b) Made at Weſtminſter 25th April, ann. 3. Edw. 1. An. Dom. 1275. Co. Lit. 114, 115. Barring. Obſ. Stat. 67. ſeq.

(c) Time of memory hath been long ago aſcertained by the law to commence from the reign of Richard the firſt, and any cuſtom may be deſtroyed by evidence of its non-exiſtence in any part of the long period from his days to the preſent. This rule was adopted, when by the ſtat. of Weſt. 1. c. 39. the reign of Richard I. was made the time of limitation of a writ of right. But, ſince by the ſtat. 32. Hen. 8. 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 æra ſo very antiquated. Black. Com. 2 vol. 31. 2. Rol. Abr. 269. pl. 16. and Hawk. Abr. of Co. Lit. 168. But ſee Lit. ſec. 170. and Co. Lit. 113.

AND

AND therefore it is, that thoſe ſtatutes, or acts of parliament, that were made before the beginning of the reign of king Richard the firſt, and have not ſince been repealed, or altered, either by contrary uſage, or by ſubſequent acts of parliament, are now accounted part of the *lex non ſcripta*; being, as it were, incorporated thereinto, and become a part of the common law. And in truth, ſuch ſtatutes are not now pleadable as acts of parliament. Becauſe what is BEFORE time of memory, is ſuppoſed without a beginning, or, at leaſt ſuch a beginning as the law takes notice of. But they obtain their ſtrength by mere immemorial uſage or cuſtom *(d)*.

AND doubtleſs, many of thoſe things that now obtain as common law, had their original by parliamentary acts or conſtitutions, made in writing, by the king, lords, and commons *(e)*; though thoſe acts are now either not extant, or, if extant, were made before time of memory. The evidence of the truth hereof will eaſily appear; for that in many of thoſe old acts of parliament that were made before

GENERAL acts are always INROLLED by the clerk of the parliament, and delivered to the *Chancery*; which inrollment in *Chancery* makes the ORIGINAL record. But PRIVATE acts are *not* inrolled, unleſs at the ſpecial ſuit of the party: the original bill, with the aſſent of the lords and commons and royal aſſent indorſed and filed, and labelled with the other bills to which the great ſeal is annexed, which remain with the clerk of parliament, is the original record. Hob. 109.

(d) If found in records or hiſtories, they ought *not* to be reputed as acts of parliament. Com. Dig. 4. v. 334. Dr. Taylor's Elements of the Civil Law, 241. ſeq. and Summary of the Roman Law 113, 114, 115, 116. But *note* Hale, towards the end of this chapter.

(e) The common law and the ſtatute law flow originally from the ſame fountain, the legiſlature; the ſtatute law being the will of the legiſlature, remaining on record in writing; the common law, nothing elſe but ſtatutes, antiently written, but which have been worn out by time. All our law began by conſent of the legiſlature; and whether it be now law by cuſtom, by uſage, or by writing, it is the ſame thing. Wilſ. Par. 2. 348. 351. and ſee the 4th chap. of this Hiſtory.

time of memory and are yet extant, we may find many of thoſe laws enacted, which now obtain merely as common law, or the general cuſtom of the realm. Were the reſt of thoſe laws extant, probably the footſteps of the original inſtitution of many more laws that now obtain merely as common law, or cuſtomary laws by immemorial uſage, would appear to have been at firſt ſtatute laws, or acts of parliament.

THOSE antient acts of parliament which are ranged under the head of *leges non ſcriptæ*, or cuſtomary laws, as being made before time of memory, are to be conſidered under two periods. Firſt, ſuch as were made before the coming-in of king William I. commonly called the conqueror. Or, ſecondly, ſuch as intervened between his coming in and the beginning of the reign of Richard I, which is the legal limitation of time of memory.

THE former ſort of theſe laws are mentioned by our antient hiſtorians, eſpecially by Brompton; and are now collected into one volume by William Lambard, Eſq. in his *Tractatus de priſcis Anglorum Legibus*; being a collection of the laws of the kings, Ina, Alfred, Edward, Athelſtane, Edmond, Edgar, Ethelred, Canutus, and of Edward the confeſſor. Which laſt body of Laws, compiled by Edward the confeſſor, as they were more full and perfect than the reſt, and better accommodated to the then ſtate of things, ſo they were ſuch whereof the Engliſh were always very zealous;—as being the great rule and ſtandard of their rights and liberties (B). Whereof more hereafter *(f)*.

THE

(B) As to the laws of Edward the confeſſor, the authenticity of theſe in print is controverted by Dr. Hickes *. Mr. Lambard, who publiſhed the firſt edition of the Angle-Saxon Laws, informs his reader, that theſe called Edward the confeſſor's were printed from two manuſcripts, and that though one of them was very antient, yet the other was not ſo old †. The moſt commendable circumſtance of Edward the confeſſor's government, was his attention to the adminiſtrati n

* Hic. Theſ. Ling. ſeptem. diſſert. epiſt. 95. † Lamb. Archa. 124. 9.

(f) Chap. 3. and 5.

THE ſecond ſort are thoſe edicts, acts of parliament, or laws, that were made after the coming-in of king William, commonly named the conqueror, and before the beginning of the reign of king Richard I. and more eſpecially are thoſe which follow; whereof I ſhall make but a brief remembrance here, becauſe it will be neceſſary in the ſequel of this diſcourſe *(g)*, it may be more than once, to reſume the mention of them. And beſides, Mr. Selden, in his book called *Janus Anglorum*, has given a full account of thoſe laws. So that at preſent, it will be ſufficient for me briefly to collect the heads or diviſions of them, under the reigns of thoſe ſeveral kings wherein they were made.

FIRST, The laws of king William I. Theſe conſiſted in a great meaſure of the repetition of the laws of king Edward the confeſſor, and of the enforcing them by his own authority, and THE ASSENT OF PARLIAMENT, at the requeſt of the Engliſh; and ſome new laws were added by himſelf,

niſtration of juſtice, and his compiling, for that purpoſe, a body of laws, which he collected from the laws of Ethelbert, Ina, and Alfred. This compilation, though now loſt (for the laws that paſs under Edward's name were compoſed afterwards), was long the object of affection to the Engliſh nation *. In truth, what were in reality the laws of Edward the confeſſor is much diſputed by antiquarians, and our ignorance of them ſeems one of the greateſt defects in Engliſh hiſtory. The collection of laws in Wilkins which paſs under the name of Edward, are plainly a poſterior and an ignorant compilation. Thoſe to be found in Ingulf are genuine; but ſo imperfect, and contain ſo few clauſes favourable to the ſubject, that there is no great reaſon for contending for them ſo vehemently. It is probable, that the Engliſh meant the common law, as it prevailed during the reign of Edward; which we may conjecture to have been more indulgent to liberty than the Norman inſtitutions. The moſt material articles of it were comprehended in Magna Charta. Lord Lyttelton, in his Life of Henry the Second, has beſtowed ſome pains on this ſubject. Mr. Hume, though leſs diffuſe, is more comprehenſive.

* Spelm. in verbo Balliva.

(g) Chap. 7.

with the like aſſent of parliament, relating to military tenures, and the preſervation of the public peace of the kingdom: all which are mentioned by Mr. Lambard, in the tractate before mentioned, but more fully by Mr. Selden, in his collections and obſervations upon Eadmerus.

SECONDLY, We find little of new laws after this, till the time of king Henry I, who, beſides the confirmation of the laws of the confeſſor, and of king William I. brought in a new volume of laws, which to this day are extant, and called the laws of king Henry I. (*b*) The entire collection of theſe is entered in the red book of the exchequer, and from thence are tranſcribed and publiſhed, by the care of ſir Roger Twiſden, in the latter end of Mr. Lambard's book before mentioned. What the ſucceſs of thoſe laws were in the time of king Stephen and king Henry II. we ſhall ſee hereafter (*i*): but they did not much obtain in England, and are now for the moſt part become wholly obſolete, and in effect quite antiquated.]

THIRDLY, The next conſiderable body of acts of parliament, were thoſe made under the reign of king Henry II. commonly called the Conſtitutions of Clarendon. What they were, appears beſt in Hoveden and Matthew Paris, under the years of that king. We have little memory elſe of any conſiderable laws enacted in this king's time, except his aſſizes, and ſuch laws as related to the foreſts; which were afterwards improved under the reign of king Richard I. But of this hereafter more at large (*k*).

AND this ſhall ſerve for a ſhort inſtance of thoſe ſtatutes, or acts of parliament, that were made before time of memory.

(*b*) The authenticity of the laws of Henry the firſt is much doubted.

(*i*) Chap. 7.
(*k*) Chap. 7.

Whereof

Whereof as we have no authentical records, but only tranſcripts, either in our antient hiſtorians, or other books and manuſcripts; ſo, they being things done before time of memory, obtain at this day no further than as by uſage and cuſtom they are, as it were, engrafted into the body of the common law and made a part thereof.

AND now I come to thoſe *leges ſcriptæ*, or acts of parliament, which were made ſince or within the time of memory, viz. ſince the beginning of the reign of Richard I. And thoſe I ſhall divide into two general heads, viz.—thoſe we uſually call the old ſtatutes, and thoſe we uſually call the new, or later, ſtatutes. And becauſe I would prefix ſome certain time, or boundary, between them, I ſhall call thoſe the old ſtatutes, which end with the reign of king Edward II. and thoſe I ſhall call the new, or later, ſtatutes, which begin with the reign of king Edward III. and ſo are derived through a ſucceſſion of kings and queens down to this day, by a continued and orderly ſeries.

TOUCHING theſe later ſort I ſhall ſay nothing; for they all keep an orderly and regular ſeries of time, and are extant upon record, either in the parliament rolls, or in the ſtatute rolls of king Edward III. and thoſe kings that follow. For excepting ſome few years in the beginning of king Edward III. (i. e. 2, 3. 7, 8, and 9. E. 3.) all the parliament rolls that ever were ſince that time have been preſerved, and are extant; and for the moſt part, the petitions upon which the acts were drawn up, or the very acts themſelves.

NOW therefore touching the elder acts of parliament, viz. thoſe that were made between the firſt year of the reign of king Richard I. and the laſt year of king Edward II. we have little extant in any authentical hiſtory; and nothing in

any

any authentical record touching acts made in the time of king Richard I. unleſs we take in thoſe conſtitutions and aſſizes mentioned by Hoveden as aforeſaid (*l*).

NEITHER is there any great evidence, what acts of parliament paſſed in the time of king John; though, doubtleſs, many there were both in his time, and in the time of king Richard I. But there is no record extant of them, and the Engliſh hiſtories of thoſe times give us but little account of thoſe laws; only Matthew Paris (*m*) gives us an hiſtorical account of the *magna charta*, and *charta de foreſta*, granted by king John at Running Mead, the fifteenth of June, in the ſeventeenth year of his reign.

AND it ſeems that the conceſſion of theſe charters was in a parliamentary way. You may ſee the tranſcripts of both charters *verbatim* in Matthew Paris, and in the red book of the exchequer. There were ſeven pair of theſe charters ſent to ſome of the great monaſteries, under the ſeal of king John; one part whereof, ſent to the abbey of Tewkeſbury, I have ſeen, under the ſeal of that king. The ſubſtance thereof differs ſomething from the *magna charta*, and *charta de foreſta*, granted by king Henry III. but not very much, as may appear by comparing them (*n*).

(*l*) Vide chap. 7.

(*m*) The former part of the hiſtory which goes under the name of Matthew Paris to the year 1235, is ſuppoſed to have been written by Roger Wendover; but it is generally referred to as the work of Matthew Paris, who died A. D. 1259.

(*n*) Thoſe who are deſirous of receiving further information of theſe antient charters, may ſee very accurate copies of them, with a learned and elegant introductory diſcourſe, in the law tracts of Mr. juſtice Blackſtone. See alſo lord Lyttelton's Hiſtory of Henry II. p. 174. and the ſeventh chapter of this Hiſtory.

BUT though theſe charters of king John ſeem to have been paſſed in a kind of parliament, yet it was in a time of great confuſion between that king and his nobles; and therefore they obtained not a full ſettlement till the time of king Henry III. when the ſubſtance of them was enacted by a full and ſolemn parliament.

I THEREFORE come down to the times of thoſe ſucceeding kings, Henry III. Edward I. and Edward II. The ſtatutes made in the times of thoſe kings, I call the old ſtatutes; partly becauſe many of them were made but in affirmance of the common law; and partly becauſe the reſt of them, that made a change in the common law, are yet ſo antient, that they now ſeem to have been, as it were, a part of the common law; eſpecially conſidering the many expoſitions that have been made of them in the ſeveral ſucceſſions of times, whereby as they became the great ſubject of judicial reſolutions and deciſions, ſo thoſe expoſitions and deciſions, together alſo with thoſe old ſtatutes themſelves, are as it were incorporated into the very common law, and become a part of it.

IN the times of thoſe three kings laſt mentioned, as likewiſe in the times of their predeceſſors, there were doubtleſs many more acts of parliament made, than are now extant of record, or otherwiſe; which might be a means of the change of the common law in the times of thoſe kings from what it was before; though all the records or memorials of thoſe acts of parliament, introducing ſuch a change, are not at this day extant. But of thoſe that are extant, I ſhall give you a brief account, not intending a large or accurate treatiſe touching that matter.

THE reign of Henry III. was a troubleſome time, in reſpect of the differences between him and his barons, which were

were not compoſed till his fifty-firſt year, after the battle of Eveſham (*o*). In his time there were many parliaments, but we have only one ſummons of parliament extant of record in his reign, viz. 49. Henry III. (*p*) And we have but few of thoſe many acts of parliament that paſſed in his time, viz. the great charter, and *charta de foreſta*, in the ninth year of his reign, which were doubtleſs paſſed in parliament. The ſtatute (*q*) of Merton (*r*), in the twentieth year of his reign (*s*); the ſtatute of Marlbridge (*t*), in the fifty-ſecond year;

(*o*) Fought on the 4th of Auguſt 1265.

(*p*) It does not appear that the citizens and burgeſſes, who were then, properly ſpeaking, the commons of the realm, were regularly ſummoned at this time. All we find is, that the cities of York and Lincoln, and other boroughs of England, were written to and required to ſend two of the moſt diſcreet men, &c.

(*q*) It ſeems to be only an ordinance. Barr. Obſ. Stat. 41.

(*r*) It is called the ſtatute of Merton, from the parliament, or rather council, ſitting at the priory of Merton, in Surrey, which belonged to regular canons, according to Dugdale. Though ſome of the priories might have had very large and ſpacious houſes, yet it is not probable that there could have been accommodation for what is now called a parliament, with the intervention of commons; and it ſhould ſeem, from Dugdale's ſhort account of this priory, that it was by no means largely endowed. In all the antient palaces of the kings of England, there was a large room, or hall, for the accommodation of what was then called a parliament, which went by the name of the parliament chamber. There is ſuch an hall, now converted into a barn, at Eltham, in Kent, which is ſaid to have been a palace of king John, though it is now conſidered by eminent antiquaries as being of a later date. Barrington has little doubt but Weſtminſter Hall was built for the ſame purpoſe. There was likewiſe ſuch a room in the old palaces of the kings of Scotland; particularly at Linlithgow, and Sterling. Barr. Obſ. Stat. 41.

(*s*) A. D. 1236.

(*t*) Or Marlebridge, "now "called" (as Sir Edward Coke, 2. Inſt. 101. ſays) "Marlebo- "rough, a town in Wiltſhire, "the greateſt fame whereof is "the holding of this parliament "there." "Henricus vero con- "cilium convocavit Marlebrigi- "um, quod eſt pagus celebris "comitatus Wilcriæ, qui in eo "conventu primum leges ab ſe "latas, et præſertim Magnæ "Chartæ de concilii ſententia "approbandas, deinde alias con- "dendas curavit, quæ ad ſtatum "et commodum regni maxime

"con-

year *(u)*; and the *dictum ſive edictum de Kennelworth (w)*, about the ſame time; and ſome few other old acts.

In the time of king Edward I. there are many more acts of parliament extant than in the time of king Henry III. Yet doubtleſs in this king's time there were many more ſtatutes made than are now extant. Thoſe that are now extant, are commonly bound together in the old book of Magna Charta. By thoſe ſtatutes, great alterations and amendments were made in the common law. And by thoſe that are now extant, we may reaſonably gueſs, that there were conſiderable alterations and amendments made by thoſe that are not extant: which poſſibly may be the real, though ſudden, means of the great advance and alteration of the laws of England in this king's reign, over what they were in the time of his predeceſſors.

" conducerent." See Polyd. Virgil, p. 314, 310.

This town, in our law books, is called a city, and the freemen citizens. 2. Inſt. 101. 39. E. 3. fo. 15.

Though Marlebridge, where this parliament was holden, is ſuppoſed to be the ſame with the town at preſent called Marlborough, yet there is ſome reaſon to doubt it, as the terminations are very different. In Saxton's maps, it is ſpelt Marlingeſboro. The city of Lincoln, in the old ſtatutes, is however called Nicoll, or Nicholl, which is a greater variation from the modern name. Barr. Obſ. Stat. 58

(w) A. D. 1267.

(w) The dictum de Kenelworth was an edict or award between Henry the third and thoſe who had been in arms againſt him; ſo called, becauſe made at Kenelworth caſtle, in Warwickſhire, anno 51. Hen. 3. A. D. 1266. It contained a compoſition of thoſe who had forfeited their eſtates in that rebellion, which compoſition was five years rent of the eſtates forfeited. Vide poſt. ch. 7. See the appendix to the laſt 4to ed. of the Statutes, and Hale's Hiſt. P. C. vol. I. 50. oct. edit.

THE firſt ſummons of parliament that I remember extant of record in this king's time, is 23. Edw. I. (x); though doubtleſs there were many more before this, the records whereof are either loſt or miſlaid. For many parliaments were held by this king before that time, and many of the acts paſſed in thoſe parliaments are ſtill extant; as, the ſtatutes of Weſtminſter 1, in the 3. of Edw. I.; the ſtatutes of Glouceſter, 6. Edw. I.; the ſtatutes of Weſtminſter 2, and of Winton, 13. Edw. I.; the ſtatutes of Weſtminſter 3, and of *quo warranto*, 10. Edw. I.; and divers others in other years, which I ſhall have occaſion to mention hereafter (y).

IN the time of king Edward II. many parliaments were held, and many laws were enacted. But we have few acts of parliament of his reign extant, eſpecially of record.

AND now, becauſe I intend to give ſome ſhort account of ſome general obſervations touching parliaments, and of acts of parliament paſſed in the times of thoſe three princes, viz. Henry III. Edward I. and Edward II. becauſe they are of greateſt antiquity, and therefore the circumſtances that attended them moſt liable to be worn out by proceſs of time, I will here mention ſome particulars relating to them, to preſerve their memory, and which may alſo be uſeful to be known in relation to other things.

WE are therefore to know, that there are theſe ſeveral kinds of records of things done in parliament, or eſpecially relating thereto, viz.

(x) The firſt regular ſummons we meet with, directed to the ſheriff, for the election of citizens and burgeſſes, is in the 23d of Edw. I. The commons had by this time obtained ſome influence. Such however was the groſs inattention to their rights, that their aſſent was not, for ſome time after, held eſſential to the enacting of laws.

(y) Chap. 7.

1. THE ſummons to parliament.

2. THE rolls of parliament.

3. BUNDLES of petitions in parliament.

4. THE ſtatutes, or acts of parliament themſelves. And,

5. THE *brevia de parliamento*, which for the moſt part were ſuch as iſſued for the wages of knights and burgeſſes. But with theſe I ſhall not meddle.

FIRST, As to the ſummons to parliament.

THESE ſummons to parliament are not all entered of record in the times of Henry III. and Edward I. none being extant of record in the time of Henry III. but that of 49. Hen. III. and none in the time of Edward I. till the 23. Edw. I. But after that year, they are for the moſt part extant of record, viz. *in dorſo claus' rotulorum*, in the backſide of the cloſe rolls.

SECONDLY, As to the rolls of parliament, viz. the entry of the ſeveral petitions, anſwers and tranſactions in parliament. Thoſe are generally and ſucceſſively extant of record in the Tower, from 4. Edw. III. downward, till the end of the reign of Edward IV. excepting only thoſe parliaments that intervened between the firſt and the fourth, and between the ſixth and the eleventh of Edward III.

BUT of thoſe rolls in the times of Henry III. and Edward I. and Edward II. many are loſt and few extant. Alſo, of the time of Henry the third I have not ſeen any parliament roll. And all that I ever ſaw of the time of Edward I. was one roll of parliament in the receipt of the exchequer of

18. Edw.

18. Edw. I. and thoſe proceedings and remembrances which are in the *Liber Placitor' Parliamenti* in the Tower; beginning, as I remember, with the twentieth year of Edward I. and ending with the parliament of Carliſle, 35. Edw. I. and not continued between thoſe years with any conſtant ſeries; but including ſome remembrances of ſome parliaments in the time of Edward I. and others in the time of Edward II.

IN the time of Edward II. beſides the *rotulus ordinationum* of the lords ordoners, about 7. Edw. II. we have little more than the parliament rolls of 7. & 8. Edw. II. and what others are interſperſed in the parliament book of Edward I. abovementioned; and as I remember, ſome ſhort remembrances of things done in parliament in the 19. Edw. III.

THIRDLY, As to the bundles of petitions in parliament. They were for the moſt part petitions of private perſons, and are commonly indorſed with remiſſions to the ſeveral courts where they were properly determinable. There are many of thoſe bundles of petitions; ſome in the times of Edward I. and Edward II. and more in the times of Edward III. and the kings that ſucceeded him.

FOURTHLY, The ſtatutes, or acts of parliament themſelves. Theſe ſeem as if in the time of Edward I. they were drawn up into the form of a law in the firſt inſtance, and ſo aſſented to by both houſes, and the king; as may appear by the very obſervation of the contexture and fabrick of the ſtatutes of thoſe times. But from near the beginning of the reign of Edward III. till very near the end of Henry VI. they were not in the firſt inſtance drawn up in the form of acts of parliament. But the petition and the anſwer were entered in the parliament rolls, and out of both,

by

by advice of the judges and others of the king's counſel, the act was drawn up conformable to the petition and anſwer; and the act itſelf for the moſt part entered in a roll, called the ſtatute roll, and the tenor thereof affixed to proclamation writs, directed to the ſeveral ſheriffs, to proclaim it as a law in their reſpective counties. *(z)*. [C]

BUT

(z) The art of printing, which makes the public, and not a few individuals, the guardians of the laws;—which has created a proud public right, *the liberty of the preſs*; a right inſeparable from the principles of a free government; and eſſential to the ſecurity of the Britiſh Conſtitution, has long ſince ſuperſeded the antient mode of promulgation by the ſheriff.—The promulgation was, as lord Holt obſerves, but a mere act of *grace*. 1. Ld. Raym. 501.

[C] If we conſult the parliament rolls, whereon the petitions of the commons are entered with the king's anſwers, we ſhall find, that to petitions of a public nature the king's aſſent is entered in theſe words, "*le roy le voet.*" By ſuch anſwer, the royal aſſent was compleatly given, and the bill acquired the force of a law before it paſſed the great ſeal, and was entered on the ſtatute roll. If the diſtinction may be admitted, we might ſay that the parliament roll contained the ſubſtance and the ſtatute roll the form of the law. Many acts however, though undoubtedly valid, were *not* entered on the *ſtatute roll*; for if the bill did not demand NOVEL LEY; that is, if the proviſion required would ſtand with the laws then in force, and did not tend to alter any ſtatute then in being; in ſuch caſe the law was compleat by the royal aſſent on the parliament roll, without any entry on the ſtatute roll. Such bills were uſually termed ORDINANCES, being ſuch as might at any time be amended by the parliament without any ſtatute; for one ſtatute could not be altered but by another: and this diſtinction is clearly expreſſed in the rolls hereunder cited, viz.

Rot. Parl. 37. E. 3. nu. 38. "As the things granted in this "parliament were *new*, and not known before then, the king aſked "the commons, if they would have the things ſo granted by way of "ORDINANCE, or ſtatute? And they anſwered, that it was good "to have them by way of ORDINANCE, and not by ſtatute, to the "end that if any thing required amendment, it might be amended "at the next parliament." [N. B. Among the ordinances on this roll, is one for regulating apparel; and it is obſervable, that "the "chancellor, by the king's command, charged the commons, at "their return into the country, *to ſhew and publiſh* the ORDINANCE "of apparel, to the end that every one might wear apparel agree-

BUT becauſe ſometimes difficulties and troubles aroſe, by this extracting of the ſtatute out of the petition and anſwer, about the latter end of Henry VI. and beginning of Edward IV. they took a courſe to reduce them, even in the firſt inſtance, into the full and complete form of acts of parliament; which was proſecuted (or entered) commonly in this form: *Item quædam petitio exhibita fuit in hoc parliamento formam actus in ſe continens, &c.* And abating that ſtile, the method ſtill continues much the ſame; namely, that the entire act is drawn up in form, and ſo comes to the king for his aſſent.

THE ancient method of paſſing acts of parliament being thus declared, I ſhall now give an account touching thoſe acts of parliament that are at this day extant, of the times of Henry III. Edward I. and Edward II. They are of two ſorts, *viz.* ſome of them are extant of record; others are extant in ancient books and memorials, but not of

" able thereto." Therefore this ſerves to explain in what manner thoſe acts which were *not* entered on the *ſtatute roll*, and conſequently *not* proclaimed by the ſheriffs, were made known to the people.—But to proceed]—It may be collected from this record, that though the law demanded was *new*, yet as it was ſuch as might ſtand with the old laws, and did *not* alter any ſtatute then in force, it might paſs indifferently by way of ordinance, or ſtatute; whereas if it *changed* any *old law*, it MUST have been BY STATUTE; as is farther evident from the following record. " Rot. Parl. 22. E. 3. nu. 30. The " king, by the aſſent of the lords, made anſwer, that laws and pro- " ceſs *heretofore uſed* could *not* be *changed*, without making NEW " STATUTES." But after all, it muſt be confeſſed, that whatever the right was, yet ſo *irregular* was the *practice*, that a great number of printed acts, as Prynne obſerves, refute this diſtinction. In ſhort, acts are, by the legiſlature, frequently called ORDINANCES; and ordinances are as frequently ſtiled acts of parliament or ſtatutes; and ſometimes the words, *act* and *ordinance*, are coupled together. Therefore perhaps the only difference, if any, between them is, that bills entered with the royal aſſent on the parliament roll were called ORDINANCES, and when entered on the ſtatute roll were ſtiled STATUTES. In ſhort, however they may be verbally diſtinguiſhed, their operation was the ſame. See Lord Macclesfield's Trial.

record.

record. And thoſe which are extant of record, are either recorded in the proper and natural roll, *viz.* the ſtatute roll; or, they are entered in ſome other roll, eſpecially in the cloſe rolls and patent rolls, or in both. Thoſe that are extant but not of record, are ſuch as though they have no record extant of them; but poſſibly the ſame is loſt, yet they are preſerved in ancient books and monuments, and in all times have had the reputation and authority of acts of parliament.

FOR an act of parliament made within time of memory loſes not its being ſo, becauſe not extant of record; eſpecially if it be a general act of parliament. For of general acts of parliament, the courts of common law are to take notice without pleading of them. And ſuch acts ſhall never be put to be tried by the record, upon an iſſue of *nul tiel record*, but it ſhall be tried by the court; who, if there be any difficulty or uncertainty touching it, or the right of pleading of it, are to uſe for their information ancient copies, tranſcripts, books, pleadings, and memorials, to inform themſelves; but not to admit the ſame to be put in iſſue by a plea of *nul tiel record* [D].

FOR,

[D] A general or public act of parliament is an univerſal rule, that regards the whole community (*a*).

All acts which concern the king, who is the head of the commonwealth, *are general laws*, of which the judges will take notice, without pleading. 8. Co. 28. 4. Co. 13. 77. So if they concern the queen; for ſhe is the king's wife. Or, the prince; for he is the eldeſt ſon of the king, and heir apparent to the crown. 8. Co. 28. The ſt. 2. R. 2. 5. *de ſcandalis magnatum* is a general law; for it touches the prelates, nobles, and great officers, who are of the king's council. 4. Co. 13. So the ſt. 35. H. 8. which concerns the capacity of the queen. 8. Co. 28. Pl. Com. 231. a. So the ſt. 11. Ed. 3. which makes the Prince duke of Cornwall. 8. Co. 28. So a ſtatute which concerns the whole SPIRITUALITY; as 21. H. 8.

(*a*) Blac. Com. 1. V. 86.

FOR, as ſhall be ſhewn hereafter, there are very many old ſtatutes which are admitted and obtain as ſuch, though there be no record at this day extant thereof; nor yet any other written evidence of the ſame, but what is in a manner only traditional; as, namely, ancient and modern books of pleadings, and the common received opinion and reputation, and the approbation of the judges learned in the laws. For the judges and courts of juſtice are, *ex officio*, bound to

13. 4. Co. 76. a. 1. Brownl. 208. So 13. El. 10. and 18. El. 11. 4. Co. 76. a. 120. b. 1. Brownl. 208. So a ſtatute which concerns all officers in general; as the ſt. W. 1. 26. that no ſheriff or other miniſter take reward, &c. 4. Co. 76. a. So a ſtatute which concerns trade in general. 4. Co. 76. b. So the ſt. 1. Jac. 22. which relates to ſhoemakers, &c. is a general law. Lut. 1410. So the ſt. 2. Ph. & M. 11. which relates to woollen weavers, &c. for the penalties are given to the king. Skin. 429. So a ſtatute which concerns all the lords generally, as the ſt. Marl. 3. 4. Co. 76. So if it concerns all perſons generally, though it be but a ſpecial or particular thing; as a ſtatute which concerns appeals, or aſſiſes, or other particular action, *elegit*, attaint, &c. the ſt. Mert. 6. and 4. H. 7. 17. concerning wards, 4. Co. 76. the ſt. W. 2. [vide W. 1. c. 20] *de malefactoribus in parcis*; and *charta de foreſta*; the ſt. 22. Ed. 4. 7. and 35. H. 8. 17. of woods in foreſts, chaſes, &c. 8. Co. 138. b.

But now, when any particular law paſſes which the legiſlature mean ſhould operate as a public act, it is, in general, enacted, that the act ſhall be deemed a public act, and be judicially taken notice of as ſuch, without ſpecially pleading the ſame (*b*).

In an action for exerciſing the trade of a worſted weaver in the city of Norwich, contrary to the 13th and 14th Ch. II. there was a ſpecial verdict.

Deniſon J. deſired that it might be conſidered, whether the act was not a private ſtatute, of which, as it was NOT pleaded, the judges could not take notice; and he mentioned the caſe of Rex v. Wild, 2. Keb. 686, in which it was agreed by the court, that this ſtatute is a private ſtatute.

It was admitted, that the objection of Mr. J. Deniſon, as ſupported by the caſe of Rex v. Wild, was concluſive, and therefore judgment was given for the defendant (*c*).

(*b*) Co. Lit. 99. a. edit. Hargrave.

(*c*) Adcock v. Gill, Mich. 26. Geo. 2.

take

take notice of *public* acts of parliament, and whether they are truly pleaded or not;—and therefore they are the triers of them. But it is otherwiſe of *private* acts of parliament, for they may be put in iſſue and tried by the record, upon *nul tiel record* pleaded, unleſs they are produced exemplified; as was done in the Prince's caſe, in Lord Coke's 8th Rep. (*d*) and therefore the averment of *nul tiel record* was refuſed in that caſe (*e*).

THE old ſtatutes or acts of parliament that are of record, as is before ſaid, are entered either upon the proper ſtatute roll, or ſome other roll in chancery.

THE firſt ſtatute roll which we have, is in the Tower; it begins with *Magna Charta* and ends with Edward III. and is called *Magnus Rotulus Statutor'*. There are five other ſtatute rolls in that office, of the times of Richard II. Henry IV. Henry V. Henry VI. and Edward IV.

I SHALL now give a ſcheme of thoſe ancient ſtatutes of the times of Henry III. Edward I. and Edward II. that are recorded in the firſt of thoſe rolls or elſewhere, to the beſt of my remembrance, and according to thoſe memorials I have long had by me, *viz.*

(*d*) 8. Co. 28.

(*e*) The judges ought to take notice of a GENERAL law, for they are to determine whether it be a ſtatute or not. *Co. Lit.* 98. *b. Dy.* 93. 1. *Lev.* 296. and therefore a man can NOT plead NUL TIEL RECORD to it. 8. *Co.* 28. *a.* So it ſhall *not* be proved by a journal, *Hob.* 110. or alledged, that the aſſent of the Commons was conditional. *Mo.* 824. But a ſtatute which concerns only a particular ſpecies, a particular thing, or a particular perſon, is deemed a PRIVATE ACT, of which the judges are not bound to take any notice, unleſs it be SPECIALLY pleaded. 4. *Co.* 76. *a.* A ſtatute which relates to a particular place or town, will be conſidered as a PRIVATE law, though it may concern ALL perſons. 4. *Co.* 76. *b.* Skin. 350. And in a GENERAL act, there may be a PRIVATE clauſe. 10. *Co.* 57. *b.*

MAGNA Charta. Magno Rot. Stat. membr. 40. & Rot. Cartar. 28. E. 1. membr. 16.

CHARTA de Foreſta. Mag. Rot. Stat. membr. 19. & Rot. Cartar. 28. E. 1. membr. 26.

STAT. de Glouceſtre. Mag. Rot. Stat. membr. 47.

WESTM. 2. Rot. Mag. Stat. membr. 47.

WESTM. 3. Rot. Clauſo, 18. E. 1. membr. 6. Dorſo.

WINTON. Rot. Mag. Stat. membr. 41. Rot. Clauſo, 8. E. 3. membr. 6. Dorſo. Pars 2. Rot. Clauſo, 5. R. 2. membr. 13. Rot. Paten. 25. E. 1. membr. 13.

DE Mercatoribus. Mag. Rot. Stat. membr. 47. in Dorſo.

DE Religioſis. Mag. Rot. Stat. membr. 47.

ARTICULI Cleri. Mag. Rot. Stat. membr. 34. Dorſo. 2. Pars. Pat. E. 1. 2. membr. 34. 2. Pars. Pat. 2. E. 3. membr. 15.

DE hiis qui ponendi ſunt in Aſſiſis. Mag. Rot. Stat. membr. 41.

DE Finibus levatis. Mag. Rot. Stat. membr. 37.

DE Defenſione Juris liberi Parliam. Lib. Parl. E. 1. fo. 32.

STAT. Eborum. Mag. Rot. Stat. membr. 32.

DE Conjunctis Infeofatis. Mag. Rot. Stat. membr. 34.

DE Eſcaetoribus. Mag. Rot. Stat. membr. 35. Dorſo, & Rot. Clauſ. 29. E. 1. membr. 14. Dorſo.

STAT.

STAT. de Lincolne. Mag. Rot. Stat. menibr.32.

STAT. de Priſcis. Rot. Mag. Stat. membr. 33. in Schedula de libertatibus perquirendis, vel Rot. Clauſ. 27. E. 1. membr. 24.

STAT. de Acton Burnel, Rot. Mag. Stat. membr. 46, Dorſo, & Rot. Clauſ. 11. E. 1, membr. 2.

JURAMENTUM Vicecomit. Rot. Mag. Stat. membr. 34. Dorſo, & Rot, Clauſ. 5. E, 2. membr. 23,

ARTICULI Stat. Glouceſtriæ. Rot. Clauſ. 2. E. 2. Pars 2, membr, 8.

DE Piſtoribus & Braciatoribus, 2. Pars, Clauſ. vel Pat. 2. R. 2. membr. 29.

DE aſportatis Religioſor. Mag, Rot. Stat. membr. 33.

WESTM. 4. De Viceconitibus & Viridi Cæra. Rot. Mag, Stat. membr. 33. in Dorſo.

CONFIRMATIONES Chartarum. Mag. Rot. Stat. membr. 28.

DE Terris Templariorum. Mag. Rot. Stat. membr. 31. in Dorſo, & Clauſ. 17. E. 2. membr. 4.

LITERA patens ſuper Priſis bonorum Cleri. Rot. Mag. Stat. membr. 33. in Dorſo.

DE Forma mittendi Extractas ad Scaccar. Rot. Mag. Stat. membr. 30. & membr. 36. in Dorſo.

STATUTUM de Scaccar. Mag. Rot. Stat.

STATUTUM de Rutland. Rot. Clauſ. 12. E. 1.

ORDINATIO Foreſtæ. Mag. Rot. Stat. membr. 30. & Rot. Clauſ. 17. E. 2. Pars 2. membr. 3.

ACCORDING to a ſtrict enquiry made about thirty years ſince, theſe were all the old ſtatutes of the times of Henry III. Edward I. and Edw. II. that were then be to found of record; what other ſtatutes have been found ſince, I know not.

THE ordinance called Butler's, for the heir to puniſh waſte in the life of the anceſtor, though it be of record in the parliament book of Edward I. yet it never was a ſtatute, nor ever ſo received; but only ſome conſtitution of the king's council, or lords in parliament, and which never obtained the ſtrength or force of an act of parliament.

NOW the ſtatutes that enſue, though moſt of them are unqueſtionable acts of parliament, yet are NOT of record that I know of, but only their memorials preſerved in ancient printed and manuſcript books of ſtatutes; yet they are at this day, for the moſt part, generally accepted and taken as acts of parliament, though ſome of them are now antiquated and of little uſe;—*viz.*

THE ſtatutes of Merton, Marlbridge, Weſtm. 1. Explanatio Statuti Glouceſtriæ, De Champertio, De Viſu Frankplegii, De Pane & Cerviſia, Articuli Inquiſitionis ſuper Stat. de Winton, Circumſpecte Agatis, De Diſtrictione Scaccarii, De Conſpirationibus, De Vocatis and Warrant. Statut. de Carliol, De Prærogativa Regis, De Modo faciendi Homag. De Wardis & Releivis, Dies Communis in Banco, Stat. de Bigamis,

Bigamis, Dies communes in Banco in caſu conſimili. Stat. Hiberniæ, De Quo Warranto, De Eſſoin calumpniand, Judicium Colliſtrigii, De Frangentibus Priſonar'. De Malefactoribus in Parcis, De Conſultationibus, De Officio Coronatoris, De Protectionibus, Sententia lata ſuper Chartas, Modus levandi Fines, Statut. de Gavelet, De Militibus, De Vaſto, De Anno Biſſextili, De Appellatis, De Extenta Manerii, Compoſitio Menſarum vel Computatio Menſarum, Stat. De Quo Warranto, Ordinatio De Inquiſitionibus, Ordinatio De Foreſta, De Admenſura Terræ, De Dimiſſione Denarior. Stat. De Quo Warranto Novùm, Ne Rector proſternat Arbores in Cæmeterio, Conſuetudines & Aſſiſa de Foreſta, Compoſitio de Ponderibus, De Tallagio, De Viſu Terræ & Servitio Regis, Compoſitio Ulnarum & Particarum, De Terris amortizandis, Dictum De Kenelworth, &c.

FROM whence we may collect theſe two obſervations, *viz.*

FIRST, that although the record itſelf be not extant, yet general ſtatutes made within time of memory, namely, ſince 1. *Richardi primi*, do not loſe their ſtrength, if any authentical memorials thereof are in books, and ſeconded with a general received tradition atteſting and approving the ſame *(f)*.

SECONDLY, that many records, even of acts of parliament, have in long proceſs of time been loſt, and poſſibly the things themſelves forgotten at this day; which yet, in or

(f) As there are ſome ſtatutes in print which are not to be found on record, ſo there are ſeveral on record which have never yet been printed. Sir Edw. Coke has enumerated many of his kind. 8. Rep. the Prince's caſe. But the reader will meet with ſeveral in the appendix to the laſt quarto edition of the Statutes at large, not noticed by Coke or any other perſon; ſome of which afford not only gratification to the antiquary, but information to the lawyer and the hiſtorian.

near

near the times wherein they were made, might cauſe many of thoſe authoritative alterations in ſome things touching the proceedings and deciſions in law; the original cauſe of which change being otherwiſe at this day hid and unknown to us. And indeed, hiſtories and annals give us an account of the ſuffrages of many parliaments, whereof we at this time have none, or few footſteps extant in records or acts of parliament. The inſtance of the great parliament at Oxford, about the fortieth of Henry III. may, among many others of like nature, be a concurrent evidence of this. For though we have mention made in our hiſtories of many conſtitutions made in the ſaid parliament at Oxford, and which occaſioned much trouble in the kingdom, yet we have no monuments of RECORD concerning that parliament, or what thoſe conſtitutions were.

AND thus much ſhall ſerve touching thoſe old ſtatutes or *leges ſcriptæ*, or acts of parliament, made in the times of thoſe three kings, Henry III. Edward I. and Edward II. Thoſe that follow in the times of Edward III. and the ſucceeding kings, are drawn down in a continued ſeries of time, and are extant of record in the parliament rolls, and in the ſtatute rolls, without any remarkable omiſſion; and therefore I ſhall ſay nothing of them.

CHAP.

CHAP. II.

Concerning the lex non ſcripta, i. e. *the common or municipal law of this kingdom (a).*

IN the former chapter I have given you a ſhort account of that part of the laws of England which is called *lex ſcripta*; namely, ſtatutes or acts of parliament, which in their original formation are reduced into writing, and are ſo preſerved in their original form, and in the ſame ſtile and words wherein they were firſt made. I now come to that part of our laws called *lex* NON *ſcripta*, under which I include not only general cuſtoms, or the common law properly ſo called, but even thoſe more *particular* laws and cuſtoms applicable to certain courts and perſons, whereof more hereafter.

AND when I call thoſe parts of our laws *leges non ſcriptæ*, I do not mean as if all thoſe laws were only oral, or communicated from the former ages to the later, merely by word; for all thoſe laws have their ſeveral monuments in writing, whereby they are tranſferred from one age to another, and without which they would ſoon loſe all kind of certainty: for as the civil and canon laws have their *reſponſa prudentum conſilia & deciſiones*, i e. their canons, decrees, and decretal determinations, extant in writing; ſo thoſe laws of England which are not comprized under the title of acts of parliament, are for the moſt part extant in records of pleas, proceedings and judgments; in books of reports, and judicial deciſions; in tractates of learned men's arguments and opinions, preſerved from ancient times, and ſtill extant in writing.

(a) See the third ſection to the Introduction of Blackſtone's Commentaries.

BUT

BUT I therefore ſtile thoſe parts of the law *leges non ſcriptæ*, becauſe their authoritative and original inſtitutions are not ſet down in writing in that manner or with that authority that acts of parliament are; but they are grown into uſe, and have acquired their binding power and the force of laws BY A LONG AND IMMEMORIAL USAGE, *and by the ſtrength of cuſtom and reception in this kingdom* (*b*). The matters indeed, and the ſubſtance of thoſe laws, are in writing, but the formal and obliging force and power of them grows by long cuſtom and uſe, as will fully appear in the enſuing diſcourſe.

THE municipal laws of this kingdom, which I thus call *leges non ſcriptæ*, are of a vaſt extent, and indeed include in their generality all thoſe ſeveral laws which are allowed as the rule and direction of juſtice and judicial proceedings, and which are applicable to all thoſe various ſubjects about which juſtice is converſant. I ſhall, for more order, and the better to guide my reader, diſtinguiſh them into two kinds, *viz.*

FIRST, The common law, as it is taken in its proper and uſual acceptation.

SECONDLY, Thoſe particular laws applicable to particular ſubjects, matters, or courts,

TOUCHING the former, *viz.* the common law, in its uſual and proper acceptation; this is that law by which proceedings and determinations in the king's ordinary courts of juſtice are directed and guided. This directs the courſe of diſcents of lands, and the kinds; the natures, and the ex-

(*b*) The Roman law, *de jure non ſcripto*, ſays, *ſine ſcripto jus venit*, QUOD USUS APPROBAVIT; *nam diuturni mores, conſenſu utentium comprobati, legem imitantur.* Inſt. l. 1. t. 2. ſ. 9.

tents

tents and qualifications of eſtates; therein alſo the manner, forms, ceremonies and ſolemnities of transferring eſtates from one to another; the rules of ſettling, acquiring, and transferring of properties; the forms, ſolemnities, and obligation of contracts; the rules and directions for the expoſition of wills, deeds, and acts of parliament; the proceſs, proceedings, judgments and executions of the king's ordinary courts of juſtice; the limits, bounds and extents of courts, and their juriſdictions; the ſeveral kinds of temporal offences and puniſhments at common law, and the manner of the application of the ſeveral kinds of puniſhments; and infinite more particulars, which extend themſelves as large, as the many exigencies in the diſtribution of the king's ordinary juſtice requires.

AND beſides theſe more common and ordinary matters to which the common law extends, it likewiſe includes the laws applicable to divers matters of very great moment. And though by reaſon of that application, the ſaid common law aſſumes divers denominations, yet they are but branches and parts of it; like as the ſame ocean, though it many times receives a different name from the province, ſhire, iſland, or country to which it is contiguous, yet theſe are but parts of the ſame ocean.

THUS the common law includes *lex prærogativa (c)*, as it is applied with certain rules to that great buſineſs of the king's prerogative. So it is called *lex foreſtæ*, as it is applied under its ſpecial and proper rules to the buſineſs of foreſts. So it is called *lex mercatoria (d)*, as it is applied under its proper rules to the buſineſs of trade and commerce. And many more inſtances of like nature may be given. Nay, the various and particular cuſtoms of cities, towns and

(c) Blac. Com. l. 1. c. 7.
(d) 8. Rep. 126. Cro. Car. 347. It is a maxim of law, that "cuilibet in ſua arte credendum eſt."

manors

manors are thus far parts of the common law *(e)*, as they are applicable to thoſe particular places; which will appear from theſe obſervations; *viz.*

FIRST, the common law does determine what of thoſe cuſtoms are good and reaſonable, and what are unreaſonable and void. Secondly, the common law gives to thoſe cuſtoms that it adjudges reaſonable, the force and efficacy of their obligation. Thirdly, the common law determines what is that continuance of time that is ſufficient to make ſuch a cuſtom. Fourthly, the common law does interpoſe and authoritatively decide the expoſition, limits and extenſion of ſuch cuſtoms.

THIS common law, though the uſage, practice and deciſions of the king's courts of juſtice may expound and evidence and be of great uſe to illuſtrate and explain it, yet it cannot be authoritatively altered or changed but by act of parliament. But of this common law, and the reaſon of its denomination, more at large hereafter.

NOW, ſecondly, as to thoſe particular laws I before mentioned, which are applicable to particular matters, ſubjects or courts. Theſe make up the ſecond branch of the laws of England, which I include under the general term of *leges non ſcriptæ*. By thoſe particular laws, I mean the laws eccleſiaſtical and the civil law, ſo far forth as they are admitted in certain courts, and certain matters allowed to the deciſion of thoſe courts, whereof hereafter.

IT is true that thoſe civil and eccleſiaſtical laws are indeed written laws; the civil law being contained in their pandects and the inſtitutions of Juſtinian, &c. their im-

(e) Blac. Com. 1. v. 74. ſeq.

perial

perial conſtitutions or codes anſwering to our *leges ſcriptæ*; or ſtatutes *(f)*; and the canon or eccleſiaſtical laws contained for the moſt part in the canons and conſtitutions of councils and popes; collected in their *Decretum Gratiani*, and the decretal epiſtles of popes; which make up the body of their *corpus juris canonici*; together with huge volumes of councils and expoſitions, deciſions and tractates of learned civilians and canoniſts; relating to both laws. So that it may ſeem, at firſt view, very improper to rank theſe under the branch of *leges non ſcriptæ*, or unwritten laws.

BUT I have for the following reaſon ranged theſe laws among the unwritten laws of England, *viz.* becauſe it is moſt plain, that neither the canon law nor the civil law have any obligation, as laws, within this kingdom, upon any account that the popes or emperors made thoſe laws, canons, reſcripts or determinations; or becauſe Juſtinian compiled their *corpus juris civilis*, and by his edicts confirmed and publiſhed the ſame as authentical; or becauſe this or that council or pope made thoſe or theſe canons or decrees; or becauſe Gratian, or Gregory, or Boniface, or Clement, did, as much as in them lay, authenticate this or that body of canons or conſtitutions *(g)*. For the king of England does not recognize any foreign authority, as ſuperior, or equal, to him in this kingdom; neither do any laws of the pope or emperor, as they are ſuch, bind here. But all the ſtrength that either the papal or imperial laws have obtained in this kingdom, is only becauſe they have been received and admitted,

(f) For a correct and conciſe idea of the Roman juriſprudence, and a ſuccinct account of the code, pandects, novels and inſtitutes of Juſtinian, ſee Gib. Hiſt. 5 v. oct. c. 44. and Anc. Univ. Hiſt. vol. xiv. 465. The vain titles of the victories of Juſtinian (ſays Gibbon) are crumbled into duſt; but the name of the legiſlator is inſcribed on a fair and everlaſting monument. See *poſt. Cap.* VII.

(g) A truth which ſtood in no need of proof. Hale in this inſtance has been thought rather to poſſeſs the warmth of a partizan, than the coolneſs of an hiſtorian.

mitted, either by the conſent of parliament, and ſo are part of the ſtatute laws of the kingdom; or elſe, by immemorial uſage and cuſtom in ſome particular caſes and courts, and no otherwiſe. And therefore, ſo far as ſuch laws are received and allowed of here, ſo far they obtain and no farther; and the authority and force they have here is not founded on, or derived from themſelves. For they bind no more with us than our laws bind in Rome or Italy. But their authority is founded merely on their being admitted and received by us, which alone gives them their authoritative eſſence, and qualifies their obligation [A.]

AND hence it is, that even in thoſe courts where the uſe of thoſe laws is indulged, according to that reception which

(A) All the ſtrength that either the papal or the imperial laws have obtained in this, or indeed in any other State in Europe, is only becauſe they have been admitted and received by immemorial uſage and cuſtom in ſome particular caſes and in ſome particular courts; then, to uſe the words of Mr. juſtice Blackſtone, they form a branch of the *leges non ſcriptæ*, or cuſtomary law; or elſe, becauſe they are in ſome other caſes introduced by conſent of parliament, and then they owe their validity to the *leges ſcriptæ*, or ſtatute law. This is declared by the expreſs and remarkable words of the ſtatute 25 Hen. 8. c. 21. intituled "the act concerning Peter-pence and Diſpenſations." "Your grace's realm, (ſays the ſtatute) recognizing no ſuperior under God but only your grace, hath been and is free from ſubjection to any man's laws, but only to ſuch as have been deviſed, made and obtained 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 amongſt them, and have bound themſelves BY LONG USE AND CUSTOM to the obſervance of the ſame, not as to the obſervance of laws of any foreign prince, potentate or prelate, but as to the CUSTOMED and antient laws of this realm, originally eſtabliſhed as laws of the ſame, by the ſaid ſufferance, conſents and cuſtom, and none otherwiſe." For an elegant enquiry into the canon and Roman law, and when the ſtudy of law, as a ſcience, became a diſtinct employment, ſee Dr. Robertſon's Hiſt. Emp. Cha. V. oct. 1 v. 74, 76, 78, 81, 381. and note 25. of that admirable work.

has

has been allowed them, if they exceed the bounds of that reception, by extending themſelves to other matters than has been allowed them; or if thoſe courts proceed according to that law, when it is controuled by the common law of the kingdom; the common law does and may prohibit and puniſh them: and it will not be a ſufficient anſwer for them to tell the king's courts, that Juſtinian or pope Gregory have decreed otherwiſe *(b)*. For we are not bound by their decrees further, or otherwiſe, than as the kingdom here has, as it were, tranſpoſed the ſame into the common and municipal laws of the realm; either by admiſſion of, or by enacting the ſame, which is that alone which can make them of any force in England [B.]. I need not give particular

(b) For which reaſon, it becomes highly neceſſary for every civilian and canoniſt, who would act with ſafety as a judge, or with 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; where they are both ſo intermixed and blended together, as to form certain ſupplemental parts of the common law of England, diſtinguiſhed by the titles of the king's maritime, the king's military, and the king's eccleſiaſtical law. The propriety of which enquiry the univerſity of Oxford has for more than a century ſo thoroughly ſeen, that in her ſtatutes (tit. vii. ſect. 2.) ſhe appoints, that one of the three queſtions to be annually diſcuſſed at the act by the juriſt-inceptors ſhall relate to the common law; ſubjoining this reaſon, "quia juris civilis ſtudioſos decet "haud imperitos eſſe juris municipalis, et differentias exteri "patriique juris notas habere." And the ſtatutes of the univerſity of Cambridge (ſtat. Eliz. R. c. 14. Cowel Inſtitut. in proemio) ſpeak expreſsly to the ſame effect. Blac. Com. 1. v. 15. Seld. in Fletam. 5. Rep. Caudrey's caſe, paſſim. 2. Inſt. 509.

[B] In the primitive church, the laity were preſent at all ſynods; when the Empire became Chriſtian, no canon was made without the emperor's conſent, which included that of the people; he having in himſelf the whole legiſlative power, which our kings have not. If therefore the king and clergy make a canon, it binds the clergy in *re eccleſiaſticâ*, but does not bind laymen, who are not repreſented in convocation; whoſe conſent is neither aſked nor given. 1 Salk. 412. 12 Co. 72. 2 Inſt. 57, 647, 653, 657.

ticular instances herein; the truth thereof is plain and evident, and we need go no further than the statutes of 24 H. 8. c. 12. 25 H. 8. c. 19, 20, 21. and the learned notes of Selden upon Fleta, and the records there cited. Nor shall I spend much time touching the use of those laws in the several courts in this kingdom; but will only briefly mention some few things concerning them.

THERE are three courts of note, wherein the civil, and in one of them the canon or ecclesiastical, law has been, with certain restrictions, allowed in this kingdom, viz. First, the courts ecclesiastical of the bishops, and their derivative officers. Secondly, the admiralty court. Thirdly, the *curia militaris*, or court of the constable and marshal, or persons commissioned to exercise that jurisdiction. I shall touch a little upon each of these.

FIRST, the ecclesiastical courts. They are of two kinds, viz. First, such as are derived immediately by the king's commission; such was formerly the court of high commission; which though, without the help of an act of parliament, it could not in matters of ecclesiastical cognizance use any temporal punishment or censure, as fine, imprisonment, &c. yet even by the common law, the kings of England, being delivered from papal usurpation, might grant a commission to hear and determine ecclesiastical causes and offences, according to the king's ecclesiastical law, as Cawdry's case, Coke's fifth Report. Secondly, such as are not derived by any immediate commission from the king. But the laws of England have annexed to certain offices, ecclesiastical jurisdiction, as incident to such offices Thus every bishop by his election

657. 2 Rol. Abr. 226, 454. Mo. 782. Br. Ordinary, 1. 2 Cro. 670. 2 Brownl, 38. Cro. Car. 538. Palmer 379. 3 Salk. 318. 2 Ventr. 44. 2 Lev. 222. 2 Inst. 97. Cases temp. lord Hardwicke 57, 326, 395. 2 Stran. 1057.

and

and confirmation, even before conſecration, had eccleſiaſtical juriſdiction annexed to his office, as *judex ordinarius* within his dioceſe. And divers abbots anciently, and moſt archdeacons at this day, by uſage, have had the like juriſdiction within certain limits and precincts.

BUT although theſe are *judices ordinarii*, and have eccleſiaſtical juriſdiction annexed to their eccleſiaſtical offices; yet this juriſdiction eccleſiaſtical *in foro exteriori* is derived from the crown of England. For there is no external juriſdiction, whether eccleſiaſtical or civil, within this realm; but what is derived from the crown. It is true, both anciently and at this day, the proceſs of eccleſiaſtical courts runs in the name, and iſſues under the ſeal, of the biſhop; and that practice ſtands ſo at this day by virtue of ſeveral acts of parliament, too long here to recount. But that is no impediment of their deriving their juriſdictions from the crown. For till 27 H. 8. cap. 24. the proceſs in counties palatine ran in the name of the counts palatine, yet no man ever doubted but that the palatine juriſdictions were derived from the crown.

TOUCHING the ſeverance of the biſhop's conſiſtory from the ſheriff's court, ſee the charter of king William I. and Mr. Selden's notes on Eadmerus. And ſee the fifth chapter of this Hiſtory (*i*).

NOW the matters of eccleſiaſtical juriſdiction are of two kinds, criminal and civil.

THE criminal proceedings extend to ſuch crimes, as by the laws of this kingdom are of eccleſiaſtical cognizance;

(*i*) For the various ſpecies of courts eccleſiaſtical, ſee a brief account in the third volume of Blackſtone's Commentaries, from page 61 to 68.

as hereſy, fornication, adultery, and ſome others; wherein their proceedings are, *pro reformatione morum, & pro ſalute animæ.* And the reaſon why they have conuzance of thoſe and the like offences, and not of others, as murder, theft, burglary, &c. is not ſo much from the nature of the offence; for ſurely the one is as much a ſin as the other; and therefore if their cognizance were of offences *quatenus peccata contra Deum*, it would extend to all ſins whatſoever, it being againſt God's law; but the true reaſon is, becauſe the law of the land has INDULGED unto that juriſdiction the conuzance of ſome crimes and not of others.

THE civil cauſes committed to their cognizance, wherein the proceedings are *ad inſtantiam partis*, ordinarily are matters of tithes; rights of inſtitution and induction to eccleſiaſtical benefices; caſes of matrimony and divorces; and teſtamentary cauſes, and the incidents thereunto; as inſinuation or probation of teſtaments, controverſies touching the ſame, and of legacies of goods and monies, &c. *(k)*.

ALTHOUGH *de jure communi* the cognizance of wills and teſtaments does not belong to the eccleſiaſtical court, but to the temporal or civil juriſdiction; yet *de conſuetudine Angliæ pertinet ad judices eccleſiaſticos*, as Linwood himſelf agrees, *Exercit. de Teſtamentis*, cap. 4. *in Gloſſa*. So that it is the cuſtom or law of England that gives the extent and limits of their external juriſdiction *in foro contentioſo*.

THE rule by which they proceed is the canon law, but not in its full latitude, and only ſo far as it ſtands uncorrected, either by contrary acts of parliament, or the common law and cuſtom of England. For there are divers canons made in ancient times, and decretals of the popes, that never were admitted here in England, and particularly in

(k) Blac. Com. 3. v. 87. ſeq.

relation

relation to tithes; many things being by our laws privileged from tithes, which by the canon law are chargeable, (as timber, ore, coals, &c.) without a ſpecial cuſtom ſubjecting them thereunto [C].

WHERE

[C] The canon law is a collection of eccleſiaſtical conſtitutions, deciſions and maxims, taken partly from Scripture, partly from the ancient Councils, and partly from the decrees of Popes, and the reports and ſayings of the primitive Fathers, whereby all matters of polity in the Roman church are regulated.

The canon law which obtained throughout the weſt, till the twelfth century, was the collection of canons made by Dionyſius Exiguus in 520, the capitularies of Charlemagne, and the decrees of the Popes, from Siricius to Anaſtaſius. No regard was had to any thing not comprized in theſe; and the French ſtill maintain the rights of the Gallican church to conſiſt in their not being obliged to admit any thing elſe, but to be at liberty to reject all innovations made in the canonical juriſprudence ſince that compilation, as well as papal decrees before Siricius.

Indeed, between the eighth and eleventh centuries, the canon law was mixed and confounded with the papal decrees from St. Clement to Siricius, which till then had been unknown. This gave occaſion to a new reform, or body of the canon law; which is the collection ſtill extant under the title of *Concordia Diſcordantium Canonum*, firſt made by Ivo in 1114, and perfected in 1151 by Gratian, a Benedictine monk, from texts of Scripture, Councils, and ſentiments of the Fathers, in the ſeveral points of eccleſiaſtical polity; and containing thoſe conſtitutions which have been denominated, by way of eminence, the Decrees, and forming the firſt part of the canon law. It is now generally known by the name of the *Decretum* of Gratian, which was formed in imitation of the Pandects of Juſtinian; and is a confuſed, immethodical compilation, full of errors and forgeries. The ſecond part of the canon law conſiſts of the decrees of the Popes from the time of Pope Alexander III. to Pope Gregory IX. and publiſhed, under the auſpices of that pope, about the year 1230, in five books, entitled *Decretalia Gregorii Noni*.

In 1298 Pope Boniface VIII. continued the papal decrees as far as his time, under the title of *Sextus Decretalium*. To theſe Pope John XXII. added the Clementines, or the five books of the conſtitution of his predeceſſor Clement V. firſt publiſhed about the year 1317. And to all theſe were afterwards added, twenty conſtitutions of the ſaid Pope John, called the *Extravagantes*; and ſome other conſtitutions of his ſucceſſors called *Extravagantes Communes*. Theſe are uſually called the Decretals.

WHERE the canon law, or the *Stylus Curiæ*, is ſilent, the civil law is taken in as a director, eſpecially in points of expoſition and determination, touching wills and legacies.

BUT things that are of temporal cognizance only, cannot by charter be delivered over to eccleſiaſtical juriſdiction, nor be judged according to the rules of the canon or civil law; which is *aliud examen*, and not competent to the nature of things of common law cognizance. And therefore, Mich. 8. H. 4. Rot. 72. *coram Rege*, when the chancellor of Oxford proceeded according to the rule of the civil law in a caſe of debt, the judgment was reverſed in B. R.—Wherein the principal error aſſigned was, becauſe they proceeded *per legem civilem ubi quilibet ligeus domini regis regni ſui Angliæ in qui-*

All theſe compoſe the body of the canon law; which, including the comments, make three volumes in folio; the rule and meaſure of church government. Indeed with us, ſince the Reformation, the canon law has been much abridged and reſtrained; only ſo much of it obtaining, as is conſiſtent with the common and ſtatute laws of the realm, and the doctrine of the eſtabliſhed church. Beſides the foreign canon law we have our legatine and provincial conſtitutions. In the reign of Henry VIII. it was enacted, that the canon law ſhould be reviewed, and till that review took place, ſuch canons, conſtitutions, ordinances and ſynodals provincial, as had been made, and were not repugnant to the law of the land, or the king's prerogative, ſhould be uſed and executed. The review was propoſed again in the reign of Edward VI. and of Queen Elizabeth; but as it was never accompliſhed, the authority of the canon law in England depends upon the ſtatute of 25 Henry VIII. c. 19. which was repealed indeed, by Queen Mary *, but again revived by 1 Eliz. c. 1.

The conſtitutions and canons made in the convocation of the province of Canterbury in 1603, though ratified by the king, and ſoon after adopted in the province of York, never obtained a parliamentary confirmation; and it has been therefore adjudged, that they do not bind the laity, however the clergy may regard them. Stra. 1057.

On the uſe of the canon law, what ſhall be ſo called, and what canons bind, ſee Com. D. 2 v. oct. 165.

* 1. and 2. Ph. and M. c. 8.

buſcunque

buſcunque placitis & querelis infra hoc regnum factis & emergentibus de ure tractari debet per communem legem Angliæ. And although king H. 8. 14 *anno regni ſui*, granted to the univerſity a liberal charter to proceed according to the uſe of the univerſity, viz. by a courſe much conformed to the civil law, yet that charter had not been ſufficient to have warranted ſuch proceedings without the help of an act of parliament. And therefore in 13 Eliz. an act paſſed, whereby that charter was in effect enacted; and 'tis thereby that at this day they have a kind of civil law procedure, even in matters that are of themſelves of common law cognizance, where either of the parties to the ſuit are privileged *(l)*.

THE coercion or execution of the ſentence in eccleſiaſtical courts, is only by excommunication of the perſon contumacious; and upon ſignification thereof into Chancery, a writ *de excommunicato capiendo* iſſues, whereby the party is impriſoned till obedience yielded to the ſentence. But beſides this coercion, THE SENTENCES of the eccleſiaſtical courts touching ſome matters do introduce a REAL EFFECT, without any other execution. As a divorce *à vinculo matrimonii* for the cauſes of conſanguinity, precontract, or frigidity, do induce a legal diſſolution of the marriage. So a ſentence of deprivation from an eccleſiaſtical benefice, does by virtue of the very ſentence, without any other coercion or execution, introduce a full determination of the intereſt of the perſon deprived [D].

(l) Vide 13 Eliz. c. 29. and Blac. Com. 3 v. 83, 84, 85.

[D] Numerous authorities may certainly be educed, to prove that the power of the courts eccleſiaſtical has been recognized by common law, and that their deciſions have been conſidered as concluſive, upon every queſtion over which they have been accuſtomed to exerciſe original juriſdiction; yet as the caſe of the late ducheſs of Kingſton threw ſome light upon the ſubject, I have taken the liberty to ſubjoin a report of that caſe.

Her

AND thus much concerning the eccleſiaſtical courts, and the uſe of the canon and civil law in them, as they are the rule and direction of proceedings therein.

SECONDLY,

Her grace was tried before the peers in parliament, for bigamy; the indictment ſtating that ſhe, "being the wife of Auguſtus John "Hervey, feloniouſly did marry and take to huſband Evelyn Pierre-"point, duke of Kingſton, her former huſband being then alive." After ſhe had pleaded to the indictment, and before the caſe on the part of the proſecution was entered into, ſhe obſerved, that in reſpect to the ſuppoſed contract of marriage with Mr. Hervey, and which was the ſole ground of proſecution, ſhe had, prior to her marriage with the duke of Kingſton, inſtituted a ſuit in the conſiſtory court of the biſhop of London *cauſa jactitationis matrimonii*; that in that ſuit Mr. Hervey was the party libelled, and of courſe the party defendant; that though in his defence he inſiſted on the marriage, yet the court eccleſiaſtical decreed that ſhe was free from any matrimonial contract with Mr. Hervey; that the ſentence being unreverſed and unimpeached, was, as ſhe humbly conceived, concluſive; ſhe therefore inferred that no other evidence ought to be received by their lordſhips in reſpect to that pretended marriage; for as a court of competent juriſdiction had decided the point, it would not only be illegal, but in vain, to call parole evidence to ſubſtantiate the fact.

After ſome altercation, the proceedings in the ſuit of jactitation were permitted to be read *de bene eſſe*. By the ſentence it was in form decreed that the preſent defendant was "free from all matri-"monial contracts or eſpouſals; more eſpecially with the ſaid Au-"guſtus John Hervey," who was, by the ſentence, enjoined to "perpetual ſilence as to the premiſes libellate."

This ſentence being read, the counſel for her grace, after ſtating that ſhe had, ſubſequent to the ſentence and in confidence of its legality, married the late duke of Kingſton, obſerved, that they did not know of any court in which the conſtitution of this kingdom had veſted authority to decide on the rights of marriage, but the eccleſiaſtical; and they believed it would not now be contended, that the courts of common law had any ſuch original juriſdiction. They admitted that marriage might incidentally be determined in the courts of common law, becauſe ſuch determinations were abſolutely neceſſary to the due adminiſtration of juſtice; but they inſiſted, that whenever the proper *forum* had decided on the queſtion, the courts of common law had never taken upon themſelves to examine into the grounds, nor in the leaſt to queſtion the validity of its deciſion. Hence they ſubmitted that the ſentence, being unimpeached and not reverſed, was concluſive ſo long as it remained in force, and that of neceſſity it muſt be received in evidence in all courts and in all

places,

SECONDLY, the ſecond ſpecial juriſdiction wherein the civil law is allowed, at leaſt as a director or rule in ſome caſes,

places, where the ſubject of that marriage ſhould become a point of litigation; on the whole, therefore, they truſted that it would repel all teſtimony, and of conſequence, make it improper to ſtate any.

On the firſt day *, it was argued by Mr. Wallace, Mr. Mansfield, Doctor Calvert and Doctor Wynne, in ſupport of the ſentence; all of whom contended, that from the legal authorities which they had adduced in ſupport of the poſition which they had advanced, there was no ground to impeach the ſentence; that it was final and concluſive; that the indictment was therefore indefenſible; and that as no evidence could be received, it would be idle and impertinent to ſtate any.

On Tueſday the 16th of April, the counſel for the proſecution were heard in anſwer to the objections.

After premiſing that the argument was of a ſingular complection, upon a point perfectly new in experience, not analogous to any known rule of proceeding in ſimilar caſes, nor founded on any principle which had been ſtated, they inſiſted that if the ſentence was a definitive and preclufive objection to all enquiry, the priſoner ought to have pleaded it in bar of the indictment; or have relied upon it in evidence, under her plea of not guilty. To ſay that ſuch a motion was wholly unprecedented, went, as they contended, a great way in concluſion againſt it. To ſay that ſuch a rule would be inconſiſtent with the plea, and repugnant to the record, ſeemed to them obviouſly deciſive. "After putting herſelf for trial upon "God and your lordſhips, ſhe beſeeches you not to hear her tried. "By this mode every ſpecies and colour of guilt, within the com- "paſs of the indictment, is neceſſarily admitted; the crime muſt "therefore be taken as proved, in its greateſt extent, with every "baſe and every hateful aggravation that it can poſſibly admit; "the firſt marriage ſolemnly celebrated, perfectly conſummated; "the ſecond, wickedly accompliſhed by practiſing a concerted fraud "upon a court of juſtice, and that in order to obtain a colluſive "ſentence againſt the firſt." After thus expatiating in general terms, they proceeded to controvert the principles and authorities which had been advanced in favour of the priſoner; and after eſtabliſhing the poſitions for which themſelves contended, they inferred that the motion was wholly inadmiſſible; that it was inconſiſtent with and repugnant to all order, and every mode of trial, to debate on imaginary topics of defence, before the charge was publicly and fully heard, and that it was equally ſo for the court to reſolve abſtract queſtions upon hypothetical grounds.

* Monday the 15th of April 1776.

The

caſes, is the admiral court or juriſdiction. This juriſdiction is derived alſo from the crown of England;—either immediately

The advocates were, Mr. attorney general Thurlow *, Mr. ſolicitor general Wedderburn †, Mr. Dunning ‡, and Dr. Harris.—Mr. attorney general in concluding his ſpeech remarked, that the ſentence was concluſive upon the priſoner, but merely void as againſt the reſt of the world; "ſhe is therefore a wife, only for the purpoſe of being puniſhed as a felon. The crime has been detected. The inconvenient conſequences of guilt are the bars which God and the order of nature have ſet againſt it: but they have not been found ſufficient. It demands the interpoſition of public authority, with ſeverer checks, to reſtrain it. Why is ſhe thus hampered with the ſentence which ſhe fabricated? Becauſe ſhe fabricated it: becauſe juſtice will not permit her to alledge her own fraud, for her own behoof; nor hear *her* complain of a wrong, which *ſhe* herſelf has wantonly committed.

"Is a ſentence pronounced between two certain perſons admiſſible evidence againſt others? Is this ſpecies of ſentence ſo? Is either admiſſible againſt the king—in any public proſecution—in this particular ſort of proſecution? Is ſuch evidence probable only, or concluſive,—againſt the parties to it—againſt ſtrangers—againſt the king—and in what caſes? What, if it were obtained by colluſion? what, if by HER colluſion? will it ſerve HER? may SHE offer it ſafely? how much will it prove againſt HER? what evidence will do to prove the colluſion? There is no end of ſuch queſtions. Were it poſſible for your lordſhips to ſtop this proſecution here, I have no deſire to wound the mind of any perſon unneceſſarily, if ſo painful a duty may be diſpenſed with, but I have rather wondered to hear ſuch hopes as theſe thus far encouraged, or even entertained on the part of the priſoner with confidence enough to make it worth her while to avow, in this ſtage of the buſineſs, that ſhe had rather have every thing preſumed againſt her, than hear any thing proved; and to diſcloſe to your lordſhips, not an anxiety to clear her injured innocence, but a dread of the enquiry."

The

* Now Lord Thurlow.

† Created Lord Loughborough, and Chief Juſtice of the Common Pleas, on the 14th of June 1780; in which Court he preſided more than twelve years, contributing to the public felicity by a wiſe and impartial adminiſtration of juſtice. His lordſhip reſigned the office of Chief Juſtice on the 11th February 1793, having been previouſly (28th January 1793) appointed to ſuſtain the more important one of Lord High Chancellor.

‡ Afterwards created Lord Aſhburton.

diately by commiſſion from the king; or mediately; which is ſeveral ways. Either by commiſſion from the lord high admiral,

The lords adjourned to Friday the 19th of April, when Mr. Wallace was called on to reply; which having done, the peers adjourned to the chamber of parliament, where it was ordered that the following queſtions ſhould be put to the judges, *viz.*

I. Whether a ſentence of the ſpiritual court againſt a marriage, in a ſuit for jactitation of marriage, is concluſive evidence ſo as to ſtop the counſel for the crown from proving the ſaid marriage in an indictment for polygamy?

II. Whether admitting ſuch ſentence to be concluſive upon ſuch indictment, the counſel for the crown may be admitted to avoid the effect of ſuch ſentence, by proving the ſame to have been obtained by fraud or colluſion?

The chief juſtice of the common pleas *, having conferred with the reſt of the judges preſent, delivered the following unanimous opinion upon the queſtions.

MY LORDS,

My lord chief baron and the reſt of my brethren have deſired me to deliver their anſwer to the queſtions your lordſhips have been pleaſed to propound to us.

That our opinion may be the better underſtood, it is neceſſary to make ſome obſervations on what has paſſed in argument upon the ſubject.

What has been ſaid at the bar is certainly true, as a general principle, that a tranſaction between two parties, in judicial proceedings, ought not to be binding upon a third; for it would be unjuſt to bind any perſon who could not be admitted to make a defence, or to examine witneſſes, or to appeal from a judgment he might think erroneous; and therefore the depoſitions of witneſſes in another cauſe in proof of a fact, the verdict of a jury finding the fact, and the judgment of the court upon the fact found, although evidence againſt the parties, and all claiming under THEM, are not, in general, to be uſed to the prejudice of ſtrangers. There are ſome exceptions to this general rule, founded upon particular reaſons, but not being applicable to the preſent ſubject, it is unneceſſary to ſtate them.

From the variety of caſes relative to judgments being given in evidence in civil ſuits, theſe two deductions ſeem to follow as generally true. Firſt, that the judgment of a court of concurrent juriſdiction, directly upon the point, is as a plea, a bar, or as evidence concluſive,

* Sir William de Grey; created Lord Walſingham in 1780.

admiral, whoſe power and conſtitution is by the king;—or by the charters granted to particular corporations bordering upon

concluſive, between the ſame parties, upon the ſame matter, directly in queſtion in another court. Secondly, that the judgment of a court of excluſive juriſdiction, directly upon the point, is, in like manner, concluſive upon the ſame matter, between the ſame parties, coming incidentally in queſtion in another court, for a different purpoſe. But neither the judgment of a concurrent or excluſive juriſdiction is evidence of any matter which came collaterally in queſtion, though within their juriſdiction; nor of any matter incidentally cognizable; nor of any matter to be inferred by argument from the judgment.

Upon the ſubject of marriage, the ſpiritual court has the ſole and excluſive cognizance of queſtioning and deciding directly, the legality of marriage; and of enforcing, ſpecifically, the rights and obligations, reſpecting perſons depending upon it; but the temporal courts have the ſole cognizance of examining and deciding upon all temporal rights of property; and, ſo far as ſuch rights are concerned, they have the inherent power of deciding incidentally, either upon the fact, or the legality of marriage, where they lie in the way to the deciſion of the proper objects of their juriſdiction. They do not want or require the aid of the ſpiritual courts; nor has the law provided any legal means of ſending to them for their opinion; except where, in the caſe of marriage, an iſſue is joined upon the record in certain real writs, upon the legality of marriage, or its immediate conſequence, "general baſtardy;" or in like manner, in ſome other particular inſtances, lying peculiarly in the knowledge of their courts; as profeſſion, deprivation, and ſome others. In theſe caſes, upon the iſſue ſo formed, the mode of trying the queſtion is by reference to the ordinary; whoſe certificate, when returned, received and entered upon record in the temporal courts, is a perpetual and concluſive evidence againſt all the world, upon that point; which exceptionable extent, on whatever reaſons founded, was the occaſion of the ſtatute of the 9th of Henry VI. requiring certain public proclamations to be made for perſons intereſted to come in, and be parties to the proceedings. But, even in theſe caſes, if the ordinary ſhould return no certificate, or an inſufficient one; or, if the iſſue is accompanied with any ſpecial circumſtances; as, if a ſecond iſſue, triable by a jury, is formed upon the ſame record; or, if the effect of the ſame iſſue is put into another form; a jury is to decide, and not the ordinary to certify, the truth; and to this purpoſe ſir William Staunford mentions a remarkable inſtance. Bigamy was triable by the biſhop's certificate; but if the priſoner, to avoid the charge, pleads that the ſecond eſpouſals were null and void, becauſe he had

a former

upon the ſea, and by commiſſion from them; or by preſcription; which nevertheleſs, in preſumption of law, is derived at firſt from the crown by charter not now extant.

THE

a former wife living, this ſpecial bigamy was not to be tried by the biſhop's certificate.

So that the trial of marriage, either as to legality, or fact, was not abſolutely, and from its nature, an object *alieni fori*.

There was a time, when the ſpiritual courts wiſhed that their determinations might, in all caſes, be received as authentic in the temporal courts; and in that ſolemn aſſembly of the king, the peers, the biſhops, and the judges, convened for the purpoſe of ſettling the demands of the Church, by Edward the ſecond, one of the claims was expreſſed in theſe words: "Si aliqua cauſa, vel negotium, cu-
"jus cognitio ſpectat ad forum eccleſiaſticum, et coram eccleſiaſtico
"judice fuerit ſententialiter terminatum, et tranſierit in rem judi-
"catum, nec per appellationem fuerit ſuſpenſum; et poſtmodum,
"coram judice ſeculari, ſuper eâdem re, inter eaſdem perſonas,
"quæſtio moveatur, et probetur per teſtes, vel inſtrumenta, talis
"exceptio in foro ſeculari non admittatur." The anſwer to which demand was expreſſed in this manner: "Quando eadem cauſa
"diverſis rationibus coram judicibus eccleſiaſticis et ſeculáribus
"ventilatur, dicunt, quod (non obſtante eccleſiaſtico judicio) curia
"regis ipſum tractat negotium, ut ſibi expedire videtur." For which lord Coke gives this reaſon, 2. Inſt. 622. "For the ſpiri-
"tual judges proceedings are for the correction of the ſpiritual inner
"man, and *pro ſalute animæ* to injoin him penance; and the judges
"of the common law proceed to give damages and recompence for
"the wrong and injury done:" and then adds, "and ſo this article
"was deſervedly rejected."

And the ſame demand was made, and received the ſame anſwer, in the third year of king James the firſt.

It is to be obſerved, that this demand related only to civil ſuits between the ſame parties; and that the ſentence ſhould be received as a plea in bar. But this attempt and miſcarriage did not prevent the temporal courts from ſhewing the ſame reſpect to their proceedings, as they did to thoſe in other courts. And therefore where in civil cauſes they found the queſtion of marriage directly determined by the eccleſiaſtical courts, they received the ſentence, though not as a plea, yet as PROOF of the fact; it being an authority accredited in a judicial proceeding by a court of competent juriſdiction; but ſtill they received it upon the ſame principles, and ſubject to the ſame rules by which they admit the acts of other courts.

Hence a ſentence of nullity, and a ſentence in affirmance of a

marriage

THE admiral juriſdiction is of two kinds, viz. *juriſdictio voluntaria*, which is no other but the power of the lord high

marriage, have been received as concluſive evidence on a queſtion of legitimacy, ariſing incidentally upon a claim to a real eſtate.

A ſentence in a cauſe of jactitation has been received upon a title in ejectment, as evidence againſt a marriage; and in like manner in perſonal actions immediately founded upon a ſuppoſed marriage.

So a direct ſentence, in a ſuit upon a promiſe of marriage againſt the contract, has been admitted evidence againſt ſuch contract, in an action brought upon the ſame promiſe for damages; it being a direct ſentence of a competent court diſproving the ground of the action.

So a ſentence of nullity is equally evidence in a perſonal action againſt a defence founded upon a ſuppoſed coverture.

But in all theſe caſes the parties to the ſuit, or at leaſt the parties againſt whom the evidence was received, were parties to the ſentence, and had acquieſced under it; or claimed under thoſe who were parties and had acquieſced.

But although the law ſtands thus with regard to civil ſuits, proceedings in matters of crime, and eſpecially of felony, fall under a different conſideration. Firſt, becauſe the parties are not the ſame; for the king, in whom the truſt of proſecuting public offences is veſted, and which is executed by his immediate orders, or in his name by ſome proſecutor, is no party to ſuch proceedings in the eccleſiaſtical court, and cannot be admitted to defend, or to examine witneſſes, or in any manner to intervene or appeal. Secondly, ſuch doctrines would tend to give the ſpiritual courts, which are not permitted to exerciſe any judicial cognizance in matters of crime, an immediate influence in trials for offences, and to draw the deciſions from the courſe of the common law, to which it ſolely and peculiarly belongs.

The ground of the judicial powers given to eccleſiaſtical courts, is merely of a ſpiritual conſideration, *pro correctione morum, et pro ſalute animæ*. They are therefore addreſſed to the conſcience of the party. But one great object of temporal juriſdiction is the public peace; and crimes againſt the public peace are wholly, and in all their parts, of temporal cognizance alone. A felony by common law was always ſo. A felony by ſtatute becomes ſo at the moment of its inſtitution. The temporal courts alone can expound the law; and judge of the crime, and its proofs; in doing ſo, they muſt ſee with their own eyes and try by their own rules, that is, by the common law of the land; it is the truſt and ſworn duty of their office.

When the acts of Henry the eighth firſt declared what marriages ſhould be lawful, and what inceſtuous, the temporal courts, though they

high admiral, as the king's general at ſea over his fleets; or, *juriſdictio contentioſa*, which is that power of juriſdiction which

they had before no juriſdiction, and the acts did not by expreſs words give them any upon the point, decided, incidentally, upon the conſtruction, declared what marriages came within the levitical degrees, and prohibited the ſpiritual courts from giving or proceeding upon any other conſtruction.

Whilſt an antient ſtatute ſubſiſted (2 H. IV. 15.) by which perſonal puniſhment was incurred on holding heretical doctrines, the temporal courts took notice, incidentally, whether the tenet was heretical or not; for "the king's courts will examine all things ordained by ſtatute."

When the ſtatute of Will. III. made certain blaſphemous doctrines a temporal crime, the temporal courts alone could determine whether the doctrine complained of was blaſphemous, ſo as to conſtitute the crime.

If a man ſhould be indicted for taking a woman by force and marrying her; or for marrying a child without her father's conſent; or for a rape,—where the defence is, that "the woman is his wife;" in all theſe caſes, the temporal courts are bound to try the priſoner by the rules and courſe of the common law, and, incidentally, to determine what is heretical and what is blaſphemous; and whether it was a marriage within the ſtatute; a marriage without conſent; and whether, in the laſt caſe, the woman was his wife: but if they ſhould happen to find, that ſentences, in the reſpective caſes, had been given in the ſpiritual court upon the hereſy, the blaſphemous doctrines, the marriage by force, the marriage without conſent, and the marriage on the rape; and the court muſt receive ſuch ſentences as concluſive evidence in the firſt inſtance, without looking into the caſe; it would veſt the ſubſtantial and effective deciſion, though not the cognizance, of the crimes, in the ſpiritual court; and leave to the jury and the temporal courts, nothing but a nominal form of proceeding, upon what would amount to a predetermined conviction or acquittal; which muſt have the effect of a real prohibition, ſince it would be in vain to prefer an indictment, where an act of a foreign court ſhall, at once, ſeal up the lips of the witneſſes, the jury and the court, and put an intire ſtop to the proceeding.

And yet it is true, that the ſpiritual courts have no juriſdiction, directly or indirectly, in any matter not altogether ſpiritual; and it is equally true, that the temporal courts have the ſole and entire cognizance of crimes which are wholly and altogether temporal in their nature.

And if the rule of evidence muſt be, as it is often declared to be, reciprocal; and that, in all caſes, in which ſentences, favourable to the

which the judge of the admiralty has in *foro contentioſo*. And what I have to ſay is of this later juriſdiction.

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the priſoner, are to be admitted as concluſive evidence for him; the ſentences, if unfavourable to the priſoner, are in like manner concluſive evidence againſt him; in what ſituation muſt the priſoner be, whoſe life, or liberty, or property, or fame, reſts on the judgments of courts which have no juriſdiction over him in the predicament in which he ſtands? and in what ſituation are the judges of the common law, who muſt condemn, on the word of an eccleſiaſtical judge, without exerciſing any judgment of their own?

The ſpiritual court alone can deprive a clergyman: felony is a good cauſe of deprivation: yet in lord Hobart's Reports it is held, that they cannot proceed to deprive for felony, before the felony has been tried at law; and although, after conviction, they may act upon THAT, and make the conviction a ground of deprivation, neither ſide can prove or diſprove any thing againſt the verdict; becauſe, as that very learned judge declares, "it would be to determine, though "not capitally, upon a capital crime, and thereby judge of the na- "ture of the crime and the validity of the proofs; neither of which "belongs to them to do."

If therefore ſuch a ſentence, even upon a matter within their juriſdiction, and before a felony committed, ſhould be concluſive evidence on a trial for a felony committed after, the opinion of a judge, incompetent to the purpoſe, reſulting (for aught appears) from incompetent proofs (as ſuppoſe the ſuppletory oath) will direct, or rule, a jury and a court of competent juriſdiction, without confronting any witneſſes, or hearing any proofs: for the queſtion ſuppoſes, and the truth is, that the temporal court does not and cannot examine, whether the ſentence is a juſt concluſion from the caſe, either in law or fact; and the difficulty will not be removed by preſuming, that every court determines rightly, becauſe it muſt be preſumed too, that the parties did right in bringing the full and true caſe before the court; and if they did, ſtill the court will have determined rightly by eccleſiaſtical laws and rules, and not by thoſe laws and rules by which criminals are to ſtand or fall in this country.

If the reaſon for receiving ſuch ſentence is, becauſe it is the judgment of a court COMPETENT to the inquiry then before them; from the ſame reaſon, the determinations of two juſtices of the peace upon the fact or validity of a marriage, in adjudging a place of ſettlement, may hereafter be offered as evidence, and give the law to the higheſt court of criminal juriſdiction.

But if a direct ſentence upon the identical queſtion, in a matrimonial cauſe, ſhould be admitted as evidence (though ſuch ſentence

againſt

THE juriſdiction of the admiralty court, as to the matter of it, is confined by the laws of this realm to things *done upon the* HIGH SEA *only*; as depredations and piracies upon the high ſea;

againſt the marriage has not the force of a final deciſion, that there was none) yet a cauſe of jactitation is of a different nature; it is ranked as a cauſe of DEFAMATION only, and not as a matrimonial cauſe, unleſs where the defendant pleads a marriage; and whether it continues a matrimonial cauſe throughout, as ſome ſay, or ceaſes to be ſo on failure of proving a marriage, as others have ſaid, ſtill the ſentence has only a negative and qualified effect, viz. "that the "party has failed in his proof, and that the libellant is free from all "matrimonial coutract, as far as yet appears;" leaving it open to new proofs of the ſame marriage in the ſame cauſe, or to any proofs of that or any other marriage in another cauſe: and if ſuch ſentence is no plea to a new ſuit there, and does not conclude the court which pronounces, it cannot conclude a court which receives the ſentence from going into new proofs to make out that, or any other marriage.

So that admitting the ſentence in its full extent and import, it only proves, that it did not YET appear that they were married, and not that they were NOT married at all: and by the rule laid down by lord chief juſtice Holt, ſuch ſentence can be no proof of any thing to be inferred by argument from it; and therefore it is not to be inferred, that there was no marriage at any time or place, becauſe the court had not THEN ſufficient evidence to prove a marriage at a particular time and place. That ſentence and this judgment may ſtand well together, and both propoſitions be equally true. It may be true, that the ſpiritual court had not then ſufficient proof of the marriage ſpecified, and that your lordſhips may now, unfortunately, find ſufficient proof of ſome marriage.

But if it was a direct and deciſive ſentence upon the point, and, as it ſtands, to be admitted as concluſive evidence upon the court, and not to be impeached from within; yet, like all other acts of the higheſt judicial authority, it is impeachable from without; although it is not permitted to ſhe that the court was *miſtaken*, it may be ſhewn that they were *miſled*.

Fraud is an extrinſic collateral act, which vitiates the moſt ſolemn proceedings of courts of juſtice. Sir Edward Coke ſays, it avoids all judicial acts, eccleſiaſtical or temporal.

In *civil ſuits*, all ſtrangers may falſify, for covin, either fines, or real or feigned recoveries; and even a recovery by a juſt title, if colluſion was practiſed to prevent a fair defence; and this, whether the covin is apparent upon the record, as not eſſoining, or not demanding the view, or by ſuffering judgment by confeſſion or default; or

ſea; offences of maſters and mariners upon the high ſea; maritime contracts made and to be executed upon the high ſea; matters of prize and reprizal upon the high ſea. But touching contracts, or things made within the bodies extrinſic, as not pleading a releaſe, collateral warranty, or other advantageous pleas.

In *criminal proceedings*, if an offender is convicted of felony on confeſſion, or is outlawed, not only the time of the felony, but the felony itſelf may be traverſed by a purchaſer, whoſe conveyance would be affected as it ſtands; and, even after a conviction by verdict, he may traverſe the time.

In the proceedings of the *eccleſiaſtical* court the ſame rule holds. In Dyer there is an inſtance of a ſecond adminiſtration fraudulently obtained to defeat an execution at law againſt the firſt; and the fact being admitted by demurrer, the court pronounced againſt the fraudulent adminiſtration. In another inſtance, an adminiſtration had been fraudulently revoked; the fact being denied, iſſue was joined upon it; and the colluſion being found by a jury, the court gave judgment againſt it.

In the more modern caſes, the queſtion ſeems to have been, whether the *parties* ſhould be admitted to prove colluſion, not ſeeming to doubt that ſtrangers might.

So that colluſion, being a matter extrinſic of the cauſe, may be imputed by a ſtranger, tried by a jury, and determined by the courts of temporal juriſdiction.

And if fraud will vitiate the judicial acts of the temporal courts, there ſeems as much reaſon to prevent the miſchiefs ariſing from colluſion in the eccleſiaſtical courts, which, from the nature of their proceedings, are at leaſt as much expoſed, and which we find have been, in fact, as much expoſed, to be practiſed upon for ſiniſter purpoſes, as the courts in Weſtminſter-hall.

We are therefore unanimouſly of opinion;

Firſt, that a ſentence in the ſpiritual court againſt a marriage, in a ſuit of jactitation of marriage, is *not* concluſive evidence, ſo as to ſtop the counſel for the crown from proving the marriage in an indictment for polygamy.

But ſecondly, admitting ſuch ſentence to be concluſive upon ſuch indictment, the counſel for the crown may be admitted to avoid the effect of ſuch ſentence, by proving the ſame to have been obtained by fraud or colluſion (*a*)."

The point being thus decided, the peers returned, and being ſeated, the lord high ſteward directed the attorney-general to proceed in the proſecution. This being done, and the fact being clearly proved, her grace was found guilty.

(*a*) See the caſe of Ilderton and Ilderton, 2. H. Blac.

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of Engliſh counties, or upon the land beyond the ſea, though the execution thereof be in ſome meaſure upon the high ſea —as charter parties, or contracts made even upon the high ſea;—touching things that are not in their own nature maritime, as a bond or contract for the payment of money;—ſo alſo of damages in navigable rivers within the bodies of counties—things done upon the ſhore at low-water, wreck of the ſea, &c:—theſe things belong not to the admiral's juriſdiction. And thus the common law, and the ſtatutes of 13 Rich. 2. cap. 15. 15 Rich. 2. cap. 3. confine and limit their juriſdiction to matters maritime, and ſuch only as are done upon the high ſea *(m)*.

THIS court is not bottom'd or founded upon the authority of the civil law, but hath both its power and juriſdiction, by the law and cuſtom of the realm, in ſuch matters as are proper for its cognizance *(n)*. And this appears by their proceſs, viz. the arreſt of the perſons of the defendants, as well as by attachment of their goods; and likewiſe by thoſe cuſtoms and laws maritime whereby many of their proceedings are directed, and which are not in many things conformable to the rules of the civil law. Such are thoſe ancient laws of Ole-

(m) The original juriſdiction of the admiralty is either by the connivance or permiſſion of the common-law courts; the ſtatutes are only in affirmance of the common law, and to prevent the great power which the admiralty had gotten in conſequence of the laws of Oleron. Generally ſpeaking, the court of admiralty has no juriſdiction of matters, or contracts, done or made on land; and the true reaſon for their juriſdiction in matters done at ſea, is becauſe no jury can come from thence; for if the matter ariſe in any place from whence the *pais* can come, the common law will not ſuffer the ſubject to be drawn *ad aliud examen*. 12 Rep. 129. Roll. Abr. 531. Owen, 122. Brownl. 37. 2 Roll. Rep. 413. Vide the caſe of Ouſton v. Hebden *paſſim*. 1 Will. 101. See alſo Hob. 12. Blac. Com. 3 v. 107. and Forteſc. de Laud. 103. ed. 1775.

(n) According to ſir Henry Spelman, *Gloſſ.* 13. and Lambard, *Archeion*, 41. it was firſt of all erected by king Edward the third,

ron, (*o*) and other cuſtoms introduced by the practice of the ſea and ſtile of the court.

ALSO, the civil law is allowed to be the rule of their proceedings only ſo far as the ſame is not contradicted by the ſtatutes of this kingdom, or by thoſe maritime laws and cuſtoms which in ſome points have obtained in derogation of the civil law. But by the ſtatute 28. Hen. 8. cap. 15. all treaſons, murders, felonies done on the high ſea, or in any haven, river, creek, port or place, where the admirals have, or pretend to have juriſdiction, are to be determined by the king's commiſſion, as if the offences were done at land, according to the courſe of the common law.

AND thus much ſhall ſerve touching the court of admiralty, and the uſe of the civil law therein (*p*).

THIRDLY, the third court wherein the civil law has its uſe in this kingdom, is the military court, held before the conſtable and marſhal anciently, as the *judices ordinarii* in this caſe; or otherwiſe before the king's commiſſioners of that juriſdiction, as *judices delegati*.

THE matter of their juriſdiction is declared and limited by the ſtatutes of 8 R. 2. cap. 5. and 13 R. 2. cap. 2. And not only by thoſe ſtatutes, but more by the very common law is their juriſdiction declared and limited as follows, viz.

FIRST, negatively. They are not to meddle with any thing determinable by the common law. And therefore, inaſmuch as matter of damages, and the quantity and deter-

(*o*) See chapter 7. Co. Lit. 11. Blac. Com. 3 v. 108.

(*p*) See further as to the juriſdiction of the maritime courts, Blac. Com. 3 v. 68, 69, 70, 106, 107, 108, 109. Hob. 212. 4 Inſt. 134. Comb. 462. 13 Rep. 53. 2 Lev. 25. Hardr. 183. 1 Side 158. 2 Show. 232. Comb. 474

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mination thereof, is of that conuſance, the court of conſtable and marſhal cannot, even in ſuch ſuits as are proper for their conuſance, give damages againſt the party convicted before them, and at moſt can only order reparation in point of honour, as *mendacium ſibi ipſi imponere* (*q*). Neither can they, as to the point of reparation in honour, hold plea of any ſuch words or things wherein the party is relievable by the courts of the common law. (*r*)

SECONDLY, affirmatively. Their juriſdiction extends to matters of arms and matters of war, viz,

FIRST, as to matters of arms, or heraldry, the conſtable and marſhal had conuſance thereof; viz. touching the rights of coat armour, bearings, creſts, ſupporters, pennons, &c. and alſo touching the rights of place and precedence, in caſes where either acts of parliament or the king's patent, he being the fountain of honour, have not already determined it; for in ſuch caſes they have no power to alter it. Thoſe things were anciently allowed to the conuſance of the conſtable and marſhal, as having ſome relation to military affairs; but ſo reſtrained, that they were only to determine the right, and give reparation to the party injured in point of honour, but not to repair him in damages, (*s*)

BUT, ſecondly, as to matters of war. The conſtable and marſhal had a double power, viz.

1. A miniſterial power; as they were two great ordinary officers, anciently, in the king's army; the conſtable being in effect the king's general; and the marſhal was employed in

(*q*) 1 Roll. Abr. 128. Year-book 37 Hen. 6. 21. Seld. of Duels, c. 10. Forteſc. de Laud. 106. ed, 1775.

(*r*) Blac. Com. 3 v. 68. 103, 104, 105, 106.

(*s*) Blac. Com. 3 v. 105.

marſhalling the king's army, and keeping the liſt of the officers and ſoldiers therein; and his certificate was the trial of thoſe whoſe attendance was requiſite. Vide Littleton, § 102.

AGAIN, 2. the conſtable and marſhal had alſo a judicial power, or a court wherein ſeveral matters were determinable. As firſt, appeals of death or murder committed beyond the ſea, according to the courſe of the civil law. Secondly, the right of priſoners taken in war. Thirdly, the offences and miſcarriages of ſoldiers contrary to the laws and rules of the army. For always, preparatory to an actual war, the kings of this realm, by advice of the conſtable and marſhal, were uſed to compoſe a book of rules and orders for the due order and diſcipline of their officers and ſoldiers, together with certain penalties on the offenders; and this was called martial law. We have extant in the Black Book of the Admiralty and elſewhere ſeveral exemplars of ſuch military laws; and eſpecially that of the ninth of Richard 2. compoſed by the king, with the advice of the duke of Lançaſter and others.

BUT touching the buſineſs of martial law, theſe things are to be obſerved (*t*), viz.

FIRST, that in truth and reality it is not a law, but ſomething indulged, rather than allowed, as a law. The neceſſity of government, order, and diſcipline, in an army, is that only which can give thoſe laws a countenance;—*quod enim neceſſitas cogit defendi.*

SECONDLY, this indulged law was only to extend to members of the army, or to thoſe of the oppoſite army, and never was ſo much indulged as intended to be executed or

(*t*) For a fuller account of our military and maritime ſtates, ſee the 13th chapter of the firſt book of Mr. Juſtice Blackſtone's Commentaries.

exerciſed

exerciſed upon others. For others who were not liſted under the army, had no colour or reaſon to be bound by military conſtitutions applicable only to the army, whereof they were not parts. But they were to be ordered and governed according to the laws to which they were ſubject, though it were a time of war.

THIRDLY, that the exerciſe of martial law, whereby any perſon ſhould loſe his life, or member, or liberty, may not 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. This is in ſubſtance declared by the Petition of Right, 3 Car. 1. whereby ſuch commiſſions and martial law were repealed, and declared to be contrary to law. And accordingly was that famous caſe of Edmond earl of Kent, who being taken at Pomfret 15 Edw. 2. the king and divers lords proceeded to give ſentence of death againſt him, as in a kind of military court by a ſummary proceeding ;which judgment was afterwards, in 1 Edw. 3. reverſed in parliament. And the reaſon of that reverſal ſerving to the purpoſe in hand, I ſhall here inſert it as entered in the record, *viz.* "*Quod cum quicunq; homo ligeus domini regis pro ſeditioni-*
"*bus, &c. tempore pacis captus & in quacunque curia domini*
"*regis ductus fuerit de ejuſmodi ſeditionibus & aliis felioniis*
"*ſibi impoſitis per legem & conſuetudine regni arrectari debet*
"*& reſponſionem adduci, et inde per communem legem, ante-*
"*quam fuerit morti adjudicand' (triari) &c. Unde cum no-*
"*torium ſit & manifeſtum quod totum tempus quo impoſitum*
"*fuit eidem comiti propter mala & facinora feciſſe, ad tempus*
"*in quo captus fuit & in quo morti adjudicatus fuit, fuit tem-*
"*pus pacis maximæ, cum per totum tempus prædictum & can-*
"*cellaria & aliæ plac. curiæ domini regis aperte fuer. in*
"*quibus cuilibet lex fiebatur ſicut fieri conſuevit, nec idem*
"*dominus rex unquam tempore illo cum vexillis explicatis*
"*equitabat,*" &c. And accordingly the judgment was re-

verſed: for martial law, which is rather indulged than allowed, and that only in caſes of neceſſity, in time of open war, is not permitted in time of peace, when the ordinary courts of juſtice are open.

IN this military court, court of honour, or court martial, the civil law has been uſed and allowed in ſuch things as belong to their juriſdiction, as the rule or direction of their proceedings and deciſions, ſo far forth as the ſame is not controuled by the laws of this kingdom, and thoſe cuſtoms and uſages which have obtained in England, which even in matters of honour are in ſome points derogatory to the civil law. But this court has been long diſuſed upon great reaſons. [E]

AND

[E] It is ſingular that ſo little has been written on the martial law of England. Martial law has in general been defined, a temporary excreſcence, bred from the diſtemper of the ſtate, and not as any part of the permanent laws of the kingdom. It is now, however, indiſputably authorized by the legiſlature *. The king is empowered to form and eſtabliſh articles of war, as well for his own troops as for thoſe of the Eaſt India Company. When we conſider therefore, in time of war, when this act is calculated to operate with effect, that no leſs perhaps than a million of ſubjects are amenable to its coercion; and that the power of the crown to create crimes and annex puniſhments (not extending to life or limb) is not unalienably confined to the ſovereign himſelf, but is diffuſed by delegation to his different officers on ſervice, it cannot but appear ſtrange that greater attention ſhould not have been paid to it. It is true, that the king hath, in the articles of war, enumerated all ſuch crimes as are puniſhable with DEATH; and in general all ſuch as are cognizable by a court martial, when acting within the reach of the civil power; and that they are alſo explicit with reſpect to ſuch miſdemeanors as can be tried under the ſanction of the military act: that in the courſe of military law, winding itſelf in many forms in the ſame channel with that of civil and criminal juriſprudence, a court OF ENQUIRY is frequently appointed, like a grand jury, to ſearch into complaints, and finally to decide whether the perſons complained of are puniſhable by law. The complaint is not ſo much againſt the law itſelf, as againſt the proceedings under it.—For inſtance, by the articles of war, and the oath which is taken by each of the members

* An "annual act," to "puniſh mutiny and deſertion."

OF

AND thus I have given a brief proſpect of theſe courts and matters, wherein the canon and civil law has been in ſome meaſure allowed as the rule or direction of proceedings or deciſions. But although in theſe courts and matters the laws of England, upon the reaſons and account before expreſſed, have admitted the uſe and rule of the canon and civil law; yet even herein alſo, the common law of England has retained thoſe *ſigna ſuperioritatis*, and the preference and ſuperintendence in relation to thoſe courts; namely,

FIRST, as the laws and ſtatutes of the realm have preſcribed to thoſe courts their bounds and limits, ſo the courts of common law have the ſuperintendency over thoſe courts, to keep them within the limits and bounds of their ſeveral ju-

of a general court martial, the juriſdiction of the members is confined to a ſingle *matter* and a ſingle *priſoner*; notwithſtanding which they have looked upon the firſt ſwearing in of the court as a ſufficient authority to try a variety of offences—many matters and many priſoners; when, in propriety, the court ſhould be ſworn *de novo* on the trial of every proſecution. And tho' the oath to witneſſes ſhould be adminiſtered in the preſence of the whole court, and of the priſoner himſelf, it has nevertheleſs been frequently the practice to examine a valetudinary witneſs by *deputation*, as it is called. It is true, his Majeſty annulled the proceedings of one court martial, for having appointed ſix of its members to take the evidence of a valetudinary witneſs. But ſtill the practice is, I believe, continued. The deputation is evermore employed, although in fact its irregularity is at any time ſufficient to render the proceedings nugatory. Opiniative evidence is alſo too frequently admitted in courts-martial; forgetting that in ſuch caſes opinion is ſubſtituted in lieu of certainty, and the truth, if not radically diſcarded, at leaſt ſubjected to the various motives of the deponent *. Theſe are a few among the many improprieties which prevail in courts-martial. Their whole proceedings ſhould undergo a thorough reformation.

A court martial may reviſe its ſentence, if it be returned for that purpoſe; but it cannot be returned more than once. See *Adye* on the ſubject of martial law; and a treatiſe intitled "Thoughts on "Martial Law, and on the Proceedings of General Courts Martial," printed for T. Becket in 1779. See alſo the caſe of Grant v. Sir Charles Gould, reported by Mr. Hen. Blackſtone, 2 v. 69.

* Lord George Sackville's Trial, 31.

riſdictions,

riſdictions, and to judge and determine whether they have exceeded thoſe bounds, or not. And in caſe they do exceed their bounds, the courts at common law iſſue their prohibitions to reſtrain them, directed either to the judge or party, or both. And alſo, in caſe they exceed their juriſdiction, the officer that executes the ſentence, and in ſome caſes the judge that gives it, are puniſhable in the courts at common law; ſometimes at the ſuit of the king, ſometimes at the ſuit of the party, and ſometimes at the ſuit of both, according to the variety and circumſtances of the caſe (*u*).

SECONDLY, the common law and the judges of the courts of common law have the expoſition of ſuch ſtatutes or acts of parliament as concern either the extent of the juriſdiction of thoſe courts, whether eccleſiaſtical, maritime, or military, for the matters depending before them. And therefore, if thoſe courts either refuſe to allow theſe acts of parliament, or expound them in any other ſenſe than is truly and properly the expoſition of them, the king's great courts of the common law, who, next under the king and his parliament, have the expoſition of thoſe laws, may prohibit and controul them (*w*).

AND thus much touching theſe courts wherein the civil and canon laws are allowed as rules and directions under the reſtrictions above-mentioned. Touching which the ſum of the whole is this:

FIRST, that the juriſdiction exerciſed in thoſe courts is derived from the crown of England, and that the laſt devolution is to the king, by way of appeal.

SECONDLY, that although the canon or civil law be reſpectively allowed as the direction or rule of their proceedings,

(*x*) Blac. Com. 1 v. 84. (*w*) Blac. Com. 1 v. 84.

yet

yet that is not as if either of thoſe laws had any original obligation in England, either as they are the laws of emperors, popes, or general councils, but only by virtue of their admiſſion here; which is evident, for that thoſe canons, or imperial conſtitutions, which have not been received here, do not bind; and alſo, for that by ſeveral contrary cuſtoms and ſtiles uſed here, many of thoſe civil and canon laws are controuled and derogated.

THIRDLY, that although thoſe laws are admitted in ſome caſes in thoſe courts, yet they are but *leges ſub graviori lege*. And the common law of this kingdom has ever obtained and retained the ſuperintendency over them, and thoſe *ſigna ſuperioritatis* before-mentioned, for the honour of the king and the common law of England (*x*).

(*x*) Such laws (ſays Blackſtone), thus admitted, reſtrained, altered, new modelled and amended, 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. Com. 1 v. 84.

CHAP.

CHAP. III.

Concerning the common law of England, *its uſe and excellence, and the reaſon of its denomination.*

I COME now to that other branch of our laws, the common municipal law of this kingdom, which has the ſuperintendency of all thoſe other particular laws uſed in the before-mentioned courts, and is the common rule for the adminiſtration of common juſtice in this great kingdom, of which it has been always tender, and there is great reaſon for it. For it is not only a very juſt and excellent law in itſelf, but it is ſingularly accommodated to the frame of the Engliſh government, and to the diſpoſition of the Engliſh nation; and ſuch as by a long experience and uſe is, as it were, incorporated into their very temperament, and in a manner become the complexion and conſtitution of the Engliſh commonwealth.

INSOMUCH that even as in the natural body the due temperament and conſtitution does by degrees work out thoſe accidental diſeaſes which ſometimes happen, and do reduce the body to its juſt ſtate and conſtitution; ſo, when at any time through the errors, diſtempers, or iniquities of men, or times, the peace of the kingdom and right order of government have received interuption, the common law has waſted and wrought out thoſe diſtempers, and reduced the kingdom to its juſt ſtate and temperament; as our preſent and former times can eaſily witneſs.

THIS law is that which aſſerts, maintains, and, with all imaginable care, provides for the ſafety of the king's royal perſon, his crown and dignity; and all his juſt rights, revenues,

nues, powers, prerogatives, and government; as the great foundation (under God) of the peace, happineſs, honour and juſtice of this kingdom. And this law is alſo that which declares and aſſerts the rights, and liberties, and the properties of the ſubject; and is the juſt, known, and common rule of juſtice and right, between man and man, within this kingdom.

AND from hence it is, that the wiſdom of the kings of England, and their great council, the honourable houſe of parliament, have always been jealous and vigilant for the reformation of what has been at any time found defective in it; to remove all ſuch obſtacles as might obſtruct the free courſe of it, and to ſupport, countenance and encourage the uſe of it; as the beſt, ſafeſt, and trueſt rule of juſtice in all matters, as well criminal as civil.

I SHOULD be too voluminous to give thoſe ſeveral inſtances that occur frequently in the ſtatutes, the parliament rolls, and parliamentary petitions, touching this matter; and ſhall therefore only inſtance in ſome few particulars in both kinds, viz. criminal and civil. And firſt, in matters civil.

IN the parliament 18 Edw. I. in a petition in the lords houſe, touching land, between Hugh Lowther and Adam Edingthorp, the defendant alledges, that if the title ſhould in this manner be proceeded in, he ſhould loſe the benefit of his warranty; and alſo, that the plaintiff, if he hath any right, hath his remedy at common law by aſſize of mortdanceſtor; and therefore demands judgment, *ſi de libero tenemento debeat hic ſine brevi reſpondere*. The judgment of the lords in parliament thereupon is entered in theſe words:

" Et quia actio de prædicto tenemento petendo & etiam
" ſuum recuperare, ſi quid habere debeat vel poſſit eidem Adæ

" per

" per aſſiſam mortis anteceſſoris competere debet, nec eſt juri
" conſonum vel hactenus in curia iſta uſitat' quod aliquis ſine
" lege communi & brevi de cancellaria de libero tenemento
" ſuo reſpondeat, & maxime in caſu ubi breve de cancellaria
" locum habere poteſt, dictum eſt præfato Adæ quod ſibi per-
" quirat per breve de cancellaria ſi ſibi viderit expe-
" dire."

ROT. Parl. 13 R. 2. No. 10. Adam Chaucer preferred his petition to the king and lords in parliament againſt ſir Robert Knolles, to be relieved touching a mortgage which he ſuppoſed was ſatisfied, and to have reſtitution of his lands. The defendant appeared, and upon the ſeveral allegations on both ſides the judgment is thus entered, viz.

" Et apres les raiſons & les allegeances de l'un party & de
" l'autre, y ſembles a ſeigneurs du parlement que le dit peti-
" tion ne eſtoit petition du parlement, deins que le mattier
" en icel comprize *dovit eſtre* diſcuſs per le commune ley.
" Et pur ceo agard ſuit que le dit Robert iroit eut ſans jour &
" que le dit Adam ne prendroit rien per ſay ſuit icy, eins que
" il ſueroit per le commune ley ſi il luy ſembloit ceo faire."
Where we may note, the words are " *dovit eſtre*," and not " poet eſtre diſcuſſe per le," &c.

ROT. Parl. 50 Edw. 3. No. 43. A judgment being given againſt the biſhop of Norwich for the archdeaconry of Norwich, in the common bench, the biſhop petitioned the lords in parliament, that the record mighbe brought into that houſe, and be reverſed for error. " Et quoy a luy eſtoit
" finalement reſpondu per common aſſent des ils les juſtices
" que ſi error y fuſt ſi aſcun a fine force per le ley de Angle-
" terre tiel error fuit voire en parlement immediatement per
" voy de error ains en bank le roy, & en nul part ailhors,
" mais

" mais ſi le caſe avenoit que error fuſt fait en bank le roy
" adonque ceo ſerra amendes en parlement."

AND let any man but look over the rolls of parliament, and the bundles of petitions in parliament, of the times of Edward I. Edward II. Edward III. Henry IV. Henry V. and Henry VI. he will find hundreds of anſwers of petitions in parliament, concerning matters determinable at common law, endorſed with anſwers to this, or the like effect:—" Sues
" vous a le commune ley;—ſequatur ad communem legem;
" —perquirat breve in cancellaria ſi ſibi viderit expedire;
" ne eſt petition du parlement;—mandetur iſta petitio in
" cancellarium, vel cancellario, vel juſticiariis de banco,
" vel theſaurario, & baronibus de ſcaccario"—and the like.

AND theſe were not barely upon the *bene placita* of the lords, but were *de jure*, as appears by thoſe former judgments given in the lords houſe in parliament. And the reaſon is evident. Firſt, becauſe if ſuch a courſe of extraordinary proceedings ſhould be had before the lords in the firſt inſtance, the party would loſe the benefit of his appeal by writ of error, according as the law allows. And that is the reaſon why even in a writ of error, or petition of error upon a judgment in any inferior court, it cannot go *per ſaltum* into parliament, till it has paſſed the court of king's bench, for that the firſt appeal is thither. Secondly, becauſe the ſubject would by that means loſe his trial *per pares*, and conſequently his attaint in caſe of a miſtake in point of iſſue or damages, to both which he is intitled by law.

AND although ſome petitions of this nature have been determined in that manner, yet it has been (generally) when the exception has not been ſtarted, or at leaſt not inſiſted upon. And one judgment in parliament, " that caſes of that

" nature

" nature ought to be determined according to the courſe of " the common law," is of greater weight than many caſes to the contrary wherein the queſtion was not ſtirred; yea, even though it ſhould be ſtirred, and the contrary affirmed upon a debate of the queſtion; becauſe greater weight is to be laid upon the judgment of any court when it is excluſive of its juriſdiction, than upon a judgment of the ſame court in affirmance of it.

NOW as to matters criminal, whether capital or not, they are determinable by the common law, and not otherwiſe. And in affirmance of that law were the ſtatutes of Magna Charta cap. 29. 5 Edw. 3. cap. 9. 25 Edw. 3. cap. 4. 29 Edw. 3. cap. 3. 27 Edw. 3. cap. 17. 38 Edw. 3. cap. 9. & 40 Edw. 3. cap. 3; the effect of which is, that no man ſhall be put out of his lands or tenements, or be impriſoned by any ſuggeſtion, unleſs it be by indictment or preſentment of lawful men, or by proceſs at common law.

AND by the ſtatute of 1 Hen. 4. cap. 14. it is enacted, that no appeals be ſued in parliament at any time to come. This extends to all accuſations by particular perſons, and that not only of treaſon or felony, but of other crimes and miſdemeanours. It is true, the petition upon which that act was drawn up, begins with appeals of felony and treaſon; but the cloſe thereof, as alſo the king's anſwer, refers as well to miſdemeanours as matters capital. And becauſe this record will give a great light to this whole buſineſs, I will here ſet down the petition and the anſwer verbatim. Vide Rot. Parl. 1 Hen. 4. No. 144 (*a*).

" Item, Supplyont les commens que deſore en avant nul " appele de traiſon ne de autre felony quelconq; ſoit accept " ou receive en le parlement ains en vous autres courts de " dan voſtre realm dementiers que en vous dits courts purra

(*a*) 3 Inſt. 31. 132. Raſt. Ent. 49, 50. 1 Mod. 148. St. at lar. 4to. ed. 1786. 1 v. 397.

" eſtre

" eſtre terminer come ad ote fait & uſe ancienement en temps
" de vous noble progeniteurs; et que cheſcun perſon qui en
" temps a venir ſerra accuſe ou impeach en voſtre parlement
" ou en aſcuns des vos dits courts per les ſeignors & commens
" di voſtre realm ou per aſcun perſon & defence ou reſponſe a
" ſon accuſement ou empeachment & ſur ſon reſponſe rea-
" ſonable record jugement & tryal come de ancienement
" temps ad eſtre fait & uſe per les bones leges de voſtre realm,
" nient obſtant que les dits empeachments ou accuſements
" ſoient faits per les ſeigneurs ou commens de voſtre relme
" come que de novel en temps de Ric. nadgarius roy ad eſtre
" fait & uſe a contrar, a tres grand miſchief & tres grand
" maleveys exemple de voſtre realm."

" LE roy voet que de cy en avant toutes les appeles de
" choſes faits deins le relme ſoient tryez & terminez per les
" bones leys faits en temps de tres noble progeniteurs de noſ-
" tre dit ſeigneur le roy, et que touts les appeles de choſes
" faits hors du realm, ſoient triez & terminez devant le
" conſtable & marſhal de Angleterre, & que nul appele ſoit
" fait en parlement defore en aſcun temps a venir."

THIS is the petition and anſwer. The ſtatute, as drawn up hereupon, is general, and runs thus: " Item, pur plu-
" ſieurs grands inconveniences & miſchiefs que pluſieurs
" fait ont advenus per colour des pluſieurs appeles faits deins
" le realm avant ces heurs ordain eſt & eſtabluz, que defore en
" avant touts appeles de choſes faits deins le realm ſoient
" tries & termines per les bones leys de le realm faits & uſes
" en temps de tres noble progeniteurs de dit noſtre ſeigneur
" le roy; et que ils les appeles de choſes faits hors du realm
" ſoient tries & termines devant le conſtable & marſhal pur
" les temps eſteant; et ouſter accordes eſt & aſſentus que nulls
" appeles ſoient defore faits ou purſues en parlement en nul
" temps avenir *(b)*."

(b) Vide ſtat. 1 Hen. 4. cap. 14. and ſee the Quarto edit. of ſtat. 14. 431.—See alſo 3 Inſt. 31. 132. 1 Mod. 148. Raſt. Ent. 49, 50.

WHERE we may obſerve, that though the petition expreſſes only treaſon and felony, yet the act is general againſt ALL appeals in parliament. And many times the purview of an act is larger than the preamble, or the petition, and ſo it is here: for the body of the act prohibits all appeals in parliament, and there was reaſon for it. For the miſchief, viz. appeals in parliament, in the time of king Richard 2. as in the petition is ſet forth, were not only of treaſon and felony, but of miſdemeanors alſo. As appears by that great proceeding, 11 Ric. 2. againſt divers, by the lords appellants; conſequently it was neceſſary to have the remedy as large as the miſchief. And I do not remember that after this ſtatute, there were any appeals in parliament, either for matters capital or criminal, at the ſuit of any particular perſon or perſons.

IT is true, impeachments by the houſe of commons, ſent up to the houſe of lords, were frequent, as well after as before this ſtatute; and that juſtly, and with good reaſon. For that neither the act, nor the petition, ever intended to reſtrain them, but only to regulate them; viz. that the parties might be admitted to their defence to them. And as neither the words of the act, nor the practice of after-times, extended to reſtrain ſuch impeachments as were made by the houſe of commons, ſo neither do thoſe impeachments and appeals agree in their nature or reaſon. For appeals were nothing elſe but accuſations, either of capital or criminal miſdemeanors, made in the lords houſe by particular perſons: but an impeachment is made by the body of the houſe of commons, which is equivalent to an indictment *pro corpore regni*, and therefore is of another nature than an accuſation or appeal. Only herein they agree, viz. impeachments in caſes CAPITAL againſt peers of the realm have been ever tried and determined in the lords houſe; but impeachments againſt a commoner have not been uſual in the houſe of lords,

lords, unleſs preparatory to a bill, or to direct an indictment in the courts below. But impeachments at the proſecution of the houſe of commons for MISDEMEANORS, as well againſt a commoner as any other, have uſually received their determinations and final judgments in the houſe of lords; whereof there have been numerous precedents in all times, both before and ſince the ſaid act. [A]

[A] As to parliamentary impeachment, the great guardian of the purity of our conſtitution, the ſtudent may conſult that moſt excellent and uſeful publication, "the Parliamentary Hiſtory of "England;" Monteſq. Sp. L. xi. 6. 1 Hal. H. P. C. 150. Rot. Parl. 4 Ed. 3. n. 2. and 6. 2 Brad. Hiſt. 190. Seld. Judic. in Parl. c. 1. Blac. Com. 1 v. 269. 4 v. 259. 399. & 12 & 13 W. 3. c. 2.

Since the publication of the laſt edition of this Hiſtory, an important queſtion, relative to the nature and continuance of Parliamentary impeachments, has taken place. Warren Haſtings Eſq. having been impeached by the Commons for certain high crimes and miſdemeanors, the Parliament, pending his trial, (which had engroſſed two or three years) was diſſolved. Within a ſhort time after the meeting of the new Parliament, namely on Friday the 17th of December 1790, it was moved in the Houſe of Commons, "That it appears that an impeachment by this Houſe, in "the name of the Commons of Great Britain, againſt Warren Haſtings, "Eſq. late Governor General of Bengal, for ſundry high crimes "and miſdemeanors, is now depending."—The Honourable Member * who moved it, ſtated, that his intention was not to move any thing which implied a doubt, but a plain aſſertion of the privileges of the Houſe of Commons, as handed down to them by their predeceſſors, through an uninterrupted ſucceſſion of five hundred years, and to be as faithfully tranſmitted to future generations. That in all the convulſions of our Government, in all the ſtruggles, conteſts, and incidental or progreſſive changes of the functions and powers of the Houſe of Commons, this alone had remained immutable—that an impeachment was never to be defeated by colluſion with a Miniſter, or by the power of the Crown. That an impeachment abated by a diſſolution of Parliament, was not to be found in plain expreſs terms on the Journals of the Houſe of Lords, on the Journals of the Houſe of Commons, nor, taking the confluence of the Rhone and the Soane, in the Minutes of the Conferences between the two Houſes. It was as little to be found in any

* Mr. Burke.

book of authority, or in any good report of law caſes. If the Houſe of Commons poſſeſſed any privileges which were not held for their own individual accommodation, but in truſt for their conſtituents, (as the right of originating money bills, and of proſecuting State criminals) they could not ſurrender or concede them, without a breach of faith. They could no more ſurrender the law and privilege of Parliament when in their favour, than they could abrogate the law when it was againſt them.

The Houſe of Lords, it had been ſaid, was a Supreme Court of Juſtice, and therefore the ſole judge of its own proceedings. Had the Commons no control over the Houſe of Lords in their judicial capacity? He was ready to pronounce that they had. The Houſe of Commons had no judicial, no executive function; but as the ſeeming paradoxes in our conſtitution would appear, on examination, to be founded in the deepeſt wiſdom, from this apparent want of function in the Houſe of Commons, from this ſeeming want of power, it had all power. It was the watch, the inquiſitor, the purifier of every judicial and executive function; and from its apparent impotence, derived its greateſt ſtrength and beauty. If it gave up this, it gave up all, and, like ſalt which had loſt its ſavour, was good for nothing. Were the Lords to reſolve, in their judicial capacity, that a writ of error abates by prorogation or diſſolution of Parliament, would the Houſe of Commons heſitate a moment to interfere, as they had interfered in the caſe of Skinner and the Eaſt India Company, when the Lords attempted to uſurp original juriſdiction? That interference gave riſe to a diſpute, but the iſſue was as happy as the interference was proper, and inſtead of fomenting diſcord between the two Houſes, had been the means of promoting their future harmony.

This motion brought on a very animated and intereſting debate. All the legal characters in the Houſe (excepting only three or four) ſtrongly reſiſted the motion; but happily without ſucceſs. Againſt the motion it was urged, that a Committee ſhould be appointed to ſearch for precedents on the ſubject; by which courſe alone, an aſſembly ſo very popular could decide with the preciſion neceſſary on ſuch a momentous occaſion, and conſiſtently with that dignity which they ought always to preſerve in the eyes of the Public which they repreſented.

Before however recourſe was had to precedents, a great preliminary queſtion preſented itſelf: By what rule, and upon what principles, the ſubject was to be inveſtigated; whether it was a queſtion of privilege to be decided by expediency, or a queſtion of law to be determined by rule?

The objection was, that it appeared to be judicial. The reſolution ſeemed to preſuppoſe doubts of the continuance, which had never been ſtirred, and quieted them by a reſolution that the impeachment was *now pending*. This ſeemed not only the aſſumption of judicial authority,

authority, but a declaration which might pledge the Houſe to give it more than judicial effect.

That the preſent ſtate of the impeachment, be it what it might, was a pure queſtion of law; to be decided by the Houſe of Lords, ſitting as a Court of Impeachment on the inquiſition of the Commons; as much an Engliſh Court of criminal law, as the Court of King's Bench, or the Quarter Seſſions. That it was impoſſible to deny this, without inſiſting that *Magna Charta*, and the thirty ſtatutes confirmatory of it, were all repealed; or at leaſt that though exiſting for ſubordinate purpoſes, they could in the preſent inſtance be made to bend to the will of one branch of the Legiſlature. That the firſt ſtruggles of our anceſtors were to fix deeply and immoveably the root of all ſound and rational liberty, by bringing juſtice, criminal and civil, to a preciſe ſtandard. That arbitrary and anomalous proceedings, by which the ſubject was queſtioned before juriſdictions not defined by law, and expoſed to trials and judgments aſcertained by no legal ſtandard, were the great vice of the ancient government of England; the grievance which firſt called forth the ſpirit and wiſdom of the founders of the conſtitution, to put an end to thoſe worſt of evils. To bring the enjoyment of life, property, and liberty, within the plain unequivocal protection of poſitive law, was the very object of *Magna Charta*; and was amply ſecured by the twenty-ninth chapter, which enacted, that no man ſhould be taken, or impriſoned, or deprived of any property, privilege, or franchiſe, but by the judgment of his equals, or the law of the land. Under ſuch an alternative, therefore, every Engliſh trial muſt be had; a jury of equals muſt decide in all caſes on the life or perſon of an Engliſh commoner, unleſs where there were exceptions by immemorial cuſtom, or poſitive ſtatute; in other words, by the law of the land.

That the trial by impeachment was one of thoſe exceptions; its only foundation muſt therefore be Engliſh law, conſequently the courſe of proceeding under it could never be changed or abrogated by a reſolution of the Houſe of Commons, but muſt be changed alone by the entire Legiſlature of the kingdom. This ſacred ſecurity of the Engliſh Government *Magna Charta* firſt eſtabliſhed; and its thirty confirmatory ſtatutes, with their ſtrong, deep, and intertwiſted roots, bound faſt the ſpreading tree of our liberties, often ſhaken indeed, but never looſened, by the contending tempeſts of ages; and the Houſe of Commons had ever ſtood as a fence around it, and planted new laws for its ſhelter and preſervation.

That the trial by impeachment, eſtabliſhed by the moſt ancient uſage, was unqueſtionably an inſtitution neceſſary for the preſervation even of the laws themſelves, and all the ſecurities of the Government; but was inſtituted by the ſame cautious wiſdom, and tempered with that juſt and benevolent ſpirit, which ſo peculiarly

characteriſed Engliſh juriſprudence. In times when the power of the Crown and its ſubordinate executive magiſtrates would, without due check, have laid waſte all the rights of the ſubject; when even the judges of the law were but too often the ſubordinate engines of oppreſſion, it became neceſſary to provide a tribunal, where criminals could be queſtioned, whoſe authority or means of corruption might over-awe or ſeduce the ordinary courts and miniſters of juſtice. But though ſpurred on by neceſſity, the founders of the conſtitution did not forget the ſafety of the criminal, even in providing for the ſuperior ſafety of the ſtate. When they conferred an inquiſitorial juriſdiction on one branch of the Legiſlature, they recollected the over-ruling influence and authority of ſuch an accuſer, and therefore conferred the power of judicature upon a coequal branch of the government; which, from being ſuperior to awe or influence, actuated by different intereſts, and divided by diſſimilar prejudices, was likely to hold even, the balance of this neceſſary and ſuperior court of juſtice.

By this mode of conſidering the ſubject (and it was ſo conſidered by every writer of authority), the trial by impeachment ſtood harmoniouſly conſiſtent with the entire conſtitution, and with all the analogies of law. By this mode of conſidering it, it could alone be reconciled with *Magna Charta*; for though the party impeached was not tried indeed by his equals, becauſe his equals were his accuſers, yet he was ſtill tried by the law of the land, (the alternative in the wording of the ſtatute) which he could not be, if an impeachment were not a branch of the eſtabliſhed criminal juſtice of England.

Beſides this legal proceeding by impeachment before the Peers of the realm as a court of criminal law, it would appear, from an inſpection of the ancient records of Parliament, (many of which had been collected by Lord Chief Juſtice Hale in a manuſcript printed by Mr. Hargrave, but not publiſhed) that the Lords anciently drew Commoners before them, on the accuſation of individuals, contrary to *Magna Charta* and the various confirmatory ſtatutes. Repeated complaints were made of theſe abuſes by the Commons, and at laſt they were declared to be utterly void, and were formally aboliſhed by ſtatute (*a*). The Lords however, for ſome time, ſeemed to have diſregarded the ſtatute, till upon a private impeachment of Lord Clarendon by Lord Briſtol, the Houſe of Lords referred the queſtion to the Judges, who declared ſuch a proceeding, on the accuſation of an individual, to be contrary to law; coming, as Lord Hale expreſſed it in the work alluded to, within the words of the 29th chapter of Magna Charta: *Nec ſuper eum ibimus, nec ſuper eum ponemus* (*b*). From that time an impeachment by the

(*a*) 1 Hen. 4. c. 14. ante, page 65. (*b*) *Mittemus* in orig.

Commons

Commons was the only caſe in which a Commoner could be ſubjected, by law, to the judicature of the Peers. Aſſuming then an impeachment to be a legal proſecution, on the accuſation of the Commons before the Lords Houſe, could it be any longer a queſtion, by which of the two Houſes every matter which the accuſed had a direct intereſt in for his preſervation, ſhould be adjudged? Common ſenſe and common juſtice equally revolted at a judgment affecting the accuſed, delivered by the accuſer. The court appointed to judge him could alone decide it; and it ſhould be left to its deciſion, without being led by authority, influence, or fear, which were all alike hoſtile to the impartial deliberations of juſtice.

If the Commons, therefore, on examination of the ſubject, ſhould have reaſon to think that, conſiſtently with a ſeries of former judgments of the Lords in ſimilar caſes, a perſon impeached had a legal right to be diſmiſſed from the impeachment by a diſſolution of the Parliment, they ought ſtudiouſly to forbear, by an exerciſe of their own authority, to place any perſon accuſed by themſelves in a worſe condition before his judges, than he might ſtand in without ſuch interference; and rather repair the defect of the law by a proſpective ſtatute, than deprive an individual of the protection of it by an *ex poſt facto* reſolution.

That the juriſdiction of deciding on the exiſtence or ſtate of the impeachment, as it might be affected by the diſſolution of Parliament, was a queſtion equally judicial with any other which might occur in the courſe of trial. The Lords might be obliged to decide it on the objection of the perſon accuſed. And it could not be conceived, that the Commons had a privilege to affect the ſtate of the priſoner in judgment. If the Lords indeed were, *mala fide*, to give a judgment hoſtile to the validity of an impeachment, and contrary to eſtabliſhed rule and cuſtom; which, in the abſence of ſtatute, could alone determine what was law; ſuch a proceeding would deſerve the moſt ſerious conſideration, as a dangerous abuſe of judicial authority. Still the queſtion of judicature would not be changed by the poſſibility of ſuch a ſuppoſition, and it equally remained to be decided by precedent, what the rule of proceeding had been which eſtabliſhed the law.

If the deciſion then was with the Lords, it was next to be examined by what rule it ought and might be expected to be decided by them. If the rules of deciſion were not to be found in the Lords' Journals, where were they to be ſought for, and what rule of law for the protection of the ſubject could exiſt? And was it to be believed, that after the virtue and wiſdom of ages had been exerted for the ſecurity of the ſubject againſt every ſpecies of arbitrary power and puniſhment; was it to be believed, that when the probability of oppreſſion in accuſations of ſtate, had reduced their anceſtors to provide ſo many ſecurities againſt vexation in the courſe of trial, that they ſhould purpoſely have left, without bounds or limits, an engine of power, highly neceſſary indeed, but like

every other power not meaſured by law, deſtructive of all the happineſs and ſecurity of life? That, therefore, the Lords muſt govern themſelves by the judgments of their own Houſe on ſimilar occaſions, and muſt deal with him, if he were placed before them, as they had dealt with others in judgment. A perſon accuſed had, by the genius of the law, a right to come under the protection of technical and formal objections, even when he ſtood not within the reaſon of them, much more if the protection inſiſted on was conſiſtent with the whole ſpirit, and all the analogies, of juſtice. The Court of King's Bench could not enforce Mr. Wilkes's outlawry, though valid in every ſubſtantial part, becauſe the County Court, where he was proclaimed and exacted, was not deſcribed upon the record with the preciſion ſanctioned by cuſtom; though it was plain to a common reader, that it was deſcribed ſo as to be diſtinguiſhed from any other. The firſt inclination of the mind oppoſed ſuch a precedent. But the defeat of juſtice in that, or any other particular caſe, was never lamented beyond its meaſure by any wiſe man; becauſe when even good judges muſt thus ſometimes ſtand diſappointed in the juſt execution of the law, from the ſtrictneſs neceſſary to the adminiſtration of it, the example formed an inexorable barrier againſt the inroads of power and tyranny, in caſes where policy and expediency might eaſily be warped on the ſpur of occaſions, to confiſcate property, or to deſtroy liberty and life. It was admitted, that the power of defeating an impeachment was an inconvenient and exceptionable prerogative of the Crown; but not more dangerous than many other prerogatives formerly belonging to the Kings of England, which in ſubſequent ages had been taken away. But how taken away? Not by reſolutions of their inexpediency, acted upon till the prerogatives were abandoned without ſtatute, but by the regular courſe of legiſlation; the Commons employing the weight of their privileges to compel conſent to a new and better rule of action, and not deſtroying the ſanctions of government, or beating down one dangerous power by the introduction of a greater. That the ſtate of the impeachment therefore ſhould be decided on by the Court, where the Commons by law had lodged it; and that the former judgments of that Court of competent juriſdiction and an acquieſcing Legiſlature, conſtituted the law on the ſubject. By an acquieſcing Legiſlature was meant, that when a ſeries of judgments by a court of competent juriſdiction, *à fortiori* of a court in the laſt reſort, had eſtabliſhed any rule of deciſion, every ſubject had a right to the benefit of it in judgment, while the rule remained in exiſtence, unreverſed by the authority of Parliament; therefore, the ſolution of the queſtion (let it be diſcuſſed where it might) depended wholly on the judgments of the Lords in ſimilar inſtances, to be collected from their different acts, as found in the Journals of that Houſe.

That the Repreſentatives were perfectly independent of the people, and were themſelves, during the legal continuance of their powers,

powers, the Commons of the land. Hence the Commons of one Parliament were unfettered by their predeceſſors, and would never give them credit for proceedings which had not received the ſanction of law. It followed equally, that when the Parliament was at an end, their controul over the rights of the ſubject, and their ſupport of thoſe rights, were equally at an end. That the idea of taking up an old proceeding *in ſtatu quo*, as it had been called, was refuted by a fair deſcription of all their powers, and of the limits to which they were confined. If a day was given for attendance, and the day arrived in a new Parliament, the next Houſe of Commons could not act upon it. If the Commons impriſoned for a contempt, the door of their priſon was opened, when thoſe who impriſoned were no more. If the Commons, as a part of the Legiſlature, had framed a bill, and their meſſenger was carrying it up to the Lords when the King diſſolved the Parliament—no future Houſe could proceed upon that ſtage of the bill, but the whole was to be taken up again. If ſuch a bill was in the nature of a public charge againſt a culprit of ſtate, as an attainder, and bills of penalty, the ſame rule attached upon it, and the culprit (in effect, though in a different ſhape) would eſcape, unleſs the whole proceeding ſhould be taken up *de novo*, as if it had never been moved one ſtep. In impeachments, the Commons had a very peculiar character as accuſers:—They had no judgment either to acquit or condemn, any more than other parties who proſecuted. They had no judgment of direction as to the mode of proceeding, or the extent of judicial powers in the court at whoſe bar they appeared; but they had a judgment of diſabling at any period, by their own diſcretion, all farther ſteps in that court, and could make it wait for their *fiat*, whether the juſtice which they had invoked ſhould or ſhould not be carried into effect. The Houſe of Lords fell under the ſame diſability, and enjoyed the ſame independence in its legiſlative character. In its judicial, it could not impriſon for a day, or a minute, beyond that which cloſed the Parliament: and it was denied, that even in treaſon, where the commitment was by the Houſe of Lords upon an impeachment, the cuſtody which remained, or the diſcretion of bail upon it in the courts of law, proved an indefinite power to extend impriſonment for the ends of juſtice beyond the duration of a Parliament. The Habeas Corpus Act met the caſe of high treaſon, by conſidering the original commitment, and the original cauſe of it, as legal or illegal; and that remand, bail, or diſcharge, had no reference to any ſuppoſed controul of the Lords over their culprit, after the Parliament was at an end, by virtue of their inherent powers. It was aſked, What impriſonment reſtrained Mr. Haſtings, or kept him even in the kingdom? What penalty of bail was a guard over him, or his friends? If any lawyer would aſſert, that Mr. Haſtings and his bail could, upon impeachment for high crimes and miſdemeanors, be touched between Parliament

Parliament and Parliament, by an order of the Lords? Indeed if they could, it would follow, that anciently impriſonment would or might have been indefinite at the mercy of the King, in all caſes of impeachment for high crimes and miſdemeanors. If it were ſaid, "No, the courts may remand the culprit or not, by their "diſcretion, as it is admitted they can upon impeachments for "high treaſon;" to this it was anſwered, "Shew firſt the im-"peachment upon a charge for high crimes and miſdemeanors, "or even the bail exiſting after the Parliament, and it would "be ſeen what the courts of law had done with it." That there was one dilemma very difficult, if not impoſſible, to be ſolved. If the Lords could not impriſon at all, or bail for a time beyond the Parliament, upon impeachment for high crimes, and might yet proceed *in ſtatu quo* at a new Parliament, the power was a mockery of juſtice, for they had no priſoner. If they could, on the other hand, impriſon him till the next Parliament, they could have done it indefinitely, as long as it pleaſed the King to diſcontinue Parliament. Upon writs of error, the Lords could not ſtir in the next Parliament, by the common law, if the error was not reverſed or affirmed in the former parliament; which had extended itſelf even to the caſe of prorogation in early times. Lord Hale had ſaid, in a manuſcript written with his own hand, that he was preſent when the Lords determined, that *in prorogation* writs of error abated (unleſs by ſpecial order continued), but that in 1673 it was firſt otherwiſe determined; affirming, however, that by diſſolution of Parliament the writ of error completely abated (and he wrote before 1678), and that he had known it ſo determined. It was true, that now writs of error do not abate, and that in that reſpect the order of 1678 had been affirmed by uſage; but if the law was originally different, it proved the idea with great force, that "*in ſtatu quo*" was out of ſight, even upon writs of error, and the analogy would, in that view of it, apply to impeachments. But the analogy between them was denied, if it was contended, that becauſe writs of error do not abate, impeachments could be taken up *in ſtatu quo*. In writs of error the record remains, and ſo in impeachments; but in writs of error there is no evidence. Was it meant by the term "depending," that the record was in court, ſo that Mr. Haſtings might be called again to plead, or that the evidence was to go on where it left off?

Upon the topic of precedents, the firſt important fact was, that from the time impeachments began, down to the year 1678, not one inſtance was to be found of an impeachment continued by the next Parliament.—It was probable, that ſome of the earlier impeachments were cloſed within the Parliament which firſt adopted them, but it ſhould be recollected how very ſhort the continuance of each Parliament uſed to be in theſe periods.—It might, therefore,

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be fairly ſuppoſed that many of thoſe proceedings died a ſudden death, by the King's power in terminating the court.—It would as little be forgotten, that moſt of the intervals between one Parliament and another were extremely tedious; which was a fact that would account for the policy of the conſtitution, in liberating the victim from cuſtody, if the other alternative ſhould have been to keep him in priſon for an indefinite period. But the caſe was far from reſting there; for inſtances, before 1678, occur, within the reigns of Charles the Firſt and Charles the Second, where impeachments, in fact, were at an end, if not in law, after the Parliament was diſſolved before judgment. It was however admitted that ſuch an actual end of an impeachment, thus interrupted by an end of the Parliament itſelf, might have ariſen from the inexpediency of carrying on the old proſecution. Yet two caſes had exiſted, in which it ſhould ſeem as if the Lords and Commons had ſuppoſed the impeachment legally at an end on the diſſolution of Parliament.

One of them was the caſe of the Duke of Buckingham in the ſecond year of Charles the Firſt, when that minion was a juſt object of popular indignation. The Commons impeached him; pending the impeachment the King diſſolved that Parliament, evidently for the purpoſe of defeating this challenge upon the juſtice of the Lords. In the mean time the King extracted the articles of impeachment, made them articles of an information againſt the Duke in the Court of Star Chamber, and ſtopped that proceeding under the colour of being ſatisfied by the evidence that he was innocent.—This conduct was clear notice to the Commons, that the King looked upon the impeachment, after a diſſolution, as a nullity. The next Parliament was convened in a very little time after the manœuvre, and we hear no more of the impeachment, nor is any complaint ſuggeſted againſt the inſult upon the Commons, though in that light it would have been viewed if the impeachment had been depending. Was the Duke leſs execrated by the Commons? Had he corrupted them? Had the King enſlaved them? Were they ignorant? or cold in the ſcent?—The Duke was more deteſted than ever; the King was at their mercy, and they were as great men as any that ever lived.—Nothing more need be ſaid of them than that, in that very year, they obtained the ſecond *Magna Charta* of England, in the Petition of Right.

In 1665 another inſtance occurred, of Drake impeached for a libel. The Lords directed, that in caſe of a diſſolution he ſhould be the object of proſecution by the Attorney-General in the King's Bench.—Why?—Could not impriſonment for the interval have ſatiated their ſpleen? And would it not have enſured the culprit when the next Parliament ſhould meet? The order for proſecuting by the Attorney-General after a diſſolution was illegal; but the ſuſpicion which gave birth to it, appeared to have been, that he would elſe

have

have eſcaped, and that neither impriſonment of him, nor bail, would have been legal between that Parliament and the next. Though, prior to theſe periods, inſtances were to be found of proceedings in Parliament againſt criminals of ſtate (not in the form of impeachments) extended in fact from one Parliament into the next; yet as far as thoſe obſolete precedents went, this at leaſt appeared: 1ſt, That ſpecial orders were deemed neceſſary ſo to continue the charge, which neceſſity admitted that, without ſpecial orders, it would have abated; and, 2dly, That unleſs it appeared the charge was acted upon *in ſtatu quo* after evidence heard, it would not reach the object of the reſolution under debate: namely, the power to go on againſt Mr. Haſtings juſt where the Managers had left off.—With reſpect to the celebrated caſe of Lord Danby in 1678, it was obſerved as to the character of thoſe times, that every ſound hiſtorian had called them times of popular fury and perſecution. It had been ſaid, "Yes, but the Lords and Commons were quarrelling "when the Parliament began, which reſolved, that impeachments "were *in ſtatu quo*. It was therefore a reluctant evidence wrung "from the Lords, by the public ſpirit of the Commons, in favour of "their conſtitutional rights." The anſwer was, that at that critical period the Lords and Commons were united, and equally violent againſt the Popiſh plot, or againſt the Miniſter, then diſgraced; that Lord Shafteſbury and the malecontents of the day had forced themſelves upon the Cabinet, and governed that very Committee, whoſe Chairman was Lord Eſſex; and theſe being the actors and the views, the act was in character. It would ſpeak for itſelf; it was full of trick—it ſhunned the light—and made a new law without reaſon, precedent, or analogy. The Lords were firſt reminded of the impeachments, and what courſe did they take? They referred to their Committee an enquiry of two points which were diſtinct; one, as to the law reſpecting the continuance or abatement of appeals and writs of error, without apparent occaſion for it; another, as to the fact reſpecting the particular ſtate of the impeachments which had been made in the former Parliament. The anſwer given on the following day was perhaps as curious a paſſage as any upon the records of Parliament, and vitiated the whole proceeding engrafted upon it. They reported, that from their view of a judgment by the Lords in 1673, petitions of appeal and writs of error were in force to be acted upon. They add (as appeared by Sir Thomas Raymond's Report *), that the papers contained in that judgment of 1673 were too voluminous. In a diſtinct ſentence, after ſtating the impeachments to be upon ſpecial matter aſſigned, they gave their opinion on a point of law to which they had never been interrogated, and at one ſtroke affirmed that opinion to be, that all thoſe impeachments were *in ſtatu quo*; not in reference to the judgment of 1673, nor with a ſingle ground of any kind, either ſtated or inſinuated. Both parts

* T. Raym. 383.

of

of the Report were then adopted by the Houſe, who, it did not appear, had ever looked at the judgment in 1673, but gave their Committee ample credit for a candid ſtatement of its effects upon writs of error. Who would have entertained a doubt, upon that Report, that in 1673 the Lords had judicially affirmed the law by which writs of error were to continue after a diſſolution? But when the judgment, as it was called (which was only a reſolution of the Lords on a reference to their Committee), was brought forward, it appeared that no queſtion was put or imagined reſpecting diſſolution of Parliament with a reference to writs of error; the only point raiſed being, Whether if prorogation had intervened, thoſe writs were at an end? If it ſhould be urged that "prorogation was the ſame as diſſolution of Parliament in princi-"ple," that propoſition would be refuted, as well as denied to be law, under the wings of Lord Hale, who died after 1673, and before 1678 *. In his Manuſcript, that great man alludes to the reſolution of 1673, as correcting and reverſing the law of a former judgment (made by the Lords in his hearing, and in that ſame Parliament), that even upon prorogation writs of error abated. But was Lord Hale of opinion, that prorogation and a diſſolution of Parliament were the ſame as to writs of error? So far from it, after ſeeming to adopt the deciſion of 1673 as good law, he proceeds to affirm, as a point clear of doubt, that after a diſſolution of Parliament the writ of error and petition of appeal was at an end; adding, that he had himſelf known it ſo ruled. Here then was detected an inſidious concealment of the fact by thoſe Lords, in 1678, as to the import of the judgment in 1673, and at the beſt a perverted analogy between two caſes, which the exiſting law had completely diſtinguiſhed. But the opinion aſſerted in the next breath, by thoſe Lords, as to impeachments, could not be juſtified even by that judgment, if the firſt analogy between prorogation and a diſſolution had been correct, becauſe there was no fair analogy between writs of error and impeachments, after a diſſolution of Parliament; one of them containing mere points of law upon the face of the record, the other containing an accuſation upon fact. In one of them the public accuſer, who had a diſcretion to interpoſe before judgment, was dead, and in the other no plaintiff was changed, but the ſame parties appeared. In character with ſuch a mode of declaring or making laws as that in 1678, was the ſubſequent conduct of thoſe times. Nothing could be more infamous than what happened in the caſe of many perſecuted Catholics, whom the Judges, and Scroggs at their head, executed, againſt all the rules of law and principles of juſtice. In character with ſuch a law, and ſo made, was the courſe of impeachment againſt Lord Stafford. The trial of Lord Stafford was of extreme importance in marking what ſhame was felt upon the judgment in 1678, and in what manner the examination of it was eluded. Jones, Maynard, and Winnington ſay,

* Namely, 25th December 1676.

"The

"The Lords have paſſed a judgment. It is too clear to be diſput-
"ed. We are to ſuppoſe they had good reaſon for it; we are to
"ſuppoſe they had precedents; but if they had none, it is proper
"to make a new precedent;" that is, proper to make it, by taking away Lord Stafford's life. The Earl of Danby, in 1682, accuſed the Peers of blowing upon their own order, by refuſing a bill which would have enacted it into a law. Then came the reverſal in 1685 of that reſolution; ſo that authority againſt authority, the laſt prevails, and it was therefore the law of the court, that impeachments abated after a diſſolution of Parliament. As to the period of 1685, the firſt year of a ſhort and wicked reign, it deſerved all the odium which a more enlightened age had thrown upon it. The reverſal was indecent in the mode of it, partial in the object, and hurried through the Houſe. But a remarkable diſtinction was taken by that reverſal, between writs of error and impeachments: that part of the order which related to writs of error had been ſince received as the law of the land; and it could be proved that the other part reſpecting impeachments, had been recognized by ſubſequent authorities in the Lords, without a hint of diſapprobation by the Commons.

That it was not true that the Commons were then completely enſlaved; Serjeant Maynard was a hoſt in favour of liberty, and then a Member of Parliament. He had been a champion for the order of 1678 againſt Lord Stafford; but in 1685, though in the habit of proteſting againſt many encroachments, he urged not one ſyllable againſt the order of reverſal, which negatived the continuance of impeachments after a diſſolution of Parliament. In 1690, the times were excellent, and perhaps a better æra for the liberty of the ſubject could not be found than in that identical year. Maynard was in the Houſe of Commons, and Somers, then Solicitor-General, the beſt and greateſt man that perhaps ever breathed in England, or in the world. A queſtion was directly put by the Lords, Whether impeachments continued or abated, upon a diſſolution? All the old precedents were examined, and many others which were not produced in 1673, were brought from the Tower. They were all ſtated; not concealed as in 1678. The Committee intimated their ſenſe of the law to be, that impeachments were at an end, upon a view of thoſe precedents; and on view of thoſe precedents the queſtion of diſcharging the Peers was expreſſly put. It was true, that politics had a ſhare in the debate which that Report produced, and that the Lords had not raiſed the point themſelves, but had ſtated another in their favour. It was, however, certain that a debate aroſe upon that Report. What became of the Houſe of Commons, when they ſaw the Report affirming impeachments to be at an end, and when they at leaſt knew it had been a point in the debate, and when there was at leaſt ambiguity in the queſtion, whether the diſcharge was upon that ground or the pardon? They urged nothing in favour of the order of 1678.—But what ſays the famous

famous Proteſt againſt the reſolution of the Lords to diſcharge the Peers? Was that ſilent upon the Report? No, it condemns the introduction of it into the debate, but not the doctrine which it imported, and imputed a deſign beyond that of relieving the Peers who had petitioned. That deſign was explained by Burnet, as having been to ſave Lord Carmarthen, againſt whom his enemies had raiſed the queſtion again, for the purpoſe of expoſing him to an old impeachment, which hung over his head, unleſs the diſſolution had made an end to it. The enemies of that Peer were buſy againſt him in the Commons; and it was propoſed, at that very time, to vote that, on account of the impeachments in a former Parliament, he ſhould be no longer one of the King's Cabinet Miniſters. Yet his enemies, aware of their own purpoſe in the Lords, and aware of the meaſures by which it had been met there, made no complaint againſt the danger, at leaſt of the order in 1678, if it could have been ſuppoſed that it was not then done away by the order of 1635.

In 1717, the Earl of Oxford was made ſubject, by a reſolution of the Lords, to an impeachment after prorogation; and it was not poſſible to read the diſſenting Lords in their Proteſt, without a neceſſary inference, that the point in queſtion had been, Whether if diſſolution abated, prorogation had or had not a ſimilar effect? That queſtion aſſumed the law of abatement as reſulting from diſſolution, and the Lords in their Proteſt never controverting that law, but affirming and commending it, expreſſed their fears that it might be weakened by a judgment in the caſe of prorogation, which they repreſented as the ſame thing; but the majority thought otherwiſe; and it was impoſſible to conceive that judgment either ſupported in argument, or in argument arraigned, unleſs upon this point conceded, namely, that a diſſolution of Parliament was the termination of an impeachment. Upon this view of the precedents a ſerious doubt was expreſſed, at leaſt whether impeachments could be taken up *in ſtatu quo* by a new Parliament. That if all the precedents were thrown into the fire, a fate which, upon the mere character of the times, two of them deſerved, yet the conſtitutional powers reſiding in both Houſes of Parliament, and general illuſtration conſidered, the Houſe was adjured to be deliberate and wary, in examining all the materials which could enlighten their judgment, before they affirmed, in the form of an aſſerted privilege, a judicial duty of the court, whoſe juriſdiction they could not change, and whoſe judgment they could not force.

Here it was enquired whether by the terms "now depending" in the motion, was meant that the impeachment was depending in all its forms, or, in other words, *in ſtatu quo*, as it depended before the diſſolution of the laſt Parliament? If ſo, the queſtion ſeemed to be ſubſtantially different from the mere conſideration whether the impeachment abated, and muſt be renovated by a particular proceſs elſewhere, not neceſſary to be then deſcribed. It was anſwered,

that

that with regard to the word "depending," introduced in the motion, it was the very word uſed in the reſolution ſent up to the Houſe of Lords in the caſe of the Earl of Danby, and therefore had been thought the proper word to be uſed on the preſent occaſion.

After this enquiry, the arguments againſt the motion were reſumed. It was ſaid to have been admitted, that there was no precedent to be found previous to 1678, of an impeachment having ſurvived a diſſolution; and therefore, not being able to eſtabliſh that order on the direct cuſtom of Parliament, recourſe had been had to the different precedents which were collected by the Committee in 1673, when the queſtion concerning writs of error was before the Houſe. But beſides that none of thoſe precedents related to impeachments by the Commons, all of them which were criminal proceedings, and not mere writs of error, were criminal appeals, directly contrary to *Magna Charta* and the ancient ſtatutes; perſiſted in, even after the ſtatute 1ſt of Henry the Fourth, chapter the 14th; and finally declared by the Lords, on reference to all the Judges, to be contrary to law, in Lord Briſtol's charge of Lord Clarendon. Such precedents therefore, even if applicable, could be no legal foundation for the ſhort-lived order of 1678. That in thoſe caſes, the Lords had given a day to the parties, in the ſucceeding Parliament, which they had omitted in the preſent inſtance, even if they had the power to have given one; by which, according to all authorities, there was an incurable chaſm in the proceedings. The party was, without day, in court, and his bail finally diſcharged from their recognizances, which went only to have him before that Parliament; Mr. Haſtings therefore was not bound to appear, nor had the Lords any proceſs to enforce his appearance; —at all events none to continue the proceedings, which were diſcontinued by no day having been given.—For this Hawkins's Pleas of the Crown, title "Diſcontinuance," where all the authorities are collected, was referred to.—Again, on adverting to the precedents, it was ſaid that that of 1673 (founded too on the anomalous and illegal proceedings alluded to) declared only that writs of error continued from ſeſſion to ſeſſion; and nothing farther was done on the ſubject till 1678, when the Parliament was diſſolved ſubſequent to the impriſonment of the Popiſh Lords under the pretended plot. The nation, at that time, was wrought up to a pitch of phrenzy concerning Popery, and upon *that ſubject*, neither the voice of reaſon nor law could be heard. The Lords and Commons, the accuſers and judges of the Lords in the Tower, jointly examined Oates, and came to a reſolution of the exiſtence of the plot, on the ſole evidence of the perſon who could give it no exiſtence but by his charge on the priſoners, who were afterwards to be tried before the Peers; which fact was ſtated, to ſhew the diſorder and irregularity which prevailed throughout that particular proceeding.

That

That on the 12th of March 1678, to give colour to the continuance of the impeachments, which by no reſolution before that time had been voted to have continuance, it was moved to declare, that writs of error (which by the reſolution in 1673 had been declared to continue from ſeſſion to ſeſſion) continued from Parliament to Parliament; and a Committee was appointed to ſearch precedents. This was evidently done to give colour to what followed; for only two days after, viz. on the 17th of the ſame March, without doing any thing on the firſt order, it was added (as an inſtruction to the Committee) to enquire alſo into the ſtate of the impeachments brought up in the laſt Parliament; and in two days afterwards, report was made to the Houſe, that "*on peruſal of the Journal of the 29th of March* 1673" (which, as had been ſhewn, applied only to the continuance of writs of error from ſeſſion to ſeſſion), and without ſearch of any other authority, or ſtatement of any one principle,—that the ſtate of the impeachments brought up in the former Parliament was not altered. The Lords agreeing with that report, made the order of 1678.

That order therefore was eſtabliſhed upon no antecedent cuſtom of Parliament, but ſtood on a moſt ſtrained and forced analogy to writs of error, which it was notorious never did continue from Parliament to Parliament till the exiſtence of the order in queſtion, as appeared from the authority of Lord Hale and Lord Coke, and a deciſion of all the Judges *temp.* Charles I.

To ſhew that that order was made on the ſpur of the occaſion, the immediate and barbarous uſe which was made of it, on the trial and execution of Viſcount Stafford, was alluded to. Lord Nottingham, whoſe authority had been cited for the continuance of impeachments, was Speaker of the Lords on that trial, and kindly conſented that Lord Stafford ſhould have counſel, provided they did not ſtand near enough to prompt him; and that aged and infirm priſoner was refuſed the right of arguing the queſtion, whether his impeachment had not abated. Perhaps, however, the Managers of that day were right, when they objected to the admiſſibility of ſuch argument, the exiſtence of the order of 1678; but for that very reaſon, if a good one, the argument now turned the other way, ſince the reverſal of that order of 1678 by that of 1685. The reverſing order was then ſtated, the language of which, it was contended, ſhould be attended to. It was not a reſolution either in the abſtract, or in a particular inſtance, that impeachments abated by the diſſolution of Parliament; leaving the order of 1678 ſtill ſtanding as an exiſting reſolution, which might have left future times to cite one judgment againſt the other, as they happened to be moſt conſonant to the opinions of thoſe who adopted the one or the other in argument. No, the order of 1685 entirely cut down and annihilated the former; the words of it being,—

" Reſolved, that the order of the 19th of March 1678-9 ſhall be " reverſed and annulled as to impeachments."

That if the Lords had juriſdiction to make the order of 1678, they had ſurely juriſdiction to unmake it; as the firſt ſtood on no antecedent cuſtom or rule of practice; and therefore while the order of 1685 remained in exiſtence, the matter was not debateable, and the Lords (let the Commons vote what they might) could not, without an act of violence and caprice, refuſe the beneſit of it to any man ſtanding before them in judgment. The queſtion, therefore, was, Whether the order of 1685 was in force? As to that, it had ſtood on the Lords Journals from the time it paſſed, and no impeachment had continued from Parliament to Parliament. Perſons impeached had been diſcharged from impriſonment on the footing of its exiſtence, and under its direct authority; and the Commons, neither when it was paſſed, nor ſubſequently acted upon, had ever made the ſmalleſt objection of any invaſion of their privileges, or of the law.

Having diſcuſſed the precedents of 1678 and 1685, it was ſaid that the true way of ſettling their authorities, was to examine what was done by the Lords themſelves, and how they regarded them the firſt ſubſequent time that the point occurred; and, alſo to obſerve how the Commons behaved on the ſame occaſion.

The next precedent was of the Lords Saliſbury and Peterborough, who were impeached of high treaſon in 1689. Parliament was diſſolved in the beginning of 1689, and a new one met in the ſame year. In 1690 thoſe Lords petitioned to be diſcharged from their impriſonment, ſtating the diſſolution of Parliament, and alſo a free and general pardon. The operation of the pardon was referred to the Judges; on their anſwer, the queſtion being put for their diſcharge from impriſonment, it paſſed in the negative; and being then admitted to bail, they remained ſubject to the impeachment, till they were diſcharged wholly upon the ſearch of precedents, and on the order of 1685. This would be evident to whoever would look at the Journals, though it was not eaſy to ſhew it to two hundred perſons, who had not the precedents, and who refuſed to look at them. That after the anſwer of the Judges, the matter of pardon was never diſcuſſed again; but the Lords aſſembled on the general queſtion of the continuance of impeachments; a Committee having before been appointed to ſearch precedents on the ſubject. It appeared by the Lords Journals of the 30th of March 1690, that the Committee, on that day reported, " that they had examined the Jour- " nals of the Houſe, from their beginning in the 12th of Henry VII. " and all the precedents of impeachments ſince that time, which " were in a liſt in the hands of the clerk, and alſo all the precedents " brought by Mr. Petyt from the Tower, among all which none " were found to continue from one Parliament to another, except

" the

"the Lords who were lately ſo long in the Tower;"—alluding to the Popiſh Lords, who were kept there under the order of 1678, and afterwards diſcharged under the order of 1685, which annulled it. It was upon this report, and not on the footing of pardon, that thoſe Lords were diſcharged. The entry mocked all argument; it was only neceſſary to read it. The words were,

"After conſideration of which report, and reading the orders "made the 19th of March 1678, and the 22d of May 1685, con- "cerning impeachments, and long debate thereon, it was reſolved, "that Lords Saliſbury and Peterborough ſhould be diſcharged from "their bail;" and they were diſcharged accordingly.

What farther ſhewed that the pardon was no ingredient in the diſcharge, if the ſtate of the proceeding were not in itſelf concluſive, was, that the pardon could not have deſtroyed the impeachment, even ſuppoſing the parties to be intitled to it; but muſt have been pleaded before the Lords in bar to it; and on which the Commons, according to every rule of law, as well as the moſt inveterate cuſtom and privilege in impeachments, muſt have been heard.

Nothing remained therefore to be ſaid on that caſe but the conduct of the Commons. Their impeachment was put an end to; the priſoner diſcharged without conſent, meſſage, or communication; and by a direct affirmance of the order of 1685, made on the face of the Lords Journals: yet no reſolution was come to in the Commons, nor any objection taken by any body, though this happened when the Commons were in high ſtrength, and in the very day-ſpring of the Revolution.

As an additional proof that the Lords acted on the order of 1685, it would appear, that a Committee to ſearch precedents had been at the ſame time appointed, on the motion of other perſons impeached, who were alſo diſcharged ſoon after, and on the precedent of Lords Saliſbury and Peterborough. Such was the caſe of Sir Adam Blair, Mole, Gray, and Elliott, who had been impeached about the ſame time with the two Lords. A Committee was appointed to ſearch precedents, on their application to the Houſe of Lords; and after continuing on bail till the diſcharge of Lords Saliſbury and Peterborough, they were alſo liberated, without communication with the Commons, and without any ſubſequent objection or diſſatisfaction; though all thoſe proceedings were of the moſt public notoriety, and could not be unknown to the Houſe of Commons of that day.

The Duke of Leeds's caſe in 1701, which followed next in order, (and which would no doubt be relied on in favour of the continuance) it was ſaid, made quite the other way. After the articles had been brought up, and towards the cloſe of the ſame Parliament, the Lords had, by meſſage, reminded the Commons of

their impeachment, and told them the ſeſſion was drawing to its cloſe. Soon after the Parliament was diſſolved. On the meeting of the new one, the Lords, without any new meſſage to the Commons, diſmiſſed the articles; entering on their Journals only, that in the *former Parliament* the Duke of Leeds had been impeached, articles brought up, and anſwer put in; but that, the Commons not proſecuting, he was diſcharged. That that failure of proſecution muſt have applied to the expired Parliament; for if the impeachment had continued to the new one, a new meſſage ſhould have been ſent before the articles were diſmiſſed for want of proſecution, according to a privilege always inſiſted on by the Commons, that the Lords, on an impeachment, can take no ſtep but in their preſence. The diſcharge was therefore, becauſe the juriſdiction of the Lords was at an end, and not an act of judicature on a ſubſiſting impeachment, as the Commons never made any complaint, as they did when Lord Somers was acquitted in their abſence.

That the caſes of the Lords Somers, Oxford, and Halifax, where the entries were ſimilar to that of the Duke of Leeds, were open to the ſame obſervation. As to the laſt and only remaining precedent, namely, that of the Earl of Oxford, in 1717, that precedent, it was ſaid, eſtabliſhed, beyond all queſtion, what effect a diſſolution was then ſuppoſed to have on an impeachment; for if it had then been doubted, much more if it had been denied, that a diſſolution would deſtroy an impeachment, it was extravagant to believe that Lord Oxford could have been adviſed to build a petition to be diſcharged on the intervention of a prorogation only, even if a diſſolution had been taken to be ineffectual; ſtill more improbable that the Lords would have ſeriouſly entertained it, and ſearched for precedents on the ſubject. It was true, it was decided that the intervening *prorogation* had not terminated that impeachment; but the language of the Lords who proteſted againſt the deciſion, demonſtrated that there was but one opinion concerning the effect of a diſſolution. For if the Lords who voted againſt the effect of the prorogation, had founded their opinion on the denial alſo of the effect of a diſſolution, the proteſting Lords muſt have ſeen that the vote had been given on the reverſal of the order of 1685; whereas they ſay, that as they, in oppoſition to the other part of the Houſe, could ſee no difference between a prorogation and diſſolution, they were afraid that the vote would *tend to weaken* the order of 1685; a language perfectly abſurd, if they had conceived that the vote had been grounded on a reverſal of it. The language of the Proteſt was therefore plainly this, "We are all agreed about the effect of a diſſolution, which is "the ſettled practice; but this vote againſt the effect of a prorogation, which we cannot diſtinguiſh from a diſſolution, may bring "even that point into doubt, which was not meant to be queſtioned."

Reference

Reference was now made to the case in Carthew *, where Lord Holt was supposed to have decided that impeachments were not abated by dissolution. That case, it was urged, was an application by Lord Salisbury to the King's Bench to be bailed before the Parliament met; and he was properly told by the King's Bench, that being impeached of treason, he was not within the act of Habeas Corpus, and therefore not being *de jure* bailable, the rest was, of course, matter of discretion. The Court, indeed, took notice that *commitments* of the Lords continued notwithstanding a dissolution of the Parliament. But the case which would probably be relied on for that doctrine, was Lord Stafford's, which was while the order in 1678 remained in force, which beat down all subordinate or collateral opinions; and besides that, the House of Lords, which alone had jurisdiction to decide upon the existence of the articles, made the decision, on the meeting of Parliament, in the very instance of Lord Salisbury; and without a murmur from the Commons, finally discharged that very impeachment which had been the subject of Lord Salisbury's application to Lord Chief Justice Holt. That Holt's opinion, on a collateral point too, and where the King's Bench had no jurisdiction, could never be opposed to the judgment of the House of Lords, which had jurisdiction, and which decided the very point in the very instance for which his opinion might be cited. The argument, therefore, might be rested on the principles set out with; the judgments of the Court competent to decide, and an acquiescing Legislature; nay, what was stronger than both, acquiescing accusers: for, besides that it had been admitted that no impeachments before 1678 appeared to have been continued from Parliament to Parliament, the case of the Duke of Buckingham, in the time of Charles the First, shewed the sense of the Commons themselves on that subject. They had impeached the Duke, who had become universally odious; apprehending the loss of their proceedings by dissolution, they had sent a remonstrance to the King on the subject; but the Parliament was nevertheless dissolved. The new one met equally revengeful against Buckingham; yet instead of going on with the impeachment, they addressed the King to remove him from his councils, on the imputation of the crimes charged by the former articles; but the impeachment was never mentioned again, not even in debate. It was worth observing, too, that Sir Edward Coke sat in that Parliament, who had been removed from his seat in the King's Bench by Buckingham, and who had also made him Sheriff, to prevent his return to Parliament; yet it never occurred to that great lawyer, with all his resentments about him, to consider the prosecution as existing.—Hence it was contended, that the precedents all went

* Carth. 132.

to the utter extinction even of the articles in the Lords House by the diſſolution of Parliament, without the right of proceeding even *de novo* on the trial, for that in every one of the precedents the articles had been only carried up, and no proceedings had been had in the original Parliament which had received them. Even the ſolitary order of 1673 had not declared that an impeachment in part proceeded upon, remained in *ſtatu quo*, to be taken up again without a re-commencement of trial; ſo far from it, it appeared to be worded to repel ſuch a concluſion. For though, in the very ſame order, the Lords had declared, in the abſtract, that writs of error, on which no trial could exiſt at all, to be broken and divided, continued from Parliament to Parliament; yet, in the next line, when they came to impeachments, they ſtudiouſly changed the ſtile, and inſtead of declaring generally that impeachments alſo continued from Parliament to Parliament, they only reſolved that the diſſolution did not alter the ſtate of thoſe impeachments brought up in the preceding Parliament; a declaration which, as no trial had begun on them, could not be brought to bear upon the preſent impeachment. Leaving therefore the queſtion of the total abatement to reſt, for the preſent, upon the authority of the precedents only, though they might be fortified by ſolid principles of law, a much greater queſtion lay behind, which the reſolution, though its meaning was avowed, did not diſtinctly expreſs; viz. Whether, ſuppoſing the articles themſelves did ſtill remain of record untouched by the diſſolution, *the proceedings upon them* exiſted *in ſtatu quo?* a poſition not only without ſupport from any one precedent, but repugnant to every principle of Engliſh juſtice.

That in order to decide upon both the queſtions, *i. e.* either upon the exiſtence of the impeachment at all after a diſſolution, or its exiſtence *in ſtatu quo* if it ſtill remained, the principles of Engliſh criminal law, and the rules of criminal trial in other caſes, ſhould be conſidered; becauſe the conſtitution, in permitting the exiſtence of a Court of Impeachment as a Supreme Criminal Court for high and extraordinary occaſions, could never have intended that it ſhould bring all the other laws into diſrepute by an avowed departure from their principles;—or deprive the ſubjects of England of the great protection of Engliſh juſtice, applicable to every other occaſion. The nature of the trial by impeachment, deprived the accuſed of many advantages which the law had provided for the ſafety of accuſed perſons in all other caſes; therefore the reaſonings from other proceedings would not cloſely apply; but in the abſence of precedents, the univerſal ſecurities and ſanctions of juſtice ought not to be farther violated, than neceſſarily and unavoidably flowed from the very frame and conſtitution of the Court. And in conſidering whether the impeachment at all continued, or, if continuing, could go on in an uninterrupted courſe, the Houſe ought to keep in view the general principles of Engliſh criminal

minal law and juſtice, and to apply them as far as precedent and ſound analogy would ſupport the application. That it was proper to bring in review before the Houſe, the anxious ſolicitude of the conſtitution, which was but another name for the law, to protect perſons accuſed from all vexation and oppreſſion; proviſions which conſtituted the great characteriſtic of Engliſh liberty, eſtabliſhed for ages, and which other nations were now ſtruggling, through blood and confuſion, to obtain. An impeachment continuing, as was propoſed and inſiſted on, violated them all.

The firſt ſecurity was, that perſons accuſed ſhould be brought to a ſpeedy, or rather an immediate trial, to avoid long impriſonment, and the anxious miſeries of a doubtful condition. This was amply provided for by the Habeas Corpus Act; which enabled a perſon arreſted to call upon his accuſer to bring forward his indictment the firſt ſeſſion after his impriſonment, and to try him on it at the next; on failure of which, he was, in the firſt inſtance, entitled to bail, and in the laſt, to a final diſcharge from the accuſation.

That if ſome limitation had not applied to an impeachment, by its being a proceeding confined to a Parliament, it appeared ſtrange that the proviſions of that ſecond *Magna Charta* had not been extended to that caſe, or at leaſt ſome convenient limitation enacted, conſiſtent with that ſpecies of proceeding; for if impeachments might continue beyond one Parliament, they might continue for life, and operate to perpetual impriſonment. The liberty of the ſubject would then no longer depend on the law, but on the will of one branch of the Legiſlature.

The next great ſecurity was, that the perſons appointed to try, were to be purged from all prejudice by the challenges of the priſoner. It was true, that the conſtitution of the Court, where the Judges ſat by inheritance or creation of the Crown, to a certain degree ouſted that great privilege; and in one Parliament, or in the courſe of trials in general, its operation in ſo large a body could not be very dangerous. But if it could continue from Parliament to Parliament, without limitation, the party impeached might come at laſt to be judged by ſtrangers to his impeachment, and, what was worſe, even by his very accuſers; who, coming up from the other Houſe by ſucceſſion and creation, would judge upon property and life, on their own accuſation; yet without the poſſibility of challenge or objection from the accuſed. The law of England could never mean to ſubject any of its ſubjects to ſuch a horrible inquiſition. If at the time of the Union, the Legiſlature had thought that an impeachment could have had ſuch continuance, it ſeemed reaſonable to ſuppoſe that a clauſe of diſqualification would have been introduced, to prevent the Peers of Scotland from ſitting as judges on trials, the firſt parts of which they by no poſſibility could have heard.

The laſt great rule of Engliſh trial was, that the trial, once begun, ſhould go on without alteration or ſeparation, to prevent impreſſions from any ſource but the evidence; that the evidence ſhould be given by the witneſſes in preſence of the proſecutor, the priſoner, and the Court; and that the verdict ſhould be given on the recent view and recollection of it. Here again, the frame and conſtitution of the Court of Impeachment, to a certain extent, deprived the ſubject of thoſe valuable privileges. But ſtill, conſidering it as a trial *in one Parliament*, the evil, though to be lamented, had its limits. The proſecutors were the ſame; the Court nearly ſo; and the evidence might, during adjournment, or even prorogation, be, with the aid of notes, recollected. But what was the caſe when the Parliament was diſſolved? It could not be ſaid that the pendency of an impeachment deprived the people of the free choice of their repreſentatives; not one Member, therefore, of the former Parliament might return, by election, to the new one. How, then, was ſuch new Houſe of Commons to proceed?

Suppoſe the former Parliament to have been diſſolved juſt when the accuſed had made his defence, and that while the evidence on which his accuſation reſted was freſh in his own memory, and preſent to the recollection of the Managers and the Lords, he had reſted his whole defence on obſervations on that evidence, without calling witneſſes; appealing to the honour of the Managers for the truth of them, as well as to the juſtice of the Houſe—ſuppoſe, when he had thus finiſhed, and had impreſſed even the Commons themſelves with his innocence, the Parliament had been diſſolved; how could ſuch a trial proceed *in ſtatu quo?* Were the new Commons to reply to the priſoner, whoſe defence they had never heard? or was the priſoner to make it over again, when the foundation of it was forgotten, in order that the new Commons might hear it? And ſuppoſing he could do it, it would ſtill be obſervations on evidence which the Managers had never ſeen, and of which there was no record, and which, even if recorded, would be written evidence, contrary to the genius of Engliſh law. Suppoſe even an interval of years to exiſt, which might often happen, between the giving of the evidence by the witneſſes in one Parliament, and the hour of deliberation and judgment in the next; and in a caſe, too, where a judgment of guilt or innocence might abſolutely depend upon the moſt accurate recollection of the proofs; in what ſituation would the Lords and Commons ſtand upon ſuch an occaſion? The Lords who had ſat from the beginning of the trial, muſt judge wholly from the injudicial notes of a ſleepy clerk, and with but a feeble recollection of the oral teſtimony; and the new Lords, open to no challenge, could judge from no other poſſible ſource, never having even ſeen the witneſſes who delivered it. In the ſame blind manner muſt the Commons demand judgment againſt a perſon whom the old Commons, who had heard the evidence, might have acquitted.

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By ſuch rules of trial, who would deſtroy the life of a ſparrow, or even pluck a feather out of his wing? What would the Judges, as well as the Lords, ſay to the caſe of a Peer indicted for murder in the King's Bench, and whoſe indictment was brought up by *certiorari* for trial, as it muſt be, into the Lords' Houſe, if, pending ſuch a trial, and when the moſt important witneſs was under croſs-examination, the Parliament were diſſolved;—would the witneſs be ſet up again a twelvemonth afterwards, to go on with what he had been ſaying the year before? or would the trial begin *de novo?* That that part of the argument might reſt on the anſwer which the Lords and Judges would give to that judicial queſtion, where the Commons could have no pretence of privilege; and if it were anſwered, that the trial ſhould begin *de novo*, upon what principles ſhould a Commoner be expoſed to dangers on an impeachment, which could not belong to a Peer, on an indictment for the higheſt crime?

Argument being now almoſt exhauſted *againſt the motion*, it was, in general, added, that in the lapſe of ſeven centuries, no criminal trial in any Court had ever been interrupted, and taken up again *in ſtatu quo*; nor had any one impeachment ever been ſo continued from one Parliament to another; nor before that moment had ſuch a poſition been ever hinted at by any hiſtorian, or aſſerted by any man living, in or out of Parliament. The caſe of the Duke of Suffolk was an extraordinary one to look to as a precedent. The noble Duke had been baniſhed, and his enemies, not thinking *that* a ſufficient puniſhment, moved an impeachment in that Houſe; but it was not true that a trial had been begun in one Parliament and continued in the next. While thoſe proceedings, however, were going on at home, the noble Duke lay dead in France. One inherent principle in the conſtitution was, that the Crown commanded the activity and exertion of its different powers. In ſupport of that poſition, the general adminiſtration of juſtice, and the hardſhip attending the diſcontinuance or revival of ſuits in ordinary Courts of Judicature, were referred to; adding, that there were always days appointed for putting in appearances. That the ſame rule of law obtained in the Parliament: by the King's proclamation a ſeſſion was to be holden upon a particular day; and upon the authority of Lord Coke every ſeſſion is a new Parliament; and new bills are uſually brought in. That there was a great difference between writs of error and appeals and an impeachment; writs of error and appeals being regulated by the laws and cuſtoms of the realm, modified by the uſage of Parliament; but an impeachment was always governed by the law of Parliament only. That upon a diſſolution, impeachments muſt abate, ſince a perſon impeached was put without a day, which conſequently entitled him to his diſcharge. That the Houſe had no power to revive an impeachment, ſince it was an acknowledged principle, inherent

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in the conſtitution, that the Parliament ſhould die, and all its proceedings determine with its exiſtence.

It was again aſked, Whether the word *depending* meant depending *in ſtatu quo?* for if the queſtion meant that it was depending *in ſtatu quo*, no one could heſitate to declare that it outraged every idea of judicial proceeding. So far from its being a propoſition, the maintenance of which was eſſential to the privileges of the Commons of England, it was a doctrine which militated againſt their privileges. That they gave up their privileges in giving up the point of abatement, ſince one of the moſt eſſential privileges of the people was ſecurity and protection againſt indefinite trial, the protracted and tedious trial to which the doctrine of non-abatement led. That it was not only abated as to the *ſtatu quo*, but abated with reſpect to the record in the Houſe of Lords. It could not ſurely be imagined that the laſt Houſe of Commons could bind the preſent by any one of its reſolutions—if it had the right ſo to do, it muſt alſo have the means—it could not; nor could a blade of graſs, the property of any gentleman of landed property, nor the ſmalleſt coin, the property of any monied man, be touched by any reſolution of that Houſe; then how could a reſolution of the Houſe hold a ſubject of this country bound to anſwer from year to year? It may be ſaid, Shall a Miniſter adviſe the King to diſſolve the Parliament, that he might free himſelf from an impeachment? To this it might be anſwered, that perhaps the King might be properly adviſed to diſſolve the Parliament, for the purpoſe of ſeeing whether the impeachment they had brought was countenanced by the people. Precedents, when militating againſt truth and juſtice, were to be received with jealouſy. But they were always to be conſidered moſt attentively, becauſe if they had, by their uniformity, conſtituted a rule of law, it was wiſe and prudent that they ſhould not rathly be departed from. Did they deſire too much in requeſting time to ſearch for the true rule of law, in the concurring precedents on the caſe? That the precedents were uniform and concurring to the ſupport of the arguments, except in the ſolitary inſtance of 1678. If however the precedents were abſurd, yet if they had made a rule of law, and that rule was eſtabliſhed and underſtood, it was of more conſequence that the rule of law ſhould be acted upon, than that that impeachment ſhould be continued upon any abſtract principle of theoretic benefit. They ſhould ſolemnly alter the rule by an act of the Legiſlature, and not abet a ſide-wind proceeding, againſt the rule ſo eſtabliſhed. That the continuance of the impeachment was farther illegal, becauſe it was not before the Law Judges, nor proſecuted by the ſame accuſer as at the outſet. The integrity of the cauſe was violated, it being an invariable rule in criminal juriſprudence, that the Judges and the accuſers ſhould be the ſame throughout. It was then aſked, Whether in the caſe of Earl Ferrers, if a diſſolution had taken place it might not have been pleaded in bar to judgment? And in the

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and it was averred that the Crown ought to have the right of diſſolving, for the purpoſe of abating impeachments, to ſee the ſenſe of the people. And if the ſecond Houſe of Commons ſhould think fit to revive the charges, they ſhould ſee the whole caſe, or otherwiſe they could not conſcientiouſly make up their minds upon the ſubject. It was denied that the Lords having appointed minutes to be taken, furniſhed thereby good evidence for the new Houſe, inaſmuch as the demeanour of witneſſes went a conſiderable way in determining what degree of credit was to be given to their evidence; and in the end it was ſaid, that in civil cauſes the rigour of evidence was nonſenſe, in compariſon of what it was in criminal procedure.

In SUPPORT *of the motion*, it was confidently ſaid, that after having examined, with all poſſible accuracy and attention, ſuch precedents as were analogous to the caſe in queſtion, each of them went decidedly in favour of the impeachment remaining *in ſtatu quo*. The growth and developement of the principle of impeachment was traced from the reign of Edward IV. for the purpoſe of ſhewing that in its relation to the effect of a diſſolution, it was preciſely the ſame for impeachments as for writs of error and appeal. Various inſtances were produced of writs of error not abating prior to 1673, and thence it was concluded that the report of the Lords' Committee, and the reſolutions of the Lords at that time, which had remained unqueſtioned ever ſince, were founded on precedents, and what was clearly underſtood to be the practice of Parliament. That the report and reſolution of 1678, reſpecting the continuance of an impeachment after a diſſolution, were grounded upon that of 1673; becauſe both impeachments and writs of error ſtood ſo ſtrictly connected in principle, that it was impoſſible to make a diſtinction between them. That the reſolution of 1673 could not have been adopted merely as a colourable foundation for the reſolution of 1678, becauſe when the former paſſed it was impoſſible that the caſe to which the latter applied, could have been foreſeen; and that when the Earl of Danby applied to the Court of King's Bench to be bailed after the diſſolution of Parliament, the Court recognized the doctrine, that the impeachment did not fall to the ground in conſequence of the diſſolution, as the known and eſtabliſhed law of Parliament. On the precedent of 1685, by which the reſolution, as far as it reſpected impeachments, was reverſed, it was remarked, that its authority was of no avail, the Commons having been corruptly choſen and wholly devoted to the Court;—the principal evidence for the proſecution, Titus Oates, convicted of perjury, and conſequently incompetent; and the reſolution itſelf paſſed without any examination of precedents, not generally with expreſs limitation to the particular caſe. Hence it was inferred, that from the caſes of the Lords Saliſbury and Peterborough, 1690, it was underſtood to be the law of Parliament, that impeachments do not abate by a diſſolution; and after much delay and management, they were at laſt diſcharged

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by a reſolution ſtrictly applicable to their particular caſe, and in no reſpect affecting the general queſtion. Even the caſe of the Earl of Oxford, in the year 1717, would, as far as it proceeded, warrant a ſimilar concluſion. It behoved the Houſe to uſe the utmoſt circumſpection, in aſcertaining how far their right might be affected by the doubt which appointing a Committee to ſearch for precedents would imply. The friends of Mr. Haſtings ſhould remember that his caſe was unconnected with the general queſtion: that if it were proper for the Houſe to proceed againſt him, the renewal of the impeachment would be a greater hardſhip than to take it up where it then ſtood; and that, at all events, neither the length of the proof, nor the magnitude of the crime, could, with any ſhadow of decency, be ſuffered to protect the criminal. The Houſe was then earneſtly adviſed not to put it in the power of the Crown to ſet aſide an impeachment by a diſſolution; or of the Lords, to defeat it by delay; which, as they might chooſe on what and how many days they would ſit each ſeſſion of Parliament, they might be able to do, were a diſſolution not to carry it into effect. On the preſent occaſion, it certainly was the duty of the Houſe of Commons entirely to clear away all doubts which might have ariſen concerning the nature, force, and extent of their own privileges; to ſtamp a double certainty upon the caſe in queſtion; and thus, whilſt they did honour to themſelves, to confer one of the moſt important ſervices in their power upon poſterity. The queſtion was no leſs, than whether the right of the Commons to impeach ſhould exiſt; for it was ridiculous to affirm that the Commons had the right to impeach, if it was coupled with a power in the Crown to prevent the efficacy of an impeachment at any period, which might ſuit the purpoſe of the adviſers of the King, and deſtroy it even in the moment of conviction and judgment.

That a right admitted and acquieſced in for centuries, was not to be ſuppoſed doubtful, becauſe ſome ingenious men had endeavoured to bring into queſtion, what their anceſtors had agreed in for three hundred years; and if forced analogies and ſceptical arguments, from vague and unſupported theories, were to be the grounds of appointing Committees of Enquiry into the privileges of the Commons, there was no right ſo eſtabliſhed but might be called in queſtion, and no privilege, however neceſſary, but might be diſputed. Not a line in the Journals of the Commons could juſtify even a doubt; and if doubts were to be raiſed by inveſtigation of the Lords Journals, no Member of that Houſe would look into thoſe Journals for the privileges of the Commons, nor aſk the opinion of a Houſe of Peers upon the extent of the Commons powers. They alone were competent to declare their own privileges; and there was an end of the power of impeachment itſelf, if they were to inquire of the Lords what were its limits, and calmly ſubmit that important privilege to their ſole

determination.

determination. In this view of the ſubject, it was idle to ſearch for precedents, becauſe the principle was a matter of daily practice; for three years the Houſe had gone on with the trial, from ſeſſion to ſeſſion, from prorogation to prorogation; and that in principle and in law, there was no difference between diſſolution and prorogation, between a new ſeſſion and a new Parliament. It had been admitted that the courſe of deciſions of a competent court were ſufficient to form the law; though it could never be admitted that any deciſion of the Houſe of Lords could make the law. Their deciſions, conſiſtent with principle, were the beſt evidence of the law, which the Houſe could not make by its reſolutions. That very principle, however, proved the impeachment did not abate; for no courſe of deciſions, not even one authority, could be produced for its abating, but the miſerable deciſion of the year 1685, which was to be raked from the aſhes in which it had lain ever ſince it had paſſed, deſpiſed and forgotten by the very men who made it; contaminated and diſgraced by the miſerable circumſtances which gave it birth, and the diſgraceful times in which it happened. That the queſtion had been attempted to be reaſoned, upon principle, upon analogy, and upon direct authority. It was too obvious that the Miniſter who committed a crime deſerving of impeachment, would be the firſt to give himſelf indemnity, by the commiſſion of a freſh crime. With regard to analogy, the foundation of analogical reaſoning conſiſted in proving the admiſſion of a principle in one inſtance, and drawing from thence an argument, that in ſimilar proceedings, and in like caſes, the ſame principle ought to be admitted. But it was remarkable that in all the analogies introduced into the debate, much care had been taken to fly from analogies to other judicial proceedings in the Houſe of Peers, and to apply to ſuppoſed analogies drawn from other courts, and other proceedings founded upon other principles, and ſtanding in circumſtances entirely different and diſtinct from thoſe in which the two Houſes ſtood with regard to any proceeding before the Houſe of Lords in its judicial capacity. Among other analogies, bills of attainder and other legiſlative proceedings had been alluded to, which were unqueſtionably abated and deſtroyed by a diſſolution. But if there was any analogy between the two caſes, the objection to the argument was, that it proved too much. Unfortunately, bills of attainder, like other legiſlative proceedings, ended with a ſeſſion, and were deſtroyed by a prorogation, equally as by a diſſolution. Where had the analogy lain for four years? Had the friends of Mr. Haſtings been ſo negligent as not to remark the ſimilarity between impeachments and bills of attainder till then? Or if they had remarked it, why did they not come forward with the analogy three years ago, convey the knowledge to the Houſe, and inform them that they were proſecuting Mr. Haſtings without any authority, becauſe impeachments were like bills of attainder; and ended, as they did, with the ſeſſion of parliament in

which

which they commenced? That it never had been doubted within thoſe walls, that impeachments continued from Parliament to Parliament. In truth it could hardly be ſaid with fairneſs, that it had ever been doubted any where. Before the queſtion was agitated with any party view, in the caſe of the Popiſh Lords, the great Lord Nottingham, a man eminently learned, to whom the profeſſion of the law owed as much as to any man; who had done more to form and improve one branch of our law than all who had ſucceeded him;—that great Judge, in declaring the cauſes of holding the Parliament, and ſpeaking for the Crown itſelf, had ſolemnly and deliberately been of opinion, that a diſſolution made no alteration on an impeachment. Upon the meeting of Parliament in the year after the Popiſh Lords were impeached, addreſſing himſelf to the Commons, he informed them that the King had, during the diſſolution of Parliament, been applied to, to liberate thoſe Lords; but that he had thought it right to reſerve them for juſtice, and deſired the Commons to proceed ſpeedily with their trials, that they might not ſuffer the miſeries of indefinite confinement. Before he had directed the Commons to proceed upon the trials, he muſt have been of opinion that the trials were in exiſtence. When the queſtion came afterwards in the next ſeſſion to be agitated, it was ſolemnly ſettled by the reſolution of 1678, that the ſtate of impeachments was not affected by diſſolution of Parliament; not upon the ſpur of the occaſion, but upon mature deliberation and enquiry; upon following up the principle which was firmly eſtabliſhed in the year 1673, and which never ſince had been controverted. Much abuſe had been thrown on the times about the year 1678: It was true they were times of much ferment, but it was to the fermenting of the great ſpirit of liberty at that time, that we owed our very exiſtence, even the meeting in that Houſe then to diſcuſs that queſtion. That ſome exceſſes might have been practiſed, could not be denied; and the particular exiſtence of the Popiſh plot might be a chimera. But the fear of popery, and terror for the loſs of liberty, were not at that time ideal fears. It was to the ſpirit of our anceſtors then, and to the principles which they ſucceſsfully maintained, that this country owed the Revolution, and the exiſtence of the preſent family upon the throne of the kingdom. Let thoſe times be what they might, the reſolution in queſtion was not tainted by any thing which might be bad in them. It had nothing to do with the Popiſh plot. The queſtion was agitated in the impeachment of Lord Danby, impeached for crimes totally diſtinct from the plot, and decided by a Houſe of Lords, certainly not particularly inimical to that Miniſter. After that period the queſtion came again to be mentioned in the Houſe of Commons. In one of the conferences with regard to Lord Danby, the Managers, among other things, reported, that one of the Lords had put the Commons in mind that they

they had gained two great points in that Parliament, viz. that impeachments continued from Parliament to Parliament, and that the impeached Lord muſt withdraw. The Managers for the Commons replied, that thoſe points were agreeable to the ancient law and rule of Parliament. The propriety and truth of that anſwer was not at the time queſtioned by any man. No one therefore could doubt what he found above one hundred years ago declared by great and able men, and admitted by the whole Houſe of Commons, to be the ancient law and uſage of Parliament. Upon that law, Lord Stafford was tried and executed; and in his caſe it was ſolemnly decided. Much had been ſaid with regard to that trial, namely, that the witneſſes were perjured, and that unfortunate nobleman had a hard fate. But if the witneſſes were believed, the conviction was juſt; the other circumſtances of the trial, and the mode in which it was conducted, were little liable to objection. The form of conducting a trial, the principles which directed it, the queſtions of law which aroſe in the courſe of it, were not to be ſet aſide becauſe the witneſſes happened to be perjured, or even becauſe an innocent man had loſt his life by their being believed. That about the period when thoſe things paſſed in Parliament, the queſtion had more than once occurred in Weſtminſter Hall, where it was equally admitted as law, that impeachments continued notwithſtanding a diſſolution. Lord Danby and the Popiſh Lords had applied to be bailed; if an idea had prevailed of the abatement of the impeachment, their application ought to have been to be diſcharged. But the Court would not even bail them, till Jefferies was made Chief Juſtice. Bailing was an affirmance of the commitment, and therefore a direct authority that the impeachment ſubſiſted. Upon looking into the caſe of Fitzharris, there was ground to ſay, that the queſtion had been ſolemnly determined by all the Judges of England. Fitzharris had been generally impeached by the Commons of high treaſon; no articles were preſented againſt him; Parliament was diſſolved. He was afterwards indicted for a ſpecial treaſon under an act of Charles the Second; he pleaded that he was impeached. In the courſe of the diſcuſſion of the plea, his Counſel often endeavoured to argue that impeachments continued from Parliament to Parliament. Had the law been clearly otherwiſe, it would have been eaſy to have told them, "What ſignifies all this argument? The impeachment is "gone" So far from it, the Chief Juſtice ſtudiouſly avoided that queſtion; and when they were preſſing to argue it, ſtopped them by telling them, that the only queſtion before the Court upon the plea was, Whether a general impeachment for treaſon could be pleaded in bar of an indictment for the particular treaſon ſet forth? In the courſe of the trial, one of the Counſel for Fitzharris inſiſted that it had been, after the diſſolution of Parliament, ſolemnly reſolved by all the Judges, that the King could not proceed upon the indictments againſt the Popiſh Lords on account

account of the impeachments which were *then depending* againſt them: the chief anſwer made by the then Attorney-General was, that that was an extra-judicial opinion.—Though that opinion was extra-judicial, ſtill it had all the weight of an opinion of the twelve Judges; an opinion which they could not have formed if they had not thought impeachments did not abate, and that a diſſolution of Parliament had no effect whatever upon the ſtate of an impeachment,

After all this, it might have been thought that the point was clear; but in the firſt day of the firſt Parliament of James the Second, in the moment of ſervility and adulation, the Houſe of Lords thought proper to reverſe the order of 1678, ſo far as related to impeachments, and next day to diſcharge the Popiſh Lords. If ever there was a time dangerous to the liberties of this country, it was that period: a weak and bigoted Prince upon the throne; a packed and garbled Houſe of Commons almoſt named by the Crown, in conſequence of the violent and arbitrary deſtruction of the charters of the different corporations; and a people broken-hearted and almoſt worn down in their repeated ſtruggles with the Crown; added to all which, had the Houſe of Commons been differently formed from what it was, to proceed with the proſecution was impoſſible. The principal witneſſes were convicted of perjury; yet in ſuch a time, and under ſuch circumſtances, even the then Houſe of Peers was aſhamed to declare the reſolution of 1678 not to be law. On the very day in which that miniſter of wickedneſs Jefferies took his ſeat as a Peer, it was reverſed, without putting any declaration in its place, without enquiry, without examination, without the knowledge of the Commons, and without daring to look in the face the very reſolution which was attempted to be reverſed; the Proteſt expreſly ſtating, that it was not *even allowed to be read, though repeatedly called for*. That ſuch a precedent, at ſuch a time, and under ſuch circumſtances, was now gravely contended to be ſufficient to overturn ſettled law, deſtroy every principle, and trample upon the privileges of the Commons. But had even that caſe been regarded and followed? The very man who made it deſerted it. It had ſerved his purpoſe, and was laid by for ever. Not many years afterwards, in 1688-9, Lords Saliſbury and Peterborough were impeached; and after the diſſolution they applied to the King's Bench to be bailed. Lord Holt was then Chief Juſtice, a man of as great and reſpectable character as ever ſat upon the bench, but certainly not remarkable for his great reſpect for the privileges of the two Houſes of Parliament. He was the friend, and had been the Counſel of Lord Danby. In his caſe he had had opportunity to conſider the nature of impeachments; that very queſtion muſt therefore have been before him, and he could not be ignorant of the reſolution of

1685, which had liberated his client. Yet neither the Lords applying to be bailed, nor the Court in refusing to bail them, take the least notice of that order. Upon the authority of the case of Lord Stafford, (which certainly was not law if the order of 1685 was supposed to have had any operation) the Chief Justice and all the Judges refused to bail them; expressly grounding their judgment; and resting their opinion, on what had been determined at that trial, as having settled and fixed the law upon the point. Had either the Lords themselves, or the Judges, an idea that the resolution of 1685 had altered the law, would the one have totally forgotten in their application to the court, and the other totally neglected in their judgment, a solemn determination made only four years before, and within the positive knowledge of both the parties and the Judges? Upon the meeting of Parliament those Lords applied to the House of Peers, who, indeed, did appoint a Committee to search precedents, and did attempt to involve their case with that general question; but with that question their case had nothing to do. An act of general pardon had passed. A question was put to the Judges, whether their case fell within it. The Judges were of opinion, that if the offences were committed under certain circumstances, they were within the act; and on a subsequent day they were discharged. It was impossible to read the Protest, and not to see that the pardon was the ground of the discharge. The Protest states the proceeding to be extra-judicial and without proper parties; complains that the Commons were not heard, and that even the House had not been attended with precedents of the effect of pardon. Nothing could be more ridiculous than such a Protest, if the Lords had been discharged; because the impeachment was at an end. To have heard the Commons would have been impossible, no proceeding being in existence. To have enquired about pardons must have been idle, because the Lords were discharged on a separate and distinct ground. But had the precedent been followed since? The same person who had been impeached as Earl of Danby, was in 1695 impeached as Duke of Leeds; he lay under impeachment for five years, and through several Parliaments. How did it happen that he never claimed the benefit of the resolution of 1685? After five years and three dissolutions, the House of Lords took up his case, but did not declare that it had long been at an end. They acted upon it as *a pending* proceeding, and dismissed it; "*the Commons not prosecuting:*" which was a direct authority in the present case. About the same period (in the year 1701) Lord Holt had again occasion to consider the law of Impeachments, in deciding the case of Peters and Benning, reported in 12th Mod. Rep. 604—in which he declared, *that impeachments upon which some proceedings had been had, and Parliament dissolved, might be continued in a subsequent Parliament.* Mr. Justice

Foſter expreſsly ſtates the caſe of Lord Saliſbury, as grounded on the act of general pardon; and reaſons from it in a manner which it was impoſſible he ſhould have done, if he had been of opinion that his impeachment had been ended by a diſſolution. To all theſe authorities, parliamentary and legal, nothing was oppoſed but the proceedings in 1685. That an attempt had been made to argue ſomething from the Proteſt in the caſe of Lord Oxford, in the year 1717, urging that it muſt have been admitted in the debate, that diſſolution would abate an impeachment. No ſuch admiſſion could be gathered from the Proteſt. It was true that it had been aſſerted by the Minority, who, from their own aſſertion, argued that a prorogation would equally abate it. That that Proteſt ſtated as a fact a matter notoriouſly untrue, *viz.* That diſſolution and prorogation equally put an end to judicial, as to legiſlative, proceedings. Every one knew that judicial proceedings in the Houſe of Lords abate neither by the one nor the other. But if any thing to the preſent argument was to be drawn from that Proteſt, it was, that both ſides of the Houſe were agreed that there was no difference between diſſolution and prorogation; if ſo, as a prorogation did not put an end to an impeachment, neither did a diſſolution.

It had been ſaid that writs of error and other judicial proceedings had, till the year 1673, conſtantly abated by a diſſolution, and that impeachments muſt do ſo too. At that very time it was equally held, that prorogation abated a writ of error; how then came it that impeachments continued from ſeſſion to ſeſſion? If the fact were true, it would prove that impeachments did not in former times abate, when writs of error did; or if it were admitted that the analogy was well founded, it would prove that when it came to be held that writs of error did not abate by diſſolution, it ought equally to have been held ſo as to impeachments. The poſition that writs of error and appeals in ancient times abated by a diſſolution, was not however well founded. The order of 1673 was not the reſult of the arbitrary will of the Houſe of Lords, but the conſequence of an inveſtigation into what was the ancient courſe of proceeding in that Houſe; and whoever would look at the caſes quoted in the Report preceding the order of 1673, or would examine the numerous caſes to be found in Lord Hale's book, or the rolls of Parliament, would ſee that the ancient courſe was to preſent a petition complaining of an erroneous judgment, in conſequence of which a *ſcire facias* iſſued returnable at the next Parliament. So far was the proceeding from abating, that in the ordinary and regular courſe, the party was not compelled to appear and hear the errors till the next Parliament; which principle was not confined to proceedings in error alone, but extended itſelf to every judicial proceeding before the Houſe of Lords, as

was evident from a bare inſpection of the Report in the year 1673. That there was a caſe in Levinz Reports *, (17th Charles II.) where it was expreſsly declared, that writs of error, and *ſcire facias* thereon, did not abate by prorogation. About the middle of the reign of James the Firſt, a practice began, which became more frequent in the time of Charles the Second, of making writs of error returnable immediately, and making orders of the Houſe of Lords for their hearing from time to time. It was then argued, that as thoſe writs, and the appearance of the parties, were ſupported by orders of the Houſe of Lords, and as all orders fell with a diſſolution or prorogation, that the writs of error were at an end. In conſequence of this reaſoning, the Courts of Law held the writ to be abated; but ſo far were they from making any diſtinction between diſſolution and prorogation, that all the caſes which held thoſe proceedings abated by a diſſolution, were grounded on the caſe of Gonſalove and Heydon, which was the caſe of a diſſolution. So far thoſe caſes were an authority to prove that there was no diſtinction between prorogation and diſſolution, as to judicial proceedings. That when the Houſe of Lords found the courts below proceeding in this courſe, they were driven to inveſtigate the ſubject; the conſequence was, the order of 1673; which order, it was true, extended only to prorogation; but the principle extended equally to diſſolution, and was accordingly applied to that caſe, in the year 1678. Thoſe orders again brought the law back to its ancient principle, and judicial proceedings in Parliament have ever ſince, as they had done in ancient times, continued undiſturbed by a diſſolution. The court in which they are, continues the ſame; the time of its meeting is fixed to a certain day by prorogation, to an uncertain one by a diſſolution; but the court, the judges, and all the proceedings, remain untouched and unaltered. That there was no diſtinction in law between diſſolution and prorogation. Lord Coke expreſsly ſays, that every new ſeſſion is a new Parliament; and in that he has been followed, without contradiction or diſpute, by every lawyer who has ſucceeded him. So far, therefore, as analogy to other judicial proceedings in the Houſe of Lords could apply, that analogy was clearly in favour of the motion. That the preſent caſe had been attempted to be compared to abatements at common law by the death of the King; but in order to ſupport that reaſoning, recourſe muſt firſt be had to fiction, and then to analogy. There was no poſſible reſemblance between the death of the King and the diſſolution of Parliament; and even if there were, it was unfair to reaſon from it. Abatement of judicial proceedings by demiſe of the Crown, was an anomalous proceeding; the general rule being, that the King never died, and from that

* Pritchard's caſe, 1. Lev. 165.

it was an exception: the argument, therefore, ought to be drawn from the rule and not from the exception. Every perſon knew that in early times, the profits of courts of juſtice formed a conſiderable part of the royal revenue; to increaſe which was equally the object of the King, and the Judges; and the doctrine of abatement was encouraged and extended, even contrary to other principles. But admitting that thoſe caſes were not anomalous, and that ſome analogy might be drawn, ſtill the argument was equally defective. The idea upon which ſuits abated by the death of the King, was a notion of perſonal truſt and confidence granted by the King to particular judges; the diſſolution of Parliament, or the calling of another, neither gave nor entruſted any perſonal confidence whatever. It had been ſaid that Commiſſioners of oyer and terminer, and the like, abated alſo by the death of the King, and that their proceedings were at an end by whatever deſtroyed their commiſſion. There was in thoſe caſes, however, not only the notion of perſonal confidence from the perſon of the Crown, but alſo the very authority of the judges was conferred, created, and limited, by the commiſſion itſelf. There was no analogy between a commiſſion conferring a ſpecial authority, and a writ calling an exiſting inherent authority into exerciſe. Calling a Parliament conferred no authority; diſſolving it took away none; the rights and powers of the peerage exiſted independent of the Crown and its powers, and when called into action, naturally returned to their former ſtate. The calling of a Parliament was nothing more than appointing a time for the high Court of Peers to meet, without having the leaſt operation upon its proceedings.

Conſidering the matter ſhortly upon principle, it was difficult to believe that to be law, which appeared ſo totally deſtructive of the neceſſary powers of the Houſe of Commons. Impeachments were of no uſe, if they might be ſtopped at the pleaſure of the perſon accuſed. They were naturally directed againſt Miniſters, and men often in the poſſeſſion of power. Could it be doubted, that he who had ſo adviſed the Crown to miſuſe its authority as to deſerve an impeachment, would heſitate in adviſing a diſſolution to ſave himſelf? Would he who had riſked every thing in the commiſſion of one crime, doubt about the commiſſion of another, to give himſelf ſecurity from the conſequences of his former one? There was no period of an impeachment in which it might not be done: the criminal might take the chance of an acquittal, and finding that likely to fail him, ſave himſelf by this mode. It was ſaid he might be impeached again, at leaſt; the doctrine however went to throw open his priſon-doors and to elude juſtice. Was it a thing unknown in the Hiſtory of England, for a Miniſter to fly from the vengeance of Parliament? Was it nothing that the means of eſcape were put in his power? But ſuppoſe he did not fly, did he not return to the new Parliament with the ſame weapon in his hand,

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to defeat and elude the juſtice of his country? The length of the preſent Trial had been complained of; but that length would be doubled, if it was held that the proceedings abated, unleſs it was alſo held that a criminal was to eſcape merely becauſe it had been found neceſſary to diſſolve the Parliament; or becauſe a crime happened to be committed near the period when by law it would expire.

That the deciſion involved in it conſiderations of the firſt magnitude. The rights and privileges of Parliament were concerned, which muſt remain ever inviolably ſacred, or our valuable and excellent Conſtitution be ſubverted and deſtroyed. Precedents had been conſulted with laborious induſtry; but thoſe adduced in favour of impeachments *abating* on a diſſolution of Parliament, were in number ſo few, and of ſuch queſtionable authority, as clearly to evince the *imbecility* of the poſition. Indeed if there were precedents which *clearly* eſtabliſhed the point, they might be called upon to bow in ſilence to the authority, but ſhould loſe no time in providing ſome remedy againſt a practice, whoſe tendency was hoſtile to the privileges of the Houſe, and deſtructive of the liberties of the country. The authority of ſuch precedents no one would ſay ought to be relied on, in preference to that of the *fundamental principles* of the Conſtitution. But there exiſted no evidence of ſuch a uniform rule of parliamentary practice. From a diſpaſſionate review of the different precedents, it was aſſerted with confidence, and the ſequel, it was truſted, would abundantly juſtify the aſſertion, that impeachments did continue *in ſtatu quo* from Parliament to Parliament, notwithſtanding the precedents ſo much inſiſted upon in ſupport of an *abatement* of ſuch proceedings by a diſſolution. Caſes perfectly in point might be adduced from the reigns of Richard the Second, and others; but it would be ſufficient to inſiſt on the caſe of the Duke of Suffolk, in the reign of Henry the Sixth, which indiſputably proved that Impeachments continued from one Parliament to another, By the reſolution of the Lords in 1673, writs of error and petitions of appeal, were made to continue from Parliament to Parliament; but it had been contended, ſince no mention was made of *impeachments* in that reſolution, that a diſſolution of Parliament operated as an *abatement* of ſuch proceedings. The very oppoſite concluſion was deducible from the Report of the Committee; which expreſsly ſtated, that *writs of error, petitions of appeal, and other buſineſſes of a judicial nature*, ought not to be narrowed in their diſcuſſion, but to extend from Parliament to Parliament. Impeachments, therefore, as judicial proceedings, did not neceſſarily *abate* by a diſſolution, In the order of 1678, *impeachments* were expreſsly mentioned, in common with writs of error and petitions of appeal, to continue from one Parliament to another. To that precedent, however clear and deciſive, objections had been taken to invalidate its authority. Firſt, it was affirmed to have been a very

precipitate proceeding. How could that objection apply? Did it refer to any new matter not included in the former resolution of 1673? Clearly not. That order was only a deduction from the principles already laid down in the former decision; it could not then be a *precipitate* measure. But the critical juncture of affairs, during the ferment of party violence and of civil contention, might probably, it was said, contribute materially to that resolution, which authorized the continuance of impeachments. That objection, too, must vanish the moment the circumstances of the times, when the decision in question took place, were contrasted with those of the subsequent period, when it was rescinded. In 1678, the proceedings of the Lords were not influenced by any particular reference to some matter then depending; it was a general order, that writs of error, petitions of appeal, and impeachments, should survive a dissolution of parliament. Nor was that measure the production of any party violence or animosity; it was an unanimous decision, founded on the resolution of 1673, to serve as a standing precedent for the conduct of future impeachments. But what was the case of the reversal of that decision in 1685, so much depended on as a precedent in favour of the abatement of impeachment by dissolution? Was it not at the æra when James the Second, a bigoted and Popish Prince, had ascended the Throne; when the Parliament was *obsequiously* devoted to the will of the monarch; when the sacrifice of principle was required to be made, by the prejudices of the times; when certain Popish Lords were about to be solemnly impeached, who were the supposed favourites of the King? Under such circumstances, what was the conduct of Parliament? They might think compliance was better than resistance at such a period; and therefore determined, probably with the best intentions, to rid themselves of the impeachments in contemplation, by rescinding the order of 1678. The professed object of that reversal, then, was to screen the noblemen in question from the impending danger of impeachment. Against which of the decisions did the objection taken from the circumstances of the times apply most forcibly; to the order of 1678, or to its reversal in 1685? Unquestionably to the latter.—The next objection to the order of 1678 was taken from the case of Lord Stafford. How could that instance invalidate the authority of the precedent in question? Because it afforded an opportunity of appealing to the passions; — that, from an eloquent and pathetic description of the trial, conviction, and execution of that unfortunate nobleman, the Committee might infer the injustice of the principle of continuing impeachments. Was that a legitimate and conclusive argument? Would not such reasoning prove adverse to the cause attempted to be established? For, admitting the Parliament in that instance to have acted improperly by continuing an impeachment, might not another Parliament be equally culpable in dispensing with

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the continuance of ſuch a proceeding? Suppoſe a delinquent impeached, the charges of crimination gone through, and a diſſolution of Parliament to take place; would it not prove the extremity of injuſtice to ſtay the proceedings in ſuch a caſe, by which the defendant would be precluded from entering on his defence, and judgment of crimination or acquittal could not paſs without a renewal of the proceedings *de novo*? His innocence or guilt muſt remain a ſubject of much doubt and ſuſpicion. Would it not therefore be infinitely more expedient and proper, for the honour and reputation of both parties, that ſuch proceedings, conducted by one Parliament, ſhould be reſumed *in ſtatu quo* by another? Upon ſuch a liberal principle the accuſer would have every fair opportunity of making good his charge; and the accuſed have equal liberty to eſtabliſh his defence. Nothing ſhort of that procedure could deſerve the name of public juſtice. What, becauſe the fate of one nobleman, from the continuance of impeachment, was ſuppoſed hard and oppreſſive, did it therefore follow that the exerciſe of ſuch a privilege of the Commons, in every inſtance, would be attended with the ſame noxious conſequences? If the abuſe of an inſtitution was a valid argument of its inutility, the objection might apply; otherwiſe pathetic expoſtulation would go for nothing; for in deciding upon the merit of a dry precedent, our paſſions ought not to interfere with our judicial deliberations. The validity of the order of 1678 ſtood therefore unimpeached; a precedent which neither eloquence nor ſophiſtry could poſſibly invalidate.

That the caſe of Lords Saliſbury and Peterborough, adduced as a precedent in favour of an *abatement* of impeachment by diſſolution, was equally unfortunate; for there did not appear from the proceedings, any reference whatever, either to the order of 1685, or to any former deciſion on the ſubject. Nor did the impeachment of Sir Adam Blair and others apply. And as to the impeachment of Lord Danby, there could not remain a doubt as to the ſentiments then entertained by Parliament; ſince he was clearly diſmiſſed, becauſe the Commons had declined the proſecution. Three diſſolutions of Parliament had obtained, before he was diſcharged. It was evident, if a diſſolution operated as an abatement, Lord Danby would have been diſmiſſed on the firſt diſſolution; nay, he would have been, upon that principle, diſcharged of courſe. But the caſe was quite otherwiſe; for Parliament was repeatedly diſſolved, and Lord Danby as often detained; until at length, the Commons declining to proſecute, he was diſcharged; ſo that that impeachment *abated* by the act of the Commons, and not by the operation of a diſſolution. In the caſes of Lords Somers, Halifax, Portland, and the Duke of Leeds, the impeachments abated in the ſame manner; the Commons not proſecuting, the parties were diſcharged. On which ſide did the weight of evidence from prece-

dents preponderate? Did not the ſcale fairly incline in favour of the continuance of impeachments from Parliament to Parliament? The right to proſecute an impeachment until judgment was obtained, was clear, unequivocal, and indiſputable, even from the authority of thoſe precedents.

Parliament, it was urged, exerciſed two powers, legiſlative and judicial, each of which had ſeparate and diſtinct limits and duration. The confuſion of thoſe powers was the principal ſource of all the doubts upon the preſent queſtion. Lawyers had differed as much in their opinions reſpecting writs of error, and petitions of appeal, as of impeachments: and from ſuch a colliſion of oppoſite ſentiments, much ſatisfaction could not be expected. Reference ſhould therefore be made to the clear and eſtabliſhed principle of the Conſtitution, in order to remove every difficulty. Every act of legiſlation terminated by prorogation, as well as by diſſolution; but no judicial act was influenced by either. Impeachment therefore being a judicial proceeding, could not be affected by prorogation or diſſolution. In the caſe of writs of error, and of petitions of appeal, the proceſs continued from ſeſſion to ſeſſion, and from Parliament to Parliament; much more neceſſary was it that the proceedings in an impeachment ſhould alſo continue; for in the one caſe, there was only one individual againſt another; but in the other, the Houſe of Commons, and all the Commons of Great Britain, were parties againſt a State delinquent. The impeachment in queſtion was not the act of the late Parliament, but of the whole Commons of the realm; the proceeding being in the name both of Conſtituents and Repreſentatives. It had been aſked, If the Houſe of Commons, in this inſtance, were the attornies of the people? In one ſenſe they were conſidered as agents, conſulting their own judgment and diſcretion, in protecting the intereſts of their conſtituents; but they were not the attornies of the people, as agents delegated with power, to act merely by the inſtructions of their conſtituents. An impeachment had been commenced by the Commons in the perſons of their late repreſentatives; ſuch a proceeding ought not to be diſcontinued without due enquiry and deliberation; for the Houſe ſtood in a ſimilar ſituation with a ſucceſſor to the King's Attorney-General, who was always required to proceed, with all trials already commenced on the part of the King. In law, it had been ſaid, there was no ſuch body as the Commons of England recognized. Would any one draw ſuch an abſurd inference, from an accidental omiſſion, that ſuch a body had no real exiſtence, which was to be regarded as the principal object of legiſlation in every civilized country? Our anceſtors had, in their accuſtomed wiſdom, ſufficiently guarded againſt ſuch a ſuppoſed ſoleciſm in politics, by ordering all ſupplies to be granted in the name of the Commons, as well as all impeachments to be laid in their name;—and when once a proceeding

ceeding assumed a judicial form, its existence no longer depended on the persons who were immediately concerned in its institution. That the House of Commons was only the legal organ of instituting impeachments, as the Attorney-General was of filing an information, *ex officio*, or an indictment, in the name of the King. The public prosecutors in the one case were the Commons of the realm, and the King was the prosecutor in the other. From the consideration of the capacity in which the House, as a judicial body, acted in the conduct of impeachments, it followed, that their proceedings could not abate, or be affected, either by a prorogation or dissolution of Parliament.

That the authority of Lord Hale was to be distrusted in the present instance, since writs of error, petitions of appeal, and impeachments, were considered by him as legislative proceedings. All legislative proceedings unquestionably abated by prorogation, as well as dissolution; but impeachments, writs of error, and petitions of appeal, are judicial proceedings, which continue from session to session, and from Parliament to Parliament. The error of Lord Hale proceeded from his confounding the legislative with the judicial power, in parliamentary proceedings. Lord Holt entertained a different opinion on the subject, since he had argued from the case of Lord Stafford, as a weighty and irrefragable precedent, in favour of the continuance of impeachments, and other judicial proceedings, from one Parliament to another. Lord Chief Baron Comyns, an authority of the highest respectability in Courts of Justice, was also decided in his opinion on the subject; for, from a passage in his Digest *, it appeared, not only that impeachments continued, but that they could be resumed and prosecuted, until judgment was obtained, notwithstanding any contingent interruption, from either prorogation or dissolution. Had such proceedings abated in consequence of such an event, it was evident that the course of public justice would be greatly interrupted. But there was neither precedent nor law which authorized such a deduction; and the continuance of impeachments was frequently rendered indispensably necessary, in order to produce a salutary operation, and to guard against their abuse. And if impeachments were allowed to be a branch of the judicial power, they must necessarily have the same operation with other acts of that power. Writs of error, petitions of appeal, as judicial acts, survived prorogation and dissolution; so also ought impeachments. To admit the continuance of the former, and insist on the abatement of the latter, by the operation of a dissolution, was the grossest absurdity; since, as judicial proceedings, they were branches of the same power, and their connection depended on a permanent union in principle.—That those who insisted upon the abatement of impeachments, were con-

* 5. V. oct. 249, 250.

sistent,

ſitent, if they alſo inſiſted on the abatement of writs of error and petitions of appeal; but when once the continuance of the latter was allowed, and the abatement of the former contended for, in conſequence of a diſſolution, then it was evident that impeachments were made, in one inſtance, a branch of the judicial power, and in another, an act of the legiſlative, to ſerve ſome particular purpoſe. Such a confuſion of the two parliamentary powers ſhould be ſtudiouſly avoided, leſt their proceedings, impeded by endleſs doubts and difficulties, might terminate in injuſtice to individuals, and eventually tend to ſubvert the conſtitution. That the power of impeachment was a privilege of the firſt conſequence to the liberties of the country; it operated as a ſalutary check upon thoſe in adminiſtration, and effectually guarded againſt every undue influence of the Crown, in the protection of State delinquency. Ought the event of an impeachment, then, to depend on the operation of a diſſolution? If the exerciſe of that power were once to be influenced by ſuch an event, there would be an end to official reſponſibility; the moſt flagrant acts of corruption, oppreſſion, and injuſtice, would paſs with impunity; for the party impeached might procure, by intereſt or influence, a diſſolution of Parliament, in order to eſcape the puniſhment his offences might juſtly deſerve. Voluntary exile was, indeed, too heavy a puniſhment for injured innocence to endure, to avoid an unjuſt impeachment; but for the guilty delinquent to enjoy ſuch an indulgence, would be no puniſhment, but rather a reward. The abatement of impeachments therefore by diſſolution of Parliament, would throw an inſurmountable obſtacle in the way of public juſtice, and deprive the Houſe of a power the moſt formidable to a corrupt Adminiſtration.

The objection, that no man could be a Judge *de jure* in a court without a competent knowledge of the whole proceedings, was admitted to be true, in an inferior Court of Judicature; but not applicable to the Houſe of Lords, inaſmuch as that Supreme Court was liable perpetually to change its Members. And ſuppoſing the new Members ignorant of the proceedings already had of the impeachment depending, what inconvenience could ariſe from that circumſtance, when copies of the whole evidence were printed? They need only refer for requiſite information to the Journals. They had a right to judge from the Minutes, on the fidelity and accuracy of which they might always depend, ſince they were diſtributed not only among thoſe Peers who were preſent at the taking of the evidence, but among thoſe who were abſent, for their information. That an impeachment was an extraordinary caſe, which did not admit of being conducted by the ſame rules which governed an inferior Court of Judicature. In the one caſe, judgment was formed upon printed evidence; but in the other, *viva voce* evidence was certainly requiſite,

site. And were the rules of the Court of King's Bench to obtain in the Houſe of Lords, the queſtion would be wholly at an end, and the right of impeachment at once annihilated; ſince it were better to file an indictment in the one, than prefer an impeachment in the other. But the principle of impeachment was, to bring delinquents to juſtice, who would have eſcaped, if tried according to the ordinary rules of Courts of Judicature. That the practice of the Houſe of Lords was incompatible with that of other Courts, in regard to *viva voce* evidence and deciſion, without ſeparating. Notes were in conſtant practice, and written evidence conſulted, without which it were impoſſible, in caſes of impeachment, to reduce under one view the whole body of the evidence; for there were few inſtances in which impeachments did not occupy ſome days: written evidence was then as indiſpenſable in a trial of ten days, as of three years. But it was ſaid, that in a long impeachment, in conſequence of the conſtant change of Members in the Houſe of Lords, ſome who had been accuſers became Judges. In reply it was obſerved, that there was no period of prorogation to which the ſame objection would not apply. The Members who were ſo circumſtanced, certainly could not be deprived of their judicial powers; at the ſame time, the exerciſe and application of thoſe powers remained at the ſole diſpoſal of their own feelings and conſciences. It was an unavoidable circumſtance incidental to the nature of ſuch a proceeding as an impeachment, from which no danger of injuſtice could be apprehended with any ſhadow of reaſon.

That the Court in which the Trial had been conducted, was acceſſible to all; the reports and papers reſpecting the evidence were open to general inſpection; ſo that it was entirely at the option, not only of every Member of the Houſe of Commons, but alſo of every Britiſh ſubject, to remain in ignorance of any part of the proceedings. It was wiſhed it ſhould be underſtood by all, as an eſtabliſhed and incontrovertible principle, that impeachments continued *in ſtatu quo*; inaſmuch as a contrary mode of proceeding would be attended with conſequences deſtructive of the privileges of the Houſe, as well as injurious to the party accuſed. If an offence, for inſtance, was committed, the conviction of which required proceeding by impeachment on the eve of a diſſolution of Parliament, the proſecution might be poſtponed until the meeting of a new Parliament, in order to avoid a repetition of the proceedings; the conſequence naturally to be apprehended would be, the eſcape of the delinquent. If, on the other hand, an impeachment had been carried on for ſuch a conſiderable length of time as to exceed a diſſolution of Parliament, the repetition of the proceedings in that caſe might materially impede the progreſs of other public buſineſs. The death of a witneſs, in the mean time might conſiderably affect the ſtate of the evidence; and an impeachment, by that mode of

proceeding,

proceeding, be converted into an engine of oppreſſion and injuſtice. Suppoſe the party impeached to have made ſome progreſs in his defence, his accuſers might poſſeſs ſufficient influence to procure a ſudden diſſolution of Parliament; the conſequence might be, a freſh accuſation againſt him, fabricated out of his own defence. By ſuch a nefarious proceeding, he might continue to be the object of public proſecution all his life, without the poſſibility of being pronounced either innocent or guilty. An impeachment, therefore, muſt continue *in ſtatu quo* after a diſſolution. The Houſe of Lords could not proceed to judgment, unleſs the Houſe of Commons prayed it; in like manner, as the Court of King's Bench, on a conviction on a criminal information or indictment preferred by the Attorney-General, would not give judgment until that officer came into Court and prayed it.—That in ancient days, the Parliament was diſſolved, or expired, at the end of a ſingle ſeſſion; but as election petitions and other public buſineſs increaſed, it had been found neceſſary to increaſe the duration of Parliaments. And in defining the diſtinction of the rules of proceeding in the Courts of Law and the Court of Parliament, it was ſaid, that in the former, the whole power of the Court was derived from the Crown; but in the Court of Parliament, all the power was derived from the People.

The Houſe of Lords had been admitted to be a permanent Court of Judicature. In all impeachments, the accuſing party virtually, though not identically, was the ſame after a diſſolution as before; for it would be ridiculous to contend that the great body of the people, in whoſe name, and on whoſe behalf, the Articles had been carried up to the Houſe of Lords, had ſuſtained any material or aſſignable alteration. As no real change, then, had happened either in the tribunal or proſecutor, it was clear that whatever was actually criminal ſix months ago, had not become leſs criminal from the interval which had taken place. The primary law of right, the true object of all human legiſlation, and the criterion of its excellence, was neither to be affected by lapſe of time, nor difference of ſituation: and upon what principles of reaſon, or of juſtice, ſhould the chances of eſcape be multiplied to the guilty, or the tortures of imputed guilt prolonged to the innocent, becauſe the King might be adviſed to call a new Parliament?

But there was another conſideration, which aroſe out of the caſe of the Earl of Danby. That Miniſter had been impeached by the Houſe of Commons in 1678, and, after conſiderable delays, had pleaded the King's pardon. Charles the Second told his Parliament, in the moſt expreſs terms, that he had given Lord Danby his pardon under his broad ſeal: that if that pardon ſhould be found defective in form, he would renew it, again and again, till it ſhould be perfect; for he was determined to protect him, as he was not criminal (and his Majeſty had aſſigned not a very conſtitutional

reaſon

reaſon for his innocence), having acted only in obedience to his orders. That was preciſely the ſort of caſe which an impeachment was peculiarly calculated to reach. The King could never regularly be anſwerable for the faults of his government. Miniſters alone were reſponſible; and if they valued their reputation or their ſafety, would relinquiſh their ſituations, whenever the King ſhould be reſolved to act in contempt of their advice: the boaſted right of impeachment, upon which the Houſe of Commons ſo juſtly valued itſelf, would otherwiſe be a mockery. If the King, who was not amenable, could affectedly take the blame upon himſelf and protect his Miniſter by a pardon, corruption, and every ſpecies of political infamy, would be placed beyond the vengeance of an inſulted nation. The Houſe of Commons, in 1678, felt that if the plea of Lord Danby were allowed, it would undermine the right of impeachment; a right derived to them from their conſtituents; to be exerciſed for their benefit, and not for their own, any farther than as they were a part of, and not diſtinct from, the great body of the people. They had had no precedent of a plea of pardon, but they had what was better than precedent—they had good ſenſe and principle to direct them. They reſiſted the validity of the plea with ſpirit and firmneſs; and as they were neither to be ſoothed nor intimidated, the King had recourſe to his only chance of ſcreening his favourite from juſtice, by diſſolving the Parliament.—That the doctrine ſo properly contended for by the Houſe of Commons in Lord Danby's caſe, had been afterwards ſolemnly eſtabliſhed by an Act, which every one muſt conſider as one of the moſt happy and ſacred Acts of the Legiſlature, namely. the 12th and 13th of William the Third, (*a*) which had ſettled the ſucceſſion to the Crown upon the Houſe of Hanover; and had enacted, for the better ſecuring the rights and liberties of the ſubject, that no pardon under the great ſeal *ſhould be pleadable* to an impeachment by the Commons. But of what uſe was that ſalutary clauſe, if the King, who was reſtrained from the improper exerciſe of his prerogative in one mode, might eventually produce the ſame effect in another—by diſſolving the Parliament? It was true, that in ſome reſpects the preſent times did not reſemble thoſe of Charles the Second, and that no man would be found raſh enough to adviſe the diſſolution of a Parliament for ſo infamous a purpoſe. And though the Legiſlature had wiſely declined to mark out the exact limits within which the exerciſe of the Royal prerogative ſhould be confined; yet the enlightened ſtate of the country had ſufficiently aſcertained, for all wholeſome purpoſes, the boundaries beyond which diſcretion would not incline it to proceed. Such was the fortunate, the glorious ſituation in which they were then placed; but, as the peculiar guardians of the rights and liberties of the people, their duty called upon them to extend their political views beyond the contracted ſpace of

(*a*) c. 2. ſ. 3.

their

their own natural exiſtence; and to take care that poſterity ſhould not ſuffer, becauſe they felt and rejoiced in their own ſecurity.—That it had been well obſerved, in opening the buſineſs, that the Houſe were in a Committee, in one of its great ſuperintending capacities, namely, in the Committee of Courts of Juſtice: and it was the nature of the Court, and the circumſtance of the Houſe of Commons itſelf being the proſecutor, which could produce a doubt. But when the caſe was ſtated, it would prove more clearly the neceſſity of ſtanding upon their privileges, and only admitting the precedents (not deciſive) of other Courts, and of the Houſe of Lords, as illuſtrative of the great conſtitutional queſtion. Suppoſe the Court of King's Bench, which obtained juriſdiction in civil ſuits by the fiction of the defendant being in the cuſtody of the Marſhal of the Marſhalſea; or the Exchequer, whoſe civil juriſdiction was obtained by feigning the plaintiff to be the King's debtor, were to ſay, "We will no longer admit the operation of thoſe fictions; fictions "which the wiſdom of our anceſtors had contrived in order to in-"troduce powers equal and co-ordinate in the diſtribution of private "juſtice, and to give three places, inſtead of the Common Pleas alone, "to decide on the property and perſonal rights of individuals;" whereby, among other wiſe regulations, juſtice had been brought to a higher degree of perfection in this country, than in any other in the civilized world; if the Judges of thoſe Courts were to diſregard thoſe uſeful fictions, and thus abridge the means of juſtice, by ſhutting up two of the ſources from whence it flows, would not the Houſe of Commons inquire; would they not by their anathemas, either in the form of Reſolution, of Addreſs, of Impeachment, or ſome other conſtitutional mode of exerciſing their inquiſitorial power, compel thoſe Judges to do their duty? So in the preſent caſe; Could the Commons ſit by and ſee their day of trial paſſed over unnoticed, the fiction of a diſſolution operating, it was hoped inadvertently, on the Lords, to put the impeachment of a great State criminal aſide, without enquiry and reſolution, founded on their known and undoubted privilege? a privilege ſimilar to that which founded their inquiries into the conduct of the inferior juriſdictions, and which only differed in this, that in the caſe of the Lords it was one ſupreme power in conflict with another, without any third authority to decide between them, and therefore more purely and emphatically a queſtion of privilege. That they ſtood upon the beſt and ſoundeſt precedent in the hiſtory of the Conſtitution, when they determined not to go into a Committee to enquire into precedents, where their privileges were clear and material. It had been agitated in 1679, whether a pardon was pleadable in bar of an impeachment. The Commons, when called upon by the Lords to argue the queſtion at their bar, refuſed to argue it, becauſe it was ſo clearly interwoven with the Conſtitution, and ſo eſſential a privilege, that to argue was to doubt; and to doubt, almoſt an abandonment

donment of the right.—The reſolution of 1673 was again adverted to. Upon the face of the order of the Lords to inquire in 1673, and on the Report and Reſolution founded on that Report, a clear diſtinction was taken between the proceedings of the Houſe of Lords in a judicial and in a legiſlative capacity. In particular the Report of the Committee ſaid, that "*any buſineſs in which their Lordſhips act as a "Court of Judicature, and not in their legiſlative capacity*, continues "in *ſtatu quo* from ſeſſion to ſeſſion." And the Reſolution on that Report ſaid, that *buſineſſes* continued.—What *buſineſſes?*—Undoubtedly the buſineſſes referred to by the Reporting Committee; of judicial, as contradiſtinguiſhed from a legiſlative capacity. And that reſolution, though proceeding on various precedents, did not make, but ſet forth the real conſtitution of the Court of the King in Parliament; which was the true, real foundation for the continuance of an impeachment; namely, that it was a conſtantly exiſting Court; and although from diſſolution, or other cauſe, it might not be ſitting to do juſtice, yet it was always open to receive appeals and writs of error. Many caſes were in the law books, which ſhewed that a writ of error might be brought *ad proximum Parliamentum* during diſſolution, as well as *ad proximam ſeſſionem* during prorogation; which proved the Court of the King in Parliament, which was the Court in which the Commons impeached, as well as that in which error was tried, to be a conſtantly exiſting Court; which was alſo founded in the very origin and ſource of the Lords' juriſdiction.—That the identity of Parliament was gone, and that the Houſe ſat under a new authority, was denied. The Lords, it was ſaid, had been properly ſtiled the *hereditary Judges* of the kingdom. Why?—Becauſe they derived their juriſdictions from their patent of Peerage, not from the writ of ſummons on diſſolution, or proclamation to meet in Parliament after prorogation. That the patent of Peerage, to the Peer and his heirs for ever, according to the nature of the limitation, gave to him and his heirs of full age, as each ſucceeded, a right to act as a Judge in that ſupreme Court of the King in Parliament. This was ſo clear a right, that no power could deprive him of it; for it was expreſsly laid down by Lord Coke, and admitted by every lawyer, that the Peer was intitled to his writ of ſummons to Parliament; and if not ſent to him, he might go, demand, and take it from the office. That the writ, or patent, was the ſource of judicial power to the Peer and his heirs, for ever; who was thereby conſtituted *an hereditary Judge*; exactly as the writ or patent to a Judge in Weſtminſter Hall, for life, and for the life of the King, gave judicial power to the Judge. The power once given, could not be taken away by the Crown, during the life and good behaviour of the Judge. That of the Peer only ended by extinction of the Peerage, or forfeiture to the laws. The Judge's power ceaſed (before the firſt year of the preſent King,)

King) with the demiſe of the Crown; but the judicial authority of the Peer did not. Why?—Becauſe it was hereditary. That in the ſeventh Report of Lord Coke, reſpecting the diſcontinuance of proceſs by the demiſe of the Crown, it was expreſsly laid down, that proceſs by the Sheriff of London does not abate, nor any heritable juriſdiction. Why?—Becauſe the authority was independent of the Crown; whereas the proceedings in Weſtminſter Hall did abate; ſubject, however, to revival. Why?—Becauſe the authority which gave birth to the juriſdiction was gone; whereas the juriſdiction of the Lords was in perpetuity. No act of the King could take it away, no act of the King could therefore abate it. The authority was given with the patent of Peerage; the day or time to exerciſe it, by the writ of ſummons, to meet at the beginning of a Parliament; or of the proclamation, to meet at the beginning of a ſeſſion. Thus the day of meeting appointed by the King, at pleaſure, gave the time for exerciſing the juriſdiction of the Court, ſtiled the Court of the King in Parliament; juſt as the common law, by giving the Term to the Judges of Weſtminſter Hall, gave the time for exerciſing their judicial powers. The Judges in Weſtminſter Hall could no more exerciſe juriſdiction *in Bank*, (interlocutory matters done in chambers being different) out of Term, than the Court of the King in Parliament could, when Parliament was in prorogation or diſſolution. But the King could abridge neither juriſdiction, at the times allotted for it, by law and practice. He could not withhold a Judge, or impede a cauſe in the King's Bench; he could not diſſolve a cauſe, or withhold a Peer in the Court of the King, in Parliament. In ſhort, it was a Court perpetually exiſting; and Lord Hale, whoſe authority, had been ſo much relied on, on the other ſide, ſaid in the caſe of *Sedgwick* and *Goſton*, reported in 1ſt Modern *(a)* in the year 1673, that the Regiſter of writs contains a *ſcire facias* for a writ of error *ad proximum Parliamentum*. The Lords therefore, when they reſolved that judicial matters ſurvived in *ſtatu quo* from ſeſſion to ſeſſion, in 1673, conſidered ſeſſion and Parliament (as it was) to be one and the ſame thing; not only on the force of the precedents there cited, but on the reaſon of the thing, derived from the nature of the juriſdiction; conſidering it as a Court, which though, like all other Courts, it had certain times of acting, yet, like all other Courts, it had a conſtant exiſtence, and could not be annihilated. Hiſtorical anecdote ought to be conſulted, in explaining deciſions and precedents. Who would abandon hiſtory, as a mean of clearing doubtful caſes? The characters of the Judges who decided, was material in the judgments of courts of law; ſo was the character of the times, in parliamentary precedents. On the precedent of 1673, hiſtory was ſilent; but the ſilence of hiſtory was an important ingredi-

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(a) 106.—3. Keb. 256. S. C.

ent in the caſe of 1673. Reſearch had been made in vain, into all the hiſtories of the times, for the origin of that important reſolution: but what had been looked for in vain in the hiſtories of the times, had been found in the law books. From the Reſtoration, to the year 1673, it appeared by many of the law reporters, that many caſes, reſpecting the operation of prorogation and diſſolution, on writs of error and appeals, had taken place; doubts had ariſen, and the Courts knew not how to decide. The reſolution of 1673 muſt therefore have been a rule to ſettle thoſe doubts; a rule, taking its riſe, not out of impeachment, party agitation, or political ſpirit, but out of mere queſtions of private right and private property, uninfluenced by paſſion or violence. And what did that calm, mild, reſolution, originating in peace, not ſpringing from diſcord, mark out? That the Court of the King in Parliament, was a conſtantly exiſting Court, whoſe judicial proceedings were not touched by the exertion of prorogation, but remained *in ſtatu quo*, from ſeſſion to ſeſſion, which was the ſame as from Parliament to Parliament.

To reſcue from abuſe the reſolution of 1678, it was ſaid, that inſtead of being ſtated inſidiouſly, it was ſtated fairly and correctly. Had the matter of impeachment been coupled with writ of error or appeal, it would have been inſidious, becauſe it would have been ſetting forth that as a principle, which was merely a concluſion. In that reſolution it was fairly ſtated, held out ſingly, diſunited from other judicial proceedings, in order to provoke conſideration. It was deſired by the Lords' reſolution of 1678, that the Committee ſhould, as well as writs of error, conſider the ſtate of impeachments; and it was reſolved upon the report, ſubſtantively and diſtinctly, that diſſolution of Parliament did not alter the ſtate of impeachments; that is, that the continuance of impeachment after diſſolution, was a corollary, flowing from the ſtate of other judicial proceedings. As to their citing no precedent for the proceeding, the obſervation was equally without foundation. The Committee of 1678 referred to the Journal 1673; which ſtates precedents, not only of civil caſes, but, as had been obſerved, of criminal caſes, and of criminal caſes ſubſequent to the act of Henry the Fourth. Thoſe antecedent, however, were as good authority to the preſent point, as thoſe ſubſequent. The object of the act of Henry the Fourth was to aboliſh criminal proceedings before the Lords, at the ſuit of individuals; till that time they were legal; and by the precedents they appeared to have endured from Parliament to Parliament. At that time of day if they endured from ſeſſion to ſeſſion, they endured from Parliament to Parliament; for it was admitted that in the early times of Parliament, there were no prorogations; at leaſt none appeared on record, previous to the reign of Philip and Mary. Thoſe caſes therefore, whether prior to or ſince the time of Henry the Fourth, eſtabliſhed, that criminal proceedings begun in one Parliament,

were carried on in ſubſequent Parliaments, and did not abate. But it had been endeavoured to ſhew, that the Parliament of 1678 deſerved no credit! a Parliament which, next to that which ſettled the Revolution, and that which ſeated the Houſe of Brunſwick on the throne, deſerved more of poſterity than any Parliament on record. It was not right to conſider Parliament by the character of the times, but by conſtitutional acts, in their legiſlative and deliberative capacity. In that view, there was not an important or material privilege of perſonal freedom, parliamentary independence, or conſtitutional principle, afterwards enacted and enforced at the Revolution, which was not enforced and carried by the Houſe of Commons in 1678. All the ſeeds were ſown in that Parliament, which afterwards grew to maturity. It paſſed the *habeas corpus* act;—it reſiſted Lord Shafteſbury, who, as Chancellor, had attempted to regain the power of trying elections, and judging of the right of Members to their ſeats; and thus, by a ſecond ſtruggle, fixed that invaluable privilege for ever. It reſolved, not on precedent and record, but on the clear unalienable rights of a free conſtitution, and the independence of inquiſitorial power (without which inquiſitorial power was a mockery)—that a pardon was not pleadable in bar of an impeachment;—that a Lord High Steward, an officer named by the Crown, was not a neceſſary part of the Court of the King in Parliament; which, if it had been neceſſary, empowered the Crown to ſtop an impeachment *in limine*, by refuſing to appoint that officer; and laſtly completed the great work of inquiſitorial independence, by deciding that a diſſolution did not annul an impeachment. The reſolution of 1678, therefore, was not only ſound and juſt in itſelf, but was the act of a Parliament, whoſe reputation ſtood as high, for conſtitutional doctrine, as any in the annals of our hiſtory. With regard to the precedent of 1685, if, inſtead of having paſſed in times when a ſervile Houſe of Lords, and a packed Houſe of Commons, choſen by boroughs deprived of their legal rights, acting under a bigoted and miſguided Prince, that reſolution had paſſed in the beſt of times, and under the moſt perfect Parliament, it would amount to no authority whatever; becauſe it only removed one reſolution, without putting another in its place; and in ſo doing left the principle entire, for it did not venture to affect other judicial proceedings. If ſo, it was like reverſing a rule of court;—(rules which Courts of Judicature were competent to make, to advance juſtice or regulate proceedings;)—but which could neither make law nor annul it.

The caſes at common law, confirmatory of the continuance of an impeachment, were again alluded to: and firſt, the caſe of Lord Danby, in Skinner's reports *. In that caſe, Lord Holt was counſel at the bar, and Jeffries the Judge came down on purpoſe to do the

* 56. 162.

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job of the day; and yet he, who was not fettered by any principle of duty, who could foresee all the consequences of admission, admitted that all that was done was to enlarge Lord Danby's custody, and that upon the meeting of the new Parliament, they might proceed to the trial of Lord Danby. So far there was the authority of Jeffries, that instrument of prerogative and oppression, that impeachment endured from Parliament to Parliament. The next case in the books (from Carthew's reports †), arose on the application of Lord Salisbury to be bailed, in 1690. Lord Holt, counsel for the prisoner in the former case, was now Chief Justice of the King's Bench, and presided at that application; and he, who knew exactly all that had passed, said, that commitments by the Peers endured from Parliament to Parliament; that Lord Danby being bailed to appear at the next session of Parliament, was an affirmance of the commitment; and a plain proof of the opinion of the Court at the time, that the commitment was not avoided or discharged by prorogation or dissolution. In 12th Modern, 604, Lord Holt says (by way of illustration), "If an impeachment be in one "Parliament, and some proceeding thereon, and then the Parliament "is dissolved, and a new one called; there may be a continuance on "the impeachment." Holt, who was counsel for the Popish Lords in 1679, had twice, as Chief Justice, delivered that doctrine; and was, perhaps, of all the Judges who ever sat in Westminster Hall, the Judge whose authority was of most importance in a point of Parliamentary privilege; he who had been led to a full consideration of the privileges of both Houses, and had opposed as a Judge in Westminster Hall the privileges of each (*a*). So that if any cases deserved authority, those deserved authority, as being delivered by a Judge, who had more means of information on the particular case, than any person of the times; who was not afraid of combating the privileges of either House of Parliament; whose authority therefore, on a question of that kind, might be deservedly reckoned higher than that of any Judge who had ever sat in Westminster Hall; because if he had prejudices, they were prejudices unfavourable to the privileges of Parliament, when set in opposition to the Courts of Westminster Hall.

It had been argued, that the present House of Commons must be supposed totally ignorant of the whole which had passed, and therefore incapable of going on with the prosecution. A great constitutional principle, however, was not to be decided by extreme and abstract cases, but by the real solid principles of reason and law, applied to the conduct of men; to the principles of the constitution, and the

† 132.

(*a*) See the case of the King *v.* Knollys, 1. Ld. Raym. 10. and Ashby and White, 2. Ld. Raym. 938. 6. Mod. 45.

exiſting ſtate of things. Perhaps the beſt way of anſwering one extreme caſe, was by putting another. It was admitted, that prorogation did not annul an impeachment; yet, it required no ſtretch of imagination to put a caſe, where prorogation ſhould work the exact phyſical impoſſibility of going on, which was not actually, but only politically true (if true at all) in the caſe of diſſolution. Suppoſe Elizabeth, whoſe power as to holding Parliaments was not conſtrained by any act of the Legiſlature, inſtead of maintaining the conſequence of this country among the other Powers of Europe (which created public neceſſities, and obliged her to hold Parliaments), had been, like her grandfather, Henry the Seventh, frugal, parſimonious, unambitious, living on the income of her Crown lands and hereditary revenue;—the Parliament which met at the beginning of her reign, might have been continued by prorogations to the end of it; and an impeachment might have taken place at the beginning, which, according to the neceſſary admiſſion on the other ſide, muſt have ſurvived to the laſt year of her reign, entire and unabated. During the three-and-forty years of that reign, it was hardly ſuppoſable, by the courſe of nature, but quite certain from the fluctuation of repreſentation, that any one Member of the Parliament of the firſt year, would be in the Parliament of the laſt; yet the law was admitted to be, that the impeachment would not abate, provided the Parliament was prolonged for forty-three years by prorogation, but that forty days of diſſolution annihilated it; yet the prorogation of forty-three years would leave no one Member, nor no one veſtige or trace of the proceeding. That a diſſolution leaves in Parliament in general, by all obſervation on changes in Parliament, all or moſt of the leading men; all whoſe ſituation leads them to conduct affairs, or guide the buſineſs of Parliament. From which extreme caſe was to be derived this important obſervation—the whole was a queſtion of expediency. That the neceſſity of ending the impeachment did not ariſe from diſſolution; becauſe the new Houſe of Commons, being ſtill the legal organ of the people of England, who never die, could as well expreſs their ſenſe in the new, as in the former Parliament; and in a new Parliament, the ſame, or very many of the ſame perſons were returned, who did know the facts, who had conducted the buſineſs, and therefore who could decide upon the expediency of proceeding; whereas, after a long prorogation, ſuch as had been ſuppoſed, the Members being dead, gone, or retired, all memory and trace of the proceeding being obliterated, the expediency was to end it.

But conceding that prorogation did not annul an impeachment, had given up the queſtion; for there was no diſtinction, in the opinion of lawyers, or in the thing itſelf, between prorogation and diſſolution. Whether Parliament were conſidered according to its perſonal,

ſonal, deliberative, legiſlative, or judicial functions, diſſolution and prorogation were the ſame. If either Houſe of Parliament, in its deliberative capacity, was engaged in any inveſtigation, diſſolution put an end to the proceeding; ſo did prorogation. If a legiſlative act was in its progreſs, diſſolution put an end to that meaſure of legiſlation; ſo did prorogation. During the ſeſſion of Parliament, and coming and going, each Member had perſonal privilege; which privilege was put an end to by diſſolution, as well as by prorogation. But as to judicial proceedings, it was the reverſe;—they continued. A writ of error was, confeſſedly, not ended by prorogation; neither by diſſolution. Why? Becauſe prorogation and diſſolution were the ſame in law. An appeal was not ended either by prorogation or diſſolution. And the queſtion now was, Whether an impeachment, that great act of inquiſitorial power, which controuls Miniſters and Judges, and protects the conſtitution,—in its nature judicial,—in its proceeding analogous to the trial of a Peer in a Court which never ceaſes to exiſt (though its time of acting might be interrupted at the will of the Crown), was to be an exception to this great general rule;—whether that, without which all the reſt would be uſeleſs, ſhould bend to a power, which ſhook none of the others;—whether, while a cauſe between two individuals reſiſted the ſtorm of prerogative, and in the ſhape of a writ of error ſurvived diſſolution,—a cauſe inſtituted by the repreſentatives of the Commons of England, for themſelves and all the Commons of England, ſhould give way to that power?

From the analogy of the death of the Houſe of Commons to the demiſe of the Crown, it could not be argued that the record was gone; becauſe on the demiſe of the Crown, the proceedings on an information or indictment only abated; the information itſelf remained. It was aſked, What they meant to do with the record? Was it to remain unacted upon? Was the accuſed to remain for ever under it? or, Was there to be a *noli proſequi* by the Commons? or, Was there to be a proceeding? If a *noli proſequi*, of courſe it might as well abate; for whether a thing ended of itſelf, or could not be carried on from want of knowledge in the proſecutors, was one and the ſame thing. Was it to be carried on? If it was, that either ſuppoſed knowledge, or the means of acquiring it. But the record remained: and why ſhould not the proceeding upon it remain? Becauſe, by the demiſe of the Crown, proceedings on an information abated.—But what ſort of proceedings? Thoſe which were preparatory to trial; the plea, and what are called, in the language of Weſtminſter Hall, the continuances;—proceedings merely preparatory to impanelling the jury. Whereas, in the caſe of that impeachment, the Lords were a jury impanelled to try the cauſe of Mr. Haſtings;—a jury who did not fall within the rules of

other juries, but who were equally known to the conſtitution as thoſe already deſcribed; and who could only be diſcharged from their duty, like all other juries, by a verdict. It could not with propriety be compared with the common trial by jury. When a jury was impanelled to try a cauſe, a Judge preſided—the Judge took notes, but there was no ſtop to take down the queſtion—no ſtop to receive the anſwer—no form which made the evidence, as it were, a record—all was done on the general impreſſion, and, as it were, *uno flatu*. The jury could not ſeparate till they had given their verdict; could neither eat, drink, nor take refreſhment; and if they retired, muſt retire in cuſtody of a bailiff, till they pronounced upon the priſoner whom they were impanelled to try. It was not ſo in the Court of the King in Parliament; there the Court adjourned and continued *de die in diem,—de ſeſſione in ſeſſionem*, and, as was contended *de Parliamento in Parliamentum*; and their proceedings and forms were all calculated to ſuit that conſtitution. The evidence was taken in a different manner. The queſtion, inſtead of being aſked of the witneſs, was put to the Court by the Manager; the Chancellor preſiding, put the queſtion to the witneſs; that queſtion being firſt taken down by the clerk, who likewiſe, before another queſtion was put, took down the anſwer given by the witneſs. Thus, not the general effect, but the preciſe terms were taken down, and preſerved for the benefit of the Court; that as well thoſe who were not preſent, as thoſe who from death, creation, &c. found their way into the Court, might legally give judgment of condemnation or acquittal. Therefore, if the argument, founded on the demeanor of a witneſs not being ſeen by the proſecutors, had any foundation, it applied more ſtrongly to the Court: for if a perſon might judge, who had not ſeen a witneſs examined, ſurely the proſecutor might aſk for judgment, under ſimilar circumſtances.

Hence the Court in which the Commons impeached, was the Court in which a Peer was tried; the ſame Court which tried writs of error; which in no caſe required the King to ſupply it with powers to enable it to act; but poſſeſſed thoſe powers inherently, in its own nature and conſtitution. The Crown gave it a day; but in the language of Mr. Juſtice Foſter, it openeth at the beginning, and ſhutteth at the end of every ſeſſion, as the King's Bench openeth and ſhutteth with the Term.

That in a queſtion which concerned the ſafety and welfare of the people, every conſideration, except what had a tendency to promote thoſe great objects, became ſuperſeded: *Salus populi ſuprema lex, prima lex, media lex*. To thoſe who were only ordinary Members of Parliament, the rights of the Commons were every thing. They took it for granted, that what they poſſeſſed in favour of their conſtituents, was lawfully poſſeſſed; that what was never diſputed there, ought not to be diſputed any where. They employed argument

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and research to defend their right against those who attacked them, not to raise questions amongst themselves against themselves; or to furnish offensive weapons to their adversaries, by teaching them to doubt the legality of their best-founded claims.

That the Judges, in all the Courts, take notes, not only for their own use, but for the instruction of the Jury, and summing up of the evidence. It was singular, that things provided as aids to the known frailty of memory, should be alledged as reasons for rejecting memory so assisted. How came the memory to be worse for that, which was always done *in perpetuam rei memoriam?*

Charles II. himself, in his speech from the Throne, expressly said to his new Parliament, that he would not discharge the Earl of Danby, because he was under impeachment by the last Parliament, and ought to be tried in the new; a declaration which shewed that the King acted on the clear, known, recognized law, not on any claim of the Commons. The House afterwards took it up on the same ground. They sent word to the Lords, to remind them of the depending impeachment of Lord Danby. The Lords take it into consideration, and solemnly adjudge, that an impeachment is not discontinued by the dissolution of Parliament. It was not considered as a right regained or recovered; it was the clear, indubitable right of the Commons, in which the Lords acquiesced.

Were they satisfied with a bare acquiescence? When Lord Stafford was brought to trial, he pleaded the discontinuance. Did the Lords yield to it? They would not so much as suffer it to be argued. On the foundation of that privilege, Lord Stafford was tried, condemned, executed, and by the attainder his whole line of succession cut off. Should that which had been sufficient to attaint and degrade for ever, one of the noblest families in the world, not be sufficient to support the right of maintaining a temperate process, for bringing to legal judgment one India delinquent?

The High Court of Impeachment was composed of the hereditary branch of the Legislature—the Lords of Parliament; whose authority did not depend on the sitting of Parliament, although during the sitting of Parliament they exercised their authority in judicial proceedings. Like the Judges between Term and Term, they did not in the recess exercise their functions, but in that recess their functions were not extinguished. The meeting of Parliament was to them, therefore, no more than notice from the Crown to proceed in the exercise of their privileges, but which the Crown could neither take away, abridge, nor render void. What was the case of the prosecutors, and what was the right? The prosecutors were the Commons of Great Britain, of whom the Commons House of Parliament was the organ and the instrument. The great constituent body of the people of England possessed the accusatory right of impeachment

inceſſantly; a right neceſſarily and phyſically exiſting at all times; which could neither be taken from them, nor abridged by any change which they might make in their agents the Houſe of Commons, whom they choſe to conduct ſuch impeachment. If, therefore, neither the judicature, before whom the matter of impeachment was to be tried, nor the accuſers on ſuch impeachment, were either politically or phyſically annihilated by diſſolution; if it was true, that though the means of acting were for a time ſuſpended, the right remained;—it followed, that every judicial proceeding in which they happened to be engaged before ſuch a ſuſpenſion took place, revived on their meeting again in the proper capacity to put in motion their inherent rights; and that during every ſuch interval, every ſuch proceeding muſt be ſtill depending in the ſtate in which it was left.

It was remarked as a ſingular circumſtance, that when their own Journals were free from any opinion, much leſs any inſtance of denial, they ſhould be referred to the Journals of the Houſe of Lords, to learn what were the privileges of the Houſe of Commons. That there was not one ſingle *dictum* on the Journals of the Houſe of Commons againſt the doctrine, not even a ſurmiſe. What was the popular argument advanced for the diſcontinuance of the impeachment? Merely that the evidence could not be known to the accuſers perſonally, and that they muſt truſt to written minutes, of the truth of which they were uncertain. What was all this appeal to the heart, on the duty of hearing evidence *vivâ voce*, inſtead of reading it, when truly written? Was it to be eſtabliſhed as a principle, that to the pure adminiſtration of juſtice, memory muſt alone aſſiſt the judgment, unrefreſhed by minutes? If an impeachment ſhould laſt the whole poſſible length of a Parliament, the memory muſt hold out, as they could not conſcientiouſly demand judgment, if their recollection was aſſiſted by referring to the notes which had been taken; and unleſs they poſſeſſed memories of that retentive kind, they were to be deprived of all exerciſe of judgment. Why ſhould they, who had only to make up their minds on the evidence, to juſtify them in demanding judgment, require more preciſe means of knowledge than the noble Lords who had to give judgment? Why ſet up a wild theory againſt plain ſenſe? If they were not to judge on evidence ſo taken, in what a predicament did they place the Sovereign? To him, both in the exerciſe of his gracious prerogative, that of mercy, as well as in that of his moſt afflicting duty,—enforcing the execution of juſtice,—the chief Magiſtrate of the kingdom had only written evidence, taken by others, to truſt to. His Majeſty could only judge from what he read, or from what he was told; yet it was never imagined, much leſs imputed to the exerciſe of thoſe Royal prerogatives, that the Royal judgment had been led by defective evidence; which

which muſt be admitted, unleſs it ſhould be ſtated that his Majeſty was always, in fact, preſent in every Court, and maſter of every part of the evidence. Again were the times of Charles II. alluded to. They were not, it was ſaid, bad times in parliamentary law, nor could any precedent derived from them be ſuſpected merely on that account. The fact was, that the times, in a conſtitutional point of view, were good. All that could be charged upon them was their credulity. The people, harraſſed and alarmed by repeated attempts on their liberty, were perhaps too ready to liſten to thoſe who wiſhed to take advantage of their fears; but while ſome of their acts, viewed coolly, and at a diſtance, might be blameable, the principle on which they acted was good. The condemnation of Lord Stafford, viewed, as we were now enabled to view it, diveſted of fear and credulity, and convinced that Oates and Bedloe, the principal witneſſes againſt him, were impoſtors, we muſt naturally lament. But every man who had peruſed the printed account of that trial, muſt admit that it was regular in form, and that the verdict of his Peers, believing, as they did, the evidence of Oates and Bedloe, was a juſt verdict, ſuch as they were bound in conſcience to pronounce. In thoſe times, which were reprobated as incapable of affording a precedent fit to be followed, every queſtion neceſſary to ſtop an impeachment, by the exerciſe of prerogative, had been tried; and all had been baffled by the vigorous and conſtitutional exertions of the Commons, and ever ſince completely ſettled. The King firſt tried to ſtop the impeachment by refuſing to appoint a Lord High Steward. The Commons conteſted the point, agitated it with the Lords, and it ended in ſettling the commiſſion of a Lord High Steward, by inſerting words, which have ever ſince ſtood in the commiſſion, and which make the Lord High Steward not a neceſſary part of the Court. Thus the Commons, without an act of Parliament, eſtabliſhed that the King could not ſtop an impeachment by refuſing to appoint a Lord High Steward; becauſe that office was determined to be unneceſſary. The King next tried to ſtop the impeachment by granting a pardon to Lord Danby. There again the prerogative of the King was routed by the privilege of the Commons. The Lords too diſallowed the pardon, as a plea in bar; and ſuch a meaſure had never ſince been attempted.

Diſappointed in all thoſe means of ſaving Lord Danby, the King reſolved to diſſolve the Parliament. Here again he was foiled. The new Houſe of Commons took the buſineſs up with the ſpirit of the former; and arguing on the true principles of the conſtitution, enforced upon the ſoundeſt doctrine and cleareſt precedents, that notwithſtanding diſſolution, an impeachment remained *in ſtatu quo* to be proceeded on by the new Parliament. The guilt of Lord Danby was, perhaps, as much the guilt of the King, as his own. The King had employed his favourite to ſell the intereſt of his people to a foreign

a foreign power, and to barter away the dignity of his Crown for a diſgraceful penſion to himſelf. Implicated in the crime, he was naturally anxious to protect the inſtrument of it, and for that purpoſe reſorted to every exerciſe of his prerogative, which the advice of his Miniſter, or his own ingenuity, could ſuggeſt. Every one of his meaſures on that occaſion, had a direct parliamentary condemnation. Fortunate it was for the country, fortunate for poſterity, that the King had had recourſe to thoſe manœuvres; becauſe it had been the means of eſtabliſhing beyond a doubt, that no ſhift or evaſion, no abuſe of prerogative, no colluſion between the Crown and the criminal, could defeat an impeachment by the Commons.

Of the times in which the reſolution of 1678 was made, the opinion of men who ſpoke of them, without reference to any particular queſtion, but on a general view of our hiſtory and conſtitution, would far outweigh all that had been ſaid, as applicable to the preſent caſe. Judge Blackſtone, whoſe opinion was juſtly in high eſteem, had ſaid, that the Parliament known by the name of the Long Parliament of Charles the Second, was deſerving of the higheſt praiſe in a conſtitutional view. In the body of his work, he enumerates many different regulations, which were the work of that Parliament; and ſays they demonſtrate this truth, "that the conſtitution of England had arrived to its full vigour, and the true balance between "liberty and prerogative was happily eſtabliſhed by *law*, in the "reign of King Charles the Second (*g*)." And in a note on that paſſage, he ſays, "The point of time at which I would chuſe to "fix this *theoretical* perfection of our public law, is the year 1679; "after the *habeas corpus* act was paſſed, and that for licenſing the "preſs had expired; though the years which immediately followed "it were times of great *practical* oppreſſion (*h*)."

In ſettling every conteſted point of law, we ſhould firſt look to uſage and then to reaſon. That there was a great diſtinction between the ordinary law, in the common courts of juſtice, and the conſtitutional law. For the former we ſhould look to uſage, where that could direct; but for the latter, to reaſon, in preference to uſage; becauſe in ordinary caſes *certainty* was of more value than ſoundneſs of principle; but in conſtitutional law, ſoundneſs of principle was every thing. Certainty of uſage, on a conſtitutional point, if it failed, ſerved only to increaſe deſpair, and to drive to the laſt deſperate remedy, for deſperate caſes. That the law of impeachment was not to be collected from the uſage of courts of juſtice—for who was it meant to controul? Not only men in high ſtations, who might commit crimes which the common law could not reach; but firſt and principally, the courts of juſtice themſelves. If the power of impeachment be rendered nugatory, what ſecurity is there for

(*g*) Comm. 4. V. oct. 439. (*h*) *Id.*

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the integrity of Judges, and the pure adminiſtration of juſtice? Were it to be governed by abſurd or iniquitous rules of practice, what abuſe could it correct? They would not imagine extraordinary caſes of enormity in Judges, but ſuppoſe them ſo devoted to the Crown, as to give ſuch a deciſion as had been given in the caſe of *Ship-Money*. Suppoſe them, as in the reign of Charles II. ſo pliant to the prevailing party of the day, as to execute Whigs one day, and Tories the next, under colour of law, what remedy was left, if that of impeachment did not apply? Were a Judge even to attain to that enormous pitch of arbitrary wickedneſs, as to order a man to puniſhment who had been acquitted by a Jury, there was no mode of proceeding againſt him but by impeachment. With regard to the force of precedents on conſtitutional points, had the diſpenſing power claimed by the Stuarts been decided by precedent, it might, perhaps, have been found to be good. But would any man regard a precedent in ſuch a caſe? Muſt it not be perceived, that a Legiſlature and a diſpenſing power in the Crown were things incompatible; and that wherever any uſage appeared ſubverſive of the conſtitution, if it had laſted for one, or for two hundred years, it was not a precedent, but an uſurpation?

They were told they might proceed by a bill of pains and penalties. What, it was argued, would be gained by that, unleſs it could be made appear, that a bill of pains and penalties could not be ſtopped in its progreſs by the Crown? And though ſuch abuſes were not, in general, to be ſuppoſed, yet when controul was removed, all abuſes were to be ſuppoſed. Again they were told, that if a Miniſter adviſed the Crown to diſſolve the Parliament, to get rid of an impeachment, they might impeach him again. By the ſame rule he might adviſe to diſſolve them again; and ſo they might go on, impeaching and diſſolving alternately, with no other effect than a mockery of juſtice. It had alſo been ſaid, that the points on which the law of Parliament turned, were of ſuch nicety, that none but a lawyer could underſtand them. The ſuppoſed nicety proved the falſity of the argument. Were the caſe ſo, how could the law of Parliament be ever underſtood by men of common education and plain underſtanding? How could it have been eſtabliſhed, by men of ſtill more ordinary education, who compoſed the majority of the Houſe of Commons, when the theory of the conſtitution was developed and explained? But they had, it ſeemed, no knowledge of the proceedings, on the impeachment, during the late Parliament;—there was no evidence on which they could judge, whether any thing had been proved by the Managers appointed by the late Houſe of Commons. It was ſomewhat ſtrange, that profeſſional men ſhould be ſo profoundly ignorant of what was known to all the world beſide. They could liſten only to oral evidence; the minutes of the evidence taken down and printed by direc-

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tion of the Lords for their own information, were to lawyers of no uſe whatever. That one learned gentleman, who unfortunately had not attended the trial; who had not heard the evidence; who had no materials on which to form his judgment; who could not ſuffer himſelf to read written minutes, of written evidence, ſuch as compoſed the greater part of the evidence on the trial; and who was ſo conſcientious, that he would not, as an accuſer, pray judgment againſt a man who, for any thing he knew, might be innocent; had aſked how he, as a Member of the Houſe of Commons, could go to the bar of the Lords, and demand judgment againſt Mr. Haſtings, ſuppoſing him to be found guilty? To this it was anſwered, that when that learned gentleman came to be Attorney General, he might with the greateſt propriety move the Court of King's Bench for judgment againſt all perſons convicted by his predeceſſor in office; and that on much weaker evidence than the minutes of the impeachment; on no other evidence than a copy of the record; and when he came to be a Judge, might even pronounce judgment on what might be conſidered as ſtill weaker evidence, namely, the notes of a brother Judge. It was well known that nine-tenths of miſdemeanors were tried at ſittings, and the record being returned to the Court from whence it iſſued, ſentence was there pronounced, by Judges who had heard no part of the oral evidence—who had ſeen nothing of the demeanor of the priſoner, or the witneſſes—who had no knowledge whatever of the caſe, or of its circumſtances, but what they derived from the notes of the Judge who tried the cauſe. Affidavits, both in extenuation and aggravation, might be, and frequently were, produced and read; and on that ſort of evidence, which was thus gravely repreſented by profeſſional men as no evidence at all;—on the written evidence of a note book, with the addition ſometimes of written affidavits; on evidence of ſuch authority (which, if tho ſewhoſe buſineſs it was to underſtand it beſt, were to be believed, ought not to be of force to pluck a feather from a ſparrow's wing), would learned gentlemen, when advanced to the Bench, decide, whether a fellow-ſubject ſhould be fined a ſhilling or ten thouſand pounds—whether he ſhould be impriſoned in the King's Bench for a week, or in Newgate for three years. That it had been aſked, if all their proceedings did not ceaſe with a diſſolution? Preciſely thoſe, it was anſwered, which ceaſed on a prorogation. On a prorogation, all votes of money, all bills depending, fell to the ground. So they did on a diſſolution. By prorogation, the ſtate of an impeachment was not affected. No more was it affected by a diſſolution. During the interval occaſioned by either, the High Court of Parliament could not ſit, any more than the Courts of Common Law, in the interval between Term and Term.

When

When Parliament met after either, judicial proceedings were taken up *in ſtatu quo*, juſt as in the Courts below after a vacation. In this manner had the proceedings on the impeachment been ſuſpended, by every prorogation of Parliament, and the Committee of Managers diſſolved. After prorogation, the Committee had been re-appointed, and the proceedings on the trial reſumed. That there was no difference between the preſent ſituation of the Houſe, and its ſituation after any of the prorogations ſince the trial commenced;—except that having been ſent back to their conſtituents, they might more properly review their former proceedings, to ſee what they would abide by, and what they would abandon. That by the act of 1773, for enquiring into offences committed in India, it was provided that various parliamentary proceedings, neceſſary for that purpoſe, ſhould continue from Seſſion to Seſſion, and from Parliament to Parliament; but not one word was ſaid of impeachments. That was no caſual omiſſion, but an omiſſion on principle. It was in the contemplation of the framers of that act, to include impeachments; but on the advice of the late Mr. Dyſon, whoſe knowledge of the law of Parliament had never been queſtioned, they were expreſsly omitted, that the undoubted right and privilege of the Commons might not be weakened, by an indirect admiſſion on their own part that it was not clear.

It had been obſerved, that as the diſſolution of Parliament was generally expected, thoſe who conducted the impeachment, and were anxious that public juſtice ſhould not be defeated, ought to have brought in a bill to continue the impeachment over the diſſolution, when they ſaw that the trial could not be concluded before it. Thoſe who ſaid ſo, ought to recollect, that it was not the opinion of the Managers, that the impeachment would be affected by a diſſolution. All which on them depended, the Managers had done. They had moved a reſolution in the laſt Seſſion of the late Parliament, that the Commons would perſevere in the proſecution of the impeachment till the ends of public juſtice were obtained; and the reſolution had been adopted by the Houſe. What was the conduct of thoſe who thought a diſſolution would put an end to the impeachment? Did they apprize the Houſe of it? No—When they ſaw the Houſe voting that it would perſevere in the impeachment, when they knew that a diſſolution was approaching, which, in their opinion, muſt neceſſarily be fatal to it, inſtead of bringing forward their conſtitutional law for the information of the Houſe, when ſuch information might have been uſeful, they concealed it, and now, for the firſt time, brought it into action. They had on their own Journals an expreſs declaration, that an impeachment did not abate by diſſolution of Parliament; a declaration acquieſced in by the Lords, repeatedly acted upon by the Commons, and never once contradicted by any ſubſequent declaration; and it was ſtrange indeed to hear thoſe

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who had *laid it* down as a principle, that an order of any competent Court, acquieſced in for a ſeries of years, and never afterwards annulled, made law—adviſing the Houſe of Commons to conſult the Journals of the Lords, for the purpoſe of turning aſide the clear and uniform ſtream of the law of Parliament, as it appeared on their own, for more than a century. Were any man to affirm, in defiance of the act of Queen Anne, that Parliament had no right to interfere with the deſcent of the Crown—that the act of ſettlement was not law, and that the Houſe of Stuart, and not the Houſe of Brunſwick, had the only legal right to it—no one would feel an apprehenſion that the propoſition might be true; but would deſire time to recover from his aſtoniſhment, to repreſs the indignation which it muſt naturally excite, and to obtain for it ſuch a free and temperate diſcuſſion, as might procure the moſt ſolid and effectual condemnation of a doctrine ſo abſurd and extravagant. Such a diſcuſſion the queſtion before the Houſe had received; and great as were the advantages which the nation had derived from the acceſſion of the Houſe of Brunſwick to the Throne, the deciſion of it was of as much importance to the conſtitution and the future happineſs of the people, as whether the ſucceſſion ſhould continue in that Houſe, or revert to the Houſe of Stuart. That next to the independent, free-born ſpirit of the people, the law of impeachment was the beſt ſecurity for the undiſturbed enjoyment of their lives and liberties. It was the only peaceable ſecurity againſt the vices of Government; and let no man, by weakening or annihilating that, reduce them to the neceſſity of having recourſe to any other. To declare that an impeachment did not abate by diſſolution of Parliament, with a view to prevent the improper interference of the Crown, had been called *muzzling the lion with a cobweb.* After the privilege was aſſerted and eſtabliſhed, the King, it was ſaid, might diſſolve the Parliament, when the Lords were on the point of pronouncing a priſoner guilty, or after he had been found guilty and before judgment was given; and ſo afford him the means of eſcape; or, he might create fifty new Peers in a day, for the purpoſe of acquitting a ſtate criminal. All this was undoubtedly true. Though every one would lament to ſee the power of creating Peers abuſed, yet they would much more lament to ſee that power taken away; and it was a poſſible evil, againſt which they could propoſe no remedy. But whenever ingenuity could point out ſome poſſible abuſe againſt which they could not provide, were they to give up every ſecurity againſt that abuſe, which the conſtitution had put into their hands? No human form of Government was ever yet ſo perfect, as to guard againſt every poſſible abuſe of power; and the ſubjects of

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every Government muſt bear with ſome. But when abuſes became ſo frequent, or enormous, as to be oppreſſive and intolerable, and to threaten the deſtruction of Government itſelf, then it was that the laſt remedy muſt be applied—that the free ſpirit of the people muſt put into action their natural power to redreſs thoſe grievances, for which they had no peaceable means of redreſs, and aſſert their indefeaſible right to a juſt and equitable Government. No man would deny, that caſes might occur, in which the people could have no choice but ſlavery, or reſiſtance; no man would heſitate to ſay what their choice ought to be; and it was the beſt wiſdom of every Government, not to create a neceſſity for reſiſtance, by depriving the people of the legal means of redreſs. The alternative every good man muſt deprecate, as too dreadful in its probable conſequences; and whenever ſad neceſſity ſhould urge it on, every individual, who had a heart to feel for the calamities of his country, muſt deplore the exigency of the times. Nevertheleſs, they were to watch poſſibilities in that Houſe with the eye of jealouſy; and ſhould tyranny ever be enforced, no doubt the gentlemen of the Long Robe would contradict the ſentiments which they had choſen to deliver, by their actions; and prove, by their zeal and activity, that they were as ready to lay down their lives in defence of their freedom, as any deſcription of men whatever. That the right of impeachment proceeding, without abatement, from Seſſion to Seſſion, and from Parliament to Parliament—was the vital, the defenſive principle of the conſtitution; which preſerved it from internal decay; which protected it from internal injury; without which every office of executive power, every function of judicial authority, might be exerciſed or abuſed, at the diſcretion or caprice of him who held, or of him who had the right of appointing to it.

The motion was put, and carried, without a diviſion (*i*). At a ſubſequent time, this important queſtion was debated in the Houſe of Lords, and was attended with the ſame ſucceſs. On the 16th May 1791 it was moved, that "A Meſſage be ſent to "the Commons to inform them that the Lords were ready to "proceed on the Trial of Warren Haſtings Eſq." which paſſed in the affirmative, by a majority of 48—Contents 66—Not Contents 18.—(*k*)

(*i*) Vide Parl. Reg. by Debrett, 28 vol. fo. 150. where there is a liſt of the precedents from 18 Ed. 1. to 3 Geo. 1.

(*k*) *Id.* 30 vol. fo. 189.

AND

AND thus much in general, touching the great regard that parliaments and the kingdom have had, and that moſt juſtly, to the common law; and the great care they have had to preſerve and maintain it, as the common intereſt and birthright of the king and kingdom.

I SHALL now add ſome few words touching the ſtiles and appellations of the common law, and the reaſons of it. It is called ſometimes, by way of eminence, *lex terræ*, as in the ſtatute of *Magna Charta*, cap. 29. where certainly the common law is at leaſt principally intended by thoſe words, *aut per legem terræ*; as appears by the expoſition thereof in ſeveral ſubſequent ſtatutes, and particularly in the ſtatute 28. Edw. 3. cap. 3. which is but an expoſition and declaration of that ſtatute. Sometimes it is called *lex Angliæ*, as in the ſtatute of Merton, cap. 9. "*Nolumus leges Angliæ* "*mutari* (*l*), &c." Sometimes it is called *lex & conſuetudo regni*; as in all commiſſions of *oyer* and *terminer*, and in the ſtatutes of 18. Edw. 1. cap. . . and *De Quo Warranto*, and divers others. But moſt commonly it is called the common law; or, the common law of England; as in the ſtatute of *Articuli ſuper Chartas*, cap. 15. in the ſtatute 25. Edw. 3. cap. 5. and infinite more records and ſtatutes.

Now, the reaſon why it is called the common law, or what was the occaſion that firſt gave that determination to it, is variouſly aſſigned, viz.

FIRST, ſome have thought it to be ſo called, by way of contradiſtinction to thoſe other laws that have obtained within this kingdom. As, firſt, by way of contradiſtinction to the ſtatute law. Thus a writ of entry *ad Communem Legem*, is ſo

(*l*) Seld. Differt. ad Fletam. 3 Inſt. 208. Barring. on Stat. 44.

called

called in contradiſtinction to writs of entry *in Caſu conſimili*, and *Caſu proviſo*, which are given by act of parliament. Secondly, by way of contradiſtinction to particular cuſtomary laws. Thus diſcents at common law, dower at common law, are in contradiſtinction to ſuch dowers and diſcents as are directed by particular cuſtoms. And thirdly, in contradiſtinction to the civil, canon, martial and military laws, which are, in ſome particular caſes and courts, admitted as the rule of their proceedings.

SECONDLY, ſome have conceived, that the reaſon of this appellation was this, viz. In the beginning of the reign of Edward III. before the Conqueſt, commonly called Edward the Confeſſor, there were ſeveral laws, and of ſeveral natures, which obtained in ſeveral parts of this kingdom, viz. THE MERCIAN LAWS—in the counties of Glouceſter, Worceſter, Hereford, Warwick, Oxon, Cheſter, Salop, and Stafford: THE DANISH LAWS—in the counties of York, Derby, Nottingham, Leiceſter, Lincoln, Northampton, Bedford, Bucks, Hertford, Eſſex, Middleſex, Norfolk, Suffolk, Cambridge and Huntington: THE WEST-SAXON LAWS—in the counties of Kent, Suſſex, Surrey, Berks, Southampton, Wilts, Somerſet, Dorſet, and Devon (*m*).

THI;

(*m*) The old laws of the Saxons make particular mention of the Daniſh, the Mercian, and the Weſt Saxon laws. And notwithſtanding Sir Matthew Hale is ſupported by the authority of Camden, Spelman, Cowell, Selden, Du Freſne, Phillips, and Tyrrell, yet biſhop Nicholſon (Eng. Hiſt. lib. 1. 113. Scotch Hiſt. pref. 29) ſtrongly contends that ſuch a diviſion of the Engliſh laws is merely imaginary. The biſhop has taken great pains to define the genuine import of the word laga; and will have it, that laga (in compoſition with Dæna, Myncena, and Were Sexena, in any of our Saxon remains) ſignifies properly a country, a diſtrict or a province, and that it cannot be otherwiſe rightly tranſlated. Giving all due credit to the learning, to the induſtry and ingenuity of the biſhop, it is certain that all our hiſtorians and antiquarians (himſelf alone excepted)

THIS king, to reduce the kingdom as well under one law, as it then was under one monarchical government, extracted out of all thoſe provincial laws, one law to be obſerved through the whole kingdom. Thus Ranulphus Ceſtrenſis, cited by ſir Henry Spelman in his Gloſſary, under the title *Lex*, ſays, *Ex tribus his Legibus Sanctus Edvardus unam Legem—&c.* And the ſame, *in totidem verbis*, is affirmed in his hiſtory of the laſt year of the ſame king Edward. (*Vide ibid. plura de hoc.*) But Hoveden carries up the common laws, or thoſe ſtiled the Confeſſor's laws, much further. For in his Hiſtory of Henry II. he tells us, *Quod iſtæ Leges prius inventæ & conſtitutæ erant tempore Edgari, avi ſui, &c.* Vide Hoveden. And poſſibly the grandfather might be the firſt collector of them into a body, and afterwards Edward might add to the compoſition, and give it the denomination of the common law. But the original of it cannot in truth be referred to either, but is much more ancient, and is as undiſcoverable as the head of Nile. Of which more at large in the following chapter.

THIRDLY, others ſay, and that moſt truly, that it is called the common law, becauſe it is the common municipal law, or rule of juſtice, in this kingdom. So that *Lex Communis*,

excepted) are agreed that there was a threefold diviſion of laws, out of which and other laws then extant, the Confeſſor made that collection which is called by his name, and which made one COMMON LAW; and that the proper definition of lagu is *lex*, law. [Blackſtone has followed this general received opinion. Com. 1 v. 65. Though theſe laws were ſomewhat different from each other, yet it muſt be admitted, that the difference for centuries chiefly conſiſted in the various rates of mulcts or fines which were exacted from thoſe who were guilty of certain crimes, according to the plenty or ſcarcity of money in their reſpective countries. They all held (ſays Spelman) "an "uniformity in ſubſtance, differ-"ing rather in their mulcts than "in their canon;—in the quanti-"ty of amercements, than in the "courſe of juſtice." Reliquiæ Spelm. 49.

or

or *Jus Communis*, is all one and the ſame with *Lex Patriæ*, or *Jus Patrium*. For although there are divers particular laws, ſome by cuſtom, applied to particular places, and ſome to particular cauſes; yet that law, which is common to the generality of all perſons, things, and cauſes, and has a ſuperintendency over thoſe particular laws that are admitted in relation to particular places or matters, is *Lex Communis Angliæ*; as the municipal laws of other countries may be, and are ſometimes called, the common law of that country; as *Lex Communis Norrica*, *Lex Communis Burgundica*, *Lex Communis Lombardica*, *&c.* So that although all the former reaſons have their ſhare in this appellation, yet the principal cauſe thereof ſeems to be the latter: and hence ſome of the ancients called it *Lex Communis*; others *Lex Patriæ*; and ſo they were called in their confirmation by king William I. whereof hereafter (*n*).

(*n*) See Dr. Taylor's Elements of the Civil Law—a book of infinite learning, and which the inquiſitive and induſtrious ſtudent will find of infinite advantage. Though Mr. Gibbon (ſpeaking of that work) ſays it is "a work of amuſing, though various reading; but which cannot be praiſed for philoſophical preciſion." Gib. Hiſt. 8 v. oct. 66.—And in another place, (id. 77) he terms the author—"a learned, rambling, ſpirited writer."

CHAP. IV.

Touching the original of the common law of England.

THE kingdom of England, being a very ancient kingdom, has had many viciſſitudes and changes, eſpecially before the coming in of king William I. under ſeveral, either conqueſts or acceſſions, of foreign nations. For though the Britons were, as is ſuppoſed, the moſt ancient inhabitants, yet there were mingled with them, or brought in upon them, the Romans, the Picts, the Saxons, the Danes, and laſtly, the Normans. And many of thoſe foreigners were, as it were, incorporated together, and made one common people and nation. Hence ariſes the difficulty, and indeed moral impoſſibility, of giving any ſatisfactory, or ſo much as probable conjecture, touching the original of the laws, for the following reaſons.

FIRST, from the nature of laws themſelves in general; which being to be accommodated to the conditions, exigencies, and conveniences of the people, for or by whom they are appointed, (*a*) as thoſe exigencies and conveniencies do inſenſibly grow upon the people, ſo many times there grows inſenſibly a variation of laws, eſpecially in a long tract of time. And hence it is, that though for the purpoſe in ſome

(*a*) Inventæ ſunt leges ad ſalutem civium, civitatum que incolumitatem, vitamque hominum & quietam & beatam. Cic. de Leg. l. 4. See Blac. Com. 1 v. 63. to 92 and 4 v. 409. Summam divinæ mentis rationem, (ſays Hopperus, of the law) et vocem cum bonitate et potentia conjunctam, quæ præſita in Repub. jubet ea, quæ facienda ſunt, et prohibet contraria. L. 1. de Vera Juriſprud. tit. 20.

particular

particular part of the common law of England, we may eaſily ſay, that the common law, as it is now taken, is otherwiſe than it was in that particular part, or point, in the time of Henry II. when Glanville wrote; or than it was in the time of Henry III. when Bracton wrote;—yet it is not poſſible to aſſign the certain time when the change began. Nor have we all the monuments, or memorials, either of acts of parliament, or of judicial reſolutions, which might induce or occaſion ſuch alterations. For we have no authentic records of any acts of parliament, before 9. Hen. III. and thoſe we have of that king's time, are but few. Nor have we any reports of judicial deciſions, in any conſtant ſeries of time, before the reign of Edward I.; though we have the plea rolls of the times of Henry III. and king John, in ſome remarkable order. So that uſe and cuſtom, judicial deciſions and reſolutions, and acts of parliament, though not now extant, might introduce ſome new laws, and alter ſome old, which we now take to be the very common law itſelf, though the times and preciſe periods of ſuch alterations are not explicitly, or clearly known. But though thoſe particular variations and acceſſions have happened in the laws, yet they being only partial and ſucceſſive, we may with juſt reaſon ſay, they are the ſame Engliſh laws now, that they were, ſix hundred years ſince, in the general. As the Argonauts ſhip was the ſame when it returned home, as it was when it went out; though in that long voyage it had ſucceſſive amendments, and ſcarce came back with any of its former materials;—and as Titius is the ſame man he was forty years ſince; though phyſicians tell us, that in a tract of ſeven years, the body has ſcarce any of the ſame material ſubſtance it had before.

SECONDLY, the ſecond difficulty in the ſearch of the antiquity of laws and their original, is in relation to that people, unto whom the laws are applied; which, in the caſe of

England, will render many obſervables, to ſhew it hard to be traced. For,

FIRST, it is an ancient kingdom. And in ſuch caſes, though the people and government had continued the ſame *ab origine*, as they ſay the Chineſe did, till the late incurſion of the Tartars, without the mixture of other people or laws; *(b)* yet it were an impoſſible thing, to give any certain account of the original of the laws of ſuch a people; unleſs we had as certain monuments thereof, as the Jews had of theirs, by the hand of Moſes (*c*). And that upon the following accounts. Firſt, we have not any clear and certain monuments of the original foundation of the Engliſh kingdom, or ſtate; when, and by whom, and how it came to be planted. That which we have concerning it, is uncertain and traditional. And ſince we cannot know the original of the planting of this kingdom, we cannot certainly know the original of the laws thereof, which may be well preſumed to be very near as ancient as the kingdom itſelf (*d*). Again, ſecondly, though tradition might be a competent diſcoverer of the ori-

(*b*) The Chineſe are a very ſingular object for the attention of the world, as well on account of the extraordinary duration of their empire, as an unchangeable attachment to their maxims.—Attached to their antient cuſtoms from taſte, and to their antient government from habit and from principle; they place their whole happineſs in obedience; unwilling to quit their ſtation, provided that their cuſtoms and their manners, which confirm the conſtitution of their country, be preſerved to them; forgetting, however, that a ſlaviſh ſubmiſſion to national cuſtoms, not only perpetuates national errors, but deprives a nation of numerous advantages.

(*c*) Blac. Com. 4 v. 409.

(*d*) The hiſtory of paſt events is immediately loſt or disfigured when intruſted to memory, or to oral tradition. The only certain means by which nations can indulge their curioſity in reſearches concerning their remote origin, is to conſider the language, the manners, and the cuſtoms of their anceſtors, and to compare them with thoſe of the neighbouring nations.

ginal

ginal of a kingdom or ſtate, I mean oral tradition, yet ſuch a tradition were incompetent without written monuments to derive to us, at ſo long a diſtance, the original laws and conſtitutions of the kingdom. Becauſe they are of a complex nature, and therefore not orally traducible to ſo great a diſtance of ages, unleſs we had the original, or authentic tranſcript of thoſe laws, as the Jews had of their law; or as the Romans had of their laws of the Twelve Tables, engraven in braſs (*e*). But yet further, thirdly, it is very evident to every day's experience, that laws, the further they go from their original inſtitution, grow the larger, and the more numerous. In the firſt coalition of a people, their proſpect is not great; they provide laws for their preſent exigence and convenience. But in proceſs of time, poſſibly, their firſt laws are changed, altered, or antiquated, as ſome of the laws of the Twelve Tables, among the Romans, were. But whatſoever be done touching their old laws, there muſt of neceſſity be a proviſion of new and other laws, ſucceſſively anſwering to the multitude of ſucceſſive exigencies and emergencies, that in a long tract of time will offer themſelves. So that, if a man could at this day have the proſpects of all the laws of the Britons, before any invaſion upon them, it would yet be impoſſible to ſay, which of them were new and which were old; and the ſeveral ſeaſons and periods of time wherein every law took its riſe and original; eſpecially ſince it appears, that in thoſe elder times, the Britons were not reduced to that civilized eſtate, as to keep the annals and memorials of their laws and government, as the Romans and other civilized parts of the world have done. It is true, when the conqueſt of a country appears, we can tell when the laws of a conquering people came to be given to the conquered. Thus we can tell, that in the time of Henry II. when the conqueſt of Ireland had obtained a good progreſs, and in the time of king

(*e*) Blac. Com. 1 v. 82. ſeq.

John, when it was compleated, the Engliſh laws were ſettled in Ireland (*f*). But if we were upon this inquiry, "what were the original of thoſe Engliſh laws that were "thus ſettled there;" we are ſtill under the ſame queſt and difficulty that we are now, *viz.* what is the original of the Engliſh laws.—For they that begin new colonies, plantations and conqueſts, if they ſettle new laws, and which the places had not before, yet for the moſt part, I don't ſay altogether, they are the old laws which obtained in thoſe countries from whence the conquerors or planters came.

SECONDLY, the ſecond difficulty of the diſcovery of the original of the Engliſh laws is this:—That this kingdom has had many and great viciſſitudes of people that inhabited it, and that in their ſeveral times prevailed and obtained a great hand in the government of this kingdom; whereby it came to paſs, that there aroſe a great mixture and variety of laws; in ſome places, the laws of the Saxons; in ſome places, the laws of the Danes; in ſome places, the laws of the ancient Britons; in ſome places, the laws of the Mercians; and in ſome places, or among ſome people perhaps, the laws of the Normans. For although, as I ſhall ſhew hereafter (*g*), the Normans never obtained this kingdom by ſuch a right of conqueſt as did or might alter the eſtabliſhed laws of the kingdom; yet, conſidering that king William I. brought with him a great multitude of that nation, and many perſons of great power and eminence, which were planted generally over this kingdom, eſpecially in the poſſeſſions of ſuch as had oppoſed his coming in, it muſt needs be ſuppoſed, that thoſe occurrences might eaſily have a great influence upon the laws of this kingdom, and ſecretly and inſenſibly introduce new laws, cuſtoms and uſages (*h*). So

(*f*) Cap. 9. (*g*) Cap. 5, 6. (*h*) Blac. Com. 4 v. 409.

that

that although the body and groſs of the law might continue the ſame, and ſo continue the ancient denomination that it firſt had, yet it muſt needs receive diverſe acceſſions from the laws of thoſe people that were thus imtermingled with the ancient Britons or Saxons. As the rivers of Severn, Thames, Trent, &c. though they continue the ſame denomination which their firſt ſtream had, yet have the acceſſion of divers other ſtreams added to them, in the tracts of their paſſage, which enlarge and augment them. And hence grew thoſe ſeveral denominations of the Saxon, Mercian, and Daniſh laws, out of which, as before is ſhewn, the Confeſſor extracted his body of the common law. And therefore among all thoſe various ingredients and mixtures of laws, it is almoſt an impoſſible piece of chymiſtry to reduce every *Caput Legis* to its true original; as to ſay, this is a piece of the Daniſh, this of the Norman, or this of the Saxon or Britiſh law. Neither was it, or indeed is it much material, which of theſe is their original. For 'tis very plain, the ſtrength and obligation, and the formal nature of a law is not upon account that the Danes, or the Saxons, or the Normans, brought it in with them; but they became laws, and binding in this kingdom, by virtue only of their being received and approved here (*i*).

THIRDLY, a third difficulty ariſes from thoſe accidental emergencies that happened, either in the alteration of laws, or communicating or conveying of them to this kingdom. For firſt, the ſubdiviſion of the kingdom into ſmall kingdoms under the Heptarchy, did moſt neceſſarily introduce a variation of laws; becauſe the ſeveral parts of the kingdom were

(*i*) Law may be conſidered as a treaty to which the members of the ſame community have agreed, and under which the magiſtrate and the ſubject continue to enjoy their rights, and to maintain the peace of ſociety.

not

not under one common ſtandard. And ſo it will ſoon be in any kingdoms that are cantonized, and not under one common method of diſpenſation of laws, though under one and the ſame king. Again, the intercourſe and traffick with other nations, as it grew more or greater, did gradually make a communication and tranſmigration of laws from us to them, and from them to us. Again, the growth of Chriſtianity in this kingdom, and the reception of learned men from other parts, eſpecially from Rome, and the credit that they obtained here, might reaſonably introduce ſome new laws; and antiquate or abrogate ſome old onés, that ſeem leſs conſiſtent with the Chriſtian doctrines. And by this means were introduced not only ſome of the judicial laws of the Jews, but alſo ſome points relating to, or bordering upon, or derived from the canon or civil laws; as may be ſeen in thoſe laws of the ancient kings, Ina, Alfred, Canutus, &c. collected by Mr. Lambard (*k*).

HAVING thus far premiſed, it ſeems, upon the whole matter, an endleſs and inſuperable buſineſs to carry up the Engliſh laws to their ſeveral ſprings and heads, and to find out their firſt original. Neither would it be of any moment or uſe if it were done. For whenever the laws

(*k*) That the civil law is intimately connected with the municipal juriſprudence in ſeveral countries of Europe, is a fact ſo well known, that it needs no illuſtration. Though our common law is ſuppoſed by ſome to form a ſyſtem perfectly diſtinct from the Roman code, and however we may affectedly boaſt of the diſtinction, yet it is evident that many of the ideas and maxims of the civil law are incorporated into the Engliſh juriſprudence. This is well illuſtrated by Mr. Barrington, Obſerv. on Stat. 76. ſeq. "The laws of all nations (ſaid chief juſtice Holt) are doubtleſs raiſed out of the ruins of the civil law; it muſt be own'd that the principles of our law are borrowed from the civil law, and therefore grounded on the ſame reaſon in many things." 12 Mod. 482.

of

of England, or the ſeveral *Capita* thereof began; or from whence or whomſoever derived; or what laws of other countries contributed to the matter of our laws; yet moſt certainly their obligation ariſes not from their matter, but from their admiſſion and reception, and authorization in this kingdom. And thoſe laws, if convenient and uſeful for the kingdom, were never the worſe, though they were deſumed and taken from the laws of other countries; ſo as they had their ſtamp of obligation and authority from the reception and approbation of this kingdom, by virtue of the common law; of which this kingdom has been always jealous, eſpecially in relation to the canon, civil, and Norman law, for the reaſons hereafter ſhewn.

PASSING therefore from this unſearchable inquiry, I ſhall deſcend to that which gives the authority, viz. the formal conſtituents, as I may call them, of the common law. And they ſeem to be principally, if not only, thoſe three, viz. 1. The common uſage, or cuſtom, and practice of this kingdom, in ſuch parts thereof as lie in uſage or cuſtom: 2. The authority of parliament, introducing ſuch laws: and, 3. The judicial deciſions of courts of juſtice, conſonant to one another, in the ſeries and ſucceſſions of time.

1. As to the firſt of theſe, USAGE AND CUSTOM generally received, do *obtinere vim Legis*, and is that which gives power, ſometimes to the canon law, as in the eccleſiaſtical courts; ſometimes to the civil law, as in the admiralty courts; and again, controuls both, when they croſs other cuſtoms that are generally received in the kingdom. This is that which directs diſcents; has ſettled ſome ancient ceremonies and ſolemnities in conveyances, wills and deeds, and in many more particulars. And if it be enquired, what is the evidence of this cuſtom, or wherein it conſiſts, or is to be found?

found? I anſwer, it is not ſimply an unwritten cuſtom, nor barely orally derived down from one age to another; but it is a cuſtom that is derived down in writing, and tranſmitted from age to age; eſpecially ſince the beginning of Edward I. to whoſe wiſdom the laws of England owe almoſt as much as the laws of Rome to Juſtinian (*l*).

2. ACTS OF PARLIAMENT. And here it muſt not be wondered at, that I make acts of parliament one of the authoritative conſtituents of the common law, though I had before contradiſtinguiſhed the one from the other. For we are to know, that although the original or authentic tranſcripts of acts of parliament are not before the time of Henry III. and many that were in his time are periſhed and loſt; yet CERTAINLY SUCH THERE WERE; and many of thoſe things that we now take for common law, were undoubtedly acts of parliament, though now not to be found of record (*m*). And if in the next age, the ſtatutes made in the time of Henry III. and Edward I. were loſt, yet even thoſe would paſs for parts of the common law. And indeed, by long uſage and the many reſolutions grounded upon them, and by their great antiquity, they ſeem even already to be incorporated with the very common law. That this is ſo, may appear, though not by records, for we have none ſo ancient, yet by an authentical and unqueſtionable hiſtory, wherein a man may, without much difficulty, find, that many of thoſe *Capitula Legum* that are now uſed and taken for common law, were things enacted in parliaments or great councils under William I. and his predeceſſors, kings of England, as may be made appear hereafter. But yet, thoſe conſtitutions and laws being made before time of memory, do now obtain, and

(*l*) Blac. Com. 1 v. 68.

(*m*) Vide the caſe of Collins and Blantern, Will. par. 2. 348. 351. and the firſt chapter of this Hiſtory, note (*e*).

are

are taken as part of the common law and immemorial customs of the kingdom. And so they ought now to be esteemed, though in their first original they were acts of parliament.

3. JUDICIAL DECISIONS. It is true, the decisions of courts of justice, though by virtue of the laws of this realm they do bind, as a law between the parties thereto, as to the particular case in question, till reversed by error or attaint; yet they do not make a law, properly so called, for that only the king and parliament can do; yet they have a great weight and authority in expounding, declaring, and publishing what the law of this kingdom is; especially when such decisions hold a consonancy and congruity with resolutions and decisions of former times. And though such decisions are less than a law, yet they are a greater evidence thereof than the opinion of any private persons, AS SUCH, whatsoever—(*n*).

FIRST, because the persons who pronounce those decisions, are men chosen by the king for that employment, as being of greater learning, knowledge, and experience in the laws than others. Secondly, because they are upon their oaths to judge according to the laws of the kingdom. Thirdly, because they have the best helps to inform their judgments. Fourthly, because they do *sedere pro tribunali*, and their judgments are strengthened and upheld by the laws of this kingdom, till they are by the same law reversed or avoided (*o*).

(*n*) An opinion, though erroneous, concluding to the judgment of a court, is a judicial opinion; because it is not only delivered under the sanction of the judge's oath, but on mature deliberation. But an extra-judicial opinion, whether given in or out of court, is no more than the *prolatum* of him who gives it; it has no legal efficacy. So, an opinion given in court, if not necessary to the judgment, is extra-judicial. Vaugh. 382.

(*o*) Blac. Com. 1 v. 69. seq. Id. 267. Forteſc. de Laud. cap. 8. Seld. Review of Tith. cap. 8. 13 W. 3. cap. 2. 1 Geo. 3. cap. 23. and De Lolme, cap. 8.

Now

Now judicial deciſions, as far as they refer to the laws of this kingdom, are for the matter of them of three kinds.

FIRST, they are either ſuch as have their reaſons ſingly in the laws and cuſtoms of the kingdom. As, who ſhall ſucceed as heir to the anceſtor;—what is the ceremony requiſite for paſſing a freehold;—what eſtate, and how much ſhall the wife have for her dower; and many ſuch matters, wherein the ancient and expreſs laws of the kingdom give an expreſs deciſion, and the judge ſeems only the inſtrument to pronounce it. And in theſe things, the law or cuſtom of the realm is the only rule and meaſure to judge by; and in reference to thoſe matters, the deciſions of courts are the conſervatories and evidences of thoſe laws.

SECONDLY, or they are ſuch deciſions, as by way of deduction and illation upon thoſe laws, are framed or deduced. As for the purpoſe, whether of an eſtate thus, or thus, limited, the wife ſhall be endowed;--whether if thus, or thus limited, the heir may be barred; and infinite more of the like complicated queſtions. And herein the rule of deciſion is, firſt, the common law and cuſtom of the realm, which is the great *ſubſtratum* that is to be maintained; and then authorities or deciſions of former times, in the ſame or the like caſes; and then the reaſon of the thing itſelf (*p*).

THIRDLY, or they are ſuch as ſeem to have no other guide but the common reaſon of the thing, unleſs the ſame point has been formally decided. As in the expoſition of the intention of clauſes in deeds, wills, covenants, &c. where the very ſenſe of the words, and their poſitions and

(*p*) This ſource of deciſion is called "*præteritorum memoria* "*eventorum.*"

relations,

relations, give a rational account of the meaning of the parties. And in ſuch caſes, the judge does much better herein, than what a bare grave grammarian, or logician, or other prudent man could do. For in many caſes there have been former reſolutions, either in point, or agreeing in reaſon or analogy with the caſe in queſtion; or, perhaps alſo, the clauſe to be expounded is mingled with ſome terms or clauſes that require the knowledge of the law, to help out with the conſtruction or expoſition. Both which do often happen in the ſame caſe, and therefore it requires the knowledge of the law, to render and expound ſuch clauſes and ſentences. And doubtleſs a good common lawyer is the beſt expoſitor of ſuch clauſes, &c. (*q*).

(*o*) Plowd. 122. ſeq. 140. ſeq. Thus the practice and deciſions of courts acquire the authority of laws; every proceeding is conducted by ſome fixed and determinate rule; and the beſt and moſt effectual precautions are taken for the impartial application of rules to particular caſes.

CHAP.

CHAP. V.

How the common law of England *ſtood at and for ſome time after the coming in of king* William I.

IT is the honour and ſafety, and therefore the juſt deſire of kingdoms that recognize no ſuperior but God, that their laws have theſe two qualifications. Firſt, that they be not dependent upon any foreign power; for a dependency in laws, derogates from the honour and integrity of the kingdom, and from the power and ſovereignty of the prince thereof. Secondly, that they taſte not of bondage or ſervitude; for that derogates from the dignity of the kingdom, and from the liberties of the people thereof.

IN relation to the former conſideration, the kings of this realm, and their great councils, have always been jealous and careful, that they admitted not any foreign power; eſpecially ſuch as pretended authority to impoſe laws upon other free kingdoms or ſtates; nor to countenance the admiſſion of ſuch laws here, as were derived from ſuch a power.

ROME, as well ancient as modern, pretended a kind of univerſal power and intereſt; the former by their victories, which were large, and extended even to Britain itſelf; and the latter, upon the pretence of being univerſal biſhop, or vicar general, in all matters eccleſiaſtical. So that upon pretence of the former the civil law, and upon pretence of the latter the canon law, was introduced, or pretended to

ſome

ſome kind of right, in the territories of ſome abſolute princes, and among others here in England. But this kingdom has been always very jealous of giving too much countenance to either of thoſe laws, and has always ſhewn a juſt indignation and reſentment againſt any incroachments of this kind, either by the one law or the other. It is true, as before is ſhewn, that in the admiralty and military courts, the civil law has been admitted, and in the eccleſiaſtical courts, the canon law has been, in ſome particulars, admitted: but ſtill they carry ſuch marks and evidences about them, whereby it may be known that they bind not, nor have the authority of laws from themſelves, but from the authoritative admiſſion of this kingdom.

AND as thus the kingdom, for the reaſons before given, never admitted the civil or the canon law to be the rule of the adminiſtration of common juſtice in this kingdom; ſo neither has it endured any laws to be impoſed upon the people by any right of conqueſt; as being unſuitable to the honour or liberty of the Engliſh kingdom, to recognize their laws as given them at the will and pleaſure of a conqueror. And hence it was, that although the people unjuſtly aſſiſted king Henry IV. in his uſurpation of the crown, yet he was not admitted thereunto, until he had declared, that he claimed not as a conqueror (*a*), but as a ſucceſſor (*b*). Only he reſerved to himſelf the liberty of extending a pretence of conqueſt againſt the Scroops, that were ſlain in battle againſt him; which yet he durſt not

(*a*) His right as a conqueror was never avowed, it was only inſinuated.

(*b*) See Knyghton 2757. Henry patched up a title in the beſt manner he could; and in the end, he left himſelf, in the eyes of men of ſenſe, no foundation of right, but his poſſeſſion.

reſt upon without a confirmation in parliament. Vide Rot. Parl. 1 H. 4. No. 56. & Pars 2. ibid. No. 17. [A]

[A] It is without queſtion that Henry IV. claimed not the crown as a conqueror, though he was very much inclined ſo to do (*a*), but as a ſucceſſor, by deſcent, from the right line of the blood royal.

In order to this he ſet up a ſhew of two titles: the one, upon the pretence of being the firſt of the blood royal, in the entire male line, whereas the duke of Clarence left only one daughter Philippa; from which female branch, by a marriage with Edmond Mortimer, earl of March, the houſe of York deſcended: the other, by reviving an exploded rumour, firſt propagated by John of Gaunt, that Edmund earl of Lancaſter, to whom Henry's mother was heireſs, was in reality the elder brother of king Edward I. though his parents, on account of his perſonal deformity, had impoſed him on the world for the younger; and therefore Henry would be intitled to the crown, either as ſucceſſor to Richard II. in caſe the entire male line was allowed a preference to the female; or, even prior to that unfortunate prince, if the crown could deſcend through a female, while an entire male line was exiſting.

However, as in Edward the Third's time we find the parliament approving and affirming the law of the crown, 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 (*b*) in "the perſon of our ſovereign lord the king, and in the heirs of "his body iſſuing;" and prince Henry is declared heir apparent to the crown, to hold to him and the heirs of his body iſſuing, with remainder to lord Thomas, lord John, and lord Humphrey, the king's ſons, and the heirs of their bodies reſpectively. Which is indeed nothing more than the law would have done before, provided Henry the Fourth had been a rightful king. It however ſerves to ſhew, that it was then generally underſtood, that the king and Parliament had a right to new-model and regulate the ſucceſſion to the crown. And we may obſerve, with what caution and delicacy the parliament then avoided declaring any ſentiment of Henry's original title. However, ſir Edward Coke more than once expreſsly declares (*c*), that at the time of paſſing this act, the right of the crown was in deſcent from Philippa, daughter and heir of Lionel duke of Clarence (*d*).

(*a*) Seld. Tit. Hon. 1 3. (*b*) Soit mys et demoerge. (*c*) 4 Inſt. 37. 205.
(*d*) Blac. Com. 1 v. 202.

AND

AND upon the like reaſon it was, that King William I. though he be called the Conqueror, and his attaining the crown here, is often in hiſtory, and in ſome records, called CONQUESTUS ANGLIÆ; yet in truth it was not ſuch a conqueſt as did, or could alter the laws of this kingdom; or impoſe laws upon the people *per modum conqueſtûs*, or *jure belli*. And therefore, to wipe off that falſe imputation upon our laws, as if they were the fruit, or effect of a conqueſt, or carried in them the badge of ſervitude to the will of the Conqueror, which notion ſome ignorant and prejudiced perſons have entertained; I ſhall rip up and lay open this whole buſineſs from the bottom, and to that end enquire into the following particulars, viz.

FIRST, of the thing called conqueſt; what it is when attained; and the rights thereof.

SECONDLY, of the ſeveral kinds of conqueſt, and their effects, as to the alteration of laws by the victor.

THIRDLY, how the Engliſh laws ſtood at the entry of king William I.

FOURTHLY, by what title he entered: and whether by ſuch a right of conqueſt as did, or could, alter the Engliſh laws.

FIFTHLY, whether *de facto* there was any alteration of the ſaid laws, and by what means, after his coming in.

FIRST touching the firſt of theſe, viz. conqueſt, what it is when attained, and the rights thereof. It is true, that it ſeems to be admitted as a kind of law among all nations, that in caſe of a ſolemn war between ſupreme princes, the conqueror acquires a right of dominion, as well as a property over the things and perſons that are

fully conquered *(c)*. The reaſons aſſigned are principally theſe, viz.

FIRST, becauſe both parties have appealed to the higheſt tribunal that can be; viz. the trial by war; wherein the great Judge and Sovereign of the world, the Lord of Hoſts, ſeems in a more eſpecial manner than in other caſes, to decide the controverſy. Secondly, becauſe unleſs this ſhould be a final deciſion, mankind would be deſtroyed by endleſs broils, wars, and contentions; therefore, for the preſervation of mankind, this great deciſion ought to be final, and the conquered ought to acquieſce in it *(d)*. Thirdly, becauſe if this ſhould not be admitted, and be, as it were, by the tacit conſent of mankind, accounted a lawful acquiſition, there would not be any ſecurity or peace under any government. For by the various revolutions of dominion acquired by this means, have been, and are to this day, the ſucceſſions of kingdoms and ſtates preſerved. What was once the Romans, was before that the Grecians; and before them, the Perſians; and before the Perſians, the Aſſyrians. And if this juſt victory were not allowed to be a firm acqueſt of dominion, the preſent poſſeſſors would be ſtill obnoxious to the claim of the former proprietors, and ſo they would be in a reſtleſs ſtate of doubts, difficulties, and changes, upon the pretenſion of former claims; therefore, to cut off this inſtability and unſettledneſs in dominion and property, it would ſeem that the common conſent

(*c*) In the opinion of Grotius, he may impoſe ſubjection upon the whole body, whether it be a ſtate, or only part of a ſtate; and whether that ſubjection be civil, mixt, or deſpotick. De Jure Belli ac Pacis l. 8. c. 8. Seneca makes uſe of this argument in the controverſy *de Olynthio*.—Vide Controverſ. 2 v. Contr. xxxiv. 390. edit. Gron. Major.

(*d*) See the Diſſertation of Cocceius de Jure Victoriæ Diverſo a Jure Belli, ſect. 23. but Freuer has attempted to refute the opinion of Coccius, in his notes upon Puffendorf de Offic. Hom. & Civ. l. 2. c. 16. ſect. 13.

of

of all nations has tacitly ſubmitted, that acquiſition by right of conqueſt, in a ſolemn war between perſons not ſubjects of each other by bonds of allegiance or fidelity, ſhould be allowed as one of the lawful titles of acquiring dominion over the perſons, places and things ſo conquered.

BUT whatever be the real truth or juſtice of this poſition, yet we are much at a loſs touching the things *in hypotheſi*; viz. whether this be the effect of every kind of conqueſt? Whether the war be juſt or unjuſt? What are the requiſites to the conſtituting of a juſt war (*e*)? Who are the perſons that may acquire? and, What are the ſolemnities requiſite for that acqueſt? But above all, the greateſt difficulty is, When there ſhall be ſaid ſuch a victory as acquires this right? Indeed if there be a total deletion of every perſon of the oppoſing party or country, then the victory is complete, becauſe none remains to call it in queſtion. But ſuppoſe they are beaten in one battle, may they not rally again? or if the greater part be ſubdued, may not the leſſer keep their ground? or if they do not at the preſent, may they not in the next age regain their liberty? or if they be quiet for a time, may they not, as they have opportunity, renew their pretenſions? And although the victor, by his power, be able to quell and ſuppreſs them, yet he is beholden to his ſword for it; and the right that he got by his victory before, would not be ſufficient, without a power and force to eſtabliſh and ſecure him againſt new troubles. And on the other ſide, if thoſe few ſubdued perſons can by force regain what they once had a pretence to, a former victory will be but a weak defence; and if it would, they would have the like pretence to a claim of acqueſt by victory over him, as he had over them.

(*e*) Of a juſt and ſolemn war, ſee Grot. l. 3. c. 3. according to the right of nations,

IT ſeems, therefore, a difficult thing to determine, in what indiviſible moment this victory is ſo compleat, that *jure belli*, the acqueſt of dominion is fully gotten. And therefore, victors are uſed to ſecure themſelves againſt diſputes of that kind; and as it were to under-pin their acqueſt *jure belli* —(that they might not be loſt by the ſame means whereby they were gained)—by the continuation of eternal forces of ſtanding armies, caſtles, garriſons, munitions, and other acts of power and force; ſo as thereby to over-bear and prevent an ordinary poſſibility of the prevailing of the conquered or ſubdued people againſt the conqueror or victor. He that lays the weight of his title upon victory or conqueſt, rarely reſts in it, as a complete conqueſt, till he has added to it ſomewhat of conſent or faith of the conquered, (*f*) ſubmitting voluntarily to him. Then, and not till then, he thinks his title ſecure, and his conqueſt complete. And indeed, he has no reaſon to think his title can be otherwiſe ſecure; for where the title is merely force or power, his title will fail, if the conquered can with like force or power over-match his, and ſo regain their former intereſt or dominion.

Now this conſent is of two kinds, either expreſſed, or implied.

AN expreſs conſent is, when after a victory, the party conquered do expreſly ſubmit themſelves to the victors, either ſimply or abſolutely;—by dedition, yielding themſelves, giving him their faith and their allegiance; or elſe, under certain pacts, conventions, agreements, or capitulations. As when the ſubdued party, either by themſelves, or by ſubſtitutes, or delegates by them choſen, do yield their faith

(*f*) In ſuch caſe the acquiſition is lawful, and that whether the war be juſt, or unjuſt. Grot. l. 3. c. 8. ſect. 1. note 1. l. 3. c. 19. ſect. 11. note 1 Puffendorf, l. 8. c. 8. ſect. 1.

and

and their allegiance to the victor, upon certain pacts or agreements between them; as, for holding or continuing their religion, their laws, their form of civil administration, &c.

AND thus, though force were perhaps the occasion of this consent, yet in truth it is consent only that is the true proximate and fixed foundation of the victor's right; which now no longer rests barely upon external force, but upon the express consent and pact of the subdued people. Consequently, this pact or convention is that which is to be the immediate foundation of that dominion. And upon a diligent observation of most acquests gotten by conquest, or so called, we shall find this to be the conclusion of almost all victories; they end in deditions and capitulations, and faith given to the conqueror; whereby oftentimes the former laws, privileges, and possessions are confirmed to the subdued, without which the victors seldom continue long or quiet in their new acquests, without extreme expence, force, severity, and hazard.

AN implied consent is, when the subdued do continue for a long time quiet and peaceable under the government of the victor; accepting his government; submitting to his laws; taking upon them offices and employments under him; and obeying and owning him as their governor, without opposing him, or claiming their former right. This seems to be a tacit acceptance of, and assent to him. And though this is gradual, and possibly no determinate time is stinted, wherein a man can say, this year, or this month, or this day, such a tacit consent was completed and concluded;—for circumstances may make great variations in the sufficiency of the evidence of such an assent;—yet by a long and quiet tract of peaceable submission to the laws and go-

vernment of the victor, men may reaſonably conjecture, that the conquered have relinquiſhed their purpoſe of regaining by force, what by force they loſt.

BUT ſtill all this is intended of a lawful conqueſt by a foreign prince or ſtate, and not an uſurpation by a ſubject, either upon his prince or fellow ſubjects. For ſeveral ages and diſcents do not purge the unlawfulneſs of ſuch an uſurpation.

SECONDLY, concerning the ſeveral kinds of conqueſts, and their effects, as to the alteration of laws by the victor. There ſeems to be a double kind of conqueſt, which induces a various conſideration touching the change of laws; viz. *victoria in regem & populum, & victoria in regem tantùm.*

THE conqueſt over the people or country, is when the war is denounced by a prince or ſtate foreign, and no ſubject; and when the intention and denunciation of the war is againſt the king and people or country; and the pretenſion of title is by the ſword, or *jure belli.* Such were moſt of the conqueſts of ancient monarchs, viz. the Aſſyrian, Perſian, Grecian, and Roman conqueſts. And in ſuch caſes, the acquiſitions of the victor were abſolute and univerſal. He gained the intereſt and property of the very ſoil of the country ſubdued; which the victor might, at his pleaſure, give, ſell, or *arrent.* He gained a power of aboliſhing or changing their laws and cuſtoms; and of giving new, or, of impoſing the law of the victor's country. But although this the conqueror might do, yet a change of the laws of the conquered country was rarely univerſally made, eſpecially by the Romans; who, though in their own particular colonies, planted in conquered countries, they

they obſerved the Roman law; which poſſibly might by degrees, without any rigorous impoſition, gain and inſinuate themſelves into the conquered people, and ſo gradually obtain, and inſenſibly conform them, at leaſt ſo many of them as were *conterminous* to the colonies and garriſons, to the Roman laws;—yet they rarely made a rigorous and univerſal change of the laws of the conquered country, unleſs they were ſuch as were foreign and barbarous, or altogether inconſiſtent with the victor's government. But in other things, they commonly indulged unto the conquered, the laws and religion of their country, upon a double account, viz.

FIRST, on account of humanity; thinking it a hard and over-ſevere thing, to impoſe preſently upon the conquered, a change of their cuſtoms, which long uſe had made dear to them. And, ſecondly, upon the account of prudence; for the Romans, being a wiſe and experienced people, found that thoſe indulgencies made their conqueſts the more eaſy, and their enjoyments thereof the more firm. Whereas a rigorous change of the laws and religion of the people, would render them in a reſtleſs and unquiet condition, and ready to lay hold of any opportunity, of defection or rebellion, to regain their ancient laws and religion, which ordinary people count moſt dear to them. Though at this day, the indulgence of a Paganiſh religion is not uſed to be allowed by any Chriſtian victor, as is obſerved in Calvin's caſe, in the Seventh Report. To give one inſtance for all, it was upon this account, that though the Romans had wholly ſubdued Syria and Paleſtina, yet they allowed to the inhabitants the uſe of their religion and laws, ſo far forth as conſiſted with the ſafety and ſecurity of the victor's intereſt. And therefore, though they reſerved to themſelves the cognizance of ſuch cauſes as concerned themſelves, their officers, or revenues;

revenues; and such cases as might otherwise disturb the security of their empire—as treasons, insurrections, and the like; yet it is evident, they indulged the people of the Jews, &c. to judge by their own law; not only of some criminal proceedings, but even of capital, in some cases; as appears by the history of the Gospels and Acts of the Apostles.

BUT still this was but an indulgence, and therefore was resumable by the victor; unless there intervened any capitulation between the conqueror and the conquered to the contrary, which was frequent; especially in those cases when it was not a compleat conquest, but rather a dedition upon terms and capitulations, agreed between the conqueror and the conquered; wherein usually, the yielding party secured to themselves, by the articles of their dedition, the enjoyment of their laws and religion; then by the laws of nature and of nations, both which oblige to the observation of faith and promises, those terms and capitulations were to be observed. Again, secondly, when after a full conquest, the conquered people resumed so much courage and power as began to put them into a capacity of regaining their former laws and liberties; this commonly was the occasion of terms and capitulations between the conquerors and conquered. Again, thirdly, when by long succession of time, the conquered had either been incorporated with the conquering people, whereby they had worn out the very marks and discriminations between the conquerors and conquered; and if they continued distinct, yet by a long prescription, usage and custom, the laws and rights of the conquered people were in a manner settled; and the long permission of the conquerors amounted to a tacit concession or capitulation, for the enjoyment of their laws and liberties.

BUT

BUT of this more than enough is ſaid, becauſe it will appear in what follows, that William I. never made any ſuch conqueſt of England.

SECONDLY, therefore I come to the ſecond kind of conqueſt, viz. that which is only *victoria in regem*. And this is where the conqueror either has a real right to the crown or chief government of a kingdom, or at leaſt has, or makes ſome pretence or claim thereunto; and, in purſuance of ſuch claim, raiſes war, and by his forces obtains what he ſo pretends a title to. Now this kind of conqueſt does only inſtate the victor in thoſe rights of government, which the conquered prince, or that prince to whom the conqueror pretends a right of ſucceſſion, had; whereby he becomes only a ſucceſſor *jure belli*, but not a victor, or conqueror upon the people; and therefore has no more right of altering their laws, or taking away their liberties or poſſeſſions, than the conquered prince, or the prince to whom he pretends a right of ſucceſſion, had. For the intention, ſcope, and effect of his victory extends no further than the ſucceſſion, and does not at all affect the rights of the people. The conqueror is, as it were, the plaintiff; the conquered prince is the defendant; and the claim is a claim of title to the crown. And becauſe each of them pretends a right to the ſovereignty, and there is no other competent trial of the title between them, they put themſelves upon the great trial by battle *(g)*; wherein there is nothing in queſtion touching the rights of the people, but only touching the right of the crown; and that being decided by the victory, the victor comes in as a ſucceſſor, and not *jure victoriæ*, as in relation to the people's rights; the moſt ſacred whereof are their laws and religion.

(g) Vide cap. 6. note *(b)*.

INDEED,

INDEED, thoſe that do voluntarily aſſiſt the conquered prince, commonly undergo the ſame hazard with him, and do, as it were, put their intereſt upon the hazard and iſſue of the ſame trial; and therefore commonly fall under the ſame ſeverity with the conquered, at leaſt *de facto*; becauſe, perchance, the victor thinks he cannot be ſecure without it. Yet uſage, and indeed common prudence, makes the conquerors uſe great moderation and diſcrimination, in relation to the aſſiſtants of the conquered prince; and to extend this ſeverity only to the eminent and buſy aſſiſtants of the conquered; and not to the *gregarii*, or ſuch as either by conſtraint, or by neceſſity, were enforced to ſerve againſt him. And as to thoſe alſo, on whom they exerciſe their power, it has been rarely done *jure belli aut victoriæ*, but by a judiciary proceeding, as in caſes of treaſon; becauſe now the great title by battle has pronounced for the right of the conqueror; and at beſt, no man muſt dare to ſay otherwiſe now, whatſoever debility was in his pretenſion or claim. We ſhall ſee the inſtances hereof in what follows.

THIRDLY, as to the third point, how the laws of England ſtood at the entry of king William I. It ſeems plain, that at the time of his entry into England, the laws commonly called the laws of Edward the Confeſſor, were then the ſtanding laws of the kingdom (*b*). Hoveden tells us, in a digreſſion under his Hiſtory of King Henry II. that thoſe laws were originally put together by king Edgar, who was the Confeſſor's grandfather, viz.

" VERUM tamen poſt mortem ipſius regis Edgari uſq; " ad coronationem ſancti regis Edvardi quod tempus continet " ſexaginta & ſeptem annos prece (vel pretio) leges ſopitæ

(*b*) Ante cap. 1.

" ſunt

" ſunt & jus prætermiſſæ ſed poſtquam rex Edvardus in " regno fuit ſublimatus concilio baronum Angliæ legem " annos ſexaginta & ſeptem ſopitam, excitavit & confirma- " vit, & ea lex ſic confirmata vocata eſt lex ſancti Edvardi, " non quod ipſe prius inveniſſet eam ſed cum prætermiſſa " fuiſſet & oblivioni penitus dedita a morte avi ſui regis Ed- " gari qui primus inventor ejus fuiſſe dicitur uſque ad ſua " tempora, viz. ſexaginta & ſeptem annos." And the ſame paſſage, *in totidem verbis*, is in the Hiſtory of Litchfield, cited in Sir Robert Twiſden's Prologue to the Laws of King William I. But although poſſibly, thoſe laws were collected by king Edgar, yet it is evident, by what is before ſaid, they were augmented by the Confeſſor, by that extract of laws before-mentioned; which he made out of that three-fold law that obtained in ſeveral parts of England, viz. the Daniſh, the Mercian, and the Weſt-Saxon laws.

THIS manual, as I may call it, of laws, ſtiled the Confeſſor's Laws, was but a ſmall volume, and contains but few heads; being rather a ſcheme, or directory, touching ſome method to be obſerved in the diſtribution of juſtice, and ſome particular proceedings relative thereunto; eſpecially in matters of crime, as appears by the laws themſelves, which are now printed in Mr. Lambard's Saxon Laws, p. 133, and other places. Yet the Engliſh were very zealous for them, no leſs or otherwiſe than they are at this time for the Great Charter; inſomuch that they were never ſatisfied till the ſaid laws were reinforced and mingled, for the moſt part, with the coronation oath of king William I. and ſome of his ſucceſſors.

AND this may ſerve ſhortly touching this third point; whereby we ſee that the laws that obtained at the time of

the

the entry of king William I. were the Engliſh laws, and principally thoſe of Edward the Confeſſor.

FOURTHLY, the fourth particular is, the pretenſions of king William I. to the crown of England, and what kind of conqueſt he made. This will be beſt rendered and underſtood, by producing the hiſtory of that buſineſs, as it is delivered over to us by the ancient hiſtorians that lived in or near that time. The ſum, or *totum* whereof is this.

KING EDWARD the Confeſſor, having no children, nor like to have any, had three perſons related to him, whom he principally favoured, viz. Firſt,

EDGAR ÆTHELING, the ſon of Edward, the ſon of Edmond Ironſide. MATT. PARIS, anno 1066. "Edmundus "autem Latus Ferreum rex naturalis de ſtirpe regum genuit "Edwardum & Edwardus genuit Edgarum cui de jure debe-"batur regnum Anglorum."

SECONDLY, Harold, the ſon of Goodwin earl of Kent, the Confeſſor's father-in-law; he having married earl Goodwin's daughter. And Thirdly,

WILLIAM duke of Normandy; who was allied to the Confeſſor thus, viz. William was the ſon of Robert *(i)*, the

(*i*) William duke of Normandy, ſurnamed the Baſtard, was the ſon of Robert the ſecond, by Harlotta, the daughter of a tanner in Falaiſe. Brompton, 910. Our ancient hiſtorians differ about the name of William's mother. Abbot Brompton calls her Arlet, and ſo does the ancient chronicle of Normandy. Knyghton nominates her Arlee; others call her Herleva; which laſt may probably be right; moſt of the French writers, eſpecially the moderns, calling her Herleve. Writers are better agreed as to her family; for they ſay, in general, that ſhe was a tanner's daughter.

the ſon of Richard duke of Normandy, which Richard was brother unto the Confeſſor's mother. Vide Hoveden, ſub initio anni primi Willielmi primi.

THERE was likewiſe a great familiarity, as well as this alliance, between the Confeſſor and duke William; for the Confeſſor had often made conſiderable reſidences in Normandy; and this gave a fair expectation to duke William of ſucceeding him in this kingdom. And there was alſo, at leaſt, pretended, a promiſe made him by the Confeſſor, that duke William ſhould ſucceed him in the crown of England [B]. And becauſe Harold was in great favour with the king,

daughter. A French author, however, of great integrity, reports the matter differently in all reſpects. He ſays her name was Helena, and that ſhe was not the daughter of a tanner, but of one Foubert, valet-de-chambre to the Duke of Normandy, which Foubert was the ſon of a tanner. Recueil des Rangs des Grands de France, par. 1. du Tillet, p. 137. William was ſo little aſhamed of his birth, that he aſſumed the appellation of Baſtard, in ſome of his letters and charters. Spelm. Gloſſ. in verb. *baſtardus*. Camden in *Richmondſhire*. Notwithſtanding his illegitimacy, and the meanneſs of his mother, he had been allowed to ſucceed in the dutchy, to his father, though not without a very dangerous and factious oppoſition; which he had the good fortune to ſubdue, by the prudent care of his guardians and his own ability.

[B] Though the inveterate prepoſſeſſions of Edward kept him from ſeconding the pretenſions of Harold, yet he took but feeble and irreſolute ſteps for ſecuring the ſucceſſion to the Duke of Normandy. The whole ſtory of the tranſactions between Edward, Harold, and the duke of Normandy is told ſo differently by the ancient writers, that there are few important paſſages of the Engliſh hiſtory liable to ſo great uncertainty. It does not ſeem likely, as ſome have ſuppoſed, that Edward ever executed a will in the duke's favour, much leſs that he got it ratified by the ſtates of the kingdom, as is affirmed by others. The will would have been known to all, and would have been produced by the Conqueror, to whom it gave ſo plauſible a title; but the doubtful and ambiguous manner in which he ſeems always to have mentioned it,

king, and of great power in England, and therefore the likelieſt man by his aſſiſtance to advance, or by his oppoſition to hinder, or temperate, the duke's expectation; there was a contract made between the duke and Harold in Normandy, in the Confeſſor's life-time, that Harold ſhould, after the Confeſſor's death, aſſiſt the duke in obtaining the crown of England (*k*). Shortly after which the Confeſſor died, and then ſtepped up the three competitors to the crown, viz.

it, proves, that he could only plead the known intentions of that monarch in his favour, which he was deſirous to call a will. There is indeed a charter of the Conqueror, preſerved by Dr. Hicks, (vol. 1.) where he calls himſelf *rex hereditarius*, meaning heir by will; but a prince poſſeſſed of ſo much power, and attended with ſo much ſucceſs, may employ what pretences he pleaſes. It is ſufficient to refute his pretences to obſerve, that there is a great diffidence and variation among the hiſtorians with regard to a point, which, had it been real, muſt have been agreed upon by all of them.

As to the circumſtance of Harold's contract with the duke, in Normandy, ſome hiſtorians, particularly Malmeſbury and Matthew Weſtminſter, affirm that Harold had no intention of going over to Normandy, but that taking the air in a pleaſure-boat on the coaſt, he was driven over, by ſtreſs of weather, to the territories of Guy, Count of Ponthieu: but beſides that this ſtory is not probable in itſelf, and is contradicted by moſt of the ancient hiſtorians, it is refuted by a very curious and authentic monument. It is a tapeſtry preſerved in the ducal palace of Rouen, and ſuppoſed to have been wrought by orders of Matilda, wife to the Emperor: at leaſt, it is of very great antiquity. Harold is there repreſented as taking his departure from king Edward in execution of ſome commiſſion, and mounting his veſſel with a great train. The deſign of redeeming his brother and nephew, who were hoſtages, is the moſt likely cauſe that can be aſſigned; and is accordingly mentioned by Eadmer, Hoveden, Brompton, and Simeon of Durham. For a farther account of this piece of tapeſtry, ſee Hiſtoire de l'Academie de Literature, tom. ix. p. 535. HUME.

(*k*) W. Malmſb. 93. Hoveden, 449. Brompton, 947. Gul. Gemet. l. 7. c. 32. H. Hunt. 366. Ingulf. 68. Wace, 459, 460. MS. penes Carte, 354.

1. EDGAR ÆTHELING, who was indeed favoured by the nobility, but being an infant was overborn by the power of Harold, who thereupon began to ſet up for himſelf. Whereupon Edgar, with his two ſiſters, fled into Scotland; where he, and one of his ſiſters, dying without iſſue, Margaret, his other ſiſter and heir, married Malcolm, king of Scots; from whence proceeded the race of the Scottiſh kings (*o*).

2. HAROLD, who having at firſt raiſed a power under pretence of ſupporting and preſerving duke William's title to this kingdom, and having by force ſuppreſſed Edgar, he thereupon claimed the crown to himſelf. And pretending an adoption, or bequeſt of the kingdom unto him by the Confeſſor, he forgot his promiſe made to duke William, and uſurped the crown; which he held but the ſpace of nine months and four days. HOVEDEN [C].

(*o*) Though Edward had, with great affection, brought up Edgar, and had alſo beſtowed on him the title of Ætheling, a title which, I believe, excluſively belonged to the royal family, and ſeemed to mark him out as heir to the crown; yet he was not afterwards, perhaps, (as Hale ſuppoſes) *overborn by the power of Harold.* On the contrary, notwithſtanding this appearance of an adoption, as he was ſtill under age when Edward died, he was not thought capable of taking the government, and therefore was not nominated by that monarch at his deceaſe, to ſucceed to the kingdom. And the ſame objection prevailed with the great council, or Witena-gemote, to ſet him aſide, and elect Harold. The excluding a minor from the ſucceſſion in England, was not new to the Saxons. Ld. Lyt. Hiſt. Hen. II. 1 v. 3. 4. 349. 350. But ſee note [C] which follows below.

[C] Harold's acceſſion was attended with as little oppoſition as if he had ſucceeded by the moſt unqueſtionable title. The citizens of London, the biſhops and clergy, had adopted his cauſe; and all the moſt powerful nobility, connected with him by alliance or by friendſhip, willingly ſeconded his pretenſions. The title of Edgar Ætheling was ſcarce ever mentioned; much leſs the claim of the duke of Nor-

3. WILLIAM duke of Normandy, who pretended a promiſe of ſucceſſion by the Confeſſor, and a capitulation or ſtipulation by Harold for his aſſiſtance; and had, it ſeems, ſo

Normandy; and Harold, aſſembling the council, received the crown from their hands, without waiting for any regular meeting of the ſtates, or ſubmitting the queſtion to their free choice or determination (*m*). The new prince, founding his title on the ſuppoſed ſuffrages of the people, which appeared unanimous, was, on the day immediately ſucceeding Edward's death, crowned and anointed king by Aldred, archbiſhop of York. The whole nation ſeemed joyfully to ſwear allegiance to him.

The duke of Normandy, when he firſt received intelligence of Harold's acceſſion, was moved to the higheſt pitch of indignation; but that he might give the better colour to his pretenſions, he ſent over an embaſſy to England, upbraiding Harold, with his breach of faith, and ſummoning him to reſign immediately poſſeſſion of the kingdom. Harold replied, that the oath with which he was reproached, had been extorted by the well-grounded fear of violence, and could never, for that reaſon, be regarded as obligatory: That he had no commiſſion, either from the late king, or from the ſtates of England, who alone could diſpoſe of the crown, to make any tender of the ſucceſſion to the duke of Normandy; and if he, a private perſon, had aſſumed ſo much authority, and had even voluntarily ſworn to ſupport the duke's pretenſions, the oath was unlawful, and it was his duty to ſeize the firſt opportunity of breaking it: That he had obtained the crown by the unanimous ſuffrages of the people; and ſhould ſhew himſelf totally unworthy of their favour, did he not ſtrenuouſly maintain thoſe national liberties, with which they had entruſted him: and that the duke, if he made any attempt by force of arms, ſhould experience the power of an united nation, conducted by a prince, who, ſenſible of the obligations impoſed on him by his royal dignity, was determined, that the ſame moment ſhould put a period to his life and to his government (*n*). HUME.

(*m*) G. Pict. 196. Ypod. Neuſt. 436. Order. Vitalis, 492. M. Weſt. 221. W. Malm. 93. Ingulf. 68. Brompton 957. Knyghton 2339. H. Hunting. 210. Many of the hiſtorians ſay, that Harold was regularly elected by the ſtates; ſome, that Edward left him his ſucceſſor by will.

(*n*) W. Malm. 99. Higden 285. M. Weſt. 222. De Geſt. Angl. incerto auctore 331.

[D] The

ſo far intereſted the pope in favour of his pretenſions, that he pronounced for William againſt both the others [D].

HEREUPON the duke makes his claim to the crown of England; gathered a powerful army, and came over; and upon the 14th of October, Anno 1067 (q), gave Harold

(q) There is, I believe, a miſtake in the year, for it ſeems agreed that William, on the day of St. Michael, 1066 (and not 1067) landed at Pevenſey, in Suſſex. Ld. Lyt. Hiſt. Hen. II. 1 v. oct. 25.

[D] The moſt important ally, whom William gained by negociation, was the Pope, who had a powerful influence over the ancient barons, no leſs devout in their religious principles, than valorous in their military enterprizes. The Roman pontiff, after an inſenſible progreſs during ſeveral ages of darkneſs and ignorance, began now to lift his head openly above all the Princes of Europe; to aſſume the office of a mediator, or even an arbiter, in the quarrels of the greateſt monarchs; to interpoſe himſelf in all ſecular affairs, and to obtrude his dictates, as ſovereign laws, on his obſequious diſciples. It was a ſufficient motive to Alexander II. the reigning pope, for embracing William's quarrel, that he alone had made an appeal to his tribunal, and rendered him umpire of the diſpute between him and Harold; but there were other advantages which that pontiff foreſaw muſt reſult from the conqueſt of England by the Norman arms. That kingdom, though at firſt converted by Romiſh miſſionaries, though it had afterwards advanced ſome farther ſteps towards ſubjection under Rome, maintained ſtill a great independence in its eccleſiaſtical adminiſtration; and forming a world within itſelf, entirely ſeparated from the reſt of Europe, it had hitherto proved inacceſſible to thoſe exorbitant claims, which ſupported the grandeur of the papacy. Alexander therefore hoped, that the French and Norman barons, if ſucceſsful in their enterprize, might import into that country a more devoted reverence to the holy ſee, and bring the Engliſh churches to a nearer conformity with thoſe of the reſt of Europe. He declared immediately in favour of William's claim (o); pronounced Harold a perjured uſurper; denounced excommunication againſt him and his adherents; and the more to encourage the duke of Normandy in his enterprize, he ſent him a conſecrated banner, and a ring with one of St. Peter's hairs in it (p). Thus (adds Mr. Hume) were all the ambition and violence of that invaſion covered over ſafely with the broad mantle of religion.

(o) W. Malm. 100. Ingulf. 69. Higden, 285. Brompton, 958.

(p) Baker, 2d. edit. 1684.

battle, and overthrew him at that place in Suſſex where William afterwards founded Battel-abbey, in memory of that victory (*r*). And then he took upon him the government of the kingdom, as king thereof; and upon Chriſtmas following was ſolemnly crowned at Weſtminſter by the archbiſhop of York (*s*). And he declared at his coronation, that he claimed the crown, not *jure belli*, but *jure ſucceſſionis*. Brompton gives us this account thereof, "cum "nomen tyranni exhorreſceret & nomen legitimi principis "induere vellet petiit conſecrari;" and accordingly, ſays the ſame author, the archbiſhop of York, in reſpect of ſome preſent incapacity in the archbiſhop of Canterbury, "mu-"nus hoc adimplevit ipſumque Gulielmum Regem ad jura "Eccleſiæ Anglicanæ tuenda & conſervanda populumque "ſuum recte regendum, & Leges rectas ſtatuendum ſa-"cramento ſolemniter adſtrinxit;" (*t*) and thereupon he took the homage of the nobility (*u*).

(*r*) Gul. Gemet. 288. Chron. Sax. 189. M. Weſt. 226. M. Paris, 9. Diceto, 482. This convent was freed by him from all epiſcopal juriſdiction. Monaſt. Ang. tom. 1. p. 311, 312.

(*s*) William pretending that Stigand, the primate, had obtained his pall in an irregular manner from pope Benedict IX. who was himſelf an uſurper, refuſed to be conſecrated by him; and therefore conferred that honour on Aldred, archbiſhop of York. Gul. Pictav. 206. Ingulf. 69. Malmeſ. 102. Hoveden, 450. M. Weſt. 245. Flor. Wig. 635. M. Paris, 4. Anglia Sacra, vol. 1. p. 248. Alur. Bever. 127. Stigand was poſſeſſed of ſuch influence and authority over the Engliſh, as might be dangerous to a new eſtabliſhed monarch. Eadmer. 6. See Biog. Brit. 1 v. 128. tit. Aldred, ed. 1778. Ld. Lyt. Hiſt. Hen. II. 1 v. oct. 40.

(*t*) Order. Vital. 503. Malmeſb. 271.

(*u*) The King, thus poſſeſſed of the throne by a pretended deſtination of king Edward, and by an irregular election of the people, but ſtill more by the power of his arms, retired from London to Barking in Eſſex; and there received the ſubmiſſions of all the nobility who had not attended his coronation. Gul. Pictav. 208. Order. Vitalis, 503.

THIS

THIS being the true, though ſhort account of the ſtate of that buſineſs, there neceſſarily follows from thence theſe plain and unqueſtionable conſequences.

FIRST, that the conqueſt of king William I. was not a conqueſt upon the country, or people, but only upon the king of it, in the perſon of Harold, the uſurper. For William I. came in upon a pretence of title of ſucceſſion to the Confeſſor; and the proſecution and ſucceſs of the battle he gave to Harold, was to make good his claim of ſucceſſion, and to remove Harold, as an unlawful uſurper, upon his right. Which right was now decided in his favour, and determined by that great trial, by battle (*x*).

SECONDLY, that he acquired in conſequence thereof no greater right than what was in the Confeſſor, to whom he pretended a right of ſucceſſion; and therefore, could no more alter the laws of the kingdom upon the pretence of conqueſt, than the Confeſſor himſelf might; or than the duke himſelf could have done, had he been the true and rightful ſucceſſor to the crown, in point of deſcent from the Confeſſor. Neither is it material, whether his pretence were true or falſe; or whether, if true, it were available or not, to entitle him to the crown. For whatſoever it was, it was ſufficient to direct his claim, and to qualify his victory ſo, that the *jus belli* thereby acquired, could be only *victoria in regem, ſed non in populum:* and put him only in the ſtate, capacity and qualification of a ſucceſſor to the king, and not as conqueror of the kingdom (*y*).

(*x*) Seld. of Tithes, c. 8. Blac. Com. 1 v. 199.

(*y*) Though Sir Matthew Hale, and others, contend that the conqueſt by William can be conſidered in no other light than an acquiſition, without any of the powers attendant on ſubjugation, yet others, particularly Wilkins and Dr. Brady, underſtand it to have been no leſs than an abſolute conqueſt. See note [E] on this chapter.

THIRDLY, and as this his antecedent claim kept his acqueſt within the bounds of a ſucceſſor, and reſtrained him from the unlimited bounds and power of a conqueror; ſo his ſubſequent coronation, and the oath by him taken, is a further unqueſtionable demonſtration, that he was reſtrained within the bounds of a ſucceſſor, and not enlarged with the latitude of a victor. For at his coronation, he bound himſelf by a ſolemn oath to preſerve the rights of the church, and to govern according to the laws; and not abſolutely and unlimitedly, according to the will of a conqueror.

FOURTHLY, that if there were any doubt whether there might be ſuch a victory as might give a pretenſion to him of altering laws, or governing as a conqueror; yet to ſecure from that poſſible fear, and to avoid it, he ends his victory in a capitulation. Namely, he takes the ancient oath of a king unto the people; and the people reciprocally giving or returning him that aſſurance that ſubjects ought to give their prince, by performing their homage to him as their king, declared him, by the victory he had obtained over the uſurper, to be the ſucceſſor of the Confeſſor (z). Conſequently, if there might be any pretence of conqueſt over the people's rights, as well as over Harold's, yet the capitulation, or ſtipulation, removes the claim or pretence of a conqueror, and enſtates him in the regulated capacity and ſtate of a ſucceſſor. And upon all this it is evident, that king William I. could not abrogate, or alter the ancient laws of the kingdom, any more than if he had ſucceeded the Confeſſor as his lawful heir, and had acquired the crown by the peaceable courſe of deſcent, without any ſword drawn. [E]

AND

(z) See Ld. Lyt. Hiſt. Hen. II. 1 v. oct. 40. and the authorities there cited. Alſo Biog. Brit. 1 v. 128. ed. 1778. tit. Aldred.

[E] Some have been deſirous of refuſing to William the title of conqueror, in the ſenſe in which it is commonly underſtood; and on

AND thus much may ſuffice, to ſhew that king William I. did not enter by ſuch a right of conqueſt, as did or could alter the laws of this kingdom.

on pretence that the word is ſometimes in old books applied to ſuch as make an acquiſition of territory by any means, they are willing to reject William's title by right of war to the crown of England. It is needleſs to enter into a controverſy, which by the terms of it muſt neceſſarily degenerate into a diſpute of words. It ſuffices to ſay, that the Duke of Normandy's firſt invaſion of the iſland was hoſtile; that his ſubſequent adminiſtration was entirely ſupported by arms; that in the very frame of his laws, he made a diſtinction between the Normans and Engliſh, to the advantage of the former (*a*); that he acted in every thing as abſolute maſter over the natives, whoſe intereſts and affections he totally diſregarded; and that if there was an interval when he aſſumed the appearance of a legal magiſtrate, 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 inclination to his preſent policy. Scarce any of thoſe revolutions which both in hiſtory and in common language have always been denominated conqueſts, appear equally violent, or have been attended with ſo ſudden an alteration, both of power and property. The Roman ſtate, which ſpread its dominion over Europe, left the rights of individuals in a great meaſure untouched; and thoſe civilized conquerors, while they made their own country the ſeat of empire, found, that they could draw moſt advantage from the ſubject provinces, by beſtowing on the natives the free enjoyment of their own laws, and of their private poſſeſſions. The barbarians who ſubdued the Roman empire, though they ſettled in the conquered countries, yet being accuſtomed to a rude, uncultivated life, found a ſmall part of the land ſufficient to ſupply all their wants; and they were not tempted to ſeize extenſive poſſeſſions, which they neither knew how to cultivate nor employ. But the Normans and other foreigners who followed the ſtandard of William, while they made the vanquiſhed kingdom the ſeat of empire, were yet ſo far advanced in arts as to be acquainted with the advantages of a large property; and having totally ſubdued the natives, they puſhed the rights of conqueſt (very extenſive in the eyes of avarice and ambition, however narrow in thoſe of reaſon) 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

(*a*) Hoveden, p. 600.

THEREFORE I come to the laſt queſtion I propoſed to be conſidered, viz. Whether *de facto* there was any thing done by

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 ancient inhabitants. Contumely ſeems even to have been wantonly added to oppreſſion (*b*); and the natives were univerſally reduced to ſuch a ſtate of meanneſs and poverty, that the Engliſh name became a term of reproach; and ſeveral generations elapſed before one family of Saxon pedigree was raiſed to any conſiderable honours, or could ſo much as attain the rank of barons of the realm (*c*). Theſe facts are ſo apparent from the whole tenor of the Engliſh hiſtory, that none would have been tempted to deny or elude them, were they not heated by the controverſies of faction; while one party were abſurdly afraid of theſe abſurd conſequences, which they ſaw the other party inclined to draw from this event. But it is evident, that the preſent rights and privileges of the people, who are a mixture of Engliſh and Normans, can never be affected by a tranſaction which paſſed more than ſeven hundred years ago; and as all ancient authors (*d*), who lived nearest

(*b*) H. Hunt. p. 370. Brompton, p. 980.

(*c*) So late as the reign of king Stephen, the earl of Albemarle, before the battle of the ſtandard, addreſſed the officers of the army in theſe terms: *Proceres Angliæ clariſſimi, et genere Normanni*, &c. Brompton, p. 1026. See farther Abbas Rieval. p. 339, &c. All the barons and military men of England ſtill called themſelves Normans.

(*d*) Ingulf. p. 70. H. Hunt. p. 370, 372. M. Weſt. p. 225. Gul. Neub. p. 357. Alured. Beverl. p. 124. De geſt. Angl. p. 333. M. Paris, p. 4. Sim. Dun. p. 206. Brompton, p. 962. 980, 1161. Gervaſe Tilb. lib. 1. cap 16. Textus Roſſenſis apud Seld. Spicileg. ad Eadm. p. 197. Gul. Pict. p. 206. Ordericus Vitalis, p. 521. 666. 853. Epiſt. St. Thom. p. 801. Gul. Malmeſb. p. 52, 57. Knyghton, p. 2354. Eadmer. p. 110. Thom. Rudborne in Ang. Sacra, vol. I. p. 248. Monach. Roff. in Anglia Sacra, vol. II. p. 276. Girald. Cambr. in eadem, vol. II. p. 413. Hiſt. Elyenſis, p. 516. The words of this laſt hiſtorian, who is very ancient, are remarkable, and worth tranſcribing. "Rex itaque factus Willielmus, quid in principes Anglorum, qui tantæ cladi ſupereſſe poterant, fecerit, dicere, cum nihil profit, omitto. Quid enim prodeſſet, ſi nec unum in toto regno de illis dicerem priſtine poteſtate uti permiſſum, ſed omnes aut in gravem paupertatis ærumnam detruſos aut ex hæreditatos patria pulſos, aut

exſules

by king William I. after his acceſſion to the crown, in reference either to the alteration or confirmation of the laws; and how and in what manner the ſame was done.

THIS, being a narrative of matters of fact, I ſhall divide into two inquiries; viz. firſt, What was done in relation to the lands and poſſeſſions of the Engliſh; and ſecondly, What was done in relation to the laws of the kingdom in general. For both of theſe will be neceſſary to make up a clear narrative touching the alteration or ſuſpenſion, confirmation or execution, of the laws of this kingdom by him.

FIRST, therefore, touching the former, viz. What was done in relation to the lands and poſſeſſions of the Engliſh.

THESE two things muſt be premiſed, viz. Firſt, a matter of right, or law; which is this, that in caſe this had been a conqueſt upon the kingdom, it had been at the pleaſure of the conqueror to have taken all the lands of the kingdom into his own poſſeſſion;—to have put a period to all former titles;—to have cancelled all former grants;—and to have given, as it were, the date and original to every man's claim, ſo as to have been no higher nor ancienter than ſuch his conqueſt, and to hold the ſame by a title derived wholly from and under him. I do not ſay, that every abſo-

neareſt the time, and beſt knew the ſtate of the country, unanimouſly ſpeak of the Norman dominion as a conqueſt by war and arms, no reaſonable man, from the fear of imaginary conſequences, will ever be tempted to reject their concurring and undoubted teſtimony. HUME.

effoſis oculis, vel cæteris amputatis membris, opprobrium hominum factos, aut certe miſerrime afflictos, vita privatos. Simili modo utilitate carere exiſtimo dicere quid in minorem populum, non ſolum ab eo, ſed a ſuis actum ſit, cum id dictu ſciamus difficile, et ob immanem crudelitatem fortaſſis incredibile.

lute

lute conqueror of a kingdom will do thus; but that he may, if he will, and has power to effect it. Secondly, the ſecond thing to be premiſed is, a matter of fact, which is this: That duke William brought in with him a great army of foreigners, that expected a reward of their undertaking; and therefore were doubtleſs very craving and importunate for gratifications to be made them by the conqueror (*e*). Again, it is very probable, that of the Engliſh themſelves, there were perſons of very various conditions and inclinations; ſome perchance did adhere to the duke, and were aſſiſtant to him openly, or at leaſt under-hand, towards the bringing him in; and thoſe were ſure to enjoy their poſſeſſions privately and quietly when the duke prevailed. Again, ſome did, without all queſtion, adhere to Harold; and thoſe in all probability were ſeverely dealt with, and diſpoſſeſſed of their lands, unleſs they could make their peace. Again, poſſibly there were others who aſſiſted Harold; partly out of fear and compulſion; yet thoſe, poſſibly, if they were of any note or eminence, fared little better than the reſt. Again, there were ſome that probably ſtood neuter, and meddled not; and thoſe, though they could not expect much favour, yet they might in juſtice expect to enjoy their own. Again, it muſt needs be ſuppoſed, that the duke having ſo great an army of foreigners;—ſo many ambitious and covetous minds to be ſatisfied;—ſo many to be rewarded in point of gratitude; and after ſo great a concuſſion as always happens upon the event of a victory, it muſt needs, upon thoſe and ſuch like accounts, be evident to any man that conſiders things

(*e*) William beſtowed the forfeited eſtates on the moſt powerful of his captains, and eſtabliſhed funds for the payment of his ſoldiers. Gul. Pict. 208.—His military inſtitutions were thoſe of a tyrant; at leaſt of one, who reſerved to himſelf, whenever he pleaſed, the power of aſſuming that character. H. Hunt. 369. M. Weſt. 225. Malmſb. 104.

of

of this nature, that there were great outrages and oppreſſions committed by the victor's ſoldiers and their officers;—many falſe accuſations made againſt innocent perſons;—great diſturbances and evictions of poſſeſſions;—many right owners being unjuſtly thrown out, and conſequently many occupations and uſurpations of other men's rights and poſſeſſions;—and a long while before thoſe things could be reduced to any quiet and regular ſettlement [F].

THESE

[F] Though the early confiſcation of Harold's followers might ſeem iniquitous, being extended towards men who had never ſworn fidelity to the duke of Normandy; who were ignorant of his pretenſions, and who only fought in defence of the government, which they themſelves had eſtabliſhed in their own country; yet were theſe rigours, however contrary to the ancient Saxon laws, excuſed on account of the urgent neceſſities of the prince. The ſucceſſive deſtruction of families was a convincing proof that the king intended to rely entirely on the ſupport and affections of foreigners; and new forfeitures, attainders, and violences were the neceſſary reſult of this deſtructive plan of adminiſtration. No Engliſhman poſſeſſed his confidence, or was intruſted with any command or authority; and ſtrangers, whom a rigorous diſcipline could have but ill contained, were encouraged in every act of inſolence and tyranny againſt them. The eaſy ſubmiſſion of the kingdom on its firſt invaſion, had expoſed the natives to contempt; the ſubſequent proofs of their animoſity and reſentment had made them the object of hatred; and they were ſoon deprived of every expedient by which they could hope to make themſelves either regarded or beloved by their ſovereign. Impreſſed with the ſenſe of this diſmal ſituation, many Engliſhmen fled into foreign countries, with an intention of paſſing their lives abroad free from oppreſſion, or of returning on a favourable opportunity to aſſiſt their friends in the recovery of their native liberties (*f*). It was crime ſufficient, in an Engliſhman, to be opulent, noble, or powerful; and the policy of the king concurring with the rapacity of his foreign adventurers, produced almoſt a total revolution in the landed property of the kingdom. Ancient and honourable families were reduced to beggary; the nobles themſelves were every where treated with ignominy and

(*f*) Order. Vital. 508. M. Weſt. 225. M. Paris, 4. Sim. Dun. 197.

contempt;

THESE general obſervations being premiſed, we will now ſee what *de facto* was done in relation to men's poſſeſſions, in conſequence of this victory of the duke.

FIRST, it is certain that he took into his hands all the demeſne lands of the crown which were belonging to Edward the Confeſſor at the time of his death; and avoided all the diſpoſitions and grants thereof made by Harold, during his ſhort reign. And this might be one great end of his making that noble ſurvey, in the fourth year of his reign, called generally, Doomſday-read, in ſome records; as Rot. Winton, &c.—thereby to aſcertain what were the poſſeſſions of the crown in the time of the Confeſſor. And thoſe he entirely reſumed. And this is the reaſon why in ſome of our old books it is ſaid, ANCIENT DEMESNE is that which was held by king William the Conqueror; and in others 'tis ſaid, ancient demeſne is that which was held by king Edward the Confeſſor. And both true in their kind, in this reſpect; viz. that whatſoever appeared to be the Confeſſor's at the time of his death, was aſſumed by king William into his own poſſeſſion [G].

SECONDLY,

contempt; they had the mortification of ſeeing their caſtles and manors poſſeſſed by Normans of the meaneſt birth, and of the loweſt ſtations (*g*), and they found themſelves carefully excluded from every road, which led either to riches or preferment (*b*). HUME.

[G] Thoſe lands which were in the poſſeſſion of Edward the Confeſſor, and which afterwards came to William the Conqueror,

(*g*) Order. Vitalis, 521. M. Weſt. 229.

(*b*) The obliging all the inhabitants to put out their fires and lights at certain hours, upon the ſounding of a bell, called the courfeu, is repreſented by Polydore Virgil, lib. 9, as a mark of the ſervitude of the Engliſh. But this was a law of police, which William had previouſly eſtabliſhed in Normandy. See Du Moulin, Hiſt. de Normandie, 160. The ſame law had place in Scotland. Le Burgor, cap. 86.

and

SECONDLY, it is alſo certain, that no perſon ſimply, and *quatenus* an Engliſh man, was diſpoſſeſſed of any of his poſſeſſions;

and were by him ſet down in a book called DOMESDAY, under the title *De Terra Regis*, are ANCIENT DEMESNE LANDS. They were exempt from any *feudal* ſervitude, and were let out to huſbandmen to cultivate for the purpoſe of ſupplying the king's houſhold and family with proviſions and neceſſaries. For this purpoſe the tenants (who are called by Bracton, *villani privilegiati*) enjoyed certain privileges, and the tenure itſelf had ſeveral properties diſtinct from others, which it retains to this day; though the lands be in the hands of a ſubject, and the ſervices changed from labour to money. 2 Inſt. 542. 4 Inſt. 269. F. N. B. 14. Salk. 57. pl. 2. Black. Com. 2 v. 99. But the lands which were in the poſſeſſion of Edward the Confeſſor, and which were given away by him, are NOT at this day ancient demeſne; nor are any others, except thoſe which are written down in the book of DOMESDAY; and therefore, whether ſuch lands are ancient demeſne or not, is to be tried only by that book. Salk. 57. 4 Inſt. 269. Hob. 183. Brownl. 43. The book of DOMESDAY was brought into court by a certiorari out of chancery, directed to the treaſurer and chamberlain of the exchequer, and by mittimus ſent into the common pleas. Dy. 150. b. Iſſue was taken "whether Longhope in the county of "Glouceſter was ancient demeſne or not;" on producing the book of DOMESDAY, it appeared that Hope was ancient demeſne, but nothing ſaid of Longhope; and the Court held, that the party failed in his proof. Lev. 106. Sid. 147. But if the queſtion be, "whether lands be parcel of a manor which is ancient de-"meſne?" this ſhall be tried by a jury. Salk. 56. pl. 1. 2 Salk. 174. But ſee Burr. 1048. where an acre of land may be ancient demeſne, though the manor, of which it is parcel, is not ſo. Vide Rol. Abr. 321. and ſee F. N. B. 14. Leon. 232. Dyer 8. 11 Co. 10. Bro. Ancient Dem. 15. 2 Leon. 191. 3 Lev. 405. Lands which are next, or moſt convenient to the lord's manſion-houſe, and which he keeps in his own hands, for the ſupport of his family, and for hoſpitality, are called his demeſnes, but have not the ſame properties with ancient demeſne. Spelm. 12. Blackſtone, in treating of the rents and profits of the demeſne lands of the crown, as being a branch of the king's ordinary revenue, ſays, "Theſe demeſne lands, *terræ dominicales regis*, being either the ſhare reſerved to the crown at the original diſtribution of landed property, or ſuch as came to it afterwards by forfeitures or other means, were anciently very large and extenſive; comprizing divers manors,

poſſeſſions; conſequently their land was not pretended unto, as acquired *jure belli*. Which appears moſt plainly by the following evidences, viz.

FIRST,

manors, honours and lordſhips; the tenants of which had very peculiar privileges. 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, (1 Ann ſt. 1. c. 7.) whereby all future grants or leaſes from the crown, for any longer term than thirty-one years, or three lives, are declared to be void; except with regard to houſes, which may be granted for fifty years. And no reverſionary leaſe can be made, ſo as to exceed, together with the eſtate in being, the ſame term of three lives, or thirty-one years: that is, where there is a ſubſiſting leaſe of which there are twenty years ſtill to come, the king cannot grant a future intereſt, to commence after the expiration of the former, for any longer term than eleven years. The tenant muſt alſo be made liable to be puniſhed for committing waſte; and the uſual rent muſt be reſerved, or, where there has uſually been no rent, one third of the clear yearly value. The misfortune is, that this act was made too late, after almoſt every valuable poſſeſſion of the crown had been granted away for ever, or elſe upon very long leaſes; but may be of benefit to poſterity, when thoſe leaſes expire." Black. Com. 1 v. 286. As to the tenure, lord Holt, ſaid it was as ancient as any other, though he ſuppoſes that the privileges annexed to it, commenced by ſome act of parliament; for that it cannot be created by grant at this day. Salk. 57. Mr. Juſtice Blackſtone, in treating of this tenure, deſcribes it thus: "There is a ſpecies of tenure deſcribed by Bracton under the name ſometimes of privileged villenage, and ſometimes of villein ſocage. This he tells us, l. 4. tr. 1. c. 28, 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 alienc or transfer their tenements by grant or feoffment, any more than pure villeins can; but muſt ſurrender them to the lord or his ſteward, to be again granted out and held in villenage. And from theſe circumſtances we may collect, that what he here deſcribes, is no other than an exalted ſpecies of copyhold, ſubſiſting at this day, viz. the tenure in ancient demeſne; to which, as partaking of the baſeneſs of villenage in the nature of its ſervices, and the freedom of ſocage in their certainty,

he

FIRST, that very many of thoſe perſons that were poſſeſſed of lands in the time of Edward the Confeſſor, and ſo returned

he has therefore given a name compounded out of both, and calls it VILLANUM SOCAGIUM. The tenants of ancient demeſne lands, under the crown, were not all of the ſame order or degree. Some of them, as Britton teſtifies, c. 66. 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. F. N. B. 228. Others were in great meaſure enfranchiſed by the royal favour, being only bound in reſpect of their lands to perform ſome of the better ſort of villein ſervices, but thoſe DETERMINATE and CERTAIN; as, to plough the king's land, to ſupply his court with proviſions, and the like; all of which are now changed into pecuniary rents: and in conſideration hereof they had many immunities and privileges granted to them; 4 Inſt. 269.; as, To try the right of their property in a peculiar court of their own, called a court of ancient demeſne, by a peculiar proceſs denominated, a writ of right cloſe; F. N. B. 11. Not to pay toll or taxes; not to contribute to the expences of knights of the ſhire; not to be put on juries, and the like. See 1 New Abr. 111. Theſe tenants therefore, though their tenure be abſolutely copyhold, yet have an intereſt equivalent to a freehold: for, though their ſervices were of a baſe and villenous original, (Gilb. Hiſt. Exch. 16. 30.) yet the tenants were eſteemed, in all other reſpects, to be highly privileged villeins; and eſpecially in this, 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 (c. 66.) to be lands and tenements which are not held by knight-ſervice, nor by grand ſerjeanty, nor by petit, but by ſimple ſervices, being as it were lands enfranchiſed by the king or his predeceſſors from their ancient demeſne. And the ſame name is alſo given them in Fleta, l. 1. c. 8. Hence Fitzherbert obſerves, (N. B. 13.) that no lands are ancient demeſne but lands holden in ſocage: that is, not in free and common ſocage, but in this amphibious, ſubordinate claſs, of villein ſocage. And it is poſſible, that as this ſpecies of ſocage tenure is plainly founded upon *predial* ſervices, or ſervices of the plough, it may have given cauſe to imagine that all ſocage tenures aroſe from the ſame original; for want of diſtinguiſhing, with Bracton, between free ſocage or

ſocage

returned upom the book of Doomſday, retained the ſame unto them and their deſcendants; and ſome of their deſcendants retain the ſame poſſeſſions to this day; which could not have been, if preſently, *jure belli ac victoriæ univerſalis*, the lands of the Engliſh had been veſted in the conqueror. And again;

SECONDLY, we do find, that in all times, even ſuddenly after the conqueſt, the charters of the ancient Saxon kings WERE PLEADED AND ALLOWED; and titles made and created by them, to lands, liberties, franchiſes, and regalities, affirmed and adjudged under William I. Yea, when that exception was offered, THAT BY THE CONQUEST THOSE CHARTERS HAD LOST THEIR FORCE, yet thoſe claims were allowed. As in 7 E. 3. *fines*, mentioned by Mr. Selden, in his notes upon Eadmerus; which could not be, if there had been ſuch a conqueſt as had veſted all men's rights in the conqueror.

THIRDLY, many recoveries were had ſhortly after this conqueſt, as well by heirs as ſucceſſors, of the ſeiſin of their predeceſſors before the conqueſt. We ſhall take one or

ſocage of frank tenure, and villein ſocage or ſocage of ancient demeſne.—Lands holden by this tenure are therefore a ſpecies of copyhold, and as ſuch preſerved and exempted from the operation of the ſtatute of 12 Cha. 2. c. 24. Yet they differ from common copyholds, principally in the privileges beforementioned: as alſo they differ from freeholders by one eſpecial mark and tincture of villenage, noted by Bracton and remaining to this day, viz. that they cannot be conveyed from man to man by the general common-law conveyances of feoffment, and the reſt; but muſt paſs by ſurrender, to the lord or his ſteward, in the manner of common copyholds: yet with this difference, (Kitch. on Courts 194.) that, in the ſurrender of theſe lands in ancient demeſne, it is not uſed to ſay, "to hold at the will of the lord," in their copies, but only "to "hold according to the CUSTOM *of the manor*." Black. Com. 2 v. 101. How ancient demeſne may become frank-fee, and where it may be pleaded, and the form, vide 1 New Abr. 112, 113, and the authorities there cited.

two

two inſtances for all; namely, that famous record *apud Pinendon*, by the archbiſhop of Canterbury, in the time of king William I. of the ſeiſin and title of his predeceſſors before the conqueſt. See the whole proceſs and proceedings thereupon, in the end of Mr. Selden's notes upon Eadmerus, and Spelman's Gloſſary, title *Drenches*. Upon theſe inſtances, and much more that might be added, it is without contradiction, that the rights and inheritances of the Engliſh, *quia tales*, were not abrogated or impeached by this conqueſt; but continued, notwithſtanding, the ſame. For, as is before obſerved, it was *jure belli quoad regem, ſed non quoad populum.*

BUT to deſcend to ſome particulars. The Engliſh perſons that the Conqueror had to deal with were of three kinds, viz.

FIRST, ſuch as adhered to him againſt Harold the uſurper; and, without all queſtion, thoſe continued the poſſeſſion of their lands; and their poſſeſſions were rather increaſed by him, than any way diminiſhed.

SECONDLY, ſuch as adhered to Harold, and oppoſed the duke, and fought againſt him; and doubtleſs, as to thoſe, the duke after his victory uſed his power, and diſpoſſeſſed them of their eſtates; which is uſual upon all concluſions and events of this kind, upon a double reaſon: Firſt, to ſecure himſelf againſt the power of thoſe that oppoſed him, and to weaken them in their eſtates, that they ſhould not afterwards be enabled to make head againſt him: and, ſecondly, to gratify thoſe that aſſiſted him, and to reward their ſervices in that expedition; and to make them firm to his intereſt, which was now twiſted with their own. For it

can't be imagined, but that the Conqueror was aſſiſted with a great company of foreigners—ſome that he favoured—ſome that had highly deſerved for their valour—ſome that were neceſſitous ſoldiers of fortune—and others that were either ambitious or covetous; all whoſe deſires, deſerts, or expectations, the Conqueror had no other means to ſatisfy, but by the eſtates of ſuch as had appeared open enemies to him; and doubtleſs, many innocent perſons ſuffered in this kind, under falſe ſuggeſtions and accuſations; which occaſioned great exclamations by the writers of thoſe times againſt the violences and oppreſſions which were uſed after this victory.

AND, thirdly, ſuch as ſtood neuter, and meddled not on either ſide during the controverſy. And doubtleſs, for ſome time after this great change, many of thoſe ſuffered very much, and were hardly uſed in their eſtates, eſpecially ſuch as were of the more eminent ſort (*i*).

GERVASIUS TILBURIENSIS, who wrote in the time of Henry II. lib. 1. cap. *Quid Murdrum & Quare ſic Dictum*, gives us a large account of what he had traditionally learned touching this matter, to this effect, viz. "Poſt regni conquiſitionem & perduellium ſubjectionem, &c. nomine autem ſucceſſionis a temporibus ſubactæ gentis nihil ſibi vendicarent, &c." i. e. after the conqueſt of the kingdom, and ſubjection of the rebels, when the king himſelf and his great men had ſurveyed their new acquiſitions, ſtrict enquiry was made, who they were that, fighting againſt the king, had ſaved themſelves by flight. From theſe, and the heirs of ſuch as were ſlain in battle, fighting againſt him, all hopes of ſucceſſion, or of poſſeſſing their

(*i*) Vide note [F] on this chapter.

eſtates,

eſtates, were loſt; for the people being ſubdued, they held their lives [*and fortunes*] as a favour.

But Gervaſe, as he ſpeaks ſo liberally in relation to the conqueſt, and the *ſubacta gens*, as he terms us; ſo it ſhould ſeem he was, in great meaſure, miſtaken in this relation. For it is moſt plain, that thoſe that were not viſibly engaged in the aſſiſtance of Harold, were not, according to the rules of thoſe times, diſabled to enjoy their poſſeſſions, or make title of ſucceſſion to their anceſtors, or tranſmit to their poſterity as formerly; though poſſibly ſome oppreſſions might be uſed to particular perſons, here and there, to the contrary. And this appears by that excellent monument of antiquity, ſet down in ſir H. Spelman's Gloſſary, in the title of *Drenches* or *Drenges*, which I ſhall here tranſcribe, viz.

"Edwinus de Sharborne, et quidam alii qui ejecti fue-
" runt & terris ſuis abierunt ad conqueſtorem & dixerunt
" ei, *quod nunquam ante conqueſtum, nec in conqueſtum, nec*
" *poſt, fuerunt contra regem ipſum in* CONCILIO AUT IN
" AUXILIO *ſed tenuerunt ſe in pace*, et hoc parati ſunt pro-
" bare qualiter rex vellet ordinare, per quod idem rex fa-
" cit inquiri per totam Angliam ſi ita fuit, quod quidem
" probatum fuit, propter quod idem rex præcepit ut om-
" nes illi qui ſic tenuerunt ſe in pace in forma prædicta
" quod ipſi REHABERENT omnes terras & dominationes
" ſuas adeo integre & in pace ut unquam habuerent vel
" tenuerunt ante conqueſtum ſuum, et quod ipſi in poſte-
" rum vocarentur *Dranges*."

But it ſeems the poſſeſſions of the Church were not under this diſcrimination, for they being held not in right of the perſon, but of the Church, were not ſubject to any confiſ-

cation by the adherence of the poſſeſſor to Harold the uſurper (*k*). And therefore, though it ſeems Stigand archbiſhop of Canterbury, at the coming in of William I. had been in ſome oppoſition againſt him, which probably might be the true cauſe why he performed not the office of his coronation, which of right belonged to him, though ſome other impediments were pretended (*l*), and might alſo poſſibly be the reaſon why a conſiderable part of his poſſeſſions were granted to Odo, biſhop of Bayeux; yet they were afterwards recovered by Lanfranc, his ſucceſſor, at Pinendon, " *in pleno comitatu, ubi rex præcepit totum comi-*
" *tatum abſque mora conſidere, & homines comitatûs omnes*
" *francigenos & præcipue Anglos in antiquis legibus & con-*
" *ſuetudinibus peritos in unum convenire.*"

To this may be added thoſe ſeveral grants and charters made by king William I. mentioned in the Hiſtory of Ely, and in Eadmerus, for reſtoring to biſhopricks and abbies ſuch lands, or goods, as had been taken away from them, viz.

" WILLIELMUS Dei gratia rex Anglorum, Lanfranco
" archiepiſcopo Cantuar' & Galfrido epiſcopo Conſtantien.
" & Roberto comiti de Ou & Richardo filio comitis Gilberti
" & Hugoni de Monteforti ſuiſque aliis proceribus regni
" Angliæ ſalutem. Summonete vicecomites meos ex meo
" præcepto & ex parte mea eis dicite ut reddant epiſcopa-
" tibus meis & abbatiis totum dominium omneſque domi-
" nicas terras quas de dominio epiſcopatuum meorum, &
" abbatarium, epiſcopi mei & abbates eis vel lenitate ti-

(*k*) William, however, retained the church in great ſubjection, as well as his lay ſubjects: and would allow none, of whatever character, to diſpute his ſovereign will and pleaſure.

(*l*) The crimes alledged againſt Stigand were mere pretences; his ruin was not only reſolved on, but proſecuted with great ſeverity. Hoveden, 453. Diceto, 482. Knyghton, 2345. Anglia Sacra, 1 v. 5, 6, Ypod. Neuſt. 438. Eadmerus in initio libri.

" more

" more vel cupiditate dederunt vel habere conſenſerunt vel
" ipſi violentia ſua inde abſtraxerunt, & quod hactenus
" injuſte poſſiderunt de dominio eccleſiarum mearum. Et
" niſi reddiderint ſicut eos ex parte mea ſummonebitis, vos
" ipſos velint nolint, conſtringite reddere; et quod ſi qui-
" libet alius vel aliquis veſtrum quibus hanc juſtitiam im-
" poſui ejuſdem querelæ fuerit reddat ſimiliter quod de
" domino epiſcopatuum vel abbatiarum mearum habuit
" ne propter illud quod inde aliquis veſtrum habebit, minus
" exerceat ſuper meos vicecomites vel alios, quicunque te-
" neant dominium eccleſiarum mearum, quod præcipio, &c."

" WILLIELMUS rex Anglor' omnibus ſuis fidelibus ſuis &
" vicecomitibus in quorum vicecomitatibus abbatia de Heli
" terras habet ſalutem. Præcipio ut abbatia præd. habeat
" omnes conſuetudines ſuas ſcilicet ſaccham & ſocham toll
" & team & infanganetheof, hamſocua, & grithbrice fith-
" wite & ferdwite infra burgum & extra & omnes alias
" forisfacturas in terra ſua ſuper ſuos homines ſicut habuit
" die qua rex Edwardus fuit vivus & mortuus, & ſicut
" mea juſſione dirationatæ apud Keneteford per plures
" ſcyras ante meos barones, viz. Galfridum Conſtantien.
" ep. & Baldewine abbatem, &c. Teſte Rogere Bigot."

" WILLIELMUS rex Angl. Lanfranco archiepo', & Rogero
" comiti Moritoniæ, & Galfrido Conſtantien. ep. ſalutem.
" Mando vobis & præcipio ut iterum faciatis congregari
" omnes ſcyras quæ interfuerunt placito habito de terris
" eccleſia de Heli, antequam mea conjux in Normaniam
" noviſſime veniret, cum quibus etiam ſint de baronibus
" meis qui competenter adeſſe poterint & prædicto placito
" interfuerint & qui terras ejuſdem eccleſiæ tenent; quibus
" in unum congregatis eligantur plures de illis Anglis qui
" ſciunt quomodo terræ jacebant præfatæ eccleſiæ die qua
" rex Edwardus obiit, & quod inde dixerint ibidem jure-

" jurando teſtentur; quo facto reſtituentur eccleſiæ terræ
" quæ in dominico ſuo erant die obitus regis Edwardi;
" exceptis his quas homines clamabant me ſibi dediſſe;
" illas vero literis mihi ſignificate quæ ſint, & qui eas te-
" nent; qui autem tenent thainlandes quæ proculdubio
" debent teneri de eccleſia faciant concordiam cum abbate
" quam meliorem poterint, & ſi noluerunt terræ remaneant
" ad eccleſiam, hoc quoque detinentibus ſocham & ſaccham
" fiat," &c.

" WILLIELMUS rex Anglorum, Lanfranco archiepiſc', &
" G. epiſc. & R. comiti M. ſalutem, &c. Defendite ne
" Remigius epiſcopus novas conſuetudines requirat infra in-
" ſulam de Heli, nolo enim quod ibi habeat niſi illud quod
" anteceſſor ejus habebat tempore regis Edwardi ſcilicet qua
" die ipſe rex mortuus eſt. Et ſi Remig. epiſcopus inde placi-
" tare voluerit placitet inde ſicut feciſſet tempore regis Edw.
" & placitum iſtum ſit in veſtra præſentia; de cuſtodia de Nor-
" guic. abbatem Simeonem quietum eſſe demittite; ſed ibi
" municionem ſuam conduci faciat & cuſtodiri. Facite re-
" manere placitum de terris quas calumniantur Willielmus de
" Ou, & Radulphus filius Gualeranni, & Robertus Gernon;
" ſi inde placitare noluerint ſicut inde placitaſſent tempore re-
" gis Edwardi, & ſicut in eodem tempore abbatia conſuetudines
" ſuas habebat, volo ut eas omnino faciatis habere ſicut abbas
" per chartas ſuas & per teſtes ſuos eas deplacitare poterit."

I MIGHT add many more charters to the foregoing, and more eſpecially thoſe famous charters in Spelman's Councils, vol. ii. fol. 14. & 165. whereby it appears, that king William I.—" communi concilio, & concilio archiepiſcoporum
" epiſcoporum & abbatum, & omnium principum & baro-
" num regni,"—inſtituted the courts for holding pleas of eccleſiaſtic cauſes to be ſeparate and diſtinct from thoſe courts

courts that had jurisdiction of civil causes (*m*). *Sed de his plusquam satis.* [H].

AND

(*m*) Blac. Com. 4 v. 415. See also Seld. in Fad. p. 6. l. 24. 4 Inst. 259. Wilk. LL. Angl. Sax. 292. and Blac. Com. 3 v. 63.

[H] The county court in the Anglo-Saxon times, and even during some part of the reign of William I. was a court of great power and dignity, in which the bishop of the diocese sat with the earl, and on which all the abbots, priors, barons, knights, and freeholders of the county were obliged to attend. Here all the controversies arising in the county, the most important not excepted, were determined; though not always finally, because there lay an appeal from its decrees to a higher court. In a county court of Kent, held in the reign of William I. at Pinendine, and of which Hale makes mention (ante), there were present one archbishop, three bishops, the earl of the county, the vice-earl or sheriff, a great number of the king's barons, besides a still greater multitude of knights and freeholders, who in the course of three days adjudged several manors to belong to the archbishopric of Canterbury, which had been possessed for some time by Odo, bishop of Baieux, the king's uterine brother, and by other powerful barons.(*n*)

But the county courts did not continue long after the conquest in this state of power and splendour. For William I. about A. D. 1085, separated the ecclesiastical from the civil part of these courts; prohibiting the bishops to sit as judges, the clergy to attend as suitors, and the causes of the Church to be tried but in courts of their own (*o*). By this regulation, which is said to have been made in a common council of the archbishops, bishops, abbots, and chief men of the kingdom, the county courts were deprived of their most venerable judges, their most respectable suitors, and most important business. Besides this, after the departure of the bishops and clergy, the earls disdained to sit as judges, and the great barons to attend as suitors, in the county courts; which, by degrees, reduced them to their present state. This was not the worst effect of this most imprudent and pernicious regulation. For by it the kingdom was split asunder; the crown and mitre were set at variance; and the ecclesiastical courts, by putting themselves under the immediate protection of the Pope, formed the clergy into a separate state, under a

(*n*) Dugdale Originales Jurid. 30. Hickesii Dissertat. Epistolaris, 31. &c.

(*o*) Wilkins Concilia, l. 1. p. 368, 369.

AND thus I conclude the point I firſt propounded, viz. How king William I. after his victory, dealt with the poſſeſſions of the Engliſh. Whereby it appears that there was no pretence of an univerſal conqueſt, or that he was a victor *in populum*. Neither did he claim the title of Engliſh lands upon that account, but only made uſe of his victory thus far, to ſeize the lands of ſuch as had OPPOSED him; which is univerſal in all caſes of victories, though without the pretence of conqueſt.

SECONDLY, therefore I come to the ſecond general queſtion, viz. What was done in relation to the laws.

IT is very plain, that the king, after his victory, did, as all wiſe princes would have done, endeavour to make a ſtricter union between England and Normandy. In order thereunto, he endeavoured to bring in the French inſtead of the Saxon language, then uſed in England. "Deliberavit," ſays Holcot, "quomodo linguam Saxonicam poſſit deſtruere, "& Anglicam & Normanicam idiomate concordare; & ideo

foreign ſovereign, which in the end was productive of infinite diſorders.

The eccleſiaſtical courts, which were immediately erected in conſequence, were 1. The Archdeacon's Court. For as the archdeacon was diſcharged from ſitting as a judge, with the hundredary, in the hundred court, he was authorized to erect a court of his own, in which he took cognizance of eccleſiaſtical cauſes within his archdeaconry. 2. The Biſhop's Court, or Conſiſtory, which received appeals from the archdeacon's court, and whoſe juriſdiction extended over the whole dioceſe. 3. The Archbiſhop's Court, which received appeals from the conſiſtories of the ſeveral biſhops of the province, and had juriſdiction not only over the particular dioceſe of the archbiſhop, but over all the dioceſes in the province. From this higheſt eccleſiaſtical court, appeals lay to the Pope, which ſoon became frequent, vexatious, and expenſive (*p*).

(*p*) Id. ibid. Hen. Hiſt. 3 v. 339.

"ordinavit

" ordinavit quod nullus in curia regis placitaret NISI IN LIN-" GUA GALLICA," &c. *(q)*. From whence arose the practice of pleading in our courts of law in the Norman or French tongue, which custom continued till the statute of 36 E. 3. c. 15.

AND as he thus endeavoured to make a community in their language, so possibly he might endeavour to make the like in their laws, and to introduce the Norman laws into England, or as many of them as he thought convenient. And it is very probable, that after the victory, the Norman nobility and soldiers were scattered through the whole kingdom, and mingled with the English; which might possibly introduce some of the Norman laws and customs insensibly into this kingdom. And to that end the Conqueror did industriously mingle the English and Normans together, shuffling the Normans into English possessions here, and putting the English into possessions in Normandy, and

(*q*) Probably the customs of England were originally recorded in Saxon. William declared his conquest by a change of laws and language. He had entertained the difficult project of totally abolishing the English language; and, for that purpose, he ordered that in all schools throughout the kingdom, the youth should be instructed in the French tongue; a practice which was continued from custom, till after the reign of Edward III. and was never indeed totally discontinued in England. The pleadings in the supreme courts of judicature were in French. 36 Ed. 3. c. 15. Seld. Spicileg. ad Eadmer. 189. Fort. Laud. Leg. Angl. c. 48. The deeds were often drawn in the same language: the laws were composed in that idiom. Ingulf. 71. 88. Chron. Rothom. A. D. 1066.—No other tongue was used at court. It became the language of all fashionable societies, and the English themselves, ashamed of their own country, affected to excel in that foreign dialect. From this attention of William, and from the great foreign dominions long annexed to the crown of England, proceeded that great mixture of French which is at present to be found in the English tongue, and which composes the greatest and best part of our language. Hen. Hist. 3 v. 354.

making

making marriages among them, eſpecially between the nobility of both nations.

THIS gave the Engliſh a ſuſpicion, that they ſhould ſuddenly have a change of their laws before they were aware of it. But it fell out much better. For firſt, there ariſing ſome danger of a defection of the Engliſh, countenanced by the archbiſhop of York in the north, and Frederick, abbot of St. Albans, in the ſouth; the king, by the perſuaſions of Lanfranc, archbiſhop of Canterbury,—"pro bono "pacis apud Berkhamſtead juravit ſuper animas reliquias "ſancti Albani tactiſque ſacroſanctis evangeliis (miniſtrante "juramento abbate Frederico) ut bonas & approbatas antiquas "regni leges quas ſancti & pii Angliæ reges ejus anteceſſores, "& maxime rex Edvardus ſtatuit INVIOLABILITER OBSER-"VARET; et ſic pacificati ad propria læti receſſerunt." Vide MAT. PARIS *in vita Frederici Abbatis ſancti Albani.*

BUT although now, upon this capitulation, the ancient Engliſh laws were confirmed, and namely, the laws of St. Edward the Confeſſor; yet it appeared not what thoſe laws were; and therefore, in the fourth year of his reign, we are told by Hoveden, *(r)* in a digreſſion he makes in his Hiſtory under the reign of king Henry II. and alſo in the Chronicle of Lithfield—"Willielmus rex anno quarto regni "ſui conſilio baronum ſuorum fecit ſummonari per univerſos "conſulatos Angliæ Anglos nobiles & ſapientes & ſua lege "eruditos ut eorum jura & conſuetudines ab ipſis audiret, elec-"tis igitur de ſingulis totius patriæ comitatibus viri duodecim "jurejurando confirmaverunt ut quoad poſſint recto tramite "neque ad dextram neque ad ſiniſtram partem divertentes le-"gum ſuarum conſuetudinem & ſancitam pateſacerent nihil

(r) Vide Hoveden, 600. See Knyghton, 2355. alſo Ingulf, 88. Brompton, 982

"præter-

" prætermittentes nihil addentes, nihil prævaricando mutan-
" tes," &c. and then ſets down many of thoſe ancient laws approved and confirmed by the king, and COMMUNE CONCILIUM. Wherein it appears, that he ſeems to be moſt pleaſed with thoſe laws that came under the title of LEX DANICA, as moſt conſonant to the Norman cuſtoms.

" QUO auditu mox univerſi compatrioti qui leges dixerint
" triſtes effecti uno miniſterio deprecati ſunt quatenus permit-
" teret leges ſibi proprias & conſuetudines antiquas habere in
" quibus vixerunt patres, & ipſi in iis nati & nutriti ſunt, quia
" durum valde ſibi foret ſuſcipere leges ignotas, & judicare de
" iis quæ neſciebant; rege vero ad flectendum ingrato exiſtente,
" tandem eum perſecuti ſunt deprecantes quatenus pro anima
" regis Edvardi qui eas ſub diem ſuum eis conceſſerat barones
" & regnum & cujus, orant leges non aliorum extraneorum
" cogere quam ſub legibus perſeverare patriis; unde conſilio
" habito præcatui baronem tandem acquievit," &c.

GERVASIUS Tilburienſis, who lived near that time, ſpeaks ſhortly, and to the purpoſe, thus: " Propoſitis legibus Angli-
" canis ſecundum triplicitam earum diſtinctionem, i. e. Mer-
" chenlage, Weſtſaxon-lage, & Dane-lage, quaſdam earum
" reprobans quaſdam autem approbans illis tranſmarinas legis
" Neuſtriæ quas ad regni pacem tuendam efficaſiſſime vide-
" bantur, adjecit."

So that by this, there appears to have been a double collection of laws, viz.

FIRST, the laws of the Confeſſor, which were granted and confirmed by king William, and are alſo called the laws of king William; which are tranſcribed in Mr. Selden's notes upon Eadmerus, page 173. the title whereof is thus, viz. " Hæ ſunt leges & conſuetudines quas Willielmus rex con-
" ceſſit

" ceſſit univerſo populo Angliæ poſt ſubactam terram eadem " ſunt quas Edvardus rex cognatus ejus obſervavit ante eum." And theſe ſeem to be the very ſame that Ingulfus mentions to have been brought from London, and placed by him in the abbey of Crowland in the fifteenth year of the ſame king William; "*attuli eadem vice mecum Londini in meum* " *monaſterium legum volumen, &c.*"

SECONDLY, there were certain additional laws at that time eſtabliſhed, which Gervaſius Tilburienſis calls *leges Neuſtriæ, quæ efficaciſſimæ videbantur ad tuendam regni pacem*; which ſeem to be included in thoſe other laws of king William tranſcribed in the ſame notes upon Eadmerus, page 189. 193, &c. Which indeed were principally deſigned for the eſtabliſhment of king William in the throne, and for the ſecuring of the peace of the kingdom; eſpecially between the Engliſh and Normans, as appears by theſe inſtances, viz.

THE law *de murdro*, or the common fine for a Norman or Frenchman ſlain, and the offender not diſcovered: The law for the oath of allegiance to the king: The introduction of the trial by ſingle combat, which many learned men have thought was not in uſe here in England before William I. [I]; and the law touching knights ſervice, which Bracton,

[I] The judicial combat, or duel, though it had been long eſtabliſhed in France and Normandy, and other countries on the continent, was firſt introduced into England by the Normans (*s*). This, like other ordeals, was an appeal to the judgment of God for the diſcovery of the truth or falſehood of an accuſation which was denied, or a fact that was diſputed, founded on this ſuppoſition,—*that Heaven would always interpoſe, and give the victory to the champions of*

(*s*) Leg. Aleman. tit. 44. Burgund. tit. 45. Couſtumier de Normand. part 2. c. 2. Hoveden Annal. p. 343.—LL. Will. c. 68.

truth

Bracton, lib. 2. ſuppoſes to be introduced by the Conqueror, viz.

" QUOD omnes comites milites & ſervientes & univerſi liberi " homines totius regni habeant & teneant ſe ſemper bene in " armis & in equis ut decet & quod ſint ſemper prompti & bene " parati ad ſervitium ſuum integrum nobis explendum & pera- " gendum cum ſemper opus affuerit ſecundum quod nobis de " feodo debent & tenementis ſuis de jure facere & ſicut illis ſta-

truth and innocence. As the judicial combat was eſteemed the moſt honourable, it ſoon became the moſt common method of determining all diſputes among martial knights and barons, as well in criminal as in civil cauſes. When the combatants were immediate vaſſals of the crown, the combat was performed with great pomp and ceremony; in preſence of the king, with the Conſtable and Marſhal of England who were the judges; but if the combatants were the vaſſals of a baron, the combat was performed in his preſence. If the perſon accuſed was victorious, he was acquitted of the crime of which he had been accuſed; if defeated, he was thereby convicted, and ſubjected to the puniſhment preſcribed by law for his offence. If he was killed, his death was conſidered both as the proof and the puniſhment of his guilt. If the accuſer was vanquiſhed, he was, by the laws of ſome countries, ſubjected to the ſame puniſhment which would have fallen upon the accuſed; but in England the king had a power to mitigate or remit the puniſhment. In civil caſes, the victor gained and the vanquiſhed loſt his cauſe. Many laws were made for regulating the times and places of ſuch judicial combats, the dreſs and arms of the combatants, and every other circumſtance; which are too voluminous to be here inſerted (*t*). Several kinds of perſons were by theſe laws exempted from the neceſſity of defending their innocence, or their properties, by the judicial combat; as, women, prieſts, the ſick infirm or maimed, with young men under twenty, and old men above ſixty years of age. But all theſe perſons might, if they pleaſed, employ champions to fight their cauſes (*u*).

(*t*) See Du Cange Gloſſ. voc. *Duellum.* Spelman Gloſſ voc. *Campus.* Bract. l. 2. tract. 2. c. 21. Fleta, l. 1. c. 34, 35.

(*u*) Glanvil. de Conſuetud. Angl. l. 14 c. 1.---Henry's Hiſt. 3 v. 355. Blac. Com. 4 v. 349.

" tuimus

" tuimus per commune concilium totius regni prædicti, & " illis dedimus & conceſſimus in feodo jure hæreditario *(x)*."

WHEREIN we may obſerve, that this conſtitution ſeems to point at two things, viz. The aſſizing of men for arms, which was frequent under the title *de aſſidenda ad arma*, and is afterwards particularly enforced and rectified by the ſtat. of Winton, 13 Ed. I.—and next of conventional ſervices, reſerved by tenures upon grants made out of the crown or knights ſervice; called in Latin, *forinſecum*, or *regale ſervitium* (*y*). [K.]

AND

(*x*) See Note [K] below. (*y*) Poſt. cap. xi. note *k*.

[K] Notwithſtanding the authority of ſir Matthew Hale, which tends to ſupport the opinion, that feuds were introduced into this kingdom by the Conqueror, there are others who hold a contrary doctrine. Among theſe we may rank, ſir Edward Coke, the Judges of Ireland, Mr. Selden, Nathaniel Bacon, ſir William Temple, Saltern, and the author of the Mirror.—In truth the authorities on each ſide are numerous and reſpectable; I have therefore taken the liberty to ſubjoin the different opinions which have been publiſhed on the ſubject. I have ventured to enquire, without preſuming to decide: ſatisfied with producing the opinions of others, I pretend not to eſtabliſh any ſyſtem of my own. Sir Edward Coke ſays, that " the tenure by knights ſervice is of great " antiquity, for ſo it was in the time of king Alfred." 1 Inſt. 76. b. ſee id. 64. a. 83. a. But this opinion of Sir Edward Coke, Mr. Hargrave, the late and able editor of Coke on Littleton, ſeems, in ſome degree, to controvert; vide Harg. note 1. on Co. Lit. 64. a. and note 1. on id. 83. a.

Coke alſo, in the preface to his Third Report, ſuppoſes, that the *redditiones ſocharum et reges ſervitium*, ſaid in the book of Domeſday, *à conſtitutione antiquorum temporum*, to belong to the church of Worceſter, within the hundred of Aſwaldſhaw, prove ſocage tenure, and knight ſervice, long before the Conqueſt.

The Judges of Ireland, in the caſe of tenures, ſuppoſed, that the *Thani majores*, or *Thani reges* among the Saxons, were the king's immediate tenants of lands, which they held by perſonal ſervice, as of the king's perſon by grand-ſerjeanty, or knight ſervice in *capite*;

pite; and that the land ſo held was in thoſe times called Thaneland, as land holden in ſocage was called Reveland; and that after ſome years which followed the coming of the Normans, the title of Thane grew out of uſe, and that of Baron and Barony ſucceeded for Thane, and Thaneland. They therefore concluding ſir Henry Spelman miſtaken, who in his Gloſſary, *verb. Feudum*, refers the original of feuds in England to the Norman conqueſt, laid it down as moſt manifeſt, that *capite* tenures, tenures by knight ſervice, tenures in ſocage, &c. were frequent in the times of the Saxons, but that indeed the poſſeſſions of biſhops and abbots were firſt made ſubject to knight ſervice *in capite* by William the conqueror, in the fourth year of his reign, &c. See "The Caſe of Tenures upon the "Commiſſion of Defective Titles," &c. 8vo. printed at London, 1720. or the ſubſtance of the caſe as to this point, in biſhop Gibſon's preface to Spelman's Treatiſe of Feuds, &c.

Mr. Selden, in treating of the dignity of an earl, ſays, that in ſome places in England it was both feudal and inheritable, even from the firſt coming of the Saxons into England, which is commonly placed in 448 of Our Saviour, though by exacter calculation it falls twenty years ſooner; and that Ethelred, caldorman of Merceland, had all that which was the kingdom of Merceland to his own uſe, as an earldom and fief given him in marriage with Ethelfleda, by her father king Alfred; and to prove this cites William of Malmeſbury De Geſt. Regum, lib. 2. cap. 4. "Londonium caput regni Merciorum "cuidam Primario Ethelredo in fidelitatem ſuam cum filia Ethelfled "conceſſit." Vide Seld. Tit. of Hon. 510, 511. He ſays indeed, ibid. that Aſſerius and Florentius have it *ſervandum commendavit*: and if he had gone on, he would have found that William of Malmeſbury himſelf, in the very next line, calls it COMMISSUM, and afterwards cap. 5. *commendatum*; which words rather ſuggeſt a truſt than a feud. Malmeſ. de Geſt. Regum inter Scriptores poſt Bedam, fol. 44, 46. and Spelm. Poſthum. Treat. of Feuds, 13.

Mr. Selden likewiſe ſuppoſes the names of Thane and Vavaſor in the Saxon times, to have been feudal; and that as earl, king's thane, and middle thane, ſucceeded, one the other, in the Saxon laws, ſo count, baron, and vavaſor, are uſed as interpreters of them in the French laws of William I. and that the king's thanes held of the king in chief by knight ſervice, and were of the ſame kind with them that were, after the Normans, honorary or parliamentary barons. Tit. of Hon. 513. and he ſays ibid. 520, that a vavaſor was in the moſt antient times only a tenant by knight ſervice, that either held of a meſne lord, and not immediately of the king, or at leaſt of the king, as of an honour or manor, and not in chief.

Nathaniel, Bacon thinks that it is not clear from any author of credit, that the Normans changed the tenures of lands; and that none of them appeared to him to be of Norman original, although they

they received their names according to that dialect. Bacon Hist. of the Eng. Gov. 161.

Sir William Temple observes, that those authors who will make the Conqueror to have broken or changed the laws of England, and introduced those of Normandy, pretend that the duty of escuage, with the tenures of knight service and baronage, came over in this reign; but that it needs no proof, that those with the other feudal laws were all brought into Europe by the antient Goths, and by them settled in all the provinces which they conquered of the Roman Empire; and among the rest by the Saxons in England, as well as by the Franks in Gaul, and the Normans in Normandy. Temp. Introd. to the History of Eng. 171, 172.

Saltern supposes conveyances by feoffment and livery to have been before the Conquest, and that there were lords and tenants in the days of Gorbonian the Good, and that fealty was sworn to the prince in the time of Elidurus; which of necessity (says he) were accompanied with tenures, services, distresses, and the like. Saltern de Antiquis Britan. Legibus, cap. 8.

And lastly, the author of the Mirror imagines that tenures were ordained for the defence of the realm, by our old kings, before the Conquest. Mirr. cap. 1. sect. 3. p. 11, 12.

In opposition to these respectable authorities, and in support of sir Matthew Hale's opinion, may be adduced the sentiments of many able and learned men. Though the accession of William to the throne of England produced no very remarkable alteration in the ranks and orders of men in society; it produced (says Dr. Henry) many important changes in their political circumstances. These changes were chiefly owing to the establishment of the feudal system in England by William I. in the same state of maturity to which it had then attained in his dominions on the continent.

"In the Anglo-Saxon times, all the proprietors of land (the clergy excepted) were subjected to the following obligations, commonly called the *trinoda necessitas*—To attend the king with their followers in military expeditions;—to assist in building and defending the royal castles;—to keep the highways and bridges in a proper state *(a)*. To these three obligations, a fourth, called an heriot, was added by the laws of Canute the Great; which consisted in delivering to the king the horses and arms of his earls and thanes at their death, with certain sums of money, according to their rank and wealth (*b*). These may be called feudal prestations. But to these William I. added so many others, that he may be justly said to have completed, if not to have erected, the fabric of the feudal government in Britain.

(*a*) Hickesii dissertat. Epistol. p. 60. Reliquiæ Spelman. p. 22.

(*b*) Wilkins Leges Saxon.

The

The ſovereign of a feudal ſtate was, in idea at leaſt, the proprietor of all the lands in his dominions (*c*). Part of the lands he retained in his own poſſeſſion for the maintenance of his family, and ſupport of his dignity; the reſt he granted to certain of his ſubjects, as benefices or fees, for ſervices to be performed by them; and on ſuch other conditions as he thought proper to require, and they to accept. The idea of a feudal ſovereign was almoſt realized in William I.—He beheld a very great proportion of the lands in England at his diſpoſal, which enabled him to eſtabliſh the feudal ſyſtem of government in its full extent, with little or no difficulty.

In the diſtribution of the territory of England, he was not unmindful of the intereſts of the crown. He retained in his own poſſeſſion no leſs than 1422 manors, beſides foreſts, parks, chaces, farms, and houſes, in all parts of the kingdom (*d*). As the hopes of obtaining ſplendid eſtabliſhments for themſelves and followers had engaged many powerful barons, and even ſome ſovereign princes, to embark with him in his dangerous expedition, he was induced both by the dictates of honour and prudence to gratify their expectations by very liberal grants.

But none of theſe grants were unconditional; to all of them a great variety of obligations was annexed. Theſe obligations were either ſervices, which contributed to the ſplendor of the ſovereign, and ſecurity of the kingdom; or preſtations of various kinds, which conſtituted a conſiderable part of the royal revenue.

The ſervices to be performed by the immediate vaſſals of the crown, were chiefly, Homage and fealty;—Perſonal attendance upon the king in his court, at the three great feſtivals of Chriſtmas, Eaſter, and Whitſuntide, and in his parliament, at other times, when regularly called;—Military ſervices in the field, or in the defence of caſtles for a certain time, with a certain number of men, according to the extent of eſtates.—By theſe three things, the ſovereign of a feudal kingdom was ſecured, as far as human policy could ſecure him, in a ſplendid court for his honour, a numerous council for advice, and a powerful army for defence.

The payments or preſtations, to which the immediate vaſſals of the crown were ſubjected, were chiefly,—Reſerved rents;—Wardſhips;—On Marriages, Reliefs, Scutages, Aids.

The ſovereign of a feudal kingdom never appeared in greater ſplendor than when he received the homage of his immediate vaſſals in his great court or parliament. Seated upon his throne, in his royal robes, with his crown on his head, and ſurrounded by his nobles, he beheld his greateſt prelates and moſt powerful barons

(*c*) Somner on Gavel. 109. Smet. de Republic. l. 3. c. 10.

(*d*) Doomſday Book paſſim.

uncovered and unarmed, on their knees before him. In that humble poſture, they put both their hands between his, and ſolemnly promiſed "to be his liege men, of life and limb and worldly worſhip, "to bear faith and troth to him, to live and die with him, againſt "all manner of men (*e*)."

The courts of the Anglo-Norman kings were at all times very ſplendid, but more eſpecially at the three great feſtivals of Chriſtmas, Eaſter, and Whitſuntide, when all the prelates, earls, and barons of the kingdom were, by their tenures, obliged to attend their ſovereign, to aſſiſt in the celebration of theſe feſtivals, in the adminiſtration of juſtice, and in deliberating on the great affairs of the kingdom. The buſineſs conſiſted partly in determining important cauſes, and partly in deliberating on public affairs (*f*).

Military ſervice was the greateſt and moſt important obligation annexed to the grants of lands made by William I. and other feudal ſovereigns. The intention in making theſe grants, was to ſecure a ſufficient body of troops under proper leaders, well armed, and always ready to take the field, for defending the kingdom, and proſecuting ſuch wars as were thought neceſſary for the honour of the prince, and the proſperity of the ſtate (*g*). Lands ſo granted, may very well be conſidered as the daily pay of a certain number of troops, which the perſons to whom they were granted, were obliged to keep in conſtant readineſs for ſervice; and therefore the number of knights fees or ſtipends, which every eſtate comprehended, was carefully aſcertained. To add ſtill further to the ſtrength and ſecurity of the kingdom, William ſubjected the lands of ſpiritual barons to the ſame military ſervices (*h*).

Though William and other feudal ſovereigns made large grants of lands to their nobility, clergy, and other vaſſals, they did not relinquiſh all connexion with and intereſt in the lands. On the contrary, they granted only the right of USING the lands on certain conditions; ſtill retaining the property, or *dominium directum*, in themſelves: and to put their vaſſals conſtantly in mind of this circumſtance, they always reſerved certain annual payments (commonly very trifling), which were collected by the ſheriffs of the counties where the lands lay (*i*).

(*e*) Spelman. Du Cange in voc. *Homagium, Ligium.* Littleton ſect. 85. Bracton l. 2. c. 35. Glanvil l. 9. c. 1. Fleta l. 3. c. 16.

(*f*) Du Cange voc. *Curia.* Craig de Feudis, l. 2. c. 11.

(*g*) 4 Inſt. p. 192.

(*h*) M. Paris, p. 5. col. 1. ann. 1070.

(*i*) Madox Exchеq. c. 10. Craig de Feudis, l. 1. c. 9.

When

When a vaſſal of the crown died, and left his heir under age, and conſequently incapable of performing thoſe perſonal ſervices to his Sovereign, to which he was bound by tenure, the king took poſſeſſion of his eſtate, that he might therewith ſupport the heir, and give him an education ſuitable to his quality, and at the ſame time might provide another perſon to perform his ſervices in his room. This right of being the guardian of all minors, male or female, who held their lands of the crown by military ſervices, brought conſiderable profits into the royal coffers, or enabled the prince to enrich his favourites, by granting them the guardianſhip of ſome of his moſt opulent wards (*k*).

The king's female wards could not marry any perſon, however agreeable to themſelves and their relations, without the conſent of their royal guardian, that they might not have it in their power to beſtow an eſtate which had been derived from the crown, on one who was diſagreeable to the ſovereign (*l*); a cruel and ignominious ſervitude. No leſs a ſum than ten thouſand marks, equal to one hundred thouſand pounds of our money at preſent, was paid to the king for the wardſhip and marriage of a ſingle heireſs. The ſervitude was afterwards extended to male heirs (*m*).

The king had not only the guardianſhip and marriage of the heirs of all his immediate vaſſals, but he demanded and obtained a ſum of money from them when they came of age, and were admitted to the poſſeſſion of their eſtates; and alſo from thoſe heirs who had been of age at the death of their anceſtors. This laſt was called RELIEF, becauſe it relieved their lands out of the hands of their ſovereign, into which they fell at the death of every poſſeſſor (*n*). Reliefs were at firſt arbitrary and uncertain, and of conſequence the occaſion of much oppreſſion. They were afterwards fixed at the rate of one hundred ſhillings for a knight's fee, one hundred marks for a barony, and one hundred pounds for an earldom, which was ſuppoſed to be about the fourth part of the annual value of each (*o*).

Scutage, or ſhield money, was another preſtation, to which the military vaſſals of the crown, both of the clergy and laity, were ſubjected. It was a ſum of money paid in lieu of actual ſervice in the field, by thoſe who were not able or not willing to perform that ſervice in perſon, or to provide another to perform it in their room.

(*k*) Craig de Feudis, l. 2. c. 2. Spelman Reliquiæ, p. 25. Gloſs. voc. *Warda.* Madox Exchequ. c. 10. ſect. 4. Glanvil l. 7. c. 9.

(*l*) Du Cange voc. *Maritagium.* Glanvil l. 7. c. 9.

(*m*) Madox Exchequ. c. 10. ſect. 4.

(*n*) Glanvil l. 9. c. 4.

(*o*) Du Cange voc. *Relevium.* Madox Exchequ. c. 10. ſect. 4.

The rate of this commutation was not always the ſame; but moſt commonly it was two marks for every knight's fee; though ſometimes it was only twenty ſhillings, and at other times three marks, or two marks and a half (*p*).

Beſides all theſe payments, the immediate vaſſals of the crown, who were preſumed to be poſſeſſed of much affection and gratitude to their ſovereign for the favours they had received from him, granted, or rather complied with the demand of certain pecuniary AIDS, on ſome great occaſions, when he ſtood in particular need of their aſſiſtance. The occaſions on which thoſe aids were demanded and granted, were theſe; to make his eldeſt ſon a knight; to marry his eldeſt daughter; to ranſom his perſon when he was taken priſoner. The rate of theſe aids was alſo unſettled; but it ſeems to have been moſt frequently one mark, or one pound, for every knight's fee (*q*).

There is ſufficient evidence that all theſe ſervices and preſtations, ſo troubleſome in themſelves, and ſo liable to be rendered oppreſſive and intolerable, were brought from Normandy, and impoſed by William on the leaders of his victorious army, to whom he granted great eſtates in England. But theſe were far from being the only perſons who felt the weight of thoſe feudal ſervitudes. For the Norman and other barons who received extenſive tracts of lands, imitated the example of their ſovereign in the diſpoſal of them. They retained part of them, lying contiguous to their own caſtles, in their own poſſeſſion, which were called their Demeſnes; and the reſt they granted to their followers, on terms exactly ſimilar to thoſe on which they had received them from the crown. The vaſſals of every baron did him homage, with a reſervation of homage to the king, which was ſometimes not much regarded.—They gave perſonal attendance in his court at ſtated times, or when regularly called.—They followed him into the field with a certain number of troops, according to the quantity of land they had received.—They paid him certain reſerved rents.—Their heirs were his wards when under age.—They could not marry without his conſent.—They gave him a relief, when they obtained poſſeſſion of their eſtates; and aids for making his eldeſt ſon a knight, for marrying his eldeſt daughter, and for redeeming his perſon from captivity. In a word, a feudal baron was a king in miniature, and a barony was a little kingdom. Even the vaſſals of barons ſometimes granted ſubinfeudations, but always exactly on the ſame plan. By this means all the diſtreſsful ſervitudes of the feudal ſyſtem deſcended from the ſo-

(*p*) Du Cange voc. *Scutagium*. *Auxilium*. Madox Exchеq. c. 15.
(*q*) Spelman Du Cange Gloſs. voc. Glanvil l. 9. c. 8.

vereign

vereign to the meaneſt poſſeſſor of land by military tenure, becoming heavier as they deſcended lower (*r*).

It is true that thoſe poſſeſſors of land who were called *Socmen* (becauſe, as many think, they followed the Soc or plough) were not ſubjected to ſome of the moſt vexatious of thoſe feudal ſervitudes, as perſonal attendance, wardſhip, marriage, &c. But this was owing to the contemptible light in which they were viewed by their ſovereign and his haughty barons, who would not admit them into their courts or their company; and conſidered the education and marriage of their heirs as matters of ſmall importance and unworthy of their attention. Nor were many of theſe Socmen more free, or more happy than the military vaſſals of the king and barons. On the contrary, they were ſubjected to lower and more laborious ſervitudes, as furniſhing men, horſes, and carriages, on various occaſions; ploughing and ſowing the lands of their lords, &c (*s*). In a word, the feudal ſyſtem of tenures, eſtabliſhed by William in England, was productive of univerſal diſtreſs and ſervitude; from which even thoſe of the higher ranks were not exempted, though they were moſt ſeverely felt by the lower orders in the ſtate (*t*).

Craig in his treatiſe De Jur. Feud. 29. ſays, "Anglos ante conqueſ-
" tum vix puto hoc jus (ſcilicet feudorum) recepiſſe: rationes cur ita
" credam hæ ſunt—Scio ante conqueſtum multas apud Anglos leges
" ab Anglo-Saxonum regibus ante conqueſtum conſcriptas—Ne veſti-
" gium quidem juris feudalis in eis pæne reperitur, nam licet vaſa-
" lorum in dominos ingratitudo, ſive felonia expreſſe aliquo ſtatuto
" puniatur, pœna tamen non eſt amiſſio feudi, ut in jure feudali,
" ſed tantum vel mulcta pecuniaria, ſi parva ſit injuria, vel pœna
" capitis, ſi major, quæ juris feudalis naturam non ſapiunt.—Præ-
" terea ex ipſo Polydoro, qui Anglorum hiſtoriam conſcripſit dili-
" gentiſſime, conſtat manifeſte, conqueſtorem, cum omnia Angliæ
" prædia jure belli ad ſe pertinere diceret, legem agrariam tuliſſe,
" quâ ſe omnium poſſeſſionum dominum declaravit (quod nihil aliud
" erat quam omnia prædia de eo tanquam domino teneri,) &c."

Sir H. Spelman ſays, " jus feodale Anglis primus impoſuit Guli-
" elmus conqueſtor." (Gloſs. ad Mag. Chart. fol. 374) And again, (ad verbum *Feodum*) " Feodorum ſervitutes in Britanniam noſtram
" primus invexit Gulielmus ſenior conqueſtor nuncupatus, qui lege
" ea e Normanniâ introducta Angliam totam ſuis diviſit commilitibus:
" innuit hoc ipſum codex ejus agrarius—(Qui) Feudum et Norman-
" niam jungit, ac ſi rei novæ notitia e Normannia diſquirendâ eſſet."
And it being ſaid by the Judges of Ireland, in the abovementioned caſe of tenures, that ſir H. Spelman, thus referring the original of

(*r*) Spelman. Du Cange Gloſſ. voc. *Baron. Feodum, Curia, Homagium, Warda, Maritagium, Relevium, Adjuxilium.*

(*s*) Spelman. Du Cange Gloſs. voc. *Socmannus.*

(*t*) Dr. Henry 3 v. p. 329.

feuds in England to the Norman conqueſt, was miſtaken; he wrote an elaborate treatiſe of the nature and original of feuds and tenures, in ſupport of his opinion. This treatiſe was publiſhed by biſhop Gibſon 1723, among the poſthumous works of this great man.

Mr. Somner ſays, "Before the conqueſt, we were not in "this kingdom acquainted with what ſince, and to this day, we call "*Feoda*, foreigners *Feuda*, i. e. Fiefs or Fees, either in that general ſenſe I mean, wherein they are diſcourſed of and handled abroad "in the book thence intitled *De Feudis*, at home in that called "Littleton's Tenures." Treat. of Gav. 100. 104. And concludes, that "to the Conqueror it is, that the names and cuſtoms of our "Engliſh fees, or (as we now vulgarly call them) tenures, ſuch at "leaſt as are military, owe their introduction."

Matthew Paris, anno 1068. fol. 6. ſays, that William I. "com-"militibus ſuis qui bello Haſtingenſi regionem ſecum ſubjugave-"rant, terras Anglorum et poſſeſſiones affluentiori manu contulit, "illudque parum quod remanſerat ſub jugo poſuit perpetuæ ſervitutis." And again, anno 1070. fol. 7. he ſays, that this king "Epiſcopa-"tus quoq; et abbatias omnes quæ baronias tenebant, et eatenus "ab omni ſervitute ſeculari libertatem habuerant, ſub ſervitute "ſtatuit militari, irrotulans ſingulos epiſcopatus et abbatias pro "voluntate ſuo quot milites ſibi et ſucceſſoribus ſuis hoſtilitatis "tempore voluit a ſingulis exhiberi: et rotulos hujus eccleſiaſticæ "ſervitutis ponens in theſauris, multos viros eccleſiaſticos huic con-"ſtitutioni peſſimæ reluctantes a regno fugavit."

Mr. Camden aſſerts, that "the Engliſh were diſpoſſeſſed of "their hereditary eſtates by William I. and the lands and farms "divided among his ſoldiers; but with this reſerve, that he ſhould "ſtill remain the direct proprietor, and oblige them to do homage "to him and his ſucceſſors; that is (ſays he), that they ſhould "hold them in fee, but the king alone chief lord, and they feuda-"tory lords, and in actual poſſeſſion."

Dr. Hody ſays, that "baronies, and ſuch tenures, were firſt "brought into England by the Conqueror." Hiſt. of Convoc. 117. And Bracton, ſpeaking of the *regale ſervitium*, intimates as much in theſe words, "ſecundum quod in conqueſtu fuit adinventum." Bract. lib. 2. cap. 16. ſect. 7.

Sir Martin Wright, in his Introduction to the Law of Tenures, 52, obſerves, that William I. about the twentieth year of his reign, (*u*) and not till then, ſummoned all the great men and landholders in the kingdom (*x*) to do their homage, and ſwear their fealty to him: from whence he infers, that this was done in conſequence of

(*u*) Seld. Præf. ad Eadmer. fol. 5. Mad. Exchеq. fol. 6. in marg.

(*x*) Hen. of Huntingd. interſcript. poſt Bedam, 908. Hoveden 460. and the Waverly Annals ad An. 1084. 1086.

ſomething

ſomething new, or that theſe feudal engagements would have been required long before; and if ſo, that it is probable feudal tenures were then new. See alſo Dugd. Orig. Jurid. 6. Wilkins' Leg. Anglo-Saxon. fo. 288, 289. Cottoni Poſthuma, 13, 14. 346. Mr. Hume is of opinion that they were introduced by the Conqueror, Hiſt. Eng. 1 v. oct. 270. So is Blackſtone, Com. 4 v. 418. but ſee the fourth chapter of the ſecond book of his Commentaries paſſim. Dr. Sullivan contends for the ſame doctrine; vide his Lectures 14, 15, ſeq. and 270. ſeq.

The laws of William the Conqueror, which he added to thoſe of the Confeſſor, and by which, it is apprehended, he introduced the feudal ſyſtem into this kingdom, are as follows.

L. 52. "Statuimus (*y*) ut omnes liberi homines (*z*) feodere et ſacra-
" mento affirment, quod intra et extra (*a*) univerſum regnum Angliæ
" Regi Willielmo domino (*b*) ſuo fideles (*c*) eſſe volunt, terras et ho-
" nores illius omni fidelitate ubique ſervare cum eo, et contra inimicos
" et alienigenas defendere."

" We ordain that all freemen ſhall oblige themſelves by homage and
" fealty, that within and out of the dominions of England, they will
" be faithful to king William their lord, his lands and honours with
" all fidelity every where with him will preſerve, and againſt all ene-
" mies, foreign and domeſtic, will them defend."

L. 55. "Volumus etiam ac firmiter præcipimus et concedimus ut om-
" nes liberi homines totius monarchiæ regni noſtri prædicti habeant et
" teneant terras ſuas et poſſeſſiones ſuas bene et in pace, libere ab omni
" exactione injuſta, et ab omni tallagio; ita quod nihil ab eis exigatur vel
" capiatur niſi ſervitium ſuum liberum quod de jure nobis facere de-

(*y*) *Statuimus.* This implies it was not by the king alone, but by the *commune concilium*, or, as ſome ſuppoſe, the Parliament; for the ſtyle of the King of England, when ſpeaking of himſelf, was, for ages after, in the ſingular number.

(*z*) *Liberi homines.* Theſe were tenants in military ſervice, and men of truſt and reputation. Brady's Anſwer to Petyt, p. 39.

(*a*) *Intra et extra univerſum regnum Angliæ.* Theſe words are particular; for they deviate from the general principles of the feudal law, and were highly advantageous to William. By the feudal law, no vaſſal was obliged to ſerve his lord in war, unleſs it was defenſive, or one he thought a juſt one; nor for any territories belonging to his lord which were not part of the ſeigniory of which he held; but this would not effectually ſerve for the defence of William. He was Duke of Normandy, which he held from France; and he knew the king of that country was jealous of the extraordinary acceſſion of power he had gained by his new territorial acquiſition, and would take every occaſion, juſt or unjuſt, of attacking him there; in ſhort, that he muſt be always in a ſtate of war. Such an obligation on his tenants, of ſerving EVERY WHERE, was of the higheſt conſequence for him to obtain: nor was it difficult; as moſt of them alſo had eſtates in Normandy, and were by ſelf-intereſt engaged in its defence.

(*b*) *Willielmo domino ſuo*, not *regi*, not the oath of allegiance as king, but the oath of fealty from a tenant.

(*c*) *Fideles.* This is the very technical word of the feudal law for a vaſſal.

" bent et facere tenentur, et prout ſtatutum eſt eis et illis a nobis da-
" tum et conceſſum jure hæreditario impertum per commune concili-
" um totius regni noſtri prædicti."

" We will and firmly command and grant that all freemen of the
" whole monarchy of our aforeſaid kingdom may have and hold their
" lands and poſſeſſions well and in peace, free from all unjuſt exactions
" and taillage; ſo as nothing be exacted or taken, ſave their free ſervi-
" ces, which of right they ought and are bound to perform to us, and
" as it was appointed to them, and given and granted to them by us
" as a perpetual right of inheritance by the common council of the whole
" kingdom."

L. 58 " Statuimus etiam et firmiter præcipimus ut omnes comites,
" et barones, et milites, et ſervientes (*d*), et univerſi liberi homines
" totius regni noſtri prædicti habeant et teneant ſe ſemper bene in ar-
" mis et in equis ut decet et oportet, et quod ſint ſemper prompti et
" bene parati ad ſervitium ſuum integrum nobis explendum et peragen-
" dum cum ſuper opus adfuerit, ſecundum quod nobis debent de feo-
" dis et tenementis ſuis de jure facere, et ſicut illis ſtatuimus per
" commune concilium totius regni noſtri prædicti, et illis dedimus
" et conceſſimus in feodo jure hæreditario (*e*)."

" We ordain alſo, and firmly command, that all earls, and barons,
" and knights, and ſervants, and all the freemen of our whole king-
" dom aforeſaid, ſhall always be fitted with horſes and arms as they
" ought to be, and always ready and well prepared to perform their
" whole ſervice to us when there ſhall be need, according to what
" they ought by law to do to us, by reaſon of their fiefs and tenements,
" and as we have ordained to them by the common council of our
" whole kingdom aforeſaid, and have given and granted to them in
" fee in hereditary right."

L. 59. " Statuimus etiam et firmiter præcipimus ut omnes liberi
" homines (*f*) totius regni noſtri prædicti ſint fratres conjurati ad mo-
" narchiam

(*d*) *Servientes*, the lower ſoldiers not knighted, who had not yet got lands, but were quartered on the Abbeys. Others are of opinion, that by *ſervientes* are meant thoſe who held by grand or petit ſerjeanty.

(*e*) This new policy 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; 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 had previouſly nominated to the king.

(*f*) *Liberi homines*—The freemen in this law are the ſame as thoſe mentioned before; ſuch as held in military tenure, though not knighted; for thoſe were called *milites*: ſometimes they are taken promiſcuouſly one for the

" narchiam noſtram et adregnum noſtrum pro viribus ſuis et facultatibus " contra inimicos pro poſſe ſuo defendendum et viriliter ſervandum, pa- " cem et dignitatem coronæ noſtræ integram obſervandam et ad judici- " um rectum et juſtitiam conſtanter omnibus modis pro poſſe ſuo ſine " dolo et ſine dilatione faciendam. Hoc decretum ſancitum eſt in " civitate London."

" We ordain alſo and firmly command, that all freemen of our " whole kingdom aforeſaid be ſworn brothers, manfully to preſerve " and defend our monarchy or government, and our kingdom, with " all their power, force, and might, againſt enemies, and keep entire " the dignity and peace of our crown, and to give right judgment, " and conſtantly to do juſtice by all ways and means, according to " their power and ability, without fraud or delay. This law was " enacted in the city of London."

L. 63. " Hoc quoque præcipimus ut omnes habeant et teneant legem " Edwardi regis (*g*) in omnibus rebus, adauctis hiis quas *conſtituimus* " (*b*) ad utilitatem Anglorum.

" This we alſo command, that all our ſubjects have and enjoy the " laws of king Edward in all things; with the addition of thoſe which " we have appointed for the benefit of the Engliſh."

Mr. Juſtice Blackſtone and Doctor Sullivan differ as to the time when William introduced the feudal ſyſtem, the former conceiving it to have been in the twentieth, and the latter in the fourth year of his reign. It was probably in the twentieth (*i*)."

On the whole, it is probable that William introduced into England the feudal law which he found eſtabliſhed in France and Normandy, and which, during that age, was the foundation both of the ſtability and of the diſorders in moſt of the monarchical governments of Europe.—It is not a little remarkable, that in tracing the great lines of the Mexican conſtitution, an image of feudal policy, in its moſt rigid form, riſes to view. In truth, its ſpirit and principles ſeem to have operated in the new world in the ſame manner as in the ancient. Dr. Robertſon, Hiſt. Amer. 2 v. 280.

the other; they were very different from our ordinary freeholders at this day. Anſwer to Petyt, p. 38, 39. Gloſſary, by the ſame author, p. 32. According to Sullivan, they were " the Saxon freeholders, and the tenants of the church, who now were ſubjected to knight's ſervice."

(*g*) *Legem Edwardi regis*—William at his coronation ſwore to obſerve the laws of Edward the Confeſſor; and with reſpect to ſuch of them as did not claſh with his deſigns, he now again confirms them, adding thereto the above laws and ſome others.

(*b*) The word *conſtituimus* implies a parliamentary act; and therefore extended to the Normans here, the benefit of the Engliſh laws. Lyt. Hiſt. Hen. II. 8vo. 1 v. 464. 468.

(*i*) Seld. pref. Ead. 5. Mad. Excheq. 6. in marg. Wright's Ten. 52.

AND

AND note, that theſe laws were not impoſed *ad libitum regis*, but they were ſuch as were ſettled *per commune concilium regni*; and poſſibly at that very time, when twelve out of every county were returned to aſcertain the Confeſſor's laws, as before is mentioned out of Hoveden. Which appears to be ASSUFFICIENT AND EFFECTUAL A PARLIAMENT AS EVER WAS HELD IN ENGLAND [L.]

By

[L] The ſtudent will find a pertinent account of the alterations of our laws under the reign of William the firſt, in the laſt chapter of the fourth volume of Mr. Juſtice Blackſtone's Commentaries. The laws of William in the Norman language, with the Latin tranſlation of Dr. Wilkins, as alſo an Engliſh one, with notes and references, were ſome time ſince publiſhed by Mr. Kelham, in his Dictionary of the Norman Language.

To aſcertain the laws of Edward the Confeſſor, we find that William ſummoned twelve men from every county; and this Sir Matthew Hale will have to be "as ſufficient and effectual a parliament as "ever was held in England." With every deference to his authority, it is apprehended that thoſe twelve men were not members of the legiſlature. If they were, how came they afterwards to be diſcontinued till the time of Henry the third, in whoſe reign we firſt find any account of the commons? It is more than probable, that they were ſummoned on a particular occaſion, and for a particular purpoſe, which none but themſelves could anſwer. William, on his coronation, had ſworn to govern by the laws of Edward the Confeſſor; ſome of which had been reduced into writing, but the greater part conſiſted of the immemorial cuſtoms of the realm. Having diſtributed the confiſcations among his followers, foreigners and ſtrangers to thoſe laws and cuſtoms, it of courſe became neceſſary to aſcertain them; to effect which he ſummoned twelve Saxons from every county. That they were not legiſlators is evident from this, that when William wanted to revive the Daniſh laws, laws which had been abliſhed by the Confeſſor, but which were ſomewhat ſimilar to the Norman mode of juriſprudence, they prevailed againſt him; not by refuſing their conſent, but by intreaty and adjuration. They intreated him by their tears and their prayers, and adjured him by the ſoul of Edward his benefactor.

Who were the conſtituent members of the great councils or parliaments of this period, is a queſtion which has been differently anſwered and warmly agitated (*k*). That all archbiſhops, biſhops, abbots, priors, earls, and barons, who held each an entire barony

(*k*) Petyt's Rights of the Commons aſſerted, Jan. Angl. Facies Nova, Dr. Frady's Tracts, &c. &c.

in me-

By all which it is apparent, firſt, that William I. did not pretend, nor indeed could he pretend, notwithſtanding this nominal

immediately of the king *in capite*, were conſtituent members of theſe great councils, has never been denied, and needs not be proved. Beſides thoſe great ſpiritual and temporal barons, there were many others who held ſmaller portions of land, as one, two, three or four knights fees, immediately of the king, by the ſame honourable tenure with the great barons; who were alſo members of the great councils of the kingdom, and were commonly called the leſſer barons, or free military tenants of the crown. Among many evidences which might eaſily be produced of this, the fourteenth article of the Great Charter of king John is one of the moſt deciſive, and ſeems to be ſufficient. "To have a common council of the kingdom, to aſſeſs "an aid otherwiſe than in the three foreſaid caſes (*l*), or to aſſeſs a "ſcutage, we will cauſe to be ſummoned the archbiſhops, biſhops, "earls, and greater barons, particularly by our letters; and beſides, "we will cauſe to be ſummoned in general, by our ſheriffs and bailiffs, "all thoſe who hold of us *in capite*." But beſides all theſe great and ſmall barons, who, by virtue of their tenures, were obliged, as well as entitled, to ſit as members in the great councils of the kingdom; our hiſtorians of this period ſometimes ſpeak of great multitudes of people, both of the clergy and laity, who were preſent in ſome of thoſe councils (*m*). Eadmerus, the friend and ſecretary of archbiſhop Anſelm, thus deſcribes the perſons aſſembled in a great council at Rockingham, A. D. 1095, to whom his patron made a ſpeech, "Anſelm ſpoke to the biſhops, abbots, and princes or principal men, and to a numerous multitude of monks, clerks, and laymen ſtanding by (*n*)." By the biſhops, abbots, and princes, we are certainly to underſtand the ſpiritual and temporal barons. But who are we to underſtand by "the numerous multitude of monks, clerks, and "laymen ſtanding by?" Were they members of this aſſembly, or were they only ſpectators and by-ſtanders? If by the multitude of thoſe clerks and laymen, the hiſtorian did not mean the leſſer barons, it is highly probable that they were only ſpectators. We are told by ſeveral contemporary hiſtorians, that the great councils of the kingdom in thoſe times were very much incommoded by crouds of ſpectators, who forced their way into their meetings. One of the hiſtorians thus deſcribes a great council held by king Stephen: "The king, by an edict, publiſhed through England, called the

(*l*) Theſe three foreſaid caſes were, to make his eldeſt ſon a knight; to marry his eldeſt daughter; to redeem his own perſon; in all which caſes, aids were due by tenure.

(*m*) Spelman. Concil. l. 2. p. 33.

(*n*) Eadmeri Hiſt. p. 26.

rulers

nominal conqueſt, to alter the laws of this kingdom without common conſent *in communi concilio regni*, or in parliament. And, ſecondly, that if there could be any pretence of any ſuch right, or if in that turbulent time ſomething of that kind had happened; yet by all thoſe ſolemn capitulations, oaths, and conceſſions, that pretence was wholly avoided, and the ancient laws of the kingdom ſettled, and were not to be altered, or added unto, at the pleaſure of the Conqueror, WITHOUT CONSENT IN PARLIAMENT.

IN the ſeventeenth year of his reign, or, as ſome ſay, the fifteenth, he began that great ſurvey recorded in two books, called the Great Doomſday Book, and Little Doomſday Book, and finiſhed it in the twentieth year of his reign, anno Domini 1086, (*o*) as appears by the learned

(*o*) At the end of Doomſday Book the date, or year, viz. 1086, is written in a large coeval hand. Mad. Exch. 1 v. 296. Wright's Ten. 52, 53.

rulers of the churches, and the chiefs of the people, to a council at London. All theſe coming thither, as into one receptacle, and the pillars of the churches being ſeated in order, and the vulgar alſo forcing themſelves in on all hands, confuſedly and promiſcuouſly, as uſual, many things were uſefully propoſed, and happily tranſacted, for the benefit of the church and kingdom (*p*)." In a great council held at Weſtminſter, May 18, A. D. 1127, the ſpectators, who are ſaid to have been innumerable; were ſo outrageous, that they interrupted the buſineſs of the council, and prevented ſome things from being debated (*q*). Upon the whole, it ſeems to be almoſt certain, that though great numbers of people of all ranks, prompted by political curioſity, or intereſted in the affairs which were to be debated, attended the great councils of the kingdom in this period, none were properly members of the councils but thoſe deſcribed in the Great Charter of king John, viz. the ſpiritual and temporal barons,

(*p*) Geſta Stephani Regis, apud Duchene, p. 932.

(*q*) Spelman. Concil. l. 2. p. 35.

who

learned preface of Mr. Selden to Eadmerus, and indeed by the books themſelves; the original record of which is ſtill extant, remaining in the cuſtody of the vice-chamberlains of his majeſty's exchequer. This record contains a ſurvey of all the ancient demeſne lands of the kingdom, and contains in many manors, not only the tenants names, with the quantity of lands and their values, but likewiſe the number and quality of the reſiants or inhabitants, with divers rights, privileges, and cuſtoms claimed by them. And being made and found by verdict, or preſentment, of juries, in every hundred, or diviſion, upon their oaths, there was no receding from, or avoiding, what was written in this record. And therefore, as Gervaſius Tilburienſis ſays, page 41. "Ob hoc nos eundem librum judiciarium nominamus; "non quod in eo de propoſitis aliquibus dubiis feratur "ſententia, ſed quod ab eo ſicut ab ultimo die judicii non "licet ulla ratione diſcedere." [M]

AND

who were perſonally ſummoned; and thoſe who held ſmaller parcels of land than baronies, immediately of the king, by knight's ſervice, who were ſummoned edictally by the ſheriffs of their reſpective counties (r).

[M] The book called Doomſday proves the great and extenſive genius, and does honour to the memory of William. It was begun in the year 1081, and was a general ſurvey of all the lands in the kingdom; their extent in each diſtrict; their proprietors, tenures, value; the quantity of meadow, paſture, wood, and arable land, which they contained; and in ſome counties, the number of tenants, cottages, and ſlaves of all denominations, who lived upon them. He appointed commiſſioners for this purpoſe, who entered every particular in their regiſter by the verdict of juries; and after a labour of SIX YEARS (for the work was ſo long in finiſhing) brought him an exact account of all the landed property of his kingdom. Chron. Sax. 190. Ingulf. 79. Chron. T. Tykes, 23. H. Hunt. 370. Hoveden, 460.

(r) Hen. Hiſt. 3 v. 345.

M. Weſt.

AND thus much ſhall ſuffice touching the fifth general head; namely, of the progreſs made after the coming in of king

M. Weſt. 229. Flor. Wigorn. 641. Chron. Abb. St. Petri de Bungo, 51. M. Paris, 8. The three northern counties, Weſtmorland, Cumberland, and Northumberland, were not comprehended in this ſurvey, on account of their wild, uncultivated ſituation. This monument, called DOMESDAY BOOK, the moſt valuable piece of antiquity poſſeſſed by any nation, is ſtill preſerved in the exchequer; and tho' only ſome extracts of it have hitherto been publiſhed, yet it ſerves to illuſtrate to us in many particulars, the ancient ſtate of England. Alfred had finiſhed a like ſurvey of the kingdom in his time, which was long kept at Wincheſter, and which probably ſerved as a model to William in this undertaking.

Mr. Madox in his Hiſtory of the Exchequer (s) ſays, "the great and memorable ſurvey of the lands holden in DEMEANE within this realm, which was finiſhed in the year 1086, and is called DOMESDAY-BOOK, ſheweth under the title TERRA REGIS, what and which the demeanes of the crown were, at that time, and in the time of king Edward the Confeſſor: and hath been ever ſince counted the great index, to diſtinguiſh the king's demeanes from his eſcheats and other lands, and from the lands of other men." It is generally known, that the queſtion "whether lands are ancient demeſne or not?" is to be decided by the DOMESDAY of William I. from whence there is no appeal; and it is a book of that authority, that even the Conqueror himſelf ſubmitted ſome caſes, wherein he was concerned, to be determined by it. See before note [G] on this chapter.

It may be neceſſary to notice ſome conjectures reſpecting the etymon of the word DOMESDAY. Many have ſuppoſed it to allude to the final day of judgment. Hammond apprehends, that the addition of DAY to this DOME-BOOK, was not meant with any alluſion to the final day of judgment, but was to ſtrengthen and confirm it; and ſignifieth the JUDICIAL DECISIVE RECORD, or, BOOK OF DOOMING JUDGMENT AND JUSTICE. But the Obſerver on our Ancient Statutes goes farther: "The common etymology of the word DOMESDAY, (ſays Barrington) in which all the Gloſſaries agree, viz. the compariſon of it to the day of judgment, never appeared to me ſatisfactory: if this whimſical account of the name was the real one, the Latin for it would be DIES JUDICII; whereas, in all the old Chronicles, it is ſtiled either LIBER JUDICIALIS, or CENSUALIS. Bullet, in his Celtic Dictionary, hath the word DOM, which he renders *Seur*, *Seigneur*, and hence the Spaniſh word DON; as alſo the words DEYA and DEIA, which he tranſ-

(s) Vol. I. 296.

later

king William, relating to the laws of England, their eſtabliſhment, ſettlement, and alteration. If any one be minded to

lates PROCLAMATION, AVERTISEMENT: Domeſday therefore may ſignify the lord's or king's advertiſement to the tenants who hold under him, and this ſenſe of the word agrees well with part of the contents of this famous ſurvey. See likewiſe Upton's notes on b. 1. canto vii. ſt. 26. of Spenſer's Faerie Queen, where he produces inſtances of the word DAYE ſignifying judgment; and DAYES-MAN, an arbitrator or judge. In the north of England, an arbitrator, or elected judge, is uſually termed a dies-man, or days-man: and Dr. Hammond ſaith, that the word DAY in all idioms ſignifies judgment. "In a petition to the "king in parliament, by the treaſurer and barons of the exchequer, "they certify with regard to the manor of Tring in Hertfordſhire, "Invenimus in libro veſtro qui vocatur Domeſday, &c." 6 Edw. 1. A. D. 1278. amongſt the collection publiſhed by the munificence of parliament (*t*).

Camden calls this book *Gulielmi librum cenſualem*, the tax book of king William; it was alſo called *Magna Rolla Winton*. The dean and chapter of York have a regiſter ſtiled Domeſday; ſo hath the biſhop of Worceſter; and there is an ancient roll in Cheſter-caſtle called Doomſday-Roll.

That the reader may have ſome idea of the manner of entering the lands in this book, I have ſelected the following inſtances.

"Eaſeſſa Terra Regis Dimid. Hundred. de Witham. Witham tenuit "Haroldus t. R. E. pro maner. et pro 5 hidis: tunc 21 villan. modo "15; tunc 9 bordar. modo 10; tunc 6 ſervi, modo 9; tunc 23 ſoche-"manni, et modo ſimiliter; tunc inter totum valebat 10 lib. modo 20; "ſed vicecomes inter ſuas conſuetudines et placita, de dimid. hundred. "recepit inde 34 lib. et 4lib. de gerſuma. In hoc manerio adjacebant "t. R. E. 34 liberi homines, qui tunc reddebant 10 ſol. de conſuetu-"dine et 11d. Ex illis tenet Ilbodius 2, de 45 acr. et val. 6 ſol. et "redd. maner. ſuam conſuetudinem. Tedricus Pointel 8, de dimid. "hid. et 22 acr. dimid. reddentes conſuetud. Ranulph Piperel 10, "de 2 hid. et 45 acr. non reddentes conſuetudinem. Willielmus Groſſe "5, et unus tantum reddit conſuetudinem, et val. 3 lib. 13 ſ. Rad. "Baignard 6, et unus reddit conſuetud. et val' 20 ſ. Hamo dapifer 1, "de dimid. hid. et val. 20 ſ. Goſcelinus Loremarius habet terram "unius, et non reddit conſuet. &c. Modo cuſtodit hoc manerium "Petrus vicecomes in manu regis."

Thus in Engliſh: "Eſſex [title in the top of the leaf]; the King's "Land;" and before the particular manor or town, the hundred in which it lies is noted, as here, "The Half Hundred of Witham.

(*t*) Bar. on Stat. 270.

"Harold

to ſee what this prince did in reference to eccleſiaſtics; let him conſult Eadmerus; and the learned notes of Mr. Selden

" Harold held Witham, in the time of king Edward; for a manor " and for 5 hides. Then there were twenty-one villains, now fif- " teen [for they recorded what was in Edward the Confeſſor's time, " as well as in that of the Conqueror]; then there were nine bor- " dars, now ten; then 6 ſervants or ſlaves, now 9; then there were " twenty-three ſochemans, now the ſame number; then the whole " was valued at ten pounds, now twenty pounds. But the viſcount, " or ſheriff, received from the half hundred, for his cuſtoms, and " mulcts, or forfeitures, thirty-three pounds; and four pounds for " fine or income: In this manor, or belonging to this manor, or in " the bounds of this manor; there were in the time of king Ed- " ward thirty-four freemen, which then paid an accuſtomable rent " of ten ſhillings and eleven pence. Of theſe, Ilbods holds two; " which had forty-five acres, and they were worth to him ſix ſhil- " lings, and paid their old rent to the manor. Tedric Pointel holds " eight, who had half a hide, and twenty-two acres and a half; " paying cuſtom or old rent. Ranulph Piperel holds ten, who had " two hides and forty-five acres, which paid no cuſtom or old rent. " William Groſſe holds five, and only one of them paid cuſtom; " and were worth to him three pounds thirteen ſhillings (by " the year is to be underſtood in all theſe ſums). Ralph Baignard " holds ſix, and one paid cuſtom; they were worth twenty ſhillings. " Hamo, the ſewer or ſteward, holds one, who had half a hide, and " was worth to him twenty ſhillings. Goſcelin Loremar hath the land " of one, and pays no cuſtom. Peter the viſcount, or ſheriff, keeps " this manor in the king's hand."

" Eſſeſſa Terra Regis Hund. de Beventre. Haveringas tenuit Harol- " dus t. R. E pro 1 maner. et pro 10 hid. Tunc 41 villan. modo 40; " ſemp. 41 bordar. et 6 ſervi, et 2 car. in dominio; tunc 41 car. homi- " num, modo 40; ſylv. id. porc. c. acr. prati; mod. 1 molen. et 2 runc. " et 10 animalia, et 160 porc. et 269. ov. Huic maner. adjacebant 4 lib. " homines, de 4 hidis, t. R. E. reddentes conſuetudinem; modo ten- " 3 hid. Rob fil. Corbutionis, Hugo de Montafori quartam hidam, " et non reddidere conſuetudinem eſſe quo eas habuere, &c. Hoc " maner. val. t. R. E. 36l. modo 40; et Petrus vicecomes inde recepit " 30l. de cenſu, et 10l. de gerſuma."

Thus in Engliſh: " Eſſex [title as before]; the King's Land; " the Hundred of Beventre. Harold held Haveringe, in the " time of Edward the Confeſſor, for one manor and ten hides. " Then there were forty-one villains, now forty; there were " always forty-one bordars, and ſix ſervants or ſlaves, and " two carucates in demeſne, or the lord's lands; there were " forty-one carucates among the men or tenants, now for- " ty; wood ſufficient for five hundred hogs, one hundred acres of " meadow,

Selden upon it; eſpecially page 167, 168, &c. where he ſhall find how this king divided the epiſcopal conſiſtory

" meadow; now one mill, and two working-horſes, or packhorſes, " and ten young growing beaſts, one hundred and ſixty hogs, and " two hundred and ſixty-nine ſheep. To this manor there be- " longed four freemen, who had four hides in the time of Edward " the Confeſſor, paying an accuſtomable rent. Now Robert, ſon of " Corbutio, holds three of thoſe hides, and Hugh Montfort the " fourth, and have paid no rent ſince they held them. This ma- " nor was worth thirty-ſix pounds; now forty; and Peter the viſ- " count, or ſheriff, receives from it eighty pounds for rent, and " ten pounds for an income or fine."

The contents of Doomſday-Book are ſummed up in the following verſes—

Quid deberetur fiſco, quæ, quanta tributa,
Nomine quid cenſus; quæ vectigalia, quantum
Quiſque teneretur feodali ſolvere jure,
Qui ſunt exempti, vel quos angaria damnat,
Qui ſunt vel glebæ ſervi, vel conditionis,
Quove manumiſſus patrono jure ligatur.

This book is ſtill remaining, fair and legible; conſiſting of two volumes, a greater and a leſs; the greater comprehending all the counties of England, except Northumberland, Cumberland, Weſtmorland, Durham, and part of Lancaſhire, which were never ſurveyed; and except Eſſex, Suffolk, and Norfolk, which are comprehended in the leſſer volume. It was formerly kept under three different locks and keys; one in the cuſtody of the treaſurer, and the others of the two chamberlains of the exchequer. It is now depoſited in the chapter-houſe at Weſtminſter, where it may be conſulted, on paying the proper officer a fee of 6s. and 8d. for a ſearch, and 4d. per line for a tranſcript.

The meritorious induſtry of modern times has applied itſelf to a ſimilar ſurvey of one part of the kingdom, and will, it is hoped, in the end, embrace the whole of it. Sir John Sinclair, in the year 1791, publiſhed a Statiſtical Account of Scotland; of which it has been ſaid, " that no publication of equal information and " curioſity has appeared in Great Britain ſince Doomſday-Book, " and that from the ample and authentic facts which it records, it " muſt be reſorted to by every future ſtateſman, philoſopher, and " divine, as the beſt baſis that has ever yet appeared for political ſpecu- " lation." On a ſimilar, though more confined ſcale, is Mr. Lyſons'

" Hiſtorical

from the county court, and how he reſtrained the clergy and their courts from exerciſing eccleſiaſtical juriſdiction upon tenants *in capite* (*u*).

(*u*) Blac. Com. 4 v. 415, 416. and ſee note [H] on this chapter.

" Hiſtorical Account of the Towns, Villages, and Hamlets, within " Twelve Miles of London."

For farther particulars concerning Domeſday-Book ſee Spelm. Gloſſ. *ad verbum* Domeſdei. Seld. Pref. ad. Eadm. 3, 4. Gerv. de Tilb. Dial. de Scacc. l. 1. c. 16. Ingulf. Hiſt. int. Script. poſt Bedam, 908, 909. Alſo an account of it printed by order of the Antiq. Soc. in 1756. and Groſe's Antiq. of England and Wales. There is an extract from Doomſday-Book in the type projected by Mr. Nichols, and in which that valuable record has been ſince printed, in Martin's Hiſtory of Thetford.

CHAP.

CHAP. VI.

Concerning the parity or ſimilitude of the laws of England *and* Normandy, *and the reaſons thereof.*

THE great ſimilitude that in many things appears between the laws of England and thoſe of Normandy, has given ſome occaſion, to ſuch as conſider not well of things, to ſuppoſe that this happened by the power of the Conqueror, in conforming the laws of this kingdom to thoſe of Normandy; and therefore will needs have it, that our Engliſh laws ſtill retain the mark of that conqueſt, and that we received our laws from him, as from a conqueror: than which aſſertion, as it appears even by what has before been ſaid, nothing can be more untrue. Beſides, if there were any laws derived from the Normans to us, as perhaps there might be ſome, yea poſſibly many; yet it no more concludes the poſition to be true, that we received ſuch laws *per modum conqueſtûs*, than if the kingdom of England ſhould at this day take ſome of the laws of Perſia, Spain, Egypt, or Aſſyria, and by authority of parliament ſettle them here: which though they were for their matter foreign, yet their obligatory power, and their formal nature or reaſon of becoming laws here, were not at all due to thoſe countries, whoſe laws they were; but to the proper and intrinſical authority of this kingdom, by which they were received as, or enacted into, laws. And therefore, as no law that is foreign, binds here in England, till it be received and authoritatively engrafted into the law of Eng-

land; ſo there is no reaſon in common prudence and underſtanding for any man to conclude, that no rule or method of juſtice is to be admitted in a kingdom, though never ſo uſeful or beneficial, barely upon this account,—that another people entertained it, and made it a part of their laws before us (*a*).

BUT as to the matter itſelf, I ſhall conſider, and enquire of the following particulars, viz.

1. HOW long the kingdom of England and duchy of Normandy ſtood in CONJUNCTION, under ONE governor.

2. WHAT evidence we have touching the laws of Normandy, and of their agreement with ours.

3. WHEREIN conſiſts that parity, or diſparity, of the Engliſh and Norman laws.

4. WHAT might be reaſonably judged to be the reaſon and foundation of that likeneſs which is to be found between the laws of both countries.

(*a*) That there was a very great ſimilarity between the laws of England and of Normandy, ſoon after the conqueſt, is undeniable. This ſimilarity doth not ſubſiſt only in matters of eſſential juſtice, but in the rules of deſcents—in the terms of limitations—in the forms of writs; and in other things of an indifferent nature, which could neither have ariſen from neceſſity, nor have fallen out by accident. The only queſtion is, how this ſimilarity was produced, Whether by the exportation of the Engliſh laws into Normandy, or the importation of the Norman laws into England? Something of both might have happened in the courſe of time; but in the reign of William I. it is evident, (however Sir Matthew Hale doubted it) both from the nature of things, and the concurrent teſtimony of hiſtorians, that the current of laws and cuſtoms ran ſtrong from Normandy into England. Eadmeri Hiſt. 6. But notwithſtanding the changes which were made in the ancient conſtitution, in the government and laws of England, by the conqueſt, it muſt not be imagined that they were quite deſtroyed. This was ſo far from being the caſe, that many of them were preſerved and even adopted by the Conqueror. Vide cap. v.

FIRST,

FIRST, touching the conjunction under one governor of England and Normandy.

WE are to know, that the kingdom of England and duchy of Normandy were *de facto*, in conjunction, under theſe kings, viz. William I. William II. Henry I. king Stephen, Henry II. and Richard I. who, dying without iſſue, left behind him Arthur, earl of Britain, his nephew, only ſon of Geoffry earl of Britain, ſecond brother of Richard I.—and John the youngeſt brother to Richard I. who afterward became king of England by USURPING the crown from his nephew Arthur. But the princes of Normandy ſtill adhered to Arthur,—" ſicut domino ligeo ſuo " dicentes judicium & conſuetudinem eſſe illarum regionum " ut Arthurus filius fratris ſenioris in patrimonio ſibi debito " & hæreditate avunculo ſuo ſuccedat eodem jure quod " Gualfridus pater ejus eſſet habiturus ſi regi Richardo de- ". functo ſupervixiſſet."

AND therein they ſaid true, and the laws of England were the ſame. Witneſs the ſucceſſion of Richard II. to Edward III. Alſo the laws of Germany and the ancient Saxons were accordant hereunto. And it was accordingly decided in a trial by battle (*b*), under Otho the emperor, as we are told by Radulphus, *de Dicto ſub anno* 945. And ſuch are the laws of France to this day; vide Chopimus *de Domanio Franciæ*, lib. 2. tit. 12. And ſuch were the ancient cuſtoms of the Normans, as we are told by the *Grand Coutumier*, cap. 99. And ſuch is the law of Nor-

(*b*) This ſpecies of trial is of great antiquity, but much diſuſed; though *ſtill in force* if the parties chuſe to abide by it. Blac. Com. 3 v. 337. It was introduced in England by William the Conqueror. LL. Will. cap. 68. See note [I] on chap. v. In what caſes uſed, ſee Black. Com. ibid. and 4 v. 346. Barring. on Stat. 202, 294. For the foundation and univerſality of this mode of trial, conſult Dr. Robertſ. Hiſt. Cha. V. 1 v. oct. 62. ſeq. It was authorized by the eccleſiaſtics. Id. 357

 mandy,

mandy, and of the iſles of Jerſey and Guernſey, which ſome time were parcel thereof, at this day, as is agreed by Terrier, the beſt expoſitor of their cuſtoms, lib. 2. cap. 2. And ſo it was adjudged, within my remembrance, in the iſle of Jerſey, in a controverſy there, between John Perchard and John Rowland, for the goods and eſtate of Peter Perchard.

BUT nevertheleſs, John the uncle of Arthur came by force and power, "*et Rotomagum gladio ducatûs Normanniæ* "*accinctus eſt per miniſterium Rotomagenſis archiepiſcopi*," as Matthew Paris ſays; and ſhortly after alſo uſurped the crown of England, and impriſoned his nephew Arthur, who died in the year 1202, being, as was ſuppoſed, murdered by his ſaid uncle. Vide Matthew Paris, *in fine regni regis Rici primi*, and Walſingham in his Ypodigma Neuſtriæ, *ſub eodem anno* 1202 *(b)*.

AND

(*b*) Mr. Hume, in treating of the death of this unhappy prince, obſerves, that the circumſtances which attended this deed of darkneſs were, no doubt, carefully concealed by the actors, and are variouſly related by hiſtorians: but the moſt probable account is as follows. The king, it is ſaid, firſt propoſed to William de la Brave, one of his ſervants, to diſpatch Arthur; but William replied, that he was a gentleman, not an aſſaſſin; and poſitively refuſed compliance. Another inſtrument of murder was found, and was diſpatched with proper orders to Falaiſe; but Hubert de Bourg, chamberlain to the king, and conſtable of the caſtle, feigning that he himſelf would execute the king's mandate, ſent back the aſſaſſin, ſpread the report that the young prince was dead, and publicly performed all the ceremonies of his interment: but finding that the Bretons vowed vengeance for the murder, and that all the revolted barons perſevered more obſtinately in their rebellion, he thought it prudent to reveal the ſecret, and to inform the world, that the duke of Brittany was ſtill alive, and in his cuſtody. This diſcovery proved fatal to the young prince. John firſt removed him to the caſtle of Rouen, and, coming in a boat, during the night-time, to that place, commanded Arthur to be brought forth to him. The young prince, aware of his danger, and now more ſubdued by the continuance of

AND to countenance his uſurpation in Normandy, and to give himſelf the better pretence of title, he by his power ſo far prevailed there, that HE OBTAINED A CHANGE OF THE LAW THERE, purely to ſerve his turn, by transferring the right of inheritance from the ſon of the elder brother to the younger brother; as appears by the *Grand Coutumier*, cap. 99. But withal, the gloſs takes notice of it as an INNOVATION, and brought in by men of power, though it mentions not the particular reaſon, which was as aforeſaid.

THE king of France, of whom the duchy of Normandy was holden, highly reſented the injury done by king John to his nephew Arthur; who, as was ſtrongly ſuſpected, came not fairly to his end. He ſummoned king John, as duke of Normandy, into France, to give an account of his actions; and upon his default of appearing, he was by king Philip of France forejudged of the ſaid duchy. Vide Mat. Paris, *in initio regni Johannis.* And this ſentence was ſo effectually put in execution, that in the year 1204, Mat. Paris tells us, "tota Normannia, Turania, Andegavia, & "Pictavia, cum civitatibus & caſtellis & rebus aliis præter Ru- "pellam, Toar, & Mar. Caſtellam ſunt in regis Francorum "dominium devoluta (*c*)."

BUT yet he retained, though with much difficulty, the iſlands of Jerſey and Guernſey, and the uninterrupted poſſeſſion of ſome parts of Normandy, for ſome time after. And both he and his ſon king Henry III. kept the ſtile and title

of his misfortunes, and by the approach of death, threw himſelf on his knees before his uncle and begged for mercy; but the barbarous tyrant, making no reply, ſtabbed him with his own hands; and, faſtening a ſtone to the dead body, threw it into the Seine.—Hume's Hiſt. 2 v. oct. 48.

(*c*) W. Heming, 455. M. Weſt 264. Knyghton, 2429. Trivet, 144. Gul. Britto, l. 7. Ann. Waverl. 168.

of Dukes of Normandy, &c. 'till the 43d year of king Henry III. At which time (for 3000 livres Tournois, and upon ſome other agreements) he reſigned Normandy and Anjou to the king of France (*d*), and never afterwards uſed that title, as appears by the Continuation of Mat. Paris, *ſub anno* 1260. Only the four iſlands, ſome time parcel of Normandy, were ſtill, and to this day are, enjoyed by the crown of England, viz. Jerſey, Guernſey, Sarke, and Alderney, though they are ſtill governed under their ancient Norman laws (*e*).

SECONDLY, as to the ſecond enquiry, what evidence we have touching the laws of Normandy.

THE beſt, and indeed only common evidence of the ancient cuſtoms and laws of Normandy, is that book which is called the *Grand Coutumier* of Normandy, which in later years has been illuſtrated, not only with a Latin and French gloſs, but alſo with the commentaries of Terrier, a French author.

THIS book does not only contain many of the ancienter laws of Normandy, but moſt plainly it contains thoſe laws and cuſtoms which were in uſe here, in the time of king Henry II. king Richard I. and king John; yea, and ſuch alſo as were in uſe and practice in that country after the ſeparation of Normandy from the crown of England. For we ſhall find therein, in their writs and proceſſes, frequent mention of king Richard I. and the entire text of the 110th chapter thereof is an edict of Philip king of France, after the ſeverance of Normandy from the crown of England.

(*d*) Rymer, 1 v. 675. M. Paris, 566. Chron. T. Tykes, 53. Trivet, 208. M. Weſtm. 371.

(*e*) Vide poſt. cap 9.

I ſpeak

I ſpeak not of thoſe additional edicts which are annexed to that book, of a far later date. So that we are not to take that book as a collection of the laws of Normandy, as they ſtood BEFORE the acceſſion or union thereof to the crown of England; but as they ſtood LONG AFTER, under the time of thoſe dukes of Normandy that ſucceeded William I. And it ſeems to be a collection made AFTER the time of king Henry III. or, at leaſt, AFTER the time of king John; and conſequently it ſtates their laws and cuſtoms as they ſtood in uſe and practice about the time of that collection made, which obſervation will be of uſe in the enſuing diſcourſe.

THIRDLY, touching the third particular, viz. the agreement and diſparity of the laws of England and Normandy.

IT is very true, we ſhall find a great ſuitableneſs in their laws, in many things agreeing with the laws of England; eſpecially as they ſtood in the time of king Henry II.—The beſt indication whereof we have in the collection of Glanville; the rules of diſcents, of writs, of proceſs, of trials, and ſome other particulars, holding a great analogy in both dominions, yet not without their differences and diſparities in many particulars *(f)*, viz.

FIRST, ſome of thoſe laws are ſuch as were never uſed in England. For inſtance, there was in Normandy a certain tribute paid to the duke, called *Monya*, i. e. a certain ſum yielded to him, in conſideration that he ſhould not alter their coin, payable every three years. Vide *Coutumier*, cap. 15 *(g)*. But this payment was never admitted in England. Indeed

(*f*) Sulliv. Lect. xxix.

(*g*) Monya, or Moneyage, was a tax of one ſhilling on every hearth; and levied once in every three

Indeed it was taken for a time, but was ouſted by the firſt law of king Henry I. as an uſurpation. Again, by the cuſtom of Normandy, the lands deſcended to the *baſtard eigne*, born before marriage of the ſame woman, by whom the ſame man had other children after marriage. *Coutumier*, cap. 27. But the laws of England were always contrary, as appears by Glanville, lib. 7. cap. 13. and the ſtatute of Merton, which ſays, *Nolumus leges Angli-canas mutare, &c.* Again, by the laws of Normandy, if a man died without iſſue, or brother, or ſiſter, the lands did deſcend to the father. *Coutumier*, cap. 15. Terrier, cap. 2. But in England, this law ſeems never to have been uſed.

SECONDLY, again, ſome laws were uſed in Normandy, which were in uſe in England LONG BEFORE the ſuppoſed Norman conqueſt, and therefore could in no poſſibility have their original force, or any binding power here, upon that pretence. For inſtance, it appears by the *Coutumier* of Normandy, that the ſheriff of the county was an annual officer, and ſo it is evident he was likewiſe in England before the conqueſt. And among the laws of Edward the Confeſſor, it is provided, "quod aldermanni in civitatibus eandem "habeant dignitatem qualem habent ballivi hundredorum in "ballivis ſuis ſub vicecomitem." Again, wreck of the ſea, and treaſure trove, was a prerogative belonging to the dukes of Normandy, as appears by the *Coutumier*, cap. 17, & 18. —And ſo it was belonging to the crown of England before the conqueſt; as appears by the charter of Edward the Confeſſor to the abbey of Ramſey, of the manor of Ringſtede,

three years. It was granted to induce the ſovereign not to debaſe the coin. Thus the prince received money from his ſubjects not only for doing good, but for not doing all the evil in his power, M. Paris 38.

"cum

" cum toto ejectu maris quod wreccum dicitur," and the like. Vide ibid. of treasure trove, & vide the laws of Edward the Confessor, cap. 14. So fealty, homage, and relief, were incident to tenures by the laws of Normandy. Vide *Coutumier*, cap. 29. And so they were in England BEFORE the conquest; as appears by the laws of Edward the Confessor, cap. 35. and the laws of Canutus, mentioned by Brompton, cap. 8.—So the trial by jury of twelve men, was the USUAL trial among the Normans, in most suits; especially in assizes, *et juris utrum*; as appears by the *Coutumier*, cap. 92, 93, & 94. And THAT TRIAL WAS IN USE HERE IN ENGLAND BEFORE THE CONQUEST, as appears in Brompton among the laws of king Elthred, cap. 3. which gives some specimen of it, viz. " Habeant placita in singu-" lis wapentachiis & exeant seniores duodecim thani vel præ-" positus cum iis & jurent quod neminem innocentem accu-" sare nec noxium concelare (*b*)."

THIRDLY, again, in some things, though both the law of Normandy and the law of England agreed in the fact, and in the manner of proceeding, yet there was an apparent discrimination in their law from ours.—As for instance, the husband seised in right of the wife, having issue by her, and she dying, by the custom of Normandy he held---but only during his widowhood. *Coutumier*, cap. 119. But in England, he held during his life, by the courtesy of England.

FOURTHLY, but in some things the laws of Normandy agreed with the laws of England, especially as they stood in the times of Henry II. and Richard I. so that they seem to be, as it were, copies or counterparts one of another. Though in many things the laws of England are since changed in a great measure from what they then were.

(*b*) Vide cap. 12.

For

For inſtance, at this day in England, and for very many ages paſt, all lands of inheritance, as well ſocage tenures as of knight's ſervice, deſcend to the eldeſt ſon; unleſs in Kent, and ſome other places, where the cuſtom directs the deſcent to ALL the males, and in ſome places to the youngeſt. But the ancient law uſed in England, though it directed knights ſervices and ſerjeanties to deſcend to the eldeſt ſon, yet it directed vaſſalages and ſocage lands to deſcend to all the ſons. Glanvil. lib. 7. cap. 3. And ſo do the laws of Normandy to this day. Vide *Coutumier*, cap. 26. *& poſt hic*, cap. 11.

AGAIN, leproſy AT THIS DAY does not impede the deſcent; but by the laws in uſe in England, in the elder times, unto the time of king John, and for ſome time afterwards, leproſy DID IMPEDE the deſcent. As *placito quarto Johannis*, in the caſe of W. Fulch, a judge of that time. And accordingly were the laws of Normandy. Vide *Le Coutumier*, cap. 27. and the 11th chapter of this Hiſtory.

AGAIN, at this day, by the law of England, in caſes of trials by twelve men, ALL OUGHT TO AGREE, and any one diſſenting, no verdict can be given. But by the laws of Normandy, though a verdict ought to be by the concurring conſent of twelve men, yet in caſe of diſſent, or diſagreement, of the jury, they uſed to put off the leſſer number that were diſſenters, and added a kind of *tales* equal to the greater number ſo agreeing, until they had got a verdict of twelve men that concurred. *Coutumier*, c. 95 (*i*). And we may find ſome ancient footſteps of the like uſe HERE in England, though long ſince antiquated;

(*i*) Vide cap. 12.

vide

vide Bracton, lib. 4. cap. 19. where he ſpeaks thus—
" Contingit etiam multotiens quod juratores in veritate di-
" cenda ſunt ſibi contrarii ita quod in unam concordare
" non poſſunt ſententiam, quo caſu de conſilio curiæ affor-
" tietur aſſiſa, ita quod apponantur alii juxta numerum
" majoris partis quæ diſſenſerit, vel ſaltem quatuor vel ſex
" & adjungantur aliis, vel etiam per ſeipſos ſine aliis, de
" veritate diſcutiant & judicent, et per ſe reſpondeant &
" eorum veredictum allocabitur & tenebitur cum quibus
" ipſi convenirent."

AGAIN, at this day, by the laws of England, a man may give his lands in FEE-SIMPLE, which he has by deſcent, to any one of his children and diſinherit the reſt. But by the ancient laws uſed here, it ſeems to be otherwiſe. As Mich. 10. Johannis, Glanv. lib. 7. cap. 2. the caſe of William de Cauſcia. And accordingly were the laws of Normandy, as we find in the *Grand Coutumier*, cap. 36. " Quand
" le pere avoit pluſieurs fills, ils ne peut fairde de ſon he-
" ritage le un meilleur que le auter." And yet it ſeems to this day, in England, it holds ſome reſemblance in caſes of frank-marriage; viz. that the doneſs, in caſe ſhe will have any part of her father's other lands, ought to put her lands in hotchpot (*k*).

AGAIN, by the law of England, the younger brother ſhall not exclude the ſon of the elder, who died in the life-time of the father. And this was the ancient law of Normandy, but received ſome interruption in favour of king John's claim. Vide *Coutumier*, cap. 25. & *hic ante*. And indeed, generally, the rule of deſcents in Normandy,

(*k*) Lit. ſect. 17. 19, 20. 266 Brit. c. 72. 79 273. 292. Bract. l. 2. c. 34.

was the SAME, in MOST cases, with that of descents with us at this day. As for instance, that the descent of the line of the father shall not resort to that of the mother, *et è converso*; and that the course was otherwise in cases of purchases. But in most things, the law of Normandy was consonant to the law with us, as it was in the time of king Richard I. and king John; except in cases of descents to *bastard eigne*, excluding *mulier puisne*, as aforesaid (*i*).

AGAIN, at this day there are many writs now in use which were anciently also in use here, as well as in Normandy. As writs of right, writs of dower, writs *de novel disseisin*, *de mortdancestor*, *juris utrum*, *darreim presentment*, &c. And some that are now out of use, though anciently in use here in England. As writs *de feodo vel vadio*, *de feoda vel warda*, &c. All which are taken notice of by Glanville, lib. 13. cap. 27, 28, 29. And the very same forms of writs in effect were in use in Normandy, as appears by the *Coutumier*, *per totum*.—And the writ *de feodo vel vadio* (ibid. cap. 11.) according to Glanville, lib. 13. cap. 27. runs thus, viz. "Rex vicecomiti salutem: summone per bonos "summonitores duodecim liberos & legales homines de vi- "cineto quod sint coram me vel justiciis meis eo die parati "sacramento recognoscere utrum *N.* teneat unam caruca- "tam terræ in illa villa quæ *R.* clamat versus eum per breve "meum in feodo an in vadio invadiatam ei ab ipso *R.* vel ab "*H.* antecessore ejus, vel aliter si sit feodam vel hære- "ditas ipsius *N.* an in vadio invadiata ei ab ipso *R.* vel ab "*H.* &c. et interim terram illam videant, &c." Vide ibid.

(*i*) As to *bastard eigne* and *mulier puisne*, see Glanv. l. 7. c. 2. Lit. sect. 399, 400. Co. Lit. 244.—For a concise explication of the terms, see Blac. Comm. 2 v. 248.

AND

AND according to the *Grand Coutumier*, that writ runs thus, viz. " Si rex fecerit te ſecurum de clamore ſuo proſe- " quend' ſummoneas recognitores de vicineto quod ſint ad " primas aſſiſas ballivæ, ad cognoſcendum utrum carucata " terræ in *B.* quod *G.* deforceat *R.* ſit feodum tenentis vel " vadium novum dictum per manus *G.* poſt coronationem " regis Richardi & pro quanta, & utrum ſit propinquior " hæres ad redimendum vadium, & videatur interim terræ, " &c." So that there ſeems little variance, either in the nature, or in the form of thoſe writs, uſed here in the time of Henry II., and thoſe uſed in Normandy when the *Coutumier* was made.

AGAIN, the uſe was in England, to limit certain NOTABLE times, within the compaſs of which thoſe titles which men deſigned to be relieved upon, muſt accrue. Thus it was done in the time of Henry III. by the ſtatute of Merton, cap. 8. —At which time the limitation in a writ of right was from the time of king Henry I.—and by that ſtatute it is reduced to the time of king Henry II —And for aſſizes of Mortdanceſtor, they were thereby reduced from the laſt return of king John out of Ireland; which was 12 *Johannis.*—And for aſſizes of novel diſſeiſin, *à primâ transfretatione regis in Normanniam*; which was 5 Hen. III.—and which before that, had been *poſt ultimum redditum Henrici III. de Britanniâ*, as appears by Bracton. And this time of limitation was alſo afterwards, by the ſtatutes of Weſtm. 1. cap. 39. and Weſt. 2. cap. 2. 46. reduced unto a narrow ſcantlet, the writ of right being limited to the firſt coronation of king Richard I.

BUT before the limitation ſet by that ſtatute of Merton, there were ſeveral limitations ſet for ſeveral writs. For we find among the pleas of king John's time, the limitation of writs,

writs, *de tempore quo rex Henricus avus noster fuit vivus & mortuus.* And in a writ of aiel, *die quo rex Henricus obiit* in the time of Henry II. as appears by Glanville, lib. 13. cap. 3.—There were then divers limitations in use, as in Mortdancestor, *post primam coronationem nostram, viz. Henrici secundi*, Glanvil. lib. 1. cap. 1.—And touching assizes of novel disseisin, vide ibid. cap. 32. where he tells us, *cum quis intra assisam, &c.* And the time of limitation in an assize was then *post ultimam meam transfretationem* (viz. *Henrici primi*) *in Normanniam*, lib. 13. cap. 33. But in a writ of right, as also in a writ of customs and services, it was *de tempore regis Henrici avi mei*, viz. Henry I. Vid. ib. lib. 12. cap. 10. 16.—And it seems very apparent, that the limitations anciently in Normandy, for all actions ancestrel, was *post primam coronationem regis Henrici secundi*, as appears expressly in the *Coutumier*, cap. 111. *De Feofe & Gage.*

So that anciently, the time of limitation in Normandy, was the same as in England, and indeed borrowed from England; viz. in all actions ancestrel, from the coronation of Henry II. and thus, in those actions wherein the limitation was anciently from the coronation of king Richard I. was substituted. As in the writ *de feofe & gage*, in the *Coutumier*, cap. 111. *de feofe & forme*, cap. 112. in the writ *de ley apparisan*, ib. cap. 24. & cap. 22. "Ascun "gage ne peut estre requise en Normandy, si il ne fuit engage "post le coronement de roy Richard ou deins quarante annus." So that the old limitation, as well for the redemption of mortgages, as for bringing those writs above-mentioned, was *post coronationem regis Henrici secundi*; but altered, as it seems, by king Philip, the son of Lewis king of France, after king John's ejectment out of Normandy. And since the time from the coronation of king Richard I. is estimated

to

to bear proportion to forty years, it is probable this change of the limitation by king Philip of France, was about the beginning of the reign of king Henry III.—or about thirty or forty years after the coronation of Richard I.—from whoſe coronation about thirty years were elapſed, 5 *aut* 6 *Henrici* III. for anciently the limitation in this caſe was thirty years.

FOURTHLY, I now come to the fourth enquiry; viz. how this great parity between the laws of England and Normandy came to be effected. And before I come to it, I ſhall premiſe two obſervables,---which I would have the reader to carry along with him through the whole diſcourſe, viz.---Firſt, that this parity of laws does not at all infer a neceſſity, that they ſhould be impoſed by the Conqueror, which is ſufficiently ſhewn in the foregoing chapters; and in this it will appear, that there were divers other means that cauſed a ſimilitude of both laws, without any ſuppoſition of impoſing them by the Conqueror. Secondly, that the laws of Normandy were, in the greater part thereof, BORROWED from ours, rather than ours from them; and the ſimilitude of the laws of both countries did in a greater meaſure ariſe from THEIR imitation of our laws, rather than from our imitation of theirs. Though there can't be denied, but that a reciprocal imitation of each other's laws was, in ſome meaſure at leaſt, had in both dominions. And theſe two things being premiſed, I deſcend to the means whereby this parity, or ſimilitude of the laws of both countries, did ariſe, as follow, viz.

FIRST, Mr. Camden and ſome others have thought, there was ever ſome congruity between the ancient cuſtoms of this iſland and thoſe of the country of France, both in matters religious and civil; and tells us of the ancient Druids, who were THE COMMON INSTRUCTORS OF BOTH COUN-

TRIES (*m*): *Gallia causidicos docuit facunda Britannos.* And some have thought, that anciently, both countries were conjoined by a small neck of land, which might make an easier transition of the customs of either country to the other. But those things are too remote conjectures, and we need them not to solve the congruity of laws between England and Normandy. Therefore,

SECONDLY, it seems plain, that before the Normans coming in, in way of hostility, there was a great intercourse of commerce and trade, and a mutual communication, between those two countries. And the consanguinity between the two princes gave opportunities of several interviews between them and their courts, in each other's countries. And it is evident by history, that the Confessor, before his accession to the crown, made a long stay in Normandy, and was there often; which of consequence must have drawn many of the English thither, and of the Normans hither. All which might be a means of their mutual under-

(*m*) The Druids, of whom much notice has been taken by historians, have been represented by some, as persons of learning, derived to them by long tradition. They were respected and admired, not only for knowing more than others, but for despising what all others valued and pursued.—By their virtue and their temperance, they reproved and corrected those vices in others, from which they were themselves happily free; and made use of no other arms, than the reverence due to integrity, to enforce obedience to their own commands. Hence they derived so much authority, that they were not only priests, but judges:—no laws were instituted without their approbation; nor any person punished, but by their condemnation. The druidical hierarchy, and the several institutions peculiar to that priesthood, do not appear to have been settled in any part of Europe, except in the British isles and in Gaul.—According to Cæsar, whose testimony cannot be disputed, Gaul received it from Britain. See Dr. Borlase's Observations on the Antiquities of Cornwal. cap. 3. 4. 5. 6. and Rowland's *Mona Antiqua Restaurata, the second. ed. by Dr. Owen.*

ſtanding of the cuſtoms and laws of each other's ountry; and gave opportunities of incorporating and ingrafting divers of them into each other, as they were found uſeful or convenient. And therefore, the author of the Prologue to the *Grand Cuſtumier*, thinks it more probable, that the laws of Normandy were derived from England, than that ours were derived from thence.

THIRDLY, it is evident, that when the duke of Normandy came in, he brought over a great multitude, not only of ordinary ſoldiers, but of the beſt of the nobility and gentry of Normandy. Hither they brought their families, language and cuſtoms; and the victor uſed all his art and induſtry to incorporate them into this kingdom. And the more effectually to make both people become one nation, he made marriages between the Engliſh and Normans;---tranſplanting many Norman families hither, and many Engliſh families thither.---He kept his court ſometimes here and ſometimes there; and by thoſe means inſenſibly derived many Norman cuſtoms hither, and Engliſh cuſtoms thither; without any ſevere impoſition of laws on the Engliſh, as conqueror. And by this method he might eaſily prevail to bring in, even without the people's conſent, ſome cuſtoms and laws, that perhaps were of foreign growth; which might the more eaſily be done, conſidering how in a ſhort time the people of both nations were intermingled.---They were mingled in marriages, in families, in the church; in the ſtate, in the court, and in councils; yea, and in parliaments, in both dominions.---Though Normandy became, as it were, an appendix to England, which was the nobler dominion, and received a greater conformity of their laws to the Engliſh, than they gave to it.

FOURTHLY, but the greateſt mean of the aſſimilation of the laws of both kingdoms was this. The kings of England continued dukes of Normandy till king John's time, and he kept ſome footing there, notwithſtanding the confiſcation thereof by the king of France, as aforeſaid. And during all this time, England, which was AN ABSOLUTE MONARCHY, had the prelation, or preference, before Normandy, which was but a FEUDAL DUCHY, and a ſmall thing in reſpect of England.---By this means Normandy became, as it were, an appendant to England, and ſucceſſively received its laws and government from England; which had a greater influence on Normandy, than THAT could have on England. Inſomuch that oftentimes there iſſued precepts into Normandy, to ſummon perſons there to anſwer in civil cauſes here; yea, even for lands and poſſeſſions in Normandy. As *placito* 1 *Johannis*---a precept iſſued to the ſeneſchal of Normandy, to ſummon Robert Jeronymus to anſwer to John Marſhal, in a plea of land, giving him forty days warning; to which the tenant appeared, and pleaded a recovery in Normandy. The like precept iſſued, for William de Boſco, againſt Jeoffry Ruſham, for lands in Corbeſpine in Normandy.

AND on the other ſide, *Trin.* 14 *Johannis*, in a ſuit between Francis Borne and Thomas Adorne, for certain lands in Ford, the defendant pleaded a concord made in Normandy, in the time of king Richard I. upon a ſuit there before the king, for the honour of Bonn in Normandy, and for certain lands in England, whereof the lands in queſtion were parcel, before the ſeneſchal of Normandy, *anno* 1099. But it was excepted againſt, as an inſufficient fine, and varying in form from other fines; and therefore the defendant relied upon it as a releaſe.

By theſe, and many the like inſtances, it appears as follows, viz.

FIRST, that there was a great intercourſe between England and Normandy, before and after the Conqueror; which might give a great opportunity of an aſſimilation and conformity of the laws in both countries. Secondly, that a much greater conformation of laws aroſe AFTER the Conqueror, during the time that Normandy was enjoyed by the crown of England, than before. And thirdly, that this ſimilitude of the laws of England and Normandy, was not by conformation of the laws of England to thoſe of Normandy, but by conformation of the laws of Normandy to thoſe of England,---which now grew to a great height, perfection and glory. So that Normandy became but a perquiſite, or appendant, of it.

AND as the reaſon of the thing ſpeaks it, ſo the very fact itſelf atteſts it: for—

FIRST, it is apparent, that in point of limitation in actions anceſtrel, from the time of the coronation of king Henry II. it was anciently ſo here in England in Glanville's time, and was tranſmitted from hence into Normandy. For it is no way reaſonable to ſuppoſe the contrary, ſince Glanville mentions it to be enacted here *concilio procerum*. And though this be but a ſingle point, or inſtance, yet the evidence thereof makes out a criterion, or probable indication, that many other laws were in like manner ſo ſent hence into Normandy.

SECONDLY, it appears, that in the ſucceſſion of the kings of England, from king William I. to king Henry II. the laws of England received a great improvement and perfec-

tion, as will plainly appear from Glanville's book, written in the time of king Henry II.—especially if compared with those sums, or collections, of laws, either of Edward the Confessor, William I. or Henry I. whereof hereafter.

So that it seems, by use, practice, commerce, study and improvement of the English people, they arrived in Henry the second's time to a greater improvement of the laws; and that in the time of king Richard I. and king John, they were more perfected, as may be seen in the pleadings, especially of king John's time; and though far inferior to those of the times of succeeding kings, yet they are far more regular and perfect than those that went before them. And now, if any do but compare the *Coutumier* of Normandy with the tract of Glanville, he will plainly find that the Norman tract of laws followed the pattern of Glanville, and was writ LONG AFTER it, when possibly the English laws were yet more refined and more perfect. For it is plain beyond contradiction, that the collection of the customs and laws of Normandy was made after the time of king Henry II.—for it mentions his coronation, and appoints it for the limitation of actions ancestrel,—which must at least have been thirty years after. Nay, the *Coutumier* appears to have been made after the act of settlement of Normandy in the crown of France; for therein is specified the institution of Philip king of France for appointing the coronation of king Richard I. for the limitation of actions, which was AFTER the said Philip's full possession of Normandy.

INDEED, if those laws and customs of Normandy had been a collection of the laws they had had there BEFORE the coming-in of king William I. it might have been a probability that their laws, being so near like ours, might have been transplanted from thence hither. But the case is visibly otherwise. For the *Coutumier* is a collection AFTER the time

time of king Richard I.—yea, after the time of king John, and POSSIBLY AFTER Henry the third's time; when it had received ſeveral repairings, amendments and poliſhings, under the ſeveral kings of England, William I. William II. Henry I. king Stephen, Henry II. Richard I. and king John; who were either knowing themſelves in the laws of England, or were aſſiſted with a council that were knowing therein.

AND as in this tract of time the laws of England received a great advance and perfection, as appears by that excellent collection of Glanville, written even in Henry the ſecond's time (*n*), when yet there were near thirty years to acquire unto a further improvement before Normandy was loſt; ſo from the laws of England, thus modelled, poliſhed, and perfected, the ſame draughts were drawn upon the laws of Normandy; which received the faireſt lines from the laws of England, as they ſtood at leaſt in the beginning of king John's time; and were in effect, in a great meaſure, the defloration of the Engliſh laws, and a tranſcript of them; though mingled and interlarded with many particular laws and cuſtoms of their own, which altered the features of the original in many points.

(*n*) Vide cap. 7.

CHAP. VII.

Concerning the progreſs of the laws of England, *after the time of king* William I. *until the time of king* Edward II.

THAT which precedes in the two foregoing chapters, gives us ſome account of the laws of England, as they ſtood in and after THE GREAT CHANGE which happened under king William I. commonly called the Conqueror. I ſhall now proceed to the hiſtory thereof in the enſuing times, until the reign of king Edward II. (*a*).

WILLIAM I. having three ſons,—Robert the eldeſt, William the next, and Henry the youngeſt, diſpoſed of the crown of England to William his ſecond ſon (*b*), and the duchy of Normandy to Robert (*c*), his eldeſt ſon. And accordingly William II. commonly called William Rufus, ſucceeded his father in this kingdom. We have little memorable of him in relation to the laws, only that he ſeverely preſſed and extended the foreſt laws.

(*a*) See the laſt chapter of Mr. Juſtice Blackſtone's Commentaries on "the riſe, progreſs, and "gradual improvements of the "laws of England."

(*b*) William the conqueror, in his laſt illneſs, wrote to Lanfranc, archbiſhop of Canterbury, deſiring him to crown William, his ſecond ſon, king of England. Gul. Gemet. p. 292. Order. Vital. p. 659. Chron. de Mailr. p. 161. Malmeſ. p. 112. H. Hunt. p. 371. Hoveden, p. 460. M. Weſtm. p. 230. But ſee Lord Lyttelton's Hiſt. Hen. II. IV. oct. 75. The three ſucceſſors of the Conqueror—William, Henry, and Stephen, in the eſtimation of many, were no better than uſurpers; they certainly reigned with diſputed titles.

(*c*) He left HIM Normandy and Maine, and bequeathed to Henry nothing but the poſſeſſions of his mother Matilda; but foretold, that he would, one day, ſurpaſs both his brothers in power and opulence. Order. Vital. 659. Gul. Neuſtr. 357. Fragm. de Gul. Conq. 32.

HENRY

HENRY I. ſon of William I. and brother of William II. ſucceeded his ſaid brother in the kingdom of England, and afterwards expelled his eldeſt brother Robert out of the duchy of Normandy alſo. He proceeded much in the benefit of the laws (*d*), viz.

FIRST, he reſtored the free-election of biſhops and abbots, which before that time he and his predeceſſors inveſted *per annulum & baculum*; yet reſerving thoſe three enſigns of the patronage thereof, viz. *conge d' eſlire*, cuſtody of the temporalties, and homage upon their reſtitution. Vide HOVEDEN *in vitâ ſuâ*.

BUT ſecondly, the great eſſay he made, was the compoſing an abſtract or manual of laws, wherein he confirmed the laws of Edward the Confeſſor, "cum illis emendationi-"bus quibus eam pater meus emendavit baronum ſuorum "concilio;" and then adds his own laws, ſome whereof ſeem to taſte of the canon law (*e*). The whole collection is tranſcribed in the Red Book of the exchequer; from whence it is now printed in the end of Lambard's Saxon Laws, and therefore not needful to be here repeated (*f*).

(*d*) Henry executed juſtice, and that with rigour; the beſt maxim which a prince in that age could follow. Stealing was firſt made capital in this reign; and falſe coining, which was then a very common crime, and by which the money had been extremely debaſed, was ſeverely puniſhed by Henry. Sim. Dunelm. 231. Bromptom, 1000, Flor. Wigorn. 653. Hoveden, 471. Annal. Waverl. 149.

(*e*) There is a code which paſſes under the name of Henry I. but the beſt antiquarians have agreed not to think it genuine. It is, however, a very ancient compilation, and may be uſeful to inſtruct us in the manners and cuſtoms of the times. We learn from it, that a great diſtinction was then made between the Engliſh and Normans, much to the advantage of the latter. LL. Hen. I. ſec. 18. 75.

(*f*) Lamb. Arch. 175. Wilk. Leges Ang. Sax. 233.

THEY

THEY, for the moſt part, contain a model of proceedings in the county courts, the hundred courts, and the courts leet; the former to be held twelve times in the year, the latter twice; and alſo of the courts baron. Theſe were the ordinary uſual courts, wherein juſtice was then, and for a long time after, moſt commonly adminiſtered.—Alſo they concern criminal proceedings, and the puniſhment of crimes, and ſome few things touching civil actions and intereſts; as in chapter 70, directing deſcents, viz.

" SI quis ſine liberis deceſſerit pater aut mater ejus in hæ-
" reditatem ſuccedant, vel frater vel ſoror, ſi pater & mater
" deſint; ſi nec hos habeat, frater vel ſoror patris vel matris,
" & deinceps in quintum genetalium, qui cum propiores in
" parentela ſint hæreditario jure ſuccedant; et dum virilis
" ſexus extiterit & hæreditas abinde ſit femina non hæredite-
" tur; primum patris feodum primogenitus filius habeat.
" Emptiones vero & deinceps acquiſitiones det cui magis
" velit, ſed ſi Bockland habeat quam ei parentes dederint
" mittat eam extra cognationem ſuam (*g*)."

I HAVE obſerved and inſerted this law, for two reaſons, viz. Firſt, to juſtify what I before ſaid, that the laws of Normandy took the Engliſh laws for their pattern in many things. Vide *Le Conſumier*, cap. 25, 26, 36, &c. And ſecondly, to ſee how much the laws of England grew and increaſed in their particularity and application, between this time and the laws of William I.;—which in chapter 36, has no more touching deſcents than this, viz.—" Si quis inteſtatus
" obierit, liberi ejus hæreditatem equaliter dividant." But proceſs of time grafted thereupon, and made particular provi-ſions for particular caſes, and added diſtributions and ſub-diviſions to thoſe general rules.

(*g*) Blac. Com. 4 v. 421.

THESE

THESE laws of king Henry I. are a kind of miſcellany, made up of thoſe ancient laws called the laws of the Confeſſor and king William I. and of certain parts of the canon and civil law, and of other proviſions, that cuſtom and the prudence of the king and council had thought upon, choſen, and put together.

KING Stephen ſucceeded, BY WAY OF USURPATION, upon Maud, the ſole daughter and heir of king Henry I (*b*).

THE laws of Henry I. grew tedious and ungrateful to the people, partly becauſe new, and ſo not ſo well known; and partly becauſe more difficult and ſevere than thoſe ancient laws called the Confeſſor's. For Walſingham, in his Ypodigma Neuſtriæ, tells us, that the Londoners petitioned queen Maud, "ut liceret eis uti legibus ſancti Edvardi & "non legibus patris ſui Henrici, quia graves erant (*i*);" and

(*b*) Matilda, or, as Hale calls her, Maud, was the only legitimate iſſue of Henry I. and whom he betrothed to the emperor Henry V. but he dying without iſſue, Henry beſtowed her on Geoffrey, the eldeſt ſon of Fulk, count of Anjou. Though Henry by his will left his daughter Matilda all his dominions, yet, independent of that diſpoſition, ſhe was moſt unqueſtionably heir to the kingdom of England. In the progreſs and ſettlement of the feudal law, the male ſucceſſion to fiefs had taken place ſome time before the female was admitted; and eſtates being conſidered as military beneficcs, not as property, were tranſmitted to ſuch only as could ſerve in the armies, and perform in perſon, the conditions upon which they were originally granted. But after that the continuance of rights, during ſome generations, in the ſame family, had, in ſome meaſure, obliterated the primitive idea, the females were gradually admitted to the poſſeſſion of feudal property; and the ſame revolution of principles which procured them the inheritance of private eſtates, naturally introduced their ſucceſſion to government and authority. The failure, therefore, of male heirs to the kingdom of England and duchy of Normandy, ſeemed to leave the ſucceſſion open, without a rival, to Matilda. See Lord Lyt. Hiſt. Hen. II. 1 v. oct. 231. ſeq.

(*i*) Contin. Flor. Wig. 677. Gervaſe, 1355.

that

that her refuſal gave occaſion to their defection from her, and ſtrengthened Stephen in his uſurpation; who according to the method of uſurpers, to ſecure himſelf on the throne, was willing and ready to gratify the deſires of the people herein. He furthermore took his oath, that he would not retain in his hands the temporalties of the biſhops; that he would remit the ſeverity of the foreſt laws; and that he would alſo remit the tribute of Danegelt [A]. But he performed nothing.

His

[A] When the invaſions of the Danes were frequent and formidable, it was cuſtomary either to bribe them to deſiſt from depredation, or to maintain a conſiderable body of troops to defend the coaſts againſt thoſe dangerous enemies. The ordinary revenues of the crown being inadequate to the expence, it became neceſſary, with conſent of the Witena-gemote, to impoſe a tax, firſt of one Saxon ſhilling, afterwards of two or more, on every hide of land in the kingdom. As there were 243,600 hides of land in England, this tax, at one ſhilling on each hide, raiſed 12,180 Saxon pounds; equal in quantity of ſilver, to about 36,540 pounds ſterling, and in efficacy, to more than 360,000 pounds of our money at preſent. This tax ſeems to have been firſt impoſed A. D. 991, and was called Danegeld, or the Daniſh tax of payment (*a*). It was ſoon after raiſed to two, at laſt to ſeven ſhillings on every hide of land, and continued to be levied long after the original occaſion of impoſing it had ceaſed. While the invaſions of the Danes were almoſt annual, our kings derived little profit from this tax; but after the acceſſion of the Daniſh princes to the throne of England, it became one of the chief branches of the royal revenue. It was raiſed ſo high, and collected with ſo much ſeverity, by Canute, A. D. 1018, that it amounted to the prodigious ſum of 71,000 Saxon pounds, beſides 11,000 of the ſame pounds paid by the City of London (*b*). It appears, however, from very good authority, that this was too great a ſum for England to pay in one year, at that time. "The tribute (ſays an Author of thoſe times, preſerved by Mr. Leland) that "was paid annually by the Engliſh to the Danes, was at length "raiſed to 72,000 pounds and more, beſides 11,000 pounds paid by "the City of London. Thoſe who had money to pay their pro-"portion of this grievous tax, paid it; but thoſe who had not

(*a*) Chron. Saxon. 126, 128. LL. Edw. Conf. ſect. 12. (*b*) Id. p. 151.

"money,

His times were troubleſome. He did little in relation to the laws. Nor have we any memorial of any record touching his proceedings therein, only there are ſome few pipe rolls of his time, relating to the revenue of the crown (*k*).

Henry II. the ſon of Maud, ſucceeded Stephen. He reigned long, viz. about thirty-five years. And though he

" money, irrecoverably loſt their lands and poſſeſſions. The church " of Peterborough, and ſeveral other churches, ſuſtained great " loſſes on that occaſion (*c*)." From theſe accounts it is evident, that this tax had been gradually raiſed from one ſhilling to ſeven ſhillings on each hide of land. It was afterwards reduced to four ſhillings on each hide; at which rate it ſeems to have continued till it was finally aboliſhed. It was remitted in the reign of Henry the ſecond. Houſes in towns were ſubjected to this tax: an houſe of a certain value paid the ſame as a hide of land (*d*).

(*k*) The advancement of Stephen to the throne procured him neither tranquility nor happineſs; and tho' the ſituation of England prevented the neighbouring States from taking any durable advantage of her confuſions, yet her inteſtine diſorders were to the laſt degree ruinous and deſtructive. The Court of Rome, during theſe diſorders, was permitted to make farther advances in her uſurpations; and appeals to the pope, which had been always ſtrictly prohibited by the Engliſh laws, became now common in every eccleſiaſtical controverſy. H. Hunt. 395. In this turbulent reign, the Pandects of Juſtinian were brought into England from Rome, by ſome of the attendants of archbiſhop Theobald. Vacarius, prior of Bec, read lectures upon them to very crowded audiences. J. Sariſburien. l. 8. c. 22. p. 672. Great oppoſition, however, was made to the introduction of thoſe laws.—John of Saliſbury tells us, that he had ſeen ſome, who were ſo much enraged againſt them, that whenever they met with a copy of the Roman law, they either tore it in pieces, or threw it into the fire. Stephen, out of hatred to the archbiſhop, joined in this oppoſition; he even publiſhed an edict, impoſing ſilence on Vacarius, and prohibiting any one to read the books of the civil law: but it did not anſwer the purpoſe for which it was intended. Seld. apud Fletam, c. 7. From this reign, therefore, we are to date the introduction of the Roman civil and canon laws into this realm. Blac. Com. 4 v. 421.

(*c*) Leland's Collectanea, 1 v. 11.

(*d*) Hen. Hiſt. 2 v. 260.

was

was not without great troubles and difficulties; yet he built up the laws and the dignity of the kingdom to a great height and perfection (*l*). For;

FIRST, in the entrance of his government, he ſettled the peace of the kingdom (*m*). He alſo reformed the coin (*n*); which was much adulterated and debaſed in the times and troubles of king Stephen; "et leges Henrici avi ſui præ- "cepit per totum regnum inviolabiliter obſervari." HOVE-DEN.

SECONDLY, againſt the inſolences and uſurpations of the clergy, he by the advice of his council or parliament, at

(*l*) He was, perhaps, the greateſt prince of his time, for wiſdom, virtue and ability—his character, both in public and in private life, being almoſt without a blemiſh. He poſſeſſed every accompliſhment, both of body and mind, which makes a man either eſtimable or amiable. He occupied himſelf for ſeveral years in the adminiſtration of juſtice, in the execution of the laws, and in guarding againſt thoſe inconveniencies, which either the paſt convulſions of his ſtate, or the political inſtitutions of that age, unavoidably occaſioned. The proviſions which he made, ſhew ſuch a largeneſs of thought as qualified him to become a legiſlator; and they were commonly calculated for the future, as well as for the preſent happineſs of his kingdom. His exactneſs in adminiſtering juſtice had gained him ſo great a reputation, that even foreign and diſtant princes made him an arbiter, and ſubmitted their differences to his judgment. Rymer, vol. iv. 43. Bened. Abb. 172. Dicето, 597. Brompton, 1120. See his Hiſtory and of the age in which he lived, by lord Lyttelton; an elaborate work, enriched with illuſtrations of the ancient laws and conſtitution of England.

(*m*) The title of Henry the ſecond to the crown was more unexceptionable than thoſe of his three predeceſſors; he nevertheleſs thought it prudent, on his acceſſion, to conciliate the affections of his ſubjects, by granting them a charter, confirming one which had been before granted by his grandfather Henry the firſt. Blac. Law Tr. 2 v. p. 11.

(*n*) He repaired the coin, which had been extremely debaſed during the reign of his predeceſſor; and took proper meaſures againſt the return of like abuſes. Hoveden, 491.

Clarendon's

Clarendon, enacted thoſe ſixteen articles mentioned by Mat. Paris, *ſub anno* 1164. They are long, and therefore I remit you thither for the particulars of them [B].

'Tis

[B] About the middle of the twelfth century, the eccleſiaſtics, having renounced all immediate ſubordination to the civil magiſtrate, openly pretended to an exemption, in criminal accuſations, from a trial before courts of juſtice; and were gradually introducing a like exemption in civil cauſes: in fact, HOLY ORDERS WERE BECOME A FULL PROTECTION FOR ALL ENORMITIES (*a*).

Henry II. therefore deeming it neceſſary to define with preciſion the exact boundaries of the civil and eccleſiaſtical juriſdictions, on the 25th of January 1164, ſummoned a general council of the nobility and prelates at Clarendon, to whom he ſubmitted the important queſtion.

After great contention between the temporal barons and the biſhops, they at length adjuſted, and ſigned, a charter, or code of laws, called the Conſtitutions of Clarendon: ſixteen of its articles related particularly to eccleſiaſtical matters, whereof the ten following were the moſt contradictory to the pretenſions of the clergy and the ſee of Rome.

Firſt, if any diſpute ſhall ariſe concerning the advowſon and preſentation of churches, between laymen, or between eccleſiaſtics and laymen, or between eccleſiaſtics, let it be determined in the court of our lord the king (*b*).

Secondly,

(*a*) It is not eaſy to fix with preciſion when the eccleſiaſtics firſt began to claim exemption from the civil juriſdiction. It is certain, that during the early and pureſt ages of the Church, they pretended to no ſuch immunity. Then the authority of the civil magiſtrate extended to all perſons, and to all cauſes. What was at firſt an act of complaiſance, flowing from veneration for their character, was in proceſs of time, improved into exemption. Du Cange, in his Gloſſary, voc. *Curia Chriſtianitatis*, has collected moſt of the cauſes with reſpect to which the clergy arrogated an excluſive juriſdiction; and refers to the authors, or original papers, which confirm his obſervations. Giannone, in his Civil Hiſtory of Naples, lib 19. ſect. 3. has ranged theſe under proper heads, and ſcrutinizes the pretenſions of the church with boldneſs and diſcernment.

(*b*) Before the eſtabliſhment of the ſpiritual court in England, rights of advowſon were tried in the county courts, where the preſence of the king's officer and other lay aſſiſtants prevented partial and unjuſt deciſions by the eccleſiaſtical judge. But after the ſeparation of the eccleſiaſtical and civil juriſdictions by William the conqueror, the clergy endeavoured to draw all cauſes of this nature into the ſpiritual court, which was very prudently

'Tis true, Thomas Becket, archbiſhop of Canterbury, boldly and INSOLENTLY took upon him to declare many of thoſe articles void; eſpecially thoſe five mentioned in his epiſtle to his ſuffragans, recorded by Hoveden; viz.

Firſt,

Secondly, eccleſiaſtics arraigned and accuſed of any matter, being ſummoned by the king's juſticiary, ſhall come into *his* court, TO ANSWER THERE, concerning that which, it ſhall appear to the king's court, is cognizable there; and ſhall anſwer in the eccleſiaſtical court, concerning that which, it ſhall appear, is cognizable there; ſo that the king's juſticiary ſhall ſend to the court of holy church, to ſee in what manner the cauſe ſhall be tried there: and if an eccleſiaſtic ſhall be convicted, or confeſs the crime, the Church ought not any longer to give him protection.

Thirdly, it is *unlawful* for archbiſhops, biſhops, and *any dignified clergymen of the realm*, to go out of the realm without the king's licence; and if they ſhall go, they ſhall, if it ſo pleaſe the king, give ſecurity, that they will not, either in going, ſtaying, or returning, procure any evil, or damage, to the king, or the kingdom (*c*).

Fourthly, perſons excommunicated ought not to give any ſecurity by way of depoſit, nor take any oath, but only find ſecurity and pledge to ſtand to the judgment of the Church, in order to abſolution (*d*).

Fifthly, no tenant IN CHIEF of the king, nor any of the officers of his houſhold, or of his demeſne, ſhall be excommunicate, nor ſhall the lands of any of them be put under an interdict; unleſs application ſhall firſt have been made to our lord the king, if he be in the kingdom; or, if he be out of the kingdom, to his juſticiary; that he may do right concerning ſuch perſon; and in ſuch manner, as that what ſhall belong to the king's court ſhall be there deter-

dently reſiſted by the civil power in thoſe days, and the trial thereof reſerved to the king's ſupreme court. Ld. Lytt. Hiſt. Henry II. vol. 4. oct. 371.

(*c*) This was enacted to prevent the too frequent and dangerous intercourſe between the pope and Engliſh prelates. The words in the original conſtitution, *perſonæ regni*, ſhould be tranſlated DIGNIFIED clergymen. Vide Titles of Honour, 732. It takes in all clergymen who held of him *in chief*, but does not here extend to all parſons, or beneficed clergymen, as the word is commonly tranſlated.

(*d*) The words in the original are, "non debent dare *vadium ad re-*"*manens*," which being ſomewhat obſcure, have been differently tranſlated by different authors.

mined,

firſt, that there ſhould be no appeal to the biſhop without the king's licence. Secondly, that no archbiſhop or biſhop ſhould go over the ſeas, at the pope's command, without the

mined, and what ſhall belong to the eccleſiaſtical court ſhall be ſent thither, that it may be there determined (*e*).

Sixthly, concerning appeals, if any ſhall ariſe, they ought to proceed from the archdeacon to the biſhop, and from the biſhop to the archbiſhop. And, if the archbiſhop ſhall fail in doing juſtice, the cauſe ſhall at laſt be brought to our lord the king, that by his precept the diſpute may be determined in the archbiſhop's court; ſo that it ought not to proceed any farther without the conſent of our lord the king (*f*).

Seventhly,

(*e*) One reaſon aſſigned for this, by the authors of thoſe times, is, that the king ſhould not ignorantly be expoſed to converſe with an excommunicated perſon; to prevent which, notice to the king would have been ſufficient; whereas the conſtitution itſelf declares the intention to be, that the king may do right concerning ſuch perſon. And it not only ſecures the perſons of the king's tenants and officers from excommunication, but alſo their lands from an interdict, without application to him. In truth, it was meant as a check upon the power of the ſpiritual court, and, as appears from Eadmer, was coeval with the eſtabliſhment of that court in England. Yet the latter part of it ſhews, that it did not take from thence all power of inflicting the diſcipline of the Church on ſcandalous ſinners, becauſe they held of the king, or ſerved him as his officers; but only prevented the exerciſe of that juriſdiction over his tenants and officers, without a reaſonable cauſe, or in caſes not properly cognizable there, but belonging to his courts of civil or criminal juſtice. The only fault of this law ſeems to have been the limitation of it, in making that a privilege of one claſs of the people, which was a right due to all. Ibid. 372.

(*f*) In a letter of the biſhop of London to the pope, concerning the diſpute between the king and Becket, he explains this conſtitution as being no prohibition of appeals to Rome, but only a check on their being carried thither unneceſſarily, and without the leave of the king. His words are, "In appellationibus ex "antiqua regni ſui conſuetudine id "ſibi vindicat (rex ſcilicet) honoris "et oneris, ut ob civilem cauſam "ullus clericorum regni ſui ejuſdem "regni fines exeat, niſi, an ipſius "authoritate et mandato jus ſuum "obtinere queat, experiendo cognoſ-"cat. Quod ſi nec ſic obtinuerit, ad "excellentiam veſtram, ipſo in nullo "reclamante, cum volet quilibet ap-"pellabit." Without queſtion there is not in the words of this conſtitution any direct prohibition of appeals to Rome; it being only declared, that, upon an appeal from the archdeacon, the cauſe ought not to proceed any further than the archbiſhop's court without conſent of the king. But in effect this reſtraint would generally have ſtopped the cauſe in that court; and it manifeſtly aſſerted the royal ſupremacy, by ſubjecting the power of appealing to Rome, in eccleſiaſtical cauſes, to the will and pleaſure

king's licence. Thirdly, that the biſhop ſhould not excommunicate the king's tenants *in capite* without the king's licence.

Seventhly, if there ſhall ariſe any diſpute between an eccleſiaſtic and a layman, or between a layman and eccleſiaſtic, *about any tenement*, which the eccleſiaſtic pretends to be held in *frank almoigne*, and the layman pretends to be a *lay fee*, it ſhall be determined before the king's chief juſtice, *by the trial of twelve lawful men*, whether the tenement belongs to frank almoigne, or is a lay fee; and if it be found to be frank almoigne, then it ſhall be pleaded in the eccleſiaſtical court; but if a lay fee, then in the king's court; unleſs both parties ſhall claim to hold of the ſame biſhop or baron: but if both ſhall claim to hold the ſaid fee under the ſame biſhop, or baron, the plea ſhall be in *his* court: provided that by reaſon of ſuch trial, the party who was firſt ſeiſed ſhall not loſe his ſeiſin till it ſhall have been finally determined by the plea.

Eighthly, whoſoever is of any city, or caſtle, or borough, or demeſne manor, *of our lord the king*, if he ſhall be cited by the archdeacon or biſhop for any offence, and ſhall refuſe to anſwer to ſuch citation, it is allowable to put him under an interdict; but he ought not to be excommunicated, before the king's chief officer of the town be applied to, that he may by due courſe of law compel him to anſwer accordingly; and if the king's officer ſhall fail therein, ſuch officer ſhall be at the mercy of our lord the king; and then the biſhop may compel the perſon accuſed by eccleſiaſtical juſtice.

Ninthly, pleas of debt, whether they be due by faith ſolemnly pledged, or without faith ſo pledged, belong to the king's judicature (*g*).

Tenthly, when an archbiſhoprick, or biſhoprick, or abbey, or priory, *of royal foundation*, ſhall be vacant, it ought to be in the

pleaſure of the king: whereas the pope claimed the right of receiving ſuch appeals, as inherent in his ſee. Henry's deſire of gaining the conſent of the biſhops to this conſtitution, was the reaſon of his avoiding an expreſs prohibition; but he intended it ſhould have the ſame operation, and the pope ſaw that intent. Ibid. 373.

(*g*) The clergy of England began firſt in the reign of king Stephen to extend their juriſdiction in the ſpiritual courts to the trial of perſons for breach of faith, *pro læſione fidei*, in civil contracts; by which means they drew thither a vaſt number of cauſes which belonged to the civil courts, and of which they had no proper cognizance. To this encroachment they were inſtigated by the biſhops of Rome, and therefore Alexander condemned the above-recited ſtatute, which was made to prevent it.

hands

licence. Fourthly, that the biſhop ſhould not have the conuzance of perjury, or *fidei læſionis*. And, fifthly, that

 the

hands of our lord the king, and he ſhall receive all the rents and iſſues thereof, as of his demeſne; and when that church is to be ſupplied, our lord the king ought to ſend for the principal clergy of that church, and the election ought to be made in the king's chapel, with the aſſent of our lord the king, and the advice of ſuch of the prelates of the kingdom as he ſhall call for that purpoſe; and the perſon elect ſhall there do homage and fealty to our lord the king, as his liege lord, of life, limb, and worldly honour, (SAVING HIS ORDER) before he be conſecrated (*b*).

The king, thinking that he had now finally prevailed in this great enterprize, ſent the conſtitutions to pope Alexander, requiring his ratification: but Alexander, who plainly ſaw that they were calculated to eſtabliſh the *independency* of England, abſolutely condemned, in the ſtrongeſt terms, the ten articles above recited, and only ratified the following ſix, viz.

1. Churches belonging to the fee of our lord the king cannot be given away in perpetuity, without the conſent and grant of the king.

2. Laymen ought not to be accuſed, unleſs by certain and legal accuſers and witneſſes, in the preſence of the biſhop, ſo as that the

(*b*) The ſaving clauſe at the end certainly opened a wide door to elude all the obligations contracted by the prelates in the act of homage and oath of fealty; though it is affirmed by Becket, in a letter to the pope, that "the ſame form was then uſed by the whole Chriſtian church." He likewiſe adds, that when his holineſs abſolved him from an oath which he had taken at Clarendon, that pontiff told him, that "not even for the preſervation of his life ſhould a biſhop lay himſelf under any obligation without a SAVING to his order, and to the honour of God:" to which he adhered moſt pertinaciouſly. As for the form of election which is laid down in this ſtatute, it muſt be obſerved, that the making it, in the king's chapel, by the principal clergy of the vacant church, with the advice only of ſuch of the prelates of the kingdom as he ſhould call for that purpoſe, ſeems to have been a practice of no very ancient date; not older than the reign of Henry I. or William Rufus. For Mr. Tyrrel, in the introduction to his Hiſtory of England, has proved by many authorities, (ſee Chron. Sax. edit. Oxon. p. 174). that during the times of the Saxons, the Engliſh prelates had been uſually elected in the Witena-gemote, or great council, with the advice or concurrence of the whole aſſembly. It likewiſe appears from the Saxon Chronicle, that the ſame form was continued under William I. But whatever form had been kept up in thoſe, or was continued in theſe times, the chief power in the elections, was, by the conſtitution of the kingdom, aſſigned to the king.

archdeacon

the clergy ſhould be convened before lay judges, and that the king's courts ſhould have conuzance of churches and of tythes.

THIRDLY, he raiſed up the municipal laws of the kingdom to a greater perfection, and a more orderly and regular admi-

archdeacon may not loſe his right, nor any thing which ſhould thereby accrue to him: and if the offending perſons be ſuch, as that none will or dare accuſe them, the ſheriff, being thereto required by the biſhop, ſhall ſwear twelve lawful men of the vicinage, or town, before the biſhop, to declare the truth, according to their conſcience.

3. Archbiſhops, biſhops, and all dignified clergymen, who hold of the king in chief, have their poſſeſſions from the king *as a barony*, and anſwer thereupon to the king's juſtices and officers, and follow and perform all royal cuſtoms and rights, and, like other barons, ought to be preſent at the trials of the king's court with the barons, till the judgment proceeds to loſs of members or death.

4. If any nobleman of the realm ſhall forcibly reſiſt the archbiſhop, biſhop, or arch-deacon, in doing juſtice upon him or his, the king ought to bring them to juſtice; and if any ſhall forcibly reſiſt the king in his judicature, the archbiſhops, biſhops, and archdeacons, ought to bring him to juſtice, that he may make ſatisfaction to our lord the king.

5. The chattels of thoſe who are under forfeiture to the king, ought not to be detained in any church, or church-yard, againſt the king's juſticiary; becauſe they belong to the king, whether they are found within churches or without.

6. The ſons of villeins ought not to be ordained without the conſent of their lords, in whoſe lands they are known to have been born.

A tranſcript of the Conſtitutions of Clarendon, from the *Cottonian* manuſcript of Becket's life and epiſtles, which is probably the moſt antient and correct copy, is in lord Lyttelton's Henry the Second.

Theſe ſtatutes were not only enacted by the advice and authority of parliament, but after a ſtrict enquiry into the law and cuſtoms of the realm anterior to that time; and which theſe ſtatutes only revived and confirmed. The preamble ſays, "in præſentiâ ejuſdem "regis facta eſt iſta recordatio vel recognitio cujuſdam partis con-"ſuetudinum et libertatum et dignitatum anteceſſorum ſuorum; "videlicet, regis Henrici avi ſui et aliorum, quæ obſervari et teneri "debent in regno."

niſtration

niſtration than before. 'Tis true, we have no record of judicial proceedings ſo ancient as that time, except the PIPE ROLLS in the exchequer, which are only accounts of his revenue. But we need no other evidence hereof, than the tractate of Glanville, which though perhaps it was not written by that Ranulphus de Glanvilla who was *juſtitiarius Angliæ* under Henry II. yet it ſeems to be wholly written at that time (*o*). By that book, though many parts thereof are at this day antiquated and altered, and in that long courſe of time which has elapſed ſince that king's reign, much enlarged, reformed, and amended; yet by comparing it with thoſe laws of the Confeſſor and Conqueror, yea, and the laws of his grandfather king Henry I. which he confirmed, it will eaſily appear, that the rule and order, as well as the adminiſtration of the law, was greatly improved beyond what it was formerly. And we have more footſteps of their agreement and concord herein with the laws, as they were uſed from the time of Edward I. and downwards, than can be found in all thoſe obſolete laws of Henry I. which indeed were but diſorderly, confuſed, and general things; rather the caſes and ſhells of directing the way of adminiſtration, than inſtitutions of law, if compared with Glanville's tractate of our laws.

(*o*) Sir Edward Coke (4 Inſt. 345.) ſays, that this book was firſt printed "by the perſuaſion and procurement of ſir William Stanford, a grave and learned judge of the common pleas A. D. 1554. 1 & 2 Ph & M.——" Henricus "rex Angliæ pater conſtituit "(ſays Hoveden) Ranulphum de "Glanvilla ſummum juſtic. to-"tius Angliæ, cujus ſapientia "conditæ ſunt leges ſubſcriptæ "quas Anglicanas vocamus." Hov. A. D. 1180. et reg. H. 2. 26. Plowd. 368. Sulliv. Lect. 130. 148. 288.—This book of Glanville (Tractatus de Legibus & Conſuetudinibus Angliæ) is ſuppoſed to have been the firſt undertaking of the kind, in any country of Europe. It was compoſed about the year 1181.—Robertſ. Cha. V. 1 v. oct. 382.

FOURTHLY, the adminiſtration of the common juſtice of the kingdom ſeems to be wholly diſpenſed in the county courts, hundred courts, and courts baron; except ſome of the greater crimes reformed by the laws of king Henry I. and that part thereof which was ſometimes taken up by the *juſtitiarius Angliæ*. This doubtleſs bred great inconvenience, uncertainty, and variety in the laws, viz.

FIRST, by the IGNORANCE of the judges, which were the freeholders of the county. For although the alderman, or chief conſtable of every hundred, was always to be a man learned in the laws; and although, not only the freeholders, but the biſhops, barons, and great men, were by the laws of king Henry I. appointed to attend the county court, yet they ſeldom attended there; or if they did, in proceſs of time they neglected to ſtudy the Engliſh laws, as great men uſually do.

SECONDLY, another inconvenience was, that this alſo bred GREAT VARIETY of laws, eſpecially in the ſeveral counties. For the deciſions, or judgments, being made by divers courts, and ſeveral independent judges and judicatories, who had no common intereſt among them in their ſeveral judicatories; thereby, in proceſs of time, every ſeveral county would have ſeveral laws, cuſtoms, rules, and forms of proceeding;---which is always the effect of ſeveral independent judicatories, adminiſtered by ſeveral judges.

THIRDLY, a third inconvenience was, that all the buſineſs of any moment was carried by parties and factions. For the freeholders being generally the judges, and converſing one among another, and being as it were the chief judges, not only of the fact, but of the law; EVERY MAN THAT HAD

A SUIT

A SUIT THERE, SPED ACCORDING AS HE COULD MAKE PARTIES. And men of great power and intereſt in the county did eaſily overbear others, in their own cauſes, or in ſuch wherein they were intereſted; either by relation of kindred, tenure, ſervice, dependance, or application.

AND although in caſes of falſe judgment, the law, even as then uſed, provided a remedy, by writ of falſe judgment, before the king or his chief juſtice; and in caſe the judgment was found to be ſuch, in the county court, all the ſuitors were conſiderably amerced; which alſo continued long after in uſe with ſome ſeverity; yet this proved but an INEFFECTUAL remedy for thoſe miſchiefs.

THEREFORE the king took another and a more effectual courſe. For in the twenty-ſecond year of his reign (*p*), by advice of his parliament held at Northampton, HE INSTITUTED JUSTICES ITINERANT (*q*); dividing the kingdom into ſix circuits, and to every circuit allotting three judges, knowing or experienced in the laws of the realm (*r*). Theſe juſtices with their ſeveral circuits are declared by Hoveden, *ſub eodem anno*; i. e. 22. H. 2. viz.

" 1. HUGO CRESSY, Walterus filius Roberti, & Robertus
" Maunſel, for Norfolk, Suffolk, Cambridge, Hunting-
" don, Bedford, Buckingham, Eſſex, and Hartford coun-
" ties.

" 2. HUGO DE GUNDEVILLA, W. filius Radulphi, & W.

(*p*) A. D. 1176.

(*q*) In the Black Book in the exchequer, cap. 8. they are called " juſticiarii deambulantes" and " perluſtrantes."

(*r*) Blac. Com. 4v. 422. Speed, 467. Jan. Anglorum 108. Pryn. on 4 Inſt. 150. cap. 33. Spelm. Gloſs. verb. Iter.

" Baſſet, for Lincoln, Nottingham, Derby, Stafford, War-
" wick, Northampton, and Leiceſter counties.

" 3. ROBERTUS filius Bernardi, Richardus Giffard, &
" Rogerus filius Ramfrey, for Kent, Surrey, Suſſex, Hamp-
" ſhire, Berks, and Oxon counties.

" 4. W. FILIUS Stephani, Bertein de Verdun, & Turſtavi
" filius Simonis, for Hereford, Glouceſter, Worceſter, and
" Salop counties.

" 5. RADULPHUS filius Stephani, W. Ruffus, & Gilbertus
" Pipard, for the counties of Wilts, Dorſet, Somerſet, De-
" von, and Cornwall.

" 6. ROBERTUS DE WATTS, Radulphus de Glanvilla,
" & Robertus Picknot, for the counties of York, Richmond,
" Lancaſter, Copland, Weſtmoreland, Northumberland, and
" Cumberland.

" HI, (conſilio archiepiſcoporum, epiſcoporum, comi-
" tum & baronum regni, &c. apud Nottingham exiſten-
" tium) miſſi ſunt per ſingulos Angliæ comitatus & jura-
" verunt quod cuilibet jus ſuum conſervarent illæ ſum." Hoveden, fo. 313. & Mat. Paris, *in anno* 1176. And that theſe men were well known in the law, appears by their companion, Radulphus de Glanvilla; who ſeems to have been the author of the treatiſe *De Legibus Angliæ*, and was afterwards made *juſtitiarius Angliæ*.

To thoſe juſtices was afterwards committed the conuzance of all civil and criminal pleas happening within their diviſions; and likewiſe pleas of the crown, pleas touching liberties, and the king's rights. And, the better to acquaint

acquaint them with their buſineſs, there were certain aſſizes which were firſt enacted at Clarendon, and afterwards confirmed at Northampton; they were not much unlike the *capitula itineris* mentioned in our old *Magna Charta*, but are not ſo perfect, and are ſet down by Hoveden *ubi ſupra*, and are too long to be here inſerted. I ſhall only take notice of this one, viz. eſtabliſhing deſcents, becauſe I ſhall hereafter have occaſion to uſe it:—"Si quis obierit francus "tenens hæredes ipſius remaneant in talem ſeiſina qualem "pater ſuus, &c."

But beſides thoſe courts in eyre, there were two great ſtanding courts, viz. the exchequer and the court of king's bench, *vel curiam coram ipſo rege, vel ejus juſticiario.* And it was provided by the above-mentioned aſſiſæ,—"quod "juſticiæ faciant omnes juſticias & rectitudines ſpectantes "ad dominium regis, & ad coronam ſuam per breve do-"mini regis vel illorum qui in ejus loco erunt de feodo "dimidii militis & infra, niſi tam grandis ſit quærela quod "non poſſit deduci ſine domino rege vel talis quam juſti-"ciæ ei reponunt pro dubitatione ſuâ, vel ad illos qui in loco "ejus erunt, &c."

Neither do I find any diſtinct mention of the court of common bench, in the time of this king; though in the time of king John, there is often mention made thereof; and the rolls of that court, of king John's time, are yet extant upon record. *Vide poſt. ſub Richardi primi* [C].

The

[C] The editor of the third edition of this Hiſtory ſubjoined the following note, on the ſentence to which the preſent note refers.—"Notwithſtanding what our author here writes, it appears by "Glanville and others, that the common pleas was then alſo in be-"ing,

THE limitation of the aſſiſe of Novel Diſſeiſin, is by thoſe aſſiſes appointed to be, "à tempore quo dominus rex venit "in

"ing, and *Magna Charta* has only fixed that court to a certain place "which before was moveable and uncertain."

Sir Edward Coke, it is true, ſtrongly contends for the ſame poſition.—"For the antiquity of the court of common pleas, they err" (ſays ſir Edward) "that hold that before the ſtatute of *Magna* "*Charta* there was no court of common pleas, but had his creation "by or after that charter; for the learned know, that in the ſix-and-"twentieth year of Edward the third, the abbot of B. in a writ "of aſſize brought before the juſtices in eire, claimed conuſance "and to have writs of aſſize, and other original writs out of the "king's court by preſcription, time out of mind of man, in the "reigns of Saint Edmond, and ſaint Edward the Confeſſor, before "the conqueſt. And on the behalf of the abbot were ſhewed "divers allowances thereof in former times, in the king's courts, "and that king Henry the Firſt confirmed their uſage, and that "they ſhould have conuſance of pleas, ſo that the juſtices of the "*one bench or the other* ſhould not intermiddle. And the ſtatute of "*Magna Charta* erecteth no court, but giveth direction for the pro-"per juriſdiction thereof in theſe words: *Communia placita non* "*ſequantur curiam noſtram, ſed teneantur in aliquo certo loco.* And "properly the ſtatute ſaith, *non ſequantur*, for that the king's-bench "did in thoſe days follow the king *ubicunque fuerit in Angliâ*, and "therefore enacteth that common pleas ſhould be holden in a court "reſident in a certain place. In the next chapter of *Magna Charta*, "(made at one and the ſame time) it is provided, *et ea, quæ per* "*eoſdem* (ſ. *juſticiarios et itinerantes*) *propter difficultatem ali-*"*quorum articulorum terminari non poſſunt, referantur ad juſti-*"*ciarios noſtros de banco, et ibi terminentur.* And in the next to "that, *aſſiſæ de ultimâ præſentatione ſemper capiantur coram juſti-*"*ciariis de banco, et ibi terminentur.* Therefore it manifeſtly "appeareth, that at the making of the ſtatute of *Magna Charta* "there were *juſticiarii de banco*, which all men confeſs to be the "court of common pleas. And therefore that court was not erect-"ed by or after that ſtatute (*a*)." From the whole of Coke's obſervations here and in the preface to his Eighth Report, it ſeems to have been his opinion, that the court of common pleas was not only a diſtinct court, at the time of making the *Magna Charta* of the 9th of Henry III. but alſo exiſted as ſuch before the conqueſt. But ac-

(*a*) Co. Lit. 71. b.

cording

" in Angliam proximam poſt pacis factam inter ipſum, &
" regem filium ſuum."

THE ſame king afterwards, in the twenty-fifth year of his reign, divided the limits of his itinerant juſtices into four circuits or diviſions; and to each circuit aſſigned a greater number of juſtices; viz.—five at leaſt, which are thus ſet down in Hoveden, folio 337. viz. *(s)*.

" ANNO

cording to Mr. Madox, whoſe enquiries into the ſubject were certainly more minute, the origin of the court of common pleas is of a much later date. He ſo far agrees with Coke, as to admit, that the *Magna Charta* of Henry the Third rather confirmed, than erected, the bank or common pleas; and that ſuch a court was in being ſeveral years before the *Magna Charta* of the 17th of king John, though it was then firſt made ſtationary. But in other reſpects ſir Edward Coke and Mr. Madox differ widely; for the latter thinks, that for ſome time after the conqueſt there was one great and ſupreme judicature called *curia regis*, which he ſuppoſes to have been of Norman and not of Anglo-Saxon original, and to have exerciſed juriſdiction over the common as well as other pleas; that the common pleas and exchequer were gradually ſeparated from the *curia regis*, and became juriſdictions wholly diſtinct from it; and that the ſeparation of the common pleas began in the reign of the firſt Richard, or early in the reign of John, and was completed by Henry the Third. See Mad. Hiſt. Exchcq. fol. ed. 63. and the chapter on the diviſion of the king's courts 539. See farther, 3 Blackſt. Comment. 5th ed. 37. 4 Inſt. 99. Lamb. Archeion. ed. 1635. p. 24. to 34 and the books cited in Pryn on 4 Inſt. 52. Harg. note 2. on Co. Lit. 71. b. and ſee Sullivan Lect. xxxii. and Barring. on Stat. 10. Lord Bacon ſuppoſes that the court of common pleas was erected in the reign of Henry the Third (*b*).

(*s*) This important ordinance of Henry had a direct tendency to reſtrain the oppreſſions of the barons, and to protect the inferior gentry and common people in their property. Hoveden, 590. Theſe juſtices were either prelates or conſiderable nobility; and beſides carrying the authority of the king's commiſſion, were able, by the dignity of their own characters, to give weight

(*b*) Vol. ii. 378.

and

" ANNO 1179. 25 H. 2. Magno concilio celebrato apud " Windeſhores, communi conſilio archiepiſcoporum comi- " tum & baronum & coram rege filio ſuo, rex diviſit An- " gliam in quatuor partes, & unicuique partium præfecit " viros ſapientes ad faciendum juſtitiam in terra ſua in hunc " modum.

" 1. RICARDUS epiſcopus Winton, Ricardus theſaura- " rius regis, Nicholaus filius Turoldi, Thomas Baſſet & " Robertus de Whitefield, for the counties of Southampton, " Wilts, Glouceſter, Somerſet, Devon, Cornwall, Berks, " and Oxon.

" 2. GALFRIDUS Elienſis epiſcopus, Nicholaus capellanus " regis, Gilbertus Pipard, Reginald de Wiſebeck capellanus " regis, & Gaulfridus Hoſce, for the counties of Cambridge, " Huntingdon, Northampton, Leiceſter, Warwick, Win- " cheſter, Hereford, Stafford, and Salop.

" 3. JOHANNES epiſcopus Norwicenſis, Hugo Murdac " clericus regis, Michael Bellet, Ricardus de le Pec, & " Radulphus Brito, for Norfolk, Suffolk, Eſſex, Hartford, " Middleſex, Kent, Surrey, Suſſex, Bucks, and Bedford.

" 4. GALFRIDUS DE LUCI, Johannes Comyn, Hugo de " Gaerſt, Radulphus de Glanvilla, W. de Bendings, Alanus " de Furnellis, for the counties of Nottingham, Derby, " York, Northumberland, Weſtmorland, Cumberland, and " Lancaſter.

and credit to the laws. The honour of bringing this wiſe inſtitution to a ſettled ſtate, is due to Henry II. Yet there is ſufficient evidence, that courts were held, occaſionally at leaſt, by itinerant judges in more antient times. Madox Exchcq. 86. ſeq.

" ISTI

"ISTI ſunt juſticiæ in curia regis conſtituti ad audiendum "clamores populi."

THIS prince did theſe three notable things, viz.

FIRST, by this means he improved and perfected the laws of England, and doubtleſs transferred over many of the Engliſh laws into Normandy; which, as before is obſerved, cauſed that great ſuitableneſs between their laws and ours. So that the ſimilitude did ariſe, much more by a CONFORMATION of their laws to thoſe of England, than by any conformation of the Engliſh laws to theirs; eſpecially in the reigns of king Henry II. and his two ſons, king Richard, and king John, both of whom were alſo dukes of Normandy.

SECONDLY, he checked the pride and inſolence of the pope and the clergy, by thoſe conſtitutions made in a parliament at Clarendon, whereby he reſtrained the exorbitant power of the eccleſiaſtics, and the exemption they claimed from ſecular juriſdiction. And,

THIRDLY, he ſubdued and conquered Ireland, and added it to the crown of England; which conqueſt was begun by Richard earl of Stigule, or Strongbow, 14 H. 2. but was perfected by the king himſelf, in the ſeventeenth year of his reign; and, for the greater ſolemnity of the buſineſs, was ratified by the FEALTIES of the biſhops and nobles of Ireland, and by a bull of confirmation from pope Alexander; who was willing to intereſt himſelf in that buſineſs, to ingratiate himſelf with the king, and to gain a pretence for that ARROGANT USURPATION, of diſpoſing of temporal dominions.

dominions. *Vide* Hoveden, *anno* 14 *H.* 2. and the Ninth Chapter of this Hiſtory (*t*).

RICHARD I. eldeſt ſon of king Henry II. ſucceeded his father. I have ſeen little of record, touching the juridical proceedings, either of him or his ſaid father, other than what occurs in the PIPE-ROLLS in the exchequer; which both in the time of Henry II. Richard I. and king John, and all the ſucceeding kings, are fairly preſerved. And the beſt remembrances that we have of this king's reign in relation to the law, are what Roger Hoveden's Annals have delivered down to us, viz.

(*t*) To the "three notable things" which ſir Matthew Hale has thought proper to notice, it may not be improper to add, that Henry introduced and eſtabliſhed the grand aſſize, or trial by a ſpecial kind of jury, in a writ of right, at the option of the tenant or defendant, inſtead of the barbarous and Norman trial by battle. Blac. Com. 4 v. 422. All advances towards reaſon and good ſenſe are ſlow and gradual.--Henry, though ſenſible of the great abſurdity attending the trial by duel or battle, did not venture to aboliſh it: he only admitted either of the parties to challenge a trial by an aſſize or a jury of twelve freeholders. Glanv. lib. 2. cap. 7.—This latter method of trial ſeems to have been very antient in England, and moſt probably was fixed by the laws of Alfred: but the barbarous and violent genius of the age had of late given more credit to the trial by battle, which had become the general method of deciding all important controverſies. It was never aboliſhed by law, in England: and there is an inſtance of it ſo late as the reign of Elizabeth. Vide Dyer's Rep. fo. 301. pl. 40. But the inſtitution revived by this king, being found more reaſonable and more ſuitable to a civilized people, gradually prevailed over it. To the reign of Henry II. muſt alſo be referred the introduction of eſcuage, or pecuniary commutation for perſonal military ſervice, which in proceſs of time was the parent of the ancient ſubſidies granted to the crown by parliament, and the land tax of later times. Blac. Com. 4 v. 423. See Madox, 435, 436, 437, 438. Tyrrel, vol. ii. 466. from the records.

FIRST,

FIRST, he inſtituted a body of naval laws in his return from the Holy Land, in the iſland of Oleron, which are yet extant, with ſome additions. *De quibus vide* Mr. Selden's *Mare Clauſum, lib.* 2. *cap.* 24. I ſuppoſe they are the ſame which are attributed to him by Matt. Paris, anno 1196. And he conſtituted juſtices to put them in execution *(u)*.

SECONDLY, he obſerved the ſame method of diſtributing juſtice as his father had begun, by juſtices itinerant *per ſingulos Angliæ comitatus*; to whom he delivered two kinds of extracts or articles of inquiry, viz. *capitula coronæ*, much reformed and augmented from what they were before, and *capitula de Judæis*. The whole may be read in Hoveden, fo. 423. *ſub anno* 5 *R.* 1. and by thoſe articles it appears, that at that time there was a ſettled court for the common pleas, as well as for the king's bench. Though it ſeems that pleas of LAND were then INDIFFERENTLY held in either; as appears by the firſt and ſecond articles thereof, where we have,—"placita per breve domini regis, "vel per breve capitalis juſticiæ, vel à capitali curiâ regis "coram eis (juſticiis) miſſa:" the former whereof ſeems to

(u) The laws of Oleron concerning naval affairs, are the only ſpecimen of the legiſlative capacity of this brave and magnanimous prince. They were made at the iſle of Oleron, off the coaſt of France, where his fleet rendezvouſed in their paſſage to the Holy Land. Theſe laws were deſigned for the keeping of order, and for the determination of controverſies abroad; and they were framed with ſuch wiſdom, that they have been adopted by other nations as well as England. "I think," ſays Dr. Sullivan, "to this time we "may, with probability enough, "refer the origin of the admi-"ralty juriſdiction." Sulliv. Lect. 331. Blac. Com. 4 v. 423. But ſee Dr. Henry's Hiſt. 3 v. 533.—Theſe laws, which are forty-ſeven in number, are evidently very antient, and no leſs prudent, humane and juſt. Many of them, from a change of manners and circumſtances, have been long obſolete.

be

be the common pleas, which held pleas by original writ, which writ was under the king's *teste* when he was in England. But when he was beyond the seas, it was under the *teste* of the *justiciarius Angliæ*, as the *custos regni* in the king's absence (*v*).

THE power which the justices itinerant had to hold pleas in writs of right, or the grand assize, was sometimes limited—as here by the *articuli coronæ* under Henry II.—to half a knight's fee, or under. For here, in these articles it is, "de "magnis assisis quæ sunt de centum solidis & infra." But in the next commissions, instructions, or *capitula coronæ*, it is, "de magnis assisis usque ad decem libratas terræ & "infra."

IN his eighth year, he established a common rule for weights and measures throughout England, called *assisa de mensuris*; wherein we find the measure of woollen cloths was then the same with that of *Magna Charta*, 9 H. 3. viz. "*de duobus ulnis infra lisuras (w)*."

IN the year before his death, the like justices errant went through many counties of England, to whom articles, or *capitula placitorum coronæ*, not much unlike the former, were delivered. *Vide* Hoveden, *sub anno* 1198. fo. 445.

AND in the same year he issued commissions in the Trent, Hugh de Neville being chief justice; and to those were

(*v*) Vide note [C] on this chapter.

(*w*) He established by law one weight and measure throughout his kingdom. Mat. Paris, 109. 134. Trivet, 127. Ann. Waverl. 165. Hoved. 774. An useful institution, which the mercenary disposition and necessities of his successor engaged him to dispense with for money.

also

alſo delivered articles of inquiry, commonly called *aſſiſæ de foreſtâ*, which may be read at large in Hoveden, *ſub eodem anno*. Theſe gave great diſcontent to the kingdom, for both the laws of the foreſt and their execution were rigorous and grievous (*x*).

KING John ſucceeded his ſaid brother, both in the kingdom of England, and duchy of Normandy. The evidence that we have, touching the progreſs of the laws of his time, are principally three, viz. Firſt, his charters of liberties. Secondly, the records of pleadings and proceedings in his courts. Thirdly, the courſe he took for ſettling the Engliſh laws in Ireland.

1. TOUCHING the firſt of theſe, his charters of the liberties of England, and of the foreſt, were hardly and with difficulty gained by his baronage, at Stanes, *anno Dom.* 1215. The collection of the former was, as Matt. Paris tells us, upon the view of the charter or law of king Henry I. which he ſays, contained "quaſdam libertates & leges à rege Edvardo Sancto, eccleſiæ & magnatibus conceſſas, exceptis "quibuſdam libertatibus quas idem rex de ſuo adjecit;" and that thereupon the baronage fell into a reſolution to have

(*x*) Mr. Juſtice Blackſtone, ſpeaking of Richard I. ſays he was "a ſportſman as well as a "ſoldier, and therefore enforced "the foreſt laws with ſome ri"gour, which occaſioned many "diſcontents among his people: "though (according to Mat"thew Paris) he REPEALED "the penalties of caſtration, loſs "of eyes, and cutting off the "hands and feet, before inflicted "on ſuch as tranſgreſſed in "hunting; probably finding that "their ſeverity prevented pro"ſecutions."—Blac. Com. 4 v. 423.—Mr. Hume ſays, that Richard RENEWED the ſevere laws againſt traanſgreſſors in his foreſts, whom he puniſhed by caſtration, and putting out their eyes, as in the reign of his great-grandfather. Hiſt. Eng. 2 v. oct. 38.

thoſe laws granted by king John. But as it is certain, that the laws added by king Henry I. to thoſe of the Confeſſor, were many more, and much differing from his; ſo the laws contained in the Great Charter of king John, differed much from thoſe of king Henry I. Neither are we to think, that the charter of king John contained ALL the laws of England; but only, or principally, ſuch as were of A MORE COMPREHENSIVE NATURE, and concerned the common rights and liberties of the church, baronage, and commonalty; which were of the greateſt moment, and had been moſt invaded by king John's father and brother [D].

THE

[D] In the time of John, the rigours of the feodal ſyſtem and the foreſt laws were ſo warmly maintained, that they occaſioned many inſurrections. At length, however, the confederated barons and the king agreed on a conference, which was appointed to be held at Runnemede, between Windſor and Staines; a place which has ever ſince been extremely celebrated on account of this great event. The two parties encamped apart, like open enemies; and after a debate of a few days, the king, with a facility which was ſomewhat ſuſpicious, ſigned and ſealed the charter which was required of him. The vices, the follies, and the loſſes of John, not only conſtrained and encouraged his ſubjects to demand, but enabled them to obtain, this great palladium of Engliſh liberty. This famous *capitularium*, commonly called the Great Charter, either granted or ſecured very important liberties and privileges to every order of men in the kingdom.

It confirmed many liberties of the Church, and redreſſed many grievances incident to feodal tenures, of no ſmall moment at the time; though now, unleſs conſidered attentively and with this retroſpect, they ſeem but of trifling concern. But, beſides theſe feodal proviſions, care was alſo taken therein to protect the ſubject againſt other oppreſſions, then frequently ariſing from unreaſonable amercements, from illegal diſtreſs or other proceſs for debts or ſervices due to the crown, and from the tyrannical abuſe of the prerogative of purveyance and pre-emption. It fixed the forfeiture of lands for felony in the ſame manner as it ſtill remains; prohibited for the future the grants of excluſive fiſheries, and the erection of new bridges ſo as to oppreſs the neighbourhood. With reſpect to private rights; it eſtabliſhed the teſtamentary power of the ſubject over part of his perſonal

THE Leſſer Charter, or *de Foreſtâ*, was to reform the exceſſes and encroachments which had been made, eſpecially in

ſonal eſtate, the reſt being diſtributed among his wife and children; it laid down the law of dower, as it hath continued ever ſince; and prohibited the appeals of women, unleſs for the death of their huſbands. In matters of public police and national concern; it injoined an uniformity of weights and meaſures; gave new encouragements to commerce, by the protection of merchant ſtrangers; and forbade the alienation of lands in mortmain. With regard to the adminiſtration of juſtice; beſides prohibiting all denials or delays of it, it fixed the court of common pleas at Weſtminſter, that the ſuitors might no longer be harraſſed with following the king's perſon in all his progreſſes; and at the ſame time brought the trial of iſſues home to the very doors of the freeholders, by directing aſſizes to be taken in the proper counties, and eſtabliſhing annual circuits: it alſo corrected ſome abuſes then incident to the trials by wager of law and of battle; directed the regular awarding of inqueſts for life or member; prohibited the king's inferior miniſters from holding pleas of the crown, or trying any criminal charge, whereby many forfeitures might otherwiſe have unjuſtly accrued to the exchequer; and regulated the time and place of holding the inferior tribunals of juſtice, the county court, ſheriff's tourn, and court leet. It confirmed and eſtabliſhed the liberties of the city of London, and all other cities, boroughs, towns, and ports of the kingdom. And, laſtly, (which alone would have merited the title that it bears, of the Great Charter) it protected every individual of the nation in the free enjoyment of his life, his liberty, and his property, unleſs declared to be forfeited by the judgment of his peers or the law of the land (*a*). See Blackſtone's tract, which is an excellent edition of the Great Charter, with an introductory hiſtorical diſcourſe. To inſure the obſervance of the Great Charter, John allowed the barons to chuſe five-and-twenty members from their own body, as conſervators of the public liberties. If any complaint was made of a violation of the charter, any four of theſe barons might admoniſh the king to redreſs the grievance; and if ſatisfaction was not obtained, they could aſſemble the whole council of twenty-five; who, in conjunction with the great council, were empowered to compel him. All men throughout the kingdom were bound to ſwear obedience to the five-and-twenty barons; and the

(*a*) Blac. Com. 4 v. 425.

freeholders

the time of Richard I. and Henry II. who had made new afforeſtations, and much extended the rigour of the foreſt laws. And both theſe charters do, in ſubſtance, agree with that *Magna Charta, et de Foreſtâ*, granted and confirmed 9 Hen. 3.—I ſhall not need to recite them, or to make any collections or inferences from them. They are both extant in the Red Book of the exchequer, and in Matt. Paris, *ſub anno* 1215. The record and the hiſtorian do *verbatim* agree.

As to the ſecond evidence we have of the progreſs of the laws in king John's time; they are the records of pleadings and proceedings which are ſtill extant. But although this king endeavoured to bring the law, and the pleadings and proceedings thereof, to ſome better order than he found it, yet for ſaving his profits thereof he was very ſtudious; and for the better reduction of it into order and method, we find frequently, in the records of his time, fines impoſed *pro ſtultiloquio*; which were no other than mulcts impoſed by the court for barbarous and diſorderly pleading:

freeholders of each county were to chuſe twelve knights, who were to make report of ſuch evil cuſtoms as required redreſs, conformable to the tenor of the Great Charter (*d*).

Thoſe men were, by this convention, really inveſted with the ſovereignty of the kingdom; were rendered co-ordinate with the king, or rather ſuperior to him, in the exerciſe of the executive power; and as there was no circumſtance of government, which, either directly or indirectly, might not bear a relation to the ſecurity or obſervance of the Great Charter, there could ſcarce occur any incident in which they might not lawfully interpoſe their authority (*e*). HUME.

(*d*) Mat. Paris, 181. This ſeems a certain proof that the houſe of commons was not then in being; otherwiſe the knights and burgeſſes from the ſeveral counties could have given in to the lords a liſt of the grievances, without any new election.

(*e*) Dr. Henry's Hiſt. 3 v. 182, 369 to 385.

from

from whence afterwards that common fine aroſe *pro pulchrè placitando*, which was indeed no other than a fine for want of it. And yet, for all this, the proceedings in his courts were rude, imperfect, and defective, to what they were in the enſuing times of Edward I. &c. But ſome few obſervables I ſhall take notice of, upon the peruſal of the judicial records of the time of king John, viz.

FIRST, that the courts of king's bench and common pleas were THEN DISTINCT COURTS, and diſtinctly held from the beginning to the end of king John's reign (*y*).

SECONDLY, that as yet, neither one, nor both, of thoſe courts diſpatched the buſineſs of the kingdom; but a great part thereof was diſpatched by the juſtices itinerant, which were ſometimes in uſe, but not without their intermiſſions. And much of the publick buſineſs was diſpatched in the county courts, and in other inferior courts. And ſo it continued, though with a gradual decreaſe, till the end of king Edward I. and for ſome time after. Hence it was, that in thoſe elder times, the profits of thoſe county courts aroſe, for which the ſheriff anſwered in his farm, *de proficuis comitatûs*. Alſo fines were levied there, and poſt fines, and fines *pro licentiâ concordandi*, and great fines there anſwered. Fines *pro inquiſitionibus habendi*, fines for miſdemeanors, though called amerciaments, aroſe to great ſums, as will appear to any who ſhall peruſe the ancient viſcontiels.

BUT, as I ſaid before, the buſineſs of inferior courts grew gradually leſs and leſs; conſequently their profits and bu-

(*y*) Vide note [C] on this chapter.

ſineſs of any moment came to the great courts, where they were diſpatched with greater juſtice and equality. Beſides, the greater courts, obſerving what partiality and brocage was uſed in the inferior courts, gave a pretty quick ear to writs of falſe judgment; which was the appeal the law allowed from erroneous judgments in the county courts (z). And this, by degrees, waſted the credit and buſineſs of thoſe inferior courts.

THIRDLY, that the diſtinction between the king's bench and common bench, as to the point of *communia placita*, was not YET, nor for ſome time after, ſettled. Hence it is, that frequently in the time of king John, we ſhall find that common pleas were held in *B. R.*—Yea, in Mich. & Hill. 13 *Johannis*, a fine was levied *coram ipſo rege*, between Gilbert Fitz Roger and Helwiſe his wife, plaintiffs, and Robert Barpyard, tenant of certain lands in Kirby, &c (*a*).

AND again; whereas there was frequently a liberty granted anciently by the kings of England, and allowed, "*quod non* "*implacitetur niſi coram rege*," I find *inter placita de diverſis Terminis ſecundo Johannis*, that upon a ſuit between Henry de Rochala and the abbot of Leiceſter, before the juſtices *de banco*, the abbot pleaded the charter of king Richard I. "quod idem abbas pro nullo reſpondeat niſi coram ipſo "rege vel capitali juſtitiario ſuo." And it is ruled againſt the abbot, "quia omnia placita quæ coram juſtic. de banco te-

(z) A writ of falſe judgment lies whenever a falſe judgment is given in an inferior court NOT of record. F. N. B. 17. Mcor 73.

(*a*) See note [C] on this chapter. Barr. Obſ. on Stat. 10, 11. and Sulliv. Lect. 312. ſeq.

"nentur,

" nentur, coram domino regi vel ejus capitali juſtitiario te-
" neri intelliguntur." But this point was afterwards ſettled by the ſtatute of *Magna Charta* (*b*), " quod communia pla-
" cita non ſequantur curiam noſtram."

FOURTHLY, that the four Terms were then held according as was uſed in after-times, with little variance, and had the ſame denominations they ſtill retain.

FIFTHLY, that there were oftentimes conſiderable ſums of money, or horſes, or other things, given to obtain juſtice. Sometimes it is ſaid to be *pro habendâ inquiſitione, ut ſupra.* And *inter placita incerti temporis regis Johannis*, the men of Yarmouth againſt the men of Haſtings and Winchelſea, " afferunt domino regi tres palfridos & ſex aſturias
" narenſes ad inquiſitionem habendam per legales, &c." And frequently the ſame was done, and often accounted for in the PIPE-ROLLS under the name of OBLATA. To remedy this abuſe, was the proviſion made in king John's and king Henry the Third's charters, " NULLI VENDEMUS JUSTITIAM VEL
" RECTUM (*c*)." But yet fines upon originals, being certain, have continued to this day, notwithſtanding that proviſion; but thoſe enormous *oblata* before mentioned, are thereby remedied and taken away [E].

S 4 SIXTHLY,

(*b*) Cap. 11. (*c*) Barring. on Stat. 22. Mag. Car. cap. 29.

[E] Fines, amerciaments, and OBLATAS, as they were called, were a conſiderable branch of the royal power and revenue. The antient records of the exchequer, which are ſtill preſerved, give ſurprizing accounts of the numerous fines and amerciaments levied in thoſe days (*a*), and of the ſtrange inventions fallen upon to exact money from the ſubject. It appears, that the old kings of England put themſelves entirely on the footing of the barbarous

(*a*) Madox's Hiſt. Exch. 272.

caſtern

SIXTHLY, that in all the time of king John, the purgation *per ignem & aquam*, or the trial by ORDEAL, continued: as

eaſtern princes, whom no man muſt approach without a preſent, who ſell all their good offices, and intrude themſelves into every buſineſs, that they may have a pretence of extorting money. Even juſtice was avowedly bought and ſold; the king's court itſelf, though the ſupreme judicature of the kingdom, was open to none that brought not large preſents to the king; the bribes given for the expedition, delay (*b*), ſuſpenſion, and, doubtleſs, for the perverſion of juſtice, were entered in the public regiſters of the royal revenue, and remain as monuments of the perpetual iniquity and tyranny of the times. The barons of the exchequer, for inſtance, the firſt nobility of the kingdom, were not aſhamed to inſert, as an article in their records, that the county of Norfolk paid a ſum, that they might be fairly dealt with (*c*); the borough of Yarmouth, that the king's charters, which they have for their liberties, might not be violated (*d*); Richard, ſon of Gilbert, for the king's helping him to recover his debt from the Jews (*e*); Serlo, ſon of Terlavaſton, that he might be permitted to make his defence, in caſe he was accuſed of a certain homicide (*f*); Walter de Burton for free law, if accuſed of wounding another (*g*); Robert de Eſſart for having an inqueſt to find whether Roger the butcher, and Wace and Humphry, accuſed him of robbery and theft out of envy and ill-will or not (*h*); William Buhuſt for having an inqueſt to find whether he was accuſed of the death of one Godwin out of ill-will or for juſt cauſe (*i*). Theſe few inſtances are ſelected from a great number of the like kind, which Madox ſelected from a ſtill greater number, preſerved in the antient rolls of the exchequer (*k*).

Sometimes the party litigant proffered the king a certain portion, a half, a third, a fourth; payable out of the debts, which he, as the executor of juſtice, ſhould aſſiſt him in recovering (*l*). Theophania de Weſtland agreed to pay the half of 212 marks, that ſhe might recover that ſum againſt James de Fugleſton (*m*); Solomon the Jew engaged to pay one mark out of every ſeven that he ſhould recover againſt Hugh de la Hoſe (*n*); Nicholas Morrel promiſed to

(*b*) Id. 274, 309.
(*c*) Id. 295.
(*d*) Id. ibid.
(*e*) Madox's Hiſt. Exchcq. 296. He paid two hundred marks, a great ſum in thoſe days.
(*f*) Id. 296.
(*g*) Id. ibid.
(*h*) Id. 298.
(*i*) Id. 302.
(*k*) Chap. 12.
(*l*) Id. 311.
(*m*) Id. ibid.
(*n*) Id. 79. 312.

pay

as appears by frequent entries upon the rolls *(d)*. But it ſeems to have ended with this king, for I do not find it in uſe in any time after. Perchance the barbarouſneſs of the trial, and perſuaſions of the clergy, prevailed at length to antiquate it, for many canons had been made againſt it [F].

SEVENTHLY,

pay ſixty pound, that the earl of Flanders might be diſtrained to pay him three hundred and forty-three pound, which the earl had taken from him; and this was to be paid out of the firſt money that Nicholas ſhould recover of the earl (*o*). There were no profits ſo ſmall as to be below the king's attention—his protection and good offices, of every kind, were bought and ſold.

(*d*) Barring. on Stat. 296. Blac. Com. 4 v. 425.

[F] Our anceſtors, as an infallible method of diſcovering truth, and of guarding againſt deception, appealed to heaven, and referred every point in diſpute, to be determined, as they imagined, by the deciſions of unerring wiſdom and impartial juſtice. The perſon accuſed, in order to prove his innocence, ſubmitted, in ſome caſes, to trial, by plunging his arm in boiling water; by lifting a red-hot iron with his naked hand; by walking barefoot over burning ploughſhares; or by other experiments equally perilous and formidable. On other occaſions, he challenged his accuſer to fight him in ſingle combat. All theſe various forms of trial were conducted with many devout ceremonies; the miniſters of religion were employed, the Almighty was called upon to interpoſe, for the manifeſtation of guilt, and for the protection of innocence; and whoever eſcaped unhurt, or came off victorious, was pronounced to be acquitted by the judgment of God (*a*).

Among all the whimſical and abſurd inſtitutions which owe their exiſtence to the weakneſs of human reaſon, this, which ſubmitted queſtions that affected the property, the reputation, and the lives of men, to the determination of chance, or of bodily ſtrength and addreſs, appears to be the moſt extravagant and prepoſterous. There were circumſtances, however, which led the nations of Europe to conſider this equivocal mode of deciding any point in conteſt as a direct appeal to heaven, and a certain method of diſcovering its will.

(*o*) Id. 312.
(*a*) Murat. Diſſertatio de judiciis Dei. Antiquit. Italic. vol. iii. p. 612.

As

SEVENTHLY, in this king's time, the deſcent of ſocage as well as knight's ſervice lands to the ELDEST ſon, prevailed in

As men are unable to comprehend the manner in which the Almighty carries on the government of the univerſe, by equal, fixed, and general laws, they are apt to imagine, that in every caſe which their paſſions or intereſt render important in their own eyes, the ſupreme Ruler of all ought viſibly to diſplay his power, in vindicating innocence and puniſhing vice. It requires no inconſiderable degree of ſcience and philoſophy to correct this popular error. But the ſentiments prevalent in Europe during the dark ages, inſtead of correcting, ſtrengthened it. Religion, for ſeveral centuries, conſiſted chiefly in believing the legendary hiſtory of thoſe ſaints whoſe names crowd and diſgrace the Romiſh calendar. The fabulous tales concerning their miracles, had been declared authentic by the bulls of popes, and the decrees of councils; they made the great ſubject of the inſtructions which the clergy offered to the people, and were received by them with implicit credulity and admiration.

By theſe, men were accuſtomed to believe that the eſtabliſhed laws of nature might be violated on the moſt frivolous occaſions, and were taught to look rather for particular and extraordinary acts of power under the divine adminiſtration, than to contemplate the regular progreſs and execution of a general plan. One ſuperſtition prepared the way for another; and whoever believed that the ſupreme Being had interpoſed miraculouſly on thoſe trivial occaſions mentioned in legends, could not but expect his intervention in matters of greater importance, when ſolemnly referred to his deciſion (*b*). The canon law very early declared againſt trial by ordeal, or *vulgaris purgatio*, as being the fabric of the devil, "cum ſit contra præceptum "Domini, non tentabis Dominum Deum tuum." Decret. part 2. cauſ. 2. qu. 5. diſt. 7. Decretal. lib. 3. tit. 50. c. 9. and Spelm. Gloſs. 435. Upon this authority, though the canons themſelves were of no validity in England, it was thought proper to aboliſh this mode of trial entirely in our courts of juſtice, by an act of parliament in 3 Hen. III. according to ſir Edward Coke, 9 Rep. 32. or rather by an order of the king in council. 1 Rym. Fœd. 228. Spelm. Gloſs. 326. 2 Pryn. Rec. Append, 20. Seld. Eadm. fol. 48. A faint mark of improvement in the age.

The moſt common kinds of ordeal uſed in England, were—the judicial combat; the ordeal of the croſs; the ordeal of the corſned; the ordeal of cold water; the ordeal of hot water; the ordeal of

(*b*) Robertſ. Cha. V. 1 v. oct. 59. Blac. Com. l. 4. c. 27.

hot

in all places *(e)*; unleſs there was a ſpecial cuſtom, that the lands were partible *inter maſculos*. And therefore, Mich. *ſecundo Johannis*, in a *rationabili parte bonorum*, by Gilbert Beville againſt William Beville his elder brother, for lands in Gunthorpe, the defendant pleaded, "quod nunquam partita vel partibilia fuere;" and becauſe the defendant could not prove it, judgment was given for the demandant. And by degrees it prevailed ſo, that whereas at this time the averment came on the part of the heir at law, that the land "*nunquam partita vel partibilis extetit*;" in a little time after the averment was turned on the other hand, viz. that though the land was ſocage, yet unleſs he did aver and prove that it was PARTITA ET PARTIBILIS, he failed in his demand.

THIRDLY, the third inſtance of the progreſs of king John's reign, in relation to the common law, was his ſettling the ſame in Ireland, which he made his more immediate and particular buſineſs. But hereof we ſhall add a particular chapter by itſelf *(f)*, when we have ſhewn you what proceedings and progreſs was made therein in the time of Edward I. The many and great troubles that fell upon king John and the whole kingdom, eſpecially towards the latter end of his reign, did much hinder the good effect of ſettling the laws of England, and conſequently the peace thereof; which might have been bottomed, eſpecially upon the Great

(*e*) Vide poſt. cap. 11. paſſim. (*f*) Cap. 9.

hot iron. The modes in which theſe appeals to heaven were performed, are noticed by Dr. Henry in the ſecond volume of his Hiſtory of England (*e*). If we ſuppoſe that few or none eſcaped conviction, who thus expoſed themſelves, we ſhall be very much miſtaken, The whole was a groſs impoſition on the credulity of mankind.

(*e*) Page 303 to 308.

Charter,

charter. But this unfortunate prince and the kingdom were ſo entangled with inteſtine wars, and with the invaſion of the French, who aſſiſted the Engliſh barons againſt their king, and by the advantages and uſurpations that the pope and the clergy made by thoſe diſtempers, that all ended in a confuſion with the king's death (*g*).

I COME therefore to the long and troubleſome reign of Henry III. who was about nine years old at his father's death; he being born *in feſto ſancti Remigii* 1207 (*h*), and king John died *in feſto ſancti Lucæ* 1216. The young king was crowned the 28th of October (*i*), being then in the tenth year of his age, and was under the tutelage of William earl-marſhal (*k*).

THE nobility were quick and earneſt, notwithſtanding his minority, to have the liberties and laws of the kingdom confirmed. Preparatory thereto, in the year 1223, writs iſſued to the ſeveral counties to enquire, by twelve good and lawful knights, "quæ fuerunt libertates in Angliâ tempore regni Henrici avi ſui," returnable *quindena Paſchæ.*

(*g*) It ſhould not be forgotten, that the firſt traces which remain of the ſeparation of the greater barons from the leſs, in the conſtitution of parliaments, are found in the great charter of king John, though omitted in that of Henry III. John, in the ninth year of his reign, firſt gave by charter to the city of London, the right of electing annually a mayor, out of its own body, an office which, till then, had been held for life.

(*h*) Henry III. was born on the firſt of October 1207.

(*i*) He was crowned on the 28th of October 1216. M. Paris, 200. Hiſt. Croyl. Cont. 474. W. Heming. 562. Trivet, 168.

(*k*) The earl of Pembroke;—who, at the time of John's death was mareſchal of England. By his office he was at the head of the armies, and conſequently, during a ſtate of civil wars and convulſions, at the head of the ſtate. It happened fortunately for the young monarch, and for the nation, that the power could not have been intruſted into more able and more faithful hands.

What

What ſucceſs thoſe inquiſitions had, or what returns were made thereof, appears not. But in the year following, the young king ſtanding in need of a ſupply of money from the clergy and laity, none would be granted, unleſs the liberties of the kingdom were confirmed, as they were expreſſed and contained in the two charters of king John; which the king accordingly granted in his parliament at Weſtminſter, and they were accordingly proclaimed, "ita "quod chartæ utrorumque regum in nulla inveniatur diſſi-"miles." MAT. PARIS, *anno* 1224.

IN the year 1227, the king holding his parliament at Oxford, and being now of full age, by ill advice, cauſes the two charters he had formerly granted to be cancelled; "hanc occaſionem prætendens, quod chartæ illæ conceſſæ "fuerunt & libertates ſcriptæ & ſignatæ dum ipſe erat ſub "cuſtodiâ, nec ſui corporis aut ſigilli aliquam poteſtatem ha-"buit, unde viribus carere debuit, &c." Which fact occaſioned a great diſturbance in the kingdom. This inconſtancy in the king was in truth THE FOUNDATION OF ALL HIS FUTURE TROUBLES, and yet was ineffectual to his end and purpoſe; for thoſe charters were NOT avoidable for the king's nonage; and if there could have been any ſuch pretence, that alone would NOT avoid them, for they were laws CONFIRMED IN PARLIAMENT.

BUT the Great Charter, and the Charter of the Foreſt, did not expire ſo; for, in 1253, they were again ſealed and publiſhed. And becauſe, after the battle of Eveſham, the king had wholly ſubdued the barons, and thereby a jealouſy might grow, that he again meant to infringe it, in the parliament of Marlbridge (*l*) they were again con-

(*l*) Cap. 5.

firmed,

firmed. And thus we have the great ſettlement of the laws and liberties of the kingdom eſtabliſhed in this king's time. The charters themſelves are not every word the ſame with thoſe of king John, but they differ very little in ſubſtance.

THIS Great Charter, and *Charta de Foreſtâ*, was the great baſis upon which this ſettlement of the Engliſh laws ſtood, in the time of this king and his ſon. There were alſo ſome additional laws of this king yet extant, which much poliſhed the common law, viz. the ſtatutes of Merton and Marlbridge, and ſome others.

WE have likewiſe two other PRINCIPAL MONUMENTS of the great advance and perfection that the Engliſh laws attained to under this king, viz. the tractate of Bracton, and thoſe records of pleas, as well in both benches as before the juſtices itinerant, the records whereof are ſtill extant.

TOUCHING the former, viz. Bracton's tractate, it yields us a great evidence of the growth of the laws between the times of Henry II. and Henry III. If we do but compare Glanville's book with that of Bracton, we ſhall ſee A VERY GREAT ADVANCE OF THE LAW, in the writings of the latter, over what they are in Glanville. It will be needleſs to inſtance particulars. Some of the writs and proceſſes do indeed in ſubſtance agree, but the proceedings are much more regular and ſettled, as they are in Bracton, above what they are in Glanville. The book itſelf in the beginning ſeems to borrow its method from the civil law. But the greateſt part of the ſubſtance is, either of the courſe of proceedings in the law known to the author; or of reſolutions and deciſions in the courts of king's-bench and common-bench, and

before

before juſtices itinerant; for now the inferior courts began to be of little uſe or eſteem (*m*).

As to the judicial records of the time of this king, they were grown to a much greater degree of perfection, and the pleadings more orderly; many of which are extant. But the great troubles, and the civil wars that happened in his time, gave a great interruption to the legal proceedings of courts. They had a particular commiſſion and judicatory for matters happening in time of war, ſtiled *placita de tempore turbationis*, wherein are many excellent things. They were made principally about the battle of Eveſham, and after it. And for ſettling of the differences of this kingdom, was the *Dictum* or *Edictum de Kenelworth* (*n*) made, which is printed in the old *Magna Charta*.

We have little extant of reſolutions in this king's time, but what are either remembered by Bracton, or ſome few broken and ſcattered Reports collected by Fitzherbert in his Abridgment. There are alſo ſome few ſums, or conſtitutions, relative to the law; which though poſſibly NOT acts of parliament, yet have obtained in uſe as ſuch. As,—"de "diſtrictione ſcaccarii, ſtatutum panis & cereviſiæ, dies com-"munes in banco, ſtatutum Hiberniæ, ſtat. de ſcaccario, ju-"dicium colliſtrigrii," and others (*o*).

We come now to the time of Edward I. who is well ſtiled our ENGLISH JUSTINIAN; for in his time the law, *quaſi per ſaltum*, obtained a very great perfection.

(*m*) It is worthy of remembrance, that towards the end of the reign of this monarch, we find the firſt record of any writ for ſummoning knights, citizens, and burgeſſes to parliament.

(*n*) Vide cap. 1.

(*o*) Barr. on Stat. 39. 46.

THE pleadings are SHORT indeed, but excellently good and PERSPICUOUS. And although for ſome time, ſome of thoſe imperfections and ancient inconvenient rules obtained; as for inſtance, in point of deſcents; where the MIDDLE brother held of the eldeſt, and dying without iſſue, the lands deſcended to the YOUNGEST; upon that old rule in the time of Henry II. "nemo poteſt eſſe dominus & hæres," mentioned in Glanville; at leaſt if he had once received homage, 13 E. 1. Fitz. Avowry 235.; yet the laws did never, in any one age, receive ſo great and ſudden an advancement. Nay, I think I may ſafely ſay, all the ages ſince his time have NOT done ſo much, in reference to the orderly ſettling and eſtabliſhing of the diſtributive juſtice of this kingdom, as he did within a ſhort compaſs of the thirty-five years of his reign; eſpecially about the firſt thirteen years thereof (*p*).

INDEED, many penal ſtatutes and proviſions, in relation to the peace and good government of the kingdom, have been ſince made. But as touching the common adminiſtration of juſtice between party and party, and accommodating of the rules, and of the methods and orders of proceeding, HE DID THE MOST, at leaſt of any king ſince William I.—and left the ſame, as a fixed and ſtable rule and order of proceeding, very little differing from that which we now hold and practiſe; eſpecially as to the ſubſtance and principal contexture thereof.

IT would be the buſineſs of a volume to ſet down all the particulars, and therefore I ſhall only give ſome ſhort obſervations touching the ſame (*q*).

(*p*) Blac. Com. 4 v. 425.

(*q*) Mr. Juſt. Blackſtone has conciſely, but elegantly and ſufficiently enumerated the principal part of theſe regulations, in the fourth volume of his Commentaries, from page 425 to 427 oct.

FIRST,

FIRST, he perfectly ſettled the Great Charter, and *Charta de Foreſtâ*, not only by a practice conſonant to them, in the diſtribution of law and right;—but alſo by that ſolemn act paſſed 25 E. 1. and ſtiled *confirmationes cartarum*.

SECONDLY, he eſtabliſhed and diſtributed the ſeveral juriſdictions of courts within their proper bounds. And becauſe this head has ſeveral branches, I ſhall ſubdivide the ſame, viz.

1. He checked the incroachments and inſolences of the pope and the clergy, by the ſtatute of Carliſle.

2. HE declared the limits and bounds of the eccleſiaſtical juriſdiction, by the ſtatutes of *circumſpecte agatis* & *articuli cleri*. For note, though this latter ſtatute was not publiſhed till Edward II. yet it was COMPILED in the beginning of Edward I.

3. HE eſtabliſhed the limits of the court of common pleas; perfectly performing the direction of *Magna Charta*, "*quod communia placita* NON SEQUANTUR *curia noſtra*," in relation to B. R.; and in expreſs terms extending it to the court of exchequer, by the ſtatute of *articuli ſuper chartas*, cap. 4. It is true, upon my firſt reading of the *placita de banco* of Edward the Firſt, I found very many appeals of death, of rape, and of robbery therein; and therefore I doubted, whether the ſame were not held, at leaſt by writ, in the common pleas court: but, upon better inquiry, I found many of the records before juſtices itinerant were entered, or filled up, among the records of the common pleas; which might occaſion that miſtake.

4. HE eſtabliſhed the extent of the juriſdiction of the ſteward and marſhal. *Vide articuli ſuper chartas*, càp. 3. And,

5. HE alſo ſettled the bounds of inferior courts, not only of counties, hundreds, and courts baron;—which he kept within their proper and narrow bounds, for the reaſons given before; and ſo gradually the common juſtice of the kingdom came to be adminiſtered by men knowing in the laws, and converſant in the great courts of *B. R.* and *C. B.* and before juſtices itinerant;—but alſo, by that excellent ſtatute of Weſtminſter 1. cap. 35. he kept the courts of great men within their limits, under ſeveral penalties; wherein ordinarily very great incroachments and oppreſſions were exerciſed.

THE third general obſervation I make is, he did not only explain, but excellently enforced, *Magna Charta*, by the ſtatute *de tallagio non concedendo*, 34 E. 1.

FOURTHLY, he provided againſt the interruption of the common juſtice of the kingdom, which had too commonly been affected, by mandates under the great ſeal or privy ſeal. This he did by the ſtatute of *articuli ſuper chartas*, cap. 6.—which interruptions, notwithſtanding *Magna Charta*, had formerly been frequent in uſe (*r*).

(*r*) Edward enacted a law to this purpoſe, but it is very doubtful, whether he ever obſerved it. We are ſure tha ſcarce any of his ſucceſſors did. The multitude of theſe letters of protection were a ground of complaint by the commons in 3 Edw. II. See Ryley, 525. This practice is declared illegal by the ſtatute of Northampton, paſſed in the reign of Edward III. but ſtill continued, like many other abuſes. There are inſtances of it ſo late as the reign of Elizabeth.

FIFTHLY,

FIFTHLY, he ſettled the forms, ſolemnities, and efficacies of fines; confining them to the common pleas, and to juſtices itinerant; and appointed the place where they brought the records after their circuits; whereby one common repoſitory might be kept of aſſurances of lands: which he did by the ſtatute *de modo levandi fines*, 18 E. 1.

SIXTHLY, he ſettled that great and orderly method, for the ſafety and preſervation of the peace of the kingdom, and ſuppreſſing of robberies, by the ſtatute of Winton.

SEVENTHLY, he ſettled the method of tenures, to prevent multiplicity of penalties, which grew to a great inconvenience; and remedied it by the ſtatute of *quia emptores terrarum*, 18 E. 1.

EIGHTHLY, he ſettled a ſpeedier way for recovery of debts, not only for merchants and tradeſmen, by the ſtatutes of Acton Burnel and *de mercatoribus*, but alſo for other perſons, by granting an execution for a moiety of the lands, by *elegit*.

NINTHLY, he made effectual proviſion for recovery of advowſons and preſentations to churches, which was before infinitely lame and defective, by ſtatute Weſtminſter 2. cap. 1.

TENTHLY, he made that GREAT ALTERATION in eſtates, from what they were formerly, by ſtatute Weſtminſter 2. cap. 1. whereby eſtates of fee-ſimple, CONDITIONAL AT COMMON LAW, were turned into ESTATES-TAIL, not removeable from the iſſue by the ordinary methods of alienation.

tion (s). Upon this ſtatute, and for the qualifications hereof, are the ſuperſtructures built of 4 H. 7. cap. 32. 32 H. 8. and 33 H. 8.

ELEVENTHLY, he introduced quite a new method, both in the laws of Wales, and in the method of their diſpenſation, by the ſtatute of Rutland (t).

TWELFTHLY, in brief, partly by the learning and experience of his judges, and partly by his own wiſe interpoſition, he ſilently and without noiſe, abrogated many ill and inconvenient uſages, both in his courts of juſtice, and in the country. He rectified and ſet in order the method of collecting his revenue in the exchequer, and removed ob-

(s) By this ſtatute Edward ESTABLISHED a new limitation of property, concerning the good policy of which modern times have, however, entertained a very different opinion. Blac. Com. 4 v. 427. Barring. on Stat. 112. The chief obſtruction to the execution of juſtice in thoſe times was the power of the great barons; and Edward was perfectly qualified, by his character and abilities, to keep thoſe tyrants in awe, and to reſtrain their illegal practices. This ſalutary purpoſe was accordingly the great object of his attention; yet he was imprudently led into a meaſure which tended very much to encreaſe and confirm their exorbitant authority. He paſſed the ſtatute of Weſtminſter, which by allowing them to entail their eſtates, made it impracticable to diminiſh the property of the great families, and of conſequence left them every mean of increaſe and acquiſition.

By the words of the ſtatute *de donis*, a perpetuity was created, and the donee was reſtrained either from alienation or forfeiture. In a ſhort time it was manifeſt that this reſtriction was not only inconſiſtent with the reaſons of the common law, but repugnant to every idea of ſound policy. The great, however, were unwilling to make any parliamentary alteration in the law, and therefore the judges, in the time of Edward IV. encouraged the fineſſe of a COMMON RECOVERY, in order to bar the entail; the judges conceiving the caſe of a common recovery not to be within the operation of the ſtatute. Another wound given to theſe perpetuities was, by the ſtatute 4 *H. VII.* cap. 24. which made a fine with proclamations a bar to the iſſue in tail, and ſo repealed that clauſe of the ſtatute *de donis*, *quod finis ipſo jure ſit nullus*. See note [C] on cap. 5.

(t) See poſt. cap. 9.

folete

ſolete and illeviable parts thereof out of charge. And by the ſtatutes of Weſtminſter 1. and Weſtminſter 2. Glouceſter, and Weſtminſter 3. and of *articuli ſuper chartas*, he did remove ALMOST ALL that was either grievous or impractical, out of the law, and the courſe of its adminiſtration; and ſubſtituted ſuch apt, ſhort, pithy, and effectual remedies and proviſions, as by the length of time, and the experience had of their convenience, have ſtood ever ſince, without any great alteration; and are now as it were incorporated into, and become a part of the common law itſelf.

UPON the whole matter, it appears, that the very ſcheme, mould and model of the common law, eſpecially in relation to the adminiſtration of common juſtice between party and party, as it was highly rectified and ſet in a much better light and order by this king, than his predeceſſors left it to him; ſo in a very great meaſure it has continued the ſame, in all ſucceeding ages, to this day (*t*). So that the mark, or epocha, we are to take for the true ſtating of the law of England, WHAT IT IS, is to be conſidered, ſtated, and eſtimated, from what it was when this king LEFT it. Before his time, it was in a great meaſure, rude and unpoliſhed, in compariſon of what it was, after his reduction thereof. And on the other ſide, as it was thus poliſhed and ordered by him, ſo has it ſtood hitherto, without any great or conſiderable alteration; abating ſome few additions and alterations which ſucceeding times have made, which for the moſt part are in the ſubject matter of the laws themſelves,

(*t*) Blac. Com. 4 v. 427. There cannot be a better proof of the excellence of Edward's conſtitutions, than that from his time to that of Henry VIII. there happened very few, and thoſe not very conſiderable alterations in the legal forms of proceedings.

and not so much in the rules, methods, or ways of its administration.

As I before observed some of those many great accessions to the perfection of the law under this king, so I shall now observe some of those boxes or repositories where they may be found; which are of the following kinds, viz.

FIRST, the acts of parliament in the time of this king; which are full of excellent wisdom and perspicuity, yet brevity. But of this, enough before is said.

SECONDLY, the judicial records in the time of this king. I shall not mention those of the chancery, the close-patent and charter-rolls, which yet will very much evidence the learning and judgment of that time: but I shall mention the rolls of judicial proceedings, especially those in the king's-bench and common-pleas, and in the eyres. I have read over many of them, and do generally observe,

1. THAT they are written in an excellent hand,

2. THAT the pleading is VERY SHORT, but VERY CLEAR AND PERSPICUOUS; neither loose or uncertain, nor perplexing the matter either with impropriety, obscurity, or multiplicity of words. They are clearly and orderly digested, effectually representing the business that they intend (*a*).

(*a*) "It is worthy of observation, (says sir Edward Cok-) that in the reigns of Edward the Second, Edward the First, and upwards, the pleadings were plain and sensible, but nothing curious; evermore having chief respect to the MATTER, and not to forms of words. But even in those days, the forms of the Register of original writs were then punctually observed, and matters in law excellently debated and resolved." 1 Inst. 304. a.

3. THAT

3. THAT the title and the reaſon of the law upon which they proceed, (which many times is expreſsly delivered upon the record itſelf) is perſpicuous, clear, and rational. So that their SHORT AND PITHY PLEADINGS AND JUDGMENTS do far better render the ſenſe of the buſineſs, and the reaſons thereof, than thoſe long, intricate, perplexed, and formal pleadings, that oftentimes, of late, are UNNECESSARILY uſed.

THIRDLY, the reports of the terms and years of this king's time, a few broken caſes whereof are in Fitzherbert's Abridgment. But we have no ſucceſſive terms or years thereof, but only ancient manuſcripts, perchance, not running through the whloe time of this king. Yet they are VERY GOOD, but VERY BRIEF. Either the judges then ſpoke leſs, or the reporters were not ſo ready-handed as to take all they ſaid. Hence this brevity makes them the more obſcure. But yet in thoſe brief interlocutions between the judge and the pleaders, and in their definitions, there appears A GREAT DEAL OF LEARNING AND JUDGMENT. Some of theſe reports, though broken, yet the beſt of their kind, are in Lincoln's-Inn library.

FOURTHLY, the tracts written or collected in the time of this wiſe and excellent prince: which ſeem to be of two kinds, viz. ſuch as were only the tractates of private men, and therefore had no greater authority than private collections, yet contain much of the law then in uſe; as Fleta, the Mirror, Britton, and Thornton: or elſe, ſecondly, they were ſums, or abſtracts, of ſome particular parts of the law; as, *Novæ Narrationes*, Hengham *Magna et Parva*, *Cadit Aſſiſa ſumma*, *De Baſtardia ſummâ*: by all which, compared even with Bracton, there appears a growth

and a perfecting of the law into a greater regularity and order (*x*).

And thus much ſhall ſerve for the ſeveral periods, or growth, of the common law, until the time of Edward I. incluſively. Wherein having been ſomewhat prolix, I ſhall be the briefer in what follows; eſpecially ſeeing that from this time downwards, the books and reports printed, give a full account of the enſuing progreſs of the law.

(*x*) The chief advantage which the people of England reaped, and ſtill continue to reap, from the reign of this great prince, was the correction, extenſion, amendment, and eſtabliſhment of the laws, which Edward maintained in great vigour, and left much improved to poſterity; for the work of wiſe legiſlators commonly remain, while the acquiſitions of conquerors often periſh with them. This merit has juſtly gained to Edward the appellation of the Engliſh JUSTINIAN. Not only the numerous ſtatutes paſſed in his reign, touch the chief points of juriſprudence, and, according to ſir Edward Coke (*a*), truly deſerve the name of eſtabliſhments, becauſe they were more conſtant, ſtanding, and durable laws than any made ſince; but the regular order of his adminiſtration gave an opportunity to the common law to refine itſelf, and brought the judges to a certainty in their determinations, and the lawyers to a preciſion in their pleadings,

(*a*) 2 Inſt. 156.

CHAP.

CHAP. VIII.

A brief continuation of the progreſs of the laws, from the time of king Edward II. *incluſive, down to theſe times.*

HAVING in the former chapter been ſomewhat large in diſcourſing of the progreſs of the laws, and the incidental additions they received, in the ſeveral reigns of king William II. king Henry I. king Stephen, king Henry II. king Richard I. king John, king Henry III. and king Edward I.—I ſhall now proceed to give a brief account of the progreſs thereof, in the time of Edward II. and the ſucceeding reigns, down to theſe times.

EDWARD II. ſucceeded his father. Though he was an unfortunate prince, and by reaſon of the troubles and unevenneſs of his reign, the very law itſelf had many interruptions, yet it held its current, in a great meaſure, according to that frame and ſtate that his father had left it in.

BESIDES the records of judicial proceedings in his time, many whereof are ſtill extant, there were ſome other things that occurred in his reign, which give us ſome kind of indication of the ſtate and condition of the law during that reign. As,

FIRST, the ſtatutes made in his time, eſpecially that of 17 E. 2. ſtiled DE PREROGATIVA REGIS; which though it be called a ſtatute, yet for the moſt part is but a ſum, or collection, of certain of the king's prerogatives that were known

known law, long before. As for inſtance, the king's wardſhip of lands IN CAPITE attracting the wardſhip of lands held of others; the king's grant of a manor not carrying an advowſon appendant unleſs named; the king's title to the eſcheat of the lands of the Normans, which was in uſe from the firſt defection of Normandy under king John;- the king's title to wreck, royal fiſh, treaſure trove, and many others; all of which were ancient prerogatives to the crown (*a*).

SECONDLY, the reports of the years and terms of this king's reign. Theſe are not printed in any one entire volume, or in any ſeries or order of time; only ſome BROKEN CASES thereof in Fitzherbert's Abridgment, and in ſome other books diſperſedly. Yet there are many entire copies thereof abroad, very excellently reported; wherein are many reſolutions agreeing with thoſe of Edward the Firſt's time. The beſt copy of theſe reports that I know now extant, is that in Lincoln's-Inn library, which gives a fair ſpecimen of the learning of the pleaders and judges of that time (*b*).

KING

(*a*) Vide Barring. on Stat. 179. ſeq.

(*b*) See the firſt volume of the Year-Books, edit. 1678. intituled, "Les reports des caſes argue & adjudge in le temps del' roy Edward le ſecond. Solonq; les ancient manuſcripts ore remanent en les maines de ſir Jehan' Maynard chevaler, ſerjeant de la ley a ſa tres excellent majeſty le roy Charles le ſecond."—This is the old book of reports "of the years and terms" of Edward the Second, to which Hale alludes: and it is probable that theſe reports were firſt publiſhed in conſequence of his recommendation, in the caſe of Sacheverell and Frogatt, Mich. 23. Car. II. reported in 2 Saund. 367. 1. Vent. 148. 161. 2 Keb. 798. 819. 833. 839. T. Raym. 213. Mr. Selden, to whom knowledge of this kind was perfectly familiar, ſays the compiler of theſe reports was one Richard de Winchedon, who lived in the reign of Edward II.—There is ſome ſmall variation in the copies

KING EDWARD III. succeeded his father. His reign was long; and UNDER IT THE LAW WAS IMPROVED TO THE GREATEST HEIGHT. The judges and pleaders were very learned, and the pleadings are somewhat more polished than those in the time of Edward I.—Yet they have neither UNCERTAINTY, PROLIXITY, NOR OBSCURITY. They were PLAIN AND SKILFUL; and in the rules of law, especially in relation to real actions, and titles of inheritance, VERY LEARNED AND EXCELLENTLY POLISHED, and exceeded those of the time of Edward I.: so that at the latter end of this king's reign the law seemed to be near its meridian (c).

THE

pies. Seld. Differt. Fict. 528, 529. Ten volumes of the YEAR-BOOKS, or OLD REPORTS, beginning with the reign of Edward the Third, and ending with that of Henry the Eighth, were printed by subscription in the year 1679. To these were afterwards added the cases which were determined in the time of Edward the Second and collected by Serjeant Maynard. This valuable collection was produced from the joint labours of many learned men; of men who were particularly chosen to take notes of all that judicially occurred and was decided. These notes were not only communicated to, but, if they required it, were corrected by, the judges. Plowden, one of the most valuable of our reporters, says, that these books were collected by four able men, especially appointed for the purpose, and who were annually rewarded by the king. See pref. 3. Rep. Dugd. cap. xxiii. Nicholson. iii. 178. Tyrrel, Int. ci. Mr. Justice Blackstone says they "were taken by the prothonotaries, or chief scribes of the court, at the expence of the crown, and published annually, whence they are known under the denomination of the Year-Books." Com. I. v. 72. This opinion may be right, but the learned judge has omitted to make mention of the authority which induced him to entertain it. Sir Edward Coke, in the preface to his Third Report, remarks, that "the kings of this realm, that is to say, E. 3. H. 4. H. 5. H. 6. E. 4. R. 3. and H. 7. did select and appoint four discreet and learned professors of law to report the judgments and opinions of the reverend judges:" but takes no notice of their being either "the prothonotaries" or "chief scribes of the court;" or that their reports were "published annually." "Out of these "old fields (adds Sir Edward) "springs the new corn."

(c) "In the reign of Edward III. pleadings (in the opinion of Sir

THE reports of this king's time run from the beginning to the end of his reign; excepting ſome few years between the 10th and 17th, and 30th and 35d years of his reign. But thoſe omitted years are extant in many hands, in old manuſcripts (*d*).

THE BOOK OF ASSIZES is a collection of the aſſizes that happened in the time of Edward III. being, from the beginning to the end, extracted out of the books and aſſizes of thoſe that attended the aſſizes in the country (*e*).

THE juſtices itinerant continued by intermitting viciſſitudes till about the 4th of Edward III. and ſome till the 10th of Edward III. Their juriſdiction extended to pleas of the crown, or criminal cauſes, civil ſuits and pleas of liberties, and *quo warranto*'s. The reports thereof are not printed, but are in many hands in manuſcript, both of the times of Edward I. Edward II. and Edward III. full of excellent learning. Some few broken reports of thoſe eyres, eſpecially of Cornwal, Nottingham, Northampton, and Derby, are collected by Fitzherbert in his Abridgment.

AFTER the 10th of Edward III. I do not find any juſtices *errant ad communia placita*, but only *ad placita foreſtæ*.

ſir Edward Coke) grew to perfection, both without lameneſs and curioſity; for then the judges and profeſſors of the law were excellently learned, and then knowledge of the law flouriſhed: the ſerjeants of the law, &c. drew their own pleadings, and therefore truly ſaid that reverend juſtice Thirning, in the reign of Henry IV. that in the time of Edward III. the law was in a higher degree than it had been any time before; for before that time the manner of pleading was but feeble, in compariſon of that it was afterwards in the reign of the ſame king."—1 Inſt. 304. b.

(*d*) Probably they were all printed in Maynard's edition of the Year-Books.

(*e*) Vide "Le Livre des Aſſiſes," which is the fifth volume of the Year-Books, ed. 1679.

Other

Other things that concerned thoſe juſtices itinerant were ſupplied and tranſacted in the common bench for *communia placita*;—in the king's bench and exchequer for *placita de libertatibus*;—and before juſtices of aſſize, *niſi prius*, *oyer* and *terminer*, and gaol delivery, for aſſizes and pleas of the crown.

AND thus much for the law in the time of Edward III. [A].

RICHARD

[A] The old Gothic powers of electing the principal ſubordinate magiſtrates, the ſheriffs, and conſervators of the peace, were taken from the people in the reigns of Edward II. and Edward III. and juſtices of the peace eſtabliſhed inſtead of the latter. In the reign alſo of Edward the Third, the parliament "is ſuppoſed moſt proba-" bly to have aſſumed its preſent form, by a ſeparation of the com-" mons from the lords." It is remarked by an elegant hiſtorian (*a*), that conquerors, though uſually the bane of human kind, proved often, in the feudal times, the moſt indulgent of ſovereigns. They ſtood moſt in need of ſupplies from their people; and not being able to compel them by force to ſubmit to the neceſſary impoſitions, they were obliged to make them ſome compenſation, by equitable laws and popular conceſſions. This remark is in ſome meaſure, though imperfectly, juſtified by the conduct of Edward III. He took no ſteps of moment without conſulting his parliament, and obtaining their approbation, which he afterwards pleaded as a reaſon for their ſupporting his meaſures (*b*). The parliament therefore roſe into greater conſideration during his reign, and acquired a more regular authority than in any former times; and even the houſe of commons, which, during turbulent and factious periods, was naturally oppreſſed by the greater power of the crown and barons, began to appear of ſome weight in the conſtitution.

The ſtatute for defining and aſcertaining treaſons was one of the firſt productions of this new-modelled aſſembly. One of the moſt popular laws enacted by any prince, was the ſtatute which paſſed in the twenty fifth of this reign (*c*), and which limited the caſes of high treaſon, before vague and uncertain, to three principal heads,—

(*a*) Dr. Robertſon's Hiſt. Scot. Vol. I.

(*b*) Cotton's Abridg. p. 108.

(*c*) Chap. 2.

the

RICHARD II. ſucceeding his grandfather, the dignity of the law, together with the honour of the kingdom, by reaſon of the weakneſs of this prince, and the difficulties occurring in his government, SEEMED SOMEWHAT TO DECLINE; as may appear by comparing the twelve laſt years of Edward III. commonly called *quadrageſms*, with the reports of king Richard II. wherein appears a viſible declination of the learning and depth of the judges and pleaders.

IT is true, we have no printed continued report of this king's reign. But I have ſeen the entire years and terms thereof in a manuſcript, out of which, or ſome other copy thereof, I ſuppoſe Fitzherbert abſtracted thoſe broken caſes of this reign in his Abridgment.

IN all thoſe former times, eſpecially from the end of Edward III. back to the beginning of Edward I. the learning of the common law conſiſted principally in aſſizes and REAL ACTIONS. Rarely was any title determined in any perſonal action; unleſs in caſes of titles to rents, or ſervices,

the conſpiring the death of the king, the levying war againſt him, and the adhering to his enemies; and the judges were prohibited, if any other caſes ſhould occur, from inflicting the penalty of treaſon, without an application to parliament. The bounds of treaſon were indeed ſo much limited by this ſtatute, which ſtill remains in force without any alteration, that the lawyers were obliged to enlarge them, and to explain a conſpiracy for levying war againſt the king, to be equivalent to a conſpiracy againſt his life; and this interpretation, ſeemingly forced, has, from the neceſſity of the caſe, been tacitly acquieſced in. Mr. Juſtice Blackſtone has enumerated ſome other legal improvements which were effectuated under the auſpices of this brave and indulgent ſovereign (*d*).

(*d*) Blac. Com. 4 v. 428.

by

by replevin. And the reaſons thereof were principally theſe, viz.

FIRST, becauſe theſe ancient times were great favourers of THE POSSESSOR; and therefore, if about the time of Edward II. a diſſeiſor had been in poſſeſſion by a year and a day, he was not to be put out without a recovery by aſſize. Again, if the diſſeiſor had made a feoffment, they did not countenance an entry upon the feoffee, becauſe thereby he might loſe his warranty, which he might ſave, if he were impleaded in an aſſize or writ of entry. By this means real actions were frequent, and alſo aſſizes.

SECONDLY, they were willing to quiet men's poſſeſſions. And therefore after a recovery, or bar, in an aſſize or real action, the party was driven to an action of a higher nature.

THIRDLY, becauſe there was then no known action, wherein a perſon could recover his poſſeſſion, other than by an aſſize or a real action. For till the end of Edward IV. the poſſeſſion was not recovered in an *adjectione firmæ*; but ONLY DAMAGES.

FOURTHLY, becauſe an aſſize was a ſpeedy and effectual remedy to recover a poſſeſſion; the jury being ready impanelled and at the bar the firſt day of the return. And although by diſuſage the practicers of law are not ſo ready in it, yet the courſe thereof in thoſe times was as ready and as well known to all profeſſors of the law, as the courſe of *ejectione firmæ* is now. [B.]

TOUCHING

[B] "All the law concerning diſſeiſins exiſted and was in practice prior to the aſſize of *novel diſſeiſin*. The aſſize was introduced, probably

TOUCHING the reports of the years and terms of Henry IV. and Henry V. I can only say, they do not arrive, either in

probably from the uſage of Normandy, for the *Grand Coutumier* treats of aſſizes in or before the reign of Henry the Second. Glanville, who wrote in that reign, calls the great aſſize a benefit *clementiam principis de conſilio procerum populis indultam.*" And the Myrrour (*a*) ſays "Glanville introduced it."

Seiſin is a technical term to denote the completion of that inveſtiture by which the tenant was admitted into the tenure; and without which no freehold could be conſtituted or paſs. *Sciendum eſt feudum, ſine inveſtiturâ, nullo modo conſtitui poſſe*

Diſſeiſin therefore muſt mean, ſome way or other turning the tenant out of his tenure; uſurping his place and feudal relation. At this time no tenant could alien without licence of the lord. When the lord conſented, the only form of conveyance was by feoffment publicly made, *coram paribus curiæ*, with the lord's concurrence. Homage or fealty was ſolemnly ſworn; and ſuit of court and ſervices were frequently done. The freeholder repreſented the whole fee; did the duty to the lord; and defended the whole fee againſt ſtrangers.

The freehold never could be in abeyance, becauſe the lord could never be at a loſs to know upon whom to call as his tenant; nor a ſtranger to know againſt whom to bring his *præcipe*. From the neceſſity of there being always a viſible tenant of the freehold, and the notoriety who acted, and did ſuit and ſervice as ſuch, many privileges were allowed to innocent perſons, deriving title from the freeholder *de facto*.

If the diſſeiſor died after one year's nonclaim, the deſcent to his heir gave him the right of poſſeſſion, and took away the true owner's entry. The ſtat. of 32. H. 8. cap. 33. requires five years nonclaim. The feoffee of a diſſeiſor acquired title of poſſeſſion at this time by one year's nonclaim. The deſcent to his heir remains privileged as it was at common law; for the 32. Hen. 8. cap. 33. extends not to any feoffee of the diſſeiſor, immediate or mediate. The feoffee of a diſſeiſor was favoured, becauſe he came innocently into the tenure, by a ſolemn public inveſtiture, with the lord's concurrence.

But the ſtatute "*quia emptores terrarum*" (*b*) (which took away ſubinfeudations, and gave free liberty of alienation to the tenants of ſubjects, and to thoſe who held of the king as of an honour or manor) and other ſtatutes which extended the power of alienation to the

(*a*) C. 2. Sec. 25. pa. 150. Edit. 1642. (*b*) 18 E. 1.

king's

In the nature of the learning contained in them, or in the judiciouſneſs and knowledge of the judges and pleaders, nor

king's tenant *in capite*; the frequent releaſes of feudal ſervices; the ſtatutes of uſes, and of wills; and, at laſt, the total abolition (*c*) of all military tenures, have left us little but the names of feoffment, ſeiſin, tenure, and freeholder, without any preciſe knowledge of the thing originally ſignified by thoſe ſounds. The idea which modern times annex to freehold or freeholder, is taken merely from the duration of the eſtate. Copyholds, and the cuſtomary freeholds in the North, retain ſome faint traces, in imitation of the old ſyſtem of feudal tenures. It is obvious how a man may viſibly be the copyholder or cuſtomary freeholder *de facto*, in prejudice of the rightful tenant. It is obvious too, that uſurping ſuch a tenure, is a different fact from the naked poſſeſſion or occupation of the land. But whoever will look into the practice of other countries, where tenures ſubſiſt with all the ſolemnities of feoffments and ſeiſins, upon every change of a tenant, by deſcent or alienation, and upon every uſurpation of the real right, will eaſily comprehend, that at the time alluded to, it might be as notorious who was the feudal tenant *de facto*, as who is now *de facto* incumbent of a living, or mayor of a corporation.

Diſſeiſin was a complicated fact, and differed from diſpoſſeſſing. The freeholder by diſſeiſin, differed from a poſſeſſor by wrong. Bracton, *De Aſſiſa Novæ Diſſeyſinæ*, puts many caſes of poſſeſſion wrongfully taken, which he calls intruſion, becauſe there is no diſſeiſin. "*Poſſeſſio quæ nuda eſt omnino, et ſine alicuo veſtimento; quæ dicitur intruſio.*" VESTIMENTO is ſeiſin, inveſtiture; (from whence the Saxon term *veſt*) a metaphor which the feudiſts took from clothing, and by which they meant to intimate, "that the naked poſſeſſion was clothed with all the ſolemnities of a feudal tenure." A particular tenant, according to feudal notions, was in, as of the ſeiſin of the fee, of which his eſtate was a part. If he aliened the fee (which he could only do by ſolemn feoffment, with the concurrence of the lord of whom the fee was held), he forfeited his particular eſtate, for having betrayed the ſeiſin with which he was entruſted. But on account of the privity and confidence between him and the reverſioner, and the notorious ſolemnity of the act of inveſtiture, his feoffment diſſeiſed the reverſioner.

Bracton, who wrote in the reign of Henry III. before tenants could alien without licence, mentions the diſſeiſin in this caſe as a neceſſary

(*c*) 12. C. c. 23. and 13. C. 2. c. 7.

conſe-

in any other reſpect ariſe to the perfection of the laſt twelve years of Edward III.

conſequence, and as a thing which could not poſſibly be otherwiſe.

" Item facit quis Diſſeyſinam, cum quis in ſeyſina fuerit ut de " libero tenemento & ad vitam, vel ad terminum annorum, vel " nomine cuſtodiæ, vel aliquo alio modo; alium feoffaverit, in pre- " judicium veri domini, & fecerit alteri liberum tenementum; " cum duo ſimul & *ſemel*, de eodem tenemento & in ſolidum, eſſe " non poſſunt in ſeyſina." He conſiders it as impoſſible for the true tenant not to be put out, when another actually came into his place.

So late as the 32d of Eliz. in the caſe of Matheſon *v.* Trot, 1 Leon. 209. the diſtinction upon which the judgment turns is, " that Henry Denny gained a wrongful poſſeſſion in fee; but did " not gain any ſeiſin, ſo no diſſeiſor, therefore the deſcent to his heir " is not privileged." Nobody can diſſeiſe the king; neither can any one be diſſeiſed to the uſe of the king. The king may be wrongfully diſpoſſeſſed: but the intruder's injurious poſſeſſion is *ſine aliquo veſtimento*, and called intruſion. The king cannot be made a diſſeiſor, not becauſe it is wrong, for he may, in fact, withhold the poſſeſſion of land from a ſubject contrary to right. But the reaſon ſeems, according to the feudal ſyſtem, to be this: A ſubject never could ſtand in the king's ſeiſin or tenure; and the king never could be in the feudal relation of a ſubject. By that policy, all real property was held mediately or immediately of the king. In the king himſelf all real property was allodial. The preciſe definition of what conſtituted diſſeiſin, which made the diſſeiſor the tenant to the demandant's *præcipe*, though the right owner's entry was not taken away, was once well known; but it is not now to be found. The more we read, unleſs we are very careful to diſtinguiſh, the more we are confounded. For, after the aſſize of *novel diſſeiſin* was introduced, the legiſlature by many acts of parliament, and the courts of law by liberal conſtructions in furtherance of juſtice, extended this remedy, for the benefit of the owner, to every treſpaſs or injury done to his real property, if by bringing his aſſize he thought fit to admit himſelf diſſeiſed.

It lay againſt adviſers, aiders, or abettors, who were not tenants. Co. Lit. 180. b. It lay againſt the tenant who was no diſſeiſor; as the heir of a diſſeiſor or his feoffee. Stat. Glouceſter. It lay for the owner, againſt the diſſeiſor of the diſſeiſor. The tenant's not being ready to pay rent-ſeck when demanded, was, for the benefit of the owner's remedy, a diſſeiſin. Lit. ſect. 233. It lay for outrageous

diſtreſs.

diſtreſs. 2. Inſt. 412. It lay againſt guardian, or particular tenant, who made a feoffment, as well as againſt their feoffees. 2 Inſt. 413. The Stat. of Weſtm. 2. c. 25. extends it to a man's depaſturing the ground of another; or taking fiſh, in his fiſhery. If one receives my rent without my conſent, I may elect to make him a diſſeiſor. Style 407. If a guardian aſſigns dower to a woman not dowable, the owner may elect to make her a diſſeiſor, 24. Ed. 3. 43. cited in Cro. Car. 203. In a word, for the ſake of the remedy, as between the true owner and the wrong doer, to puniſh the wrong; and, as between the true owner and naked poſſeſſor, to try the title, the aſſize was extended to almoſt every caſe of obſtruction to an owner's full enjoyment of lands, tenements, or hereditaments.

The reports of aſſize can only relate to caſes where the owner admits himſelf diſſeiſed.

The law books treat of diſſeiſin, with a view to the aſſize; which was the common method of trying titles till ejectment came in uſe.

Littleton, who wrote long after the remedy by aſſize was enlarged by ſtatutes and by equitable conſtruction, ſpeaks of diſſeiſins principally as between the owner and treſpaſſer or poſſeſſor, with an eye to the remedy by aſſize.

Theſe are the common authorities from whence deſcriptions have been cited of a diſſeiſin. The definitions in the books, though very imperfect, favour often of that which originally was an ACTUAL diſſeiſin in ſpite of the owner.

Littleton in ſect. 279. defines diſſeiſin with an &c. "Where a "man enters into lands or tenements, where his entry is not con-"geable, and ouſteth him which hath the freehold, &c." The comment ſays, "Every entry is no diſſeiſin, unleſs there be an "ouſter of the freehold;" and Co. Lit. 153. b. ſays, "Diſſeiſin is "putting a man out of ſeiſin, and ever implies a wrong: but diſ-"poſſeſſion or ejectment is putting out of poſſeſſion, and may be by "right or wrong. *Diſſeiſin eſt un perſonal treſpaſs de tortious ouſter "del ſeiſin.*"

Though the term "diſſeiſin," uſed, happens to be the ſame, the thing ſignified by that word, as applied to the two caſes of actual diſſeiſin, or diſſeiſin by election, is very different. The diſtinction of diſſeiſin AT ELECTION, is made in the caſe of Blunden *v.* Baugh, Cro. Car. 303. The three Judges, with whom agreed the four Judges of the Common Pleas, argued and held, "that the leſſee "for years of the tenant at will, was a diſſeiſor AT THE ELECTION "OF THE ORIGINAL LESSOR, for the ſake of his remedy, but "never could be looked upon as the freeholder, or a diſſeiſor in ſpite "of the owner, or with regard to third perſons." If a *præcipe* was

brought againſt him, he might ſay, "I am not tenant to the free-"hold." When the eaſy ſpecific remedy was by aſſize, where the entry was not taken away, the injured owner might, for his benefit, elect to conſider the wrong as a diſſeiſin. So, ſince an ejectment is become the eaſy ſpecific remedy, he may elect to call the wrong a diſpoſſeſſion.

Where an ejectment is brought, there can be no diſſeiſin; becauſe the plaintiff may lay his demiſe when his title accrued, and recover the profits from the time of the demiſe. The entry confeſſed is previous to making the leaſe; but there is no real or ſuppoſed re-entry after the ejectment complained of. If it was conſidered as a diſſeiſin, no meſne profits could be recovered without an actual re-entry. If the leſſee for life or years makes a feoffment, the leſſor may ſtill diſtrain for the rent, or charge the perſon to whom it is paid, as a receiver, or bring an ejectment, and chooſe whether he will be conſidered as diſſeiſed. Metcalf on the demiſe of Kynaſton *v.* Parry and others, a caſe reſerved at Salop aſſizes, 25th March 1742, for the opinion of the Court of Exchequer (who gave judgment in it on the 24th of November 1743), was thus: Tenant in tail of lands leaſed by his father to a ſecond ſon, for lives, (under a power) upon his father's death received the rent from the occupier, as owner, and as if no ſuch leaſe had been made, during his whole life. He ſuffered a common recovery. It was holden, "that this was only a diſſeiſin "of the freehold at election; that therefore he could not make "a good tenant to the *præcipe*." And the recovery was adjudged bad.

Except the ſpecial caſe of fines with proclamations, which ſtands entirely upon diſtinct grounds, the conſtruction of the ſtat. of 4. Hen. 7. c. 24. one can ſcarce ſuggeſt a caſe where the true owner, whoſe entry is not taken away, may not elect, by purſuing a poſſeſſory remedy, to be deemed as not having been diſſeiſed.

The conſequence of actual diſſeiſins, conſidered as ſuch, continue law to this day. The diſſeiſed cannot diſpoſe or deviſe; the deſcent takes away his entry. There are two caſes cited in the caſe of Blunden *v.* Baugh, material to this point. Pouſty *v.* Blackman, B. R. Trin. 18. Jac. Rot. 1230. Palmer 201 (*d*). The caſe, in effect and operation, was this: Tenant at will made a leaſe for years: the original leſſor deviſed Though the leaſe by tenant at will at the election of the original leſſor was a diſſeiſin, yet they adjudged his deviſe good; becauſe he had not ELECTED to admit himſelf diſſeiſed, and by making a will intimated the contrary.

Another caſe was in the 14th of Eliz.—Sir Ambroſe Cone, of his own head, entered into lands of Sir William Hollis, and paid Sir William, afterwards, a certain rent, claiming to hold as tenant at

(*d*) Cro. Jac. 659. S. C.

will,

will, and died. His heir entered; upon whom Sir William entered. It was adjudged, "that at the election of Sir William, Sir Ambrose was a disseisor; but as Sir William had not determined his "election before the death of Sir Ambrose, and entered upon his "heir, it was no disseisin, and consequently the descent no bar to "his entry."

In the case of Pously *v.* Blackman, Palmer 205. it is said, "If a "disseisee devise and afterwards enter, the devise is good." This Dodderidge denied, and said there must be a new publication; which seems right, if there ever was a disseisin; for where an actual entry is necessary, it will not make good a conveyance made before: as was holden in B. R. & Dom Proc. in the case of Berrington *v.* Parkhurst (*e*). The actual entry could not support the lease made before. Yet in Salk. 237. (*f*) it is agreed, "the devise is good, because he was seised *ab initio*, so as he might bring trespass:" *i. e.* he never was disseised at all, by his election; and he might make that election, without an entry; he might bring his ejectment, he might bring trespass, without a re-entry. If it was not for this doctrine of election, what a condition would men be in!

In the case of Pously *v.* Blackman, there was no entry; and after much argument, it was at last resolved, unanimously, by the whole Court, from the inconveniences which would be introduced if a lessee by a secret contract with a stranger could defeat the will of his lessor, "that the devise was good," and that the owner, by making a devise, shewed his election not to be disseised.

Taking possession under a judgment in ejectment, never can be a disseisin of the freehold. Suppose it a real proceeding, the termor of a disseisee might, at the old law, recover against the disseisor. He might recover against the feoffee of his lessor; but he never could thereby become a disseisor of the freehold; he never could be other than a termor, enjoying, in the nature of a bailiff, by virtue of a real covenant. In respect of a freehold, his possession enured always by right, and never by wrong. If the lessor had infeoffed, it enured to the alience; if the lessor was disseised and might enter, it enured to the disseisee; if his entry was taken away, it enured to the heir or feoffee of the disseisor, who in that case had the right of possession.

Suppose the proceeding, as it is, a fictitious remedy; then in truth and substance, a judgment in ejectment is a recovery of the possession, not of the seisin or freehold, without prejudice to the

(*e*) A. D. 1738. (*f*) Bunter *v.* Coke.

right, as it may afterwards appear, even between the parties. He who enters under it, in truth and ſubſtance can only be poſſeſſed, according to right, *prout lex poſtulat.*

If he has a freehold, he is in as a freeholder. If he has a chattel-intereſt, he is in as a termor; and in reſpect of the freehold, his poſſeſſion enures according to right. If he has no title, he is in as a treſpaſſer; and without any re-entry by the true owner, is liable to account for the profits.

The true owner may enter upon a diſſeiſor, but after judgment in ejectment, an actual entry would not be permitted. An ejectment is a poſſeſſory remedy, and only competent where the leſſor of the plaintiff may enter. Therefore it is always neceſſary for the plaintiff to ſhew, that his leſſor had a right to enter, by proving a poſſeſſion within twenty years, or accounting for the want of it, under ſome of the exceptions allowed by the ſtatute. Twenty years adverſe poſſeſſion is a poſitive title to the defendant; it is not a bar to the action or remedy of the plaintiff only, but takes away his right of poſſeſſion; and every plaintiff in ejectment muſt ſhew a right of poſſeſſion, as well as of property (*g*).

There is an excellent analyſis of real actions, in the firſt volume of Comyns's Digeſt; after which the ſtudent may conſult Fitzherbert's Natura Brevium, with Sir Matthew Hale's Commentary, and the tenth and eleventh chapters of the third book of Mr. Juſtice Blackſtone's Commentaries.

In addition to our author's progreſs of the law under the reign of Richard the Second, it is proper to remark, that the ſtatutes of *præmunire*, for effectually depreſſing the civil power of the pope, were the work of this and the precedent reign. The eſtabliſhment alſo of a laborious parochial clergy, by the endowment of vicarages out of the overgrown poſſeſſions of the monaſteries, added luſtre to the cloſe of the fourteenth century; though the ſeeds of the general reformation which were thereby firſt ſown in the kingdom, were almoſt overwhelmed by the ſpirit of perſecution introduced into the laws of the land by the influence of the regular clergy (*b*). It was uſual at this time for the Church, that they might elude the mortmain act (*i*), to make their votaries leave lands IN TRUST to certain perſons, under whoſe names the clergy enjoyed the benefit

(*g*) See the caſe of Taylor, ex dm. Atkyns *v.* Horde, *paſſim*, 1. Burr. 60.

(*b*) Blac. Com. 4 v. 428.

(*i*) M. C. 9. H. 3. c. 36. 7. Ed. 1. ſt. 2. 13. Ed. 1. c. 32. 18. Ed. 1. ſt. 1. c. 3. 27. Ed. 1. ſt. 2. 34. Ed. 1. ſt. 3. 18. Ed. 3. ſt. 3. c. 3. 15. R. 2. c. 5.

BUT the times of Henry VI. as alſo of Edward IV. Edward V. and Henry VII. were times that abounded with learning and excellent men. There is little odds in the uſefulneſs or learning of theſe books; only the firſt part of Henry VI. is more barren, ſpending itſelf much in learning of little moment, and now out of uſe. But the ſecond part is full of excellent learning. [C.]

of the bequeſt. The parliament ſtopped the progreſs of this abuſe (*k*). The greateſt novelty introduced into the civil government during this reign, was the creation of peers by PATENT. The lord Beauchamp of Holt was the firſt peer who was advanced to the houſe of lords in this manner. Though he was ſummoned, he never ſat. His patent, however, could never have been deemed valid, becauſe Michael de la Pole was the Lord Chancellor who affixed the ſeal to it, which had been before taken from him by act of parliament, and he declared incapable of ever having it again. This, then, was a ſingle and ineffectual attempt to create a new peer without the aſſent of parliament, which was the uſual way; above thirty having been made ſo in that very reign. His ſucceſſors were too wiſe to follow this example, for every barony newly created, till the union of the Roſes, which were about fourteen, were every one of them, as appears on the face of the patents, by authority of parliament, if we except two or three; and even theſe, on a cloſe examination, will appear not to be new baronies, but re-grants of old feudal baronies by tenure; which undoubtedly were all in the ſole diſpoſition of the king (*l*).

[C] From the time of Richard the Second to that of Henry the Seventh, the civil wars and diſputed titles to the crown gave no leiſure for farther juridical improvement; "*nam ſilent leges inter* "*arma*;" and yet to theſe very diſputes we owe the happy loſs of all the dominions of the crown on the continent of France; which turned the minds of ſubſequent princes entirely to domeſ-

(*k*) Knyghton, 27. 38. Cotton 355.

(*l*) Selden-Tit. Hon. part 2. chap. 5. ſec. 27. and 28. Sulliv. 193. ed. 1776.

tic

IN the times of thoſe three kings, Henry VI. Edward IV. and Henry VII. the learning ſeems to be much alike. But theſe two things are obſervable in them, and indeed generally in all reports after the time of Edward III. viz.

FIRST, that real actions and aſſizes were not ſo frequent as formerly. For many titles of land were determined in perſonal actions; and the reaſons hereof ſeem to be,

1ſt, BE-

tic concerns. To theſe likewiſe we owe the method of barring entails by the fiction of common recoveries, invented originally by the clergy to evade the ſtatute of mortmain, but introduced under Edward the Fourth for the purpoſe of unfettering eſtates, and making them more liable to forfeiture: while, on the other hand, the owners endeavoured to protect them by the univerſal eſtabliſhment of uſes, another of the clerical inventions (*a*).

The ſenſe of wiſe men, and the general bent of the people in this country, have ever been againſt making land perpetually unalienable. The utility of the end was thought to juſtify any means to attain it.

Nothing could be more agreeable to the law of tenures, than a male fee unalienable. But this bent to ſet property free, allowed the donee, after a ſon was born, to deſtroy the limitation, and break the condition of his inveſtiture.

No ſooner had the ſtatute *de donis* repeated what the law of tenures ſaid before, "that the tenor of the grant ſhould be obſerved," than the ſame bent permitted tenant in tail of the freehold and inheritance to make an alienation voidable only, under the name of a diſcontinuance. But this was a ſmall relief.

At laſt, the people having groaned for 200 years under the inconvenience of ſo much property being unalienable, and the great men, to raiſe the pride of their families, and in thoſe turbulent times to preſerve their eſtates from forfeitures, preventing any alteration by legiſlative authority, the ſame bent threw out a fiction in Taltarum's caſe (*b*), by which tenant in tail of the freehold and inheritance,

(*a*) Blac. Com. 4v. 428.
(*b*) Pigott on Common Recoveries, p. 7, 8, 9, 10.

1ſt, BECAUSE the learning of them began, by little and little, to be leſs known or underſtood.

2dly,

or with conſent of the freeholder, might aliene abſolutely. Public utility adopted and gave ſanction to the doctrine, for the real political reaſon, "TO BREAK ENTAILS." But the oſtenſible reaſon, from "the "fictitious recompence," hampered ſucceeding times how to diſtinguiſh caſes which were within the falſe reaſon given, but not within the real policy of the invention: till at laſt the legiſlature applauded common recoveries, and lent its aid by the acts of 11. H. 7. c. 20. 33. Hen. 8. c. 31. 34. & 35. Hen. 8. c. 20. 14. Eliz. c. 8. and 14. Geo. 2. c. 20. which laſt is a retroſpective and declaratory law, and ſeems to have reſtored the original tenant to the *præcipe*.

As the legiſlature has for ages avowed the propoſition, we may now ſay, that COMMON RECOVERIES ARE A MERE FORM OF CONVEYANCE. All neceſſary circumſtances of form and ceremony are taken from its fictitious original. The policy of this ſpecies of alienation meant to take a middle way as to entails, between perpetuities and abſolute property.

Alienations were allowed, yet in ſuch a ſhape as neceſſarily required deliberation and delay; and they were only allowed to be made by tenant in tail in poſſeſſion, or by tenant in tail in remainder, with conſent of the owner of the firſt eſtate for life. The eldeſt ſon was reſtrained in the life-time of his father, or mother, or any other anceſtor or relation, ſeiſed for life, under a family ſettlement.

When a termor after the 4th of Henry VII. made a feoffment, and levied a fine with proclamations, and inſiſted upon five years non-claim, the Judges with ſtrong ſenſe ſaid, though a feoffment by tenant for life, or years, or at will, is a diſſeiſin, it ſhall not operate as a diſſeiſin, to enable the termor himſelf to bar the inheritance, by a fine with proclamations, according to the 4 H. 7. c. 20. For, ſay they, "it was never the intent of the makers of the act, that thoſe who "could not levy a fine, ſhould by making an eſtate by wrong and "fraud, be enabled to bar thoſe who had right. For if they themſelves without ſuch fraudulent eſtate could not levy a fine to bar "thoſe who had the freehold and inheritance, certainly the makers of "the 4th H. 7. c. 20. did not intend, that by making of an eſtate by "fraud and practice, they ſhould have power to bar them; and ſuch "fraudulent eſtate is as no eſtate, in the judgment of the law." So as to a common recovery, it was never the intent, that thoſe who could not ſuffer a recovery ſhould, by making an eſtate by wrong and fraud,

be

2dly, THE ancient ſtrictneſs of preſerving poſſeſſion to poſſeſſors till eviction by action, began not to be ſo much in

be enabled to bar thoſe inremainder or reverſion, who had a right. For if they themſelves, without ſuch fraudulent eſtate, could not ſuffer a recovery to bar thoſe in remainder and reverſion, certainly the framers of this qualified ſpecies of alienation did not intend, that by making an eſtate by fraud and practice, they ſhould have power to bar them; for a common recovery, which the parties have no power to ſuffer directly, cannot be made good by wrong and fraud.

After the ſtatute *de donis*, tenant in tail in remainder, with the concurrence of the freeholder, might make a voidable alienation by diſcontinuance; but he could not acquire to himſelf that privilege by an injurious entry and feoffment. Co. Lit. 347. Hob. 323. If in caſes of recoveries ſtratagem ſhould prevail, redreſs would follow too late (*c*).

A remarkable law paſſed in the reign of Henry VI. for the due election of members of parliament in counties. After the fall of the feudal ſyſtem, the diſtinction of tenures was in a great meaſure loſt; and every freeholder, as well thoſe who held of meſne lords, as the immediate tenants of the crown, were by degrees admitted to give their votes at elections. This innovation was confirmed by a law of Henry the Fourth (*d*), which gave right to ſuch a multitude of electors, as was the occaſion of great diſorder in the eighth and tenth of this king; therefore, laws were enacted, limiting the electors to ſuch as poſſeſſed forty ſhillings a-year in land, free from all burden within the county (*e*). This ſum was equivalent to near twenty pounds a-year of our preſent money; and it were to be wiſhed, that the ſpirit as well as letter of this law had been maintained.

The preamble of the ſtatute is remarkable. "Whereas the elections of knights have of late, in many counties of England, "been made by outrageous and exceſſive numbers of people, many "of them of ſmall ſubſtance and value, yet pretending to a right "equal to the beſt knights and eſquires; whereby manſlaughters, "riots, batteries, and diviſions among the gentlemen and other "people of the ſame counties, ſhall very likely riſe and be, unleſs "due remedy be provided in this behalf, &c." We may learn from theſe expreſſions what an important matter the election of a Member of Parliament was now become in England. That aſſembly was

(*c*) By lord Mansfield, in the caſe of Taylor, ex dm. Atkyns *v.* Horde, 1. Bur 60.

(*d*) Stat. at large, 7. Hen. 4. cap. 15.

(*e*) 8 Hen. 6. cap. 7. 10 Hen. 6. cap. 2.

beginning

in uſe; unleſs in ſuch caſes of deſcents and diſcontinuances. —The latter neceſſarily drove the demandant to his formedon, or

beginning in this period to aſſume great authority. The commons had it much in their power to enforce the execution of the laws; and if they failed in their duty, in this particular, it proceeded leſs from any exorbitant power of the crown, than from the licentious ſpirit of the ariſtocracy, and perhaps from the rude education of the age, and their own want of a due ſenſe of the advantages reſulting from a regular adminiſtration of juſtice.

As to the reign of Henry the Seventh, his miniſters (not to ſay the king himſelf) were more induſtrious (in the opinion of Blackſtone) in hunting out proſecutions upon old and forgotten penal laws, for the mean and diſgraceful purpoſe of extorting money from the ſubject, than in framing any new and beneficial regulations. For the diſtinguiſhing character of this reign was (ſays the commentator) that of amaſſing treaſure in the king's coffers, by every means that could be deviſed: and almoſt every alteration in the laws, however ſalutary or otherwiſe in their future conſequences, had this and this only for their great and immediate object (*f*). The capacity of Henry was excellent, but in ſome degree contracted by the narrowneſs of his heart. Avarice was his ruling paſſion; and he remains an inſtance, almoſt ſingular, of a man, placed in an high ſtation, and poſſeſſed of talents for great affairs, in whom that paſſion predominated above ambition. Though the opinion which Mr. Juſtice Blackſtone entertains, may probably be right, yet it is but proper to remark, that Henry is celebrated by his hiſtorian for many good laws, which he cauſed to be enacted for the government of his ſubjects. It muſt be confeſſed that ſeveral conſiderable regulations are found among the ſtatutes of this reign, as well with reſpect to the police as the commerce of the kingdom. To gratify the inſatiable avarice of Henry, the court of ſtar chamber (continues the commentator) "was new modelled, and armed with "powers the moſt dangerous and unconſtitutional over the perſons "and properties of the ſubject (*g*)." It is true, that early in the reign of Henry, the authority of the ſtar-chamber was in ſome caſes confirmed by act of parliament (*h*). Lord Bacon extols the uſe of this court; but men began, during the age of that hiſtorian, to feel that ſo arbitrary a juriſdiction was totally incompatible with liberty; and in proportion as the ſpirit of independence roſe ſtill higher in the

(*f*) Com. 4 v. 429.
(*g*) Id. ib.
(*h*) Rot. parl. 3 H. 7. n. 17.

nation,

or his *cui in vita*, &c. But the deſcents that tolled (*f*) entry were rare, becauſe men preſerved their rights to enter, &c. by continual claims.

(*f*) In other words, that *take* applied, meaning, to bar, defeat, *away* entry. Blac. Com. 3 v. or take away. See ſtat. 8 Henry 176. — the word *toll*, as here VI. cap. 9.

nation, the averſion againſt it increaſed, till this "court of crimi. "nal equity" was intirely aboliſhed by act of parliament, in the reign of Charles the Firſt. Mr. Juſtice Blackſtone enumerates many other particulars which were allowed and contrived to increaſe the riches of the ſovereign; from whence he infers, that "there is hardly a "ſtatute in this reign introductive of a new law or modifying the "old, but what either directly or obliquely tended to the emolument "of the exchequer (*i*)." Let it not be forgotten however, that in this reign ſuits were given to the poor *in formâ pauperis*, as it is called; that is, without the payment of any fees (*k*); a good law at all times, eſpecially in that age, when the people laboured under the oppreſſion of the great. But the moſt important law in its conſequences which was enacted during the reign of Henry, was that by which the nobility and the gentry acquired a power of deſtroying the ancient entails, and of alienating their eſtates (*l*). It is true that the practice was introduced in the reign of Edward the Fourth; but it was not, properly ſpeaking, law, till the ſtature of Henry the Seventh; which, by correcting ſome abuſes which attended that practice, indirectly gave a ſanction to it. By means of this law, combined with the approaching luxury and refinements of the age, the great fortunes of the barons were gradually diſſipated, and the property of the commons increaſed. It is probable that Henry foreſaw and intended this conſequence; becauſe the conſtant ſcheme of his policy conſiſted in depreſſing the great, and exalting thoſe who were more dependent on him.—One great check to induſtry in England was the erecting of corporations; an abuſe which is not yet entirely corrected. A law was enacted, that corporations ſhould not paſs any bye-laws without the conſent of three of the chief officers of ſtate (*m*). And to the praiſe of this prince it may be obſerved, that ſometimes, in order to promote commerce, he lent to merchants ſums of money without intereſt, when he knew that their ſtock was not ſufficient for thoſe enterprizes which they had in view.

(*i*) Com. 4 v. 420, 430.
(*k*) 11 H. 7. c. 12.
(*l*) 4 H. 7. c. 24.
(*m*) 19 H. 7. c 7.

3dly,

3dly, BECAUSE the ſtatute of 8. Hen. VI. had helped men to an action to recover their poſſeſſions by a writ of forcible entry; even while the method of recovery of poſſeſſions by ejectments was not known or uſed.

THE SECOND thing obſervable is, that though pleadings in the times of thoſe kings were far SHORTER than afterwards, eſpecially after Henry VIII. yet they were much longer than in the time of king Edward III.; and the pleaders, yea and the judges too, became ſomewhat TOO CURIOUS therein. So that that art, or dexterity of pleading, which in its uſe, nature and deſign, was only TO RENDER THE FACT PLAIN AND INTELLIGIBLE, AND TO BRING THE MATTER TO JUDGMENT WITH A CONVENIENT CERTAINTY, began to degenerate from its primitive ſimplicity, and the true uſe and end thereof, and to become A PIECE OF NICETY AND CURIOSITY: which how theſe later times have improved, the length of the pleadings—the many and unneceſſary repetitions—the many miſcarriages of cauſes, upon ſmall and trivial niceties in pleading, have too much witneſſed (*g*).

I SHOULD

(*g*) What would ſir Matthew Hale have ſaid, had he lived in theſe times of "nicety and curioſity?"—times in which pleading ſeems to be involved in all that perplexity can ſuggeſt, or prolixity ſupply! He might, perhaps, impute it to incapacity, or to deſign; in either light, a reproach to thoſe, whoſe duty it is, not only to be well informed of the merits of a cauſe, but to apply the pleadings to the real point in controverſy; and that in a mode the moſt ſimple and intelligible.—The ſcience of pleading (however thoſe who do not underſtand, may affect to deſpiſe it) is admirably calculated for the purpoſes of analyſing a cauſe; of extracting, like the roots of an equation, the true points in diſpute, and referring them with all imaginable ſimplicity to the court or to the jury. It is reducible to the ſtricteſt rules of pure dialectic; and were it ſcientifically taught in our publick ſeminaries of learning,

I SHOULD now say something touching the times since Henry VII. to this day, and therefore shall conclude this chapter with some general observations touching the proceedings of law in these later times.

AND first, I shall begin where I left before; touching the length and nicety of pleadings, which at this day far exceeds not only that short, yet perspicuous, course of pleading, which was in the time of Henry VI. Edward IV. and

ing; would fix the attention, give a habit of reasoning closely, quicken the apprehension, and invigorate the understanding as effectually as the famed peripatetic system; which, how ingenious and subtle soever, is not so *honourable*, so *laudable*, or so *profitable*, as the science in which Littleton exhorts his sons to employ their courage and their care. Jones's Isæus, pref. disc. 25. The earl of Mansfield, who, with the most comprehensive and enlightened genius, possessed the most consummate and enlarged knowledge, remarked, that "the substantial rules of pleading are founded in strong sense, and in the soundest and closest logic; and so appear, when well understood and explained: but by being misunderstood and misapplied, are often made use of as instruments of chicane." 1 Burr. 319. Though this science, when properly applied, merits every commendation, yet nothing would perhaps more prevent "the many miscarriages of causes," or more promote the ends of justice, than to enact that the defendant shall in all actions, on giving previous notice of his intended defence to the plaintiff, be permitted to plead the general issue, and give the merits of his case in evidence. Without referring to the numerous cases in which the legislature has already permitted it to be done, it need only be remarked, that in the mixed action of ejectment it is the uniform practice: so in personal actions of considerable importance; as questions arising on mercantile contracts, by insurance, bills of exchange, and the like: so in almost all special actions on the case, and in a great measure even in the common action of *assumpsit*. Lamentable at present is the increase of costs upon the suitor, and that even in cases where he succeeds; an evil, which if not speedily corrected, may in the end be productive of serious consequences.

Henry

Henry VII. but thoſe of all times whatſoever, as our vaſt preſſes of parchment for any one plea do abundantly witneſs.

AND the reaſons thereof ſeem to be theſe, viz.

FIRST, becauſe in ancient times the pleadings were drawn AT THE BAR, and the exceptions alſo taken at the bar: which were rarely taken for the pleaſure, or curioſity, of the pleader; but only, when it was apparent, that the omiſſion, or the matter excepted to, was for the moſt part THE VERY MERIT AND LIFE OF THE CAUSE; and purpoſely omitted, or miſpleaded, becauſe his matter, or cauſe, would bear no better. But now, the pleadings being firſt drawn in writing, are drawn to an EXCESSIVE LENGTH, AND WITH VERY MUCH LABORIOUSNESS AND CARE ENLARGED, leſt it might afford an exception not intended by the pleader, and which could be eaſily ſupplied from the truth of the caſe; leſt the other party ſhould catch that advantage, which commonly the adverſe party ſtudies;—not in contemplation of the merits, or juſtice, of the cauſe, but to find a ſlip to faſten upon; though in truth, either not material to the merits of the plea, or at leaſt not to the merits of the cauſe, if the plea were in all things conformable to it.

SECONDLY, becauſe thoſe parts of pleading which in ancient times might perhaps be material, but at this time are become only mere ſtyles and forms, are ſtill continued with much religion; and ſo all thoſe ancient forms at firſt introduced for convenience, but NOW NOT NECESSARY, or it may

may be, antiquated as to their uſe, are yet continued as things wonderfully material, though THEY ONLY SWELL THE BULK, and contribute nothing to the weight of the plea.

THIRDLY, theſe pleas being moſtly drawn by clerks, who are paid for entries and copies thereof, the larger the pleadings are, the more profits come to them; and the dearer the clerk's place, the dearer he makes the client pay (*b*).

(*b*) It may be conſidered as a reproach to the adminiſtration of juſtice, that the fees of its officers ſhould be in proportion to the length of its proceedings. In one of the ſuperior courts at Weſtminſter, ſome of its officers are legally entitled to a fee from the plaintiff in every cauſe, on the filing of his declaration; a fee which is either greater or leſs, as the declaration is either long or ſhort; though the officers have no extra (if any) trouble, in the one caſe or the other; and though no part of the pleadings are now, nor have been for many years, drawn either by themſelves or their clerks. This has long been a ſubject of complaint. Excluſive of the burthen on the ſuitor, which in many caſes is not light, it prevents the court itſelf from bearing that ſhare of the public buſineſs which it is calculated to ſuſtain, and bounden to endure.

By Stat. 5 & 6 Ed. 6. c. 16. "againſt buying and ſelling "of offices," the ſale of all offices "which concern the "adminiſtration or execution of "juſtice, or any clerkſhip to be "occupied in any manner of "court of record wherein juſ-"tice is to be miniſtred," is poſitively forbidden: but by a proviſoe, (ſ. 7.) the act is not to extend "to any of the chief "juſtices of the king's bench, "or common place, or to any "of the juſtices of aſſize." Were this proviſoe repealed, and an adequate compenſation made to the elevated characters in whoſe favour it was enacted, it would no doubt be grateful to them and beneficial to the public. It would not only ſilence the clamour of diſappointment, but contribute by wiſe and popular means to enforce the true ſpirit of the act; namely, (as its preamble ſtates) "perſons "worthy and meet to be ad-"vanced, would be preferred, "and no other."

FOURTHLY,

FOURTHLY, an overforwardneſs in courts to give countenance to frivolous exceptions, though they make nothing to the true merits of the cauſe; whereby it often happens that cauſes are not determined according to their merits, but do often miſcarry for inconſiderable omiſſions in pleading (*i*).

BUT, ſecondly, I ſhall conſider what is the reaſon that in the time of Edward I. one Term contained not above two or three hundred rolls, but at this day one Term contains two thouſand rolls, or more.

THE reaſons whereof may be theſe, viz.

1ſt, Many petty buſineſſes, as treſpaſſes and debts under 40s. are now brought to Weſtminſter, which uſed to be diſpatched in the county or hundred courts. And yet the plaintiffs are not to be blamed, becauſe at this day thoſe inferior courts are ſo ill ſerved, and juſtice there ſo ill adminiſtered, that they had better ſeek it (where it may be had) at Weſtminſter, though at ſomewhat more expence (*k*).

2dly, Multitudes of attornies practiſing in the great courts at Weſtminſter, who are ready at every market to gratify the ſpleen, ſpite, or pride, of every plaintiff (*l*).

(*i*) This is now in a great degree remedied by the erection of courts of conſcience, for the recovery of ſmall debts.

(*k*) However pertinent this fourth reaſon of ſir Matthew Hale might have been heretofore, it is not now in the leaſt degree applicable; the courts having been, for many years, and that much to their honour, aſſiduous to diſcountenance and reprove all frivolous exceptions, and to forward as much as poſſible, the true merits of every cauſe.

(*l*) The number of attornies now (1794) on the rolls of the different courts at Weſtminſter, is almoſt incredible; more than two thouſand practiſe within London and its environs.

3dly, A great increaſe of people in this kingdom above what they were anciently; which muſt needs multiply ſuits.

4thly, A great increaſe of trade and trading perſons, above what there were in ancient times; which muſt have the like effect.

5thly, Multitudes of new laws, both penal and others; all which breed new queſtions, and new ſuits at law; and in particular the ſtatute touching the deviſing of lands;—*cum multis aliis.*

6thly, The multiplication of actions upon the caſe, which were rare formerly, and thereby wager of law ouſted, which diſcouraged many ſuits. For when men were ſure, that in caſe they reſted upon a bare contract without ſpecialty, the other party might wage his law, they would not reſt upon ſuch contracts without reducing the debt into a ſpecialty, if it were of any value; which created much certainty, and accorded many ſuits.

AND herewith I ſhall conclude this chapter, ſhewing what progreſs the law has made, from the reign of king Edward I. down to theſe times (*m*).

(*m*) Mr. Juſtice Blackſtone having, in the moſt elegant and judicious manner, continued this plan of ſir Matthew Hale, from the reign of Henry VII. to that of his preſent majeſty, I therefore take the liberty of referring the reader to the fourth volume of the Commentaries of that learned judge—from page 429 to 443 incluſive.

END OF THE FIRST VOLUME.