COMMENTARIES

ON THE

LAWS

OF

ENGLAND.

BOOK THE FIRST.

BY

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TO

THE QUEEN'S MOST EXCELLENT MAJESTY,

THE FOLLOWING VIEW

OF THE LAWS AND CONSTITUTION

OF ENGLAND,

THE IMPROVEMENT AND PROTECTION OF WHICH

HAVE DISTINGUISHED THE REIGN

OF HER MAJESTY'S ROYAL CONSORT,

IS,

WITH ALL GRATITUDE AND HUMILITY,

MOST RESPECTFULLY INSCRIBED

BY HER DUTIFUL

AND MOST OBEDIENT

SERVANT,

WILLIAM BLACKSTONE.

PREFACE.

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

THE death of Mr VINER *in* 1756, *and his ample benefaction to the univerſity for promoting the ſtudy of the law, produced about two years afterwards a regular and public eſtabliſhment of what the author had privately undertaken. The knowlege of our laws and conſtitution was adopted as a liberal ſcience by general academical authority; competent endowments were decreed for the ſupport*

of a lecturer, and the perpetual encouragement of ſtudents; and the compiler of the enſuing commentaries had the honour to be elected the firſt Vinerian profeſſor.

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

THE labour indeed of theſe reſearches, and of a regular attention to his duty, for a ſeries of ſo many years, he hath found inconſiſtent with his health, as well as his other

other avocations: and hath therefore deſired the univerſity's permiſſion to retire from his office, after the concluſion of the annual courſe in which he is at preſent engaged. But the hints, which he had collected for the uſe of his pupils, having been thought by ſome of his more experienced friends not wholly unworthy of the public eye, it is therefore with the leſs reluctance that he now commits them to the preſs: though probably the little degree of reputation, which their author may have acquired by the candor of an audience (a teſt widely different from that of a deliberate peruſal) would have been better conſulted by a total ſuppreſſion of his lectures; —— had that been a matter intirely within his power.

FOR the truth is, that the preſent publication is as much the effect of neceſſity, as it is of choice. The notes which were taken by his hearers, have by ſome of them (too partial in his favour) been thought worth reviſing and tranſcribing; and theſe tranſcripts have been frequently lent to others. Hence copies have been multiplied, in their nature imperfect, if not erroneous; ſome of which have fallen into mercenary hands, and become the object of clandeſtine ſale. Having therefore ſo much reaſon to apprehend a ſurreptitious impreſſion, he choſe rather to ſubmit his own errors to the world, than to ſeem anſwerable for thoſe of other men. And, with this apology, he commits himſelf to the indulgence of the public.

ERRATA.

Page 138, *line* 15: *for* no *read* an
Page 147, *(notes) col.* 2. *after* 1 Sid. 1. *add* See Stat. 13 Car. II. c.7.
Page 224, *line* 14: *after* fit *add* at
Page 376, *line* 6: *for* predial *read* rectorial

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LAWS OF ENGLAND.

INTRODUCTION.

SECTION THE FIRST.

ON THE STUDY OF THE LAW.*

MR VICE-CHANCELLOR, AND GENTLEMEN OF THE UNIVERSITY,

THE general expectation of ſo numerous and reſpectable an audience, the novelty, and (I may add) the importance of the duty required from this chair, muſt unavoidably be productive of great diffidence and apprehenſions in him who has the honour to be placed in it. He muſt be ſenſible how much will depend upon his conduct in the infancy of a ſtudy, which is now firſt adopted by public academical authority; which has generally been reputed (however unjuſtly) of a dry and unfruitful nature; and of which the theoretical, elementary parts have hitherto received a very moderate ſhare of cultivation. He cannot but reflect that, if either his plan of inſtruction be crude and injudicious, or the execution of it lame and ſuperficial, it will caſt a damp upon the farther progreſs of this moſt uſeful and moſt rational branch of learning; and may defeat for a time the public-

* Read in Oxford at the opening of the Vinerian lectures; 25 Oct. 1758.

ſpirited deſign of our wiſe and munificent benefactor. And this he muſt more eſpecially dread, when he feels by experience how unequal his abilities are (unaſſiſted by preceding examples) to complete, in the manner he could wiſh, ſo extenſive and arduous a taſk; ſince he freely confeſſes, that his former more private attempts have fallen very ſhort of his own ideas of perfection. And yet the candour he has already experienced, and this laſt tranſcendent mark of regard, his preſent nomination by the free and unanimous ſuffrage of a great and learned univerſity, (an honour to be ever remembered with the deepeſt and moſt affectionate gratitude) theſe teſtimonies of your public judgment muſt entirely ſuperſede his own, and forbid him to believe himſelf totally inſufficient for the labour at leaſt of this employment. One thing he will venture to hope for, and it certainly ſhall be his conſtant aim, by diligence and attention to atone for his other defects; eſteeming, that the beſt return, which he can poſſibly make for your favourable opinion of his capacity, will be his unwearied endeavours in ſome little degree to deſerve it.

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

NOR

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

FAR be it from me to derogate from the ſtudy of the civil law, conſidered (apart from any binding authority) as a collection of written reaſon. No man is more thoroughly perſuaded of the general excellence of it's rules, and the uſual equity of it's deciſions; nor is better convinced of it's uſe as well as ornament to the ſcholar, the divine, the ſtateſman, and even the common lawyer. But we muſt not carry our veneration ſo far as to ſacrifice our Alfred and Edward to the manes of Theodoſius and Juſtinian: we muſt not prefer the edict of the praetor, or the reſcript of the Roman emperor, to our own immemorial cuſtoms, or the ſanctions of an Engliſh parliament; unleſs we can alſo prefer the deſpotic monarchy of Rome and Byzantium, for whoſe meridians the former were calculated, to the free conſtitution of Britain, which the latter are adapted to perpetuate.

WITHOUT detracting therefore from the real merit which abounds in the imperial law, I hope I may have leave to aſſert, that if an Engliſhman muſt be ignorant of either the one or the other, he had better be a ſtranger to the Roman than the Engliſh inſtitutions. For I think it an undeniable poſition, that a competent knowlege of the laws of that ſociety, in which we live,

is

is the proper accompliſhment of every gentleman and ſcholar; an highly uſeful, I had almoſt ſaid eſſential, part of liberal and polite education. And in this I am warranted by the example of antient Rome; where, as Cicero informs us[a], the very boys were obliged to learn the twelve tables by heart, as a *carmen neceſſarium* or indiſpenſable leſſon, to imprint on their tender minds an early knowlege of the laws and conſtitutions of their country.

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

AND, firſt, to demonſtrate the utility of ſome acquaintance with the laws of the land, let us only reflect a moment on the ſingular frame and polity of that land, which is governed by this ſyſtem of laws. A land, perhaps the only one in the univerſe, in which political or civil liberty is the very end and ſcope of the conſtitution[b]. This liberty, rightly underſtood, conſiſts in the power of doing whatever the laws permit[c]; which is only to be effected by a general conformity of all orders and degrees to thoſe equitable rules of action, by which the meaneſt individual is protected from the inſults and oppreſſion of the greateſt. As therefore every ſubject is intereſted in the preſervation of the laws, it is incumbent upon every man to be acquainted with thoſe at leaſt, with which he is immediately concerned; leſt he incur the cenſure, as well as inconvenience, of living in ſociety without knowing the obligations which it lays him under. And thus much

[a] *De Legg.* 2. 23.

[b] Monteſq. *Eſp. L.* l. 11. *c.* 5.

[c] *Facultas ejus, quod cuique facere libet, niſi quid vi, aut jure prohibetur. Inſt.* 1. 3. 1.

may

may ſuffice for perſons of inferior condition, who have neither time nor capacity to enlarge their views beyond that contracted ſphere in which they are appointed to move. But thoſe, on whom nature and fortune have beſtowed more abilities and greater leiſure, cannot be ſo eaſily excuſed. Theſe advantages are given them, not for the benefit of themſelves only, but alſo of the public: and yet they cannot, in any ſcene of life, diſcharge properly their duty either to the public or themſelves, without ſome degree of knowlege in the laws. To evince this the more clearly, it may not be amiſs to deſcend to a few particulars.

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

AGAIN, the policy of all laws has made ſome forms neceſſary in the wording of laſt wills and teſtaments, and more with regard to their atteſtation. An ignorance in theſe muſt always be of dangerous conſequence, to ſuch as by choice or neceſſity compile their own teſtaments without any technical aſſiſtance. Thoſe who have attended the courts of juſtice are the beſt witneſſes of the confuſion and diſtreſſes that are hereby occaſioned in families; and of the difficulties that ariſe in diſcerning the true meaning

[d] Education. §. 187.

of

of the teſtator, or ſometimes in diſcovering any meaning at all: ſo that in the end his eſtate may often be veſted quite contrary to theſe his enigmatical intentions, becauſe perhaps he has omitted one or two formal words, which are neceſſary to aſcertain the ſenſe with indiſputable legal preciſion, or has executed his will in the preſence of fewer witneſſes than the law requires.

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

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

contempt from his inferiors, and of cenſure from thoſe to whom he is accountable for his conduct.

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

INDEED it is really amazing, that there ſhould be no other ſtate of life, no other occupation, art, or ſcience, in which ſome method of inſtruction is not looked upon as requiſite, except only the ſcience of legiſlation, the nobleſt and moſt difficult of any. Apprenticeſhips are held neceſſary to almoſt every art, commercial or mechanical: a long courſe of reading and ſtudy muſt form the divine, the phyſician, and the practical profeſſor of the laws: but every man of ſuperior fortune thinks himſelf *born* a legiſlator. Yet Tully was of a different opinion: "It is neceſ-

"ſary, ſays he[e], for a ſenator to be thoroughly acquainted with "the conſtitution; and this, he declares, is a knowlege of the "moſt extenſive nature; a matter of ſcience, of diligence, of "reflexion; without which no ſenator can poſſibly be fit for his "office."

THE miſchiefs that have ariſen to the public from inconſiderate alterations in our laws, are too obvious to be called in queſtion; and how far they have been owing to the defective education of our ſenators, is a point well worthy the public attention. The common law of England has fared like other venerable edifices of antiquity, which raſh and unexperienced workmen have ventured to new-dreſs and refine, with all the rage of modern improvement. Hence frequently it's ſymmetry has been deſtroyed, it's proportions diſtorted, and it's majeſtic ſimplicity exchanged for ſpecious embelliſhments and fantaſtic novelties. For, to ſay the truth, almoſt all the perplexed queſtions, almoſt all the niceties, intricacies, and delays (which have ſometimes diſgraced the Engliſh, as well as other, courts of juſtice) owe their original not to the common law itſelf, but to innovations that have been made in it by acts of parliament; "overladen (as ſir Edward "Coke expreſſes it[f]) with proviſoes and additions, and many "times on a ſudden penned or corrected by men of none or very "little judgment in law." This great and well-experienced judge declares, that in all his time he never knew two queſtions made upon rights merely depending upon the common law; and warmly laments the confuſion introduced by ill-judging and unlearned legiſlators. "But if, he ſubjoins, acts of parliament were "after the old faſhion penned, by ſuch only as perfectly knew "what the common law was before the making of any act of "parliament concerning that matter, as alſo how far forth for-"mer ſtatutes had provided remedy for former miſchiefs, and "defects diſcovered by experience; then ſhould very few queſ-

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

[f] 2 Rep. Pref.

"tions

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

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

SHOULD a judge in the moſt ſubordinate juriſdiction be deficient in the knowlege of the law, it would reflect infinite contempt upon himſelf and diſgrace upon thoſe who employ him. And yet the conſequence of his ignorance is comparatively very trifling and ſmall: his judgment may be examined, and his errors rectified, by other courts. But how much more ſerious and

affecting is the caſe of a ſuperior judge, if without any ſkill in the laws he will boldly venture to decide a queſtion, upon which the welfare and ſubſiſtence of whole families may depend! where the chance of his judging right, or wrong, is barely equal; and where, if he chances to judge wrong, he does an injury of the moſt alarming nature, an injury without poſſibility of redreſs!

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

THE Roman pandects will furniſh us with a piece of hiſtory not unapplicable to our preſent purpoſe. Servius Sulpicius, a gentleman of the patrician order, and a celebrated orator, had occaſion to take the opinion of Quintus Mutius Scaevola, the oracle of the Roman law; but for want of ſome knowlege in that ſcience, could not ſo much as underſtand even the technical terms, which his friend was obliged to make uſe of. Upon which Mutius Scaevola could not forbear to upbraid him with this memorable reproof[g], "that it was a ſhame for a patrician, a noble-"man, and an orator of cauſes, to be ignorant of that law in "which he was ſo peculiarly concerned." This reproach made ſo deep an impreſſion on Sulpicius, that he immediately applied himſelf to the ſtudy of the law; wherein he arrived to that pro-

[g] *Ff.* 1. 2. 2. §. 43. *Turpe eſſe patricio, & nobili, & cauſas oranti, jus in quo verſaretur ignorare.*

ficiency,

ficiency, that he left behind him about a hundred and fourſcore volumes of his own compiling upon the ſubject; and became, in the opinion of Cicero [h], a much more complete lawyer than even Mutius Scaevola himſelf.

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

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

NOR will ſome degree of legal knowlege be found in the leaſt ſuperfluous to perſons of inferior rank; eſpecially thoſe of the learned profeſſions. The clergy in particular, beſides the common obligations they are under in proportion to their rank and fortune, have alſo abundant reaſon, conſidered merely as clergy-

[h] *Brut.* 41.

men,

men, to be acquainted with many branches of the law, which are almoſt peculiar and appropriated to themſelves alone. Such are the laws relating to advowſons, inſtitutions, and inductions; to ſimony, and ſimoniacal contracts; to uniformity, reſidence, and pluralities; to tithes and other eccleſiaſtical dues; to marriages (more eſpecially of late) and to a variety of other ſubjects, which are conſigned to the care of their order by the proviſions of particular ſtatutes. To underſtand theſe aright, to diſcern what is warranted or enjoined, and what is forbidden by law, demands a ſort of legal apprehenſion; which is no otherwiſe to be acquired than by uſe and a familiar acquaintance with legal writers.

FOR the gentlemen of the faculty of phyſic, I muſt frankly own that I ſee no ſpecial reaſon, why they in particular ſhould apply themſelves to the ſtudy of the law; unleſs in common with other gentlemen, and to complete the character of general and extenſive knowlege; a character which their profeſſion, beyond others, has remarkably deſerved. They will give me leave however to ſuggeſt, and that not ludicrouſly, that it might frequently be of uſe to families upon ſudden emergencies, if the phyſician were acquainted with the doctrine of laſt wills and teſtaments, at leaſt ſo far as relates to the formal part of their execution.

BUT thoſe gentlemen who intend to profeſs the civil and eccleſiaſtical laws in the ſpiritual and maritime courts of this kingdom, are of all men (next to common lawyers) the moſt indiſpenſably obliged to apply themſelves ſeriouſly to the ſtudy of our municipal laws. For the civil and canon laws, conſidered with reſpect to any intrinſic obligation, have no force or authority in this kingdom; they are no more binding in England than our laws are binding at Rome. But as far as theſe foreign laws, on account of ſome peculiar propriety, have in ſome particular caſes, and in ſome particular courts, been introduced and allowed by our laws, ſo far they oblige, and no farther; their authority being wholly founded upon that permiſſion and adoption. In which we are not ſingular in our notions; for even in Holland, where the imperial

imperial law is much cultivated and it's deciſions pretty generally followed, we are informed by Van Leeuwen [i], that, "it receives "it's force from cuſtom and the conſent of the people, either ta- "citly or expreſſly given: for otherwiſe, he adds, we ſhould no "more be bound by this law, than by that of the Almains, the "Franks, the Saxons, the Goths, the Vandals, and other of the "antient nations." Wherefore, in all points in which the different ſyſtems depart from each other, the law of the land takes place of the law of Rome, whether antient or modern, imperial or pontificial. And in thoſe of our Engliſh courts wherein a reception has been allowed to the civil and canon laws, if either they exceed the bounds of that reception, by extending themſelves to other matters, than are permitted to them; or if ſuch courts proceed according to the deciſions of thoſe laws, in caſes wherein it is controlled by the law of the land, the common law in either inſtance both may, and frequently does, prohibit and annul their proceedings [k]: and it will not be a ſufficient excuſe for them to tell the king's courts at Weſtminſter, that their practice is warranted by the laws of Juſtinian or Gregory, or is conformable to the decrees of the Rota or imperial chamber. For which reaſon it becomes highly neceſſary for every civilian and canoniſt that would act with ſafety as a judge, or with prudence and reputation as an advocate, to know in what caſes and how far the Engliſh laws have given ſanction to the Roman; in what points the latter are rejected; and where they are both ſo intermixed and blended together, as to form certain ſupplemental parts of the common law of England, diſtinguiſhed by the titles of the king's maritime, the king's military, and the king's eccleſiaſtical law. The propriety of which enquiry the univerſity of Oxford has for more than a century ſo thoroughly ſeen, that in her ſtatutes [l] ſhe appoints, that one of the three queſtions to be annually diſcuſſed at the act by the juriſt-inceptors ſhall relate to the common law; ſubjoining this reaſon, "*quia juris civilis ſtu-* "*dioſos decet haud imperitos eſſe juris municipalis, & differentias ex-*

[i] *Dedicatio corporis juris civilis. Edit.* 1663. *tam.* 5 Rep. Caudrey's Caſe. 2 Inſt. 599.

[k] Hale. Hiſt. C. L. c. 2. Selden *in Fle-* [l] *Tit. VII. Sect.* 2. §. 2.

"*terã*

"*teri patriique juris notas habere.*" And the ſtatutes [m] of the univerſity of Cambridge ſpeak expreſſly to the ſame effect.

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

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

[m] *Doctor legum mox a doctoratu dabit operam legibus Angliae, ut non ſit imperitus earum legum quas habet ſua patria, et differentias exteri patriique juris noſcat.* Stat. Eliz. R. c. 14. Cowel. *Inſtitut. in proœmio.*

[n] c. 47. [o] c. 48.

THAT

THAT antient collection of unwritten maxims and cuſtoms, which is called the common law, however compounded or from whatever fountains derived, had ſubſiſted immemorially in this kingdom; and, though ſomewhat altered and impaired by the violence of the times, had in great meaſure weathered the rude ſhock of the Norman conqueſt. This had endeared it to the people in general, as well becauſe it's deciſions were univerſally known, as becauſe it was found to be excellently adapted to the genius of the Engliſh nation. In the knowlege of this law conſiſted great part of the learning of thoſe dark ages; it was then taught, ſays Mr Selden [p], in the monaſteries, *in the univerſities*, and in the families of the principal nobility. The clergy in particular, as they then engroſſed almoſt every other branch of learning, ſo (like their predeceſſors the Britiſh druids [q]) they were peculiarly remarkable for their proficiency in the ſtudy of the law. *Nullus clericus niſi cauſidicus*, is the character given of them ſoon after the conqueſt by William of Malmſbury [r]. The judges therefore were uſually created out of the ſacred order [s], as was likewiſe the caſe among the Normans [t]; and all the inferior offices were ſupplied by the lower clergy, which has occaſioned their ſucceſſors to be denominated *clerks* to this day.

BUT the common law of England, being not committed to writing, but only handed down by tradition, uſe, and experience, was not ſo heartily reliſhed by the foreign clergy; who came over hither in ſhoals during the reign of the conqueror and his two ſons, and were utter ſtrangers to our conſtitution as well as our language. And an accident, which ſoon after happened, had nearly completed it's ruin. A copy of Juſtinian's pandects, being newly [u] diſcovered at Amalfi, ſoon brought the civil law into

[p] *in Fletam.* 7. 7.

[q] Caeſar *de bello Gal.* 6. 12.

[r] *de geſt. reg. l.* 4.

[s] Dugdale *Orig. jurid. c.* 8.

[t] *Les juges ſont ſages perſonnes & autentiques, — ſicome les archeveſques, eveſques, les chanoines les egliſes cathedraulx, & les autres perſonnes qui ont dignitez in ſaincte egliſe; les abbez, les prieurs conventaulx, & les gouverneurs des egliſes, &c. Grand Couſtumier, ch.* 9.

[u] *circ. A. D.* 1130.

vogue all over the weſt of Europe, where before it was quite laid aſide [w] and in a manner forgotten; though ſome traces of it's authority remained in Italy [x] and the eaſtern provinces of the empire [y]. This now became in a particular manner the favourite of the popiſh clergy, who borrowed the method and many of the maxims of their canon law from this original. The ſtudy of it was introduced into ſeveral univerſities abroad, particularly that of Bologna; where exerciſes were performed, lectures read, and degrees conferred in this faculty, as in other branches of ſcience: and many nations on the continent, juſt then beginning to recover from the convulſions conſequent upon the overthrow of the Roman empire, and ſettling by degrees into peaceable forms of government, adopted the civil law, (being the beſt written ſyſtem then extant) as the baſis of their ſeveral conſtitutions; blending and interweaving it among their own feodal cuſtoms, in ſome places with a more extenſive, in others a more confined authority [z].

NOR was it long before the prevailing mode of the times reached England. For Theobald, a Norman abbot, being elected to the ſee of Canterbury [a], and extremely addicted to this new ſtudy, brought over with him in his retinue many learned proficients therein; and among the reſt Roger ſirnamed Vacarius, whom he placed in the univerſity of Oxford [b], to teach it to the people of this country. But it did not meet with the ſame eaſy reception in England, where a mild and rational ſyſtem of laws had been long eſtabliſhed, as it did upon the continent; and, though the monkiſh clergy (devoted to the will of a foreign primate) received it with eagerneſs and zeal, yet the laity who were more intereſted to preſerve the old conſtitution, and had already ſeverely felt the effect of many Norman innovations, continued wedded to the uſe of the common law. King Stephen imme-

[w] *LL. Wiſigoth.* 2. 1. 9.
[x] *Capitular. Hludow. Pii.* 4. 102.
[y] Selden *in Fletam.* 5. 5.
[z] Domat's treatiſe of laws, c. 13. §. 9. *Epiſtol. Innocent. IV. in M. Paris. ad A. D.* 1254.
[a] *A. D.* 1138.
[b] Gervaſ. Dorobern. *Act. Pontif. Cantuar. col.* 1665.

diately

diately publiſhed a proclamation [c], forbidding the ſtudy of the laws, then newly imported from Italy; which was treated by the monks [d] as a piece of impiety, and, though it might prevent the introduction of the civil law proceſs into our courts of juſtice, yet did not hinder the clergy from reading and teaching it in their own ſchools and monaſteries.

FROM this time the nation ſeems to have been divided into two parties; the biſhops and clergy, many of them foreigners, who applied themſelves wholly to the ſtudy of the civil and canon laws, which now came to be inſeparably interwoven with each other; and the nobility and laity, who adhered with equal pertinacity to the old common law; both of them reciprocally jealous of what they were unacquainted with, and neither of them perhaps allowing the oppoſite ſyſtem that real merit which is abundantly to be found in each. This appears on the one hand from the ſpleen with which the monaſtic writers [e] ſpeak of our municipal laws upon all occaſions; and, on the other, from the firm temper which the nobility ſhewed at the famous parliament of Merton; when the prelates endeavoured to procure an act, to declare all baſtards legitimate in caſe the parents intermarried at any time afterwards; alleging this only reaſon, becauſe holy church (that is, the canon law) declared ſuch children legitimate: but "all the earls and barons (ſays the parliament roll [f]) "with one voice anſwered, that they would not change the laws "of England, which had hitherto been uſed and approved." And we find the ſame jealouſy prevailing above a century afterwards [g], when the nobility declared with a kind of prophetic ſpirit, "that the realm of England hath never been unto this "hour, neither by the conſent of our lord the king and the lords "of parliament ſhall it ever be, ruled or governed by the civil

[c] Rog. Bacon. *citat. per* Selden. *in Fletam.* 7. 6. *in Forteſc.* c. 33. & 8 Rep. Pref.

[d] Joan. Sariſburiens. *Polycrat.* 8. 22.

[e] *Idem, ibid.* 5. 16. Polydor. Vergil. *Hiſt.* l. 9.

[f] *Stat. Merton.* 20 *Hen. III.* c. 9. *Et omnes comites & barones una voce reſponderunt, quod nolunt leges Angliae mutare, quae hucuſque uſitatae ſunt & approbatae.*

[g] 11 Ric. II.

"law[h]." And of this temper between the clergy and laity many more inſtances might be given.

WHILE things were in this ſituation, the clergy, finding it impoſſible to root out the municipal law, began to withdraw themſelves by degrees from the temporal courts; and to that end, very early in the reign of king Henry the third, epiſcopal conſtitutions were publiſhed[i], forbidding all eccleſiaſtics to appear as advocates *in foro ſaeculari*; nor did they long continue to act as judges there, nor caring to take the oath of office which was then found neceſſary to be adminiſtred, that they ſhould in all things determine according to the law and cuſtom of this realm[k]; though they ſtill kept poſſeſſion of the high office of chancellor, an office then of little juridical power; and afterwards, as it's buſineſs increaſed by degrees, they modelled the proceſs of the court at their own diſcretion.

BUT wherever they retired, and wherever their authority extended, they carried with them the ſame zeal to introduce the rules of the civil, in excluſion of the municipal law. This appears in a particular manner from the ſpiritual courts of all denominations, from the chancellor's courts in both our univerſities, and from the high court of chancery before-mentioned; in all of which the proceedings are to this day in a courſe much conformed to the civil law: for which no tolerable reaſon can be aſſigned, unleſs that theſe courts were all under the immediate direction of the popiſh eccleſiaſtics, among whom it was a point of religion to exclude the municipal law; pope Innocent the fourth having [l] forbidden the very reading of it by the clergy, becauſe it's deciſions were not founded on the imperial conſtitutions, but merely on the cuſtoms of the laity. And if it be conſidered, that our univerſities began about that period to receive their preſent form of ſcholaſtic diſcipline; that they were then, and continued to

[h] Selden. *Jan. Anglor. l.* 2. §. 43. *in Fortesc. c.* 33.

[i] Spelman. *Concil. A. D.* 1217. Wilkins, *vol.* 1. *p.* 574, 599.

[k] Selden. *in Fletam.* 9. 3.

[l] M. Paris *ad A. D.* 1254.

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be till the time of the reformation, entirely under the influence of the popiſh clergy; (ſir John Maſon the firſt proteſtant, being alſo the firſt lay, chancellor of Oxford) this will lead us to perceive the reaſon, why the ſtudy of the Roman laws was in thoſe days of bigotry[m] purſued with ſuch alacrity in theſe ſeats of learning; and why the common law was entirely deſpiſed, and eſteemed little better than heretical.

AND, ſince the reformation, many cauſes have conſpired to prevent it's becoming a part of academical education. As, firſt, long uſage and eſtabliſhed cuſtom; which, as in every thing elſe, ſo eſpecially in the forms of ſcholaſtic exerciſe, have juſtly great weight and authority. Secondly, the real intrinſic merit of the civil law, conſidered upon the footing of reaſon and not of obligation, which was well known to the inſtructors of our youth; and their total ignorance of the merit of the common law, though it's equal at leaſt, and perhaps an improvement on the other. But the principal reaſon of all, that has hindered the introduction of this branch of learning, is, that the ſtudy of the common law, being baniſhed from hence in the times of popery, has fallen into a quite different chanel, and has hitherto been wholly cultivated in another place. But as this long uſage and eſtabliſhed cuſtom, of ignorance in the laws of the land, begin now to be thought unreaſonable; and as by this means the merit of thoſe

[m] There cannot be a ſtronger inſtance of the abſurd and ſuperſtitious veneration that was paid to theſe laws, than that the moſt learned writers of the times thought they could not form a perfect character, even of the bleſſed virgin, without making her a civilian and a canoniſt. Which Albertus Magnus, the renowned dominican doctor of the thirteenth century, thus proves in his *Summa de laudibus chriſtiferae virginis (divinum magis quam humanum opus) qu.* 23. §. 5. "*Item quod jura civilia, & leges, & decreta "ſcivit in ſummo, probatur hoc modo: ſapien-"tia advocati manifeſtatur in tribus; unum, "quod obtineat omnia contra judicem juſtum & "ſapientem; ſecundo, quod contra adverſarium "aſtutum & ſagacem; tertio, quod in cauſa "deſperata: ſed beatiſſima virgo, contra ju-"dicem ſapientiſſimum, Dominum; contra ad-"verſarium callidiſſimum, dyabolum; in cauſa "noſtra deſperata; ſententiam optatam obti-"nuit.*" To which an eminent franciſcan, two centuries afterwards, Bernardinus de Buſti (*Mariale, part.* 4. *ſerm.* 9.) very gravely ſubjoins this note. "*Nec videtur incongruum "mulieres habere peritiam juris. Legitur enim "de uxore Joannis Andreae gloſſatoris, quod "tantam peritiam in utroque jure habuit, ut "publice in ſcholis legere auſa ſit.*

laws

laws will probably be more generally known; we may hope that the method of ſtudying them will ſoon revert to it's antient courſe, and the foundations at leaſt of that ſcience will be laid in the two univerſities; without being excluſively confined to the chanel which it fell into at the times I have been juſt deſcribing.

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

THE incident I mean was the fixing the court of common pleas, the grand tribunal for diſputes of property, to be held in one certain ſpot; that the ſeat of ordinary juſtice might be permanent and notorious to all the nation. Formerly that, in conjunction with all the other ſuperior courts, was held before the

[n] Forteſc. *de laud. LL. c.* 25.

[o] This remarkably appeared in the caſe of the abbot of Torun, *M.* 22 *E.* 3. 24. who had cauſed a certain prior to be ſummoned to anſwer at Avignon for erecting an oratory *contra inhibitionem novi operis*; by which words Mr Selden, *(in Flet.* 8. 5.) very juſtly underſtands to be meant the title *de novi operis nuntiatione* both in the civil and canon laws, *(Ff.* 39. 1. *C.* 8. 11. and *Decretal.* not *Extrav.* 5. 32.) whereby the erection of any new buildings in prejudice of more antient ones was prohibited. But Skipwith the king's ſerjeant, and afterwards chief baron of the exchequer, declares them to be flat nonſenſe; "*in ceux parolx*, contra inhibiti-"onem novi operis, *ny ad pas entendment*:" and juſtice Schardelow mends the matter but little by informing him, that they ſignify a reſtitution *in their law*; for which reaſon he very ſagely reſolves to pay no ſort of regard to them. "*Ceo n'eſt que un reſti-*"*tution en lour ley, pur que a ceo n'avomus* "*regard, &c.*"

king's

king's capital juſticiary of England, in the *aula regis*, or ſuch of his palaces wherein his royal perſon reſided; and removed with his houſhold from one end of the kingdom to the other. This was found to occaſion great inconvenience to the ſuitors; to remedy which it was made an article of the great charter of liberties, both that of king John and king Henry the third [p], that "common pleas ſhould no longer follow the king's court, but be "held in ſome certain place:" in conſequence of which they have ever ſince been held (a few neceſſary removals in times of the plague excepted) in the palace of Weſtminſter only. This brought together the profeſſors of the municipal law, who before were diſperſed about the kingdom, and formed them into an aggregate body; whereby a ſociety was eſtabliſhed of perſons, who (as Spelman [q] obſerves) addicting themſelves wholly to the ſtudy of the laws of the land, and no longer conſidering it as a mere ſubordinate ſcience for the amuſement of leiſure hours, ſoon raiſed thoſe laws to that pitch of perfection, which they ſuddenly attained under the auſpices of our Engliſh Juſtinian, king Edward the firſt.

IN conſequence of this lucky aſſemblage, they naturally fell into a kind of collegiate order, and, being excluded from Oxford and Cambridge, found it neceſſary to eſtabliſh a new univerſity of their own. This they did by purchaſing at various times certain houſes (now called the inns of court and of chancery) between the city of Weſtminſter, the place of holding the king's courts, and the city of London; for advantage of ready acceſs to the one, and plenty of proviſions in the other [r]. Here exerciſes were performed, lectures read, and degrees were at length conferred in the common law, as at other univerſities in the canon and civil. The degrees were thoſe of barriſters (firſt ſtiled apprentices [s] from *apprendre*, to learn) who anſwered to our ba-

[p] *c.* 11.
[q] *Gloſſar.* 334.
[r] Forteſc. *c.* 48.
[s] Apprentices or Barriſters ſeem to have been firſt appointed by an ordinance of king Edward the firſt in parliament, in the 20th year of his reign. (Spelm. *Gloſſ.* 37. Dugdale. *Orig. jurid.* 55.)

chelors;

chelors; as the ſtate and degree of a ſerjeant [t], *ſervientis ad legem*, did to that of doctor.

THE crown ſeems to have ſoon taken under it's protection this infant ſeminary of common law; and, the more effectually to foſter and cheriſh it, king Henry the third in the nineteenth year of his reign iſſued out an order directed to the mayor and ſheriffs of London, commanding that no regent of any law ſchools *within* that city ſhould for the future teach law therein [u]. The word, law, or *leges*, being a general term, may create ſome doubt at this diſtance of time whether the teaching of the civil law, or the common, or both, is hereby reſtrained. But in either caſe it tends to the ſame end. If the civil law only is prohibited, (which is Mr Selden's [w] opinion) it is then a retaliation upon the clergy, who had excluded the common law from *their* ſeats of learning. If the municipal law be alſo included in the reſtriction, (as ſir Edward Coke [x] underſtands it, and which the words ſeem to import) then the intention is evidently this; by preventing private teachers within the walls of the city, to collect all the common lawyers into the one public univerſity, which was newly inſtituted in the ſuburbs.

[t] The firſt mention I have met with in our lawbooks of ſerjeants or countors, is in the ſtatute of Weſtm. 1. 3 Edw. I. c. 29. and in Horn's Mirror, *c.* 1. §. 10. *c.* 2. §. 5. *c.* 3. §. 1. in the ſame reign. But M. Paris in his life of John II, abbot of St. Alban's, which he wrote in 1255, 39 Hen. III. ſpeaks of advocates at the common law, or countors *(quos banci narratores vulgariter appellamus)* as of an order of men well known. And we have an example of the antiquity of the coif in the ſame author's hiſtory of England, *A. D.* 1259. in the caſe of one William de Buſſy; who, being called to account for his great knavery and malpractices, claimed the benefit of his orders or clergy, which till then remained an entire ſecret; and to that end *voluit ligamenta coifae ſuae ſolvere, ut palam monſtraret ſe tonſuram habere clericalem; ſed non eſt permiſſus. —— Satelles vero eum arripiens, non per coifae ligamina ſed per guttur eum apprehendens, traxit ad carcerem.* And hence ſir H. Spelman conjectures, *(Gloſſar.* 335.) that coifs were introduced to hide the tonſure of ſuch renegade clerks, as were ſtill tempted to remain in the ſecular courts in the quality of advocates or judges, notwithſtanding their prohibition by canon.

[u] *Ne aliquis ſcholas regens de legibus in eadem civitate de caetero ibidem leges doceat.*

[w] *in Flet.* 8. 2.

[x] 2 Inſt. proëm.

IN

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

HENCE it is evident, that (though under the influence of the monks our univerſities neglected this ſtudy, yet) in the time of Henry the ſixth it was thought highly neceſſary and was the univerſal practice, for the young nobility and gentry to be inſtructed in the originals and elements of the laws. But by degres this cuſtom has fallen into diſuſe; ſo that in the reign of queen Elizabeth ſir Edward Coke [b] does not reckon above a thouſand ſtudents, and the number at preſent is very conſiderably leſs. Which ſeems principally owing to theſe reaſons: firſt, becauſe the inns of chancery being now almoſt totally filled by the inferior branch of the profeſſion, they are neither commodious nor proper for the reſort of gentlemen of any rank or figure; ſo that there are now very rarely any young ſtudents entered at the inns of chancery: ſecondly, becauſe in the inns of court all ſorts of regimen and academical ſuperintendance, either with regard to morals or ſtudies, are found impracticable and therefore entirely neglected: laſtly, becauſe perſons of birth and fortune, after having finiſhed their uſual courſes at the univerſities, have ſeldom

[y] *c.* 49.
[z] 3 Rep. pref.
[a] *ibid.*
[b] *ibid.*

leiſure or reſolution ſufficient to enter upon a new ſcheme of ſtudy at a new place of inſtruction. Wherefore few gentlemen now reſort to the inns of court, but ſuch for whom the knowlege of practice is abſolutely neceſſary; ſuch, I mean, as are intended for the profeſſion: the reſt of our gentry, (not to ſay our nobility alſo) having uſually retired to their eſtates, or viſited foreign kingdoms, or entered upon public life, without any inſtruction in the laws of the land; and indeed with hardly any opportunity of gaining inſtruction, unleſs it can be afforded them in theſe ſeats of learning.

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

BUT if, upon the whole, there are any ſtill wedded to monaſtic prejudice, that can entertain a doubt how far this ſtudy is properly and regularly *academical*, ſuch perſons I am afraid either have not conſidered the conſtitution and deſign of an univerſity, or elſe think very meanly of it. It muſt be a deplorable narrowneſs of mind, that would confine theſe ſeats of inſtruction to the limited views of one or two learned profeſſions. To the praiſe

of

of this age be it ſpoken, a more open and generous way of thinking begins now univerſally to prevail. The attainment of liberal and genteel accompliſhments, though not of the intellectual ſort, has been thought by our wiſeſt and moſt affectionate patrons [c], and very lately by the whole univerſity [d], no ſmall improvement of our antient plan of education; and therefore I may ſafely affirm that nothing (how *unuſual* ſoever) is, under due regulations, improper to be *taught* in this place, which is proper for a gentleman to *learn*. But that a ſcience, which diſtinguiſhes the criterions of right and wrong; which teaches to eſtabliſh the one, and prevent, puniſh, or redreſs the other; which employs in it's theory the nobleſt faculties of the ſoul, and exerts in it's practice the cardinal virtues of the heart; a ſcience, which is univerſal in it's uſe and extent, accommodated to each individual, yet comprehending the whole community; that a ſcience like this ſhould have ever been deemed unneceſſary to be ſtudied in an univerſity, is matter of aſtoniſhment and concern. Surely, if it were not before an object of academical knowlege, it was high time to make it one; and to thoſe who can doubt the propriety of it's reception among us (if any ſuch there be) we may return an anſwer in their own way; that ethics are confeſſedly a branch of academical learning, and Ariſtotle *himſelf has ſaid*, ſpeaking of the laws of his own country, that juriſprudence or the knowlege of thoſe laws is the principal and moſt [e] perfect branch of ethics.

FROM a thorough conviction of this truth, our munificent benefactor Mr VINER, having employed above half a century in amaſſing materials for new modelling and rendering more commodious the rude ſtudy of the laws of the land, conſigned both

[c] Lord chancellor Clarendon, in his dialogue of education, among his tracts, p.325. appears to have been very ſolicitous, that it might be made "a part of the ornament "of our learned academies to teach the "qualities of riding, dancing, and fencing, "at thoſe hours when more ſerious exer-"ciſes ſhould be intermitted."

[d] By accepting in full convocation the remainder of lord Clarendon's hiſtory from his noble deſcendants, on condition to apply the profits ariſing from it's publication to the eſtabliſhment of a *manage* in the univerſity.

[e] Τελειοτατη μαλιστα αρετη, ὁτι της τελειας αρετης χρησις εστι. *Ethic. ad Nicomach. l.* 5. *c.* 3.

the plan and execution of theſe his public-ſpirited deſigns to the wiſdom of his parent univerſity. Reſolving to dedicate his learned labours "to the benefit of poſterity and the perpetual ſervice "of his country[f]," he was ſenſible he could not perform his reſolutions in a better and more effectual manner, than by extending to the youth of this place thoſe aſſiſtances, of which he ſo well remembered and ſo heartily regretted the want. And the ſenſe, which the univerſity has entertained of this ample and moſt uſeful benefaction, muſt appear beyond a doubt from their gratitude in receiving it with all poſſible marks of eſteem[g]; from their alacrity and unexampled diſpatch in carrying it into execution[h]; and, above all, from the laws and conſtitutions by which they have effectually guarded it from the neglect and abuſe to which ſuch inſtitutions are liable[i]. We have ſeen an univerſal emulation, who beſt ſhould underſtand, or moſt faithfully pur-

[f] See the preface to the eighteenth volume of his abridgment.

[g] Mr Viner is enrolled among the public benefactors of the univerſity by decree of convocation.

[h] Mr Viner died June 5, 1756. His effects were collected and ſettled, near a volume of his work printed, almoſt the whole diſpoſed of, and the accounts made up, in a year and a half from his deceaſe, by the very diligent and worthy adminiſtrators with the will annexed, (Dr Weſt and Dr Good of Magdalene, Dr Whalley of Oriel, Mr Buckler of All Souls, and Mr Betts of Univerſity college) to whom that care was conſigned by the univerſity. Another half year was employed in conſidering and ſettling a plan of the propoſed inſtitution, and in framing the ſtatutes thereupon, which were finally confirmed by convocation on the 3d of July, 1758. The profeſſor was elected on the 20th of October following, and two ſcholars on the ſucceeding day. And, laſtly, it was agreed at the annual audit in 1761, to eſtabliſh a fellowſhip; and a fellow was accordingly elected in January following. — The reſidue of this fund, ariſing from the ſale of Mr Viner's abridgment, will probably be ſufficient hereafter to found another fellowſhip and ſcholarſhip, or three more ſcholarſhips, as ſhall be thought moſt expedient.

[i] The ſtatutes are in ſubſtance as follows:

1. THAT the accounts of this benefaction be ſeparately kept, and annually audited by the delegates of accounts and profeſſor, and afterwards reported to convocation.

2. THAT a profeſſorſhip of the laws of England be eſtabliſhed, with a ſalary of two hundred pounds *per annum*; the profeſſor to be elected by convocation, and to be at the time of his election at leaſt a maſter of arts or bachelor of civil law in the univerſity of Oxford, of ten years ſtanding from his matriculation; and alſo a barriſter at law of four years ſtanding at the bar.

3. THAT ſuch profeſſor (by himſelf, or by deputy to be previouſly approved by convocation)

ſue, the deſigns of our generous patron: and with pleaſure we recollect, that thoſe who are moſt diſtinguiſhed by their quality,

convocation) do read one ſolemn public lecture on the laws of England, and in the Engliſh language, in every academical term, at certain ſtated times previous to the commencement of the common law term; or forfeit twenty pounds for every omiſſion to Mr Viner's general fund: and alſo (by himſelf, or by deputy to be approved, if occaſional, by the vice-chancellor and proctors; or, if permanent, both the cauſe and the deputy to be annually approved by convocation) do yearly read one complete courſe of lectures on the laws of England, and in the Engliſh language, conſiſting of ſixty lectures at the leaſt; to be read during the univerſity term time, with ſuch proper intervals that not more than four lectures may fall within any ſingle week: that the profeſſor do give a month's notice of the time when the courſe is to begin, and do read *gratis* to the ſcholars of Mr Viner's foundation; but may demand of other auditors ſuch gratuity as ſhall be ſettled from time to time by decree of convocation: and that, for every of the ſaid ſixty lectures omitted, the profeſſor, on complaint made to the vice-chancellor within the year, do forfeit forty ſhillings to Mr Viner's general fund; the proof of having performed his duty to lie upon the ſaid profeſſor.

4. THAT every profeſſor do continue in his office during life, unleſs in caſe of ſuch miſbehaviour as ſhall amount to bannition by the univerſity ſtatutes; or unleſs he deſerts the profeſſion of the law by betaking himſelf to another profeſſion; or unleſs, after one admonition by the vice-chancellor and proctors for notorious neglect, he is guilty of another flagrant omiſſion: in any of which caſes he be deprived by the vice-chancellor, with conſent of the houſe of convocation.

5. THAT ſuch a number of fellowſhips with a ſtipend of fifty pounds *per annum*, and ſcholarſhips with a ſtipend of thirty pounds be eſtabliſhed, as the convocation ſhall from time to time ordain, according to the ſtate of Mr Viner's revenues.

6. THAT every fellow be elected by convocation, and at the time of election be unmarried, and at leaſt a maſter of arts or bachelor of civil law, and a member of ſome college or hall in the univerſity of Oxford; the ſcholars of this foundation or ſuch as have been ſcholars (if qualified and approved of by convocation) to have the preference: that, if not a barriſter when choſen, he be called to the bar within one year after his election; but do reſide in the univerſity two months in every year, or in caſe of non-reſidence do forfeit the ſtipend of that year to Mr Viner's general fund.

7. THAT every ſcholar be elected by convocation, and at the time of election be unmarried, and a member of ſome college or hall in the univerſity of Oxford, who ſhall have been matriculated twenty four calendar months at the leaſt: that he do take the degree of bachelor of civil law with all convenient ſpeed; (either proceeding in arts or otherwiſe) and previous to his taking the ſame, between the ſecond and eighth year from his matriculation, be bound to attend two courſes of the profeſſor's lectures, to be certified under the profeſſor's hand; and within one year after taking the ſame be called to the bar: that he do annually reſide ſix months till he is of four years ſtanding, and four months from that time till he is maſter of arts or bachelor of civil law; after which he be bound to reſide two months in every year; or, in caſe of non-reſidence, do forfeit the ſtipend of that year to Mr Viner's general fund.

8. THAT the ſcholarſhips do become void in caſe of non-attendance on the profeſſor, or not taking the degree of bachelor of

their fortune, their ſtation, their learning, or their experience, have appeared the moſt zealous to promote the ſucceſs of Mr Viner's eſtabliſhment.

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

of civil law, being duly admoniſhed ſo to do by the vice-chancellor and proctors: and that both fellowſhips and ſcholarſhips do expire at the end of ten years after each reſpective election; and become void in caſe of groſs miſbehaviour, non-reſidence for two years together, marriage, not being called to the bar within the time before limited, (being duly admoniſhed ſo to be by the vice-chancellor and proctors) or deſerting the profeſſion of the law by following any other profeſſion: and that in any of theſe caſes the vice-chancellor, with conſent of convocation, do declare the place actually void.

9. THAT in caſe of any vacancy of the profeſſorſhip, fellowſhips, or ſcholarſhips, the profits of the current year be ratably divided between the predeceſſor or his repreſentatives, and the ſucceſſor; and that a new election be had within one month afterwards, unleſs by that means the time of election ſhall fall within any vacation, in which caſe it be deferred to the firſt week in the next full term. And that before any convocation ſhall be held for ſuch election, or for any other matter relating to Mr Viner's benefaction, ten days public notice be given to each college and hall of the convocation, and the cauſe of convoking it.

[k] See lord Bacon's propoſals and offer of a digeſt.

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very numerous and very powerful profeſſion in the preſervation of our rights and revenues.

FOR I think it is paſt diſpute that thoſe gentlemen, who reſort to the inns of court with a view to purſue the profeſſion, will find it expedient (whenever it is practicable) to lay the previous foundations of this, as well as every other ſcience, in one of our learned univerſities. We may appeal to the experience of every ſenſible lawyer, whether any thing can be more hazardous or diſcouraging than the uſual entrance on the ſtudy of the law. A raw and unexperienced youth, in the moſt dangerous ſeaſon of life, is tranſpanted on a ſudden into the midſt of allurements to pleaſure, without any reſtraint or check but what his own prudence can ſuggeſt; with no public direction in what courſe to purſue his enquiries; no private aſſiſtance to remove the diſtreſſes and difficulties, which will always embaraſs a beginner. In this ſituation he is expected to ſequeſter himſelf from the world, and by a tedious lonely proceſs to extract the theory of law from a maſs of undigeſted learning; or elſe by an aſſiduous attendance on the courts to pick up theory and practice together, ſufficient to qualify him for the ordinary run of buſineſs. How little therefore is it to be wondered at, that we hear of ſo frequent miſcarriages; that ſo many gentlemen of bright imaginations grow weary of ſo unpromiſing a ſearch[1], and addict themſelves wholly to amuſements, or other leſs innocent purſuits; and that ſo many perſons of moderate capacity confuſe themſelves at firſt ſetting out, and continue ever dark and puzzled during the remainder of their lives!

THE evident want of ſome aſſiſtance in the rudiments of legal knowlege, has given birth to a practice, which, if ever it had grown to be general, muſt have proved of extremely perni-

[1] Sir Henry Spelman, in the preface to his gloſſary, gives us a very lively picture of his own diſtreſs upon this occaſion. "*Emiſit me mater Londinum, juris noſtri ca-*
"*peſſendi gratia; cujus cum veſtibulum ſalu-*
"*taſſem, reperiſſemque linguam peregrinam, dia-*
"*lectum barbaram, methodum inconcinnam, mo-*
"*lem non ingentem ſolum ſed perpetuis humeris*
"*ſuſtinendam, excidit mihi (fateor) animus,*
"*&c.*"

cious

cious conſequence: I mean the cuſtom, by ſome ſo very warmly recommended, to drop all liberal education, as of no uſe to lawyers; and to place them, in it's ſtead, as the deſk of ſome ſkilful attorney; in order to initiate them early in all the depths of practice, and render them more dextrous in the mechanical part of buſineſs. A few inſtances of particular perſons, (men of excellent learning, and unblemiſhed integrity) who, in ſpight of this method of education, have ſhone in the foremoſt ranks of the bar, have afforded ſome kind of ſanction to this illiberal path to the profeſſion, and biaſſed many parents, of ſhortſighted judgment, in it's favour: not conſidering, that there are ſome geniuſes, formed to overcome all diſadvantages, and that from ſuch particular inſtances no general rules can be formed; nor obſerving, that thoſe very perſons have frequently recommended by the moſt forcible of all examples, the diſpoſal of their own offſpring, a very different foundation of legal ſtudies, a regular academical education. Perhaps too, in return, I could now direct their eyes to our principal ſeats of juſtice, and ſuggeſt a few hints, in favour of univerſity learning[m]: --- but in theſe all who hear me, I know, have already prevented me.

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

[m] The four higheſt offices in the law were at that time filled by gentlemen, two of whom had been fellows of All Souls college; another, ſtudent of Chriſt-Church; and the fourth a fellow of Trinity college, Cambridge.

[n] See Kennet's life of Somner. p. 67.

[o] *Ff.* 40. 9. 12.

NOR

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

THE inconveniences here pointed out can never be effectually prevented, but by making academical education a previous ſtep to the profeſſion of the common law, and at the ſame time making the rudiments of the law a part of academical education. For ſciences are of a ſociable diſpoſition, and flouriſh beſt in the neighbourhood of each other: nor is there any branch of learning, but may be helped and improved by aſſiſtances drawn from other arts. If therefore the ſtudent in our laws hath formed both his ſentiments and ſtyle, by peruſal and imitation of the pureſt claſſical writers, among whom the hiſtorians and orators will beſt deſerve his regard; if he can reaſon with preciſion, and ſeparate argument from fallacy, by the clear ſimple rules of pure unſophiſticated logic; if he can fix his attention, and ſteadily purſue truth through any the moſt intricate deduction, by the uſe of mathematical demonſtrations; if he has enlarged his conceptions of nature and art, by a view of the ſeveral branches of genuine, experimental, philoſophy; if he has impreſſed on his mind the ſound maxims of the law of nature, the beſt and moſt authentic foundation of human laws; if, laſtly, he has contemplated thoſe maxims reduced to a practical ſyſtem in the laws of imperial Rome; if he has done this or any part of it, (though all may be eaſily done under as able inſtructors as ever graced any ſeats of learning) a ſtudent thus qualified may enter upon the ſtudy of the law with incredible advantage and reputation. And if,

at the concluſion, or during the acquiſition of theſe accompliſhments, he will afford himſelf here a year or two's farther leiſure, to lay the foundation of his future labours in a ſolid ſcientifical method, without thirſting too early to attend that practice which it is impoſſible he ſhould rightly comprehend, he will afterwards proceed with the greateſt eaſe, and will unfold the moſt intricate points with an intuitive rapidity and clearneſs.

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

BEFORE I conclude, it may perhaps be expected, that I lay before you a ſhort and general account of the method I propoſe to follow, in endeavouring to execute the truſt you have been pleaſed to repoſe in my hands. And in theſe ſolemn lectures, which are ordained to be read at the entrance of every term, (more perhaps to do public honour to this laudable inſtitution, than for the private inſtruction of individuals[p]) I preſume it will beſt anſwer the intent of our benefactor and the expectation of this learned body, if I attempt to illuſtrate at times ſuch detached titles of the law, as are the moſt eaſy to be underſtood, and moſt capable of hiſtorical or critical ornament. But in reading the complete courſe, which is annually conſigned to my care, a more regular method will be neceſſary; and, till a better is propoſed,

[p] See Lowth's *Oratio Crewiana*, p. 365.

I ſhall

I ſhall take the liberty to follow the ſame that I have already ſubmitted to the public[q]. To fill up and finiſh that outline with propriety and correctneſs, and to render the whole intelligible to the uninformed minds of beginners, (whom we are too apt to ſuppoſe acquainted with terms and ideas, which they never had opportunity to learn) this muſt be my ardent endeavour, though by no means my promiſe to accompliſh. You will permit me however very briefly to deſcribe, rather what I conceive an academical expounder of the laws ſhould do, than what I have ever known to be done.

HE ſhould conſider his courſe as a general map of the law, marking out the ſhape of the country, it's connexions and boundaries, it's greater diviſions and principal cities: it is not his buſineſs to deſcribe minutely the ſubordinate limits, or to fix the longitude and latitude of every inconſiderable hamlet. His attention ſhould be engaged, like that of the readers in Forteſcue's inns of chancery, "in tracing out the originals and as it were the elements of the law." For if, as Juſtinian[r] has obſerved, the tender underſtanding of the ſtudent be loaded at the firſt with a multitude and variety of matter, it will either occaſion him to deſert his ſtudies, or will carry him heavily through them, with much labour, delay, and deſpondence. Theſe originals ſhould be traced to their fountains, as well as our diſtance will permit; to the cuſtoms of the Britons and Germans, as recorded by Caeſar and Tacitus; to the codes of the northern nations on the continent, and more eſpecially to thoſe of our own Saxon princes; to the rules of the Roman law, either left here in the days of Papinian, or imported by Vacarius and his followers; but, above

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

[r] *Incipientibus nobis exponere jura populi Romani, ita videntur tradi poſſe commodiſſime, ſi primo levi ac ſimplici via ſingula tradantur: Alioqui, ſi ſtatim ab initio rudem adhuc & infirmum animum ſtudioſi multitudine ac varietate rerum oneravimus, duorum alterum, aut deſertorem ſtudiorum efficiemus, aut cum magno labore, ſaepe etiam cum diffidentia (quae plerumque juvenes avertit) ſerius ad id perducemus, ad quod leviore via ductus, ſine magno labore & ſine ulla diffidentia maturius perduci potuiſſet. Inſt.* 1. 1. 2.

all, to that inexhauſtible reſervoir of legal antiquities and learning, the feodal law, or, as Spelman [s] has entitled it, the law of nations in our weſtern orb. Theſe primary rules and fundamental principles ſhould be weighed and compared with the precepts of the law of nature, and the practice of other countries; ſhould be explained by reaſons, illuſtrated by examples, and confirmed by undoubted authorities; their hiſtory ſhould be deduced, their changes and revolutions obſerved, and it ſhould be ſhewn how far they are connected with, or have at any time been affected by, the civil tranſactions of the kingdom.

A PLAN of this nature, if executed with care and ability, cannot fail of adminiſtring a moſt uſeful and rational entertainment to ſtudents of all ranks and profeſſions; and yet it muſt be confeſſed that the ſtudy of the laws is not merely a matter of amuſement: for as a very judicious writer [t] has obſerved upon a ſimilar occaſion, the learner "will be conſiderably diſappointed "if he looks for entertainment without the expence of attention." An attention, however, not greater than is uſually beſtowed in maſtering the rudiments of other ſciences, or ſometimes in purſuing a favorite recreation or exerciſe. And this attention is not equally neceſſary to be exerted by every ſtudent upon every occaſion. Some branches of the law, as the formal proceſs of civil ſuits, and the ſubtile diſtinctions incident to landed property, which are the moſt difficult to be thoroughly underſtood, are the leaſt worth the pains of underſtanding, except to ſuch gentlemen as intend to purſue the profeſſion. To others I may venture to apply, with a ſlight alteration, the words of ſir John Forteſcue [u],

[s] Of Parliaments. 57.

[t] Dr Taylor's preface to Elem. of civil law.

[u] *Tibi, princeps, neceſſe non erit myſteria legis Angliae longo diſciplinatu rimare. Sufficiet tibi,* — et ſatis *denominari legiſta mereberis, ſi legum principia & cauſas, uſque ad elementa, diſcipuli more indagaveris.* — *Quare tu, princeps ſereniſſime, parvo tempore, parva induſtria, ſufficienter eris in legibus regni Angliae eruditus, dummodo ad ejus apprehenſionem tu conferas animum tuum.* — *Noſco namque ingenii tui perſpicacitatem, quo audacter pronuntio quod in legibus illis (licet earum peritia, qualis judicibus neceſſaria eſt, vix viginti annorum lucubrationibus acquiratur) tu doctrinam principi congruam in anno uno ſufficienter nanciſceris; nec interim militarem diſciplinam, ad quam tam ardenter anhelas, negliges; ſed ea, recreationis loco, etiam anno illo tu ad libitum perfrueris.* c. 8.

when

when firſt his royal pupil determines to engage in this ſtudy. "It will not be neceſſary for a gentleman, as ſuch, to examine "with a cloſe application the critical niceties of the law. It will "fully be ſufficient, and he may well enough be denominated a "lawyer, if under the inſtruction of a maſter he traces up the "principles and grounds of the law, even to their original ele- "ments. Therefore in a very ſhort period, and with very little "labour, he may be ſufficiently informed in the laws of his "country, if he will but apply his mind in good earneſt to re- "ceive and apprehend them. For, though ſuch knowlege as is "neceſſary for a judge is hardly to be acquired by the lucubra- "tions of twenty years, yet with a genius of tolerable perſpica- "city, that knowlege which is fit for a perſon of birth or con- "dition may be learned in a ſingle year, without neglecting his "other improvements."

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

SECTION THE SECOND.

OF THE NATURE OF LAWS IN GENERAL.

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

THUS when the ſupreme being formed the univerſe, and created matter out of nothing, he impreſſed certain principles upon that matter, from which it can never depart, and without which it would ceaſe to be. When he put that matter into motion, he eſtabliſhed certain laws of motion, to which all moveable bodies muſt conform. And, to deſcend from the greateſt operations to the ſmalleſt, when a workman forms a clock, or other piece of mechaniſm, he eſtabliſhes at his own pleaſure certain arbitrary laws for it's direction; as that the hand ſhall deſcribe a given ſpace in a given time; to which law as long as the work conforms, ſo long it continues in perfection, and anſwers the end of it's formation.

If we farther advance, from mere inactive matter to vegetable and animal life, we ſhall find them ſtill governed by laws; more numerous indeed, but equally fixed and invariable. The whole progreſ of plants, from the ſeed to the root, and from thence to the ſeed again; --- the method of animal nutrition, digeſtion, ſecretion,

ſecretion, and all other branches of vital oeconomy; --- are not left to chance, or the will of the creature itſelf, but are performed in a wondrous involuntary manner, and guided by unerring rules laid down by the great creator.

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

MAN, conſidered as a creature, muſt neceſſarily be ſubject to the laws of his creator, for he is entirely a dependent being. A being, independent of any other, has no rule to purſue, but ſuch as he preſcribes to himſelf; but a ſtate of dependance will inevitably oblige the inferior to take the will of him, on whom he depends, as the rule of his conduct: not indeed in every particular, but in all thoſe points wherein his dependance conſiſts. This principle therefore has more or leſs extent and effect, in proportion as the ſuperiority of the one and the dependance of the other is greater or leſs, abſolute or limited. And conſequently as man depends abſolutely upon his maker for every thing, it is neceſſary that he ſhould in all points conform to his maker's will.

THIS will of his maker is called the law of nature. For as God, when he created matter, and endued it with a principle of mobility, eſtabliſhed certain rules for the perpetual direction of that motion; ſo, when he created man, and endued him with freewill to conduct himſelf in all parts of life, he laid down certain

tain immutable laws of human nature, whereby that freewill is in ſome degree regulated and reſtrained, and gave him alſo the faculty of reaſon to diſcover the purport of thoſe laws.

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

BUT if the diſcovery of theſe firſt principles of the law of nature depended only upon the due exertion of right reaſon, and could not otherwiſe be attained than by a chain of metaphyſical diſquiſitions, mankind would have wanted ſome inducement to have quickened their inquiries, and the greater part of the world would have reſted content in mental indolence, and ignorance it's inſeparable companion. As therefore the creator is a being, not only of infinite *power*, and *wiſdom*, but alſo of infinite *goodneſs*, he has been pleaſed ſo to contrive the conſtitution and frame of humanity, that we ſhould want no other prompter to enquire after and purſue the rule of right, but only our own ſelf-love, that univerſal principle of action. For he has ſo intimately connected, ſo inſeparably interwoven the laws of eternal juſtice with the happineſs of each individual, that the latter cannot be attained but by obſerving the former; and, if the former be punctually obeyed, it cannot but induce the latter. In conſequence of which mutual connection of juſtice and human felicity, he has not per-

[a] *Juris praecepta ſunt haec, honeſte vivere, alterum non laedere, ſuum cuique tribuere. Inſt.* 1.1.3.

plexed

plexed the law of nature with a multitude of abſtracted rules and precepts, referring merely to the fitneſs or unfitneſs of things, as ſome have vainly ſurmiſed; but has graciouſly reduced the rule of obedience to this one paternal precept, "that man ſhould "purſue his own happineſs." This is the foundation of what we call ethics, or natural law. For the ſeveral articles into which it is branched in our ſyſtems, amount to no more than demonſtrating, that this or that action tends to man's real happineſs, and therefore very juſtly concluding that the performance of it is a part of the law of nature; or, on the other hand, that this or that action is deſtructive of man's real happineſs, and therefore that the law of nature forbids it.

THIS law of nature, being co-eval with mankind and dictated by God himſelf, is of courſe ſuperior in obligation to any other. It is binding over all the globe, in all countries, and at all times: no human laws are of any validity, if contrary to this; and ſuch of them as are valid derive all their force, and all their authority, mediately or immediately, from this original.

BUT in order to apply this to the particular exigencies of each individual, it is ſtill neceſſary to have recourſe to reaſon; whoſe office it is to diſcover, as was before obſerved, what the law of nature directs in every circumſtance of life; by conſidering, what method will tend the moſt effectually to our own ſubſtantial happineſs. And if our reaſon were always, as in our firſt anceſtor before his tranſgreſſion, clear and perfect, unruffled by paſſions, unclouded by prejudice, unimpaired by diſeaſe or intemperance, the taſk would be pleaſant and eaſy; we ſhould need no other guide but this. But every man now finds the contrary in his own experience; that his reaſon is corrupt, and his underſtanding full of ignorance and error.

THIS has given manifold occaſion for the benign interpoſition of divine providence; which, in compaſſion to the frailty, the imperfection, and the blindneſs of human reaſon, hath been

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

UPON theſe two foundations, the law of nature and the law of revelation, depend all human laws; that is to ſay, no human laws ſhould be ſuffered to contradict theſe. There is, it is true, a great number of indifferent points, in which both the divine law and the natural leave a man at his own liberty; but which are found neceſſary for the benefit of ſociety to be reſtrained within certain limits. And herein it is that human laws have their greateſt force and efficacy; for, with regard to ſuch points as are not indifferent, human laws are only declaratory of, and act in ſubordination to, the former. To inſtance in the caſe of murder: this is expreſſly forbidden by the divine, and demonſtrably by the natural law; and from theſe prohibitions ariſes the true unlawfulneſs of this crime. Thoſe human laws, that annex a puniſhment to it, do not at all increaſe it's moral guilt, or ſuperadd any freſh obligation *in foro conſcientiae* to abſtain from it's

it's perpetration. Nay, if any human law ſhould allow or injoin us to commit it, we are bound to tranſgreſs that human law, or elſe we muſt offend both the natural and the divine. But with regard to matters that are in themſelves indifferent, and are not commanded or forbidden by thoſe ſuperior laws; ſuch, for inſtance, as exporting of wool into foreign countries; here the inferior legiſlature has ſcope and opportunity to interpoſe, and to make that action unlawful which before was not ſo.

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

THUS much I thought it neceſſary to premiſe concerning the law of nature, the revealed law, and the law of nations, before

[b] Puffendorf, *l.* 7. *c.* 1. compared with Barbeyrac's commentary. [c] *Ff.* 1. 1. 9.

I proceeded to treat more fully of the principal ſubject of this ſection, municipal or civil law; that is, the rule by which particular diſtricts, communities, or nations are governed; being thus defined by Juſtinian [d], "*jus civile eſt quod quiſque ſibi populus con-*"*ſtituit.*" I call it *municipal* law, in compliance with common ſpeech; for, tho' ſtrictly that expreſſion denotes the particular cuſtoms of one ſingle *municipium* or free town, yet it may with ſufficient propriety be applied to any one ſtate or nation, which is governed by the ſame laws and cuſtoms.

MUNICIPAL law, thus underſtood, is properly defined to be "a rule of civil conduct preſcribed by the ſupreme power in "a ſtate, commanding what is right and prohibiting what is "wrong." Let us endeavour to explain it's ſeveral properties, as they ariſe out of this definition.

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

[d] *Inſt.* 1. 2. 1.

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

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

IT is likewiſe "a rule *preſcribed.*" Becauſe a bare reſolution, confined in the breaſt of the legiſlator, without manifeſting itſelf by ſome external ſign, can never be properly a law. It is requiſite that this reſolution be notified to the people who are to obey it. But the manner in which this notification is to be made, is matter of very great indifference. It may be notified by univerſal tradition and long practice, which ſuppoſes a previous publication, and is the caſe of the common law of England. It may be notified, *viva voce*, by officers appointed for that purpoſe, as is done with regard to proclamations, and ſuch acts of parliament

as

as are appointed to be publicly read in churches and other aſſemblies. It may laſtly be notified by writing, printing, or the like; which is the general courſe taken with all our acts of parliament. Yet, whatever way is made uſe of, it is incumbent on the promulgators to do it in the moſt public and perſpicuous manner; not like Caligula, who (according to Dio Caſſius) wrote his laws in a very ſmall character, and hung them up upon high pillars, the more effectually to enſnare the people. There is ſtill a more unreaſonable method than this, which is called making of laws *ex poſt facto*; when *after* an action is committed, the legiſlator then for the firſt time declares it to have been a crime, and inflicts a puniſhment upon the perſon who has committed it; here it is impoſſible that the party could foreſee that an action, innocent when it was done, ſhould be afterwards converted to guilt by a ſubſequent law; he had therefore no cauſe to abſtain from it; and all puniſhment for not abſtaining muſt of conſequence be cruel and unjuſt[e]. All laws ſhould be therefore made to commence *in futuro*, and be notified before their commencement; which is implied in the term "*preſcribed*." But when this rule is in the uſual manner notified, or preſcribed, it is then the ſubject's buſineſs to be thoroughly acquainted therewith; for if ignorance, of what he *might* know, were admitted as a legitimate excuſe, the laws would be of no effect, but might always be eluded with impunity.

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

[e] Such laws among the Romans were denominated *privilegia*, or private laws, of which Cicero *de leg.* 3. 19. and in his oration *pro domo*, 17. thus ſpeaks; "*Vetant leges* "*ſacratae, vetant duodecim tabulae, leges privatis hominibus irrogari; id enim eſt privi-*"*legium. Nemo unquam tulit, nihil eſt crudelius,* "*nihil pernicioſius, nihil quod minus haec civi-*"*tas ferre poſſit.*"

THIS

THIS will naturally lead us into a ſhort enquiry concerning the nature of ſociety and civil government; and the natural, inherent right that belongs to the ſovereignty of a ſtate, wherever that ſovereignty be lodged, of making and enforcing laws.

THE only true and natural foundations of ſociety are the wants and the fears of individuals. Not that we can believe, with ſome theoretical writers, that there ever was a time when there was no ſuch thing as ſociety; and that, from the impulſe of reaſon, and through a ſenſe of their wants and weakneſſes, individuals met together in a large plain, entered into an original contract, and choſe the talleſt man preſent to be their governor. This notion, of an actually exiſting unconnected ſtate of nature, is too wild to be ſeriouſly admitted; and beſides it is plainly contradictory to the revealed accounts of the primitive origin of mankind, and their preſervation two thouſand years afterwards; both which were effected by the means of ſingle families. Theſe formed the firſt ſociety, among themſelves; which every day extended it's limits, and when it grew too large to ſubſiſt with convenience in that paſtoral ſtate, wherein the patriarchs appear to have lived, it neceſſarily ſubdivided itſelf by various migrations into more. Afterwards, as agriculture increaſed, which employs and can maintain a much greater number of hands, migrations became leſs frequent; and various tribes, which had formerly ſeparated, reunited again; ſometimes by compulſion and conqueſt, ſometimes by accident, and ſometimes perhaps by compact. But though ſociety had not it's formal beginning from any convention of individuals, actuated by their wants and their fears; yet it is the *ſenſe* of their weakneſs and imperfection that *keeps* mankind together; that demonſtrates the neceſſity of this union; and that therefore is the ſolid and natural foundation, as well as the cement, of ſociety. And this is what we mean by the original contract of ſociety; which, though perhaps in no inſtance it has ever been formally expreſſed at the firſt inſtitution of a ſtate, yet in nature and reaſon muſt always be underſtood and implied, in

in the very act of aſſociating together: namely, that the whole ſhould protect all it's parts, and that every part ſhould pay obedience to the will of the whole; or, in other words, that the community ſhould guard the rights of each individual member, and that (in return for this protection) each individual ſhould ſubmit to the laws of the community; without which ſubmiſſion of all it was impoſſible that protection could be certainly extended to any.

FOR when ſociety is once formed, government reſults of courſe, as neceſſary to preſerve and to keep that ſociety in order. Unleſs ſome ſuperior were conſtituted, whoſe commands and deciſions all the members are bound to obey, they would ſtill remain as in a ſtate of nature, without any judge upon earth to define their ſeveral rights, and redreſs their ſeveral wrongs. But, as all the members of ſociety are naturally equal, it may be aſked, in whoſe hands are the reins of government to be entruſted? To this the general anſwer is eaſy; but the application of it to particular caſes has occaſioned one half of thoſe miſchiefs which are apt to proceed from miſguided political zeal. In general, all mankind will agree that government ſhould be repoſed in ſuch perſons, in whom thoſe qualities are moſt likely to be found, the perfection of which are among the attributes of him who is emphatically ſtiled the ſupreme being; the three grand requiſites, I mean, of wiſdom, of goodneſs, and of power: wiſdom, to diſcern the real intereſt of the community; goodneſs, to endeavour always to purſue that real intereſt; and ſtrength, or power, to carry this knowlege and intention into action. Theſe are the natural foundations of ſovereignty, and theſe are the requiſites that ought to be found in every well conſtituted frame of government.

HOW the ſeveral forms of government we now ſee in the world at firſt actually began, is matter of great uncertainty, and has occaſioned infinite diſputes. It is not my buſineſs or intention to enter into any of them. However they began, or by what

what right ſoever they ſubſiſt, there is and muſt be in all of them a ſupreme, irreſiſtible, abſolute, uncontrolled authority, in which the *jura ſummi imperii*, or the rights of ſovereignty, reſide. And this authority is placed in thoſe hands, wherein (according to the opinion of the founders of ſuch reſpective ſtates, either expreſſly given, or collected from their tacit approbation) the qualities requiſite for ſupremacy, wiſdom, goodneſs, and power, are the moſt likely to be found.

THE political writers of antiquity will not allow more than three regular forms of government; the firſt, when the ſovereign power is lodged in an aggregate aſſembly conſiſting of all the members of a community, which is called a democracy; the ſecond, when it is lodged in a council, compoſed of ſelect members, and then it is ſtiled an ariſtocracy; the laſt, when it is entruſted in the hands of a ſingle perſon, and then it takes the name of a monarchy. All other ſpecies of government, they ſay, are either corruptions of, or reducible to, theſe three.

BY the ſovereign power, as was before obſerved, is meant the making of laws; for wherever that power reſides, all others muſt conform to, and be directed by it, whatever appearance the outward form and adminiſtration of the government may put on. For it is at any time in the option of the legiſlature to alter that form and adminiſtration by a new edict or rule, and to put the execution of the laws into whatever hands it pleaſes: and all the other powers of the ſtate muſt obey the legiſlative power in the execution of their ſeveral functions, or elſe the conſtitution is at an end.

IN a democracy, where the right of making laws reſides in the people at large, public virtue, or goodneſs of intention, is more likely to be found, than either of the other qualities of government. Popular aſſemblies are frequently fooliſh in their contrivance, and weak in their execution; but generally mean to do the thing that is right and juſt, and have always a degree of pa-

triotiſm or public ſpirit. In ariſtocracies there is more wiſdom to be found, than in the other frames of government; being compoſed, or intended to be compoſed, of the moſt experienced citizens; but there is leſs honeſty than in a republic, and leſs ſtrength than in a monarchy. A monarchy is indeed the moſt powerful of any, all the ſinews of government being knit together, and united in the hand of the prince; but then there is imminent danger of his employing that ſtrength to improvident or oppreſſive purpoſes.

THUS theſe three ſpecies of government have, all of them, their ſeveral perfections and imperfections. Democracies are uſually the beſt calculated to direct the end of a law; ariſtocracies to invent the means by which that end ſhall be obtained; and monarchies to carry thoſe means into execution. And the antients, as was obſerved, had in general no idea of any other permanent form of government but theſe three; for though Cicero[f] declares himſelf of opinion, "*eſſe optime conſtitutam rem-*"*publicam, quae ex tribus generibus illis, regali, optimo, et populari,* "*ſit modice confuſa;*" yet Tacitus treats this notion of a mixed government, formed out of them all, and partaking of the advantages of each, as a viſionary whim; and one that, if effected, could never be laſting or ſecure[g].

BUT happily for us of this iſland, the Britiſh conſtitution has long remained, and I truſt will long continue, a ſtanding exception to the truth of this obſervation. For, as with us the executive power of the laws is lodged in a ſingle perſon, they have all the advantages of ſtrength and diſpatch, that are to be found in the moſt abſolute monarchy; and, as the legiſlature of the kingdom is entruſted to three diſtinct powers, entirely independent of each other; firſt, the king; ſecondly, the lords ſpiritual and temporal, which is an ariſtocratical aſſembly of perſons

[f] In his fragments *de rep. l.* 2.

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

ſelected

ſelected for their piety, their birth, their wiſdom, their valour, or their property; and, thirdly, the houſe of commons, freely choſen by the people from among themſelves, which makes it a kind of democracy; as this aggregate body, actuated by different ſprings, and attentive to different intereſts, compoſes the Britiſh parliament, and has the ſupreme diſpoſal of every thing; there can no inconvenience be attempted by either of the three branches, but will be withſtood by one of the other two; each branch being armed with a negative power, ſufficient to repel any innovation which it ſhall think inexpedient or dangerous.

HERE then is lodged the ſovereignty of the Britiſh conſtitution; and lodged as beneficially as is poſſible for ſociety. For in no other ſhape could we be ſo certain of finding the three great qualities of government ſo well and ſo happily united. If the ſupreme power were lodged in any one of the three branches ſeparately, we muſt be expoſed to the inconveniences of either abſolute monarchy, ariſtocracy, or democracy; and ſo want two of the three principal ingredients of good polity, either virtue, wiſdom, or power. If it were lodged in any two of the branches; for inſtance, in the king and houſe of lords, our laws might be providently made, and well executed, but they might not always have the good of the people in view: if lodged in the king and commons, we ſhould want that circumſpection and mediatory caution, which the wiſdom of the peers is to afford: if the ſupreme rights of legiſlature were lodged in the two houſes only, and the king had no negative upon their proceedings, they might be tempted to encroach upon the royal prerogative, or perhaps to aboliſh the kingly office, and thereby weaken (if not totally deſtroy) the ſtrength of the executive power. But the conſtitutional government of this iſland is ſo admirably tempered and compounded, that nothing can endanger or hurt it, but deſtroying the equilibrium of power between one branch of the legiſlature and the reſt. For if ever it ſhould happen that the independence of any one of the three ſhould be loſt, or that it ſhould become ſubſervient to the views of either of the other two, there would

ſoon be an end of our conſtitution. The legiſlature would be changed from that, which was originally ſet up by the general conſent and fundamental act of the ſociety; and ſuch a change, however effected, is according to Mr Locke[h] (who perhaps carries his theory too far) at once an entire diſſolution of the bands of government; and the people would be reduced to a ſtate of anarchy, with liberty to conſtitute to themſelves a new legiſlative power.

HAVING thus curſorily conſidered the three uſual ſpecies of government, and our own ſingular conſtitution, ſelected and compounded from them all, I proceed to obſerve, that, as the power of making laws conſtitutes the ſupreme authority, ſo wherever the ſupreme authority in any ſtate reſides, it is the right of that authority to make laws; that is, in the words of our definition, *to preſcribe the rule of civil action.* And this may be diſcovered from the very end and inſtitution of civil ſtates. For a ſtate is a collective body, compoſed of a multitude of individuals, united for their ſafety and convenience, and intending to act together as one man. If it therefore is to act as one man, it ought to act by one uniform will. But, inaſmuch as political communities are made up of many natural perſons, each of whom has his particular will and inclination, theſe ſeveral wills cannot by any *natural* union be joined together, or tempered and diſpoſed into a laſting harmony, ſo as to conſtitute and produce that one uniform will of the whole. It can therefore be no otherwiſe produced than by a *political* union; by the conſent of all perſons to ſubmit their own private wills to the will of one man, or of one or more aſſemblies of men, to whom the ſupreme authority is entruſted: and this will of that one man, or aſſemblage of men, is in different ſtates, according to their different conſtitutions, underſtood to be *law.*

THUS far as to the *right* of the ſupreme power to make laws; but farther, it is it's *duty* likewiſe. For ſince the reſpec-

[h] On government, part 2. §. 212.

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tive members are bound to conform themſelves to the will of the ſtate, it is expedient that they receive directions from the ſtate declaratory of that it's will. But ſince it is impoſſible, in ſo great a multitude, to give injunctions to every particular man, relative to each particular action, therefore the ſtate eſtabliſhes general rules, for the perpetual information and direction of all perſons in all points, whether of poſitive or negative duty. And this, in order that every man may know what to look upon as his own, what as another's; what abſolute and what relative duties are required at his hands; what is to be eſteemed honeſt, diſhoneſt, or indifferent; what degree every man retains of his natural liberty; what he has given up as the price of the benefits of ſociety; and after what manner each perſon is to moderate the uſe and exerciſe of thoſe rights which the ſtate aſſigns him, in order to promote and ſecure the public tranquillity.

FROM what has been advanced, the truth of the former branch of our definition, is (I truſt) ſufficiently evident; that "*municipal law is a rule of civil conduct preſcribed by the ſupreme* "*power in a ſtate.*" I proceed now to the latter branch of it; that it is a rule ſo preſcribed, "*commanding what is right, and* "*prohibiting what is wrong.*"

NOW in order to do this completely, it is firſt of all neceſſary that the boundaries of right and wrong be eſtabliſhed and aſcertained by law. And when this is once done, it will follow of courſe that it is likewiſe the buſineſs of the law, conſidered as a rule of civil conduct, to enforce theſe rights and to reſtrain or redreſs theſe wrongs. It remains therefore only to conſider in what manner the law is ſaid to aſcertain the boundaries of right and wrong; and the methods which it takes to command the one and prohibit the other.

FOR this purpoſe every law may be ſaid to conſiſt of ſeveral parts: one, *declaratory*; whereby the rights to be obſerved, and the wrongs to be eſchewed, are clearly defined and laid down: another,

another, *directory*; whereby the ſubject is inſtructed and enjoined to obſerve thoſe rights, and to abſtain from the commiſſion of thoſe wrongs: a third, *remedial*; whereby a method is pointed out to recover a man's private rights, or redreſs his private wrongs: to which may be added a fourth, uſually termed the *ſanction*, or *vindicatory* branch of the law; whereby it is ſignified what evil or penalty ſhall be incurred by ſuch as commit any public wrongs, and tranſgreſs or neglect their duty.

WITH regard to the firſt of theſe, the *declaratory* part of the municipal law, this depends not ſo much upon the law of revelation or of nature, as upon the wiſdom and will of the legiſlator. This doctrine, which before was ſlightly touched, deſerves a more particular explication. Thoſe rights then which God and nature have eſtabliſhed, and are therefore called natural rights, ſuch as are life and liberty, need not the aid of human laws to be more effectually inveſted in every man than they are; neither do they receive any additional ſtrength when declared by the municipal laws to be inviolable. On the contrary, no human legiſlature has power to abridge or deſtroy them, unleſs the owner ſhall himſelf commit ſome act that amounts to a forfeiture. Neither do divine or natural *duties* (ſuch as, for inſtance, the worſhip of God, the maintenance of children, and the like) receive any ſtronger ſanction from being alſo declared to be duties by the law of the land. The caſe is the ſame as to crimes and miſdemeſnors, that are forbidden by the ſuperior laws, and therefore ſtiled *mala in ſe*, ſuch as murder, theft, and perjury; which contract no additional turpitude from being declared unlawful by the inferior legiſlature. For that legiſlature in all theſe caſes acts only, as was before obſerved, in ſubordination to the great lawgiver, tranſcribing and publiſhing his precepts. So that, upon the whole, the declaratory part of the municipal law has no force or operation at all, with regard to actions that are naturally and intrinſically right or wrong.

BUT

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

THUS much for the *declaratory* part of the municipal law: and the *directory* ſtands much upon the ſame footing; for this virtually includes the former, the declaration being uſually collected from the direction. The law that ſays, "thou ſhalt not "ſteal," implies a declaration that ſtealing is a crime. And we have ſeen that, in things naturally indifferent, the very eſſence of right and wrong depends upon the direction of the laws to do or to omit it.

THE *remedial* part of a law is ſo neceſſary a conſequence of the former two, that laws muſt be very vague and imperfect without it. For in vain would rights be declared, in vain directed

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to be obſerved, if there were no method of recovering and aſſerting thoſe rights, when wrongfully withheld or invaded. This is what we mean properly, when we ſpeak of the protection of the law. When, for inſtance, the *declaratory* part of the law has ſaid "that the field or inheritance, which belonged to Titius's "father, is veſted by his death in Titius;" and the *directory* part has "forbidden any one to enter on another's property without "the leave of the owner;" if Gaius after this will preſume to take poſſeſſion of the land, the *remedial* part of the law will then interpoſe it's office; will make Gaius reſtore the poſſeſſion to Titius, and alſo pay him damages for the invaſion.

WITH regard to the *ſanction* of laws, or the evil that may attend the breach of public duties; it is obſerved, that human legiſlators have for the moſt part choſen to make the ſanction of their laws rather *vindicatory* than *remuneratory*, or to conſiſt rather in puniſhments, than in actual particular rewards. Becauſe, in the firſt place, the quiet enjoyment and protection of all our civil rights and liberties, which are the ſure and general conſequence of obedience to the municipal law, are in themſelves the beſt and moſt valuable of all rewards. Becauſe alſo, were the exerciſe of every virtue to be enforced by the propoſal of particular rewards, it were impoſſible for any ſtate to furniſh ſtock enough for ſo profuſe a bounty. And farther, becauſe the dread of evil is a much more forcible principle of human actions than the proſpect of good[i]. For which reaſons, though a prudent beſtowing of rewards is ſometimes of exquiſite uſe, yet we find that thoſe civil laws, which enforce and enjoin our duty, do ſeldom, if ever, propoſe any privilege or gift to ſuch as obey the law; but do conſtantly come armed with a penalty denounced againſt tranſgreſſors, either expreſſly defining the nature and quantity of the puniſhment, or elſe leaving it to the diſcretion of the judges, and thoſe who are entruſted with the care of putting the laws in execution.

[i] Locke, Hum. Und. b. 2. c. 21.

OF

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

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

IT is held, it is true, and very juſtly, by the principal of our ethical writers, that human laws are binding upon mens conſciences. But if that were the only, or moſt forcible obligation, the good only would regard the laws, and the bad would ſet them at defiance. And, true as this principle is, it muſt ſtill be underſtood with ſome reſtriction. It holds, I apprehend, as to *rights*; and that, when the law has determined the field to belong to Titius, it is matter of conſcience no longer to withhold or to invade it. So alſo in regard to *natural duties*, and ſuch offences as are *mala in ſe*: here we are bound in conſcience, becauſe we are bound by ſuperior laws, before thoſe human laws were in being, to perform the one and abſtain from the other. But in relation to thoſe laws which enjoin only *poſitive duties*, and forbid only ſuch things as are not *mala in ſe* but *mala prohibita* merely, an-

nexing a penalty to noncompliance, here I apprehend conſcience is no farther concerned, than by directing a ſubmiſſion to the penalty, in caſe of our breach of thoſe laws: for otherwiſe the multitude of penal laws in a ſtate would not only be looked upon as an impolitic, but would alſo be a very wicked thing; if every ſuch law were a ſnare for the conſcience of the ſubject. But in theſe caſes the alternative is offered to every man; "either ab- "ſtain from this, or ſubmit to ſuch a penalty;" and his conſcience will be clear, whichever ſide of the alternative he thinks proper to embrace. Thus, by the ſtatutes for preſerving the game, a penalty is denounced againſt every unqualified perſon that kills a hare. Now this prohibitory law does not make the tranſgreſſion a moral offence: the only obligation in conſcience is to ſubmit to the penalty if levied.

I HAVE now gone through the definition laid down of a municipal law; and have ſhewn that it is "a rule --- of civil con- "duct --- preſcribed --- by the ſupreme power in a ſtate --- com- "manding what is right, and prohibiting what is wrong:" in the explication of which I have endeavoured to interweave a few uſeful principles, concerning the nature of civil government, and the obligation of human laws. Before I conclude this ſection, it may not be amiſs to add a few obſervations concerning the *interpretation* of laws.

WHEN any doubt aroſe upon the conſtruction of the Roman laws, the uſage was to ſtate the caſe to the emperor in writing, and take his opinion upon it. This was certainly a bad method of interpretation. To interrogate the legiſlature to decide particular diſputes, is not only endleſs, but affords great room for partiality and oppreſſion. The anſwers of the emperor were called his reſcripts, and theſe had in ſucceeding caſes the force of perpetual laws; though they ought to be carefully diſtinguiſhed, by every rational civilian, from thoſe general conſtitutions, which had only the nature of things for their guide. The emperor Macrinus, as his hiſtorian Capitolinus informs us, had once reſolved

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to aboliſh theſe reſcripts, and retain only the general edicts; he could not bear that the haſty and crude anſwers of ſuch princes as Commodus and Caracalla ſhould be reverenced as laws. But Juſtinian thought otherwiſe[k], and he has preſerved them all. In like manner the canon laws, or decretal epiſtles of the popes, are all of them reſcripts in the ſtricteſt ſenſe. Contrary to all true forms of reaſoning, they argue from particulars to generals.

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

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

[k] *Inſt.* 1. 2. 6.

[l] L. of N. and N. 5. 12. 3.

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

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

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

[m] *l.* 5. *c.* 12. §. 8.

5. BUT,

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

FROM this method of interpreting laws, by the reaſon of them, ariſes what we call *equity*; which is thus defined by Grotius[o], "the correction of that, wherein the law (by reaſon of its univer-"ſality) is deficient." For ſince in laws all caſes cannot be foreſeen or expreſſed, it is neceſſary, that when the general decrees of the law come to be applied to particular caſes, there ſhould be ſomewhere a power veſted of excepting thoſe circumſtances, which (had they been foreſeen) the legiſlator himſelf would have excepted. And theſe are the caſes, which, as Grotius expreſſes it, "*lex non exacte definit, ſed arbitrio boni viri permittit.*"

Equity thus depending, eſſentially, upon the particular circumſtances of each individual caſe, there can be no eſtabliſhed

[n] *l.* 1. *c.* 11. [o] *de aequitate.*

rules

rules and fixed precepts of equity laid down, without deſtroying it's very eſſence, and reducing it to a poſitive law. And, on the other hand, the liberty of conſidering all caſes in an equitable light muſt not be indulged too far, leſt thereby we deſtroy all law, and leave the deciſion of every queſtion entirely in the breaſt of the judge. And law, without equity, tho' hard and diſagreeable, is much more deſirable for the public good, than equity without law; which would make every judge a legiſlator, and introduce moſt infinite confuſion; as there would then be almoſt as many different rules of action laid down in our courts, as there are differences of capacity and ſentiment in the human mind.

SECTION THE THIRD.

OF THE LAWS OF ENGLAND.

THE municipal law of England, or the rule of civil conduct preſcribed to the inhabitants of this kingdom, may with ſufficient propriety be divided into two kinds; the *lex non ſcripta*, the unwritten, or common law; and the *lex ſcripta*, the written, or ſtatute law.

THE *lex non ſcripta*, or unwritten law, includes not only *general cuſtoms*, or the common law properly ſo called; but alſo the *particular cuſtoms* of certain parts of the kingdom; and likewiſe thoſe *particular laws*, that are by cuſtom obſerved only in certain courts and juriſdictions.

WHEN I call theſe parts of our law *leges non ſcriptae*, I would not be underſtood as if all thoſe laws were at preſent merely *oral*, or communicated from the former ages to the preſent ſolely by word of mouth. It is true indeed that, in the profound ignorance of letters which formerly overſpread the whole weſtern world, all laws were intirely traditional, for this plain reaſon, that the nations among which they prevailed had but little idea of writing. Thus the Britiſh as well as the Gallic druids committed all their laws as well as learning to memory [a]; and it is ſaid of the primitive Saxons here, as well as their brethren on the continent, that *leges ſola memoria et uſu retinebant* [b]. But with us at preſent the monuments and evidences of our legal cuſtoms are contained in the records of the ſeveral courts of juſtice, in books

[a] *Caeſ. de b. G. lib.* 6. *c.* 13. [b] Spelm. Gl. 362.

of

of reports and judicial deciſions, and in the treatiſes of learned ſages of the profeſſion, preſerved and handed down to us from the times of higheſt antiquity. However I therefore ſtile theſe parts of our law *leges non ſcriptae*, becauſe their original inſtitution and authority are not ſet down in writing, as acts of parliament are, but they receive their binding power, and the force of laws, by long and immemorial uſage, and by their univerſal reception throughout the kingdom. In like manner as Aulus Gellius defines the *jus non ſcriptum* to be that, which is "*tacito* "*et illiterato hominum conſenſu et moribus expreſſum.*"

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

AND indeed our antiquarians and firſt hiſtorians do all poſitively aſſure us, that our body of laws is of this compounded nature. For they tell us, that in the time of Alfred the local cuſtoms of the ſeveral provinces of the kingdom were grown ſo various, that he found it expedient to compile his *dome-book* or *liber judicialis*, for the general uſe of the whole kingdom. This

[c] *c.* 17. [d] See his propoſals for a digeſt.

book

book is ſaid to have been extant ſo late as the reign of king Edward the fourth, but is now unfortunately loſt. It contained, we may probably ſuppoſe, the principal maxims of the common law, the penalties for miſdemeſnors, and the forms of judicial proceedings. Thus much may at leaſt be collected from that injunction to obſerve it, which we find in the laws of king Edward the elder, the ſon of Alfred[e]. "*Omnibus qui reipublicae praeſunt, "etiam atque etiam mando, ut omnibus aequos ſe praebeant judices, "perinde ac in judiciali libro (Saxonice,* ꝺom-bec*) ſcriptum habetur; "nec quicquam formident quin jus commune (Saxonice,* polcpihte*) "audacter libereque dicant.*"

BUT the irruption and eſtabliſhment of the Danes in England which followed ſoon after, introduced new cuſtoms and cauſed this code of Alfred in many provinces to fall into diſuſe; or at leaſt to be mixed and debaſed with other laws of a coarſer alloy. So that about the beginning of the eleventh century there were three principal ſyſtems of laws prevailing in different diſtricts. 1. The *Mercen-Lage*, or Mercian laws, which were obſerved in many of the midland counties, and thoſe bordering on the principality of Wales; the retreat of the antient Britons; and therefore very probably intermixed with the Britiſh or Druidical cuſtoms. 2. The *Weſt-Saxon-Lage*, or laws of the weſt Saxons, which obtained in the counties to the ſouth and weſt of the iſland, from Kent to Devonſhire. Theſe were probably much the ſame with the laws of Alfred abovementioned, being the municipal law of the far moſt conſiderable part of his dominions, and particularly including Berkſhire, the ſeat of his peculiar reſidence. 3. The *Dane-Lage*, or Daniſh law, the very name of which ſpeaks it's original and compoſition. This was principally maintained in the reſt of the midland counties, and alſo on the eaſtern coaſt, the ſeat of that piratical people. As for the very northern provinces, they were at that time under a diſtinct government[f].

[e] c. 1.

[f] Hal. Hiſt. 55.

OUT of theſe three laws, Roger Hoveden[g] and Ranulphus Ceſtrenſis[h] inform us, king Edward the confeſſor extracted one uniform law or digeſt of laws, to be obſerved throughout the whole kingdom; though Hoveden and the author of an old manuſcript chronicle[i] aſſure us likewiſe, that this work was projected and begun by his grandfather king Edgar. And indeed a general digeſt of the ſame nature has been conſtantly found expedient, and therefore put in practice by other great nations, formed from an aſſemblage of little provinces, governed by peculiar cuſtoms. As in Portugal, under king Edward, about the beginning of the fifteenth century[k]. In Spain under Alonzo X, who about the year 1250 executed the plan of his father St. Ferdinand, and collected all the provincial cuſtoms into one uniform law, in the celebrated code entitled *las partidas*[l]. And in Sweden about the ſame aera, a univerſal body of common law was compiled out of the particular cuſtoms eſtabliſhed by the laghman of every province, and intitled the *land's lagh*, being analogous to the *common law* of England[m].

BOTH theſe undertakings, of king Edgar and Edward the confeſſor, ſeem to have been no more than a new edition, or freſh promulgation, of Alfred's code or dome-book, with ſuch additions and improvements as the experience of a century and an half had ſuggeſted. For Alfred is generally ſtiled by the ſame hiſtorians the *legum Anglicanarum conditor*, as Edward the confeſſor is the *reſtitutor*. Theſe however are the laws which our hiſtories ſo often mention under the name of the laws of Edward the confeſſor; which our anceſtors ſtruggled ſo hardly to maintain, under the firſt princes of the Norman line; and which ſubſequent princes ſo frequently promiſed to keep and to reſtore, as the moſt popular act they could do, when preſſed by foreign emergencies or domeſtic diſcontents. Theſe are the laws, that

[g] *in Hen. II.*
[h] *in Edw. Confeſſor.*
[i] *in Seld. ad Eadmer.* 6.
[k] Mod. Un. Hiſt. xxii. 135.
[l] Ibid. xx. 211.
[m] Ibid. xxxiii. 21, 58.

ſo

ſo vigorouſly withſtood the repeated attacks of the civil law; which eſtabliſhed in the twelfth century a new Roman empire over moſt of the ſtates on the continent: ſtates that have loſt, and perhaps upon that account, their political liberties; while the free conſtitution of England, perhaps upon the ſame account, has been rather improved than debaſed. Theſe, in ſhort, are the laws which gave riſe and original to that collection of maxims and cuſtoms, which is now known by the name of the common law. A name either given to it, in contradiſtinction to other laws, as the ſtatute law, the civil law, the law merchant, and the like; or, more probably, as a law *common* to all the realm, the *jus commune* or *folcright* mentioned by king Edward the elder, after the abolition of the ſeveral provincial cuſtoms and particular laws beforementioned.

BUT though this is the moſt likely foundation of this collection of maxims and cuſtoms, yet the maxims and cuſtoms, ſo collected, are of higher antiquity than memory or hiſtory can reach: nothing being more difficult than to aſcertain the preciſe beginning and firſt ſpring of an antient and long eſtabliſhed cuſtom. Whence it is that in our law the goodneſs of a cuſtom depends upon it's having been uſed time out of mind; or, in the ſolemnity of our legal phraſe, time whereof the memory of man runneth not to the contrary. This it is that gives it it's weight and authority; and of this nature are the maxims and cuſtoms which compoſe the common law, or *lex non ſcripta*, of this kingdom.

THIS unwritten, or common, law is properly diſtinguiſhable into three kinds: 1. General cuſtoms; which are the univerſal rule of the whole kingdom, and form the common law, in it's ſtricter and more uſual ſignification. 2. Particular cuſtoms; which for the moſt part affect only the inhabitants of particular diſtricts. 3. Certain particular laws; which by cuſtom are adopted and uſed by ſome particular courts, of pretty general and extenſive juriſdiction.

I. As to general cuſtoms, or the common law, properly ſo called; this is that law, by which proceedings and determinations in the king's ordinary courts of juſtice are guided and directed. This, for the moſt part, ſettles the courſe in which lands deſcend by inheritance; the manner and form of acquiring and transferring property; the ſolemnities and obligation of contracts; the rules of expounding wills, deeds, and acts of parliament; the reſpective remedies of civil injuries; the ſeveral ſpecies of temporal offences, with the manner and degree of puniſhment; and an infinite number of minuter particulars, which diffuſe themſelves as extenſively as the ordinary diſtribution of common juſtice requires. Thus, for example, that there ſhall be four ſuperior courts of record, the chancery, the king's bench, the common pleas, and the exchequer; --- that the eldeſt ſon alone is heir to his anceſtor; --- that property may be acquired and transferred by writing; --- that a deed is of no validity unleſs ſealed; --- that wills ſhall be conſtrued more favorably, and deeds more ſtrictly; --- that money lent upon bond is recoverable by action of debt; --- that breaking the public peace is an offence, and puniſhable by fine and impriſonment; --- all theſe are doctrines that are not ſet down in any written ſtatute or ordinance, but depend merely upon immemorial uſage, that is, upon common law, for their ſupport.

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

BUT

BUT here a very natural, and very material, queſtion ariſes: how are theſe cuſtoms or maxims to be known, and by whom is their validity to be determined? The anſwer is, by the judges in the ſeveral courts of juſtice. They are the depoſitary of the laws; the living oracles, who muſt decide in all caſes of doubt, and who are bound by an oath to decide according to the law of the land. Their knowlege of that law is derived from experience and ſtudy; from the "*viginti annorum lucubrationes*," which Forteſcue [n] mentions; and from being long perſonally accuſtomed to the judicial deciſions of their predeceſſors. And indeed theſe judicial deciſions are the principal and moſt authoritative evidence, that can be given, of the exiſtence of ſuch a cuſtom as ſhall form a part of the common law. The judgment itſelf, and all the proceedings previous thereto, are carefully regiſtered and preſerved, under the name of *records*, in publick repoſitories ſet apart for that particular purpoſe; and to them frequent recourſe is had, when any critical queſtion ariſes, in the determination of which former precedents may give light or aſſiſtance. And therefore, even ſo early as the conqueſt, we find the "*praeteritorum* "*memoria eventorum*" reckoned up as one of the chief qualifications of thoſe who were held to be "*legibus patriae optime inſti-* "*tuti*[o]." For it is an eſtabliſhed rule to abide by former precedents, where the ſame points come again in litigation; as well to keep the ſcale of juſtice even and ſteady, and not liable to waver with every new judge's opinion; as alſo becauſe the law in that caſe being ſolemnly declared and determined, what before was uncertain, and perhaps indifferent, is now become a permanent rule, which it is not in the breaſt of any ſubſequent judge to alter or vary from, according to his private ſentiments: he being ſworn to determine, not according to his own private judgment, but according to the known laws and cuſtoms of the land; not delegated to pronounce a new law, but to maintain and expound the old one. Yet this rule admits of exception, where the former determination is moſt evidently contrary to reaſon;

[n] *cap.* 8.

[o] Seld. review of Tith. c. 8.

much

much more if it be contrary to the divine law. But even in ſuch caſes the ſubſequent judges do not pretend to make a new law, but to vindicate the old one from miſrepreſentation. For if it be found that the former deciſion is manifeſtly abſurd or unjuſt, it is declared, not that ſuch a ſentence was *bad law*, but that it was *not law*; that is, that it is not the eſtabliſhed cuſtom of the realm, as has been erroneouſly determined. And hence it is that our lawyers are with juſtice ſo copious in their encomiums on the reaſon of the common law; that they tell us, that the law is the perfection of reaſon, that it always intends to conform thereto, and that what is not reaſon is not law. Not that the particular reaſon of every rule in the law can at this diſtance of time be always preciſely aſſigned; but it is ſufficient that there be nothing in the rule flatly contradictory to reaſon, and then the law will preſume it to be well founded [p]. And it hath been an antient obſervation in the laws of England, that whenever a ſtanding rule of law, of which the reaſon perhaps could not be remembered or diſcerned, hath been wantonly broke in upon by ſtatutes or new reſolutions, the wiſdom of the rule hath in the end appeared from the inconveniences that have followed the innovation.

THE doctrine of the law then is this: that precedents and rules muſt be followed, unleſs flatly abſurd or unjuſt: for though their reaſon be not obvious at firſt view, yet we owe ſuch a deference to former times as not to ſuppoſe they acted wholly without conſideration. To illuſtrate this doctrine by examples. It has been determined, time out of mind, that a brother of the half blood (i. e. where they have only one parent the ſame, and the other different) ſhall never ſucceed as heir to the eſtate of his half brother, but it ſhall rather eſcheat to the king, or other ſuperior lord. Now this is a poſitive law, fixed and eſtabliſhed by cuſtom, which cuſtom is evidenced by judicial deciſions; and therefore can never be departed from by any modern judge without a

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

breach

breach of his oath and the law. For herein there is nothing repugnant to natural juſtice; though the reaſon of it, drawn from the feodal law, may not be quite obvious to every body. And therefore, on account of a ſuppoſed hardſhip upon the half brother, a modern judge might wiſh it had been otherwiſe ſettled; yet it is not in his power to alter it. But if any court were now to determine, that an elder brother of the half blood might enter upon and ſeiſe any lands that were purchaſed by his younger brother, no ſubſequent judges would ſcruple to declare that ſuch prior determination was unjuſt, was unreaſonable, and therefore was *not law*. So that *the law*, and the *opinion of the judge* are not always convertible terms, or one and the ſame thing; ſince it ſometimes may happen that the judge may *miſtake* the law. Upon the whole however, we may take it as a general rule, "that the "deciſions of courts of juſtice are the evidence of what is com-"mon law:" in the ſame manner as, in the civil law, what the emperor had once determined was to ſerve for a guide for the future [q].

THE deciſions therefore of courts are held in the higheſt regard, and are not only preſerved as authentic records in the treaſuries of the ſeveral courts, but are handed out to public view in the numerous volumes of *reports* which furniſh the lawyer's library. Theſe reports are hiſtories of the ſeveral caſes, with a ſhort ſummary of the proceedings, which are preſerved at large in the record; the arguments on both ſides; and the reaſons the court gave for their judgment; taken down in ſhort notes by perſons preſent at the determination. And theſe ſerve as indexes to, and alſo to explain, the records; which always, in matters of conſequence and nicety, the judges direct to be ſearched. The reports are extant in a regular ſeries from the reign of king Edward the ſecond incluſive; and from his time to that of Henry

[q] "*Si imperialis majeſtas cauſam cognitionaliter examinaverit, et partibus coram conſtitutis ſententiam dixerit, omnes omnino judices, qui ſub noſtro imperio ſunt, ſciant hanc eſſe legem, non ſolum illi cauſae pro qua promulgata eſt, ſed et in omnibus ſimilibus.*" C. 1. 14. 12.

the

the eighth 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*. And it is much to be wiſhed that this beneficial cuſtom had, under proper regulations, been continued to this day: for, though king James the firſt at the inſtance of lord Bacon appointed two reporters with a handſome ſtipend for this purpoſe, yet that wiſe inſtitution was ſoon neglected, and from the reign of Henry the eighth to the preſent time this taſk has been executed by many private and cotemporary hands; who ſometimes through haſte and inaccuracy, ſometimes through miſtake and want of ſkill, have publiſhed very crude and imperfect (perhaps contradictory) accounts of one and the ſame determination. Some of the moſt valuable of the antient reports are thoſe publiſhed by lord chief juſtice Coke; a man of infinite learning in his profeſſion, though not a little infected with the pedantry and quaintneſs of the times he lived in, which appear ſtrongly in all his works. However his writings are ſo highly eſteemed, that they are generally cited without the author's name[r].

BESIDES theſe reporters, there are alſo other authors, to whom great veneration and reſpect is paid by the ſtudents of the common law. Such are Glanvil and Bracton, Britton and Fleta, Littleton and Fitzherbert, with ſome others of antient date, whoſe treatiſes are cited as authority; and are evidence that caſes have formerly happened in which ſuch and ſuch points were determined, which are now become ſettled and firſt principles. One of the laſt of theſe methodical writers in point of time, whoſe works are of any intrinſic authority in the courts of juſtice, and do not entirely depend on the ſtrength of their quotations from older

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

authors,

authors, is the ſame learned judge we have juſt mentioned, ſir Edward Coke; who hath written four volumes of inſtitutes, as he is pleaſed to call them, though they have little of the inſtitutional method to warrant ſuch a title. The firſt volume is a very extenſive comment upon a little excellent treatiſe of tenures, compiled by judge Littleton in the reign of Edward the fourth. This comment is a rich mine of valuable common law learning, collected and heaped together from the antient reports and year books, but greatly defective in method[s]. The ſecond volume is a comment upon many old acts of parliament, without any ſyſtematical order; the third a more methodical treatiſe of the pleas of the crown; and the fourth an account of the ſeveral ſpecies of courts[t].

AND thus much for the firſt ground and chief corner ſtone of the laws of England, which is, general immemorial cuſtom, or common law, from time to time declared in the deciſions of the courts of juſtice; which deciſions are preſerved among our public records, explained in our reports, and digeſted for general uſe in the authoritative writings of the venerable ſages of the law.

THE Roman law, as practiſed in the times of it's liberty, paid alſo a great regard to cuſtom; but not ſo much as our law: it only then adopting it, when the written law is deficient. Though the reaſons alleged in the digeſt[u] will fully juſtify our practice, in making it of equal authority with, when it is not contradicted by, the written law. "For ſince, ſays Julianus, the "written law binds us for no other reaſon but becauſe it is ap-"proved by the judgment of the people, therefore thoſe laws "which the people hath approved without writing ought alſo to "bind every body. For where is the difference, whether the

[s] It is uſually cited either by the name of Co. Litt. or as 1 Inſt.

[t] Theſe are cited as 2, 3, or 4 Inſt. without any author's name. An honorary diſtinction, which, we obſerved, was paid to the works of no other writer; the generality of reports and other tracts being quoted in the name of the compiler, as 2 Ventris, 4 Leonard, 1 Siderfin, and the like.

[u] *Ff.* 1. 3. 32.

"people declare their aſſent to a law by ſuffrage, or by a uniform "courſe of acting accordingly?" Thus did they reaſon while Rome had ſome remains of her freedom; but when the imperial tyranny came to be fully eſtabliſhed, the civil laws ſpeak a very different language. "*Quod principi placuit legis habet vigorem,* "*cum populus ei et in eum omne ſuum imperium et poteſtatem confe-* "*rat,*" ſays Ulpian[w]. "*Imperator ſolus et conditor et interpres le-* "*gis exiſtimatur,*" ſays the code[x]. And again, "*ſacrilegii inſtar* "*eſt reſcripto principis obviare*[y]." And indeed it is one of the characteriſtic marks of Engliſh liberty, that our common law depends upon cuſtom; which carries this internal evidence of freedom along with it, that it probably was introduced by the voluntary conſent of the people.

II. THE ſecond branch of the unwritten laws of England are particular cuſtoms, or laws which affect only the inhabitants of particular diſtricts.

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

SUCH is the cuſtom of gavelkind in Kent and ſome other parts of the kingdom (though perhaps it was alſo general till the

[w] *Ff.* 1. 4. 1.
[x] *C.* 1. 14. 12.
[y] *C.* 1. 23. 5.

[z] Mag. Cart. c. 9. — 1 Edw. III. ſt. 2. c. 9. — 14 Edw. III. ſt. 1. c. 1. — and 2 Hen. IV. c. 1.

Norman

Norman conqueſt) which ordains, among other things, that not the eldeſt ſon only of the father ſhall ſucceed to his inheritance, but all the ſons alike: and that, though the anceſtor be attainted and hanged, yet the heir ſhall ſucceed to his eſtate, without any eſcheat to the lord. --- Such is the cuſtom that prevails in divers antient boroughs, and therefore called borough-engliſh, that the youngeſt ſon ſhall inherit the eſtate, in preference to all his elder brothers. --- Such is the cuſtom in other boroughs that a widow ſhall be intitled, for her dower, to all her huſband's lands; whereas at the common law ſhe ſhall be endowed of one third part only. --- Such alſo are the ſpecial and particular cuſtoms of manors, of which every one has more or leſs, and which bind all the copy-hold-tenants that hold of the ſaid manors. --- Such likewiſe is the cuſtom of holding divers inferior courts, with power of trying cauſes, in cities and trading towns; the right of holding which, when no royal grant can be ſhewn, depends entirely upon immemorial and eſtabliſhed uſage. --- Such, laſtly, are many particular cuſtoms within the city of London, with regard to trade, apprentices, widows, orphans, and a variety of other matters; which are all contrary to the general law of the land, and are good only by ſpecial cuſtom, though thoſe of London are alſo confirmed by act of parliament[a].

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

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

[a] 8 Rep. 126. Cro. Car. 347.

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

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

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

1. THAT it have been uſed ſo long, that the memory of man runneth not to the contrary. So that if any one can ſhew the beginning of it, it is no good cuſtom. For which reaſon no cuſtom can prevail againſt an expreſs act of parliament; ſince

[b] Co. Litt. 175 *b*.
[c] Litt. §. 265.
[d] Dr and St. 1. 10.
[e] Cro. Car. 516.
[f] Hob. 85.
[g] Litt. §. 212. 4 Inſt. 274.

the

the ſtatute itſelf is a proof of a time when ſuch a cuſtom did not exiſt [h].

2. IT muſt have been *continued*. Any interruption would cauſe a temporary ceaſing: the revival gives it a new beginning, which will be within time of memory, and thereupon the cuſtom will be void. But this muſt be underſtood with regard to an interruption of the *right*; for an interruption of the *poſſeſſion* only, for ten or twenty years, will not deſtroy the cuſtom [i]. As if I have a right of way by cuſtom over another's field, the cuſtom is not deſtroyed, though I do not paſs over it for ten years; it only becomes more difficult to prove: but if the *right* be any how diſcontinued for a day, the cuſtom is quite at an end.

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

4. CUSTOMS muſt be *reaſonable* [l]; or rather, taken negatively, they muſt not be unreaſonable. Which is not always, as ſir Edward Coke ſays [m], to be underſtood of every unlearned man's reaſon, but of artificial and legal reaſon, warranted by authority of law. Upon which account a cuſtom may be good, though the particular reaſon of it cannot be aſſigned; for it ſufficeth, if no good legal reaſon can be aſſigned againſt it. Thus a cuſtom in a pariſh, that no man ſhall put his beaſts into the common till the third of october, would be good; and yet it would be hard to ſhew the reaſon why that day in particular is fixed upon, rather than the day before or after. But a cuſtom that no cattle ſhall be put in till the lord of the manor has firſt put in his, is unreaſonable, and therefore bad: for peradventure the lord will never put in his; and then the tenants will loſe all their profits [n].

[h] Co. Litt. 113 *b*.
[i] Co. Litt. 114 *b*.
[k] Co. Litt. 114.
[l] Litt. §. 212.
[m] 1 Inſt. 62.
[n] Co. Copyh. §. 33.

5. CUS-

5. CUSTOMS ought to be *certain*. A cuſtom, that lands ſhall deſcend to the moſt worthy of the owner's blood, is void; for how ſhall this worth be determined? But a cuſtom to deſcend to the next male of the blood, excluſive of females, is certain, and therefore good [o]. A cuſtom, to pay two pence an acre in lieu of tythes, is good; but to pay ſometimes two pence and ſometimes three pence, as the occupier of the land pleaſes, is bad for it's uncertainty. Yet a cuſtom, to pay a year's improved value for a fine on a copyhold eſtate, is good: though the value is a thing uncertain. For the value may at any time be aſcertained; and the maxim of law is, *id certum eſt, quod certum reddi poteſt.*

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

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

NEXT, as to the allowance of ſpecial cuſtoms. Cuſtoms, in derogation of the common law, muſt be conſtrued ſtrictly. Thus, by the cuſtom of gavelkind, an infant of fifteen years may by one

[o] 1 Roll. Abr. 565. [p] 9 Rep. 58.

ſpecies

ſpecies of conveyance (called a deed of feoffment) convey away his lands in fee ſimple, or for ever. Yet this cuſtom does not impower him to uſe any other conveyance, or even to leaſe them for ſeven years: for the cuſtom muſt be ſtrictly purſued [q]. And, moreover, all ſpecial cuſtoms muſt ſubmit to the king's prerogative. Therefore, if the king purchaſes lands of the nature of gavelkind, where all the ſons inherit equally; yet, upon the king's demiſe, his eldeſt ſon ſhall ſucceed to thoſe lands alone [r]. And thus much for the ſecond part of the *leges non ſcriptae*, or thoſe particular cuſtoms which affect particular perſons or diſtricts only.

III. THE third branch of them are thoſe peculiar laws, which by cuſtom are adopted and uſed only in certain peculiar courts and juriſdictions. And by theſe I underſtand the civil and canon laws.

IT may ſeem a little improper at firſt view to rank theſe laws under the head of *leges non ſcriptae*, or unwritten laws, ſeeing they are ſet forth by authority in their pandects, their codes, and their inſtitutions; their councils, decrees, and decretals; and enforced by an immenſe number of expoſitions, deciſions, and treatiſes of the learned in both branches of the law. But I do this, after the example of ſir Matthew Hale [s], becauſe it is moſt plain, that it is not on account of their being *written* laws, that either the canon law, or the civil law, have any obligation within this kingdom; neither do their force and efficacy depend upon their own intrinſic authority; which is the caſe of our written laws, or acts of parliament. They bind not the ſubjects of England, becauſe their materials were collected from popes or emperors; were digeſted by Juſtinian, or declared to be authentic by Gregory. Theſe conſiderations give them no authority here: for the legiſlature of England doth not, nor ever did, recognize any foreign power, as ſuperior or equal to it in this kingdom; or as having the right to give law to any, the meaneſt, of it's

[q] Co. Cop. §. 33.
[r] Co. Litt. 15 *b*.
[s] Hiſt. C. L. c. 2.

ſubjects.

ſubjects. But all the ſtrength that either the papal or imperial laws have obtained in this realm, or indeed in any other kingdom in Europe, is only becauſe they have been admitted and received by immemorial uſage and cuſtom in ſome particular caſes, and ſome particular courts; and then they form a branch of the *leges non ſcriptae*, or cuſtomary law: or elſe, becauſe they are in ſome other caſes introduced by conſent of parliament, and then they owe their validity to the *leges ſcriptae*, or ſtatute law. This is expreſſly declared in thoſe remarkable words of the ſtatute 25 Hen. VIII. c. 21. addreſſed to the king's royal majeſty.---"This your grace's "realm, recognizing no ſuperior under God but only your grace, "hath been and is free from ſubjection to any man's laws, but "only to ſuch as have been deviſed, made, and ordained *within* "this realm for the wealth of the ſame; or to ſuch other, as by "ſufferance of your grace and your progenitors, the people of "this your realm, have taken at their free liberty, by their own "conſent, to be uſed among them; and have bound themſelves "by long uſe and cuſtom to the obſervance of the ſame: not as "to the obſervance of the laws of any foreign prince, potentate, "or prelate; but as to the *cuſtomed* and antient laws of this realm, "originally eſtabliſhed as laws of the ſame, by the ſaid ſuffer-"ance, conſents, and cuſtom; and none otherwiſe."

BY the civil law, abſolutely taken, is generally underſtood the civil or municipal law of the Roman empire, as comprized in the inſtitutes, the code, and the digeſt of the emperor Juſtinian, and the novel conſtitutions of himſelf and ſome of his ſucceſſors. Of which, as there will frequently be occaſion to cite them, by way of illuſtrating our own laws, it may not be amiſs to give a ſhort and general account.

THE Roman law (founded firſt upon the regal conſtitutions of their antient kings, next upon the twelve tables of the *decemviri*, then upon the laws or ſtatutes enacted by the ſenate or people, the edicts of the praetor, and the *reſponſa prudentum* or opinions of learned lawyers, and laſtly upon the imperial decrees, or conſtitutions

ſtitutions of ſucceſſive emperors) had grown to ſo great a bulk, or as Livy expreſſes it [t], "*tam immenſus aliarum ſuper alias acervatarum legum cumulus*," that they were computed to be many camels' load by an author who preceded Juſtinian [u]. This was in part remedied by the collections of three private lawyers, Gregorius, Hermogenes, and Papirius; and then by the emperor Theodoſius the younger, by whoſe orders a code was compiled, *A. D.* 438, being a methodical collection of all the imperial conſtitutions then in force: which Theodoſian code was the only book of civil law received as authentic in the weſtern part of Europe till many centuries after; and to this it is probable that the Franks and Goths might frequently pay ſome regard, in framing legal conſtitutions for their newly erected kingdoms. For Juſtinian commanded only in the eaſtern remains of the empire; and it was under his auſpices, that the preſent body of civil law was compiled and finiſhed by Tribonian and other lawyers, about the year 533.

THIS conſiſts of, 1. The inſtitutes, which contain the elements or firſt principles of the Roman law, in four books. 2. The digeſts, or pandects, in fifty books, containing the opinions and writings of eminent lawyers, digeſted in a ſyſtematical method. 3. A new code, or collection of imperial conſtitutions, the lapſe of a whole century having rendered the former code, of Theodoſius, imperfect. 4. The novels, or new conſtitutions, poſterior in time to the other books, and amounting to a ſupplement to the code; containing new decrees of ſucceſſive emperors, as new queſtions happened to ariſe. Theſe form the body of Roman law, or *corpus juris civilis*, as publiſhed about the time of Juſtinian: which however fell ſoon into neglect and oblivion, till about the year 1130, when a copy of the digeſts was found at Amalfi in Italy; which accident, concurring with the policy of the Romiſh eccleſiaſtics [w], ſuddenly gave new vogue and authority to the civil law, introduced it into ſeveral nations, and occaſioned that

[t] *l.* 3. *c.* 34.

[u] Taylor's elements of civil law. 17.

[w] See §. 1. pag. 18.

mighty inundation of voluminous comments, with which this ſyſtem of law, more than any other, is now loaded.

THE canon law is a body of Roman eccleſiaſtical law, relative to ſuch matters as that church either has, or pretends to have, the proper juriſdiction over. This is compiled from the opinions of the antient Latin fathers, the decrees of general councils, the decretal epiſtles and bulles of the holy ſee. All which lay in the ſame diſorder and confuſion as the Roman civil law, till about the year 1151, one Gratian an Italian monk, animated by the diſcovery of Juſtinian's pandects at Amalfi, reduced them into ſome method in three books, which he entitled *concordia diſcordantium canonum*, but which are generally known by the name of *decretum Gratiani*. Theſe reached as low as the time of pope Alexander III. The ſubſequent papal decrees, to the pontificate of Gregory IX, were publiſhed in much the ſame method under the auſpices of that pope, about the year 1230, in five books entitled *decretalia Gregorii noni*. A ſixth book was added by Boniface VIII, about the year 1298, which is called *ſextus decretalium*. The Clementine conſtitutions, or decrees of Clement V, were in like manner authenticated in 1317 by his ſucceſſor John XXII; who alſo publiſhed twenty conſtitutions of his own, called the *extravagantes Joannis*: all which in ſome meaſure anſwer to the novels of the civil law. To theſe have been ſince added ſome decrees of later popes in five books, called *extravagantes communes*. And all theſe together, Gratian's decree, Gregory's decretals, the ſixth decretal, the Clementine conſtitutions, and the extravagants of John and his ſucceſſors, form the *corpus juris canonici*, or body of the Roman canon law.

BESIDES theſe pontificial collections, which during the times of popery were received as authentic in this iſland, as well as in other parts of chriſtendom, there is alſo a kind of national canon law, compoſed of *legatine* and *provincial* conſtitutions, and adapted only to the exigencies of this church and kingdom. The *legatine* conſtitutions were eccleſiaſtical laws, enacted in national ſynods, held

held under the cardinals Otho and Othobon, legates from pope Gregory IX and pope Adrian IV, in the reign of king Henry III about the years 1220 and 1268. The *provincial* conſtitutions are principally the decrees of provincial ſynods, held under divers arch-biſhops of Canterbury, from Stephen Langton in the reign of Henry III to Henry Chichele in the reign of Henry V; and adopted alſo by the province of York[x] in the reign of Henry VI. At the dawn of the reformation, in the reign of king Henry VIII, it was enacted in parliament[y] that a review ſhould be had of the canon law; and, till ſuch review ſhould be made, all canons, conſtitutions, ordinances, and ſynodals provincial, being then already made, and not repugnant to the law of the land or the king's prerogative, ſhould ſtill be uſed and executed. And, as no ſuch review has yet been perfected, upon this ſtatute now depends the authority of the canon law in England.

As for the canons enacted by the clergy under James I, in the year 1603, and never confirmed in parliament, it has been ſolemnly adjudged upon the principles of law and the conſtitution, that where they are not merely declaratory of the antient canon law, but are introductory of new regulations, they do not bind the laity[z]; whatever regard the clergy may think proper to pay them.

THERE are four ſpecies of courts in which the civil and canon laws are permitted under different reſtrictions to be uſed. 1. The courts of the arch-biſhops and biſhops and their derivative officers, uſually called in our law courts chriſtian, *curiae chriſtianitatis*, or the eccleſiaſtical courts. 2. The military courts. 3. The courts of admiralty. 4. The courts of the two univerſities. In all, their reception in general, and the different degrees of that reception, are grounded intirely upon cuſtom; corroborated in the latter inſtance by act of parliament, ratifying thoſe charters which confirm the cuſtomary law of the univerſities.

[x] Burn's eccl. law, pref. viii.

[y] Statute 25 Hen. VIII. c. 19; revived and confirmed by 1 Eliz. c. 1.

[z] Stra. 1057.

The more minute conſideration of theſe will fall properly under that part of theſe commentaries which treats of the juriſdiction of courts. It will ſuffice at preſent to remark a few particulars relative to them all, which may ſerve to inculcate more ſtrongly the doctrine laid down concerning them [a].

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

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

3. AN appeal lies from all theſe courts to the king, in the laſt reſort; which proves that the juriſdiction exerciſed in them is derived from the crown of England, and not from any foreign potentate, or intrinſic authority of their own.---And, from theſe three ſtrong marks and enſigns of ſuperiority, it appears beyond a doubt that the civil and canon laws, though admitted in ſome caſes by cuſtom in ſome courts, are only ſubordinate and *leges ſub graviori lege*; and that, thus admitted, reſtrained, altered, new-modelled, and amended, they are by no means with us a diſtinct independent ſpecies of laws, but are inferior branches of the cuſtomary or unwritten laws of England, properly called, the king's eccleſiaſtical, the king's military, the king's maritime, or the king's academical, laws.

[a] Hale Hiſt. c. 2.

LET

LET us next proceed to the *leges ſcriptae*, the written laws of the kingdom, which are ſtatutes, acts, or edicts, made by the king's majeſty by and with the advice and conſent of the lords ſpiritual and temporal and commons in parliament aſſembled [b]. The oldeſt of theſe now extant, and printed in our ſtatute books, is the famous *magna carta*, as confirmed in parliament 9 Hen. III: though doubtleſs there were many acts before that time, the records of which are now loſt, and the determinations of them perhaps at preſent currently received for the maxims of the old common law.

THE manner of making theſe ſtatutes will be better conſidered hereafter, when we examine the conſtitution of parliaments. At preſent we will only take notice of the different kinds of ſtatutes; and of ſome general rules with regard to their conſtruction [c].

FIRST, as to their ſeveral kinds. Statutes are either *general* or *ſpecial*, *public* or *private*. A general or public act is an uni-

[b] 8 Rep. 20.

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

verſal

verſal rule, that regards the whole community; and of theſe the courts of law are bound to take notice judicially and *ex officio*; without the ſtatute being particularly pleaded, or formally ſet forth by the party who claims an advantage under it. Special or private acts are rather exceptions than rules, being thoſe which only operate upon particular perſons, and private concerns; ſuch as the Romans intitled *ſenatus-decreta*, in contradiſtinction to the *ſenatus-conſulta*, which regarded the whole community [d]: and of theſe the judges are not bound to take notice, unleſs they be formally ſhewn and pleaded. Thus, to ſhew the diſtinction, the ſtatute 13 Eliz. c. 10. to prevent ſpiritual perſons from making leaſes for longer terms than twenty one years, or three lives, is a public act; it being a rule preſcribed to the whole body of ſpiritual perſons in the nation: but an act to enable the biſhop of Cheſter to make a leaſe to A. B. for ſixty years, is an exception to this rule; it concerns only the parties and the biſhop's ſucceſſors; and is therefore a private act.

STATUTES alſo are either *declaratory* of the common law, or *remedial* of ſome defects therein. Declaratory, where the old cuſtom of the kingdom is almoſt fallen into diſuſe, or become diſputable; in which caſe the parliament has thought proper, *in perpetuum rei teſtimonium*, and for avoiding all doubts and difficulties, to declare what the common law is and ever hath been. Thus the ſtatute of treaſons, 25 Edw. III. cap. 2. doth not make any new ſpecies of treaſons; but only, for the benefit of the ſubject, declares and enumerates thoſe ſeveral kinds of offence, which before were treaſon at the common law. Remedial ſtatutes are thoſe which are made to ſupply ſuch defects, and abridge ſuch ſuperfluities, in the common law, as ariſe either from the general imperfection of all human laws, from change of time and circumſtances, from the miſtakes and unadviſed determinations of unlearned judges, or from any other cauſe whatſoever. And, this being done either by enlarging the common law where it was too narrow and circumſcribed, or by re-

[d] Gravin. *Orig.* 1. §. 24.

ſtraining

ſtraining it where it was too lax and luxuriant, this has occaſioned another ſubordinate diviſion of remedial acts of parliament into *enlarging* and *reſtraining* ſtatutes. To inſtance again in the caſe of treaſon. Clipping the current coin of the kingdom was an offence not ſufficiently guarded againſt by the common law: therefore it was thought expedient by ſtatute 5 Eliz. c. 11. to make it high treaſon, which it was not at the common law: ſo that this was an *enlarging* ſtatute. At common law alſo ſpiritual corporations might leaſe out their eſtates for any term of years, till prevented by the ſtatute 13 Eliz. beforementioned: this was therefore a *reſtraining* ſtatute.

SECONDLY, the rules to be obſerved with regard to the conſtruction of ſtatutes are principally theſe which follow.

1. THERE are three points to be conſidered in the conſtruction of all remedial ſtatutes; the old law, the miſchief, and the remedy: that is, how the common law ſtood at the making of the act; what the miſchief was, for which the common law did not provide; and what remedy the parliament hath provided to cure this miſchief. And it is the buſineſs of the judges ſo to conſtrue the act, as to ſuppreſs the miſchief and advance the remedy [e]. Let us inſtance again in the ſame reſtraining ſtatute of the 13 Eliz. By the common law eccleſiaſtical corporations might let as long leaſes as they thought proper: the miſchief was, that they let long and unreaſonable leaſes, to the impoveriſhment of their ſucceſſors: the remedy applied by the ſtatute was by making void all leaſes by eccleſiaſtical bodies for longer terms than three lives or twenty one years. Now in the conſtruction of this ſtatute it is held, that leaſes, though for a longer term, if made by a biſhop, are not void during the biſhop's life; or, if made by a dean with concurrence of his chapter, they are not void during the life of the dean: for the act was made for the benefit and protection of the ſucceſſor [f]. The miſchief is therefore ſufficiently ſuppreſſed by vacating them after the death of the grantor; but

[e] 3 Rep. 7 *b.* Co. Litt. 11 *b.* 42.

[f] Co. Litt. 45. 3 Rep. 60.

the

the leaſes, during their lives, being not within the miſchief, are not within the remedy.

2. A STATUTE, which treats of things or perſons of an inferior rank, cannot by any *general words* be extended to thoſe of a ſuperior. So a ſtatute, treating of "deans, prebendaries, "parſons, vicars, *and others having ſpiritual promotion*," is held not to extend to biſhops, though they have ſpiritual promotion; deans being the higheſt perſons named, and biſhops being of a ſtill higher order [g].

3. PENAL ſtatutes muſt be conſtrued ſtrictly. Thus a ſtatute 1 Edw. VI. having enacted that thoſe who are convicted of ſtealing *horſes* ſhould not have the benefit of clergy, the judges conceived that this did not extend to him that ſhould ſteal but *one horſe*, and therefore procured a new act for that purpoſe in the following year [h]. And, to come nearer our own times, by the ſtatute 14 Geo. II. c. 6. ſtealing ſheep, *or other cattle*, was made felony without benefit of clergy. But theſe general words, "or "other cattle," being looked upon as much too looſe to create a capital offence, the act was held to extend to nothing but mere ſheep. And therefore, in the next ſeſſions, it was found neceſſary to make another ſtatute, 15 Geo. II. c. 34. extending the former to bulls, cows, oxen, ſteers, bullocks, heifers, calves, and lambs, by name.

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

[g] 2 Rep. 46. [h] Bac. Elem. c. 12.

ditors *and others*, was held to extend by the general words to a gift made to defraud the queen of a forfeiture [i].

5. ONE part of a ſtatute muſt be ſo conſtrued by another, that the whole may if poſſible ſtand: *ut res magis valeat, quam pereat*. As if land be veſted in the king and his heirs by act of parliament, ſaving the right of A; and A has at that time a leaſe of it for three years: here A ſhall hold it for his term of three years, and afterwards it ſhall go to the king. For this interpretation furniſhes matter for every clauſe of the ſtatute to work and operate upon. But

6. A SAVING, totally repugnant to the body of the act, is void. If therefore an act of parliament veſts land in the king and his heirs, ſaving the right of all perſons whatſoever; or veſts the land of A in the king, ſaving the right of A: in either of theſe caſes the ſaving is totally repugnant to the body of the ſtatute, and (if good) would render the ſtatute of no effect or operation; and therefore the ſaving is void, and the land veſts abſolutely in the king [k].

7. WHERE the common law and a ſtatute differ, the common law gives place to the ſtatute; and an old ſtatute gives place to a new one. And this upon the general principle laid down in the laſt ſection, that "*leges poſteriores priores contrarias abrogant*." But this is to be underſtood, only when the latter ſtatute is couched in negative terms, or by it's matter neceſſarily implies a negative. As if a former act ſays, that a juror upon ſuch a trial ſhall have twenty pounds a year; and a new ſtatute comes and ſays, he ſhall have twenty marks: here the latter ſtatute, though it does not expreſs, yet neceſſarily implies a negative, and virtually repeals the former. For if twenty marks be made qualification ſufficient, the former ſtatute which requires twenty pounds is at an end [l]. But if both acts be merely affirmative, and the

[i] 3 Rep. 82.
[k] 1 Rep. 47.
[l] Jenk. Cent. 2. 73.

ſubſtance ſuch that both may ſtand together, here the latter does not repeal the former, but they ſhall both have a concurrent efficacy. If by a former law an offence be indictable at the quarter ſeſſions, and a latter law makes the ſame offence indictable at the aſſiſes; here the juriſdiction of the ſeſſions is not taken away, but both have a concurrent juriſdiction, and the offender may be proſecuted at either; unleſs the new ſtatute ſubjoins expreſs negative words, as, that the offence ſhall be indictable at the aſſiſes, *and not elſewhere* [m].

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

9. ACTS of parliament derogatory from the power of ſubſequent parliaments bind not. So the ſtatute 11 Hen. VII. c. 1. which directs, that no perſon for aſſiſting a king *de facto* ſhall be attainted of treaſon by act of parliament or otherwiſe, is held to be good only as to common proſecutions for high treaſon; but will not reſtrain or clog any parliamentary attainder [o]. Becauſe the legiſlature, being in truth the ſovereign power, is always of equal, always of abſolute authority: it acknowleges no ſuperior upon earth, which the prior legiſlature muſt have been, if it's ordinances could bind the preſent parliament. And upon the ſame principle Cicero, in his letters to Atticus, treats with a proper contempt theſe reſtraining clauſes which endeavour to tie up the hands of ſucceeding legiſlatures. "When you repeal the law it-

[m] 11 Rep. 63.
[n] 4 Inſt. 325.
[o] 4 Inſt. 43.

"ſelf,

"ſelf, ſays he, you at the ſame time repeal the prohibitory "clauſe, which guards againſt ſuch repeal [p]."

10. LASTLY, acts of parliament that are impoſſible to be performed are of no validity; and if there ariſe out of them collaterally any abſurd conſequences, manifeſtly contradictory to common reaſon, they are, with regard to thoſe collateral conſequences, void. I lay down the rule with theſe reſtrictions; though I know it is generally laid down more largely, that acts of parliament contrary to reaſon are void. But if the parliament will poſitively enact a thing to be done which is unreaſonable, I know of no power that can control it: and the examples uſually alleged in ſupport of this ſenſe of the rule do none of them prove, that where the main object of a ſtatute is unreaſonable the judges are at liberty to reject it; for that were to ſet the judicial power above that of the legiſlature, which would be ſubverſive of all government. But where ſome collateral matter ariſes out of the general words, and happens to be unreaſonable; there the judges are in decency to conclude that this conſequence was not foreſeen by the parliament, and therefore they are at liberty to expound the ſtatute by equity, and only *quoad hoc* diſregard it. Thus if an act of parliament gives a man power to try all cauſes, that ariſe within his manor of Dale; yet, if a cauſe ſhould ariſe in which he himſelf is party, the act is conſtrued not to extend to that; becauſe it is unreaſonable that any man ſhould determine his own quarrel [q]. But, if we could conceive it poſſible for the parliament to enact, that he ſhould try as well his own cauſes as thoſe of other perſons, there is no court that has power to defeat the intent of the legiſlature, when couched in ſuch evident and expreſs words, as leave no doubt whether it was the intent of the legiſlature or no.

THESE are the ſeveral grounds of the laws of England: over and above which, equity is alſo frequently called in to aſſiſt, to

[p] *Cum lex abrogatur, illud ipſum abrogatur, quo non eam abrogari oporteat. l. 3. ep. 23.*

[q] 8 Rep. 118.

moderate, and to explain it. What equity is, and how impoſſible in it's very eſſence to be reduced to ſtated rules, hath been ſhewn in the preceding ſection. I ſhall therefore only add, that there are courts of this kind eſtabliſhed for the benefit of the ſubject, to correct and ſoften the rigor of the law, when through it's generality it bears too hard in particular caſes; to detect and puniſh latent frauds, which the law is not minute enough to reach; to enforce the execution of ſuch matters of truſt and confidence, as are binding in conſcience, though perhaps not ſtrictly legal; to deliver from ſuch dangers as are owing to misfortune or overſight; and, in ſhort, to relieve in all ſuch caſes as are, *bona fide*, objects of relief. This is the buſineſs of our courts of equity, which however are only converſant in matters of property. For the freedom of our conſtitution will not permit, that in criminal caſes a power ſhould be lodged in any judge, to conſtrue the law otherwiſe than according to the letter. This caution, while it admirably protects the public liberty, can never bear hard upon individuals. A man cannot ſuffer *more* puniſhment than the law aſſigns, but he may ſuffer *leſs*. The laws cannot be ſtrained by partiality to inflict a penalty beyond what the letter will warrant; but in caſes where the letter induces any apparent hardſhip, the crown has the power to pardon.

SECTION THE FOURTH.

OF THE COUNTRIES SUBJECT TO THE LAWS OF ENGLAND.

THE kingdom of England, over which our municipal laws have juriſdiction, includes not, by the common law, either Wales, Scotland, or Ireland, or any other part of the king's dominions, except the territory of England only. And yet the civil laws and local cuſtoms of this territory do now obtain, in part or in all, with more or leſs reſtrictions, in theſe and many other adjacent countries; of which it will be proper firſt to take a review, before we conſider the kingdom of England itſelf, the original and proper ſubject of theſe laws.

WALES had continued independent of England, unconquered and uncultivated, in the primitive paſtoral ſtate which Caeſar and Tacitus aſcribe to Britain in general, for many centuries; even from the time of the hoſtile invaſions of the Saxons, when the antient and chriſtian inhabitants of the iſland retired to thoſe natural intrenchments, for protection from their pagan viſitants. But when theſe invaders themſelves were converted to chriſtianity, and ſettled into regular and potent governments, this retreat of the antient Britons grew every day narrower; they were overrun by little and little, gradually driven from one faſtneſs to another, and by repeated loſſes abridged of their wild independence. Very early in our hiſtory we find their princes doing homage to the crown of England; till at length in the reign of Edward the firſt, who may juſtly be ſtiled the conqueror of Wales, the line

of

of their antient princes was aboliſhed, and the king of England's eldeſt ſon became, as a matter of courſe, their titular prince: the territory of Wales being then entirely annexed to the dominion of the crown of England[a], or, as the ſtatute of Rutland[b] expreſſes it, "*terra Walliae cum incolis ſuis, prius regi jure feodali* "*ſubjecta*, (of which homage was the ſign) *jam in proprietatis* "*dominium totaliter et cum integritate converſa eſt, et coronae regni* "*Angliae tanquam pars corporis ejuſdem annexa et unita.*" By the ſtatute alſo of Wales[c] very material alterations were made in divers parts of their laws, ſo as to reduce them nearer to the Engliſh ſtandard, eſpecially in the forms of their judicial proceedings: but they ſtill retained very much of their original polity, particularly their rule of inheritance, viz. that their lands were divided equally among all the iſſue male, and did not deſcend to the eldeſt ſon alone. By other ſubſequent ſtatutes their provincial immunities were ſtill farther abridged: but the finiſhing ſtroke to their independency, was given by the ſtatute 27 Hen. VIII. c. 26. which at the ſame time gave the utmoſt advancement to their civil proſperity, by admitting them to a thorough communication of laws with the ſubjects of England. Thus were this brave people gradually conquered into the enjoyment of true liberty; being inſenſibly put upon the ſame footing, and made fellow-citizens with their conquerors. A generous method of triumph, which the republic of Rome practiſed with great ſucceſs; till ſhe reduced all Italy to her obedience, by admitting the vanquiſhed ſtates to partake of the Roman privileges.

IT is enacted by this ſtatute 27 Hen. VIII, 1. That the dominion of Wales ſhall be for ever united to the kingdom of England. 2. That all Welchmen born ſhall have the ſame liberties as other the king's ſubjects. 3. That lands in Wales ſhall be inheritable according to the Engliſh tenures and rules of deſcent. 4. That the laws of England, and no other, ſhall be uſed in Wales: beſides many other regulations of the police of this

[a] Vaugh. 400.
[b] 10 Edw. I.
[c] 12 Edw. I.

principality.

principality. And the ſtatute 34 & 35 Hen. VIII. c. 26. confirms the ſame, adds farther regulations, divides it into twelve ſhires, and, in ſhort, reduces it into the ſame order in which it ſtands at this day; differing from the kingdom of England in only a few particulars, and thoſe too of the nature of privileges, (ſuch as having courts within itſelf, independent of the proceſs of Weſtminſter hall) and ſome other immaterial peculiarities, hardly more than are to be found in many counties of England itſelf.

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

[d] 4 Inſt. 345.

HOWEVER

HOWEVER ſir Edward Coke, and the politicians of that time, conceived great difficulties in carrying on the projected union: but theſe were at length overcome, and the great work was happily effected in 1707, 5 Anne; when twenty five articles of union were agreed to by the parliaments of both nations: the purport of the moſt conſiderable being as follows:

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

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

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

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

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

16, 17. THE ſtandards of the coin, of weights, and of meaſures, ſhall be reduced to thoſe of England, throughout the united kingdoms.

18. THE laws relating to trade, cuſtoms, and the exciſe, ſhall be the ſame in Scotland as in England. But all the other laws of Scotland ſhall remain in force; but alterable by the parliament of Great Britain. Yet with this caution; that laws relating to public policy are alterable at the diſcretion of the parliament; laws relating to private rights are not to be altered but for the evident utility of the people of Scotland.

22. SIXTEEN

22. SIXTEEN peers are to be choſen to repreſent the peerage of Scotland in parliament, and forty five members to ſit in the houſe of commons.

23. THE ſixteen peers of Scotland ſhall have all privileges of parliament: and all peers of Scotland ſhall be peers of Great Britain, and rank next after thoſe of the ſame degree at the time of the union, and ſhall have all privileges of peers, except ſitting in the houſe of lords and voting on the trial of a peer.

THESE are the principal of the twenty five articles of union, which are ratified and confirmed by ſtatute 5 Ann. c. 8. in which ſtatute there are alſo two acts of parliament recited; the one of Scotland, whereby the church of Scotland, and alſo the four univerſities of that kingdom, are eſtabliſhed for ever, and all ſucceeding ſovereigns are to take an oath inviolably to maintain the ſame; the other of England, 5 Ann. c. 6. whereby the acts of uniformity of 13 Eliz. and 13 Car. II. (except as the ſame had been altered by parliament at that time) and all other acts then in force for the preſervation of the church of England, are declared perpetual; and it is ſtipulated, that every ſubſequent king and queen ſhall take an oath inviolably to maintain the ſame within England, Ireland, Wales, and the town of Berwick upon Tweed. And it is enacted, that theſe two acts "ſhall for ever be obſerved "as fundamental and eſſential conditions of the union."

UPON theſe articles, and act of union, it is to be obſerved, 1. That the two kingdoms are now ſo inſeparably united, that nothing can ever diſunite them again, but an infringement of thoſe points which, when they were ſeparate and independent nations, it was mutually ſtipulated ſhould be "fundamental and "eſſential conditions of the union." 2. That whatever elſe may be deemed "fundamental and eſſential conditions," the preſervation of the two churches, of England and Scotland, in the ſame ſtate that they were in at the time of the union, and the main-

tenance of the acts of uniformity which eſtabliſh our common prayer, are expreſſly declared ſo to be. 3. That therefore any alteration in the conſtitutions of either of thoſe churches, or in the liturgy of the church of England, would be an infringement of theſe "fundamental and eſſential conditions," and greatly endanger the union. 4. That the municipal laws of Scotland are ordained to be ſtill obſerved in that part of the iſland, unleſs altered by parliament; and, as the parliament has not yet thought proper, except in a few inſtances, to alter them, they ſtill (with regard to the particulars unaltered) continue in full force. Wherefore the municipal or common laws of England are, generally ſpeaking, of no force or validity in Scotland; and, of conſequence, in the enſuing commentaries, we ſhall have very little occaſion to mention, any farther than ſometimes by way of illuſtration, the municipal laws of that part of the united kingdoms.

THE town of Berwick upon Tweed, though ſubject to the crown of England ever ſince the conqueſt of it in the reign of Edward IV, is not part of the kingdom of England, nor ſubject to the common law; though it is ſubject to all acts of parliament, being repreſented by burgeſſes therein. And therefore it was declared by ſtatute 20 Geo. II. c. 42. that where England only is mentioned in any act of parliament, the ſame notwithſtanding ſhall be deemed to comprehend the dominion of Wales, and town of Berwick upon Tweed. But the general law there uſed is the Scots law, and the ordinary proceſs of the courts of Weſtminſter-hall is there of no authority [e].

AS to Ireland, that is ſtill a diſtinct kingdom; though a dependent, ſubordinate kingdom. It was only entitled the dominion or lordſhip of Ireland [f], and the king's ſtile was no other than *dominus Hiberniae*, lord of Ireland, till the thirty third year of king Henry the eighth; when he aſſumed the title of king, which is recognized by act of parliament 35 Hen. VIII. c. 3. But, as Scotland and England are now one and the ſame kingdom,

[e] 1 Sid. 382. 2 Show. 365.

[f] *Stat. Hiberniae.* 14 Hen. III.

and

and yet differ in their municipal laws; ſo England and Ireland are, on the other hand, diſtinct kingdoms, and yet in general agree in their laws. The inhabitants of Ireland are, for the moſt part, deſcended from the Engliſh, who planted it as a kind of colony, after the conqueſt of it by king Henry the ſecond, at which time they carried over the Engliſh laws along with them. And as Ireland, thus conquered, planted, and governed, ſtill continues in a ſtate of dependence, it muſt neceſſarily conform to, and be obliged by ſuch laws as the ſuperior ſtate thinks proper to preſcribe.

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

[g] 4 Inſt. 358. Edm. Spenſer's ſtate of Ireland. p. 1513. edit. Hughes.

[h] Vaugh. 294. 2 Pryn. Rec. 85.

[i] 1 Inſt. 341.

[k] *A. R.* 30. 1 Rym. *Foed.* 442.

[l] *A. R.* 5.—*pro eo quod leges quibus utuntur Hybernici Deo deteſtabiles exiſtunt, et omni juri diſſonant, adeo quod leges cenſeri non debeant — nobis et conſilio noſtro ſatis videtur expediens eiſdem utendas concedere leges Anglicanas.* 3 Pryn. Rec. 1218.

[m] Edm. Spenſer. *ibid.*

"party, but in many things repugnant quite both to God's law "and man's." The latter part of which character is alone allowed it under Edward the firſt and his grandſon.

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

BUT the Iriſh nation, being excluded from the benefit of the Engliſh ſtatutes, were deprived of many good and profitable laws,

[n] 2 Ric. III. pl. 12.

[o] 4 Inſt. 353.

made

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

BUT this ſtate of dependence being almoſt forgotten, and ready to be diſputed by the Iriſh nation, it became neceſſary ſome years ago to declare how that matter really ſtood: and therefore by ſtatute 6 Geo. I. c. 5. it is declared, that the kingdom of Ireland ought to be ſubordinate to, and dependent upon, the imperial crown of Great Britain, as being inſeparably united thereto; and that the king's majeſty, with the conſent of the lords and commons of Great Britain in parliament, hath power to make laws to bind the people of Ireland.

[p] 4 Inſt. 351.
[q] 12 Rep. 112.
[r] Puff. L. of N. 8. 6. 24.

THUS

THUS we ſee how extenſively the laws of Ireland communicate with thoſe of England: and indeed ſuch communication is highly neceſſary, as the ultimate reſort from the courts of juſtice in Ireland is, as in Wales, to thoſe in England; a writ of error (in the nature of an appeal) lying from the king's bench in Ireland to the king's bench in England[s], as the appeal from all other courts in Ireland lies immediately to the houſe of lords here: it being expreſſly declared, by the ſame ſtatute 6 Geo. I. c. 5. that the peers of Ireland have no juriſdiction to affirm or reverſe any judgments or decrees whatſoever. The propriety, and even neceſſity, in all inferior dominions, of this conſtitution, "that, though juſtice be in general adminiſtred by courts of "their own, yet that the appeal in the laſt reſort ought to be to "the courts of the ſuperior ſtate," is founded upon theſe two reaſons. 1. Becauſe otherwiſe the law, appointed or permitted to ſuch inferior dominion, might be inſenſibly changed within itſelf, without the aſſent of the ſuperior. 2. Becauſe otherwiſe judgments might be given to the diſadvantage or diminution of the ſuperiority; or to make the dependence to be only of the perſon of the king, and not of the crown of England[t].

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

AND, firſt, the iſle of Man is a diſtinct territory from England and is not governed by our laws; neither doth any act of parliament extend to it, unleſs it be particularly named therein; and then an act of parliament is binding there[u]. It was formerly a ſub-

[s] This was law in the time of Hen. VIII. as appears by the antient book, entituled, *diverſity of courts, c. bank le roy.*

[t] Vaugh. 402.

[u] 4 Inſt. 284. 2 And. 116.

a ſubordinate feudatory kingdom, ſubject to the kings of Norway; then to king John and Henry III of England; afterwards to the kings of Scotland; and then again to the crown of England: and at length we find king Henry IV claiming the iſland by right of conqueſt, and diſpoſing of it to the earl of Northumberland; upon whoſe attainder it was granted (by the name of the lordſhip of Man) to ſir John de Stanley by letters patent 7 Hen. IV[w]. In his lineal deſcendants it continued for eight generations, till the death of Ferdinando earl of Derby, *A. D.* 1594; when a controverſy aroſe concerning the inheritance thereof, between his daughters and William his ſurviving brother: upon which, and a doubt that was ſtarted concerning the validity of the original patent[x], the iſland was ſeiſed into the queen's hands, and afterwards various grants were made of it by king James the firſt; all which being expired or ſurrendered, it was granted afreſh in 7 Jac. I. to William earl of Derby, and the heirs male of his body, with remainder to his heirs general; which grant was the next year confirmed by act of parliament, with a reſtraint of the power of alienation by the ſaid earl and his iſſue male. On the death of James earl of Derby, *A.D.* 1735, the male line of earl William failing, the duke of Atholl ſucceeded to the iſland as heir general by a female branch. In the mean time, though the title of king had long been diſuſed, the earls of Derby, as lords of Man, had maintained a ſort of royal authority therein; by aſſenting or diſſenting to laws, and exerciſing an appellate juriſdiction. Yet, though no Engliſh writ, or proceſs from the courts of Weſtminſter, was of any authority in Man, an appeal lay from a decree of the lord of the iſland to the king of Great Britain in council[y]. But, the diſtinct juriſdiction of this little ſubordinate royalty being found inconvenient for the purpoſes of public juſtice, and for the revenue, (it affording a convenient aſylum for debtors, outlaws, and ſmugglers) authority was given to the treaſury by ſtatute 12 Geo. I. c. 28. to purchaſe the intereſt of the then proprietors for the uſe of the crown: which purchaſe hath

[w] Selden. tit. hon. 1. 3.

[x] Camden. Eliz. *A.D.* 1594.

[y] 1 P. W. 329.

at

at length been completed in this preſent year 1765, and confirmed by ſtatutes 5 Geo. III. c. 26, & 39. whereby the whole iſland and all it's dependencies, ſo granted as aforeſaid, (except the landed property of the Atholl family, their manerial rights and emoluments, and the patronage of the biſhoprick[z] and other eccleſiaſtical benefices) are unalienably veſted in the crown, and ſubjected to the regulations of the Britiſh exciſe and cuſtoms.

THE iſlands of Jerſey, Guernſey, Sark, Alderney, and their appendages, were parcel of the duchy of Normandy, and were united to the crown of England by the firſt princes of the Norman line. They are governed by their own laws, which are for the moſt part the ducal cuſtoms of Normandy, being collected in an antient book of very great authority, entituled, *le grand couſtumier*. The king's writ, or proceſs from the courts of Weſtminſter, is there of no force; but his commiſſion is. They are not bound by common acts of our parliaments, unleſs particularly named[a]. All cauſes are originally determined by their own officers, the bailiffs and jurats of the iſlands; but an appeal lies from them to the king in council, in the laſt reſort.

BESIDES theſe adjacent iſlands, our more diſtant plantations in America, and elſewhere, are alſo in ſome reſpects ſubject to the Engliſh laws. Plantations, or colonies in diſtant countries, are either ſuch where the lands are claimed by right of occupancy only, by finding them deſart and uncultivated, and peopling them from the mother country; or where, when already cultivated, they have been either gained by conqueſt, or ceded to us by treaties. And both theſe rights are founded upon the law of nature, or at leaſt upon that of nations. But there is a difference between theſe two ſpecies of colonies, with reſpect to the laws by which they are bound. For it is held[b], that if an uninhabited country be diſcovered and planted by Engliſh ſubjects, all the Engliſh

[z] The biſhoprick of Man, or Sodor, or Sodor and Man, was formerly within the province of Canterbury, but annexed to that of York by ſtatute 33 Hen. VIII. c. 31.

[a] 4 Inſt. 286.

[b] Salk. 411. 666.

laws

laws are immediately there in force. For as the law is the birthright of every ſubject, ſo wherever they go they carry their laws with them[c]. But in conquered or ceded countries, that have already laws of their own, the king may indeed alter and change thoſe laws; but, till he does actually change them, the antient laws of the country remain, unleſs ſuch as are againſt the law of God, as in the caſe of an infidel country[d].

OUR American plantations are principally of this latter ſort, being obtained in the laſt century either by right of conqueſt and driving out the natives (with what natural juſtice I ſhall not at preſent enquire) or by treaties. And therefore the common law of England, as ſuch, has no allowance or authority there; they being no part of the mother country, but diſtinct (though dependent) dominions. They are ſubject however to the control of the parliament; though (like Ireland, Man, and the reſt) not bound by any acts of parliament, unleſs particularly named. The form of government in moſt of them is borrowed from that of England. They have a governor named by the king, (or in ſome proprietary colonies by the proprietor) who is his repreſentative or deputy. They have courts of juſtice of their own, from whoſe deciſions an appeal lies to the king in council here in England. Their general aſſemblies which are their houſe of commons, together with their council of ſtate being their upper houſe, with the concurrence of the king or his repreſentative the governor, make laws ſuited to their own emergencies. But it is particularly declared by ſtatute 7 & 8 W. III. c. 22. That all laws, by-laws, uſages, and cuſtoms, which ſhall be in practice in any of the plantations, repugnant to any law, made or to be made in this kingdom relative to the ſaid plantations, ſhall be utterly void and of none effect.

THESE are the ſeveral parts of the dominions of the crown of Great Britain, in which the municipal laws of England are not of force or authority, merely *as* the municipal laws of Eng-

[c] 2 P. Wms. 75. [d] 7 Rep. 17 *b*. Calvin's caſe. Show. Parl. C. 31.

land. Moſt of them have probably copied the ſpirit of their own law from this original; but then it receives it's obligation, and authoritative force, from being the law of the country.

As to any foreign dominions which may belong to the perſon of the king by hereditary deſcent, by purchaſe, or other acquiſition, as the territory of Hanover, and his majeſty's other property in Germany; as theſe do not in any wiſe appertain to the crown of theſe kingdoms, they are entirely unconnected with the laws of England, and do not communicate with this nation in any reſpect whatſoever. The Engliſh legiſlature had wiſely remarked the inconveniences that had formerly reſulted from dominions on the continent of Europe; from the Norman territory which William the conqueror brought with him, and held in conjunction with the Engliſh throne; and from Anjou, and it's appendages, which fell to Henry the ſecond by hereditary deſcent. They had ſeen the nation engaged for near four hundred years together in ruinous wars for defence of theſe foreign dominions; till, happily for this country, they were loſt under the reign of Henry the ſixth. They obſerved that from that time the maritime intereſts of England were better underſtood and more cloſely purſued: that, in conſequence of this attention, the nation, as ſoon as ſhe had reſted from her civil wars, began at this period to flouriſh all at once; and became much more conſiderable in Europe than when her princes were poſſeſſed of a larger territory, and her counſels diſtracted by foreign intereſts. This experience and theſe conſiderations gave birth to a conditional clauſe in the act[e] of ſettlement, which veſted the crown in his preſent majeſty's illuſtrious houſe, "That in caſe the crown and "imperial dignity of this realm ſhall hereafter come to any per-"ſon not being a native of this kingdom of England, this nation "ſhall not be obliged to engage in any war for the defence of any "dominions or territories which do not belong to the crown of "England, without conſent of parliament."

[e] Stat. 12 & 13 W. III. c. 3.

WE

WE come now to conſider the kingdom of England in particular, the direct and immediate ſubject of thoſe laws, concerning which we are to treat in the enſuing commentaries. And this comprehends not only Wales, of which enough has been already ſaid, but alſo part of the ſea. The main or high ſeas are part of the realm of England, for thereon our courts of admiralty have juriſdiction, as will be ſhewn hereafter; but they are not ſubject to the common law[f]. This main ſea begins at the low-water-mark. But between the high-water-mark, and the low-water-mark, where the ſea ebbs and flows, the common law and the admiralty have *diviſum imperium*, an alternate juriſdiction; one upon the water, when it is full ſea; the other upon the land, when it is an ebb[g].

THE territory of England is liable to two diviſions; the one eccleſiaſtical, the other civil.

1. THE eccleſiaſtical diviſion is, primarily, into two provinces, thoſe of Canterbury and York. A province is the circuit of an arch-biſhop's juriſdiction. Each province contains divers dioceſes, or ſees of ſuffragan biſhops; whereof Canterbury includes twenty one, and York three; beſides the biſhoprick of the iſle of Man, which was annexed to the province of York by king Henry VIII. Every dioceſe is divided into archdeaconries, whereof there are ſixty in all; each archdeaconry into rural deanries, which are the circuit of the archdeacon's and rural dean's juriſdiction, of whom hereafter; and every deanry is divided into pariſhes[h].

A PARISH is that circuit of ground in which the ſouls under the care of one parſon or vicar do inhabit. Theſe are computed to be near ten thouſand in number. How antient the diviſion of pariſhes is, may at preſent be difficult to aſcertain; for

[f] Co. Litt. 260.
[g] Finch. L. 78.
[h] Co. Litt. 94.

it ſeems to be agreed on all hands, that in the early ages of chriſtianity in this iſland, pariſhes were unknown, or at leaſt ſignified the ſame that a dioceſe does now. There was then no appropriation of eccleſiaſtical dues to any particular church; but every man was at liberty to contribute his tithes to whatever prieſt or church he pleaſed, provided only that he did it to ſome: or, if he made no ſpecial appointment or appropriation thereof, they were paid into the hands of the biſhop, whoſe duty it was to diſtribute them among the clergy and for other pious purpoſes according to his own diſcretion [i].

MR Camden [k] ſays England was divided into pariſhes by archbiſhop Honorius about the year 630. Sir Henry Hobart [l] lays it down that pariſhes were firſt erected by the council of Lateran, which was held *A. D.* 1179. Each widely differing from the other, and both of them perhaps from the truth; which will probably be found in the medium between the two extremes. For Mr Selden has clearly ſhewn [m], that the clergy lived in common without any diviſion of pariſhes, long after the time mentioned by Camden. And it appears from the Saxon laws, that pariſhes were in being long before the date of that council of Lateran, to which they are aſcribed by Hobart.

WE find the diſtinction of pariſhes, nay even of mother-churches, ſo early as in the laws of king Edgar, about the year 970. Before that time the conſecration of tithes was in general *arbitrary*; that is, every man paid his own (as was before obſerved) to what church or pariſh he pleaſed. But this being liable to be attended with either fraud, or at leaſt caprice, in the perſons paying; and with either jealouſies or mean compliances in ſuch as were competitors for receiving them; it was now ordered by the law of king Edgar [n], that "*dentur omnes decimae primariae "eccleſiae ad quam parochia pertinet.*" However, if any thane, or

[i] Seld. of tith. 9. 4. 2 Inſt. 646. Hob. 296.

[k] in his Britannia.

[l] Hob. 296.

[m] of tithes. c. 9.

[n] c. 1.

great

great lord, had a church within his own demeſnes, diſtinct from the mother-church, in the nature of a private chapel; then, provided ſuch church had a coemitery or conſecrated place of burial belonging to it, he might allot one third of his tithes for the maintenance of the officiating miniſter: but, if it had no coemitery, the thane muſt himſelf have maintained his chaplain by ſome other means; for in ſuch caſe *all* his tithes were ordained to be paid to the *primariae eccleſiae* or mother-church [o].

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

THUS pariſhes were gradually formed, and pariſh churches endowed with the tithes that aroſe within the circuit aſſigned. But ſome lands, either becauſe they were in the hands of irreligious and careleſs owners, or were ſituate in foreſts and deſart

[o] *Ibid.* c. 2. See alſo the laws of king Canute, c. 11. about the year 1030.

places,

places, or for other now unſearchable reaſons, were never united to any pariſh, and therefore continue to this day extraparochial; and their tithes are now by immemorial cuſtom payable to the king inſtead of the biſhop, in truſt and confidence that he will diſtribute them, for the general good of the church [p]. And thus much for the eccleſiaſtical diviſion of this kingdom.

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

TITHINGS, towns, or vills, are of the ſame ſignification in law; and had, each of them, originally a church and celebration of divine ſervice, ſacraments, and burials; which to have, or have had, ſeparate to itſelf, is the eſſential diſtinction of a town, according to ſir Edward Coke [t]. The word *town* or *vill* is indeed, by the alteration of times and language, now become a generical term, comprehending under it the ſeveral ſpecies of

[p] 2 Inſt. 647. 2 Rep. 44. Cro. Eliz. 512.

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

[r] Mirr. c. 1. §. 3.

[s] Finch. L. 8.

[t] 1 Inſt. 115 *b.*

cities,

cities, boroughs, and common towns. A city is a town incorporated, which is or hath been the ſee of a biſhop; and though the biſhoprick be diſſolved, as at Weſtminſter, yet ſtill it remaineth a city [u]. A borough is now underſtood to be a town, either corporate or not, that ſendeth burgeſſes to parliament [w]. Other towns there are, to the number ſir Edward Coke ſays [x] of 8803, which are neither cities nor boroughs; ſome of which have the privileges of markets, and others not; but both are equally towns in law. To ſeveral of theſe towns there are ſmall appendages belonging, called hamlets; which are taken notice of in the ſtatute of Exeter [y], which makes frequent mention of entire vills, demi-vills, and hamlets. Entire vills ſir Henry Spelman [z] conjectures to have conſiſted of ten freemen, or frank-pledges, demi-vills of five, and hamlets of leſs than five. Theſe little collections of houſes are ſometimes under the ſame adminiſtration as the town itſelf, ſometimes governed by ſeparate officers; in which laſt caſe it is, to ſome purpoſes in law, looked upon as a diſtinct townſhip. Theſe towns, as was before hinted, contained each originally but one pariſh, and one tithing; though many of them now, by the encreaſe of inhabitants, are divided into ſeveral pariſhes and tithings: and ſometimes, where there is but one pariſh there are two or more vills or tithings.

As ten families of freeholders made up a town or tithing, ſo ten tithings compoſed a ſuperior diviſion, called a hundred, as conſiſting of ten times ten families. The hundred is governed by an high conſtable or bailiff, and formerly there was regularly held in it the hundred court for the trial of cauſes, though now fallen into diſuſe. In ſome of the more northern counties theſe hundreds are called wapentakes [a].

THE ſubdiviſion of hundreds into tithings ſeems to be moſt peculiarly the invention of Alfred: the inſtitution of hundreds

[u] Co. Litt. 109 *b*.
[w] Litt. §. 164.
[x] 1 Inſt. 116.
[y] 14 Edw. I.
[z] Gloſſ. 274.
[a] Seld. *in Forteſc. c.* 24.

themſelves

themſelves he rather introduced than invented. For they ſeem to have obtained in Denmark[b]: and we find that in France a regulation of this ſort was made above two hundred years before; ſet on foot by Clotharius and Childebert, with a view of obliging each diſtrict to anſwer for the robberies committed in it's own diviſion. Theſe diviſions were, in that country, as well military as civil; and each contained a hundred freemen; who were ſubject to an officer called the *centenarius*; a number of which *centenarii* were themſelves ſubject to a ſuperior officer called the count or *comes*[c]. And indeed this inſtitution of hundreds may be traced back as far as the antient Germans, from whom were derived both the Franks who became maſters of Gaul, and the Saxons who ſettled in England. For we read in Tacitus[d], that both the thing and the name were well known to that warlike people. "*Centeni ex ſingulis pagis ſunt, idque ipſum inter ſuos vocantur; et quod primo numerus fuit, jam nomen et honor eſt.*"

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

[b] Seld. tit. of hon. 2. 5. 3.
[c] Monteſq. Sp. L. 30. 17.
[d] *de morib. German.* 6.
[e] *LL. Edw. c.* 34.

nominated

nominated ridings; the north, the eaſt, and the weſt-riding. The number of counties in England and Wales have been different at different times: at preſent there are forty in England, and twelve in Wales.

THREE of theſe counties, Cheſter, Durham, and Lancaſter, are called counties palatine. The two former are ſuch by preſcription, or immemorial cuſtom; or, at leaſt as old as the Norman conqueſt[f]: the latter was created by king Edward III, in favour of Henry Plantagenet, firſt earl and then duke of Lancaſter, whoſe heireſs John of Gant the king's ſon had married; and afterwards confirmed in parliament, to honour John of Gant himſelf; whom, on the death of his father-in-law, he had alſo created duke of Lancaſter[g]. Counties palatine are ſo called *a palatio*; becauſe the owners thereof, the earl of Cheſter, the biſhop of Durham, and the duke of Lancaſter, had in thoſe counties *jura regalia*, as fully as the king hath in his palace; *regalem poteſtatem in omnibus*, as Bracton expreſſes it[h]. They might pardon treaſons, murders, and felonies; they appointed all judges and juſtices of the peace; all writs and indictments ran in their names, as in other counties in the king's; and all offences were ſaid to be done againſt their peace, and not, as in other places, *contra pacem domini regis*[i]. And indeed by the antient law, in all peculiar juriſdictions, offences were ſaid to be done againſt his peace in whoſe court they were tried; in a court leet, *contra pacem domini*; in the court of a corporation, *contra pacem ballivorum*; in the ſheriff's court or tourn, *contra pacem vice-comitis*[k]. Theſe palatine privileges were in all probability originally granted to the counties of Cheſter and Durham, becauſe they bordered upon enemies countries, Wales and Scotland; in order that the owners, being encouraged by ſo large an authority, might be the more watchful in it's defence; and that the inhabitants, having juſtice adminiſtered at home, might not be obliged to go out of the

[f] Seld. tit. hon. 2. 5. 8.
[g] Plowd. 215.
[h] *l.* 3. *c.* 8. §. 4.
[i] 4 Inſt. 204.
[k] Seld. *in Hengham magn. c.* 2.

county, and leave it open to the enemies incurſions. And upon this account alſo there were formerly two other counties palatine, Pembrokeſhire and Hexamſhire, the latter now united with Northumberland: but theſe were aboliſhed by parliament, the former in 27 Hen. VIII, the latter in 14 Eliz. And in 27 Hen. VIII likewiſe, the powers beforementioned of owners of counties palatine were abridged; the reaſon for their continuance in a manner ceaſing: though ſtill all writs are witneſſed in their names, and all forfeitures for treaſon by the common law accrue to them [l].

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

[l] 4 Inſt. 205.
[m] 215.
[n] 4 Inſt. 205.
[o] 1 Ventr. 155.

his

his heirs; and in this ſtate, ſay ſir Edward Coke[p] and Lambard[q], viz. in the natural heirs or poſterity of Henry VII, did the right of the duchy remain to their days; a ſeparate and diſtinct inheritance from that of the crown of England[r].

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

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

[p] 4 Inſt. 206.

[q] Archeion. 233.

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

[s] 4 Inſt. 220.

COMMENTARIES
ON THE
LAWS OF ENGLAND.

BOOK THE FIRST.
OF THE RIGHTS OF PERSONS.

CHAPTER THE FIRST.

OF THE ABSOLUTE RIGHTS OF INDIVIDUALS.

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

Now,

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

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

THE objects of the laws of England falling into this fourfold diviſion, the preſent commentaries will therefore conſiſt of the four following parts: 1. *The rights of perſons*; with the means whereby ſuch rights may be either acquired or loſt. 2. *The rights of things*; with the means alſo of acquiring and loſing them. 3. *Private wrongs*, or civil injuries; with the means of redreſſing them by law. 4. *Public wrongs*, or crimes and miſdemeſnors; with the means of prevention and puniſhment.

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

[a] 11 *Philipp.* 12. [b] *l.* 1. *c.* 3.

NOW

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

PERSONS alſo are divided by the law into either natural perſons, or artificial. Natural perſons are ſuch as the God of nature formed us: artificial are ſuch as created and deviſed by human laws for the purpoſes of ſociety and government; which are called corporations or bodies politic.

THE rights of perſons conſidered in their natural capacities are alſo of two ſorts, abſolute, and relative. Abſolute, which are ſuch as appertain and belong to particular men, merely as individuals or ſingle perſons: relative, which are incident to them as members of ſociety, and ſtanding in various relations to each other. The firſt, that is, abſolute rights, will be the ſubject of the preſent chapter.

BY the abſolute *rights* of individuals we mean thoſe which are ſo in their primary and ſtricteſt ſenſe; ſuch as would belong to their perſons merely in a ſtate of nature, and which every man is intitled to enjoy whether out of ſociety or in it. But with regard to the abſolute *duties*, which man is bound to perform conſidered

ſidered as a mere individual, it is not to be expected that any human municipal laws ſhould at all explain or enforce them. For the end and intent of ſuch laws being only to regulate the behaviour of mankind, as they are members of ſociety, and ſtand in various relations to each other, they have conſequently no buſineſs or concern with any but ſocial or relative duties. Let a man therefore be ever ſo abandoned in his principles, or vitious in his practice, provided he keeps his wickedneſs to himſelf, and does not offend againſt the rules of public decency, he is out of the reach of human laws. But if he makes his vices public, though they be ſuch as ſeem principally to affect himſelf, (as drunkenneſs, or the like) they then become, by the bad example they ſet, of pernicious effects to ſociety; and therefore it is then the buſineſs of human laws to correct them. Here the circumſtance of publication is what alters the nature of the caſe. *Public* ſobriety is a relative duty, and therefore enjoined by our laws: *private* ſobriety is an abſolute duty, which, whether it be performed or not, human tribunals can never know; and therefore they can never enforce it by any civil ſanction. But, with reſpect to *rights*, the caſe is different. Human laws define and enforce as well thoſe rights which belong to a man conſidered as an individual, as thoſe which belong to him conſidered as related to others.

FOR the principal aim of ſociety is to protect individuals in the enjoyment of thoſe abſolute rights, which were veſted in them by the immutable laws of nature; but which could not be preſerved in peace without that mutual aſſiſtance and intercourſe, which is gained by the inſtitution of friendly and ſocial communities. Hence it follows, that the firſt and primary end of human laws is to maintain and regulate theſe *abſolute* rights of individuals. Such rights as are ſocial and *relative* reſult from, and are poſterior to, the formation of ſtates and ſocieties: ſo that to maintain and regulate theſe, is clearly a ſubſequent conſideration. And therefore the principal view of human laws is, or ought always to be, to explain, protect, and enforce ſuch rights as are abſolute,

abſolute, which in themſelves are few and ſimple; and, then, ſuch rights as are relative, which ariſing from a variety of connexions, will be far more numerous and more complicated. Theſe will take up a greater ſpace in any code of laws, and hence may appear to be more attended to, though in reality they are not, than the rights of the former kind. Let us therefore proceed to examine how far all laws ought, and how far the laws of England actually do, take notice of theſe abſolute rights, and provide for their laſting ſecurity.

THE abſolute rights of man, conſidered as a free agent, endowed with diſcernment to know good from evil, and with power of chooſing thoſe meaſures which appear to him to be moſt deſirable, are uſually ſummed up in one general appellation, and denominated the natural liberty of mankind. This natural liberty conſiſts properly in a power of acting as one thinks fit, without any reſtraint or control, unleſs by the law of nature: being a right inherent in us by birth, and one of the gifts of God to man at his creation, when he endued him with the faculty of free-will. But every man, when he enters into ſociety, gives up a part of his natural liberty, as the price of ſo valuable a purchaſe; and, in conſideration of receiving the advantages of mutual commerce, obliges himſelf to conform to thoſe laws, which the community has thought proper to eſtabliſh. And this ſpecies of legal obedience and conformity is infinitely more deſirable, than that wild and ſavage liberty which is ſacrificed to obtain it. For no man, that conſiders a moment, would wiſh to retain the abſolute and uncontroled power of doing whatever he pleaſes; the conſequence of which is, that every other man would alſo have the ſame power; and then there would be no ſecurity to individuals in any of the enjoyments of life. Political therefore, or civil, liberty, which is that of a member of ſociety, is no other than natural liberty ſo far reſtrained by human laws (and no farther) as is neceſſary and expedient for the general advantage of the publick [c]. Hence we may collect that the law, which reſtrains a

[c] *Facultas ejus, quod cuique facere libet, niſi quid jure prohibetur. Inſt.* 1. 3. 1.

man from doing miſchief to his fellow citizens, though it diminiſhes the natural, increaſes the civil liberty of mankind: but every wanton and cauſeleſs reſtraint of the will of the ſubject, whether practiced by a monarch, a nobility, or a popular aſſembly, is a degree of tyranny. Nay, that even laws themſelves, whether made with or without our conſent, if they regulate and conſtrain our conduct in matters of mere indifference, without any good end in view, are laws deſtructive of liberty: whereas if any public advantage can ariſe from obſerving ſuch precepts, the control of our private inclinations, in one or two particular points, will conduce to preſerve our general freedom in others of more importance; by ſupporting that ſtate of ſociety, which alone can ſecure our independence. Thus the ſtatute of king Edward IV[d], which forbad the fine gentlemen of thoſe times (under the degree of a lord) to wear pikes upon their ſhoes or boots of more than two inches in length, was a law that ſavoured of oppreſſion; becauſe, however ridiculous the faſhion then in uſe might appear, the reſtraining it by pecuniary penalties could ſerve no purpoſe of common utility. But the ſtatute of king Charles II[e], which preſcribes a thing ſeemingly as indifferent; viz. a dreſs for the dead, who are all ordered to be buried in woollen; is a law conſiſtent with public liberty, for it encourages the ſtaple trade, on which in great meaſure depends the univerſal good of the nation. So that laws, when prudently framed, are by no means ſubverſive but rather introductive of liberty; for (as Mr Locke has well obſerved[f]) where there is no law, there is no freedom. But then, on the other hand, that conſtitution or frame of government, that ſyſtem of laws, is alone calculated to maintain civil liberty, which leaves the ſubject entire maſter of his own conduct, except in thoſe points wherein the public good requires ſome direction or reſtraint.

THE idea and practice of this political or civil liberty flouriſh in their higheſt vigour in theſe kingdoms, where it falls little

[d] 3 Edw. IV. c. 5.
[e] 30 Car. II. ſt. 1. c. 3.
[f] on Gov. p. 2. §. 57.

ſhort

ſhort of perfection, and can only be loſt or deſtroyed by the folly or demerits of it's owner: the legiſlature, and of courſe the laws of England, being peculiarly adapted to the preſervation of this ineſtimable bleſſing even in the meaneſt ſubject. Very different from the modern conſtitutions of other ſtates, on the continent of Europe, and from the genius of the imperial law; which in general are calculated to veſt an arbitrary and deſpotic power of controlling the actions of the ſubject in the prince, or in a few grandees. And this ſpirit of liberty is ſo deeply implanted in our conſtitution, and rooted even in our very ſoil, that a ſlave or a negro, the moment he lands in England, falls under the protection of the laws, and with regard to all natural rights becomes *eo inſtanti* a freeman [g].

THE abſolute rights of every Engliſhman (which, taken in a political and extenſive ſenſe, are uſually called their liberties) as they are founded on nature and reaſon, ſo they are coeval with our form of government; though ſubject at times to fluctuate and change: their eſtabliſhment (excellent as it is) being ſtill human. At ſome times we have ſeen them depreſſed by overbearing and tyrannical princes; at others ſo luxuriant as even to tend to anarchy, a worſe ſtate than tyranny itſelf, as any government is better than none at all. But the vigour of our free conſtitution has always delivered the nation from theſe embaraſſments, and, as ſoon as the convulſions conſequent on the ſtruggle have been over, the ballance of our rights and liberties has ſettled to it's proper level; and their fundamental articles have been from time to time aſſerted in parliament, as often as they were thought to be in danger.

FIRST, by the great charter of liberties, which was obtained, ſword in hand, from king John; and afterwards, with ſome alterations, confirmed in parliament by king Henry the third, his ſon. Which charter contained very few new grants; but, as ſir Edward Coke [h] obſerves, was for the moſt part declaratory of the

[g] Salk. 666.

[h] 2 Inſt. proem.

principal grounds of the fundamental laws of England. Afterwards by the ſtatute called *confirmatio cartarum*[i], whereby the great charter is directed to be allowed as the common law; all judgments contrary to it are declared void; copies of it are ordered to be ſent to all cathedral churches, and read twice a year to the people; and ſentence of excommunication is directed to be as conſtantly denounced againſt all thoſe that by word, deed, or counſel act contrary thereto, or in any degree infringe it. Next by a multitude of ſubſequent corroborating ſtatutes, (ſir Edward Coke, I think, reckons thirty two[k],) from the firſt Edward to Henry the fourth. Then, after a long interval, by *the petition of right*; which was a parliamentary declaration of the liberties of the people, aſſented to by king Charles the firſt in the beginning of his reign. Which was cloſely followed by the ſtill more ample conceſſions made by that unhappy prince to his parliament, before the fatal rupture between them; and by the many ſalutary laws, particularly the *habeas corpus* act, paſſed under Charles the ſecond. To theſe ſucceeded *the bill of rights*, or declaration delivered by the lords and commons to the prince and princeſs of Orange 13 February 1688; and afterwards enacted in parliament, when they became king and queen: which declaration concludes in theſe remarkable words; "and they do claim, "demand, and inſiſt upon all and ſingular the premiſes, as their "undoubted rights and liberties." And the act of parliament itſelf[l] recognizes "all and ſingular the rights and liberties aſſerted "and claimed in the ſaid declaration to be the true, antient, and "indubitable rights of the people of this kingdom." Laſtly, theſe liberties were again aſſerted at the commencement of the preſent century, in the *act of ſettlement*[m], whereby the crown is limited to his preſent majeſty's illuſtrious houſe, and ſome new proviſions were added at the ſame fortunate aera for better ſecuring our religion, laws, and liberties; which the ſtatute declares to be "the birthright of the people of England;" according to the antient doctrine of the common law[n].

[i] 25 Edw. I.
[k] 2 Inſt. proem.
[l] 1 W. and M. ſt. 2. c. 2.
[m] 12 & 13 W. III. c. 2.
[n] Plowd. 55.

THUS

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

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

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

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

atrocious a light, though it remains a very heinous miſdemeſnor [p].

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

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

BOTH the life and limbs of a man are of ſuch high value, in the eſtimation of the law of England, that it pardons even homicide if committed *ſe defendendo*, or in order to preſerve them. For whatever is done by a man, to ſave either life or member, is looked upon as done upon the higheſt neceſſity and compulſion. Therefore if a man through fear of death or mayhem is prevailed upon to execute a deed, or do any other legal act; theſe, though accompanied with all other the requiſite ſolemnities, are totally void in law, if forced upon him by a well-grounded apprehenſion of loſing his life, or even his limbs, in caſe of his non-compliance [t]. And the ſame is alſo a ſufficient excuſe for the commiſſion of many miſdemeſnors, as will appear in the fourth book.

[p] 3 Inſt. 90.

[q] Stat. 12 Car. II. c. 24.

[r] Stat. 10 & 11 W. III. c. 16.

[s] *Qui in utero ſunt, in jure civili intelliguntur in rerum natura eſſe, cum de eorum commodo agatur. Ff.* 1. 5. 26.

[t] 2 Inſt. 483.

The

The conſtraint a man is under in theſe circumſtances is called in law *dureſs*, from the Latin *durities*, of which there are two ſorts; dureſs of impriſonment, where a man actually loſes his liberty, of which we ſhall preſently ſpeak; and dureſs *per minas*, where the hardſhip is only threatened and impending, which is that we are now diſcourſing of. Dureſs *per minas* is either for fear of loſs of life, or elſe for fear of mayhem, or loſs of limb. And this fear muſt be upon ſufficient reaſon; "*non*," as Bracton expreſſes it, "*ſuſpicio cujuſlibet vani et meticuloſi hominis, ſed talis qui poſſit* "*cadere in virum conſtantem; talis enim debet eſſe metus, qui in ſe* "*contineat vitae periculum, aut corporis cruciatum*[u]." A fear of battery, or being beaten, though never ſo well grounded, is no dureſs; neither is the fear of having one's houſe burnt, or one's goods taken away and deſtroyed; becauſe in theſe caſes, ſhould the threat be performed, a man may have ſatisfaction by recovering equivalent damages[w]: but no ſuitable atonement can be made for the loſs of life, or limb. And the indulgence ſhewn to a man under this, the principal, ſort of dureſs, the fear of loſing his life or limbs, agrees alſo with that maxim of the civil law; *ignoſcitur ei qui ſanguinem ſuum qualiter qualiter redemptum voluit*[x].

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

[u] *l.* 2. *c.* 5.
[w] 2 Inſt. 483.
[x] *Ff.* 48. 21. 1.

foundling

foundling hoſpitals, though comprized in the Theodoſian code [y], were rejected in Juſtinian's collection.

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

[y] *l.* 11. *t.* 27.

[z] Co. Litt. 133.

[a] This was alſo a rule in the feodal law, *l.* 2. *t.* 21. *deſiit eſſe miles ſeculi, qui factus eſt miles Chriſti; nec beneficium pertinet ad eum qui non debet gerere officium.*

[b] Litt. §. 200.

[c] Co. Litt. 133 *b.*

which

which reaſon leaſes, and other conveyances, for life, are uſually made to have and to hold for the term of one's *natural* life [d].

THIS natural life being, as was before obſerved, the immediate donation of the great creator, cannot legally be diſpoſed of or deſtroyed by any individual, neither by the perſon himſelf nor by any other of his fellow creatures, merely upon their own authority. Yet nevertheleſs it may, by the divine permiſſion, be frequently forfeited for the breach of thoſe laws of ſociety, which are enforced by the ſanction of capital puniſhments; of the nature, reſtrictions, expedience, and legality of which, we may hereafter more conveniently enquire in the concluding book of theſe commentaries. At preſent, I ſhall only obſerve, that whenever the *conſtitution* of a ſtate veſts in any man, or body of men, a power of deſtroying at pleaſure, without the direction of laws, the lives or members of the ſubject, ſuch conſtitution is in the higheſt degree tyrannical: and that whenever any *laws* direct ſuch deſtruction for light and trivial cauſes, ſuch laws are likewiſe tyrannical, though in an inferior degree; becauſe here the ſubject is aware of the danger he is expoſed to, and may by prudent caution provide againſt it. The ſtatute law of England does therefore very ſeldom, and the common law does never, inflict any puniſhment extending to life or limb, unleſs upon the higheſt neceſſity: and the conſtitution is an utter ſtranger to any arbitrary power of killing or maiming the ſubject without the expreſs warrant of law. "*Nullus liber homo*, ſays the great charter [e], *ali-*"*quo modo deſtruatur, niſi per legale judicium parium ſuorum aut* "*per legem terrae.*" Which words, "*aliquo modo deſtruatur*," according to ſir Edward Coke [f], include a prohibition not only of *killing*, and *maiming*, but alſo of *torturing* (to which our laws are ſtrangers) and of every oppreſſion by colour of an illegal authority. And it is enacted by the ſtatute 5 Edw. III. c. 9. that no man ſhall be forejudged of life or limb, contrary to the great charter and the law of the land: and again, by ſtatute 28 Ed. III.

[d] 2 Rep. 48. Co. Litt. 132.
[e] c. 29.
[f] 2 Inſt. 48.

c. 3. that no man ſhall be put to death, without being brought to anſwer by due proceſs of law.

3. BESIDES thoſe limbs and members that may be neceſſary to man, in order to defend himſelf or annoy his enemy, the reſt of his perſon or body is alſo entitled by the ſame natural right to ſecurity from the corporal inſults of menaces, aſſaults, beating, and wounding; though ſuch inſults amount not to deſtruction of life or member.

4. THE preſervation of a man's health from ſuch practices as may prejudice or annoy it, and

5. THE ſecurity of his reputation or good name from the arts of detraction and ſlander, are rights to which every man is intitled, by reaſon and natural juſtice; ſince without theſe it is impoſſible to have the perfect enjoyment of any other advantage or right. But theſe three laſt articles (being of much leſs importance than thoſe which have gone before, and thoſe which are yet to come) it will ſuffice to have barely mentioned among the rights of perſons; referring the more minute diſcuſſion of their ſeveral branches, to thoſe parts of our commentaries which treat of the infringement of theſe rights, under the head of perſonal wrongs.

II. NEXT to perſonal ſecurity, the law of England regards, aſſerts, and preſerves the perſonal liberty of individuals. This perſonal liberty conſiſts in the power of loco-motion, of changing ſituation, or removing one's perſon to whatſoever place one's own inclination may direct; without impriſonment or reſtraint, unleſs by due courſe of law. Concerning which we may make the ſame obſervations as upon the preceding article; that it is a right ſtrictly natural; that the laws of England have never abridged it without ſufficient cauſe; and, that in this kingdom it cannot ever be abridged at the mere diſcretion of the magiſtrate, without the explicit permiſſion of the laws. Here again the language of the great charter[g] is, that no freeman ſhall be taken or impriſoned, but

[g] c. 29.

but by the lawful judgment of his equals, or by the law of the land. And many ſubſequent old ſtatutes[h] expreſſly direct, that no man ſhall be taken or impriſoned by ſuggeſtion or petition to the king, or his council, unleſs it be by legal indictment, or the proceſs of the common law. By the petition of right, 3 Car. I, it is enacted, that no freeman ſhall be impriſoned or detained without cauſe ſhewn, to which he may make anſwer according to law. By 16 Car. I. c. 10. if any perſon be reſtrained of his liberty by order or decree of any illegal court, or by command of the king's majeſty in perſon, or by warrant of the council board, or of any of the privy council; he ſhall, upon demand of his counſel, have a writ of *habeas corpus*, to bring his body before the court of king's bench or common pleas; who ſhall determine whether the cauſe of his commitment be juſt, and thereupon do as to juſtice ſhall appertain. And by 31 Car. II. c. 2. commonly called *the habeas corpus act*, the methods of obtaining this writ are ſo plainly pointed out and enforced, that, ſo long as this ſtatute remains unimpeached, no ſubject of England can be long detained in priſon, except in thoſe caſes in which the law requires and juſtifies ſuch detainer. And, leſt this act ſhould be evaded by demanding unreaſonable bail, or ſureties for the priſoner's appearance, it is declared by 1 W. & M. ſt. 2. c. 2. that exceſſive bail ought not to be required.

OF great importance to the public is the preſervation of this perſonal liberty: for if once it were left in the power of any, the higheſt, magiſtrate to impriſon arbitrarily whomever he or his officers thought proper, (as in France it is daily practiced by the crown) there would ſoon be an end of all other rights and immunities. Some have thought, that unjuſt attacks, even upon life, or property, at the arbitrary will of the magiſtrate, are leſs dangerous to the commonwealth, than ſuch as are made upon the perſonal liberty of the ſubject. To bereave a man of life, or by violence to confiſcate his eſtate, without accuſation or trial, would be ſo groſs and notorious an act of deſpotiſm, as muſt at once

[h] 5 Edw. III. c. 9. 25 Edw. III. ſt. 5. c. 4. and 28 Edw. III. c. 3.

convey the alarm of tyranny throughout the whole kingdom. But confinement of the perſon, by ſecretly hurrying him to gaol, where his ſufferings are unknown or forgotten; is a leſs public, a leſs ſtriking, and therefore a more dangerous engine of arbitrary government. And yet ſometimes, when the ſtate is in real danger, even this may be a neceſſary meaſure. But the happineſs of our conſtitution is, that it is not left to the executive power to determine when the danger of the ſtate is ſo great, as to render this meaſure expedient. For the parliament only, or legiſlative power, whenever it ſees proper, can authorize the crown, by ſuſpending the *habeas corpus* act for a ſhort and limited time, to impriſon ſuſpected perſons without giving any reaſon for ſo doing. As the ſenate of Rome was wont to have recourſe to a dictator, a magiſtrate of abſolute authority, when they judged the republic in any imminent danger. The decree of the ſenate, which uſually preceded the nomination of this magiſtrate, "*dent operam conſu-*"*les, nequid reſpublica detrimenti capiat,*" was called the *ſenatus conſultum ultimae neceſſitatis.* In like manner this experiment ought only to be tried in caſes of extreme emergency; and in theſe the nation parts with it's liberty for a while, in order to preſerve it for ever.

THE confinement of the perſon, in any wiſe, is an impriſonment. So that the keeping a man againſt his will in a private houſe, putting him in the ſtocks, arreſting or forcibly detaining him in the ſtreet, is an impriſonment[i]. And the law ſo much diſcourages unlawful confinement, that if a man is under *dureſs of impriſonment*, which we before explained to mean a compulſion by an illegal reſtraint of liberty, until he ſeals a bond or the like; he may alledge this dureſs, and avoid the extorted bond. But if a man be lawfully impriſoned, and either to procure his diſcharge, or on any other fair account, ſeals a bond or a deed, this is not by dureſs of impriſonment, and he is not at liberty to avoid it[k]. To make impriſonment lawful, it muſt either be, by proceſs from the courts of judicature, or by warrant from ſome

[i] 2 Inſt. 589.

[k] 2 Inſt. 482.

legal

legal officer, having authority to commit to priſon; which warrant muſt be in writing, under the hand and ſeal of the magiſtrate, and expreſs the cauſes of the commitment, in order to be examined into (if neceſſary) upon a *habeas corpus*. If there be no cauſe expreſſed, the goaler is not bound to detain the priſoner[l]. For the law judges in this reſpect, ſaith ſir Edward Coke, like Feſtus the Roman governor; that it is unreaſonable to ſend a priſoner, and not to ſignify withal the crimes alleged againſt him.

A NATURAL and regular conſequence of this perſonal liberty, is, that every Engliſhman may claim a right to abide in his own country ſo long as he pleaſes; and not to be driven from it unleſs by the ſentence of the law. The king indeed, by his royal prerogative, may iſſue out his writ *ne exeat regnum*, and prohibit any of his ſubjects from going into foreign parts without licence[m]. This may be neceſſary for the public ſervice, and ſafeguard of the commonwealth. But no power on earth, except the authority of parliament, can ſend any ſubject of England *out of* the land againſt his will; no not even a criminal. For exile, or tranſportation, is a puniſhment unknown to the common law; and, wherever it is now inflicted, it is either by the choice of the criminal himſelf, to eſcape a capital puniſhment, or elſe by the expreſs direction of ſome modern act of parliament. To this purpoſe the great charter[n] declares that no freeman ſhall be baniſhed, unleſs by the judgment of his peers, or by the law of the land. And by the *habeas corpus* act, 31 Car. II. c. 2. (that ſecond *magna carta*, and ſtable bulwark of our liberties) it is enacted, that no ſubject of this realm, who is an inhabitant of England, Wales, or Berwick, ſhall be ſent priſoner into Scotland, Ireland, Jerſey, Guernſey, or places beyond the ſeas; (where they cannot have the benefit and protection of the common law) but that all ſuch impriſonments ſhall be illegal; that the perſon, who ſhall dare to commit another contrary to this law, ſhall be diſabled from bearing any office, ſhall incur the penalty of a praemunire, and be incapable of receiving the king's pardon:

[l] 2 Inſt. 52, 53.
[m] F. N. B. 85.
[n] cap. 29.

and

and the party ſuffering ſhall alſo have his private action againſt the perſon committing, and all his aiders, adviſers and abettors, and ſhall recover treble coſts; beſides his damages, which no jury ſhall aſſeſs at leſs than five hundred pounds.

THE law is in this reſpect ſo benignly and liberally conſtrued for the benefit of the ſubject, that, though *within* the realm the king may command the attendance and ſervice of all his liegemen, yet he cannot ſend any man *out of* the realm, even upon the public ſervice: he cannot even conſtitute a man lord deputy or lieutenant of Ireland againſt his will, nor make him a foreign embaſſador [o]. For this might in reality be no more than an honorable exile.

III. THE third abſolute right, inherent in every Engliſhman, is that of property: which conſiſts in the free uſe, enjoyment, and diſpoſal of all his acquiſitions, without any control or diminution, ſave only by the laws of the land. The original of private property is probably founded in nature, as will be more fully explained in the ſecond book of the enſuing commentaries: but certainly the modifications under which we at preſent find it, the method of conſerving it in the preſent owner, and of tranſlating it from man to man, are entirely derived from ſociety; and are ſome of thoſe civil advantages, in exchange for which every individual has reſigned a part of his natural liberty. The laws of England are therefore, in point of honor and juſtice, extremely watchful in aſcertaining and protecting this right. Upon this principle the great charter [p] has declared that no freeman ſhall be diſſeiſed, or diveſted, of his freehold, or of his liberties, or free cuſtoms, but by the judgment of his peers, or by the law of the land. And by a variety of antient ſtatutes [q] it is enacted, that no man's lands or goods ſhall be ſeiſed into the king's hands, againſt the great charter, and the law of the land; and that no man ſhall be diſinherited, nor put out of his franchiſes or freehold,

[o] 2 Inſt. 47.
[p] c. 29.
[q] 5 Edw. III. c. 9. 25 Edw. III. ſt. 5. c. 4. 28 Edw. III. c. 3.

unleſs

unleſs he be duly brought to anſwer, and be forejudged by courſe of law; and if any thing be done to the contrary, it ſhall be redreſſed, and holden for none.

So great moreover is the regard of the law for private property, that it will not authorize the leaſt violation of it; no, not even for the general good of the whole community. If a new road, for inſtance, were to be made through the grounds of a private perſon, it might perhaps be extenſively beneficial to the public; but the law permits no man, or ſet of men, to do this without conſent of the owner of the land. In vain may it be urged, that the good of the individual ought to yield to that of the community; for it would be dangerous to allow any private man, or even any public tribunal, to be the judge of this common good, and to decide whether it be expedient or no. Beſides, the public good is in nothing more eſſentially intereſted, than in the protection of every individual's private rights, as modelled by the municipal law. In this, and ſimilar caſes the legiſlature alone can, and indeed frequently does, interpoſe, and compel the individual to acquieſce. But how does it interpoſe and compel? Not by abſolutely ſtripping the ſubject of his property in an arbitrary manner; but by giving him a full indemnification and equivalent for the injury thereby ſuſtained. The public is now conſidered as an individual, treating with an individual for an exchange. All that the legiſlature does is to oblige the owner to alienate his poſſeſſions for a reaſonable price; and even this is an exertion of power, which the legiſlature indulges with caution, and which nothing but the legiſlature can perform.

NOR is this the only inſtance in which the law of the land has poſtponed even public neceſſity to the ſacred and inviolable rights of private property. For no ſubject of England can be conſtrained to pay any aids or taxes, even for the defence of the realm or the ſupport of government, but ſuch as are impoſed by his own conſent, or that of his repreſentatives in parliament. By the ſtatute 25 Edw. I. c. 5 and 6. it is provided, that the king ſhall

ſhall not take any aids or taſks, but by the common aſſent of the realm. And what that common aſſent is, is more fully explained by 34 Edw. I. ſt. 4. cap. 1. which enacts, that no talliage or aid ſhall be taken without aſſent of the arch-biſhops, biſhops, earls, barons, knights, burgeſſes, and other freemen of the land[r]: and again by 14 Edw. III. ſt. 2. c. 1. the prelates, earls, barons, and commons, citizens, burgeſſes, and merchants ſhall not be charged to make any aid, if it be not by the common aſſent of the great men and commons in parliament. And as this fundamental law had been ſhamefully evaded under many ſucceeding princes, by compulſive loans, and benevolences extorted without a real and voluntary conſent, it was made an article in the petition of right 3 Car. I, that no man ſhall be compelled to yield any gift, loan, or benevolence, tax, or ſuch like charge, without common conſent by act of parliament. And, laſtly, by the ſtatute 1 W. & M. ſt. 2. c. 2. it is declared, that levying money for or to the uſe of the crown, by pretence of prerogative, without grant of parliament; or for longer time, or in other manner, than the ſame is or ſhall be granted, is illegal.

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

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

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

2. THE

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

3. A THIRD ſubordinate right of every Engliſhman is that of applying to the courts of juſtice for redreſs of injuries. Since the law is in England the ſupreme arbiter of every man's life, liberty, and property, courts of juſtice muſt at all times be open to the ſubject, and the law be duly adminiſtred therein. The emphatical words of *magna carta*[s], ſpoken in the perſon of the king, who in judgment of law (ſays ſir Edward Coke[t]) is ever preſent and repeating them in all his courts, are theſe; "*nulli* "*vendemus, nulli negabimus, aut differemus rectum vel juſtitiam:* "and therefore every ſubject," continues the ſame learned author, "for injury done to him *in bonis, in terris, vel perſona*, by "any other ſubject, be he eccleſiaſtical or temporal without any "exception, may take his remedy by the courſe of the law, and "have juſtice and right for the injury done to him, freely without "ſale, fully without any denial, and ſpeedily without delay." It were endleſs to enumerate all the *affirmative* acts of parliament wherein juſtice is directed to be done according to the law of the land: and what that law is, every ſubject knows; or may know if he pleaſes: for it depends not upon the arbitrary will of any judge; but is permanent, fixed, and unchangeable, unleſs by authority of parliament. I ſhall however juſt mention a few *negative* ſtatutes, whereby abuſes, perverſions, or delays of juſtice, eſpecially by the prerogative, are reſtrained. It is ordained by

[s] c. 29. [t] 2 Inſt. 55.

magna carta[u], that no freeman ſhall be outlawed, that is, put out of the protection and benefit of the laws, but according to the law of the land. By 2 Edw. III. c. 8. and 11 Ric. II. c. 10. it is enacted, that no commands or letters ſhall be ſent under the great ſeal, or the little ſeal, the ſignet, or privy ſeal, in diſturbance of the law; or to diſturb or delay common right: and, though ſuch commandments ſhould come, the judges ſhall not ceaſe to do right. And by 1 W. & M. ſt. 2. c. 2. it is declared, that the pretended power of ſuſpending, or diſpenſing with laws, or the execution of laws, by regal authority without conſent of parliament, is illegal.

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

4. IF there ſhould happen any uncommon injury, or infringement of the rights beforementioned, which the ordinary courſe of law is too defective to reach, there ſtill remains a fourth ſubordinate right appertaining to every individual, namely, the right of petitioning the king, or either houſe of parliament, for the

[u] c. 29.

redreſs

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

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

[w] Monteſq. Sp. L. 12. 26.

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

[x] Monteſq. Sp. L. 11. 5.

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in the very boſom of his native country, that the Engliſh is the only nation in the world, where political or civil liberty is the direct end of it's conſtitution. Recommending therefore to the ſtudent in our laws a farther and more accurate ſearch into this extenſive and important title, I ſhall cloſe my remarks upon it with the expiring wiſh of the famous father Paul to his country, "ESTO PERPETUA!"

CHAPTER THE SECOND.

OF THE PARLIAMENT.

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

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

IN all tyrannical governments the ſupreme magiſtracy, or the right both of *making* and of *enforcing* the laws, is veſted in one and the ſame man, or one and the ſame body of men; and wherever theſe two powers are united together, there can be no public liberty. The magiſtrate may enact tyrannical laws, and execute them in a tyrannical manner, ſince he is poſſeſſed, in quality of diſpenſer of juſtice, with all the power which he as legiſlator thinks proper to give himſelf. But, where the legiſlative and executive authority are in diſtinct hands, the former will take care not to entruſt the latter with ſo large a power, as may tend to the ſubverſion of it's own independence, and therewith of the liberty of the ſubject. With us therefore in England this ſupreme

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

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

WITH us in England this general council hath been held immemorially, under the ſeveral names of *michel-ſynoth*, or great council, *michel-gemote* or great meeting, and more frequently *wittena-gemote* or the meeting of wiſe men. It was alſo ſtiled in Latin, *commune concilium regni*, *magnum concilium regis*, *curia magna*,

[a] Mod. Un. Hiſt. xxiii. 307.

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

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

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

[c] Glanvil. *l.* 13. *c.* 32. *l.* 9. *c.* 10.—Pref. 9 Rep. — 2 Inſt. 526.

[d] *l.* 2. *c.* 2.

[e] c. 1. §. 3.

[f] *Quanta eſſe debeat per nullam aſſiſam generalem determinatum eſt, ſed pro conſuetudine ſingulorum comitatuum debetur. l.* 9. *c.* 10.

act

act of parliament, made in the reign of William the conqueror, was pleaded in the caſe of the abbey of St Edmund's-bury, and judicially allowed by the court[g].

HENCE it indiſputably appears, that parliaments, or general councils, are coeval with the kingdom itſelf. How thoſe parliaments were conſtituted and compoſed, is another queſtion, which has been matter of great diſpute among our learned antiquarians; and, particularly, whether the commons were ſummoned at all; or, if ſummoned, at what period they began to form a diſtinct aſſembly. But it is not my intention here to enter into controverſies of this ſort. I hold it ſufficient that it is generally agreed, that in the main the conſtitution of parliament, as it now ſtands, was marked out ſo long ago as the ſeventeenth year of king John, *A. D.* 1215, in the great charter granted by that prince; wherein he promiſes to ſummon all arch-biſhops, biſhops, abbots, earls, and greater barons, perſonally; and all other tenants in chief under the crown, by the ſheriff and bailiffs; to meet at a certain place, with forty days notice, to aſſeſs aids and ſcutages when neceſſary. And this conſtitution has ſubſiſted in fact at leaſt from the year 1266, 49 Hen. III: there being ſtill extant writs of that date, to ſummon knights, citizens, and burgeſſes to parliament. I proceed therefore to enquire wherein conſiſts this conſtitution of parliament, as it now ſtands, and has ſtood for the ſpace of five hundred years. And in the proſecution of this enquiry, I ſhall conſider, firſt, the manner and time of it's aſſembling: ſecondly, it's conſtituent parts: thirdly, the laws and cuſtoms relating to parliament, conſidered as one aggregate body: fourthly and fifthly, the laws and cuſtoms relating to each houſe, ſeparately and diſtinctly taken: ſixthly, the methods of proceeding, and of making ſtatutes, in both houſes: and laſtly, the manner of the parliament's adjournment, prorogation, and diſſolution.

I. AS to the manner and time of aſſembling. The parliament is regularly to be ſummoned by the king's writ or letter, iſſued

[g] Year book, 21 Edw. III. 60.

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

IT is true, that by a ſtatute, 16 Car. I. c. 1. it was enacted, that if the king neglected to call a parliament for three years,

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

the

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

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

IT is likewiſe true, that at the time of the revolution, *A.D.* 1688, the lords and commons by their own authority, and upon the ſummons of the prince of Orange, (afterwards king William) met in a convention and therein diſpoſed of the crown and kingdom. But it muſt be remembered, that this aſſembling was upon

[i] Stat. 12 Car. II. c. 1.

[k] 1 Sid. 1.

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

AND this by the antient ſtatutes of the realm[1], he is bound to do every year, or oftener, if need be. Not that he is, or ever was, obliged by theſe ſtatutes to call a *new* parliament every year; but only to permit a parliament to ſit annually for the redreſs of

[1] 4 Edw. III. c. 14. and 36 Edw. III. c. 10.

grievances,

grievances, and diſpatch of buſineſs, *if need be*. Theſe laſt words are ſo looſe and vague, that ſuch of our monarchs as were enclined to govern without parliaments, neglected the convoking them, ſometimes for a very conſiderable period, under pretence that there was no need of them. But, to remedy this, by the ſtatute 16 Car. II. c. 1. it is enacted, that the ſitting and holding of parliaments ſhall not be intermitted above three years at the moſt. And by the ſtatute 1 W. & M. ſt. 2. c. 2. it is declared to be one of the rights of the people, that for redreſs of all grievances, and for the amending, ſtrengthening, and preſerving the laws, parliaments ought to be held *frequently*. And this indefinite *frequency* is again reduced to a certainty by ſtatute 6 W. & M. c. 2. which enacts, as the ſtatute of Charles the ſecond had done before, that a new parliament ſhall be called within three years[m] after the determination of the former.

II. THE conſtituent parts of a parliament are the next objects of our enquiry. And theſe are, the king's majeſty, ſitting there in his royal political capacity, and the three eſtates of the realm; the lords ſpiritual, the lords temporal, (who ſit, together with the king, in one houſe) and the commons, who ſit by themſelves in another[n]. And the king and theſe three eſtates, together, form the great corporation or body politic of the kingdom, of which the king is ſaid to be *caput, principium, et finis*. For upon their coming together the king meets them, either in perſon or by repreſentation; without which there can be no beginning of a parliament[o]; and he alſo has alone the power of diſſolving them.

IT is highly neceſſary for preſerving the ballance of the conſtitution, that the executive power ſhould be a branch, though not the whole, of the legiſlature. The total union of them, we have ſeen, would be productive of tyranny; the total disjunction of them for the preſent, would in the end produce the ſame

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

[n] 4 Inſt. 1.

[o] 4 Inſt. 6.

effects,

effects, by cauſing that union, againſt which it ſeems to provide. The legiſlature would ſoon become tyrannical, by making continual encroachments, and gradually aſſuming to itſelf the rights of the executive power. Thus the long parliament of Charles the firſt, while it acted in a conſtitutional manner, with the royal concurrence, redreſſed many heavy grievances and eſtabliſhed many ſalutary laws. But when the two houſes aſſumed the power of legiſlation, in excluſion of the royal authority, they ſoon after aſſumed likewiſe the reins of adminiſtration; and, in conſequence of theſe united powers, overturned both church and ſtate, and eſtabliſhed a worſe oppreſſion than any they pretended to remedy. To hinder therefore any ſuch encroachments, the king is himſelf a part of the parliament: and, as this is the reaſon of his being ſo, very properly therefore the ſhare of legiſlation, which the conſtitution has placed in the crown, conſiſts in the power of *rejecting*, rathar than *reſolving*; this being ſufficient to anſwer the end propoſed. For we may apply to the royal negative, in this inſtance, what Cicero obſerves of the negative of the Roman tribunes, that the crown has not any power of *doing* wrong, but merely of *preventing* wrong from being done [p]. The crown cannot begin of itſelf any alterations in the preſent eſtabliſhed law; but it may approve or diſapprove of the alterations ſuggeſted and conſented to by the two houſes. The legiſlative therefore cannot abridge the executive power of any rights which it now has by law, without it's own conſent; ſince the law muſt perpetually ſtand as it now does, unleſs all the powers will agree to alter it. And herein indeed conſiſts the true excellence of the Engliſh government, that all the parts of it form a mutual check upon each other. In the legiſlature, the people are a check upon the nobility, and the nobility a check upon the people; by the mutual privilege of rejecting what the other has reſolved: while the king is a check upon both, which preſerves the executive power from encroachments. And this very executive power is again checked, and kept within due bounds by the two houſes,

[p] *Sulla — tribunis plebis ſua lege injuriae faciendae poteſtatem ademit, auxilii ferendi reliquit. de LL.* 3. 9.

through

through the privilege they have of enquiring into, impeaching, and puniſhing the conduct (not indeed of the king, which would deſtroy his conſtitutional independence; but, which is more beneficial to the public) of his evil and pernicious counſellors. Thus every branch of our civil polity ſupports and is ſupported, regulates and is regulated, by the reſt; for the two houſes naturally drawing in two directions of oppoſite intereſt, and the prerogative in another ſtill different from them both, they mutually keep each other from exceeding their proper limits; while the whole is prevented from ſeparation, and artificially connected together by the mixed nature of the crown, which is a part of the legiſlative, and the ſole executive magiſtrate. Like three diſtinct powers in mechanics, they jointly impel the machine of government in a direction different from what either, acting by themſelves, would have done; but at the ſame time in a direction partaking of each, and formed out of all; a direction which conſtitutes the true line of the liberty and happineſs of the community.

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

THE next in order are the ſpiritual lords. Theſe conſiſt of two arch-biſhops, and twenty four biſhops; and, at the diſſolution of monaſteries by Henry VIII, conſiſted likewiſe of twenty ſix mitred abbots, and two priors [q]: a very conſiderable body, and in thoſe times equal in number to the temporal nobility [r]. All theſe hold, or are ſuppoſed to hold, certain antient baronies under the king: for William the conqueror thought proper to change the ſpiritual tenure, of frankalmoign or free alms, under which the biſhops held their lands during the Saxon government, into the feodal or Norman tenure by barony; which ſubjected their eſtates to all civil charges and aſſeſſments, from which they

[q] Seld. tit. hon. 2. 5. 27. [r] Co. Litt. 97.

were

were before exempt[s]: and, in right of ſucceſſion to thoſe baronies, the biſhops obtained their ſeat in the houſe of lords[t]. But though theſe lords ſpiritual are in the eye of the law a diſtinct eſtate from the lords temporal, and are ſo diſtinguiſhed in all our acts of parliament, yet in practice they are uſually blended together under the one name of *the lords*; they intermix in their votes; and the majority of ſuch intermixture binds both eſtates. For if a bill ſhould paſs their houſe, there is no doubt of it's being effectual, though every lord ſpiritual ſhould vote againſt it; of which Selden[u], and ſir Edward Coke[w], give many inſtances: as, on the other hand, I preſume it would be equally good, if the lords temporal preſent were inferior to the biſhops in number, and every one of thoſe temporal lords gave his vote to reject the bill; though this ſir Edward Coke ſeems to doubt of[x].

THE lords temporal conſiſt of all the peers of the realm (the biſhops not being in ſtrictneſs held to be ſuch, but merely lords of parliament[y]) by whatever title of nobility diſtinguiſhed; dukes, marquiſſes, earls, viſcounts, or barons; of which dignities we ſhall ſpeak more hereafter. Some of theſe ſit by deſcent, as do all antient peers; ſome by creation, as do all new-made ones; others, ſince the union with Scotland, by election, which is the caſe of the ſixteen peers, who repreſent the body of the Scots nobility. Their number is indefinite, and may be encreaſed at will by the power of the crown: and once, in the reign of queen Anne, there was an inſtance of creating no leſs than twelve together; in contemplation of which, in the reign of king George the firſt, a bill paſſed the houſe of lords, and was countenanced by the then miniſtry, for limiting the number of the peerage. This was thought by ſome to promiſe a great acquiſition to the conſtitution, by reſtraining the prerogative from gaining the aſcendant in that auguſt aſſembly, by pouring in at pleaſure an un-

[s] Gilb. Hiſt. Exch 55. Spelm. W. I. 291.
[t] Glanv. 7. 1. Co. Litt. 97. Seld. tit. hon. 2. 5. 19.
[u] Baronage. p. 1. c. 6.
[w] 2 Inſt. 585, 6, 7.
[x] 4 Inſt. 25.
[y] Staunford. P. C. 153.

limited

limited number of new created lords. But the bill was ill-reliſhed and miſcarried in the houſe of commons, whoſe leading members were then deſirous to keep the avenues to the other houſe as open and eaſy as poſſible.

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

ſince titles of nobility are thus expedient in the ſtate, it is alſo expedient that their owners ſhould form an independent and ſeparate branch of the legiſlature. If they were confounded with the maſs of the people, and like them had only a vote in electing repreſentatives, their privileges would ſoon be borne down and overwhelmed by the popular torrent, which would effectually level all diſtinctions. It is therefore highly neceſſary that the body of nobles ſhould have a diſtinct aſſembly, diſtinct deliberations, and diſtinct powers from the commons.

THE commons conſiſt of all ſuch men of any property in the kingdom as have not ſeats in the houſe of lords; every one of which has a voice in parliament, either perſonally, or by his repreſentatives. In a free ſtate, every man, who is ſuppoſed a free agent, ought to be, in ſome meaſure, his own governor; and therefore a branch at leaſt of the legiſlative power ſhould reſide in the whole body of the people. And this power, when the territories of the ſtate are ſmall and it's citizens eaſily known, ſhould be exerciſed by the people in their aggregate or collective capacity, as was wiſely ordained in the petty republics of Greece, and the firſt rudiments of the Roman ſtate. But this will be highly inconvenient, when the public territory is extended to any conſiderable degree, and the number of citizens is encreaſed. Thus when, after the ſocial war, all the burghers of Italy were admitted free citizens of Rome, and each had a vote in the public aſſemblies, it became impoſſible to diſtinguiſh the ſpurious from the real voter, and from that time all elections and popular deliberations grew tumultuous and diſorderly; which paved the way for Marius and Sylla, Pompey and Caeſar, to trample on the liberties of their country, and at laſt to diſſolve the commonwealth. In ſo large a ſtate as ours it is therefore very wiſely contrived, that the people ſhould do that by their repreſentatives, which it is impracticable to perform in perſon: repreſentatives, choſen by a number of minute and ſeparate diſtricts, wherein all the voters are, or eaſily may be, diſtinguiſhed. The counties are therefore repreſented by knights, elected by the proprietors of lands;

lands; the cities and boroughs are repreſented by citizens and burgeſſes, choſen by the mercantile part or ſuppoſed trading intereſt of the nation; much in the ſame manner as the burghers in the diet of Sweden are choſen by the corporate towns, Stockholm ſending four, as London does with us, other cities two, and ſome only one [z]. The number of Engliſh repreſentatives is 513, and of Scots 45; in all 558. And every member, though choſen by one particular diſtrict, when elected and returned ſerves for the whole realm. For the end of his coming thither is not particular, but general; not barely to advantage his conſtituents, but the *common* wealth; to adviſe his majeſty (as appears from the writ of ſummons [a]) "*de communi conſilio ſuper negotiis quibuſ-*"*dam arduis et urgentibus, regem, ſtatum et defenſionem regni An-*"*gliae et eccleſiae Anglicanae concernentibus.*" And therefore he is not bound, like a deputy in the united provinces, to conſult with, or take the advice, of his conſtituents upon any particular point, unleſs he himſelf thinks it proper or prudent ſo to do.

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

[z] Mod. Un. Hiſt. xxxiii. 18.
[a] 4 Inſt. 14.
[b] 4 Jan. 1648.

III. WE are next to examine the laws and cuſtoms relating to parliament, thus united together and conſidered as one aggregate body.

THE power and juriſdiction of parliament, ſays ſir Edward Coke [c], is ſo tranſcendent and abſolute, that it cannot be confined, either for cauſes or perſons, within any bounds. And of this high court he adds, it may be truly ſaid "*ſi antiquitatem ſpectes, eſt vetuſtiſſima; ſi dignitatem, eſt honoratiſſima; ſi juridictionem, eſt capaciſſima.*" It hath ſovereign and uncontrolable authority in making, confirming, enlarging, reſtraining, abrogating, repealing, reviving, and expounding of laws, concerning matters of all poſſible denominations, eccleſiaſtical, or temporal, civil, military, maritime, or criminal: this being the place where that abſolute deſpotic power, which muſt in all governments reſide ſomewhere, is entruſted by the conſtitution of theſe kingdoms. All miſchiefs and grievances, operations and remedies, that tranſcend the ordinary courſe of the laws, are within the reach of this extraordinary tribunal. It can regulate or new model the ſucceſſion to the crown; as was done in the reign of Henry VIII and William III. It can alter the eſtabliſhed religion of the land; as was done in a variety of inſtances, in the reigns of king Henry VIII and his three children. It can change and create afreſh even the conſtitution of the kingdom and of parliaments themſelves; as was done by the act of union, and the ſeveral ſtatutes for triennial and ſeptennial elections. It can, in ſhort, do every thing that is not naturally impoſſible; and therefore ſome have not ſcrupled to call it's power, by a figure rather too bold, the omnipotence of parliament. True it is, that what they do, no authority upon earth can undo. So that it is a matter moſt eſſential to the liberties of this kingdom, that ſuch members be delegated to this important truſt, as are moſt eminent for their probity, their fortitude, and their knowlege; for it was a known apothegm of the great lord treaſurer Burleigh, "that

[c] 4 Inſt. 36.

"England

"England could never be ruined but by a parliament:" and, as ſir Matthew Hale obſerves [d], this being the higheſt and greateſt court, over which none other can have juriſdiction in the kingdom, if by any means a miſgovernment ſhould any way fall upon it, the ſubjects of this kingdom are left without all manner of remedy. To the ſame purpoſe the preſident Monteſquieu, though I truſt too haſtily, preſages [e]; that as Rome, Sparta, and Carthage have loſt their liberty and periſhed, ſo the conſtitution of England will in time loſe it's liberty, will periſh: it will periſh, whenever the legiſlative power ſhall become more corrupt than the executive.

IT muſt be owned that Mr Locke [f], and other theoretical writers, have held, that "there remains ſtill inherent in the people "a ſupreme power to remove or alter the legiſlative, when they "find the legiſlative act contrary to the truſt repoſed in them: "for when ſuch truſt is abuſed, it is thereby forfeited, and de-"volves to thoſe who gave it." But however juſt this concluſion may be in theory, we cannot adopt it, nor argue from it, under any diſpenſation of government at preſent actually exiſting. For this devolution of power, to the people at large, includes in it a diſſolution of the whole form of government eſtabliſhed by that people, reduces all the members to their original ſtate of equality, and by annihilating the ſovereign power repeals all poſitive laws whatſoever before enacted. No human laws will therefore ſuppoſe a caſe, which at once muſt deſtroy all law, and compel men to build afreſh upon a new foundation; nor will they make proviſion for ſo deſperate an event, as muſt render all legal proviſions ineffectual. So long therefore as the Engliſh conſtitution laſts, we may venture to affirm, that the power of parliament is abſolute and without control.

IN order to prevent the miſchiefs that might ariſe, by placing this extenſive authority in hands that are either incapable, or elſe

[d] of parliaments, 49.
[e] Sp. L. 11. 6.
[f] on Gov. p. 2. §. 149, 227.

improper,

improper, to manage it, it is provided that no one ſhall ſit or vote in either houſe of parliament, unleſs he be twenty one years of age. This is expreſſly declared by ſtatute 7 & 8 W. III. c. 25. with regard to the houſe of commons; though a minor was incapacitated before from ſitting in either houſe, by the law and cuſtom of parliament [g]. To prevent crude innovations in religion and government, it is enacted by ſtatute 30 Car. II. ſt. 2. and 1 Geo. I. c. 13. that no member ſhall vote or ſit in either houſe, till he hath in the preſence of the houſe taken the oaths of allegiance, ſupremacy, and abjuration, and ſubſcribed and repeated the declaration againſt tranſubſtantiation, and invocation of ſaints, and the ſacrifice of the maſs. To prevent dangers that may ariſe to the kingdom from foreign attachments, connexions, or dependencies, it is enacted by the 12 & 13 W. III. c. 2. that no alien, born out of the dominions of the crown of Great Britain, even though he be naturalized, ſhall be capable of being a member of either houſe of parliament.

FARTHER: as every court of juſtice hath laws and cuſtoms for it's direction, ſome the civil and canon, ſome the common law, others their own peculiar laws and cuſtoms, ſo the high court of parliament hath alſo it's own peculiar law, called the *lex et conſuetudo parliamenti*; a law which ſir Edward Coke [h] obſerves, is "*ab omnibus quaerenda, a multis ignorata, a paucis cog-*"*nita.*" It will not therefore be expected that we ſhould enter into the examination of this law, with any degree of minuteneſs; ſince, as the ſame learned author aſſures us [i], it is much better to be learned out of the rolls of parliament, and other records, and by precedents, and continual experience, than can be expreſſed by any one man. It will be ſufficient to obſerve, that the whole of the law and cuſtom of parliament has it's original from this one maxim; "that whatever matter ariſes concerning "either houſe of parliament, ought to be examined, diſcuſſed, "and adjudged in that houſe to which it relates, and not elſe-

[g] 4 Inſt. 47.
[h] 1 Inſt. 11.
[i] 4 Inſt. 50.

"where."

"where." Hence, for inſtance, the lords will not ſuffer the commons to interfere in ſettling a claim of peerage; the commons will not allow the lords to judge of the election of a burgeſs; nor will either houſe permit the courts of law to examine the merits of either caſe. But the maxims upon which they proceed, together with their method of proceeding, reſt entirely in the breaſt of the parliament itſelf; and are not defined and aſcertained by any particular ſtated laws.

THE *privileges* of parliament are likewiſe very large and indefinite; which has occaſioned an obſervation, that the principal privilege of parliament conſiſted in this, that it's privileges were not certainly known to any but the parliament itſelf. And therefore when in 31 Hen. VI the houſe of lords propounded a queſtion to the judges touching the privilege of parliament, the chief juſtice, in the name of his brethren, declared, "that they ought "not to make anſwer to that queſtion; for it hath not been uſed "aforetime that the juſtices ſhould in any wiſe determine the "privileges of the high court of parliament; for it is ſo high "and mighty in his nature, that it may make law; and that "which is law, it may make no law; and the determination and "knowlege of that privilege belongs to the lords of parliament, "and not to the juſtices[k]. Privilege of parliament was principally eſtabliſhed, in order to protect it's members not only from being moleſted by their fellow-ſubjects, but alſo more eſpecially from being oppreſſed by the power of the crown. If therefore all the privileges of parliament were once to be ſet down and aſcertained, and no privilege to be allowed but what was ſo defined and determined, it were eaſy for the executive power to deviſe ſome new caſe, not within the line of privilege, and under pretence thereof to haraſs any refractory member and violate the freedom of parliament. The dignity and independence of the two houſes are therefore in great meaſure preſerved by keeping their privileges indefinite. Some however of the more notorious privileges of the members of either houſe are, privilege of ſpeech,

[k] Seld. Baronage. part. 1. c. 4.

off

of perſon, of their domeſtics, and of their lands and goods. As to the firſt, privilege of ſpeech, it is declared by the ſtatute 1 W. & M. ſt. 2. c. 2. as one of the liberties of the people, "that the freedom of ſpeech, and debates, and proceedings in "parliament, ought not to be impeached or queſtioned in any "court or place out of parliament." And this freedom of ſpeech is particularly demanded of the king in perſon, by the ſpeaker of the houſe of commons, at the opening of every new parliament. So likewiſe are the other privileges, of perſon, ſervants, lands and goods; which are immunities as antient as Edward the confeſſor, in whoſe laws[l] we find this precept. "*Ad ſynodos venien-*"*tibus, ſive ſummoniti ſint, ſive per ſe quid agendum habuerint, ſit* "*ſumma pax:*" and ſo too, in the old Gothic conſtitutions, "*ex-*"*tenditur haec pax et ſecuritas ad quatuordecim dies, convocato* "*regni ſenatu*[m]." This includes not only privilege from illegal violence, but alſo from legal arreſts, and ſeiſures by proceſs from the courts of law. To aſſault by violence a member of either houſe, or his menial ſervants, is a high contempt of parliament, and there puniſhed with the utmoſt ſeverity. It has likewiſe peculiar penalties annexed to it in the courts of law, by the ſtatutes 5 Hen. IV. c. 6. and 11 Hen. VI. c. 11. Neither can any member of either houſe be arreſted and taken into cuſtody, nor ſerved with any proceſs of the courts of law; nor can his menial ſervants be arreſted; nor can any entry be made on his lands; nor can his goods be diſtrained or ſeiſed; without a breach of the privilege of parliament. Theſe privileges however, which derogate from the common law, being only indulged to prevent the member's being diverted from the public buſineſs, endure no longer than the ſeſſion of parliament, ſave only as to the freedom of his perſon: which in a peer is for ever ſacred and inviolable; and in a commoner for forty days after every prorogation, and forty days before the next appointed meeting[n]; which is now in effect as long as the parliament ſubſiſts, it ſeldom being prorogued for more than fourſcore days at a time. But this privilege

[l] *cap.* 3.
[m] Stiernh. *de jure Goth. l.* 3. *c.* 3.
[n] 2 Lev. 72.

of

of perſon does not hold in crimes of ſuch public malignity as treaſon, felony, or breach of the peace[o]; or rather perhaps in ſuch crimes for which ſurety of the peace may be required. As to all other privileges which obſtruct the ordinary courſe of juſtice, they ceaſe by the ſtatutes 12 W. III. c. 3. and 11 Geo. II. c. 24. immediately after the diſſolution or prorogation of the parliament, or adjournment of the houſes for above a fortnight; and during theſe receſſes a peer, or member of the houſe of commons, may be ſued like an ordinary ſubject, and in conſequence of ſuch ſuits may be diſpoſſeſſed of his lands and goods. In theſe caſes the king has alſo his prerogative: he may ſue for his debts, though not arreſt the perſon of a member, during the ſitting of parliament; and by ſtatute 2 & 3 Ann. c. 18. a member may be ſued during the ſitting of parliament for any miſdemeſnor or breach of truſt in a public office. Likewiſe, for the benefit of commerce, it is provided by ſtatute 4 Geo. III. c. 33, that any trader, having privilege of parliament, may be ſerved with legal proceſs for any juſt debt, (to the amount of 100 *l.*) and unleſs he makes ſatisfaction within two months, it ſhall be deemed an act of bankruptcy; and that commiſſions of bankrupt may be iſſued againſt ſuch privileged traders, in like manner as againſt any other.

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

IV. THE laws and cuſtoms relating to the houſe of lords in particular. Theſe, if we exclude their judicial capacity, which will be more properly treated of in the third and fourth books of theſe commentaries, will take up but little of our time.

ONE very antient privilege is that declared by the charter of the foreſt[p], confirmed in parliament 9 Hen. III; viz. that every lord ſpiritual or temporal ſummoned to parliament, and paſſing

[o] 4 Inſt. 25.

[p] cap. 11.

through the king's foreſts, may, both in going and returning, kill one or two of the king's deer without warrant; in view of the foreſter, if he be preſent; or on blowing a horn if he be abſent, that he may not ſeem to take the king's veniſon by ſtealth.

IN the next place they have a right to be attended, and conſtantly are, by the judges of the court of king's bench and commonpleas, and ſuch of the barons of the exchequer as are of the degree of the coif, or have been made ſerjeants at law; as likewiſe by the maſters of the court of chancery; for their advice in point of law, and for the greater dignity of their proceedings. The ſecretaries of ſtate, the attorney and ſolicitor general, and the reſt of the king's learned counſel being ſerjeants, were alſo uſed to attend the houſe of peers, and have to this day their regular writs of ſummons iſſued out at the beginning of every parliament[q]: but, as many of them have of late years been members of the houſe of commons, their attendance is fallen into diſuſe.

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

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

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

[q] Stat. 31 Hen. VIII. c. 10. Smith's commonw. b. 2. c. 3. Moor. 551. 4 Inſt. 4. Hale of parl. 140.

[r] Seld. baronage. p. 1. c. 1.

[s] 4 Inſt. 12.

THERE

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

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

FIRST, with regard to taxes: it is the antient indiſputable privilege and right of the houſe of commons, that all grants of ſubſidies or parliamentary aids do begin in their houſe, and are firſt beſtowed by them [t]; although their grants are not effectual to all intents and purpoſes, until they have the aſſent of the other two branches of the legiſlature. The general reaſon, given for this excluſive privilege of the houſe of commons, is, that the ſupplies are raiſed upon the body of the people, and therefore it is proper that they alone ſhould have the right of taxing themſelves. This reaſon would be unanſwerable, if the commons taxed none but themſelves: but it is notorious, that a very large ſhare of property is in the poſſeſſion of the houſe of lords; that this property is equally taxable, and taxed, as the property of the commons; and therefore the commons not being the *ſole* perſons taxed, this cannot be the reaſon of their having the *ſole* right of raiſing and modelling the ſupply. The true reaſon, ariſing from the ſpirit of our conſtitution, ſeems to be this. The lords being a permanent hereditary body, created at pleaſure by the king, are ſuppoſed more liable to be influenced by the crown, and when once influenced to continue ſo, than the commons, who are a

[t] 4 Inſt. 29.

temporary elective body, freely nominated by the people. It would therefore be extremely dangerous, to give them any power of framing new taxes for the ſubject: it is ſufficient, that they have a power of rejecting, if they think the commons too laviſh or improvident in their grants. But ſo reaſonably jealous are the commons of this valuable privilege, that herein they will not ſuffer the other houſe to exert any power but that of rejecting; they will not permit the leaſt alteration or amendment to be made by the lords to the mode of taxing the people by a money bill; under which appellation are included all bills, by which money is directed to be raiſed upon the ſubject, for any purpoſe or in any ſhape whatſoever; either for the exigencies of government, and collected from the kingdom in general, as the land tax; or for private benefit, and collected in any particular diſtrict; as by turnpikes, pariſh rates, and the like. Yet ſir Matthew Hale[u] mentions one caſe, founded on the practice of parliament in the reign of Henry VI[w], wherein he thinks the lords may alter a money bill; and that is, if the commons grant a tax, as that of tonnage and poundage, for *four* years; and the lords alter it to a leſs time, as for *two* years; here, he ſays, the bill need not be ſent back to the commons for their concurrence, but may receive the royal aſſent without farther ceremony; for the alteration of the lords is conſiſtent with the grant of the commons. But ſuch an experiment will hardly be repeated by the lords, under the preſent improved idea of the privilege of the houſe of commons: and, in any caſe where a money bill is remanded to the commons, all amendments in the mode of taxation are ſure to be rejected.

NEXT, with regard to the elections of knights, citizens, and burgeſſes; we may obſerve that herein conſiſts the exerciſe of the democratical part of our conſtitution: for in a democracy there can be no exerciſe of ſovereignty but by ſuffrage, which is the declaration of the people's will. In all democracies therefore it is of the utmoſt importance to regulate by whom, and in what manner, the ſuffrages are to be given. And the Athenians were

[u] on parliaments, 65, 66.

[w] Year book, 33 Hen. VI. 17.

ſo

ſo juſtly jealous of this prerogative, that a ſtranger, who interfered in the aſſemblies of the people, was puniſhed by their laws with death: becauſe ſuch a man was eſteemed guilty of high treaſon, by uſurping thoſe rights of ſovereignty, to which he had no title. In England, where the people do not debate in a collective body but by repreſentation, the exerciſe of this ſovereignty conſiſts in the choice of repreſentatives. The laws have therefore very ſtrictly guarded againſt uſurpation or abuſe of this power, by many ſalutary proviſions; which may be reduced to theſe three points, 1. The qualifications of the electors. 2. The qualifications of the elected. 3. The proceedings at elections.

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

AND this conſtitution of ſuffrages is framed upon a wiſer principle than either of the methods of voting, by centuries, or by tribes, among the Romans. In the method by centuries, inſtituted by Servius Tullius, it was principally property, and not numbers

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

BUT to return to our qualifications; and firſt thoſe of electors for knights of the ſhire. 1. By ſtatute 8 Hen. VI. c. 7. and 10 Hen. VI. c. 2. The knights of the ſhires ſhall be choſen of people dwelling in the ſame counties; whereof every man ſhall have freehold to the value of forty ſhillings by the year within the county; which by ſubſequent ſtatutes is to be clear of all charges and deductions, except parliamentary and parochial taxes. The knights of ſhires are the repreſentatives of the landholders, or landed intereſt, of the kingdom: their electors muſt therefore have eſtates in lands or tenements, within the county repreſented: theſe eſtates muſt be freehold, that is, for term of life at leaſt; becauſe beneficial leaſes for long terms of years were not in uſe at the making of theſe ſtatutes, and copyholders were then little better than villeins, abſolutely dependent upon their lord: this freehold muſt be of forty ſhillings annual value; becauſe that ſum would then, with proper induſtry, furniſh all the neceſſaries of life, and render the freeholder, if he pleaſed, an independent

independent man. For biſhop Fleetwood, in his *chronicon pretioſum* written about ſixty years ſince, has fully proved forty ſhillings in the reign of Henry VI to have been equal to twelve pounds *per annum* in the reign of queen Anne; and, as the value of money is very conſiderably lowered ſince the biſhop wrote, I think we may fairly conclude, from this and other circumſtances, that what was equivalent to twelve pounds in his days is equivalent to twenty at preſent. The other leſs important qualifications of the electors for counties in England and Wales may be collected from the ſtatutes cited in the margin[x]; which direct, 2. That no perſon under twenty one years of age ſhall be capable of voting for any member. This extends to all ſorts of members, as well for boroughs as counties; as does alſo the next, viz. 3. That no perſon convicted of perjury, or ſubornation of perjury, ſhall be capable of voting in any election. 4. That no perſon ſhall vote in right of any freehold, granted to him fraudulently to qualify him to vote. Fraudulent grants are ſuch as contain an agreement to reconvey, or to defeat the eſtate granted; which agreements are made void, and the eſtate is abſolutely veſted in the perſon to whom it is ſo granted. And, to guard the better againſt ſuch frauds, it is farther provided, 5. That every voter ſhall have been in the actual poſſeſſion, or receipt of the profits, of his freehold to his own uſe for twelve calendar months before; except it came to him by deſcent, marriage, marriage ſettlement, will, or promotion to a benefice or office. 6. That no perſon ſhall vote in reſpect of an annuity or rentcharge, unleſs regiſtered with the clerk of the peace twelve calendar months before. 7. That in mortgaged or truſt-eſtates, the perſon in poſſeſſion, under the abovementioned reſtrictions, ſhall have the vote. 8. That only one perſon ſhall be admitted to vote for any one houſe or tenement, to prevent the ſplitting of freeholds. 9. That no eſtate ſhall qualify a voter, unleſs the eſtate has been aſſeſſed to ſome land tax aid, at leaſt twelve months before the election. 10. That

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

no

no tenant by copy of court roll ſhall be permitted to vote as a freeholder. Thus much for the electors in counties.

As for the electors of citizens and burgeſſes, theſe are ſuppoſed to be the mercantile part or trading intereſt of this kingdom. But as trade is of a fluctuating nature, and ſeldom long fixed in a place, it was formerly left to the crown to ſummon, *pro re nata*, the moſt flouriſhing towns to ſend repreſentatives to parliament. So that as towns encreaſed in trade, and grew populous, they were admitted to a ſhare in the legiſlature. But the misfortune is, that the deſerted boroughs continued to be ſummoned, as well as thoſe to whom their trade and inhabitants were transferred; except a few which petitioned to be eaſed of the expence, then uſual, of maintaining their members: four ſhillings a day being allowed for a knight of the ſhire, and two ſhillings for a citizen or burgeſs; which was the rate of wages eſtabliſhed in the reign of Edward III[y]. Hence the members for boroughs now bear above a quadruple proportion to thoſe for counties, and the number of parliament men is increaſed ſince Forteſcue's time, in the reign of Henry the ſixth, from 300 to upwards of 500, excluſive of thoſe for Scotland. The univerſities were in general not empowered to ſend burgeſſes to parliament; though once, in 28 Edw. I. when a parliament was ſummoned to conſider of the king's right to Scotland, there were iſſued writs, which required the univerſity of Oxford to ſend up four or five, and that of Cambridge two or three, of their moſt diſcreet and learned lawyers for that purpoſe[z]. But it was king James the firſt, who indulged them with the permanent privilege to ſend conſtantly two of their own body; to ſerve for thoſe ſtudents who, though uſeful members of the community, were neither concerned in the landed nor the trading intereſt; and to protect in the legiſlature the rights of the republic of letters. The right of election in boroughs is various, depending intirely on the ſeveral charters, cuſtoms, and conſtitutions of the reſpective places, which has occaſioned infinite diſputes; though now by ſtatute 2 Geo. II. c. 24. the right

[y] 4 Inſt. 16.

[z] Prynne parl. writs. I. 345.

of

of voting for the future ſhall be allowed according to the laſt determination of the houſe of commons concerning it. And by ſtatute 3 Geo. III. c. 15. no freeman of any city or borough (other than ſuch as claim by birth, marriage, or ſervitude) ſhall be intitled to vote therein unleſs he hath been admitted to his freedom twelve calendar months before.

2. OUR ſecond point is the qualification of perſons to be elected members of the houſe of commons. This depends upon the law and cuſtom of parliaments [a], and the ſtatutes referred to in the margin [b]. And from theſe it appears, 1. That they muſt not be aliens born, or minors. 2. That they muſt not be any of the twelve judges, becauſe they ſit in the lords' houſe; nor of the clergy, for they ſit in the convocation; nor perſons attainted of treaſon or felony, for they are unfit to ſit any where [c]. 3. That ſheriffs of counties, and mayors and bailiffs of boroughs, are not eligible in their reſpective juriſdictions, as being returning officers [d]; but that ſheriffs of one county are eligible to be knights of another [e]. 4. That, in ſtrictneſs, all members ought to be inhabitants of the places for which they are choſen: but this is intirely diſregarded. 5. That no perſons concerned in the management of any duties or taxes created ſince 1692, except the commiſſioners of the treaſury, nor any of the officers following, (viz. commiſſioners of prizes, tranſports, ſick and wounded, wine licences, navy, and victualling; ſecretaries or receivers of prizes; comptrollers of the army accounts; agents for regiments; governors of plantations and their deputies; officers of Minorca or Gibraltar; officers of the exciſe and cuſtoms; clerks or deputies in the ſeveral offices of the treaſury, exchequer, navy, victualling, admiralty, pay of the army or navy, ſecretaries of ſtate, ſalt, ſtamps, appeals, wine licences, hackney coaches, hawkers and pedlars) nor any perſons that hold any new office under the

[a] 4 Inſt. 47.

[b] 1 Hen. V. c. 1. 23 Hen. VI. c. 15. 1 W. & M. ſt. 2. c. 2. 5 & 6 W. & M. c. 7. 11 & 12 W. III. c. 2. 12 & 13 W. III. c. 10. 6 Ann. c. 7. 9 Ann. c. 5. 1 Geo. I. c. 56. 15 Geo. II. c. 22. 33 Geo. II. c. 20.

[c] 4 Inſt. 47.

[d] Hale of parl. 114.

[e] 4 Inſt. 48.

crown created ſince 1705, are capable of being elected members. 6. That no perſon having a penſion under the crown during pleaſure, or for any term of years, is capable of being elected. 7. That if any member accepts an office under the crown, except an officer in the army or navy accepting a new commiſſion, his ſeat is void; but ſuch member is capable of being re-elected. 8. That all knights of the ſhire ſhall be actual knights, or ſuch notable eſquires and gentlemen, as have eſtates ſufficient to be knights, and by no means of the degree of yeomen. This is reduced to a ſtill greater certainty, by ordaining, 9. That every knight of a ſhire ſhall have a clear eſtate of freehold or copyhold to the value of ſix hundred pounds *per annum*, and every citizen and burgeſs to the value of three hundred pounds; except the eldeſt ſons of peers, and of perſons qualified to be knights of ſhires, and except the members for the two univerſities: which ſomewhat ballances the aſcendant which the boroughs have gained over the counties, by obliging the trading intereſt to make choice of landed men: and of this qualification the member muſt make oath, and give in the particulars in writing, at the time of his taking his ſeat. But, ſubject to theſe reſtrictions and diſqualifications, every ſubject of the realm is eligible of common right. It was therefore an unconſtitutional prohibition, which was inſerted in the king's writs, for the parliament holden at Coventry, 6 Hen. IV, that no apprentice or other man of the law ſhould be elected a knight of the ſhire therein [f]: in return for which, our law books and hiſtorians [g] have branded this parliament with the name of *parliamentum indoctum*, or the lack-learning parliament; and ſir Edward Coke obſerves with ſome ſpleen [h], that there was never a good law made thereat.

3. THE third point regarding elections, is the method of proceeding therein. This is alſo regulated by the law of parliament, and the ſeveral ſtatutes referred to in the mar-

[f] Pryn. on 4 Inſt. 13.
[g] Walſingh. *A. D.* 1405.
[h] 4 Inſt. 48.

gin [i];

gin[i]; all which I ſhall endeavour to blend together, and extract out of them a ſummary account of the method of proceeding to elections.

AS ſoon as the parliament is ſummoned, the lord chancellor, (or if a vacancy happens during parliament, the ſpeaker, by order of the houſe) ſends his warrant to the clerk of the crown in chancery; who thereupon iſſues out writs to the ſheriff of every county, for the election of all the members to ſerve for that county, and every city and borough therein. Within three days after the receipt of this writ, the ſheriff is to ſend his precept, under his ſeal, to the proper returning officers of the cities and boroughs, commanding them to elect their members; and the ſaid returning officers are to proceed to election within eight days from the receipt of the precept, giving four days notice of the ſame; and to return the perſons choſen, together with the precept, to the ſheriff.

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

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

AND, as it is eſſential to the very being of parliament that elections ſhould be abſolutely free, therefore all undue influences upon the electors are illegal, and ſtrongly prohibited. For Mr Locke[k] ranks it among thoſe breaches of truſt in the executive magiſtrate, which according to his notions amount to a diſſolution of the government, "if he employs the force, treaſure, "and offices of the ſociety to corrupt the repreſentatives, or openly "to preingage the electors, and preſcribe what manner of perſons "ſhall be choſen. For thus to regulate candidates and electors, "and new model the ways of election, what is it, ſays he, but "to cut up the government by the roots, and poiſon the very "fountain of public ſecurity?" As ſoon therefore as the time and place of election, either in counties or boroughs, are fixed, all ſoldiers quartered in the place are to remove, at leaſt one day before the election, to the diſtance of two miles or more; and not return till one day after the poll is ended. Riots likewiſe have been frequently determined to make an election void. By vote alſo of the houſe of commons, to whom alone belongs the power of determining conteſted elections, no lord of parliament, or lord lieutenant of a county, hath any right to interfere in the election of commoners; and, by ſtatute, the lord warden of the cinque ports ſhall not recommend any members there. If any officer of the exciſe, cuſtoms, ſtamps, or certain other branches of the revenue, preſumes to intermeddle in elections, by perſuading any voter or diſſuading him, he forfeits 100 *l*, and is diſabled to hold any office.

THUS are the electors of one branch of the legiſlature ſecured from any undue influence from either of the other two, and from all external violence and compulſion. But the greateſt danger is that in which themſelves co-operate, by the infamous practice of bribery and corruption. To prevent which it is enacted that no candidate ſhall, after the date (uſually called the *teſte*) of the writs, or after the vacancy, give any money or entertainment

[k] on Gov. part. 2. §. 222.

to

to his electors, or promiſe to give any, either to particular perſons, or to the place in general, in order to his being elected; on pain of being incapable to ſerve for that place in parliament. And if any money, gift, office, employment, or reward be given or promiſed to be given to any voter, at any time, in order to influence him to give or withhold his vote, both he that takes and he that offers ſuch bribe forfeits 500 *l*, and is for ever diſabled from voting and holding any office in any corporation; unleſs, before conviction, he will diſcover ſome other offender of the ſame kind, and then he is indemnified for his own offence [l]. The firſt inſtance that occurs of election bribery, was ſo early as 13 Eliz. when one Thomas Longe (being a ſimple man and of ſmall capacity to ſerve in parliament) acknowleged that he had given the returning officer and others of the borough of Weſtbury four pounds to be returned member, and was for that premium elected. But for this offence the borough was amerced, the member was removed, and the officer fined and impriſoned [m]. But, as this practice hath ſince taken much deeper and more univerſal root, it hath occaſioned the making of theſe wholeſome ſtatutes; to complete the efficacy of which, there is nothing wanting but reſolution and integrity to put them in ſtrict execution.

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

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

[m] 4 Inſt. 23. Hale of parl. 112. Com. Journ. 10 & 11 May 1571.

former;

former; which in all probability would be much more effectual, than adminiſtring it only to the electors.

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

VI. I PROCEED now, ſixthly, to the method of making laws; which is much the ſame in both houſes: and I ſhall touch it very briefly, beginning in the houſe of commons. But firſt I muſt premiſe, that for diſpatch of buſineſs each houſe of parliament has it's ſpeaker. The ſpeaker of the houſe of lords is the lord chancellor, or keeper of the king's great ſeal; whoſe office it is to preſide there, and manage the formality of buſineſs. The ſpeaker of the houſe of commons is choſen by the houſe; but muſt be approved by the king. And herein the uſage of the two houſes differs, that the ſpeaker of the houſe of commons cannot give his opinion or argue any queſtion in the houſe; but the ſpeaker of the houſe of lords may. In each houſe the act of the majority binds the whole; and this majority is declared by votes openly

openly and publickly given: not as at Venice, and many other ſenatorial aſſemblies, privately or by ballot. This latter method may be ſerviceable, to prevent intrigues and unconſtitutional combinations: but is impoſſible to be practiced with us; at leaſt in the houſe of commons, where every member's conduct is ſubject to the future cenſure of his conſtituents, and therefore ſhould be openly ſubmitted to their inſpection.

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

THE perſons, directed to bring in the bill, preſent it in a competent time to the houſe, drawn out on paper, with a multitude of blanks, or void ſpaces, where any thing occurs that is dubious, or neceſſary to be ſettled by the parliament itſelf; (ſuch, eſpecially, as the preciſe date of times, the nature and quantity of penalties, or of any ſums of money to be raiſed) being indeed only the ſceleton of the bill. In the houſe of lords, if the bill

[n] See, among numberleſs other inſtances, the *articuli cleri*, 9 Edw. II.

begins

begins there, it is (when of a private nature) peruſed by two of the judges, who ſettle all points of legal propriety. This is read a firſt time, and at a convenient diſtance a ſecond time; and after each reading the ſpeaker opens to the houſe the ſubſtance of the bill, and puts the queſtion, whether it ſhall proceed any farther. The introduction of the bill may be originally oppoſed, as the bill itſelf may at either of the readings; and, if the oppoſition ſucceeds, the bill muſt be dropt for that ſeſſions; as it muſt alſo, if oppoſed with ſucceſs in any of the ſubſequent ſtages.

AFTER the ſecond reading it is committed, that is, referred to a committee; which is either ſelected by the houſe in matters of ſmall importance, or elſe, upon a bill of conſequence, the houſe reſolves itſelf into a committee of the whole houſe. A committee of the whole houſe is compoſed of every member; and, to form it, the ſpeaker quits the chair, (another member being appointed chairman) and may ſit and debate as a private member. In theſe committees the bill is debated clauſe by clauſe, amendments made, the blanks filled up, and ſometimes the bill entirely new modelled. After it has gone through the committee, the chairman reports it to the houſe with ſuch amendments as the committee have made; and then the houſe reconſider the whole bill again, and the queſtion is repeatedly put upon every clauſe and amendment. When the houſe have agreed or diſagreed to the amendments of the committee, and ſometimes added new amendments of their own, the bill is then ordered to be engroſſed, or written in a ſtrong groſs hand, on one or more long rolls of parchment ſewed together. When this is finiſhed, it is read a third time, and amendments are ſometimes then made to it; and, if a new clauſe be added, it is done by tacking a ſeparate piece of parchment on the bill, which is called a ryder. The ſpeaker then again opens the contents; and, holding it up in his hands, puts the queſtion, whether the bill ſhall paſs. If this is agreed to, one of the members is directed to carry it to the lords, and deſire their concurrence; who, attended by ſeveral more, carries it to the

the bar of the houſe of peers, and there delivers it to their ſpeaker, who comes down from his woolſack to receive it.

IT there paſſes through the ſame forms as in the other houſe, (except engroſſing, which is already done) and, if rejected, no more notice is taken, but it paſſes *ſub ſilentio*, to prevent unbecoming altercations. But if it is agreed to, the lords ſend a meſſage by two maſters in chancery (or ſometimes two of the judges) that they have agreed to the ſame: and the bill remains with the lords, if they have made no amendment to it. But if any amendments are made, ſuch amendments are ſent down with the bill to receive the concurrence of the commons. If the commons diſagree to the amendments, a conference uſually follows between members deputed from each houſe; who for the moſt part ſettle and adjuſt the difference: but, if both houſes remain inflexible, the bill is dropped. If the commons agree to the amendments, the bill is ſent back to the lords by one of the members, with a meſſage to acquaint them therewith. The ſame forms are obſerved, *mutatis mutandis*, when the bill begins in the houſe of lords. And when both houſes have done with the bill, it always is depoſited in the houſe of peers, to wait the royal aſſent.

THIS may be given two ways: 1. In perſon; when the king comes to the houſe of peers, in his crown and royal robes, and ſending for the commons to the bar, the titles of all the bills that have paſſed both houſes are read; and the king's anſwer is declared by the clerk of the parliament in Norman-French: a badge, it muſt be owned, (now the only one remaining) of conqueſt; and which one could wiſh to ſee fall into total oblivion; unleſs it be reſerved as a ſolemn memento to remind us that our liberties are mortal, having once been deſtroyed by a foreign force. If the king conſents to a public bill, the clerk uſually declares, "*le roy le veut*, the king wills it ſo to be;" if to a private bill, "*ſoit fait come il eſt deſirè*, be it as it is deſired." If the king refuſes his aſſent, it is in the gentle language of "*le roy ſ'aviſera*, "the king will adviſe upon it." 2. By ſtatute 33 Hen. VIII. c. 21.

the king may give his aſſent by letters patent under his great ſeal, ſigned with his hand, and notified, in his abſence, to both houſes aſſembled together in the high houſe. And, when the bill has received the royal aſſent in either of theſe ways, it is then, and not before, a ſtatute or act of parliament.

THIS ſtatute or act is placed among the records of the kingdom; there needing no formal promulgation to give it the force of a law, as was neceſſary by the civil law with regard to the emperors edicts: becauſe every man in England is, in judgment of law, party to the making of an act of parliament, being preſent thereat by his repreſentatives. However, a copy thereof is uſually printed at the king's preſs, for the information of the whole land. And formerly, before the invention of printing, it was uſed to be publiſhed by the ſheriff of every county; the king's writ being ſent to him at the end of every ſeſſion, together with a tranſcript of all the acts made at that ſeſſion, commanding him "*ut ſtatuta illa, et omnes articulos in eiſdem contentos, in ſingulis locis ubi expedire viderit, publice proclamari, et firmiter teneri et obſervari faciat.*" And the uſage was to proclaim them at his county court, and there to keep them, that whoever would might read or take copies thereof; which cuſtom continued till the reign of Henry the ſeventh [o].

AN act of parliament, thus made, is the exerciſe of the higheſt authority that this kingdom acknowleges upon earth. It hath power to bind every ſubject in the land, and the dominions thereunto belonging; nay, even the king himſelf, if particularly named therein. And it cannot be altered, amended, diſpenſed with, ſuſpended, or repealed, but in the ſame forms and by the ſame authority of parliament: for it is a maxim in law, that it requires the ſame ſtrength to diſſolve, as to create an obligation. It is true it was formerly held, that the king might in many caſes diſpenſe with penal ſtatutes [p]: but now by ſtatute 1 W. & M. ſt. 2. c. 2. it is declared, that the ſuſpending or diſpenſing with

[o] 3 Inſt. 41. 4 Inſt. 26.

[p] Finch. L. 81. 234.

laws

laws by regal authority, without conſent of parliament, is illegal.

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

AN adjournment is no more than a continuance of the ſeſſion from one day to another, as the word itſelf ſignifies: and this is done by the authority of each houſe ſeparately every day; and ſometimes for a fortnight or a month together, as at Chriſtmas or Eaſter, or upon other particular occaſions. But the adjournment of one houſe is no adjournment of the other[q]. It hath alſo been uſual, when his majeſty hath ſignified his pleaſure that both or either of the houſes ſhould adjourn themſelves to a certain day, to obey the king's pleaſure ſo ſignified, and to adjourn accordingly[r]. Otherwiſe, beſides the indecorum of a refuſal, a prorogation would aſſuredly follow; which would often be very inconvenient to both public and private buſineſs. For prorogation puts an end to the ſeſſion; and then ſuch bills, as are only begun and not perfected, muſt be reſumed *de novo* (if at all) in a ſubſequent ſeſſion: whereas, after an adjournment, all things continue in the ſame ſtate as at the time of the adjournment made, and may be proceeded on without any freſh commencement.

A PROROGATION is the continuance of the parliament from one ſeſſion to another, as an adjournment is a continuation of the ſeſſion from day to day. This is done by the royal authority, expreſſed either by the lord chancellor in his majeſty's preſence, or by commiſſion from the crown, or frequently by proclamation. Both houſes are neceſſarily prorogued at the ſame time; it not being a prorogation of the houſe of lords, or commons, but of the parliament. The ſeſſion is never underſtood

[q] 4 Inſt. 28.

[r] Com. Journ. *paſſim: e.g.* 11 Jun. 1572. 4 Aug. 1685. 24 Febr. 1691. 21 Jun. 1712. 5 Apr. 1604. 4 Jun. 14 Nov. 18 Dec. 1621. 16 Apr. 1717. 3 Feb. 1741. 10 Dec. 1745. 11 Jul. 1625. 13 Sept. 1660. 25 Jul. 1667.

to be at an end, until a prorogation: though, unleſs ſome act be paſſed or ſome judgment given in parliament, it is in truth no ſeſſion at all[s]. And formerly the uſage was, for the king to give the royal aſſent to all ſuch bills as he approved, at the end of every ſeſſion, and then to prorogue the parliament; though ſometimes only for a day or two[t]: after which all buſineſs then depending in the houſes was to be begun again. Which cuſtom obtained ſo ſtrongly, that it once became a queſtion[u], whether giving the royal aſſent to a ſingle bill did not of courſe put an end to the ſeſſion. And, though it was then reſolved in the negative, yet the notion was ſo deeply rooted, that the ſtatute 1 Car. I. c. 7. was paſſed to declare, that the king's aſſent to that and ſome other acts ſhould not put an end to the ſeſſion; and, even ſo late as the reſtoration of Charles II, we find a proviſo tacked to the firſt bill then enacted[w], that his majeſty's aſſent thereto ſhould not determine the ſeſſion of parliament. But it now ſeems to be allowed, that a prorogation muſt be expreſſly made, in order to determine the ſeſſion. And, if at the time of an actual rebellion, or imminent danger of invaſion, the parliament ſhall be ſeparated by adjournment or prorogation, the king is empowered[x] to call them together by proclamation, with fourteen days notice of the time appointed for their reaſſembling.

A DISSOLUTION is the civil death of the parliament; and this may be effected three ways: 1. By the king's will, expreſſed either in perſon or by repreſentation. For, as the king has the ſole right of convening the parliament, ſo alſo it is a branch of the royal prerogative, that he may (whenever he pleaſes) prorogue the parliament for a time, or put a final period to it's exiſtence. If nothing had a right to prorogue or diſſolve a parliament but itſelf, it might happen to become perpetual. And this would be extremely dangerous, if at any time it ſhould attempt to encroach upon the executive power: as was fatally experien-

[s] 4 Inſt. 28. Hale of parl. 38.
[t] Com. Journ. 21 Oct. 1553.
[u] *Ibid.* 21 Nov. 1554.
[w] Stat. 12 Car. II. c. 1.
[x] Stat. 30 Geo. II. c. 25.

ced

ced by the unfortunate king Charles the firſt; who, having unadviſedly paſſed an act to continue the parliament then in being till ſuch time as it ſhould pleaſe to diſſolve itſelf, at laſt fell a ſacrifice to that inordinate power, which he himſelf had conſented to give them. It is therefore extremely neceſſary that the crown ſhould be empowered to regulate the duration of theſe aſſemblies, under the limitations which the Engliſh conſtitution has preſcribed: ſo that, on the one hand, they may frequently and regularly come together, for the diſpatch of buſineſs and redreſs of grievances; and may not, on the other, even with the conſent of the crown, be continued to an inconvenient or unconſtitutional length.

2. A PARLIAMENT may be diſſolved by the demiſe of the crown. This diſſolution formerly happened immediately upon the death of the reigning ſovereign, for he being conſidered in law as the head of the parliament, (*caput, principium, et finis*) that failing, the whole body was held to be extinct. But, the calling a new parliament immediately on the inauguration of the ſucceſſor being found inconvenient, and dangers being apprehended from having no parliament in being in caſe of a diſputed ſucceſſion, it was enacted by the ſtatutes 7 & 8 W. III. c. 15. and 6 Ann. c. 7. that the parliament in being ſhall continue for ſix months after the death of any king or queen, unleſs ſooner prorogued or diſſolved by the ſucceſſor: that, if the parliament be, at the time of the king's death, ſeparated by adjournment or prorogation, it ſhall notwithſtanding aſſemble immediately: and that, if no parliament is then in being, the members of the laſt parliament ſhall aſſemble, and be again a parliament.

3. LASTLY, a parliament may be diſſolved or expire by length of time. For if either the legiſlative body were perpetual; or might laſt for the life of the prince who convened them, as formerly; and were ſo to be ſupplied, by occaſionally filling the vacancies with new repreſentatives; in theſe caſes, if it were once corrupted, the evil would be paſt all remedy: but when

when different bodies ſucceed each other, if the people ſee cauſe to diſapprove of the preſent, they may rectify it's faults in the next. A legiſlative aſſembly alſo, which is ſure to be ſeparated again, (whereby it's members will themſelves become private men, and ſubject to the full extent of the laws which they have enacted for others) will think themſelves bound, in intereſt as well as duty, to make only ſuch laws as are good. The utmoſt extent of time that the ſame parliament was allowed to ſit, by the ſtatute 6 W. & M. c. 2. was *three* years; after the expiration of which, reckoning from the return of the firſt ſummons, the parliament was to have no longer continuance. But by the ſtatute 1 Geo. I. ſt. 2. c. 38. (in order, profeſſedly, to prevent the great and continued expenſes of frequent elections, and the violent heats and animoſities conſequent thereupon, and for the peace and ſecurity of the government then juſt recovering from the late rebellion) this term was prolonged to *ſeven* years; and, what alone is an inſtance of the vaſt authority of parliament, the very ſame houſe, that was choſen for three years, enacted it's own continuance for ſeven. So that, as our conſtitution now ſtands, the parliament muſt expire, or die a natural death, at the end of every ſeventh year; if not ſooner diſſolved by the royal prerogative.

CHAPTER THE THIRD.

OF THE KING, AND HIS TITLE.

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

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

THE executive power of the Engliſh nation being veſted in a ſingle perſon, by the general conſent of the people, the evidence of which general conſent is long and immemorial uſage, it became neceſſary to the freedom and peace of the ſtate, that a rule ſhould be laid down, uniform, univerſal, and permanent; in order to mark out with preciſion, *who* is that ſingle perſon, to whom are committed (in ſubſervience to the law of the land) the care and protection of the community; and to whom, in return, the duty and allegiance of every individual are due. It is of the higheſt importance to the public tranquillity, and to the conſciences

ſciences of private men, that this rule ſhould be clear and indiſputable: and our conſtitution has not left us in the dark upon this material occaſion. It will therefore be the endeavour of this chapter to trace out the conſtitutional doctrine of the royal ſucceſſion, with that freedom and regard to truth, yet mixed with that reverence and reſpect, which the principles of liberty and the dignity of the ſubject require.

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

I. FIRST, it is in general *hereditary*, or deſcendible to the next heir, on the death or demiſe of the laſt proprietor. All regal governments muſt be either hereditary or elective: and, as I believe there is no inſtance wherein the crown of England has ever been aſſerted to be elective, except by the regicides at the infamous and unparalleled trial of king Charles I, it muſt of conſequence be hereditary. Yet while I aſſert an hereditary, I by no means intend a *jure divino*, title to the throne. Such a title may be allowed to have ſubſiſted under the theocratic eſtabliſhments of the children of Iſrael in Paleſtine: but it never yet ſubſiſted in any other country; ſave only ſo far as kingdoms, like other human fabrics, are ſubject to the general and ordinary diſpenſations of providence. Nor indeed have a *jure divino* and an *hereditary* right any neceſſary connexion with each other; as ſome have very weakly imagined. The titles of David and Jehu were equally

jure

jure divino, as thoſe of either Solomon or Ahab; and yet David ſlew the ſons of his predeceſſor, and Jehu his predeceſſor himſelf. And when our kings have the ſame warrant as they had, whether it be to ſit upon the throne of their fathers, or to deſtroy the houſe of the preceding ſovereign, they will then, and not before, poſſeſs the crown of England by a right like theirs, *immediately* derived from heaven. The hereditary right, which the laws of England acknowlege, owes it's origin to the founders of our conſtitution, and to them only. It has no relation to, nor depends upon, the civil laws of the Jews, the Greeks, the Romans, or any other nation upon earth: the municipal laws of one ſociety having no connexion with, or influence upon, the fundamental polity of another. The founders of our Engliſh monarchy might perhaps, if they had thought proper, have made it an elective monarchy: but they rather choſe, and upon good reaſon, to eſtabliſh originally a ſucceſſion by inheritance. This has been acquieſced in by general conſent; and ripened by degrees into common law: the very ſame title that every private man has to his own eſtate. Lands are not naturally deſcendible any more than thrones: but the law has thought proper, for the benefit and peace of the public, to eſtabliſh hereditary ſucceſſion in one as well as the other.

IT muſt be owned, an elective monarchy ſeems to be the moſt obvious, and beſt ſuited of any to the rational principles of government, and the freedom of human nature: and accordingly we find from hiſtory that, in the infancy and firſt rudiments of almoſt every ſtate, the leader, chief magiſtrate, or prince, hath uſually been elective. And, if the individuals who compoſe that ſtate could always continue true to firſt principles, uninfluenced by paſſion or prejudice, unaſſailed by corruption, and unawed by violence, elective ſucceſſion were as much to be deſired in a kingdom, as in other inferior communities. The beſt, the wiſeſt, and the braveſt man would then be ſure of receiving that crown, which his endowments have merited; and the ſenſe of an unbiaſſed majority would be dutifully acquieſced in by the few who were

of different opinions. But hiſtory and obſervation will inform us, that elections of every kind (in the preſent ſtate of human nature) are too frequently brought about by influence, partiality, and artifice: and, even where the caſe is otherwiſe, theſe practices will be often ſuſpected, and as conſtantly charged upon the ſucceſsful, by a ſplenetic diſappointed minority. This is an evil, to which all ſocieties are liable; as well thoſe of a private and domeſtic kind, as the great community of the public, which regulates and includes the reſt. But in the former there is this advantage; that ſuch ſuſpicions, if falſe, proceed no farther than jealouſies and murmurs, which time will effectually ſuppreſs; and, if true, the injuſtice may be remedied by legal means, by an appeal to thoſe tribunals to which every member of ſociety has (by becoming ſuch) virtually engaged to ſubmit. Whereas, in the great and independent ſociety, which every nation compoſes, there is no ſuperior to reſort to but the law of nature; no method to redreſs the infringements of that law, but the actual exertion of private force. As therefore between two nations, complaining of mutual injuries, the quarrel can only be decided by the law of arms; ſo in one and the ſame nation, when the fundamental principles of their common union are ſuppoſed to be invaded, and more eſpecially when the appointment of their chief magiſtrate is alleged to be unduly made, the only tribunal to which the complainants can appeal is that of the God of battels, the only proceſs by which the appeal can be carried on is that of a civil and inteſtine war. An hereditary ſucceſſion to the crown is therefore now eſtabliſhed, in this and moſt other countries, in order to prevent that periodical bloodſhed and miſery, which the hiſtory of antient imperial Rome, and the more modern experience of Poland and Germany, may ſhew us are the conſequences of elective kingdoms.

2. BUT, ſecondly, as to the particular mode of inheritance, it in general correſponds with the feodal path of deſcents, chalked out by the common law in the ſucceſſion to landed eſtates; yet with one or two material exceptions. Like them, the crown will deſcend

deſcend lineally to the iſſue of the reigning monarch; as it did from king John to Richard II, through a regular pedigree of ſix lineal deſcents. As in them, the preference of males to females, and the right of primogeniture among the males, are ſtrictly adhered to. Thus Edward V ſucceeded to the crown, in preference to Richard his younger brother and Elizabeth his elder ſiſter. Like them, on failure of the male line, it deſcends to the iſſue female; according to the antient Britiſh cuſtom remarked by Tacitus[a], "*ſolent foeminarum ductu bellare, et ſexum in imperiis non diſcer-*"*nere.*" Thus Mary I ſucceeded to Edward VI; and the line of Margaret queen of Scots, the daughter of Henry VII, ſucceeded on failure of the line of Henry VIII, his ſon. But, among the females, the crown deſcends by right of primogeniture to the eldeſt daughter only and her iſſue; and not, as in common inheritances, to all the daughters at once; the evident neceſſity of a ſole ſucceſſion to the throne having occaſioned the royal law of deſcents to depart from the common law in this reſpect: and therefore queen Mary on the death of her brother ſucceeded to the crown alone, and not in partnerſhip with her ſiſter Elizabeth. Again: the doctrine of repreſentation prevails in the deſcent of the crown, as it does in other inheritances; whereby the lineal deſcendants of any perſon deceaſed ſtand in the ſame place as their anceſtor, if living, would have done. Thus Richard II ſucceeded his grandfather Edward III, in right of his father the black prince; to the excluſion of all his uncles, his grandfather's younger children. Laſtly, on failure of lineal deſcendants, the crown goes to the next collateral relations of the late king; provided they are lineally deſcended from the blood royal, that is, from that royal ſtock which originally acquired the crown. Thus Henry I ſucceeded to William II, John to Richard I, and James I to Elizabeth; being all derived from the conqueror, who was then the only regal ſtock. But herein there is no objection (as in the caſe of common deſcents) to the ſucceſſion of a brother, an uncle, or other collateral relation, of the *half* blood; that is, where the relationſhip proceeds not from the ſame *couple* of anceſtors (which

[a] *in vit. Agricolae.*

conſtitutes a kinſman of the *whole* blood) but from a *ſingle* anceſtor only; as when two perſons are derived from the ſame father, and not from the ſame mother, or *vice verſa*: provided only, that the one anceſtor, from whom both are deſcended, be he from whoſe veins the blood royal is communicated to each. Thus Mary I inherited to Edward VI, and Elizabeth inherited to Mary; all born of the ſame father, king Henry VIII, but all by different mothers. The reaſon of which diverſity, between royal and common deſcents, will be better underſtood hereafter, when we examine the nature of inheritances in general.

3. THE doctrine of *hereditary* right does by no means imply an *indefeaſible* right to the throne. No man will, I think, aſſert this, that has conſidered our laws, conſtitution, and hiſtory, without prejudice, and with any degree of attention. It is unqueſtionably in the breaſt of the ſupreme legiſlative authority of this kingdom, the king and both houſes of parliament, to defeat this hereditary right; and, by particular entails, limitations, and proviſions, to exclude the immediate heir, and veſt the inheritance in any one elſe. This is ſtrictly conſonant to our laws and conſtitution; as may be gathered from the expreſſion ſo frequently uſed in our ſtatute book, of "the king's majeſty, his heirs, and "ſucceſſors." In which we may obſerve, that as the word, "heirs," neceſſarily implies an inheritance or hereditary right, generally ſubſiſting in the royal perſon; ſo the word, "ſucceſſors," diſtinctly taken, muſt imply that this inheritance may ſometimes be broke through; or, that there may be a ſucceſſor, without being the heir, of the king. And this is ſo extremely reaſonable, that without ſuch a power, lodged ſomewhere, our polity would be very defective. For, let us barely ſuppoſe ſo melancholy a caſe, as that the heir apparent ſhould be a lunatic, an ideot, or otherwiſe incapable of reigning: how miſerable would the condition of the nation be, if he were alſo incapable of being ſet aſide! --- It is therefore neceſſary that this power ſhould be lodged ſomewhere: and yet the inheritance, and regal dignity, would be very precarious indeed, if this power were *expreſſly* and *avowedly*

edly lodged in the hands of the ſubject only, to be exerted whenever prejudice, caprice, or diſcontent ſhould happen to take the lead. Conſequently it can no where be ſo properly lodged as in the two houſes of parliament, by and with the conſent of the reigning king; who, it is not to be ſuppoſed, will agree to any thing improperly prejudicial to the rights of his own deſcendants. And therefore in the king, lords, and commons, in parliament aſſembled, our laws have expreſſly lodged it.

4. BUT, fourthly; however the crown may be limited or transferred, it ſtill retains it's deſcendible quality, and becomes hereditary in the wearer of it: and hence in our law the king is ſaid never to die, in his political capacity; though, in common with other men, he is ſubject to mortality in his natural: becauſe immediately upon the natural death of Henry, William, or Edward, the king ſurvives in his ſucceſſor; and the right of the crown veſts, *eo inſtanti*, upon his heir; either the *haeres natus*, if the courſe of deſcent remains unimpeached, or the *haeres factus*, if the inheritance be under any particular ſettlement. So that there can be no *interregnum*; but as ſir Matthew Hale[b] obſerves, the right of ſovereignty is fully inveſted in the ſucceſſor by the very deſcent of the crown. And therefore, however acquired, it becomes in him abſolutely hereditary, unleſs by the rules of the limitation it is otherwiſe ordered and determined. In the ſame manner as landed eſtates, to continue our former compariſon, are by the law hereditary, or deſcendible to the heirs of the owner; but ſtill there exiſts a power, by which the property of thoſe lands may be transferred to another perſon. If this transfer be made ſimply and abſolutely, the lands will be hereditary in the new owner, and deſcend to his heirs at law: but if the transfer be clogged with any limitations, conditions, or entails, the lands muſt deſcend in that chanel, ſo limited and preſcribed, and no other.

IN theſe four points conſiſts, as I take it, the conſtitutional notion of hereditary right to the throne: which will be ſtill far-

[b] 1 Hiſt. P. C. 61.

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

KING Egbert about the year 800, found himſelf in poſſeſſion of the throne of the weſt Saxons, by a long and undiſturbed deſcent from his anceſtors of above three hundred years. How his anceſtors acquired their title, whether by force, by fraud, by contract, or by election, it matters not much to enquire; and is indeed a point of ſuch high antiquity, as muſt render all enquiries at beſt but plauſible gueſſes. His right muſt be ſuppoſed indiſputably good, becauſe we know no better. The other kingdoms of the heptarchy he acquired, ſome by conſent, but moſt by a voluntary ſubmiſſion. And it is an eſtabliſhed maxim in civil polity, and the law of nations, that when one country is united

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to another in ſuch a manner, as that one keeps it's government and ſtates, and the other loſes them; the latter entirely aſſimilates or is melted down in the former, and muſt adopt it's laws and cuſtoms[c]. And in purſuance of this maxim there hath ever been, ſince the union of the heptarchy in king Egbert, a general acquieſcence under the hereditary monarchy of the weſt Saxons, through all the united kingdoms.

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

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

HE was not indeed the true heir to the crown, being the younger brother of king Edmund Ironſide, who had a ſon Edward, ſirnamed (from his exile) the outlaw, ſtill living. But this ſon was then in Hungary; and, the Engliſh having juſt ſhaken off the Daniſh yoke, it was neceſſary that ſomebody on the ſpot ſhould mount the throne; and the confeſſor was the next of the royal line then in England. On his deceaſe without iſſue, Harold II uſurped the throne, and almoſt at the ſame inſtant came on the

[c] Puff. L. of N. and N. b. 8. c. 12. §. 6.

Norman

Norman invaſion: the right to the crown being all the time in Edgar, ſirnamed Atheling, (which ſignifies in the Saxon language the firſt of the blood royal) who was the ſon of Edward the outlaw, and grandſon of Edmund Ironſide; or, as Matthew Paris[d] well expreſſes the ſenſe of our old conſtitution, "*Edmundus au-*" *tem latusferreum, rex naturalis de ſtirpe regum, genuit Edwar-*" *dum; et Edwardus genuit Edgarum, cui de jure debebatur reg-*" *num Anglorum.*"

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

THIS conqueſt then by William of Normandy was, like that of Canute before, a forcible tranſfer of the crown of England into a new family: but, the crown being ſo transferred, all the inherent properties of the crown were with it transferred alſo. For, the victory obtained at Haſtings not being[f] a victory over the nation collectively, but only over the perſon of Harold, the only right that the conqueror could pretend to acquire thereby, was the right to poſſeſs the crown of England, not to alter the nature of the government. And therefore, as the Engliſh laws ſtill re-

[d] *A.D.* 1066.
[e] William of Malmſb. *l.* 3.
[f] Hale, Hiſt. C. L. c. 5. Seld. review of tithes, c. 8.

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mained in force, he muſt neceſſarily take the crown ſubject to thoſe laws, and with all it's inherent properties; the firſt and principal of which was it's deſcendibility. Here then we muſt drop our race of Saxon kings, at leaſt for a while, and derive our deſcents from William the conqueror as from a new ſtock, who acquired by right of war (ſuch as it is, yet ſtill the *dernier reſort* of kings) a ſtrong and undiſputed title to the inheritable crown of England.

ACCORDINGLY it deſcended from him to his ſons William II and Henry I. Robert, it muſt be owned, his eldeſt ſon, was kept out of poſſeſſion by the arts and violence of his brethren; who proceeded upon a notion, which prevailed for ſome time in the law of deſcents, that when the eldeſt ſon was already provided for (as Robert was conſtituted duke of Normandy by his father's will) in ſuch a caſe the next brother was entitled to enjoy the reſt of their father's inheritance. But, as he died without iſſue, Henry at laſt had a good title to the throne, whatever he might have at firſt.

STEPHEN of Blois, who ſucceeded him, was indeed the grandſon of the conqueror, by Adelicia his daughter, and claimed the throne by a feeble kind of hereditary right; not as being the neareſt of the male line, but as the neareſt male of the blood royal. The real right was in the empreſs Matilda or Maud, the daughter of Henry I; the rule of ſucceſſion being (where women are admitted at all) that the daughter of a ſon ſhall be preferred to the ſon of a daughter. So that Stephen was little better than a mere uſurper; and the empreſs Maud did not fail to aſſert her right by the ſword: which diſpute was attended with various ſucceſs, and ended at laſt in a compromiſe, that Stephen ſhould keep the crown, but that Henry the ſon of Maud ſhould ſucceed him; as he afterwards accordingly did.

HENRY, the ſecond of that name, was the undoubted heir of William the conqueror; but he had alſo another connexion in

blood, which endeared him ſtill farther to the Engliſh. He was lineally deſcended from Edmund Ironſide, the laſt of the Saxon race of hereditary kings. For Edward the outlaw, the ſon of Edmund Ironſide, had (beſides Edgar Atheling, who died without iſſue) a daughter Margaret, who was married to Malcolm king of Scotland; and in her the Saxon hereditary right reſided. By Malcolm ſhe had ſeveral children, and among the reſt Matilda the wife of Henry I, who by him had the empreſs Maud, the mother of Henry II. Upon which account the Saxon line is in our hiſtories frequently ſaid to have been reſtored in his perſon: though in reality that right ſubſiſted in the *ſons* of Malcolm by queen Margaret; king Henry's beſt title being as heir to the conqueror.

FROM Henry II the crown deſcended to his eldeſt ſon Richard I, who dying childleſs, the right veſted in his nephew Arthur, the ſon of Geoffrey his next brother; but John, the youngeſt ſon of king Henry, ſeiſed the throne; claiming, as appears from his charters, the crown by hereditary right [g]: that is to ſay, he was next of kin to the deceaſed king, being his ſurviving brother; whereas Arthur was removed one degree farther, being his brother's ſon, though by right of repreſentation he ſtood in the place of his father Geoffrey. And however flimzey this title, and thoſe of William Rufus and Stephen of Blois, may appear at this diſtance to us, after the law of deſcents hath now been ſettled for ſo many centuries, they were ſufficient to puzzle the underſtandings of our brave, but unlettered, anceſtors. Nor indeed can we wonder at the number of partizans, who eſpouſed the pretenſions of king John in particular; ſince even in the reign of his father, king Henry II, it was a point undetermined [h], whether, even in common inheritances, the child of an elder brother ſhould ſucceed to the land in right of repreſentation, or the younger ſurviving brother in right of proximity of blood. Nor is it to this day decided in the collateral ſucceſſion to the fiefs of

[g] "*Regni Angliae; quod nobis jure competit haereditario.*" Spelm. *Hiſt. R. Joh.* apud Wilkins. 354.

[h] Glanv. *l.* 7. *c.* 3.

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the empire, whether the order of the ſtocks, or the proximity of degree ſhall take place[i]. However, on the death of Arthur and his ſiſter Eleanor without iſſue, a clear and indiſputable title veſted in Henry III the ſon of John: and from him to Richard the ſecond, a ſucceſſion of ſix generations, the crown deſcended in the true hereditary line. Under one of which race of princes[k], we find it declared in parliament, "that the law of the crown of Eng-"land is, and always hath been, that the children of the king "of England, whether born in England, or elſewhere, ought to "bear the inheritance after the death of their anceſtors. Which "law, our ſovereign lord the king, the prelates, earls, and ba-"rons, and other great men, together with all the commons, in "parliament aſſembled, do approve and affirm for ever."

UPON Richard the ſecond's reſignation of the crown, he having no children, the right reſulted to the iſſue of his grandfather Edward III. That king had many children, beſides his eldeſt, Edward the black prince of Wales, the father of Richard II: but to avoid confuſion I ſhall only mention three; William his ſecond ſon, who died without iſſue; Lionel duke of Clarence, his third ſon; and John of Gant duke of Lancaſter, his fourth. By the rules of ſucceſſion therefore the poſterity of Lionel duke of Clarence were entitled to the throne, upon the reſignation of king Richard; and had accordingly been declared by the king, many years before, the preſumptive heirs of the crown; which declaration was alſo confirmed in parliament[l]. But Henry duke of Lancaſter, the ſon of John of Gant, having then a large army in the kingdom, the pretence of raiſing which was to recover his patrimony from the king, and to redreſs the grievances of the ſubject, it was impoſſible for any other title to be aſſerted with any ſafety; and he became king under the title of Henry IV. But, as ſir Matthew Hale remarks[m], though the people unjuſtly aſſiſted Henry IV in his uſurpation of the crown, yet he was not admitted thereto, until he had declared that he

[i] Mod. Un. Hiſt. xxx. 512.
[k] Stat. 25 Edw. III. ſt. 2.
[l] Sandford's geneal. hiſt. 246.
[m] Hiſt. C. L. c. 5.

claimed, not as a conqueror, (which he very much inclined to do[n]) but as a ſucceſſor, deſcended by right line of the blood royal; as appears from the rolls of parliament in thoſe times. And in order to this he ſet up a ſhew of two titles: the one upon the pretence of being the firſt of the blood royal in the intire male line, whereas the duke of Clarence left only one daughter Philippa; from which female branch, by a marriage with Edmond Mortimer earl of March, the houſe of York deſcended: the other, by reviving an exploded rumour, firſt propagated by John of Gant, that Edmond earl of Lancaſter (to whom Henry's mother was heireſs) was in reality the elder brother of king Edward I; though his parents, on account of his perſonal deformity, had impoſed him on the world for the younger: and therefore Henry would be intitled to the crown, either as ſucceſſor to Richard II, in caſe the intire 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 intire male line was exiſting.

HOWEVER, as in Edward the third's time we find the parliament approving and affirming the right of the crown, as before ſtated, ſo in the reign of Henry IV they actually exerted their right of new-ſettling the ſucceſſion to the crown. And this was done by the ſtatute 7 Hen. IV. c. 2. whereby it is enacted, "that the inheritance of the crown and realms of England and "France, and all other the king's dominions, ſhall be *ſet and re-* "*main*[o] in the perſon of our ſovereign lord the king, and in the "heirs of his body iſſuing;" and prince Henry is declared heir apparent to the crown, to hold to him and the heirs of his body iſſuing, with remainder to lord Thomas, lord John, and lord Humphry, the king's ſons, and the heirs of their bodies reſpectively. Which is indeed nothing more than the law would have done before, provided Henry the fourth had been a rightful king. It however ſerves to ſhew that it was then generally underſtood, that the king and parliament had a right to new-model and re-

[n] Seld. tit. hon. 1. 3.

[o] *ſoit mys et demoerge.*

gulate

gulate the ſucceſſion to the crown. And we may obſerve, with what caution and delicacy the parliament then avoided declaring any ſentiment of Henry's original title. However ſir Edward Coke more than once expreſſly declares [p], that at the time of paſſing this act the right of the crown was in the deſcent from Philippa, daughter and heir of Lionel duke of Clarence.

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

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

[p] 4 Inſt. 37, 205.

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

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

[q] 4 Inſt. 36.
[r] 4 Inſt. 37.
[s] *Ibid.*

Where-

Whereupon the act made in his favour was ſo much diſregarded, that it never was printed in our ſtatute books.

HENRY the eighth, the iſſue of this marriage, ſucceeded to the crown by clear indiſputable hereditary right, and tranſmitted it to his three children in ſucceſſive order. But in his reign we at ſeveral times find the parliament buſy in regulating the ſucceſſion to the kingdom. And, firſt, by ſtatute 25 Hen. VIII. c. 12. which recites the miſchiefs, which have and may enſue by diſputed titles, becauſe no perfect and ſubſtantial proviſion hath been made by law concerning the ſucceſſion; and then enacts, that the crown ſhall be entailed to his majeſty, and the ſons or heirs males of his body; and in default of ſuch ſons to the lady Elizabeth (who is declared to be the king's eldeſt iſſue female, in excluſion of the lady Mary, on account of her ſuppoſed illegitimacy by the divorce of her mother queen Catherine) and to the lady Elizabeth's heirs of her body; and ſo on from iſſue female to iſſue female, and the heirs of their bodies, by courſe of inheritance according to their ages, *as the crown of England hath been accuſtomed and ought to go*, in caſe where there be heirs female of the ſame: and in default of iſſue female, then to the king's right heirs for ever. This ſingle ſtatute is an ample proof of all the four poſitions we at firſt ſet out with.

BUT, upon the king's divorce from Ann Boleyn, this ſtatute was, with regard to the ſettlement of the crown, repealed by ſtatute 28 Hen. VIII. c. 7. wherein the lady Elizabeth is alſo, as well as the lady Mary, baſtardized, and the crown ſettled on the king's children by queen Jane Seymour, and his future wives; and, in defect of ſuch children, then with this remarkable remainder, to ſuch perſons as the king by letters patent, or laſt will and teſtament, ſhould limit and appoint the ſame. A vaſt power; but, notwithſtanding, as it was regularly veſted in him by the ſupreme legiſlative authority, it was therefore indiſputably valid. But this power was never carried into execution; for by ſtatute 35 Hen. VIII. c. 1. the king's two daughters are legitimated again, and the

crown

crown is limited to prince Edward by name, after that to the lady Mary, and then to the lady Elizabeth, and the heirs of their reſpective bodies; which ſucceſſion took effect accordingly, being indeed no other than the uſual courſe of the law, with regard to the deſcent of the crown.

BUT leſt there ſhould remain any doubt in the minds of the people, through this jumble of acts for limiting the ſucceſſion, by ſtatute 1 Mar. p. 2. c. 1. queen Mary's hereditary right to the throne is acknowleged and recognized in theſe words: "the "crown of theſe realms is moſt lawfully, juſtly, and rightly *deſ-* "*cended* and come to the queen's highneſs that now is, being the "very, true, and undoubted heir and inheritrix thereof." And again, upon the queen's marriage with Philip of Spain, in the ſtatute which ſettles the preliminaries of that match [t], the hereditary right to the crown is thus aſſerted and declared: "as "touching the right of the queen's inheritance in the realm and "dominions of England, the children, whether male or female, "ſhall ſucceed in them, according to the known laws, ſtatutes, "and cuſtoms of the ſame." Which determination of the parliament, that the ſucceſſion *ſhall* continue in the uſual courſe, ſeems tacitly to imply a power of new-modelling and altering it, in caſe the legiſlature had thought proper.

ON queen Elizabeth's acceſſion, her right is recognized in ſtill ſtronger terms than her ſiſter's; the parliament acknowleging [u], "that the queen's highneſs is, and in very deed and of moſt mere "right ought to be, by the laws of God, and the laws and ſta- "tutes of this realm, our moſt lawful and rightful ſovereign liege "lady and queen; and that her highneſs is rightly, lineally, and "lawfully deſcended and come of the blood royal of this realm "of England; in and to whoſe princely perſon, and to the heirs "of her body lawfully to be begotten, after her, the imperial "crown and dignity of this realm doth belong." And in the ſame reign, by ſtatute 13 Eliz. c. 1. we find the right of parlia-

[t] 1 Mar. p. 2. c. 2.

[u] Stat. 1 Eliz. c. 3.

ment

ment to direct the ſucceſſion of the crown aſſerted in the moſt explicit words. "If any perſon ſhall hold, affirm, or maintain "that the common laws of this realm, not altered by parliament, "ought not to direct the right of the crown of England; or that "the queen's majeſty, with and by the authority of parliament, "is not able to make laws and ſtatutes of ſufficient force and va- "lidity, to limit and bind the crown of this realm, and the de- "ſcent, limitation, inheritance, and government thereof;---ſuch "perſon, ſo holding, affirming, or maintaining, ſhall during the "life of the queen be guilty of high treaſon; and after her de- "ceaſe ſhall be guilty of a miſdemeſnor, and forfeit his goods and "chattels."

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

claim by hereditary right to the Engliſh, as well as Scottiſh throne, being the heir both of Egbert and William the conqueror.

AND it is no wonder that a prince of more learning than wiſdom, who could deduce an hereditary title for more than eight hundred years, ſhould eaſily be taught by the flatterers of the times to believe there was ſomething divine in this right, and that the finger of providence was viſible in it's preſervation. Whereas, though a wiſe inſtitution, it was clearly a human inſtitution; and the right inherent in him no natural, but a poſitive right. And in this and no other light was it taken by the Engliſh parliament; who by ſtatute 1 Jac. I. c. 1. did "recognize "and acknowlege, that immediately upon the diſſolution and de- "ceaſe of Elizabeth late queen of England, the imperial crown "thereof did by inherent birthright, and lawful and undoubted "ſucceſſion, deſcend and come to his moſt excellent majeſty, as "being lineally, juſtly, and lawfully, next and ſole heir of the "blood royal of this realm." Not a word here of any right immediately derived from heaven: which, if it exiſted any where, muſt be ſought for among the *aborigines* of the iſland, the antient Britons; among whoſe princes indeed ſome have gone to ſearch it for him [w].

BUT, wild and abſurd as the doctrine of divine right moſt undoubtedly is, it is ſtill more aſtoniſhing, that when ſo many human hereditary rights had centered in this king, his ſon and heir king Charles the firſt ſhould be told by thoſe infamous judges, who pronounced his unparalleled ſentence, that he was an elective prince; elected by his people, and therefore accountable to them, in his own proper perſon, for his conduct. The confuſion, inſtability, and madneſs, which followed the fatal cataſtrophe of that pious and unfortunate prince, will be a ſtanding argument in

[w] Elizabeth of York, the mother of queen Margaret of Scotland, was heireſs of the houſe of Mortimer. And Mr Carte obſerves, that the houſe of Mortimer, in virtue of it's deſcent from Gladys only ſiſter to Lewellin ap Jorweth the great, had the true right to the principality of Wales. iii. 705.

favour

favour of hereditary monarchy to all future ages; as they proved at laſt to the then deluded people: who, in order to recover that peace and happineſs which for twenty years together they had loſt, in a ſolemn parliamentary convention of the ſtates reſtored the right heir of the crown. And in the proclamation for that purpoſe, which was drawn up and attended by both houſes[x], they declared, "that, according to their duty and allegiance, they did "heartily, joyfully, and unanimouſly acknowlege and proclaim, "that immediately upon the deceaſe of our late ſovereign lord "king Charles, the imperial crown of theſe realms did by inhe-"rent birthright and lawful and undoubted ſucceſſion deſcend and "come to his moſt excellent majeſty Charles the ſecond, as being "lineally, juſtly, and lawfully, next heir of the blood royal of this "realm: and thereunto they moſt humbly and faithfully did ſub-"mit and oblige themſelves, their heirs and poſterity for ever."

THUS I think it clearly appears, from the higheſt authority this nation is acquainted with, that the crown of England hath been ever an hereditary crown; though ſubject to limitations by parliament. The remainder of this chapter will conſiſt principally of thoſe inſtances, wherein the parliament has aſſerted or exerciſed this right of altering and limiting the ſucceſſion; a right which, we have ſeen, was before exerciſed and aſſerted in the reigns of Henry IV, Henry VII, Henry VIII, queen Mary, and queen Elizabeth.

THE firſt inſtance, in point of time, is the famous bill of excluſion, which raiſed ſuch a ferment in the latter end of the reign of king Charles the ſecond. It is well known, that the purport of this bill was to have ſet aſide the king's brother and preſumptive heir, the duke of York, from the ſucceſſion, on the ſcore of his being a papiſt; that it paſſed the houſe of commons, but was rejected by the lords; the king having alſo declared beforehand, that he never would be brought to conſent to it. And from this tranſaction we may collect two things: 1. That the crown was

[x] Com. Journ. 8 May, 1660.

univerſally acknowleged to be hereditary; and the inheritance indefeaſible unleſs by parliament: elſe it had been needleſs to prefer ſuch a bill. 2. That the parliament had a power to have defeated the inheritance: elſe ſuch a bill had been ineffectual. The commons acknowleged the hereditary right then ſubſiſting; and the lords did not diſpute the power, but merely the propriety, of an excluſion. However, as the bill took no effect, king James the ſecond ſucceeded to the throne of his anceſtors; and might have enjoyed it during the remainder of his life, but for his own infatuated conduct, which (with other concurring circumſtances) brought on the revolution in 1688.

THE true ground and principle, upon which that memorable event proceeded, was an entirely new caſe in politics, which had never before happened in our hiſtory; the abdication of the reigning monarch, and the vacancy of the throne thereupon. It was not a defeazance of the right of ſucceſſion, and a new limitation of the crown, by the king and both houſes of parliament: it was the act of the nation alone, upon an apprehenſion that there was no king in being. For in a full aſſembly of the lords and commons, met in convention upon this apprehended vacancy, both houſes[y] came to this reſolution; "that king James the ſecond, "having endeavoured to ſubvert the conſtitution of the kingdom, "by breaking the original contract between king and people; "and, by the advice of jeſuits and other wicked perſons, having "violated the fundamental laws; and having withdrawn himſelf "out of this kingdom; has abdicated the government, and that the "throne is thereby vacant." Thus ended at once, by this ſudden and unexpected vacancy of the throne, the old line of ſucceſſion; which from the conqueſt had laſted above ſix hundred years, and from the union of the heptarchy in king Egbert almoſt nine hundred. The facts themſelves thus appealed to, the king's endeavours to ſubvert the conſtitution by breaking the original contract, his violation of the fundamental laws, and his withdrawing himſelf out of the kingdom, were evident and notorious: and the

[y] Com. Journ. 7 Feb. 1688.

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conſequences drawn from theſe facts (namely, that they amounted to an abdication of the government; which abdication did not affect only the perſon of the king himſelf, but alſo all his heirs, and rendered the throne abſolutely and completely vacant) it belonged to our anceſtors to determine. For, whenever a queſtion ariſes between the ſociety at large and any magiſtrate veſted with powers originally delegated by that ſociety, it muſt be decided by the voice of the ſociety itſelf: there is not upon earth any other tribunal to reſort to. And that theſe conſequences were fairly deduced from theſe facts, our anceſtors have ſolemnly determined, in a full parliamentary convention repreſenting the whole ſociety. The reaſons upon which they decided may be found at large in the parliamentary proceedings of the times; and may be matter of inſtructive amuſement for us to contemplate, as a ſpeculative point of hiſtory. But care muſt be taken not to carry this enquiry farther, than merely for inſtruction or amuſement. The idea, that the conſciences of poſterity were concerned in the rectitude of their anceſtors' deciſions, gave birth to thoſe dangerous political hereſies, which ſo long diſtracted the ſtate, but at length are all happily extinguiſhed. I therefore rather chuſe to conſider this great political meaſure, upon the ſolid footing of authority, than to reaſon in it's favour from it's juſtice, moderation, and expedience: becauſe that might imply a right of diſſenting or revolting from it, in caſe we ſhould think it unjuſt, oppreſſive, or inexpedient. Whereas, our anceſtors having moſt indiſputably a competent juriſdiction to decide this great and important queſtion, and having in fact decided it, it is now become our duty at this diſtance of time to acquieſce in their determination; being born under that eſtabliſhment which was built upon this foundation, and obliged by every tie, religious as well as civil, to maintain it.

BUT, while we reſt this fundamental tranſaction, in point of authority, upon grounds the leaſt liable to cavil, we are bound both in juſtice and gratitude to add, that it was conducted with a temper and moderation which naturally aroſe from it's equity; that,

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

THIS ſingle poſtulatum, the vacancy of the throne, being once eſtabliſhed, the reſt that was then done followed almoſt of

[z] See chapter 7. [a] on Gov. p. 2. c. 19.

courſe.

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

PERHAPS, upon the principles before eſtabliſhed, the convention might (if they pleaſed) have veſted the regal dignity in a family intirely new, and ſtrangers to the royal blood: but they were too well acquainted with the benefits of hereditary ſucceſſion, and the influence which it has by cuſtom over the minds of the people, to depart any farther from the antient line than temporary neceſſity and ſelf-preſervation required. They therefore ſettled the crown, firſt on king William and queen Mary, king James's eldeſt daughter, for their *joint* lives; then on the ſurvivor of them; and then

[b] Com. Journ. 12 Feb. 1688.

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on the iſſue of queen Mary: upon failure of ſuch iſſue, it was limited to the princeſs Anne, king James's ſecond daughter, and her iſſue; and laſtly, on failure of that, to the iſſue of king William, who was the grandſon of Charles the firſt, and nephew as well as ſon in law of king James the ſecond, being the ſon of Mary his only ſiſter. This ſettlement included all the proteſtant poſterity of king Charles I, except ſuch other iſſue as king James might at any time have, which was totally omitted through fear of a popiſh ſucceſſion. And this order of ſucceſſion took effect accordingly.

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

IT was towards the end of king William's reign, when all hopes of any ſurviving iſſue from any of theſe princes died with the duke of Gloceſter, that the king and parliament thought it neceſſary again to exert their power of limiting and appointing the

the ſucceſſion, in order to prevent another vacancy of the throne; which muſt have enſued upon their deaths, as no farther proviſion was made at the revolution, than for the iſſue of king William, queen Mary, and queen Anne. The parliament had previouſly by the ſtatute of 1 W. & M. ſt. 2. c. 2. enacted, that every perſon who ſhould be reconciled to, or hold communion with, the ſee of Rome, ſhould profeſs the popiſh religion, or ſhould marry a papiſt, ſhould be excluded and for ever incapable to inherit, poſſeſs, or enjoy, the crown; and that in ſuch caſe the people ſhould be abſolved from their allegiance, and the crown ſhould deſcend to ſuch perſons, being proteſtants, as would have inherited the ſame, in caſe the perſon ſo reconciled, holding communion, profeſſing, or marrying, were naturally dead. To act therefore conſiſtently with themſelves, and at the ſame time pay as much regard to the old hereditary line as their former reſolutions would admit, they turned their eyes on the princeſs Sophia, electreſs and ducheſs dowager of Hanover, the moſt accompliſhed princeſs of her age [c]. For, upon the impending extinction of the proteſtant poſterity of Charles the firſt, the old law of regal deſcent directed them to recur to the deſcendants of James the firſt; and the princeſs Sophia, being the daughter of Elizabeth queen of Bohemia, who was the youngeſt daughter of James the firſt, was the neareſt of the antient blood royal, who was not incapacitated by profeſſing the popiſh religion. On her therefore, and the heirs of her body, being proteſtants, the remainder of the crown, expectant on the death of king William and queen Anne without iſſue, was ſettled by ſtatute 12 & 13 W. III. c. 2. And at the ſame time it was enacted, that whoſoever ſhould hereafter come to the poſſeſſion of the crown, ſhould join in the communion of the church of England as by law eſtabliſhed.

[c] Sandford, in his genealogical hiſtory, publiſhed *A. D.* 1677, ſpeaking (page 535) of the princeſſes Elizabeth, Louiſa, and Sophia, daughters of the queen of Bohemia, ſays, the firſt was reputed the moſt learned, the ſecond the greateſt artiſt, and the laſt one of the moſt accompliſhed ladies in Europe.

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

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

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

AND

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

CHAPTER THE FOURTH.

OF THE KING'S ROYAL FAMILY.

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

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

AND, firſt, ſhe is a public perſon, exempt and diſtinct from the king; and not, like other married women, ſo cloſely connected as to have loſt all legal or ſeparate exiſtence ſo long as the marriage continues. For the queen is of ability to purchaſe lands, and to convey them, to make leaſes, to grant copyholds, and do other acts of ownerſhip, without the concurrence of her lord; which no other married woman can do [b]: a privilege as old as the

[a] Finch. L. 86. [b] 4 Rep. 23.

Saxon

Saxon aera[c]. She is alſo capable of taking a grant from the king, which no other wife is from her huſband; and in this particular ſhe agrees with the *auguſta*, or *piiſſima regina conjux divi imperatoris* of the Roman laws; who, according to Juſtinian[d], was equally capable of making a grant to, and receiving one from, the emperor. The queen of England hath ſeparate courts and officers diſtinct from the king's, not only in matters of ceremony, but even of law; and her attorney and ſolicitor general are intitled to a place within the bar of his majeſty's courts, together with the king's counſel[e]. She may alſo ſue and be ſued alone, without joining her huſband. She may alſo have a ſeparate property in goods as well as lands, and has a right to diſpoſe of them by will. In ſhort, ſhe is in all legal proceedings looked upon as a feme ſole, and not as a feme covert; as a ſingle, not as a married woman[f]. For which the reaſon given by ſir Edward Coke is this: becauſe the wiſdom of the common law would not have the king (whoſe continual care and ſtudy is for the public, and *circa ardua regni*) to be troubled and diſquieted on account of his wife's domeſtic affairs; and therefore it veſts in the queen a power of tranſacting her own concerns, without the intervention of the king, as if ſhe was an unmarried woman.

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

THE queen hath alſo ſome pecuniary advantages, which form her a diſtinct revenue: as, in the firſt place, ſhe is intitled to an

[c] Seld. *Jan. Angl.* 1. 42.
[d] *Cod.* 5. 16. 26.
[e] Selden tit. hon. 1. 6. 7.
[f] Finch. L. 86. Co. Litt. 133.
[g] Co. Litt. 133.
[h] Finch. L. 185.
[i] *Ff.* 1. 3. 31.

antient

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

THE revenue of our antient queens, before and ſoon after the conqueſt, ſeems to have conſiſted in certain reſervations or rents out of the demeſne lands of the crown, which were expreſſly appropriated to her majeſty, diſtinct from the king. It is frequent in domeſday-book, after ſpecifying the rent due to the crown, to add likewiſe the quantity of gold or other renders reſerved to the queen [n]. Theſe were frequently appropriated to particular purpoſes; to buy wool for her majeſty's uſe [o], to purchaſe oyl for her

[k] Pryn. *Aur. Reg.* 2.

[l] 12 Rep. 21. 4 Inſt. 358.

[m] *Ibid.* Pryn. 6. Madox. hiſt. exch. 242.

[n] *Bedefordſcire. Maner. Leſtone redd. per annum xxii lib. &c: ad opus reginae ii uncias auri.* —— *Herefordſcire. In Lene, &c, conſuetud. ut praepoſitus manerii veniente domina ſua (regina) in maner. praeſentaret ei xviii oras denar. ut eſſet ipſa laeto animo.* Pryn. Append. to *Aur. Reg.* 2, 3.

[o] *cauſa coadunandi lanam reginae.* Domeſd. *ibid.*

lamps [p],

lamps [p], or to furniſh her attire from head to foot [q], which was frequently very coſtly, as one ſingle robe in the fifth year of Henry II ſtood the city of London in upwards of fourſcore pounds [r]. A practice ſomewhat ſimilar to that of the eaſtern countries, where whole cities and provinces were ſpecifically aſſigned to purchaſe particular parts of the queen's apparel [s]. And, for a farther addition to her income, this duty of queen-gold is ſuppoſed to have been originally granted; thoſe matters of grace and favour, out of which it aroſe, being frequently obtained from the crown by the powerful interceſſion of the queen. There are traces of it's payment, though obſcure ones, in the book of domeſday and in the great pipe-roll of Henry the firſt [t]. In the reign of Henry the ſecond the manner of collecting it appears to have been well underſtood, and it forms a diſtinct head in the antient dialogue of the exchequer [u] written in the time of that prince, and uſually attributed to Gervaſe of Tilbury. From that time downwards it was regularly claimed and enjoyed by all the queen conſorts of England till the death of Henry VIII; though after the acceſſion of the Tudor family the collecting of it ſeems to have been much neglected: and, there being no queen conſort afterwards till the acceſſion of James I, a period of near ſixty years, it's very nature and quantity became then a matter of doubt: and, being referred by the king to his then chief juſtices and chief baron, their report of it was ſo very unfavorable [w], that queen Anne (though ſhe claimed it) yet never thought proper to exact it. In 1635, 11 Car. I, a time fertile of expedients for raiſing money upon dormant precedents in our old records (of

[p] *Civitas Lundon. Pro oleo ad lampad. reginae. Mag. rot. pip. temp. Hen. II. ibid.*

[q] *Vicecomes Berkeſcire, xvi l. pro cappa reginae. (Mag. rot. pip. 19—22 Hen. II. ibid.) Civitas Lund. cordubanario reginae xx s. Mag. Rot. 2 Hen. II.* Madox hiſt. exch. 419.

[r] *Pro roba ad opus reginae, quater xx l. & vi s. & viii d. Mag. Rot. 5 Hen. II. ibid.* 250.

[s] *Solere aiunt barbaros reges Perſarum ac Syrorum — uxoribus civitates attribuere, hoc modo; haec civitas mulieri redimiculum praebeat, haec in collum, haec in crines, &c. Cic. in Verrem. lib. 3. c. 33.*

[t] See Madox *Diſceptat. epiſtolar.* 74. Pryn. *Aur. Regin.* Append. 5.

[u] *lib. 2. c. 26.*

[w] Mr Prynne, with ſome appearance of reaſon, inſinuates, that their reſearches were very ſuperficial. *Aur. Reg.* 125.

which

which ſhip-money was a fatal inſtance) the king, at the petition of his queen Henrietta Maria, iſſued out his writ for levying it; but afterwards purchaſed it of his conſort at the price of ten thouſand pounds; finding it, perhaps, too trifling and troubleſome to levy. And when afterwards, at the reſtoration, by the abolition of the military tenures, and the fines that were conſequent upon them, the little that legally remained of this revenue was reduced to almoſt nothing at all, in vain did Mr Prynne, by a treatiſe which does honour to his abilities as a painful and judicious antiquarian, endeavour to excite queen Catherine to revive this antiquated claim.

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

BUT farther: though the queen is in all reſpects a ſubject, yet, in point of the ſecurity of her life and perſon, ſhe is put on the ſame footing with the king. It is equally treaſon (by the ſtatute 25 Edw. III.) to compaſs or imagine the death of our lady the king's companion, as of the king himſelf: and to violate, or defile, the queen conſort, amounts to the ſame high crime; as well in the perſon committing the fact, as in the queen herſelf, if conſenting. A law of Henry the eighth[z] made it treaſon alſo for any woman, who was not a virgin, to marry the king without informing him thereof. But this law was ſoon after repealed; it treſpaſſing too ſtrongly, as well on natural juſtice, as female mo-

[x] Bracton, *l.* 3. *c.* 3. Britton, *c.* 17. Fleta, *l.* 1. *c.* 45 & 46.

[y] Pryn. *Aur. Reg.* 127.

[z] Stat. 33 Hen. VIII. c. 21.

deſty.

deſty. If however the queen be accuſed of any ſpecies of treaſon, ſhe ſhall (whether conſort or dowager) be tried by the houſe of peers, as queen Ann Boleyn was in 28 Hen. VIII.

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

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

[a] 2 Inſt. 18.
[b] Co. Litt. 31 *b*.
[c] 2 Inſt. 50.

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

THE younger ſons and daughters of the king, who are not in the immediate line of ſucceſſion, are little farther regarded by the laws, than to give them precedence before all peers and public officers as well eccleſiaſtical as temporal. This is done by the ſtatute 31 Hen. VIII. c. 10. which enacts that no perſon, except the king's children, ſhall preſume to ſit or have place at the ſide of the cloth of eſtate in the parliament chamber; and that certain great officers therein named ſhall have precedence above all dukes, except only ſuch as ſhall happen to be the king's ſon, brother, uncle, nephew (which ſir Edward Coke [e] explains to ſignify grandſon or *nepos*) or brother's or ſiſter's ſon. And in 1718, upon a queſtion referred to all the judges by king George I, it was reſolved by the opinion of ten againſt the other two, that

[d] 8 Rep. 1. Seld. titl. of hon. 2. 5. [e] 4 Inſt. 362.

the

the education and care of all the king's grandchildren while minors, and the care and approbation of their marriages, when grown up, did belong of right to his majesty as king of this realm, during their father's life [f]. And this may suffice for the notice, taken by law, of his majesty's royal family.

[f] Fortesc. Al. 401—440.

CHAPTER THE FIFTH.

OF THE COUNCILS BELONGING TO THE KING.

THE third point of view, in which we are to conſider the king, is with regard to his councils. For, in order to aſſiſt him in the diſcharge of his duties, the maintenance of his dignity, and the exertion of his prerogative, the law hath aſſigned him a diverſity of councils to adviſe with.

1. THE firſt of theſe is the high court of parliament, whereof we have already treated at large.

2. SECONDLY, the peers of the realm are by their birth hereditary counſellors of the crown, and may be called together by the king to impart their advice in all matters of importance to the realm, either in time of parliament, or, which hath been their principal uſe, when there is no parliament in being [a]. Accordingly Bracton [b], ſpeaking of the nobility of his time, ſays they might properly be called "*conſules, a conſulendo; reges enim "tales ſibi aſſociant ad conſulendum.*" And in our law books [c] it is laid down, that peers are created for two reaſons; 1. *Ad conſulendum*, 2. *Ad defendendum regem:* for which reaſons the law gives them certain great and high privileges; ſuch as freedom from arreſts, &c, even when no parliament is ſitting: becauſe the law

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

intends,

intends, that they are always aſſiſting the king with their counſel for the commonwealth; or keeping the realm in ſafety by their proweſs and valour.

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

BESIDES this general meeting, it is uſually looked upon to be the right of each particular peer of the realm, to demand an audience of the king, and to lay before him, with decency and

[d] 1 Inſt. 110. [e] Hiſt. b. 2.

reſpect,

reſpect, ſuch matters as he ſhall judge of importance to the public weal. And therefore, in the reign of Edward II, it was made an article of impeachment in parliament againſt the two Hugh Spencers, father and ſon, for which they were baniſhed the kingdom, "that they by their evil covin would not ſuffer the great men "of the realm, the king's good counſellors, to ſpeak with the "king, or to come near him; but only in the preſence and hear-"ing of the ſaid Hugh the father and Hugh the ſon, or one of "them, and at their will, and according to ſuch things as plea-"ſed them [f]."

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

4. BUT the principal council belonging to the king is his privy council, which is generally called, by way of eminence, *the council*. And this, according to ſir Edward Coke's deſcription of it [i], is a noble, honorable, and reverend aſſembly, of the king and ſuch as he wills to be of his privy council, in the king's court or palace. The king's will is the ſole conſtituent of a privy coun-

[f] 4 Inſt. 53.
[g] 1 Inſt. 110.
[h] 3 Inſt. 125.
[i] 4 Inſt. 53.

ſellor;

ſellor; and this alſo regulates their number, which of antient time was twelve or thereabouts. Afterwards it increaſed to ſo large a number, that it was found inconvenient for ſecreſy and diſpatch; and therefore king Charles the ſecond in 1679 limited it to thirty: whereof fifteen were to be the principal officers of ſtate, and thoſe to be counſellors, *virtute officii*; and the other fifteen were compoſed of ten lords and five commoners of the king's chooſing [k]. But ſince that time the number has been much augmented, and now continues indefinite. At the ſame time alſo, the antient office of lord preſident of the council was revived in the perſon of Anthony earl of Shaftsbury; an officer, that by the ſtatute of 31 Hen. VIII. c. 10. has precedence next after the lord chancellor and lord treaſurer.

PRIVY counſellors are *made* by the king's nomination, without either patent or grant; and, on taking the neceſſary oaths, they become immediately privy counſellors during the life of the king that chooſes them, but ſubject to removal at his diſcretion.

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

THE *power* of the privy council is to enquire into all offences againſt the government, and to commit the offenders into cuſtody, in order to take their trial in ſome of the courts of law. But their juriſdiction is only to enquire, and not to puniſh: and the perſons committed by them are entitled to their *habeas corpus* by

[k] Temple's Mem. part 3. [l] 4 Inſt. 54.

ſtatute

ſtatute 16 Car. I. c. 10. as much as if committed by an ordinary juſtice of the peace. And, by the ſame ſtatute, the court of ſtarchamber, and the court of requeſts, both of which conſiſted of privy counſellors, were diſſolved; and it was declared illegal for them to take cognizance of any matter of property, belonging to the ſubjects of this kingdom. But, in plantation or admiralty cauſes, which ariſe out of the juriſdiction of this kingdom, and in matters of lunacy and ideocy (being a ſpecial flower of the prerogative) with regard to theſe, although they may eventually involve queſtions of extenſive property, the privy council continues to have cognizance, being the court of appeal in ſuch cauſes: or, rather, the appeal lies to the king's majeſty himſelf, aſſiſted by his privy council.

As to the *qualifications* of members to ſit this board: any natural born ſubject of England is capable of being a member of the privy council; taking the proper oaths for ſecurity of the government, and the teſt for ſecurity of the church. But, in order to prevent any perſons under foreign attachments from inſinuating themſelves into this important truſt, as happened in the reign of king William in many inſtances, it is enacted by the act of ſettlement [m], that no perſon born out of the dominions of the crown of England, unleſs born of Engliſh parents, even though naturalized by parliament, ſhall be capable of being of the privy council.

THE *privileges* of privy counſellors, as ſuch, conſiſt principally in the ſecurity which the law has given them againſt attempts and conſpiracies to deſtroy their lives. For, by ſtatute 3 Hen. VII. c. 14. if any of the king's ſervants, of his houſhold, conſpire or imagine to take away the life of a privy counſellor, it is felony, though nothing be done upon it. And the reaſon of making this ſtatute, ſir Edward Coke [n] tells us, was becauſe ſuch ſervants have greater and readier means, either by night or by day, to deſtroy ſuch as be of great authority, and near about the

[m] Stat. 12 & 13 W. III. c. 2.

[n] 3 Inſt. 38.

king:

king: and ſuch a conſpiracy was, juſt before this parliament, made by ſome of king Henry the ſeventh's houſhold ſervants, and great miſchief was like to have enſued thereupon. This extends only to the king's menial ſervants. But the ſtatute 9 Ann. c. 16. goes farther, and enacts, that *any perſons* that ſhall unlawfully attempt to kill, or ſhall unlawfully aſſault, and ſtrike, or wound, any privy counſellor in the execution of his office, ſhall be felons, and ſuffer death as ſuch. This ſtatute was made upon the daring attempt of the ſieur Guiſcard, who ſtabbed Mr Harley, afterwards earl of Oxford, with a penknife, when under examination for high crimes in a committee of the privy council.

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

CHAPTER THE SIXTH.

OF THE KING'S DUTIES.

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

THE principal duty of the king is, to govern his people according to law. *Nec regibus infinita aut libera poteſtas*, was the conſtitution of our German anceſtors on the continent [b]. And this is not only conſonant to the principles of nature, of liberty, of reaſon,

[a] 7 Rep. 5.

[b] *Tac. de M. G. c. 7.*

reaſon, and of ſociety, but has always been eſteemed an expreſs part of the common law of England, even when prerogative was at the higheſt. "The king," ſaith Bracton [c], who wrote under Henry III, "ought not to be ſubject to man, but to God, and to "the law; for the law maketh the king. Let the king therefore "render to the law, what the law has inveſted in him with re-"gard to others; dominion, and power: for he is not truly king, "where will and pleaſure rules, and not the law." And again [d]; "the king alſo hath a ſuperior, namely God, and alſo the law, "by which he was made a king." Thus Bracton: and Forteſcue alſo [e], having firſt well diſtinguiſhed between a monarchy abſolutely and deſpotically regal, which is introduced by conqueſt and violence, and a political or civil monarchy, which ariſes from mutual conſent; (of which laſt ſpecies he aſſerts the government of England to be) immediately lays it down as a principle, that "the king of England muſt rule his people according to the de-"crees of the laws thereof: inſomuch that he is bound by an "oath at his coronation to the obſervance and keeping of his own "laws." But, to obviate all doubts and difficulties concerning this matter, it is expreſſly declared by ſtatute 12 & 13 W. III. c. 2. that "the laws of England are the birthright of the people there-"of; and all the kings and queens who ſhall aſcend the throne "of this realm ought to adminiſter the government of the ſame "according to the ſaid laws; and all their officers and miniſters "ought to ſerve them reſpectively according to the ſame: and "therefore all the laws and ſtatutes of this realm, for ſecuring "the eſtabliſhed religion, and the rights and liberties of the people "thereof, and all other laws and ſtatutes of the ſame now in force, "are by his majeſty, by and with the advice and conſent of the "lords ſpiritual and temporal and commons, and by authority of "the ſame, ratified and confirmed accordingly."

AND, as to the terms of the original contract between king and people, theſe I apprehend to be now couched in the corona-

[c] *l.* 1. *c.* 8.
[d] *l.* 2. *c.* 16. §. 3.
[e] *c.* 9. & 34.

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

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

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

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

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

THIS is the form of the coronation oath, as it is now preſcribed by our laws: the principal articles of which appear to be at leaſt as antient as the mirror of juſtices[f], and even as the time of Bracton[g]: but the wording of it was changed at the revolution, becauſe (as the ſtatute alleges) the oath itſelf had been

[f] *cap.* 1. §. 2.

[g] *l.* 3. *tr.* 1. *c.* 9.

framed

framed in doubtful words and expreſſions, with relation to antient laws and conſtitutions at this time unknown[h]. However, in what form ſoever it be conceived, this is moſt indiſputably a fundamental and original expreſs contract; though doubtleſs the duty of protection is impliedly as much incumbent on the ſovereign before coronation as after: in the ſame manner as allegiance to the king becomes the duty of the ſubject immediately on the deſcent of the crown, before he has taken the oath of allegiance, or whether he ever takes it at all. This reciprocal duty of the ſubject will be conſidered in it's proper place. At preſent we are only to obſerve, that in the king's part of this original contract are expreſſed all the duties that a monarch can owe to his people; viz. to govern according to law: to execute judgment in mercy: and to maintain the eſtabliſhed religion.

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

CHAPTER THE SEVENTH.

OF THE KING'S PREROGATIVE.

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

THERE cannot be a ſtronger proof of that genuine freedom, which is the boaſt of this age and country, than the power of diſcuſſing and examining, with decency and reſpect, the limits of the king's prerogative. A topic, that in ſome former ages was thought too delicate and ſacred to be profaned by the pen of a ſubject. It was ranked among the *arcana imperii*; and, like the

[a] chap. 1. page 137.

myſteries

myſteries of the *bona dea*, was not ſuffered to be pried into by any but ſuch as were initiated in it's ſervice: becauſe perhaps the exertion of the one, like the ſolemnities of the other, would not bear the inſpexion of a rational and ſober enquiry. The glorious queen Elizabeth herſelf made no ſcruple to direct her parliaments to abſtain from diſcourſing of matters of ſtate[b]; and it was the conſtant language of this favorite princeſs and her miniſters, that even that auguſt aſſembly "ought not to deal, to judge, or to meddle, with "her majeſty's prerogative royal[c]." And her ſucceſſor, king James the firſt, who had imbibed high notions of the divinity of regal ſway, more than once laid it down in his ſpeeches, that "as it is "atheiſm and blaſphemy in a creature to diſpute what the deity "may do, ſo it is preſumption and ſedition in a ſubject to diſpute "what a king may do in the height of his power: good chriſ-"tians, he adds, will be content with God's will, revealed in his "word; and good ſubjects will reſt in the king's will, revealed "in *his* law[d]."

BUT, whatever might be the ſentiments of ſome of our princes, this was never the language of our antient conſtitution and laws. The limitation of the regal authority was a firſt and eſſential principle in all the Gothic ſyſtems of government eſtabliſhed in Europe; though gradually driven out and overborne, by violence and chicane, in moſt of the kingdoms on the continent. We have ſeen, in the preceding chapter, the ſentiments of Bracton and Forteſcue, at the diſtance of two centuries from each other. And ſir Henry Finch, under Charles the firſt, after the lapſe of two centuries more, though he lays down the law of prerogative in very ſtrong and emphatical terms, yet qualifies it with a general reſtriction, in regard to the liberties of the people. "The king "hath a prerogative in all things, that are not injurious to the "ſubject; for in them all it muſt be remembered, that the king's "prerogative ſtretcheth not to the doing of any wrong[e]." *Nihil*

[b] Dewes. 479.
[c] *Ibid.* 645.
[d] King James's works. 557, 531.
[e] Finch. L. 84, 85.

enim

enim aliud poteſt rex, niſi id ſolum quod de jure poteſt[f]. And here it may be ſome ſatisfaction to remark, how widely the civil law differs from our own, with regard to the authority of the laws over the prince, or (as a civilian would rather have expreſſed it) the authority of the prince over the laws. It is a maxim of the Engliſh law, as we have ſeen from Bracton, that "*rex debet eſſe "ſub lege, quia lex facit regem:*" the imperial law will tell us, that "*in omnibus, imperatoris excipitur fortuna; cui ipſas leges Deus "ſubjecit*[g]." We ſhall not long heſitate to which of them to give the preference, as moſt conducive to thoſe ends for which ſocieties were framed, and are kept together; eſpecially as the Roman lawyers themſelves ſeem to be ſenſible of the unreaſonableneſs of their own conſtitution. "*Decet tamen principem,*" ſays Paulus, "*ſervare leges, quibus ipſe ſolutus eſt*[h]." This is at once laying down the principle of deſpotic power, and at the ſame time acknowleging it's abſurdity.

BY the word prerogative we uſually underſtand that ſpecial pre-eminence, which the king hath, over and above all other perſons, and out of the ordinary courſe of the common law, in right of his regal dignity. It ſignifies, in it's etymology, (from *prae* and *rogo*) ſomething that is required or demanded before, or in preference to, all others. And hence it follows, that it muſt be in it's nature ſingular and eccentrical; that it can only be applied to thoſe rights and capacities which the king enjoys alone, in contradiſtinction to others, and not to thoſe which he enjoys in common with any of his ſubjects: for if once any one prerogative of the crown could be held in common with the ſubject, it would ceaſe to be prerogative any longer. And therefore Finch[i] lays it down as a maxim, that the prerogative is that law in caſe of the king, which is law in no caſe of the ſubject.

PREROGATIVES are either *direct* or *incidental*. The *direct* are ſuch poſitive ſubſtantial parts of the royal character and au-

[f] Bract. *l.* 3. *tr.* 1. *c.* 9.
[g] *Nov.* 105. §. 2.
[h] *Ff.* 32. 1. 23.
[i] Finch. L. 85.

thority,

thority, as are rooted in and ſpring from the king's political perſon, conſidered merely by itſelf, without reference to any other extrinſic circumſtance; as, the right of ſending embaſſadors, of creating peers, and of making war or peace. But ſuch prerogatives as are *incidental* bear always a relation to ſomething elſe, diſtinct from the king's perſon; and are indeed only exceptions, in favour of the crown, to thoſe general rules that are eſtabliſhed for the reſt of the community: ſuch as, that no coſts ſhall be recovered againſt the king; that the king can never be a joint-tenant; and that his debt ſhall be preferred before a debt to any of his ſubjects. Theſe, and an infinite number of other inſtances, will better be underſtood, when we come regularly to conſider the rules themſelves, to which theſe incidental prerogatives are exceptions. And therefore we will at preſent only dwell upon the king's ſubſtantive or direct prerogatives.

THESE ſubſtantive or direct prerogatives may again be divided into three kinds: being ſuch as regard, firſt, the king's royal *character*; ſecondly, his royal *authority*; and, laſtly, his royal *income*. Theſe are neceſſary, to ſecure reverence to his perſon, obedience to his commands, and an affluent ſupply for the ordinary expenſes of government; without all of which it is impoſſible to maintain the executive power in due independence and vigour. Yet, in every branch of this large and extenſive dominion, our free conſtitution has interpoſed ſuch ſeaſonable checks and reſtrictions, as may curb it from trampling on thoſe liberties, which it was meant to ſecure and eſtabliſh. The enormous weight of prerogative (if left to itſelf, as in arbitrary government it is) ſpreads havoc and deſtruction among all the inferior movements: but, when balanced and bridled (as with us) by it's proper counterpoiſe, timely and judiciouſly applied, it's operations are then equable and regular, it invigorates the whole machine, and enables every part to anſwer the end of it's conſtruction.

IN the preſent chapter we ſhall only conſider the two firſt of theſe diviſions, which relate to the king's political *character* and

authority; or, in other words, his *dignity* and regal *power*; to which laſt the name of prerogative is frequently narrowed and confined. The other diviſion, which forms the royal *revenue*, will require a diſtinct examination; according to the known diſtribution of the feodal writers, who diſtinguiſh the royal prerogatives into the *majora* and *minora regalia*, in the latter of which claſſes the rights of the revenue are ranked. For, to uſe their own words, "*majora regalia imperii praeeminentiam ſpectant; minora* "*vero ad commodum pecuniarium immediate attinent; et haec proprie* "*fiſcalia ſunt, et ad jus fiſci pertinent*[k]."

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

I. AND, firſt, the law aſcribes to the king the attribute of *ſovereignty*, or pre-eminence. "*Rex eſt vicarius*," ſays Bracton, "*et miniſter Dei in terra: omnis quidem ſub eo eſt, et ipſe ſub nullo,*

[k] *Peregrin. de jure fiſc. l.* 1. *c.* 1. *num.* 9. [l] *l.* 1. *c.* 8.

"*niſi*

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

[m] Seld. tit. of hon. 1. 2.

[n] Finch. L. 83.

gency of one of the conſtituent parts of the ſovereign legiſlative power.

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

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

[o] Finch. L. 255.

[p] Law of N. and N. l. 8. c. 10.

[q] on Gov. p. 2. § 205.

NEXT,

NEXT, as to caſes of ordinary public oppreſſion, where the vitals of the conſtitution are not attacked, the law hath alſo aſſigned a remedy. For, as a king cannot miſuſe his power, without the advice of evil counſellors, and the aſſiſtance of wicked miniſters, theſe men may be examined and puniſhed. The conſtitution has therefore provided, by means of indictments, and parliamentary impeachments, that no man ſhall dare to aſſiſt the crown in contradiction to the laws of the land. But it is at the ſame time a maxim in thoſe laws, that the king himſelf can do no wrong; ſince it would be a great weakneſs and abſurdity in any ſyſtem of poſitive law, to define any poſſible wrong, without any poſſible redreſs.

FOR, as to ſuch public oppreſſions as tend to diſſolve the conſtitution, and ſubvert the fundamentals of government, they are caſes which the law will not, out of decency, ſuppoſe; being incapable of diſtruſting thoſe, whom it has inveſted with any part of the ſupreme power; ſince ſuch diſtruſt would render the exerciſe of that power precarious and impracticable. For, whereever the law expreſſes it's diſtruſt of abuſe of power, it always veſts a ſuperior coercive authority in ſome other hand to correct it; the very notion of which deſtroys the idea of ſovereignty. If therefore (for example) the two houſes of parliament, or either of them, had avowedly a right to animadvert on the king, or each other, or if the king had a right to animadvert on either of the houſes, that branch of the legiſlature, ſo ſubject to animadverſion, would inſtantly ceaſe to be part of the ſupreme power; the ballance of the conſtitution would be overturned; and that branch or branches, in which this juriſdiction reſided, would be completely ſovereign. The ſuppoſition of *law* therefore is, that neither the king nor either houſe of parliament (collectively taken) is capable of doing any wrong; ſince in ſuch caſes the law feels itſelf incapable of furniſhing any adequate remedy. For which reaſon all oppreſſions, which may happen to ſpring from any branch of the ſovereign power, muſt neceſſarily be out of the reach

reach of any *ſtated rule*, or *expreſs legal* proviſion: but, if ever they unfortunately happen, the prudence of the times muſt provide new remedies upon new emergencies.

INDEED, it is found by experience, that whenever the unconſtitutional oppreſſions, even of the ſovereign power, advance with gigantic ſtrides and threaten deſolation to a ſtate, mankind will not be reaſoned out of the feelings of humanity; nor will ſacrifice their liberty by a ſcrupulous adherence to thoſe political maxims, which were originally eſtabliſhed to preſerve it. And therefore, though the poſitive laws are ſilent, experience will furniſh us with a very remarkable caſe, wherein nature and reaſon prevailed. When king James the ſecond invaded the fundamental conſtitution of the realm, the convention declared an abdication, whereby the throne was rendered vacant, which induced a new ſettlement of the crown. And ſo far as this precedent leads, and no farther, we may now be allowed to lay down the *law* of redreſs againſt public oppreſſion. If therefore any future prince ſhould endeavour to ſubvert the conſtitution by breaking the original contract between king and people, ſhould violate the fundamental laws, and ſhould withdraw himſelf out of the kingdom; we are now authorized to declare that this conjunction of circumſtances would amount to an abdication, and the throne would be thereby vacant. But it is not for us to ſay, that any one, or two, of theſe ingredients would amount to ſuch a ſituation; for there our precedent would fail us. In theſe therefore, or other circumſtances, which a fertile imagination may furniſh, ſince both law and hiſtory are ſilent, it becomes us to be ſilent too; leaving to future generations, whenever neceſſity and the ſafety of the whole ſhall require it, the exertion of thoſe inherent (though latent) powers of ſociety, which no climate, no time, no conſtitution, no contract, can ever deſtroy or diminiſh.

II. BESIDES the attribute of ſovereignty, the law alſo aſcribes to the king, in his political capacity, abſolute *perfection*. The king can do no wrong. Which antient and fundamental maxim

maxim is not to be underſtood, as if every thing tranſacted by the government was of courſe juſt and lawful, but means only two things. Firſt, that whatever is exceptionable in the conduct of public affairs is not to be imputed to the king, nor is he anſwerable for it perſonally to his people: for this doctrine would totally deſtroy that conſtitutional independence of the crown, which is neceſſary for the balance of power, in our free and active, and therefore compounded, conſtitution. And, ſecondly, it means that the prerogative of the crown extends not to do any injury: it is created for the benefit of the people, and therefore cannot be exerted to their prejudice [r].

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

YET ſtill, notwithſtanding this perſonal perfection, which the law attributes to the ſovereign, the conſtitution has allowed a latitude of ſuppoſing the contrary, in reſpect to both houſes of parliament; each of which, in it's turn, hath exerted the right of remonſtrating and complaining to the king even of thoſe acts of

[r] Plowd. 487.

royalty,

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

IN farther purſuance of this principle, the law alſo determines that in the king can be no negligence, or *laches*, and therefore no delay will bar his right. *Nullum tempus occurrit regi* is the ſtanding maxim upon all occaſions: for the law intends that the king is always buſied for the public good, and therefore has not leiſure to aſſert his right within the times limited to ſubjects[u]. In the king alſo can be no ſtain or corruption of blood: for if the heir to the crown were attainted of treaſon or felony, and afterwards the crown ſhould deſcend to him, this would purge the attainder *ipſo facto*[w]. And therefore when Henry VII, who as earl of Richmond ſtood attainted, came to the crown, it was not thought neceſſary to paſs an act of parliament to reverſe this attainder; becauſe, as lord Bacon in his hiſtory of that prince informs us, it was agreed that the aſſumption of the crown had at once purged all attain-

[s] Com. Journ. 18 Nov. 1685.
[t] Com. Journ. 4 Dec. 1717.
[u] Finch. L. 82. Co. Litt. 90 *b*.
[w] Finch. L. 82.

ders.

ders. Neither can the king in judgment of law, as king, ever be a minor or under age; and therefore his royal grants and aſſents to acts of parliament are good, though he has not in his natural capacity attained the legal age of twenty one[x]. By a ſtatute indeed, 28 Hen.VIII. c.17. power was given to future kings to reſcind and revoke all acts of parliament that ſhould be made while they were under the age of twenty four: but this was repealed by the ſtatute 1 Edw.VI. c.11. ſo far as related to that prince; and both ſtatutes are declared to be determined by 24 Geo. II. c. 24. It hath alſo been uſually thought prudent, when the heir apparent has been very young, to appoint a protector, guardian, or regent, for a limited time: but the very neceſſity of ſuch extraordinary proviſion is ſufficient to demonſtrate the truth of that maxim of the common law, that in the king is no minority; and therefore he hath no legal guardian[y].

[x] Co. Litt. 43.

[y] The methods of appointing this guardian or regent have been ſo various, and the duration of his power ſo uncertain, that from thence alone it may be collected that his office is unknown to the common law; and therefore (as ſir Edward Coke ſays, 4 Inſt. 58.) the ſureſt way is to have him made by authority of the great council in parliament. The earl of Pembroke by his own authority aſſumed, in very troubleſome times, the regency of Henry III, who was then only nine years old; but was declared of full age by the pope at ſeventeen, confirmed the great charter at eighteen, and took upon him the adminiſtration of the government at twenty. A guardian and council of regency were named for Edward III, by the parliament which depoſed his father; the young king being then fifteen, and not aſſuming the government till three years after. When Richard II ſucceeded at the age of eleven, the duke of Lancaſter took upon him the management of the kingdom, till the parliament met, which appointed a nominal council to aſſiſt him. Henry V on his death-bed named a regent and a guardian for his infant ſon Henry VI, then nine months old: but the parliament altered his diſpoſition, and appointed a protector and council, with a ſpecial limited authority. Both theſe princes remained in a ſtate of pupillage till the age of twenty three. Edward V, at the age of thirteen, was recommended by his father to the care of the duke of Gloceſter; who was declared protector by the privy council. The ſtatutes 25 Hen.VIII. c.12. and 28 Hen.VIII. c.7. provided, that the ſucceſſor, if a male and under eighteen, or if a female and under ſixteen, ſhould be till ſuch age in the governance of his or her natural mother, (if approved by the king) and ſuch other counſellors as his majeſty ſhould by will or otherwiſe appoint: and he accordingly appointed his ſixteen executors to have the government of his ſon, Edward VI, and the kingdom; which executors elected the earl of Hertford protector. The ſtatute 24 Geo. II. c.24. in caſe the crown ſhould deſcend to any of the children of Frederick late prince of Wales under the age of eighteen, appoints the princeſs dowager;—and that of 5 Geo.III. c.27.

III. A THIRD attribute of the king's majeſty is his *perpetuity*. The law aſcribes to him, in his political capacity, an abſolute immortality. The king never dies. Henry, Edward, or George may die; but the king ſurvives them all. For immediately upon the deceaſe of the reigning prince in his natural capacity, his kingſhip or imperial dignity, by act of law, without any *interregnum* or interval, is veſted at once in his heir; who is, *eo inſtanti*, king to all intents and purpoſes. And ſo tender is the law of ſuppoſing even a poſſibility of his death, that his natural diſſolution is generally called his *demiſe*; *dimiſſio regis, vel coronae:* an expreſſion which ſignifies merely a transfer of property; for, as is obſerved in Plowden[z], when we ſay the demiſe of the crown, we mean only that in conſequence of the diſunion of the king's body natural from his body politic, the kingdom is transferred or demiſed to his ſucceſſor; and ſo the royal dignity remains perpetual. Thus too, when Edward the fourth, in the tenth year of his reign, was driven from his throne for a few months by the houſe of Lancaſter, this temporary transfer of his dignity was denominated his *demiſe*; and all proceſs was held to be diſcontinued, as upon a natural death of the king[a].

WE are next to conſider thoſe branches of the royal prerogative, which inveſt this our ſovereign lord, thus all-perfect and immortal in his kingly capacity, with a number of authorities and powers; in the exertion whereof conſiſts the executive part of government. This is wiſely placed in a ſingle hand by the Britiſh conſtitution, for the ſake of unanimity, ſtrength and diſpatch. Were it placed in many hands, it would be ſubject to many wills: many wills, if diſunited and drawing different ways, create weakneſs in a government: and to unite thoſe ſeveral wills, and

in caſe of a like deſcent to any of his preſent majeſty's children, empowers the king to name either the queen, the princeſs dowager, or any deſcendant of king George II reſiding in this kingdom; — to be guardian and regent, till the ſucceſſor attains ſuch age, aſſiſted by a council of regency: the powers of them all being expreſsly defined and ſet down in the ſeveral acts.

[z] Plowd. 177. 234.

[a] M. 49 Hen. VI. pl. 1—8.

reduce

reduce them to one, is a work of more time and delay than the exigencies of ſtate will afford. The king of England is therefore not only the chief, but properly the ſole, magiſtrate of the nation; all others acting by commiſſion from, and in due ſubordination to him: in like manner as, upon the great revolution in the Roman ſtate, all the powers of the antient magiſtracy of the commonwealth were concentred in the new emperor; ſo that, as Gravina[b] expreſſes it, "*in ejus unius perſona veteris reipublicae vis* "*atque majeſtas per cumulatas magiſtratuum poteſtates exprimebatur.*"

AFTER what has been premiſed in this chapter, I ſhall not (I truſt) be conſidered as an advocate for arbitrary power, when I lay it down as a principle, that in the exertion of lawful prerogative, the king is and ought to be abſolute; that is, ſo far abſolute, that there is no legal authority that can either delay or reſiſt him. He may reject what bills, may make what treaties, may coin what money, may create what peers, may pardon what offences he pleaſes: unleſs where the conſtitution hath expreſſly, or by evident conſequence, laid down ſome exception or boundary; declaring, that thus far the prerogative ſhall go and no farther. For otherwiſe the power of the crown would indeed be but a name and a ſhadow, inſufficient for the ends of government, if, where it's juriſdiction is clearly eſtabliſhed and allowed, any man or body of men were permitted to diſobey it, in the ordinary courſe of law: I ſay, in the *ordinary* courſe of law; for I do not now ſpeak of thoſe *extraordinary* recourſes to firſt principles, which are neceſſary when the contracts of ſociety are in danger of diſſolution, and the law proves too weak a defence againſt the violence of fraud or oppreſſion. And yet the want of attending to this obvious diſtinction has occaſioned theſe doctrines, of abſolute power in the prince and of national reſiſtance by the people, to be much miſunderſtood and perverted by the advocates for ſlavery on the one hand, and the demagogues of faction on the other. The former, obſerving the abſolute ſovereignty and tranſcendent dominion of the crown laid down (as it certainly is) moſt

[b] *Orig.* 1. §. 105.

ſtrongly and emphatically in our lawbooks, as well as our homilies, have denied that any caſe can be excepted from ſo general and poſitive a rule; forgetting how impoſſible it is, in any practical ſyſtem of laws, to point out beforehand thoſe eccentrical remedies, which the ſudden emergence of national diſtreſs may dictate, and which that alone can juſtify. On the other hand, over-zealous republicans, feeling the abſurdity of unlimited paſſive obedience, have fancifully (or ſometimes factiouſly) gone over to the other extreme: and, becauſe reſiſtance is juſtifiable to the perſon of the prince when the being of the ſtate is endangered, and the public voice proclaims ſuch reſiſtance neceſſary, they have therefore allowed to every individual the right of determining this expedience, and of employing private force to reſiſt even private oppreſſion. A doctrine productive of anarchy, and (in conſequence) equally fatal to civil liberty as tyranny itſelf. For civil liberty, rightly underſtood, conſiſts in protecting the rights of individuals by the united force of ſociety: ſociety cannot be maintained, and of courſe can exert no protection, without obedience to ſome ſovereign power: and obedience is an empty name, if every individual has a right to decide how far he himſelf ſhall obey.

IN the exertion therefore of thoſe prerogatives, which the law has given him, the king is irreſiſtible and abſolute, according to the forms of the conſtitution. And yet, if the conſequence of that exertion be manifeſtly to the grievance or diſhonour of the kingdom, the parliament will call his adviſers to a juſt and ſevere account. For prerogative conſiſting (as Mr Locke[c] has well defined it) in the diſcretionary power of acting for the public good, where the poſitive laws are ſilent, if that diſcretionary power be abuſed to the public detriment, ſuch prerogative is exerted in an unconſtitutional manner. Thus the king may make a treaty with a foreign ſtate, which ſhall irrevocably bind the nation; and yet, when ſuch treaties have been judged pernicious, impeachments have purſued thoſe miniſters, by whoſe agency or advice they were concluded.

[c] on Gov. 2. §. 166.

THE

THE prerogatives of the crown (in the ſenſe under which we are now conſidering them) reſpect either this nation's intercourſe with foreign nations, or it's own domeſtic government and civil polity.

WITH regard to foreign concerns, the king is the delegate or repreſentative of his people. It is impoſſible that the individuals of a ſtate, in their collective capacity, can tranſact the affairs of that ſtate with another community equally numerous as themſelves. Unanimity muſt be wanting to their meaſures, and ſtrength to the execution of their counſels. In the king therefore, as in a center, all the rays of his people are united, and form by that union a conſiſtency, ſplendor, and power, that make him feared and reſpected by foreign potentates; who would ſcruple to enter into any engagements, that muſt afterwards be reviſed and ratified by a popular aſſembly. What is done by the royal authority, with regard to foreign powers, is the act of the whole nation: what is done without the king's concurrence is the act only of private men. And ſo far is this point carried by our law, that it hath been held [d], that ſhould all the ſubjects of England make war with a king in league with the king of England, without the royal aſſent, ſuch war is no breach of the league. And, by the ſtatute 2 Hen.V. c. 6. any ſubject committing acts of hoſtility upon any nation in league with the king, was declared to be guilty of high treaſon: and, though that act was repealed by the ſtatute 20 Hen.VI. c. 11. ſo far as relates to the making this offence high treaſon, yet ſtill it remains a very great offence againſt the law of nations, and puniſhable by our laws, either capitally or otherwiſe, according to the circumſtances of the caſe.

I. THE king therefore, conſidered as the repreſentative of his people, has the ſole power of ſending embaſſadors to foreign ſtates, and receiving embaſſadors at home. This may lead us into a ſhort enquiry, how far the municipal laws of England inter-

[d] 4 Inſt. 152.

meddle

meddle with or protect the rights of theſe meſſengers from one potentate to another, whom we call embaſſadors.

THE rights, the powers, the duties, and the privileges of embaſſadors are determined by the law of nature and nations, and not by any municipal conſtitutions. For, as they repreſent the perſons of their reſpective maſters, who owe no ſubjection to any laws but thoſe of their own country, their actions are not ſubject to the control of the private law of that ſtate, wherein they are appointed to reſide. He that is ſubject to the coercion of laws is neceſſarily dependent on that power by whom thoſe laws were made: but an embaſſador ought to be independent of every power, except that by which he is ſent; and of conſequence ought not to be ſubject to the mere municipal laws of that nation, wherein he is to exerciſe his functions. If he groſſly offends, or makes an ill uſe of his character, he may be ſent home and accuſed before his maſter[e]; who is bound either to do juſtice upon him, or avow himſelf the accomplice of his crimes[f]. But there is great diſpute among the writers on the laws of nations, whether this exemption of embaſſadors extends to all crimes, as well natural as poſitive; or whether it only extends to ſuch as are *mala prohibita*, as coining, and not to thoſe that are *mala in ſe*, as murder[g]. Our law ſeems to have formerly taken in the reſtriction, as well as the general exemption. For it has been held, both by our common lawyers and civilians[h], that an embaſſador is privileged by the law of nature and nations; and yet, if he commits any offence againſt the law of reaſon and nature, he ſhall loſe his privilege[i]: and that therefore, if an embaſſador conſpires the death of the king in whoſe land he is, he may be condemned and executed for treaſon; but if he commits any other ſpecies of treaſon, it is otherwiſe, and he muſt be ſent to his own kingdom[k]. And theſe po-

[e] As was done with count Gyllenberg the Swediſh miniſter to Great Britain, *A. D.* 1716.

[f] Sp. L. 26. 21.

[g] Van Leeuwen *in Ff.* 50. 7. 17. Barbeyrac's Puff. l. 8. c. 9. §. 9. & 17. Van Bynkerſhoek *de foro legator.* c. 17, 18, 19.

[h] 1 Roll. Rep. 175. 3 Bulſtr. 27.

[i] 4 Inſt. 153.

[k] 1 Roll. Rep. 185.

ſitions

ſitions ſeem to be built upon good appearance of reaſon. For ſince, as we have formerly ſhewn, all municipal laws act in ſubordination to the primary law of nature, and, where they annex a puniſhment to natural crimes, are only declaratory of and auxiliary to that law; therefore to this natural, univerſal rule of juſtice embaſſadors, as well as other men, are ſubject in all countries; and of conſequence it is reaſonable that wherever they tranſgreſs it, there they ſhall be liable to make atonement [l]. But, however theſe principles might formerly obtain, the general practice of Europe ſeems now to have adopted the ſentiments of the learned Grotius, that the ſecurity of embaſſadors is of more importance than the puniſhment of a particular crime [m]. And therefore few, if any, examples have happened within a century paſt, where an embaſſador has been puniſhed for any offence, however atrocious in it's nature.

IN reſpect to civil ſuits, all the foreign juriſts agree, that neither an embaſſador, nor any of his train or *comites*, can be proſecuted for any debt or contract in the courts of that kingdom wherein he is ſent to reſide. Yet ſir Edward Coke maintains, that, if an embaſſador make a contract which is good *jure gentium*, he ſhall anſwer for it here [n]. And the truth is, we find no traces in our lawbooks of allowing any privilege to embaſſadors or their domeſtics, even in civil ſuits, previous to the reign of queen Anne; when an embaſſador from Peter the great, czar of Muſcovy, was actually arreſted and taken out of his coach in London, in 1708, for debts which he had there contracted. This the czar reſented very highly, and demanded (we are told) that the officers who made the arreſt ſhould be puniſhed with death. But the queen (to the amazement of that deſpotic court) directed her miniſter to inform him, "that the law of England had not yet pro-"tected embaſſadors from the payment of their lawful debts; "that therefore the arreſt was no offence by the laws; and that

[l] Foſter's reports. 188.

[m] *Securitas legatorum utilitati quae ex poena eſt praeponderat. de jur. b. & p.* 2. 18. 4. 4.

[n] 4 Inſt. 153.

"ſhe

"ſhe could inflict no puniſhment upon any, the meaneſt, of her "ſubjects, unleſs warranted by the law of the land[o]." To ſatisfy however the clamours of the foreign miniſters (who made it a common cauſe) as well as to appeaſe the wrath of Peter[p], a new ſtatute was enacted by parliament[q], reciting the arreſt which had been made, "in contempt of the protection granted by her ma-"jeſty, contrary to the law of nations, and in prejudice of the "rights and privileges, which embaſſadors and other public mi-"niſters have at all times been thereby poſſeſſed of, and ought to "be kept ſacred and inviolable:" wherefore it enacts, that for the future all proceſs whereby the perſon of any embaſſador, or of his domeſtic or domeſtic ſervant, may be arreſted, or his goods diſtreined or ſeiſed, ſhall be utterly null and void; and the perſons proſecuting, ſoliciting, or executing ſuch proceſs ſhall be deemed violaters of the law of nations, and diſturbers of the public repoſe; and ſhall ſuffer ſuch penalties and corporal puniſhment as the lord chancellor and the two chief juſtices, or any two of them, ſhall think fit. But it is expreſſly provided, that no trader, within the deſcription of the bankrupt laws, who ſhall be in the ſervice of any embaſſador, ſhall be privileged or protected by this act; nor ſhall any one be puniſhed for arreſting an embaſſador's ſervant, unleſs his name be regiſtred with the ſecretary of ſtate, and by him tranſmitted to the ſheriffs of London and Middleſex. Exceptions, that are ſtrictly conformable to the rights of embaſſadors[r], as obſerved in the moſt civilized countries. And, in conſequence of this ſtatute, thus enforcing the law of nations, theſe privileges are now uſually allowed in the courts of common law[s].

[o] Mod. Un. Hiſt. xxxv. 454.

[p] A copy of the act made upon this occaſion, very elegantly engroſſed and illuminated, was ſent him to Moſcow as a preſent.

[q] 7 Ann. c. 12.

[r] *Saepe quaeſitum eſt an comitum numero et jure habendi ſunt, qui legatum comitantur, non ut inſtructior fiat legatio, ſed unice ut lucro ſuo conſulant, inſtitores forte et mercatores. Et, quamvis hos ſaepe defenderint et comitum loco habere voluerint legati, apparet tamen ſatis eo non pertinere, qui in legati legationiſve officio non ſunt. Quum autem ea res nonnunquam turbas dederit, optimo exemplo in quibuſdam aulis olim receptum fuit, ut legatus teneretur exhibere nomenclaturam comitum ſuorum.* Van Bynkerſh. c. 15. *prope finem.*

[s] Fitzg. 200. Stra. 797.

II. IT

II. IT is alſo the king's prerogative to make treaties, leagues, and alliances with foreign ſtates and princes. For it is by the law of nations eſſential to the goodneſs of a league, that it be made by the ſovereign power[t]; and then it is binding upon the whole community: and in England the ſovereign power, *quoad hoc*, is veſted in the perſon of the king. Whatever contracts therefore he engages in, no other power in the kingdom can legally delay, reſiſt, or annul. And yet, leſt this plenitude of authority ſhould be abuſed to the detriment of the public, the conſtitution (as was hinted before) hath here interpoſed a check, by the means of parliamentary impeachment, for the puniſhment of ſuch miniſters as adviſe or conclude any treaty, which ſhall afterwards be judged to derogate from the honour and intereſt of the nation.

III. UPON the ſame principle the king has alſo the ſole prerogative of making war and peace. For it is held by all the writers on the law of nature and nations, that the right of making war, which by nature ſubſiſted in every individual, is given up by all private perſons that enter into ſociety, and is veſted in the ſovereign power[u]: and this right is given up not only by individuals, but even by the intire body of people, that are under the dominion of a ſovereign. It would indeed be extremely improper, that any number of ſubjects ſhould have the power of binding the ſupreme magiſtrate, and putting him againſt his will in a ſtate of war. Whatever hoſtilities therefore may be committed by private citizens, the ſtate ought not to be affected thereby; unleſs that ſhould juſtify their proceedings, and thereby become partner in the guilt. Such unauthorized voluntiers in violence are not ranked among open enemies, but are treated like pirates and robbers: according to that rule of the civil law[w]; *hoſtes hi ſunt qui nobis, aut quibus nos, publice bellum decrevimus: caeteri latrones aut praedones ſunt.* And the reaſon which is given by Grotius[x], why ac-

[t] Puff. L. of N. b. 8. c 9. §. 6.
[u] Puff. l. 8. c. 6. §. 8. and Barbeyr. *in loc.*
[w] *Ff.* 50. 16. 118.
[x] *de jur. b. & p. l.* 3. *c.* 3. §. 11.

cording to the law of nations a denunciation of war ought always to precede the actual commencement of hoſtilities, is not ſo much that the enemy may be put upon his guard, (which is matter rather of magnanimity than right) but that it may be certainly clear that the war is not undertaken by private perſons, but by the will of the whole community; whoſe right of willing is in this caſe transferred to the ſupreme magiſtrate by the fundamental laws of ſociety. So that, in order to make a war completely effectual, it is neceſſary with us in England that it be publicly declared and duly proclaimed by the king's authority; and, then, all parts of both the contending nations, from the higheſt to the loweſt, are bound by it. And, wherever the right reſides of beginning a national war, there alſo muſt reſide the right of ending it, or the power of making peace. And the ſame check of parliamentary impeachment, for improper or inglorious conduct, in beginning, conducting, or concluding a national war, is in general ſufficient to reſtrain the miniſters of the crown from a wanton or injurious exertion of this great prerogative.

IV. BUT, as the delay of making war may ſometimes be detrimental to individuals who have ſuffered by depredations from foreign potentates, our laws have in ſome reſpect armed the ſubject with powers to impel the prerogative; by directing the miniſters of the crown to iſſue letters of marque and repriſal upon due demand: the prerogative of granting which is nearly related to, and plainly derived from, that other of making war; this being indeed only an incomplete ſtate of hoſtilities, and generally ending in a formal denunciation of war. Theſe letters are grantable by the law of nations[y], whenever the ſubjects of one ſtate are oppreſſed and injured by thoſe of another; and juſtice is denied by that ſtate to which the oppreſſor belongs. In this caſe letters of marque and repriſal (words in themſelves ſynonimous and ſignifying a taking in return) may be obtained, in order to ſeiſe the bodies or goods of the ſubjects of the offending ſtate, until ſatis-

[y] Grot. *de jur. b. & p. l.* 3. *c.* 2. §. 4 & 5.

faction

faction be made, wherever they happen to be found. Indeed this cuſtom of repriſals ſeems dictated by nature herſelf; and accordingly we find in the moſt antient times very notable inſtances of it [z]. But here the neceſſity is obvious of calling in the ſovereign power, to determine when repriſals may be made; elſe every private ſufferer would be a judge in his own cauſe. And, in purſuance of this principle, it is with us declared by the ſtatute 4 Hen. V. c. 7. that, if any ſubjects of the realm are oppreſſed in time of truce by any foreigners, the king will grant marque in due form, to all that feel themſelves grieved. Which form is thus directed to be obſerved: the ſufferer muſt firſt apply to the lord privy-ſeal, and he ſhall make out letters of requeſt under the privy ſeal; and, if, after ſuch requeſt of ſatisfaction made, the party required do not within convenient time make due ſatisfaction or reſtitution to the party grieved, the lord chancellor ſhall make him out letters of marque under the great ſeal; and by virtue of theſe he may attack and ſeiſe the property of the aggreſſor nation, without hazard of being condemned as a robber or pirate.

V. UPON exactly the ſame reaſon ſtands the prerogative of granting ſafe-conducts, without which by the law of nations no member of one ſociety has a right to intrude into another. And therefore Puffendorf very juſtly reſolves [a], that it is left in the power of all ſtates, to take ſuch meaſures about the admiſſion of ſtrangers, as they think convenient; thoſe being ever excepted who are driven on the coaſts by neceſſity, or by any cauſe that deſerves pity or compaſſion. Great tenderneſs is ſhewn by our laws, not only to foreigners in diſtreſs (as will appear when we come to ſpeak of ſhipwrecks) but with regard alſo to the admiſſion of ſtrangers who come ſpontaneouſly. For ſo long as their

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

[a] Law of N. and N. b. 3. c. 3. §. 9.

nation continues at peace with ours, and they themſelves behave peaceably, they are under the king's protection; though liable to be ſent home whenever the king ſees occaſion. But no ſubject of a nation at war with us can, by the law of nations, come into the realm, nor can travel himſelf upon the high ſeas, or ſend his goods and merchandize from one place to another, without danger of being ſeized by our ſubjects, unleſs he has letters of ſafe-conduct; which by divers antient ſtatutes[b] muſt be granted under the king's great ſeal and inrolled in chancery, or elſe are of no effect: the king being ſuppoſed the beſt judge of ſuch emergencies, as may deſerve exception from the general law of arms.

INDEED the law of England, as a commercial country, pays a very particular regard to foreign merchants in innumerable inſtances. One I cannot omit to mention: that by *magna carta*[c] it is provided, that all merchants (unleſs publickly prohibited beforehand) ſhall have ſafe conduct to depart from, to come into, to tarry in, and to go through England, for the exerciſe of merchandize, without any unreaſonable impoſts, except in time of war: and, if a war breaks out between us and their country, they ſhall be attached (if in England) without harm of body or goods, till the king or his chief juſticiary be informed how our merchants are treated in the land with which we are at war; and, if ours be ſecure in that land, they ſhall be ſecure in ours. This ſeems to have been a common rule of equity among all the northern nations; for we learn from Stiernhook[d], that it was a maxim among the Goths and Swedes, "*quam legem exteri nobis* "*poſuere, eandem illis ponemus.*" But it is ſomewhat extraordinary, that it ſhould have found a place in *magna carta*, a mere interior treaty between the king and his natural-born ſubjects; which occaſions the learned Monteſquieu to remark with a degree of admiration, "that the Engliſh have made the protection of *foreign* "merchants one of the articles of their *national* liberty[e]." But

[b] 15 Hen. VI. c. 3. 18 Hen. VI. c. 8. 20 Hen. VI. c. 1.

[c] c. 30.

[d] *de jure Sueon. l.* 3. *c.* 4.

[e] Sp. L. 20. 13.

indeed

indeed it well juſtifies another obſervation which he has made [f], "that the Engliſh know better than any other people upon earth, "how to value at the ſame time theſe three great advantages, re-"ligion, liberty, and commerce." Very different from the genius of the Roman people; who in their manners, their conſtitution, and even in their laws, treated commerce as a diſhonorable employment, and prohibited the exerciſe thereof to perſons of birth, or rank, or fortune [g]: and equally different from the bigotry of the canoniſts, who looked on trade as inconſiſtent with chriſtianity [h], and determined at the council of Melfi, under pope Urban II, *A. D.* 1090, that it was impoſſible with a ſafe conſcience to exerciſe any traffic, or follow the profeſſion of the law [i].

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

I. FIRST, he is a conſtituent part of the ſupreme legiſlative power; and, as ſuch, has the prerogative of rejecting ſuch proviſions in parliament, as he judges improper to be paſſed. The expediency of which conſtitution has before been evinced at large [k]. I ſhall only farther remark, that the king is not bound by any act of parliament, unleſs he be named therein by ſpecial and particular words. The moſt general words that can be deviſed ("any "perſon or perſons, bodies politic, or corporate, *&c.*") affect not him in the leaſt, if they may tend to reſtrain or diminiſh any of his rights or intereſts [l]. For it would be of moſt miſchievous conſequence to the public, if the ſtrength of the executive power

[f] Sp. L. 20. 6.

[g] *Nobiliores natalibus, et honorum luce conſpicuos, et patrimonio ditiores, pernicioſum urbibus mercimonium exercere prohibemus.* C. 4 63. 3.

[h] *Homo mercator vix aut nunquam poteſt Deo placere: et ideo nullus Chriſtianus debet eſſe mercator; aut ſi voluerit eſſe, projiciatur de eccleſia Dei.* *Decret.* 1. 88. 11.

[i] *Falſa ſit poenitentia [laici] cum penitus ab officio curiali vel negotiali non recedit, quae ſine peccatis agi ulla ratione non praevalet.* *Act. Concil. apud Baron.* *c.* 16.

[k] ch. 2. pag. 149.

[l] 11 Rep. 74 *b.*

were

were liable to be curtailed without it's own expreſs conſent, by conſtructions and implications of the ſubject. Yet where an act of parliament is expreſſly made for the preſervation of public rights and the ſuppreſſion of public wrongs, and does not interfere with the eſtabliſhed rights of the crown, it is ſaid to be binding as well upon the king as upon the ſubject[m]: and, likewiſe, the king may take the benefit of any particular act, though he be not eſpecially named[n].

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

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

[m] 11 Rep. 71. [n] 7 Rep. 32.

THIS

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

TO this branch of the prerogative may be referred the power veſted in his majeſty, by ſtatutes 12 Car. II. c. 4. and 29 Geo. II. c. 16. of prohibiting the exportation of arms or ammunition out of this kingdom, under ſevere penalties: and likewiſe the right which the king has, whenever he ſees proper, of confining his

[o] 2 Inſt. 30.

[p] Cowel's interpr. *tit. caſtellorum operatio.* Seld. *Jan. Angl.* 1. 42.

[q] 2 Inſt. 31.

[r] 1 Inſt. 5.

ſubjects

ſubjects to ſtay within the realm, or of recalling them when beyond the ſeas. By the common law[s], every man may go out of the realm for whatever cauſe he pleaſeth, without obtaining the king's leave; provided he is under no injunction of ſtaying at home: (which liberty was expreſſly declared in king John's great charter, though left out in that of Henry III) but, becauſe that every man ought of right to defend the king and his realm, therefore the king at his pleaſure may command him by his writ that he go not beyond the ſeas, or out of the realm without licence; and if he do the contrary, he ſhall be puniſhed for diſobeying the king's command. Some perſons there antiently were, that, by reaſon of their ſtations, were under a perpetual prohibition of going abroad without licence obtained; among which were reckoned all peers, on account of their being counſellors of the crown; all knights, who were bound to defend the kingdom from invaſions; all eccleſiaſtics, who were expreſſly confined by cap. 4. of the conſtitutions of Clarendon, on account of their attachment in the times of popery to the ſee of Rome; all archers and other artificers, leſt they ſhould inſtruct foreigners to rival us in their ſeveral trades and manufactures. This was law in the times of Britton[t], who wrote in the reign of Edward I: and ſir Edward Coke[u] gives us many inſtances to this effect in the time of Edward III. In the ſucceeding reign the affair of travelling wore a very different aſpect: an act of parliament being made[w], forbidding all perſons whatever to go abroad without licence; *except* only the lords and other great men of the realm; and true and notable merchants; and the king's ſoldiers. But this act was repealed by the ſtatute 4 Jac. I. c. 1. And at preſent every body has, or at leaſt aſſumes, the liberty of going abroad when he pleaſes. Yet undoubtedly if the king, by writ of *ne exeat regnum*, under his great ſeal or privy ſeal, thinks proper to prohibit him from ſo doing; or if the king ſends a writ to any man, when abroad, commanding his return; and in either caſe the ſubject diſobeys; it is a high contempt of the king's prero-

[s] F. N. B. 85.
[t] c. 123.
[u] 3 Inſt. 175.
[w] 5 Ric. II. c. 2.

gative,

gative, for which the offender's lands ſhall be ſeiſed till he return; and then he is liable to fine and impriſonment[x].

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

IT is probable, and almoſt certain, that in very early times, before our conſtitution arrived at it's full perfection, our kings in perſon often heard and determined cauſes between party and party.

[x] 1 Hawk. P. C. 22.

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

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

IN criminal proceedings, or proſecutions for offences, it would ſtill be a higher abſurdity, if the king perſonally ſate in judgment; becauſe in regard to theſe he appears in another capacity, that of *proſecutor*. All offences are either againſt the king's peace, or his crown and dignity; and are ſo laid in every indictment. For, though in their conſequences they generally ſeem (except in the caſe of treaſon and a very few others) to be rather offences againſt the kingdom than the king; yet, as the public, which is an inviſible body, has delegated all it's power and rights, with re-

[z] 2 Hawk. P. C. 2.
[a] Ld Raym. 747.
[b] Com. Journ. 3 Mar. 1761.

gard

gard to the execution of the laws, to one viſible magiſtrate, all affronts to that power, and breaches of thoſe rights, are immediately offences againſt him, to whom they are ſo delegated by the public. He is therefore the proper perſon to proſecute for all public offences and breaches of the peace, being the perſon injured in the eye of the law. And this notion was carried ſo far in the old Gothic conſtitution, (wherein the king was bound by his coronation oath to conſerve the peace) that in caſe of any forcible injury offered to the perſon of a fellow ſubject, the offender was accuſed of a kind of perjury, in having violated the king's coronation oath; *dicebatur fregiſſe juramentum regis juratum*[c]. And hence alſo ariſes another branch of the prerogative, that of *pardoning* offences; for it is reaſonable that he only who is injured ſhould have the power of forgiving. And therefore, in parliamentary impeachments, the king has no prerogative of pardoning: becauſe there the commons of Great Britain are in their own names the proſecutors, and not the crown; the offence being for the moſt part avowedly taken to be done againſt the public. Of proſecutions and pardons I ſhall treat more at large hereafter; and only mention them here, in this curſory manner, to ſhew the conſtitutional grounds of this power of the crown, and how regularly connected all the links are in this vaſt chain of prerogative.

IN this diſtinct and ſeparate exiſtence of the judicial power, in a peculiar body of men, nominated indeed, but not removeable at pleaſure, by the crown, conſiſts one main preſervative of the public liberty; which cannot ſubſiſt long in any ſtate, unleſs the adminiſtration of common juſtice be in ſome degree ſeparated both from the legiſlative and alſo from the executive power. Were it joined with the legiſlative, the life, liberty, and property, of the ſubject would be in the hands of arbitrary judges, whoſe deciſions would be then regulated only by their own opinions, and not by any fundamental principles of law; which, though legiſlators may depart from, yet judges are bound to obſerve. Were

[c] Stiernh. *de jure Goth. l.* 3. *c.* 3. A notion ſomewhat ſimilar to this may be found in the mirrour. c. 1. §. 5.

it joined with the executive, this union might ſoon be an overballance for the legiſlative. For which reaſon, by the ſtatute of 16 Car. I. c. 10. which aboliſhed the court of ſtar chamber, effectual care is taken to remove all judicial power out of the hands of the king's privy council; who, as then was evident from recent inſtances, might ſoon be inclined to pronounce that for law, which was moſt agreeable to the prince or his officers. Nothing therefore is more to be avoided, in a free conſtitution, than uniting the provinces of a judge and a miniſter of ſtate. And indeed, that the abſolute power, claimed and exerciſed in a neighbouring nation, is more tolerable than that of the eaſtern empires, is in great meaſure owing to their having veſted the judicial power in their parliaments, a body ſeparate and diſtinct from both the legiſlative and executive: and, if ever that nation recovers it's former liberty, it will owe it to the efforts of thoſe aſſemblies. In Turkey, where every thing is centered in the ſultan or his miniſters, deſpotic power is in it's meridian, and wears a more dreadful aſpect.

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

FROM the ſame original, of the king's being the fountain of juſtice, we may alſo deduce the prerogative of iſſuing proclama-

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

tions,

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

IV. THE king is likewiſe the fountain of honour, of office, and of privilege: and this in a different ſenſe from that wherein he is ſtiled the fountain of juſtice; for here he is really the parent of them. It is impoſſible that government can be maintained

[g] 3 Inſt. 162.
[h] 4 Mod. 177, 179.
[i] Stat. 1 Edw. VI. c. 12.

without

without a due ſubordination of rank; that the people may know and diſtinguiſh ſuch as are ſet over them, in order to yield them their due reſpect and obedience; and alſo that the officers themſelves, being encouraged by emulation and the hopes of ſuperiority, may the better diſcharge their functions: and the law ſuppoſes, that no one can be ſo good a judge of their ſeveral merits and ſervices, as the king himſelf who employs them. It has therefore intruſted with him the ſole power of conferring dignities and honours, in confidence that he will beſtow them upon none, but ſuch as deſerve them. And therefore all degrees of nobility, of knighthood, and other titles, are received by immediate grant from the crown: either expreſſed in writing, by writs or letters patent, as in the creations of peers and baronets; or by corporeal inveſtiture, as in the creation of a ſimple knight.

FROM the ſame principle alſo ariſes the prerogative of erecting and diſpoſing of offices: for honours and offices are in their nature convertible and ſynonymous. All offices under the crown carry in the eye of the law an honour along with them; becauſe they imply a ſuperiority of parts and abilities, being ſuppoſed to be always filled with thoſe that are moſt able to execute them. And, on the other hand, all honours in their original had duties or offices annexed to them: an earl, *comes*, was the conſervator or governor of a county; and a knight, *miles*, was bound to attend the king in his wars. For the ſame reaſon therefore that honours are in the diſpoſal of the king, offices ought to be ſo likewiſe; and as the king may create new titles, ſo may he create new offices: but with this reſtriction, that he cannot create new offices with new fees annexed to them, nor annex new fees to old offices; for this would be a tax upon the ſubject, which cannot be impoſed but by act of parliament[k]. Wherefore, in 13 Hen. IV, a new office being created by the king's letters patent for meaſuring cloths, with a new fee for the ſame, the letters patent were, on account of the new fee, revoked and declared void in parliament.

[k] 2 Inſt. 533.

UPON

UPON the ſame, or a like reaſon, the king has alſo the prerogative of conferring privileges upon private perſons. Such as granting place or precedence to any of his ſubjects, as ſhall ſeem good to his royal wiſdom[l]: or ſuch as converting aliens, or perſons born out of the king's dominions, into denizens; whereby ſome very conſiderable privileges of natural-born ſubjects are conferred upon them. Such alſo is the prerogative of erecting corporations; whereby a number of private perſons are united and knit together, and enjoy many liberties, powers, and immunities in their politic capacity, which they were utterly incapable of in their natural. Of aliens, denizens, natural-born, and naturalized ſubjects, I ſhall ſpeak more largely in a ſubſequent chapter; as alſo of corporations at the cloſe of this book of our commentaries. I now only mention them incidentally, in order to remark the king's prerogative of making them; which is grounded upon this foundation, that the king, having the ſole adminiſtration of the government in his hands, is the beſt and the only judge, in what capacities, with what privileges, and under what diſtinctions, his people are the beſt qualified to ſerve, and to act under him. A principle, which was carried ſo far by the imperial law, that it was determined to be the crime of ſacrilege, even to doubt whether the prince had appointed proper officers in the ſtate[m].

V. ANOTHER light in which the laws of England conſider the king with regard to domeſtic concerns, is as the arbiter of commerce. By commerce, I at preſent mean domeſtic commerce only. It would lead me into too large a field, if I were to attempt to enter upon the nature of foreign trade, it's privileges, regulations, and reſtrictions; and would be alſo quite beſide the purpoſe of theſe commentaries, which are confined to the laws of England. Whereas no municipal laws can be ſufficient to order and determine the very extenſive and complicated affairs of traffic and merchandize; neither can they have a proper authority for

[l] 4 Inſt. 361.

[m] *Diſputare de principali judicio non oportet: ſacrilegii enim inſtar eſt, dubitare an is dignus ſit, quem elegerit imperator.* C. 9. 29. 3.

this

this purpoſe. For as theſe are tranſactions carried on between the ſubjects of independent ſtates, the municipal laws of one will not be regarded by the other. For which reaſon the affairs of commerce are regulated by a law of their own, called the law merchant or *lex mercatoria*, which all nations agree in and take notice of. And in particular the law of England does in many caſes refer itſelf to it, and leaves the cauſes of merchants to be tried by their own peculiar cuſtoms; and that often even in matters relating to inland trade, as for inſtance with regard to the drawing, the acceptance, and the transfer, of bills of exchange [n].

WITH us in England, the king's prerogative, ſo far as it relates to mere domeſtic commerce, will fall principally under the following articles:

FIRST, the eſtabliſhment of public marts, or places of buying and ſelling, ſuch as markets and fairs, with the tolls thereunto belonging. Theſe can only be ſet up by virtue of the king's grant, or by long and immemorial uſage and preſcription, which preſuppoſes ſuch a grant [o]. The limitation of theſe public reſorts, to ſuch time and ſuch place as may be moſt convenient for the neighbourhood, forms a part of oeconomics, or domeſtic polity; which, conſidering the kingdom as a large family, and the king as the maſter of it, he clearly has a right to diſpoſe and order as he pleaſes.

SECONDLY, the regulation of weights and meaſures. Theſe, for the advantage of the public, ought to be univerſally the ſame throughout the kingdom; being the general criterions which reduce all things to the ſame or an equivalent value. But, as weight and meaſure are things in their nature arbitrary and uncertain, it is therefore expedient that they be reduced to ſome fixed rule or ſtandard: which ſtandard it is impoſſible to fix by any written law or oral proclamation; for no man can, by words only, give another an adequate idea of a foot-rule, or a pound-weight. It

[n] Co. Litt. 172. Ld Raym. 181. 1542. [o] 2 Inſt. 220.

is

is therefore neceſſary to have recourſe to ſome viſible, palpable, material ſtandard; by forming a compariſon with which, all weights and meaſures may be reduced to one uniform ſize: and the prerogative of fixing this ſtandard, our antient law veſted in the crown; as in Normandy it belonged to the duke [p]. This ſtandard was originally kept at Wincheſter: and we find in the laws of king Edgar [q], near a century before the conqueſt, an injunction that the one meaſure, which was kept at Wincheſter, ſhould be obſerved throughout the realm. Moſt nations have regulated the ſtandard of meaſures of length by compariſon with the parts of the human body; as the palm, the hand, the ſpan, the foot, the cubit, the ell, (*ulna*, or arm) the pace, and the fathom. But, as theſe are of different dimenſions in men of different proportions, our antient hiſtorians [r] inform us, that a new ſtandard of longitudinal meaſure was aſcertained by king Henry the firſt; who commanded that the *ulna* or antient ell, which anſwers to the modern yard, ſhould be made of the exact length of his own arm. And, one ſtandard of meaſures of length being gained, all others are eaſily derived from thence; thoſe of greater length by multiplying, thoſe of leſs by ſubdividing, that original ſtandard. Thus, by the ſtatute called *compoſitio ulnarum et perticarum*, five yards and an half make a perch; and the yard is ſubdivided into three feet, and each foot into twelve inches; which inches will be each of the length of three grains of barley. Superficial meaſures are derived by ſquaring thoſe of length; and meaſures of capacity by cubing them. The ſtandard of weights was originally taken from corns of wheat, whence the loweſt denomination of weights we have is ſtill called a grain; thirty two of which are directed, by the ſtatute called *compoſitio menſurarum*, to compoſe a penny weight, whereof twenty make an ounce, twelve ounces a pound, and ſo upwards. And upon theſe principles the firſt ſtandards were made; which, being originally ſo fixed by the crown, their ſubſequent regulations have been generally made by the king in parliament. Thus, under king

[p] *Gr. Couſtum. c.* 16

[q] *cap.* 8.

[r] William of Malmſb. *in vita Hen. I.* Spelm. *Hen. I. ap.* Wilkins. 299.

Richard I, in his parliament holden at Weſtminſter, *A.D.* 1197, it was ordained that there ſhall be only one weight and one meaſure throughout the kingdom, and that the cuſtody of the aſſiſe or ſtandard of weights and meaſures ſhall be committed to certain perſons in every city and borough [s]; from whence the antient office of the king's aulnager ſeems to have been derived, whoſe duty it was, for a certain fee, to meaſure all cloths made for ſale, till the office was aboliſhed by the ſtatute 11 & 12 W. III. c. 20. In king John's time this ordinance of king Richard was frequently diſpenſed with for money [t]; which occaſioned a proviſion to be made for inforcing it, in the great charters of king John and his ſon [u]. Theſe original ſtandards were called *pondus regis* [w], and *menſura domini regis* [x]; and are directed by a variety of ſubſequent ſtatutes to be kept in the exchequer, and all weights and meaſures to be made conformable thereto [y]. But, as ſir Edward Coke obſerves [z], though this hath ſo often by authority of parliament been enacted, yet it could never be effected; ſo forcible is cuſtom with the multitude, when it hath gotten an head.

THIRDLY, as money is the medium of commerce, it is the king's prerogative, as the arbiter of domeſtic commerce, to give it authority or make it current. Money is an univerſal medium, or common ſtandard, by compariſon with which the value of all merchandize may be aſcertained: or it is a ſign, which repreſents the reſpective values of all commodities. Metals are well calculated for this ſign, becauſe they are durable and are capable of many ſubdiviſions: and a precious metal is ſtill better calculated for this purpoſe, becauſe it is the moſt portable. A metal is alſo the moſt proper for a common meaſure, becauſe it can eaſily be reduced to the ſame ſtandard in all nations: and every particular nation fixes on it it's own impreſſion, that the weight and

[s] Hoved. Matth. Paris.
[t] Hoved. *A.D.* 1201.
[u] 9 Hen. III. c. 25.
[w] *Plac.* 35 *Edw. I. apud* Cowel's Interpr. *tit. pondus regis.*
[x] *Flet.* 2. 12.
[y] 14 Edw. III. ſt. 1. c. 12. 25 Edw. III. ſt. 5. c. 10. 16 Ric. II. c. 3. 8 Hen. VI. c. 5. 11 Hen. VI. c. 8. 11 Hen. VII. c. 4. 22 Car. II. c. 8.
[z] 2 Inſt. 41.

ſtandard

cautious of giving ſuch certificates, and of courſe confines the poor at home, where frequently no adequate employment can be had.

THE law of ſettlements may be therefore now reduced to the following general heads; or, a ſettlement in a pariſh may be acquired, 1. By birth; which is always *prima facie* the place of ſettlement, until ſome other can be ſhewn [o]. This is alſo always the place of ſettlement of a baſtard child; for a baſtard, having in the eye of the law no father, cannot be referred to *his* ſettlement, as other children may [p]. But, in legitimate children, though the place of birth be *prima facie* the ſettlement, yet it is not concluſively ſo; for there are, 2. Settlements by parentage, being the ſettlement of one's father or mother: all children being really ſettled in the pariſh where their parents are ſettled, until they get a new ſettlement for themſelves [q]. A new ſettlement may be acquired ſeveral ways; as, 3. By marriage. For a woman, marrying a man that is ſettled in another pariſh, changes her own: the law not permitting the ſeparation of huſband and wife [r]. But if the man be a foreigner, and has no ſettlement, her's is ſuſpended during his life, if he be able to maintain her; but after his death ſhe may return again to her old ſettlement [s]. The other methods of acquiring ſettlements in any pariſh are all reducible to this one, of forty days reſidence therein: but this forty days reſidence (which is conſtrued to be lodging or lying there) muſt not be by fraud, or ſtealth, or in any clandeſtine manner; but accompanied with one or other of the following concomitant circumſtances. The next method therefore of gaining a ſettlement, is, 4. By forty days reſidence, and notice. For if a ſtranger comes into a pariſh, and delivers notice in writing of his place of abode, and number of his family, to one of the overſeers (which muſt be read in the church and regiſtered) and reſides there unmoleſted for forty days after ſuch notice, he is legally ſettled thereby [t]. For the law preſumes that ſuch a one

[o] 1 Lord Raym. 567.
[p] Salk. 427.
[q] Salk. 528. 2 Lord Raym. 1473.
[r] Stra. 544.
[s] Foley. 249.
[t] Stat. 13 & 14 Car. II. c. 12. 1 Jac. II. c. 17. 3 & 4 W. & M. c. 11.

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dower the perficient founder of all eleemoſynary ones, the right of viſitation of the former reſults, according to the rule laid down, to the king; and of the latter, to the patron or endower.

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

AS to eleemoſynary corporations, by the dotation the founder and his heirs are of common right the legal viſitors, to ſee that that property is rightly employed, which would otherwiſe have deſcended to the viſitor himſelf: but, if the founder has appointed and aſſigned any other perſon to be viſitor, then his aſſignee ſo appointed is inveſted with all the founder's power, in excluſion of