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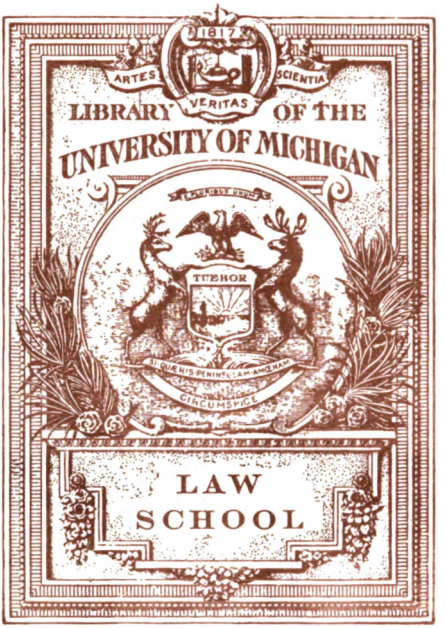

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J. Smith. 1813.

BLACKSTONE'S COMMENTARIES:

WITH

NOTES OF REFERENCE,

TO

THE CONSTITUTION AND LAWS,

OF THE

FEDERAL GOVERNMENT OF THE UNITED STATES;

AND OF THE

COMMONWEALTH OF VIRGINIA.

32845

IN FIVE VOLUMES.

WITH AN APPENDIX TO EACH VOLUME,

CONTAINING

SHORT TRACTS UPON SUCH SUBJECTS AS APPEARED NECESSARY TO FORM A CONNECTED

VIEW OF THE LAWS OF VIRGINIA,

AS A MEMBER OF THE FEDERAL UNION.

BY ST. GEORGE TUCKER,

PROFESSOR OF LAW, IN THE UNIVERSITY OF WILLIAM AND MARY, AND ONE OF THE JUDGES OF THE GENERAL COURT IN VIRGINIA.

PHILADELPHIA:

PUBLISHED BY WILLIAM YOUNG BIRCH, AND ABRAHAM SMALL,

NO. 17, SOUTH SECOND-STREET.

ROBERT CARR, PRINTER.

1803.

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District of Pennsylvania: to wit.

BE it remembered, That on the ninth day of May, in the twenty-seventh Year of the Independence of the United States of America, William Young Birch, and Abraham Small, of the said District, have deposited in this Office the Title of a Book, the right whereof they claim as Proprietors, in the words following, to wit:

"Blackstone's Commentaries: with Notes of Reference, to the "Constitution and Laws of the Federal Government of the United "States; and of the Commonwealth of Virginia. In Five Volumes. "With an Appendix to each Volume, containing, Short Tracts "upon such Subjects as appeared necessary to form a connected "View of the Laws of Virginia, as a Member of the Federal "Union, By St. George Tucker, Professor of Law, in the Uni-"versity of William and Mary, and one of the Judges of the "General Court in Virginia."

In Conformity to the Act of the Congress of the United States, intituled, "An Act for the Encouragement of Learning, by securing the Copies of Maps, Charts, and Books, to the Authors and Proprietors of such Copies during the times therein mentioned," and also, to an Act entituled, "An Act supplementary to an Act, entituled, an Act for the Encouragement of Learning, by securing the Copies of Maps, Charts, and Books, to the Authors and Proprietors of such Copies, during the Times therein mentioned. And extending the Benefits thereof to the Arts of designing, engraving, and etching historical, and other Prints."

(L. S.) D. CALDWELL,

Clerk of the District of Pennsylvania.

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ADVERTISEMENT.

The Editor having procured a copy of a late Edition of Blackstone's Commentaries, published in London, by Edward Christian, Esq. has made a selection of such of the Notes, contained in that Edition, as appeared to him most likely to be of use to an American Student...In the *Second Volume*, the selection has been more copious than in any of the others: they are distinguished, by his name being subjoined to the end of each Note.

MAY 12, 1803.

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COMMENTARIES

ON THE

LAWS OF ENGLAND.

IN FOUR BOOKS.

BY SIR WILLIAM BLACKSTONE, KNT.

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

WITH THE LAST CORRECTIONS OF THE AUTHOR.

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TO THE READER.

Messrs. Pleasants and Pace, having, since this Edition of the Commentaries has been in the press, published a new collection of the LAWS OF VIRGINIA, containing, not only, all the acts printed in the edition of 1794, but likewise, a very considerable number of acts passed since that period; the Editor avails himself of the opportunity, thereby afforded him, to assist the researches of the student, in consulting any act contained in that collection, which may be referred to in the notes, or appendices to this work. For this purpose, he has formed the following table, shewing, the correspondence between the edition of 1794, and subsequent sessions acts, and the chapters in the latter collection; by means of which, any act contained in that collection, and referred to in the following notes, may readily be found.

TABLE.

N. B. The chapters in Pleasant's and Pace's collection correspond with the chapters, as numbered in the edition of 1794, from chap. 1, to chap. 181, inclusive: the correspondence between the succeeding chapters and the Sessions acts, as published annually, will appear below.

Sessions Acts.	Pace's Edi.	Sessions Acts	Pace's Edi.	Sessions Acts.	Pace's Edi.	Sessions Acts.	Pace's Edi.
1795 c. 1	c. 182	c. 25	c. 216	c. 14	c. 250	c. 71	c. 284
c. 2	c. 183	c. 27	c. 217	c. 15	c. 251	1801 c. 1	c. 285
c. 3	c. 184	c. 28	c. 218	c. 19	c. 252	c. 2	c. 286
c. 5	c. 185	c. 42	c. 219	c. 23	c. 253	c. 3	c. 287
c. 8	c. 186	c. 45	c. 220	1799 c. 1	c. 254	c. 4	c. 288
c. 9	c. 187	1797 c. 2	c. 221	c. 2	c. 255	c. 5	c. 289
c. 10	c. 188	c. 4	c. 222	c. 3	c. 256	c. 7	c. 290
c. 11	c. 189	c. 5	c. 223	c. 8	c. 257	c. 8	c. 291
c. 13	c. 190	c. 6	c. 224	c. 11	c. 258	c. 9	c. 292
c. 14	c. 191	c. 7	c. 225	c. 17	c. 259	c. 10	c. 293
c. 15	c. 192	c. 8	c. 226	c. 23	c. 260	c. 11	c. 294
c. 16	c. 193	c 9	c. 227	c. 34	c. 261	c. 12	c. 295
c. 17	c. 194	c. 20	c. 228	c. 46	c. 262	c. 13	c. 296
c. 18	c. 195	c. 22	c. 229	c. 49	c. 263	c. 14	c. 297
c. 19	c. 196	c. 23	c. 230	c. 58	c. 264	c. 25	c. 298
c. 20	c. 197	c. 24	c. 231	c. 59	c. 265	c. 26	c. 299
c. 54	c. 198	c. 25	c. 232	c. 64	c. 266	c. 15	c. 300
1796 c. 1	c. 199	c. 26	c. 233	1800 c. 2	c. 267	c. 16	c. 301
c. 2	c. 200	c. 23	c. 234	c. 4	c. 268	c. 17	c. 302
c. 5	c. 201	c. 24	c. 235	c. 6	c. 269	c. 18	c. 303
c. 6	c. 202	c. 36	c. 236	c. 12	c. 270	c. 19	c. 304
c. 7	c. 203	c. 44	c. 237	c. 38	c. 271	c. 21	c. 305
c. 8	c. 204	c. 55	c. 238	c. 39	c. 272	c. 22	c. 306*
c. 9	c. 205	c. 65	c. 239	c. 40	c. 273	c. 23	c. 305*
c. 11	c. 206	c. 108	c. 240	c. 43	c. 274	c. 24	c. 307*
c. 12	c. 207	1798 c. 1	c. 241	c. 44	c. 275		
c. 13	c. 208	c. 2	c. 242	c. 51	c. 276	October	Appx.
c. 16	c. 209	c. 3	c. 243	c. 53	c. 277	1782 c 19	c. 1
c. 17	c. 210	c. 6	c. 244	c. 54	c. 278	1784 c. —	c. 2
c. 18	c. 211	c. 7	c. 245	c 58	c. 279	—— ——	c. 3
c. 19	c. 212	c. 9	c. 246	c. 59	c. 280	—— ——	c. 4
c. 20	c. 213	c. 10	c. 247	c. 60	c. 281	1792 c. 20	c. 5
c. 23	c. 214	c. 11	c. 248	c. 61	c. 282	c. 27	c. 6
c. 24	c. 215	c. 13	c. 249	c. 70	c. 283		

* There is a small error in the numbering of these three chapters in Pleasant and Pace's Edition; they are here referred to as numbered.

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COMMENTARIES

ON THE

LAWS OF ENGLAND.

BOOK THE FIRST.

PART THE SECOND.

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John Spear Smith.

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, 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], have expressed it, *sanctio justa, jubens honesta et prohibens contraria;* it follows, that the primary and principal objects of the law are RIGHTS and WRONGS. In the prosecution, therefore, of these commentaries, I shall follow this very simple and obvious division; and shall in the first place consider the *rights* that are commanded, and secondly the *wrongs* that are forbidden, by the laws of England. 122

a 11 *Phillip.* 12. b *l.* 1. *c.* 3.

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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.

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

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Allegiance is the right of the magistrate, and protection the right of the people[1].

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

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

1. But here it is to be remembered, that a distinction arises in our government betwen personal allegiance, and that which is due to the constitution and government. In monarchical governments allegiance is supposed to be due to the person of the monarch....in ours, it is due to the constitution and government, and not to the persons of those who administer the government. See page 368, Note, 2.

In America, there are rights, which appertain to one man without any correlative duty, owing to any other man. Though perhaps there is a correlative duty owing to the commonwealth. Thus every free white male, aged twenty-one years, and possessing a certain quantity of freehold lands in Virginia, hath an indubitable right to vote for any person to represent him as a member of congress, or of the state legislature: but no other person is authorised to claim the exercise of that right from him; much less, is there any other person to whom the exercise of it is a duty. Nevertheless, I conceive it to be a duty which the state has a right to compel him to perform.

"Every right is annexed to a certain character or relation, which "each individual bears in society. The rights of magistrates, le-"gislators, judges, husbands, fathers, heirs, purchasers, and occu-"pants, are all dependent upon the respective characters of the "claimants."...*Christian.*

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By the absolute *rights* of individuals we mean those which are so in their primary and strictest sense; such as would belong to their persons merely in a state of nature, and which every man is entitled to enjoy, whether out of society or in it. But with regard to the absolute *duties*, which man is bound to
124 perform, considered as a mere individual, it is not to be expected that any human municipal law should at all explain or enforce them. For the end and intent of such laws being only to regulate the behaviour of mankind, as they are members of society, and stand in various relations to each other, they have consesequently no concern with any other 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 the 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 subse-

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quent consideration. And, therefore, the principal view of human laws is, or ought always to be, to explain, protect, and enforce such rights as are absolute, which in themselves are 125
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 uncontrolled power of doing whatever he pleases: the consequence of which is, that every other man would also have the same power; and then there would be no security to individuals in any of the enjoyments of life. Political, therefore, or civil liberty, which is that of a member of society, is no other than natural liberty so far restrained by human laws (and no farther) as is necessary and expedient for the general advantage

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of the public[c 2]. Hence we may collect that the law, which re-
126 strains a man from doing mischief to his fellow-citizens, though it diminishes the natural[3], increases the civil liberty of mankind;

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

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2. "Political liberty consists in the power of doing whatever does "not injure another: the exercise of the natural rights of every man "has no other limits than those which are necessary to secure to "every other man the free exercise of the same rights; and these "limits are determinable only by the law." Declaration of the rights of man, and of citizens, by the national assembly of France.... 1789.

3. Man in a state of nature has no more right to do mischief, than in a state of society: the restrictions of society, therefore, do not diminish any natural right, when they prohibit the doing mischief: they only restrain the exercise of a natural power to which no right was ever annexed. We must be careful, therefore, not to confound the term natural liberty, with natural right. Man, when he enters into society, may sacrifice a portion of his natural liberty in the sense here spoken of, without a particle of his natural rights. "It is a long "received doctrine, that in a sate of society, or government, men "give up a portion of their natural rights, in order to have the residue "secured to them; by which it must be understood, that the rights "possessed and enjoyed in a state of government, are necessarily "fewer than those possessed, in what has been called, a state of na-"ture. A man who adopts this opinion, is naturally enough inclined "to look on government with a jealous eye; to esteem it, at best, "but as the least of two evils; and to feel the restraints, or obligati-"ons, imposed by it, as an abridgement of his natural liberty. This "position conveys an idea altogether untrue, and highly derogatory "to the noblest of all human institutions; an institution so fundamen-"tally necessary, that without it, no other could take place, of any "nature whatever. Without it, men must forever remain in a state "of savage ignorance and wretchedness; in a condition more misera-"ble, and more contemptible than that of the vilest brutes, or rep-"tiles. If we could suppose men in that state, which is falsely called "a state of nature, their rights would be extremely few, of very "little value, and wholly destitute of protection and security. And "unless we include among the natural rights of man, his right of con-"necting himself with others in a state of civil society, his existence "would be too wretched to be worth preserving. By legitimate go-"vernment, his rights, so far from being diminished, are multiplied

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but that every wanton and causeless restraint of the will of the subject, whether practised by a monarch, a nobility, or a popular assembly, is a degree of tyranny: nay, that even laws themselves, whether made with or without our consent, if they regulate and constrain our conduct in matters of mere indifference, without any good end in view, are regulations destructive of liberty: whereas, if any public advantage can arise from observing such precepts, the control of our private inclinations, in one or two particular points, will conduce to preserve our general freedom in others of more importance; by supporting that state of society, which alone can secure our independence. Thus the statute of king Edward IV[d], which forbad the fine gentlemen of those times (under the degree of a lord) to wear pikes upon their shoes or boots of more than two inches in length, was a law that savoured of oppression; because, however ridiculous the fashion then in use might appear, the restraining it by pecuniary penalties

d 3 Edw. IV. c. 5.

"a thousand fold. To government he is indebted for every comfort, "every convenience, and every enjoyment of life. He binds him-"self to certain duties, which are the conditions by which he becomes "entitled to the benefits of government. But these duties, except "on extraordinary occasions, are extremely light, whilst the bene-"fits they procure are immense in value, and almost infinite in "number. Were it possible in the jurisprudence of a democratic "government, to deprive men of the benefits of government in exact "proportion to their neglect of their obligations to it, it would be a "code founded in severe justice; and every one would become sen-"sible, how incomparably more numerous and valuable are the "rights acquired by the stipulations of compact, than those which "belong to a state of nature. All would then be induced to make a "proper estimate of the blessings of a well ordered community, and "to be in love with legitimate government, as the fountain of true "liberty, and of every thing valuable in human life. No one should "dare to talk of the rights of man who is unwilling to perform the "duties of a citizen. Such a person would, in strict justice, have no "rights, but those of a savage: for the essential rights of man are ac-"quired by purchase, and the price must be paid to make the title "good. This price is, obedience to the laws." Oration in commemoration of American independence, July 4, 1795, by T. T. T. of South-Carolina.

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could serve no purpose of common utility. But the statute of king Charles II[e], which prescribes a thing seemingly as indifferent, (a dress for the dead, who are all ordered to be buried in woollen) is a law consistent with public liberty; for it encourages the staple trade, on which in great measure depends the universal good of the nation. So that laws, when prudently framed, are by no means subversive, but rather introductive of liberty; for (as Mr. Locke has well observed[f]) where there is no law there is no freedom. But then, on the other hand, that constitution or frame of government, that system of laws, is alone calculated to maintain civil liberty, which leaves the subject entire master of his own conduct, except in those points wherein the public good requires some direction or restraint.

The idea and practice of this political or civil liberty flourish
127 in their highest vigour in these kingdoms, where it falls little 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 so far becomes a freeman[g]; though the master's right to his service may *possibly* still continue[4].

e 30 Car. II. st. 1. c. 3. f On Gov. p. 2. §. 57.

g Salk. 666. See ch. 14.

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4. The act for preventing the further importation of slaves, declared all slaves thereafter imported into Virginia by sea or land, contrary to the true intent of that act, to become free upon such importation. L. V. 1778, c. 1, but a subsequent act unfortunately extended the period when they should become free to twelve months. L. V. 1785, c. 77. Edi. 1794, c. 103.

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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 embarrassments: and as soon as the convulsions consequent on the struggle have been over, the balance 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 principal grounds of the fundamental laws of England. Afterwards by the statute called *confirmatio cartarum*[i], whereby the 128
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 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 rapture between them; and by the many salutary laws, particularly the *habeas corpus* act, passed under

h 2 Inst, proem, i 25 Ewd. I, k 2 Inst. proem.

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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 pre-"mises, 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 king-"dom." Lastly, these liberties were again asserted at the commencement of the present century, in the *act of settlement*[m], whereby the crown was limited to his present majesty's illustrious house; and some new provisions were added, at the same fortunate 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].

129 Thus much for the *declaration* of our rights and liberties[5].... 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

l 1 W. & M. st. 2. c. 2.
m 12 & 13 W. III. c. 2.
n Plowd. 55.

5. The declarations of rights, of the people of the United States are contained, 1st. In the unanimous declaration of independence, by the congress of the United States. 2dly. In the articles of confederation and perpetual union, concluded between the several states; which were perhaps abrogated. 3dly. By the constitution of the United States, as approved and ratified by the several state conventions. 4thly. By the amendments of the constitution of the United States, proposed by congress in March, 1789, and since ratified and confirmed by the several states in the union. 5thly. By the bill of rights, and constitutions of the respective states, and 6thly. and lastly, by legislative acts, and declarations of the state legislatures. The contents of them respectively, have either been already noticed, or will occasionally be touched upon in the course of the notes in this edition.

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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[6].

1. Life is the immediate gift of God, a right inherent by nature in every individual; and it begins in contemplation of law a 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](6). But the modern law doth not look upon this of- 130

o *Si aliquis mulierem pregnantem 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.

6. The right of personal security in the United States, in addition to those enumerated by the commentator, seems also to consist in the uninterrupted enjoyment of his conscience in all matters respecting religion, and of his opinions in those of a civil nature. See C. U.S. Art. 6. Amendments to C. U.S. Art. I. Bill of rights, Art. 12, 16. This subject will be more fully discussed in a subsequent note.

(6) But if the child be born alive, and afterwards die in consequence of the potion, or beating, it will be murder. 3. Inst. 50. But quere, how shall this be proved?

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fence in quite so atrocious a light, but merely as a heinous misdemesnor[p].

An infant *in ventre sa mere*, or in the mother's womb, is supposed in law to be born for many purposes. It is capable of having a legacy, or a surrender of a copyhold estate made to it. It may have a guardian assigned to it[q]; and it is enabled to have an estate limited to it's use, and to take afterwards by such limitation, as if it were then actually born [r] [7]. And in this point the civil law agrees with ours[s] (7).

2. A man's limbs (by which for the present we only understand those members which may be useful to him in fight, and the loss of which alone amounts to mayhem by the common law) are also the gift of the wise Creator, to enable him to protect himself from external injuries in a state of nature. to these therefore he has a natural inherent right; and they cannot be wantonly destroyed or disabled without a manifest breach of civil liberty[8].

p 3 Inst. 50.

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

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

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

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7. "It may have a distributive share of intestate property, even "with the half blood, 1. Ves. p. 81. It is capable of taking a devise "of land. 2 Atk. 117. Frem. 244, 293. It takes under a marriage "settlement a provision made for children at the time of the death "of the father. 1 Ves. 85, and it hath been lately decided, that mar-"riage, and the birth of a posthumous child, amount to a revoca-"tion of a will executed before marriage."....*Christian.*

(7.) Herewith the laws of Virginia also agree. V. L. 1748. c. 2. Edi. 1769, 1785. c. 62, 85. Edi. 1794. c. 90, 95. By the laws of England also, an infant in *ventre sa mere* seems capable of taking as heir, provided it be afterwards born alive. 2 B. c. 208. But in Virginia the law is now altered in that respect, unless the infant be the child of the person from whom the inheritance shall descend. V. L. 1785. c. 60. Edi. 1794. c. 93. §. 13.

8. Such breaches are accordingly severely punishable, in some instances by our laws, as will be shewn in it's proper place. L. U. S. 1 Cong. 2 Sess. c. 9. §. 13. L. V. 1752. c. 6. 1788. c. 28. Edi. 1794. c. 99.

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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[9]. For whatever is done by a man, to save either life or member, is looked upon as done upon the highest necessity and compulsion. Therefore, if a man through fear of death, or mayhem, is prevailed upon to execute a deed, or do any other legal act; these, though accompanied with all other the requisite solemnities, may be afterwards avoided, if forced upon him by a well-grounded apprehension of losing his life, or even his limbs, in case of his non-compliance[t]. And the same is also a sufficient excuse for the commission of many misdemesnors, as will appear in the fourth book. The constraint a man is under in these circumstances is called in law *duress*, from the Latin *duri-*
ties, of which there are two sorts; duress of imprisonment, 131
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 or loss of life, or else for fear of mayhem, or loss of limb. And this fear must be upon sufficient reason; "*non*," as Bracton express it, "*sus-*
"*picio 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 burned, or one's goods taken away and destroyed; because in these cases, should the threat be performed, a man may have satisfaction by recovering equivalent damages[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].

t 2 Inst. 483.
u *l.* 2. c. 5.
w 2 Inst. 483.
x *Ef.* 48. 21. 1.

9. Herewith the laws of Virginia agree. L. V. 1789. c. 10. Edi. 1794. c. 43.

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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[10], of which in their proper places. A humane provision; yet, though dictated by the principles of society, discountenanced by the Roman laws. For the edicts of the emperor Constantine commanding the public to maintain the children of those who were unable to provide for them, in order to prevent the murder and exposure of infants, an institution founded on the same principle as our foundling hospitals, though comprized in the Theodosian code[y], were rejected in Justinian's collection.

132 These rights, of life and member, can only be determined by the death of the person; which was formerly accounted to be either a civil or natural death. The civil death commenced, if any man was banished or abjured the realm[z] by the process of the common law, or entered into religion; that is, went into a monastery, and became there a monk professed: in which cases he was absolutely dead in law, and his next heir should have his estate(10). For, such banished man was entirely cut off from society; and such a monk, upon his profession, renounced solemnly all secular concerns: and besides, as the popish clergy claimed an exemption from the duties of civil life and the commands of the temporal magistrate, the genius of the English

y *l.* 11. *c.* 27. z Co. Litt. 133.

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10. Herewith the laws of Virginia also agree. It must however be acknowledged, that the laws respecting the poor are capable of great improvement. See V. L. 1794, c. 102.

(10.) Any person absenting himself from the commonwealth of Virginia beyond sea, or elsewhere, for seven years, successively, shall be presumed to be dead, in any case wherein his death shall come in question, unless proof be made that he was alive within that time. L. V. 1786, c. 67. Edi. 1794, c. 26.

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laws would not suffer those persons to enjoy the benefits of society, who secluded themselves from it, and refused to submit to its regulations[a]. A monk was therefore accounted *civiliter mortuus*, and when he entered into religion might, like other dying men, make his testament and executors; or, if he made none, the ordinary might grant administration to his next of kin, as if he were actually dead intestate. And such executors and administrators had the same power, and might bring the same actions for debts due to the religious, and were liable to the same actions for those due from him, as if he were naturally deceased[b]. Nay, so far has this principle been carried, that when one was bound in a bond to an abbot and his successors, and afterwards made his executors and professed himself a monk of the same abbey, and in process of time was himself made abbot thereof; here the law gave him, in the capacity of abbot, an action of debt against his own executors to recover the money due[c]. In short, a monk or religious, were so effectually dead in law, that a lease made even to a third person, during the life (generally) of one who afterwards became a monk, determined by such his entry into religion: for which reason leases, and other conveyances for life, were usually made to have and to hold for the term of one's *natural life*[d]. But, even in the times of popery, the law of England took no cognizance of *profession* in any foreign country, 133
because the fact could not be tried in our courts[e]; and therefore, since the reformation, this disability is held to be abolished[f]: as is also the disability of banishment, consequent upon abjuration, by statute 21 Jac. I. c. 28.

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 permis-

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.

d 2 Rep. 48. Co. Litt. 132.

e Co. Litt. 132.

f 1 Salk, 162.

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sion, be frequently forfeited for the breach of those laws of society, which are enforced by the sanction of capital punishments; of the nature, restrictions, expedience, and legality of which, we may hereafter more conveniently inquire in the concluding book of these commentaries. At present, I shall only observe, that whenever the *constitution* of a state vests in any man, or body of men, a power of destroying at pleasure, without the direction of laws, the lives or members of the subject, such constitution is in the highest degree tyrannical: and that whenever any *laws* direct such destruction for light and trivial causes, such laws are likewise tyrannical, though in an inferior degree: because here the subject is aware of the danger he is exposed to, and may by prudent caution provide against it. The statute law of England does therefore very seldom, and the common law does never inflict any punishment extending to life or limb, unless upon the highest necessity: and the constitution is an utter stranger to any arbitrary power of killing or maiming the subject without the express warrant of law. "*Nullus liber homo*," says the great charter[g], "*aliquo modo destruatur, nisi per legale judi-*
"*cium parium suorum aut per legem terrae*[11]." Which words, "*aliquo modo destruatur*," according to sir Edward Coke[h], include a prohibition not only of *killing*, and *maiming*, but also of *torturing* (to which our laws are strangers) and of every oppression by colour of an illegal authority. And it is enacted by the
134 statute 5 Edw. III. c. 9, that no man shall be judged of life or limb, contrary to the great charter and the law of the land: and again, by statute 28 Edw. III. c. 3, that no man shall be put to death, without being brought to answer by due process of law[12].

g c. 29. h 2 Inst. 48.

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11. Herewith both the federal and state laws agree. Amendments to C. U. S. Art. 7. L. V. 1785, c. 81. Edi. 1794, c. 15, is a pretty exact translation of this part of the British *Magna Charta*.

12. No man shall be deprived of life, liberty, or property, without due process of law. Amendments to C. U. S. Art. 7. V. Bill of Rights, Art. 9. V. L. 1785, c. 81. Edi. 1794, c. 15.

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3. Besides those limbs and members that may be necessary to a man, in order to defend himself or annoy his enemy, the rest of his person or body is also entitled, by the same natural right, to security from the corporal insults of menaces, assaults, beating, and wounding; though such insults amount not to destruction of life or member[13].

4. The preservation of a man's health from such practices as may prejudice or annoy it[14]; and,

5. The security of his reputation or good name from the arts of detraction and slander, are rights to which every man is entitled, by reason and natural justice; since without these it is impossible to have the perfect enjoyment of any other advantage or right. But these three last articles (being of much less importance than those which have gone before, and those which are yet to come) it will suffice to have barely mentioned among the rights of persons: referring the more minute discussion of their several branches, to those parts of our commentaries which treat of the infringement of these rights, under the head of personal wrongs[15].

II. Next to personal security, the law of England regards, asserts, and preserves the personal liberty of individuals. This personal liberty consists in the power of loco-motion, of changing situation, or moving one's person to whatsoever place one's own inclination may direct; without imprisonment or restraint, unless by due course of law. Concerning which we may make the same observations as upon the preceding article; that it is a right strictly natural; that the laws of England have never

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13. This is by the common law. The persons of women, who are liable to some atrocious injuries which may fall under this description, are protected by some special laws for that purpose to be found in our statutory code. V. L. Edi. 1794, c. 104, 130. Sess. Acts of 1796, c. 2.

14. V. L. Edi. 1794, c. 23, 103, 105, 106, afford instances hereof.

15. See Appendix, Note G.

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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 (15). Here again
135 the language of the great charter[i] is, that no freeman shall be taken or imprisoned, but by the lawful judgment of his equals, or by the law of the land[16]. And many subsequent old statutes[j] expressly direct, that no man shall be taken or imprisoned by suggestion or petition to the king or his council, unless it be by legal indictment, or the process of the common law. By the petition of right, 3 Car. I, it is enacted, that no freeman shall be imprisoned or detained without cause shewn, to which he may make answer according to law[17]. 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 council, 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[18].

i c. 29.
j 5 Edw. III. c. 9. 25 Edw. III. st. 5. c. 4. 28 Edw. III. c. 3.

(15.) The privilege of the writ of *Habeas Corpus* shall not be suspended, (viz. by congress) unless when in cases of rebellion or invasion the public safety may require it. C. U. S. Art. I. Sec. 9. The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated; and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the person or things to be seized. Amendments to C. U. S. Art. 6. No person shall be deprived of life, liberty, or property, without due process of law. Ib. Art. 7. Excessive bail shall not be required, Ib. Art. 10. And herewith also agrees the bill of rights, Art. 8, 9, 10, and V. L. 1785, c. 81. Edi. 1794, c. 15.

16. V. L. 1785, c. 81. Edi. 1794, c. 15. accordant.

17. Amendments to C. U. S. Art. 6. V. Bill of Rights, Art. 10. accordant.

18. C. U. S. Art. 1. Sec. 9. L. U. S. 1 Cong. 1 Sess. c. 20. Sec. 14. L. V. 1784, c. 35. Edi. 1794, c. 118. accordant.

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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[19]. 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[20].

Of great importance to the public is the preservation of this personal liberty: for if once it were left in the power of any, the highest, magistrate to imprison arbitrarily whomever he or his officers thought proper, (as in France it is daily practised by the crown[k]) there would soon be an end of all other rights and immunities. Some have thought, that unjust attacks, even upon life, or property, at the arbitrary will of the magistrate, are less 136
dangerous to the commonwealth, than such as are made upon the personal liberty of the subject. To bereave a man of life, or by violence to confiscate his estate, without accusation or trial, would be so gross and notorious an act of despotism, as must at once convey the alarm of tyranny throughout the whole kingdom: but confinement of the person, by secretly hurrying him to gaol, where his sufferings are unknown or forgotten, is a less public, a less striking, and therefore a more dangerous engine of arbitrary government. And yet sometimes, when the state is in real danger, even this may be a necessary measure. But the happiness of our constitution is, that it is not left to the executive power to determine when the danger of the state is so great, as to render this measure expedient: for it is the parliament

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

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19. V. L. 1794, c. 118. to the same purpose.

20. Amendments to C. U. S. Art. 10. Bill of Rights, Art. 9. 1785, c. 80. Edi. 1794, c. 14. accordant.

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only, or legislative power, that, whenever it sees proper, can authorise the crown, by suspending the *habeas corpus* act for a short and limited time[21], to imprison suspected persons without giving any reason for so doing; as the senate of Rome was wont to have recourse to a dictator, a magistrate of absolute authority, when they judged the republic in any imminent danger. The decree of the senate, which usually preceded the nomination of this magistrate, "*dent operam consules, ne quid respublica* "*detrimenti capiat*, was called the *senatus consultum 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[l]. And the law so much discourages unlawful confinement, that if a man is under *duress of imprisonment*, which we before explained to mean a compulsion by an illegal restraint of liberty, until he seals a bond or the like; he may allege this duress, and avoid the extorted bond.
137 But if a man be lawfully imprisoned, and either to procure his discharge, or any other fair account, seals a bond or a deed, this is not by duress of imprisonment, and he is not at liberty to avoid it[m]. To make imprisonment lawful, it must either be by process from the courts of judicature, or by warrant from some legal officer having authority to commit to prison; which warrant must be in writing, under the hand and seal of the magistrate, and express the causes of the commitment, in order to be examined into (if necessary) upon a *habeas corpus*[22]. If there

l 2 Inst. 589. m 2 Inst. 482.

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21. The privilege of the writ of *Habeas Corpus*, can only be suspended by the authority of congress, in case of *actual rebellion or invasion*. C. U. S. Art. 1. Sec. 9. And the legislature, only, have power to suspend it in the state governments.

22. General warrants, commanding the seizure of any persons not named, or whose offence is not particularly described, and sup-

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be no cause expressed, the gaoler is not bound to detain the prisoner[n]. For the law judges in this respect, saith sir Edward Coke, like Festus the Roman governor; that it is unreasonable to send a prisoner, and not to signify withal the crimes alleged 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[o] [23]. This may be necessary for the public service and safeguard of the commonwealth. But no power on earth, except the authority of parliament, can send any subject of England *out of* the land against his will; no, not even a criminal. For exile, and transportation, are punishments at present unknown to the common law; and, whenever the latter is now inflicted, it is either by the choice of the criminal himself to escape a capital punishment, or else by the express direction of some modern act of parliament. To this purpose the great charter[p] declares,

n 2 Inst. 52, 53. o F. N. B. 85. p c. 29.

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ported by evidence, are grievous and oppressive, and ought not to be granted. Bill of rights, Art. 10. Amendments to C. U. S. Art. 6.

23. The constitution of Virginia, Art. 9, expressly declares, "that the government shall not, under any pretext, exercise any power, or prerogative by virtue of any law, statute, or custom of England." And the laws of Virginia expressly admit the right of expatriation. It seems also to result from the nature of our government, that the federal executive possesses no such power as that here spoken of. But where it is suggested that a defendant in a *civil* suit, in which bail is not ordinarily required, is about to depart the state, the courts of equity, for good cause shewn, will award a writ of *ne exeat* to compel the defendant to give security to satisfy the judgment, or perform the decree of the court. V. L. Edi. 1794, c. 64, 110. See also, 3 p. Wms. 312. 3 Bro. 370, and 1. Ves. jun. 96.

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that no freeman shall be banished, unless by the judgment of his peers, or by the law of the land[24]. 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,
138 or places beyond the seas; (where they cannot have the full benefit and protection of the common law) but that all such imprisonments shall be illegal; that the person, who shall dare to commit another contrary to this law, shall be disabled from bearing any office, shall incur the penalty of a *praemunire*, and be incapable of receiving the king's pardon: and the party suffering shall also have his private action against the person committing, and all his aiders, advisers and abbettors, and shall recover treble costs; besides his damages, which no jury shall assess at less than five hundred pounds.

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24. V. L. 1785, c. 81. Edi. 1794, c. 15. accordant. No person shall be deprived of life, liberty, or property, without due process of law. Amendments of C. U. S. Art. 7.

Notwithstanding this express declaration of the C. U. S. an act was passed, 5 Cong. c. 75, authorising the president to order all such aliens as he should judge dangerous to the peace and safety of the United States, or have reasonable grounds to suspect of any treasonable, or secret machinations against the government thereof, to depart out of the territory of the United States within a limited time; and in case of disobedience, every such alien so ordered, was liable, on conviction, to be imprisoned for any term not exceeding three years. And any alien so ordered to depart, and remaining in the United States without a licence for that purpose, obtained from the president, might be arrested, and sent out of the United States by his order: and in case of his voluntary return thereto, might be imprisoned so long as in the opinion of the president the public safety might require. This unpopular act was limited to two years, when it was permitted to expire. The states of Kentucky and Virginia protested against it as unconstitutional: a construction, which it seems impossible to invalidate, unless we could conceive that aliens are not persons, that the suspicions of a president of the United States are a probable cause supported by oath, or affirmation; that the opinion or judgment of a president is a trial by jury and a conviction, (in case of treasonable acts) upon the tes-

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The law in this respect is so benignly and liberally construed for the benefit of the subject, that, though *within* the realm the king may command the attendance and service of all his liegemen, yet he cannot send any man *out of* the realm, even upon the public service; excepting sailors and soldiers, the nature of whose employment necessarily implies an exception: he cannot even constitute a man lord deputy, or lieutenant of Ireland against his will, nor make him a foreign ambassador[q]. For this might in reality be no more than an honourable exile.

III. The third absolute right, inherent in every Englishman, is that of property: which consists in the free use, enjoyment, and disposal of all his acquisitions, without any control or diminution, save only by the laws of the land[25]. The original of private property is probably founded in nature, as will be be more fully explained in the second book of the ensuing commentaries: but certainly the modifications under which we at present find it, the method of conserving it in the present owner, and of translating it from man to man, are entirely derived from society: and are some of those civil advantages, in exchange for which, every individual has resigned a part of his natural liberty. The laws of England are therefore, in point of honour and justice, extremely watchful in ascertaining and protecting this right. Upon this principle the great charter[r] has declared that no freeman shall be disseised, or divested, of his freehold, or of his liberties, or free customs, but by the judgment of his 139
peers, or by the law of the land[26]. And by a variety of ancient

q 2 Inst. 46. r c. 29.

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timony of two witnesses; and that neither imprisonment, nor banishment, is any deprivation of personal liberty. See note (28) p. 260.

25. The means of acquiring and possessing property is one of the inherent rights of man, as enumerated in our bill of rights, Art. 1. See also Amendts. to C. U. S. Art. 6, 7.

26. Amendments to the C. U. S. Art. 7. L. V. 1785, c. 81. Edi. 1794, c. 15. accordant.

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statutes[s] 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[27]; and that no man shall be disinherited, nor put out of his franchises or freehold, unless he be duly brought to answer, and be forejudged by course of law; but 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 authorise 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[28]. The public is now considered as an individual, treating with an individual for an

s 5 Edw. III. c. 9. 25 Edw. III. st. 5. c. 4. 28 Edw. III. c. 3.

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27. Private property shall not be taken for the public use, without just compensation. Amendments to the C. U. S. Art. 7. V. L. 1794, c. 121.

28. V. L. 1785, c. 75. Edi. 1794, c. 19. accordant, except that the county courts are generally authorised to judge of the propriety of opening the road. The compensation to be allowed is assessed by a jury, assembled by virtue of a writ of *ad quod damnum*.

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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 140
postponed even public necessity to the sacred and inviolable rights of private property. For no subject of England can be constrained to pay any aids or taxes, even for the defence of the realm or the support of government, but such as are imposed by his own consent, or that of his representatives in parliament[29]. By the statute, 25 Edw. I. c. 5. and 6, it is provided, that the king shall not take any aids or tasks, but by the common assent of the realm. And what that common assent is, is more fully explained by 34 Edw. I. st. 4. c. 1, which[t] enacts, that no talliage or aid shall be taken without the assent of the archbishops, bishops, earls, barons, knights, burgesses, and other freemen of the land: and again, by 14 Edw. III. st. 2. c. 1, the prelates, earls, barons, and commons, citizens, burgesses, and merchants shall not be charged to make any aid, if it be not by the common assent of the great men and commons in parliament. And as this fundamental law had been shamefully evaded under many succeeding princes, by compulsive loans, and benevolences extorted without a real and voluntary consent, it was made an article in the petition of right, 3 Car I, that no man shall be compelled to yield any

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

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29. Congress shall have power to lay and collect taxes, duties, imposts, and excises, to pay the debts, and provide for the common defence, and general welfare of the United States: but all duties, imposts, and excises, shall be uniform throughout the United States: and no capitation, or other direct tax, shall be laid but in proportion to the census. C. U. S. Art. 1. §. 89. And in the state governments, also, no man can be taxed, or deprived of his property for public uses, without his own consent, or that of his representatives. Bill of Rights, Art, 6,

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gift, loan, or benevolence, tax, or such like charge, without common consent by act of parliament. And, lastly, by the statute 1 W. and M. st. 2. c. 2, it is declared, that levying money for or to the use of the crown, by pretence of prerogative, without grant of parliament; or for longer time, or in other manner, than the same is or shall be granted: is illegal.

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

1. The constitution, powers, and privileges of parliament, of which I shall treat at large in the ensuing chapter[30].

2. The limitation of the king's prerogative, by bounds, so certain and notorious, that it is impossible he should either mistake or legally exceed them without the consent of the people.... Of this also, I shall treat in 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[31].

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30. Having already treated somewhat at large of the constitution, powers and privileges both of the federal and the state legislature, in the Appendix to the first part of this volume, the Editor will, in general, confine himself to short references, only, in this and the ensuing chapters. See C. U. S. Art. 1. C. V. Art. 3.

31. The powers and duties of the federal executive, and of the governor of the commonwealth, with the limitations thereof respectively. See C. U. S. Art. 2. C. V. Art. 9. L. V. c. 62. Edi. 1794.

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3. A third subordinate right of every Englishman is that of applying to the courts of justice for redress of injuries[32]. Since the law is in England the supreme arbiter of every man's life, liberty, and property, courts of justice must at all times be open to the subject, and the law be duly administered therein. The emphatical words of *magna carta*[u], spoken in the person of the king, who in judgment of law (says Sir Edward Coke[w]) is ever present and repeating them in all his courts, are these; *nulli vendemus, nulli negabimus, aut differemus rectum vel justitiam:* "[33]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 142
to the law of the land: and what that law is, every subject knows, or may know, if he pleases; for it depends not upon the arbitrary will of any judge, but is permanent, fixed, and unchangeable, unless by authority of parliament. I shall, however, just mention a few *negative* statutes, whereby abuses, perversions, or delays of justice, especially by the prerogative, are restrained.... It is ordained by *magna carta*[x], that no freeman shall be outlawed, that is, put out of the protection and benefit of the laws, but according to the law of the land[34]. By 2 Edw. III. c. 8. and 11 Ric. II. c. 10, it is enacted, that no commands or letters

u c. 29. w 2. Inst. 55. x c. 29.

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32. See C. U. S. Art. 3. C. V. Art. 3. 14.

33. Justice or right shall not be sold, denied, or deferred to any man. L. V. 1785, c. 81. Edi. 1794, c. 15.

34. No freeman shall be taken or imprisoned, or be disseized of his freehold or liberties, or free customs, or be outlawed or exiled, or any otherwise destroyed, nor shall the commonwealth pass upon him, nor condemn him, but by lawful judgment of his peers, or by the law of the land. V. L. 1785, c. 81. Edi. 1794, c. 15.

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shall be sent under the great seal, or the little seal, the signet, or privy seal, in disturbance of the law; or to disturb or delay common right: and, though such commandments should come, the judges shall not cease to do right; which is also made a part of their oath by statute 18 Edw. III. st. 4[35]. And by 1 W. and M. st. 2. c. 2, it is declared, that the pretended power of suspending, or dispensing with laws, or the execution of laws, by regal authority, without consent of parliament, is illegal[36].

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 out works were demolished, there would be an inlet to all manner of innovation in the body of the law itself. The king, it is true, may erect new courts of justice; [37]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 star-chamber, 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 star-chamber, 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

35. It is also made a part of the oath of the judges of all the superior courts in Virginia, but not of the county courts. Edi. 1794, c. 63, 64, 65, 66, 67, neither is it a part of the oath of the federal judges. L. U. S. 1 Cong. 1 Sess. c. 20.

36. All power of suspending laws, or the execution of laws, by any authority without the consent of the representatives of the people, is injurious to their rights, and ought not to be exercised. Bill of rights, Art. 7.

37. It does not belong to the executive authority either in the federal, or state government, to erect courts of judicature. The constitutions of both provide for the establishment of superior courts, and the congress, or state legislature only, has authority to establish inferior tribunals. C. U. S. Art. 3. C. V. Art. 14.

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tried and determined in the ordinary courts of justice, and by *course of law.*

4. If there should happen any uncommon injury, or infringement of the rights before-mentioned, which the ordinary course of law is too defective to reach, there still remains a fourth subordinate right, appertaining to every individual, namely, the right of petitioning the king, or either house of parliament, for the redress of grievances[38]. In Russia we are told[y] that the czar Peter, established a law, that no subject might petition the throne, till he had first petitioned two different ministers of state. In case he obtained justice from neither, he might then present a third petition to the prince; but upon pain of death, if found to be in the wrong. The consequence of which was, that no one dared to offer such third petition; and grievances seldom falling under the notice of the sovereign, he had little opportunity to redress them. The restrictions, for some there are, which are laid upon petitioning in England, are of a nature extremely different; and while they promote the spirit of peace, they are no check upon that of liberty. Care only must be taken, lest, under the pretence of petitioning, the subject be guilty of any riot or tumult; as happened in the opening of the memorable parliament in 1640: and, to prevent this, it is provided by the statute 13 Car. II. st. 1. c. 5, that no petition to the king, or either house of parliament, for any alteration in church or state, shall be signed by above twenty persons, unless the matter thereof be approved by three justices of the peace, or the major part of the grand 148

y Montesq. Sp. L. xii. 26.

38. The right of the people peaceably to assemble, and to petition the government for a redress of grievances shall not be prohibited. Amendments to C. U. S. Art. 3. The convention of Virginia, at the time of their acceptance and ratification of the constitution of the United States, declared; That the people have a right peaceably to assemble together to consult for the common good, or to instruct their representatives; and that every freeman hath a right to petition or apply to the legislature for redress of grievances. See the bill of rights proposed by that convention, Art. 15.

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jury, in the country[39]; and in London by the lord mayor, aldermen, and common council: nor shall any petition be presented by more than ten persons at a time. But, under these regulations, it is declared by the statute 1 W. & 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[40]
144 suitable to their condition and degree, and such as are allowed by law[41]. Which is also declared by the same statute 1 W. & M. st. 2. c. 2, and it is indeed, a public allowance under due restrictions, of the natural right of resistance and self-preservation, when the sanctions of society and laws are found insufficient to restrain the violence of oppression.

In these several articles consist the rights, or, as they are frequently termed, the liberties of Englishmen: liberties, more generally talked of, than thoroughly understood; and yet highly necessary to be perfectly known and considered by every man of rank or property, lest his ignorance of the points whereon they are founded should hurry him into faction and licentiousness on the one hand, or a pusillanimous indifference and criminal submission on the other. And we have seen that these rights con-

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39. From hence, probably originated the practice of grand-juries presenting state-grievances. The right of petitioning is not subject to any limitation or restriction in the United States.

40. The right of the people to keep and bear arms shall not be infringed. Amendments to C. U. S. Art. 4, and this without any qualification as to their condition or degree, as is the case in the British government.

41. Whoever examines the forest, and game laws in the British code, will readily perceive that the right of keeping arms is effectually taken away from the people of England. The commentator himself informs us, Vol. II, p. 412, "that the prevention of popular "insurrections and resistence to government by disarming the bulk "of the people, is a reason oftener meant than avowed by the makers "of the forest and game laws."

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sist, primarily, in the free enjoyment of personal security, of personal liberty, and of private property. So long as these remain inviolate, the subject is perfectly free; for every species of compulsive tyranny and oppression must act in opposition to one or other of these rights, having no other object upon which it can possibly be employed. To preserve these from violation, it is necessary, that the constitution of parliament be supported in its full vigour; and limits, certainly known, be set to the royal prerogative. And, lastly, to vindicate these rights, when actually violated or attacked, the subjects of England are entitled, in the first place, to the regular administration and free course of justice in the courts of law; next, to the right of petitioning the king and parliament for redress of grievances; and, lastly, to the right of having and using arms for self-preservation and defence. And all these rights and liberties it is our birth-right to enjoy entire; unless where the laws of our country have laid them under necessary restraints. Restraints in themselves so gentle and moderate, as will appear upon farther inquiry, that no man of sense or probity would wish to see them slackened. For all of us have it in our choice to do every thing that a good man would desire to do; and are restrained from nothing, but what would be pernicious either to ourselves or our fellow-citizens.... So that this review of our situation may fully justify the observa- 145
tion of a learned French author, who indeed generally both thought and wrote in the spirit of genuine freedom[z]; and who hath not scrupled to profess, even in the very bosom of his native country, that the English is the only nation in the world, where political or civil liberty is the direct end of it's constitution[42]. Re-

z Montesq. Sp. L. xi. 5.

42. Professor Christian, in one of his notes upon this chapter, page 126, hints at a distinction between civil and political liberty. Something of the same kind will be found in the tract concerning slavery, Appendix note H. Perhaps the idea is not there carried far enough; I shall therefore subjoin a few observations in this place.

Perhaps the difficulty which occurs in drawing the line of distinction between civil and political liberty, arises from the present use of that term, as synonimous with the word right: it may be not amiss, therefore, to give a short definition of each.

Liberty

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commending, 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![43]"

Liberty, then, is defined by Mr. Locke, to be, the power in any agent to do, or to forbear, any particular action, according to the determination or thought of the mind, whereby either of them is preferred to the other*.

Right, on the other hand, is defined by Doctor Johnson, to be, that which justly belongs to one; or, a just claim.

In discussing the interests, immunities, privileges, prerogatives, and powers, which appertain to men and states, as moral agents, the term right seems to be more definite and appropriate than that of liberty; I shall therefore adopt it.

Rights, then, I apprehend, admit of a fourfold division: 1st, natural rights; 2dly, social rights; 3dly, civil rights; 4thly, political rights. 1. Natural rights, are such as appertain to every man, as a moral agent, independent of any social institutions, or laws, whatsoever: to which all men, without distinction, so long as they remain in the state of nature, are absolutely entitled. The whole of which are comprehended under the right of self-preservation, and of doing whatsoever may be necessary to that end.

It is this right of self-preservation which gives to any person in the state of nature the right to punish any other for any evil he has done; and to be himself both the judge and executioner of the law of nature.

But this natural right doth not amount, even in the state of nature, to a state of license, or uncontrolled liberty; for the state of nature hath the law of nature to govern it, which obliges every one; and reason, which is that law, teaches all mankind that will consult it, that being all equal, and independent, no one ought to harm another in his life, health, liberty, or possessions. And, therefore, when his own preservation comes not in competition, he ought, as much as he can, to preserve the rest of mankind, and may not, unless it be to do justice on an offender, take away, or impair the life, or what tends to the preservation of the liberty, health, limbs, or goods of another†.

When

* Locke on the Human Understanding, B. 2. c. 21. Sec. 8.
† Locke on Civil Government, c. 2.

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43. See Appendix, Note H.

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When a man quits the state of nature, and enters into a state of society, he resigns into the hands of society the right of punishing an offender, for an injury already done him, the society by the terms of the social compact, having engaged to punish every such offender for him. But he retains the right of repelling force by force; because that may be absolutely necessary for self-preservation, and the intervention of the society in his behalf, may be too late to prevent an injury. Upon the same principle, he may be supposed to retain every other natural right, which the society cannot aid him in preserving or enforcing.

2. Social rights are such as appertain to every individual in a state of society, without regard to the form or nature of the government in which he resides. Social rights comprehend whatever natural rights a man hath not abandoned by entering into society; they likewise include all those privileges which are supposed to be tacitly stipulated for, by the very act of association; such as the right of protection from injury, which the whole society has engaged to afford him; or of redress for the same, by suit or action. The right of holding lands by a mere symbolical representation, as a deed, instead of actual possession, the only title which the law of nature gives; the right of transmitting property to his posterity, or to his executors, or legatees; are all of them, social rights, being the mere creatures of the artificial institutions of society.

Social rights depend upon the laws, customs, and usages of different nations and countries; but they have no relation to the nature, form, or administration of the government; the rights which appertain to these subjects being more properly civil, or political, as will be shewn hereafter. Therefore, in all civilized nations, all free persons, whether citizens or aliens; males or females; infants or adults; white or black, of sound mind, or ideots and lunatics, have their respective social rights, according to the laws, customs, and usages of the country. Slaves, only, where slavery is tolerated by the laws, are excluded from social rights. Society deprives them of personal liberty, and abolishes their right to property; and, in some countries, even annihilates all their other natural rights: the life of the slave, in divers parts of the world, being held by a tenure, altogether as precarious as that of the ox he ploughs with.

3. Civil rights, taken in a strict and confined sense, as contradistinguished from natural and social rights, are such as appertain to a man as a citizen or subject, of this, or that, particular state or country; in his private and individual capacity as a free agent, and member of the body politic or state, in respect to the state or body politic; and contradistinguished from such as might be due to him as a magistrate, legislator, judge, or other public agent, character,

or

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or functionary. The right of electing, and being elected to, any public office or trust, may be considered as among the most important of these rights.

These civil rights may be inherited, or acquired, in the United States: they are acquired by a foreigner who is naturalized; they are inherited by all whose parents, at the time of their birth, were citizens. They may be enlarged, in some states, by the purchase of lands, if the purchaser had no lands before; they may be narrowed by the sale of lands, if the seller has no more left.

Aliens, women, children under the age of discretion, ideots, and lunatics, during their state of insanity, and negroes and mulattoes, though natives of the state, and born free, have no civil rights in Virginia, taken in this strict and limited sense.

4. Political rights, as contradistinguished from the three former, are such as appertain to a man, or body of men, as magistrates, legislators, judges, or other public agents, characters, or functionaries. Thus the prerogatives of a king of Great Britain are his political rights; and the powers vested in the president of the United States; in the senate; in the whole body of the congress; in the federal courts; and in the executive, legislative, and judiciary departments, and officers of the several states, constitute their political rights, respectively.

Political rights, in monarchies and aristocracies, are frequently personal and hereditary; in democracies properly constituted, they are merely official, temporary, and incapable of transmission by inheritance. In England, a man may be a chief magistrate, a legislator, or a judge, by inheritance: in the American States it is a fundamental principle, that no man can be a magistrate, a legislator, or a judge by hereditary right. In America, women have no political rights; in England, a woman may hold the reins of government.

Civil rights form the only balance or counterpoise in a state, against political rights: where the constitution of a state respects civil rights, more than such as are political, the people, whilst the constitution remains in full force, are free; but the government may possibly be too feeble to preserve the constitution, or to secure to individuals the enjoyment of their social rights: but where the constitution respects political rights, more than civil rights, the state may be free, and the constitution preserved in its full tone and vigour: but the people (unless they have reserved to themselves the power to change the constitution, which is not supposed in this case,) are slaves.

As

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As civil rights form the only check in a state upon such as are political, so also do they constitute the only safeguard and protection for social rights. In Turkey, where there are no civil rights, social rights are at the mercy of the grand seignior and his bashaws.

The right of personal liberty is a *natural* right; the benefit of *habeas corpus* is a *social* right; the right of individuals to choose representatives to congress is a *civil* right; the right of the several state legislatures to appoint senators to congress is a *political* right. The first of these rights is derived from our Creator, and is not abandoned by entering into society; the second is a creature of social law, invented for the security and protection of the former; the third results from the constitution of the United States regarded as a civil compact; the fourth results from the same instrument, regarded as a federal compact. The right of congress to make laws, binding not only upon the several states, but, in some cases, upon every individual citizen, is another *political* right, the creature of the same instrument.

Social rights are not unfrequently unequal; in England no inferior tradesman or mechanic, whatever his property may be; nor even a farmer, upon the land which he rents, and occupies, can kill a hare or a partridge, without being liable to a penalty for so doing; nor can any other person unless he hath a freehold estate, or other adequate qualification, to the amount of 100*l.* per annum, at least, except he be the son and heir apparent of an esquire, or person of a superior degree; in which case he may do it with impunity, (so far as relates to the public) wheresoever he meets with them. In Virginia, a negro or mulatto, though born free, cannot be a witness in any civil suit, in which a white person may be a party, nor in any criminal prosecution whatsoever, against a white person, even though the negro, or mulatto may have been beaten or maimed by him.

Civil rights also, are frequently unequal; both in England, and in Virginia, none but the possessors of a freehold-estate in lands, of a certain value, are (in general*) qualified to vote for a member of congress, or of the state legislature; nor can any negro, or mulatto, though free, and possessed of such an estate in lands, vote for either in Virginia.

Wherever a distinction of ranks is permitted, or established by the laws, or constitution, there an inequality, both in respect to social, and civil rights, is unavoidable.

Social

* The right of suffrage in Williamsburg, Norfolk, and Richmond. is extended to all house-keepers in those towns: the same holds in respect to the English boroughs.

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Social rights are, in some respects, more extensive in England, than in Virginia, for in England domestic slavery is unknown. In other respects they are more extensive here, than in England; for any free white person may be naturalized here, in the mode prescribed by law, as a matter of right; in England it is a matter of the highest grace, and favour. *Social* rights have, moreover, one security more, in the United States than in England; for no man in America is subject to the operation of a bill of attainder as he may be in England.

Civil rights are far more extensive in the United States than in England: every citizen without regard to his religion, or estate, may be elected a member of either house of congress, or even president of the United States, if there be no other constitutional objection, or incapacity: in England, a member of parliament must possess a certain estate, and must profess to believe in one particular set of religious tenets; and none but the persons of one particular family are at present capable of succeeding to the office of chief magistrate. *Civil* rights are likewise better secured in the United States, than in England; depending generally upon the federal and state constitutions for their support, instead of the acts of the ordinary legislature, as in England.

On the other hand, *political* rights are far more extensive in England, than in the American states; for the British parliament can alter the established religion of the land, and even change the constitution of the kingdom. Congress can make no law respecting religion; nor, of itself, can it change an iota of the federal constitution. And the powers of the state legislatures are equally restrained.

Hitherto, we have spoken of *political* rights, as they regard a man or body of men, as public functionaries, or component parts of the body politic, or state, and not as they regard the state, or nation itself; in this latter view, political rights may be either perfect, or imperfect.

When any state freely exercises all the rights of self-government, without any constraint, or control, except such as the general law of nations imposes upon all civilized nations, alike, the political rights of such state are *perfect;* that is the state is politically free.

It is nevertheless easy to conceive that the people of such a state may groan under the most intolerable slavery, from which they cannot relieve themselves. Rome under the government of the Cæsars, and modern Turkey may illustrate this position.

But

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But when a state, from any external cause, is deprived of any of the rights of self government, the political rights of such a state are *imperfect*, and the state itself can no longer be said to be politically free, whatever *civil* rights the people of such a state may enjoy therein. Such is the state of colonies, and other dependent governments.

In this case it is no less easy to conceive that both *social* and *civil* rights may be extensive, and secure, as they relate to the administrative authority of the dependent state; but precarious, and uncertain, as they relate to the paramount state, to which the dependent state is, itself subject. Such was the state of United America before the revolution; *civil* rights were in fact more extensive here, than in the predominant state; but the *political* rights of the *colonies* were *imperfect*. The revolution was necessary to their perfection, and also to the security of the *civil* rights of their inhabitants; by establishing them on the basis of the constitution of a state, which should be in itself absolutely free, and independent of all external constraint, or control, whatsoever.

From the preceding investigation of the nature of different rights, we may hazard the following definitions, without pretending to answer for their accuracy.

1. *Natural* liberty, then, consists in the power of acting as one thinks fit, without any constraint, or control, except by the law of nature.

2. *Social* liberty is natural liberty so far restrained by human laws, and no farther, as is necessary and expedient for the general advantage of any community.

3. *Civil* liberty consists in the free and uninterrupted exercise, enjoyment, and security of a man's *civil* rights; including in a more general and extensive sense, his *social* rights, also.

4. *Political* liberty, when applied to a state, or nation, consists in the absolute and unconstrained power of self-government; without any other constraint, or control whatsoever, except such as the general law of nations imposes upon all states, and nations alike. When applied to the public functionaries of any state, it consists in the free and uninterrupted exercise, enjoyment and security of their respective political rights, according to the constitution of the state.

Civil liberty is most perfect where social rights are protected and secured; where civil rights are equal, extensive, and established upon the basis of the constitution; where the political rights of

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of the public functionaries are defined, and limited by the constitution; and where the political rights of the state, or nation, itself, are perfect, and unlimited.

Those rights, which, according to Judge Blackstone, are the absolute rights of individuals, constitute, according to this distribution, the aggregate of their social rights.

The *quantum* of civil liberty in a state, is more or less, according as the people, have more or less, a share in government, and of a controlling power over the persons, by whom it is administered*.

* Price on civil liberty, Sect. 2.

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OF THE PARLIAMENT[1].

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 some also are *supreme*, in whom the sovereign power of the state resides; others are *subordinate*, deriving all their authority from the supreme magistrate, accountable to him for their conduct, and acting in an inferior secondary sphere(1).

In all tyrannical governments the supreme magistracy, or the right of *making* and *enforcing* the laws, is vested in one and the same man, or one and the same body of men; and whereso-

1. In the Appendix to the former part of this volume, the student will find "a summary view and comparison of the constituent parts "of the parliament of Great Britain, and the congress of the Unit-"ed States." See Appendix, note D. In the present chapter the Editor hath generally confined himself to short notes of reference to the correlative parts of the constitution of the United States, or of the state of Virginia.

(1.) A more obvious distinction in the United States, is that of the people, and their agents; the former being at once sovereign and subject; the latter governors and servants. Of agents some are federal, or such as have the administration of the government of the United States; others there are to whom the administration of the state governments is, exclusively, committed.

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ever these two powers are united together, there can be no public liberty[2]. 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,
147 this supreme power is divided into two branches; the one legislative, to wit, the parliament, consisting of king, lords, and commons; the other executive, consisting of the king alone.... It will be the business of this chapter to consider the British parliament; in which the legislative power, and (of course) the supreme and absolute authority of the state, is vested in our constitution.

The original or first institution of parliaments is one of those matters which lie so far hidden in the dark ages of antiquity, that the tracing of it out is a thing equally difficult and uncertain. The word, *parliament*, itself, (*parlement* or *colloquium*, as some of our historians translate it) is comparatively of modern date; derived from the French, and signifying an assembly that met and conferred together. 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

a Mod. Un. Hist. xxiii. 307. The first mention of it in our statute law is in the preamble to the statute of Westm. 1. 3. Edw. I. *A. D.* 1272.

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2. Both the bill of rights, Art. 5. and the constitution of Virginia, Art. 3. declare, That the legislative and executive powers of the state should be separate and distinct from the judiciary, and from each other, except in certain cases especially provided. The distribution of the powers of the federal government is conformable to the same principle. See C. U. S. Art. 1. §. 1. Art. 2. §. 1. Art. 3. §. 1.

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the northern nations, particularly the Germans[b]; and carried by them into all the countries of Europe, which they overran at the dissolution of the Roman empire. Relics of which constitution, under various modifications and changes, are still to be met with in the diets of Poland, Germany, and Sweden, and the assembly of the estates in France[c]: for what is there now called the parliament is only the supreme court of justice, consisting of the peers, certain dignified ecclesiastics and judges; which neither is in practice, nor is supposed to be in theory, a general council of the realm.

With us in England this general council hath been held immemorially, under the several names of *michel-synoth* or great council, *michel-gemote* or great meeting, and more frequently 148
wittena-gemote or the meeting of wise men. It was also stiled in Latin, *commune concilium regni*, *magnum concilium regis*, *curia magna*, *conventus magnatum vel procerum*, *assisa generalis*, and sometimes *communitas regni Angliae*[d]. We have instances of it's meeting to order the affairs of the kingdom, to make new laws, and to mend the old, or, as Fleta[e] expresses it, "*novis injuriis emersis nova constituere remedia*," so early as the reign of Ina king of the west Saxons, Offa king of the Mercians, and Ethelbert king of Kent, in the several realms of the heptarchy. And, after their union, the mirror[f] informs us, that king Alfred ordained for a perpetual usage, that these councils should meet twice in the year, or oftener, if need be, to treat of the government of God's people; how they should keep themselves from sin, should live in quiet, and should receive right. Our succeeding Saxon and Danish monarchs held frequent councils of this sort, as appears from their respective codes of laws; the titles whereof usually speak them to be enacted, either by the king with the advice of his wittena-gemote, or wise men, as, "*haec*

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

c These were assembled for the last time, *A. D.* 1561. (See Whitelocke of parl. c. 72. or according to Robertson, *A. D.* 1614. (Hist. Cha. V. i. 369.)

d Glanvil. *l.* 13. c. 32. *l.* 9. c. 10....Pref. 9 Rep....2 Inst. 526.

e *l.* 2. c. 2. f c. 1. §. 3.

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"*sunt instituta, quae Edgarus rex consilio sapientum suorum in-*
"*stituit;*" or to be enacted by those sages with the advice of the king, as, "*haec sunt judicia, qua sapientes consilio regis Ethel-*
"*stani instituerunt;*" or lastly, to be enacted by them both together, as, "*haec sunt institutiones, quas rex Edmundus et epis-*
"*copi sui cum sapientibus suis instituerunt.*"

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

Hence it indisputably appears, that parliaments, or general councils, are coeval with the kingdom itself. How those parliaments were constituted and composed, is another question, which has been matter of great dispute among our learned antiquaries; and, particularly, whether the commons were summoned at all; or, if summoned, at what period they began to form a distinct assembly. But it is not my intention here to enter into controversies of this sort. I hold it sufficient that it is generally agreed, that in the main the constitution of parliament, as it now stands, was marked out so long ago as the seventeenth year of king John, *A. D.* 1215, in the great charter granted by that prince; wherein he promises to summon all archbishops, bishops, abbots, earls, and greater barons, personally; and all other tenants in chief under the crown, by the sheriff and bailiffs; to meet at a certain place, with forty days notice, to assess aids and

g *Quanta esse debeat per nullam assissam generalem determinatum est, sed pro consuetudine singulorum comitatuum debetur. l.* 9. *c.* 10.

h Year book. 21 Edw. III. 60.

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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 inquire wherein consists this constitution of parliament, as it now stands, and has stood for the space of at least five hundred years. And in the prosecution of this inquiry, I shall consider, first, the manner and time of 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[3]. The parliament is regularly to be summoned by the king's writ or letter, issued out of chancery by advice of the privy council, at least forty days before it begins to sit. It is a branch of the royal prerogative, that no parliament can be convened by its own authority, or by the authority of any, except the king alone. And this prerogative is founded upon very good reason. For, supposing it had a right to meet spontaneously, without being called together, it is impossible to conceive that all the members, and each of the houses, would agree unanimously upon the proper time and place of meeting; and if half of the members met, and half absented themselves, who shall determine which is really the legislative body, the part assembled, or that which stays away[4]? It is therefore necessary that the parliament should be 150

3. The manner and time of assembling the congress of the United States, is provided for in the C. U. S. Art. 1. Sec. 4.

The manner, and time of assembling the legislature of the state, is likewise provided for, in C. V. Art. 4. L. V. Edi. 1794, c. 17, 162, and Sessions Acts, 1796, c. 9. 1797, c. 15. and 1798, c. 14.

4. The inconveniencies here suggested have been so completely obviated by the provisions contained in the federal, and state constitutions and laws, as to shew them to be merely creatures of the imagination.

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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[i]. Nor is it an exception to this rule that, by some modern statutes, on the demise of a king or queen, if there be then no parliament in being, the last parliament revives, and is to sit again for six months, unless dissolved by the successor: for this revived parliament must have been originally summoned by the crown.

151 It is true, that by a statute, 16 Car. I. c. 1. it was enacted, that, if the king neglected to call a parliament for three years, the peers might assemble and issue out writs for choosing one; and, in case of the neglect of the peers, the constituents might meet and elect one themselves[5]. 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;

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

5. Both congress, and the state legisalture, must meet at least once a year. C. U. S. Art. 1. §. 4. C. V. Art. 4. 10.

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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 settled in peace[6]. 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. And yet, out of abundant caution, it was thought necessary to confirm it's acts in the next parliament, by statute 13 Car. II. c. 7, and c. 14.

It is likewise true, that, at the time of the revolution, *A. D.* 1688, the lords and commons, by their own authority, and upon the summons of the prince of Orange, (afterwards king William) met in a convention, and therein disposed of the crown and kingdom. But it must be remembered, that this assembling was upon a like principle of necessity as at the restoration; that is, upon a full conviction that king James the second had abdicated the government; and, that the throne was thereby vacant: which supposition of the individual members was confirmed by their 152

i Stat. 12 Car. II. c. 1. k 1 Sid. 1.

6. The conventions which were held in Virginia during the existence of the regal government, assembled in consequence of recommendations from the members of the general assembly, which had been dissolved by the governor; or of recommendations from the general congress held at Philadelphia.

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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.

153 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 grievances, and dispatch of business, *if need be*. These last words are so loose and vague, that such of our monarchs as were inclined to govern without parliaments, neglected the convoking them, sometimes for a very considerable period, under pretence that there was no need of them. But, to remedy this, by the statute 16 Car. II. c. 1, it is enacted, that the sitting and holding of parliaments shall not be intermitted

1 4 Edw. III. c. 14. 36 Edw. III. c. 10.

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above three years at the most. And by the statute 1 W. and M. st. 2. c. 2, it is declared to be one of the rights of the people, that for redress of all grievances, and for the amending, strengthening, and preserving the laws, parliaments ought to be held *frequently*. And this indefinite *frequency*, is again reduced to a certainty by statute 6 W. and M. c. 2, which enacts, as the statute of Charles the second had done before, that a new parliament shall be called, within three years [m] after the determination of the former[7].

II. The constituent parts of a parliament are the next objects of our inquiry. And these are, the king's majesty, sitting there in his royal political capacity, and the three estates of the realm: the lords spiritual, the lords temporal, (who sit, together with the king, in one house) and the commons, who sit by themselves in another. And the king and these three estates, together, form the great corporation or body politic of the kingdom [n], 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 [8].

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 legislative. The total union of them, we have seen, would be productive of tyranny; the total disjunc- 154

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

n 4 Inst. 1, 2. Stat. 1 Eliz. c. 3. Hale of Parl. 1. o 4 Inst. 6.

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7. Both congress, and the legislature of the state, as was before observed, must assemble once a year, at least. C. U. S. Art. 1. §. 4. C. V. Art 4.

8. The president of the United States may convene congress, and the governor of the state may likewise convene the general assembly; but neither of them have the power of dissolution, or even of prorogation. C. U. S. Art. 2. C. V. Art. 10.

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tion of them, for the present, would in the end produce the same effects, by causing that union against which it seems to provide. The legislature would soon become tyrannical, by making continual encroahments, and gradually assuming to itself the rights of the executive power[9]. Thus the long parliament of Charles the first, while it acted in a constitutional manner, with the royal concurrence, redressed many heavy grievances and established many salutary laws. But, when the two houses assumed the power of legislation, in exclusion of the royal authority, they soon after assumed likewise the reins of administration; and, in consequence of these united powers, overturned both church and state, and established a worse oppression than any they pretended to remedy. To hinder therefore any such encroachments, the king is himself a part of the parliament: and, as this is the reason of his being so, very properly therefore the share of legislation, which the constitution has placed in the crown, consists in the power of *rejecting* rather than *resolving;* this being sufficient to answer the end proposed[10]. 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

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

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9. How far this has been found to be true in practice in Virginia, the student may collect from Mr. Jefferson's Notes. Art. Constitution. §. 4. &c.

10. The share of legislation which the C. U. S. has confided to the president, consists in a temporary power of rejection, only, instead of the absolute power here spoken of. C. U. S. Art. 1. §. 7. The executive authority in Virginia has no part in the legislative.

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true excellence of the English government, that all the parts of it form a mutual check upon each other[11]. In the legislature, 155 the people are a check upon the nobility, and the nobility a check upon the people; by the mutual privilege of rejecting what the other has resolved: while the king is a check upon both, which preserves the executive power from encroachments. And this very executive power is again checked, and kept within due bounds, by the two houses, through the privilege they have of inquiring into, impeaching, and punishing the conduct (not indeed of the king[q], which would destroy his constitutional independence; but, which is more beneficial to the public) of his evil and pernicious counsellors[12]. 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

q Stat. 12. Car. II. c. 30.

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11. "The mutual control, the well poised balance, of the several "members of the British legislature; are the visions of theoretical, "or the pretext of practical politicians. It is a government not of "check, but of conspiracy." Mackintosh on the French Revolution, London, 1791, p. 340.

12. A late political writer in England, considers "the practical "claim of impeachment the vaunted responsibility of ministers, as the "most sorry juggle of political empiricism, by which a people were "ever attempted to be lulled into servitude." Mackintosh on the French revolution, p. 332. Lond. 1791.....If there be any part of the constitution of the United States that deserves unqualified censure, it is that which prescribes the mode of trying impeachments. See appendix Note D. The power of impeachment is indeed given by the constitution, Art. 1. §. 2, 3. But the practical exercise of that power, if it ever be resorted to, will demonstrate the inadequacy of that part of the constitution. In Virginia, impeachments must be tried before the general court: or, the court of appeals; if the person impeached be a judge of the general court, C. V. Art. 16, 17.

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in mechanics, they jointly impel the machine of government in a direction different from what either, acting by itself, would have done; but, at the same time, in a direction partaking of each, and formed out of all: a direction which constitutes the true line of the liberty and happiness of the community [13].

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[14]. 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[r]: a very considerable body, and, in those times, equal in number to the temporal nobility[s].
156 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 frank-almoign or free alms, under which the bishops held their lands during the Saxon government, into the feodal or Norman tenure by barony; which subjected their estates to all civil charges and assessments, from which they were before exempt[t]: and, in right of succession to those baronies, which were unalienable from their respective dignities, the bishops and abbots were allowed their seats in the house of lords[u]. But, though these lords spiritual are, in the eye of the law, a distinct estate from the lords temporal, and are so distinguished in most of our acts of parliament, yet in

r Seld. tit. hon. 2, 5, 27.
s Co. Litt. 97.
t Gilb. Hist. Exch. 55. Spelm. W. I. 291.
u Glanv. 7, 1. Co. Litt. 97. Seld. tit. hon. 2, 5, 19.

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13. How far this is practically true, the student may collect from a perusal of Mackintosh's Defence of the French revolution; Lond. 1791. p. 264, &c. and the masterly tracts, entitled Political Disquisitions, by J. Burgh, Esq. published in London 1773, or 1774, and reprinted in Philadelphia, 1775.

14. The clergy are utterly excluded from the legislature of Virginia, by the constitution, Art. 14. But this is practically disregarded.

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practice they are usually blended together, under the one name of *the lords*; they intermix in their votes; and the majority of such intermixture joins both estates. And from this want of a separate assembly and separate negative of the prelates, some writers have argued[w], very cogently, that the lords spiritual and temporal are now in reality only one estate[x]: which is unquestionably true in every effectual sense, though the antient distinction between them, still nominally continues. For, if a bill should pass their house, there is no doubt of it's validity, though every lord spiritual should vote against it; of which Selden[y], and Sir Edward Coke[z], give many instances: as, on the other hand, I presume it would be equally good, if the lords temporal present were inferior to the bishops in number, and every one of those temporal lords gave his vote to reject the bill; though sir Edward Coke seems to doubt[zz], whether this would not be an *ordinance*, rather than an *act*, of parliament.

The lords temporal consist of all the peers of the realm, (the 157
bishops not being in strictness held to be such, but merely lords of parliament[a]) 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 increased at will by the power of the crown: and once, in the reign of queen Anne

w Whitelocke on Parliam. c. 72. Warburt. Alliance. b. 2. c. 3.

x Dyer. 60.

y Baronage. p. 1. c. 6. The act of uniformity, 1 Eliz. c. 2, was passed with the dissent of all the bishops; (Gibs. codex. 286.) and, therefore, the stile of *lords spiritual* is omitted throughout the whole.

z 2 Inst. 585, 6, 7. See Keilw. 184; where it is holden by the judges, 7 Hen. VIII. that the king may hold a parliament without any spiritual lords. This was also exemplified in fact in the two first parliaments of Charles II; wherein no bishops were summoned, till after the repeal of the statute 16 Car. I. c. 27. by statute 13 Car. II. st. 1, c, 2,

zz 4 Inst. 25.

a Staunford. P. C. 153.

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there was an instance of creating no less than twelve together; in contemplation of which, in the reign of king George the first, a bill passed the house of lords, and was countenanced by the then ministry, for limiting the number of the peerage. This was thought, by some, to promise a great acquisition to the constitution, by restraining the prerogative from gaining the ascendant in that august assembly, by pouring in at pleasure an unlimited number of new created lords. But the bill was ill-relished and miscarried in the house of commons, whose leading members were then desirous to keep the avenues to the other house as open and easy as possible[15].

The distinction of rank and honours is necessary in every well-governed state[16]: in order to reward such as are eminent for their services to the public, in a manner the most desirable to individuals, and yet without burden to the community; exciting thereby an ambitious yet laudable ardour, and generous emulation, in others[17]. And emulation, or virtuous ambition, is a

15. Mackintosh, speaking of this bill, observes, "It is a matter "of perfect notoriety that the rejection of it was occasioned by the "secession of Sir Robert Walpole from the Cabinet, and the oppo-"sition of him and his party to it was merely as a ministerial mea-"sure. The debate was not guided by any general legislative prin-"ciples. It was simply an experiment on the strength of two parties "contending for power." Def. of F. Revolution, 267.

16. The student will find this political dogma disputed, Appendix, Note D.

17. See Mackintosh's Def. of the French Revo. Lon. 1791, p. 81, 339, &c. Paine's Rights of Man, Albany Edi. 52, 53, &c. Burgh's Political Disquisitions, Phila. 1775, Vol. II. p. 89. The latter concludes his remarks in this manner. "That the merit chiefly re-"garded in our times, is the merit of seconding the views of the court, "and that the greatest demerit, according to our modern way of "estimating demerit, is opposing court measures; appears from the "court's late proceedings against my incomparable friend the great "Dr. Franklin, whom they have deprived of his place of deputy-post-"master of North-America, which place he himself improved from "being a burthen upon the government, to it's bringing a revenne "of several thousands a year; all because that faithful trustee would "not sit silent, and see his constituents betrayed."

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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 15
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[18]. 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([18]). If they

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18. "The English nobility buried themselves with Charles the "first, under the ruins of the throne; and before that time, when "Philip the second endeavoured to tempt the French with the allure-"ment of liberty, the crown was constantly supported by a nobility, "who think it an honour to obey a king, but consider it as the lowest "infamy to share the power with the people." Montesquieu's Spirit of Laws, Lib. 8, 9.

(18.) The commentator, in this last sentence, offers a particular reason why a body of nobility is necessary to the support of the British constitution; the proposition contained in the first sentence of this paragraph, "that the distinction of ranks and honours is necessary

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were confounded with the mass of the people; and, like them, had only a vote in electing representatives, their privileges would soon be borne down and overwhelmed by the popular torrent, which would effectually level all distinctions. It is, therefore, highly necessary, that the body of nobles should have a distinct assembly, distinct deliberations, and distinct powers from the commons.

The commons consist of all such men of property in the kingdom, as have not seats in the house of lords; every one of which has a voice in parliament, either personally, or by his representatives[19]. 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
159 known, should be exercised by the people in their aggregate or collective capacity, as was wisely ordained in the petty republics of Greece, and the first rudiments of the Roman state. But this will be highly inconvenient, when the public territory is extended to any considerable degree, and the number of citizens is increased. Thus when, after the social war, all the burghers of Italy were admitted free citizens of Rome, and each had a vote in the public assemblies, it became impossible to distinguish the spurious from the real voter; and, from that time, all elections and popular deliberations grew tumultuous and disor-

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in every well governed state," is general. From the particular reason abovementioned, he draws a general conclusion; and from thence proceeds to another general proposition, viz. "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." The student must take heed not to be misled by a mode of reasoning which thus confounds general and particular propositions and conclusions together.

19. How far this is from being practically true, the student may discover by perusing Locke on Government, c. 13. Burgh's Political Disquisitions, Vol. I. p. 39, &c. Mackintosh's Def. of the French Revolution, 265, 336, &c.

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derly; which paved the way for Marius and Sylla, Pompey and Cæsar, to trample on the liberties of their country, and at last to dissolve the commonwealth. In so large a state as ours it is, therefore, very wisely contrived, that the people should do that by their representatives, which it is impracticable to perform in person: the representatives, chosen by a number of minute and separate districts, wherein all the voters are, or easily may be, distinguished. The counties are, therefore, represented by knights, elected by the proprietors of lands: the cities and boroughs are represented by citizens and burgesses, chosen by the mercantile part, or supposed trading interest of the nation; much in the same manner as the burghers in the diet of Sweden are chosen by the corporate towns, Stockholm sending four, as London does with us, other cities two, and some only one[b]. The number of English representatives is 513, and of Scotts 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[c]) "*de communi consilio super negotiis quibusdam arduis et urgen-*"*tibus, regem, statum, et defensionem regni Angliae et ecclesiae* "*Anglicanae concernentibus.*" And therefore he is not bound, like a deputy in the united provinces, to consult with, or take the advice of, his constituents upon any particular point, unless he himself thinks it proper or prudent so to do[20].

b Mod. Un. Hist. xxxiii. 18. c. 4 Inst. 14.

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20. How far this doctrine may be true, as it applies to the British government, will not be here contested; but the Editor has attempted, at least, to shew, that it is inapplicable to the nature of our representative democracy. Appendix, note D.

"If the members of the house of commons are not obliged to re-"gard the instructions of their constituents; the people of England "choose a set of despots every seven years, and are as perfect slaves "as the Turks, excepting the few months of a general election." Burgh's Political Disquisitions, Vol. I. p. 185. Phila. 1775. The same writer insists with great apparent reason on his side, that the denial of responsibility is a novel doctrine in England. Ibid. 180, to 205.

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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 times of madness and anarchy, the commons once passed a vote[d], "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*.

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[e], is so transcendent and absolute, that it cannot be confined, either for causes or persons, within any bounds. And of this high court, he adds, it may be truly said, "*si antiquitatem spectes, est vetustissima; si dignitatem, est honoratissima; si jurisdictionem, est capacissima.*" It hath sovereign and uncontrolable authority in the making, confirming, enlarging, restraining, abrogating, repealing, reviving and expounding of laws, concerning matters of all possible denominations, ecclesiastical, or temporal, civil, military, maritime, or criminal; this being the place where that absolute despotic power, which must, in all governments[21], reside somewhere, is entrusted by the

d 4 Jan. 1648. e 4 Inst. 36.

21. In the United States this absolute power is not delegated to the government: it remains with the people, whose safety requires that the government which they have themselves established, should

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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[22]; 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[23]; 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[24]. True it is, that what the parliament doth, no authority upon earth can undo. So that it is a matter most essential to the liberties of this kingdom, that such members be delegated to this important trust, as are most eminent for their probity, their fortitude, and their knowledge; for it was a known apothegm of the great lord treasurer Burleigh, "that "England could never be ruined but by a parliament: and, as

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be limited. "The powers not delegated to the United States by the "constitution, nor prohibited by it to the states, are reserved to the "states respectively, or to the people." Amendments to the C. U. S. Art. 12.

22. Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof. Amdts. C. U. S. Art. 3. Religion or the duty which we owe to our Creator, and the manner of discharging it, can be directed only by reason and conviction, not by force or violence, and therefore all men are equally entitled to the free exercise of religion according to the dictates of conscience. Bill of Rights. Art. 16.

23. The legislature have no such power in our government. Congress may propose amendments; but they must be ratified by two thirds of the state legislatures. C. U. S. Art. 5. The people, only, when they see fit, can alter the state constitution, there being no provision for changing it in any other manner.

24. See note, p. 52. Vol. I. Part I.

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sir Matthew Hale observes[f], 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[g]; 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[h], 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 forfeit-"ed, and devolves to those who gave it[25]." But, however, just this conclusion may be, in theory, we cannot practically adopt
162 it, nor take any *legal* steps for carrying it into execution, under any dispensation of government at present actually existing. For this devolution of power, to the people at large, includes in it a dissolution of the whole form of government established by that people; reduces all the members to their original state of equality; and, by annihilating the sovereign power, repeals all positive laws whatsoever before enacted. No human laws will, therefore, suppose a case, which at once must destroy all law, and compel men to build afresh upon a new foundation; nor will they make provision for so desperate an event, as must render all legal provisions ineffectual[i]. So long, therefore, as the English constitution lasts, we may venture to affirm, that the power of parliament is absolute and without control.

f of parliament, 49.

g Sp. L. 11. 6.

h on Gov. p. 2. §. 149, 227.

i Whitelocke, c. 50. 4 Inst. 47.

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25. This principle is expressly recognized in our government. Amendments to C. U. S. Art. 11, 12. See Declaration of Independence, and Virginia Bill of Rights, Art. 3.

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In order to prevent the mischiefs that might arise, by placing this extensive authority in hands that are either incapable, or else improper, to manage it, it is provided by the custom and law of parliament, that no one shall sit or vote in either house, unless he be twenty-one years of age[26]. This is also expressly declared by statute 7 and 8 W. III. c. 25, with regard to the house of commons; doubts having arisen, from some contradictory adjudications, whether or no a minor was incapacitated from sitting in that house[k]. It is also enacted by statute 7 Jac. I. c. 6, that no member be permitted to enter into the house of commons, till he hath taken the oath of allegiance before the lord steward or his deputy: and by 30 Car. II. st. 2. and 1 Geo. I. c. 13, that no member shall vote or sit in either house, till he hath in the presence of the house taken the oath of allegiance, supremacy, and abjuration, and subscribed and repeated the declaration against transubstantiation, and invocation of saints, and the sacrifice of the mass[27]. Aliens, unless naturalized, were likewise by the law of parliament incapable to serve therein[l]: and now it is enacted, by statute 12 and 13 W. III. c. 2, that no alien, even though he be naturalized, shall be capable of being a member of either house of parliament[28]. And there are not only

j See page 244. k Com. Journ. 16 Dec. 1690.
l Com. Journ. 10 Mar. 1623. 18 Feb. 1625.

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26. A member of the federal house of representatives must be twenty-five years of age, and a member of the senate thirty. C. U. S. Art. I. A member of the house of delegates of Virginia must be twenty-one, and a member of the senate twenty-five years of age. C. V. Art. 6. L. V. 1785, c. 55. Edi. 1794, c. 17.

27. The senators and representatives of the United States, and the members of the state legislatures, shall be bound, by oath or affirmation, to support the federal constitution. C. U. S. Art. 6. The members of the state legislature are also bound to take an oath of fidelity to the state. Ord. of Conv. May 1776, c. 3. V. L. 1779, c. 5. Edi. 1794, c. 57.

28. No person shall be a representative in congress who shall not have been seven years a citizen of the United States; nor a senator, who shall not have been nine years a citizen. C. U. S. Art. 1. No person can be eligible to a seat in the state legislature, until an ac-

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these standing incapacities; but if any person is made a peer by the king, or elected to serve in the house of commons by the people, yet may the respective houses upon complaint of any crime in such person, and proof thereof, adjudge him disabled and incapable to sit as a member[m29]: and this by the law and custom of parliament.

For, 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[n] observes, is "*ab omnibus quaerenda, a multis ignorata, a paucis cognita.*" It will not, therefore, be expected that we should enter into the examination of this law, with any degree of minuteness: since, as the same learned author assures us[o], 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 adjudg-"ed in that house to which it relates, and not elsewhere[p 30]."

m Whitelocke of parl. c. 102. See Lord's Journ. 3 May 1620. 13 May 1624. 26 May 1725. Com. Journ. 14 Feb. 1580. 21 Jun. 1628. 9 Nov. 21 Jan. 1640. 6 Mar. 1676. 6 Mar. 1711. 17 Feb. 1769.

n 1 Inst. 11.

o 4 Inst. 50.

p 4 Inst. 15.

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tual residence in the state for five years after taking the oath of fidelity, nor until he shall have evinced a permanent attachment thereto, by intermarrying with a citizen of the United States, or purchased lands to the value of three hundred dollars. V. L. 1786, c. 10. Edi. 1794, c. 110.

29. Each house of congress may, with concurrence of two thirds, expel a member. C. U. S. Art. 1. Sec. 5.

30. Each house may determine the rules of its own proceedings, both in the federal and in the state legislature. C. U. S. Art. 1. Sec. 5. C. V. Art. 7.

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Hence, for instance, the lords will not suffer the commons to interfere in settling the election of a peer of Scotland; the commons will not allow the lords to judge of the election of a burgess; nor will either house permit the subordinate courts of law to examine the merits of either case. But the maxims upon which they proceed, together with the method of proceeding, rest entirely in the breast of the parliament itself; and are not defined and ascertained by any particular stated laws (30).

The *privileges* of parliament are likewise very large and indefinite[31]. And, therefore, when in 31 Hen. VI, the house of lords propounded a question to the judges concerning them, the chief justice, sir John Fortescue, in the name of his brethren, declared, "that they ought not to make answer to that question: 164
"for it hath not been used aforetime that the justices should, in "any wise, determine the privileges of the high court of parlia-"ment. For it is so high and mighty in it's nature, that it may "make law: and that which is law, it may make no law: and

(30) See some very just and pertinent remarks of professor Christian upon this passage.

31. The privileges both of the federal and state legislature, so far at least as respects the members, appear to be few and definite. "They shall, in all cases, except treason, felony, and breach of the peace, be privileged from arrest during their attendance at the session of their respective houses, and in going to, and returning from the same: and for any speech, or debate in either house, they shall not be questioned in any other place. C. U. S. Art. 1. §. 6. V. L. 1705, c. 1. §. 13. Edi. 1769....1785, c. 55. Edi. 1794, c. 17. 1798, c. 11.

"All privilege is a nuisance, whose extent is unknown; because "the subject is thereby in danger of falling into undesigned offence. "But it has always been made a point to keep the extent of parlia-"mentary privilege, prerogative royal, ministerial power, &c. pro-"found secrets. These are the *arcana imperii:* in English, "tricks "of state." The truth is, our ministers choose to secure a small "convenience to themselves (the convenience of keeping the people "in fear of them) though at the risque of great loss to the people." Burgh's Pol. Disq. Vol. I. p. 206. Phila. 1775.

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"the determination and knowledge of that privilege belongs to "the lords of parliament, and not to the justices[q]." 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 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[32]. The dignity and independence of the two houses are, therefore, in great measure preserved by keeping their privileges indefinite(32.) Some, however, of the more notorious privileges of the members of either house, are, privilege of speech, of person, of their domestics, and of their lands and goods. As to the first, privilege of speech, it is declared by the statute 1 W. & M. st. 2. c. 2, as one

q Seld. Baronage, part. 1. c. 4.

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32. "Judge Blackstone, in his account of the unknown and unlimited "powers and privileges of parliament, seems to forget that the safety "of the people limits all free governments. It is true that the people "of England, not being accustomed, till lately, to apprehend danger "from any quarter but the throne (tyranny having been an old trick "among kings from Nimrod's time down,) have all along encouraged "and supported their parliaments in extending their power, as the "only sure bulwark against regal encroachments. But latter ages "have taught us the necessity of looking out for security against par-"liamentary encroachments." Burgh's Pol. Disq. Vol. I. 226.

"There is a clear reason to be assigned, why the privilege and "powers of the British parliament are undefinable, which will by no "means properly apply to our legislature. Their constitution is "established only on precedents," &c. See the passage as quoted at large, page 52. Vol. I. Part I.

(32.) Mr. Christian makes some very just remarks on this passage; in the course of which he contends that they ought to be limited by those boundaries which afford the greatest share of security to the constituent, who may be equally injured by their extension and diminution.

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of the liberties of the people, "that the freedom of speech, and "debates, and proceedings in parliament, ought not to be im-"peached or questioned, in any court or place, out of parlia-"ment[33]." 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 persons, servants, lands and goods: which are immunities as antient as Edward the confessor; in whose laws[r] we find this precept, "*ad synodus venientibus, sive summo-"niti sint, sive per se quid agendum habuerint, sit summa pax:*" and so too, in the old Gothic constitutions, "*extenditur haec pax "et securitas ad quatuordecim dies, convocato regni senatu*[s]." This included formerly not only privilege from illegal violence, but also from legal arrests, and seizures by process from the courts of law. And still, to assault by violence a member of 165
either house, or his menial servants, is a high contempt of parliament, and there punished with the utmost severity. It has, likewise, peculiar penalties annexed to it in the courts of law, by the statutes 5 Hen. IV. c. 6, and 11 Hen. VI. c. 11. Neither can any member of either house be arrested and taken into custody, unless for some indictable offence, without a breach of the privilege of parliament.

But all other privileges, which derogate from the common law, in matters of civil right, are now at an end, save only as to the freedom of the member's person; which, in a peer, (by the privilege of peerage) is, for ever, sacred and inviolable; and, in

r *cap.* 3. s Steiran. *de jure Goth. l.* 3. *c.* 3.

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33. C. U. S. Art. 1. §. 6. accordant. See the note in the last page.

The act of 1798, c. 11, made to preserve the freedom of speech, and of proceedings in the legislature, makes it a high misdemeanor to arrest or prosecute any member of either house, on account of any words spoken, or written, or any proposition made, or proceedings had in either house of assembly. The act of congress, commonly called the sedition act, probably gave rise to this act of the Virginia legislature. L. V. 1798. Sessions acts.

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a commoner, (by the privilege of parliament) for forty days after every prorogation, and forty days before the next appointed meeting[t] [34]: which is now in effect, as long as the parliament subsists, it seldom being prorogued for more than fourscore days at a time. As to all other privileges, which obstruct the ordinary course of justice, they were restrained by the statutes 12 W. III. c. 3. 2 & 3 Ann. c. 18, and 11 Geo. II. c. 24, and are now totally abolished by statute 10 Geo. III. c. 50, which enacts, that any suit may at any time be brought against any peer or member of parliament, their servants, or any other person entitled to privilege of parliament; which shall not be impeached or delayed by pretence of any such privilege; except that the person of a member of the house of commons shall not thereby be subjected to any arrest or imprisonment. Likewise, for the benefit of commerce, it is provided by statute 4 Geo. III. c. 33, that any trader, having privilege of parliament, may be served with legal process for any just debt to 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.

t 2 Lev. 72.

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34. The privileges of the members of the general assembly in Virginia, continue during the session, and one day before and after, for every twenty miles they must necessarily travel. And in the mean time all process in which they are parties shall be suspended without abatement or discontinuance: if any person taken in execution be delivered by privilege of either house, so soon as such privilege ceaseth, he shall return himself a prisoner in execution, or be liable to an escape. V. L. 1785, c. 55. Edi. 1794, c. 17. Under this latter provision it happened, that the house of delegates directed their serjeant at arms to demand one of their members, then in the custody of the sheriff of Henrico, upon an execution, (without the member's suing out a writ of privilege, as might possibly have been thought necessary.) This order was founded upon the return of the sheriff of the county for which the member was chosen, certifying his election, and a letter from the member himself to the house, acquainting him with his confinement; Oct. Sess. 1793, *ut audivi.*

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The only way by which courts of justice could antiently take cognizance of privilege of parliament, was by writ of privilege[35], in the nature of a *supersedeas*, to deliver the party out of custody 166
when arrested in a civil suit[u]. For when a letter was written by the speaker to the judges, to stay proceedings against a privileged person, they rejected it as contrary to their oath of office[v]. But since the statute 12 W. III. c. 3, which enacts that no privileged person shall be subject to arrest or imprisonment, it hath been held that such arrest is irregular *ab initio*, and that the party may be discharged upon motion[w]. It is to be observed, that there is no precedent of any such writ of privilege, but only in civil suits; and that the statute of 1 Jac. I. c. 13, and that of king William (which remedy some inconveniences arising from privilege of parliament) speak only of civil actions. And, therefore, the claim of privilege hath been usually guarded with an exception as to the case of indictable crimes[x]; or as it hath been frequently expressed, of treason, felony, and breach (or surety) of the peace[y]. Whereby it seems to have been understood that no privilege was allowable to the members, their families, or servants, in any *crime* whatsoever; for all crimes are treated by the law as being *contra pacim domini regis*. And instances have not been wanting, wherein privileged persons have been convicted of misdemesnors, and committed, or prosecuted to outlawry, even in the middle of a session[z]; which proceeding has afterwards received the sanction and approbation of parliament[a]. To which may be added, that, a few years ago, the case of writing and publishing seditious libels was resolved by both houses[b] not to be intitled to privilege[36];

u Dyer 59. 4 Pryn, *Brev. Parl.* 757. v Latch. 48. Noy. 83.
w Stra. 989. x Com. Journ. 17 Aug. 1641.
y 4 Inst. 25. Com. Journ. 20 May, 1675.
z *Mich.* 16 *Edw. IV. in Scacch.* Lord Raym. 1461.
a Com. Journ. 16 May, 1726.
b Com. Journ. 24 Nov. Lord's Journ. 29 Nov. 1763.

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35. See the preceding note.

36. How far the writing and publishing such a libel in America, could be considered as operating to deprive a member of his privilege, is a question which I believe has not yet occurred.

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and that the reasons, upon which that case proceeded[c], extended equally to every indictable offence. So that the chief, if not the only, privilege of parliament, in such cases, seems to be the right of receiving immediate information of the imprisonment or detention of any member, with the reason for which he is detained: 167 a practice that is daily used upon the slightest military accusations, preparatory to a trial by a court martial[d]; and which is recognized by the several temporary statutes for suspending the *habeas corpus* act[e]: whereby it is provided, that no member of either house shall be detained, till the matter of which he stands suspected, be first communicated to the house of which he is a member, and the consent of the said house obtained for his commitment or detaining. But yet the usage has uniformly been, ever since the revolution, that the communication has been subsequent to the arrest.

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

IV. The laws and customs relating to the house of lords in particular[37]. 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[f], confirmed in parliament 9 Hen. III; viz. that every lord spiritual or temporal summoned to parliament, and passing through the king's forests, may, both in going and returning, kill one or two of the king's deer without warrant; in view of the forester if he be present, or on blowing a horn if he be absent: that he may not seem to take the king's venison by stealth.

c Lord's Protest. *ibid.* d Com. Journ. 20 Apr. 1762.
e Particularly 17 Geo. II. c. 6. f c. 11.

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37. In the United States the privileges of the members of both houses of congress, are precisely the same. It is the same also in the state legislature.

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In the next place they have a right to be attended, and constantly are, by the judges of the court of king's bench and common pleas, and such of the barons of the exchequer as are of the degree of the coif, or have been made serjeants at law; as likewise by the king's learned counsel, being serjeants, and by the masters of the court of chancery; for their advice in point of law, and for the greater dignity of their proceedings. The secretaries of state, with the attorney and solicitor general, were also used to attend the house of peers, and have to this day (together with the judges, &c.) their regular writs of summons issued out at the beginning of every parliament[g], *ad tractandum et* 168
consilium impendendum, though not *ad consentiendum;* but, whenever of late years they have been members of the house of commons[h], their attendance here hath 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[i]. 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[k].

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[38].

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

There is also one statute peculiarly relative to the house of lords; 6 Ann. c. 23, which regulates the election of the sixteen

g Stat. 31 Hen. VIII. c. 10. Smith's Commonw. b. 2. c. 3. Moor. 551. 4 Inst. 4. Hale of Parl. 140.

h See Com. Journ. 11 Apr. 1614. 8 Feb. 1620. 10 Feb. 1625. 4 Inst. 48.

i Seld. baronage, p. 1. c. 1.

k 4 Inst. 12.

38. The yeas and nays of the members of either house of congress, shall, at the desire of one-fifth of those present, be entered on the journal. C. U. S. Art. 1. Sec. 5. This, in some respects, answers the purpose of a protest.

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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[39], and are first bestowed by them[1]; although their grants are not effectual
169 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 ([39]). 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 com-

1 4 Inst. 29.

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39. All bills for raising a revenue shall originate in the house of representatives, C. U. S. Art. 1. Sec. 7; but the senate may propose, or concur with amendments, as on other bills, Ib....Money bills shall, in no instance, be altered by the senate of Virginia, but wholly approved or rejected. C. V. Art. 8.

(39.) In the committee of supply, any member of the committee, (though it is looked upon as the peculiar province of the chancellor of the exchequer) may propose such a scheme of taxation as he thinks proper. Post. p. 308. So that in fact, all taxes seem to originate with the crown and it's ministers.

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mons not being the *sole* persons taxed, this cannot be the reason of their having the *sole* right of raising and modelling the supply. The true reason, arising from the spirit of our constitution, seems to be this. The lords being a permanent hereditary body, created at pleasure by the king, are supposed more liable to be influenced by the crown, and when once influenced to continue so, than the commons, who are a temporary elective body, freely nominated by the people. It would, therefore, be extremely dangerous, to give the lords any power of framing new taxes for the subject; it is sufficient that they have a power of rejecting it, 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[40]; 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[m] mentions one case, founded on the practice of parliament in the reign of Henry VI[n], wherein he thinks the lords may alter a money bill: and that is, if the commons grant a tax, as that of tonnage 170
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 com-

m On parliaments, 65, 66.

n Year book, 33 Hen. VI. 17. But see the answer to this case by sir Heneage Finch. Com. Journ. 22 Apr. 1671.

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40. See the last note in the preceding page.

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mons, all amendments in the mode of taxation are sure to be rejected.

Next, with regard to the elections of knights, citizens, and burgesses[41]; we may observe, that herein consists the exercise of the democratical part of our constitution: for in a democracy there can be no exercise of sovereignty but by suffrage, which is the declaration of the people's will. In all democracies, therefore, it is of the utmost importance to regulate by whom, and in what manner, the suffrages are to be given. And the Athenians were so justly jealous of this prerogative, that a stranger, who interfered in the assemblies of the people, was punished by their laws with death: because such a man was esteemed guilty of high treason, by usurping those rights of sovereignty, to which he had no title. In England, where the people do not debate in a collective body but by representation, the exercise of this sovereignty consists in the choice of representatives. The laws have therefore very strictly guarded against usurpation or abuse of this power, by many salutary provisions; which may be reduced to these three points, 1. The qualifications of the electors. 2. The qualifications of the elected. 3. The proceedings at elections.

1. As to the qualifications of the electors. The true reason of requiring any qualification, with regard to property, in voters, is to exclude such persons as are in so mean a situation that they are esteemed to have no will of their own[42]. If these persons

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41. As to the elections of representatives to congress. See C. U. S. Art. 1. Sec. 2. L. V. 1792. Sessions acts, c. 1. 1801, c. 24. And for elections to the state legislature, see C. V. Art. 7. L. V. 1785, c. 55. Edi. 1794, c. 17, 61. Sess. acts 1797, c. 15. 1798, c. 14. Appendix to Vol. I. Part I. Notes C. and D.

42. The electors of representatives to congress, in each state, shall have the qualifications requisite for electors of the most numerous branch of the state legislature. C. U. S. Art. I. All men having sufficient evidence of permanent common interest with, and attachment to the community, have the right of suffrage. Bill of Rights, Art. 6. This, in Virginia, as ascertained by law, consists

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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 171
true theory and genuine principles of liberty, every member of the community, however poor, should have a vote in electing those delegates, to whose charge is committed the disposal of his property, his liberty, and his life. But, since that can hardly be expected in persons of indigent fortunes, or such as are under the immediate dominion of others, all popular states have been obliged to establish certain qualifications; whereby some, who are suspected to have no will of their own, are excluded from voting, in order to set other individuals, whose wills may be supposed independent, more thoroughly upon a level with each other.

And this constitution of suffrages is framed upon a wiser principle, with us, than either of the methods of voting, by centuries or by tribes, among the Romans. In the method by centuries, instituted by Servius Tullius, it was principally property, and not numbers, that turned the scale: in the method by tribes, gradually introduced by the tribunes of the people, numbers only were regarded, and property entirely overlooked. Hence the laws passed by the former method, had usually too great a tendency to aggrandize the patricians or rich nobles; and those by the latter had too much of a levelling principle. Our constitution steers between the two extremes. Only such are entirely excluded, as can have no will of their own: there is hardly a free agent to be found who is not entitled to a vote in some place or other in the kingdom. Nor is comparative wealth, or property, entirely disregarded in elections; for though the richest man has only one vote at one place, yet, if his property be at all diffused,

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in a freehold estate, at least in twenty-five acres of land, with a house thereon equal to twelve feet square, or fifty acres of unimproved land, or a lot, or part of a lot of land in a city or town established by act of assembly, with a house thereon of the like superficial content. L. V. 1785, c. 55. Edi. 1794, c. 17.

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he has probably a right to vote at more places than one, and therefore has many representatives[43]. This is the spirit of our constitution: not that I assert it is in fact quite so perfect[n] as I have
172 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 ([43]).

n The candid and intelligent reader will apply this observation to many other parts of the work before him, wherein the constitution of our laws and government are represented as nearly approaching to perfection; without descending to the invidious task of pointing out such deviations and corruptions, as length of time and a loose state of national morals have too great a tendency to produce. The incurvations of practice are then the most notorious when compared with the rectitude of the rule; and to elucidate the clearness of the spring, conveys the strongest satire on those who have polluted or disturbed it.

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43. This was partly the case also in Virginia, so far as relates to members of the general assembly; these being chosen in the different counties on their respective court days, which are generally different, a man might have voted in several different counties if disposed to do so. But the elections for members to congress being held on the same day, in every part of the state, it can rarely happen that any man can vote for more than one representative to congress. V. L. 1785, c. 55. 1792, c. 1. Sessions acts.

But the law is now altered in Virginia, all elections for members to the general assembly being now held on the same day, to wit, on the fourth Wednesday in April, yearly, which is also the day on which representatives to congress are to be chosen, in those years, wherein elections are by the constitution and laws of the United States appointed to be held. See L. V. 1798, c. 14.

(43) The following strictures upon this passage, occur in Mr. Burgh's Political Disquisitions, Vol. I. p. 80, 81. "If judge Blackstone did, at the time he wrote the 172d page of his Commentaries, recollect the miserable state of representation in our times, it is inconceivable how he could bring himself to write as he has done." "Only such are entirely excluded from voting for members," says he, "as can have no will of their own" (meaning poor and dependent people without property.) "There is hardly a free agent to be found, but what is entitled to a vote in some place or other in the kingdom." Did the learned judge consider what he himself has observed, that the borough members are four times as numerous as the county members; that a few thousands of electors send in the majo-

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But to return to our qualifications; and first those of electors for knights of the shire. 1. By statute 8 Hen. VI. c. 7, and 10 Hen. VI. c. 2, (amended by 14 Geo. III. c. 58,) the knights of the shire shall be chosen of people, whereof every man shall have freehold to the value of forty shillings by the year within the county; which (by subsequent statutes) is to be clear of all charges and deductions, except parliamentary and parochial taxes. 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

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rity of the house; that in many places a handful of beggars sends in as many members as the great and rich county of York or city of Bristol? Did the learned judge consider these shocking absurdities and monstrous disproportions, or did he consider the alarming influence the court has in parliament, when he wrote what follows, viz. "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." What! are we to be put off with a cold "*If*," in a case where our country lies bleeding to death? "*If* any alteration might be wished"....Let us go on then, and say, "*If*" the deliverance of ourselves and posterity might be wished; "*If*" any alteration of what must bring us to ruin might be wished; any alteration from a mockery rather than the reality of representation; any alteration from 300 placemen and pensioners sitting in the house of commons; any alteration from a corrupt court's commanding the majority of the elections into the house, and the majority of the votes, when in it; any alteration from the parliament's becoming a mere outwork of the court; if it is at last to be doubted whether the saving of our country is to be wished, what is to become of us? Had a hackneyed court hireling written in this manner, it had been no matter of wonder; but if the most intelligent men in the nation are to endeavour to persuade the people that there is hardly room for a wish; that there is scarce any thing capable of alteration for the better, (the judge's four volumes are a continued panegyric) at the very time when there is hardly any thing in the condition, it ought to be in; at the time when we have upon us every symptom of a declining state; when we are sinking in a bottomless gulph of debt and corruption; the spirit of the constitution gone, the foundations of public security shaken, and the whole fabric ready to come down in ruin upon our heads, if they, who ought to be the watchmen of the public weal, are thus to damp all proposals for redress of grievances....*Quo res summa loco?* In what condition is this once free and enlightened people likely soon to be?

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represented: these estates must be freehold, that is, for term of life at least[44]; because beneficial leases for long terms of years were not in use at the making of these statutes, and copyholders were then little better than villeins, absolutely dependent upon their lords: this freehold must be of forty shillings annual value; because that sum would then, with proper industry, furnish all the necessaries of life, and render the freeholder, if he pleased, an independent man. For bishop Fleetwood, in his *chronicon preciosum*, written at the beginning of the present century, has fully proved forty shillings, in the reign of Henry VI, to have been equal to twelve pounds *per annum* in the reign of queen Anne; and, as the value of money is very considerably lowered since the bishop wrote, I think we may fairly conclude, from this and other circumstances, that what was equivalent to twelve pounds in his days, is equivalent to twenty at present. The other less important qualifications of the electors for counties in England and Wales, may be collected from the statutes cited in the margin[o]; which direct, 2. That no person under twenty-one years of age shall be capable of voting for any member[45]. 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,
173 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[46]. 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

o 7 and 8 W. III. c. 25. 10 Ann. c. 23. 31 Geo. II. c. 14. 3 Geo. III. c. 24. 2 Geo. II. c. 21. 18 Geo. II. c. 18.

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44. V. L. 1785, c. 55. Edi. 1794, c. 17, accordant.

45. V. L. 1785, c. 55. Edi. 1794, c. 17, accordant.

46. V. L. 1736, c. 1. Edi. 1769, accordant.

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descent, marriage, marriage-settlement, will[47], or promotion to a benefice or office. 6. That no person shall vote in respect of an annuity or rent-charge, unless registered with the clerk of the peace twelve calendar months before. 7. That in mortgaged or trust estates, the person in possession, under the above-mentioned restrictions, shall have the vote. 8. That only one person shall be admitted to vote for any one house or tenement, to prevent the splitting of freeholds[48]. 9. That no estate shall qualify a voter, unless the estate has been assessed to some land tax aid, at least twelve months before the election: 10. That no tenant by copy of court roll shall be permitted to vote as a freeholder. Thus much for the electors in counties.

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, 174
pro re nata, the most flourishing towns to send representatives to parliament. So that as towns increased in trade, and grew populous, they were admitted to a share in the legislature. But the misforture is, that the deserted boroughs continued to be summoned[49], 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:

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47. V. L. 1736, c. 1, accordant. But the act of 1785, c. 55, reduces the time to six months. Edi. 1794, c. 17.

48. In right of land holden by parceners, &c. but one vote shall be given, unless the quantity of land, in case of partition, be sufficient to entitle every one of them to vote separately. The laws of Virginia are silent, in respect to the other provisions noticed by the Commentator. See V. L. 1785, c. 55. Edi. 1794, c. 17.

49. To what gross absurdities, says Mr. Locke, the following of custom, when reason has left it, may lead, we may be satisfied, when we see the bare name of a town, of which there remains not so much as the ruins, where scarce so much housing as a sheep-cot, or more inhabitants than a shepherd, are to be found, send as many representatives to the grand assembly of law-makers, as a whole county, numerous in people, and powerful in riches. On Gov. c. 13.

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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[p]. Hence the members for boroughs now bear above a quadruple proportion to those for counties[50], 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[q]. But it was king James the first, who indulged them with the permanent privilege to send constantly two of their own body; to serve for those students who, though useful members of the community, were neither concerned in the landed nor the trading interest; and to protect in the legislature the rights of the republic of letters. The right of election in boroughs is various, depending entirely on the several charters, customs, and constitutions of the respective places, which has occasioned infinite disputes; though now by statute 2 Geo. II. c. 24, the right of voting for the future shall be allowed according to the last determination of the house of commons concerning it. And by statute 3 Geo. III. c. 15, no freeman of any city or borough (other than such as claim by birth, marriage, or servitude) shall be entitled to vote therein, unless he hath been admitted to his freedom twelve calendar months before[51].

p 4 Inst. 16.

q Prynne parl. writs, I. 342.

50. Mr. Burgh gives a list of twenty-eight boroughs, in which the majority of the electors comes below twenty, which send fifty six members to parliament. The boroughs of Newton and Old Sarum, have each one elector and two representatives: and the borough of Marlborough two of each. According to him, 254 members of the British parliament are actually elected by 5,723 votes: the whole number of members being 558, Political Disquisitions, 1 vol. p. 45, &c.

51. The right of suffrage in Williamsburg, Norfolk, and Richmond stands nearly upon the same footing. L. V. 1785, c. 55. Edi. 1794, c. 17. 1788, c. 63. Sess. Acts.

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2. Next, as to the qualifications of persons to be *elected* members of the house of commons. Some of these depend upon the law and custom of parliaments, declared by the house of commons[r]; others upon certain statutes. And from these, it appears, 1. That they must not be aliens born[s], or minors[t52]. 2. That they must not be any of the twelve judges[u 53], because they sit in the lords' house; nor of the clergy[w], for they sit in the convocation; nor persons attainted of treason or felony[x], for they are unfit to sit any where. 3. That sheriffs of counties, and mayors and baliffs of boroughs, are not eligible in their respective jurisdictions, as being returning officers[y]; but that sheriffs of one county are eligible to be knights of another[z 54]. 4. That, in strictness, all members ought to have heen inhabitants of the places for which they are chosen[a 55]: but this, having

r 4 Inst. 47, 48. s See p. 162. t Ibid.
u Com. Journ. 9 Nov. 1605.
w Com. Journ. 13 Oct. 1553. 8 Feb. 1620. 17 Jan. 1661.
x Com. Journ. 21 Jan. 1580. 4 Inst. 47.
y Bro *Abr. t. Parliament.* 7. Com. Journ. 25 June, 1604. 14 Apr. 1614. 22 Mar. 1620, 2, 4. 15 June. 17 Nov. 1685. Hal. of parl. 114.
z 4 Inst. 48. Whitlocke of Parliament, ch. 99, 100, 101.
a Stat. 1 Hen. V. c. 1. 23 Hen VI. c. 15.

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52. See page 162, note 26, 28. C. U. S. Article 1. § 2, 3. C. V. Article 6. L. V. 1785, c. 55. 1786, c. 10. Edi. 1794, c. 17, 110.

53. No person holding any office under the United States shall be a member of either house during his continuance in office. C. U. S. Article 1. §. 6. The same provision as to the state legislature. C. V. Article 3, 14. Members of congress are ineligible to, and incapable of holding any legislative, executive, or judicial office, under the commonwealth of Virginia. L. V. 1788. c. 38. Sess. Acts, Edi. 1794, c. 36. And, also, all persons receiving any emolument from the United States. Sess. Acts, 1798, ch. 15.

54. Sheriffs are altogether excluded from the Legislature, C. V. Art. 14. So, also, are all ministers of the gospel of every denomination, Ibid.

55. C. V. Art. 5. accordant, as to members of the state legislature, V. L. 1788, c. 2. 1792, c. 1, and 1801, c. 24, require the same thing as to representatives in congress. But the constitution of the U. S. does not.

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been long disregarded, was at length entirely repealed by statute 14 Geo. III. c. 58. 5. That no persons concerned in the management of any duties or taxes created since 1692, except the commissioners of the treasury [b], nor any of the officers following[c], (*viz.* commissioners of prizes, transports, sick and wounded, wine licences, navy, and victualling; secretaries or receivers of prizes; comptrollers of the army accounts; agents for regiments; governors of plantations and their deputies; officers of Minorca or Gibraltar; officers of the excise and customs; clerks or deputies in the several offices of the treasury, exchequer, navy, victualling, admiralty, pay of the army or navy, secretaries of state, salt, stamps, appeals, wine licences, hackney coaches, hawkers and pedlars) nor any persons that hold any new office under the crown created since 1705 [d], are capable of being elected or sitting as members. 6. That no person having a pension under the crown during pleasure, or for any term of years, is capable of being elected or sitting [e] [56] 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 [f] [57]. 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 [g]. This is reduced to a still

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b Stat. 5 and 6 W. and M. c. 7.

c Stat, 11. and 12 W. III. c. 2. 12 and 13 W. III. c. 10. 6 Ann. c. 7. 15 Geo. II. c. 22.

d Stat. 6 Ann. c, 7.

e Stat. 6 Ann. c. 7. 1 Geo. c. 66.

f Stat. 6 Ann. c. 7,

g Stat. 23 Hen. VI. c. 15.

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56. But what if the pension be for life, or hereditary? The pensioner in this case is not ineligible. "It was reckoned, there were "232 members of the first parliament of George I. who had places, "pensions, or titles, besides a great many brothers, and heirs apparent of the nobility, or persons otherwise likely to be under undue influence; the number of which was not below 50, which added "to the 232, makes 282. A frightful majority on the side of the "court. And there is no reason to suppose the number fewer, now, "than it was then." Burgh's Political Disquisitions. Vol. 2. p. 44.

57. The person so accepting is, ineligible during his continuance in office, since he cannot be a member, C. U. S. Article, 1, §. 6. C. V. Art. 3, 14.

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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[h]: which somewhat balances the ascendant which the boroughs have gained over the counties, by obliging the trading interest to make choice of landed men: and of this qualification the member must make oath, and give in the particulars in writing, at the time of his taking his seat[i] *. But, subject to these standing restrictions 177
and disqualifications, every subject of the realm is eligible of common right: though there are instances, wherein persons in particular circumstances have forfeited that common right, and have been declared ineligible *for that parliament* by a vote of the house of commons[j], or *for ever* by an act of the legislature[k]. But it was an unconstitutional prohibition, which was grounded

h Stat. 9 Ann. c. 5.
i Stat. 33 Geo. II. c. 20.
j See page 163.
k Stat. 7 Geo. I. c. 28.

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* By statute 22 Geo. III. c. 45, every person who shall directly or indirectly, by himself or by any other to his use, hold any contract made with the commissioners of the treasury, navy, or victualling-office, or the master-general or board of ordnance, or any other person, for, or on account of the public service; or shall, in pursuance of any such contract, furnish any money to be remitted abroad, or any wares or merchandize to be used in the service of the public, shall be incapable of being elected or sitting or voting in the house of commons, during the time that he shall hold such contract ([57].)

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(57). " And if any person disqualified by such contract shall sit " in the house he shall forfeit 500*l.* for every day; and if any person " who engages in a contract with government, admits any member " of parliament to a share of it, he shall forfeit 500*l.* to the prosecu- " tor."....*Christian.*

This act is in perfect unison with the principles of the federal constitution, and well deserves to be adopted by congress, as a pattern.

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on an ordinance of the house of *lords*[l], and inserted in the *king's* writs, for the parliament holden at Coventry, 6 Hen IV, that no apprentice or other man of the law should be elected a knight of the shire therein[m]: in return for which, our law books and historians[n] have branded this parliament with the name of *parliamentum indoctum*, or the lack-learning parliament; and Sir Edward Coke, observes, with some spleen[o], that there was never a good law made thereat.

3. The third point, regarding elections, is the method of proceeding therein[58]. This is also regulated by the law of parliament, and the several statutes referred to in the margin[p]; all which I shall blend together, and extract out of them a summary account of the method of proceeding to elections.

As soon as the parliament is summoned, the lord chancellor (or if a vacancy happens during the sitting of parliament[59], the speaker, by order of the house; and without such order, if a vacancy happens by death, or the member's becoming a peer,
178 in the time of a recess for upwards of twenty days) sends his

l 4 Inst. 10, 48. Pryn. Plea for Lords, 379. 2 Whitelocke, 359, 368.

m Pryn. on 4 Inst. 13. n Walsingh. *A. D.* 1405.

o 4 Inst. 48.

p 7 Hen. IV. c. 15. 8 Hen. VI. c. 7. 23 Hen. VI. c. 14. 1 W. and M. st. 1. c. 2. 2 W. and M. st. 1 c. 7. 5 and 6 W. and M. c. 20. 7 W. III. c. 4. 7 and 8 W. III. c. 7. and c. 25. 10 and 11 W. III. c. 7. 12 and 13 W. III c. 10. 6 Ann. c. 23. 9 Ann. c. 5. 10 Ann. c. 19. and c. 33. 2 Geo. II. c. 24. 8 Geo. II. c. 30. 18 Geo. II. c. 18. 19 Geo. II. c. 28. 10 Geo. III. c. 16. 11. Geo. III. c. 42 14 Geo. III. c. 15. 15 Geo. III. c. 36. 28 Geo. III. c. 52.

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58. For the method of proceeding at all elections in Virginia, see V. L. 1785, c. 55. Edi. 1794, c. 17. Sessions acts, 1788, c. 2 1792. c. 1. 1801, c. 24.

59. When vacancies happen in the representation in congress from any state, the executive authority thereof shall issue writs of election to fill such vacancies. C. U. S. Art. 1. §. 2. If a vacancy happen in the general assembly of Virginia, the speaker shall issue the writ: but not without the special order of the house, if the vacancy be occasioned by acceptance of an office. V. L. 1785. c. 55. Edi. 1794. c. 17.

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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 [q]; 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 [60], at the next county court that shall happen after the delivery of the writ. The county court is a court held every month or oftner 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: 179

q In the borough of New-Shoreham in Sussex, wherein certain freeholders of the county are entitled to vote by statute 11 Geo. III. c. 55, the election must be within *twelve* days, with *eight* days notice of the same.

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60. In Virginia, elections may be conducted by the under sheriff of the county, in the absence of the high sheriff. V. L. 1785, c. 55. Edi. 1794, c. 17. Sess. acts, 1792, c. 1. 1801, c. 24. The times, places, and manner of holding elections for senators and representatives shall be prescribed in each state by the legislature thereof: But congress may at any time, by law, make or alter such regulations, except as to the places of choosing senators. C. U. S. Art. 1. §. 4. V. L. 1798, c. 14, fix the fourth Wednesday in April, in every second year, as the time; and 1792, c. 1, the county court-houses as the places, of chosing federal representatives. The members of the state legislatures are directed to be chosen at the county court-houses on the same day annually. V. L. 1797, c. 15, and 1798, c. 14.

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and, in all such cases, ten days public notice must be given of the time and place of the election.

And, as it is essential to the very being of parliament, that elections should be absolutely free, therefore, all undue influences upon the electors are illegal, and strongly prohibited. For Mr. Locke ranks it among those branches of trust in the executive magistrate, which, according to his notions, amount to a dissolution of the government, "if he employs the force, trea-"sure, and officers of the society to corrupt the representatives, "or openly to preingage the electors, and prescribe what man-"ner of persons shall be chosen. For thus to regulate candi-"dates and electors, and new model the ways of election, what "is it, says he, but to cut up the government by the roots, and "and poison the very fountain of public security?" As soon, therefore, as the time and place of election, either in counties or boroughs, are fixed, all soldiers quartered in the place, are to remove, at least one day before the election, to the distance of two miles or more; and not to return till one day after the poll is ended[61]. 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, presume to intermeddle in elections, by persuading any voter or dissuading him, he forfeits 100*l*, and is disabled to hold any office[62].

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61. A similar regulation in the elections of representatives to congress, seems highly proper, and necessary. See the Journals of Congress, March, 1792.

62. If any sheriff shall, directly, or indirectly, so interfere in the elections of senators or delegates, as to shew partiality for any candidates, he shall forfeit and pay the sum of 200*l*. and moreover be deprived of his right of voting for two years. V. L. 1784, c. 20. Sessions acts. But if the number of votes for several candidates be equal, he may declare which he will elect, and return him accordingly. V. L. 1785, c. 55. Edi. 1794, c. 17.

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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[63], give any money or entertainment to his electors, or promise to give any, either to particular persons, or to the place in general, in order to his be- 180
ing 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, as well he that takes, as he that offers such bribe, forfeits 500*l*, and is for ever disabled from voting and holding any office in any corporation; unless, before conviction, he will discover some other offender of the same kind, and then he is indemnified for his own offence[s]. 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 for which he was chosen, four pounds to be returned member, and was for that premium elected. But, for this offence the borough was amerced, the member was removed, and the officer fined and imprisoned[t]. 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.

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

t 4 Inst. 23. Hale of parl. 112. Com. Journ. 10 and 11 May, 1571.

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63. Our laws prohibit bribery and corruption at any time. V. L. 1785, c. 55. Edi. 1794, c. 17. Sess. Acts of 1783, c. 2. 1792, c. 1. 1801, c. 24. Sess. Acts 1798, c. 10.

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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[64]; and the electors both in counties and boroughs are also compellable to take the oath of abjuration and that against bribery and corruption. And it might not be amiss, if the members elected, were bound to take the latter oath, as well as the former; which in all probability would be much more effectual, than administering it only to the electors[65].

The election being closed, the returning officer in boroughs
181 returns his precept to the sheriff, with the persons elected by the majority[66]: 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. The form and manner of proceeding upon such petition are now regulated by statute 10 Geo. III. c. 16, (amend-

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64. V. L. 1785, c. 55. Edi. 1794, c. 17. accordant.

65. It is most devoutly to be wished that a similar institution could be found in our laws.

66. The manner of making the returns in Virginia is prescribed at length, in the act of 1785, c. 55, and the penalty on making a false return, is by the same act fixed at 100*l.* Edi. 1794, c. 17. See also, as to the returns of representatives to congress, V. L. 1788, c. 2. 1792, c. 1. 1801, c. 24, Sessions Acts.

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ed by 11 Geo. III. c. 42, and made perpetual by 14 Geo. III. c. 15,) which directs the method of chusing by lot a select committee of fifteen members, who are sworn well and truly to try the same, and a true judgment to give according to the evidence[67]. And this abstract of the proceedings at elections of knights, citizens, and burgesses, concludes our inquiries into the laws and customs more peculiarly relative to the house of commons.

VI. I proceed now, sixthly, to the method of making laws; 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[68]. The speaker of the house of lords, whose office it is to preside there, and manage the formality of business, is the lord chancellor, or keeper of the king's great seal, or any other appointed by the king's commission: and, if none be so appointed, the house of lords (it is said) may elect. 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, if a lord of parliament, may. In each house the act of the majority binds the whole; and this majority is de- 182
clared by votes openly and publicly given: not as at Venice, and many other senatorial assemblies, privately or by ballot. This latter method may be serviceable, to prevent intrigues and un-

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67. See the method of proceeding in this case. V. L. 1785, c. 55. 1788, c. 52. Edi. 1794, c. 17, 39. Acts of 1797, c. 15. and L. U. S. 5 Cong. c. 25. See also V. L. 1798, c. 10.

68. The house of representatives in congress shall choose their speaker and other officers. But the vice-president of the United Sta es is by his office president of the senate....but in his absence the senate may choose a president *pro tempore*. C. U.S. Art. 1. §. 2. 3. In the general assembly of Virginia, each house chooses it's own speaker. C. V. Art. 7. The manner of proceeding, both in congress, and in the state legislature, is in general conformable to the rules of the British parliament, as here mentioned by the commentator.

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constitutional 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. Formely, 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[t]: 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 skeleton of the bill. In the house of lords, if the bill begins there, it is (when of a private nature) referred to two of the judges, to examine and report the state of the facts alleged, to
183 see that all necessary parties consent, and to settle all points of technical propriety. This is read a first time, and at a convenient distance a second time; and after each reading, the speaker opens

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

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to the house the substance of the bill, and puts the question, whether it shall proceed any farther. The introduction of the bill may be originally opposed, as the bill itself may at either of the readings; and, if the opposition succeeds, the bill must be dropped for that session: as it must also, if opposed with success in any of the subsequent stages.

After the second reading, it is committed, that is, referred to a committee; which is either selected by the house in matters of small importance, or else, upon a bill of consequence, the house resolves itself into a committee of the whole house. A committee of the whole house is composed of every member; and, to form it, the speaker quits the chair, (another member being appointed chairman) and may sit and debate as a private member. In these committees the bill is debated clause by clause, amendments made, the blanks filled up, and sometimes the bill entirely new modelled. After it has gone through the committee, the chairman reports it to the house with such amendments as the committee have made; and then the house reconsiders the whole bill again, and the question is repeatedly put upon every clause and amendment. When the house hath agreed or disagreed to the amendments of the committee, and sometimes added new amendments of it's own, the bill is then ordered to be engrossed, or written in a strong gross hand, on one or more long rolls (or presses) of parchment sewed together. When this is finished, it is read a third time, and amendments are sometimes then made to it; and if a new clause be added, it is done by tacking a separate piece of parchment on the bill, which is called a ryder[u]. The speaker then again opens the contents; and, holding it up in his hands, puts the question, whether the bill shall pass. If this is agreed to, the title to it is then settled; which used to be a general one for all the acts passed in the session, till in the first year of Henry VIII, distinct titles were introduced for each chapter. After this, one of the members is directed to carry it to the lords, and desire their concurrence; who, attended by several more, carries it to the bar of the house of peers, and there delivers it to their speaker, who comes down from his woolsack to receive it. 184

u Noy. 84.

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It there passes through the same forms as in the other house, (except engrossing, which is already done) and, if rejected, no more notice is taken, but it passes *sub silentio*, to prevent unbecoming altercations. But if it is agreed to, the lords send a message by two masters in chancery (or upon matters of high dignity or importance, by two of the judges) that they have agreed to the same: and the bill remains with the lords, if they have made no amendment to it. But if any amendments are made, such amendments are sent down with the bill to receive the concurrence of the commons. If the commons disagree to the amendments, a conferrence 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 the bill is sent back to the lords by one of the members, with a message to acquaint them therewith. The same forms are observed, *mutatis mutandis*, when the bill begins in the house of lords. But when an act of grace or pardon is passed, it is first signed by his majesty, and then read once only in each of the houses, without any new engrossing or amendment[w]. And when both houses have done with any bill, it always is deposited in the house of peers, to wait the royal assent;[69] except in the

w D'ewes journ. 20. 73 Com. journ. 17 June, 1747.

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69. Every bill which shall have passed the house of representatives and the senate shall, before it becomes a law, be presented to the president of the United States: if he approve, he shall sign it; but if not, he shall return it with his objections to that house in which it shall have originated, who shall enter the objections at large on their journals and proceed to reconsider it. If after such reconsideration two thirds of that house shall agree to pass the bill, it shall be sent, together with the objections to the other house, by which it shall likewise be reconsidered, and if approved by two thirds of that house it shall become a law. But in all such cases the votes of both houses shall be determined by yeas and nays, and the names of the persons voting for and against the bill shall be entered on the journal of each house, respectively. C. U. S. Art. 1. §. 7. The executive of the commonwealth has no negative on the proceedings of the general assembly, either absolute or qualified.

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case of a bill of supply, which after receiving the concurrence of the lords is sent back to the house of commons[x].

The royal assent may be given two ways: 1. In person; when the king comes to the house of peers, in his crown and royal robes, and sending for the commons to the bar; the titles of all the bills that have passed both houses are read; and the king's answer is declared by the clerk of the parliament in Norman-French: 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, 185
the clerk usually declares, "*le roy le veut*, the king wills it so to "be;" if to a private bill, "*soit fait comme il est desiré*, be it as "it is desired." If the king refuses his assent, it is in the gentle language of "*le roy s'avisera*, the king will advise upon it." When a bill of supply is passed, it is carried up and presented to the king by the speaker of the house of commons[y]; and the royal assent is thus expressed, "*le roy remercie ses loyal subjects*, "*accepte lour benevolence, et aussi le veut*, the king thanks his "loyal subjects, accepts their benevolence, and wills it so to be." In case of an act of grace, which originally proceeds from the crown, and has the royal assent in the first stage of it, the clerk of the parliament thus pronounces the gratitude of the subject; "*les prelats, seigneurs, et commons, en ce present parliament as-*"*semblees, au nom de touts vous autres subjects, remercient tres*"*humblement votre majeste, et prient a Dieu vous donner en sante*"*bone vie et longue;* the prelates, lords, and commons, in this pre-"sent parliament assembled, in the name of all your other sub-

x Com. journ. 24 July, 1660.

y *Rot. Parl.* 9. *Hen. IV.* in Pryn. 4. Inst. 30, 31.

If any bill shall not be returned by the president of the U. States, within ten days, Sundays excepted, after it shall have been presented to him, the same shall be law, in like manner as if he had signed it, unless the congress by their adjournment prevent its return, in which case it shall not be law. C. U. S. Art. 1. §. 7.

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"jects, most humbly thank your majesty and pray to God to grant "you in health and wealth long to live[z]." 2. By the statute 33 "Hen. VIII, c. 21, the king may give his assent by letters patent under his great seal, signed with his hand, and notified in his absence to both houses assembled together in the high house. And, when the bill has received the royal assent in either of these ways, it is then, and not before, a statute or act of parliament.

This statute or act is placed among the records of the kingdom[70]; there needing no formal promulgation to give it the force of law, as was necessary by the civil law with regard to the emperor's edicts: because every man in England is, in judgment of law, party to the making of an act of parliament, being present thereat by his representatives. However, a copy thereof, is usually printed at the king's press, for the information of the whole land. And formerly, before the invention of printing, it was used to be published by the sheriff of every county; the king's writ being sent to him at the end of every session, together with a transcript of all the acts made at that
186 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[a].

An act of parliament, thus made, is the exercise of the highest authority that this kingdom acknowledges upon earth. It

z D'ewes journ. 35. a 3 Inst. 41. 4 Inst. 26.

70. The statutes made by congress are deposited in the office of the secretary of state, there to be safely kept, and are to be recorded in books provided for that purpose, L. U. S. 1 cong. 1 Sess. c. 14. The acts of the state legislature are preserved by the clerk of the house of delegates; by an act of 1796, he is allowed a salary as keeper of the rolls. As to the manner of promulgating the acts of congress and of the state legislature. See note 1. p. 46. Vol. I. Part I.

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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[b]: but now by statute 1 W. and M. st. 2. c. 2, it is declared, that the suspending or dispensing with laws by regal authority, without consent of parliament, is illegal[71].

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[72]; 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[c]. It

b Finch. L. 81. 234. Bacon. Elem. c. 19.

c 4 Inst. 28.

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71. All power of suspending laws, or the execution of laws, by any authority, without the consent of the representatives of the people, is injurious to their rights, and ought not to be exercised. Bill of Rights, Art. 7.

72. Neither house, during the session of congress, shall, without the consent of the other, adjourn for more than three days, nor to any other place than that in which the two houses shall be sitting. C. U. S. Art. 1. §. 5. In case of disagreement between them, with respect to the time of adjournment, (but in no other case whatsoever, I presume, Art. 1. §. 7.) the president of the United States may adjourn them to such time as he shall think proper. C. U S. Art. 2. §. 3. The governor of the commonwealth shall not prorogue, or adjourn the assembly during their sitting, nor dissolve them at any time. C. V. Art. 10.

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hath 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[d]. Otherwise, besides the indecorum of a
187 refusal, a prorogation would assuredly follow; which would often be very inconvenient both to 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[73]. Both houses are necessarily prorogued at the same time; it not being a prorogation of the house of lords, or commons, but of the parliament. The session is never understood to be at an end until a prorogation: though, unless some act be passed, or some judgment given in parliament, it is in truth no session at all[e]. 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

d Com. Journ. *passim. e. g.* 11 June, 1572. 5 April, 1604. 4 Jun. 14 Nov. 18 Dec. 1621. 11 July, 1625. 13 Sept. 1660. 25 July, 1667. 4 Aug. 1685. 24 Feb. 1691. 21 June, 1712. 16 April, 1717. 3 Feb. 1741. 10 Dec. 1745. 21 May, 1768.

e 4 Inst. 28. Hale of parl. 38. Hut. 61.

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73. As the executive authority of the United States cannot interfere in the adjournments of congress, Art. 1. §. 7, except in case of disagreement between the two houses, Art. 2. §. 3, it seems sufficiently evident that he cannot in any case prorogue them. The executive of Virginia is expressly prohibited from exercising this authority, as was mentioned in the last note. C. V. Art. 10.

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day or two[f]: 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[g], whether giving the royal assent to a single bill did not of course put an end to the session. And, though it was then resolved in the negative, yet the notion was so deeply rooted, that the statute 1 Car. I. c. 7, was passed to declare, that the king's assent to that and some other acts should not put an end to the session; and, even so late as the reign of Charles II, we find a proviso frequently tacked to a bill[h], 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[i] to call them together by proclamation, with fourteen days notice of the time appointed for their re-assembling. 188

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 experienced by the unfortunate king Charles the first; who, having unadvisedly passed an act to continue the parliament then in being till such time as it should please to dissolve itself, at last fell a sacrifice to that inordinate power, which he himself had consented to give them. It is, therefore, extremely necessary, that the crown should be empowered to regulate the duration of these assemblies, under the limitations which the English constitution has

f Com. Journ. 21 Oct. 1553. g *Ibid.* 21 Nov. 1554.
h Stat. 12 Car. II. c. 1. 22 and 23 Car. II. c. 1.
i Stat. 30 Geo. II. c. 25.

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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 and 8 W. III. c. 15,
189 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[74]. For if either the legislative body were perpetual; or might last for the life of the prince who convened them, as formerly; and were so to be supplied, by occasionally filling the vacancies with new representatives; in these cases, if it were once corrupted, the evil would be past all remedy: but when different bodies succeed each other, if the people see cause to disapprove of the present, they may rectify 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

74. This is the only method by which either congress, or the state legislature, can be dissolved. The former exists two years, and the latter one, only. C. U. S. Art. 1. §. 2. C. V. Art. 5. 10.

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as duty, to make only such laws as are good. The utmost extent of time that the same parliament was allowed to sit, by the statute 6 W. and M. c. 2, was *three* years; after the expiration of which reckoning from the return of the first summons, the parliament was to have no longer continuance. But by the statute 1 Geo. I. st. 2. c. 38, (in order, professedly, to prevent the great and continued expences of frequent elections, and the violent heats and animosities consequent thereupon, and for the peace and security of the government then just recovering from the late rebellion) this term was prolonged to *seven* years: and, what alone is an instance of the vast authority of parliament, the very same house, that was chosen for three years, enacted 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.

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OF THE KING[1], 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 inti-

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1. "Released from the control of prescriptive authority, Americans determined also to break the fetters of prescriptive opinion, and to make use of the light of reason to guide them in their future arrangements. The rights of Britons made up the sum of their first demands, and of their wishes: but in the pursuit of this object, it was their peculiar happiness to discover, and to obtain what was infinitely more precious: the rights of human nature. They perceived no claim, in reason or justice, that any one man could have, to be, by inheritance, a ruler over millions; nor could they find that the right of hereditary pre-eminence, in any class of men, rested on more tenable ground. It remained then to enquire, whether considerations of national interest, dictated an acquiescence in principles, which reason seemed to disclaim.

"From the documents of history, it was evident that the pretended right of kings was not conceded from a general experience of it's utility, but was a mere usurpation, maintained by violence and fraud. Nor was there a want of proof, that the powers of monarchy had been employed, less for the purpose of diffusing happiness among men, than for that of rendering them subservient, to the ambition and pleasures of a few, who viewed and treated them as cattle, only created to wear the yoke of despotism. It appeared that the great mass of mankind had, in all times past, been held in a state of servitude; that their mental faculties had been stifled by oppression, and the fruits of their bodily labour seized on, to satisfy the rapacious luxury of their rulers. It was perceived, also, that the cruel and destructive wars, which, in all ages, had spread horror and desolation over the earth, arose, not from an inherent enmity in human nature, against itself; not from a savage desire in

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tled 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 tranquility, and to the

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men to destroy each other, but from the insatiable thirst of princes, after false glory, conquest and empire. It was plain to be observed, that as the sense of mutual dependence was lost among men, the obligations of humanity were forgotten; that the insolence and cruelty of monarchs grew with the growth of their power; and that their vanity exacted homage in proportion to the multitude and enormity of their crimes. For the more effectual advancement of the interests of illegitimate authority, fraud had been called in to the aid of force, the holy name of the Almighty himself, had been profaned, and prostituted to the vile purposes of deception, and religion reduced to a system of scandalous hypocrisy.

"Such being the known state of recorded facts, for a people, who were free, to offer voluntary submission to the dominion of princes, would have been as unwise, as to expose themselves to the ferocious rage of prowling wolves and tygers. They would have acted no better than the foolish insect, which, being dazzled with the splendour of the flame, from which it has recently escaped, immediately rushes into it again, to be entirely consumed." Oration in commemoration of American Independence, by T. T. T. of South-Carolina.

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

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

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

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our kings have the same warrant as they had, whether it be to sit upon the throne of their fathers, or to destroy the house of the preceding sovereign, they will then, and not before, possess the crown of England by a right like theirs, *immediately* derived from heaven. The hereditary right which the laws of England acknowledge, owes 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 the one as well as the other.

It must be owned, an elective monarchy seems to be the most obvious, and best suited of any to the rational principles of government, and the freedom of human nature: and accordingly we find from history that, in the infancy and first rudiments of almost every state, the leader, chief magistrate, or prince, hath usually been elective. And, if the individuals who compose that state, could always continue true to first principles, uninfluenced by passion or prejudice, unassailed by corruption, and unawed by violence, elective sucession 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 opi- 193
nions. 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

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be often suspected, and as constantly charged upon the successful, by a splenetic disappointed minority[2]. 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 complaints can appeal is that of the God of battles, the only process by which the appeal, can be carried on is that of a civil and intestine war. An hereditary succession to the crown is therefore now established, in this and most other countries, in order to prevent that periodical bloodshed and misery, which the history of antient imperial Rome, and the more modern experience of Poland and Germany, may shew us are the consequences of elective kingdoms[3].

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2. If the student will peruse the Federalist, (a collection of essays printed in New-York, 1788) No. 68, he will see a very satisfactory answer to these objections, so far as they may be supposed to apply to the election of a president of the United States.

3. "The most plausible plea that has ever been offered in favour of hereditary succession is, that it preserves a nation from civil wars; and were it true, it would be weighty; whereas, it is the most barefaced falsity ever imposed upon mankind. The whole history of England disowns the fact. Thirty kings, and two minors, have reigned in that distracted kingdom since the conquest, in which time, there have been (including the revolution) no less than eight

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2. But, secondly, as to the particular mode of inheritance, it in general corresponds with the feodal path of descents, chalked out by the common law in the succession to landed estates; yet with one or two material exceptions. Like estates, the crown will descend lineally to the issue of the reigning monarch; as it 194
did from king John to Richard II, through a regular pedigree of six lineal generations. As in common descents, the preference of males to females, and the right of primogeniture among the males, are strictly adhered to. Thus Edward V, succeeded to the crown, in preference to Richard his younger brother, and Elizabeth his elder sister. Like lands or tenements, the crown, on failure of the male line, descends to the issue female; according to the antient British custom remarked by Tacitus[a]; "*solent* "*foeminarum ductu bellare, et sexum in imperiis non discernere.*" Thus Mary I succeeded to Edward VI; and the line of Margaret queen of Scots, the daughter of Henry VII, succeeded on failure of the line of Henry VIII, his son. But, among the females, the crown descends by right of primogeniture to the eldest daughter only and her issue; and not, as in common inheritances, to all the daughters at once; the evident necessity of a sole succession to the throne having occasioned the royal law of descents to depart from the common law in this respect: and, therefore, queen Mary, on the death of her brother, succeeded to the crown alone, and not in partnership with her sister Elizabeth. Again: the doctrine of representation prevails in the descent of the crown, as it does in other inheritances; whereby the lineal descendants of any person deceased, stand in the same place as their ancestor, if living, would have done. Thus, Richard II, succeeded his grandfather Edward III, in right of his father the black prince; to the exclusion of all his uncles, his grandfather's younger children. Lastly, on failure of lineal descendants, the crown goes to the next collateral relations of the late king; provided they are lineally descended from the blood royal, that is, from that

a *In vit. Agricolae.*

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civil wars, and nineteen rebellions. Wherefore, instead of making for peace, it makes against it, and destroys the very foundation it seems to stand on." Paine's Common Sense, p. 19. Albany, 1794.

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

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 broken through; or, that there may be a successor, without being the heir, of the king. And this is so extremely reasonable, that without such a power, lodged somewhere, our polity would be very defective. For, let us barely suppose so melancholy a case, as that the heir apparent should be a lunatic,

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an ideot, or otherwise incapable of reigning: how miserable would the condition of the nation be, if he were also incapable of being set aside!....It is, therefore, necessary that this power should be lodged somewhere: and yet the inheritance, and regal dignity, would be very precarious indeed, if this power were *expressly* and *avowedly* lodged in the hands of the subject only, to be exerted whenever prejudice, caprice, or discontent should 196
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. For 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 heir at law: but if the transfer be clogged with any limitations, conditions, or entails, the lands must descend in that channel, so limited and prescribed, and no other.

[b] 1 Hist. P. C. 61.

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In these four points consists, as I take it, the constitutional notion of hereditary right to the throne: which will be still farther
197 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 inquiry 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 generally at last returned back into the old hereditary channel, though sometimes a very considerable period has intervened. And, even in those instances where the succession has been violated, the crown has ever been looked upon as hereditary in the wearer of it. Of which the usurpers themselves were so sensible, that they for the most part endeavoured to vamp up some feeble shew of a title by descent, in order to amuse the people, while they gained the possession of the kingdom. And, when possession was once gained, they considered it as the purchase or acquisition of a new estate of inheritance, and transmitted or endeavoured to transmit it to their own posterity, by a kind of hereditary right of usurpation.

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

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united to another in such a manner, as that one keeps it's government and states, and the other loses them; the latter entirely assimilates with or is melted down in the former, and 198
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 the sons of king Ethelwolf succeeded to each other in the kingdom, without regard to the children of the elder branches, according to the rule of succession prescribed by their father, and confirmed by the wittena-gemote, in the heat of the Danish invasions; and also, that king Edred, the uncle of Edwy, mounted the throne for about nine years, in the right of his nephew a minor, the times being very troublesome and dangerous. But this was with a view to preserve, and not to destroy, the succession; and accordingly Edwy succeeded him.

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

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

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the spot should mount the throne; and the confessor was the
199 next of the royal line then in England. On his decease without issue, Harold II usurped the throne; and almost at the same instant came on the Norman invasion: the right to the crown being all the time in Edgar, sirnamed Atheling (which signifies in the Saxon language *illustrious*, or of royal blood) who was the son of Edward the outlaw, and grandson of Edmund Ironside; or, as Matthew Paris[d] well expresses the sense of our old constitution, "*Edmundus autem latusferreum, rex naturalis de stirpe* "*regum, genuit Edwardum; et Edwardus genuit Edgarum, cui* "*de jure debebatur regnum Anglorum.*"

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

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

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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was the right to possess the crown of England, not to alter the nature of its government. And, therefore, as the English laws 200 still remained 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 perhaps might proceed upon a notion, which prevailed for some time in the law of descents, (though never adopted as the rule of public successions[g]) that when the eldest son was already provided for, (as Robert was constituted duke of Normandy by his father's will) in such a case the next brother was entitled to enjoy the rest of their father's inheritance. But, as he died without issue, Henry at last had a good title to the throne, whatever he might have at first.

Stephen of Blois, who succeeded him, was indeed the grandson of the conqueror, by Adelicia his daughter, and claimed the throne by a feeble kind of hereditary right: not as being the nearest of the male line, but as the nearest male of the blood royal, excepting his brother Theobald; who was earl of Blois, and therefore seems to have waved, as he certainly never insisted on, so troublesome and precarious a claim. The real right was in the empress Matilda or Maud, the daughter of Henry I; the rule of succession being (where women are admitted at all) that the daughter of a son shall be preferred to the son of a daughter. So that Stephen was little better than a mere usurper; and therefore he rather chose to rely on a title by election[h], while

g See lord Lyttleton's Life of Henry II. Vol. I. page 467.

h "*Ego Stephanus Dei gratia assensu cleri et populi in regem Anglorum electus, &c.*" (*Cart. A. D.* 1136. Ric. de Hagustald. 314. Hearne *ad Guil. Neubr.* 711.)

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the empress Maud did not fail to assert her hereditary right by the sword: which dispute was attended with various success, and ended at last in the compromise made at Wallingford, that Stephen should keep the crown; but that Henry, the son of Maud, should succeed him; as he afterwards accordingly did.

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

From Henry II, the crown descended to his eldest son Richard I, who dying childless, the right vested in his nephew Arthur, the son of Geoffrey his next brother: but John, the youngest son of king Henry, seized the throne; claiming, as appears from his charters, the crown by hereditary right[i]: that is to say, he was next of kin to the deceased king, being his surviving brother: whereas Arthur was removed one degree farther, being his brother's son, though by right of representation he stood in the place of his father Geoffrey. And however flimsy this title, and those of William Rufus and Stephen of Blois, may appear at this distance to us, after the law of descents hath now been settled for so many centuries, they were sufficient to puzzle the understandings of our brave, but unlettered ancestors. Nor indeed can we wonder at the number

i "....*Regni Angliae; quod nobis jure competit haereditario.*" Spelm. *Hist. R. Job. apud* Wilkins, 354.

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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[i], whether, even in common inheritances, the child of an elder brother should succeed to the land in right of representation, or the younger surviving brother in right of proximity of blood. Nor is it, to this day, decided in the collateral succession to the fiefs of the empire, whether the order of the stocks, or the proximity of degree, shall take place[k]. 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[l] we find it declared in parliament, "that the law of the crown of England is, "and always hath been, that the children of the king of England, "whether born in England, or elsewhere, ought to bear the in-"heritance after the death of their ancestors. Which law our "sovereign lord the king, the prelates, earls and barons, and "other great men, together with all the commons in parliament "assembled, do approve and affirm for ever."

Upon Richard the second's resignation of the crown, he having no children, the right resulted to the issue of his grand-father 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[m]. 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 re- 203

i Glanv. *l.* 7. *c.* 3.
k Mod. Un. Hist. xxx. 512.
l Stat. 25 Edw. III. st. 2.
m Standford's geneal. hist. 246.

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cover 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[n], though the people unjustly assisted Henry IV, in his usurpation of the crown, yet he was not admitted thereto, until he had declared that he claimed, not as a conqueror, (which he very much inclined to do[o]) 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 entitled 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 law of the crown, as before stated, so in the reign of Henry IV they actually exerted their right of new-settling the succession to the crown. And this was done by the statute 7 Hen. IV. c. 2, whereby it is enacted, "that the inheritance of the crown and realms of England and "France, and all other the king's dominions, shall be *set and* "*remain*[p] 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
204 body issuing, with remainder to lord Thomas, lord John, and lord Humphrey, the king's sons, and the heirs of their bodies,

n Hist. C. L. c. 5. o Seld. tit. hon. 1, 3. p *Soit mys et demoerge.*

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respectively: which is indeed nothing more than the law would have done before, provided Henry the fourth had been a rightful king. It however serves to shew that it was then generally understood, that the king and parliament had a right to new-model and regulate the succession to the crown: and we may also observe, with what caution and delicacy the parliament then avoided declaring any sentiment of Henry's original title. However, sir Edward Coke, more than once, expressly declares[q], that at the time of passing this act, the crown was in the descent from Philippa, daughter and heir of Lionel duke of Clarence.

Nevertheless the crown descended regularly from Henry IV to his son and grandson Henry V and VI; in the latter of whose reigns the house of York asserted their dormant title; and, after imbruing the kingdom in blood and confusion, for seven years together, at last established it in the person of Edward IV. At his accession to the throne, after a breach of the succession, that continued for three descents, and above threescore years, the distinction of a king *de jure*, and a king *de facto* began to be first taken; in order to indemnify such as had submitted to the late establishment, and to provide for the peace of the kingdom, by confirming all honours conferred, and all acts done, by those who were now called the usurpers, not tending to the disherison of the rightful heir. In statute 1 Edw. IV. c. 1. the three Henrys are 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 205
title: after which he is generally believed to have murdered his

q 4 Inst. 37, 205.

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two nephews; upon whose death the right of the crown devolved to their sister Elizabeth.

The tyrannical reign of king Richard III gave occasion to Henry, earl of Richmond, to assert his title to the crown. A title the most remote and unaccountable that ever was 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 Richd. 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*[r]."

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[s], in Elizabeth, eldest daughter of Edward IV: and his possession was establised by parliament, holden the first year of his reign. In the act for which purpose, the parliament seems to have copied the caution of their predecessors in the reign of Henry IV. and, therefore, (as lord Bacon, the historian of this reign, observes) carefully avoided any recognition of Henry VII's right, which indeed was none at all: and the king would not have it by way of new law or ordinance, whereby a right might seem to be created and conferred upon him; and, therefore, a middle way was rather chosen, by way (as the noble historian expresses it) of *establishment*, and that under covert and indifferent words, "that the inheritance of the crown should *rest*, *remain*, and "*abide*, in king Henry VII and the heirs of his body:" thereby providing for the future, and at the same time acknowledging
206 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[ss] de-

r 4 Inst. 36. s *Ibid.* 37. ss 4 Inst. 37.

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clares) by much his best title to the crown. Whereupon the act made in his favour was so much disregarded, that it never was printed in our statute books.

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

But, upon the king's divorce from 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 Seymore, 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 207
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 34 Hen. VIII. c. 1, the king's two daughters are legitimated again, and the crown is limited to prince Edward by

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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 *de-* "*scended* 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 statutes of this realm, our most lawful and rightful sove-
208 "reign 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 stat. 13 Eliz. c. 1, we find the right of parliament to direct the succession of the crown asserted in the most explicit words. "If any person shall hold, affirm, or maintain "that the common laws of this realm, not altered by parlia- "ment, ought not to direct the right of the crown of England; or

t 1 Mar. p. 2. c. 2. u Stat. 1 Eliz. c. 3.

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"that the queen's majesty, with and by the authority of parliament, "is not able to make laws and statutes of sufficient force and "validity, to limit and bind the crown of this realm, and the 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 grand-daughter of king Edmund Ironside, was the person in whom the hereditary right of the Saxon kings, supposing it not abolished by the conquest, resided. She married Malcolm king of Scotland; and Henry II, by a descent from Matilda their daughter, is generally called the restorer of 209
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 Scotish 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

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times to believe there was something divine in this right, and that the finger of Providence, was visible in its preservation..... Whereas, though a wise institution, it was clearly a human institution; and the right inherent in him no natural, but a positive, right. And in this, and no other light was it taken by the English parliament; who, by statute 1 Jac. I. c. 1, did "recognize "and acknowledge, that immediately upon the dissolution, and "decease of Elizabeth, late queen of England, the imperial "crown, thereof, did by inherent birth-right, and lawful and "undoubted succession, descend and come to his most excel-"lent 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 hu-
210 man hereditary rights had centered in this king, his son and heir king Charles the first should be told by those infamous judges, who pronounced his unparalleled sentence, that he was an elective prince, elected by his people, and, therefore, accountable to them, in his own proper person, for his conduct. The confusion, instability, and madness, which followed the fatal catastrophe of that pious and unfortunate prince, will be a standing argument in favour of hereditary monarchy to all future ages; as they proved at last to the then deluded people: who in order to recover that peace and happiness which for twenty years together they had lost, in a solemn parliamentary convention of the states restored the right heir of the crown. And in the proclamation for that purpose, which was drawn up and attended by both houses[x], they declared, "that, according to their duty

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 Glady's only sister to Lewellin ap Jorwerth the great, had the true right to the principality of Wales. Hist. Eng. iii. 705.

x Com. Journ. 8 May, 1660.

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" and allegiance, they did heartily, joyfully, and unanimously
" acknowledge and proclaim, that immediately upon the decease
" of our late sovereign lord king Charles, the imperial crown of
" these realms did by inherent birth-right and lawful and undoubt-
" ed succession descend and come to his most excellent majes-
" ty Charles the second, and being lineally, justly, and lawfully,
" next heir of the blood royal of this realm: and thereunto they
" most humbly and faithfully did submit and oblige themselves
" their heirs, and posterity for ever."

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

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

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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 a conviction that there was no king in being. For in a full assembly of the lords and commons, met in a convention upon the supposition of this vacancy, both houses[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 go-"vernment, and that the throne is thereby vacant." Thus ended
212 at once, by this sudden and unexpected vacancy of the throne, the old line of succession; which from the conquest had lasted above six hundred years, and from the union of the heptarchy in king Egbert almost nine hundred. The facts themselves thus appealed to, the king's endeavour to subvert the constitution by breaking the original contract, his violation of the fundamental laws, and his withdrawing himself out of the kingdom, were evident and notorious: and the consequences drawn from these facts (namely, that they amounted to an abdication of the government; which abdication did not affect only the person of the king himself, but also all his heirs, and rendered the throne absolutely and completely vacant) it belonged to our ancestors to determine. 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

y Com. Journ. 7 Feb. 1688.

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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 comtemplate, as a speculative point of history. But care must be taken not to carry this inquiry farther, than merely for instruction or amusement. The idea, that the consciences of posterity were concerned in the rectitude of their ancestor's decisions, gave birth to those dangerous political heresies, which so long distracted the state, but at length are all happily extinguished. I, therefore, rather choose to consider this great political measure upon the solid footing of authority, than to reason in 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 to have been unjust, oppressive, or inexpedient. Whereas, our ancestors having most indisputably a competent jurisdiction to decide this great and important question, and having in fact decided it, it is now become our duty at this distance of time to acquiesce in their de- 213
termination; 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, 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

z See Chap. 7.

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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
214 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[b]. And thus the constitution was kept entire; which, upon every sound principle of government, must otherwise have fallen to pieces, had so principal and constituent a part as the royal authority been abolished, or even suspended.

This single postulatum, the vacancy of the throne, being once established, the rest that was then done followed almost of course. For, if the throne be at any time vacant, (which may happen by other means besides that of abdication; as if all the royal blood 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

a On Gov. p. 2. c. 19. b Law of Forfeit, 118, 119.

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declaration of 12 February, 1688[c], 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 dig- "nity during their lives, and the life of the survivor of them; and "that the sole and full exercise of the regal power be only in, "and executed by, the said prince of Orange, in the names of "the said prince and princess, during their joint lives: and after "their deceases the said crown and royal dignity to be to the "heirs of the body of the said princess; and for default of such "issue, to the princess Anne of Denmark and the heirs of her "body; and for default of such issue, to the heirs of the body of "the said prince of Orange."

Perhaps, upon the principles before established, the convention might (if they pleased) have vested the regal dignity in a family entirely new, and strangers to the royal blood: but they were too well acquainted with the benefits of hereditary sucsession, 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 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 eldest sister. This settlement included all the protestant posterity of king Charles I, except such other issue as king James might at any time have, which was totally omitted through fear of a popish succession. And this order of succession took effect accordingly. 215

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

c Com. Journ. 12 Feb. 1688.

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otherwise than by descent. The new settlement did not merely consist in excluding king James, and the person pretended to be prince of Wales, and then suffering the crown to descend in the old hereditary channel: for the usual course of descent was in some instances broken through; and yet the convention still kept it in their eye, and paid a great, though not total, regard to it. Let us see how the succession would have stood, if no abdication had happened, and king James had left no other issue than his two daughters queen Mary and queen Anne. It would have stood thus: queen Mary and her issue; queen Anne and her
216 issue; king William and his issue. But we may remember, that queen Mary was only nominally queen, jointly with her husband king William, who alone had the regal power; and king William was personally preferred to queen Anne, though his issue was postponed to hers. Clearly, therefore, these princes were successively in possession of the crown by a title different from the usual course of 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 succession, in order to prevent another vacancy of the throne; which must have ensued upon their deaths, as no farther provision was made at the revolution, than for the issue of queen Mary, queen Anne, and king William. The parliament had previously, by the statute of 1 W. and M. st. 2. c. 2, enacted, that every person who should be reconciled to, or hold communion with, the see of Rome, should profess the popish religion, or should marry a papist, should be excluded, and 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 dutchess dowager of Hanover,

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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 youngest daughter of Elizabeth queen of Bohemia, who was the 217
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 and 13 W. III. c. 2. And at the same time it was enacted, that whosoever should hereafter come to the possession of the crown, should join in the communion of the church of England, as by law established.

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

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.

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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
218 the new king and parliament. Formerly, the descent was absolute, and the crown went to the next heir without any restriction: but now, upon the new settlement, the inheritance is conditional; being limited to such heirs only, of the body of the princess Sophia, as are protestant members of the church of England, and are married to none but protestants.

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

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OF THE KING'S ROYAL FAMILY[1].

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 220
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 to do other acts of ownership, without the concurrence

a Finch. L. 86.

1. The fundamental principle of the American Constitutions and governments, being the perfect equality of rights, there was no room to admit any thing therein, that should bear the most distant resemblance to the subject of this chapter.

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of her lord; which no other married woman can do[b]; a privilege as old as the 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 entitled to a place within the bar of his majesty's courts, together with the king's counsel[e]. She may likewise sue and be sued alone, without joining her husband. 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
221 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 entitled to an antient perquisite called queen-gold, or *aurum reginae;* which

b 4 Rep. 23.
c Seld. *Jan. Angl.* 1. 42.
d *Cod*, 5, 16. 26.
e Seld. tit. hon. 1, 6, 7.
f Finch. L. 86. Co. Litt. 133.
g Co. Litt. 133.
h Finch. L. 185.
i *Ef* 1, 3, 31.

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is a royal revenue, belonging to every queen consort during her marriage with the king, and due from every person who hath made a voluntary offering or fine to the king, amounting to ten marks or upwards, for and in consideration of any privileges, grants, licences, pardons, or other matter of royal favour conferred upon him by the king: and it is due in the proportion of one tenth part more, over and above the entire offering or fine made to the king: and becomes an actual debt of record to the queen's majesty by the mere recording of the fine[k]. As if an hundred marks of silver be given to the king for liberty to take in mortmain, or to have a fair, market, park, chase, or free-warren: there the queen is entitled to ten marks in silver, or (what was formerly an equivalent denomination) to one mark in gold, by the name of queen-gold, or *aurum 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 original 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 222
were expressly appropriated to her majesty, distinct from the king. It is frequent in domesday-book, after specifying the rent due to the crown, to add likewise, the quantity of gold or other renders reserved to the queen[n]. These were frequently appropriated to particular purposes; to buy wool for her majesty's use[o], to purchase oil for her lamps[p], or to furnish her attire

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.*

p *Civitas Lundon. Pro oleo ad lampad. reginae. (Mag. rot. pipp. temp. Hen. II. ibid.)*

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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 attibuted 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 acces-
223 sion 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 the chief justices and chief baron, their report of it was so very unfavourable[u], that his consort queen Anne (though she claimed it) yet never thought proper to exact it. In 1635, 11 Car. I, a time fertile of expedients for raising money upon dormant precedents in our old records (of

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. *cap.* 33.)

t See Maddox *Disceptat. epistolar.* 74. Pryn. *Aur. Reg.* Append. 5.

u *Lib.* 2. *c.* 26.

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

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

Another 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 balena 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 224
lady the king's companion, as of the king himself: and to violate, or defile the queen consort, amounts to the same high crime; as well in the person committing the fact, as in the queen herself, if consenting. A law of Henry the eighth[z] made it treason also for any woman, who was not a virgin, to marry the king without informing him thereof: but this law was soon after repealed: it trespassing too strongly, as well on natural justice, as female modesty. If, however, the queen be accused of any species of treason, she shall (whether consort or dowa-

w 19 Rym. *Foed.* 721.

x Bracton. *l.* 3. *c.* 3. Britton, *c.* 17. Flet. *l.* 1. *c.* 45 and 46.

y Pryn. *Aur. Reg.* 127.

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

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ger be tried by the peers of parliament, 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 infidelity, 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 alledged, because the succession to the crown is not thereby endangered. Yet still, *pro dignitate regali*, no man can marry a queen dowager without special licence from the king, on pain of forfeiting his lands and goods. This sir Edward Coke[a] tells us was enacted in parliament in 6 Hen. VI, though the statute be not in print. But she, though an alien born, shall still be entitled to dower after the king's demise, which no other alien is[b]. A queen dowager, when married again to a subject, doth not lose her regal dignity, as peeresses dowager do their peerage when they marry commoners. For Catherine, queen dowager of Henry V, though she married a private gentleman, Owen ap Mere-
225 dith 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 dowager of Navarre marrying with Edmond earl of Lancaster, brother to king Edward the first, maintained an action of dower (after the death of her second husband) by the name of queen of Navarre[c].

The prince of Wales, or heir apparent to the crown, and also his royal consort, and the princess royal, or eldest daughter

a 2 Inst. 18. See Riley's Plac. Parl. 72. b Co. Litt. 31,

c 2 Inst. 50.

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of the king, are likewise peculiarly regarded by the laws. For, by statute 25 Edw. III, to compass or conspire the death of the 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, on 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 rest of the royal family may be considered in two different lights, according to the different senses in which the term, *royal family*, is used. The larger sense includes all those, who are by any possibility inheritable to the crown. Such, before the revolution, were all the descendants of William the conqueror; who had branched into an amazing extent, by intermarriages with the antient nobility. Since the revolution and act of settlement, it means the protestant issue of the princess Sophia; now comparatively few in number, but which, in process of time, may possibly be as largely diffused. The more 226
confined sense includes only those, who are within a certain degree of propinquity to the reigning prince, and to whom, therefore, the law pays an extraordinary regard and respect: but, after that degree is past, they fall into the rank of ordinary subjects, and are seldom considered any farther, unless called to the succession upon failure of the nearer lines. For, though colateral consanguinity is regarded indefinitely, with respect to inheritance or succession, yet it is, and can only be regarded within some certain limits, in any other respect, by the natural constitution of things and the dictates of positive law [e].

d 8 Rep. 1. Seld. tit. of hon. 2, 5.

e See *essay on collateral consanguinity*, in Law-tracts, 4to. *Oxon.* 1771.

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The younger sons and daughters of the king, and other branches of the royal family, who are not in the immediate line of succession, were, therefore, little farther regarded by the antient law, than to give them, to a certain degree, precedence before all peers and public officers, as well ecclesiastical as temporal. This is done by the statute 31 Hen. VIII. c. 10, which enacts that no person, except the king's children, shall presume to sit or have place at the side of the cloth of estate in the parliament chamber; and that certain great officers therein named, shall have precedence above all dukes, except only such as shall happen to be the king's son, brother, uncle, nephew (which sir Edward Coke[f] explains to signify grandson or *nepos*) or brother's or sister's son. Therefore, after these degrees are past, peers or others of the *blood royal*, are intitled to no place or precedence except what belongs to them by their personal rank or dignity. Which made sir Edward Walker complain[g], that by the hasty creation of prince Rupert to be duke of Cumberland, and of the earl of Lenox to be duke of that name, previous to the creation of king Charles's second son, James, to be duke of York, it might happen that their grandsons would have precedence of the grandsons of the duke of York.

Indeed, under the description of the king's *children* his *grandsons* are held to be included, without having recourse to sir
225* Edward Coke's interpretation of *nephew*: and, therefore, when his late majesty king George II created his grandson Edward, the second son of Frederick prince of Wales deceased, duke of York, and referred it to the house of lords to settle his place and precedence, they certified[h] that he ought to have place next to the late duke of Cumberland the then king's youngest son; and that he might have a seat on the left hand of the cloth of estate. But when, on the accession of his present majesty, those royal personages ceased to take place as the *children* and ranked only as the *brother* and *uncle*, of the king, they also left their seats on the side of the cloth of estate: so that when the duke of Gloucester, his majesty's second brother, took his seat in the house of peers[i], he was placed on the upper end of the earl's bench (on

f 4 Inst. 362.
g Tracts, p. 301.
h Lords' Journ. 24 Apr. 1760.
i *Ibid.* 10 Jan. 1765.

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which the dukes usually sit) next to his royal highness the duke of York. And in 1718, upon a question referred to all the judges by king George I, it was resolved by the opinion of ten against the other two, that the education and care of all the king's grandchildren while minors, did belong of right to his majesty as king of this realm, even during their father's life[k]. But they all agreed, that the care and approbation of their marriages, when grown up, belonged to the king their grandfather. And the judges have more recently concurred in opinion[l], that this care and approbation extend also to the presumptive heir of the crown; though to what other branches of the royal family the same did extend they did not find precisely determined. The most frequent instances of the crown's interposition go no farther than nephews and nieces[m]; but examples are not wanting 226*
of it's reaching to more distant collaterals[n]. And the statute 6 Henry VI before mentioned, which prohibits the marriage of a queen dowager without the consent of the king, assigns this reason for it: "because the disparagement of the queen shall give "greater comfort and example to other ladies of estate, who are "of the *blood royal*, more lightly to disparage themselves[o]." Therefore, by the statute 28 Hen. VIII. c. 18. (repealed, among other statutes of treasons, by 1 Edw. VI. c. 12.) it was made high treason for any man to contract marriage with the king's children or reputed children, his sisters or aunts *ex parte paterna*, or the children of his brethren or sisters; being exactly the same degrees, to which precedence is allowed by the statute

k Fortesc. Al. 401, 440. l Lords' Journ. 28 Feb. 1772.

m See (besides the instances cited in Fortescue Aland) for *brothers* and *sisters*; under king Edward III, 4 Rym. 392, 403, 411, 501, 508, 512, 549, 683....under Henry V, 9 Rym. 710, 711, 741....under Edward IV, 11 Rym. 564, 565, 590, 601....under Henry VIII, 13 Rym. 249, 423....under Edw. VI, 7 St. Tr. 3, 8. For *nephews* and *nieces*; under Henry III, 1 Rym. 852....under Edward I, 2 Rym. 489....under Edward III, 5 Rym. 561....under Richard II, 7 Rym. 264..., under Richard III, 12 Rym. 232, 244....under Henry VIII, 15 Rym. 26, 31.

n To *great nieces*; under Edward II. 3 Rym. 575, 644. To *first cousins*; under Edward III, 5 Rym. 177. To *second* and *third cousins*; under Edward III, 5 Rym. 729....under Richard II, 7 Rym. 225....under Henry VI, 10 Rym. 322....under Henry VII, 12 Rym. 529....under queen Elizabeth, Camd. Ann. A. D. 1562. To *fourth cousins*; under Henry VII, 12 Rym. 329. To the *blood-royal* in general; under Richard II, 7 Rym. 787.

o Ril. plac. parl. 672.

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31 Hen. VIII, before-mentioned. And now, by statute 12 Geo. III. c. 11, no descendant of the body of king George II, (other than the issue of princesses married into foreign families) is capable of contracting matrimony, without the previous consent of the king signified under the great seal; and any marriage contracted without such consent is void. Provided that such of the said descendants, as are above the age of twenty-five, may after a twelvemonth's notice given to the king's privy council, contract and solemnize marriage without the consent of the crown; unless both houses of parliament shall, before the expiration of the said year, expressly declare their disapprobation of such intended marriage. And all persons solemnizing, assisting, or being present at, any such prohibited marriage, shall incur the penalties of the statute of *praemunire*.

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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].

1. The first of these is the high court of parliament, whereof we have already treated at large [2].

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1. "The president of the United States, shall have power, by and "with the advice and consent of the senate, to make treaties, pro-"vided two thirds of the senators present concur; and he shall no-"minate, and by and with the advice and consent of the senate, shall "appoint ambassadors, other public ministers and consuls, judges of "the supreme court, and all other officers of the United States, "whose appointments are not otherwise provided for by the consti-"tution. He may likewise require the opinion, in writing, of the "principal officer in each of the executive departments, upon any "subject relating to the duties of their respective offices." C. U. S. Art. 2.

The governor of Virginia shall, with the advice of a council of state, consisting of eight members, chosen by joint ballot of both houses of assembly, (two of whom are removed by joint ballot of both houses at the end of every three years, and are ineligible for the next three years,) exercise the executive powers of government, according to the laws of the common-wealth. C. V. Art. 9, 11.

2. Analogous thereto we may consider the congress of the United States, concerning whose powers, see Appendix, note D;

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2. Secondly, the peers of the realm are, by their birth, hereditary counsellors of the crown[3], 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:* on which account the law gives them certain great and high privileges: such as freedom from arrests, *&c.* even when no parliament is sitting: because it intends, that they are always assisting the king with their counsel for the commonwealth, or keeping the realm in safety by their prowess and valour.

228 Instances of conventions of the peers, to advise the king, have been in former times very frequent; though now fallen into disuse, by reason of the more regular meetings of parliament. Sir Edward Coke[d], gives us an extract of a record, 5 Hen. IV, concerning an exchange of lands between the king and the earl of Northumberland, wherein the value of each was agreed to be settled by advice of parliament (if any should be called before the feast of saint Lucia) or otherwise by advice of the grand council of peers which the king promises to assemble before the said feast, in case no parliament shall be called. Many other instances of this kind of meeting are to be found under our antient kings: though the formal method of convoking them had

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

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as also, the general assembly of the commonwealth, so far as relates to the affairs of the state; concerning which, see Appendix, note C, in the former part of this volume.

3. "The idea of hereditary legislators," [or counsellors] is as in-"consistent as that of hereditary judges, or hereditary juries; and "as absurd as an hereditary mathematician, or an hereditary wise man; and as ridiculous as an hereditary poet laureat." Paine's Rights of Man, Part I. p. 56. Albany, 1794.

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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 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, 229
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 pleased "them[f]."

3. A third council belonging to the king, are, according to sir Edward Coke[g], his judges of the courts of law, for law matters[4]. And this appears frequently in our statutes, particularly

e Hist. b. 2.
f 4 Inst. 53.
g 1 Inst. 110.

4. The federal and state courts may, in some measure, be regarded in the same light: for it being the duty of the executive to

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14 Edw. III. c. 5, and in other books of law. So that when the king's council is mentioned generally, it must be defined, particularised, 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 the king's *council*, were understood the king's judges of his courts of justice, the subject matter being legal: this being the general way of interpreting the word, *council* [h].

4. But the principal council belonging to the king is his privy council, which is generally called, by way of eminence, *the council* [5]. And this, according to Sir Edward Coke's description of it [i], is a noble, honourable, and reverend assembly, of the king, and such as he wills to be of his privy council, in the king's court or palace. The king's will is the sole constituent of a privy counsellor; and this also regulates their number, which of antient time was twelve, or thereabouts. Afterwards, it increased to so large a number, that it was found inconvenient for secrecy and dispatch; and, therefore, king Charles the second,
230 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 num-

h 3 Inst. 125. i 4 Inst. 53.
k Temple's Mem. part 3.

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see that the laws are faithfully executed, it consequently belongs to that department to carry into execution the judgments of the courts. And these judgments may be considered as the advice of those courts to the federal, or state executive, respectively, what ought to be done, after a final discussion of the complaint before them.

5. See the note at the beginning of this chapter.

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ber has been much augmented, and now continues indefinite (5). 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.

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

The *duty* of a privy counsellor appears from the oath of office[m], which consists of seven articles: 1. To advise the king according to the best of his cunning and discretion. 2. To advise

l Stat. 12 and 13 Will. III. c. 2.

m 4 Inst. 54.

(5) "No inconvenience (according to professor Christian) arises from the extension of their numbers, as those only attend who are specially summoned for that particular occasion, upon which their advice and assistance are required. The *cabinet* council, as it is called, consists of those ministers of state who are more immediately in the king's confidence, and who are summoned to consult upon the arduous and important discharge of the executive authority." *Christian.* Here, also, any matters of importance which are to be submitted to the consideration of parliament, are usually first discussed, as I have been informed.

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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
231 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 inquire into all offences against the government, and to commit the offenders to safe custody, in order to take their trial in some of the courts of law[6]. But their jurisdiction herein is only to inquire, and not to punish: and the persons committed by them are intitled to their *habeas corpus* by statute 16 Car. I. c. 10, as much as if committed by an ordinary justice of the peace. And, by the same statute, the 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 or idiocy[n], being a special flower of the prerogative; with regard to these, although they may

n 3 P. Wms. 108.

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6. It is presumed that the power of commitment belongs exclusively to the judiciary department, in all cases where a prosecution is to be commenced on the part of the government: since no warrant can issue but upon probable cause, supported by oath or affirmation, and particularly describing the person to be apprehended. Amendments to C. U. S. Art. 6. And there is nothing in the constitution which warrants the supposition, that the executive department can either administer an oath, or grant a warrant for that purpose.

The act of 1785, V. L. c. 15, authorises the governor, with advice of the council, to apprehend and secure all suspicious persons, being the subjects of any foreign power, or state, who shall have made a declaration of war, or actually commenced hostilities against the United States, or from whom the president of the United States shall apprehend hostile designs against them, with a saving of the privileges of merchants, their families, agents or servants. 1794, c. 62. V. L.

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eventually involve questions of extensive property, the privy council continues to have cognizance, being the court of appeal in such cases: or, rather the appeal lies to the king's majesty himself in council. Whenever also a question arises between two provinces in America or elsewhere, as concerning the extent of their charters and the like, the king in his council exercises *original* jurisdiction therein, upon the principles of feodal sovereignty. And so, likewise, when any person claims an island or a province, in the nature of a feodal principality, by grant from the king or his ancestors, the determination of that right belongs to his majesty in council: as was the case of the earl of Derby with regard to the Isle of Man in the reign of queen Elizabeth, and the earl of Cardigan and others, as representatives of the duke of Montague, with relation to the island of St. Vincent in 1764. But from all the dominions of the crown, excepting Great-Britain and Ireland, an *appellate* jurisdiction (in the last 232
resort) is vested in the same tribunal; which usually exercises it's judicial authority in a committee of the whole privy council, who hear the allegations and proofs, and make their report to his majesty in council, by whom the judgment is finally given.

The *privileges* of privy counsellors[7], as such (abstracted from their honorary precedence[o]) consist principally in the security which the law has given them against attempts and conspiracies to destroy their lives. For, by statute 3 Hen. VII. c. 14, if any of the king's servants, of his household, conspire or imagine to take away the life of a privy counsellor, it is felony, though

o See page 405.

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7. The senators of the United States have no privileges distinct from those of the members of the house of representatives: viz. an exemption from arrest during their attendance at their respective houses, and in going to, and returning from the same. C. U. S. Art. 1. §. 6.

The constitution of Virginia is silent as to the subject of privilege; but the act of 1788, c. 67, Edi. 1794, c. 66, exempts the persons of privy counsellors from arrest upon process in civil suits; but allows an execution against their bodies, in case an execution against their estate be returned unsatisfied.

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nothing be done upon it. The reason of making this statute, sir Edward Coke[p] tells us, was, because such a conspiracy was, just before this parliament, made by some of king Henry the seventh's household servants, and great mischief was like to have ensued thereupon. This extends only to the king's menial servants. But the statute 9 Ann. c. 16, goes farther, and enacts, that *any person* that shall unlawfully attempt to kill, or shall unlawfully assault, and strike, or wound, any privy counsellor in the execution of his office, shall be a felon without benefit of clergy. This statute was made upon the daring attempt of the sieur Guiscard, who stabbed Mr. Harley, afterwards earl of Oxford, with a penknife, when under examination for high crimes in a committee of the privy council.

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.

p 3 Inst. 38.

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OF THE KING's DUTIES[1].

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

a 7 Rep. 5.

1. The duties of the president of the United States have been shortly discussed in the appendix to the former part of this volume, note D. The constitution requires that he shall take an oath, "faithfully to execute his office; and that he will, to the best of his "ability, preserve, protect, and defend, the constitution of the "United States." And it declares it to be his duty to take care that the laws be faithfully executed. C. U. S. Art. 2.

The constitution of Virginia declares that the governor of the commonwealth shall, with the advice of the council of state, exercise the executive powers of government, according to the laws of the commonwealth; and shall not, under any pretence, exercise any power or prerogative by virtue of any law, statute, or custom of England. C. V. Art. 9. See also Appendix, note C.

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that contract to a plain certainty. So that, whatever doubts might be formerly raised by weak and scrupulous minds, about the existence of such an original contract, they must now entirely cease; especially with regard to every prince, who hath reigned since the year 1688.

The principal duty of the king is, to govern his people according to law[2]. *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, 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
234 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 vested in him "with regard to others; dominion and power: for he is not truly "king, where will and pleasure rules, and not the law." And again[d]; "the king also hath a superior, namely God, and also "the law, by which he was made a king." 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 ac-"cording to the decrees of the laws thereof: insomuch that he is "bound by an oath at his coronation to the observance and "keeping of his own laws." But, to obviate all doubts and diffi-"culties concerning this matter, it is expressly declared by statute 12 and 13 W. III, c. 2. "that the laws of England are the "birthright of the people thereof; and all the kings and "queens who shall ascend the throne of this realm ought to ad-"minister the government of the same according to the said

b Tac. *de mor. Germ.* c. 7.
c *l.* 1. c. 8.
d *l.* 2. c. 16. §. 3.
e *c.* 9. and 34.

2. C. U. S. Art. 2, C. V. Art. 9, accordant, see the last note.

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"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 establish-"ed religion, and the rights and liberties of the people thereof, "and all other laws and statutes of the same now in force, are "ratified and confirmed accordingly."

And, as to the terms of the original contract between king and people, these I apprehend to be now couched in the coronation oath, which by the statute 1 W. and M. st. 1. c. 6, is to be administered to every king and queen, who shall succeed to the imperial crown of these realms, by one of the archbishops or bishops of the realm, in the presence of all the people; who on their parts do reciprocally take the oath of allegiance to the crown. This coronation oath is conceived in the following terms[3]:

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3. The oath of the governor of Virginia, as prescribed by an ordinance of the convention which formed the constitution, is as follows: "I, A. B. elected governor of Virgina, by the representatives "thereof, do solemnly promise and swear, that I will, to the best of my "skill and judgment, execute the said office diligently and faithfully, "according to law, without favour, affection, or partiality; that I will, "to the utmost of my power, *support, maintain, and defend the com-"monwealth of Virginia, and the* CONSTITUTION *of the same*, and "protect the people thereof in the secure enjoyment of all their "rights, franchises, and privileges; and will constantly endeavour "that the laws and ordinances of the commonwealth shall be duly "observed, and that law, and justice, in mercy, be executed in all "judgments. And, lastly, I do solemnly promise and swear, that "I will peaceably and quietly resign the government to which I "have been elected, at the several periods to which my continu-"ance in the said office is, or shall be limited by law and the con-"stitution. So help me God*." In May, 1799, an act passed prescribing the oath of fidelity and the oaths of certain public officers. By that act the governor's oath of office was changed, by omitting the words, "support, maintain, and defend the commonwealth of "Virginia, and the constitution of the same." So soon did the legislature evince a desire to remove any possible opposition on the part of the executive to their own sovereign will. The oath has since undergone no alteration. V. L. 1794, c. 57. See also note 1, on this chapter.

* Revised Code, 1784, p. 36.

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The archbishop or bishop shall say, "Will you solemnly pro-
"mise and swear to govern the people of this kingdom of Eng-
"land, 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 re-
"formed religion established by the law? And will you pre-
"serve unto the bishops and clergy of this realm, and to the
"churches committed to their charge, all such rights and privi-
"leges 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 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 has been framed in doubtful words and expressions, with relation to
236 antient laws and constitutions at this time unknown [h]. How-

f *cap.* 1. §. 2.

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

h In the old folio abridgment of the statutes, printed by Lettou and Machlinia, in the reign of Edward IV. (*penes me*) there is preserved a copy of the old coronation oath; which, as the book is extremely scarce, I will here transcribe. *Ceo est le serement que le roy jurre a soun coronement: que il gardera et meintenera lez droitez et lez franchisez de seynt esglise grauntez auncienment dez droitez rojs christiens d'Engletere, et quil gardera toutez sez terrez honoures et dignites droiturelx et franks del coron du roialme d'Engletere en tout maner dentier te sanz null maner damenusement, et lez droitez dispergez dilapidez ou perduz de la corone a soun poiair reappeller en launcien estate, et quil gardera le peas de seynt esglise et al clergie et al people de bon accorde, et quil face faire en toutez sez jugementez owel et droit justice oue discretion et misericorde, et quil grauntera a*

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ever, 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. And, with respect to the latter of these three branches, we may farther remak, that by the act of union, 5 Ann. c. 8, two preceding statutes are recited and confirmed; the one of the parliament of Scotland, the other of the parliament of England: which enact; the former, that every king at his accession shall take and subscribe an oath, to preserve the protestant religion and presbyterian church government in Scotland; the latter, that at his coronation he shall take and subscribe a similar oath, to preserve the settlement of the church of Eng. land within England, Ireland, Wales, and Berwick, and the territories thereunto belonging.

tenure lez leyes et custumez du roialme, et a soun poiar lez face garder et affirmer que lez gentez du people avont faitez et estiez, et lez 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.) Prynne has also given us a copy of the coronation-oaths of Richard II, (Signal Loyalty. II. 246.) Edward IV, (*ibid.* 251.) James I, and Charles I, (*ibid.* 269.)

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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[1]. It was ranked among the *arcana imperii:* and,

Chap. 1. p. 141.

1. The title "*prerogative*" it is presumed was annihilated in America with the kingly government, It will however be of use to the student to observe in the course of this chapter how many of the

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like the 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 inspection of a rational and sober inquiry..... The glorious queen Elizabeth herself made no scruple to direct her parliaments to abstain from discoursing of matters of state[b]; and it was the constant language of this favourite princess and her ministers, that even that august assembly "ought not to "deal, to judge, or to meddle with her majesty's prerogative "royal[c]." And her successor, king James the first, who had imbibed high notions of the divinity of regal sway, more than once laid it down in his speeches, that, "as it is atheism and "blasphemy in a creature to dispute what the deity may do, "so it is presumption and sedition in a subject to dispute what "a king may do in the height of his power; good christians, "he adds, will be content with God's will, revealed in his word; "and good subjects will rest in the king's will, revealed in *his* "law[d]."

But, whatever might be the sentiments of some of our princes, this was never the language of our 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

b Dewes. 479. c *Ibid.*. 645.
d King James' Works, 557, 531.

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flowers of the crown, which were formerly stiled prerogatives, have been rejected as nuisances, by our own constitutions; or, where necessarily retained, have been confided to safer hands than those of a single hereditary executive magistrate.

The governor of Virginia shall not under any pretence exercise any power or *prerogative* by virtue of any law, statute, or custom of England. C. V. Art. 9.

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

By the word prerogative we usually understand that special pre-eminence, which the king hath, over and above all other persons, and out of the ordinary course of the common law, in right of his regal dignity. It signifies, in 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, there-

e Finch L. 84, 85.

f Bracton, *l.* 3. *tr.* 1. *c.* 9.

g *Nov.* 105. Sec. 2.

h *Ff.* 32. 1. 23.

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fore, Finch[1] 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[2].

Prerogatives are either *direct* or *incidental*. The *direct* are such positive substantial parts of the royal character and authority, as are rooted in and spring from the king's political person, considered merely by itself, without reference to any other extrinsic circumstance; as, the right of sending 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 be better 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. 240

These substantive or direct prerogatives may again be divided into three kinds: being such as regard, first, the king's royal *character;* secondly, his royal *authority;* and lastly, his royal *income*. These are necessary, to secure reverence to his person, obedience to his commands, and an affluent supply for the ordinary expences of government; without all of which it is impossible to maintain the executive power in due independence and vigour. Yet, in every branch of this large and extensive dominion, our free constitution has interposed such seasonable checks and restrictions, as may curb it from trampling on those liberties, which it was meant to secure and establish. The

i Finch. L. 85.

2. This definition of prerogative is enough to make a citizen of the United States shudder at the recollection that he was born under a government in which such doctrines are received as catholic: and must at the same time fill the heart of every true friend to his country with joy and gratitude for that deliverance, which, under the auspices of an Almighty Providence, has been happily atchieved by us.

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enormous weight of prerogative, if left to itself, (as in arbitrary governments it is) spreads havoc and destruction among all the inferior movements: but, when balanced and regulated (as with us) by it's proper counterpoise, timely and judiciously applied, it's operations are then equable and certain, 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
241 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 prae-eminentiam spec-*
"*tant; minora vero ad commodum pecuniarium immediate atti-*
"*nent; 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

k *Peregrin. de jure fisc. l.* 1. *c.* 1. *num.* 9.

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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[3]. "*Rex est vicarius*," says Bracton[l], "*et minister Dei in terra: omnis quidem sub eo est, et ipse sub* 242
"*nullo, 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[n]; which at the same time declare the king to be the supreme head of the realm, in matters both civil and ecclesiastical, and of consequence inferior to no man upon earth, dependent on no man, accountable to no man. Formerly there prevailed a ridiculous notion, propagated by the German and Italian civilians, that an emperor could do many things which a king could not, (as the creation of notaries and the like) and that all kings were in some degree subordinate and subject to the emperor of Germany or Rome. The meaning, therefore, of the legislature, when it uses these terms of *empire* and *imperial*, and applies them to the realm and crown of England, is only to assert that our king is equally sovereign and independent within these his dominions, as any emperor is in his empire[o]; and owes no kind of subjection to any other potentate upon earth. Hence, it is, that no suit or action can be brought against the king, even in civil matters, because no court can have jurisdiction over him. For all jurisdiction implies superiority

l *l.* 1. *c.* 8. m Seld. tit. of hon. I. 2.

n See also 24 Geo. II. c. 24. 5 Geo. III. c. 27.

o *Rex allegavit, quod ipso omnes libertates haberet in regno suo, quas imperator vendicabat in imperio* (M. Paris, *A. D.* 1095.)

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3. In the United States of America, all notions of personal pre-eminence are consigned to oblivion, and it is hoped will forever remain buried under the immovable mass of equal rights.

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of power: authority to try would be vain and idle, without an authority to redress; and the sentence of a court would be contemptible, unless that court had power to command the execution of it: but, who, says Finch[p], shall command the king? Hence it is, likewise, that by law the person of the king is sacred, even though the measures pursued in his reign be completely tyrannical and arbitrary: for no jurisdiction upon earth has power to try him in a criminal way; much less to condemn him to punishment[4]. 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, 243 by destroying the free agency of one of the constituent parts of the sovereign legislative power.

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

And, first, as to private injuries: if any person has, in point of property, a just demand upon the king, he must petition him in his court of chancery, where his chancellor will administer right as a matter of grace, though not upon compulsion[q5]:

p Finch. L, 83. q Finch. L. 255. See b. III. c. 17.

4. The constitution of the United States not only supposes a president may be fallible, but also criminal. It prescribes the mode in which he shall be tried, upon an impeachment, Art. 1. §. 3, and expressly declares that he shall be removed from office, on impeachment for, and conviction of treason, bribery, or other high crimes and misdemeanors. C. U. S. Art. 2. The governor of Virginia, when he is out of office [His election is annual] shall be impeachable by the house of delegates, and tried in the general court: and if found guilty, he shall be either forever disabled to hold any office under government, or subject to such pains and penalties as the law shall direct. C. V. Art. 16.

5. Any person who is entitled to demand against the commonwealth any right in law or equity, may petition the high court of

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And this is entirely consonant to what is laid down by the writers on natural law. "A subject, says Puffendorf[r], so long "as he continues a subject, hath no way to *oblige* his prince to "give him his due, when he refuses it; though no wise prince "will ever refuse to stand to a lawful contract. And, if the "prince gives the subject leave to enter an action against him, "upon such contract, in his own courts, the action itself pro-"ceeds rather upon natural equity, than upon the municipal "laws." For the end of such action is not to *compel* the prince to observe the contract, but to *persuade* him. And, as to personal wrongs; it is well observed by Mr. Locke[s], "the harm "which the sovereign can do in his own person not being likely "to happen often, nor to extend itself far; nor being able by his "single strength to subvert the laws, nor oppress the body of the "people, (should any prince have so much weakness and ill-na-"ture as to endeavour to do it)....the inconveniency therefore of "some particular mischiefs, that may happen sometimes, when "a heady prince comes to the throne, are well recompensed by "the peace of the public and security of the government, in the "person of the chief magistrate being thus set out of the reach of "danger."

Next, as to cases of ordinary public oppression, where the 244
vitals of the constitution are not attacked, the law hath also assigned a remedy. For as a king cannot misuse his power, without the advice of evil counsellors, and the assistance of wicked ministers, these men may be examined and punished. The constitution has, therefore, provided, by means of indictments, and parliamentary impeachments, that no man shall dare to assist the crown in contradiction to the laws of the land. But it is at the same time a maxim in those laws, that the king himself

r Law of N. and N. b. 8. c. 10.

s On Gov. p. 2. §. 205.

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chancery or the district court, holden at Richmond, for redress, and such court shall proceed to do right thereon. L. V. Edi. 1794, c. 85.

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can do no wrong[6]: since it would be a great weakness and absurdity in any system of positive law, to define any possible wrong, without any possible redress.

For, as to such public oppressions as tend to dissolve the constitution, and subvert the fundamentals of government, they are cases, which the law will not, out of decency, suppose: being incapable of distrusting those, whom it has invested with any part of the supreme power; since such distrust would render the exercise of that power precarious and impracticable[t]. For, wherever the law expresses 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 balance of the constitution would be overturned; and that branch or branches, in which this jurisdiction resided, would be completely sovereign. The supposition of *law*, therefore, is, that neither the king, nor either house of parliament (collectively taken) is capable of doing any wrong[7]; since, in such cases, the law feels itself incapable of furnishing any ade-

t See these points more fully discussed in the *considerations of the law of forfeiture*, 3d edit. p. 109...126, wherein the very learned author has thrown many new and important lights on the texture of our happy constitution.

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6. "When it is laid down as a maxim, that a king can do no "wrong, it places him in a state of similar security with that of "ideots, and persons insane, and responsibility is out of the question "with respect to himself. It then descends upon the minister, who "shelters himself under a majority in parliament, which, by places, "pensions, and corruption, he can always command; and that ma-"jority justifies itself by the same authority with which it protects "the minister." Paine's Rights of Man, part 1, p. 118, Albany, 1794.

7. "Here the learned judge tells us, that, because neither can "the king exercise any arbitrary restraining power over either of

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quate remedy. For which reason all oppressions, which may happen to spring from any branch of the sovereign power, must necessarily be out of the reach of any *stated rule*, or *express legal* provision: but, if ever they unfortunately happen, the prudence of the times must provide new remedies upon new emergencies.

Indeed, it is found by experience, that whenever the unconstitutional oppressions, even of the sovereign power, advance with gigantic strides, and threaten desolation to a state, mankind will not be reasoned out of the feelings of humanity; nor will sacrifice their liberty by a scrupulous adherence to these 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 authorised 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

" the houses of parliament, nor either or both houses of parliament " over the king....therefore what? Therefore, the supposition of " the law is, that none of the three branches of the legislature can " do wrong, because the law feels itself incapable of furnishing an " adequate remedy. If the law or the lawyers suppose that none of " three branches of the legislature is capable of doing wrong, for " that they are supreme, and whatever the supreme power esta- " blishes, must of course be right, as none can say to the supreme " power, what dost thou? Yet history shews, that king, lords, and " commons, have often (as was to be expected from the weakness of " human nature) done very wrong things." Burgh's Pol. Disq. vol. 3. p. 276.

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a situation; for there our precedent would fail us. In these, therefore, or other circumstances, which a fertile imagination may furnish, since both law and history are silent, it becomes us to be silent too; leaving to future generations, whenever necessity and the safety of the whole shall require it, the exertion of those inherent (though latent) powers of society, which no climate, no time, no constitution, no contract, can ever destroy or diminish.

246 II. Beside the attribute of sovereignty, the law also ascribes to the king, in his political capacity, absolute *perfection*. The king can do no wrong[8]. Which antient and fundamental maxim is not to be understood, as if every thing transacted by the government was of course just and lawful, but means only two things. First, that whatever is exceptionable in the conduct of public affairs is not to be imputed to the king, nor is he answerable for it personally to his people: for this doctrine would totally destroy that constitutional independence of the crown, which is necessary for the balance of power in our free and active, and therefore compounded, constitution. And, secondly, it means that the prerogative of the crown extends not to do any injury; it is created for the benefit of the people, and therefore cannot be exerted to their prejudice[u].

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

u Plowd. 487.

8. See the Notes, p. 242, 244.

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has thought proper to employ. For the law will not cast an imputation on that magistrate whom it intrusts with the executive power, as if he was capable of intentionally disregarding his trust: but attributes to mere imposition (to which the most perfect of sublunary beings must still continue liable) those little inadvertencies, which, if charged on the will of the prince, might lessen him in the eyes of his subjects.

Yet still, notwithstanding this personal perfection, which 247
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 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[w], 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[x], for saying that a part of the king's speech "seemed "rather to be calculated for the meridian of Germany than "Great Britain, and that the king was a stranger to our language "and constitution[9]."

w Com. Journ. 18 Nov. 1685. x *Ibid.* 4 Dec. 1717.

9. These instances do not seem calculated to impress an American with a very high idea of the freedom of speech, and of debate in a British parliament, when the person of the king is concerned.

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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* has been the standing maxim opon 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[y] (9). In the king also can be no stain or corrup-
248 tion of blood: for if the heir to the crown were attainted of treason or felony, and afterwards the crown should descend to him, this would purge the attainder *ipso facto*[z]. And, therefore, when Henry VII, who as earl of Richmond stood attainted, came to the crown, it was not thought necessary to pass an act of parliament to reverse this attainder; because, as lord Bacon in his history of that prince informs us, it was agreed that the assumption of the crown had at once purged all attainders. Neither can the king, in judgment of law, as king, ever be a minor or under age; and therefore his royal grants and assents to acts of parliament are good, though he has not in his natural capacity attained the legal age of twenty-one[a]. By a statute indeed, 28 Hen. VIII, c. 17, power was given to future king's to rescind and revoke all acts of parliament that should be made while they were under the age of twenty-four: but this was repealed by the statute 1 Edw. VI, c. 11, so far as related to that prince; and both statutes are declared to be determined by 24 Geo. II. c. 24. It hath also been usually thought prudent, when the heir apparent has been very young, to appoint a protector, guardian, or regent, for a limited time: but the very necessity of such extraordinary provision is sufficient to demonstrate the truth of that maxim of the common law, that in the king is no minority; and therefore he hath no legal guardian[b].

y Finch. L. 82, Co. Litt. 90.

z Finch. L. 82.

a Co. Litt. 43. 2 Inst. proem. 3.

b The methods of appointing this guardian or regent have been so various, and the duration of his power so uncertain, that from hence alone it may be

(9.) No time shall bar the commonwealth of execution. L. V. Edi. 1785, Oct. 1778, c, 2. §. 4. The title of the commonwealth to lands which have been settled thirty years, upon which quitrents or taxes have been paid at any time within that period, is relinquished, by the act of 1797, c. 10.

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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[10]. For

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 pupilage till the age of twenty-three. Edward V, at the age of thirteen, was recommend 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 government of his or her natural mother, (if approved by the king) and such other counsellors as his majesty should by will or otherwise appoint: and he accordingly appointed his sixteen executors to have the government of his son 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 Frederic late prince of Wales under the age of eighteen, appointed the princess dowager; and that of 5 Geo. III, c. 27, in case of a like descent to any of his present majesty's children, empowers the king to name either the queen, the princess dowager, or any descendant of king George II, residing in this kingdom; to be guardian and regent, till the successor attains such age, assisted by a council of regency: the powers of them all being expressly defined and set down in the several acts.

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10. The constitution of the United States, and the law made in pursuance thereof, 4 Cong. c. 8, have, it is presumed, made effectual provision for the uninterrupted continuation of the executive office in the United States, without recurring to this maxim of the British government. In case of the death or inability of the president, the vice-president instantly succeeds to the executive office. If there be no vice-president, the president of the senate, *pro tem-*

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immediately upon the decease of the reigning prince in his natural capacity, his kingship or imperial dignity, by act of law, without any *interregnum* or interval, is vested at once in his heir; who is, *eo instanti*, king to all intents and purposes. And so tender is the law of supposing even a possibility of his death, that his natural dissolution is generally called his *demise; demissio regis, vel, coronae:* an expression which signifies merely a transfer of property; for, as is observed in Plowden [c], when we say the demise of the crown, we mean only that, in consequence of the disunion of the king's natural body from his body politic, the kingdom is transferred or demised to his successor; and so the royal dignity remains perpetual. Thus, too, when Edward the fourth, in the tenth year of his reign, was driven from his throne, for a few months, by the house of Lancaster, this temporary transfer of his dignity was denominated his *demise;* and all process was held to be discontinued, as upon a natural death of the king [d].

250 We are next to consider those branches of the royal prerogative, which invest thus our sovereign lord, thus all-perfect and immortal in his kingly capacity, with a number of authorities and powers; in the exertion whereof consists the executive part of government [11]. This is wisely placed in a single

c Plowd. 177, 234. d M. 49 Hen. VI. pl. 1—8.

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fore, is to supply his place; and if there be no such person, the office devolves upon the speaker of the house of representatives. C. U. S. Art. 2. L. U. S. 2 Cong. c. 8.

The president of the privy council, in Virginia, or in case of his death, or inability, the privy councillor, whose name stands next in the list of appointments, shall, in case of the death, inability, or necessary absence of the governor from the government, act as lieutenant governor. C. V. Art. 11. V. L. Edi. 1794, c. 62.

11. In the course of this investigation the student will discover, that a part only of these powers are confided solely to the president of the United States; in many instances they cannot be exercised without the concurrence of the senate, as an executive council; in not a few, congress, taken collectively, are invested with the authority of the government.

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hand by the British constitution, for the sake of unanimity, strength, and dispatch. Were it placed in many hands, it would be subject to many wills: many wills, if disunited and drawing different ways, create weakness in a government; and to unite those several wills, and reduce them to one, is a work of more time and delay than the exigencies of state w ll afford. The king of England is therefore not only the chief, but properly the sole, magistrate of the nation [12]; 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 [e] expresses it, "*in ejus* "*unius persona veteris reipublicae vis atque majestas per cumu-* "*latas 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 [13]. For other-

e *Orig.* 1. 103.

12. It is otherwise in the United States; the president is the *chief* magistrate, but he is not the *sole* magistrate of the nation. He may nominate, but he cannot make a permanent appointment, to office (except in some particular instances) without the concurrence of the senate. Many of those who are nominated and commissioned are not responsible to him, or removeable by him; but are responsible only to the people, and to the law, and removeable only upon impeachment by their representatives, and upon conviction of treason, bribery, or other high crimes and misdemeanors. C. U. S. Art. 2, 3.

13. The powers, or more properly, the duties, of the executive department, are, in general, well defined, and limited in the constitution of the United States. Art. 2. In some instances there is per-

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wise the power of the crown would indeed be but a name and a shadow, insufficient for the ends of government, if, where its jurisdiction is clearly established and allowed, any man or body of men were permitted to disobey it, in the ordinary course of
251 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 transcendant dominion of the crown laid down (as it certainly is) most strongly and emphatically in our law-books, as well as our homilies, have denied that any case can be excepted from so general and positive a rule; forgetting how impossible it is, in any practical system of laws, to point out beforehand those eccentrical remedies, which the sudden emergence of national distress may dictate, and which that alone can justify. On the other hand, over-zealous republicans, feeling the absurdity of unlimited passive obedience, have fancifully (or sometimes factiously) gone over to the other extreme: and because resistance is justifiable to the person of the prince when the being of the state is endangered, and the public voice proclaims such resistance necessary, they have therefore allowed to every individual the right of determining this expedience, and of employing private force to resist even private oppression. A doctrine productive of anarchy, and (in consequence) equally fatal to civil liberty as tyranny itself. For civil liberty, rightly understood, consists in protecting the rights of individuals by the united force of society: society can-

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haps too much room left for an extension of them by construction, and reference to the British model. On the other hand, in the commonwealth of Virginia, the powers of the executive are not only limited, without the possibility of a constructive extension of them, but, in general, submitted entirely to the control of the legislature, C. V. Art. 9.

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not 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 these 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 252
just and severe account. For prerogative consisting (as Mr. Locke[f] has well defined it) in the discretionary power of acting for the public good, where the positive laws are silent; if that discretionary power be abused to the public detriment, such prerogative is exerted in an unconstitutional mannner. Thus the king may make a treaty with a foreign state, which shall irrevocably bind the nation; and yet, when such treaties have been judged pernicious, impeachments have pursued those ministers, by whose agency or advice they were concluded.

The prerogatives of the crown (in the sense under which we are now considering them) respect either this nation's intercourse with foreign nations, or 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 centre, all the rays of his people are united, and form, by that union, a consistency, splendour, and power, that make him feared and respected by foreign potentates; who would scruple to enter into any engagement, that must afterwards be revised and ratified by a popular assembly. What is done by the royal authority, with regard to foreign powers, is the act of the whole nation: what is done without the king's

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concurrence, is the act only of private men. And so far is this point carried by our law, that it hath been held[g], that should all the subjects of England make war with a king in league with the king of England, without the royal assent, such war is no breach of the league. And, by the statute 2 Hen. V. c. 6, any subject committing acts of hostility, upon any nation in league with the king, was declared to be guilty of high treason: and, though that act was repealed by the statute 20 Hen. VI. c. 11[14], so far as relates to the making this offence high treason, yet still
253 it remains a very great offence against the law of nations[15], and punishable, by our laws, either capitally or otherwise, according to the circumstances of the case.

I. The king, therefore, considered as the representative of his people, has the sole power of sending ambassadors to foreign states, and receiving ambassadors at home[16]. This may lead us into a short digression, by way of inquiry, how far the municipal laws of England intermeddle with or protect the rights of these

g 4 Inst. 152.

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14. The statutes, so far as relates to the crime of treason, are repealed in the United States. C. U. S. Art. 3. §. 3.

15. The case of Henfield, who was prosecuted in the federal court of Pennsylvania, for acting as a prize-master on board a vessel taken by a French privateer, was supposed to fall under this construction. Congress at the succeeding session passed an act, whose duration was limited to two years, the object of which was, generally, to prohibit any acts of hostility being committed by the citizens of the United States, under authority of any of the belligerent powers, against any powers with whom the United States are at peace. L. U. S. 3. cong. c. 50. The same thing is also prohibited by our treaties, with France, Holland, Prussia, Sweden and Great-Britain. See also L. U. S. 5 cong. c. 1.

16. "The president of the United States shall nominate, and by and with the advice and consent of the Senate, shall appoint ambassadors, other public ministers, and consuls."...."He shall also, receive ambassadors, and other public ministers." C. U. S. Art. 2. §. 2, 3.

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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[h]; who is bound either to do justice upon him, or avow himself the accomplice of his crimes[i]. But there is great dispute among the writers on the law 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[k]. Our law seems to have formerly taken in the restriction, as well as the general exemption. For it has been 254
held, both by our common lawyers and civilians[l] 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[m]: 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[n]. And these positions seem to be built upon

h As was done with count Gyllenberg, the Swedish minister to Great-Britain, *A. D.* 1716.

i Sp. L. 26. 21.

k Van Leeuwen *in Ff.* 50, 7, 17, Barbeyrac's Puff. *l.* 8. *c.* 9. §. 9. and 17. Van Bynkershoek *de foro legator. c.* 17, 18, 19.

l 1 Roll. Rep. 175. 3 Bulstr. 27.

m 4 Inst. 153.

n 1 Roll. Rep. 185.

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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[o]. But, however these principles might formerly obtain, the general practice of this country, as well as of the rest of Europe, seems now to pursue the sentiments of the learned Grotius, that the security of embassadors is of more importance than the punishment of a particular crime[p]. And, therefore, few, if any, examples have happened within a century past, where an 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, or any of his train or *comites*, can be prosecuted for any debt or contract, in the courts of that kingdom wherein he is sent to reside. Yet sir Edward Coke maintains, that, if an embassador make a contract which is good *jure gentium*, he shall answer for it here[q]. But the truth is, so few cases (if any) had arisen, wherein the privilege was either claimed or disputed, even with regard to civil suits, that our law books are
255 (in general) quite silent upon it 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[r], for a debt of fifty pounds which he had there contracted. Instead of applying to be discharged upon his privilege, he gave bail to the action, and the next day complained to the queen. The persons who were concerned in the arrest were examined before the privy council, (of which the lord chief justice Holt was at the same time sworn a member[s]) and seventeen were committed to prison[t]: most of whom were prosecuted by information in the

o Foster's Reports, 188.

p *Securitas legatorum utilitati quae ex poena est praeponderat.* (*de jure b. & p.* 18, 4, 4.)

q 4 Inst. 153.

r 21 July, 1708. Boyer's Annals of queen Anne.

s 25 July, 1708. *Ibid.*

t 25, 29 July, 1708. *Ibid.*

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court of queen's bench, at the suit of the attorney-general[u], and at their trial before the lord chief justice were convicted of the facts by the jury[w], reserving the question of law, how far those facts were criminal, to be afterwards argued before the judges; which question was never determined. In the mean time, the czar resented this affront very highly, and demanded that the sheriff of Middlesex, and all others concerned in the arrest, should be punished with instant death[x]. But the queen (to the amazement of that despotic court) directed her secretary to inform him, "that she could inflict no punishment upon any, the "meanest, of her subjects, unless warranted by the law of the "land: and, therefore, was persuaded that he would not insist "upon impossibilities[y]." To satisfy, however, the clamours of the foreign ministers (who made it a common cause) as well as to appease the wrath of Peter, a bill was brought into parliament[z], and afterwards passed into a law[a], to prevent and to punish such outrageous insolence for the future. And with a copy of this act, elegantly engrossed and illuminated, accompanied by a letter from the queen, an embassador extraordinary[b] was commissioned to appear at Moscow[c], who declared, "that though her majesty 256
"could not inflict such a punishment as was required, because of "the defect in that particular of the former established constitu-"tions of her kingdom, yet, with the unanimous consent of the "parliament, she had caused a new act to be passed, to serve as "a law for the future." This humiliating step was accepted as a full satisfaction by the czar; and the offenders, at his request, were discharged from all farther prosecution.

This statute[d] recites the arrest which had been made, "in "contempt of the protection granted by her majesty, contrary "to the law of nations, and in prejudice of the rights and privi-"leges, which embassadors and other public ministers have at "all times been thereby possessed of, and ought to be kept

u 23 Oct. 1708. *Ibid.*
w 14 Feb. 1708. *Ibid.*
x 17 Sept. 1708. *Ibid.*
y 11 Jan. 1708. *Ibid.* Mod. Un. Hist. xxxv. 454.
z Com. Journ. 23 Dec. 1708.
a 21 Apr. 1709. Boyer, *Ibid.*
b Mr. Whitworth.
c 8 Jan. 1709. Boyer, *Ibid.*
d 7 Ann. c. 12.

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"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 distrained or seized, 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 [17]; 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 priviledged or protected by this act [18]; nor shall any one be punished for arresting an ambassador's servant, unless his name be registered with the secretary of state, and by him transmitted to the sheriffs of London and Middlesex [19]. Exceptions that are strictly conformable to the rights of embassadors [e], as observed in the most civilized countries. And, in consequence of this statute, thus declaring and enforcing the law of nations [20], these privi-

e *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.*

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17. L. U. S. 1 Cong. 2 Sess. c. 9. §. 25, 26, accordant. And the person convicted shall be imprisoned, not exceeding three years, and fined at the discretion of the court. Ibidem.

18. No citizen or inhabitant of the United States who shall have contracted debts prior to his entering into the service of any ambassador, or other public minister, which debts shall be still due and unpaid shall have the benefit of the act. L. U. S. 1 Cong. 2 Sess. c. 9. §. 27.

19. The act of congress contains a similar provision in respect to servants. See also, 3 Burr. 1676, 1 Wills. 20, 78.

20. The act of congress further declares, "That if any person "shall assault, strike, wound, imprison, or in any other manner in-"fract the law of nations by offering violence to the person of an "ambassador, or other public minister, such person, so offending, "on conviction shall be imprisoned not exceeding three years, and "fined at the discretion of the court." L. U. S. Ib. §. 28.

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leges are now held to be a part of the law of the land, and are constantly allowed in the courts of common law [f].

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 [g]; 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 [21]. 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 [22], for the punishment of such ministers as from criminal motives advise or conclude any treaty, which shall afterwards be judged to derogate from the honour and interest of the nation.

III. Upon the same principle the king has also the sole prerogative of making war and peace [23]. For it is held by all the

f Fitzg. 200. Stra. 797.
g Puff. L. of N. b. 8. c. 9, Sec. 6.

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21. The president of the United States hath power, by and with the advice and consent of the senate, to make treaties, provided two thirds of the senators present concur. C. U. S. Art. 2. §. 2.

22. See p. 155, note 12.

23. The constitution of the United States, intrusts the important power of making war, not in the president, nor in the president and senate, but in congress: where the people by their immediate representatives deliberate upon the necessity of involving the nation in such a state of calamity. C. U. S. Art. 1. §. 8, 10.

The French constitution says "that the right of war and peace "is in the nation. Where else should it reside, but in those who "are to pay the expence?"

"War is the common harvest of all those who participate in the "division and expenditure of public money, in all countries. It is "the art of conquering at home; the object of it is an increase of revenue; and, as revenue cannot be increased without taxes, a

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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 [h]: and this right is given up, not only by individuals, but even by the entire body of people, that are under the dominion of a sovereign. It would, indeed, be extremely improper, that any number of subjects should have the power of binding the supreme magistrate, and putting him against his will in a state of war. Whatever hostilities, therefore, may be committed by private citizens, the state ought not to be affected thereby; unless that should justify their proceedings, and thereby become partner in the guilt. Such unauthorised volunteers in violence are not ranked among open enemies, but are treated like pirates and robbers [24]: according to that rule of the civil law [i] *hostes hi sunt qui nobis, aut quibis nos, publice bellum decrevimus: caeteri latrones aut praedones sunt.* And the reason
258 which is given by Grotius [j], why according to the law of nations a denunciation of war ought always to precede the actual commencement of hostilities, is not so much that the enemy may be put upon his guard, (which is matter rather of magnanimity than right) but that it may be certainly clear that the war is not undertaken by private persons, but by the will of the whole com-

h Puff. b. 8. c. 6. Sec. 8, and Barbeyr. *in loc.*
i *Ff.* 50, 16, 118.
j *de jure b. & p. l.* 3. *c.* 3. Sec. 11.

" pre ence must be made for expenditures. In reviewing the his-
" tory of the English government, it's wars, and it's taxes, a bye-
" stander not blinded by prejudice, or warped by interest, would de-
" clare, that taxes are not raised, to carry on wars, but that wars
" were raised to carry on taxes.

" The French constitution, therefore, to provide against those
" evils, has taken away the power of declaring war, from kings and
" misisters, and placed the right, where the expence must fall. Were
" this the case in all countries we should hear but little more of
" wars." Paine's Rights of Man, part 1. p. 48, 49. Albany, 1794.

24. See note 15. p. 253. No state shall without consent of congress engage in war, unless actually invaded, or in such imminent danger as will not admit of delay. C. U. S. Art. 1. §. 10. Nor at any time grant letters of marque and reprisal. Ibid.

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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 [25]. 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.[26]

IV. But, as the delay of making war may sometimes be detrimental to individuals who have suffered by depredations from foreign potentates, our laws have, in some respects, armed the subject with powers to impel the prerogative; by directing the ministers of the crown to issue letters of marque and reprisal upon due demand: the prerogative of granting which is nearly related to, and plainly derived from, that other of making war; this being indeed only an incomplete state of hostilities, and generally ending in a formal denunciation of war. These letters are grantable by the law of nations [k], whenever the subjects of one state are oppressed and injured by those of another; and justice is denied by that state to which the oppressor belongs.

k *Ibid. l.* 3. *c.* 2. Sec. 4 & 5.

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25. Though this conclusion seems very natural, yet by a single provision in the constitution of the United States, the president, by and with the advice and consent of two thirds of the senators present, may conclude a treaty of peace, without the concurrence of the house of representatives, whose assent is necessary to put the nation into a state of war, though it seems unnecessary to it's restoration to a state of peace. See C. U. S. Art. 1, 2.

26. Mr. Burgh treats the check of parliamentary impeachment, with as little ceremony or respect as Mackintosh, (see p. 155, note 12,) in his strictures on this passage. Pol. Disq. Vol. 1. p. 371, Philadelphia, 1775.

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In this case letters of marque and reprisal (words used as synonimous; and signifying, the latter a taking in return, the former the passing the frontiers in order to such taking [l]) may be obtained, in order to seise the bodies or goods of the subjects of
259 the offending state, until satisfaction be made, wherever they happen to be found. And, indeed, this custom of reprisals seems dictated by nature herself; for which reason we find in the most antient times very notable instances of it [m]. But here the necessity is obvious of calling in the sovereign power, to determine when reprisals may be made; else every private sufferer would be a judge in his own cause. In pursuance of which principle, it is with us declared by the statute 4 Hen. V. c. 7, that, if any subjects of the realm are oppressed in 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 [27].

V. Upon exactly the same reason stands the prerogative of granting safe-conducts [28], without which, by the law of nations,

l. Dufresne. tit. *Marca.*

m See the account given by Nestor, in the eleventh book of the Illiad, 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.

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27. As congress, only, can declare war, so congress, only, can grant letters of marque and reprisal. The states are prohibited from granting them even in time of war. C. U. S. Art. 1. §. 8, 10. The manner in which they shall be granted has not yet been prescribed. But now see the act of 5 Cong. c. 85. §. 2, 3.

28. The act of 1 Cong. 2 Sess. c. 9. Sec. 28, declares, "That if any "person shall violate any safe conduct, or passport duly obtained "and issued under the authority of the United States, the person

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no member of one society has a right to intrude into another. And, therefore, Puffendorf very justly resolves [n], that it is left in the power of all states, to take such measures about the admission of strangers, as they think convenient; those being ever excepted who are driven on the coasts by necessity, or by any cause that deserves pity or compassion. Great tenderness is shewn by our laws, not only to foreigners in distress (as will appear when we come to speak of shipwrecks) but with regard also to the admission of strangers who come spontaneously. For so long as their nation continues at peace with ours, and they themselves behave peaceably, they are under the king's protection; 260
though liable to be sent home whenever the king sees occasion (28.) 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 seised by our subjects, unless he has letters of safe-conduct; which by divers antient statutes [o] must be granted under the king's great seal, and inrolled in chancery, or else are of no effect: the king being supposed the best judge of such emergencies, as may deserve exception from the general law of arms. But passports under the king's sign-manual, or licences from his ambassadors abroad, are now more usually obtained, and are allowed to be of equal validity.

Indeed the law of England, as a commercial country, pays a very particular regard to foreign merchants in innumerable instances. One I cannot omit to mention: that by *magna carta* [p] it is provided, that all merchants (unless publicly prohibited be-

n Law of N. and N. b. 3. c. 3. Sec. 9.
o 15 Hen. VI. c. 3. 18 Hen. VI. c. 8. 20 Hen. VI. c. 1.
p c. 30.

"so offending, on conviction, shall be imprisoned not exceeding "three years, and fined at the discretion of the court."

(28.) See L. U. S. 5 Cong. c. 75, commonly called the alien bill, as also, the act concerning alien enemies....Ib. c. 83. The former of which was probably borrowed from the statute of 33 Geo. 3. c. 4, to the like effect.

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fore-hand) shall have safe-conduct to depart from, to come into, to tarry in, and to go through England, for the exercise of merchandize, without any unreasonable imposts, except in time of war: and, if a war breaks out between us and their country, they shall be attached (if in England) without harm of body or goods, till the king or his chief justiciary be informed how our merchants are treated in the land with which we are at war; and, if ours be secure in that land, they shall be secure in ours[29]. This seems to have been a common rule of equity among all the northern nations; for we learn from Stiernhook[q], that it was a maxim among the Goths and Swedes, "*quam legem exteri nobis* "*posuere, eandem illis ponemus.*" But it is somewhat extraordinary, that it should have found a place in *magna carta*, a mere interior treaty between the king and his natural-born subjects:

q *de jure Sueon. l.* 3. *c.* 4.

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29. Herewith agrees the act of 1785, c. 79. V. L. 1794, c. 12. By our treaties with France, Holland, Sweden, Prussia, and the emperor of Morocco, from six to nine months are allowed the merchants of those nations, respectively, to withdraw themselves, and their effects, in case of war. But it is stipulated in the treaty of 1794, between the United States and Great Britain, "that in "case of a rupture between them, the merchants and others of each "of the two nations residing in the dominions of the other, shall "have the privilege of remaining and continuing their trade, so "long as they behave peaceably, and commit no offence against the "laws; and in case their conduct should render them suspected, "and the respective governments should think proper to order "them to remove, the term of twelve months, from the publication "of the order, shall be allowed them for that purpose, to remove all "their families, effects, and property; but this favour shall not be "extended to those who act contrary to the established laws." Art. 26.

The act of 5 Cong. c. 83, declares, that aliens, with whose nation we have any treaty, shall, in case of war, be permitted to remain in the United States the full time stipulated by treaty; and where there is no such treaty, the president may ascertain and declare such reasonable time for their departure, as may be consistent with the public safety, and according to the dictates of humanity and national hospitality.

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which occasions the learned Montesquieu to remark, with a degree of admiration, "that the English have made the protec- 261
"tion of *foreign* merchants one of the articles of their *national* "liberty[r]." But indeed it well justifies another observation which he has made[s], "that the English know better than any "other people upon earth, how to value at the same time these "three great advantages, religion, liberty, and commerce." Very different from the genius of the Roman people; who in their manners, their constitution, and even in their laws, treated commerce as a dishonourable employment, and prohibited the exercise thereof to persons of birth, or rank, or fortune[t]: and equally different from the bigotry of the canonists, who looked on trade as inconsistent with christianity[u], and determined at the council of Melfi, under pope Urban II, *A. D.* 1090, that it was impossible, with a safe conscience, to exercise any traffic, or follow the profession of the law[w].

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[30].

r Sp. L. 20, 13.

s *Ibid.* 20, 6.

t *Nobiliores natalibus, et honorum luce conspicuos, et patrimonio ditiores, perniciosum urbibus mercimonium exercere prohibemus.* *C.* 4, 63, 3.

u *Homo mercator vix aut nunquam potest Deo placere: et ideo nullus christianus debet esse mercator; aut si voluerit esse, projiciatur de ecclesia Dei.* Decret. 1, 88, 11.

w *Falsa fit 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.

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30. Every bill which shall have passed the house of representatives and senate, shall, before it becomes a law, be presented to the

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The expediency of which constitution has before been evinced at large[x]. I shall only farther remark, that the king is not bound by any act of parliament, unless he be named therein by special and particular words[31]. The most general words that can be devised ("any person or persons, bodies politic or cor-
262 "porate, &c.") affect not him in the least, if they may tend to restrain or diminish any of his rights or interests[y]. For it would be of most mischievous consequence to the public, if the strength of the executive power were liable to be curtailed without 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[z]: and, likewise, the king may take the benefit of any particular act, though he be not especially named[a].

II. The king is considered, in the next place, as the generalissimo, or the first in military command, within the kingdom[32].

x ch. 2. p. 154.
z *Ibid.* 71.
y 11 Rep. 74.
a 7 Rep. 32.

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president of the United States. If he approve, he shall sign it; if not, he shall return it, with his objections, &c. See note p. 184. C. U. S. Art. 1. Sec. 7.

31. This rule of construction is not applicable to the government of the United States.

32. The president of the United States is commander in chief of the army and navy of the United States, and of the militia of the several states, when called into the actual service of the United States. C. U. S. Art. 2.

The governor of Virginia may embody the militia, with the advice of the privy council, and when embodied, shall alone have the direction of the militia under the laws of the country. C. V. Art. 13.

The manner in which the militia of the several states may be called forth for the service of the United States, is prescribed, L. U. S. 3 Cong. c. 101.

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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 [33]. 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 263
predecessors, kings and queens of England; and that both or either house of parliament cannot, nor ought to, pretend to the same.

This statute, it is obvious to observe, extends not only to fleets and armies, but also to 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 kingdon [b34]: and all lands were formerly subject to a tax, for building of castles wherever the king

b 2 Inst. 30.

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33. These powers are not vested in the president, but in congress. C. U. S. Art. 1. Sec. 8.

34. Congress, only, is vested with authority in these instances. C. U. S. Art. 1. Sec. 8. L. U. S. Sec. 3. Cong. c. 9.

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thought proper. This was one of the three things, from contributing to the performance of which no lands were exempted; and therefore called by our Saxon ancestors the *trinoda necessitas: sc. pontis reparatio, arcis constructio, et expeditio contra hostem*[c]. And this they were called upon to do so often, that, as sir Edward Coke from M. Paris assures us[d], there were in the time of Henry II 1115, castles subsisting in England. The inconveniencies of which, when granted out to private subjects, the lordly barons of those times, were severely felt by the whole kingdom; for, as William of Newburgh remarks in the reign of king Stephen, "*erant in Anglia quodammodo toto reges vel potius* "*tyranni quot domini castellorum:*" but it was felt by none more sensibly than by two succeeding princes, king John and king Henry III. And, therefore, the greatest part of them being demolished in the barons' wars, the kings of after-times have been very cautious of suffering them to be rebuilt in a fortified manner: and sir Edward Coke lays it down[e], that no subject can build a castle, or house of strength imbattled, or other fortress defensible, without the licence of the king; for the danger which might ensue, if every man at his pleasure might do it.

It is partly upon the same, and partly upon a fiscal foundation,
264 to secure his marine revenue, that the king has the prerogative of appointing *ports* and *havens*, or such places only, for persons and merchandize to pass into and out of the realm, as he in his wisdom sees proper[35]. By the feodal law all navigable rivers and havens were computed among the *regalia*[f], and were subject to the sovereign of the state. And in England it hath always been holden, that the king is lord of the whole shore[g], and particularly is the guardian of the ports and havens, which are the

c Cowel's Interpr. *tit. castellorum operatio.* Seld. *Jan. Angl.* 1. 42.
d 2 Inst. 31.
e 1 Inst. 5.
f 2 *Feud. t.* 56. Crag. 1, 15, 15.
g F. N. B. 113.

35. Congress hath power to regulate commerce with foreign nations, and among the several states. C. U. S. Art. 1. §. 8. The establishment of ports was an incident thereto: the laws of the United States 1 Cong. 2 Sess. c. 35, accordingly established ports. See also, 5 Cong. c. 128.

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inlets and gates of the realm [h]: and therefore, so early as the reign of king John, we find ships seised by the king's officers for putting in at a place that was not a legal port [i]. These legal ports were undoubtedly at first assigned by the crown; since to each of them a court of portmote is incident [k], the jurisdiction of which must flow from the royal authority: the *great ports* of the sea are also referred to, as well known and established, by statute 4 Hen. IV. c. 20, which prohibits the landing elsewhere under pain of confiscation: and the statute 1 Eliz. c. 11, recites, that the franchise of lading and discharging had been frequently granted by the crown.

But though the king had a power of granting the franchise of havens and ports, yet he had not the power of resumption, or of narrowing and confining their limits when once established; but any person had a right to load or discharge his merchandize in any part of the haven: whereby the revenue of the customs was much impaired and diminished, by fraudulent landings in obscure and private corners. This occasioned the statutes of 1 Eliz. c. 11, and 13, and 14 Car. II. c. 11. §. 14, which enable the crown by commission to ascertain the limits of all ports, and to assign proper wharfs and quays in each port, for the exclusive landing and loading of merchandize.

The erection of beacons, light-houses, and sea-marks, is also a branch of the royal prerogative [36]: whereof the first was anti- 265
ently used in order to alarm the country, in case of the approach of an enemy; and all of them are signally useful in guiding and preserving vessels at sea by night as well as by day. For this purpose the king hath the exclusive power, by commission under his great seal [l], to cause them to be erected in fit

h Dav. 9, 56.

i Madox. hist. exch. 530.

k 4 Inst. 148.

l 3 Inst. 204. 4. Inst. 148.

36. This power, like the former, being one of the incidents attending the right of regulating commerce, belongs also to congress, only, and not to the executive department. They have accordingly exercised it. 1 Cong. 1 Sess. c. 9. 5 Cong. c. 51, &c.

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and convenient places [m] as well upon the lands of the subject as upon the demesnes of the crown: which power is usually vested by letters patent in the office of lord high admiral [n]. And by statute 8 Eliz. c. 13, the corporation of the trinity-house are impowered to set up any beacons or sea-marks wherever they shall think them necessary; and if the owner of the land or any other person shall destroy them, or shall take down any steeple, tree, or other known sea-mark, he shall forfeit 100*l*, or in case of inability to pay it, shall be, *ipso facto*, outlawed.

To this branch of the prerogative may also be referred the power vested in his majesty, by statutes 12 Car. II. c. 4, and 29 Geo. II. c. 16, of prohibiting the exportation of arms or ammunition out of this kingdom, under severe penalties[37]: and likewise the right which the king has, whenever he sees proper, of confining his subjects to stay within the realm, or of recalling them from beyond the seas. By the common law [o], every man may go out of the realm for whatever cause he pleaseth, without obtaining the king's leave[38]; provided he is under no injunction of staying at home: (which liberty was expressly declared in king John's great charter, though left out in that of Henry III) but, because that every man ought of right to defend the king and his realm, therefore, the king at his pleasure may command him by his writ that he go not beyond the seas, or out of the realm, without license; and, if he do the contrary, he shall be punished for disobeying the king's command. Some persons, there antiently were, that, by reason of their stations, were under a per-

m *Rot. Claus.* 1 *Ric. II. m.* 42 Pryn. on 4 Inst. 136.

n Stat. 138. 4 Inst. 149.

o F. N. B. 85.

37. In 1794, congress, by law, prohibited the exportation of arms, &c. from the United States for a year, under severe penalties; and in 1795, they authorised the president to permit the exportation thereof, in certain cases, the former law notwithstanding. L. U. S. 3 Cong. c. 33, and 118. 5 Cong. c. 2.

38. The act of 1783, c. 16. V. L. Edi. 1794, c. 110, expressly recognizes the right of every citizen, not only to depart the state, but to expartiate himself. See p. 137. note 23.

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petual 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 de- 266
fend the kingdom from invasions; all ecclesiastics, who were expressly confined by the fourth chapter of the constitutions of Clarendon, on account of their attachment, in the times of popery, to the see of Rome; all archers and other artificers, lest they should instruct foreigners to rival us in their several trades and manufactures. This was law in times of Briton[p], who wrote in the reign of Edward I: and sir Edward Coke[q] 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[r], forbidding all persons whatever, to go abroad without licence; *except* only the lords and other great men of the realm; and true and notable merchants; and the king's soldiers. But this act was repealed by the statute 4 Jac. I. c. 1. And at present every body has, or at least assumes, the liberty of going abroad when he pleases. Yet, undoubtedly, if the king, by writ of *ne exeat regnum*, under his great seal or privy seal, thinks proper to prohibit him from so doing; or if the king sends a writ to any man, when abroad, commanding his return; and in either case the subject disobeys; it is a high contempt of the king's prerogative, for which the offender's lands shall be seised till he return; and then he is liable to fine and imprisonment[s] [39].

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[40]. By the fountain of jus-

p c. 123.
q 3 Inst. 175
r 5 Ric. II. c. 2.
s. 1 Hawk. P. C. 22.

39. See page 137, note 23. 3 P. Wms. 312. 3 Brown, 370. 1 Viz. Jun. 96.

40. It was before observed, p. 250. note 12. That the president of the United States, although he is the *chief*, is not, (like a king of England, according to the commentator) the *sole* magistrate of the nation. In the United States the Judiciary are a distinct and inde-

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tice 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*[t]. He is not the spring but the reservoir; from whence right and equity are conducted, by a thousand channels, to every individual. The original power of judicature, by the fundamental principles of society, is lodged in the society at
267 large: but as it would be impracticable to render complete justice to every individual, by the people in their collective capacity, therefore, every nation has committed that power to certain select magistrates, who with more ease and expedition can hear and determine complaints; and in England this authority has immemorially been exercised by the king or his substitutes. He, therefore, has alone, the right of erecting courts of judicature: for, though the constitution of the kingdom hath 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 propable, and almost certain, that in very early times, before our constitution arrived at it's full perfection, our kings

t *Ad hoc autem creatus est et electus, ut justitiam fatiat universis.* Bract. *l.* 3. *tr.* 1. *c.* 9.

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pendent order of magistrates, from the executive. This separation forms the basis of all our republics. C. U. S. Art. 1. §. 8. Art. 3. §. 1. Letter from the federal judges to the president of the United States. Appendix, note A. in *notis*. C. V. Art. 3, 14, 15.

"It is an important principle, which, in the discussion of ques-
" tions of the present kind, ought never to be lost sight of, that the
" judiciary of this country is not a *subordinate*, but *co-ordinate*
" branch of the government." per. Patterson, justice of the supreme court of the United States. 2 Dallas, 309.

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in person often heard and determined causes between party and party. But at present, by the long and uniform usage of many ages, our kings have delegated their whole judicial power to the judges of their several courts: which are the grand depositaries of the fundamental laws of the kingdom, and have gained a known and stated jurisdiction, regulated by certain and established rules, which the crown itself cannot now alter but by act of parliament[u]. 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;[41] 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 268
are continued in their offices during their good behaviour, notwithstanding any demise of the crown, (which was formerly held[w] immediately to vacate their seats) and their full salaries are absolutely secured to them during the continuance of their commissions; his majesty having been pleased to declare, that "he looked upon the independence and uprightness of the "judges, as essential to the impartial administration of justice; "as one of the best securities of the rights and liberties of his "subjects; and as most conducive to the honour of the "crown[x]."

In criminal proceedings, or prosecutions for offences, it would still be a higher absurdity, if the king personally sate in

u 2 Hawk. P. C. 2.
x Com. Journ. 3. Mar. 1761.
w Lord Raym. 747.

41. "The judges both of the supreme and inferior courts shall "hold their offices during good behaviour; and shall at stated times "receive for their services, a compensation which shall not be dimi-"nished during their continuance in office." C. U. S. Art. 3. The judges of the superior courts in Virginia, likewise hold their office during good behaviour, and the constitution also declares, that they shall have fixed, and adequate salaries. C. V. Art. 14.

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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 regard to the execution of the laws, to one visible magistrate, all affronts to that power, and breaches of those rights, are immediately offences against him, to whom they are so delegated by the public. He is therefore the proper person to prosecute for all public offences and breaches of the peace, being the person injured in the eye of the law. And this notion was carried so far in the old Gothic constitution, (wherein the king was bound by his coronation oath to conserve the peace) that in case of any forcible injury offered to the person of a fellow subject, the offender was accused of a kind of perjury, in having violated the king's coronation oath; *dicebatur fregisse juramentum regis juratum*[y]. And hence also arises another
269 branch of the prerogative, that of *pardoning* offences[42]; for it is reasonable that he only who is injured should have the power of forgiving. 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

y Stiernh. *de jure Goth. l.* 3. *c.* 3. A notion somewhat similar to this may be found in the mirror. c. 1. §. 5. And so also, when the chief justice Thorpe was condemned to be hanged for bribery, he was said *sacramentum domini regis fregisse. Rot. Parl.* 25 *Edw. III.*

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42. The president hath the power of granting reprieves, and pardons for offences against the United States except in cases of impeachment. C. U. S. Art. 2. The governor of Virginia "shall, with the advice of the council of state have the power of granting reprieves, or pardons, except where the prosecution shall have been carried on by the house of delegates, or the law shall otherwise particularly direct; in which cases, no reprieve or pardon shall be granted, but by *resolve* of the house of delegates." C. V. Art. 9. The governor of Virginia can not grant a pardon in case of treason, 1776, c. 3. V. L. 1794, c. 168.

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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 removable at pleasure, by the crown, consists one main preservative of the public liberty; which cannot subsist long in any state, unless the administration of common justice be in some degree separated both from the legislative and also from the executive power[43]. Were it joined with the legislative, the life, liberty, and property, of the subject, would be in the hands of arbitrary judges, whose decisions would be then regulated only by their own opinions, and not by any fundamental principles of law; which, though legislators may depart from, yet judges are bound to observe. Were it joined with the executive, this union might soon be an over-balance for the legislative. For which reason, by the statute of 16 Car. I. c. 10, which abolished the court of star-chamber, effectual care is taken to remove all judicial power out of the hands of the king's privy council; who, as then was evident from recent instances, might soon be inclined to pronounce that for law, which was most agreeable to the prince or his officers. *Nothing, therefore, is more to be avoided, in a free constitution, than uniting the provinces of a judge and a minister of state.* And indeed, that the absolute power, claimed and exercised in a neighbouring nation, is more tolerable than that of the eastern empires, is in great measure owing to their having vested the judicial power in their parliaments, a body separate and distinct from both the legislative and executive: and, if ever that nation recovers it's former liberty, it will owe it to the efforts of those

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43. This grand desideratum, if ever completely obtained, may be found in the constitutions of the American states. In the federal government, (according to the true theory of the constitution) it approaches nearer to perfection than in any of the state constitutions that I have examined. The constitution and bill of rights of Virginia expressly declare that these powers shall be separate and distinct, except in some particular instances therein specified; the inconveniences of which are subjects of daily observation. C. U. S. Art. 3. C. V. Art. 3.

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assemblies. In Turkey, where every thing is centered in the
270 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[z]. His judges are the mirror by which the king's image is reflected. It is the regal office, and not the royal person, that is always present in court, always ready to undertake prosecutions, or pronounce judgment, for the benefit and protection of the subject. And from this ubiquity it follows, that the king can never be nonsuit[a]; for a nonsuit is the desertion of the suit or action by the non-appearance of the plaintiff in court. For the same reason also, in the forms of legal proceedings, the king is not said to appear *by his attorney*, as other men do; for in contemplation of law he is always present in court[b].

From the same original, of the king's being the fountain of justice, we may also deduce the prerogative of issuing proclamations[44], which is vested in the king alone. These proclamations have then a binding force, when (as sir Edward Coke observes[c]) they are grounded upon and enforce the laws of the realm. For, though the making of laws is entirely the work of a distinct part, the legislative branch, of the sovereign power, yet the manner, time, and circumstances of putting those laws in execution must

z Fortesc. c. 8. 2 Inst. 186. a Co. Litt. 139.
b Finch. L. 81. c 3 Inst. 162.

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44. The right of issuing proclamations, is, perhaps, deducible from that injunction upon the president, contained in C. U. S. Art. 2. "That he shall take care that the laws be faithfully executed." Congress, in their addresses to the president, approved of his proclamation of neutrality, June 1793. They have also by repeated acts authorised his issuing proclamations. L. U. S. 3 Cong. c. 17, 41, 101....The governor of Virginia was authorised by the act of 1787, c. 34, to give effect to a law by his proclamation; and the act of 1788, c. 78, authorised him to put a period to a law, in the same manner.... Sessions acts, 1787, 1788, and 1796, c. 2, Sec. 45.

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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[45] upon all shipping in time of war[d], will be equally 271
binding as an act of parliament, because founded upon a prior law. But a proclamation to lay an embargo in time of peace upon all vessels laden with wheat (though in the time of a public scarcity) being contrary to law, and particularly to statute 22 Car. II. c. 13, the advisers of such a proclamation and all persons acting under it, found it necessary to be indemnified by a special act of parliament[46], 7 Geo. III. c. 7. A proclamation for disarming papists is also binding, being only in execution of what the legislature has first ordained: but a proclamation for allowing arms to papists, or for disarming any protestant subjects, will not bind; because the first would be to assume a dispensing power, the latter a legislative one; to the vesting of either of which in any single person, the laws of England are absolutely strangers. Indeed, by the statutes 31 Hen. VIII. c. 8, it was enacted, that the king's proclamations should have the force of acts of parliament: a statute, which was calculated to introduce the most despotic tyranny; and which must have proved fatal to the liberties of this kingdom, had it not been luckily repealed in the minority of his successor, about five years after[e].

d 4 Mod. 177, 179. e Stat. 1 Edw. VI. c. 12.

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45. A similar power was granted to the president of the United States for a limited time. L. U. S. 3 Cong. c. 41.

46. Some acts of indemnification were passed by the legislature of Virginia during the revolutionary war. Oct. 1777, c. 6. Nov. 1781, c. 24.

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IV. The king is likewise the fountain of honour[47], of office[48], and of privilege[49]: 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 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 be-

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47. No title of nobility can be granted by any state, or by the United States: and no person holding any office of profit, or trust under them, shall, without consent of congress, accept of any present, emolument, office, or title of any kind whatever, from any king, prince, or foreign state. C. U. S. Art. 1. Sec. 9, 10. In case any alien, applying to be admitted to citizenship, shall have borne any hereditary title, or been of any of the orders of nobility in the kingdom or state from which he came, he shall, at the time of his admission, make an express renunciation of his title or order of nobility in the court where his application is made, which shall be recorded in the said court. L. U. S. 3 Cong. c. 85. 7 Cong. 1 Sess. c. 28.

48. The power of appointment to office under the United States, is vested, in general, in the president, by and with the advice and consent of the senate; the right of nomination being in the president. But congress may, by law, vest the appointment of such inferior officers as they may think proper, in the president alone, in the courts of law, or in the heads of departments. C. U. S. Art. 2. Sec. 2.

The power of appointment in Virginia, in all important cases, is vested in the legislature: the executive and the courts of law have also the power of appointment in some cases. All commissions are tested by the governor. C. V. Art. 14, 15, 18.

49. No man, or set of men, are entitled to exclusive or separate emoluments or privileges from the community, but in consideration of public services; which not being descendible, neither ought the offices of magistrate, legislator, or judge, to be hereditary. Bill of Rights, Art. 4.

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stow them upon none, but such as deserve them. And, therefore, all degrees of nobility, of knighthood, and other titles, are 272
received by immediate grant from the crown: either expressed in writing, by writs or letters patent, as in the creations of peers and baronets; or by corporeal investiture, as in the creation of a simple knight.

From the same principle also, arises the prerogative of erecting[50] 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[51]: 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[52] annexed to them, nor annex new fees to old offices; for this would be a tax upon the

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50. The power of erecting offices belongs not to the president of the United States but to congress, since no office under the United States can be created but by the constitution, or by law. The president, vice-president, senators, representatives in congress, and judges of the supreme court, are officers which the constitution requires; ambassadors, other public ministers, and consuls, are officers which it permits to be occasionally nominated by the president, and appointed by him, by and with the advice and consent of the senate. All other offices, not particularly provided for by the constitution, must be established by law. C. U. S. Art. 2. Sec. 2. The legislature alone can erect any office in Virginia. C. V. Art. 9.

51. "A titled nobility is the most undisputed progeny of feudal "barbarism. Titles had, in all nations, denoted offices; it was re- "served for Gothic Europe to attach them to ranks." Mackintosh's Def. of the Fr. Rev. p. 70. 3d Edi.

52. Fees of office in the United States are established by law. See L. U. S. 1 Cong. 2 Sess. c. 35, &c. L. V. 1794, c. 115 and 69.

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subject, which cannot be imposed but by act of parliament[f]. Wherefore, in 13 Hen. IV, a new office being created by the king's letters patent for measuring cloths, with a new fee for the same, the letters patent were, on account of the new fee, revoked and declared void in parliament.

Upon the same, or a like reason, the king has also the prerogative of conferring privileges [53] upon private persons. Such as granting place or precedence to any of his subjects, as shall seem good to his royal wisdom[g]: or such as converting aliens [54], 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 [55]; whereby a number of private persons are united and knit together, and enjoy many liberties, powers, and immu-
273 nities 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

f 2 Inst. 533. g 4 Inst. 361.

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53. See the notes in the preceding page.

54. Congress shall have power to establish an uniform rule of naturalization. C. U. S. Art. 1. Sec. 8. They have done so. L. U. S. 1 Cong. 2 Sess. c. 3, which act was repealed by the act of 3 Cong. c. 85. V. L. 1794, c. 110, shews the mode by which aliens might have been admitted to the rights of citizenship before those periods. And now see L. U. S. 5 Cong. c. 71, and 7 Cong. c. 28.

55. This power, it was presumed, remained with the state legislatures. Congress, however, have, in one instance, shewn, that they considered themselves as invested with it. See L. U. S. 1 Cong. 3 Sess. c. 10. "To incorporate the subscribers to the bank of the "United States."

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what distinctions, his people are the best qualified to serve, and to act under him. A principle, which was carried so far by the imperial law, that it was determined to be the crime of sacrilege, even to doubt whether the prince had appointed proper officers in the state[h].

V. Another light, in which the laws of England consider the king with regard to domestic concerns, is the arbiter of commerce. By commerce, I at present mean domestic commerce only [56]. 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 this purpose. For, as these are transactions carried on between subjects of independent states, the municipal laws of one will not be regarded by the other. For which reason the affairs of commerce are regulated by a law of their own, called the law merchant or *lex mercatoria*, which all nations agree in and take notice of. And in particular, it is held to be part of the law of England, which decides the causes of merchants by the general rules which obtain in all commercial countries; and that often even in matters relating to domestic trade, as for instance, with regard to the drawing, the acceptance, and the transfer, of inland bills of exchange[i].

h *Disputare de principali judicio non oportet; sacrilegii enim instar est, dubitare an is dignus sit, quem elegerit imperator.* C. 9, 29, 3.

i Co. Litt. 172. Ld. Raym. 181, 1542.

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56. Congress have power to regulate commerce with foreign nations, and among the several states, and with the Indian tribes. C. U. S. Art. 1. Sec. 8. The regulation of domestic commerce, it is presumed, remains with the states respectively, except as to the right of regulating the value of coin, and the standard of weights and measures. Ib. Amendts. C. U. S. Art. 12.

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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[57]. These can only be set up by virtue of the king's grant, or by long and immemorial usage and prescription, which presupposes such a grant[k]. The limitation of these public resorts, to such time and such place as may be most convenient for the neighbourhood, forms a part of economics, or domestic 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[58]. These, for the advantage of the public, ought to be universally the same throughout the kingdom; being the general criterions which reduce all things to the same or an equivalent value. But, as weight and measure are things in their nature arbitrary and uncertain, it is therefore expedient that they be reduced to some fixed rule or standard: which standard it is impossible to fix by any written law or oral proclamation; for no man can, by words only, give another an adequate idea of a foot-rule, or a pound-weight. It is, therefore, necessary to have recourse to some visible, palpable, material standard; by forming a comparison with which, all

k 2 Inst. 220.

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57. It may be presumed, that these powers belong exclusively to the state legislatures. Amdts. C. U. S. Art. 12. They have been repeatedly exercised by the legislature of Virginia.

58. The regulation of weights and measures belongs to congress. C. U. S. Art. 1. No law has yet been passed on the subject. In Virginia, the act of 1734, c. 1, continued and enforced by the act of 1794, c. 140, until congress shall make provision on the subject, establishes the English standards. For the principles upon which a general standard in these respects may be obtained, the student may consult the report of the secretary of state (Mr. Jefferson) to congress, on the subject, July 4, 1790.

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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[l]. This standard was originally kept at Winchester: and we find in the laws of king Edgar[m], near a century before the conquest, an injunction that the one measure, which was kept at Winchester, should be observed throughout the realm. Most nations have regulated the standard of measures of length by comparison with the parts 275
of the human body; as the palm, the hand, the span, the foot, the cubit, the ell, (*ulna*, or arm) the pace, and the fathom. But, as these are of different dimensions in men of different proportions, our antient historians[n] 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 a half make a perch: and the yard is subdivided into three feet, and each foot into twelve inches; which inches will be each of the length of three grains of barley. Superficial measures are derived by squaring those of length; and measures of capacity by cubing them. The standard of weights was originally taken from corns of wheat, whence the lowest denomination of weights we have is still called a grain; thirty-two of which are directed, by the statute called *compositio mensurarum*, to compose a pennyweight, whereof twenty make an ounce, twelve ounces a pound, and so upwards. And upon these principles the first standards were made; which, being originally so fixed by the crown, their subsequent regulations have been generally made by the king in parliament. Thus, under king Richard I, in his parliament holden at Westminster, *A. D.* 1197, it was ordained that there should be only one weight and one measure throughout the kingdom, and that the custody of the assise or standard of weights and measures should be committed to certain persons in

l *Gr. Coustum.* c. 16. m *cap.* 8.

n Will. Mamsb. *in vita Hen. I.* Spelm. *Hen. I. apud* Wilkins, 299.

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every city and borough[o]; 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 and 12 W. III. c. 20. In king
276 John's time this ordinance of king Richard was frequently dispensed with for money[p]; which occasioned a provision to be made for inforcing it, in the great charters of king John and his son[q]. These original standards were called *pondus regis*[r], and *mensura domini regis*[s]; and are directed by a variety of subsequent statutes to be kept in the exchequer, and all weights and measures to be made conformable thereto[t]. But, as sir Edward Coke observes[u], though this hath so often, by authority of parliament, been enacted, yet it could never be effected; so forcible is custom with the multitude.

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 standard (wherein consists the intrinsic value) may both be known by inspection only.

As the quantity of precious metals increases, that is, the more of them there is extracted from the mine, this universal medium or common sign will sink in value, and grow less pre-

o Hoved. Matth. Paris. p Hoved. *A. D.* 1201.

q 9 Hen. 3, c. 25.

r *Plac.* 35 *Edw. I. apud* Cowel's interpr. *tit. pondus regis.*

s *Flet.* 2. 12. t 14 Edw. III. st. 1. c. 12. 25 Edw. III. st. 5. c. 10. 16 Ric. II. c. 3. 8 Hen. VI. c. 5. 11 Hen. VI. c. 8. 11 Hen. VII. c. 4. 22 Car. II. c. 8. u Inst. 41.

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cious. Above a thousand millions of bullion are calculated to have been imported into Europe from America within less than three centuries; and the quantity is daily increasing. The consequence is, that more money must be given now for the same commodity than was given an hundred years ago..... 277
And, if any accident were to diminish the quantity of gold and silver, their value would proportionably rise. A horse, that was formerly worth ten pounds, is now perhaps worth twenty and, by any failure of current specie, the price may be reduced to what it was. Yet is the horse in reality neither dearer nor cheaper at one time than another: for, if the metal which constitutes the coin was formerly twice as scarce as at present, the commodity was then as dear at half the price, as now it is at the whole.

The coining of money is in all states the act of the sovereign power[59]; for the reason just mentioned, that it's value may be known on inspection. And with respect to coinage in general, there are three things to be considered therein; the materials, the impression, and the denomination.

With regard to the materials, sir Edward Coke lays it down[w], that the money of England must either be of gold or silver[60]: and none other was ever issued by the royal authority till 1672, when copper farthings and half-pence were coined by king Charles the second, and ordained by proclamation to be

w 2 Inst. 577.

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59. Congress have power to coin money, and to regulate the value thereof. C. U. S. Art. 1, §. 8. See the act for establishing a mint, and regulating the coins of the United States. 2 Cong. c. 15. No state shall coin money, emit bills of credit, or make any thing but gold and silver coin a tender in payment of debts. C. U. S. Art. 1, §. 10.

60. Only the gold and silver coins of the United States are made a legal tender. 2 Cong. c. 15, §. 16. Those of full weight at their respective values, as declared in the act; those of less than full weight, in proportion to their respective weights. *Ibid.*

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current in all payments, under the value of sixpence, and not otherwise. But this copper coin is not upon the same footing with the other in many respects, particularly with regard to the offence of counterfeiting it[61]. And, as to the silver coin, it is enacted by statute 14 Geo. III. c. 42, that no tender of payment in silver money, exceeding twenty-five pounds at one time, shall be a sufficient tender in law, for more than its value by weight, at the rate of *5s 2d.* an ounce.

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

The denomination, or the value for which the coin is to pass current[62], is likewise in the breast of the king; and if any unusual pieces are coined, that value must be ascertained by proclamation. In order to fix the value, the weight, and the fine-

x 1 His. P. C. 191.

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61. If any gold or silver coin of the United States be debased through the default of any person employed in the mint, for the purpose of profit or gain, or otherwise, with a fraudulent intent; or the metal or coin committed to their charge be embezzled by them, it shall be deemed felony in the person offending, and he shall suffer death. L. U. S. 2 Cong. c. 15, §. 19.

The money of account of the United States shall be expressed in dollars, or units, dismes, or tenths, cents, or hundredths, and milles, or thousandths, in decimal proportions, each to the other. L. U. S. 2 Cong. c. 15, §. 20. The money of account of the state of Virginia corresponds therewith. L. V. Edi. 1794, c. 111.

62. The denominations of the coins of the United States are as follows: TABLE

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ness of the metal are to be taken into consideration together. When a given weight of gold or silver is of a given fineness, it is then of the true standard [x 63], and called esterling metal, or

x This standard hath been frequently varied in former times; but hath for many years past been thus invariably settled. The pound troy of gold, consisting of twenty-two carats (or twenty-four parts) fine, and two of alloy, is divided into forty-four guineas and an half of the present value of 21*s*. each. And the pound troy of silver, consisting of eleven ounces and two pennyweights pure, and eighteen pennyweights alloy, is divided into sixty-two shillings. (See Folkes on English coins).

TABLE OF COINS IN THE UNITED STATES.

DENOMINATIONS.	VALUE.			WEIGHTS.	
Gold Coins.	*Dolls.*	*Cts.*	*Ms.*	*Grains of Pure Gold.*	*Grains of Stand. Gold.*
Eagle	10	...	...	247.5	270
Half-Eagle	5	...	...	123.75	135
Quarter-Eagle	2	50	...	61.875	67.5
SILVER COINS.				Grains of pure Silver	Grains of Std. Silver.
Dollar	....	100	...	371.25	416
Half-Dollar	....	50	...	185.625	208
Quarter-Dollar	....	25	...	92.8125	104
Disme	....	10	...	37.125	41.6
Half-Disme	....	5	...	18.5625	20.8
COPPER COIN.				COPPER.	Reduced by Proclam. to
Cent	....	...	10	208 ...	160
Half-Cent	....	...	5	104 ...	80

63. The standard of all gold coins of the United States shall be eleven parts of pure gold, and one of alloy, of silver and copper, the proportion of silver not exceeding one half. The standard of all silver coins, shall be 1485 parts of fine to 179 parts of alloy; which alloy shall be wholly of copper. And the proportion between pure gold and pure silver, shall be as fifteen to one, in value, L. U. S. 2 Cong. c. 15, 46. The dollar of the United States is of the same value as a Spanish milled dollar. Ibid.

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sterling; a name for which there are various reasons given[y], but none of them entirely satisfactory. And of this sterling or esterling metal all the coin of the kingdom must be made, by the statute 25 Edw. III. c. 13. So that the king's prerogative seemeth not to extend to the debasing or inhancing the value of the coin, below or above the sterling value[z]: though sir Matthew Hale[a] appears to be of another opinion. The king may also, by his proclamation, legitimate foreign coin, and make it current here[64]; declaring at what value it shall be taken in payments[b].

y Spelm. Gloss. 203. Dufresne, III. 165. The most plausible opinion seems to be that adopted by those two etymologists, that the name was derived from the *Esterlingi*, or Easterlings; as those Saxons were antiently called, who inhabited that district of Germany, now occupied by the Hanse-towns and their appendages; the earliest traders in modern Europe.

z 2 Inst. 577. a 1 Hal. P. C. 194. b *Ibid.* 197.

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64. This power belongs, exclusively to congress. C. U. S. Art. 1. §. 8. See the act regulating the value of foreign coin. L. U. S. 2 Cong. c. 49. by which they are to pass as current money within the United States, at the following rates.

Gold coins of Great-Britain, and Portugal at their present standard,	100 cents for every 27 grains.
Gold coins of France, Spain, and it's dominions at their present standard.	100 cents for every 27.4 grains.
Spanish milled dollars,	100 cents, weighing 17 dwts. 7 grains.
Crowns of France,	110 cents, weighing 18 dwts. 17 grains.

The rates of foreign currency, as estimated at the custom-house, for the purpose of ascertaining the *ad valorem* duties on foreign goods are as follows: 1 Cong. 2 Sess. c. 35. §. 39:

	Dols.	*Cts.*
The pound sterling of Great Britain,	4	44
The livre tournois of France.	0	18.5
The florin, or guilder of the United Netherlands,	0	39
The mark banco, of Hamburgh,	0	33 1-3
The rix dollar of Denmark,	1	00
The rial of plate, of Spain,	0	10
The millree of Portugal,	1	24
The pound sterling of Ireland,	4	10
The tale of China,	1	48
The pagoda of India,	1	94
The rupee of Bengal,	0	55.5

See also, L. U. S. 5 Cong. c. 34. §. 39, and 7 Cong. c. 38.

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But this, I apprehend, ought to be by comparison with the standard of our own coin; otherwise the consent of parliament will be necessary. There is at present no such legitimated money; Portugal coin being only current by private consent, so that any one who pleases may refuse to take it in payment. The 279
king may also at any time decry, or cry down, any coin of the kingdom, and make it no longer current[c 65].

V. The king is, lastly, considered by the laws of England as the head and supreme governor of the national church[66].

c 1 Hal. P. C. 197.

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65. All copper coins, except cents and half cents, were cried down by congress. L. U. S. 2 Cong. c. 39.

66. "The faculties of man have hitherto in all countries, been "more or less cramped by the interference of civil authority, in mat- "ters of speculation, by tyrannical laws against heresy and schism, and "by slavish hierarchies, and religious establishments. It is above all "things that no such fetters on reason should be admitted into Ameri- "ca. I observe, with inexpressible satisfaction, that at present they "have no existence there. In this respect the governments of the "United States are liberal to a degree that is unparalleled. They "have the distinguished honour of being the first states under hea- "ven, in which forms of government have been established favour- "able to universal liberty." Doctor Price's observations on the importance of the American revolution, p. 18. Lond. 1786. This venerable patriot probably lived to see that article of the amendments to the federal constitution, which guarantees to the United States a perpetual exemption from tyranny over the mind.

"No religious test shall ever be required as a qualification to any "office or public trust under the United States," C. U. S. Art. 6.

"Congsess shall make no law respecting an establishment of re- "ligion, or probibiting the free exercise thereof." Amendments "to the C. U. S. Art. 3.

"Religion, or the duty which we owe to our Creator, and the "manner of discharging it, can be directed only by reason and con- "viction, not by force or violence, and therefore all men are equally "entitled to the free exercise of religion, according to the dictates "of conscience." Bill of Rights, Art 16.

"No man shall be compelled to frequent or support any religious "worship, place, or ministry, whatsoever; nor shall be enforced,

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

In virtue of this authority the king convenes, prorogues, restrains, regulates, and dissolves all ecclesiastical synods or convocations. This was an inherent prerogative of the crown, long before the time of Henry VIII, as appears by the statute 8 Henry VI. c. 1, and the many authors both lawyers and historians, vouched by sir Edward Coke[d]. So that the statute 25 Henry VIII. c. 19, which restrains the convocation from making or putting in execution any canons repugnant to the king's prerogative, or the laws, customs, and statutes of the realm, was merely declaratory of the old common law[e]: that part of it only being new, which makes the king's royal assent actually necessary to the validity of every canon. The convocation or ecclesiastical synod, in England, differs considerably in it's constitution from the synods of other christian kingdoms: those consisting wholly of bishops; whereas with us the convocation is the miniature of a parliament, wherein the archbishop pre-
280 sides with regal state; the upper house of bishops represents the house of lords; and the lower house, composed of represen-

d 4 Inst. 322, 323. e 12 Rep. 72.

"restrained, molested, or burthened, in his body or goods, nor shall "otherwise suffer on account of his religious opinions or belief; "but all men shall be free to profess, and by argument to maintain "their opinions in matters of religion, and the same shall in no wise "diminish, enlarge, or affect their civil capacities." V. L. Edi. "1794, c. 20. See also, Appendix, note G. Vol. I. part 2.

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tatives of the several diocesses at large, and of each particular chapter therein resembles the house of commons with it's knights of the shire and burgesses [f]. This constitution is said to be owing to the policy of Edward I: who thereby, at one and the same time, let in the inferior clergy to the privileges of forming ecclesiastical canons, (which before they had not) and also introduced a method of taxing ecclesiastical benefices, by consent of convocation [g].

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

As head of the church, the king is likewise the *dernier resort* in all ecclesiastical causes; an appeal lying ultimately to him in chancery from the sentence of every ecclesiastical judge: which right was restored to the crown by statute 25 Hen. VIII. c. 19, as will more fully be shewn hereafter [67].

f In the diet of Sweden, where the ecclesiastics form one of the branches of the legislature, the chamber of the clergy resembles the convocation of England. It is composed of the bishops and superintendants; and also of deputies, one of which is chosen by every ten parishes or rural deanry. Mod. Un. Hist. xxxiii. 18.

g Gilb. Hist. of Exch. c. 4.

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67. We have now attended the student through the whole course of the commentator's illustration of the principles of the British constitution and government; the several constituent parts; their respective rights, privileges, and prerogatives; in the course of which we have not only endeavoured to shew the correspondence, or disagreement, between those constituent parts, and the several branches of our own governments; but also minutely pointed out such of those powers, as have been retained in our own constitutions; or have been altered or modified, so as to adapt them to the principles of a representative democracy; or expunged and annihilated, as uselesss, or pernicious in such a government. We have also occa-

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sionally shewn in what manner, and by whom, the powers retained in our constitutions are to be exercised. In the progress of which, the student cannot fail to have remarked how many of the most important prerogatives of the British crown, are transferred from the executive authority, in the United States, to the supreme national council in congress assembled.

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OF THE KING'S REVENUE[1].

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

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

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1. Congress have power to lay and collect taxes, duties, imposts and excises, to pay the debts, and provide for the common defence, and general welfare of the United States: but all duties, imposts, and excises, shall be uniform throughout the United States. But no capitation or other direct tax shall be laid, unless in proportion to the census, or enumeration directed by the constitution to be taken....nor shall any tax or duty be laid on articles exported from any state. C. U. S. Art. 1. §. 8, 9.

Private property shall not be taken for public use without just compensation. Amendments to C. U. S. Art. 7.

No man can be deprived of his property for public uses, without his own consent, or that of his representatives. Bill of Rights, Article 6.

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

282 I. The first of the king's ordinary revenues, which I shall take notice of, is of an ecclesiastical kind; (as are also the three succeeding ones), viz. the custody of the temporalties of bishops: by which are meant all the lay revenues, lands, and tenements, (in which is included his barony), which belong to an archbishop's or bishop's see. And these upon the vacancy of the bishoprick are, immediately, the right of the king, as a consequence of his prerogative in church matters; whereby he is considered as the founder of all archbishopricks and bishopricks, to whom, during the vacancy they revert[2]. And for the same reason, before the dissolution of abbeys, the king had the custody of the temporalties of all such abbeys and priories, as were of royal foundation (but not of those founded by subjects), on the death of the abbot or prior[a]. Another reason may also be given, why the policy of the law hath vested this custody in the king; because, as the successor is not known, the lands and possessions of the see would be liable to spoil and devastation, if no one had a property therein. Therefore, the law has given the king, not the temporalties, themselves, but the *custody* of the temporalties, till such time, as a successor is appointed; with power of taking to himself, all the intermediate

a 2 Inst. 15.

2. This branch of revenue never had existence in the United States.

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profits, without any account of the successor; and with the right of presenting (which the crown very frequently exercises) to such benefices and other preferments as fall within the time of vacation[b]. This revenue is of so high a nature, that it could not be granted out to a subject, before, or even after, it accrued; but now by the statute 15 Edw. III. st. 4. c. 4 and 5, the king may, after the vacancy, lease the temporalties to the dean and chapter; saving to himself all advowsons, escheats, and the like. Our antient kings, and particularly William Rufus, were not only remarkable for keeping the bishopricks a long time vacant, for the sake of enjoying the temporalties, but also committed horrible waste on the woods and other parts of the estate; and to crown all, would never, when the see was filled up, restore to the bishop his temporalties again, unless he purchased them at an exorbitant price. To remedy which, king Henry 283
the first[c], granted a charter at the beginning of his reign, promising neither to sell, nor let to farm, nor take any thing from the domains of the church, till the successor was installed. And it was made one of the articles of the great charter[d], that no waste should be committed in the temporalties of bishopricks, neither should the custody of them be sold. The same is ordained by the statute of Westminster the first[e]; and the statute 14 Edw. III. st. 4. c. 4, (which permits, as we have seen, a lease to the dean and chapter), is still more explicit in prohibiting the other exactions. It was also a frequent abuse, that the king would, for trifling, or no causes, seise the temporalties of bishops, even during their lives, into his own hands: but this is guarded against by statute 1 Edw. III. st. 2. c. 2.

This revenue of the king, which was formerly very considerable, is now by a customary indulgence almost reduced to nothing: for, at present, as soon as the new bishop is consecrated and confirmed, he usually receives the restitution of his temporalties quite entire, and untouched, from the king; and at the same time does homage to his sovereign: and then, and not sooner, he has a fee simple in his bishoprick, and may maintain an action for the profits[f].

b Stat. 17 Edw. II. c. 14. F. N. B. 32.
c Matt. Paris.
d 9 Hen. III. c. 5.
e 3 Edw. I. c. 21.
f Co. Litt. 67, 341.

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II. The king is entitled to a corody, as the law calls it, out of every bishoprick, that is, to send one of his chaplains to be maintained by the bishop, or to have a pension allowed him till the bishop promotes him to a benefice[g]. This is also in the nature of an acknowledgment to the king, as founder of the see, since he had formerly the same corody or pension from every abbey or priory of royal foundation[3]. It is, I apprehend, now fallen into total disuse; though sir Matthew Hale says[h], that it is due of common right, and that no prescription will discharge it.

III. The king also (as was formerly observed[i]) is entitled to
284 all the tithes arising in extraparochial places[k 4]: though perhaps it may be doubted how far this article, as well as the last, can be properly reckoned a part of the king's own royal revenue; since a corody supports only his chaplains, and these extraparochial tithes are held under an implied trust, that the king will distribute them for the good of the clergy in general.

IV. The next branch consists in the first fruits, and tenths, of all spiritual preferments in the kingdom; both of which I shall consider together[5].

These were originally a part of the papal usurpations over the clergy of this kingdom; first introduced by Pandulph the pope's legate, during the reigns of king John and Henry the third, in the see of Norwich; and afterwards attempted to be made universal by the popes Clement V and John XXII, about the beginning of the fourteenth century. The first-fruits, *pri-*

g F. N. B. 230.
h Notes on F. N. B. above cited.
i Page 113.
k 2 Inst. 647.

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3. This, as well as the former never had existence in the United States.

4. This stands upon the same footing at present as the two former.

5. Obsolete, in the United States.

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mitiae, or *annates*, were the first year's whole profits of the spiritual preferment, according to a rate or *valor* made under the direction of pope Innocent IV by Walter bishop of Norwich, in 38 Hen. III, and afterwards advanced in value by commission from pope Nicholas III. *A. D.* 1292, 20 Edw. I[l]; which valuation of pope Nicholas is still preserved in the exchequer[m]. The tenths, or *decimae*, were the tenth part of the annual profit of each living by the same valuation; which was also claimed by the holy see, under no better pretence than a strange misapplication of that precept of the Levitical law, which directs[n], that the Levites "should offer the tenth part of their tithes as a "heave-offering to the Lord, and give it to Aaron the *high* "priest." But this claim of the pope met with a vigorous resistance from the English parliament: and a variety of acts were passed to prevent and restrain it, particularly the statute 6 Hen. IV. c. 1, which calls it a horrible mischief and damnable custom. But the popish clergy, blindly devoted to the will of a foreign master, still kept it on foot; sometimes more secretly, sometimes more openly and avowedly: so that in the reign of Henry VIII, it was computed, that in the compass of fifty years 285
800,000 ducats had been sent to Rome for first-fruits only..... And, as the clergy expressed this willingness to contribute so much of their income to the head of the church, it was thought proper (when in the same reign the papal power was abolished, and the king was declared the head of the church of England) to annex this revenue to the crown; which was done by statute 26 Hen. VIII. c. 3, (confirmed by statute 1 Eliz. c. 4,) and a new *valor beneficiorum* was then made, by which the clergy are at present rated.

By these last mentioned statutes all vicarages under ten pounds a year, and all rectories under ten marks, are discharged from the payment of first-fruits: and if, in such livings as continue chargeable with this payment, the incumbent lives but half a year, he shall pay only one quarter of his first-fruits; if but one whole year, then half of them; if a year and a half, three

l F. N. B. 176.

m 3 Inst. 154.

n Numb. xviii. 26.

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quarters; and if two years, then the whole: and not otherwise. Likewise by the statute 27 Hen. VIII. c. 8, no tenths are to be paid for the first year, for then the first-fruits are due: and by other statutes of queen Anne, in the fifth and sixth years of her reign, if a benefice be under fifty pounds *per annum*, clear yearly value, it shall be discharged of the payment of first-fruits and tenths.

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

286 V. The next branch of the king's ordinary revenue (which, as well as the subsequent branches, is of a lay or temporal nature) consists in the rents and profits of the demesne lands of the crown. These demesne lands, *terrae dominicales regis*, being either the share reserved to the crown at the original distribution of landed property, or such as came to it afterwards by forfeitures or other means, were antiently very large and extensive; comprising divers manors, honors, and lordships[6]; the tenants

o 5 Ann. c. 24. 6 Ann. c. 27. 1 Geo. I. st. 2. c. 12. 3 Geo. I. c. 10.

6. Large cessions of territory have been made to the United States by several of the states in the union. See V. L. Edi. 1794, c.

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of which had very peculiar privileges, as will be shewn in the second book of these commentaries, when we speak of the tenure in antient demesne. At present they are contracted within a very narrow compass, having been almost entirely granted away to private subjects. This has occasioned the parliament frequently to interpose; and particularly, after king William III had greatly impoverished the crown, an act passed[p], whereby all future grants or leases from the crown for any longer term than thirty-one years or three lives, are declared to be void; except with regard to houses, which may be granted for fifty years..... And no reversionary lease can be made, so as to exceed, together with the estate in being, the same term of three lives or thirty-one years: that is where there is a subsisting lease, of which there are twenty years still to come, the king cannot grant a future interest, to commence after the expiration of the former, for any longer term than eleven years. The tenant must also be made liable to be punished for committing waste; and the usual rent must be reserved, or, where there has usually been no rent, one third of the clear yearly value[q]. The misfortune is, that this act was made too late, after almost every valuable possession of the crown had been granted away for ever, or else upon very long leases; but may be of some benefit to posterity, when those leases come to expire.

VI. Hither might have been referred the advantages which 287
used to arise to the king from the profits of his military tenures, to which most lands in the kingdom were subject, till the statute 12 Car. II. c. 24, which, in great measure, abolished them all:

p 1 Ann. st. 1. c. 7.

q In like manner by the civil law, the inheritances or *fundi patrimoniales* of the imperial crown could not be alienated, but only let to farm. *Cod. l.* 11. *t.* 61.

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7. Congress have power to dispose of, and make all needful rules and regulations respecting the same, or other property belonging to the United States. C. U. S. Art. 4. §. 3. L. U. S. 4 Cong. c. 30. See also the ordinance for the government of the territory of the United States, north-west of the river Ohio, July 13, 1787. Appendix to Brown's Edi. of the L. U. S, page 101, and appendix, note D. Vol. I, part I.

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the explication of the nature of which tenures must be postponed to the second book of these commentaries [7]. Hither also might have been referred the profitable prerogative of purveyance and pre-emption: which was a right enjoyed by the crown of buying up provisions and other necessaries, by the intervention of the king's purveyors, for the use of his royal houshold, at an appraised valuation, in preference to all others, and even without consent of the owner: and also of forcibly impressing the carriages and horses of the subject, to do the king's business on the public roads, in the conveyance of timber, baggage, and the like, however inconvenient to the proprietor, upon paying him a set-
288 tled price. A prerogative, which prevailed pretty generally throughout Europe, during the scarcity of gold and silver, and the high valuation of money consequential thereupon. In those early times, the king's houshold (as well as those of inferior lords) were supported by specific renders of corn, and other victuals, from the tenants of the respective demesnes; and there was also a continual market kept at the palace gate to furnish viands for the royal use[r]. And this answered all purposes, in those ages of simplicity, so long as the king's court continued in any certain place. But when it removed from one part of the kingdom to another (as was formerly very frequently done), it was found necessary to send purveyors, beforehand, to get together a sufficient quantity of provisions and other necessaries for the houshold: and, lest the unusual demand should raise them to an exorbitant price, the powers before mentioned were vested in these purveyors: who, in process of time, very greatly abused their authority, and became a great oppression to the subject, though of little advantage to the crown; ready money in open market (when the royal residence was more permanent, and specie began to be plenty) being found, upon experience, to be the best proveditor of any. Wherefore, by degrees, the powers of purveyance have declined, in foreign countries, as well as

r 4 Inst. 273.

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7. Obsolete, in the United States, all the lands even under the royal government, being held in free and common socage, by virtue of the charters granted to the states respectively.

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in our own: and particularly were abolished in Sweden by Gustavus Adolphus, towards the beginning of the last century[s]. And, with us in England, having fallen into disuse during the suspension of monarchy, king Charles, at his restoration, consented, by the same statute, to resign entirely these branches of his revenue and power: and the parliament, in part of recompense, settled on him, his heirs and successors, for ever, the hereditary excise of fifteen pence *per* barrel on all beer and ale sold in the kingdom, and a proportionable sum for certain other liquors. So that this hereditary excise, the nature of which shall be farther explained in the subsequent part of this chapter, now forms the sixth branch of his majesty's ordinary revenue.

VII. A seventh branch might also be computed to have 289
arisen from wine licenses[8]; or the rents payable to the crown by such persons as are licensed to sell wine by retail throughout England, except in a few privileged places. These were first settled on the crown by the statute 12 Car. II. c. 25, and, together with the hereditary excise[9], made up the equivalent in value for the loss sustained by the prerogative in the abolition of the military tenures, and the right of pre-emption and purveyance: but this revenue was abolished by the statute 30 Geo. II. c. 19, and an annual sum of upwards of 7000*l.* *per annum*, issuing out of the new stamp duties imposed on wine licenses, was settled on the crown in it's stead.

VIII. An eighth branch of the king's ordinary revenue is usually reckoned to consist in the profits arising from his

s Mod. Un. Hist. xxxiii. 220.

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8. See the act laying duties on licenses for selling wines, and foreign distilled spirituous liquors by retail. L. U. S. 3 Cong. c. 48. These acts have been repealed by an act of 7 Cong. c. 19. See, also, the act for regulating ordinaries. L. V. Edi. 1794, c. 107.

9. See the acts imposing duties upon spirits distilled in the United States. L. U. S. 1 Cong. 3 Sess. c. 15. 2 Cong. c. 32. 3 Cong. c. 49.....since repealed. 7 Cong. c. 19.

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forests [10]. Forests are waste grounds belonging to the king, replenished with all manner of beasts of chase or venary; which are under the king's protection, for the sake of his royal recreation and delight; and, to that end, and for preservation of the king's game, there are particular laws, privileges, courts, and officers belonging to the king's forests: all which will be, in their turns, explained in the subsequent books of these commentaries. What we are now to consider are only the profits arising to the king from hence, which consist principally in amercements, or fines levied for offences against the forest-laws. But as few, if any, courts of this kind for levying amercements [s] have been held since 1632, 8 Car. I; and as, from the accounts given of the proceedings in that court by our histories and law books [t], no body would now wish to see them again revived, it is needless (at least in this place) to pursue this inquiry any farther.

IX. The profits arising from the king's ordinary courts of justice, make a ninth branch of his revenue. And these consist
290 not only in fines imposed upon offenders, forfeitures of recognizances, and amercements levied npon defaulters; but also in certain fees due to the crown in a variety of legal matters, as, for setting the great seal to charters, original writs, and other forensic proceedings [11], and for permitting fines to be levied of lands in order to bar entails, or otherwise to insure their title. As none of these can be done without the immediate intervention of the king, by himself, or his officers, the law allows him certain perquisites and profits, as a recompense for the trouble,

s Roger North, in his life of lord keeper North, (43, 44.) mentions an eyre, or *iter*, to have been held south of Trent soon after the restoration: but I have met with no report of it's proceedings.

t 1 Jones, 267, 298.

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10. Obsolete in the United States.

11. A tax of one dollar shall be paid upon all final judgments in the district courts, V. L. Edi. 1794, c. 66. Sec. 15. Other taxes on law process, appeals, writs of error, &c. have been imposed from time to time by annual acts. See V. L. 1794, c. 1. 1795, c. 6. Sess. Acts. The act of 1798, c. 2, to the same effect, seems to be a perpetual law.

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he undertakes for the public. These, in process of time, have been almost all granted out to private persons, or else appropriated to certain particular uses: so that, though our law-proceedings are still loaded with their payment, very little of them is now returned into the king's exchequer; for a part of whose royal maintenance they were originally intended. All future grants of them, however, by the statute 1 Ann. st. 2. c. 7, are to endure for no longer time than the prince's life who grants them.

X. A tenth branch of the king's ordinary revenue, said to be grounded on the consideration of his guarding and protecting the seas from pirates and robbers, is the right to *royal fish*, which are whale and sturgeon [12]: and these, when either thrown ashore, or caught near the coasts, are the property of the king, on account[t] of their superior excellence. Indeed our ancestors seem to have entertained a very high notion of the importance of this right; it being the prerogative of the kings of Denmark and the dukes of Normandy[u]; and from one of these it was probably derived to our princes. It is expressly claimed and allowed in the statute *de praerogativa regis*[w]: and the most antient treatises of law now extant make mention of it[x]; though they seem to have made a distinction between whale and sturgeon, as was incidentally observed in a former chapter[y].

XI. Another maritime revenue, and fou nded partly on the 291
same reason, is that of shipwrecks: which are also declared to be the king's property by the same prerogative statute 17 Edw.

t Plowd. 315.

u Stiernh. *de jure Sueonum. l.* 2. *c.* 8. *Gr. Coustum. cap.* 17.

w 17 Edw. II. *c.* 11.

x Bracton, *l.* 3. *c.* 3. Britton, *c.* 17. Fleta, *l.* 1. *c.* 45 and 46. *Memorana. Scacch'. H.* 24 *Edw.* 1. 37, prefixed to Maynard's year book of Edward II.

y Ch. 4, p. 223.

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12. Obsolete, if ever claimed in the United States.

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II. c. 11, and were so, long before, at the common law[13]. It is worthy observation, how greatly the law of wrecks has been altered, and the rigour of it gradually softened in favour of the distressed proprietors. Wreck, by the antient common law, was, where any ship was lost at sea, and the goods or cargo were thrown upon the land; in which case these goods, so wrecked, were adjudged to belong to the king: for it was held, that, by the loss of the ship, all property was gone out of the original owner[z]. But this was undoubtedly adding sorrow to sorrow, and was consonant neither to reason nor humanity. Wherefore it was first ordained by king Henry I, that if any person escaped alive out of the ship, it should be no wreck[a]: and afterwards king Henry II, by his charter[b], declared, that if on the coasts of either England, Poictou, Oleron, or Gascony, any ship should be distressed, and either man or beast should escape or be found therein alive, the goods should remain to the owners, if they claimed them within three months; but otherwise should be esteemed a wreck, and should belong to the king, or other lord of the franchise. This was again confirmed with improvements by king Richard the first; who, in the second year of his reign[c], not only established these concessions, by ordaining that the owner, if he was shipwrecked and escaped, "*omnes res suas liberas et quietas haberet*," but also, that, if he perished, his children, or in default of them his bretheren and sisters, should retain the property; and, in default of brother or sister, then the goods should remain to the king[d]. And the law, as laid

z Dr. and St. d. 2. c. 51.

a Spelm. *Cod. apud* Wilkins. 305.

b 26 May, *A. D.* 1174. 1 Rym. *Focd.* 36.

c Rog. Hoved. *in Ric.* I.

d In like manner Constantine the Great, finding that by the imperial law the revenue of wrecks was given up to the princes' treasury or *fiscus*, restrained it by an edict, (*Cod.* 11. 5. 1.) and ordered them to remain to the owners; adding this humane expostulation: "*Quod enim jus habet fiscus in aliena "calamitate, ut de re tam luctuosa compendium sectetur?*"

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13. The laws of Virginia consider the property in wrecks, or goods wrecked, still to continue in the original owner. L. V. May 1782, c. 26. Edi. 1794, c. 6.

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down by Bracton in the reign of Henry III, seems still to have improved in it's equity. For then, if not only a dog (for instance) escaped, by which the owner might be discovered, but if any certain mark were set on the goods, by which they might be known again, it was held to be no wreck[e]. And this is certainly most agreeable to reason; the rational claim of the king being only founded on this, that the true owner cannot be ascertained. Afterwards, in the statute of Westminster the first[f], the time of limitation of claims, given by the charter of Henry II, is extended to a year and a day, according to the usage of Normandy[g]: and it enacts, that if a man, a dog, or a cat, escape alive, the vessel shall not be adjudged a wreck. These animals, as in Bracton, are only put for examples[h]; for it is now held[i], that not only if any live thing escape, but if proof can be made of the property of any of the goods or lading which come to shore, they shall not be forfeited as wreck. The statute further ordains, that the sheriff of the county shall be bound to keep the goods a year and a day, (as in France for one year, agreeably to the maritime laws of Oleron[j], and in Holland for a year and a half) that if any man can prove a property in them, either in his own right or by right of representation[k], they shall be restored to him without delay; but, if no such property be proved within that time, they shall be the king's. If the goods are of a perishable nature, the sheriff may sell them, and the money shall be liable in their stead[l]. This revenue of wrecks is frequently granted out to lords of manors, as a royal franchise; and if any one be thus entitled to wrecks in his own land, and the king's goods are wrecked thereon, the king may claim them at any time, even after the year and day[m]. 292

It is to be observed, that, in order to constitute a legal *wreck*, the goods must come to land. If they continue at sea, the law distinguishes them by the barbarous and uncouth appellations of

e Bract. *l.* 3. *c.* 3. f 3 Edw. I. c. 4.
g *Gr. Coustum.* c. 17.
h Flet. *l.* 1. *c.* 44. 2 Inst. 167. 5 Rep. 107.
i Hamilton v. Davies. *Trin.* 11 *Geo. III. B. R.*
j §. 28. k 2 Inst. 168.
l Plowd. 166.
m 2 Inst. 168. Bro. *Abr. tit. Wreck.*

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jetsam, *flotsam*, and *ligan*. Jetsam is where goods are cast into the sea, and there sink and remain under water: flotsam is where they continue swimming on the surface of the waves[14]: ligan is where they are sunk in the sea, but tied to a cork or buoy, in order to be found again[n]. These are also the king's if no owner appears to claim them: but, if any owner appears, he is entitled to recover the possession. For even if they be cast overboard, without any mark or buoy, in order to lighten the ship, the owner is not by this act of necessity construed to have renounced his property[o]: much less can things ligan be supposed to be abandoned, since the owner has done all in his power to assert and retain his property. These three are, therefore, accounted so far a distinct thing from the former, that by the king's grant to a man of wrecks, things jetsam, flotsam, and ligan will not pass [p].

Wrecks, in their legal acception, are at present not very frequent: for, if any goods come to land, it rarely happens, since the improvement of commerce, navigation, and correspondence, that the owner is not able to assert his property within the year and day limited by law. And in order to preserve this property entire for him, and if possible to prevent wrecks at all, our laws have made many very humane regulations; in a spirit quite opposite to those savage laws, which formerly prevailed in all the northern regions of Europe, and a few years ago were still said to subsist on the coasts of the Baltic sea, permitting the inhabitants to seize on whatever they could get as lawful prize: or, as an author of their own expresses it, "*in* "*naufragorum miseria et calamitate tanquam vultures ad prae-*

n 5 Rep. 106.

o *Quae enim res in tempestate, levandae navis causa, ejiciuntur, hae dominorum permanent. Quia palam est, eas non eo animo ejici, quod quis habere nolit.* Inst. 2. 1. §. 48.

p 5 Rep. 108.

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14. If a boat, or other vessel be taken up adrift, the taker up must advertise it, in the same manner as estrays are to be advertised; and if no person appears to claim the property he shall be entitled to the same benefit as in the case of estrays. V. L. 1785, c. 70. Edi. 1794, c. 16. Vi. Post. p. 298. note 23.

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"*dam currere*[q]." For by the statute 27 Edw. III. c. 13, if any ship be lost on the shore, and the goods come to land (which cannot, says the statute, be called wreck) they shall be presently delivered to the merchants, paying only a reasonable reward to those that saved and preserved them, which is entitled *salvage*. 294
Also by the common law, if any persons (other than the sheriff) take any goods so cast on shore, which are not legal wreck, the owners might have a commission to inquire and find them out, and compel them to make restitution[r]. And by statute 12 Ann. st. 2. c. 18, confirmed by 4 Geo. I. c. 12, in order to assist the distressed[15], and prevent the scandalous illegal practices on some of our sea coasts, (too similar to those on the Baltic) it is enacted, that all head-officers, and others of towns near the sea, shall, upon application made to them, summon as many hands as are necessary, and send them to the relief of any ship in distress, on forfeiture of 100*l.* and, in case of assistance given, salvage shall be paid by the owners, to be assessed by three neighbouring justices. All persons that secret any goods shall forfeit their treble value[16]: and if they wilfully do any act whereby the ship is lost or destroyed, by making holes in her, stealing her pumps, or otherwise, they are guilty of felony, without benefit of clergy[17]. Lastly, by the statute 26 Geo. II. c. 19, plundering any vessel either in distress, or wrecked, and whether any living creature be on board, or not, (for, whether wrecked or otherwise, it is clearly not the property of the populace) such plundering, I say, or preventing the escape of any person that endeavours to save his life, or wounding him with intent to destroy him, or putting out false lights, in order to

q Stiernh. *de jure Sueon. l.* 3. *c.* 5. r F. N. B. 112.

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15. Most of the provisions contained in these statutes have been enacted in Virginia: the act appoints commissioners in all the counties on the sea coast to assist and superintend the saving of goods in case of wreck. Edi. 1794, c. 6. If the vessel be French, the mode of proceeding is prescribed by the act of congress. L. U. S. 2 Cong. c. 24.

16. L. V. May 1782, c. 26, Edi. 1794, c. 6. accordant.

17. V. L. 1794, c. 6. accordant.

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bring any vessel into danger, are all declared to be capital felonies; in like manner as the destroying of trees, steeples, or other stated seamarks, is punished by the statute 8 Eliz. c. 13, with a ferfeiture of 100*l.* or outlawry. Moreover, by the statute of George II, pilfering any goods cast ashore is declared to be petty larceny; and many other salutary regulations are made, for the more effectually preserving ships of any nation in distress[s] [18].

295 XII. A twelfth branch of the royal revenue, the right to mines, has its original from the king's prerogative of coinage, in order to supply him with materials: and, therefore, those mines, which are properly royal, and to which the king is entitled when found, are only those of silver and gold[s] [19]. By the old common law, if gold or silver be found in mines of base metal, according to the opinion of some, the whole was a royal mine, and belonged to the king; though others held that it only did so, if the quantity of gold or silver was of greater value than the quantity of base metal[t]. But now by the statutes 1 W. & M. st. 1. c. 30, and 5 W. & M. c. 6, this difference is made immaterial; it being enacted, that no mines of copper, tin, iron, or lead, shall be looked upon as royal mines, notwithstanding gold or silver

s By the civil law, to destroy persons shipwrecked, or prevent their saving the ship, is capital. And to steal even a plank from a vessel, in distress or wrecked, makes the party liable to answer for the whole ship and cargo. (*Ff.* 47. 9, 3.) The laws also of the Wisigoths, and the most early Neapolitan consitutions, punished with the utmost severity all those who neglected to assist any ship in distress, or plundered any goods cast on shore. (Lindenbrog. *Cod. LL. antiqu.* 146. 715.)

s 2 Inst. 577.

t Plowd. 336.

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18. These last mentioned statutes are not in force in the United States, nor are the provisions of them contained in the law of Virginia concerning wrecks.

19. In all the patents for lands granted in Virginia during the regal government, there was a reversion of one fifth part of the ore, to the crown: but this reversion was abolished by the act of May 1779, c. 13. Edi. 1785.

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may be extracted from them in any quantities: but that the king, or persons claiming royal mines under his authority, may have the ore, (other than tin-ore in the counties of Devon and Cornwall) paying for the same a price stated in the act. This was an extremely reasonable law: for now private owners are not discouraged from working mines, through a fear that they may be claimed as royal ones; neither does the king depart from the just rights of his revenue, since he may have all the precious metal contained in the ore, paying no more for it than the value of the base metal which it is supposed to be; to which base metal the land owner is by reason and law entitled.

XIII. To the same original may in part be referred the revenue of treasure-trove (derived from the French word, *trover*, to find,) called in Latin *thesaurus inventus*, which is where any money or coin, gold, silver, plate or bullion, is found hidden *in* the earth, or other private place, the owner thereof being unknown[20]; in which case the treasure belongs to the king: but if he that hid it be known, or afterwards found out, the owner and not the king is entitled to it[u]. Also if it be found in the sea, or *upon* the earth, it doth not belong to the king, but the 296
finder, if no owner appears[w]. So that it seems it is the *hiding*, and not the *abandoning* of it, that gives the king a property: Bracton[x] defining it, in the words of the civilians, to be "*vetus depositio pecuniae*." This difference clearly arises from the different intentions, which the law implies in the owner. A man that hides his treasure in a secret place, evidently does not mean to relinquish his property; but reserves a right of claiming it

u 3 Inst. 132. Dalt. of sheriffs. c. 16.

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

x *l.* 3. *c.* 3. Sect. 4.

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20. All escheats, penalties, and forfeitures, heretofore going to the king, shall go to the commonwealth, save only such as the legislature may abolish, or otherwise provide for. C. V. Art. 20. It may be doubted how far the rights claimed in virtue of the regal prerogative were meant to be comprehended under this clause.

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again, when he sees occasion: and, if he dies and the secret also dies with him, the law gives it the king, in part of his royal revenue. But a man that scatters his treasure into the sea, or upon the public surface of the earth, is construed to have absolutely abandoned his property, and returned it into the common stock, without any intention of reclaiming it: and, therefore, it belongs, as in a state of nature, to the first occupant, or finder; unless the owner appear and assert his right, which then proves that the loss was by accident, and not with an intent to renounce his property.

Formerly all treasure-trove belonged to the finder[y]; as was also the rule of the civil law[z]. Afterwards it was judged expedient for the purposes of the state, and particularly for the coinage, to allow part of what was so found to the king; which part was assigned to be all *hidden* treasure; such as is *casually lost* and unclaimed, and also such as is *designedly abandoned*, still remaining the right of the fortunate finder. And that the prince shall be entitled to this hidden treasure is now grown to be, according to Grotius[a], "*jus commune, et quasi gentium*:" for it is not only observed, he adds, in England, but in Germany, France, Spain, and Denmark. The finding of deposited treasure was much more frequent, and the treasures themselves more considerable, in the infancy of our constitution than at present. When the Romans, and other inhabitants of the respective countries which composed their empire, were driven out by the northern nations, they concealed their money under ground:
297 with a view of resorting to it again when the heat of the irruption should be over, and the invaders driven back to their desarts. But, as this never happened; the treasures were never claimed; and on the death of the owners the secret also died along with them. The conquering generals, being aware of the value of these hidden mines, made it highly penal to secret them from the public service. In England, therefore, as among the feudists[b], the punishment of such as concealed from the king the

y Bracton *l.* 3. *c.* 3. 3 Inst. 133.
z *Ff.* 41, 1, 31.
a *De jur. b. & p. l.* 2. *c.* 8. Sect. 7.
b Glanv. *l.* 1. *c.* 2. Crag. 1, 16, 40.

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finding of hidden treasure was formerly no less than death; but now it is only fine and imprisonment[c].

XIV. Waifs, *bona waviata*, are goods stolen, and waived or thrown away by the thief in his flight, for fear of being apprehended[21]. These are given to the king by the law, as a punishment upon the owner, for not himself pursuing the felon, and taking away his goods from him[d]. And, therefore, if the party robbed do his diligence immediately to follow and apprehend the thief, (which is called making fresh *suit*,) or do convict him afterwards, or procure evidence to convict him, he shall have his goods again[e 22]. Waived goods do also not belong to the king, till seised by somebody for his use; for if the party robbed can seise them first, though at the distance of twenty years, the king shall never have them[f]. If the goods are hid by the thief, or left any where by him, so that he had them not about him, when he fled, and, therefore, did not throw them away in his flight; these also are not *bona waviata*, but the owner may have them again when he pleases[g]. The goods of a foreign merchant, though stolen and thrown away in flight, shall never be waifs[h]: the reason whereof may be, not only for the encouragement of trade, but also because there is no wilful default in the foreign merchant's not pursuing the thief; he being generally a stranger to our laws, our usages, and our language.

XV. Estrays are such valuable animals as are found wandering in any manor or lordship, and no man knoweth the owner of them; in which case the law gives them to the king as the general owner and lord paramount of the soil, in recompense for the da- 298

c 3 Inst. 133.
d Cro. Eliz. 694.
e Finch. L. 212.
f *Ibid.*
g 5 Rep. 109.
h Fitzh. *Abr. tit. Estray.* 1. 3 Bulstr. 19.

21. This, being a species of forfeiture, it is presumed would go to the commonwealth. C. V. Art. 20.

22. Herewith agrees our act of 1785, c. 71. V. L. 1794, c. 75. See 2 Blacks. Rep. 117.

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mage which they may have done therein: and they now most commonly belong to the lord of the manor, by special grant from the crown. But, in order to vest an absolute property in the king, or his grantees, they must be proclaimed in the church and two market towns next adjoining to the place where they are found: and then, if no man claims them, after proclamation and a year and a day passed, they belong to the king or his substitute without redemption[i]; even though the owner were a minor, or under any other legal incapacity[k] [23]. A provision similar to which obtained in the old Gothic constitution, with regard to all things that were found, which were to be thrice proclaimed; *primum coram comitibus et viatoribus obviis, deinde in proxima villa vel pago, postremo coram ecclesia vel judicio:* and the space of a year was allowed for the owner to reclaim his property[l]. If the owner claims them within the year and day, he must pay the charges of finding, keeping, and proclaiming them[m]. The king or lord has no property till the year and day is passed: for if a lord keepeth an estray three quarters of a year, and within the year it strayeth again, and another lord getteth it, the first lord cannot take it again[n]. Any beasts may be estrays, that are

i Mirr. c 3, §. 19.
k 5 Rep. 108. Bro. *Abr. tit. Estray.* Cro. Eliz. 716.
l Stiernh. *de jur. Gothor. l.* 3. *c.* 5.
m Dalt. Sh. 79.
n Finch L. 177.

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23. It shall be lawful for any person by himself or his agent to take up an estray upon his own land; and if, after being appraised and advertised as the law directs, no owner shall appear, the property, if the valuation be under twenty shillings, shall be vested in the owner of the land: and if the valuation be above twenty shillings, it shall be advertised three times in the Virginia Gazette, and if no owner appear within a year and a day, the property shall thenceforth be vested in the owner of the lands. But the former owner may in either case within five years demand and recover the valuation money, deducting the expences allowed by the act. L. V. 1785, c. 70. Edi. 1794, c. 16.

If any person takes up a boat, or other vessel adrift, he shall proceed in the same manner, and have the same benefit as in case of estrays. V. E. *Ibid.*

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by nature tame or reclaimable, and in which there is a valuable property, as sheep, oxen, swine, and horses, which we in general call cattle; and so Fleta[o] defines them, *pecus vagens, quod nullus petit, sequitur vel advocat.* For animals upon which the law sets no value, as a dog or cat, and animals *ferae naturae*, as a bear or wolf, cannot be considered as estrays. So swans may be estrays, but not any other fowl[p]; whence they are said to be royal fowl. The reason of which distinction seems to be, that, cattle and swans being of a reclaimed nature, the owner's property in them is not lost merely by their temporary escape; and they also, from their intrinsic value, are a sufficient pledge for the expence of 299
the lord of the franchise in keeping them the year and day. For he that takes an estray is bound, so long as he keeps it, to find it in provisions and preserve it from damage[q]; and may not use it by way of labour, but is liable to an action for so doing[r]. Yet he may milk a cow, or the like; for that tends to the preservation, and is for the benefit, of the animal[s].

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

o *l.* 1. *c.* 43.

p 7 Rep. 17.

q 1 Roll. Abr. 889.

r Cro. Jac. 147.

s Cro. Jac. 148. Noy, 119.

t *l.* 1. *c.* 12.

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XVI. The next branch of the king's ordinary revenue consists in forfeitures of lands and goods for offences[24]; *bona confiscata*, as they are called by the civilians, because they belonged to the *fiscus* or imperial treasury; or, as our lawyers term them, *forisfacta*; that is, such whereof the property is gone away or departed from the owner. The true reason and only substantial ground of any forfeiture for crimes consist in this; that all property is derived from society, being one of those civil rights which are conferred upon individuals, in exchange for that degree of natural freedom, which every man must sacrifice when he enters into social communities. If, therefore, a member of
300 any national community violates the fundamental contract of his association, by transgressing the municipal law, he forfeits his right to such privileges as he claims by that contract; and the state may very justly resume that portion of property, or any part of it, which the laws have before assigned him. Hence, in every offence of an atrocious kind, the laws of England have exacted a total confiscation of the moveables or personal estate; and in many cases a perpetual, in others only a temporary, loss of the offender's immoveables or landed property; and have vested them both in the king, who is the person supposed to be offended, being the one visible magistrate in whom the majesty of the public resides. The particulars of these forfeitures will be more properly recited when we treat of crimes and misdemesnors. I therefore only mention them here, for the sake of regularity, as a part of the *census regalis;* and shall postpone, for the present, the farther consideration of all forfeitures, excepting one species only, which arises from the misfortune rather than the crime of the owner, and is called a *deodand.*

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24. No attainder of treason shall work corruption of blood or forfeiture, except during the life of the person attainted C. U. S. Art. 3. No conviction or judgment for treason, or misprision of treason, against the United States; or for murder, manslaughter, piracy, or robbery; or for misprision of felony, or for being accessary to any of those offences; or for confederating to become pirates; or for any mayhem, or forgery; or for the stealing or falsifying any record, &c. or for any larceny, or theft; or for receiving stolen goods; or for perjury, or subornation of perjury; or for bribery; or for obstructing, resisting, or opposing the execution of lawful process; or for the rescue of any person convicted of, or committed

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By this is meant whatever personal chattel is the immediate occasion of the death of any reasonable creature: which is forfeited to the king[25], to be applied to pious uses, and distributed in alms by his high almoner[u]; though formerly destined to a more superstitious purpose. It seems to have been originally designed, in the blind days of popery, as an expiation for the souls of such as were snatched away by sudden death; and for that purpose ought properly to have been given to holy church[w]: in the same manner as the apparel of a stranger, who was found dead, was applied to purchase masses for the good of his soul. And this may account for that rule of law, that no deodand is due where an infant, under the age of discretion, is killed by a fall *from* a cart, or horse, or the like, not being in motion[x]; whereas, if an adult person falls from thence and is 301
killed, the thing is certainly forfeited. For the reason given by sir Matthew Hale seems to be very inadequate, *viz.* because an infant is not able to take care of himself; for why should the

u 1 Hal. P. C. 419. Fleta, *l.* 1. c. 25.
w Fitzh. *Abr. tit. Enditement. pl.* 27. Staunf. P. C. 20, 21.
x 3 Inst. 57. 1 Hal. P. C. 422.

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for any crime against the United States; or for rescuing the body of any murderer, convicted, and executed, and ordered for dissection, in any case where such offence is cognizable by the federal courts, shall work corruption of blood, or any forfeiture of estate. L. U. S. 1 Cong. 2 Sess. c. 9.

"All escheats, penalties, and forfeitures heretofore going to the "king, shall go to the commonwealth, save only such as the legisla- "ture may abolish, or otherwise provide for." C. V. Art. 20.

"Whensoever any person shall happen to be attainted, convict- "ed, or outlawed of any treason, misprision of treason, murder, or "felony whatsoever, there shall, in no case, be a forfeiture to the "commonwealth of dower, or of lands, slaves, or personal estate; "but the same shall descend and pass in like manner as is by law di- "rected, in case of persons dying intestate; nor shall any attainder "work a corruption of blood." L. V. 1789, c. 30. Edi. 1794, c. 74. Sec. 31.

25. All forfeitures, heretofore going to the king, shall go to the commonwealth, save only such as the legislature may abolish, or otherwise provide for. C. V. Art. 20.

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owner save his forfeiture, on account of the imbecility of the child, which ought rather to have made him more cautious to prevent any accident of mischief? The true ground of this rule seems rather to have been, that the child, by reason of it's want of discretion, was presumed incapable of actual sin, and therefore needed no deodand to purchase propitiatory masses: but every adult, who died in actual sin, stood in need of such atonement, according to the humane superstition of the founders of the English law.

Thus stands the law if a person be killed by a fall from a thing standing still. But if a horse, or ox, or other animal, of his own motion, kill as well an infant as an adult, or if a cart run over him, they shall in either case be forfeited as deodands [y]; which is grounded upon this additional reason, that such misfortunes are in part owing to the negligence of the owner, and, therefore, he is properly punished by such forfeiture. A like punishment is in like cases inflicted by the Mosaical law [z]: "if an ox gore a "man that he die, the ox shall be stoned, and his flesh shall not "be eaten." And, among the Athenians [a], whatever was the cause of a man's death, by falling upon him, was exterminated or cast out of the dominions of the republic. Where a thing, not in motion, is the occasion of a man's death, that part only which is the immediate cause is forfeited; as if a man be climbing up the wheel of a cart, and is killed by falling from it, the wheel alone is a deodand [b]: but, wherever the thing is in motion, not only that part which immediately gives the wound, (as the wheel, which runs over his body) but all things which move with it and help to make the wound more dangerous (as the cart and load-
302 ing, which increase the pressure of the wheel) are forfeited [c]. It matters not whether the owner were concerned in the killing or not; for, if a man kills another with my sword, the sword is

y *Omnia, quae movent ad mortem, sunt Deo danda.* Bracton. *l.* 3. *c.* 5.

z Exod. xxi. 28.

a Aeschin. *cont. Ctesiph.* Thus too by our antient law, a well in which a person was drowned, was ordered to be filled up, under the inspection of the coroner. Flet. *l.* 1. *c.* 25. Sec. 10. Fitzh. Abr. *t. corone.* 416.

b 1 Hal. P. C. 422.

c 1 Hawk. P. C. c. 26.

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forfeited[d] as an accursed thing[e]. And, therefore, in all indictments for homicide, the instrument of death and the value are presented and found by the grand jury (as, that the stroke was given by a certain penknife, value sixpence) that the king or his grantee may claim the deodand: for it is no deodand, unless it be presented as such by a jury of twelve men[f]. No deodands are due for accidents happening upon the high sea, that being out of the jurisdiction of the common law: but if a man falls from a boat or ship in fresh water, and is drowned, it hath been said, that the vessel and cargo are in strictness of law a deodand[g]. But juries have of late very frequently taken upon themselves to mitigate these forfeitures, by finding only some trifling thing, or part of an entire thing, to have been the occasion of the death. And, in such cases, although the finding by the jury be hardly warrantable by law, the court of king's bench hath generally refused to interfere on behalf of the lord of the franchise, to assist so unequitable a claim[h].

Deodands, and forfeitures in general, as well as wrecks, treasure-trove, royal-fish, mines, waifs, and estrays, may be granted by the king to particular subjects, as a royal franchise: and indeed they are for the most part granted out to the lords of manors, or other liberties(25): to the perversion of their original design.

XVII. Another branch of the king's ordinary revenue arises 303
from escheats of lands[26], which happen upon the defect of heirs

d A similar rule obtained among the antient Goths. *Si quis, me nesciente, quocunque meo telo vel instrumento in perniciem suam abutatur; vel ex aedibus meis cadat, vel incidat in puteum meum, quantumvis tectum et munitum, vel in cataractam, et sub molendino meo confringatur, ipse aliqua mulcta plectar; at in parte infelicitatis meae numeretur, habuisse vel aedificasse aliquod quo homo periret.* Stiernhook *de jure Goth. l.* 3. *c.* 4.

e Dr. and St. d. 2. c. 51.

f 3 Inst. 57.

g 3 Inst. 58. 1 Hal. P. C. 423. Molley *de jur. maritim.* 2. 225.

h Foster of homicide, 266.

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(25). Bill of rights. Art. 4. Contra.

26. All escheats heretofore going to the king, shall go to the commonwealth. C. V. Art. 20. See L. V. 1794, c. 82, 180.

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to succeed to the inheritance; whereupon they in general revert to and vest in the king, who is esteemed, in the eye of the law, the original proprietor of all the lands in the kingdom. But the discussion of this topic more properly belongs to the second book of these commentaries, wherein we shall particularly consider the manner in which lands may be acquired or lost by escheat.

XVIII. I proceed, therefore, to the eighteenth and last branch of the king's ordinary revenue; which consists in the custody of ideots, from whence we shall be naturally led to consider also the custody of lunatics[27].

An ideot, or natural fool, is one that hath had no understanding from his nativity; and, therefore, is by law presumed never likely to attain any. For which reason the custody of him and of his lands was formerly vested in the lord of the fee[h]; (and therefore still, by special custom, in some manors the lord shall have the ordering of ideot and lunatic copy-holders[i]) but, by reason of the manifold abuses of this power by subjects, it was at last provided by common consent, that it should be given to the king, as the general conservator of his people; in order to prevent the ideot from wasting his estate, and reducing himself and his heirs to poverty and distress[k]. This fiscal prerogative of the

h Flet. *l.* 1. *c* 11. §. 10. i Dyer. 302. Hutt. 17. Noy. 27.
k F. N. B. 232,

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27. The lands, tenements, and chattels of all ideots and lunatics whatsoever, shall be committed to the care of a committee, for safe keeping, and good management thereof; who shall have power to sue, and may be sued, for debts due to, or from the insane person, in the same manner as executors; and their estates shall be kept, safely, without waste or destruction; and they and their house-hold shall be maintained competently, with the profits thereof; and the residue shall be kept for their use, to be delivered up to them when they come to right mind; and if they die in such state, their lands and chattels shall be distributed, as in the case of other persons dying intestate. V. L. Edi. 1794, c. 120. See also, V. L. 1769, c. 28. [Edi. 1785] 1785, c. 66, 68, 85, 87. 1788, c. 56. 1790, c. 19. Sess. acts.

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king is declared in parliament by statute 17 Edw. II. c. 9, which directs (in affirmance of the common law[l]), that the king shall have ward of the lands of natural fools, taking the profits without waste or destruction, and shall find them necessaries; and after the death of such idiots he shall render the estate to the heirs: in order to prevent such idiots from alienating their lands, and their heirs from being disinherited[28].

By the old common law, there is a writ *de idiota inquirendo*, to inquire whether a man be an idiot or not[m]: which must be tried by a jury of twelve men: and, if they find him *purus idiota*, 304
the profits of his lands, and the custody of his person may be granted by the king to some subject, who has interest enough to obtain them[n] [29]. This branch of the revenue hath been long considered as a hardship upon private families: and so long ago as in the 8 Jac. I, it was under the consideration of parliament, to vest this custody in the relations of the party, and to settle an equivalent on the crown in lieu of it; it being then proposed to share the same fate with the slavery of the feodal tenures, which has been since abolished[o]. Yet few instances can be given of the oppressive exertion of it, since it seldom happens that a jury finds a man an idiot *a nativitate*, but only *non compos mentis* from some particular time; which has an operation very different in point of law.

l 4 Rep. 126. *Memorand' Scacc'* 20 *Edw. I.* (prefixed to Maynard's year-book of Edw. II.) fol. 20, 24.

m F. N. 232.

n This power, though of late very rarely exerted, is still alluded to in common speech, by that usual expression of *begging* a man for a fool.

o 4 Inst. 203. Com. Journ. 1610.

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28. See the preceding note.

29. It would seem, that in England, the king, or his grantee shall have the whole profits of an idiot's estate, after finding him necessaries, without account to the representatives of the idiot after his death. But our law puts the estates of idiots and lunatics precisely on the same footing. V. L. Edi. 1794, c. 120. See also the preceding page, note 27.

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A man is not an idiot[p], if he hath any glimmering of reason, so that he can tell his parents, his age, or the like common matters. But a man who is born deaf, dumb, and blind, is looked upon by the law as in the same state with an idiot[q]; he being supposed incapable of any understanding, as wanting all those senses which furnish the human mind with ideas.

A lunatic, or *non compos mentis*, is one who hath had understanding, but by disease, grief, or other accident, hath lost the use of his reason[r]. A lunatic is, indeed, properly one that hath lucid intervals; sometimes enjoying his senses, and sometimes not, and that frequently depending upon the change of the moon. But under the general name of *non compos mentis* (which sir Edward Coke says is the most legal name[s]) are comprized not only lunatics, but persons under frenzies; or who lose their intellects by disease; those that *grow* deaf, dumb, and blind, not being *born* so; or such, in short, as are judged by the court of chancery incapable of conducting their own affairs. To these also, as well as idiots, the king is guardian, but to a very different purpose.
305 For the law always imagines, that these accidental misfortunes may be removed; and therefore only constitutes the crown a trustee for the unfortunate persons, to protect their property, and to account to them for all profits received, if they recover, or after their decease to their representatives. And, therefore, it is declared by the statute 17 Edw. II. c. 10, that the king shall provide for the custody and sustentation of lunatics, and preserve their lands and the profits of them for their use, when they come to their right mind; and the king shall take nothing to his own use: and if the parties die in such estate, the residue shall be distributed for their souls by the advice of the ordinary, and of course (by the subsequent amendments of the law of administration) shall now go to their executors or administrators[30].

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

r *Idiota a casu et infirmitate.* (*Mem. Scacch.* 20 *Edw. I.* in Maynard's year-book of Edw. II. 20.)

s 1 Inst. 246.

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30. V. L. 1785, c. 66. 1794, c. 120. Accordant.

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On the first attack of lunacy, or other occasional insanity, while there may be hopes of a speedy restitution of reason, it is usual to confine the unhappy objects in private custody, under the direction of their nearest friends and relations: and the legislature, to prevent all abuses incident to such private custody, hath thought proper to interpose it's authority, by statute 14 Geo. III. c. 49. (continued by 19 Geo. III. c. 15.) for regulating private mad-houses[31]. But, when

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31. An hospital for the reception of idiots, lunatics, and other persons of insane mind, was established in Williamsburg, by the act of 1769, c. 28, the trustees or directors of which, were by the same act incorporated, and the regulations thereof prescribed. The act, as amended by several subsequent statutes, declares, that a justice of the peace shall, by his warrant, order any person whose mind, from his own observation, or the information of others, appears to be unsound, to be brought before himself and two other justices, who shall inquire into the state of his mind, and write down, as well what shall appear to themselves, as what shall be testified by witnesses, touching the supposed insanity: and if two of them shall adjudge that he ought to be confined, and some friend will not become bound with surety for the restraint and care of him, they shall order him to be removed to the hospital, and there received, at the same time transmitting the examinations of the witnesses, and the relation of such facts as they shall think pertinent to the subject, to be laid before the directors; by whom the insane shall, as soon as may be, be examined, and either registered as a patient, or discharged, as the directors shall determine. V. L. Edi. 1794, c. 120.

The act of 1785, c. 87, enacted, "That if the directors differ in "opinion from the justices, they shall report the matter to the high "court of chancery, who shall thereupon award the writ *de idiota in-* "*quirendo*, directed to the sheriff of that county from whence the- "person supposed to be insane shall have been removed, and such "person shall be put into the custody of the sheriff, and remain "there until the inquisition be taken and returned, and then shall "be enlarged or registered as the court shall order." This clause is omitted in the last act. In case an infant child, or ward, be suggested by the parent or guardian to be of unsound mind, the county or corporation court wherein he resides shall appoint three justices to examine into the state of his mind, who shall proceed as before directed.

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the disorder is grown permanent, and the circumstances of the party will bear such additional expence, it is proper to apply to the royal authority to warrant a lasting confinement.

The method of proving a person *non compos* is very similar to that of proving him an idiot. The lord chancellor, to whom, by special authority from the king, the custody of idiots and lunatics is entrusted[t], upon petition or information, grants a commission in nature of the writ *de idiota inquirendo*, to inquire into the party's state of mind; and if he be found *non compos*, he usually commits the care of his person, with a suitable allowance for his maintenance, to some friend, who is then called his committee. However, to prevent sinister practices, the next heir is seldom permitted to be this committee of the person; because it is his interest that the party should die. But, it
306 hath been said, there lies not the same objection against his next of kin, provided he be not his heir; for it is his interest to preserve the lunatic's life, in order to increase the personal estate by savings, which he or his family may hereafter be entitled to enjoy[tt]. The heir is generally made the manager or committee of the estate, it being clearly his interest by good management to keep it in condition: accountable however to the court of chancery, and to the *non compos* himself, if he recovers; or otherwise, to his administrators.

In this case of idiots and lunatics the civil law agrees with ours; by assigning them tutors to protect their persons, and curators to manage their estates. But in another instance the Roman law goes much beyond the English. For, if a man by notorious prodigality was in danger of wasting his estate, he was looked upon as *non compos*, and committed to the care of

t 3 P. Wms. 108. tt 2 P. Wms. 638.

The expence of maintaining a registered insane person shall be reimbursed out of his estate, if any; or (if an infant) by his parent, if of sufficient ability; to be adjudged and certified by the court of the county, &c. V. L. Edi. 1794, c. 120.

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curators or tutors by the praetor [u]. And by the laws of Solon such prodigals were branded with perpetual infamy [w]. But with us, when a man on an inquest of idiocy hath been returned an *unthrift* and not an *idiot* [x], no farther proceedings have been had. And the propriety of the practice itself seems to be very questionable. It was doubtless an excellent method of benefiting the individual, and of preserving estates in families; but it hardly seems calculated for the genius of a free nation, who claim and exercise the liberty of using their own property as they please. "*Sic utere tuo, ut alienum non laedas*," is the only restriction our laws have given with regard to oeconomical prudence. And the frequent circulation and transfer of lands and other property, which cannot be effected without extravagance somewhere, are perhaps not a little conducive towards keeping our mixed constitution in it's due health and vigour.

This may suffice for a short view of the king's *ordinary* revenue, or the proper patrimony of the crown; which was very large, formerly, and capable of being increased to a magnitude truly formidable: for there are very few estates in the kingdom, that have not, at some period or other, since the Nor- 307
man conquest, been vested in the hands of the king by forfeiture, escheat, or otherwise. But, fortunately for the liberty of the subject, this hereditary landed revenue, by a series of improvident management, is sunk almost to nothing [32]; and the

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

w Potter Antiqu. b. 1. c. 26. x Bro. *Abr. tit. Idiot.* 4.

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32. "The lands, forests, imposts, &c. &c. which once formed "the patrimony of the crown in England, bore most of the expen- "ces of the government. It is well for the kingdom that the ex- "travagance of the crown has been the means of alienating this "property, for the consequence has been making the crown depen- "dent on the people. But in America such a patrimony would be "continental property, capable of being applied only to public pur- "poses, in the way which the public should approve, 100,000*l.* per. "annum:

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casual profits, arising from other branches of the *census regalis*, are likewise almost all of them alienated from the crown. In order to supply the deficiencies of which, we are now obliged to have recourse to new methods of raising money, unknown to our early ancestors; which methods constitute the king's *extraordinary* revenue. For, the public patrimony being got into the hands of private subjects, it is but reasonable, that private contributions should supply the public service. Which, though it may perhaps fall harder upon some individuals, whose ancestors have had no share in the general plunder, than upon

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"annum: reserved and faithfully laid out in clearing unlocated "lands, and other improvements, would, in a short time, increase "to a treasure, or continental patrimony which would defray the "whole expenditure of the union, and keep the states free from "debts and taxes forever. Such a reserve would, supposing it im-"proved so as to produce a profit of five per. cent. increase to a capi-"tal of three millions in nineteen years: thirty millions in fifty-seven "years; one hundred millions in eightv-one years; and two hundred "sixty-one millions in one hundred years." Dr. Price's observations on the importance of the American revolution. Lond. 1784, p. 10. The Doctor's opinion of the importance of the unlocated lands belonging to the U. S. seems very different from that of a great American financier, who, in his last report to congress, after stating the quantity to be twenty-one millions of acres, proceeds thus: "This "quantity, at twenty cents per acre, the price upon former occa-"sions contemplated, would yield a snm of four million two hundred "thousand dollars. But it is believed that it would be unsafe to "count upon so large a sum."

"Besides the uncertainty as to the proportion which may be of "a saleable quality, and as to the price which may be obtained for "it, the boundary between the United States and the Indians, is "understood to be unsettled, with regard to a considerable part of "the tract on which the computation is made. If it ultimately "yield three millions of dollars, it will probably equal every rea-"sonable expectation." Report of Mr. Secretary Hamilton to congress, Jan. 19. 1795, containing a plan for the further support of public credit.

See the act containing the Virginia cession to the United States. L. V. 1794, c. 40. North Carolina cession. L. U. S. 1 Cong. 2 Sess. c. 6. act for disposing of lands the property of the United States. L. U. S. 3 Cong. c. 29. 6 Cong. c. 55.

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others, yet, taking the nation throughout, it amounts to nearly the same; provided the gain by the extraordinary, should appear to be no greater than the loss by the ordinary, revenue. And perhaps, if every gentleman in the kingdom was to be stripped of such of his lands as were formerly the property of the crown; was to be again subject to the inconveniencies of purveyance and pre-emption, the oppression of forest laws, and the slavery of feodal tenures; and was to resign into the king's hands, all his royal franchises of waifs, wrecks, estrays, treasure-trove, mines, deodands, forfeitures, and the like; he would find himself a greater loser, than by paying his *quota* to such taxes, as are necessary to the support of government. The thing therefore to be wished and aimed at in a land of liberty is by no means the total abolition of taxes, which would draw after it very pernicious consequences, and the very supposition of which is the height of political absurdity. For, as the true idea of government and magistracy will be found to consist in this, that some few men are deputed by many others to preside over public affairs, so that individuals may the better be enabled to attend their private concerns; it is necessary that those individuals should be bound to contribute a portion of their private gains, in order to support that government, and reward that magistracy, which protects them in the enjoyment of their respective properties. But the things to be aimed at are wisdom and moderation, not only in granting, but also in 308
the method of raising, the necessary supplies; by contriving to do both in such a manner as may be most conducive to the national welfare, and at the same time most consistent with oeconomy and the liberty of the subject; who, when properly taxed, contributes only, as was before observed [y], some part of his property, in order to enjoy the rest.

These extraordinary grants are usually called by the synonymous names of aids, subsidies, and supplies; and are granted, we have formerly seen [z], by the commons of Great Britain in parliament assembled: who, when they had voted a supply to his majesty, and settled the *quantum* of that supply, usually

y Page 282. z Page 169.

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resolve themselves into what is called a committee of ways and means, to consider the ways and means of raising the supply so voted. And in this committee every member (though it is looked upon as the peculiar province of the chancellor of the exchequer) may propose such scheme of taxation as he thinks will be least detrimental to the public. The resolutions of this committee, when approved by a vote of the house, are in general esteemed to be (as it were) final and conclusive. For, though the supply cannot be actually raised upon the subject till directed by an act of the whole parliament, yet no moniedman will scruple to advance to the government any quantity of ready cash, on the credit of a bare vote of the house of commons, though no law be yet passed to establish it.

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

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

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

a 2 Inst. 77. 4 Inst. 34.

b Hoved. *A. D.* 1188, Carte. 1. 719. Hume. i, 329.

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teenths were more usually granted than tenths. Originally the amount of these taxes was uncertain, being levied by assessments new made at every fresh grant of the commons, a commission for which, is preserved by Matthew Paris[c]: but it was at length reduced to a certainty in the eighth year of Edward III, when, by virtue of the king's commission, new taxations were made of every township, borough, and city in the kingdom, and recorded in the exchequer: which rate was, at the time, the fifteenth part of the value of every township, the whole amounting to about 29,000*l.* and, therefore, it still kept up the name of a fifteenth, when, by the alteration of the value of money and the increase of personal property, things came to be in a very different situation. So that when, of later years, the commons granted the king a fifteenth, every parish in England immediately knew their proportion of it; that is, the same identical sum that was assessed by the same aid in the eighth of Edward III; and then raised it by a rate among themselves, and returned it into the royal exchequer.

The other antient levies were in the nature of a modern land tax: for we may trace up the original of that charge as high as to the introduction of our military tenures[d]; when every tenant of a knight's fee was bound, if called upon, to attend the king in his army for forty days in every year. But this personal attendance growing troublesome in many respects, the tenants found means of compounding for it, by first sending others in their stead, and in process of time by making a pecuniary satisfaction to the crown in lieu of it. This pecuniary satisfaction at last came to be levied by assessments, at so much for every knight's fee, under the name of scutages; which appear to have been levied for the first time in the fifth year of Henry the second, on account of his expedition to Toulouse, and were then (I apprehend) mere arbitrary compositions, as the king and the subject could agree. But this precedent being afterwards abused into a means of oppression, (in levying scutages on the landholders by the royal authority only, whenever our kings went to war, in order to hire mercenary troops and pay their contingent 310

c *A. D.* 1232.

d See the second book of these commentaries.

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expences), it became thereupon a matter of national complaint; and king John was obliged to promise in his *magna carta* [e], that no scutage should be imposed without the consent of the common council of the realm. This clause was, indeed, omitted in the charters of Henry III, where [f] we only find it stipulated, that scutages should be taken as they were used to be in the time of king Henry the second. Yet afterwards, by a variety of statutes under Edward I, and his grandson [g], it was provided, that the king shall not take any aids or tasks, any talliage or tax, but by the common assent of the great men and commons in parliament.

Of the same nature with scutages upon knights-fees were the assessments of hydage upon all other lands, and of talliage upon cities and burghs [h]. But they all gradually fell into disuse upon the introduction of subsidies, about the time of king Richard II, and king Henry IV. These were a tax, not immediately imposed upon property, but upon persons in respect of their reputed estates, after the nominal rate of 4*s*. in the pound for lands and 2*s*. 8*d*. for goods; and for those of aliens in a double proportion. But this assessment was also made according to an antient valuation; wherein the computation was so very mode-
311 rate, and the rental of the kingdom was supposed to be so exceeding low, that one subsidy of this sort, did not, according to sir Edward Coke [i], amount to more than 70,000*l*. whereas a modern land-tax at the same rate produces two millions. It was antiently the rule never to grant more than one subsidy, and two fifteenths at a time: but this rule was broken through for the first time, on a very pressing occasion, the Spanish invasion in 1588; when the parliament gave queen Elizabeth two subsidies and four fifteenths. Afterwards, as money sunk in value, more subsidies were given; and we have an instance in the first parliament of 1640, of the king's desiring twelve subsidies of the commons, to be levied in three years; which was looked upon as a startling proposal: though lord Clarendon says [k], that the

e *cap*. 14.
f 9 Hen. III. c. 37.
g 25 Edw. I. c. 5 and 6. 34 Edw. I. st. 4. c. 1. 14 Edw. III. st. 2. c. 1.
h Madox' hist. exch. 480.
i 4 Inst. 33. k Hist. b. 2.

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speaker, serjeant Glanville, made it manifest to the house, how very inconsiderable a sum twelve subsidies amounted to, by telling them he had computed what he was to pay for them himself; and when he named the sum, he being known to be possessed of a great estate, it seemed not worth any farther deliberation..... And, indeed, upon calculation, we shall find, that the total amount of these twelve subsidies, to be raised in three years, is less than what is now raised in one year, by a land-tax of two shillings in the pound.

The grant of scutages, talliages, or subsidies by the commons did not extend to spiritual preferments; those being usually taxed at the same time by the clergy themselves in convocat on: which grants of the clergy were confirmed in parliament, otherwise they were illegal, and not binding; as the same noble writer observes of the subsidies granted by the convocation, which continued sitting after the dissolution of the first parliament in 1640. A subsidy granted by the clergy was after the rate of 4*s*. in the pound according to the valuation of their living's in the king's books; and amounted, as sir Edward Coke tells us[l], to about 20,000*l*. While this custom continued, convocations were wont to sit as frequently as parliaments: but the last subsidies, thus given by the clergy, were those confirmed by statute 15 Car. II. cap. 10, since which another method of taxation has generally prevailed, which takes in the clergy as well as 312
the laity: in recompence for which the beneficed clergy have from that period been allowed to vote at the election of knights of the shire[m]; and thenceforward also the practice of giving ecclesiastical subsidies hath fallen into total disuse.

The lay subsidy was usually raised by commissioners appointed by the crown, or the great officers of state: and therefore in the beginning of the civil wars between Charles I. and his parliament, the latter having no other sufficient revenue to support themselves and their measures, introduced the practice of laying weekly and monthly assessments[n] of a specific sum upon

l 4 Inst. 33.

m Dalt. of sheriffs, 418. Gilb. hist. of exch. c. 4.

n 29 Nov. 4 Mar. 1642.

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the several counties of the kingdom; to be levied by a pound rate on lands and personal estates: which were occasionally continued during the whole usurpation, sometimes at the rate of 120,000*l.* a month, sometimes at inferior rates[o]. After the restoration the antient method of granting subsidies, instead of such monthly assessments, was twice, and twice only, renewed; *viz.* in 1663, when four subsidies were granted by the temporalty, and four by the clergy; and in 1670, when 800,000*l.* was raised by way of subsidy, which was the last time of raising supplies in that manner. For, the monthly assessments being now established by custom, being raised by commissioners named by parliament, and producing a more certain revenue; from that time forwards we hear no more of subsidies, but occasional assessments were granted as the national emergencies required.... These periodical assessments, the subsidies which preceded them, and the more antient scutage, hydage, and talliage, were to all intents and purposes a land tax; and the assessments were sometimes expressly called so[p]. Yet a popular opinion has prevailed, that the land tax was first introduced in the reign of king William III; because in the year 1692 a new assessment or valuation of estates was made throughout the kingdom: which,
313 though by no means a perfect one, had this effect, that a supply of 500,000*l.* was equal to 1*s.* in the pound of the value of the estates given in. And according to this enhanced valuation, from the year 1693 to the present, a period of above fourscore years, the land tax has continued an annual charge upon the subject; above half the time at 4*s*, in the pound, sometimes at 3*s*, sometimes at 2*s*, twice[q] at 1*s*, but without any total intermission. The medium has been 3*s.* 3*d.* in the pound; being equivalent with twenty-three antient susidies, and amounting annually to more than a million and a half of money. The method of raising it is by charging a particular sum upon each county, according to the valuation given in, *A. D.* 1692: and this sum is assessed and raised upon individuals (their personal estates, as well as real, being liable thereto) by commissioners appointed in the

o One of these bills of assessment, in 1656, is preserved in Scobell's collection, 400.

p Com. journ. 26 Jun. 9. Dec. 1678.

q For the years 1732 and 1733.

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act, being the principal landholders of the county, and their officers[33].

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33. The act for equalizing the land tax, V. L. Edi. 1785. Oct. 1782, c. 19. arranges all the counties in the commonwealth so as to form four districts: the first district comprehends the counties of Brunswick, Amelia, Cumberland, Goochland, Hanover, Spottsylvania, Stafford, Prince William and Fairfax, and the counties eastward thereof, comprehending in the whole, forty three counties, the average or standard in which is fixed at ten shillings per acre. The counties of Loudon, Fauquier, Culpeper, Orange, Louisa, Fluvanna, Lunenburg, Mecklenburg, Prince Edward, Charlotte, Albermarle, Buckingham, Berkley, Amherst, Campbell, Halifax, Bedford, and Frederick, compose the second class, the average or standard in which is seven shillings and six pence per acre. The counties of Pittsylvania, Henry, Botetourt, Shenandoah, Rockingham, Augusta, Rockbridge, and Hampshire, compose the third class; the average or standard in which is five shillings per acre. The counties of Washington, Montgomery, Greenbrier, Monongalia and Ohio, and the counties which have been established since by the division of those counties, compose the fourth class; the average or standard in which is three shillings per acre. Commissioners were appointed by the act to examine the returns of the valuations of that year, and to ascertain the average price per acre of all the lands in each county, and by comparing the same with the standard, or average of each district, by a just per centage, to apply the difference to the account of every individual within the district, and to add, or deduct from the same accordingly. The commissioners were also required to make out a book of the accounts of each county, to be transmitted to the commissioners for the tax in each county, who are to furnish the sheriffs with copies thereof, in order to enable them to proceed in their collections. But the valuations of town lots (except where manifest inequality may have taken place) were to remain unaltered. V. L. Oct. 1782, c. 19, Edi. 1785. By the act of Nov. 1781, c. 40, Edi. 1785, the land tax imposed was one per centum, the following year it was raised to one and a half per cent, Oct. 1782, c. 8, these taxes, however, have been gradually diminished from time to time, till the year 1792, when they were reduced to five shillings in the hundred pounds. Sess. Acts of 1792, c. 2. They have since been raised to 38 cents for every hundred dollars, 1797, c. 1. The manner and time of collection, see Edi. 1794, c. 83. The act of 1793, c. 3, has raised the tax of lands to forty-four cents in the hundred dollars; and the act of 1799, c. 2, at the same rate.

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II. The other annual tax is the malt tax; which is a sum of 750,000*l.* raised every year by parliament, ever since 1697, by a duty of 6*d.* in the bushel on malt, and a proportionable sum on certain liquors, such as cyder and perry, which might otherwise prevent the consumption of malt. This is under the management of the commissioners of the excise; and is indeed itself no other than an annual excise, the nature of which species of taxation I shall presently explain: only premising at present, that in

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The act of 5 Cong. c. 87, to provide for the valuation of lands and dwelling houses, and the enumeration of slaves, within the United States, and c. 92, imposing a direct tax of two millions of dollars, to be apportioned among the states; amended by c. 126, of the same session; and by the act of 6 Cong. c. 3, prescribe the manner in which the direct taxes of the United States will probably be hereafter imposed. They are too long to abridge, yet some notice of them will be proper in this place.

The several states are divided into a competent number of divisions, and one commissioner appointed for each division, who shall reside therein; the several commissioners for each state are to assemble, appoint a clerk, to divide their state into assessment districts, and appoint one respectable freeholder in each to be principal assessor, with as many assistants as they shall judge necessary; and establish regulations, and frame instructions for the assessors, whose duty it is "to enquire after and concerning all lands, dwelling houses and slaves in their respective assessment districts, and to value and enumerate the same, in the manner directed by the act. Slaves above the age of twelve years, and under fifty, only, being liable to such enumeration, with an exemption likewise in favour of those which from any fixed infirmity may be incapable of labour." L. U. S. 5 Cong. c. 87.

The apportionment being made according to the census, the amount to be collected in Virginia, was 345,488.66Ds. and five mills, out of two millions of dollars. The taxes upon dwelling houses were not fixed by one uniform scale, or rate per centum, according to their value; but a different rate was fixed, according to the different values of the houses, with the outhouses appurtenant thereto, and the lot whereon the same may be, not exceeding two acres: houses under the value of one hundred dollars being exempt from any specific tax thereon.

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the year 1760, an additional perpetual excise of 3*d. per* bushel was laid upon malt; to the produce of which a duty of 15 *per cent.* or nearly an additional halfpenny per bushel, was added in 1779: and that, in 1763, a proportionable excise was laid upon cyder and perry, but so new-modelled in 1766, as scarce to be worth collecting[34].

The perpetual taxes are,

I. The customs; or the duties, toll, tribute, or tariff, payable upon merchandize exported and imported. The considerations upon which this revenue (or the more antient part of it, which arose only from exports,) was invested in the king, were 314
said to be two[r]; 1. Because he gave the subject leave to depart the kingdom, and to carry his goods along with him. 2. Because the king was bound of common right to maintain and keep up the ports and havens, and to protect the merchant from pirates.

r Dyer, 165.

	Tenths of one p. ct.
Dwelling houses above 100 dollars value, and not more than 500 dollars, pay two tenths of one per centum, of the value thereof.	.2
Above 500, and not over 1000 dollars,	.3
Above 1000, and not over 3000 dollars,	.4
Above 3000, and not over 6000 dollars,	.5
Above 6000, and not over 10,000 dollars,	.6
Above 10,000, and not over 15,000 dollars,	.7
Above 15,000, and not over 20,000 dollars,	.8
Above 20,000, and not over 30,000 dollars,	.9
Above 30,000 dollars,	one per centum of the value.

Upon every slave fifty cents: and the residue of the tax in each state is to be assessed upon the lands therein, according to the valuation made pursuant to the former act. L. U. S. 5 Cong. c. 92. The taxes are a lien upon the lands, and other real property and slaves, for two years, and may be distrained for; or the lands and houses sold, if the taxes remain unpaid for a year, &c. Ibid. See also 6 Cong. c. 3, and 7 Cong. c. 12.

34. We have no malt tax, or duty on cyder or perry, imposed either by the federal or state government.

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

s Dyer, 43, *pl.* 24.

t 2 Inst. 58, 59.

u Dav. 9.

v This appellation seems to be derived from the French word *coustum*, or *coutum*, which signifies toll or tribute, and owes its own etymology to the word *coust*, which signifies price, charge, or as we have adopted it in English, *cost*.

w 4 Inst. 29.

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There is also another very antient hereditary duty belonging to the crown, called the *prisage* or *butlerage* of wines; which is considerably older than the customs, being taken notice of in the great roll of the exchequer, 8 Ric. I, still extant[x]. Prisage was a right of *taking* two tons of wine from every ship (English or foreign) importing into England twenty tons or more; one before and one behind the mast: which, by charter of Edward I, was exchanged into a duty of 2*s*. for every ton imported by merchant-strangers, and called butlerage, because paid to the king's butler[y].

Other customs, payable upon exports and imports, were distinguished into subsidies, tonnage, poundage, and other imposts. Subsidies were such as were imposed by parliament upon any of the staple commodities before mentioned, over and above the *custuma antiqua et magna:* tonnage was a duty upon all wines imported, over and above the prisage and butlerage aforesaid[35]: poundage was a duty imposed *ad valorem*, at the rate of 12*d*. in the pound, on all other merchandize whatsoever; and the other imposts were such as were occasionally laid on by parliament, as circumstances and times required[z]. These distinctions are now in a manner forgotten, except by the officers immediately concerned in this department; their produce being, in effect, all blended together, under the one denomination of the customs.

By these we understand, at present, a duty or subsidy paid by the merchant, at the quay, upon all imported as well as exported commodities, by authority of parliament[36]; unless where,

x Madox. hist. exch. 526, 532.

y Dav. 8. 2 Bulst. 254. Stat. Estr. 16 Edw. II. Com. journ. 27 Apr. 1689.

z Dav. 11, 12.

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35. Tonnage means, in the United States, a duty paid on all ships or vessels entered in the United States from any foreign port or place. L. U. S. 1 Cong. 2 Sess. c. 30, 35. Sec. 43. 5 Cong. c. 128. Sec. 64.

36. Congress hath power to lay and collect duties and imposts, which shall be uniform throughout the United States. No state

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for particular national reasons, certain rewards, bounties, or drawbacks, are allowed for particular exports or imports. Those of tonnage and poundage, in particular, were at first granted, as the old statutes (and particularly 1 Eliz. c. 19,) express it, for the defence of the realm, and the keeping and safeguard of the
316 seas, and for the intercourse of merchandize safely to come into and pass out of the same. They were at first usually granted only for a stated term of years, as, for two years in 5 Ric. II [a]; but in Henry the sixth's time, they were granted him for life by a statute in the thirty-first year of his reign; and again to Edward IV, for the term of his life also; since which time they were regularly granted to all his successors, for life, sometimes at the first, sometimes at other subsequent parliaments, till the reign of Charles the first; when, as the noble historian expresses it [b], his ministers were not sufficiently solicitous for a renewal of this legal grant. And yet these imposts were imprudently and unconstitutionally levied and taken, without consent of parliament, for fifteen years together; which was one of the causes of those unhappy discontents, justifiable at first in too many instances, but which degenerated at last into causeless rebellion and murder. For, as in every other, so in this particular case, the king (previous to the commencement of hostilities) gave the nation ample satisfaction for the errors of his former conduct, by passing an act [c], whereby he renounced all power in the crown of levying the duty of tonnage and poundage, without the express consent of parliament; and also all power of imposition upon any merchandizes whatever. Upon the restoration, this duty was granted to king Charles the second for life, and so it was to his two immediate successors; but now, by three several statutes, 9 Ann. c. 6, 1 Geo. I. c. 12, and 3 Geo. I. c. 7, it is made per-

a Dav. 12.
b Hist. Rebell. b. 3.
c 16 Car. 1. c. 8.

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shall, without the consent of congress, lay any imposts, or duties on imports or exports, except what may be absolutely necessary for executing its inspection laws. No tax or duty shall be laid, by congress, on articles exported from any state. C. U. S. Art. 1. Sec. 8, 9, 10. See L. U. S. 1 Cong. 2 Sess. c. 35, 39. 5 Cong. c. 128.

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petual, and mortgaged for the debt of the public. The customs thus imposed by parliament, are chiefly contained in two books of rates, set forth by parliamentary authority [d]; one signed by sir Harbottle Grimston, speaker of the house of Commons in Charles the second's time; and the other an additional one, signed by sir Spenser Compton, speaker in the reign of George the first; to which also subsequent additions have been made. Aliens pay a larger proportion than natural subjects [37], which is what is now generally understood by the alien's duty; to be exempted from which is one principal cause of the frequent applications to parliaments for acts of naturalization.

These customs are then, we see, a tax immediately paid by 317
the merchant, although ultimately by the consumer. And yet these are the duties felt least by the people; and, if prudently managed, the people hardly consider that they pay them at all. For the merchant is easy, being sensible he does not pay them for himself; and the consumer, who really pays them, confounds them with the price of the commodity: in the same manner as Tacitus observes, that the emperor Nero gained the reputation of abolishing the tax of the sale of slaves, though he only transferred it from the buyer to the seller; so that it was, as he expresses it, "*remissum magis specie, quam vi: quia, cum vendi-*
"*tor pendere jubereter, in partem pretii emptoribus accrescebat*[e]." But this inconvenience attends it on the other hand, that these imposts, if too heavy, are a check and cramp upon trade; and especially when the value of the commodity bears little or no proportion to the quantity of the duty imposed. This, in consequence, gives rise also to smuggling, which then becomes a very lucrative employment: and it's natural and most reasonable punishment, *viz.* confiscation of the commodity, is in such cases quite ineffectual; the intrinsic value of the goods, which is all

d Stat. 12 Car. II. c. 4. 11 Geo. 1. c. 7.

e *Hist. l.* 13.

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37. L. U. S. 1 Cong. 2 Sess. c. 30, 39, accordant. Quere, if not repealed, in part, by act of 5 Cong. c. 128. Sec. 104, 112.

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that the smuggler has paid, and, therefore, all that he can lose, being very inconsiderable when compared with his prospect of advantage in evading the duty. Recourse must, therefore, be had to extraordinary punishments to prevent it; perhaps even to capital ones: which destroys all proportion of punishment[f], and puts murderers upon an equal footing with such as are really guilty of no natural, but merely a positive, offence.

There is, also, another ill consequence attending high imposts on merchandize, not frequently considered, but indisputably certain; that the earlier any tax is laid on a commodity, the heavier it falls upon the consumer in the end: for every trader, through whose hands it passes, must have a profit, not only upon the raw material and his own labour and time in preparing it, but also upon the very tax itself, which he advances to the government; otherwise he loses the use and interest of the money which he so
318 advances. To instance in the article of foreign paper. The merchant pays a duty upon importation, which he does not receive again till he sells the commodity, perhaps at the end of three months. He is, therefore, equally entitled to a profit upon that duty which he pays at the custom-house, as to a profit upon the original price which he pays to the manufacturer abroad; and considers it accordingly in the price he demands of the stationer. When the stationer sells it again, he requires a profit of the printer or bookseller upon the whole sum advanced by him to the merchant: and the bookseller does not forget to charge the full proportion to the student or ultimate consumer; who, therefore, does not only pay the original duty, but the profits of these three intermediate traders, who have successively advanced it for him. This might be carried much farther in any mechanical, or more complicated, branch of trade.

II. Directly opposite in it's nature to this is the excise duty[38]; which is an inland imposition, paid sometimes upon the con-

f Montesq. Sp. L. b. 13, c. 8.

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38. Congress have power to lay and collect excises, which must be uniform throughout the United States. C. U. S. Art. 1, §. 8.

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sumption of the commodity, or frequently upon the retail sale, which is the last stage before the consumption. This is, doubtless, impartially speaking, the most oeconomical way of taxing the subject: the charges of levying, collecting, and managing the excise duties being considerably less in proportion, than in other branches of the revenue. It also renders the commodity cheaper to the consumer, than charging it with customs to the same amount would do; for the reason just now given, because generally paid in a much later stage of it. But, at the same time, the rigour and arbitrary proceedings of excise-laws seem hardly compatible with the temper of a free nation. For the frauds that might be committed in this branch of the revenue, unless a strict watch is kept, make it necessary, wherever it is established, to give the officers a power of entering and searching the housss of such as deal in exciseable commodities, at any hour of the day, and, in many cases, of the night likewise. And the proceedings in case of trangressions are so summary and sudden, that a man may be convicted in two days time in the penalty of many thousand pounds by two commissioners or justices of the peace; to 319
the total exclusion of the trial by jury, and disregard of the common law[39]. For which reason, though lord Clarendon tells us[g], that to his knowlege the earl of Bedford (who was made lord treasurer by king Charles the first, to oblige his parliament) intended to have set up the excise in England, yet it never made a

g Hist. b. 3.

L. U. S. 1 Cong. 3 Sess. c. 15. §. 14. 2 Cong. c. 32. 3 Cong. c. 49, and 5 Cong. c. 27, 42, 97, 132. But all these duties have been repealed. 7 Cong. c. 19.

39. In all criminal prosecutions, the accused shall enjoy the right to the trial by jury. Amendments to C. U. S. Art. 8. The trial of issues in fact in the district courts of the United States, in all causes, except civil causes of admiralty and maritime jurisdiction, shall be by jury. L. U. S. 1 Cong. 1 Sess. c. 20. §. 9. The state courts have cognizance of suits for recovery of penalties under the excise laws, where the cause of action arises at a greater distance than fifty miles from the nearest place established by law for holding a federal district court. L. U. S. 3 Cong. c. 49, §. 9.

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part of that unfortunate prince's revenue; being first introduced, on the model of the Dutch prototype, by the parliament itself after it's rupture with the crown. Yet such was the opinion of it's general unpopularity, that when in 1642, "aspersions were "cast by malignant persons upon the house of commons, that "they intended to introduce excises, the house, for it's vindica-"tion therein, did declare, that these rumours were false and "scandalous; and that their authors should be apprehended and "brought to condign punishment[h]." However, it's original[i] establishment was in 1643, and it's progress was gradual; being at first laid upon those persons and commodities, where it was supposed the hardship would be least perceivable, *viz.* the makers and venders of beer, ale, cyder, and perry[k], and the royalists at Oxford soon followed the example of their brethren at Westminster, by imposing a similar duty: both sides protesting, that it should be continued no longer than to the end of the war, and then be utterly abolished[l]. But the parliament at Westminster soon after imposed it on flesh, wine, tobacco, sugar, and such a multitude of other commodities, that it might fairly be denominated general: in pursuance of the plan laid down by Mr. Pymme (who seems to have been the father of the excise) in his letter to
320 sir John Hotham[m], signifying, "that they had proceeded in the "excise to many particulars, and intended to go on farther; but "that it would be necessary to use the people to it by little and "little." And afterwards, when the nation had been accustomed to it for a series of years, the succeeding champions of liberty

h Com. Journ. 8 Oct. 1642.

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

k Com. Journ. 17 May, 1643.

l Lord Clar. b. 7.

m 30 May, 1643. Dugdale of the troubles, 120.

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boldly and openly declared, "the impost of excise to be the "most easy and indifferent levy that could be laid upon the "people[n];" and accordingly continued it during the whole usurpation. Upon king Charles's return, it having then been long established and it's produce well known, some part of it was given to the crown, in 12 Car. II. by way of purchase (as was before observed) for the feodal tenures and other oppressive parts of the hereditary revenue. But, from it's first original to the present time, it's very name has been odious to the people of England. It has, nevertheless, been imposed on abundance of other commodities in the reigns of king William III, and every succeeding prince, to support the enormous expenses occasioned by our wars on the continent. Thus, brandies and other spirits are now excised at the distillery; printed silks and linens, at the printer's; starch and hair-powder, at the maker's; gold and silver wire, at the wire-drawers; plate in the hands of the vendor, who pays yearly for a license to sell it; lands and goods sold by auction, for which a pound-rate is payable by the auctioneer, who also is charged with an annual duty for his license; and coaches and other wheel-carriages, for which the occupier is excised[40], though not with the same circumstances of arbitrary strictness, as in most of the other instances. To these we may add coffee and tea, chocolate and cocoa paste, for which the duty is paid by the retailer; all artificial wines, commonly called sweets; paper and pasteboard, first when made, and again if stained or printed; malt as before-mentioned; vinegars; and the manufacture of glass; for all which the duty is paid by the manufacturer; hops, for which the person that gathers them is answerable; candles and soap, which are paid for at the maker's; malt liquors brewed for sale, which are excised at the brewery; 321
cyder and perry, at the vendor's; and leather and skins, at the tanner's. A list, which no friend to his country would wish to see farther increased.

n Ord. 14 Aug. 1649, c. 50. Scobell. 72. Stat. 1656, c. 19. Scobell. 452.

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40. How far this may be regarded as an authority in favour of the constitutionality of the carriage tax, imposed by act of 3 Cong. c. 45, the editor does not presume to conjecture.

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III. I proceed, therefore, to a third duty, namely that upon salt[41]; which is another distinct branch of his majesty's extraordinary revenue, and consists in an excise of 3*s.* 4*d.* *per* bushel imposed upon salt, by several statutes of king William and other subsequent reigns. This is not generally called an excise, because under the management of different commissioners: but the commissioners of the salt duties have by statute 1 Ann. c. 21, the same powers, and must observe the same regulations, as those of other excises. This tax has usually been only temporary; but by statute 26 Geo. II. c. 3, was made perpetual.

IV. Another very considerable branch of the revenue is levied with great cheerfulness, as, instead of being a burthen, it is a manifest advantage to the public. I mean the post-office, or duty for the carriage of letters[42]. As we have traced the original of the excise to the parliament of 1643, so it is but justice to observe, that this useful invention owes it's first legislative establishment to the same assembly. It is true, there existed post-masters in much earlier times: but I apprehend their business was confined to the furnishing of post horses to persons who were desirous to travel expeditiously, and to the dispatching of extraordinary pacquets upon special occasions.... King James I, originally erected a post-office under the control of one Matthew de Quester or de l'Equester, for the conveyance of letters to and from foreign parts; which office was af-
322 terwards claimed by lord Stanhope[o], but was confirmed and continued to William Frizell and Thomas Witherings by king Charles I, *A. D.* 1632, for the better accommodation of the English merchants[p]. In 1635, the same prince erected a letter-office for England and Scotland, under the direction of the same

o Latch. Rep. 87. p 19 Rym. *Foed.* 385.

41. Salt pays a duty of twenty cents per bushel, on importation. L. U. S. 1 Cong. 2 Sess. c. 39. 5 Cong. c. 12.

42. Congress hath power to establish post-offices and post-roads. C. U. S. Art. 1. §. 8. See L. U. S. 2 Cong. c. 7. 3 Cong. c. 23. 4 Cong. c. 76. 5 Cong. c. 149. 6 Cong. 1 Sess. c. 32. 2 Sess. c. 25. 7 Cong. c. 48.

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Thomas Witherings, and certain settled rates of postage[q]: but this extended only to a few of the principal roads, the times of carriage were uncertain, and the post-masters on each road were required to furnish the mail with horses at the rate of $2\frac{1}{2}d.$ a mile. Witherings was superseded, for abuses in the execution of both his offices, in 1640; and they were sequestered into the hands of Philip Burlamachy, to be exercised under the care and oversight of the king's principal secretary of state[r]. On the breaking out of the civil war, great confusions and interruptions were necessarily occasioned in the conduct of the letter-office. And, about that time, the outline of the present more extended and regular plan seems to have been conceived by Mr. Edmund Prideaux, who was appointed attorney-general to the commonwealth after the murder of king Charles. He was chairman of a committee in 1642 for considering what rates should be set upon inland letters[s]; and afterwards appointed post-master by an ordinance of both the houses[t], in the execution of which office he first established a *weekly* conveyance of letters in *all* parts of the nation[u]; thereby saving to the public the charge of maintaining post-masters, to the amount of 7000*l. per annum.* And, his own emoluments being probably very considerable, the common council of London endeavoured to erect another post-office in opposition to his; till checked by a resolution of the house of commons[w], declaring, that the office of post-master is, and ought to be, in the sole power and disposal of the parliament. This office was afterwards framed by one Manley in 1654[x]. But, in 1657, a regular post-office was erected by the authority of the protector and his parliament, upon nearly the same model as has been ever since adopted, and with the same rates of postage as continued till the reign of queen Anne[y]. After the restoration a similar office, with some improvements, was established by statute 12 Car. II. c. 35, but the rates of letters were altered, and some farther regulations added, by the statutes 9 Ann. c. 10. 6 Geo. I. c. 21. 26 Geo. II. c. 12. 5 Geo. 323

q *Ibid* 650. 20 Rym. 192.
r 20 Rym. 429.
s Com. Journ. 28 Mar. 1642.
t *Ibid.* 7 Sept. 1644.
u *Ibid.* 21 Mar. 1649.
w *Ibid.* 21 Mar. 1649.
x Scobell. 358.
y Com. Journ. 9 June 1657. Scobell. 511.

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III. c. 25. and 7 Geo. III. c. 50, and penalties were enacted, in order to confine the carriage of letters to the public office only, except in some few cases: a provision, which is absolutely necessary; for nothing but an exclusive right can support an office of this sort: many rival independent offices would only serve to ruin one another. The privilege of letters coming free of postage, to and from members of parliament, was claimed by the house of commons in 1660, when the first legal settlement of the present post-office was made[z]; but afterwards dropped[a] upon a private assurance from the crown, that this privilege should be allowed the members[b]. And accordingly a warrant was constantly issued to the post-master-general[c], directing the allowance thereof, to the extent of two ounces in weight: till at length it was expressly confirmed by statute 4 Geo. III. c. 24; which adds many new regulations, rendered necessary by the great abuses crept into the the practice of franking[43]; whereby the annual amount of franked letters had gradually increased, from 23,600*l.* in the year 1715, to 170,700*l.* in the year 1763[d]. There cannot be devised a more eligible method, than this, of raising money upon the subject: for therein both the government and the people find a mutual benefit. The government

z Com. Journ. 17 Dec. 1660.
a *Ibid.* 22 Dec. 1660.
b *Ibid.* 16 Apr. 1735.
c *Ibid.* 26 Feb. 1734.
d *Ibid.* 28 Mar. 1764.

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43. All letters and packets to and from the president or vice-president of the United States, and letters and packets, not exceeding two ounces in weight, to or from any senator or representative, or the secretary or clerk of either house, during their actual attendance in congress, and twenty days thereafter; and letters to and from the secretary of state; of the treasury, &c. and some other officers, shall be carried free of postage; but no person shall frank, or inclose, any letter or packet other than his own: and each person exempted from postage shall deliver to the post-office every letter inclosed to him, which may be directed to any other person, noting the place from whence it came by post. L. U. S. 3 Cong. c. 23. §. 19. If any person shall counterfeit the hand writing of any other in order to evade the payment of postage, the person offending shall forfeit one hundred dollars. Ibid. See also, 5 Cong. c. 149. §. 19. See also, 7 Cong. c. 5, and 48, §. 5.

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acquires a large revenue; and the people do their business with greater ease, expedition, and cheapness, than they would be 324
able to do if no such tax (and of course no such office) existed.

V. A fifth branch of the perpetual revenue consists in the stamp duties, which are a tax imposed upon all parchment and paper whereon any legal proceedings, or private instruments of almost any nature whatsoever, are written[44]; and also upon licenses for retailing wines, letting horses to hire, and for certain other purposes; and upon all almanacks, news-papers, advertisements, cards, dice, and pamphlets containing less than six sheets of paper. These imposts are very various, according to the nature

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44. An act has passed in the congress of the United States, for laying duties on stamped vellum, parchment and paper, the operation of which was suspended until June 1798. This act imposes a stamp duty upon licenses to practice as a counsellor, solicitor, attorney, or proctor, in any court of the United States; upon patents under the authority of the United States, except for lands granted for military services; upon charter parties, bottomry, and respondentia bonds; upon receipts to be given in discharge of any legacy, or dividend of personal estate, except where the estate is devised to, or divided among the wife and children, or grand children of the deceased; upon policies of insurance, or any instrument in nature thereof; upon exemplifications of every kind, which shall pass the seal of any court; upon bonds, bills, single or penal, foreign, and inland bills of exchange, promissory notes, or other notes above twenty dollars, and bank notes; upon letters of attorney, except for invalid pensions, or land warrants for military services; upon debentures and bills of lading; upon inventories in any case required by law, except in cases of distress for rent, or taxes, and goods taken in virtue of any legal process by an officer; upon certificates for shares in any bank; none of which instruments shall be pleaded, or given in evidence in *any court*, or admitted in any court to be available in law or equity, until duly stamped. Penalties are likewise inflicted upon those who may write them upon unstamped paper, and those who forge or counterfeit any stamp, or utter or vend any stamped paper, &c. knowing the same to be stamped with a forged or counterfeit stamp, shall be judged guilty of a misdemeanor, and punished by fine and imprisonment. L. U. S. 5 Cong. c. 11, 37, 123. 6 Cong. 1 Sess. c. 31. 2 Sess. c. 19....These acts are now repealed, 7 Cong. c. 19.

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of the thing stamped, rising gradually from a penny to ten pounds. This is also a tax, which, though in some instances it may be heavily felt, by greatly increasing the expence of all mercantile as well as legal proceedings, yet (if moderately imposed) is of service to the public in general, by authenticating instruments, and rendering it much more difficult than formerly to forge deeds of any standing; since, as the officers of this branch of the revenue vary their stamps frequently, by marks perceptible to none but themselves, a man that would forge a deed of king William's time, must know and be able to counterfeit the stamp of that date also. In France, and some other countries, the duty is laid on the contract itself, not on the instrument in which it is contained; (as, with us too, besides the stamps on the indentures, a tax is laid by statute 8 Ann. c. 9, of 6*d.* in the pound, upon every apprentice-fee, if it be 50*l.* or under; and 1*s.* in the pound, if it be a greater sum); but this tends to draw the subject into a thousand nice disquisitions and disputes concerning the nature of his contract, and whether taxable or not; in which the farmers of the revenue are sure to have the advantage [e]. Our general method answers the purposes of the state as well, and consults the ease of the subject much better. The first institution of the stamp duties was by statute 5 and 6 W. and M. c. 21, and they have since, in many instances, been increased to ten times their original amount.

325 VI. A sixth branch is the duty upon houses and windows [45]. As early as the conquest mention is made in domes-day book of fumage or fuage, vulgarly called smoke farthings; which were paid by custom to the king for every chimney in the house. And we read that Edw. the black prince (soon after his successes in France) in imitation of the English custom, imposed a tax of a florin upon every hearth in his French dominions [f]. But the first par-

e Sp. of L. b. xiii. c. 9.

f Mod. Un. Hist. xxiii. 463. Spelm. Gloss. *tit. Fuage.*

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45. There is no such duty at present. A window tax was imposed for a short time, in Virginia, during the war....Houses in lots and towns pay a tax *ad valorem.* L. V. 1797, c. 1. See also L. U. S. 5 Cong. c. 87, 92, 126.

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liamentary establishment of it in England was by statute 13 and 14 Car. II. c. 10, whereby an hereditary revenue of 2*s.* for every hearth, in all houses paying to church and poor, was granted to the king for ever. And, by subsequent statutes for the more regular assessment of this tax, the constable and two other substantial inhabitants of the parish, to be appointed yearly, (or the surveyor, appointed by the crown, together with such constable or other public officer) were, once in every year, empowered to view the inside of every house in the parish. But, upon the revolution, by statute 1 W. and M. st. 1. c. 10, hearth-money was declared to be "not only a great oppression to the poorer sort, "but a badge of slavery upon the whole people, exposing every "man's house to be entered into, and searched at pleasure, by "persons unknown to him; and therefore, to erect a lasting mo-"nument of their majesties goodness in every house in the "kingdom, the duty of hearth-money was taken away and abo-"lished." This monument of goodness remains among us to this day: but the prospect of it was somewhat darkened, when in six years afterwards, by statute 7 W. III. c. 18, a tax was laid upon all houses (except cottages) of 2*s.* now advanced to 3*s.* *per annum*, and a tax also upon all windows, if they exceeded nine, in such house. Which rates have been, from time to time, varied, being now extended to all windows exceeding six; and power is given to surveyors, appointed by the crown, to inspect the outside of houses, and also to pass through any house two days in the year, into any court or yard, to inspect the windows 326
there. A new duty from 6*d.* to 1*s.* in the pound, was also imposed by statutes 18 Geo. III. c. 26, and 19 Geo. III. c. 59, on every dwelling-house inhabited, together with the offices and gardens therewith occupied: which duty, as well as the former, is under the direction of the commissioners of the land tax.

VII. The seventh branch of the extraordinary perpetual revenue, is a duty of 21*s.* *per annum* for every male servant retained or employed in the several capacities specifically mentioned in the act of parliament, and which almost amount to an universality, except such as are employed in husbandry, trade, or ma-

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nufactures[46]. This was imposed by statute 17 Geo. III. c. 39, amended by 19 Geo. III. c. 59, and is under the management of the commissioners of the land and window tax.

VIII. An eighth branch is the duty arising from licences to hackney coaches and chairs in London, and the parts adjacent[47]. In 1654, two hundred hackney coaches were allowed within London, Westminster, and six miles round, under the direction of the court of aldermen[h]. By statute 13 and 14 Car. II. c. 2, four hundred were licensed; and the money arising thereby was applied to repairing the streets[i]. This number was increased to seven hundred by statute 5 W. and M. c. 22, and the duties vested in the crown: and by the statute 9 Ann. c. 23, and other subsequent statutes for their government[j], there are now a thousand licensed coaches and four hundred chairs. This revenue is governed by commissioners of it's own, and is, in truth, a benefit to the subject; as the expense of it is felt by no individual, and it's necessary regulations have established a competent
327 jurisdiction, whereby a very refractory race of men may be kept in some tolerable order.

IX. The ninth and last branch of the king's extraordinary perpetual revenue is the duty upon offices and pensions[48]; consisting in an annual payment of 1*s*. in the pound (over and above

h Scobell, 313.

i Com. Journ. 14 Feb. 1661.

j 10 Ann. c. 19. §. 158. 12 Geo. I. c. 15. 7 Geo. III. c. 44. 10 Geo. III. c. 44. 11 Geo. III. c. 24, 28. 12 Geo. III. c. 49.

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46. In Virginia, a tax of one shilling and eightpence is imposed upon all slaves, above the age of twelve years, except such as are exempted by the county courts, by reason of age or infirmity. V. L. 1795, c. 6. This tax was formerly much higher. Nov. 1781, c. 40, &c. It is now 35 cents, 1797, c. 1. And by laws U. S. 5 Cong. c. 92, there is a tax of fifty cents upon all negroes, mulattoes, and mustees, slaves, above twelve, and under fifty years of age. Ibid. c. 87. Sec. 8. 5 Cong. c. 92.

47. There is no such duty at present, either imposed by the federal or state government.

48. There is no such duty in the United States at present.

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all other duties[k]) out of all salaries, fees, and perquisites, of offices and pensions payable by the crown, exceeding the value of 100*l. per annum.* This highly popular taxation was imposed by statute 31 Geo. II. c. 22, and is under the direction of the commissioners of the land tax.

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

In order to take a clear and comprehensive view of the nature of this national debt, it must first be premised, that after the revolution, when our new connections with Europe introduced a new system of foreign politics, the expenses of the nation, not only in settling the new establishment, but in main- 328
taining long wars, as principals, on the continent, for the security of the Dutch barrier, reducing the French monarchy, settling the Spanish succession, supporting the house of Austria, maintaining the liberties of the Germanic body, and other purposes, increased to an unusual degree: insomuch that it was not thought advisable to raise all the expenses of any one year by taxes to be levied within that year, lest the unaccustomed weight of them should create murmurs among the people. It was therefore the policy of the times to anticipate the revenues of their posterity, by borrowing immense sums for the current service of the state, and to lay no more taxes upon the subject than would suffice to pay the annual interest of the sums so bor-

k Previous to this, a deduction of 6*d.* in the pound was charged on all pensions and annuities, and all salaries, fees, and wages of all offices of profit granted by, or derived from the crown; in order to pay the interest at the rate of three *per cent.* on one million, which was raised for discharging the debts on the civil list, by statute 7 Geo. I, st. 1. c. 27. 11 Geo. I, c. 17, and 12 Geo. I, c. 2. This million, being charged on this particular fund, is not considered as any part of the national debt.

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rowed: by this means converting the principal debt into a new species of property, transferable from one man to another at any time and in any quantity. A system which seems to have had it's original in the the state of Florence, *A. D.* 1344: which government then owed about 60,000*l.* sterling: and, being unable to pay it, formed the principal into an aggregate sum, called metaphorically a *mount* or *bank*, the shares whereof were transferable like our stocks, with interest at 5 *per cent.* the prices varying according to the exigencies of the state[l]. This policy of the English parliament laid the foundation of what is called the national debt[49]: for a few long annuities created in the reign of Charles II will hardly deserve that name. And the example then set has been so closely followed during the long wars in the reign of queen Anne, and since, that the capital of the national debt (funded and unfunded) amounted at the close

l *Pro tempore, pro spe, pro commodo minuitur eorum pretium atque augescit.* Aretin. See Mod. Un. Hist. xxxvi. 116.

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49. The same policy seems to have been pretty closely pursued in the United States, whose domestic debt, including 18,271,814 ds. 74 cents of assumed debts, amounted on the 31st Dec. 1794, to 64,825,538 ds. 70 cents, to which the foreign debt, amounting to 14,599,129 ds. 37 cents, being added, shews the debt of the U. States at that period, to be 79,424,660 ds. 07 cents, as estimated by the secretary of the treasury, and reported to congress, 1795, printed at Philadelphia by John Fenno. The unredeemed principal, Jan. 1, 1801, was 80,161,207 ds. 60 cents, according to the statement made to congress, December 12, 1801.

Latter times have thrown into the ministerial scale a weight "unknown to former ages; I mean the national debt. The anxiety "of the public creditors, the proprietors of the funds, about public "credit, as a powerful cause of their shewing a reluctance against "all proposals for salutary alterations, or restorations." Burgh's Pol. Disq. Vol. 1. p. 270.

But we may now flatter ourselves that the public debt of the United States will be rapidly diminished; congress having appropriated the immense sum of seven millions three hundred thousand dollars, annually, to it's reduction. See L. U. S. 7 Cong. c. 32.

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of the session in June 1777, to about an hundred and thirty-six millions *: to pay the interest of which, together with certain annuities for lives and years, and the charges of management, amounting annually to upwards of four millions and three quarters, the extraordinary revenues just now enumerated (excepting only the land-tax and annual malt-tax) are in the first place mortgaged, and made perpetual by parliament. Perpetual, 329
I say; but still redeemable by the same authority that imposed them: which, if it at any time can pay off the capital will abolish those taxes which are raised to discharge the interest.

By this means the quantity of property in the kingdom is greatly increased in idea, compared with former times: yet, if we coolly consider it, not at all increased in reality[50]. We may boast of large fortunes, and quantities of money in the funds. But where does this money exist? It exists only in name, in paper, in public faith, in parliamentary security: and that is undoubtedly sufficient for the creditors of the public to rely on. But then what is the pledge, which the public faith has pawned for the security of these debts? The land, the trade, and the personal industry of the subject; from which the money must arise that supplies the several taxes. In these, therefore, and these only, the property of the public creditors does really and intrinsically exist: and of course, the land, the trade, and the personal industry of individuals, are diminished in their true value just so much as they are pledged to answer. If A's income amounts to 100*l.* *per annum;* and he is so far

* [And at the close of the session in July 1786, to about two hundred and thirty-nine millions.] It is now said to amount to upwards of four hundred millions; being on the first of January, 1797, 368,897,114*l.* sterling, since which period it hath been much encreased. The annual interest on which is 14,240,481*l.* sterling, equal to 63,227,735 dollars, which is more than three-fourths of the whole national debt of the United States.

50 The observations in this, and the succeeding paragraph, are well worthy of the most serious perusal, and attention of the student.

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indebted to B, that he pays him 50*l.* *per annum* for his interest; one half of the value of A's property is transferred to B the creditor. The creditor's property exists in the demand which he has upon the debtor, and no where else; and the debtor is only a trustee to his creditor for one half of the value of his income. In short, the property of a creditor of the public consists in a certain portion of the national taxes: by how much therefore he is the richer, by so much the nation, which pays these taxes, is the poorer*.

* It is a very erroneous notion indeed to suppose, that the property of the kingdom is increased by national debts, contracted in consequence of the expences of war. On the contrary, the principal of the debt is the exact amount of the property which the nation has lost from it's capital for ever. The American war cost the nation 116 millions sterling, and the effect is precisely the same as if so much of it's wealth and treasure in corn, cattle, cloth, ammunition, coin, &c. had been collected together, and thrown into the sea, besides the loss accruing from the destruction of many of it's most productive hands. When this property is consumed, it never can be retrieved, though industry and care may acquire and accumulate new stores. Such a supply, by no mode of taxation that has yet been devised, could be collected at once, without exhausting the patience and endurance of the people. But by the method of funding, the subjects are induced to suppose, that their suffering consists only in the payment of the yearly interest of this immense waste. The ruin is completed before the interest commences, for that is paid by the nation to the nation, and returns back to it's former channel and circulation; like the balls in a tennis court, however they may be tossed from one side to the other, their sum and quantity, within the court, continue the same. The extravagance of individuals naturally suggested the system of funding public debts. When a man cannot satisfy the immediate demands of his creditor, it is an obvious expedient to give him a promissory note, to pay him at a future day, with interest for the time; and if this is an assignable note, so that the creditor may be enabled to persuade another to advance him the principal and to stand in his place, it is exactly similar to the debts or securities of government, except that, in general, they are not payable at any definite time. All debts, when no effects remain, both in public and private, are certain evidence of the waste and consumption of so much property, which nothing can restore, though frugality and industry may alleviate the future consequences. When a debt is contracted, a man is not richer for paying it; if he owes one hundred pounds, and pays interest for it, he is in no degree richer by calling in one hundred pounds from which he receives the same interest, and therewith discharges the debt; but probably, if he does so, he will feel himself more comfortable and independent, and will find his credit higher, if his occasions should oblige him to borrow in future. So it is with governments; when the debt is contracted, and the money spent, the mischief is done, the discharge of the debt can add nothing (or little comparatively) immediately

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The only advantage, that can result to a nation from public debts, is the increase of circulation by multiplying the cash of the kingdom, and creating a new species of currency, assignable at any time and in any quantity; always therefore ready to be employed in any beneficial undertaking, by means of this its transferable quality; and yet producing some profit even when it lies idle and unemployed. A certain proportion of debt seems therefore to be highly useful to a trading people; but what that proportion is, it is not for me to determine. Thus 330
much is indisputably certain, that the present magnitude of our national incumbrances very far exceeds all calculations of commercial benefit, and is productive of the greatest inconveniencies. For, first, the enormous taxes, that are raised upon the necessaries of life for the payment of the interest of this debt, are a hurt both to trade and manufactures, by raising the price as well of the artificer's subsistence, as of the raw material, and of course, in a much greater proportion, the price of the commodity itself. Nay, the very increase of paper-circulation itself, when extended beyond what is requisite for commerce or foreign exchange, has a natural tendency to increase the price of provisions as well as of all other merchandize. For, as it's effect is to multiply the cash of the kingdom, and this to such an extent that much must remain unemployed, that cash (which is the universal measure of the respective values of all other commodities) must necessarily sink in it's own value [m], and every thing grow comparatively dearer. Secondly, if part of this debt be owing to foreigners, either they draw out of the kingdom annually a considerable quantity of specie for the inter-

m See page 276.

diately to the stock or capital of the nation. But yet these important consequences may be expected from it; viz. from the abolition of taxes upon candles, soap, salt, beer, and upon a melancholy catalogue of the necessary articles of life, taxes which take from those who have nothing to spare, the price of labour would be lowered, manufactures would flourish with renewed vigour, the minds of the people would be cheered, and the nation would again have credit and spirit to meet it's most formidable enemies, and to repel and resent both injury and insult. All the nations of Europe have learnt from such dear-bought experience, that poverty and misery are the inevitable consequences of war, as to give us reason to hope, that the lives and property of mankind will not, in future, be dissipated with the profusion and wantonness of former times.

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est; or else it is made an argument to grant them unreasonable privileges, in order to induce them to reside here. Thirdly, if the whole be owing to subjects only, it is then charging the active and industrious subject, who pays his share of the taxes, to maintain the indolent and idle creditor who receives them. Lastly, and principally, it weakens the internal strength of a state, by anticipating those resources which should be reserved to defend it in case of necessity. The interest we now pay for our debts would be nearly sufficient to maintain any war, that any national motives could require. And if our ancestors in king William's time had annually paid, so long as their exigencies lasted, even a less sum than we now annually raise upon their accounts, they would in the time of war have borne no greater burdens, than they have bequeathed to and settled upon their posterity in time of peace; and might have been eased the instant the exigence was over.

331 The respective produces of the several taxes beforementioned were originally separate and distinct funds; being securities for the sums advanced on each several tax, and for them only. But at last it became necessary, in order to avoid confusion, as they multiplied yearly, to reduce the number of these separate funds, by uniting and blending them together; superadding the faith of parliament for the general security of the whole. So that there are now only three capital funds of any account, the *aggregate* fund, and the *general* fund, so called from such union and addition; and the *south sea* fund, being the produce of the taxes appropriated to pay the interest of such part of the national debt as was advanced by that company and it's annuitants. Whereby the separate funds, which were thus united, are become mutual securities for each other; and the whole produce of them, thus aggregated, liable to pay such interest or annuities as were formerly charged upon each distinct fund: the faith of the legislature being moreover engaged to supply any casual deficiencies.

The customs, excises, and other taxes, which are to support these funds, depending on contingencies, upon exports, imports, and consumptions, must necessarily be of a very uncertain amount; but though some of them have proved unproductive,

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and others deficient, the sum total hath always been considerably more than was sufficient to answer the charge upon them. The surplusses, therefore, of the three great national funds, the aggregate, general, and south sea funds, over and above the interest and annuities charged upon them, are directed by statute 3 Geo. I. c. 7, to be carried together, and to attend the disposition of parliament; and are usually denominated the *sinking* fund, because originally destined to sink and lower the national debt. To this have been since added many other intire duties, granted in subsequent years; and the annual interest of the sums borrowed on their respective credits is charged on and payable out of the produce of the sinking fund. However, the neat surplusses and savings, after all deductions paid, amount annually, to a very considerable sum. For as the interest on the national debt has been at several times reduced, (by the consent of the proprietors, who had their option either to lower their interest, 332
or be paid their principal) the savings from the appropriated revenues came at length to be extremely large. This sinking fund is the last resort of the nation; it's only domestic resource, on which must chiefly depend all the hopes we can entertain of ever discharging or moderating our incumbrances. And, therefore, the prudent and steady application of the large sums now arising from this fund, is a point of the utmost importance, and well worthy the serious attention of parliament: which was thereby enabled, in the year 1765, to reduce above two millions sterling of the public debt; and several additional millions in several succeeding years.

But, before any part of the aggregate fund (the surplusses whereof are one of the chief ingredients that form the sinking fund) can be applied to diminish the principal of the public debt, it stands mortgaged by parliament to raise an annual sum for the maintenance of the king's houshold and the civil list. For 333
this purpose, in the late reigns, the produce of certain branches of the excise and customs, the post-office, the duty on wine licenses, the revenues of the remaining crown lands, the profits arising from courts of justice, (which articles include all the hereditary revenues of the crown) and also, a clear annuity of 120,000*l.* in money, were settled on the king for life, for the

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support of his majesty's houshold, and the honour and dignity of the crown. And, as the amount of these several branches was uncertain, (though in the last reign they were computed to have sometimes raised almost a million) if they did not arise annually to 800,000*l.* the parliament engaged to make up the deficiency. But his present majesty having, soon after his accession, spontaneously signified his consent, that his own hereditary revenues might be so disposed of as might best conduce to the utility and satisfaction of the public; and having graciously accepted the limited sum of 800,000*l.* *per annum* for the support of his civil list; the said hereditary and other revenues were carried into and made a part of the aggregate fund, and the aggregate fund was charged[n] with the payment of the whole annuity to the crown of 800,000*l.* which, being found insufficient, was increased in 1777 to 900,000*l.* *per annum.* Hereby the revenues themselves, being put under the same care and management as the other branches of the public patrimony, produce more and are better collected than heretofore; and the public is still a gainer of near 100,000*l.* *per annum* by this disinterested conduct of his majesty. The civil list thus liquidated, together with the four millions and three quarters, interest of the national debt, and more than two millions produced from the sinking fund, make up the seven millions and three quarters *per annum*, neat money which were before stated to be the annual produce of our *perpetual* taxes; besides the immense, though uncertain, sums arising from the *annual* taxes on land and malt, but which, at an average, may be calculated at more than two millions and a quarter; and, added to the preceding sum, make the clear produce of the taxes (exclusive of the charge of collecting) which are raised yearly on the people of this country, amount to about ten millions sterling.

334 The expences defrayed by the civil list are those that in any shape relate to civil government[51]; as, the expenses of the roy-

n Stat. 1 Geo. III. c. 1.

51. The appropriations for the civil list of the United States government, were in 1789, 216,000 dollars. In 1790....141,492 dolls. 73 cents, and 10,000 dollars for the contingent charges of govern-

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al houshold; the revenues allotted to the judges, previous to the year 1758; all salaries to officers of state, and every of the king's servants; the appointments to foreign embassadors; the maintenance of the queen and royal family; the king's private expenses, or privy purse; and other very numerous outgoings, as secret service money, pensions, and other bounties; which sometimes have so far exceeded the revenues appointed for that purpose, that application has been made to parliament to discharge the debts contracted on the civil list; as particularly in 1724, when one million[nn] was granted for that purpose by the statute 11 Geo. I. c. 17, and in 1769 and 1777, when half a million and 600,000*l.* were appropriated to the like uses, by the statutes 9 Geo. III. c. 34, and 17 Geo. III. c. 47.

nn See Page 327.

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ment. In 1791....299,276 dolls. 53 cents. In 1792....329,653 dolls. 56 cents, and for making up former deficiences 195,119 dolls. 49 cts. in the whole, 524,773 dolls. 5 cents. In 1793.... 398, 816 dolls. 95 cts. exclusive of 82,245 dolls. 32 cents, pensions to invalids. In 1794.... 521,447 dolls. 24 cts. also exclusive of invalid pensions. In 1795... 432,749 dolls. 53 cts. and 1796....530,392 dolls. 85 cts. The average of the last four years, being about 420,850 dollars. See L.U.S. 1 Cong. 1 Sess. c. 23. 2 Sess. c. 4. 3 Sess. c. 6. 2 Cong. c. 3. 62. 3 Cong. c. 6, 73, 4 Cong. c. 1. To which, if the sum of 59,177 drs. 41 cts. appropriated by act of 2 Cong. c. 74, for the establishment of the mint, and some other purposes, be added, the average appropriation for the support of the civil list of the federal government for the last four years, will amount to 435,627 dollars; which is not equal to a ninth part of the civil list expences of Great Britain; though probably more than was calculated upon by any American, before the adoption of the federal government. N. B. The appropriations for defraying the expences of treaties, and some others are not included in the above.

The appropriations for the civil list for the year 1802, including the contingent expences of the several departments and officers; for the compensation of the clerks in the several loan offices, and for books and stationary, for them; for the payment of annuities and grants; for the support of the mint establishment; for the expences of intercourse with foreign nations; for the support of light-houses, beacons, buoys, and public piers; and for satisfying certain miscellaneous claims and expences, amount to 1,027,276 dolls. 57 cents.... L. U. S. 7 Cong. 1 Sess. c. 47.

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The civil list is, indeed, properly the whole of the king's revenue in his own distinct capacity; the rest being rather the revenue of the public, or it's creditors, though collected and distributed again, in the name and by the officers of the crown: it now standing in the same place, as the hereditary income did formerly; and, as that has gradually diminished, the parliamentary appointments have increased. The whole revenue of queen Elizabeth did not amount to more than 600,000*l.* a year[o]: that of king Charles I, was[p] 800,000*l.* and the revenue voted for king Charles II, was[q] 1,200,000*l.* though complaints were made (in the first years at least) that it did not amount to so much[r]. But it must be observed, that under these sums were included all manner of public expenses; among which lord Clarendon in his speech to the parliament computed, that the charge of the navy and land forces[52], amounted annually to 800,000*l.* which

o Lord Clar. continuation, 138.
p Com. Journ. 4 Sept. 1660. q Ibid.
r Ibid. 4 June 1663, Lord Clar. Ibid.

52. The appropriations for the military and naval establishments of the United States, for the year 1795, amount to 1,665,478 dolls. 33 cts. and for the year 1796, 1,318,873 dolls. L. U. S. 3 Cong. c. 11. 4 Cong. c. 51. The appropriation for the naval department in 1794, was 688,888 dolls. 82 cents. L. U. S. 3 Cong. c. 61. By the act to ascertain and fix the military establishment of the U. S. 4 Cong. c. 39....there are two corps of artillerists and engineers; two companies of light dragoons; and four regiments of infantry, amounting in the whole, to 1894, non-commissioned officers, musicians and privates....with a competent number of commissioned officers. A considerable alteration has been made, 7 Cong. c. 9, fixing the military *peace establishment*.

The establishment in time of peace is now fixed to consist of one corps of artillerists divided into five battalions, of four companies each, consisting in the whole of eleven hundred and twenty privates; and two regiments of infantry, consisting of six hundred and forty privates, each, with a competent number of officers. The same act authorises the president to establish a corps of engineers, the number of which seems limited to twenty officers and cadets. This corps when formed is to be stationed at West-Point, in the state of New-York, and to constitute a military academy.

The appropriations made for the support of the navy in the year 1802, amount to 888,074 dolls. 40 cents. And for the army, exclusive

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was ten times more than before, the former troubles[s]. The same revenue, subject to the same charges, was settled on king 335
James II[t]: but by the increase of trade, and more frugal management, it amounted on an average to a million and a half *per annum*, (besides other additional customs, granted by parliament[u], which produced an annual revenue of 400,000*l.*) out of which his fleet and army were maintained at the yearly expense of[w] 1,100,000*l.* After the revolution, when the parliament took into it's own hands the annual support of the forces both maritime and military, a civil list revenue was settled on the new king and queen, amounting, with the hereditary duties, to 700,000*l.* *per annum*[x]; and the same was continued to queen Anne and king George I[y]. That of king George II, we have seen, was nominally augmented to[z] 800,000*l.* and in fact was considerably more: and that of his present majesty is avowedly increased to the limited sum of 900,000*l.* And upon the whole it is doubtless much better for the crown, and also for the people, to have the revenue settled upon the modern footing rather than the antient. For the crown; because it is more certain, and collected with greater ease: for the people; because they are now delivered from the feodal hardships, and other odious branches of the prerogative. And though complaints have sometimes been made of the increase of the civil list, yet, if we consider the sums that have been formerly granted, the limited extent under which it is now established, the revenues and prerogatives given up in lieu of it, by the crown, the numerous branches of the present royal family, and (above all) the diminution of the value of money compared with what it was worth in the last century, we must acknowledge these complaints to be void of any rational foundation; and that it is impossible to support that dignity,

s Lord Clar. 165.
t Stat. 1 Jac. II. c. I.
u Ibid. c. 3 and 4.
w Com. Journ. 1 Mar. 20 Mar. 1688.
x Com. Journ. 14 Mar. 1701.
y Ibid. 17 Mar. 1701, 11 Aug. 1714.
z Stat. 1 Geo. II. c. 1.

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of the provision for the officers and soldiers who might be discharged under the arrangement of the peace establishment, 855,761 dolls. 8 cents. L. U. S. 7 Cong. c. 43 and 46.

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which a king of Great Britain should maintain, with an income in any degree less than what is now established by parliament[53].

This finishes our inquiries into the fiscal prerogatives of the
336 king; or his revenue, both ordinary and extraordinary. We have, therefore, now chalked out all the principal outlines of this vast title of the law, the supreme executive magistrate, or the king's majesty, considered in his several capacities and points of view. But, before we entirely dismiss this subject, it may not be improper to take a short comparative review of the power of the executive magistrate, or prerogative of the crown, as it stood in former days, and as it stands at present. And we cannot but observe, that most of the laws for ascertaining, limiting, and restraining this prerogative, have been made within the compass

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53. The author of the Political Disquisitions, feels great indignation at this passage. "In a republic," says he, "Judge Blackstone "would not have written as follows: 'It is impossible to support 'that dignity, which a king of Great Britain should maintain, with 'an income in any degree less, than what is now established by par-'liament.' According to the learned judge, whatever is, is right.... "But, surely, with all due submission, the dignity of a British mo-"narch does not consist in his spending large sums of his poor peo-"ple's money; but rather in his sparing their purses, and setting "them an example of frugality. With the learned Judge's good "leave, it is the dignity, if dignity it may be called, of the minis-"try, and their crew, much more than the king's that devours the "civil list. So that the plain English of what the learned Judge "has written, will be what follows;" 'It is impossible to support 'that *influence* which a British ministry should maintain, with an 'income in any degree less than several millions per. annum.' Pol. Disq. Vol. 2. p. 39, 40. Philad. 1775.

Let the student compare the provision for a king of England, with the following extracts from the constitution and laws of the United States.

"The president shall, at stated times, receive for his services, "a compensation, which shall neither be increased nor diminished, "during the period for which he shall have been elected, and he "shall not receive within that period, any other emolument from "the United States, or either of them. C. U. S. Art. 2. This com-"pensation has been fixed at 25,000 dolls. per annum. L. U. S. 1 Cong. c. 19. 2 Cong. c. 53.

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of little more than a century past; from the petition of right in 3 Car. I, to the present time. So that the powers of the crown are now to all appearance greatly curtailed and diminished since the reign of king James the first: particularly, by the abolition of the star chamber and high commission courts, in the reign of Charles the first, and by the disclaiming of martial law, and the power of levying taxes on the subject, by the same prince: by the disuse of forest laws for a century past: and by the many excellent provisions enacted under Charles the second; especially the abolition of military tenures, purveyance, and pre-emption; the *habeas corpus* act; and the act to prevent the discontinuance of parliaments for above three years: and, since the revolution, by the strong and emphatical words in which our liberties are asserted in the bill of rights, and act of settlement; by the act for triennial, since turned into septennial, elections; by the exclusion of certain officers from the house of commons; by rendering the seats of the judges permanent, and their salaries liberal and independent; and by restraining the king's pardon from obstructing parliamentary impeachments. Besides all this, if we consider how the crown is impoverished and stripped of all it's antient revenues, so that it must greatly rely on the liberality of parliament for it's necessary support and maintenance, we may perhaps be led to think, that the balance is inclined pretty strongly to the popular scale, and that the executive magistrate has neither independence nor power enough left to form that check upon the lords and commons, which the founders of our constitution intended.

But, on the other hand, it is to be considered, that every prince, in the first parliament after his accession, has by long usage a truly royal addition to his hereditary revenue settled 337
upon him for his life; and has never any occasion to apply to parliament for supplies, but upon some public necessity of the whole realm. This restores to him that constitutional independence, which at his first accession seems, it must be owned, to be wanting. And then, with regard to power, we may find perhaps that the hands of government are, at least, sufficiently strengthened; and that an English monarch is now in no danger of being overborne by either the nobility or the people. The instruments

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of power are not perhaps so open and avowed as they formerly were, and, therefore, are the less liable to jealous and invidious reflections; but they are not the weaker upon that account[54]. In short, our national debt and taxes (besides the inconveniences before mentioned) have also in their natural consequences thrown such a weight of power into the executive scale of government, as we cannot think was intended by our patriot ancestors; who gloriously struggled for the abolition of the then formidable parts of the prerogative, and by an unaccountable want of foresight established this system in their stead. The entire collection and management of so vast a revenue, being placed in the hands of the crown, have given rise to such a multitude of new officers created by and removable at the royal pleasure, that they have extended the influence of government to every corner of the nation. Witness the commissioners and the multitude of dependents on the customs, in every port of the kingdom; the commissioners of excise, and their numerous subalterns, in every inland district; the post-masters, and their servants, planted in every town, and upon every public road; the commissioners of the stamps, and their distributors, which are full as scattered and full as numerous; the officers of the salt duty, which though a species of excise and conducted in the same manner, are yet made a distinct corps from the ordinary managers of that revenue; the surveyors of houses and windows; the receivers of the land tax; the managers of lotteries; and the commissioners of hackney coaches; all which are either mediately or immediately appointed by the crown, and removable at pleasure without any reason assigned: these it requires but little penetration to see,
336* must give that power, on which they depend for subsistence, an influence most amazingly extensive. To this may be added, the frequent opportunities of conferring particular obligations, by preference in loans, subscriptions, tickets, remittances, and other money-transactions, which will greatly increase this influence;

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54. The observations contained in the remainder of this chapter, deserve the most serious consideration: similar causes will produce similar effects in all countries.

"*Foelix quem faciunt aliena pericula cautum.*"

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and that over those persons whose attachment, on account of their wealth, is frequently the most desirable. All this is the natural, though perhaps the unforeseen consequence of erecting our funds of credit, and to support them, establishing our present perpetual taxes: the whole of which is entirely new since the restoration in 1660; and by far the greatest part since the revolution in 1688. And the same may be said with regard to the officers in our numerous army, and the places which the army has created. All which put together give the executive power so persuasive an energy with respect to the persons themselves, and so prevailing an interest with their friends and families, as will amply make amends for the loss of external prerogative.

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

Add to all this, that besides the civil list, the immense revenue of almost seven millions sterling, which is annually paid to the creditors of the public, or carried to the sinking fund, is first deposited in the royal exchequer, and thence issued out to the 337*
respective offices of payment. This revenue the people can never refuse to raise, because it is made perpetual by act of parliament: which also, when well considered, will appear to be a trust of great delicacy and high importance.

Upon the whole, therefore, I think it is clear, that, whatever may have become of the *nominal*, the *real* power of the crown has not been too far weakened by any transactions in the last century. Much is indeed given up; but much is also acquired.

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The stern commands of prerogative have yielded to the milder voice of influence [55]: the slavish and exploded doctrine of non-resistance has given way to a military establishment by law; and to the disuse of parliaments has succeeded a parliamentary trust of an immense perpetual revenue. When, indeed, by the free operation of the sinking fund, our national debts shall be lessened; when the posture of foreign affairs, and the universal introduction of a well planned and national militia, will suffer our formidable army to be thinned and regulated; and when (in consequence of all) our taxes shall be gradually reduced; this adventitious power of the crown will slowly and imperceptibly diminish, as it slowly and imperceptibly rose. But, till that shall happen, it will be our especial duty, as good subjects and good Englishmen, to reverence the crown, and yet guard against corrupt and servile influence from those who are intrusted with it's authority; to be loyal, yet free; obedient, and yet independent; and, above every thing, to hope that we may long, very long, continue to be governed by a sovereign, who, in all those public acts that have personally proceeded from himself, hath manifested the highest veneration for the free constitution of Britain; hath already, in more than one instance, remarkably strengthened it's outworks; and will, therefore, never harbour a thought, or adopt a persuasion, in any the remotest degree detrimental to public liberty [56].

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55. "Upon a moderate computation (says Mr. Hume) there are near "three millions [per annum] at the disposal of the crown. The "civil list amounts to near a million; the collection of all taxes to "another million; and the employments in the army and navy, to-"gether with ecclesiastical preferments, to a third million. An "enormous sum, and what may be fairly computed to be more than "a thirtieth part of the whole income and labour of the kingdom. "When we add to this immense property the increasing luxury of "the nation, our proneness to corruption, together with the great "power and prerogatives of the crown, and the command of such "numerous military forces, there is no one but must despair of be-"ing able, without extraordinary efforts, to support our free go-"vernment much longer, under all these disadvantages." Hume's Essays, vol. 1. 86.

56. As geographers and navigators, in their maps and charts, do not confine their attention to countries that are beautiful, and unite

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the various advantages of soil, climate, and rich productions; or to seas aud rivers whose navigation is at all times safe and pleasant; but, on the contrary, think it their duty more especially to point out such rocky coasts as are objects of terror, rather than delight; and such shoals and quicksands as, though hidden from the sight, are, from that cause, the more dangerous to the mariner; and, moreover, to warn him of climates, where the destructive tornado instantaneously succeeds to a deceitful calm; so, also, it is the duty of the politician to expose the concealed and insidious operations of false principles; in general, more difficult to be guarded against, than the direct invasions of open despotism. It is with this view, that the Editor hath bestowed a greater portion of attention upon this, and the seven preceding chapters of the commentaries, than might at first have appeared necessary for the use of an *American* student.

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OF SUBORDINATE MAGISTRATES.

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

And herein we are not to investigate the powers and duties of his majesty's great officers of state, the lord treasurer, lord chamberlain, the principal secretaries, or the like; because I do not know that they are in that capacity in any considerable degree the objects of our laws, or have any very important share of magistracy conferred upon them: except that the secretaries of state are allowed the power of commitment, in order to bring offenders to trial [b] [1]. Neither shall I here treat of the office and authority of the lord chancellor, or the other judges of the superior courts of justice; because they will find a more proper place in the third part of these commentaries. Nor shall I enter into any minute disquisitions, with regard to the rights and dignities of mayors and aldermen, or other magistrates of particular corpora-

a ch. 2, p. 146.

b 1 Leon. 70. 2 Leon. 175. Comb. 143. 5 Mod. 84. Salk. 347. Carth. 291.

1. The secretary of state hath no such power in the United States. See note 6, p. 231.

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tions; because these are mere private and strictly municipal rights, depending entirely upon the domestic constitution of their respective franchises. But the magistrates and officers, whose rights and duties it will be proper in this chapter to consider, are such as are generally in use, and have a jurisdiction and authority dispersedly throughout the kingdom: which are, principally, sheriffs; coroners; justices of the peace; constables; surveyors of highways; and overseers of the poor. In treating of all which, I shall inquire into, first, their antiquity and original; next, the manner in which they are appointed and may be removed; and lastly, their rights and duties. And first of sheriffs,

I. The sheriff is an officer of very great antiquity in this kingdom, his name being derived from two Saxon words, ſcire ȝeреȝa, the reeve, bailiff, or officer of the shire. He is called in Latin *vice-comes*, as being the duputy of the earl or *comes*; to whom the custody of the shire is said to have been committed at the first division of this kingdom into counties. But the earls in process of time, by reason of their high employments and attendance on the king's person, not being able to transact the business of the county, were delivered of that burden[c]; reserving to themselves the honour, but the labour was laid on the sheriff. So that now the sheriff does all the king's business in the county; and though he be still called *vice-comes*, yet he is entirely independent of, and not subject to the earl; the king by his letters patent committing *custodiam comitatus* to the sheriff, and him alone.

Sheriffs were formerly chosen by the inhabitants of the several counties. In confirmation of which was ordained by statute 28 Edw. I. c. 8, that the people should have election of sheriffs in every shire, where the shrievalty is not of inheritance. For antiently in some counties the sheriffs were hereditary; as I apprehend they were in Scotland till the statute 20 Geo. II, c. 43; and still continue in the county of Westmorland to this day: the city of London having also the inheri-

c Dalton of sheriffs, c. 1.

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tance of the shrievalty of Middlesex vested in their body by charter[d]. The reason of these popular elections is assigned in the same statute, c. 13, "that the commons might chuse such "as would not be a burthen to them." And herein appears plainly a strong trace of the democratical part of our constitution; in which form of government it is an indispensible requisite, that the people should chuse their own magistrates[e]. This election was in all probability not absolutely vested in the commons, but required the royal approbation. For, in the Gothic constitution, the judges of the county courts (which office is executed by our sheriff) were elected by the people, but confirmed by the king: and the form of their election was thus managed: the people, or *incolae territorii*, chose *twelve* electors and they nominated *three* persons *ex quibus rex unum confirmabat*[f]. But with us in England these popular elections, growing tumultuous, were put an end to by the statute 9 Edw. II, st. 2, which enacted, that the sheriffs should from thenceforth be assigned by the chancellor, treasurer, and the judges; as being persons in whom the same trust might with confidence be reposed. By statutes 14 Edw. III, c. 7. 23 Hen. VI, c. 8, and 21 Hen. VIII. c. 20, the chancellor, treasurer, president of the king's council, *chief* justices, and *chief* baron, are to make this election; and that on the morrow of All Souls in the exchequer. And the king's letters patent, appointing the new sheriffs, used commonly to bear date the sixth day of November[g]. The statute of Cambridge, 12 Ric. II, c. 2, ordains, that the chancellor, treasurer, keeper of the privy seal, steward of the king's house, the king's chamberlain, clerk of the rolls, the justices of the one bench and the other, barons of the exchequer, and all other that shall be called to ordain, name, or make justices of the peace, *sheriffs*, and other officers of the king, shall be sworn to act indifferently, and to appoint no man that sueth either privily or openly to be put in office, but such only as they shall judge to be the best and most sufficient. And the custom now is (and has been at least ever since the time of Fortescue[h] who

d 3 Rep. 72.

e Montesq. Sp. L. b. 2. c. 2.

f Stiernh. *de jure Goth. l.* 1. *c.* 3.

g Stat. 12 Edw. IV, c. 1.

h *de L. L. c.* 24.

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was chief justice and chancellor to Henry the sixth) that all the judges, together with the other great officers and privy counsellors, meet in the exchequer on the morrow of All Souls, yearly, (which day is now altered to the morrow of St. Martin by the last act for abbreviating Michaelmas term) and then, and there, the judges propose three persons, to be reported (if approved of) to the king, who afterwards appoints one of them to be sheriff [2].

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2. Before the revolution sheriffs were appointed by the governor of the colony, on recommendation from the county courts, who were required for that purpose to nominate three persons named in the commission of the peace for their county, one of whom should be commissioned by the governor; but if the county courts should neglect or refuse to recommend, the governor was authorised by his commission to constitute any person nominated in the commission of the peace for the county, to be sheriff, for one year, but he might, if the governor should think fit, be continued two years; though not compellable to serve more than one year. L. V. 1748, c. 6. Edi. 1769.

When the revolution took place, it was provided by the constitution, that sheriffs and coroners should be nominated by the respective courts, approved by the governor, with the advice of the privy council, and commissioned by the governor. C. V. Art. 15.

Various acts were passed regulating the manner in which recommendations should be made, vacancies supplied, and so forth; which were finally consolidated into one act, in 1792.

That act enjoins the county courts, in the month of June or July, annually, to nominate three persons named in the commission of the peace for the county, one of whom being approved, as the constitution directs, shall be commissioned as sheriff: and if the court shall neglect to nominate, as by the act is directed, every justice shall forfeit and pay two hundred dollars. Edi. 1794, c. 80. If all the justices of the county refuse to accept the office of sheriff, the court may recommend two honest and substantial freeholders of the county; and if no person within the county will accept the office, the governor, upon the like recommendation, &c. may appoint any citizen of the commonwealth to be sheriff. 1795, c. 16. Sessions acts.

A sheriff shall be continued in office one year after his qualification, and with his own consent, and the approbation of the executive, may

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This custom, of the *twelve* judges proposing *three* persons, seems borrowed from the Gothic constitution before-mentioned; with this difference, that among the Goths the twelve nominors were first elected by the people themselves. And this usage of ours at it's first introduction, I am apt to believe, was founded upon some statute, though not now to be found among our printed laws: first, because it is materially different from the direction of all the statutes beforementioned: which it is hard to conceive that the judges would have countenanced by their concurrence, or that Fortescue would have inserted in his book, unless by the authority of some statute: and also, because a statute is expressly referred to in the record, which sir Edward Coke tells us[j] he transcribed from the council book of 3 March, 34 Hen. VI, and which is in substance as follows: The king had of his own authority appointed a man sheriff of Lincolnshire, which office he refused to take upon him: whereupon the opinions of the judges were taken, what should be done in this behalf. And the two chief justices, sir John Fortescue and sir John Prisot, delivered the unanimous opinion of them all; "that the king did an error when he made a person "sheriff, that was not chosen and presented to him according to "the *statute;* that the person refusing was liable to no fine for "disobedience, as if he had been one of the *three* persons cho-"sen according to the tenor of the *statute;* that they would ad-"vise the king to have recourse to the *three* persons that were "chosen according to the *statute*, or that some other thrifty man
342 "be intreated to occupy the office for this year; and that, the "next year, to eschew such inconveniencies, the order of the "*statute* in this behalf may be observed." But notwithstanding this unanimous resolution of all the judges of England, thus entered in the council book, and the statute 34 and 35 Hen. VIII.

j 2 Inst. 559.

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may be continued two years, and no longer; unless by accident or impediment a succeeding sheriff shall be prevented from qualifying, in which case the former shall continue to act, until his successor shall be qualified. Edi. 1794, c. 80. Many other provisions are contained in the act, to guard against, or provide for, accidental vacancies, for which the student must be referred to the act itself.

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c. 26. §. 61, which expressly recognizes this to be the law of the land, some of our writers[i] have affirmed, that the king, by his prerogative, may name whom he pleases to be sheriff, whether chosen by the judges or no. This is grounded on a very particular case in the fifth year of queen Elizabeth, when by reason of the plague; there was no Michaelmas term kept at Westminster; so that the judges could not meet there *in crastino animarum* to nominate the sheriffs: whereupon the queen named them herself, without such previous assembly, appointing, for the most part, one of the two remaining on the last year's list[k]. And this case, thus circumstanced, is the only authority in our books for the making these extraordinary sheriffs. It is true, the reporter adds, that it was held that the queen by her prerogative might make a sheriff without the election of the judges, *non obstante aliquo statuto in contrarium:* but the doctrine of *non obstante's*, which sets the prerogative above the laws, was effectually demolished by the bill of rights at the revolution, and abdicated Westminster-hall when king James abdicated the kingdom. However, it must be acknowledged, that the practice of occasionally naming what are called pocket-sheriffs, by the sole authority of the crown, hath uniformly continued to the reign of his present majesty; in which, I believe, few (if any) compulsory instances have occurred.

Sheriffs, by virtue of several old statutes, are to continue in their office no longer than one year[3]: and yet it hath been said[l] that a sheriff may be appointed *durante bene placito*, or during the king's pleasure; and so is the form of the royal writ[m]..... Therefore, till a new sheriff be named, his office cannot be determined, unless by his own death, or the demise of the king; in which last case it was usual for the successor to send a new writ to the old sheriff[n]: but now by statute 1 Ann. st. 1. c. 8, 343
all officers appointed by the preceeding king may hold their of-

i Jenkins, 229.
k Dyer. 225.
l 4 Rep. 32.
m Dalt. of sheriffs. 8.
n *Ibid.* 7.

3. See the last page, note 2.

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fices, for six months after the king's demise, unless sooner displaced by the successor. We may farther observe, that by statute 1 Ric. II. c. 11, no man that has served the office of sheriff for one year, can be compelled to serve the same again within three years after.

We shall find it is of the utmost importance to have the sheriff appointed according to law, when we consider his power and duty. These are either as a judge, as the keeper of the king's peace, as a ministerial officer of the superior courts of justice, or as the king's bailiff.

In this judicial capacity he is to hear and determine all causes of forty shillings value and under, in his county court[4], of which more in it's proper place; and he has also a judicial power in divers other civil causes[o]. He is likewise to decide the elections of knights of the shire[5], (subject to the control of the house of commons) of coroners[6], and of verderors; to judge of the qualification of voters, and to return such as he shall determine to be duly elected.

o Dalt. c. 4.

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4. The sheriff is not the judge, but the ministerial officer, of the county court, as well as of the superior courts of Virginia.

5. Elections of senators and delegates to the general assembly, as also elections of representatives to congress, are to be conducted by the sheriff, or in his absence by the under sheriff of the county. V. L. 1785, c. 55. Edi. 1794, c. 17. Sess. acts 1792, c. 1. In a writ of dower *unde nihil habet*, or *de quarentina habenda*, as also in a writ of admeasurement of dower, the sheriff sits as judge, so also, (as was supposed) upon a writ of *ad quod damnum*, awarded upon an application to build a water grist-mill, Edi. 1794, c. 94, 105. Formerly the sheriff sat as judge upon the execution of writs of *ad quod damnum*, sued out of the secretaries office for the purpose of docking intails of lands not exceeding 200*l.* sterling value, 1748, c. 1. Edi 1769.

6. The sheriff hath nothing to do with the election of coroners, in Virginia, they are appointed in the same manner, nearly, as the sheriffs are, C. V. Art. 15. We have no verderors, in Virginia.

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As the keeper of the king's peace, both by common law and special commission, he is the first man in the county, and superior in rank to any nobleman therein, during his office[p]. He may apprehend, and commit to prison, all persons who break the peace, or attempt to break it; and may bind any one in a recognizance to keep the king's peace. He may, and is bound *ex officio* to pursue, and take all traitors, murderers, felons, and other misdoers, and commit them to gaol for safe custody. He is also to defend his county against any of the king's enemies when they come into the land[7]: and for this purpose, as well as for keeping the peace and pursuing felons, he may command all the people of his county to attend him; which is called the *posse comitatus*, or power of the county[q]; and this summons every person above fifteen years old, and under the degree of a peer, is bound to attend upon warning[r 8], under pain of fine and imprisonment[s]. 344
But though the sheriff is thus the principal conservator of the peace in his county, yet by the express directions of the great charter[t], he, together with the constable, coroner, and certain other officers of the king, are forbidden to hold any pleas of the crown, or, in other words, to try any criminal offence[9]. For it would be highly unbecoming, that the executioners of justice

p 1 Roll. Rep. 227.

q Dalt. c. 95.

r Lamb. Eiren. 315.

s Stat. 2 Hen. V. c. 8.

t *cap.* 17.

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7. This part of the duty of sheriffs seems to be assigned to the commanding officer of the militia of the county. This officer was formerly stiled the county lieutenant: but his office seems to have been discontinued within these few years. See V. L. 1757, c. 1, Edi. 1769, *cum multis aliis*, 1792, c. 4. Edi. 1794, c. 146. §. 30.

8. If hue be levied for any murder, burglary, &c. all shall follow the hue and steps, as near as can be, and he that doeth not, shall be amerced at the discretion of a jury. V. L. Edi. 1794, c. 81.

9. No escheator, sheriff, coroner, or other inquisitor, shall hereafter have power of amercement for default of common summons; save only the judges of the general and district, or the respective county or corporation courts. V. L. Edi. 1794, c. 74. §. 27.

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should be also the judges; should impose, as well as levy, fines and amercements; should one day condemn a man to death, and personally execute him the next. Neither may he act as an ordinary justice of the peace during the time of his office[u] [10]: for this would be equally inconsistent; he being in many respects the servant of the justices.

In his ministerial capacity the sheriff is bound to execute all process issuing from the king's courts of justice. In the commencement of civil causes, he is to serve the writ, to arrest and to take bail; when the cause comes to trial, he must summon and return the jury; when it is determined, he must see the judgment of the court carried into execution. In criminal matters, he also arrests and imprisons, he returns the jury, he has the custody of the delinquent, and he executes the sentence of the court, though it extend to death itself[11].

u Stat. 1 Mar. st. 2. c. 8.

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10. In one case only may he do it. If the county court are divided between two candidates in the appointment of a clerk, the sheriff shall have the casting vote. V. L. 1787, c. 23. Edi. 1794, c. 70.

11. The sheriff by himself, or by his lawful officers or deputies, shall execute all writs, and other process to him legally issued and directed, within his county, or upon any bay, river, or creek, adjoining thereto, and shall make due return thereof. V. L. Edi. 1794, c. 80. §. 14.

The sheriff of the county in which any district court shall sit, shall execute all judgments rendered by such court in any criminal case, provided such judgments are by law to be executed in such county. V. L. Edi. 1794, c. 66. §. 19.

By the laws of the United States, it is provided, That a marshall shall be appointed in, and for each district, (the state of Virginia being one district) for the term of four years, but removeable at pleasure, whose duty it shall be to attend the federal district and circuit courts, when sitting therein, and also the supreme court, in the district in which that court shall sit; and to execute, throughout the district, all lawful precepts directed to him, and issued under the authority of the United States, and he shall have power to com-

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As the king's bailiff, it is his business to preserve the rights of the king within his bailiwick; for so his county is frequently called in the writs: a word introduced by the princes of the Norman line; in imitation of the French, whose territory is divided into bailiwicks, as that of England into counties[w]. He must seise to the king's use all lands devolved to the crown by attainder or escheat; must levy all fines and forfeitures; must seise and keep all waifs, wrecks, estrays, and the like, unless they be granted to some subject; and must also collect the king's rents within the bailiwick, if commanded by process from the exchequer[x] [12].

To execute these various offices, the sheriff has under him many inferior officers; an under-sheriff, bailiffs, and gaolers; who must neither buy, sell, nor farm their offices, on forfeiture of 500*l*[y] [13]. 345

w Fortesc. *de L. L.* c. 24.
x Dalt. c. 9.
y Stat. 3 Geo. I. c. 15.

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mand all necessary assistance in the execution of his duty, and to appoint one or more deputies, &c. L. U. S. 1 Cong. 1 Sess. c. 20.

The marshals of the several districts and their deputies shall have the same powers in executing the laws of the United States, as sheriffs and their deputies in the several states have by law, in executing the laws of the respective states. L. U. S. 3 Cong. c. 101. The marshals are also to collect all fines, &c. within their respective districts. Ibid.

12. Every person appointed sheriff, before he is sworn into, or executes his office shall enter into bond in the sum of 30,000 dollars, for the faithful collection, &c, of all taxes, within his county: he shall also collect all fines, forfeitures and amercements, as also, levies, officers fees, and poor rates, (when appointed by the overseers of the poor) and shall account for and pay the same, in the manner directed by law. V. L. Edi. 1794, c. 80. §. 8, 19.

13. This statute was never in force in Virginia, nor is there any similar provision in our laws, except what may be contained in the act against buying and selling offices, Edi. 1794, c. 60, which is nearly copied from the statute 5 and 6 Edw. VI. c. 16.

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The under-sheriff usually performs all the duties of the office; a very few only excepted, where the personal presence of the high-sheriff is necessary[14]. But no under-sheriff shall abide in his office above one year[z 15]; and if he does, by statute 23 Hen. VI. c. 8, he forfeits 200*l.* a very large penalty in those early days. And no under-sheriff or sheriff's officer shall practise as an attorney, during the time he continues in such office[a]: for this would be a great inlet to partiality and oppression[16]. But these salutary regulations are shamefully evaded, by practising in the names of other attorneys, and putting in sham deputies by way of nominal under-sheriffs: by reason of which, says Dalton[b], the under-sheriffs and bailiffs do grow so cunning in their several places, that they are able to deceive, and it may well be feared that many of them do deceive, both the king, the high-sheriff, and the county.

Bailiffs, or sheriff's officers, are either bailiffs of hundreds, or special bailiffs. Bailiffs of hundreds are officers appointed over

z Stat. 42 Edw. III. c. 9.

a Stat. 1 Hen. V. c. 4.

b Of sheriffs, c. 115.

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14. It was presumed that the presence of the high sheriff was indispensibly necessary wherever an inquest of office was to be taken; as he was supposed in all such cases to sit as judge; an office not to be exercised by deputy. And this point was accordingly so determined in Northumberland district court, Sep. term, 1794. But the court of appeals reversed that judgment: because, as was said, the practice had been for the deputy to officiate in these cases. Between Wroe and Harris, Oct. term, 1795. 2 Was. Rep. 126.

15. No under sheriff shall be capable to serve, or execute such office more than two years, in four, without producing to the county court satisfactory proof that he has collected and accounted for the taxes assigned to him by his former principal. V. L. 1772, c. 11. 1787, c. 40. Edi. 1794, c. 80, §. 12.

16. No sheriff or under-sheriff shall appear or plead as attorney for any person whatsoever, in the court of his county: except only as general attorney for persons out of the state, under penalty of thirty dollars for every offence. V. L. Edi. 1794, c. 71.

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those respective districts by the sheriffs, to collect fines therein; to summon juries; to attend the judges and justices at the assises, and quarter sessions; and also to execute writs and process in the several hundreds. But, as these are generally plain men, and not thoroughly skilful in this latter part of their office, that of serving writs, and making arrests and executions, it is now usual to join special bailiffs with them; who are generally mean persons, employed by the sheriffs on account only of their adroitness and dexterity in hunting and seising their prey. The sheriff being answerable for the misdemesnors of these bailiffs, they are, therefore, usually bound in an obligation with sureties for the due execution of their office, and thence are called bound-bailiffs; which the common people have corrupted into a much more homely appellation[17].

Gaolers are also the servants of the sheriff, and he must be 346
responsible for their conduct[18]. Their business is to keep safely

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17. The laws of Virginia take no notice of bailiffs, as a distinct class of sheriffs' officers.

18. The keepers of the county jails, are regarded as the officers of the sheriff of the county, and he seems responsible for their conduct. There are, *nominally*, district jailors; but I believe there is not a district jail in the state; the county jails, being generally used as district jails. And it is expressly provided, that whenever the jail of a county is used as a district jail, the keeper of the county jail, and no other, shall act as keeper of the district jail. See V. L. Edi. 1794, c. 67, §. 13, and c. 66, §. 17. District jailors (when there shall be jails) are to be commissioned by the governor. *Ibid.*

Before the revolution, there was a public jail in Williamsburg, the keeper of which was appointed by the governor. V. L. 1748, c. 37. Upon the removal of the seat of government to Richmond, it was declared, that, "Whereas the present jail of the county of Henrico, "now within the town of Richmond, if enlarged, may be made suffi-"cient for a public jail until one more commodious can be built, the "directors of the public buildings, are thereby empowered to en-"large the same." May 1779, c. 21. No farther provision or regulation seems to have been made on the subject, except that the judges of the general court, are authorised to superintend and regulate the public jail, by several temporary acts. They were revived in 1785, c. 48.

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all such persons as are committed to them by lawful warrant: and, if they suffer any such to escape, the sheriff shall answer it to the king, if it be a criminal matter; or, in a civil case, to the party injured[c]. And to this end the sheriff must[d] have lands sufficient within the county to answer the king and his people[19]. The abuses of gaolers and sheriff's officers, towards the unfortunate persons in their custody, are well restrained and guarded against by statute 32 Geo. II. c. 28, and by statute 14 Geo. III. c. 59, provisions are made for better preserving the health of prisoners, and preventing the gaol distemper*[20].

The vast expence, which custom had introduced in serving the office of high-sheriff, was grown such a burthen to the subject, that it was enacted, by statute 13 and 14 Car. II. c. 21, that no sheriff (except of London, Westmorland, and towns which are counties of themselves) should keep any table at the assises, except for his own family, or give any presents to the judges or their servants, or have more than forty men in livery: yet, for the sake of safety and decency, he may not have less than

c Dalt. c. 118, 4 Rep. 34.

d Stat. 9 Edw. II. st. 2. 2 Edw. III. c. 4. 4 Edw. III. c. 9. 5 Edw. III. c. 4. 13 and 14 Car. II. c. 21, Sec. 7.

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19. The sheriff is required, before entering upon his office, to give three several bonds for the due performance of the several duties of his office. The sum prescribed in the first bond is 30,000 dollars. In the two others the sum is left blank, in the act: probably from inattention. See V. L. 1794, c. 80, §. 10.

20. It is to be regretted that there are no such provisions in our laws as those mentioned to have been enacted by these statutes.

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* By statute 24 Geo. III. Sess. 2, c, 54, Sec. 22, no gaoler is to suffer tippling or gaming in the prison, or to sell any liquors therein under the penalty of 10*l.* to be recovered by distress upon conviction (21.)

(21.) It is much to be wished that some similar regulations were established in Virginia.

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twenty men in England and twelve in Wales; upon forfeiture, in any of these cases, of 200*l*[21].

II. The coroner's is also a very antient office at the common law. He is called coroner, *coronator*, because he hath principally to do with pleas of the crown, or such wherein the king is more immediately concerned[e]. And in this light the lord chief justice of the king's bench is the principal coroner in the kingdom, and may (if he pleases) exercise the jurisdiction of a coroner in any part of the realm[f]. But there are also particular coroners for

3 3 Inst. 31. 4 Inst. 271.
f 4 Rep. 57.

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21. No such provision is necessary in Virginia: on the contrary, it seems necessary to require sheriffs to employ a sufficient number of officers to perform the necessary duties, in the district courts particularly.

The laws of Virginia afford a variety of summary proceedings against sheriffs for the default, or neglect of themselves or their deputies; they likewise furnish the high sheriffs and their securities summary remedy against the deputy sheriffs and their securities; and these summary remedies are likewise extended for and against executors and administrators; for these as well as a variety of acts pointing out the duties of sheriffs, the student must consult the acts themselves. See V. L. Edi. 1794, c. 80 and 161. 1795, c. 16, sessions acts. See also 1794, c. 28, riots. c. 39, elections. c. 66, 67, writs and process. c. 73, juries. c. 74, criminal prosecutions. c. 78, attachments. c. 79, escapes. c. 83, 84, taxes and revenue. c. 90, §. 19, conveyances. c. 92, §. 61, 62, wills, &c. c. 151, 176, executions, with many others. These have been chiefly framed upon the purview of former acts, scattered through former compilations, or only to be found in the mutilated sessions acts, of which few copies are to be met with, at this day. See V. L. 1705, c. 2 and 7. 1714, c. 1. 1730, c. 5. 1745, c. 1. 1748, c. 4, 6, 7, 8. 1753, c. 1. 1755, c. 2. 1757, c. 1. 1762, c. 5. 1763, c. 1, 2, 5. 1764, c. 4, 6. Edi. 1769. Acts of 1769, c. 3. 1772, c. 11, 13. May 1776, c. 5. Oct. 1777, c. 17. Oct. 1778, c. 14. May 1780, c. 10, 11. Nov. 1781, c. 40. May, 1782, c. 39. Oct. 1782, c. 8, 36, 39. May 1783, c. 32, 38. Oct. 1783, c. 1, 2. (Edi. 1785.) See also acts of 1784, c. 20, 59. 1785, c. 1, 4, 40, 55, 61. 1786, c. 19. 1787, c. 40. 1788, c. 1, 2, 49, 67, 74, 77. 1789, c. 13, 29, 38, 48. 1790, c. 17. 1791, c. 3, 5, 6. 1792, c. 5. 1796, c. 2, 8, 27. Sessions acts.

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every county of England; usually four, but sometimes six, and sometimes fewer[g]. This office[h] is of equal antiquity with the sheriff; and was ordained together with him to keep the peace, when the earls gave up the wardship of the county.

He is still chosen by all the freeholders in the county court; as by the policy of our antient laws the sheriffs, and conservators of the peace, and all other officers were, who were concerned in matters that affected the liberty of the people[i]; and as verderors of the forest still are, whose business it is to stand between the prerogative and the subject in the execution of the forest laws. For this purpose there is a writ at common law *de coronatore eligendo*[k]: in which it is expressly commanded the sheriff, "*quod talem eligi faciat, qui melius et sciat, et velit, "et possit officio illi intendere*[22]." And, in order to effect this the more surely, it was enacted by the statute[l] of Westm. I. that none but lawful and discreet knights should be chosen; and there was an instance in the 5 Edw. III, of a man being removed from his office, because he was only a merchant[m]. But it seems it is now sufficient if a man hath lands enough to be made a knight, whether he be really knighted or not[n]: for the coroner ought to have an estate sufficient to maintain the dignity of his office, and answer any fines that may be set upon him for his misbehaviour[o]; and if he hath not enough to answer, his fine shall be levied on the county, as the punish-

g F. N. B. 163.
h Mirror, c. 1. §. 3.
i 2 Inst, 558.
k F. N. B. 163.
l 3 Edw. I, c. 10.
m 2 Inst. 32.
n F. N. B. 163, 164.
o *Ibid.*

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22. Coroners shall be nominated by the respective courts, approved by the governor, with the advice of the privy council, and commissioned by the governor. C. V. Art. 15.

From time to time, hereafter, as often as there shall be a vacancy in the office of coroner, in any county, or corporation, the court thereof, shall, at their next session, (under penalty of 150 dollars, upon

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ment for electing an insufficient officer[p] [23]. Now indeed, through the culpable neglect of gentlemen of property, this office has been suffered to fall into disrepute, and get into low and indigent hands: so that, although formerly no coroners would condescend to be paid for serving their country, and they were by the aforesaid statute of Westm. 1, expressly forbidden to take a reward, under pain of a great forfeiture to the king; yet for many years past they have only desired to be chosen for the 348
sake of their perquisites: being allowed fees for their attendance by the statute 3 Hen. VII, c. 1, which sir Edward Coke complains of heavily[q]; though since his time those fees have been much enlarged[r] [24].

The coroner is chosen for life (24): but may be removed, either by being made sheriff, or chosen verderor, which are offices incompatible with the other; or by the king's writ *de coronatore exonerando*, for a cause to be therein assigned, as that he is engaged in other business, is incapacitated by years or sickness, hath not a sufficient estate in the county, or lives in an inconvenient part of it[s]. And by the statute 25 Geo. II,

p Mirr. c. 1. §. 3. 2 Inst. 175.
q 2 Inst. 210.
r Stat. 25 Geo. II, c. 29.
s F. N. B. 163, 164.

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upon every justice, in case of failure) nominate two fit and discreet persons, residing within such county or corporation, one of whom being approved as the constitution directs, shall be commissioned during good behaviour. L. V. Edi. 1794, c. 81.

23. Every coroner, before entering upon the duties of his office, shall take the oath of fidelity to the commonwealth, and an oath of office: and before he shall be at liberty to serve any execution, shall enter into bond with security, in the court of his county, for the due execution of his office, in the penalty of 10,000 dollars. Ibid.

24. The coroner, for taking an inquisition on a dead body, (to be paid out of the estate of the deceased, if sufficient, if not, by the county) shall be allowed 2 dollars 80 cents. And for all other business done by him, the same fees as are allowed the sheriff for the like services. V. L. 1794, c. 115. §. 8.

(24.) They hold their offices in Virginia during good behaviour. V. L. 1794. c. 81. §. 1. This is a tenure for life.

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c. 29, extortion, neglect, or misbehaviour, are also made causes of removal[25].

The office and power of a coroner are also, like those of the sheriff, either judicial or ministerial; but principally judicial[26]. This is in great measure ascertained by statute 4 Edw. I, *de officio coronatoris;* and consists, first, in inquiring, when any person is slain, or dies suddenly, or in prison, concerning the manner of his death. And this must be "*super visum corporis*[ss];" for if the body be not found, the coroner cannot sit[t]. He must also sit at the very place where the death happened; and his inquiry is made by a jury from four, five, or six of the neighbouring towns, over whom he is to preside. If any be found guilty by this inquest of murder or other homicide, he is to commit them to prison for farther trial, and is also to inquire concerning their lands, goods and chattels, which are forfeited thereby[27]: but, whether it be homicide or not, he must inquire whether any deodand has accrued to the king, or the lord of the franchise, by this death[28]: and must certify the whole of this inquisition (under his own seal and the seals of

ss 4 Inst. 271.

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

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25. V. L. 1794, c. 59. accordant.

26. The duties of a coroner, both in his judicial and ministerial capacity, and the manner in which he shall conduct himself are prescribed, generally in the act of 1792, which is little more than a transcript from the English statutes. V. L. 1794, c, 81.

27. If any person be found guilty of murder by the coroner's inquest, the coroner shall immediately go into his house, and shall inquire what estate, both real and personal, he hath, and after such inquiry he shall cause all the estate to be valued, and keep the same in his hands, until the person found guilty of the inquest be taken, or surrender himself. V. L. 1794, c. 81. §. 10.

28. This seems to be obsolete in Virginia.

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the jurors [u]) together with the evidence thereon, to the court of king's bench, or the next assises [29]. Another branch of his office is to inquire concerning shipwrecks; and certify whether wreck or not, and who is in possession of the goods [30]. Concerning treasure-trove, he is also to inquire who were the finders, and where it is, and whether any one be suspected of having found and concealed a treasure; "and that may be well "perceived (saith the old statute of Edw. I,) where one liveth "riotously, haunting taverns, and hath done so of long time:" whereupon he might be attached, and held to bail, upon this suspicion only.

The ministerial office of the coroner is only as the sheriff's substitute. For when just exception can be taken to the sheriff, for suspicion of partiality, (as that he is interested in the suit, or of kindred to either plaintiff or defendant) the process must then be awarded to the coroner, instead of the sheriff, for execution of the king's writs [v] [31].

III. The next species of subordinate magistrates, whom I am to consider, are justices of the peace; the principal of whom is the *custos rotulorum*, or keeper of the records of the county [32].

u Stat. 33 Hen. VIII, c. 12. 1 and 2 P. and M. c. 13. 2 West. Symbol. §. 310. Crompt. 264. Tremain. P. C. 621.

v 4 Inst. 271.

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29. He must certify them to the court of the county, city, or borough, wherein the offence was committed, before whom the person found guilty is to be examined, in order to a further trial; which court he hath the like power and authority to summon, as a justice of the peace hath in other cases of felony, &c. V. L. 1794. c. 81. §. 8, 11, 19.

30. The act concerning coroners is silent as to this part of the coroner's duty. Perhaps the act concerning wrecks may be construed as substituting the commissioners of wrecks, for the coroner, in such cases. See Edi. 1794, c. 6.

31. V. L. 1764, c. 6. Edi. 1769. Edi. 1794, c. 81. §. 21. Accordant.

32. There is no such officer in Virginia. The county court clerks are by virtue of their office keepers of the records. V. L. 1794, c. 70.

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The common law hath ever had a special care and regard for the conservation of the peace; for peace is the very end and foundation of civil society. And, therefore, before the present constitution of justices was invented, there were peculiar officers appointed by the common law for the maintenance of the public peace. Of these, some had, and still have, this power annexed to other offices which they hold; others had it merely by itself, and were thence named *custodes* or *conservatores pacis*. Those that were so *virtute officii* still continue: but the latter sort are superseded by the modern justices.

The king's majesty[w] is, by his office and dignity royal, the principal conservator of the peace within all his dominions; and may give authority to any other to see the peace kept, and to
350 punish such as break it: hence it is usually called the king's peace. The lord chancellor or keeper, the lord treasurer, the lord high steward of England, the lord mareschall, the lord high constable of England, (when any such offices are in being) and all the justices of the court of king's bench (by virtue of their offices) and the master of the rolls (by prescription) are general conservators of the peace throughout the whole kingdom, and may commit all breakers of it, or bind them in recognizances to keep it[x]: the other judges are only so in their own courts. The coroner is also a conservator of the peace within his own county[y]; as is also the sheriff[z]; and both of them may take a recognizance or security for the peace[33]. Constables, ty-

w Lambard. Eirenarch, 12.
x Lamb. 12.
y Britton. 3.
z F. N. B. 81.

33. The judges of the court of appeals, high court of chancery, and general court, are conservators of the peace throughout the commonwealth. Justices of the peace in each county and corporation are conservators of the peace within their several counties and corporations, respectively; and have power to demand within those limits, respectively, sufficient surety and mainprize of their good behaviour, of such persons as are not of good fame. V. L. 1789, c. 30. Edi. 1794, c. 69.

The judges of the supreme, and district courts of the United States and all judges and justices of the courts of the several states, having authority by the laws of the United States, to take cognizance of of-

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thingmen, and the like, are also conservators of the peace within their own jurisdictions; and may apprehend all breakers of the peace and commit them, till they find sureties for their keeping it.

Those that were, without any office, simply and merely conservators of the peace, either claimed that power by prescription[b]; or were bound to exercise it by the tenure of their lands[c]; or, lastly, were chosen by the freeholders in full county court before the sheriff; the writ for their election directing them to be chosen "*de probioribus et potentioribus comitatus sui* "*in custodes pacis*[d]." But when queen Isabel, the wife of Edward II, had contrived to depose her husband by a forced resignation of the crown, and had set up his son Edward III in his place; this, being a thing then without example in England, it was feared would much alarm the people: especially as the old king was living, though hurried about from castle to castle; till at last he met with an untimely death. To prevent, therefore, any risings, or other disturbance of the peace, the new king sent writs to all the sheriffs in England, the form of which is preserved by Thomas Walsingham[e], giving a plausible account of the manner of his obtaining the crown; to wit, that it was done 351
ipsius patris beneplacito: and withal commanding each sheriff that the peace be kept throughout his bailiwick, on pain and peril of disinheritance and loss of life and limb. And in a few weeks after the date of these writs, it was ordained in parliament[f], that, for the better maintaining and keeping of the peace in every county, good-men and lawful, which were no maintainers of

b Lamb. 15.
c Ibid. 17.
d Ibid. 16.
e Hist. *A. D.* 1327.
f Stat. 1 Edw. III. c. 16.

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fences against the constitution and laws thereof, shall, respectively, have the like power and authority to hold to security of the peace and good behaviour, in cases arising under the constitution and laws of the United States as may, or can be lawfully exercised by any judge or justice of the peace of the respective states, in cases cognizable before them. L. U. S. 5 Cong. c. 100.

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evil, or barretors in the country, should be *assigned* to keep the peace. And in this manner, and upon this occasion, was the election of the conservators of the peace taken from the people, and given to the king [g]; this assignment being construed to be by the king's commission [h]. But still they were only called conservators, wardens, or keepers of the peace, till the statute 34 Edw. III. c. 1, gave them the power of trying felonies; then they acquired the more honourable appellation of justices [j].

These justices are appointed by the king's special commission under the great seal [34], the form of which was settled by all the judges, *A. D.* 1590 [i]. This appoints them all [k], jointly and severally, to keep the peace, and any two or more of them to inquire of and determine felonies and other misdemesnors: in which number some particular justices, or one of them, are directed to be always included, and no business to be done without their presence; the words of the commission running thus, "*quorum aliquem vestrum, A. B. C. D. &c. unum esse volumus;*" whence the persons so named are usually called justices of the *quorum* [35]. And, formerly, it was customary to appoint only a select number of justices, eminent for their skill and discretion, to be of the *quorum;* but now the practice is to advance almost all of them to that dignity, naming them all over again in the *quorum* clause, except, perhaps, only some one inconsiderable person for the sake of propriety: and no exception is now allowable, for not expressing in the form of warrants, &c.
352 that the justice who issued them is of the *quorum* [l]. When any justice intends to act under this commission, he sues out a writ

g Lamb. 20.
h Stat. 4 Edw. I II, c. 2. 18 Edw. III, st. 2. c. 2.
j Lamb. 23. i Lamb. 43.
k See the form itself, Lamb. 35. Burn. tit. Justices, Sec. 1.
l Stat. 26 Geo. II, c. 27. See also stat. 7 Geo. III, c. 21.

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34. The governor with the advice of the privy council shall appoint justices of the peace for the counties, upon the recommendation of the respective county courts. C. V. Art. 15.

35. There is no distinction made in the commissions which have been issued for some years past, in Virginia.

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of *dedimus potestatem*[36], from the clerk of the crown in chancery, empowering certain persons therein named to administer the usual oaths to him; which done, he is at liberty to act.

Touching the number and qualifications of these justices, it was ordained by statute 18 Edw. III. c. 2, that *two* or *three*, of the best reputation in each county, shall be assigned to be keepers of the peace[37]. But these being found to be rather too few for that purpose, it was provided by statute 34 Edw. III. c. 1, that one lord, and three, or four, of the most worthy men in the county, with some learned in the law, shall be made justices in every county. But afterwards the number of justices, through the ambition of private persons, became so large, that it was thought necessary by statute 12 Ric. II. c. 10, and 14 Ric. II. c. 11, to restrain them at first to six, and afterwards to eight only. But this rule is now disregarded, and the cause seems to be (as Lambard observed long ago[m]) that the growing number of statute laws, committed from time to time to the charge of justices of the peace, have occasioned also (and very reasonably) their encrease to a larger number. And, as to their qualifications, the statutes just cited direct them to be of the best reputation, and most worthy men in the county: and the statute 13 Ric. II. c. 7, orders them to be of the most sufficient knights, esquires, and gentlemen of the law. Also, by statute 2 Hen. V. st. 1. c. 4, and st. 2. c. 1, they must be resident in their several counties. And, because, contrary to these statutes, men of small substance had crept into the commission, whose poverty made them both covetous and contemptible, it was enacted by statute 18 Hen. VI. c. 11, that no justice should be put in commission, if he had not lands to the value of 20*l. per annum*. And, the rate of money being greatly altered since that time, it is now

m Lamb. 34.

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36. No such form is observed in Virginia; the usual practice is to qualify in the county, or corporation courts.

37. There is no limitation of their numbers in Virginia, but by the act of 1748, c. 4, eight, or more were required to be commissioned for every county. Nor do the laws of Virginia require any qualification in respect to estate.

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enacted by statute 5 Geo. II. c. 11, that every justice, except as is therein excepted, shall have 100*l.* *per annum* clear of all
353 deductions; and, if he acts without such qualification, he shall forfeit 100*l.* This qualification [n] is almost an equivalent to the 20*l.* *per annum*, required in Henry the sixth's time: and of this [o] the justice must now make oath. Also, it is provided, by the act 5 Geo. II. that no practising attorney, solicitor, or proctor, shall be capable of acting as a justice of the peace [38].

As the office of these justices is conferred by the king, so it subsists only during his pleasure [39]; and is determinable, 1. By the demise of the crown; that is, in six months after [p]. But if the same justice is put in commission by the successor, he shall not be obliged to sue out a new *dedimus*, or to swear to his qualification afresh [q]: nor, by reason of any new commission, to take the oaths more than once in the same reign [r]. 2. By express writ under the great seal [s], discharging any particular person from being any longer justice. 3. By superseding the commission by writ of *supersedeas*, which suspends the power of all the justices, but does not totally destroy it; seeing it may be revived again by another writ, called a *procedendo*. 4. By a new commission, which virtually, though silently, discharges all the former justices that are not included therein; for two commissions cannot subsist at once. 5. By accession of the office of sheriff or

n See bishop Fleetwood's calculations in his *chronicon pretiosum*.
o Stat. 18 Geo. II. c. 20.
p Stat. 1 Ann. c. 1.
q Stat. 1 Geo. III. c. 13.
r Stat. 7 Geo. III. c. 9.
s Lamb. 67.

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38. No justice of the peace shall appear, or plead as an attorney in the court of the county, whereof he is a member. V. L. 1794, c. 71.

39. In Oct. 1778, an act passed, (c. 5,) authorising the governor, with the advice of the council, upon any charge being made against a justice of the peace for misconduct, neglect of duty, or mal-practices, to enquire into the charge, and if the facts alleged be proved, in that case he might, with the advice aforesaid, remove such justice from the execution of his office. Some years after, this act was re-

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coroner [t]. Formerly it was thought, that if a man was named in any commission of the peace, and had afterwards a new dignity conferred upon him, that this determined his office; he no longer answering the description of the commission: but now [u] it is provided, that, notwithstanding a new title of dignity, the justice on whom it is conferred shall still continue a justice.

The power, office, and duty of a justice of the peace depend on his commission, and on the several statutes which have created objects of his jurisdiction [40]. His commission, first, empowers him singly to conserve the peace; and thereby gives him all the power of the antient conservators at the common law, in suppressing riots and affrays, in taking securities for the peace, and 354

t Stat. 1 Mar. st. 1. c. 8. u Stat. 1 Edw. VI. c. 7.

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pealed, it appearing to the general assembly "to be contrary to the true spirit of the constitution." V. L. 1787, c. 23. Sess. Acts. See the next note.

40. Justices of the peace, in Virginia, are by law judges of the county and corporation courts; which are courts of record, and have jurisdiction, in all civil cases, at the common law, and in chancery, within their respective counties and corporations; as also in criminal cases, except such where the judgment, upon conviction, shall extend to life or member. And, even in these last cases, the justices are to hold a court for the examination of the person accused, and it has been held that they may acquit, and that such acquittal is final. See vol. 4, page 335, note 3, where this opinion is controverted by the Editor; though they must remand the prisoner to the district court for further trial, in case they shall be of opinion that he is guilty. V. L. 1794, c. 67. Sec. 5, &c. 74. Upon these grounds it has been held, that a justice of the peace holds his office during good behaviour; and that he cannot be removed therefrom but upon prosecution for, and conviction of a breach thereof, either before the general court, or perhaps the district court.

Justices of the peace have cognizance, singly, of all causes where the cause of action does not exceed five dollars, or two hundred pounds of tobacco; but in these cases they cannot issue an execution against the body of the defendant. L. V. 1794, c. 67. §. 6. Their jurisdiction has since been increased to cases not exceeding ten dollars. Sessions Acts 1800, c. 38.

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in apprehending and committing felons and other criminals. It also empowers any two or more to hear and determine all felonies and other offences [41]; which is the ground of their jurisdiction at sessions, of which more will be said in it's proper place. And as to the powers given to one, two, or more justices, by the several statutes, which from time to time have heaped upon them such an infinite variety of business, that few care to undertake, and fewer understand, the office; they are such, and of so great importance to the public, that the country is greatly obliged to any worthy magistrate, that, without sinister views of his own, will engage in this troublesome service ([41].) And, therefore, if a well-meaning justice makes any undesigned slip in his practice, great lenity and indulgence are shewn to him in the courts of law; and there are many statutes made to protect him in the upright discharge of his office [w]; which, among other privileges, prohibit such justices from being sued for any oversights without notice beforehand; and stop all suits begun, on tender made of sufficient amends [42]. But, on the other hand, any malicious or tyrannical abuse of their office is usually severely punished; and all persons who recover a verdict against a justice, for any wilful or malicious injury, are entitled to double costs.

It is impossible, upon our present plan, to enter minutely into the particulars of the accumulated authority, thus committed to the charge of these magistrates. I must, therefore, refer myself at present to such subsequent part of these commentaries, as will, in their turns, comprise almost every object of the justices' jurisdiction: and, in the mean time, recommend to the

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

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41. This is not the case in Virginia; (see note 40,) except where a slave may be accused of felony. V. L. 1794, c. 103. §. 30.

(41.) See V. L. Edi. 1794, c. 21, 28, 67, 74, 87, 103, 108, and many others.

42. The statutes above referred to in the margin are not in force in Virginia. It is to be wished that a similar provision, in favour of upright magistrates, could be found in our laws.

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student the perusal of Mr. Lambard's *Eirenarcha*, and Dr. Burn's *Justice of the Peace*; wherein he will find every thing relative to this subject, both in antient and modern practice, collected with great care and accuracy, and disposed in a most clear and judicious method [43].

I shall next consider some officers of lower rank than those 355
which have gone before, and of more confined jurisdiction; but still such as are universally in use through every part of the kingdom.

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

x Philip's Life of Pole. ii. 111.
y Of Constables, 5.
z 13 Edw. I. c. 6.

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43. Starke's Justice, Williamsburg printed in 1774, was a valuable work of this kind: but the total change in our jurisprudence since that period, hath rendered it unfit for modern use. Mr. Hennings, Virginia, justice, is calculated to obviate that inconvenience, as far as I have had occasion to examine it.

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keeping of the peace, two constables in every hundred and franchise, shall inspect all matters relating to *arms* and *armour*.

Constables are of two sorts, high constables and petty constables. The former were first ordained by the statute of Winchester, as before-mentioned; are appointed at the court leets of the franchise or hundred over which they preside, or, in default of that, by the justices at their quarter sessions; and are removable by the same authority that appoints them [a]. The petty constables are inferior officers in every town and parish, subordinate
356 to the high constable of the hundred, first instituted about the reign of Edw. III [b]. These petty constables have two offices united in them; the one antient, the other modern. Their antient office is that of headborough, tithing-man, or borsholder; of whom we formerly spoke [c], and who are as antient as the time of king Alfred: their more modern office is that of constable merely; which was appointed (as was observed) so lately as the reign of Edward III, in order to assist the high constable [d]. And, in general, the antient headboroughs, tithing-men, and borsholders, were made use of to serve as petty constables; though not so generally, but that in many places they still continue distinct officers from the constable. They are all chosen by the jury at the court leet; or if no court leet be held, are appointed by two justices of the peace [e] [44].

The general duty of all constables, both high and petty, as well as of the other officers, is to keep the king's peace in their several districts; and to that purpose they are armed with very large powers, of arresting and imprisoning, of breaking open houses, and the like: of the extent of which powers, consider-

a Salk. 150.
b Spelm. Gloss. 148.
c Page 115.
d Lamb. 9.
e Stat. 14 and 15 Car. II. c. 12.

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44. The justices shall appoint constables. C. V. Art. 15. The laws of Virginia are silent with respect to any particular duties to be executed by them, except serving warrants, or writs of *fieri facias*, where judgment shall be given by a justice of the peace for any sum within their jurisdiction. L. V. 1794, c. 67. Sec. 6.

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ing what manner of men are for the most part put into these offices, it is perhaps very well that they are generally kept in ignorance. One of their principal duties, arising from the statute of Winchester, which appoints them, is to keep watch and ward in their respective jurisdictions. Ward, guard, or *custodia*, is chiefly applied to the day time, in order to apprehend rioters, and robbers on the highways; the manner of doing which is left to the discretion of the justices of the peace and the constable [f]: the hundred being, however, answerable for all robberies committed therein, by day light, for having kept negligent guard. Watch is properly applicable to the night only, (being called among our Teutonic ancestors *wacht* or *wacta* [g]) and it begins at the time when ward ends [45], and ends when that begins: for, by the statute of Winchester, in walled towns the gates shall be 357
closed from sunsetting to sunrising, and watch shall be kept in every borough and town, especially in the summer season, to apprehend all rogues, vagabonds, and night-walkers, and make them give an account of themselves. The constable may appoint watchmen, at his discretion, regulated by the custom of the place; and these, being his deputies, have, for the time being, the authority of their principal. But, with regard to the infinite number of other minute duties, that are laid upon constables by a diversity of statutes, I must again refer to Mr. Lambard and Dr. Burn; in whose compilations may be also seen, what powers and duties belong to the constable or tithing-man indifferently, and what to the constable only: for the constable may do whatever the tithing-man may; but it does not hold *e converso*, the tithing-man not having an equal power with the constable.

f Dalt. just. c. 104.

g *Excubias et explorationes quas wactas vocant. Capitular. Hludov. Pii. cap.* 1. *A. D.* 815.

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45. Something similar to watch are the patroles, required by act of assembly to be appointed once a month, or oftener, by the commanding officer of the militia in every county, "to patrole and visit "all negro quarters, and other places suspected of entertaining un-"lawful assemblies of slaves, servants, or other disorderly persons "unlawfully assembled," V. L. 1757, c. 1. 1794, c. 152.

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V. We are next to consider the surveyors of the highways. Every parish is bound of common right to keep the high roads, that go hrough it, in good and sufficient repair; unless, by reason of the tenure of lands, or otherwise, this care is consigned to ome particular private person. From this burthen no man was exempt by our antient laws, whatever other immunities he might enjoy: this being part of the *trinoda necessitas*, to which every man's estate was subject; viz. *expeditio contra hostem, arcium constructio, et pontium reparatio.* For, though the reparation of bridges only is expressed, yet that of roads also must be understood; as in the Roman law, *ad instructiones reparationesque itinerum et pontium, nullum genus hominum, nulliusque dignitatis ac venerationis meritis, cessare oportet* [h]. And indeed now, for the most part, the care of the roads only seems to be left to parishes; that of bridges being in great measure devolved upon the county at large, by statute 22 Hen. VIII. c. 5. If the parish neglected these repairs, they might formerly, as they may still, be indicted for such their neglect: but it was not then incumbent on any particular officer to call the parish together, and set them upon this work; for which reason, by the
358 statute 2 and 3 Ph. and M. c. 8. surveyors of the highways were ordered to be chosen in every parish [i].

These surveyors were originally, according to the statute of Philip and Mary, to be appointed by the constable and churchwardens of the parish; but now they are constituted by two neighbouring justices, out of such inhabitants or others, as are described in statute 13 Geo. III, c. 78, and may have salaries allotted them for their trouble [46].

h *C.* 11. 74, 4.

i This office, Mr. Dalton (just. cap. 50) says exactly answers that of the *curatores viarum* of the Romans; but it should seem that theirs was an office of rather more dignity and authority than ours: not only from comparing the method of making and mending the Roman ways with those of our country parishes; but also because one Thermus, who was the curator of the Flaminian way, was candidate for the consulship with Julius Cæsar. (*Cic. ad Attic. l.* 1. *ep.* 1.)

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46. The several county courts shall divide the public roads into precincts, and as often as necessary appoint a surveyor over each,

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Their office and duty consists in putting in execution a variety of laws for the repairs of the public highways; that is, of ways leading from one town to another [47]: all which are now reduced into one act by statute 13 Geo. III, c. 78, which enacts, 1. That they may remove all annoyances in the highways, or give notice to the owner to remove them; who is liable to penalties on non-compliance. 2. They are to call together all the inhabitants and occupiers of lands, tenements, and hereditaments within the parish, six days in every year, to labour in fetching materials or repairing the highways: all persons keeping draughts (of three horses, &c.) or occupying lands, being

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who shall see that the road be cleared and kept in good repair; and shall continue in office until another is appointed in his stead. V. L. Edi. 1794, c. 19.

47. The duties of surveyors of public roads are all prescribed by the act of 1785, c. 75, Edi. 1794, c. 19. They are to call upon these appointed by the courts to labour on the roads within their respective precincts; (viz. all male labouring persons of the age of sixteen or more, except such as are masters of two or more slaves, of the like age, who are to attend, when required, under penalty of 1 dollar 25 cents for every day's failure) and to cause every road to be constantly kept well cleared and smoothed, and thirty feet wide, at least; to set up indexes, or guide-posts, at each fork or cross-road; to construct, where necessary, and causeways and bridges, at least twelve feet broad, in repair: for which purpose we may cut and take from the lands of any person adjoining (except town lots) as much timber, earth, or stone, as may be necessary, which, if not freely given, shall be valued and paid for by the county. And where the assistance of wheel carriages is necessary, any justice may, by his warrant, authorise the impressment thereof, and the use of them shall be paid for by the county. Where a causeway or bridge shall be necessary, and the surveyor with his assistants cannot make the same, the court of the county, or (if the bridge shall join two counties) the courts of both counties shall appoint persons to contract for the building and keeping the same in repair, &c.

Where a new road is wanted, the court may order a view, and if desired by the owner of the lands through which the road is to pass, a writ of *ad quod damnum* to be directed to the sheriff to enquire what injury it will be to such owner: and if any damages be found, and the road is opened and established, such damages shall be paid by the county, &c. V. L. 1785, c. 75. Edi. 1794, c. 19.

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obliged to send a team for every draught, and for every 50*l.* a year, which they keep or occupy; persons keeping less than a draught, or occupying less than 50*l.* a year to contribute in a less proportion; and all other persons chargeable, between the ages of eighteen and sixty-five, to work or find a labourer. But they may compound with the surveyors, at certain easy rates established by the act. And every cartway leading to any market-town must be made twenty feet wide at the least, if the fences will permit; and may be increased by two justices, at the expense of the parish, to the breadth of thirty feet. 3. The surveyors may lay out their own money in purchasing materials for repairs, in erecting guide-posts, and making drains, and
359 shall be reimbursed by a rate, to be allowed at a special sessions. 4. In case the personal labour of the parish be not sufficient, the surveyors, with the consent of the quarter sessions, may levy a rate on the parish, in aid of the personal duty, not exceeding, in any one year, together with the other highway rates, the sum of 9*d.* in the pound; for the due application of which they are to account upon oath. As for turnpikes, which are now pretty generally introduced in aid of such rates, and the law relating to them, these depend principally on the particular powers granted in the several road acts, and upon some general provisions which are extended to all turnpike roads in the kingdom, by statute 13 Geo. III, c. 84, amended by many subsequent acts [k].

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

The poor of England, till the time of Henry VIII, subsisted entirely upon private benevolence, and the charity of well disposed christians. For though it appears by the mirrour [l], that by the common law the poor were to be "sustained by parsons, "rectors of the church, and the parishioners; so that none of "them die for default of sustenance;" and though by the statutes 12 Ric. II, c. 7, and 19 Hen. VII, c. 12, the poor are

k Stat. 14 Geo. III, c. 14, 36, 57, 82. 16 Geo. III, c. 39 18 Geo. III, c. 28.

l c. 1. Sec. 3.

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directed to abide in the cities or towns wherein they were born, or such wherein they had dwelt for three years, (which seem to be the first rudiments of parish settlements) yet till the statute 27 Hen. VIII, c. 25, I find no compulsory method chalked out for this purpose: but the poor seem to have been left to such relief as the humanity of their neighbours would afford them. The monasteries were, in particular, their principal resource; and, among other bad effects which attended the monastic institutions, it was not perhaps one of the least (though frequently esteemed quite otherwise) that they supported and fed a very numerous and very idle poor, whose sustenance depended upon what was daily distributed in alms at the gates of the religious houses. But, upon the total dissolution 360
of these, the inconvenience of thus encouraging the poor in habits of indolence and beggary was quickly felt throughout the kingdom: and abundance of statutes were made in the reign of king Henry the eighth and his children, for providing for the poor and impotent; which, the preambles to some of them recite, had of late years greatly increased. These poor were principally of two sorts: sick and impotent, and therefore unable to work; idle and sturdy, and therefore able, but not willing, to exercise any honest employment. To provide in some measure for both of these, in and about the metropolis, Edward the sixth founded three royal hospitals; Christ's and St. Thomas's for the relief of the impotent through infancy or sickness; and Bridewell for the punishment and employment of the vigorous and idle. But these were far from being sufficient for the care of the poor throughout the kingdom at large: and, therefore, after many other fruitless experiments, by statute 43 Eliz. c. 2, overseers of the poor were appointed in every parish[49].

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49. By the act of 1753, c. 1, the vestry of every parish in Virginia were authorised to cause to be erected, purchased, or hired, one, or more houses in the parish for the lodging, maintaining, and employing, all such poor persons as may apply for that purpose; and to support and maintain such as were unable to work, and employ, and provide cotton, hemp, flax, or other necessary materials, implements, or things for setting the poor to work; and also to levy a reasonable allowance for the education of such poor children, as should

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By virtue of the statute last mentioned, these overseers are to be nominated yearly in Easter-week, or within one month after, (though a subsequent nomination will be valid[m]) by two justices dwelling near the parish. They must be substantial householders, and so expressed to be in the appointment of the justices[n].

Their office and duty, according to the same statute, are principally these: first, to raise competent sums for the necessary relief of the poor, impotent, old, blind, and such other, being poor and not able to work: and secondly, to provide work for such as are able, and cannot otherwise get employment[50]:

m Stra. 1123. n 2 Lord Raym. 1394.

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be placed in the said houses, until they should be bound out according to law. And the church wardens, or any one of them, were authorised to send beggars to the poor house, to be employed for the space of twenty days, or less, as such church warden might direct: many other salutary regulations were contained in the act.

After the revolution, the vesteries and church wardens were gradually deprived of their powers, and overseers of the poor were finally appointed in their room, in all the counties of Virginia. V. L. 1785, c. 4. After which several amendatory acts were passed; and the whole were finally consolidated into one act, in the year 1792. See V. L. Oct. 1779, c. 36. May, 1780, c. 22. May, 1782, c. 36. [Edi. 1785.] 1784, c. 45. 1785, c. 4. 1786, c. 17. 1787, c. 48. 1788, c. 53. Sessions acts.

50. By the act of 1792, which repeals all former acts within the purview of it, it is enacted, that each county shall be laid off into not more than four districts, and three overseers of the poor be triennally elected by the free-holders and house-keepers, only, of each district: and all those of the same county shall assemble annually, choose a president, and regulate the necessary provision to be made for all the poor of the county, adjust and settle the charges of the preceeding year, and levy and assess the poor rates to be paid, according to the number of all males of sixteen years and upwards, and all female slaves of the like age within the county. The overseers of each district shall provide for the poor, lame, blind, and other inhabitants of the district not able to maintain themselves: and may also provide houses, nurses, and doctors, in such cases as a ma-

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but this latter part of their duty, which, according to the wise regulations of that salutary statute, should go hand in hand with the other, is now most shamefully neglected. However, for these joint purposes, they are impowered to make and levy rates upon the several inhabitants of the parish, by the same act of parliament; which has been farther explained and enforced by several subsequent statutes. 361

The two great objects of this statute seem to have been, 1. To relieve the impotent poor, and them only. 2. To find employment for such as are able to work: and this principally by providing stocks of raw materials to be worked up at their separate homes, instead of accumulating all the poor in one common work-house; a practice which puts the sober and diligent upon a level (in point of their earnings) with those who are dissolute and idle, depresses the laudable emulation of domestic indus-

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jority shall think necessary: and if any person applying for relief, shall be refused, the county court may direct him to be received. By warrant from a justice they may cause any poor person coming from another district or county to be removed: and by the like authority may cause vagrants to be apprehended; who, if upon exation, they be found to be vagrants (who are thus described; every able bodied man, not having wherewithal to maintain himself, who may be found loitering, and shall have a wife or children, without means for their subsistence; or not having a wife or child, who shall wander abroad and be found loitering without betaking himself to some honest employment, or go about begging) shall, by warrant from a justice, be sent to the overseers of the poor of the district to be employed in labour, and by them hired out for any term not exceeding three months. They are likewise to bind out all bastards, (and by order of court, other poor orphan children) as apprentices. But the corporation courts are required to provide for their own poor, separately from those of the county. V. L. 1794, c. 102.

The county and corporation courts are moreover impowered, whenever they shall judge it necessary to provide a poor house, and work-house, for the reception of their poor, and the reformation of vagrants. Ibid.

For the more minute provisions of the act the student must consult the act itself. V. L. Edi. 1794, c. 102.

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try and neatness, and destroys all endearing family connexions, the only felicity of the indigent. Whereas, if none were relieved but those who are incapable to get their livings, and that in proportion to their incapacity; if no children were removed from their parents, but such as are brought up in rags and idleness; and if every poor man and his family were regularly furnished with employment, and allowed the whole profits of their labour....a spirit of busy cheerfulness would soon diffuse itself through every cottage; work would become easy and habitual, when absolutely necessary for daily subsistence; and the peasant would go through his task without a murmur, if assured that he and his children (when incapable of work through infancy, age, or infirmity) would then, and then only, be entitled to support from his opulent neighbours[51].

This appears to have been the plan of the statute of queen Elizabeth; in which the only defect was confining the management of the poor to small, parochical, districts; which are frequently incapable of furnishing proper work, or providing an able director. However, the laborious poor were then at liberty to seek employment wherever it was to be had: none being obliged to reside in the places of their settlement, but such as were unable or unwilling to work; and those places of settlement being only such where they were *born*, or had made their *abode*, originally for three years[o], and afterwards (in the case of vagabonds) for one year only[p].

362 After the restoration a very different plan was adopted, which has rendered the employment of the poor more difficult, by authorizing the subdivision of parishes; has greatly increased their number, by confining them all to their respective districts; has given birth to the intricacy of our poor-laws, by multiplying and rendering more easy the methods of gaining settlements: and, in consequence, has created an infinity of expensive law-

o Stat. 19 Hen. VII. c. 12. 1 Edw. VI. c. 3. 3 Edw. VI. c. 16. 14 Eliz. c. 5.
p Stat. 39 Eliz. c. 4.

51. These observations are well worthy of legislative attention.

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suits between contending neighbourhoods, concerning those settlements and removals. By the statute 13 & 14 Car. II. c. 12. a legal settlement was declared to be gained by *birth;* or by *inhabitancy*, *apprenticeship*, or *service*, for forty days: within which period all intruders were made removeable from any parish by two justices of the peace, unless they settled in a tenement of the annual value of 10*l.* The frauds, naturally consequent upon this provision, which gave a settlement by so short a residence, produced the statute 1 Jac. II. c. 17, which directed *notice* in writing to be delivered to the parish officers, before a settlement could be gained by such residence. Subsequent provisions allowed other circumstances of notoriety to be equivalent to such notice given; and those circumstances have from time to time been altered, enlarged, or restrained, whenever the experience of new inconveniencies, arising daily from new regulations, suggested the necessity of a remedy. And the doctrine of *certificates* was invented, by way of counterpoise, to restrain a man and his family from acquiring a new settlement by any length of residence whatever, unless in two particular excepted cases; which makes parishes very cautious of giving such certificates, and of course confines the poor at home, where frequently no adequate employment can be had.

The law of settlements may be therefore now reduced to the following general heads; or, a settlement in a parish may be acquired, 1. By *birth;* for, wherever a child is first known to be, that is always *prima facie* the place of settlement, until some other can be shewn[q]. This is also generally the place of settlement of a bastard child[r]; for a bastard having in the eye of the law no father, cannot be referred to *his* settlement, as other 363
children may[s]. But, in legitimate children, though the place of birth be *prima facie* the settlement, yet it is not conclusively so; for there are, 2. Settlements by *parentage*, being the settlement of one's father or mother: all legitimate children being really settled in the parish where their parents are settled, until they

q Carth. 433. Comb. 364. Salk. 485. 1 Lord Raym. 567.

r See p. 459.

s Salk. 427.

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get a new settlement for themselves[ss]. A new settlement may be acquired several ways; as, 3. By *marriage*. For a woman, marrying a man that is settled in another parish, changes her own settlement: the law not permitting the separation of husband and wife[t]. But if the man has no settlement, her's is suspended during his life, if he remains in England and is able to maintain her; but in his absence, or after his death, or during (perhaps) his inability, she may be removed to her old settlement[u]. The other methods of acquiring settlements in any parish are all reducible to this one, of *forty days residence* therein: but this forty days residence (which is construed to be lodging or lying there) must not be by fraud, or stealth, or in any clandestine manner; but made notorious, by one or other of the following concomitant circumstances. The next method, therefore, of gaining a settlement, is, 4. By forty days residence, and *notice*[52]. For if a stranger comes into a parish, and delivers notice in writing of his place of abode, and number of his family, to one of the overseers (which must be read in the church and registered) and resides there unmolested for forty days after such notice, he is legally settled thereby[w]. For the law presumes that such a one at the time of notice is not likely to become chargeable, else he would not venture to give it; or that in such case, the parish would take care to remove him. But there are also other circumstances equivalent to such notice: therefore, 5. *Renting* for a year a tenement of the yearly value of ten pounds, and residing forty days in the parish, gains a settlement without notice[x]; upon the principle of having substance enough to gain

ss Salk. 528. 2 Lord Raym. 1473.

t Stra. 544. u Foley, 249, 251, 252. Bur. Sett. C. 370.

w Stat. 13 and 14 Car. II. c. 12. 1 Jac. II. c. 17. 3 and 4 W. and Mar. c. 11.

x Stat. 13 and 14 Car. II. c. 12.

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52. No person shall be accounted an inhabitant, so as to have gained a legal settlement in any place, until he shall have been actually resident in the county, [or corporation, I presume] wherein he shall claim a legal settlement, for the space of one whole year. V. L. Edi. 1794, c. 102, §. 35. And such residence for a year seems to supply the place of actual notice.

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credit for such a house. 6. Being charged to and paying the public *taxes* and levies of the parish; (excepting those for scavengers, highways[y], and the duties on houses and windows[z]) and, 7. Executing, when legally appointed, any public parochial *office* for a whole year in the parish, as church-warden, &c. are both of them equivalent to notice, and gain a settlement[a], if coupled with a residence of forty days. 8. Being *hired* for a year, when unmarried and childless, and *serving* a year in the same service; and 9. Being bound an *apprentice*, give the servant, and apprentice a settlement without notice[b], in that place wherein they serve the last forty days. This is meant to encourage application to trades, and going out to reputable services. 10. Lastly, the having an *estate* of one's own, and residing thereon forty days, however small the value may be, in case it be acquired by act of law or of a third person, as by descent, gift, devise, &c. is a sufficient settlement[c]: but if a man acquire it by his own act, as by purchase, (in it's popular sense, in consideration of money paid) then unless the consideration advanced, *bona fide*, be 30*l.* it is no settlement for any longer time, than the person shall inhabit thereon[d]. He is in no case removable from his own property; but he shall not, by any trifling or fraudulent purchase of his own, acquire a permanent and lasting settlement.

All persons, not so settled, may be removed to their own parishes, on complaint of the overseers, by two justices of the peace, if they shall adjudge them likely to become chargeable to the parish, into which they have intruded[53]: unless they are in

y Stat. 9 Geo. I. c. 7, §. 6.

z Stat. 21 Geo. II. c. 10. 18 Geo. III. c. 26.

a Stat. 3 & 4 W. and M. c. 11.

b Stat. 3 & 4 W. and M. c. 11. 8 and 9 W. III. c. 10. 31 Geo. II, c. 11.

c Salk. 524. d Stat. 9 Geo. I. c. 7.

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53. V. L. Edi. 1794, c. 102, §. 7, accordant.

☞ Overseers of the poor, by the act of 1785, c. 4, were required to perform the duties of *processioners*, instead of the former *vestries*. By the act of 1662, c. 78, [Purvis, p. 70] the county courts were re-

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a way of getting a legal settlement, as by having hired a house of 10*l. per annum*, or living in an annual service; for then they are not removable[e]. And in all other cases, if the parish to which they belong will grant them a certificate, acknowledging them to be *their* parishioners, they cannot be removed merely because
365 *likely* to become chargeable, but only when they become *actually* chargeable[f]. But such certificated person can gain no settlement by any of the means above-mentioned; unless by renting a tenement of 10*l. per annum*, or by serving an annual office in the parish, being legally placed therein: neither can an apprentice or

e Salk. 472. f Stat. 8 & 9 W. *III.* c. 30.

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quired to order the vestries of each parish to divide the same into so many precincts as might be necessary for the neighbours to join in, and see each other's land marks renewed, and appoint certain days between Easter and Whitsuntide for that purpose, once in every four years, under penalty of 10,000 lbs. of tobacco upon the court; 1200 lbs. of tobacco upon the vestries; and 350 lbs. of tobacco upon every person failing to attend, and renew his land-marks. By the act of 1710, c. 13, §. 31, lands were to be processioned every fourth year, between the first day of June and the first of September, beginning in the year 1711. And the vestry of every parish were to appoint two freeholders in each precinct to *procession* the lands; whose accounts were to be returned and registered in particular books, examined and attested by the church wardens, in the presence of the vestry, within six months after the return. And the bounds of land thus processioned three times should not thereafter be altered. [Edi. 1733.] Nearly the same provisions and regulations are repeated in the act of 1748, c. 1. By the act of 1785, as was above mentioned, the overseers of the poor were required to perform the duties relative to processioning, which was formerly prescribed to the vestries. By the act of 1792, [Edi. 1794, c. 86, §. 56.] the county courts are required, between the first day of June, and the first of September, 1795, and so in every four years thereafter, to divide their counties into precincts, and to appoint the times for *processioning* between the last days of September and of March following, and also appoint two or more freeholders in every precinct, to see the processioning performed, whose accounts shall be returned to the court, and registered in particular books by the clerk.... Under various penalties in case of failure. Edi. 1794, c. 86, §. 56, &c.

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servant to such certificated person gain a settlement by such their services[g].

These are the general heads of the laws relating to the poor, which, by the resolutions of the courts of justice thereon within a century past, are branched into a great variety. And yet, notwithstanding the pains that have been taken about them, they still remain very imperfect, and inadequate to the purposes they are designed for: a fate, that has generally attended most of our statute laws, where they have not the foundation of the common law to build on. When the shires, the hundreds, and the tithings, were kept in the same admirable order in which they were disposed by the great Alfred, there were no persons idle, consequently none but the impotent that needed relief: and the statute of 43 Eliz. seems entirely founded on the same principle. But when this excellent scheme was neglected and departed from, we cannot but observe with concern, what miserable shifts and lame expedients have from time to time been adopted, in order to patch up the flaws occasioned by this neglect. There is not a more necessary or more certain maxim in the frame and constitution of society, than that every individual must contribute his share, in order to the well-being of the community: and surely they must be very deficient in sound policy, who suffer one half of a parish to continue idle, dissolute, and unemployed; and at length are amazed to find, that the industry of the other half is not able to maintain the whole[54].

g Stat. 12 Ann. c. 18.

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54. See Appendix, Note I.

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OF THE PEOPLE, WHETHER ALIENS, DENIZENS, OR NATIVES.

HAVING, in the eight preceding chapters, treated of persons as they stand in the public relations of *magistrates*, I now proceed to consider such persons as fall under the denomination of the *people*. And, herein, all the inferior and subordinate magistrates, treated of in the last chapter, are included.

The first and most obvious division of the people is into aliens and natural-born subjects. Natural-born subjects are such as are born within the dominions of the crown of England; that is, within the ligeance, or as it is generally called, the allegiance of the king: and aliens, such as are born out of it. Allegiance is the tie, or *ligamen*, which binds the subject to the king, in return for that protection which the king affords the subject. The thing itself, or substantial part of it, is founded in reason and the nature of government; the name and form are derived to us from our Gothic ancestors. Under the feodal system, every owner of lands held them in subjection to some superior or lord, from whom or whose ancestors the tenant or vasal had received them: and there was a mutual trust or confidence subsisting between the lord and vasal, that the lord should protect the vasal in the enjoyment of the territory he had granted him, and, on the other hand, that the vasal should be faithful to the lord and defend him against all his enemies. This obligation on the part of the vasal was called his *fidelitas* or fealty; and an oath of fealty was required, by the feodal law, to be taken by all

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tenants to their landlord, which is couched in almost the same terms as our antient oath of allegiance[a]: except that in the usual oath of fealty there was frequently a saving or exception of the faith due to a superior lord by name, under whom the landlord himself was perhaps only a tenant or vasal. But when the acknowledgment was made to the absolute superior himself, who was vasal to no man, it was no longer called the oath of fealty, but the oath of allegiance; and therein the tenant swore to bear faith to his sovereign lord, in opposition to all men, without any saving or exception: "*contra omnes homines fidelitatem fecit*[b]." Land held by this exalted species of fealty was called *feudum ligium*, a liege fee; the vasals *homines ligii*, or liege men: and the sovereign their *dominus ligius*, or liege lord. And when sovereign princes did homage to each other, for lands held under their respective sovereignties, a distinction was always made between *simple* homage, which was only an acknowledgment of tenure[c]; and *liege* homage, which included the fealty before mentioned, and the services consequent upon it. Thus when our Edward III, in 1329, did homage to Philip VI, of France, for his ducal dominions on that continent, it was warmly disputed of what species the homage was to be, whether *liege* or *simple* homage[d]. But with us in England, it becoming a settled principle of tenure, that *all* lands in the kingdom are holden of the king as their sovereign and lord paramount, no oath but that of fealty could ever be taken to inferior lords, and the oath of allegiance was necessarily confined to the person of the king alone[1]. By an easy analogy the term of allegiance was soon

a 2 *Feud.* 5, 6, 7. b 2 *Feud.* 99.

c 7 Rep. Calvin's case, 7.

d 2 Carte. 401. Mod. Un. Hist. xxiii. 420.

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1. This principle seems to have been effectually done away in Virginia, by those of the revolution, as well as by the express declaration, that "all lands within this commonwealth shall be held in "absolute and unconditional property to all intents, and purposes whatsoever." V. L. May 1779, c. 13. Edi. 1785. See also p. 123, note I.

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brought to signify all other engagements, which are due from subjects to their prince, as well as those duties which were simply and merely territorial. And the oath of allegiance, as administered for upwards of six hundred years[e], contained a promise "to be true and faithful to the king and his heirs, and truth and "faith to bear of life and limb and terrene honour, and not to
368 "know or hear of any ill or damage intended him, without de-"fending him therefrom." Upon which sir Matthew Hale[f] makes this remark; that it was short and plain, not entangled with long or intricate clauses or declarations, and yet is comprehensive of the whole duty from the subject to his sovereign. But, at the revolution, the terms of this oath being thought perhaps to favour too much the notion of non-resistance, the present form was introduced by the convention parliament, which is more general and indeterminate than the former; the subject only promising "that he will be faithful and bear *true* allegiance "to the king," without mentioning "his heirs," or specifying in the least wherein that allegiance consists. The oath of supremacy is principally calculated as a renunciation of the pope's pretended authority: and the oath of abjuration, introduced in the reign of king Williams[g], very amply supplies the loose and general texture of the oath of allegiance; it recognizing the right of his majesty, derived under the act of settlement; engaging to support him to the utmost of the juror's power; promising to disclose all traiterous conspiracies against him; and expressly renouncing any claim of the descendants of the late pretender, in as clear and explicit terms as the English language can furnish. This oath must be taken by all persons in any office, trust, or employment; and may be tendered by two justices of the peace to any person, whom they shall suspect of disaffection[h]. And the oath of allegiance may be tendered[i] to all persons above the age of twelve years, whether natives, denizens,

e Mirror. c. 3. Sec. 35. Fleta. 3, 16. Britton. c. 29. 7 Rep. Calvin's Case, 6.

f 1 Hal. P. C. 63.

g Stat. 13 W. III. c. 6.

h Stat. 1 Geo. I. c. 13. 6. Geo. III. c. 56.

i 2 Inst. 121. 1 Hal. P. C. 64.

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or aliens, either in the court-leet of the manor, or in the sheriff's tourn, which is the court-leet of the county[2].

But, besides these express engagements, the law also holds that there is an implied, original, and virtual allegiance, owing

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2. By the act of May, 1777, c. 3, all free male inhabitants of the state, above sixteen years, were required to give assurance of allegiance to the state; which consisted in taking the following oath.... "I do swear [or affirm], that I renounce and refuse all allegiance "to George the third, king of Great Britain, his heirs and succes- "sors, and that I will be faithful and bear true allegiance to the "commonwealth of Virginia, as a free and independent state, "and that I will not at any time do, or cause to be done any matter "or thing that will be prejudicial to the freedom and independ- "ence thereof as declared by congress; and also that I will dis- "cover and make known to some one justice of the peace for the "said state, all treasons, or traiterous conspiracies which I now "or hereafter shall know to be formed against this or any of the Uni- "ted States of America." This oath was to be tendered by the justices of the peace to all persons required to take it, and all such as refused were to be disarmed. But this act seems to have been merely temporary. The title only is retained. Edi. 1785, p. 50.

By the act of May, 1779, c. 5. No person shall have power to act in any office, legislative, executive, or judiciary, before he shall have given assurance of fidelity to the commonwealth, by taking the following oath: "I A. B. do declare myself a citizen of the com- "monwealth of Virginia; I relinquish and renounce the character "of subject or citizen of any prince, or other state whatsoever, and "abjure all allegiance which may be claimed by such prince or "other state; and I do swear to be faithful and true to the common- "wealth of Virginia, so long as I continue a citizen thereof. So help "me God." The same form is still preserved. Edi. 1794, c. 57.

The members of the several state legislatures, and all executive and judicial officers, both of the United States and of the several states, and all members of congress shall be bound by oath or affirmation to support the constitution of the United States. C. U. S. Art. 6, which oath must be taken by all persons, chosen or appointed after the first day of August, 1789, before they proceed to execute the duties of their office. L. U. S. 1 Cong. 1 Sess. c. 1.

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from every subject to his sovereign, antecedently to any express promise; and although the subject never swore any faith or allegiance in form. For as the king, by the very descent of the crown, is fully invested with all the rights and bound to all the
369 duties of sovereignty, before his coronation; so the subject is bound to his prince by an intrinsic allegiance, before the superinduction of those outward bonds of oath, homage, and fealty; which were only instituted to remind the subject of this his previous duty, and for the better securing it's performance [k]. The formal profession, therefore, or oath of subjection, is nothing more than a declaration in words of what was before implied in law. Which occasions sir Edward Coke very justly to observe [l], that "all subjects are equally bounden to their allegiance, as if "they had taken the oath; because it is written by the finger of "the law in their hearts, and the taking of the corporal oath is "but an outward declaration of the same." The sanction of an oath, it is true, in case of violation of duty, makes the guilt still more accumulated, by superadding perjury to treason: but it does not increase the civil obligation to loyalty; it only strengthens the *social* tie by uniting it with that of *religion*.

Allegiance, both express and implied, is however distinguished by the law into two sorts or species; the one natural, the other local; the former being also perpetual, the latter temporary. Natural allegiance is such as is due from all men born within the king's dominions immediately upon their birth [m]. For, immediately upon their birth, they are under the king's protection; at a time too, when (during their infancy) they are incapable of protecting themselves. Natural allegiance is, therefore, a debt of gratitude; which cannot be forfeited, cancelled, or altered, by any change of time, place, or circumstance, nor by any thing but the united concurrence of the legislature [n 3]. An

k 1 Hal. P. C. 61.
m 7 Rep. 7.
l 2 Inst. 121.
n 2 P. Wms. 124.

3. The statute of 22 Geo. 3. c. 46, authorising the crown to acknowledge the independence of the United States of America, was a legislative act of the nature here spoken of, as it related to all inha-

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Englishman who removes to France, or to China, owes the same allegiance to the king of England there as at home, and twenty years hence as well as now [4]. For it is a principle of universal law [o], that the natural-born subject of one prince cannot, by any act of his own, no, not by swearing allegiance to another, put off or discharge his natural allegiance to the former ([4]): for this natural allegiance was intrinsic, and primitive, and antecedent to the other; and cannot be devested without the concurrent act of 370
that prince to whom it was first due. Indeed, the natural-born subject of one prince, to whom he owes allegiance, may be entangled by subjecting himself absolutely to another: but it is his own act that brings him into these straits and difficulties, of owing service to two masters; and it is unreasonable that, by such voluntary act of his own, he should be able at pleasure to unloose those bands, by which he is connected to his natural prince.

o 1 Hal. P. C. 68.

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bitants of the United States born under the allegiance of the crown of Great Britain. See Introduction, p. 110, note (c.) The treaty of peace between the United States and the crown of Great Britain, was a perpetual renunciation of the right of governing the United States as a people, pursuant to that statute; and, consequently, a perpetual renunciation of all claim to allegiance from any individual of that people, in virtue of his having been born a subject to that crown.

4. The laws of Virginia expressly recognise the right of expatriation: declaring, that whenever any citizen of the commonwealth shall, by deed in writing under his hand and seal, executed in the presence of, and subscribed by three witnesses, and by them, or two of them, proved in the general court, or the district, county, or corporation court wherein he resides, or by open verbal declaration made in either of them, and entered of record, declare that he relinquishes the character of a citizen, and shall depart out of the commonwealth, he shall, from the time of his departure, be considered as having exercised his right of expatriation, and shall thenceforth be deemed no citizen. V. L. Oct. 1783, c. 16. Edi. 1794, c. 110.

(4.) Mr. Locke, in his Treatise of Civil Government, Sect. 113, and sequel, contends very strongly for the right of expatriation, in those who are born subjects, but have not expressly given their con-

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Local allegiance is such as is due from an alien, or stranger born, for so long time as he continues within the king's dominion and protection [p]: and it ceases, the instant such stranger transfers himself from this kingdom to another. Natural allegiance is therefore perpetual, and local temporary only: and that for

p 7 Rep. 6.

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sent to the government; and supports his opinion with arguments that appear to be unanswerable. But, in the case of one Williams in Connecticut, who is said to have become a citizen of the French republic, judge Ellsworth is reported to have denied the right of expatriation, and to have founded his opinion upon this doctrine of judge Blackstone and sir Matthew Hale, as proving the common law of England to have been otherwise*. But, granting this, which is perhaps going too far, since sir Mathew Hale, from whom the doctrine is received, cites no adjudged case in support of it, so that his opinion is merely extrajudicial, yet how does it follow that this common law doctrine in England, has been translated to America? The American revolution is a case in point, to shew that a man is not obliged to continue the subject of that prince under whose dominion he was born, for otherwise we must admit that America was not independent, until the king of Great Britain was pleased to recognise her independence. But the treaty of peace is a recognition that her independence was *antecedent*, and not consequent to that treaty. Therefore, all the citizens of America had a right to put off their natural and primitive allegiance, without the consent or concurrent act of the prince to whom it was first due. And, if all might, any one might, with the same reason.

Again, if Williams could not expatriate himself as a citizen of Connecticut, because the common law of England, as the law of Connecticut prohibited him so to do; it would seem upon equal grounds of reason, that when that law was repealed in Virginia, as it was many years before the adoption of the constitution of the United States, and the right of expatriation was established in this state, that right must still remain unimpeached here; since there is not so much reason for supposing the common law of England in force in Virginia, as there is for supposing an act of our own legislature, uncontrolled by any higher authority, to be in force here.

☞ See this question discussed more fully in the appendix to this volume, note K.

* See judge Ellsworth's opinion, in the case of Isaac Williams, in the postscript to the Tract upon the Common Law. Appendix to Part I. of this volume, note E.

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this reason, evidently founded upon the nature of government; that allegiance is a debt due from the subject, upon an implied contract with the prince, that so long as the one affords protection, so long the other will demean himself faithfully. As, therefore, the prince is always under a constant tie to protect his natural-born subjects, at all times and in all countries, for this reason their allegiance due to him is equally universal and permanent. But, on the other hand, as the prince affords his protection to an alien, only during his residence in this realm, the allegiance of an alien is confined (in point of time) to the duration of such his residence, and (in point of locality) to the dominions of the British empire. From which considerations, sir Matthew Hale [q] deduces this consequence, that, though there be an usurper of the crown, yet it is treason for any subject, while the usurper is in full possession of the sovereignty, to practice any thing against his crown and dignity: wherefore, although the true prince regain the sovereignty, yet such attempts against the usurper (unless in defence or aid of the rightful king) have been afterwards punished with death; because of the breach of that temporary allegiance, which was due to him as king *de facto*. And, upon this footing, after Edward IV, recovered the crown, which had been long detained from his house 371
by the line of Lancaster, treasons committed against Henry VI, were capitally punished; though Henry had been declared an usurper by parliament.

This oath of allegiance, or rather the allegiance itself, is held to be applicable not only to the political capacity of the king or regal office, but to his natural person, and blood royal [5]: and for the misapplication of their allegiance, viz. to the regal capacity or crown, exclusive of the person of the king, were the

q 1 Hal. P. C. 60.

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5. We have more than once had occasion to remark that this principle has no existence in the United States: it is a scion from that idolatrous veneration for the regal character, which ascribes sacredness to his person, and absolute perfection to his mind. Allegiance in America, is only due to the state.

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Spencers banished in the reign of Edward II[r]. And from hence arose that principle of personal attachment, and affectionate loyalty, which induced our forefathers, (and, if occasion required, would doubtless induce their sons) to hazard all that was dear to them, life, fortune, and family, in defence and support of their leige lord and sovereign.

Thus allegiance, then, both express and implied, is the duty of all the king's subjects, under the distinctions here laid down, of local and temporary, or universal and perpetual. Their rights are also distinguishable by the same criterions of time and locality; natural-born subjects having a great variety of rights, which they acquire by being born within the king's ligeance, and can never forfeit by any distance of place or time, but only by their own misbehaviour: the explanation of which rights is the principle subject of the two first books of these commentaries. The same is also in some degree the case of aliens; though their rights are much more circumscribed, being acquired only by residence here, and lost whenever they remove. I shall, however, here endeavour to chalk out some of the principle lines whereby they are distinguished from natives, descending to farther particulars, when they come in course.

An alien-born may purchase lands, or other estates: but not for his own use; for the king is, thereupon, entitled to them[s 6].

r 1 Hal. P. C. 67. s Co. Litt. 2.

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6. This subject will be discussed, in the appendix to the second volume of the commentaries, in which a view will be given of the various acts passed during the revolution, concerning escheats and forfeitures from British subjects.

It may not, however, be improper to notice, in this place, that by the act of 1779, c. 13, it is declared, that, "All persons as well "foreigners, as others, shall have right to assign or transfer war- "rants or certificates of survey for lands, and any foreigner pur- "chasing warrants for lands, may locate, and have the same sur- "veyed; and after returning a certificate of survey to the land- "office, shall be allowed the term of eighteen months, either "to become a citizen, or to transfer his right in such certificate of "survey to some citizen of this, or any other of the United States

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If an alien could acquire a permanent property in lands, he must owe an allegiance, equally permanent with that property, to the king of England) which would probably be inconsistent with that, which he owes to his own natural liege lord: besides that, 372 thereby, the nation might, in time, be subject to foreign influence and feel many other inconveniencies[7]. Wherefore, by the civil law such contracts were also made void[t]: but the prince had no such advantage of forfeiture, thereby, as with us in England..... Among other reasons, which might be given for our constitution, it seems to be intended by way of punishment for the alien's presumption, in attempting to acquire any landed property: for the vendor is not affected by it, he having resigned his right, and received an equivalent in exchange. Yet an alien may acquire a property in goods, money, and other personal estate, or may hire a house for his habitation[u]; for personal estate is of a transitory and moveable nature; and, besides, this indulgence to strangers is necessary for the advancement of trade..... Aliens also may trade as freely as other people; only they are subject to certain higher duties at the custom-house (7): and there are also some obsolete statutes of Henry VIII, prohibiting alien artificers to work for themselves in this kingdom; but it is generally held that they were virtually repealed by statute 5 Eliz. c. 7. Also, an alien may bring an action concerning personal property, and may make a will, and dispose of his personal estate[w]: not as it is in France, where the king at the death of

t *Cod. l.* 11. *tit.* 55. u 7 Rep. 17.
w Lutw. 34.

"of America." And such citizen might, thereupon, obtain a patent, for the lands, which it seems the foreigner cannot. This period is now increased to two years. V. L. Edi. 1794, c. 86. §. 40.

7. One of the objections urged against the treaty of London, 1794, was, that it paved the way for those inconveniences; by enabling aliens to hold lands, and to transmit the same by descent, devise, or otherwise, to whomsoever they should think fit, and that neither they, their heirs, or assigns should ever be deemed aliens, in respect to the lands held by them, at the time of concluding that treaty..... See the treaty, Art. 9.

(7). L. U. S. 1 Cong. 2 Sess. c. 30 and 39. Accordant.

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an alien is entitled to all he is worth, by the *droit d'aubaine* or *jus albinatus* [x], unless he has a peculiar exemption [8]. When I mention these rights of an alien, I must be understood of alien-friends only, or such whose countries are in peace with ours; for alien-enemies have no rights, no privileges, unless by the king's special favour, during the time of war*.

When I say, that an alien is one who is born out of the king's dominions, or allegiance, this also must be understood with some restrictions [9]. The common law indeed stood absolutely so; with only a very few exceptions: so that a particular act of parliament became necessary after the restoration [y], "for the naturalization of children of his majesty's English subjects, born in
373 foreign countries during the late troubles." And this maxim of the law proceeded upon a general principle, that every man owes natural allegiance where he is born, and cannot owe two such allegiances, or serve two masters, at once. Yet the children of the king's embassadors born abroad were always held to be natural subjects [z]: for as the father, though in a foreign country, owes not even a local allegiance to the prince to whom he is

x A word derived from *albi natus*. Spelm. Gl. 24.

y Stat. 29 Car. II. c. 6. z 7 Rep. 18.

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* Until all ransoms of captured ships and property were prohibited by 22 Geo. *III.* c. 25, an alien enemy could sue in our courts upon a ransom bill. Lord Mansfield in a case of that kind declared, that "it was sound policy, as well "as good morality, to keep faith with an enemy in time of war. This is a con-"tract which arises out of a state of hostility, and is to be governed by the law "of nations and the eternal rules of justice." *Doug.* 625....*Christian.*

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8. By the treaty of 1778, between the United States and France, the *Droits d'aubaine*, were not to be enforced in respect to American citizens, And, "in case of a war between Great Britain and "the United States, the merchants and others of each nation re-"siding in the dominions of the other shall have the privilege of re-"maining and continuing their trade, so long as they behave peace-"ably and commit no offence against the laws." Treaty of Lond. 1794, Art. 26.

9. See Appendix, Note L.

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sent: so with regard to the son also, he was held (by a kind of *postliminium*) to be born under the king of England's allegiance, represented by his father, the embassador. To encourage also foreign commerce, it was enacted by statute 25 Edw. III. st. 2, that all children born abroad, provided *both* their parents were at the time of his birth in allegiance to the king, and the mother had passed the seas by her husband's consent, might inherit as if born in England: and accordingly it hath been so adjudged in behalf of merchants[a]. But by several more modern statutes [b] these restrictions are still farther taken off: so that all children, born out of the king's leigance, whose *fathers* (or *grandfathers* by the father's side) were natural-born subjects, are now deemed to be natural-born subjects themselves, to all intents and purposes; unless their said ancestors were attainted, or banished beyond sea, for high treason; or were at the birth of such children in the service of a prince at enmity with Great Britain..... Yet the grandchildren of such ancestors shall not be privileged in respect of the alien's duty, except they be protestants, and actually reside within the realm: nor shall be enabled to claim any estate or interest, unless the claim be made within five years after the same shall accrue.

The children of aliens, born here in England, are generally speaking, natural-born subjects, and entitled to all the privileges of such[10]. In which the constitution of France differs from ours; for there, by their *jus albinatus*, if a child be born of foreign parents, it is an alien[c].

A denizen is an alien born, but who has obtained *ex donatione regis* letters patent to make him an English subject[11]: a

a Cro. Car. 601. Mar. 91. Jenk. Cent. 3.
b 7 Ann. c. 5, 4. Geo. *II.* c. 21, and 13 Geo. *III.* c. 21.
c Jenk. Cent. 3. cites *treasure francois*, 312.

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10. L. V. Edi. 1794, c. 110. L. U. S. 1 Cong. c. 3. 7 Cong. c. 28. accordant.

11. Since the adoption of the constitution of the United States, I have been led to consider aliens admitted to take the oath of fidelity

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high and incommunicable branch of the royal prerogative[d].... A denizen is a kind of middle state, between an alien and a natural-born subject, and partakes of both of them. He may take lands by purchase or devise, which an alien may not; he cannot take by inheritance[e]: for his parent, through whom he must claim, being an alien, had no inheritable blood; and, therefore, could convey none to the son. And upon a like defect of hereditary blood, the issue of a denizen, born *before* denization, cannot inherit to him; but his issue born *after*, may[f]. A denizen is not excused[g] from paying the alien's duty, and some other mercantile burthens. And no denizen can be of the privy council, or either house of parliament, or have any office of trust, civil or military, or be capable of any grant of lands, &c. from the crown[h].

Naturalization cannot be performed but by act of parliament: for by this an alien is put in exactly the same state as if he had been born in the king's ligeance; except only that he is incapable, as well as a denizen, of being a member of the privy council, or parliament, holding offices, grants, &c[i]. No bill of naturalization can be received in either house of parliament, without such disabling clause in it[j]: nor without a clause disabling the person from obtaining any immunity in trade thereby in any fo-

d 7 Rep. Calvin's case, 25.
e 11 Rep. 67.
f Co. Litt. 8. Vaugh. 285.
g Stat. 22 Hen. VIII, c. 8.
h Stat. 12 W. III. c. 2.
i *Ibid.*
j Stat. 1 Geo. I, c. 4.

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to a particular state, or otherwise admitted to the rights of citizenship in any particular state, since that period, as a species of denizens; whereby they acquire a right to hold lands, and perhaps to hold offices, under the state thus admitting them; yet not being naturalized pursuant to the directions of the laws of the United States, they cannot be regarded as completely citizens of the United States, until they have complied with the requisitions of the acts of establishing an uniform rule of naturalization. In 1796, several persons, inhabitants of Holland, were admitted to all the "benefits "immunities and privileges of citizens within the commonwealth of "Virginia, so far as they might, by the legislature, be constitution-"ally granted." L. V. 1796, c. 68.

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reign country; unless he shall have resided in Britain for seven years next after the commencement of the session in which he is naturalized[k]. Neither can any person be naturalized or restored in blood, unless he hath received the sacrament of the lord's supper within one month before the bringing in of the bill; and unless he also takes the oaths of allegiance and supremacy in the presence of the parliament[l] [12]. But these provisions have

k Stat. 14 Geo. III, c. 84. l Stat. 7 Jac. I, c. 2.

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12. Congress have power to establish an uniform rule of naturalization. C. U. S. Art. 1. §. 8. In 1790, they passed an act for that purpose. L. U. S. 1 Cong. 2 Sess. c. 3. But that act was repealed in 1795, by an act, which declared, that any alien being a free white person, may be admitted to become a citizen of the United States, or any of them, on the conditions therein mentioned, and *not otherwise*. First, he shall have declared before some supreme, superior, district, or circuit court of a state, or of the United States, at least three years before, upon oath, that it was his intention to become a citizen of the United States; and when admitted, he shall in like manner declare, that he has resided within the United States five years at least, and one year at least in the state or territory in which the court is held; that he will support the constitution of the United States, and doth absolutely and entirely renounce and abjure all allegiance to every foreign sovereignty, and particularly the prince, &c. whose subject or citizen he was: and if he shall have borne any hereditary title, or been of any order of nobility, in any other state, he shall moreover make an express renunciation of his title, or order of nobility. L. U. S. 3 Cong. c. 85.

The act contains a provision in favour of persons then residing in the United States, who might be naturalized in a shorter period than five years....to wit, two years. Ibid. But by the act of 5 Cong. c. 71, the period of residence was extended to fourteen years: that act, however, is now repealed, and the period of residence within the United States is again reduced to five years, and one year within the state or territory, in which the court admitting the alien to the rights of citizenship, is held. He must likewise have made the same declaration which is prescribed by the act of 3 Cong. c. 83, at least three years before the time of his admission, and must in like manner abjure all allegiance to his former sovereign, and renounce any hereditary title, or order of nobility, which he might before have been entitled to. But no alien who is a native citizen, denizen, or subject, of any nation at war with the United States, at the time of his ap-

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been usually dispensed with by special acts of parliament, previous to bills of naturalization of any foreign princes or princesses[m].

m Stat. 4. Ann. c. 1. 7 Geo. II, c. 3. 9 Geo. II, c. 24. 4 Geo. III, c. 4.

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plication, shall be admitted a citizen. The court admitting him must morever be satisfied that he is a man of good moral character, attached to the principles of the federal constitution, and well disposed to the good order and happiness of the United States. But it is expressly declared, that the oath of the applicant shall in no case be allowed to prove his residence, L. U. S. 7 Cong. c. 28.

The act likewise contains a provision in favour of aliens who were residing within and under the jurisdiction of the United States, before the 29th day of January, 1795, who may be admitted to be citizens upon due proof of two years residence, within and under the jurisdiction of the United States, and one year at least immediately preceding his application within the state or territory where the court is held, on complying with the terms prescribed by the act.... And any alien residing within and under the jurisdiction of the United States, between the 29th day of January, 1795, and the 18th day of June, 1798, may be admitted a citizen within two years after passing the act, (April 14, 1802) without having declared his intention to become a citizen three years before his admission. The children of persons naturalized under any former law of the United States, or under the laws of any state, previous to the passing of any law of congress upon the subject, being under twenty-one years of age, at the time of the parents naturalization, if dwelling in the United States, shall be considered as citizens; and the children of citizens of the United States, wheresoever born, shall also be considered as citizens. But the right of citizenship shall not descend to persons whose fathers have never resided within the United States....Nor shall any person heretofore proscribed by any state, or legally convicted of having joined the armies of Great Britain during the revolutionary war, be admitted a citizen without consent of the legislature of the state, in which he was prescribed. Ibid.

Any alien who may hereafter arrive in the United States, if he desire to be naturalized, must make report of himself, or be reported by his parent, guardian, or master to the clerk of the district court where he may arrive, or some other court of record, and obtain a certificate thereof, which shall be exhibited to the court to whom application may be made to admit him as a citizen, as evidence of the time of his arrival within the United States. L. U. S. 7 Cong. c. 28.

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These are the principal distinctions between aliens, denizens, and natives: distinctions, which it hath been frequently endea- 375
voured since the commencement of this century to lay almost totally aside, by one general naturalization-act for all foreign protestants. An attempt which was once carried into execution by the statute 7 Ann. c. 5, but this, after three years experience of it, was repealed by the statute 10 Ann. c. 5, except one clause, which was just now mentioned, for naturalizing the children of English parents born abroad. However, every foreign seamen, who in the time of war serves two years on board an English ship by virtue of the king's proclamation, is *ipso facto* naturalized under the like restriction as in statute 12 W. III. c. 2.[n]; and all foreign protestants, and Jews, upon their residing seven years in any of the American colonies, without being absent above two months at a time, and all foreign protestants serving two years in a military capacity

n Stat. 13 Geo. II, c. 3.

Persons naturalized according to these acts, are entitled to all the rights of natural born citizens, except, first, that they cannot be elected as representatives in congress until seven years, thereafter. Secondly, nor can they be elected senators of the United States, until nine years thereafter. Thirdly, they are forever incapable of being chosen to the office of president of the United States. Persons naturalized before the adoption of the constitution, it is presumed, have all the capacities of natural born citizens. See C. U. S. Art. 1, 2.

It may be doubted, also, whether a person naturalized under the above mentioned acts, is eligible to any office under any of the states, until after such a residence as the laws of the state may require: since each state, it is presumed, has a right to designate the qualifications of it's own officers. The laws of Virginia require an actual residence of five years, within the state, before any naturalized foreigner can be elected or appointed to any office, legislative, executive, or judiciary. L. V. 1786, c. 10. Edi. 1794, c. 110.

See on this subject V. L. May 1779, c. 55. Oct. 1783, c. 16, 17. Edi. 1785....1786, c. 10. As to the manner in which persons might be naturalized in Virginia, before the adoption of the constitution of the United States, and before the passing of the acts of congress establishing an uniform system of naturalization, above referred to.

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there, or being three years employed in the whale fishery, without afterwards absenting themselves from the king's dominions for more than one year, and none of them falling within the incapacities declared by statute 4 Geo. II, c. 21, shall be (upon taking the oaths of allegiance and abjuration, or in some cases, an affirmation to the same effect) naturalized to all intents and purposes, as if they had been born in this kingdom; except as to sitting in parliament or in the privy council, and holding offices or grants of lands, &c. from the crown within the kingdoms of Great Britain or Ireland [o]. They, therefore, are admissible to all other privileges, which protestants or Jews born in this kingdom are entitled to. What those privileges are, with respect to jews [p] in particular, was the subject of very high debates about the time of the famous Jew-bill [q]; which enables all Jews to prefer bills of naturalization in parliament, without receiving the sacrament, as ordained by statute 7 Jac. I. It is not my intention to revive this controversy again; for the act lived only a few months, and was then repealed [r]: therefore peace be now to it's *manes*.

o Stat. 13 Geo. II, c. 7. 20 Geo. II, c. 44. 22 Geo. II, c. 45. 2 Geo. III. c. 25. 13 Geo. III, c. 25.

p A pretty accurate account of the Jews till their banishment in 8 Edw. I, may be found in Prynne's *demurrer*, and in Molloy *de jure maritimo*. b. 3. c. 6.

q Stat. 26 Geo. II, c 26.

r Stat. 27 Geo. II, c. 1.

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CHAPTER THE ELEVENTH.

OF THE CLERGY 1.

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

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1. Before the revolution no minister could be admitted to officiate in Virginia, but such as should produce to the governor a testimonial of his ordination by some bishop in England, and subscribe to be conformable to the constitutions of that church, and the laws there established. V. L. 1642, c. 77. Glebes were also laid out in every parish, and salaries appointed for them. Ibid. 1662, c. 3. 1727, c. 6. 1748, c. 27.

Immediately after the revolution, an act passed for exempting the different societies of dissenters from contributing to the support of the church, as by law established, and it's ministers. By which it was declared, that all dissenters of whatever denomination, should be totally free from all levies, &c. for those purposes....V. L. 1776, c. 2. Edi. 1785.

By the same act it was further declared, that the glebes already purchased, the churches and chapels already built, and such as were begun, or contracted for before the passing of that act, should in all time coming be saved and reserved for the use of the church by law established; as also the benefit of all private donations..... Ibid.

And, in October, 1779, an act passed, declaring, that so much of every act and acts, as provided salaries for ministers, and authorized the vesteries to levy the same (except for arrears due to Jan. 1, 1777) should be repealed. Oct. 1779, c. 36.

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This venerable body of men, being separate and set apart from the rest of the people, in order to attend the more closely to the service of Almighty God, have thereupon large privileges allowed them by our municipal laws: and had formerly much

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In 1784, an act was passed for incorporating the protestant episcopal church....Sessions acts, c. 88. In 1785, an additional act was passed on the same subject, to supply certain deficiencies in the election of vesteries. Sess. acts, c. 37. In 1786, the act for incorporating the protestant episcopal church was repealed; with a "saving to all religious societies the property to them respectively "belonging, who are thereby authorised to appoint from time to "time, according to the rules of their sect, trustees, who shall be "capable of managing and applying such property to the religious "uses of such societies: And to guard against all doubts, and mis-"constructions, it further declares, that so much of all laws then in "force, as prevented any religious society from regulating it's own "discipline, shall be, and are thereby repealed." Sess. acts, 1786, c. 12.

It would seem, then, that the clergy are no longer considered as a distinct class of citizens in Virginia, except as they are prohibited by the constitution, (of whatever denomination they may be) from being members of either house of assembly, or of the privy council. C. V. Art. 14.

It may not be amiss, before we close this note, to remark, that by the Bill of Rights, Art. 16, it is declared, "That religion or "the duty which we owe to our Creator, and the manner of discharg-"ing it can only be directed by reason, and conviction, not by force "or violence; and therefore all men are equally entitled to the free "exercise of religion according to the dictates of conscience."....
And that in pursuance of the principle here laid down, it is enacted by the general assembly, "That no man shall be compelled to fre-"quent or support any religious worship, place, or ministry, what-"soever, nor shall be enforced, restrained, molested, or burthened, "in his body or goods, nor shall otherwise suffer on account of his "religious opinions or belief; but that all men shall be free to pro-"fess, and by argument to maintain, their opinions in matters of re-"ligion, and the same shall in no wise diminish, enlarge, or affect "their civil capacities." V. L. 1785, c. 34. Edi. 1794, c. 20.

And by the constitution of the United States, Art. 6, it is declared, "That no religious test shall ever be required as a qualification to

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greater which were abridged at the time of the reformation on account of the ill use which the popish clergy had endeavoured to make of them. For, the laws having exempted them from almost every personal duty, they attempted a total exemption from every secular tie. But it is observed by sir Edward Coke [a], that, as the overflowing of waters doth many times make the river to lose it's proper channel, so in times past ecclesiastical persons, seeking to extend their liberties beyond their true bounds, either lost or enjoyed not those which of right belonged to them. The personal exemptions do indeed for the most part continue. A clergyman cannot be compelled to serve on a jury, nor to appear at a court-leet or view of frank pledge; which almost every other person is obliged to do [b]: but if a layman is summoned on a jury, and before the trial takes orders, he shall notwithstanding appear and be sworn [c]. Neither can he be chosen to any temporal office; as bailiff, reeve, 377
constable, or the like: in regard of his own continual attendance on the sacred function [d]. During his attendance on divine service he is privileged from arrests in civil suits [e]. In cases also of felony, a clerk in orders shall have the benefit of his clergy,

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

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any office, or public trust under the United States." And lastly, by the amendments to the constitution, Art. 3, it is further provided, "That congress shall make no law respecting an estab-"lishment of religion, or prohibiting the free exercise thereof."... We may therefore reasonably conclude that it is unnecessary to devote any considerable portion of our attention to the subject of the present chapter.

By the act of 1786, c. 54, no officer, for any civil cause, shall arrest any minister of religion, licensed according to the rules of his sect, who shall have taken the oath of fidelity to the commonwealth, while he shall be publicly preaching or performing religious worship, in any church, meeting-house, or other place of religious worship, on pain of imprisonment and amercement, at the discretion of a jury, and of making satisfaction to the party arrested. V. L. Edi. 1794, c, 138.

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without being branded in the hand; and may likewise have it more than once: in both which particulars he is distinguished from a layman[f]. But as they have their privileges, so also they have their disabilities, on account of their spiritual avocations. Clergymen, we have seen[g], are incapable of sitting in the house of commons; and by statute 21 Hen. VIII, c 13, are not (in general) allowed to take any lands or tenements to farm, upon pain of 10*l. per* month, and total avoidance of the lease; nor upon like pain to keep any tanhouse or brewhouse; nor shall engage in any manner of trade, nor sell any merchandize, under forfeiture of the treble value. Which prohibition is consonant to the canon law.

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

I. An arch-bishop or bishop is elected by the chapter of his cathedral church, by virtue of a licence from the crown. Election was, in very early times, the usual mode of elevation to the episcopal chair throughout all christendom; and this was promiscuously performed by the laity as well as the clergy[h]: till at
378 length it becoming tumultuous, the emperors and other sovereigns of the respective kingdoms of Europe took the appointment in some degree into their own hands; by reserving to themselves the right of confirming these elections, and of granting investiture of the temporalties, which now began almost universally to be annexed to this spiritual dignity; without which confirmation and investiture, the elected bishop could neither be consecrated nor receive any secular profits. This right was acknowledged in the

f 2 Inst. 637. Stat. 4. Hen. *VII*, c. 13, and 1 Edw. *VI*. c. 12.

g Page 175.

h *per clerum et populum*. Palm. 25. 2 Roll. Rep. 102. M. Paris, *A. D.* 1095.

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emperor Charlemagne, *A. D.* 773, by pope Hadrian I, and the council of Lateran[i], and universally exercised by other christian princes: but the policy of the court of Rome at the same time began by degrees to exclude the laity from any share in these elections, and to confine them wholly to the clergy, which at length was completely effected; the mere form of election appearing to the people to be a thing of little consequence, while the crown was in possession of an absolute negative, which was almost equivalent to a direct right of nomination. Hence the right of appointing to bishopricks is said to have been in the crown of England[k] (as well as other kingdoms in Europe) even in the Saxon times; because the rights of confirmation and investiture were in effect (though not in form) a right of complete donation[l]. But when, by length of time, the custom of making elections by the clergy only was fully established, the popes began to except to the usual method of granting these investitures, which was *per annulum et baculum*, by the prince's delivering to the prelate a ring, and pastoral staff or crosier; pretending, that this was an encroachment on the church's authority, and an attempt by these symbols to confer a spiritual jurisdiction: and pope Gregory VII, towards the close of the eleventh century, published a bulle of excommunication against all princes who should dare to confer investitures, and all prelates who should venture to receive them[m]. This was a bold step towards effecting the plan then adopted by the Roman see, of rendering the clergy entirely inde- 379
pendent of the civil authority: and long and eager were the contests occasioned by this papal claim. But at length, when the emperor Henry V, agreed to remove all suspicion of encroachment on the spiritual character, by conferring investitures for the future *per sceptrum* and not *per annulum et baculum;* and when the kings of England and France consented also to alter the form in their kingdoms, and receive only homage from the bishops

i *Decret.* 1 *dist.* 63, *c.* 22. k Palm. 28.

l "*Nulla electio praelatorum (sunt verba Ingulphi) erat mere libera et canonica; sed omnes dignitates tam episcoporum, quam abbatum, per annulum et baculum regis curia pro sua complacentia conferebat.*" *Penes clericos et monachos fuit electio, sed electum a rege postulabant.* Selden. *Jan. Ang. l.* 1, §. 39.

m *Decret.* 2 *caus.* 16. *qu.* 7, *c.* 12 & 13.

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for their temporalties, instead of investing them by the ring and crosier; the court of Rome found it prudent to suspend for a while it's other pretensions[n].

This concession was obtained from king Henry the first in England, by means of that obstinate and arrogant prelate, archbishop Anselm[o]: but king John (about a century afterwards) in order to obtain the protection of the pope against his discontented barons, was also prevailed upon to give up by a charter, to all the monasteries and cathedrals in the kingdom, the free right of electing their prelates, whether abbots or bishops: reserving only to the crown the custody of the temporalties during the vacancy; the form of granting a licence to elect, (which is the original of our *conge d'eslire*) on refusal whereof the electors might proceed without it; and the right of approbation afterwards, which was not to be denied without a reasonable and lawful cause[p]. This grant was expressly recognized and confirmed in king John's *magna carta*[q], and was again established by statute 25 Edw. III. st. 6. §. 3.

But by statute 25 Hen. VIII. c. 20, the antient right of nomination was, in effect, restored to the crown: it being enacted that, at every future avoidance of a bishoprick, the king may send the dean and chapter his usual licence to proceed to election; which is always to be accompanied with a letter missive from the king, containing the name of the person whom he would have them elect: and, if the dean and chapter delay their election above twelve days, the nomination shall devolve to the king,
380 who may by letters patent appoint such person as he pleases. This election or nomination, if it be of a bishop, must be signified by the king's letters patent to the arch-bishop of the province; if it be of an arch-bishop, to the other arch-bishop and two bishops, or to four bishops; requiring them to confirm, invest, and consecrate the person so elected: which they are bound to per-

n Mod. Un. Hist. xxv. 363. xxix. 115.

o M. Paris. *A. D.* 1107.

p M. Paris, *A. D.* 1214. 1 Rym. *Foed.* 198.

q *cap* 1. *edit. Oxon.* 1759.

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form immediately, without any application to the see of Rome. After which the bishop elect shall sue to the king for his temporalties, shall make oath to the king and none other, and shall take restitution of his secular possessions out of the king's hands only. And if such dean and chapter do not elect in the manner by this act appointed, or if such arch-bishop or bishop do refuse to confirm, invest, and consecrate such bishop elect, they shall incur all the penalties of a *praemunire*.

An arch-bishop is the chief of the clergy in a whole province; and has the inspection of the bishops of that province, as well as of the inferior clergy; and may deprive them on notorious cause[r]. The arch-bishop has also his own diocese, wherein he exercises episcopal jurisdiction; as in his province he exercises archiepiscopal. As arch-bishop, he, upon receipt of the king's writ, calls the bishops and clergy of his province to meet in convocation: but without the king's writ he cannot assemble them[s]. To him all appeals are made from inferior jurisdictions within his province; and, as an appeal lies from the bishops in person to him in person, so it also lies from the consistory courts of each diocese to his archiepiscopal court. During the vacancy of any see in his province, he is guardian of the spiritualties thereof, as the king is of the temporalties; and he executes all ecclesiastical jurisdiction therein. If an archiepiscopal see be vacant, the dean and chapter are the spiritual guardians, ever since the office of prior of Canterbury was abolished at the reformation[t]. The arch-bishop is entitled to present by lapse to all the ecclesiastical livings in the disposal of his diocesan bishops, if not filled within 381
six months. And the arch-bishop has a customary prerogative, when a bishop is consecrated by him, to name a clerk or chaplain of his own, to be provided for by such suffragan bishop; in lieu of which it is now usual for the bishop to make over by deed to the arch-bishop, his executors and assigns, the next presentation of such dignity or benefice in the bishop's disposal within that see, as the arch-bishop himself shall choose; which is, therefore, called his *option*[u]: which options are only binding on the bishop

r Lord Raym. 541.

s 4 Inst. 322, 323.

t 2 Roll. Abr. 22.

u Cowel's Interp. tit. *option*.

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himself who grants them, and not on his successors. The prerogative itself seems to be derived from the legatine power formerly annexed by the popes to the metropolitan of Canterbury[w]. And we may add, that the papal claim itself (like most others of that encroaching see) was probably set up in imitation of the imperial prerogative called *primae* or *primariae preces;* whereby the emperor exercises, and hath immemorially exercised[x], a right of naming to the first prebend that becomes vacant after his accession in every church of the empire[y]. A right, that was also exercised by the crown of England in the reign of Edward I[z]; and which probably gave rise to the royal corodies which were mentioned in a former chapter[a]. It is likewise the privilege, by custom, of the arch-bishop of Canterbury, to crown the kings and queens of this kingdom. And he hath also by the statute 25 Hen. VIII. c. 21, the power of granting dispensations in any case, not contrary to the holy scriptures and the law of God, where the pope used formerly to grant them: which is the foundation of his granting special licences, to marry at any place or time, to hold two livings, and the like: and on this also is founded the right he exercises of conferring degrees, in prejudice of the two universities[b].

382 The power and authority of a bishop, besides the administration of certain holy ordinances peculiar to that sacred order, consist principally in inspecting the manners of the people and clergy, and punishing them in order to reformation, by ecclesiastical censures. To this purpose he has several courts under him, and may visit at pleasure every part of his diocese. His chancellor

w Sherlock of options, 1.

x Goldast. *constit. imper. tom.* 3, *page* 406.

y Dufresne. V. 806. Mod. Univ. Hist. xxix. 5.

z *Rex, &c. salutem. Scribatis episcopo Karl quod. Roberto de Icard pensionem suam, quam ad preces regis praedicto Roberto concessit, de caetero solvat; et de proxima ecclesia vacatura de collatione praedicti episcopi, quam ipse Robertus acceptaverit, respiciat. Brev.* 11 Edw. I, 3 Pryn. 1264.

a ch. 8, page 284.

b See the bishop of Chester's case. Oxon. 1721.

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is appointed to hold his courts for him, and to assist him in matters of ecclesiastical law; who, as well as all other ecclesiastical officers, if lay or married, must be a doctor of the civil law, so created in some university [c]. It is also the business of a bishop to institute, and to direct induction, to all ecclesiastical livings in his diocese.

Archbishopricks and bishopricks may become void by death, deprivation for any very gross or notorious crime, and also by resignation. All resignations must be made to some superior[d]. Therefore, a bishop must resign to his metropolitan; but the archbishop can resign to none but the king himself.

II. A dean and chapter are the council of the bishop, to assist him with their advice in affairs of religion, and also in the temporal concerns of his see [e]. When the rest of the clergy were settled in the several parishes of each diocese (as hath formerly [f] been mentioned) these were reserved for the celebration of divine service in the bishop's own cathedral; and the chief of them, who presided over the rest, obtained the name of *decanus* or dean, being probably at first appointed to superintend *ten* canons or prebendaries.

All antient deans are elected by the chapter, by *conge d'eslire* from the king, and letters missive of recommendation; in the same manner as bishops: but in those chapters, that were founded by Henry VIII out of the spoils of the dissolved monasteries, the deanery is donative, and the installation merely by the king's letters patent [g]. The chapter, consisting of canons or prebendaries, are sometimes appointed by the king, sometimes by the bishop, and sometimes elected by each other. 383

The dean and chapter are, as was before observed, the nominal electors of a bishop. The bishop is their ordinary and immediate superior; and has, generally speaking, the power of visiting them, and correcting their excesses and enormities. They

c Stat. 37 Hen. VIII. c. 17.
d Gibs. cod. 822.
e 3 Rep. 75. Co. Litt. 103, 300.
f Page 113, 114.
g Gibs. cod. 173.

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had also a check on the bishop at common law: for till the statute 32 Hen. VIII. c. 28, his grant or lease would not have bound his successors, unless confirmed by the dean and chapter [h].

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

III. An arch-deacon hath an ecclesiastical jurisdiction, immediately subordinate to the bishop, throughout the whole of his diocese, or in some particular part of it. He is usually appointed by the bishop himself; and hath a kind of episcopal authority, originally derived from the bishop, but now independent and distinct from his [k]. He therefore visits the clergy; and has his separate court for punishment of offenders by spiritual censures, and for hearing all other causes of ecclesiastical cognizance.

IV. The rural deans are very antient officers of the church [l], but almost grown out of use; though their deaneries still subsist as an ecclesiastical division of the diocese, or archdeaconry. They seem to have been deputies of the bishop, planted all round his diocese, the better to inspect the conduct of the parochial
384 clergy, to inquire into and report dilapidations, and to examine the candidates for confirmation; and armed, in minuter matters, with an inferior degree of judicial and coercive authority [m].

V. The next, and indeed the most numerous, order of men in the system of ecclesiastical polity, are the parsons and vicars

h Co. Litt. 103.

i Plowd. 498.

j Bro. *Abr. t. presentation.* 3. 61. Cro. Eliz. 542, 790. 2 Roll. Abr. 352, 4 Mod. 200. Salk. 137.

k 1 Burn. Eccl. Law, 68, 69.

l Kennet. Par. Antiq. 633.

m Gibs. Cod. 972, 1550.

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of churches: in treating of whom, I shall first mark out the distinction between them; shall next observe the method by which one may become a parson or vicar; shall then briefly touch upon their rights and duties; and shall, lastly, shew how one may cease to be either.

A parson, *persona ecclesiae*, is one that hath full possession of all the rights of a parochial church [2]. He is called parson, *persona*, because by his person the church, which is an invisible body, is represented; and he is in himself a body corporate, in order to protect and defend the rights of the church (which he personates) by a perpetual succession [n]. He is sometimes called the rector, or governor, of the church: but the appellation of *parson*, (however it may be depreciated by familiar, clownish, and indiscriminate use) is the most legal, most beneficial, and most honourable title that a parish priest can enjoy; because such a one, (sir Edward Coke observes) and he only, is said *vicem seu personam ecclesiae gerere*. A parson has, during his life, the freehold in himself of the parsonage house, the glebe, the tithes, and other dues. But these are sometimes *appropriated*; that is to say, the benefice is perpetually annexed to some spiritual corporation, either sole or aggregate, being the patron of the living; which the law esteems equally capable of providing for the service of the church, as any single private clergyman. This contrivance seems to have sprung from the policy of the monastic orders, who have never been deficient in subtile inventions for the increase of their own power and emoluments. At the first establishment of parochial clergy, the tithes of the parish were distributed in a fourfold division; one for the use of the bishop, another for maintaining the fabrick of the church, a third for the poor, and the fourth to provide for the incumbent. When the

n Co. Litt. 300.

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2. The ministers of the established church, in Virginia, before the revolution, were properly parsons. Their various rights, duties, &c. may be found in the edition of V. L. 1769, p. 3, 4, 28, 29, 59, 61, 246, 248, 250, 251, 311, 368, 484. Edi. 1785, p. 39, 117. 1784, c. 88. 1786, c. 12. 1788, c. 47. Sessions Acts.

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sees of the bishops became otherwise amply endowed, they were prohibited from demanding their usual share of these tithes, and the division was into three parts only. And hence it was inferred by the monasteries, that a small part was sufficient for the officiating priest; and that the remainder might be well applied to the use of their own fraternities, (the endowment of which was construed to be a work of the most exalted piety) subject to the burthen of repairing the church and providing for it's constant supply. And, therefore, they begged and bought, for masses and obits, and sometimes even for money, all the advowsons within their reach, and then appropriated the benefices to the use of their own corporation. But, in order to complete such appropriation effectually, the king's licence, and consent of the bishop, must first be obtained: because both the king and the bishop may sometime or other have an interest, by lapse, in the presentation to the benefice; which can never happen if it be appropriated to the use of a corporation, which never dies: and also because the law reposes a confidence in them, that they will not consent to any thing that shall be to the prejudice of the church. The consent of the patron also is necessarily implied, because (as was before observed) the appropriation can be originally made to none, but to such spiritual corporation, as is also the patron of the church; the whole being indeed nothing else, but an allowance for the patrons to retain the tithes and glebe in their own hands, without presenting any clerk, they themselves undertaking to provide for the service of the church [o]. When the appropriation is thus made, the appropriators and their successors are perpetual parsons of the church; and must sue and be sued, in all matters concerning the rights of the church, by the name of parsons [p].

This appropriation may be severed, and the church become disappropriate, two ways: as, first, if the patron or appropriator presents a clerk, who is instituted and inducted to the parsonage: for the incumbent so instituted and inducted is, to all intents and purposes, complete parson; and the appropriation, being once severed, can never be re-united again, unless by a re-

o Plowd. 496, 500. p Hob. 307.

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petition of the same solemnities [q]. And, when the clerk so presented is distinct from the vicar, the rectory thus vested in him becomes what is called a *sine-cure;* because he hath no cure of souls, having a vicar under him to whom that cure is committed [r]. Also, if the corporation which has the appropriation is dissolved, the parsonage becomes disappropriated at common law; because the perpetuity of person is gone, which is necessary to support the appropriation.

In this manner, and subject to these conditions, may appropriations be made at this day: and thus were most, if not all, of the appropriations at present existing originally made; being annexed to bishopricks, prebends, religious houses, nay, even to nunneries, and certain military orders, all of which were spiritual corporations. At the dissolution of monasteries by statutes 27 Hen. VIII. c. 28, and 31 Hen. VIII. c. 13, the appropriations of the several parsonages, which belonged to those respective religious houses, (amounting to more than one third of all the parishes in England [s]) would have been, by the rules of the common law, disappropriated; had not a clause in those statutes intervened, to give them to the king in as ample a manner as the abbots, &c. formerly held the same, at the time of their dissolution. This, though perhaps scarcely defensible, was not without example; for the same was done in former reigns, when the alien priories (that is, such as were filled by foreigners only) were dissolved and given to the crown [t]. And from these two roots have sprung all the lay appropriations or secular parsonages, which we now see in the kingdom; they having been afterwards granted out from time to time by the crown [u].

These appropriating corporations, or religious houses, were wont to depute one of their own body to perform divine service,

q Co. Litt. 46.

r Sine-cures might also be created by other means. 2 Burn. Eccl. Law. 347.

s Seld. Review of Tith. c. 9. Spelm. Apology, 35.

t 2 Inst. 584.

u Sir H. Spelman (of tithes, c. 29.) says, these are now called impropriations, as being *improperly* in the hands of laymen.

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and administer the sacraments, in those parishes of which the
387 society was thus the parson. This officiating minister was in reality no more than a curate, deputy, or vicegerent of the appropriator, and therefore called *vicarius* or *vicar*. His stipend was at the discretion of the appropriator, who was however bound of common right to find somebody, *qui illi de temporalibus, episcopo de spiritualibas, debeat respondere*[w]. But this was done in so scandalous a manner, and the parishes suffered so much by the neglect of the appropriators, that the legislature was forced to interpose: and accordingly it is enacted by statute 15 Ric. II. c. 6, that in all appropriations of churches, the diocesan bishop shall ordain (in proportion to the value of the church) a competent sum to be distributed among the poor parishioners annually; and that the vicarage shall be *sufficiently* endowed. It seems the parish were frequently sufferers, not only by the want of divine service, but also by withholding those alms, for which, among other purposes, the payment of tithes was originally imposed: and, therefore, in this act a pension is directed to be distributed among the poor parochians, as well as a sufficient stipend to the vicar. But he, being liable to be removed at the pleasure of the appropriator, was not likely to insist too rigidly on the legal sufficiency of the stipend: and, therefore, by statute 4 Hen. IV, c. 12, it is ordained, that the vicar shall be a secular person, not a member of any religious house; that he shall be vicar perpetual, not removeable at the caprice of the monastery; and that he shall be canonically instituted and inducted, and be sufficiently endowed, at the discretion of the ordinary, for these three express purposes, to do divine service, to inform the people, and to keep hospitality. The endowments in consequence of these statutes have usually been by a portion of the glebe, or land, belonging to the parsonage, and a particular share of the tithes, which the appropriators found it most troublesome to collect, and which are therefore generally called privy or small tithes; the greater, or predial, tithes being still reserved to their own use. But one and the same rule was not observed in the endowment of all vicarages. Hence, some are more liberally, and some more scantily, endowed: and hence the tithes of many

[w] Seld. Tith. c. 11, 1.

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things, as wood in particular, are in some parishes rectorial, and in some vicarial tithes[3].

The distinction therefore of a parson and vicar is this: the 388
parson has for the most part the whole right to all the ecclesiastical dues in his parish; but a vicar has generally an appropriator over him, entitled to the best part of the profits, to whom he is in effect perpetual curate, with a standing salary. Though in some places the vicarage has been considerably augmented by a large share of the great tithes; which augmentations were greatly assisted by the statute 29 Car. II. c. 8, enacted in favour of poor vicars and curates, which rendered such temporary augmentations (when made by the appropriators) perpetual.

The method of becoming a parson or vicar is much the same. To both there are four requisites necessary: holy orders; presentation; institution; and induction. The method of conferring the holy orders of deacon and priest, according to the liturgy and canons[x], is foreign to the purpose of these commentaries; any farther than as they are necessary requisites to make a complete parson or vicar, By common law, a deacon, of any age, might be instituted and inducted to a parsonage or vicarage: but it was ordained by statute 13 Eliz. c. 12, that no person under twenty-three years of age, and in deacon's orders, should be presented to any benefice with cure; and if he were not ordained priest within one year after his induction, he should be *ipso facto* deprived: and now, by statute 13 & 14 Car. II. c. 4, no person is capable to be admitted to any benefice, unless he hath been first ordained a priest; and then he is, in the language of the law, a clerk in orders. But if he obtains orders, or a licence to preach, by money or corrupt practices (which seems to be the true, though not the common, notion of

x See 2 Burn. Eccl. Law. 103.

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3. For a view of the laws relating to the glebes and churches in Virginia, see Appendix, note M.

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simony) the person giving such orders forfeits[y] 40*l.* and the person receiving 10*l.* and is incapable of any ecclesiastical preferment for seven years afterwards.

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

If an action at law be brought by the patron against the bishop for refusing his clerk, the bishop must assign the cause....

y Stat. 31 Eliz. c. 6.

z A layman may also be presented: but he must take priest's orders before his admission. 1 Burn. 103.

a 2 Roll. Abr. 355.

b Glanv. *l.* 13. *c.* 20.

c 2 Roll. Abr. 356. 2 Inst. 632. Stat. 3 Ric. II. c. 3. 7 Ric. II. c. 12.

d 5 Rep. 58.

e 2 Inst. 632.

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If the cause be of a temporal nature and the fact admitted, (as for instance, outlawry) the judges of the king's courts must determine it's validity, or, whether it be sufficient cause of refusal: but if the fact be denied, it must be determined by a jury. If the cause be of a spiritual nature, (as, heresy, particularly alleged) the fact if denied shall also be determined by a jury; and if the fact be admitted or found, the court upon consultation and advice of learned divines shall decide it's sufficiency[f]. If the cause be want of learning, the bishop need not specify in what points the clerk is deficient, but only allege that he is deficient[g]: 390
for the statute 9 Edw. II. st. 1. c. 13, is express, that the examination of the fitness of a person presented to a benefice belongs to the ecclesiastical judge. But because it would be nugatory in this case to demand the reason of refusal from the ordinary, if the patron were bound to abide by his determination, who has already pronounced his clerk unfit; therefore, if the bishop returns the clerk to be *minus sufficiens in literatura*, the court shall write to the metropolitan, to re-examine him, and certify his qualifications; which certificate of the archbishop is final[h].

If the bishop hath no objections, but admits the patron's presentation, the clerk so admitted is next to be instituted by him; which is a kind of investiture of the spiritual part of the benefice: for by institution the care of the souls of the parish is committed to the charge of the clerk. When a vicar is instituted, he (besides the usual forms) takes, if required by the bishop, an oath of perpetual residence; for the maxim of law is, that *vicarius non habet vicarium*: and, as the non-residence of the appropriators was the cause of the perpetual establishment of vicarages, the law judges it very improper for them to defeat the end of their constitution, and by absence to create the very mischief which they were appointed to remedy: especially as, if any profits are to arise from putting in a curate and living at a distance from the parish, the appropriator, who is the real parson, has undoubtedly the elder title to them. When the ordinary is

f 2 Inst, 632.
g 5 Rep. 58. 3 Leo. 313.
h 2 Inst. 632.

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also the patron, and *confers* the living, the presentation and institution are one and the same act, and are called a collation to a benefice. By institution or collation the church is full, so that there can be no fresh presentation till another vacancy, at least in the case of a common patron; but the church is not full against the king, till induction: nay even if a clerk is instituted upon the king's presentation, the crown may revoke it before induction, and present another clerk[j]. Upon insitution also the clerk may enter on the parsonage house and glebe, and take the tithes; but he cannot grant or let them, or bring an action for them, till induction.

391 Induction is performed by a mandate from the bishop to the arch-deacon, who usually issues out a precept to other clergymen to perform it for him. It is done by giving the clerk corporal possession of the church, as by holding the ring of the door, tolling a bell, or the like; and, is a form required by law, with intent to give all the parishioners due notice, and sufficient certainty of their new minister, to whom their tithes are to be paid. This, therefore, is the investiture of the temporal part of the benefice, as institution is of the spiritual. And when a clerk is thus presented, instituted and inducted into a rectory, he is then, and not before, in full and complete possession, and is called in law *persona impersonata*, or parson imparsonee[k].

The rights of a parson or vicar, in his tithes and ecclesiastical dues, fall more properly under the second book of these commentaries: and as to his duties, they are principally of ecclesiastical cognizance; those only excepted which are laid upon him by statute. And those are indeed so numerous, that it is impracticable to recite them here with any tolerable conciseness or accuracy. Some of them we may remark, as they arise in the progress of our inquiries, but for the rest I must refer myself to such authors as have compiled treatises expressly upon this subject[l]. I shall only just mention the article of

i Co. Litt. 334. k Co. Lit. 300.

l These are very numerous; but there are few which can be relied on with certainty. Among these are bishop Gibson's *codex*, Dr. Burn's *ecclesiastical law*, and the earlier editions of the *clergyman's law*, published under the name of Dr. Watson, but compiled by Mr. Place a barrister.

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residence, upon the supposition of which the law doth stile every parochial minister an incumbent. By statute 21 Hen. VIII. c. 13, persons willfully absenting themselves from their benefices, for one month together, or two months in the year, incur a penalty of 5 *l.* to the king, and 5 *l.* to any person that will sue for the same: except chaplains to the king, or others therein mentioned[m], during their attendance in the houshold of such as retain them: and also except[n] all heads of houses, magistrates, and professors in the universities, and all students under forty years of age residing there, *bona fide*, for study. Legal residence 392
is not only in the parish, but also in the parsonage house, if there be one: for it hath been resolved[o], that the statute intended residence, not only for serving the cure, and for hospitality; but also for maintaining the house, that the successor also may keep hospitality there: and if there be no parsonage house, it hath been holden that the incumbent is bound to hire one, in the same or some neighbouring parish *, to answer the purposes of residence. For the more effectual promotion of which important duty among the parochial clergy, a provision is made by the statute 17 Geo. III. c. 53, for raising money upon ecclesiastical benefices, to be paid off by annually decreasing installments, and to be expended in rebuilding or repairing the houses belonging to such benefices.

We have seen that there is but one way, whereby one may become a parson or vicar: there are many ways, by which one

m Stat. 25 Hen. VIII, c. 16. 33 Hen. VIII, c. 28.
n Stat. 28 Hen. VIII, c. 13. o 6 Rep. 21.

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* [In the case of Wilkinson *qui tam* against Allot, Easter term, 16 Geo. III. *B. R.* reported in Cowper's Reports, 429, it was adjudged, that if there be no parsonage-house, *that* is no excuse for the incumbent's residing *out* of the parish ;....that the statute of non-residence is a beneficial law, and, though a penal one, has received a strict construction against such as have offended ; and that, though there be no parsonage-house, yet the provision of the statute must be performed *cy pres* ; and, therefore, he must *reside somewhere in the parish.*]

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may cease to be so. 1. By death. 2. By cession; in taking another benefice. For by Statute 21 Hen. VIII. c. 13, if any one having a benefice of 8*l. per annum*, or upwards (according to the present valuation in the king's books [p],) accepts any other, the first shall be adjudged void, unless he obtains a dispensation; which no one is entitled to have, but the chaplains of the king and others therein mentioned, the brethren and sons of lords and knights, and doctors and bachelors of divinity and law, *admitted by the universities* of this realm. And a vacancy thus made, for want of a dispensation, is called session. 3. By consecration; for, as was mentioned before [q], when a clerk is promoted to a
493 a bishoprick, all his other preferments are void the instant that he is consecrated. But there is a method, by the favour of the crown, of holding such livings *in commendam*. *Commenda*, or *ecclesia commendata*, is a living commended by the crown to the care of a clerk, to hold till a proper pastor is provided for it. This may be temporary for one, two, or three years; or perpetual: being a kind of dispensation to avoid the vacancy of the living, and is called a *commenda retinere*. There is also a *commenda recipere*, which is to take a benefice *de novo*, in the bishop's own gift, or the gift of some other patron consenting to the same; and this is the same to him as institution and induction are to another clerk [qq]. 4. By resignation. But this is of no avail, till accepted by the ordinary; into whose hands the resignation must be made [r]. By deprivation; either, first, by sentence declaratory in the ecclesiastical courts, for fit and sufficient causes allowed by the common law; such as attainder of treason or felony [s], or conviction of other infamous crime in the king's courts; for heresy, infidelity [ss], gross immorality, and the like: or, secondly in pursuance of divers penal statutes, which declare the benefice void, for some nonfeasance or neglect, or else some malefeasance or crime. As, for simony [t]; for maintaining any doctrine in derogation of the king's supremacy, or of the thirty-nine articles, or of the book of common prayer [v], for neglecting

p Cro. Car. 456.
q p. 383.
qq Hob. 144.
r Cro. Jac. 198.
s Dyer. 108. Jenk. 210.
ss Fitz. *Abr.* t. *Trial.* 54.
t Stat. 31 Eliz. c. 6. 12 Ann. c. 12.
v Stat. 1 Eliz. c. 1 and 2. 13 Eliz c. 12.

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after institution to read the liturgy and articles in the church, or make the declarations against popery, or take the abjuration oath [u]; for using any other form of prayer than the liturgy of the church of England [w]; or for absenting himself sixty days in one year from a benefice belonging to a popish patron, to which the clerk was presented by either of the universities [x]; in all which and similar cases [y] the benefice is *ipso facto* void, without any formal sentence of deprivation.

VI. A curate is the lowest degree in the church: being in the same state that a vicar was formerly, an officiating temporary minister, instead of the proper incumbent. Though there are what are called *perpetual* curacies, where all the tithes are appropriated, and no vicarage endowed, (being for some particular reasons [z] exempted from the statute of Hen. IV,) but, instead thereof, such perpetual curate is appointed by the appropriator. With regard to the other species of curates, they are the objects of some particular statutes, which ordain, that such as serve a church during it's vacancy shall be paid such stipend as the ordinary thinks reasonable, out of the profits of the vacancy: or, if that be not sufficient, by the successor within fourteen days after he takes possession [a]: and that, if any rector or vicar nominates a curate to the ordinary, to be licensed to serve the cure in his absence, the ordinary shall settle his stipend under his hand and seal, not exceeding 50*l.* *per annum*, nor less than 20*l.* and on failure of payment may sequester the profits of the benefice [b]. 394

Thus much of the clergy, properly so called. There are also certain inferior ecclesiastical officers of whom the common law takes notice; and that, principally, to assist the ecclesiastical jurisdiction, where it is deficient in powers. On which officers I shall make a few cursory remarks.

u Stat. 13 Eliz. c. 12. 14 Car. II, c. 4. 1 Geo. I, c. 6.

w Stat. 1 Eliz. c. 2.

x Stat. 1 W. and M. c. 26.

y 6 Rep. 29, 30.

z 1 Burn. Eccl. Law. 427.

a Stat. 28 Hen *VIII.* c. 11.

b. Stat. 12 Ann. st. 2. c. 12.

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VII. Churchwardens are the guardians or keepers of the church, and representatives of the body of the parish[c] (3). They are sometimes appointed by the minister, sometimes by the parish, sometimes by both together, as custom directs. They are taken, in favour of the church, to be for some purposes a kind of corporation at the common law; that is, they are enabled by that name to have a property in goods and chattels, and to bring actions for them, for the use and profit of the parish. Yet they may not waste the church goods, but may be removed by the parish, and then called to account by action at the common law; but there is no method of calling them to account, but by first removing them; for none can legally do it, but those who are put in their place. As to lands, or other real property,
395 as the church, churchyard, &c. they have no sort of interest therein; but if any damage is done thereto, the parson only or vicar shall have the action. Their office also is to repair the church, and make rates and levies for that purpose: but these are recoverable only in the eccleslastical court. They are also joined with the overseers in the care and maintenance of the poor. They are to levy[d] a shilling forfeiture on all such as do not repair to church on sundays and holidays, and are empowered to keep all persons orderly while there; to which end it has been held that a churchwarden may justify the pulling off a man's hat, without being guilty of either an assault or trespass[e].

c In Sweden they have similar officers, whom they call *kior ckiowarianules*. Stiernhook. *l.* 3. *c.* 7.

d Stat. 1 Eliz. c. 2.

e 1 Lev. 196.

(3.) Of church wardens as officers of the established church, our laws, at present, take no notice: their powers and duties as such, expired with the established church. Their duties as overseers of the poor, were transferred to overseers of the poor to be chosen by the freeholders and housekeepers of the county, pursuant to the act of 1785, c. 4. Another part of their duty, in conjunction with the vesteries, (that of processioning the bounds of land) was likewise transferred to the overseers of the poor by the same act. That duty is now to be performed by two or more freeholders to be appointed by the courts. See note 53, p. 364.

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There are also a multitude of other petty parochial powers committed to their charge by divers acts of prrliament [f].

VIII. Parish clerks and sextons are also regarded by the common law; as persons who have freeholds in their offices: and therefore though they may be punished, yet they cannot be deprived, by ecclesiastical censures [g] [4]. The parish clerk was formerly very frequently in holy orders, and some are so to this day. He is generally appointed by the incumbent, but by custom may be chosen by the inhabitants; and if such custom appears, the court of king's bench will grant a *mandamus* to the arch-deacon to swear him, in, for the establishment of the custom turns it into a temporal or civil right [h].

f See Lambard of churchwardens, at the end of his *eirenarcha*; and Dr. Burn, tit. *church, churchwardens, visitations.*

g 2 Roll. Abr. 234.

h Cro. Car. 589.

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4. The laws of Virginia, at present, take no notice of these officers.

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CHAPTER THE TWELFTH.

OF THE CIVIL STATE.

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

That part of the nation which falls under our first and most comprehensive division, the civil state, includes all orders of men from the highest nobleman to the meanest peasant, that are not included under either our former division, of clergy, or under one of the two latter, the military and maritime states: and it may sometimes include individuals of the other three orders; since a nobleman, a knight, a gentleman, or a peasant, may become either a divine, a soldier, or a seaman.

The civil state consists of the nobility and the commonalty. Of the nobility, the peerage of Great Britain, or lords temporal, as forming (together with the bishops) one of the supreme branches of the legislature, I have before sufficiently spoken: we are here to consider them according to their several degrees, or titles of honour.

All degrees of nobility and honour are derived fom the king as their fountain [a]: and he may institute what new titles he pleases. Hence it is that all degrees of nobility are not of equal antiquity. Those now in use are dukes, marquesses, earls, viscounts and barons [b] [1].

a 4 Inst. 363.

b For the original of these titles on the continent of Europe, and their subsequent introduction into this island, see Mr. Selden's *titles of honour*.

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1. The whole system of American politics, and jurisprudence may be considered as resting upon four cardinal points, or pillars.

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1. A *duke*, though he be with us, in respect of his title of nobility, inferior in point of antiquity to many others, yet is superior to all of them in rank; his being the first title of dignity after the royal family[c]. Among the Saxons the Latin name of dukes, *duces*, is very frequent, and signified, as among the Romans, the commanders or leaders of their armies, whom, in their

c Camden. Britan. *tit. ordines.*

1st. The sovereignty of the people. 2d. The administration of the government by agents chosen by themselves. 3d. The separation of the legislative, executive, and judiciary powers from each other. 4th. Equality of political rights among all the citizens of the republic....Of all these we have occasionally found it necessary to take notice, in some of the preceding notes, as also more at large in the appendix to the former part of this volume. In this place, therefore, the Editor will only cite those parts of the federal and state constitutions and laws, which prohibit these distinctions of ranks, among the citizens of the United Utates, which form the subject of this chapter of the commentaries.

"No man, or set of men, are entitled to exclusive or separate "emoluments, or privileges from the community, but in considera-"tion of public services; which not being descendible, neither ought "the offices of magistrate, legislator, or judge, to be hereditary." Bill of Rights, Art. 4.

"No title of nobility shall be granted by the United States: and "no person holding any office of profit or trust under them, shall, "without consent of congress, accept of any present, emolument, "office, or title of any kind whatever, from any king, prince, or fo-"reign state." C. U. S. Art. 1. §. 9.

"No state shall grant any title of nobility." Ibid. Sec. 10.

"In case any alien applying to be admitted to citizenship, shall "have borne any hereditary title, or been of any of the orders of no-"bility, in the kingdom or state from whence he came, he shall, at "the time of his application to be admitted, make an express renun-"ciation of his title, or order of nobility, in the court to which his "application shall be made; which renunciation shall be recorded "in the court." L. U. S. 3 Cong. c. 85. 7 Cong. c. 28. With so many barriers against the introduction of political inequality, we may reasonably hope that it will never obtain a footing among us.

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own language they called pepezoad[d]; and in the laws of Henry I. (as translated by Lambard) we find them called *heretochii*. But after the Norman conquest, which changed the military polity of the nation, the kings themselves continuing for many generations *dukes* of Normandy, they would not honour any subjects with the title of duke, till the time of Edward III; who, claiming to be king of France, and thereby losing the ducal in the royal dignity, in the eleventh year of his reign created his son, Edward, the black prince, duke of Cornwall: and many of the royal family especially, were afterwards raised to the like honour. However, in the reign of queen Elizabeth, *A. D.* 1572[e], the whole order became utterly extinct; but it was revived about fifty years afterwards by her successor, who was remarkably prodigal of honours, in the person of George Villiers duke of Buckingham.

2. A *marquess*, *marchio*, is the next degree of nobility. His office formerly was (for dignity and duty were never separated by our ancestors) to guard the frontiers and limits of the kingdom; which were called the marches, from the teutonic word, *marche*, a limit: such as, in particular, were the marches of Wales and Scotland, while each continued to be an enemy's country. The persons, who had command there, were called lords marchers, or marquesses; whose authority was abolished by statute 27 Hen. VIII, c. 27: though the title had long before been made a mere ensign of honour; Robert Vere, earl of Oxford, being created marquess of Dublin, by Richard II, in the eighth year of his reign[f].

398 3. An *earl* is a title of nobility so antient, that it's original cannot clearly be traced out. Thus much seems tolerably certain: that among the Saxons they were called *ealdormen*, *quasi* elder-men, signifing the same as *senior* or *senator* among the Romans: and also *schiremen*, because they had each of them the civil government of a several division or shire. On the ir-

d This is apparently derived from the same root as the German hertzog, the antient appellation of dukes in that country. Seld. tit. hon. 2, 1, 12.

e Camden. Britan. *tit. ordines*. Spelman. *Gloss*. 191.

f 2 Inst. 5.

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ruption of the Danes, they changed the name to *eorles*, which, according to Camden[g], signified the same in their language. In Latin they are called *comites*, (a title first used in the empire), from being the king's attendants; "*a societate nomen sumpse-runt, reges enim tales sibi associant*[h]." After the Norman conquest they were, for some time, called *counts* or *countees*, from the French; but they did not long retain that name themselves though their shires are from thence called counties to this day. The name of *earls* or *comites* is now become a mere title, they having nothing to do with the government of the county; which, as has been more than once observed, is now entirely devolved on the sheriff, the earl's deputy, or *vice-comes*. In writs, and commissions, and other formal instruments, the king, when he mentions any peer of the degree of an earl, usually stiles him, "trusty and well beloved *cousin*:" an appellation as antient as the reign of Henry IV: who, being either by his wife, his mother, or his sisters, actually related or allied to every earl then in the kingdom, artfully and constantly acknowleged that connexion in all his letters and other public acts; from whence the usage has descended to his successors, though the reason has long ago failed.

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

5. A *baron*'s is the most general and universal title of nobility; for originally every one of the peers of superior rank had 399
also a barony annexed to his other titles[k]. But it hath sometimes happened, that, when an antient baron hath been raised to a new degree of peerage, in the course of a few generations the two titles have descended differently; one, perhaps, to the male descendants, the other to the heirs general; whereby, the earldom or other superior title hath subsisted without a barony: and there are, also, modern instances, where earls and viscounts

g Britan. *tit. ordines.*
h Bracton, *l.* 1, *c.* 8. Flet. *l.* 1, *c.* 5.
i 2 Inst. 5.
k 2 Inst. 5, 6.

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have been created without annexing a barony to their other honours; so that now the rule doth not hold universally, that all peers are barons. The original and antiquity of baronies have occasioned great inquiries among our English antiquaries. The most probable opinion seems to be, that they were the same with our present lords of manors; to which the name of court baron (which is the lord's court, and incident to every manor), gives some countenance. It may be collected from king John's *magna carta* [l], that originally, all lords of manors, or barons, that held of the king *in capite*, had seats in the great council, or parliament: till about the reign of that prince the conflux of them became so large and troublesome, that the king was obliged to divide them, and summon only the greater barons in person; leaving the small ones to be summoned by the sheriff, and (as it is said) to sit by representation in another house; which gave rise to the separation of the two houses of parliament [m]. By degrees the title came to be confined to the greater barons, or lords of parliament, only; and there were no other barons among the peerage but such as were summoned by writ, in respect of the tenure of their lands or baronies, till Richard the second first made it a mere title of honour, by conferring it on divers persons by his letters patent [n].

Having made this short inquiry into the original of our several degrees of nobility, I shall next consider the manner in which they may be created. The right of peerage seems to have been originally territorial, that is, annexed to lands, honors, castles, manors, and the like, the proprietors and possessors of which, were (in right of those estates) allowed to be peers of the
400 realm, and were summoned to parliament to do suit and service to their sovereign: and, when the land was alienated, the dignity passed with it as appendant. Thus the bishops still sit in the house of lords in right of succession to certain antient baronies annexed, or supposed to be annexed, to their episcopal lands [o]: and thus, in 11 Hen. VI, the possession of the castle of Arundel was adjudged to confer an earldom on it's possessor [p]. But af-

l *cap.* 14.
m Gilb. Hist. of exch. c. 3, Seld. tit. of hon. 2, 5, 21.
n 1 Inst. 9 Seld. *Jan. Angl.* 2, §. 66.
o Glan. *l.* 7, *c.* 1.
p Seld. tit. of hon. b. 2, c. 9, Sec. 5.

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terwards, when alienations grew to be frequent, the dignity of peerage was confined to the lineage of the party ennobled, and instead of territorial became personal. Actual proof of a tenure by barony, became no longer necessary to constitute a lord of parliament; but the record of the writ of summons to him or his ancestors was admitted as a sufficient evidence of the tenure.

Peers are now created either by writ, or by patent; for those who claim by prescription must suppose either a writ or patent made to their ancestors; though by length of time it is lost..... The creation by writ, or the king's letter, is a summons to attend the house of peers, by the stile and title of that barony, which the king is pleased to confer: that by patent is a royal grant to a subject of any dignity and degree of peerage. The creation by writ is the more antient way: but a man is not ennobled thereby, unless he actually take his seat in the house of lords; and some are of opinion that there must be at least two writs of summons, and a sitting in two distinct parliaments, to evidence an hereditary barony [q]: and, therefore, the most usual, because the surest way, is, to grant the dignity by patent, which enures to a man and his heirs, according to the limitations thereof, though he never, himself, makes use of it [r]. Yet it is frequent to call up the eldest son of a peer to the house of lords by writ of summons, in the name of his father's barony: because, in that case, there is no danger of his children's losing the nobility in case he never takes his seat; for they will succeed to their grandfather. Creation by writ has, also, one advantage over that by patent: for a person created by writ, holds the dignity to him *and his* 401
heirs, without any words to that purport, in the writ; but in letters patent there must be words to direct the inheritance, else the dignity enures only to the grantee for life [s]. For a man or woman may be created noble, for their own lives, and the dignity not descend to their heirs at all, or descend only to some particular heirs: as where a peerage is limited to a man, and the heirs male of his body by Elizabeth his present lady, and not to such heirs by any former, or future wife.

q Whitelocke of parl. c. 114. r Co. Litt. 16.
s Co. Litt. 9, 16.

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Let us next take a view of a few of the principal incidents attending the nobility, exclusive of their capacity as members of parliament, and as hereditary counsellors of the crown; both of which we have before considered. And first we must observe, that in criminal cases a nobleman shall be tried by his peers..... The great are always obnoxious to popular envy: were they to be judged by the people, they might be in danger from the prejudice of their judges; and would moreover be deprived of the privilege of the meanest subjects, that of being tried by their equals, which is secured to all the realm by *magna carta*, c. 29. It is said, that this does not extend to bishops: who, though they are lords of parliament, and sit there by virtue of their baronies which they hold *jure ecclesiae*, yet are not ennobled in blood, and consequently not peers with the nobility[ss]. As to peeresses, there was no precedent for their trial when accused of treason or felony, till after Eleanor dutchess of Gloucester, wife to the lord protector, was accused of treason and found guilty of witchcraft, in an ecclesiastical synod, through the intrigues of cardinal Beaufort. This very extraordinary trial gave occasion to a special statute, 20 Hen. VI. c. 9, which declares[t] the law to be, that peeresses, either in their own right or by marriage, shall be tried before the same judicature as other peers of the realm. If a woman, noble in her own right, marries a commoner, she still remains noble, and shall be tried by her peers: but if she be only noble by marriage, then by a second marriage with a commoner, she loses her dignity; for as by marriage it is gained, by marriage it is also lost[u]. Yet if a
402 dutchess dowager marries a baron, she continues a dutchess still; for all the nobility are *pares*, and therefore it is no degradation[v]. A peer, or peeress, (either in her own right or by marriage) cannot be arrested in civil cases[u]: and they have also many peculiar privileges annexed to their peerage in the course of judicial proceedings. A peer, sitting in judgment, gives not his verdict

ss 3 Inst. 30, 31.

t Moor. 769, 2 Inst. 53. 6 Rep. 52. Staundf. P. C. 152.

u Dyer. 79. Co. Litt. 16. v 2 Inst. 50.

u Finch. L. 355. 1 Ventr. 298.

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upon oath, like an ordinary juryman, but upon his honour[w]: he answers also to bills in chancery upon his honour, and not upon his oath[x]; but when he is examined as a witness either in civil or criminal cases, he must be sworn[y]: for the respect, which the law shews to the honour of a peer, does not extend so far as to overturn a settled maxim, that *in judicio non creditur nisi juratis*[z]. The honour of peers is however so highly tendered by the law, that it is much more penal to spread false reports of them and certain other great officers of the realm, than of other men: scandal against them being called by the peculiar name of *scandalum magnatum*, and subjected to peculiar punishments by divers antient statutes[a].

A peer cannot lose his nobility, but by death or attainder; though there was an instance in the reign of Edward the fourth, of the degradation of George Nevile duke of Bedford by act of parliament[b], on account of his poverty, which rendered him unable to support his dignity[c]. But this is a singular instance: which serves at the same time, by having happened, to shew the power of parliament: and, by having happened but once, to shew how tender the parliament hath been, in exerting so high a power. It hath been said indeed[d], that if a baron wastes his estate, so that he is not able to support the degree, the *king* may degrade him: but it is expressly held by later authorities[e], that a peer cannot be degraded but by act of *parliament*.

The commonalty, like the nobility, are divided into several 403
degrees; and, as the lords, though different in rank, yet all of

w 2 Inst. 49.

x 1 P. Wms. 146.

y Salk. 512.

z Cro. Car. 64.

a 3 Edw. I. c. 34. 2 Ric. II. st. 1. c. 5. 12 Ric. II. c. 11.

b 4 Inst. 355.

c The preamble to the act is remarkable; "forasmuch as oftentimes it is "seen, that when any lord is called to high estate, and hath not convenient "livelihood to support the same dignity, it induceth great poverty and indi-"gence, and causeth oftentimes great extortion, embracery, and maintenance "to be had; to the great trouble of all such countries where such estate shall "happen to be: therefore, &c."

d Moor. 678.

e 12 Rep. 107. 12 Mod. 56.

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them are peers in respect of their nobility, so the commoners, though some are greatly superior to others, yet all are in law peers, in respect of their want of nobility[f].

The first name of dignity, next beneath a peer, was antiently that of *vidames*, *vice-domini*, or *valvasors*[g]: who are mentioned by our antient lawyers[h] as *viri magnae dignitatis;* and sir Edward Coke[i] speaks highly of them. Yet they are now quite out of use; and our legal antiquaries are not agreed upon even their original or antient office.

Now therefore the first personal dignity, after the nobility, is a *knight* of the order of St. George, or *of the garter;* first instituted by Edward III, *A. D.* 1344[k]. Next (but not till after certain *official* dignities, as privy counsellors, the chancellors of the exchequer and duchy of Lancaster, the chief justice of the king's bench, the master of the rolls, and the other English judges) follows a *knight banneret;* who indeed by statutes 5 Ric. II. st. 2. c. 4, and 14 Ric. II. c. 11, is ranked next after barons: and his precedence before the younger sons of viscounts was confirmed to him by order of king James I, in the tenth year of his reign[l]. But, in order to entitle himself to this rank, he must have been created by the king in person, in the field, under the royal banners, in time of open war[m]. Else he ranks after *baronets;* who are the next order; which title is a dignity of inheritance, created by letters patent, and usually descendible to the issue male. It was first instituted by king James the first, *A. D.* 1611, in order to raise a competent sum for the reduction of the province of Ulster in Ireland; for which reason all baronets have the arms of Ulster superadded to their family coat. Next follow *knights of the bath;* an order instituted by
404 king Henry IV, and revived by king George the first. They are so called from the ceremony of bathing, the night before their creation. The last of these inferior nobility are *knights*

f 2 Inst. 29.
h Bracton. *l.* 1. *c.* 8.
k Seld. tit. of hon. 2, 5, 41.
m 4 Inst. 6.
g Camden. *Britan t. ordines.*
i 2 Inst. 667.
l *Ibid.* 2, 11, 3.

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bachelors; the most antient, though the lowest order of knighthood amongst us: for we have an instance[n] of king Alfred's conferring this order on his son Athelstan. The custom of the antient Germans was to give their young men a shield and a lance in the great council: this was equivalent to the *toga virilis* of the Romans: before this they were not permitted to bear arms, but were accounted as part of the father's household; after it, as part of the community[o]. Hence some derive the usage of knighting, which has prevailed all over the western world, since it's reduction by colonies from those northern heroes. Knights are called in Latin *equites aurati: aurati*, from the gilt spurs they wore; and *equites*, because they always served on horseback: for it is observable[p], that almost all nations call their knights by some appellation derived from an horse. They are also called in our law, *milites*, because they formed a part of the royal army, in virtue of their feodal tenures; one condition of which was, that every one who held a knight's fee immediately under the crown (which in Edward the second's time[q] amounted to 20*l. per annum*) was obliged to be knighted, and attend the king in his wars, or fine for his non-compliance. The exertion of this prerogative as an expedient to raise money in the reign of Charles the first, gave great offence: though warranted by law, and the recent example of queen Elizabeth: but it was by the statute 16 Car. I. c. 16, abolished; and this kind of knighthood has, since that time, fallen into great disregard.

These, sir Edward Coke says[r], are all the names of *dignity* in this kingdom, esquires and gentlemen being only names of *worship*. But before these last the heralds rank all colonels, 405
serjeants at law, and doctors in the three learned professions[s].

n Will. Malmb. *lib.* 2.

o Tac. *de Morib. Germ.* 13.

p Camd. *ibid.* Co. Litt. 74.

q Stat. *de milit.* 1 Edw. II.

r 2 Inst. 667.

s The rules of precedence in England may be reduced to the following table: in which those marked *, are entitled to the rank here allotted them, by statute 31 Hen. VIII. c. 10. Marked †, by statute 1 W. and M. c. 21. Marked ||, by letters patent 9, 10, and 14 Jac. I. which see in Seld. tit. of hon. II. 5. 46. and II. 11. 3. Marked ‡, by antient usage and established custom; for which see (among others) Camden's Britannia, *tit. ordines.* Milles's cata-

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Esquires and gentlemen are confounded together by sir Edward Coke, who observes[s], that every esquire is a gentleman, and a gentleman is defined to be one *qui arma gerit*, who bears

logue of honour, *edit.* 1610, and Chamberlayne's present state of England. b. 3. ch. 3.

TABLE OF PRECEDENCE.

* The king's children and grandchildren	* Barons
* ------- brethren	† Speaker of the house of commons
* ------- uncles	† Lords commissioners of the great seal
* ------- nephews	† Viscount's eldest sons
* Archbishop of Canterbury	‡ Earls' younger sons
* Lord chancellor or keeper, if a baron	‡ Barons' eldest sons
* Archbishop of York	‖ Knights of the Garter
* Lord treasurer	‖ Privy counsellors
* Lord presdt. of the council } if barons	‖ Chancellor of the exchequer
* Lord privy seal } if barons	‖ Chancellor of the duchy
* Lord great chamberlain. But see priv. stat. 1 Geo. I. c. 3. } above all peers of their own degree	‖ Chief justice of the king's bench
* Lord high constable } above all peers of their own degree	‖ Master of the rolls
* Lord marshall } above all peers of their own degree	‖ Chief justice of the common pleas
* Lord admiral } above all peers of their own degree	‖ Chief baron of the exchequer
* Lord steward of the household } above all peers of their own degree	‖ Judges and barons of the coif
* Lord chamberlain of the household } above all peers of their own degree	‖ Knights bannerets, royal
* Dukes	‖ Viscounts' younger sons
* Marquesses	‖ Barons' younger sons
‡ Dukes' eldest sons	‖ Baronets
* Earls	‖ Knights bannerets
‡ Marquesses' eldest sons	‡ Knights of the Bath
‡ Dukes' younger sons	‡ Knights bachelors
* Viscounts	‖ Baronet's eldest sons
‡ Earls' eldest sons	‖ Knights' eldest sons
‡ Marquesses' younger sons	‖ Baronets' younger sons
* Secretary of state, if a bishop	‖ Knights' younger sons
* Bishop of London	‡ Colonels
* ------ Durham	‡ Serjeants at law
* ------ Winchester	‡ Doctors
* Bishops	‡ Esquires
* Secretary of state, if a baron	‡ Gentlemen
	‡ Yeomen
	‡ Tradesmen
	‡ Artificers
	‡ Labourers

N. B. Married women and widows are entitled to the same rank among each other, as their husbands would respectively have borne between themselves, except such rank is merely professional or official; and unmarried women to the same rank as their eldest brothers would bear among men, during the lives of their fathers. 2 Inst. 668.

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coat armour, the grant of which adds gentility to a man's family: in like manner as civil nobility, among the Romans, was founded in the *jus imaginum*, or having the image of one ancestor at least, who had borne some curule office. It is, indeed, a matter somewhat unsettled, what constitutes the distinction, or who is a real *esquire*: for it is not an estate, however large, that confers this rank upon it's owner. Camden, who was himself a herald, distinguishes them the most accurately; and he reckons up four sorts of them [t]: 1. The eldest sons of knights, and their eldest sons, in perpetual succession [u]; 2. The eldest sons of younger sons of peers, and their eldest sons in like perpetual succession: both which species of esquires sir Henry Spelman entitles *armigeri natalitii* [w]. 3. Esquires created by the kings's letters patent, or other investiture; and their eldest sons. 4. Esquires by virtue of their offices; as justices of the peace, and others who bear any office of trust under the crown. To these may be added the esquires of knights of the bath, each of whom constitutes three at his installation: and all foreign, nay, Irish peers; for not only these, but the eldest sons of peers of Great Britain, though frequently titular lords, are only esquires in the law, and must be so named in all legal proceedings [x]. As for *gentlemen*, says sir Thomas Smith [y], they be made good cheap in this kingdom: for whosoever studieth the laws of the realm, who studieth in the universities, who professeth the liberal sciences, and (to be short) who can live idly, and without manual labour, and will bear the port charge, and countenance of a gentleman, he shall be called master, and shall be taken for a gentleman. A *yeoman* is he that hath free land of forty shillings by the year; who was antiently thereby qualified to serve on juries, vote for knights of the shire, and do any other act, where 407
the law requires one that is *probus et legalis homo* [z].

The rest of the commonalty are *tradesmen*, *artificers*, and *labourers*; who, (as well as all others) must in pursuance of the statute 1 Hen. V. c. 5, be stiled by the name and addition of their

t *Ibid.*
u 2 Inst. 667.
w Gloss. 43.
x 3 Inst. 30. 2 Inst. 667.
y Commonw. of Eng. b. 1. c. 29.
z 2 Inst. 668.

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estate, degree, or mystery, and the place to which they belong, or where they have been conversant, in all original writs of actions personal, appeals, and indictments, upon which process of outlawry may be awarded; in order, as it should seem, to prevent any clandestine or mistaken outlawry, by reducing to a specific certainty the person who is the object of its process [2].

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2. Herewith the laws of Virginia agree, 1789, c. 30. Edi. 1794, c. 74. Sec. 21.

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OF THE MILITARY AND MARITIME STATES.

THE military state includes the whole of the soldiery; or, such persons as are peculiarly appointed among the rest of the people for the safeguard and defence of the realm.

In a land of liberty, it is extremely dangerous to make a distinct order of the profession of arms. In absolute monarchies this is necessary for the safety of the prince, and arises from the main principle of their constitution, which is that of governing by fear: but, in free states, the profession of a soldier, taken singly and merely as a profession, is justly an object of jealousy. In these, no man should take up arms, but with a view to defend his country and it's laws: he puts not off the citizen when he enters the camp; but it is because he is a citizen, and would wish to continue so, that he makes himself for a while a soldier. The laws, therefore, and constitution of these kingdoms know no such state as that of a perpetual standing soldier, bred up to no other profession than that of war: and it was not till the reign of Henry VII, that the kings of England had so much as a guard about their persons[1].

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1. "Congress hath power to raise and support armies: but no "appropriation of money for that use, shall be for a longer term "than two years: to provide and maintain a navy: to make rules "for the government and regulation of the land and naval forces: "to provide for calling forth the militia to execute the laws of the "union, suppress insurrections, and repel invasions: and to pro- "vide for organizing, arming, and disciplining the militia, and for "governing such part of them as may be employed in the service

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In the time of our Saxon ancestors, as appears from Edward the confessor's laws[a], the military force of this kingdom was in the hands of the dukes or heretochs, who were constituted through every province and county in the kingdom; being taken out of

a c. *de heretochiis.*

"of the United States rserving to the states respectively, the appointment of officers, andthe authority of training the militia, according to the discipline prescribed by congress." C. U. S. Art. 1. §. 8.

"No state shall, without consent of congress, keep troops, or ships of war, in time of peace, or engage in war, unless actually invaded, or in such imminent danger as will not admit of delay." Ibid. §. 10.

"A well regulated militia being necessary to the security of a free state, the right of the people to keep and bear arms shall not be infringed. No soldier shall, in time of peace, be quartered in any house without the consent of the owner; nor in time of war but in a manner prescribed by law." Amendments to C. U. S. Art. 4, 5.

"A well regulated militia, composed of the body of the people trained to arms, is the proper, natural, and safe defence of a free state: standing armies, in time of peace, should be avoided as dangerous to liberty; and in all cases the military should be under strict subordination to, and governed by, the civil power." Bill of Rights, Art. 13.

"The president of the United States shall be commander in chief of the army and navy of the United States, and of the militia of the several states, when called into the actual service of the United States." C. U. S. Art. 2. §. 2. "He shall nominate, and by and with the advice and consent of the senate, shall appoint all officers of the United States, whose appointments are not otherwise provided for." Ibid.

"The governor of Virginia may embody the militia with the advice of the privy council, and when embodied, shall, alone, have the direction of the militia under the laws of the country. Militia officers may be appointed by the governor, with the advice of the privy council, or recommendations from the respective county courts: but the governor and council have a power of suspending any officer, and ordering a court martial on complaint of misbeha-

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the principal nobility, and such as were most remarkable for being "*sapientes, fideles, et animosi.*" Their duty was to lead and regulate the English armies, with a very unlimited power; "*prout eis visum fuerit, ad honorem coronae et utilitatem regni.*" And,

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"viour, or inability, or to supply vacancies of officers, happening "when in actual service." C. V. Art. 13.

Every able bodied white male citizen of the respective states, of the age of eighteen, and under forty-five years of age (except certain persons particularly excepted, and all persons who now are, or may be excepted by the laws of the respective states) shall be enrolled in the militia: and every person so enrolled shall, within six months, provide himself with arms, &c. as directed by the act, and shall appear so armed, &c. when called out to exercise, or into service. The arms so provided are exempted from distresses, and executions, for debt or taxes. The militia of the respective states shall be arranged into divisions, brigades, regiments, battalions, and companies, as the legislature of each state shall direct. Each brigade to consist of four regiments; each regiment of two battalions; each battalion of five companies: of which one, at least, shall be formed of grenadiers, light infantry or riflemen: and to each division there shall be at least one company of artillery, and one troop of horse: the dragoons to furnish their own horses and accoutrements. L. U. S. 2 Cong. c. 33.

The former system of militia laws, by which county lieutenants, colonels and other field officers were appointed in every county, being inapplicable to the system established by this act, it became necessary to pass other laws conformable thereto. For this purpose an act was passed, 1792, c. 4, which at the succeeding session was amended, 1793, c. 1, and both acts were again amended, and reduced into one act, by the act of 1795, c. 1, by which the counties were arranged into brigades, &c. pursuant to the act of congress. By this act, privy councillors, judges, clerks of courts, and of the general assembly, the attorney-general, treasurer, auditor, register of the land-office, and their clerks, inspectors of tobacco, professors and tutors, and students of colleges, or other public seminaries, ministers of the gospel, jailors, millers, and ferrymen, actually employed as such, and all quakers and menonists, religiously scrupulous of bearing arms, and having a certificate, are exempted from militia duty: but the latter must furnish approved substitutes for actual service. There must be at least eight musters of a company of militia, and one of a battalion, and one regimental muster in every year; and the commissioned officers of each regiment are to meet

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because of this great power, they were elected by the people in their full assembly, or folkmote, in the same manner as sheriffs were elected: following still that old fundamental maxim of the Saxon constitution, that where any officer was intrusted with

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once a year for the purpose of being trained and instructed by the brigade inspectors. In case of sudden invasion or insurrection in any county, the commanding officer of the militia of such county is authorised to order out the whole, or any part of his militia, and may also call upon the commanding officers of the neighbouring counties for assistance: and the militia, when in actual service are to be governed by the articles of war, established for the troops of the United States. All arms, ammunition, and equipments of the militia are exempted from execution and distress at all times, and their persons from arrests and process in civil cases, while going to, continuing at, and returning from musters, and while in actual service. L. V. 1795, c. 1. Sessions acts.

In case of invasion, or imminent danger thereof, the president of the United States may call forth the militia of the states most convenient to the place of danger; and in case of insurrection in any state against the government thereof, he may, on application of the legislature, or executive, (when the former cannot be convened) call forth the militia of any other state, or states, to suppress such insurrection. He may, in like manner, call forth the militia of the states whenever the laws of the United States shall be opposed by combinations too powerful to be suppressed by the ordinary course of judicial proceedings, or by the powers vested in the marshals, (viz. the same powers as sheriffs possess) by that act. The militia, when in service, shall be subject to the articles of war: but no person shall he compelled to serve therein more than three months in one year after arriving at the place of rendezvous, nor more than in due rotation. L. U. S. 3 Cong. c. 101.

The militia of the United states, appear to be considered as not yet completely organized, as may be inferred from the addresses and recommendations of the president of the United States to congress, upon that subject.

The military establishment of the United States, as fixed in May 1796, consists of less than 2000 non-commissioned officers and privates. See note 52. p. 334. This may be regarded I presume, as the peace establishment*. Any person enticing a soldier to desert

* It has since been reduced by an act passed in the seventh congress.

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such power, as if abused might tend to the oppression of the people, that power was delegated to him by the vote of the people themselves[b]. So too, among the antient Germans, the ancestors of our Saxon forefathers, they had their dukes, as well as kings, with an independent power over the military, as the kings had over the civil state. The dukes were elective, the kings hereditary: for so only can be consistently understood that passage of Tacitus[c], "*reges ex nobilitate, duces ex virtute sumunt;*" in constituting their kings, the family or blood royal was regarded; in chusing their dukes or leaders, warlike merit: just as Caesar relates of their ancestors in his time, that whenever they went to war, by way either of attack or defence, they *elected* leaders to command them[d]. This large share of power, thus conferred by the people, though intended to preserve the liberty of the subject, was perhaps unreasonably detrimental to the prerogative of the crown: and accordingly we find a very ill use made of it by Edric duke of Mercia, in the reign of king Edmund Ironside; who, by 410
his office of duke or heretoch, was entitled to a large command in the king's army, and by his repeated treacheries at last transferred the crown to Canute the Dane.

It seems universally agreed by all historians, that king Alfred first settled a national militia in this kingdom, and by his prudent

b "*Isti vero viri eliguntur per commune consilium, pro communi utilitate "regni, per provincias et patrias universas, et per singulos comitatus, in pleno "folkmote, sicut et vicecomites provinciarum et comitatuum elegi debent.*" *L. L. Edw. Confess. ibid.* See also Bede, *Eccl. Hist. l.* 5, c. 10.

c *De morib. Germ.* 7.

d "*Quum bellum civitas aut illatum defendit aut infert, magistratus qui ei "bello praesint deliguntur.*" *De bell. Gall. l.* 6. c. 22.

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may be fined not exceeding 300 dollars, or imprisoned not exceeding a year. And no non commissioned officer or private soldier shall be arrested or subject to arrest, for any debt under, twenty dollars, L. U. S. 4 Cong. c. 39. 7 Cong. c. 9.

The act of 5 Cong. c. 130, established rules for the better government of the United States. See also 6 Cong. c. 33, by which the former act is amended and repealed.

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

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

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

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

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In the mean time we are not to imagine that the kingdom was left wholly without defence in case of domestic insurrections, or the prospect of foreign invasions. Besides those, who by their military tenures were bound to perform forty days service in the field, first the assise of arms, enacted 27 Hen. II [g], and afterwards the statute of Winchester [h], under Edward I, obliged every man, according to his estate and degree, to provide a determinate quantity of such arms as were then in use, in order to keep the peace: and constables were appointed in all hundreds by the latter statute, to see that such arms were provided. These weapons were changed, by the statute 4 and 5 Ph. and M. c. 2, into others of more modern service: but both this and the former provisions were repealed in the reign of James I [i]. While these continued in force, it was usual from time to time for our princes to issue commissions of array, and send into every county officers in whom they could confide, to muster and array, (or set in military order) the inhabitants of every district; and the form of the commission of array was settled in parliament in the 5 Hen. IV, so as to prevent the insertion therein of any new penal clauses [k]. But it was also provided [l] that no man should be compelled to go out of the kingdom at any rate, nor out of his shire but in cases of urgent necessity; nor should provide soldiers unless by consent of parliament. About the reign of king Henry the eighth, or his children, lieutenants began to be introdnced [m] [2], as standing representatives of the crown, to keep the counties in military order; for we find them mentioned as known officers in the statute 4 and 5 Ph. and M. c. 3, though they had not been then long in use, for Camden speaks of them [n] in the time of queen Elizabeth, 412

g Hoved. *A. D.* 1181. h 13 Edw. *I*, c. 6.
i Stat. 1 Jac. *I*, c. 25. 21 Jac. *I*, c. 28.
k Rushworth. part. 3. page 662, 667. See 8 Rym. 374, &c.
l Stat. 1 Edw. *III*, st. 2. c. 5. and 7. 25 Edw. *III*. st. 5. c. 8.
m 15 Rym. 75.
n *Brit.* 103. Edi. 1594.

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2. The county lieutenants in Virginia, in cases of invasion or insurrection seem to have been invested with a similar character, V. L. 1757, c. 1, 2. Edi. 1769.

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as extraordinary magistrates constituted only in times of difficulty and danger. But the introduction of these commissions of lieutenancy, which contained in substance the same powers as the old commissions of array, caused the latter to fall into disuse.

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

Soon after the restoration of king Charles the second, when the military tenures were abolished, it was thought proper to ascertain the power of the militia, to recognize the sole right of the crown to govern and command them, and to put the whole into a more regular method of military subordination [o]: and
413 the order, in which the militia now stands by law, is principally built upon the statutes which were then enacted. It is true the two last of them are apparently repealed; but many of their provisions are re-enacted, with the addition of some new regulations, by the present militia laws: the general scheme of which is to discipline a certain number of the inhabitants of every county, chosen by lot for *three* years, and officered by the lord lieutenant, the deputy lieutenants, and other principal landholders, under a commission from the crown. They are not compella-

o 13 Car. *II*, c. 6. 14 Car. *II*, c. 3. 15 Car. *II*. c. 4.

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ble to march out of their counties, unless in case of invasion or actual rebellion within the realm, (or any of it's dominions or territories [oo]) nor in any case compellable to march out of the kingdom. They are to be exercised at stated times: and their discipline in general is liberal and easy: but when drawn out into actual service, they are subject to the rigours of martial law, as necessary to keep them in order. This is the constitutional security, which our laws [p] have provided for the public peace, and for protecting the realm against foreign or domestic violence.

When the nation was engaged in war, more veteran troops and more regular discipline were esteemed to be necessary, than could be expected from a mere militia. And, therefore, at such times more rigorous methods were put in use for the raising of armies and the due regulation and discipline of the soldiery: which are to be looked upon only as temporary excresences bred out of the distemper of the state, and not as any part of the permanent and perpetual laws of the kingdom. For martial law, which is built upon no settled principles, but is entirely arbitrary in it's decisions, is, as sir Matthew Hale observes [q], in truth and reality no law, but something indulged rather than allowed as a law. The necessity of order and discipline in an army is the 414
only thing which can give it countenance; and, therefore, it ought not to be permitted in time of peace, when the king's courts are open for all persons to receive justice according to the laws of the land. Wherefore, Thomas earl of Lancaster being condemned at Pontefract, 15 Edw. II. by martial law, his attainder was reversed 1 Edw. III, because it was done in time of peace [qq]. And it is laid down [r], that if a lieutenant or other, that hath commission of martial authority, doth in time of peace hang or otherwise execute any man by colour of martial law, this is murder; for it is against *magna carta* [s]. The petition of

oo Stat. 16 Geo. *III*, c. 3.

p 2 Geo. *III*, c. 20. 9 Geo. *III*, c. 42. 16 Geo. *III*, c. 3. 18 Geo. *III*, c. 14 and 59. 19 Geo. *III*, c. 72. [26 *Geo.* 3. c. 107.]

q Hist. C. L. c. 2.

qq 2 Brad. Appendix, 59.

r 3 Inst. 52.

s *Cap.* 29.

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right[t] moreover enacts, that no soldier shall be quartered on the subject without his own consent[u 3]; and that no commission shall issue to proceed within this land according to martial law. And, whereas, after the restoration, king Charles the second kept up about five thousand regular troops, by his own authority, for guards and garrisons; which king James the second by degrees increased to no less than thirty thousand, all paid from his own civil list; it was made one of the articles of the bill of rights[v], that the raising or keeping a standing army within the kingdom in time of peace, unless it be with consent of parliament, is against law[4].

But, as the fashion of keeping standing armies (which was first introduced by Charles VII, in France, *A. D.* 1445[w]) has of late years universally prevailed over Europe, (though some of it's potentates, being unable themselves to maintain them, are obliged to have recourse to richer powers, and receive subsidiary pensions for that purpose) it has also for many years past, been annually judged necessary by our legislature, for the safety of the kingdom, the defence of the possessions of the crown of Great Britain, and the preservation of the balance of power in Europe, to maintain even in time of peace a standing body of troops, under the command of the crown; who are, however, *ipso facto* disbanded at the expiration of every year, unless continued by parliament[5]. And it was enacted by statute 10 W.

t 3 Car. I. See also Stat. 31 Car. II. chap. 1.

u Thus, in Poland, no soldier can be quartered upon the gentry, the only freemen in that republic. Mod. Univ. Hist. xxxiv. 23.

v Statute 1 William and Mary, st. 2. c. 2.

w Robertson, Cha. V. i. 94.

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3. No soldier shall in time of peace be quartered in any house, without the consent of the owner; nor in time of war, but in a manner to be prescribed by law. Amdts. to C. U. S. Art. 4.

4. Standing armies in time of peace, should be avoided as dangerous to liberty. Bill of Rights, Art. 13. They can only be raised and kept, by authority of Congress. C. U. S. Art. 1. §. 8. L. U. S. 4 Cong. c. 39.

5. The acts to ascertain and fix the military establishment of the United States, L. U. S. 4 Cong. c. 39. and 7 Congress, c. 9, contain-

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III. c. 1, that not more than twelve thousand regular forces should be kept on foot in Ireland, though paid at the charge of that kingdom; which permission is extended by statute 8 Geo. III. c. 13, to 16,235 men, in time of peace.

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

To keep this body of troops in order, an annual act of parliament likewise passes, "to punish mutiny and desertion, and for the better payment of the army and their quarters." This regulates the manner in which they are to be dispersed among the several inn-keepers and victuallers throughout the kingdom; and establishes a law martial for their government. By this,

x Sp. L. 11. 6.

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ed no limits to their duration, respectively: but the constitution expressly provides, that no appropriations of money for the support of an army shall be made for a longer term than two years. C. U. S. Art. 1. §. 8.

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among other things, it is enacted, that if any officer or soldier shall excite, or join any mutiny, or knowing of it, shall not give notice to the commanding officer: or shall desert, or list in any other regiment, or sleep upon his post, or leave it before he is relieved, or hold correspondence with a rebel or enemy, or strike or use violence to his superior officer, or shall disobey his lawful commands: such offender shall suffer such punishment as a court martial shall inflict, though it extend to death itself.

However expedient the most strict regulations may be in time of actual war, yet, in times of profound peace, a little relaxation of military rigor would not, one should hope, be productive of much inconvenience. And, upon this principle, though by our standing laws[y] (still remaining in force, though not attended to) desertion in time of war is made felony, without benefit of clergy, and the offence is triable by a jury and before justices at the common law; yet, by our militia laws beforementioned, a much lighter punishment is inflicted for desertion in time of peace. So, by the Roman law also, desertion in time of war was punished with death, but more mildly in time of tranquility[z]. But our mutiny act makes no such distinction: for any of the faults above-mentioned are, equally at all times, punishable with death itself, if a court martial shall think proper. This discretionary power of the court martial is indeed to be guided by the directions of the crown; which, with regard to military offences, has almost an absolute legislative power[a]. "His majesty, says the act, may form articles of war[6], and constitute "courts martial, with power to try any crime by such articles,

y Stat. 18 Hen. VI. c. 19, 2 & 3 Edw. VI. c. 2.

z *Ff.* 49, 16, 5.

a A like power over the marines is given to the lords of the admiralty, by another annual act "for the regulation of his majesty's marine forces while on "shore."

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6. It belongs to congress, and not to the executive, to make rules for the government and regulation of the land and naval forces. C. U. S. Art. 1. §. 8. The

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"and inflict penalties by sentence or judgment of the same." A vast and most important trust! an unlimited power to create crimes, and annex to them any punishments, not extending to life or limb! These are indeed forbidden to be inflicted, except 417
for crimes declared to be so punishable by this act; which crimes we have just enumerated, and, among which, we may observe that any disobedience to lawful commands is one. Perhaps in in some future revision of this act, which is in many respects hastily penned, it may be thought worthy the wisdom of parliament to ascertain the limits of military subjection, and to enact express articles of war for the government of the army, as is done for the government of the navy: especially as, by our present constitution, the nobility and gentry of the kingdom, who serve their country as militia officers, are annually subjected to the same arbitrary rule, during their time of exercise.

One of the greatest advantages of our English law is, that not only the crimes themselves which it punishes, but also the penalties which it inflicts, are ascertained and notorious: nothing is left to arbitrary discretion: the king by his judges dispenses what the law has previously ordained; but is not himself the legislator. How much, therefore, is it to be regretted, that a set of men, whose bravery has so often preserved the liberties of their country, should be reduced to a state of servitude in the midst of a nation of freemen? for sir Edward Coke will inform us [a], that it is one of the genuine marks of servitude, to have the

a 4 Inst. 332.

The sentences of general courts martial, in time of peace, extending to life or limb, or the dismission of a commissioned officer, or which shall, either in peace or war, respect a general officer, shall with the whole proceedings be laid before the president of the United States, who may direct their execution, or not, as he may think proper. L. U. S. 4 Cong. c. 39. 7 Cong. c. 9.

The troops shall be governed by the articles of war established by the former congress, (except such as may be altered or amended by the last mentioned act,) so far as they may be applicable to the constitution of the United States. Ibid. and 7 Cong. c. 9. §. 10.

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law, which is our rule of action, either concealed or precarious: "*misera est servitus ubi jus est vagum aut incognitum.*" Nor is this state of servitude quite consistent with the maxims of sound policy observed by other free nations. For, the greater the general liberty is which any state enjoys, the more cautious has it usually been in introducing slavery in any particular order or profession. These men, as baron Montesquieu observes [b], seeing the liberty which others possess, and which they themselves are excluded from, are apt (like eunuchs in the eastern seraglios) to live in a state of perpetual envy and hatred towards the rest of the community; and indulge a malignant pleasure in contributing to destroy those privileges, to which they can never be ad-
418 mitted. Hence have many free states, by departing from this rule, been endangered by the revolt of their slaves: while, in absolute and despotic governments where no real liberty exists, and consequently no invidious comparisons can be formed, such incidents are extremely rare. Two precautions are, therefore, advised to be observed in all prudent and free governments: 1. To prevent the introduction of slavery at all: or, 2. If it be already introduced, not to intrust those slaves with arms; who will then find themselves an overmatch for the freemen. Much less ought the soldiery to be an exception to the people in general, and the only state of servitude in the nation.

But as soldiers, by this annual act, are thus put in a worse condition than any other subjects, so by the humanity of our standing laws, they are in some cases put in a much better. By statute 43 Eliz. c. 3, a weekly allowance is to be raised in every county for the relief of soldiers that are sick, hurt, and maimed: not forgetting the royal hospital at Chelsea for such as are worn out in their duty [7]. Officers and soldiers that have been in the

b Sp. L. 15, 12.

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7. Officers and soldiers wounded, or disabled, while in the line of their duty in public service, shall be placed on the list of invalids, at such rate of pay, and under such regulations, as shall be directed by the president: but the compensation to an officer shall never exceed one half of his monthly pay, at the time when wounded or dis-

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king's service, are by several statutes, enacted at the close of several wars, at liberty to use any trade or occupation they are fit for, in any town in the kingdom (except the two universities) notwithstanding any statute, custom, or charter to the contrary. And soldiers in actual military service may make nuncupative wills, and dispose of their goods, wages, and other personal chattels, without those forms, solemnities, and expenses, which the law requires in other cases[c 8]. Our law does not indeed extend this privilege so far as the civil law; which carried it to an extreme that borders upon the ridiculous. For if a soldier, in the article of death, wrote any thing in bloody letters on his shield, or in the dust of the field with his sword, it was a very good military testament[d]. And thus much for the military state, as acknowledged by the laws of England.

The *maritime* state is nearly related to the former[9]: though much more agreeable to the principles of our free constitution. The royal navy of England hath ever been it's greatest defence and ornament; it is it's antient and natural strength; the floating bulwark of the island; an army, from which, however strong and powerful, no danger can ever be apprehended to liberty: and ac- 419

c Stat. 29 Car. II, c. 3. 5 W. III, c. 21. Sec. 6.

d *Si milites quid in clypeo literis sanguine sue rutilantibus adnotaverint, aut in pulvere inscripserint gladio suo, ipso tempore quo, in praelio, vitae sortem derelinquunt, hujusmodi voluntatem stabilem esse oportet.* Cod. 6, 21, 15.

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abled; and to a non-commissioned officer, private, or musician, shall never exceed five dollars per month. L. U. S. 4 Cong. c. 39, and the act of 7 Cong. c. 9, makes a similar provision for them; and also makes provision for the widows and children of commissioned officers dying of wounds received in the service of the United States, equal to one half of the monthly pay of such officer for five years, from the time of his death. But the widow forfeits her part thereof, in case of marrying again.

8. Any soldier in actual military service, or any mariner or seaman, being at sea, may dispose of his chattels by nuncupative will. V. L. 1748, c. 3. Edi. 1769. 1785, c. 61. Edi. 1794, c. 92.

9. See note 1, at the beginning of this chapter. See L. U. S. 5 Cong. c. 130. 6 Cong. c. 33.

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cordingly it has been assiduously cultivated, even from the earliest ages. To so much perfection was our naval reputation arrived in the twelfth century, that the code of maritime laws, which are called the laws of Oleron, and are received by all nations in Europe as the ground and substruction of all their marine constitutions, was confessedly compiled by our king Richard the first, at the isle of Oleron on the coast of France, then part of the possessions of the crown of England [e]. And yet, so vastly inferior were our ancestors in this point to the present age, that even in the maritime reign of queen Elizabeth, sir Edward Coke [f] thinks it matter of boast, that the royal navy of England then consisted of *three and thirty* ships. The present condition of our marine is, in great measure, owing to the salutary provisions of the statutes, called the navigation acts; whereby the constant increase of English shipping and seamen was not only encouraged, but rendered unavoidably necessary. By the statute 5 Richard II, c. 3, in order to augment the navy of England, then greatly diminished, it was ordained, that none of the king's liege people should ship any merchandize out of or into the realm, but only in ships of the king's ligeance, on pain of forfeiture. In the next year, by statute 6 Ric. II. c. 8, this wise provision was enervated, by only obliging the merchants to give English ships (if able and sufficient) the preference. But the most beneficial statute for the trade and commerce of these kingdoms is that navigation-act, the rudiments of which were first framed in 1650 [g], with a narrow partial view: being intended to mortify our own sugar islands, which were disaffected to the parliament, and still held out for Charles II, by stopping the gainful trade which they
420 then carried on with the Dutch [h]; and at the same time to clip the wings of those our opulent and aspiring neighbours. This prohibited all ships of foreign nations from trading with any English plantations without licence from the council of state. In 1651 [j], the prohibition was extended also to the mother country: and no goods were suffered to be imported into England, or any of it's dependencies, in any other than English bottoms; or in the ships of that European nation, of which the merchandize im-

e 4 Inst. 144. *Coutumes de la mer.* 2. f 4 Inst. 50.
g Scobell. 132. h Mod. Un. Hist. xli. 289.
j Scobell. 176.

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ported was the genuine growth or manufacture. At the restoration, the former provisions were continued, by statute 12 Car. II. c. 18, with this very material improvement, that the master and three-fourths of the mariners shall also be English subjects.

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

1. First, for their supply. The power of impressing sea-faring men for the sea service, by the king's commission, has been a matter of some dispute, and submitted to with great reluctance [10]; though it hath very clearly and learnedly been shewn, by sir Michael Foster [i], that the practice of impressing, and granting powers to the admiralty for that purpose, is of very antient date, and hath been uniformly continued by a regular series of precedents to the present time: whence he concludes it to be part of the common law [k]. The difficulty arises from hence, that no statute has expressly declared this power to be in the crown, though many of them very strongly imply it. The statute 2 Ric. II. c. 4, speaks of mariners being arrested and retained for the king's service, as of a thing well known and practised without dispute; and provides a remedy against their running away. By a later statute [l], if any waterman, who uses the river 419*
Thames, shall hide himself during the execution of any commission of pressing for the king's service, he is liable to heavy penalties. By another [m], no fisherman shall be taken by the queen's commission to serve as a mariner; but the commission

i Rep. 154.
k See also Comb. 245. Barr. 334.
l Stat. 2 and 3 Ph. and M. c. 16.
m Stat. 5 Eliz. c. 5.

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10. There is nothing in the constitution of the United States, which warrants a supposition, that such a power as that of impressment can ever be authorised, or exercised under the government of the United States. On the contrary, the principles of the constitution, and the nature of our government, strongly militate against the assumption or countenancing of such a power.

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shall be first brought to two justices of the peace, inhabiting near the sea coast where the mariners are to be taken, to the intent that the justices may chuse out and return such a number of able-bodied men, as in the commission are contained, to serve her majesty. And, by others [n], especial protections are allowed to seamen in particular circumstances, to prevent them from being impressed. And ferrymen are also said to be privileged from being impressed, at common law [o]. All which do most evidently imply a power of impressing to reside somewhere; and, if any where, it must from the spirit of our constitution, as well as from the frequent mention of the king's commission, reside in the crown alone.

But, besides this method of impressing, (which is only defensible from public necessity, to which all private considerations must give way) there are other ways that tend to the increase of seamen, and manning the royal navy. Parishes may bind out poor boys apprentices to masters of merchantmen [11], who shall be protected from impressing for the first three years; and if they are impressed afterwards, the masters shall be allowed their wages [p]: great advantages, in point of wages, are given to volunteer seamen in order to induce them to enter into his majesty's service [q]: and every foreign seaman, who during a war shall serve two years in any man of war, merchantman, or privateer, is naturalized *ipso facto* [r]. About the middle of king

n See Stat. 7 and 8 W. III, c. 21. 2 Ann. c. 6. 4 and 5 Ann. c. 19. 13 Geo. II. c. 17. 2 Geo. III, c. 15. 11 Geo. III, c. 38. 19 Geo. III, c. 75, &c.

o Sav. 14.

p Stat. 2 Ann. c. 6.

q Stat. 31 Geo. II, c. 10.

r Stat. 13 Geo. II, c. 3.

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11. By the act of 1785, c. 59, it was provided, that boys above ten years of age who should beg for alms, or whose parents might be chargeable to the county, might, by the county court, be bound apprentices, till the age of twenty-one years, to the owners or masters of ships belonging to any port within the commonwealth. But that provision was omitted in the revisal of 1792. Edi. 1794, c. 102.

As to seamen in the merchant service, see L. U. S: 1 Cong. 2 Sess. c. 29.

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William's reign, a scheme was set on foot [s] for a register of seamen to the number of thirty thousand, for a constant and regular supply of the king's fleet; with great privileges to the registered men, and, on the other hand, heavy penalties in case of their non-appearance when called for: but this registry, being judged to be ineffectual as well as oppressive, was abolished by statute 9 Ann. c. 21. 420*

2. The method of ordering seamen in the royal fleet, and keeping up a regular discipline there, is directed by certain express rules, articles, and orders, first enacted by the authority of parliament soon after the restoration [t]; but, since new modelled and altered, after the peace of Aix la Chapelle [u], to remedy some defects which were of fatal consequence in conducting the preceding war. In these articles of the navy almost every possible offence is set down, and the punishment thereof annexed ([11]): in which respect the seamen have much the advantage over their brethren in the land service; whose articles of war are not enacted by parliament, but framed from time to time at the pleasure of the crown. Yet from whence this distinction arose, and why the executive power, which is limited so properly with regard to the navy, should be so extensive with regard to the army, it is hard to assign a reason: unless it proceeded from the perpetual establishment of the navy, which rendered a permanent law for their regulation expedient; and the temporary duration of the army, which subsisted only from year to year, and might therefore with less danger be subjected to discretionary government. But, whatever was apprehended at the first formation of the mutiny act, the regular renewal of our standing force at the entrance of every year, has made this distinction idle. For, if from experience past we may judge of future events, the army is now lastingly ingrafted into the British constitution; with this singularly fortunate circumstance, that any branch of the legislature may annually put an end to it's legal existence, by refusing to concur in it's continuance.

s Stat. 7 & 8 W. III. c. 21. t Stat. 13 Car. II. st. 1. c. 9.
u Stat. 22 Geo. II, c. 23, amended by 19 Geo III, c. 17.

(11.) See L. U. S. 6 Cong. c. 33, at large, accordant.

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3. With regard to the privileges conferred on sailors, they are pretty much the same with those conferred on soldiers; with regard to relief when maimed or wounded, or superannuated, either by county rates, or the royal hospital at Greenwich; with regard also to the exercise of trades, and the power of making nuncupative testaments: and farther [w], no seaman aboard his majesty's ships can be arrested for any debt, unless the same be sworn to amount to at least twenty pounds; though, by the annual mutiny acts, a soldier may be arrested for a debt which extends to half that value, but not to a less amount [12].

w Stat. 31 Geo. II, c. 10.

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12. Any mariner or seaman, being at sea, may make a nuncupative will. L. V. 1748, c. 3. Edi. 1769. 1785, c. 61. 1794, c. 92. See, also, L. U. S. 5 Cong. c. 7, 94, 142. 6 Cong. c. 33; and by the act of 7 Cong. c. 9, no person under the age of twenty-one years shall be enlisted, or held in the service of the United States, without the consent of his parent, guardian, or master, first had and obtained..... And by the same act it is further provided, that no non-commissioned officer, musician, or private, shall be arrested, or subject to arrest, or to be taken in execution, for any debt under the sum of twenty dollars, contracted before enlistment, or for any debt contracted after enlistment.

By the act of 5 Cong. c. 7, any officer or seaman belonging to the navy of the United States, who may be wounded or disabled while in the line of his duty, shall be placed on the list of invalids. And by another act of the same session, c. 94, a fund for building marine hospitals is established, for the accommodation of sick and disabled seamen....By an act of the succeeding session, c. 130, every officer and seaman belonging to the navy, who may be disabled in the line of his duty, is entitled to half pay for his own life, and the life of his wife, if married at the time of receiving his wound. And by another act of the same session, c. 142, they are entitled to the same benefit of the smarine hospitals as other sick and disabled seamen. Further provision, on the same subject, has been made by the act of 7 Cong. c. 51.

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OF MASTER AND SERVANT.

HAVING thus commented on the rights and duties of persons, as standing in the *public* relations of magistrates and people, the method I have marked out now leads me to consider their rights and duties in *private* economical relations.

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

In discussing the relation of *master* and *servant*, I shall, first, 423
consider the several sorts of servants, and how this relation is

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created and destroyed: secondly, the effect of this relation with regard to the parties themselves: and, lastly, it's effect with regard to other persons.

I. As to the several sorts of servants: I have formerly observed[a] that pure and proper slavery does not, nay cannot, subsist in England: such I mean, whereby an absolute and unlimited power is given to the master over the life and fortune of the slave. And indeed it is repugnant to reason, and the principles of natural law, that such a state should subsist any where. The three origins of the right of slavery, assigned by Justinian[b], are all of them built upon false foundations[c]. As, first, slavery is held to arise "*jure gentium*," from a state of captivity in war; whence slaves are called *mancipia*, *quasi manu capti*. The conqueror, say the civilians, had a right to the life of his captive; and, having spared that, has a right to deal with him as he pleases. But it is an untrue position, when taken generally, that by the law of nature or nations, a man may kill his enemy: he has only a right to kill him, in particular cases; in cases of absolute necessity, for self-defence; and it is plain this absolute necessity did not subsist, since the victor did not actually kill him, but made him prisoner. War is itself justifiable only on principles of self-preservation; and, therefore, it gives no other right over prisoners, but merely to disable them from doing harm to us, by confining their persons: much less can it give a right to kill, torture, abuse, plunder, or even to enslave, an enemy, when the war is over. Since, therefore, the right of *making* slaves by captivity depends on a supposed right of slaughter, that foundation failing, the consequence drawn from it must fail likewise. But, secondly, it is said that slavery may begin "*jure civili*;" when one man sells himself to another. This, if only meant of contracts to serve or work for
424 another, is very just: but when applied to strict slavery, in the sense of the laws of old Rome or modern Barbary, is also impossible. Every sale implies a price, a *quid pro quo*, an equiva-

a Page 127.

b *Servi aut fiunt, aut nascuntur: fiunt jure gentium, aut jure civili: nascuntur ex ancillis nostris. Inst.* 1, 3, 4.

c Montesq. Sp. L. xv. 2.

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lent given to the seller in lieu of what he transfers to the buyer: but what equivalent can be given for life, and liberty, both of which (in absolute slavery) are held to be in the master's disposal? His property also, the very price he seems to receive, devolves *ipso facto* to his master, the instant he becomes his slave. In this case, therefore, the buyer gives nothing, and the seller receives nothing: of what validity then can a sale be, which destroys the very principles upon which all sales are founded? Lastly, we are told, that besides these two ways by which slaves "*fiunt*," or are acquired, they may also be hereditary: "*servi nascuntur*;" the children of acquired slaves are *jure naturae*, by a negative kind of birthright, slaves also. But this, being built on the two former rights, must fall together with them. If neither captivity, nor the sale of one's self, can by the law of nature and reason reduce the parent to slavery, much less can they reduce the offspring.

Upon these principles the law of England abhors, and will not endure the existence of, slavery within this nation: so that when an attempt was made to introduce it, by statute 1 Edw. VI. c. 3, which ordained, that all idle vagabonds should be made slaves, and fed upon bread and water, or small drink, and refuse meat; should wear a ring of iron round their necks, arms, or legs; and should be compelled by beating, chaining, or otherwise, to perform the work assigned them, were it never so vile; the spirit of the nation could not brook this condition, even in the most abandoned rogues; and, therefore, this statute was repealed in two years afterwards[d]. And now it is laid down[e], that a slave or negro, the instant he lands in England, becomes a freeman; that is, the law will protect him in the enjoyment of his person, and his property. Yet, with regard to any right which the master may have lawfully acquired to the perpetual service of John or Thomas, this will remain exactly in the same state as before: 425
for this is no more than the same state of subjection for life, which every apprentice submits to for the space of seven years, or sometimes for a longer term. Hence too it follows, that the infamous and unchristian practice of withholding baptism from negro ser-

d Stat. 3 and 4 Edw. VI. c. 16. e Salk. 666.

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vants, lest they should thereby gain their liberty, is totally without foundation, as well as without excuse. The law of England acts upon general and extensive principles: it gives liberty, rightly understood, that is, protection to a jew, a turk, or a heathen, as well as to those who profess the true religion of Christ; and it will not dissolve a civil obligation between master and servant, on account of the alteration of faith in either of the parties: but the slave is entitled to the same protection in England before, as after, baptism; and, whatever service the heathen negro owed of right to his American master, by general not by local law, the same (whatever it be) is he bound to render when brought to England and made a christian[1].

1. The first sort of servants, therefore, acknowledged by the laws of England, are *menial servants;* so called from being *intra moenia*, or domestics. The contract between them and their masters arises upon the hiring. If the hiring be general without any particular time limited, the law construes it to be a hiring for a year[f]; upon a principle of natural equity, that the servant shall serve, and the master maintain him, throughout all the revolutions of the respective seasons; as well when there is work to be done, as when there is not[g]: but the contract may be made for any larger or smaller term[2]. All single men between twelve years old and sixty, and married ones under thirty years of age,

f Co. Litt. 42. g F. N. B. 168.

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1. See Appendix. Note H.

2. White persons not being citizens of any of the United States, coming into Virginia to serve another in any trade or occupation, shall be compellable to perform their contracts specifically, during the term thereof, or so much thereof as shall not exceed seven years. L. V. 1785, c. 83. Edi. 1794, c. 132. Quære, if this be not contrary to the constitution of the United States, Art. 1, §. 10, which prohibits any state from passing a law impairing the obligation of contracts?

Infants under fourteen brought in under the like contract entered into with consent of their father or guardian, shall serve till twenty-one, only, or such shorter term as the contract shall have fixed. Ibid.

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and all single women between twelve and forty, not having any visible livelihood, are compellable by two justices to go out to service in husbandry or certain specific trades, for the promotion of honest industry [3]: and no master can put away his servant, or servant [4] leave his master, after being so retained, either before

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3. The statute 5 Eliz. c. 4, of which this is part, is not in force in Virginia. See V. L. Edi. 1794, c. 147.

4. If any servant shall be sick or lame, and so become useless or chargeable, his master shall maintain him until his whole time of service has expired: and if he shall put him away, and the servant become chargeable to the parish, the master shall forfeit thirty dollars to the overseers of the poor of the district, for the use of the poor: and be moreover liable to an action for damages, to the overseers of the poor. V. L. 1794, c. 132.

The indentures of servants are assignable, by consent of the servant given before a justice of the peace; who may order a lazy or disorderly servant to be whipped; or compel him to serve two days for every one which he shall have lost: any misconduct of a master may be redressed by application to the county court.... Contracts made between a master and servant during the time of service are void. Servants at the expiration of their service, if no wages be contracted for, are entitled to a suit of clothes, &c. No person shall deal with a servant without consent of his master, under penalty of forfeiting four times the value to the master, and twenty dollars to the informer. Ibid.

☞ In all cases of penal laws where free persons are punishable by fine, servants shall be punished by whipping, after the rate of twenty stripes for every eight dollars, (so that they shall not receive more than forty stripes, at any one time) unless the offender can procure some person to pay his fine. Ibid.

Any person may apprehend a servant suspected to be a runaway, and carry him before a justice of the peace, who may grant a certificate, &c. 1794, c. 131.

Any servant, marrying without consent of his master, shall serve him a year after his time of service is expired, or pay him twenty dollars; any free person marrying a servant without such consent, shall also pay the master twenty dollars; and any minister publishing the banns of marriage, or marrying any servant without consent of his master, forfeits 250 dollars. V. L. 1743, c. 26. Edi. 1794, c. 104.

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or at the end of his term, without a quarter's warning; unless
426 upon reasonable cause to be allowed by a justice of the peace[h]: but they may part by consent, or make a special bargain.

2. Another species of servants are called *apprentices* (from *apprendre*, to learn) and are usually bound for a term of years, by deed indented or indentures, to serve their masters, and be maintained and instructed by them. This is usually done to persons of trade, in order to learn their art and mystery; and sometimes very large sums are given with them, as a premium for such their instruction: but it may be done to husbandmen, nay to gentlemen, and others. And[i] children of poor persons may be apprenticed out by the overseers, with consent of two justices, till twenty-one years of age, to such persons as are thought fitting; who are also compellable to take them; and it is held, that gentlemen of fortune, and clergymen, are equally liable with others to such compulsion[k]: for which purposes our statutes have made the indentures obligatory, even though such parish-apprentice be a minor[l]. Apprentices to trades may be discharged on reasonable cause, either at the request of themselves or masters, at the quarter-sessions, or by one justice, with appeal to the sessions[m]; who may, by the equity of the statute, if they think it reasonable, direct restitution of a ratable share of the money given with the apprentice[n]: and parish-apprentices may be discharged in the same manner, by two justices[o]. But if an apprentice, with whom less than ten pounds hath been given, runs away from his master, he is compellable to serve out his time of absence, or make satisfaction for the same, at any time within seven years after the expiration of his original contract[p] [5].

h Stat. 5 Eliz. c. 4.

i Stat. 5 Eliz. c. 4. 43 Eliz. c. 2. 1 Jac. I. c. 25. 7 Jac. I. c. 3. 8 & 9 W. & M. c. 30. 2 & 3 Ann. c. 6. 4 Ann. c. 19. 17 G. II. c. 5. 18 G. III. c. 47.

k Salk. 57, 491.

l Stat. 5 Eliz. c. 4. 43 Eliz. c. 2. Cro. Car. 179.

m Stat. 5 Eliz. c. 4. n Salk. 67.

o Stat. 20 Geo. II. c. 19. p Stat. 6 Geo. III, c. 26.

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5. Every orphan whose estate is not sufficient for his maintenance, shall, by order of the county or corporation court, be bound appren-

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3. A third species of servants are *labourers*, who are only hired by the day or the week, and do not live *intra moenia*, as part of the family; concerning whom the statutes before cited[q] 427 have made many very good regulations: 1. Directing that all persons who have no visible effects, may be compelled to work: 2. Defining how long they must continue at work in summer and in winter: 3. Punishing such as leave or desert their work: 4. Empowering the justices at sessions, or the sheriff of the county, to settle their wages: and 5. Inflicting penalties on such as either give, or exact, more wages than are so settled[6].

4. There is yet a fourth species of servants, if they may be so called, being rather in a superior, a ministerial, capacity; such as *stewards*, *factors*, and *bailiffs*: whom however the law considers as servants *pro tempore*, with regard to such of their acts

q Stat. 5 Eliz. c. 4. 6 Geo. III. c. 26.

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tice by the overseers of the poor until the age of twenty-one, if a boy, or of eighteen, if a girl, to some person who shall covenant to teach the apprentice some art, trade, or business, as also reading and writing, and if a boy, common arithmetic, and to pay him twelve dollars. Any guardian, with the approbation of the court, may bind his ward an apprentice; and every such apprentice, or such as may be bound by his father, after he is sixteen years of age, may, with the approbation of the court, agree to serve till twenty-four years of age, and such agreement, entered of record, shall bind him. V. L. 1785, c. 86. Edi. 1794, c. 95.

The overseers of the poor shall monthly make returns of all poor orphans, and of such children whose parents they shall judge incapable of supporting them and bringing them up in honest courses, to the county courts, who may direct them to be bound out apprentices, as above mentioned. Edi. 1794, c. 102. Every bastard child may be bound apprentice in like manner; and by the same act, the county and corporation courts are required to hear complaints by, or against, masters and apprentices.

6. The laws of Virginia are perhaps defective in this respect. Vagrants may be hired out for three months, by the overseers of the poor. See note 50, p. 360. But the laws contain no regulations respecting the employment of other poor persons, unless they voluntarily apply to the overseers of the poor for relief. V. L. 1794, c. 102.

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as affect their master's or employer's property. Which leads me to consider,

II. The manner in which this relation, of service, affects either the master or servant. And, first, by hiring and service for a year, or apprenticeship under indentures, a person gains a settlement in that parish wherein he last served forty days[r] [7]. In the next place persons, serving, seven years as apprentices to any trade, have an exclusive right to exercise that trade in any part of England[s] [8]. This law, with regard to the exclusive part of it, has by turns been looked upon as a hard law, or as a beneficial one, according to the prevailing humour of the times: which has occasioned a great variety of resolutions in the courts of law concerning it; and attempts have been frequently made for it's repeal, though hitherto without success. At common law every man might use what trade he pleased[9]; but this statute restrains that liberty to such as have served as apprentices: the adversaries to which provision say, that all restrictions (which tend to introduce monopolies) are pernicious to trade; the advocates for it allege, that unskilfulness in trades is equally detrimental to the public, as monopolies. This
428 reason indeed only extends to such trades, in the exercise whereof skill is required: but another of their arguments goes much farther; *viz.* that apprenticeships are useful to the commonwealth, by employing of youth, and learning them to be early industrious; but that no one would be induced to undergo a seven years servitude, if others, though equally skilful, were allowed the same advantages without having undergone the same discipline: and in this there seems to be much reason. However, the resolutions of the courts have in general rather confined than extended the restriction. No trades are held to

r See page 364. s Stat. 5 Eliz. c. 4. §. 31.

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7. The laws is otherwise in Virginia. V. L. 1794, c. 102. §. 35.

8. The laws of Virginia contain no such provision.

9. This is still the case in Virginia, there being now no statute to prevent it.

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be within the statute, but such as were in being at the making of it [t]: for trading in a country village, apprenticeships are not requisite [u]: and following the trade seven years without any effectual prosecution (either as a master or a servant) is sufficient without an actual apprenticeship [w].

A master may by law correct his apprentice for negligence or other misbehaviour, so it be done with moderation [x] [10]: though, if the master or master's wife beats any other servant of full age, it is good cause of departure [y] [11]. But if any servant, workman, or labourer assault his master or dame, he shall suffer one year's imprisonment, and other open corporal punishment, not extending to life or limb [z] [12].

By service all servants and labourers, except apprentices, become entitled to wages [13]: according to their agreement, if

t Lord Raym. 514.

u 1 Ventr. 51. 2 Keb. 583.

w Lord Raym. 1179. Wallen *qui tam* v. Holton. Tr. 33 Geo. II. (by all the judges.)

x 1 Hawk. P. C. 130. Lamb. Eiren. 127. Cro. Car. 179. 2 Show. 289.

y F. N. B. 168. Bro. *Abr.* t. *Labourers* 51. *Trespass* 349.

z Stat. 5 Eliz. c. 4.

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10. The laws of Virginia do not prohibit the moderate correction of an apprentice by his master: but in case of immoderate and undeserved correction, the county or corporation courts may remove the apprentice and bind him to another master. V. L. 1794, c. 95.

11. Servants may be corrected by stripes, on order from a justice of the peace. If the master be guilty of injurious demeanor towards his servant, it shall be redressed on motion, by the court of the county or corporation, by immediate discharge from service, if the injury were gross. The courts of every county, &c. shall receive the complaints of servants, being citizens of the United States, against their masters, alleging undeserved, or immoderate correction, &c. V. L. 1794, c. 132.

12. The Stat. 5 Eliza. c. 4, is repealed in Virginia....there is no similar provision contained in our laws at present.

13. Apprentices at their discharge, when their time of service is expired, are entitled to receive twelve dollars. V. L. 1794, c. 95.

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menial servants; or according to the appointment of the sheriff or sessions, if labourers or servants in husbandry: for the statutes for regulation of wages extend to such servants only[a]; it being impossible for any magistrate to be a judge of the employment of menial servants, or of course to assess their wages.

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

And, first, the master may *maintain*, that is, abet and assist his servant in any action at law against a stranger: whereas, in general, it is an offence against public justice to encourage suits and animosities, by helping to bear the expence of them, and is called in law maintenance[b]. A master also may bring an action against any man for beating or maiming his servant: but in such case he must assign, as a special reason for so doing, his own damage by the loss of his service; and this loss must be proved upon the trial[c]. A master likewise may justify an assault in defence of his servant, and a servant in defence of his master[d]: the master, because he has an interest in his servant, not to be deprived of his service; the servant, because it is part of his duty, for which he receives his wages, to stand by and defend his master[e]. Also, if any person do hire or retain my servant, being in my service, for which the servant departeth from me and goeth to serve the other, I may have an action for damages against both the new master and the servant, or either of them:

a 2 Jones, 47. b 2 Roll. Abr. 115.
c 9 Rep. 113. d 2 Roll. Abr. 546.
e In like manner, by the laws of king Alfred, c. 38, a servant was allowed to fight for his master, a parent for his child, and a husband or father for the chasity of his wife or daughter.

Any servant by indenture, not being a citizen of the United States, if he has not contracted for wages, shall, at the end of his service, receive a new and complete suit of cloaths, suited to the season, with a hat and blanket. Ibid. c. 132.

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but if the new master did not know that he is my servant, no action lies; unless he afterwards refuse to restore him upon information and demand[f 14]. The reason and foundation, upon which all this doctrine is built, seem to be the property that every man has in the service of his domestics; acquired by the contract of hiring, and purchased by giving them wages.

As for those things which a servant may do on behalf of his master, they seem to proceed upon this principle, that the master is answerable for the act of his servant, if done by his command, either expressly given, or implied: *nam qui facit per alium, facit per se*[g]. Therefore, if the servant commit a trespass by the 430
command or encouragement of his master, the master shall be guilty of it: though the servant is not thereby excused, for he is only to obey his master in matters that are honest and lawful. If an inkeeper's servants rob his guests, the master is bound to restitution[h]: for as there is a confidence reposed in him, that he will take care to provide honest servants, his negligence is a kind of implied consent to the robbery*; *nam, qui non prohibet, cum prohibere possit, jubet.* So likewise, if the drawer at a tavern sells a man bad wine, whereby his health is injured, he may bring an action against the master[i]: although the master did not expressly order the servant to sell it to that person in particular, yet his permitting him to draw and sell it at all, is impliedly a general command.

f F. N. B. 167, 168.
h Noy's max. c. 43.
g 4 Inst. 109.
i 1 Roll. Abr. 95.

* But it has been long established law, that the inkeeper is bound to restitution if the guest is robbed in his house by any person whatever; unless it should appear that he was robbed by his own servant, or by a companion whom he brought with him, 8 *Co.* 33.

14. Every servant, upon expiration of his time, shall have his freedom recorded, and a certificate thereof under the hand of the clerk of the court, which shall indemnify any person from entertaining or hiring him. Any person harboring or entertaining a servant without such certificate, forfeits one dollar, for every day, to the master. V. L. 1794, c. 132.

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In the same manner, whatever a servant is permitted to do in the usual course of his business, is equivalent to a general command. If I pay money to a banker's servant, the banker is answerable for it: if I pay it to a clergyman's or a physician's servant, whose usual business is not to receive money for his master, and he embezzles it, I must pay it over again. If a steward lets a lease of a farm, without the owner's knowledge, the owner must stand to the bargain; for this is the steward's business..... A wife, a friend, a relation, that use to transact business for a man, are *quoad hoc* his servants; and the principal must answer for their conduct: for the law implies, that they act under a general command; and without such a doctrine as this no mutual intercourse between man and man could exist with any tolerable convenience. If I usually deal with a tradesman by myself, or constantly pay him ready money, I am not answerable for what my servant takes up upon trust; for here is no implied order to the tradesman to trust my servant: but if I usually send him upon trust, or sometimes on trust and sometimes with ready money, I am answerable for all he takes up; for the tradesman cannot possibly distinguish when he comes by my order, and when upon his own authority[k].

431 If a servant, lastly, by his negligence does any damage to a stranger, the master shall answer for his neglect: if a smith's servant lames a horse while he is shoeing him, an action lies against the master, and not against the servant. But in these cases the damage must be done, while he is actually employed in the master's service; otherwise the servant shall answer for his own misbehaviour. Upon this principle, by the common law[l], if a servant kept his master's fire negligently, so that his neighbour's house was burned down thereby, an action lay against the master; because this negligence happened in his service: otherwise, if the servant, going along the street with a torch, by negligence sets fire to a house; for there he is not in his master's immediate service: and must himself answer the damage personally.... But now the common law is, in the former case, altered by sta-

k Dr. and Stud. d. 2. c. 42. Noys Max. c. 44.

l Noy's Max. c. 44.

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tute 6 Ann. c. 3, which ordains that no action shall be maintained against any, in whose house or chamber any fire shall accidentally begin[15]; for their own loss is sufficient punishment for their own or their servant's carelessness. But if such fire happens through negligence of any servant (whose loss is commonly very little) such servant shall forfeit 100*l.* to be distributed among the sufferers; and, in default of payment, shall be committed to some workhouse and there kept to hard labour for eighteen months[m]. A master is, lastly, chargeable if any of his family layeth or casteth any thing out of his house into the street or common highway, to the damage of any individual, or the common nuisance of his majesty's liege people[n]: for the master hath the superintendance and charge of all his household. And this also agrees with the civil law[o]; which holds that the *pater familias*, in this and similar cases, "*ob alterius culpam tenetur, sive servi, sive liberi.*"

We may observe, that in all the cases here put, the master 432
may be frequently a loser by the trust reposed in his servant, but never can be a gainer; he may frequently be answerable for his servant's misbehaviour, but never can shelter himself from punishment by laying the blame on his agent. The reason of this is still uniform and the same; that the wrong done by the servant is looked upon in law as the wrong of the master himself; and it is a standing maxim, that no man shall be allowed to make any advantage of his own wrong[16].

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

n Noy's Max. c. 44.

o *Ff.* 9, 3, 1. *Inst.* 4, 5, 1.

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15. The Stat. 6. Ann. c. 3, here cited was never in force in Virginia, nor is there any similar provision in our law.

16. The laws of Virginia, which relate to the subject of this chapter, are at present not very numerous; the student will find

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them consolidated in the edition of 1794, c. 95. §. 11, 12, 15. Apprentices. c. 102. §. 25, &c. Poor. c. 103. Slaves. c. 104. §. 16, &c. Marriages c. 131. Runaway. c. 132. Servants.

Former laws on the subject were, acts of 1705, c. 7. 1748, c. 2. 13. 1753, c. 2, 1764, c. 7, Edi. 1769. Oct. 1780, c. 31. May, 1783, c. 1, Edi. 1785. 1785, c. 4, 86. 1786, c. 17. Apprentices. Acts of 1748, c. 33. 1753, c. 2. 1764, c. 8. Edi. 1769. 1769, c. 19. Edi. 1785. 1785, c. 83, 84, Sessions Acts, servants.

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OF HUSBAND AND WIFE.

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

I. Our law considers marriage in no other light than as a civil contract. The *holiness* of the matrimonial state is left entirely to the matrimonial law: the temporal courts not having jurisdiction to consider unlawful marriage as a sin, but merely as a civil inconvenience. The punishment therefore, on annulling, of incestuous or other unscriptural marriages, is the province of the spiritual courts[1]; which act *pro salute animae*[a]..... And, taking it in this civil light, the law treats it as it does all other contracts: allowing it to be good and valid in all cases, where the parties at the time of making it were, in the first place,

a Salk. 121.

1. Marriages within the Levitical degrees were prohibited, and might be dissolved by sentence of the general court, upon a bill exhibited for that purpose by the attorney general. V. L. 1730, c. 2. Edi. 1769. But by the act of 1788, c. 32, concerning incestuous marriages, the cognizance of such causes was vested in the high court of chancery, and so continues. V. L. 1794, c. 104. §. 13.

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willing to contract; secondly, *able* to contract; and, lastly, actually *did* contract, in the proper forms and solemnities required by law.

434 First, they must be *willing* to contract. "*Consensus non* "*concubitus, faciat nuptias,*" is the maxim of the civil law in this case[b]: and it is adopted by the common lawyers[c], who indeed have borrowed (especially in antient times) almost all their notions of the legitimacy of marriage from the canon and civil laws.

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

Now these disabilities are of two sorts: first, such as are canonical, and therefore sufficient by the ecclesiastical laws to avoid the marriage in the spiritual court; but these in our law only make the marriage voidable, and not *ipso facto* void, until sentence of nullity be obtained. Of this nature are pre-contract; consanguinity, or relation of blood; and affinity, or relation by marriage; and some particular corporal infirmities. And these canonical disabilities are either grounded upon the express words of the divine law, or are consequences plainly deducible from thence: it therefore being sinful in the persons who labour under them, to attempt to contract matrimony together, they are properly the object of the ecclesiastical magistrate's coercion; in order to separate the offenders, and inflict penance for the offence, *pro salute animarum.* But such marriages not being void *ab initio*, but voidable only by sentence of separation, they are esteemed valid to all civil purposes, unless such separation is actually made during the life of the parties. For, after the death of either of them, the courts of common law will not suffer the spiritual court to declare such marriages to have been void; because such declaration cannot now tend to the reformation of the parties[d]. And, therefore, when a man had married

b *Ff.* 50, 17, 30.
c Co. Litt. 33.
d Co. Litt. 33.

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his first wife's sister, and after her death the bishop's court was proceeding to annul the marriage and bastardize the issue, the 435
court of king's bench granted a prohibition *quoad hoc;* but permitted them to proceed to punish the husband for incest[e]. These canonical disabilities being entirely the province of the ecclesiastical courts, our books are perfectly silent concerning them.... But there are a few statutes, which serve as directories to those courts, of which it will be proper to take notice. By statutes 32 Hen. VIII, c. 38, it is declared, that all persons may lawfully marry, but such as are prohibited by God's law; and that all marriages contracted by lawful persons in the face of the church, and consummate with bodily knowledge, and fruit of children, shall be indissoluble. And (because in the times of popery a great variety of degrees of kindred were made impediments to marriage, which impediments might however be bought off for money) it is declared by the same statute, that nothing (God's law except) shall impeach any marriage, but within the Levitical degrees; the farthest of which is that between uncle and niece[f 2]. By the same statute all impediments, arising from pre-contracts to other persons, were abolished and declared of non effect, unless they had been consummated with bodily knowledge: in which case the canon law holds such contract to be a marriage *de facto*. But this branch of the statute was repealed by statute 2 & 3 Edw. VI. c. 23. How far the act of 26 Geo. II. c. 33, (which prohibits all suits in ecclesiastical courts to compel a marriage, in consequence of any contract) may collaterally extend to revive

e Salk. 548. f Gilb. Rep. 158.

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2. Herewith the act of 1730, c. 2, agrees, but the act of 1788, c. 32, does not extend to the uncle and niece, (probably through inattention) although it prohibits the nephew from marrying his aunt, or his uncle's wife. The act of 1794, c. 104. §. 13, agrees with the latter.

The act of 1753, c. 2, prohibits intermarriages between free white persons, and negroes, or mulattoes, under penalty of fine and imprisonment upon the white person so married, and a penalty of 250 dollars upon the minister contracting the marriage. V. L. 1794, c. 104. But the marriage is not declared void.

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this clause of Henry VIII's statute, and abolish the impediment of pre-contract, I leave to be considered by the canonists[3].

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

1. The first of these legal disabilities is a prior marriage, or having another husband or wife, living[4]; in which case, besides the penalties consequent upon it as a felony, the second marriage is to all intents and purposes void[g]: polygamy being condemned both by the law of the new testament, and the policy of all prudent states, especially in these northern climates. And Justinian, even in the climate of modern Turkey, is express[h], that "*duas uxores eodem tempore habere non licet.*"

2. The next legal disability is want of age. This is sufficient to avoid all other contracts, on account of the imbecility of judgment in the parties contracting; *a fortiori*, therefore, it ought to avoid this, the most important contract of any. Therefore, if a boy, under fourteen, or a girl, under twelve years of age, marries, this marriage is only incohate and imperfect; and, when either of them comes to the age of consent, aforesaid, they

g Bro. *Abr. tit. Bastardy*, pl. 8. h *Inst.* 1, 10, 6.

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3. All the statutes mentioned in this paragraph are either repealed, or were never in force in Virginia. V. L. Edi. 1794, c. 147.

4. The act of 1788, c. 34. Edi. 1794, c. 104, agrees herewith.

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may disagree and declare the marriage void, without any divorce or sentence in the spiritual court. This is founded on the civil law [i]. But the canon law pays a greater regard to the constitution, than the age, of the parties [k]; for if they are *habiles ad matrimonium*, it is a good marriage, whatever their age may be..... And, in our law, it is so far a marriage, that, if at the age of consent they agree to continue together, they need not be married again [l]. If the husband be of years of discretion, and the wife under twelve, when she comes to years of discretion, he may disagree as well as she may; for in contracts the obligation must be mutual; both must be bound, or neither: and so it is, *vice versa*, when the wife is of years of discretion, and the husband under [m] (4).

3. Another incapacity arises, from want of consent of parents or guardians. By the common law, if the parties, themselves, were of the age of consent, there wanted no other concurrence to make the marriage valid: and this was agreeable to the canon law. But, by several statutes [n], penalties of 100*l.* are laid on every clergyman who marries a couple either without publication of banns (which may give notice to parents or guardians) or without a licence [5], to obtain which, the consent of parents or 437

i *Leon. Constit.* 109

k *Decretal. l.* 4, *tit.* 2, *qu.* 3.

l Co. Litt. 79.

m *Co. Litt.* 79.

n 6 and 7 Will. III, c. 6. 7 and 8 W. III, c. 35. 10 Ann. c. 19.

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(4). Where there are mutual promises to marry between two persons, one of the age of twenty one, and the other under that age, the first is bound by the contract, and on the side of the minor it is voidable; and it seems agreed, that although the minor may maintain an action and recover damages, against the person of full age upon a breach of such promises; yet no action can be maintained against the minor for such a breach. Strange, 938, 939.... *Christian.*

5. By the act of 1748, c. 26. Ministers solemnizing marriage without licence, or publication of banns, were subject to a penalty of 500*l.* (which by the act of 1792, is reduced to 1500 dollars) although they should go out of the colony for that purpose; which is confirmed by the last mentioned act, and to be imprisoned a year without bail or mainprize. See Edi. 1794, c. 104.

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guardians must be sworn to [6]. And by the statute 4 and 5 Ph. and M. c. 8, whosoever marries any womanchild under the age of sixteen years, without consent of parents or guardians, shall be subject to fine, or five years imprisonment [7]: and her estate during the husband's life shall go to, and be enjoyed by the next heir [8]. The civil law, indeed, required the consent of the parent or tutor at all ages; unless the children were emancipated, or out of the parents power [o]: and if such consent from the father was wanting, the marriage was null, and the children illegitimate [p]; but the consent of the mother or guardians, if unreasonably withheld, might be redressed and supplied by the judge, or the president of the province [q]: and if the father was *non compos*, a similar remedy was given [r]. These provisions are adopted and imitated by the French and Hollanders, with this difference: that in France, the sons cannot marry without consent of parents till thirty years of age, nor the daughters till twenty-five [s]; and in Holland, the sons are at their own disposal at twenty-five, and the daughters at twenty [t]. Thus hath stood, and thus at present stands, the law in other neighbouring countries. And it has lately been thought proper to introduce somewhat of the same policy into our laws, by statute 26 Geo. II, c. 33, where-

o *Ff.* 23, 2, 2, *and* 18.

p *Ff.* 1, 5, 11.

q *Cod.* 5, 4, 1, *and* 20.

r *Inst.* 1, 10, 1.

s Domat, of Dowries, Sec. 2, Montesq. Sp. L. 23, 7.

t *Vinnius in Inst. l.* 1. *t.* 10.

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6. The certificate of the father's or guardian's consent must *now* be sworn to: and the clerk of the county or corporation may thereupon issue a licence to any authorized minister. Formerly it was requisite that the licence should be signed by some justice of the peace; but the law in that respect has been very lately altered..... V. L. 1794. c. 104. §. 12. 1796, c. 23. Sessions Acts.

7. The act of 1789, c. 8, imposes five years imprisonment, in this case, without adding a fine thereto. Edi. 1794, c. 104. §. 21.

8. The Act of 1748, c. 26, extended this case to sixteen years, the age mentioned in the statute.....But now, fourteen years, is the age fixed by the law. Edi. 1794, c. 104, §. 15. The statute of 4 and 5 P. and M, c. 8. is repealed. Ibid. c. 147.

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by it is enacted, that all mariages celebrated by licence (for banns suppose notice) where either of the parties is under twenty-one, (not being a widow or widower, who are supposed emancipated) 438 without the consent of the father, or, if he be not living, of the mother or guardians, shall be absolutely void [9]. A like provision is made as in the civil law, where the mother or guardian is *non compos*, beyond sea, or unreasonably froward, to dispense with such consent at the discretion of the lord chancellor: but no provision is made, in case the father should labour under any mental or other incapacity. Much may be, and much has been said, both for, and against this innovation upon our antient laws and constitution. On the one hand, it prevents the clandestine marriages of minors, which are often a terrible inconvenience to those private families wherein they happen. On the other hand, restraints upon marriages, especially among the lower class, are evidently detrimental to the public, by hindering the increase of the people; and to religion and morality, by encouraging licentiousness and debauchery among the single of both sexes; and thereby destroying one end of society and government, which is *concubitu prohibere vago*. And of this last inconvenience the Roman laws were so sensible, that at the same time that they forbad marriage without the consent of parents or guardians, they were less rigorous upon that very account with regard to other restraints: for, if a parent did not provide a husband for his daughter, by the time she arrived at the age of twenty-five, and she afterwards made a slip in her conduct, he was not allowed to disinherit her upon that account; "*quia non* "*sua culpa, sed parentum, id commisisse cognoscitur*."[u]

4. A fourth incapacity is want of reason; without a competent share of which, as no other, so neither can the matrimonial contract, be valid [w]. It was formerly adjudged, that the issue of an idiot was legitimate, and consequently that his marriage was valid [10]. A strange determination! since consent is abso-

u *Nov.* 115. *Sec.* 11. w 1 Roll. Abr. 357.

9. This statute was never in force in Virginia. Consequently such marriages are not void there.

10. The issue of marriages deemed null in law, shall nevertheless be legitimate. V. L. 1785, c. 60. Edi. 1794. c. 93.

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lutely requisite to matrimony, and neither idiots nor lunatics are capable of consenting to any thing. And, therefore, the civil law judged much more sensibly when it made such deprivations of reason a previous impediment; though not a cause
439 of divorce, if they happened after marriage [x]. And modern resolutions have adhered to the reason of the civil law, by determining [y] that the marriage of a lunatic, not being in a lucid interval, was absolutely void. But as it might be difficult to prove the exact state of the party's mind at the actual celebration of the nuptials, upon this account (concurring with some private family [z] reasons) the statute 15 Geo. II. c. 30, has provided, that the marriage of lunatics and persons under phrenzies (if found lunatics under a commission, or committed to the care of trustees by any act of parliament) before they are declared of sound mind by the lord chancellor or the majority of such trustees, shall be totally void [11].

x *Ff.* 23, *tit.* 1, *l.* 8, *and tit.* 2, *l.* 16.
y Morrison's case. *coram Delegat.*
z See private acts 23 Geo. *II.* c. 6.

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11. The statute here mentioned was never in force in Virginia.

☞ In addition to these incapacities, it will here be proper to notice some prohibitions contained in our law, which although they do not render the marriage void, the violation of them subjects the offender to certain penalties.

1. If any free white man or woman shall intermarry with a negro or mulatto, bond or free, the white person shall suffer six months imprisonment, and pay thirty dollars, to the use of the parish; and the minister, or other person, marrying them shall forfeit 250 dolls. one half to the use of the commonwealth, the other half to the use of the informer. V. L. 1794, c. 104, as altered from 1753. c. 2.

2. Every servant who shall marry without consent of his or her master, shall serve a year after all other time of service is expired, or pay the master twenty dollars: and every free person marrying a servant, also forfeits twenty dollars to the master, or must serve him one year: and the minister, clerk, or reader, publishing the banns of marriage, or knowingly marrying a servant without a certificate from the master that he consents thereto, forfeits 250 dolls. V. L. 1748. c. 26. Edi. 1794. c. 104.

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Lastly, the parties must not only be willing and able to contract, but actually must contract themselves in due form of law, to make it a good civil marriage. Any contract made, *per verba de praesenti*, or in words of the present tense, and in case 440
of cohabitation *per verba de futuro* also, between persons able to contract, was before the late act deemed a valid marriage to many purposes; and the parties might be compelled in the spiritual courts to celebrate it *in facie ecclesiae*. But these verbal contracts are now of no force, to compel a future marriage [a 12]. Neither is any marriage at present valid, that is not celebrated in some parish church or public chapel, unless by dispensation from the archbishop of Canterbury. It must also be preceded by publication of banns, or by licence from the spiritual judge. Many other formalities are likewise prescribed by the act; the neglect of which, though penal, does not invalidate the marriage. It is held to be also essential to a marriage, that it be performed by a person in orders [b 13]: though the intervention of a priest to solemnize this contract is merely *juris positivi*, and not *juris naturalis aut divini*: it being said that pope Innocent the third was the first who ordained the celebration of marriage in the church [c 14]; before which it was totally a civil contract.

a Stat. 26 Geo. *II*, c. 33. b Salk. 119. c Moor. 170.

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12. The statute of 26 Geo. II. c. 33, here referred to, was never in force in Virginia.

13. Quakers and menonists, or any other christian society, adopting similar regulations, may marry according to the rules of their society. V. L. 1784, c. 76. Edi. 1794, c. 104. The county courts in Lee, Randolph, Ohio, Brook, Russel, Wood, Kanawha, Tazewell, Patrick, and Hardy counties, may appoint two persons in each county, who may be authorised to celebrate the rites of marriage therein, respectively, 1794, c. 169. 1797, c. 28, 1796, c. 23, 1800, c. 35, and 1801, c. 37. Sessions acts. All ministers of the gospel ordained, and in regular communion with any society of christians (except itinerant ministers) having obtained a proper testimonial from the county or corporation court where they reside, may celebrate the rites of matrimony in Virgnia. 1784, c. 76. Edi. 1794, c. 104.

14. The place is not material in Virginia, except between quakers and menonists. See note 16, of this chapter.

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And, in the times of the grand rebellion, all marriages were performed by the justices of the peace [15]; and thse marriages were declared valid, without any fresh solemnization, by statute 12 Car. II, c. 33. But, as the law now stands, we may upon the whole collect, that no marriage by the temporal law is *ipso facto void*, that is celebrated by a person in orders,....in a parish church or public chapel (or elsewhere, by special dispensation) ....in pursuance of banns or a licence....between single persons, ...consenting....of sound mind....and of the age of twenty-one years....or of the age of fourteen in males and twelve in females, with consent of parents or guardians, or without it, in case of widowhood [16]. And no marriage is *voidable* by the ecclesiastical law, after the death of either of the parties; nor during their lives, unless for the canonical impediments of pre-

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15. All marriages openly solemnized before the first day of July, 1785, by magistrates, or other persons, which shall have been consummated by the parties, cohabiting together as man and wife, are declared to be good and valid in law. V. L. 1784, c. 76. Edi. 1794, c. 104.

16. By the laws of Virginia, no marriage is *void* that is duly solemnized by an ordained minister of the gospel, who shall have obtained from the court of the county or corporation wherein he resides, a testimonial authorising him to celebrate the rites of marriage; in pursuance of banns, or a license; or if the parties be quakers, or menonists, or members of any other christian society, which shall have adopted similar regulations, in their church, by the mutual consent of the parties, openly published and declared before their congregations, when convened for religious worship, in the manner, and agreeable to the regulations practised in such societies; or if the parties reside in either of the counties of Lee, Randolph, Ohio, Brooke, Russel, Wood, Kanawha, Tazewell, Patrick, or Hardy, by persons duly authorised for that purpose; or which hath been openly solemnized in any part of Virginia, before the first day of July, 1785, by a magistrate, or other person, and consummated by the parties cohabiting as man and wife; between single persons, consenting, of sound mind, and of the age of twenty-one years; or of the age of fourteen in males, and twelve in females, with consent of parents or guardians; or without it in case of widowhood. V. L. Edi. 1794, c. 104, 169. Acts of 1796, c. 23. 1797, c. 28. 1800, c. 54, and 1801, c. 37. Sess. acts.

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contract, if that indeed still exists; of consanguinity; and of affinity [17], or corporal imbecility, subsisting previous to the marriage.

II. I am next to consider the manner in which marriages may be dissolved; and this is either by death, or divorce. There are two kinds of divorce, the one total, the other partial; the one *a vinculo matrimonii*, the other merely *a mensa et thoro*. The total divorce, *a vinculo matrimonii*, must be for some of the canonical causes of impediment before-mentioned; and those, existing *before* the marriage, as is always the case in consanguinity; not supervenient, or arising *afterwards*, as may be the case in affinity or corporal imbecility. For in cases of total divorce, the marriage is declared null, as having been absolutely unlawful *ab initio;* and the parties are therefore separated *pro salute animarum:* for which reason, as was before observed, no divorce can be obtained, but during the life of the parties. The issue of such marriage as is thus entirely dissolved, are bastards [d 18].

Divorce *a mensa et thoro* is when the marriage is just and lawful *ab initio*, and therefore the law is tender of dissolving it; but, for some supervenient cause, it becomes improper or im- 441
possible for the parties to live together: as in the case of intolerable ill temper, or adultery, in either of the parties. For the canon law, which the common law follows in this case, deems

d Co. Litt. 235.

17. What marriages are *voidable* on account of consanguinity, or affinity between the parties, see note 1 and 2, of this chapter.... But the marriages so voidable must have been celebrated since the eighth day of December, 1788. V. L. 1788, c. 32. Edi. 1794, c. 104.

18. A divorce *a vinculo matrimonii* can only be obtained in Virginia on account of consanguinity or affinity between the parties; and that, by sentence or decree of the high court of chancery, in the cases mentioned in the last note: but the issue of marriages annulled by such decree are nevertheless legitimate. V. L. Edi. 1794, c. 104.

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so highly and with such mysterious reverence of the nuptial tie, that it will not allow it to be unloosed for any case whatsoever, that arises after the union is made. And this is said to be built on the divine revealed law; though that expressly assigns incontinence as a cause, and indeed the only cause, why a man may put away his wife and marry another[e]. The civil law, which is partly of pagan original, allows many causes of absolute divorce; and some of them pretty severe ones: (as if a wife goes to the theatre or the public games, without the knowlege and consent of the husband[f]) but among them adultery is the principal, and with reason named the first[g]. But with us in England adultery is only a cause of separation from bed and board[h]: for which the best reason that can be given, is, that if divorces were allowed to depend upon a matter within the power of either the parties, they would probably be extremely frequent; as was the case when divorces were allowed for canonical disabilities, on the mere confession of the parties[i], which is now prohibited by the canons[k]. However, divorces *a vinculo matrimonii*, for adultery, have of late years been frequently granted by act of parliament[19].

e Matt. xix. 9.
f *Nov.* 117.
g *Cod.* 5, 17, 8.
h Moor. 683.
i 2 Mod. 314.
k Can. 1603. c. 105.

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19. There is no court in Virginia which possesses cognizance of matrimonial causes generally, (unless the general court be supposed to derive such a power from the constitution, which is at least doubtful); wherefore divorces *a mensa et thoro* are at present entirely unknown to our laws. The act of 1789, c. 79, concerning the marriage of Anne Dantignac, authorised a trial of the truth of the charges of adultery and abandonment, in the general court, and pronounced the marriage to be dissolved, as soon as a verdict whereby the truth of those charges should be found, should be recorded. The act of 1790, c. 92, authorised similar proceedings in the court of Kentucky district, upon the complaint of Lewis Roberts, and in like manner declared the marriage to be dissolved, in the like event.... The act of 1791, c. 58, authorised the high court of chancery to hear and determine the charges alledged in the petition of Robert Turnbull, and to decree the marriage null and void, if those charges should

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In case of divorce *a mensa et thoro*, the law allows alimony to the wife: which is that allowance which is made to a woman for her support out of the husband's estate: being settled at the discretion of the ecclesiastical judge, on consideration of all the circumstances of the case. This is sometimes called her *estovers;* for which, if he refuses payment, there is (besides the ordinary process of excommunication) a writ at common law *de estoveris habendis*, in order to recover it[l]. It is generally proportioned to the rank and quality of the parties. But, in case of elopement, and living with an adulterer, the law allows her no alimony[m]. 442

III. Having thus shewn how marriages may be made, or dissolved, I come now, lastly, to speak of the legal consequences of such making, or dissolution.

By marriage, the husband and wife are one person in law[n]: that is, the very being or legal existence of the woman is suspended during the marriage, or at least is incorporated and consolidated into that of the husband: under whose wing, protection, and *cover*, she performs every thing; and is therefore called in our law-french a *feme-covert*, *foemina viro co-operta;* is said to be *covert baron*, or under the protection and influence of her husband, her *baron*, or lord; and her condition during her marriage is called her *coverture*. Upon this principle, of an union of person in husband and wife, depend almost all the legal rights, duties, and disabilities, that either of them acquire by the marriage.

l 1 Lev. 6.
m Cowel, tit. Alimony.
n Co. Litt. 112.

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be proved. All these acts authorised a divorce *a vinculo matrimonii*, and not *a mensa et thoro*, only.

Persons marrying within the levitical degrees, or those degrees of consanguinity and affinity, mentioned in the act of 1730, c. 2, and 1788, c. 32. Edi. 1794, c. 104. §. 13, may be separated by the definitive sentence or judgment of the high court of chancery, who may moreover punish the parties by fine, which nevertheless must be assessed by a jury.

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I speak not at present of the rights of property, but of such as are merely *personal.* For this reason, a man cannot grant any thing to his wife, or enter into covenant with her [o]: for the grant would be to suppose her separate existence; and to covenant with her would be only to covenant with himself [20]: and therefore it is also generally true, that all compacts made between husband and wife, when single, are voided by the intermarriage [p]. A woman indeed may be attorney for her husband [q]; for that implies no separation from, but is rather a representation of, her lord. And a husband may also bequeath any thing to his wife by will; for that cannot take effect till the coverture is determined by his death [r]. The husband is bound to provide his wife with necessaries by law, as much as himself: and if she contracts debts for them, he is obliged to pay them [s]; but, for any thing besides necessaries, he is not chargeable [t]. Also, if a wife elopes, and lives with another man, the husband is not chargea-
443 ble even for necessaries [u]; at least if the person, who furnishes them, is sufficiently apprised of her elopement [w]. If the wife be indebted before marriage, the husband is bound afterwards to pay the debt; for he has adopted her and her circumstances together [x] *. If the wife be injured in her person or her property, she can bring no action for redress without her husband's concurrence, and in his name, as well as her own [y]: neither can she be sued, without making the

o *Ibid.*
q F. N. B. 27.
s Salk. 118.
u Stra. 647.
x 3 Mod. 186.
p Cro. Car. 551.
r Co. Litt. 112.
t 1 Sid. 120.
w 1 Lev. 5.
y Salk. 119. 1 Roll. Abr. 347.

* But, though the husband has had a great fortune with his wife, if she dies before him, he is not liable to pay her debts contracted before marriage, either in law or equity, unless there is some part of her personal property which he did not reduce into his possession before her death, which he must afterwards recover as her administrator; and to the extent of the value of that property, he will be liable to pay his wife's debts, *dum sola,* which remained undischarged during the coverture. 1 *P. Wms.* 468....*Christian.*

20. But the husband may grant to the wife, or the wife to the husband, by the intervention of trustees. Harg. Co. Litt. 30, and this is every day's practice in Virginia.

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husband a defendant [z]. There is indeed one case where the wife shall sue and be sued as a feme sole, *viz.* where the husband has abjured the realm, or is banished [a] *: for then he is dead in law; and, the husband being thus disabled to sue for or defend the wife, it would be most unreasonable if she had no remedy, or could make no defence at all. In criminal prosecutions, it is true, the wife may be indicted and punished separately [b]; for the union is only a civil union. But, in trials of any sort, they are not allowed to be evidence for, or against, each other [c]: partly because it is impossible their testimony should be indifferent; but principally because of the union of person: and therefore, if they were admitted to be witnesses *for* each other, they would contradict one maxim of law, "*nemo in propria* "*causa testis esse debet;*" and if *against* each other, they would contradict another maxim, "*nemo tenetur seipsum accusare.*†"

z Bro *Error.* 173. 1 Leon. 312. 1 Sid. 120. This was also the practice in the courts of Athens. (Pott. Antiq. b. 1. c. 21.)

a Co. Litt. 133.

b 1 Hawk. P. C. 3.

c 2 Hawk. P. C. 431.

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* [In analogy to this principle of abjuration, it has been lately determined (Michaelmas term, 26 Geo. III. K. B. Corbet v. baron Poloenwitz and wife) that where a married woman, living separate and apart from her husband, with a separate maintenance secured to her by deed, contracts a debt, she may be sued for it as a feme sole.] 1. Term. Rep. 5.

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† The union of person is scarce sufficient to account for this rule of law; for the confessions of the husband and wife are no evidence against the other, yet the confessions of the party are legal evidence: but the better reason seems to be, that which is generally assigned, *viz.* if a wife were a witness for her husband, she would be under a strong temptation to commit perjury; and if against her husband, it would be contrary to the policy of marriage, and might create much domestic dissention and unhappiness: so *vice versa* of the husband. *Bull. N. P.* 286. But this rule, I should think, ought to be confined to cases where the husband or wife is a party in the action or prosecution; yet in one case it seems to have been held, that a wife shall not be called, in any case, to give evidence, even tending to criminate her husband. 2 *T. R.* 263. If this be true, a plaintiff or prosecutor may have the benefit of the testimony of the one, and the defendant or prisoner cannot have the benefit of the testimony of

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But, where the offence is directly against the person of the wife, this rule has been usually dispensed with [d]: and, therefore, by statute 3 Hen. VII, c. 2, in case a woman be forcibly taken away,
444 and married, she may be a witness against such her husband, in order to convict him of felony (20.) For, in this case, she can with no propriety be reckoned his wife; because a main ingredient, her consent, was wanting to the contract: and also there is another maxim of law, that no man shall take advantage of his own wrong: which the ravisher here would do, if by forcibly marrying a woman, he could prevent her from being a witness, who is perhaps the only witness, to that very fact.

In the civil law, the husband and the wife are considered as two distinct persons; and may have separate estates, contracts, debts, and injuries [e]: and, therefore, in our ecclesiastical courts, a woman may sue, and be sued, without her husband [f].

But, though our law in general, considers man and wife as one person, yet there are some instances in which she is separately considered; as inferior to him, and acting by his compulsion. And, therefore, all deeds executed, and acts done, by her, during her coverture, are void; except it be a fine, or the like matter of record, in which case she must be solely and secretly examined, to learn if her act be voluntary [g] 21. She cannot by

d State Trials, vol. 1. Lord Audley's case. Stra. 633.
e *Cod.* 4, 12, 1.
f 2 Roll. Abr 298.
g Litt. §. 669. 670.

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the other; because the evidence of the latter would tend to charge the former with perjury. Surely, in such cases, where the interests of strangers are concerned, the furtherance of public justice is a consideration far superior to the policy of marriage, or the domestic strifes of the witnesses....*Christian*.

(20.) The act of 1789, c. 8. Edi. 1794. c. 104, §. 19, is nearly a transcript of the stat. 3 Hen. 7, c. 2, here referred to. But that act does not declare that a woman may be admitted as an evidence to convict the husband of an offence against that act; but that she may be so, is according to the rule in Lord Audley's case.

21. "Whereas it has always been adjudged, that when a deed "has been acknowledged by a *feme-covert*, and no record made of

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will devise lands to her husband, unless under special circumstances; for at the time of making it she is supposed to be under his coercion[h]. And in some felonies, and other inferior crimes, committed by her, through constraint of her husband, the law excuses her[i]: but this extends not to treason or murder.

The husband also (by the old law) might give his wife moderate correction[k]. For, as he is to answer for her misbehaviour, the law thought it reasonable to intrust him with this power of restraining her, by domestic chastisement, in the same moderation that a man is allowed to correct his apprentices or children; for whom the master or parent is also liable in some cases to answer. But this power of correction was confined within reasonable bounds[l], and the husband was prohibited from using any 445
violence to his wife, *aliter quam ad virum, ex causa regiminis et castigationis uxoris suae, licite et rationabiliter pertinet*[m]. The civil law gave the husband the same, or a larger, authority over his wife: allowing him, for some misdemesnors, *flagellis et fustibus acriter verberare uxorem;* for others, only *modicam castigationem adhibere*[n]. But with us, in the politer reign of Charles the second, this power of correction began to be doubted[o]: and a wife may now have security of the peace against her husband[p]; or, in return, a husband against his wife[q]. Yet the lower rank of people, who were always fond of the old common law, still claim and exert their antient privilege: and the courts of law will still permit a husband to restrain a wife of her liberty, in case of any gross misbehaviour[r].

h Co. Litt. 112.
i 1 Hawk. P. C. 2.
k *Ibid*, 130.
l Moor. 874.
m F. N. B. 80.
n *Nov.* 117, *c.* 14, and Van Leeuwen. *in loc.*
o 1 Sid. 113. 3 Keb. 433.
p 2 Lev. 128.
q Stra. 1207.
r Stra. 478, 875.

"her privy examination, such deed is not binding on the *feme*, or "her heirs, it is therefore declared, that the law herein shall always "be held according to the said judgments." V. L. 1748, c. 1. Edi. 1769. Edi. 1794, c. 90.

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

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* Nothing, I apprehend, would more conciliate the good will of the student in favour of the laws of England, than a persuasion that they had shewn a partiality to the female sex. But I am not so much in love with my subject as to be inclined to leave it in possession of a glory which it may not justly deserve. In addition to what has been observed in this chapter, by the learned commentator, I shall here state some of the principal differencee in the English law, respecting the two sexes; and I shall leave it to the reader to determine on which side is the balance, and how far this compliment is supported by truth.

Husband and wife, in the language of the law, are stiled *baron* and *feme*: the word baron, or lord, attributes to the husband not a very courteous superiority. But we might be inclined to think this merely an unmeaning technical phrase, if we did not recollect, that if the baron kills his feme, it is the same as if he had killed a stranger, or any other person; but if the feme kills her baron, it is regarded by the laws as a much more atrocious crime; as she not only breaks through the restraints of humanity and conjugal affection, but throws off all subjection to the authority of her husband. And therefore the law denominates her crime, a species of treason, and condemns her to the same punishment as if she had killed the king. And for every species of treason (though in petit treason the punishment of men was only to be drawn and hanged,) till the 30 Geo. III. c. 48, the sentence of women was to be drawn and burnt alive. 4 Vol. 204.

By the common law all women were denied the benefit of clergy; and till the 3 and 4 W. & M. c. 9, they received sentence of death, and might have been executed, for the first offence in simple larceny, bigamy, manslaughter, &c. however learned they were, merely because their sex precluded the possibility of their taking holy orders; though a man, who could read, was for the same crime subject only to burning in the hand and a few months imprisonment. 4 Vol. 369.

These are the principal distinctions in criminal matters; now let us see how the account stands with regard to civil rights.

Intestate personal property is equally divided between males and females; but a son, though younger than all his sisters, is heir to the whole of real property.

A woman's personal property, by marriage, becomes absolutely her husband's, which at his death he may leave entirely away from her; but if he dies

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without will, she is entitled to one-third of his personal property, if he has children; if not, to one-half. In the province of York, to four-ninths or three-fourths.

By the marriage, the husband is absolutely master of the profits of the wife's lands during the coverture; and if he has had a living child, and survives the wife, he retains the whole of those lands, if they are estates of inheritance, during his life: but the wife is entitled only to dower, or one-third, if she survives, out of the husbands estates of inheritance; but this she has, whether she has had a child or not.

But a husband can be tenant by the curtesy of the trust estates of the wife, though the wife cannot be endowed of the trust estates of the husband. 3 *P. Wms.* 229.

With regard to the property of women, there is taxation without representation; for they pay taxes without having the liberty of voting for representatives; and indeed there seems at present no substantial reason why single women should be denied this privilege. Though the chastity of women is protected from violence, yet a parent can have no reparation, by our law, from the seducer of his daughter's virtue, but by stating that she is his servant, and that by the consequences of the seduction, he is deprived of the benefit of her labour: or where the seducer, at the same time, is a trespasser upon the close or premises of the parent. But when by such forced circumstances the law can take cognizance of the offence, juries disregard the pretended injury, and give damages commensurate to the wounded feelings of a parent.

Female virtue, by the temporal law, is perfectly exposed to the slanders of malignity and falsehood; for any one may proclaim in conversation, that the purest maid, or the chastest matron, is the most meretricious and incontinent of women, with impunity, or free from the animadversions of the temporal courts. Thus female honour, which is dearer to the sex than their lives, is left by the common law to be the sport of an abandoned calumniator. 3 Vol. 125.

From this impartial statement of the account, I fear there is little reason to pay a compliment to our laws for their respect and favour to the female sex.. *Christian.*

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OF PARENT AND CHILD.

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

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

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

a *Ff.* 2, 4, 5.

1. The law is altered in Virginia; for by the act of 1785, c. 60, which took effect Jannary 1st. 1787, the issue in marriages deemed null in law, shall nevertheless be legitimate :....the act of 1788, c. 32, for preventing incestuous marriages, in like manner declares the issue to be legitimate. And by the act of 1785, c. 60, where a man having by a woman one or more children, shall afterwards marry her, the children, if recognized by him, shall be thereby legitimated. These acts were consolidated in 1792. See V. L. Edi. 1794, c. 93, 104.

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legitimate children. 2. Their power over them. 3. The duties of such children to their parents.

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

The duty of parents to provide for the *maintenance* of their children, is a principle of natural law; an obligation, says Puffendorf[b], laid on them not only by nature herself, but by their own proper act, in bringing them into the world: for they would be in the highest manner injurious to their issue, if they only gave their children life, that they might afterwards see them perish. By begetting them, therefore, they have entered into a voluntary obligation, to endeavour, as far as in them lies, that the life which they have bestowed shall be supported and preserved. And thus the children will have a perfect *right* of receiving maintenance from their parents. And the president Montesquieu[c] has a very just observation upon this head: that the establishment of marriage in all civilized states is built on this natural obligation of the father to provide for his children; for that ascertains and makes known the person who is bound to fulfil this obligation: whereas, in promiscuous and illicit conjunctions, the father is unknown; and the mother finds a thousand obstacles in her way; ....shame, remorse, the constraint of her sex, and the rigour of laws;....that stifle her inclinations to perform this duty: and besides, she generally wants ability. 447

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

The civil law[d] obliges the parent to provide maintenance for his child; and, if he refuses, "*judex de ea re cognoscet.*" Nay,

b L. of N. l. 4, c. 11.
c Sp. L. b. 23, c. 2.
d *Ff.* 25, 3, 5.

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

Let us next see what provision our own laws have made for this natural duty. It is a principle of law[h], that there is an obligation on every man to provide for those descended from his loins; and the manner, in which this obligation shall be performed, is thus pointed out[i]. The father, and mother, grandfather, and grandmother of poor impotent persons shall maintain them at their own charges, if of sufficient ability, according as the quarter session shall direct: and[k] if a parent runs away, and leaves his children, the churchwardens and overseers of the parish shall seise his rents, goods, and chattels, and dispose of them toward their relief[2]. By the interpretations which the courts of law have

e *Nov.* 115.
f *l.* 4, *c.* 11, §. 7.
g *de j. b. & p. l.* 2, *c.* 7, *n.* 3.
h Raym. 500.
i Stat. 43 Eliz. c. 2.
k Stat. 5 Geo. I, c. 8.

2. The statute 43 Eliz. c. 2, if ever in force, is repealed. V. L. 1794, c. 147. The stat. 5 Geo. I, c. 8, was never in force in Virginia.

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made upon these statutes, if a mother or grandmother marries again, and was before such second marriage of sufficient ability to keep the child, the husband shall be charged to maintain it[l]: for this being a debt of hers, when single, shall like others extend to charge the husband. But at her death, the relation being dissolved, the husband is under no farther obligation.

No person is bound to provide a maintenance for his issue, 449
unless where the children are impotent and unable to work, either through infancy, disease, or accident; and then is only obliged to find them with necessaries, the penalty on refusal being no more than 20s. a month. For the policy of our laws, which are ever watchful to promote industry, did not mean to compel a father to maintain his idle and lazy children in ease and indolence: but thought it unjust to oblige the parent, against his will, to provide them with superfluities, and other indulgences of fortune; imagining they might trust to the impulse of nature, if the children were deserving of such favours. Yet, as nothing is so apt to stifle the calls of nature as religious bigotry; it is enacted[m], that if any popish parent shall refuse to allow his protestant child a fitting maintenance, with a view to compel him to change his religion, the lord chancellor shall by order of court constrain him to do what is just and reasonable. But this did not extend to persons of another religion, of no less bitterness and bigotry than the popish: and therefore in the very next year we find an instance of a jew of immense riches, whose only daughter having embraced christianity, he turned her out of doors; and on her application for relief, it was held she was entitled to none[n]. But this gave occasion[o] to another statute[p], which ordans, that if jewish parents refuse to allow their protestant children a fitting maintenance suitable to the fortune of the parent, the lord chancellor on complaint may make such order therein as he shall see proper[3].

l Styles, 283. 2 Bulstr. 346.
m Stat. 11 and 12 W. *III*. c. 4.
n Lord Raym. 699.
o Com. Journ. 18 Feb. 12 Mar. 1701.
p 1 Ann. st. 1. c. 30.

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3. The Stat. 11, and 12, Will. III. c. 4. and 1 Ann. Stat. 1. c. 30. here referred to, were never in force in Virginia.

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Our law has made no provision to prevent the disinheriting of children by will: leaving every man's property in his own disposal, upon a principal of liberty in this, as well as every
450 other, action: though perhaps it had not been amiss, if the parent had been bound to leave them at the least a necessary subsistence. Indeed, among persons of any rank or fortune, a competence is generally provided for younger children, and the bulk of the estate settled upon the eldest, by the marriage-articles. Heirs also, and children, are favourites of our courts of justice, and cannot be disinherited by any dubious or ambiguous words; there being required the utmost certainty of the testator's intentions to take away the right of an heir[q4].

From the duty of maintenance we may easily pass to that of *protection*, which is also a natural duty, but rather permitted than enjoined by any municipal laws: nature, in this respect, working so strongly as to need rather a check than a spur. A parent may, by our laws, maintain and uphold his children in their law-suits, without being guilty of the legal crime of maintaining quarrels[r5]. A parent may also justify an assault and

q 7 Lev. 150. r 2 Inst. 564.

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4. Since the acts of 1785, c. 60, 61, took effect, which happened on the first of January, 1787, all the children of a person dying intestate, are jointly his heirs. By the latter act, a last will, made when the testator had no child, wherein any child, he might have, is not provided for, or mentioned, shall have no effect during the life of any after born child, and shall be void, unless the child die before the age of twenty-one years, or marriage. And posthumus children, if not provided for by settlement, or will, nor disinherited, shall succeed to the same portion of the father's estate, as if he had died intestate, towards raising which the devisees and legatees shall contribute proportionably. And by the act of 1794, c. 170, children born during the life of the testator, but after the making of his last will, if they be neither provided for by settlement, or will, nor disinherited, but only pretermitted, shall in like manner succeed to the same portion of the estate, as if the testator had died intestate. V. L. Edi. 1794, c. 92. 170.

5. In every case where an infant may sue, his next friend shall be admitted to sue for him. V. L. 1786, c. 66. Edi. 1794, c. 95. §. 16.

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battery in defence of the persons of his children [s]: nay, where a man's son was beaten by another boy, and the father went near a mile to find him, and there revenged his son's quarrel by beating the other boy, of which beating he afterwards unfortunately died; it was not held to be murder, but manslaughter merely[t]. Such indulgence does the law shew to the frailty of human nature, and the workings of parental affection.

The last duty of parents to their children is that of giving them an *education* suitable to their station in life: a duty pointed out by reason, and of far the greatest importance of any. For, as Puffendorf very well observes[u], it is not easy to imagine or allow, that a parent has conferred any considerable benefit upon his child, by bringing him into the world; if he afterwards entirely neglects his culture and education, and suffers him to grow up like a mere beast, to lead a life useless to others, and shameful to himself(5). Yet the municipal laws of most countries

s 1 Hawk. P. C. 131.
t Cro. Jac. 296, 1 Hawk. P. C. 83
u L. of N. b. 6. c. 2. Sec. 12.

(5.) To any rational and reflecting mind, it would seem that the duty of parents towards their infant children, is the strongest and most obligatory of all relative duties, whether social or natural.... It has it's foundation in the voluntary act of the parent, alone, before the child is in *esse*; the very existence of the latter depending upon the previous conduct of the former, who thereby incurs an obligation, superior to any which the institutions of society can create. The child enters the world in a state utterly helpless, in which state he continues, invariably, for many years: very few acquire either a sufficient portion of reason, or of bodily powers, to provide for their own support, at so early an age as twelve years; and at that age his education has little more than commenced; his moral character, the most essential object of education, remaining still to be formed; or rather, the first rudiments of morality being scarcely yet perceptible to his understanding. The parents obligation to afford him this branch of instruction, is even greater, if possible, than to preserve him from perishing by hunger or cold, inasmuch as life without virtue is a curse instead of a blessing....And yet, notwithstanding this obligation upon the parent, which, considered in a moral light, can never be cancelled, may the parent, by the laws of society, disinherit, and leave his infant offspring without support,

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seem to be defective in this point, by not constraining the parent to bestow a proper education upon his children. Perhaps they thought it punishment enough to leave the parent, who neglects the instruction of his family, to labour under those griefs and inconveniencies, which his family, so uninstructed, will be sure to bring upon him. Our laws, though their defects in this particular cannot be denied, have in one instance made a wise provision for breeding up the rising generation: since the poor and laborious part of the community, when past the age of nurture, are taken out of the hands of their parents, by the statutes for apprenticing poor children[w 6]; and are placed out by the public

w See page 426.

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without shelter, and without education. The debt of a crafty and rapacious creditor, by whom the parent has been deceived, or enticed into extravagance, or some ruinous contract, shall be preferred to the claims of the child, enforced by every obligation which nature can impose. But surely the laws ought so far to interfere in behalf of an infant child, not yet arrived at years of discretion, and consequently, incapable of giving just cause of offence, as to prevent his parent from disinheriting him, either by deliberate and diabolical cruelty, or by indiscretion. The latter is more necessary than the former. Few are those parents, who by a deliberate, or wanton act of cruelty, leave their children altogether destitute; whilst thousands leave them in that state through mere indiscretion: an indiscretion, the effects of which are too frequently reserved for their miserable families, without ever being felt or even apprehended, by themselves. Ought not the laws then, to protect the claims of the helpless infant, often prior in point of time, and always superior in point of obligation, to those of a voluntary creditor, by securing to him a necessary subsistence, and education, until he has arrived at the age of discretion, and corporal ability to support himself? If, when these unextinguishable prior claims are properly satisfied, or provided for, any thing be left for the claims of the voluntary creditor, then, and not before, should they be discharged.

These ideas may not square with those which prevail in commercial countries; but it is presumed they are not the less moral for that reason; unless it can be proved that the positive institutions of society, ought to annul or to prevail over the absolute duties, injunctions, and obligations of nature.

6. See page 426, note 5.

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in such a manner, as may render their abilities, in their several stations, of the greatest advantage to the commonwealth. The rich, indeed, are left at their own option, whether they will breed up their children to be ornaments or disgraces to their family. Yet, in one case, that of religion, they are under peculiar restrictions[7]: for[x] it is provided, that if any person sends any child under his government beyond the seas, either to prevent it's good education in England, or in order to enter into or reside in any popish college, or to be instructed, persuaded, or strengthened in the popish religion; in such case, besides the disabilities incurred by the child so sent, the parent or person sending shall forfeit 100*l.* which[y] shall go to the sole use and benefit of him that shall discover the offence. And[z] if any parent or other, shall send or convey any person beyond sea, to enter into, or be resident in, or trained up in, any priory, abbey, nunnery, popish university, college or school, or house of jesuits, or priests, or in any private popish family, in order to be instructed, persuaded, or confirmed in the popish religion; or shall contribute any thing towards their maintenance when abroad by any pretext whatever, the person both sending and sent shall be disabled to sue in law or equity, or to be executor or administrator to any person, or to enjoy any legacy or deed of gift, or to bear any office in the realm, and shall forfeit all his goods and chattels, 452
and likewise all his real estate for life.

2. The *power* of parents over their children is derived from the former consideration, their duty: this authority being given them, partly to enable the parent more effectually to perform his duty, and partly as a recompense for his care and trouble in the faithful discharge of it. And upon this score the municipal laws of some nations have given a much larger authority to the

x Stat. 1 Jac I. c. 4 and 3 Jac. I. c. 5. y Stat. 11. and 12 W. III. c. 4.
z Stat. 3 Car. I. c. 2.

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7. The statutes 1 Ja. 1. c. 4, and 3 Ja. 1. c. 5, and 3 Car. 1. c. 2. and 11, and 12 W. 3. c. 4, referred to in this paragraph, are either repealed or were never in force in Virginia.

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parents, than others. The antient Roman laws gave the father a power of life and death over his children; upon this principle, that he who gave had also the power of taking away[a]. But the rigour of these laws was softened by subsequent constitutions; so that[b] we find a father banished by the emperor Hadrien for killing his son, though he had committed a very hienous crime, upon this maxim, that "*patria potestas in pietate debet, non in* "*atrocitate, consistere.*" But still they maintained to the last a very large and absolute authority: for a son could not acquire any property of his own during the life of his father; but all his acquisitions belonged to the father, or at least the profits of them for his life[c].

The power of a parent by our English laws is much more moderate; but still sufficient to keep the child in order and obedience. He may lawfully correct his child, being under age, in a reasonable manner[d]; for this is for the benefit of his education. The consent or concurrence of the parent to the marriage of his child under age, was also *directed* by our antient law to be obtained: but now it is absolutely *necessary;* for without it the contract is void[e 8]. And this also is another means, which the law has put into the parent's hands in order the better to discharge his duty; first, of protecting his children from the snares of artful and designing persons; and, next, of settling them properly in life, by preventing the ill consequences of too early and precipitate marriages. A father has no other power over his
453 son's *estate*, than as his trustee or guardian; for, though he may receive the profits during the child's minority, yet he must account

a *Ff.* 28. 2. 11. *Cod.* 8. 47. 10.

b *Ff.* 48. 9. 5.

c *Inst.* 2. 9. 1.

d 1 Hawk. P. C. 130.

e Stat. 26 Geo. II, 33.

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8. The Stat. 26 Geo. 2. c. 33, was never in force in Virginia. The laws of Virginia still direct the consent of the parent to be obtained whilst the child is under age; but the want of it does not render the marriage void. See p. 440, Note 16.

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for them when he comes of age*. He may indeed have the benefit of his children's labour while they live with him, and are maintained by him: but this is no more than he is entitled to from his apprentices or servants. The legal power of a father (for a mother, as such, is entitled to no power, but only to reverence and respect) the power of a father, I say, over the persons of his children ceases at the age of twenty-one: for they are then enfranchised by arriving at years of discretion, or that point which the law has established (as some must necessarily be established) when the empire of the father, or other guardian, gives place to the empire of reason. Yet, till that age arrives, this empire of the father continues even after his death: for he may by his will appoint a guardian to his children[9]. He may also delegate part of his parental authority, during his life, to the tutor or schoolmaster, of his child; who is then *in loco parentis*, and has such a portion of the power of the parent committed to his charge, *viz.* that of restraint and correction, as may be necessary to answer the purposes for which he is employed.

3. The *duties* of children to their parents arise from a principle of natural justice and retribution. For to those, who gave us existence, we naturally owe subjection and obedience during our minority, and honour and reverence ever after: they, who protected the weakness of our infancy, are entitled to our protection in the infirmity of their age; they who by sustenance and education have enabled their offspring to prosper, ought in return to be supported by that offspring, in case they stand in need of assistance. Upon this principle proceeded all the duties of

* Where children have fortunes independent of their parents, Lord Thurlow declared, that it was the practice in chancery to refer it to the master, to inquire whether the parents were of ability to maintain the children; if not, then to report what would be a proper maintenance; and this practice did not vary where a maintenance was directly given by the will, unless in cases where it was given to the father; under which circumstance it was a legacy to him. 1 *Bro.* 388.....*Christian*

9. V. L. 1748, c. 2. 1785, c. 86, Edi. 1794, c. 95, accordant,

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of children to their parents which are enjoined by positive laws. And the Athenian laws[f] carried this principle into practice with a scrupulous kind of nicety: obliging all children to provide for their father, when fallen into poverty; with an exception to spurious children, to those whose chastity had been prostituted by consent of the father, and to those whom he had not put in any
454 way of gaining a livelyhood. The legislature, says baron Montesquieu[g], considered, that in the first case the father, being uncertain, had rendered the natural obligation precarious; that, in the second case, he had sullied the life he had given, and done his children the greatest of injuries, in depriving them of their reputation; and that, in the third case, he had rendered their life (so far as in him lay) an unsupportable burthen, by furnishing them with no means of subsistence.

Our laws agree with those of Athens with regard to the first only of these particulars, the case of spurious issue. In the other cases the law does not hold the tie of nature to be dissolved by any misbehaviour of the parent; and therefore, a child is equally justifiable in defending the person, or maintaining the cause or suit, of a bad parent, as a good one; and is equally compellable[h] [10], if of sufficient ability, to maintain and provide for a wicked and unnatural progenitor, as for one who has shewn the greatest tenderness and parental piety.

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

1. Who are bastards. A bastard, by our English laws, is one that is not only begotten, but born, out of lawful matrimony.

f Potter's Antiq b. 4. c. 15. g Sp. I. b. 26. c. 5.
h Stat. 43 Eliz. c. 2.

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10. The Stat. 43 Eliza. c. 2, here referred to is repealed. V. L. 1794, c. 147.

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The civil and canon laws do not allow a child to remain a bastard, if the parents afterwards intermarry [i] [11]: and herein they differ most materially from our law; which though not so strict as to require that the child shall be *begotten*, yet makes it an indispensable condition, to make it legitimate, that it shall be *born*, after lawful wedlock. And the reason of our English law is surely much superior to that of the Roman, if we consider the principal end and design of establishing the contract of marriage, taken in a civil light; abstractedly from any religious 455
view, which has nothing to do with the legitimacy or illegitimacy of the children. The main end and design of marriage, therefore, being to ascertain and fix upon some certain person, to whom the care, the protection, the maintenance, and the education of the children should belong; this end is undoubtedly better answered by legitimating all issue born after wedlock than by legitimating all issue of the same parties, even born before wedlock, so as wedlock afterwards ensues; 1. Because of the very great uncertainty there will generally be, in the proof that the issue was really begotten by the same man [12]; whereas, by confining the proof to the birth, and not to the begetting, our law has rendered it perfectly certain, what child is legitimate, and who is to take care of the child. 2. Because by the Roman law a child may be continued a bastard, or made legitimate, at the option of the father and mother, by a marriage *ex post facto;* thereby opening a door to many frauds and partialities, which by our law are prevented. 3. Because by those laws a man may remain a bastard till forty years of age, and then become legitimate, by the subsequent marriage of his parents; whereby the main end of marriage, the protection of infants, is totally frustrated. 4. Because this rule of the Roman law admits of no limitations as to the time and number of bastards so to be

i *Inst.* 1, 10, 13. *Decret. l.* 4. c. 17. c. 1.

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11. The marriage alone does not legitimate a child born of the same parents before marriage; the father must *recognize* the child, before it is legitimated. 1785, c. 60. Edi. 1794. c. 93. See page 446. Note 1.

12. The only proof required by the laws of Virginia, is the recognition of the child by the father. 1785, c. 60. Edi. 1794, c. 93.

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legitimated; but a dozen of them may, twenty years after their birth, by the subsequent marriage of their parents, be admitted to all the privileges of legitimate children. This is plainly a great discouragement to the matrimonial state; to which one main inducement is usually not only the desire of having *children*, but also the desire of procreating lawful *heirs*. Whereas our constitutions guard against this indecency, and at the same time give sufficient allowance to the frailties of human nature. For, if a child be begotten while the parents are single, and they will endeavour to make an early reparation for the offence, by marrying within a few months after, our law is so indulgent as not to bastardize the child, if it be born, though not begotten, in lawful wedlock; for this is an incident that can happen but once, since all future children will be begotten, as well as born, within
456 the rules of honour and civil society. Upon reasons like these we may suppose the peers to have acted at the parliament of Merton, when they refused to enact that children born before marriage should be esteemed legitimate[k].

From what has been said it appears, that all children born before matrimony are bastards by our law: and so it is of all children born so long after the death of the husband, that, by the usual course of gestation, they could not be begotten by him. But, this being a matter of some uncertainty, the law is not exact as to a few days[l]. And this gives occasion to a proceeding at common law, where a widow is suspected to feign herself with child, in order to produce a suppositious heir to the estate: an attempt which the rigour of the Gothic constitutions esteemed equivalent to the most attrocious theft, and therefore punished with death[m]. In this case with us the heir presumptive may have a writ *de ventre inspiciendo*, to examine whether she be

k *Rogaverunt omnes episcopi magnates, ut consentirent quod nati ante matrimonium essent legitimi, sicut illi qui nati sunt post matrimonium, quia ecclesia tales habet pro legitimis. Et omnes comites et barones una voce responderunt, quod nolunt leges Angliae mutare, quae hucusque usitatae sunt et approbatae.* Stat. 20 Hen. *III.* c. 9. See the introduction to the great charter, *Edit. Oxon.* 1759, *sub anno* 1253.

l Cro Jac. 541.

m Stiernhook *de jure Gothor. l.* 3. *c.* 5.

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with child, or not[n] *; and, if she be, to keep her under proper restraint, till delivered; which is entirely conformable to the practice of the civil law[o]: but, if the widow be upon due examination found not pregnant, the presumptive heir shall be admitted to the inheritance, though liable to lose it again, on the birth of a child within forty weeks from the death of a husband[p]. But if a man dies, and his widow soon after marries again, and a child is born within such a time, as that by the course of nature it might have been the child of either husband; in this case he is said to be more than ordinarly legitimate; for he may, when he arrives to years of discretion, choose which of the fathers he pleases[q]. To prevent this, among other inconveniencies, the civil law ordained that no widow should marry *infra annum luctus*[r], a rule which obtained so early as the reign of Augustus[s], 457
if not of Romulus: and the same constitution was probably handed down to our early ancestors from the Romans, during their stay in this island; for we find it established under the Saxon and Danish governments[t].

As bastards may be born before the coverture or marriage state is begun, or after it is determined, so also children born during wedlock may in some circumstances be bastards. As if the husband be out of the kingdom of England, (or, as the law somewhat loosely phrases it, *extra quatuor maria*) for above nine months, so that no access to his wife can be presumed, her issue during that period shall be bastards[v]. But, generally, during the coverture access of the husband shall be presumed, unless the contrary can be shewn[u]; which is such a negative as can only

n Co. Litt. 8. Bract. *l.* 2. *c.* 32.
o *Ff.* 25. *tit.* 4. *per tot.* p Britton *c.* 66. *p.* 166.
q Co. Litt. 8. r *Cod.* 5, 9, 2.
s But the year was then only *ten* months. Ovid, *Fast. I.* 27.
t *Sit omnis vidua sine marito duodecim menses. L. L. Ethlr. A. D.* 1008. L. L. *Canut. c.* 71.
v Co. Litt. 244. u Salk. 123, 3 P. W. 276. Stra. 925.

* In a case, where an estate was devised to a male child which might be born within forty weeks after the death of the testator of a married woman, whose husband had been long abroad, and if no such child, the estate was devised over, this writ *de ventre inspiciendo* was awarded against the woman on the petition of the subsequent devisee. 4 *Bro.* 90. See the proceedings under this Writ, 2 *P. Wms.* 591....*Christian.*

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be proved by shewing him to be elsewhere: for the general rule is, *praesumitur pro legitimatione*[w]. In a divorce, *a mensa et thoro*, if the wife breeds children, they are bastards; for the law will presume the husband and wife conformable to the sentence of separation, unless access be proved: but, in a voluntary separation by agreement, the law will suppose access, unless the negative be shewn[x]. So also if there is an apparent impossibility of procreation on the part of the husband, as if he be only eight years old, or the like, there the issue of the wife shall be bastard[y]. Likewise, in case of divorce in the spiritual court *a vinculo matrimonii*, all the issue born during the coverture are bastards[z]; because such divorce is always upon some cause, that rendered the marriage unlawful and null from the beginning[13].

2. Let us next see the duty of parents to their bastard children, by our law; which is principally that of maintenance. For, though bastards are not looked upon as children to any civil purposes, yet the ties of nature, of which maintenance is one, are not so easily dissolved: and they hold indeed as to many other in-
458 tentions; as, particularly, that a man shall not marry his bastard sister or daughter[a]. The civil law, therefore, when it denied maintenance to bastards begotten under certain atrocious circumstances[b], was neither consonant to nature, nor reason; however profligate and wicked the parents might justly be esteemed.

The method in which the English law provides maintenance for them is as follows[c]. When a woman is delivered, or declares

w 5 Rep. 98.
x Salk. 123.
y Co. Litt. 244.
z *Ibid.* 235.
a Lord Raym. 68. Comb. 356.
b *Nov.* 89. *c.* 15.
c Stat. 18 Eliz. c. 3. 7 Jac. I, c 4. 3 Car. I. c. 4. 13 & 14 Car. II, c. 12. 6 Geo. II. c. 31.

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13. The act of 1788, c. 32, which authorises the annulling of marriages within the degrees of consanguinity and affinity therein mentioned, nevertheless declares that the issue in such marriages shall be deemed legitimate; thereby confirming the act of 1785, c. 60. Edi. 1794, c. 93, 104.

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herself with child, of a bastard, and will by oath before a justice of peace charge any person as having got her with child, the justice shall cause such person to be apprehended, and commit him till he gives security, either to maintain the child, or appear at the next quarter-sessions to dispute and try the fact. But if the woman dies, or is married before delivery, or miscarries, or proves not to have been with child, the person shall be discharged: otherwise the sessions, or two justices out of sessions, upon original application to them, may take order for the keeping of the bastard, by charging the mother or the reputed father with the payment of money or other sustentation for that purpose. And if such putative father, or lewd mother, run away from the parish, the overseers, by direction of two justices, may seize their rents, goods, and chattels, in order to bring up the said bastard child[14]. Yet such is the humanity of our laws, that no woman can be compulsively questioned concerning the father of her child, till one month after her delivery[15]: which indulgence is, however, very

14. These statutory regulations are no longer, if they were ever, in force in Virginia. The method prescribed by our law is as follows: when a woman is *delivered* of a bastard child, and will, by oath before a justice of the peace, charge any person not being a servant with being the father of it, the justice, upon an application made to him by an overseer of the poor, may issue his warrant for apprehending the person charged, and, unless he shall enter into a recognizance to appear at the next county court, and to abide and perform the order thereof, may commit him to the county jail. If the court adjudge him to be the father, they may charge him with the maintenance, in their discretion, and he shall thereupon enter into a recognizance for the performance of the order of the court, in such sum as they shall appoint, and in case of failure in paying the money he is charged with, to the overseers of the poor, the court may enter up judgment upon his recognizance, upon ten days notice: and if he refuse to enter into a recognizance, he may be committed to jail by the court, until he complies, or discharges himself by taking an oath of insolvency; or the overseers of the poor consent to his discharge. But no woman can be compulsively questioned concerning the father of her child, before her delivery. V. L. 1769, c. 27. Edi. 1785. Edi. 1794, c. 102. Bastards may be bound apprentices by the overseers of the poor. Ibid.

15. She may be questioned immediately after her delivery, it is presumed. Ibid.

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frequently a hardship upon parishes, by giving the parents opportunity to escape.

3. I proceed next to the rights and incapacities which appertain to a bastard. The rights are very few, being only such as he can *acquire;* for he can *inherit* nothing[16], being looked upon as the son of nobody, and sometimes called *filius nullius*, some-
459 times *filius populi* [d] *. Yet he may gain a sirname by reputation[e], though he has none by inheritance. All other children have their primary settlement in their father's parish; but a bastard in the parish, where born, for he hath no father[f]. However, in case of fraud, as if a woman be sent either by order of justices, or comes to beg as a vagrant to a parish which she does not belong to, and drops her bastard there; the bastard shall, in the first case, be settled in the parish from whence she was illegally removed[g]; or, in the latter case, in the mother's own parish, if the mother be apprehended for her vagrancy[h]. Bastards also born in any licensed hospital for pregnant women, are settled in the parishes to which the mothers belong[i] [18]. The incapacity of a bas-

d *Fort. de L. L. c.* 40.
e Co. Litt. 3.
f Salk. 427.
g Salk. 121.
h Stat. 17 Geo. *II*, c. 5.
i Stat. 13 Geo. *III*, c. 82.

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* Bastards are within the meaning of the marriage act 26 Geo. 2. c. 33, which requires the consent of the father, guardian, or mother, to the marriage of persons under age, who are not married by banns. The King v. Hodnett, Term. Rep. 96.....The rule that a bastard is *filius nullius* applies only to the case of inheritances. Ibid. 101 [1].

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16. Since the first of January 1787. Bastards are capable of inheriting or transmitting an inheritance, on the part of their mothers, as if they had been lawfully begotten: and if the father of a bastard marry the mother, and afterwards recognize the bastard as his child, he is thereby legitimated, and consequently capable of inheriting as if born in lawful wedlock. V. L. 1785, c. 60. 1794, c. 93.

17. It is presumed that bastards are equally within the meaning of the marriage act in Virginia. Edi. 1794, c. 104.

18. These statutory regulations were never in force in Virginia.

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tard consists principally in this, that he cannot be heir to any one, neither can he have heirs, but of his own body; for, being *nullius filius*, he is therefore of kin to nobody, and has no ancestor from whom any inheritable blood can be derived [19]. A bastard was also, in strictness, incapable of holy orders; and, though that were dispensed with, yet he was utterly disqualified from holding any dignity in the church [k]: but this doctrine seems now obsolete; and in all other respects, there is no distinction between a bastard and another man. And really any other distinction, but that of not inheriting, which civil policy renders necessary, would, with regard to the innocent offspring of his parents' crimes, be odious, unjust, and cruel to the last degree: and yet the civil law, so boasted of for it's equitable decisions, made bastards in some cases incapable even of a gift from their parents [l]. A bastard may, lastly, be made legitimate, and capable of inheriting, by the transcendant power of an act of parliament, and not otherwise [m] [20]: as was done in the case of John of Gant's bastard children, by a statute of Richard the second [21].

k Fortesc. c. 40. 5 Rep. 58. l *Cod.* 6. 57, 5.
m 4 Inst. 36.

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19. See note 16, last page.

20. V. L. 1785, c. 60. contra. See note 1. of this chapter.

21. The laws respecting the mothers of bastard children, were formerly very severe. The student may consult the act of 1710, c. 2. §. 12, 13, 14. 1753, c. 2. §. 13. 1765, c. 7. §. 3. 1769, c. 27. Edi. 1785.

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OF GUARDIAN AND WARD.

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

1. The guardian with us performs the office both of the *tutor* and *curator* of the Roman laws; the former of which had the charge of the maintenance and education of the minor, the latter the care of his fortune; or, according to the language of the court of chancery, the *tutor* was the committee of the person, the *curator* the committee of the estate. But this office was frequently united in the civil law [a]; as it is always in our law with regard to minors, though as to lunatics and idiots it is commonly kept distinct.

461 Of the several species of guardians, the first are guardians *by nature:* viz. the father, and (in some cases) the mother of the child. For, if an estate be left to an infant, the father is by common law the guardian, and must account to his child for the

a *Ff.* 26, 4, 1.

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profits [b]*. And, with regard to daughters, it seems by construction of the statute 4 and 5 Ph. and Mar. c. 8, that the father might, by deed or will, assign a guardian to any woman-child under the age of sixteen; and, if none be so assigned, the mother shall in this case be guardian [c] [1]. There are also guardians *for nurture* [d]; which are, of course, the father or mother, till the infant attains the age of fourteen years [e]: and in default of father or mother, the ordinary usually assigns some discreet person to take care of the infant's personal estate, and to provide for his maintenance and education [f]. Next are guardians *in socage*, (an appellation which will be fully explained in the second book of these commentaries) who are also called guardians *by the common law*. These take place only when the minor is entitled to some estate in lands, and then by the common law the guardianship devolves upon his next of kin, to whom the inheritance cannot possibly descend; as, where the estate descended from his father, in this case his uncle, by the mother's side, cannot possibly inherit this estate, and therefore shall be the guardian [g]. For the law judges it improper to trust the person of an infant in his hands, who may by possibility become heir to him; that there may be no temptation, nor even suspicion of temptation, for him to abuse his trust [h]. The Roman laws proceed on a quite contrary principle, committing the care of the minor to him who is the next to succeed to the inheritance, presuming that the next heir would take the best care of an estate, to which he has a prospect of succeeding: and this they boast to be "*sum-*

b Co. Litt. 88.
c 3 Rep. 39.
d Co. Litt. 88.
e Moor. 738. 3 Rep. 38.
f 2 Jones 90. 2 Lev. 163.
g Litt. §. 123.
h *Nunquam custodia alicujus de jure alicui remanet, de quo habeatur suspicio, quod possit vel velit aliquod jus in ipsa haereditate clamare.* Glanv. *l.* 7. *c.* 11.

* But an executor is not justified in paying to the father a legacy left to the child; and if he pays it to the father, and the father becomes insolvent, he may be compelled to pay it over again. 1 *P. Wms.* 285....*Christian.*

1. The act of 1789, c. 8. Edi. 1794, c. 104, §. 20, is nearly a transcript from the stat. 4 and 5 Ph. and Mar. c. 8, here cited.

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ma providentia [i]." But in the mean time, they seem to have
462 forgotten, how much it is the guardian's interest to remove the incumbrance of his pupil's life from that estate for which he is supposed to have so great a regard [k]. And this affords Fortescue [l], and sir Edward Coke [m], an ample opportunity for triumph; they affirming, that to commit the custody of an infant to him that is next in succession is "*quasi agnum committere lupo, ad devorandum* [n]." These guardians in socage, like those for nurture, continue only till the minor is fourteen years of age; for then, in both cases, he is presumed to have discretion, so far as to choose his own guardian [2]. This he may do, unless one be appointed by the father, by virtue of the statute 12 Car. II. c. 24, which, considering the imbecility of judgment in children of the age of fourteen, and the abolition of guardianship *in chivalry* (which lasted till the age of twenty-one, and of which we shall speak hereafter) enacts, that any father, under age, or of full age, may, by deed or will, dispose of the custody of his child, either born or unborn, to any person, except a popish recusant [3], either

i *Ff.* 26, 4, 1.

k The Roman satyrist was fully aware of this danger, when he puts this private prayer into the mouth of a selfish guardian;

....pupillum o utinam, quem proximus haeres
Impello, expungam. Pers. 1, 12.

l *c.* 44.

m 1 Inst. 88.

n See Stat. *Hibern.* 14 Hen. III. This policy of our English law is warranted by the wise institutions of Solon, who provided that no one should be another's guardian, who was to enjoy the estate after his death. (Potter's Antiq. b. 1. c. 26.) And Charondas, another of the Grecian legislators, directed that the inheritance should go to the father's relations, but the education of the child to the mother's; that the guardianship and right of succession might always be kept distinct. (Petit. *Leg: Att. l.* 6. t. 7.)

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2. Guardians in socage seem to be recognized by the acts of 1748, c. 2, and 1785, c. 86. Edi. 1794, c. 95.

3. The act of 1748, c. 2, conformed to the stat. 12 Car. 2. c. 24, in excepting popish recusants: but the act of 1785, c. 86, makes no exception as to them. The act of 1792, Edi. 1794, c. 95, agrees with the latter.

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in possession or reversion, till such child attains the age of one and twenty years *. These are called guardians *by statute*, or *testamentary* guardians [4]. There are also special guardians *by custom* of London, and other places [o]; but they are particular exceptions, and do not fall under the general law.

The power and reciprocal duty of a guardian and ward are the same, *pro tempore*, as that of a father and child; and therefore I shall not repeat them: but shall only add, that the guardian, when the ward comes of age, is bound to give him an account of all that he has transacted on his behalf, and must answer for all losses by his wilful default or negligence. In order, therefore, to prevent disagreeable contests with young gentlemen, it has become a practice for many guardians, of large estates especially, to indemnify themselves by applying to the court of chancery, acting under it's direction, and accounting annually before the officers of that court. For the lord chancellor is, by right, derived from the crown, the general and supreme guardian of all infants, as well as idiots and lunatics; that is, of all such persons as have not discretion enough to manage their own concerns. In case, therefore, any guardian abuses his trust, 463

o Co. Litt. 88.

* By this statute, the father may dispose of the guardianship of any child unmarried under the age of twenty-one, by deed or will, executed in the presence of two or more witnesses, till such child attains the age of twenty-one, or for any less time. And the guardian so appointed has the tuition of the ward, and the management of his estate and property.

A father cannot appoint guardians under this statute to a natural child; but where he has named guardians by his will to an illegitimate child, the court of chancery will appoint the same persons guardians without any reference to a master for his approbation. 2 Bro. 583.....*Christian.*

4. It would seem that the legislature of Virginia thought there was some distinction between statutory and testamentary guardians, as they passed an act in 1794 to amend the act of 1792. But it may be doubted whether most of the provisions of the latter act, are not comprehended in the former. See the Edi. 1794, c. 95 and 172.

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the court will check and punish him; nay sometimes will proceed to the removal of him, and appoint another guardian in his stead p [5].

2. Let us next consider the ward or person within age, for whose assistance and support these guardians are constituted by law; or who it is, that is said to be within age. The ages of male and female are different, for different purposes. A male at *twelve* years old may take the oath of allegiance; at *fourteen* is at years of discretion, and, therefore, may consent or disagree to marriage, may choose his guardian [6], and, if his discretion be

p 1 Sid. 424. 1 P. Will. 307.

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5. Formerly the general court, V. L. 1748, c. 2, but now under the act of 1785, c. 86, the high court of chancery, generally, and the court of every county and corporation within the limits of their jurisdiction, have power to control guardians, and to determine all matters between them and their wards. The courts are to take security of guardians, and if they fail or refuse to give it, the courts may appoint curators. The guardians are likewise to return inventories of their wards' estates, and to exhibit their accounts, annnally, in the month of September, or oftener (if required) to the courts: and any debt due from a guardian to his ward, shall, after the debt of the guardian, be paid before any other debt, if there be no specific lien upon his estate. Testamentary guardians, if not prohibited by the will, may make leases of their wards lands, reserving the best rent and most beneficial covenants that can be had, until the ward shall arrive at twenty-one years, or continuing beyond that time as the ward may elect: but statutory guardians are inhibited from making leases beyond their wards age of fourteen: and if the ward be a trustee, or mortgagee of lands, the guardian, by order of the high court of chancery, may execute any deed, or perform any act, which the ward, if of full age, could have done: and under the same authority may take, or make a surrender of a former lease, or take or make a new lease of lands. If a testamentary guardian be guilty of any flagrant abuse of his trust, the court may displace him: and, on the other hand, may make any guardian a reasonable compensation for his care and trouble. A guardian, with the approbation of the court, may bind his ward apprentice, &c. See the acts at large, Edi. 1794, c. 95, 172.

6. This supposes that there has been no guardian appointed by will.

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actually proved, may make his testament of his personal estate[7]; at *seventeen* may be an executor; and at *twenty-one* is at his own disposal, and may alien his lands, goods, and chattels. A female, also, at *seven* years of age may be betrothed or given in marriage; at *nine* is entitled to dower; at *twelve* is at years of maturity, and, therefore, may consent or disagree to marriage, and, if proved to have sufficient discretion, may bequeath her personal estate; at *fourteen* is at years of legal discretion, and may choose a guardian; at *seventeen* may be executrix; and at *twenty-one* may dispose of herself and her lands. So that full age in male or female is twenty-one years, which age is completed on the day preceeding the anniversary of a person's birth[q]; who till that time is an infant, and so stiled in law. Among the antient Greeks and Romans *women* were never of age, but subject to 464
perpetual guardianship[r], unless when married "*nisi convenissent in manum viri:*" and, when that perpetual tutelage wore away in process of time, we find that, in females as well as males, full age was not till twenty-five years[s]. Thus, by the constitution, of different kingdoms, this period, which is merely arbitrary, and *juris positivi*, is fixed at different times. Scotland agrees with England in this point; (both, probably, copying from the old Saxon constitutions on the continent, which extended the age of minority "*ad annum vigesimum primum, et eo usque juvenes* "*sub tutelam reponunt*[t]") but in Naples they are of full age at *eighteen*; in France, with regard to marriage, not till *thirty*: and in Holland at *twenty-five*.

3. Infants have various privileges, and various disabilities: but their very disabilities are privileges; in order to secure them

q Salk. 44, 625, Lord Raym. 480, 1096. Toder v. Sansam. *Dem. Proc.* 27 Feb. 1775.

r Pott. Antiq. b. 4, c. 11, Cic. *pro Muren.* 12.

s Inst. 1, 23, 1.

t Stiernhook *de jure Sueonum. l.* 2, c. 2. This is, also, the period when the king, as well as the subject, arrives at full age in modern Sweden. Mod. Un. Hist. xxxiii, 220.

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7. *No person* under the age of eighteen years is capable of disposing of his chattels by will, 1785, c. 61. Edi. 1794, c. 92.

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from hurting themselves by their own improvident acts. An infant cannot be sued but under the protection, and joining the name, of his guardian; for he is to defend him against all attacks as well by law as otherwise [u]: but he may sue either by his guardian, or *prochein amy*, his next friend who is not his guardian [8]. This *prochein amy* may be any person who will undertake the infant's cause; and it frequently happens, that an infant, by his *prochein amy*, institutes a suit in equity against a fraudulent guardian. In criminal cases, an infant of the age of *fourteen* years may be capitally punished for any capital offence [w]: but under the age of *seven* he cannot. The period between *seven* and *fourteen* is subject to much uncertainty: for the infant shall generally speaking, be judged *prima facie* innocent: yet if he was *doli capax*, and could discern between good and evil at the time of the offence committed, he may be convicted and undergo judgment and execution of death, though he hath not attain-
465 ed to years of puberty, or discretion [x]. And Sir Matthew Hale gives us two instances, one of a girl of thirteen, who was burned for killing her mistress: another of a boy, still younger, that had killed his companion, and hid himself, who was hanged; for it appeared, by his hiding, that he knew he had done wrong, and could discern between good and evil: and in such cases the maxim of law is, that, *malitia supplet aetatem*. So, also, in much more modern times, a boy of ten years old, who was guilty of a heinous murder, was held a proper subject for capital punishment, by the opinion of all the judges [y].

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

u Co. Litt. 135.
x 1 Hal. P. C. 26.
w 1 Hal. P. C. 25.
y Foster, 72.

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8. V. L. 1786, c. 66. Edi. 1794, c. 95. Accordant.

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It is generally true, that an infant can neither alien his lands, nor do any legal act, nor make a deed, nor indeed any manner of contract, that will bind him. But still to all these rules there are some exceptions; part of which were just now mentioned in reckoning up the different capacities which they assume at different ages: and there are others, a few of which it may not be improper to recite, as a general specimen of the whole. And first, it is true, that infants cannot aliene their estates: but infant trustees, or mortgagees, are enabled to convey, under the direction of the court of chancery or exchequer, or other courts of equity, the estates they hold in trust or mortgage, to such person as the court shall appoint [z 9]. Also, it is generally true, that an infant can do no legal act: yet, an infant, who has an advowson may present to the benefice when it becomes void [a 10]. For the law in this case dispenses with one rule, in order to maintain others of far greater consequence: it permits an infant to present a clerk, (who, if unfit, may be rejected by the bishop) rather than either suffer the church to be unserved till he comes of age, or permit the infant to be debarred of his right by lapse to the bishop. An infant may, also, purchase lands, but his purchase is incomplete: for, when he comes to age, he may either agree or disagree to it, as he thinks prudent or proper, without alleging any reason; and so may his heirs after him, if he dies without having completed his agreement [b]. It is, farther, generally true, that an infant, under twenty-one, can make no deed but what is afterwards voidable: yet, in some cases [c], he may bind himself apprentice by deed indented or indentures, for

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z Stat. 7 Ann, c. 19. 4 Geo. III, c. 16.
a Co. Litt. 172.
b Ibid. 2.
c Stat. 5 Eliz. c. 4, 43 Eliz. c. 2, Cro. Car. 179.

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9. The guardians of such infants shall under the direction of the high court of chancery, execute any deed, and perform any act which the infant if of age could have done, and such deed or other act shall be valid, except that the infant shall not be bound by a warranty or other covenant in the deed. V. L. 1785, c. 85. Edi. 1794, c. 95, and 172.

10 The whole law in regard to advowsons, is obsolete in Virginia.

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seven years [11]; and [d] he may, by deed or will, appoint a guardian to his children, if he has any [12]. Lastly, it is generally true, than an infant can make no other contract that will bind him: yet he may bind himself to pay for his necessary meat, drink, apparel, physic, and such other necessaries *; and, likewise for his good teaching and instruction, whereby he may profit himself, afterwards [e]. And thus much, at present, for the privileges and disabilities of infants [13].

d Stat. 12 Car. II, c. 24. e Co. Litt. 172.

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* It has been held, that an infant is not liable to repay money lent to him, although he should lay it out in necessaries. 1 *Salk.* 386. Nor is he bound to pay for goods bought to trade with. *Bull. N. P.* 154. But debts contracted during infancy are a good consideration to support a promise made to pay them, when a person is full of age. Infancy may be given in evidence upon the general issue, or it may be pleaded. *Bull* 152.

And where the defendant pleads infancy, and the plaintiff replies that the defendant confirmed the promise or contract, when he was of age; the plaintiff need only prove the promise, and the defendant must discharge himself by proof of the infancy. 1 *T. R.* 648....*Christian.*

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11. Every apprentice who shall be bound by his guardian, or father, with the approba ion of the court, may, after the age of sixteen, with the like approbation, agree to serve till twenty-four years of age, or any shorter time, and such agreement entered of record shall bind him, V. L. 1785, c. 86, Edi. 1794, c. 95.

12. V. L. 1748. c. 2. 1785, c. 86. 1794, c. 95. Accordant

13. The lands of infants were not subject to forfeiture for want of seating or cultivation; nor were they bound by processions of their lands made during their infancy, until six years after they came of age; nor by a will, proved during their minority, until ten years thereafter. V. L. 1748, c. 1, and 3. Their lands were excepted out of the acts concerning escheats and forfeitures from British subjects. Oct. 1779, c. 18. Edi. 1785. And now they may contest a will proved during their minority, if their interest be therein concerned, within six years after they come of age. V. L. 1785, c. 61. Edi. 1794, c. 92.

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OF CORPORATIONS[1].

WE have hitherto considered persons in their natural capacities, and have treated of their rights and duties. But, as all personal rights die with the person; and, as the necessary forms of investing a series of individuals, one after another, with the same identical rights, would be very inconvenient, if not impracticable, it has been found necessary, when it is for the advantage of the public to have any particular rights kept on foot and continued, to constitute artificial persons, who may maintain a perpetual succession, and enjoy a kind of legal immortality.

These artificial persons are called bodies politic, bodies corporate, *(corpora corporata)* or corporations: of which there is a great variety subsisting, for the advancement of religion, of learning, and of commerce; in order to preserve entire and for ever those rights and immunities, which, if they were granted only to those individuals of which the body corporate is composed, would upon their death be utterly lost and extinct. To shew the advantages of these incorporations, let us consider the case of a college in either of our universities, founded *ad studendum et orandum*, for the encouragement and support of religion and learning. If this were a mere voluntary assembly, the indivi-

1. By the repeal of all British statutes, V. L. Edi. 1794, c. 147, it would seem that the law respecting corporations, in Virginia, stands upon the foundation of the common law, only; except as their powers are limited, or enlarged, by special acts of the general assembly.

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duals which compose it might indeed read, pray, study, and perform scholastic exercises together, so long as they could agree to
468 do so: but they could neither frame, nor receive any laws or rules of their conduct; none at least, which would have any binding force, for want of a coercive power to create a sufficient obligation. Neither could they be capable of retaining any privileges or immunities: for, if such privileges be attacked, which of all this unconnected assembly has the right, or ability, to defend them? And, when they are dispersed by death or otherwise, how shall they transfer these advantages to another set of students, equally unconnected as themselves? So also, with regard to holding estates or other property, if land be granted for the purposes of religion or learning to twenty individuals not incorporated, there is no legal way of continuing the property to any other persons for the same purposes, but by endless conveyances from one to the other, as often as the hands are changed. But when they are consolidated and united into a corporation, they and their successors are then considered as one person in law: as one person, they have one will, which is collected from the sense of the majority of the individuals: this one will may establish rules and orders for the regulation of the whole, which are a sort of municipal laws of this little republic; or rules and statutes may be prescribed to it at it's creation, which are then in the place of natural laws: the privileges and immunities, the estates and possessions, of the corporation, when once vested in them, will be for ever vested, without any new conveyance to new successions; for all the individual members that have existed from the foundation to the present time, or that shall ever hereafter exist, are but one person in law, a person that never dies: in like manner as the river Thames is still the same river, though the parts which compose it are changing every instant.

The honour of originally inventing these political constitutions entirely belongs to the Romans. They were introduced, as Plutarch says, by Numa; who finding, upon his accession, the city torn to pieces by the two rival factions of Sabines and Romans, thought it a prudent and politic measure to subdivide these
469 two into many smaller ones, by instituting separate societies of every manual trade and profession. They were afterwards much

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considered by the civil law[a], in which they were called *universitates*, as forming one whole out of many individuals; or *collegia*, from being gathered together: they were adopted also by the canon law, for the maintenance of ecclesiastical discipline; and from them our spiritual corporations are derived. But our laws have considerably refined and improved upon the invention, according to the usual genius of the English nation: particularly with regard to sole corporations, consisting of one person only, of which the Roman lawyers had no notion; their maxim being that "*tres faciunt collegium*[b]." Though they held, that if a corporation, originally consisting of three persons, be reduced to one, "*si universitas ad unum redit*," it may still subsist as a corporation, "*et stet nomen universitatis*[c]."

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

The first division of corporations is into *aggregate* and *sole*. Corporations aggregate consist of many persons united together into one society, and are kept up by a perpetual succession of members, so as to continue for ever: of which kind are the mayor and commonalty of a city, the head and fellows of a college, the dean and chapter of a cathedral church. Corporations sole consist of one person only and his successors, in some particular station, who are incorporated by law, in order to give them some legal capacities and advantages, particularly that of perpetuity, which in their natural persons they could not have had. In this sense the king is a sole corporation[d]: so is a bishop: so are some deans, and prebendaries, distinct from their several chapters: and so is every parson and vicar. And the necessity, or at least use, of this institution will be very apparent, if we consider the case of a parson of a church. At the 470
original endowment of parish churches, the freehold of the church, the church-yard, the parsonage house, the glebe, and the tithes

a *Ff. l.* 3. *t.* 4. *per tot.*
b *Ff.* 50, 16, 8.
c *Ff.* 3, 4, 7.
d Co. Litt. 43.

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of the parish, were vested in the then parson by the bounty of the donor, as a temporal recompense to him for his spiritual care of the inhabitants, and with intent that the same emoluments should ever afterwards continue as a recompense for the same care. But how was this to be effected? The freehold was vested in the parson; and, if we suppose it vested in his natural capacity, on his death it might descend to his heir, and would be liable to his debts and incumbrances: or, at best, the heir might be compellable, at some trouble and expense, to convey these rights to the succeeding incumbent. The law, therefore, has wisely ordained, that the parson, *quatenus* parson, shall never die, any more than the king; by making him and his successors a corporation. By which means all the original rights of the parsonage are preserved entire to the successor: for the present incumbent, and his predecessor who lived seven centuries ago, are in law one and the same person; and what was given to the one was given to the other also.

Another division of incorporations, either sole or aggregate, is into *ecclesiastical* and *lay*. Ecclesiastical corporations are where the members that compose it are entirely spiritual persons; such as bishops; certain deans, and prebendaries; all archdeacons, parsons, and vicars; which are sole corporations: deans and chapters at present, and formerly prior and convent, abbot and monks, and the like, bodies aggregate. These are erected for the furtherance of religion, and perpetuating the rights of the church. Lay corporations are of two sorts, *civil* and *eleemosynary*. The civil are such as are erected for a variety of temporal purposes. The king, for instance, is made a corporation to prevent in general the possibility of an *interregnum* or vacancy of the throne, and to preserve the possessions of the crown entire; for, immediately upon the demise of one king, his successor is, as we have formerly seen, in full possession of the regal rights and dignity. Other lay corporations are erected for the good government of a town or particular district, as a mayor and com-
471 monalty, bailiff and burgesses, or the like: some for the advancement and regulation of manufactures and commerce; as the trading companies of London, and other towns: and some for the

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better carrying on of divers special purposes; as churchwardens, for conservation of the goods of the parish; the college of physicians and company of surgeons in London, for the improvement of the medical science; the royal society, for the advancement of natural knowledge; and the society of antiquaries, for promoting the study of antiquities. And among these I am inclined to think the general corporate bodies of the universities of Oxford and Cambridge must be ranked: for it is clear they are not spiritual or ecclesiastical corporations, being composed of more laymen than clergy: neither are they eleemosynary foundations, though stipends are annexed to particular magistrates and professors, any more than other corporations where the acting officers have standing salaries; for these are rewards *pro opera et labore*, not charitable donations only, since every stipend is preceded by service and duty: they seem, therefore, to be merely civil corporations. The eleemosynary sort are such as are constituted for the perpetual distribution of the free alms, or bounty, of the founder of them to such persons as he has directed. Of this kind are all hospitals for the maintenance of the poor, sick, and impotent; and all colleges, both *in* our universities and *out*[e] of them: which colleges, are founded for two purposes; 1. For the promotion of piety and learning by proper regulations and ordinances. 2. For imparting assistance to the members of those bodies, in order to enable them to prosecute their devotion and studies with greater ease and assiduity. And all these eleemosynary corporations are, strictly speaking, lay and not ecclesiastical, even though composed of ecclesiastical persons[f], and although they in some things partake of the nature, privileges and restrictions of ecclesiastical bodies.

Having thus marshalled the several species of corporations, 472
let us next proceed to consider, 1. How corporations, in general, may be created. 2. What are their powers, capacities, and incapacities. 3. How corporations are visited. And 4. How they may be dissolved.

I. Corporations, by the civil law, seem to have been created by the mere act, and voluntary association of their members; pro-

e Such as at Manchester, Eton, Winchester, &c.

f 1 Lord Raym. 6.

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vided such convention was not contrary to law, for then it was *illicitum collegium*[g]. It does not appear that the prince's consent was necessary to be actually given to the foundation of them; but merely that the original founders of these voluntary and friendly societies (for they were little more than such) should not establish any meetings in opposition to the laws of the state.

But, with us in England, the king's consent is absolutely necessary to the erection of any corporation, either impliedly or expressly given[h]. The king's implied consent is to be found in corporations which exist by force of the *common law*, to which our former kings are supposed to have given their concurrence[2]; common law being nothing else but custom, arising from the universal agreement of the whole community. Of this sort are the king himself, all bishops, parsons, vicars, churchwardens, and some others; who by common law have ever been held (as far as our books can shew us) to have been corporations, *virtute officii:* and this incorporation is so inseparably annexed to their offices, that we cannot frame a complete legal idea, of any of these persons, but we must also have an idea
473 of a corporation, capable to transmit his rights to his successors, at the same time. Another method of implication, whereby the king's consent is presumed, is as to all corporations by *prescrip-*

g *Ff.* 47, 22, 1. *Neque societas, neque collegium, neque hujusmodi corpus passim omnibus habere conceditur; nam et legibus, et senatus consultus, et principalibus constitutionibus, ea res coercetur. Ff.* 3, 4, 1.

h Cities and towns were first erected into corporate communities on the continent, and endowed with many valuable privileges, about the eleventh century: (Roberts. Cha. V. i. 30.) to which the consent of the feodal sovereign was absolutely necessary, as many of his prerogatives and revenues were thereby considerably diminished.

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2. No corporation hath been created in Virginia, since the revolution but by an act of the legislature. Their several powers and privileges must the refore depend wholly upon the acts of assembly by which they were first established, or such as have been afterwards made for the special purpose of limiting or enlarging, their privileges, respectively.

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tion, such as the city of London, and many others[j] which have existed as corporations, time whereof the memory of man runneth not to the contrary; and therefore are looked upon in law to be well created. For though the members thereof can shew no legal charter of incorporation, yet in cases of such high antiquity the law presumes there once was one; and that by the variety of accidents, which a length of time may produce, the charter is lost or destroyed. The methods by which the king's consent is expressly given, are either by act of parliament, or charter. By act of parliament, of which the royal assent is a necessary ingredient, corporations may undoubtedly be created[i]; but it is observable, that (till of late years) most of those statutes, which are usually cited as having created corporations, do either confirm such as have been before created by the king; as in the case of the college of physicians erected by charter 10 Hen. VIII[k]; which charter was afterwards confirmed in parliament[l]; or, they permit the king to erect a corporation *in futuro* with such and such powers; as is the case of the bank of England[m], and the society of the British fishery[n]. So that the immediate creative act was usually performed by the king alone, in virtue of his royal prerogative[o].

All the other methods therefore whereby corporations exist, by common law, by prescription, and by act of parliament, are for the most part reducible to this of the king's letters patent, or charter of incorporation. The king's creation may be performed by the words "*creamus*, *originus*, *fundamus*, *incorporamus*," or the like. Nay it is held, that if the king grants to a set of men to have *gildam mercatoriam*, a mercantile meeting or assembly[p],

j 2 Inst. 330.

i 10 Rep. 29. 1 Roll. Abr. 512.

k 8 Rep. 114.

l 14 & 15 Hen. VIII, c. 5.

m Stat. 5 & 6 W. & M. c. 20.

n Stat. 23 Geo. II, c. 4.

o See page 272.

p *Gild* signified among the Saxons a fraternity, derived from the verb *gildan* to pay, because every man paid his share towards the expenses of the community. And hence their place of meeting is frequently called the *Guild* or *Guild hall*.

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this is alone sufficient to incorporate and establish them for ever[q].

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

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

When a corporation is erected, a name must be given to it; and by that name alone it must sue, and be sued, and do all legal
475 acts; though a very minute variation therein is not material[uu]. Such name is the very being of it's constitution; and, though

q 10 Rep. 30. 1 Roll. Abr. 513. r 2 Inst. 722.
s Bro. *Abr. tit. Prerog.* 53. Viner. *Prerog.* 88. pl. 16.
t Yearbook, 2 Hen. VIII, 13. u 10 Rep. 33.
uu 10 Rep. 122.

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it is the will of the king that erects the corporation, yet the name is the knot of it's combination, without which it could not perform it's corporate functions[w]. The name of incorporation, says sir Edward Coke, is as a proper name or name of baptism; and therefore when a private founder gives his college or hospital a name, he does it only as a godfather; and by that same name the king baptizes the incorporation[x].

II. After a corporation is so formed and named, it acquires many powers, rights, capacities, and incapacities, which we are next to consider. Some of these are necessarily and inseparably incident to every corporation; which incidents, as soon as a corporation is duly erected, are tacitly annexed of course[y]. As, 1. To have perpetual succession. This is the very end of it's incorporation: for there cannot be a succession for ever without an incorporation[z]; and, therefore, all aggregate corporations have a power necessarily implied of electing members in the room of such as go off[a]. 2. To sue or be sued, implead or be impleaded, grant or receive, by it's corporate name, and do all other acts as natural persons may. 3. To purchase lands, and hold them, for the benefit of themselves and their successors; which two are consequential to the former. 4. To have a common seal. For a corporation, being an invisible body, cannot manifest it's intentions by any personal act or oral discourse: it therefore acts and speaks only by it's common seal. For, though the particular members may express their private consents to any act, by words, or signing their names, yet this does not bind the corporation: it is the fixing of the seal, and that only, which unites the several assents of the individuals, who compose the community, and makes one joint assent of the whole[b]. 5. To make by-laws or private statutes for the better government of the corporation; which are binding upon themselves, unless contrary to the laws 476
of the land, and then they are void. This is also included by law in the very act of incorporation[c]; for, as natural reason is given to the natural body for the governing it, so by-laws or sta-

w Gilb. Hist. C. P. 182.
x 10 Rep. 28.
y *Ibid.* 30, Hob. 211.
z 10 Rep. 26.
a 1 Roll. Abr. 514.
b Dav. 44, 48.
c Hob. 211.

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tutes are a sort of political reason to govern the body politic. And this right of making by-laws for their own government, not contrary to the law of the land, was allowed by the law of the twelve tables at Rome [d]. But no trading company is, with us, allowed to make by-laws, which may affect the king's prerogative, or the common profit of the people, under penalty of 40*l.* unless they be approved by the chancellor, treasurer, and chief justices, or the judges of assise in their circuits: and even, though they be so approved, still, if contrary to law, they are void [e]. These five powers are inseparably incident to every corporation, at least to every corporation *aggregate:* for two of them, though they may be practised, yet are very unnecessary to a corporation *sole*, *viz.* to have a corporate seal to testify his sole assent, and to make statutes for the regulation of his own conduct.

There are also certain privileges and disabilities that attend an aggregate corporation, and are not applicable to such as are sole; the reason of them ceasing, and of course the law. It must always appear by attorney; for it cannot appear in person, being, as sir Edward Coke says [f], invisible, and existing only in intendment and consideration of law. It can neither maintain, or be made defendant to, an action of battery or such like personal injuries: for a corporation can neither beat, nor be beaten, in it's body politic [g]. A corporation cannot commit treason, or felony, or other crime, in it's corporate capacity [h]; though it's other members may, in their distinct individual capacities [i]. 477 Neither is it capable of suffering a traitor's or felon's punishment, for it is not liable to corporate penalties, nor to attainder, forfeiture, or corruption of blood. It cannot be executor or administrator, or perform any personal duties; for it cannot take an

d *Sodales legem quam volent, dum ne quid ex publica lege corrumpant, sibi ferunto.*

e Stat. 19 Hen. VII, c. 7. 11 Rep. 54.

f 10 Rep. 32.

g Bro. *Abr. tit. Corporation.* 60.

h 10 Rep. 32.

i The civil law also ordains that, for the misbehaviour of a body corporate, the directors only shall be answerable in their personal capacities. *Ff.* 4, 3, 15.

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oath for the due execution of the office. It cannot be seised of lands to the use of another[j]; for such kind of confidence is foreign to the end of it's institution. Neither can it be committed to prison[k]; for it's existence being ideal, no man can apprehend or arrest it. And, therefore, also it cannot be outlawed; for outlawry always supposes a precedent right of arresting, which has been defeated by the parties absconding, and that also a corporation cannot do: for which reasons the proceedings to compel a corporation to appear to any suit by attorney, are always by distress on their lands and goods[l]. Neither can a corporation be excommunicated; for it has no soul, as is gravely observed by sir Edward Coke[m]: and, therefore, also it is not liable to be summoned into the ecclesiastical courts upon any account; for those courts act only *pro salute animae*, and their sentences can only be inforced by spiritual censures: a consideration, which carried to it's full extent, would alone demonstrate the impropriety of these courts interfering in any temporal rights whatsoever.

There are also other incidents and powers, which belong to some sort of corporations, and not to others. An aggregate corporation may take goods and chattels for the benefit of themselves and their successors, but a sole corporation cannot[n]: for such moveable property is liable to be lost or imbezzled, and would raise a multitude of disputes between the successor and executor; which the law is careful to avoid. In ecclesiastical and eleemosynary foundations, the king or the founder may give them rules, laws, statutes, and ordinances, which they are bound to observe: but corporations merely lay, constituted for civil 478
purposes, are subject to no particular statutes; but to the common law, and to their own by-laws, not contrary to the laws of the realm[o]. Aggregate corporations also, that have by their constitution a head, as a dean, warden, master, or the like, can-

j Bro. *Abr. tit. Feoffm. al use.* 40. Bacon of Uses, 347.
k Plowd. 558.
l Bro. *Abr. tit. Corporation.* 11. *Outlawry*, 72.
m 10 Rep. 32.
n Co. Litt. 46.
o Lord Raym. 8.

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not do any acts during the vacancy of the headship, except only appointing another: neither are they then capable of receiving a grant; for such corporation is incomplete without a head [p]. But there may be a corporation aggregate constituted without a head [q]: as the collegiate church of Southwell in Nottinghamshire, which consists only of prebendaries; and the governors of the charter-house, London, who have no president or superior, but are all of equal authority. In aggregate corporations also, the act of the major part is esteemed the act of the whole [r]. By the civil law this major part must have consisted of two-thirds of the whole; else no act could be performed [s]: which, perhaps, may be one reason why they required three at least to make a corporation. But, with us, *any* majority is sufficient to determine the act of the whole body. And whereas, notwithstanding the law stood thus, some founders of corporations had made statutes in derogation of the common law, making very frequently the unanimous assent of the society to be necessary to any corporate act: (which king Henry VIII found to be a great obstruction to his projected scheme of obtaining a surrender of the lands of ecclesiastical corporations) it was therefore enacted by statute 33 Hen. VIII. c. 27, that all private statutes shall be utterly void, whereby any grant or election, made by the head, with the concurrence of the major part of the body, is liable to be obstructed by any one or more, being the minority: but this statute extends not to any negative or necessary voice, given by the founder to the head of any such society [2].

We before observed that it was incident to every corporation,
479 to have a capacity to purchase lands for themselves and successors; and this is regularly true at the common law [t]. But they are excepted out of the statute of wills [u 3]; so that no devise of

p Co. Litt. 263, 264.
q 10 Rep. 30.
r Bro. *Abr. tit. Corporation*, 31, 34.
s *Lf.* 3, 4, 3.
t 10 Rep. 30.
u 34 Hen. VIII, c. 5.

(2.) This statute is not in force in Virginia. L. V. 1794, c. 147.

3. Corporations are not excepted out of the statute of wills in Virginia, nor do they appear ever to have been so excepted. See V. L. 1748, c. 3. 1785, c. 61. 1794, c. 92.

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lands to a corporation by will is good; except for charitable uses, by statute 43 Eliz. c. 4 [w]: which exception is again greatly narrowed by the statute 9 Geo. II. c. 36. And also, by a great variety of statutes [x], their privilege even of purchasing from any living grantor is much abridged; so that now a corporation, either ecclesiastical or lay, must have a licence from the king to purchase [y]; before they can exert that capacity which is vested in them by the common law; nor is even this in all cases sufficient. These statutes are generally called the statutes of *mortmain;* all purchases made by corporate bodies being said to be purchases in *mortmain*, *in mortua manu:* for the reason of which appellation sir Edward Coke [z] offers many conjectures; but there is one which seems more probable than any that he has given us; *viz.* that these purchases being usually made by ecclesiastical bodies, the members of which (being professed) were reckoned dead persons in law, land therefore, holden by them, might with great propriety be said to be held *in mortua manu.*

I shall defer the more particular exposition of these statutes of mortmain till the next book of these commentaries, when we shall consider the nature and tenures of estates; and also the exposition of those disabling statutes of queen Elizabeth, which restrain spiritual and eleemosynary corporations from aliening such lands as they are at present in legal possession of; only mentioning them in this place, for the sake of regularity, as statutable incapacities incident and relative to corporations [4].

The general *duties* of all bodies politic, considered in their corporate capacity, may, like those of natural persons, be re-

w Hob. 136.

x From *magna carta*, 9 Hen. III, c. 36, to 9 Geo. II, c 36.

y By the civil law, a corporation was incapable of taking lands, unless by special privilege from the emperor: *collegium, si nullo speciali privilegio subnixum sit, haereditatem capere non posse, dubium non est. Cod.* 6, 24, 8.

z 1 Inst. 2.

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4. These statutes were all repealed in 1792. V. L. Edi. 1794, c. 147.

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duced to this single one; that of acting up to the end or design, whatever it be, for which they were created by their founder.

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

I know it is generally said, that civil corporations are subject to no visitation, but merely to the common law of the land; and this shall be presently explained. But first, as I have laid it down as a rule that the founder, his heirs, or assigns, are the visitors of all lay corporations, let us inquire what is meant by the *founder*. The founder of all corporations in the strictest and original sense is the king alone, for he only can incorporate a society; and in civil incorporations, such as mayor and commonalty, &c. where there are no possessions or endowments given to the body, there is no other founder but the king: but in eleemosynary foundations, such as colleges and hospitals, where there is an endowment of lands, the law distinguishes,
481 and makes two species of foundation; the one *fundatio incipiens*, or the incorporation, in which sense the king is the general foun-

a 10 Rep. 31.

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der of all colleges and hospitals; the other *fundatio perficiens*, or the dotation of it, in which sense the first gift of the revenues is the foundation, and he who gives them is in law the founder: and it is in this last sense that we generally call a man the founder of a college or hospital[b]. But here the king has his prerogative: for, if the king and a private man join in endowing an eleemosynary foundation, the king alone shall be the founder of it. And, in general, the king being the sole founder of all civil corporations, and the endower the perficient founder of all eleemosynary ones, the right of visitation of the former results, according to the rule laid down, to the king; and of the latter to the patron or endower.

The king being thus constituted by law visitor of all civil corporations, the law has also appointed the place, wherein he shall exercise this jurisdiction: which is the court of king's bench; where, and where only, all misbehaviours of this kind of corporations are 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[c]. And this is so strictly true, that though the king by his letters patent had subjected the college of physicians to the visitation of four very respectable persons, the lord chancellor, the two chief justices, and the chief baron; though the college had accepted this charter with all possible marks of acquiescence, and had acted under it for near a century; yet in 1753, the authority of this provision coming into dispute, on an appeal preferred to these supposed

b 10 Rep. 33.

c This notion is perhaps too refined. The court of king's bench, (it may be said) from it's general superintendent authority where other jurisdictions are deficient, has power to regulate all corporations where no special visitor is appointed. But not in the light of visitor: for, as it's judgments are liable to be reversed by writs of error, it may be thought to want one of the essential marks of visitatorial power.

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visitors, they directed the legality of their own appointment to be argued: and as this college was merely a civil and not an eleemosynary foundation, they at length determined, upon several days solemn debate, that they had no jurisdiction as visitors; and remitted the appellant (if aggrieved) to his regular remedy in his majesty's court of king's bench.

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

Colleges in the universities (whatever the common law may now, or might formerly, judge) were certainly considered by the popish clergy, under whose direction they were, as *ecclesiastical*, or at least, as *clerical*, corporations; and therefore the right of visitation was claimed by the ordinary of the diocese. This is evident, because in many of our most antient colleges, where

d Yearbook, 8 Edw. *III*, 28. 8 Ass. 29. e 2 Inst. 725.

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the founder had a mind to subject them to a visitor of his own nomination, he obtained for that purpose a papal bulle to exempt them from the jurisdiction of the ordinary; several of which are still preserved in the archives of the respective societies. And in some of our colleges, where no special visitor is appointed, the bishop of that diocese, in which Oxford was formerly comprised, has immemorially exercised visitatorial authority; which can be ascribed to nothing else, but his supposed title as ordinary to visit this, among other ecclesiastical foundations. And it is not impossible, that the number of colleges in Cambridge, which are visited by the bishop of Ely, may in part be derived from the same original.

But, whatever might be formerly the opinion of the clergy, it is now held as established common law, that colleges are lay corporations, though sometimes totally composed of ecclesiastical persons; and that the right of visitation does not arise from any principles of the cannon law, but of necessity was created by the common law [f]. And yet the power and jurisdiction of visitors in colleges was left so much in the dark at common law, that the whole doctrine was very unsettled till the famous case of *Phillips and Bury* [g]. In this the main question was, whether the sentence of the bishop of Exeter, who (as visitor) had deprived doctor Bury the rector of Exeter College, could be examined and redressed by the court of king's bench. And the three puisne judges were of opinion, that it might be reviewed, for that the visitor's jurisdiction could not exclude the common law; and accordingly judgment was given in that court. But the lord chief justice Holt was of a contrary opinion; and held, that by the common law the office of visitor is to judge according to the statutes of the college, and to expel and deprive upon just occasions, and to hear all appeals of course: and that from him, and him only, the party grieved ought to have redress: the founder having reposed in him so 484
entire a confidence, that he will administer justice impartially, that his determinations are final, and examinable in no other

f Lord Raym. 8.

g Lord Raym. 5. 4 Mod. 106. Show. 35. Skinn. 407. Salk. 403. Carthew. 180.

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court whatsoever. And, upon this, a writ of error being brought into the house of lords, they concurred in sir John Holt's opinion, and reversed the judgment of the court of king's bench. To which leading case all subsequent determinations have been conformable. But, where the visitor is under a temporary disability, there the court of king's bench will interpose, to prevent a defect of justice [h]. Also it is said [i], that if a founder of an eleemosynary foundation appoints a visitor, and limits his jurisdiction by rules and statutes, if the visitor in his sentence exceeds those rules, an action lies against him; but it is otherwise, where he mistakes in a thing within his power [5].

IV. We come now, in the last place, to consider how corporations may be dissolved. Any particular member may be

h Stra. 797. i 2 Lutw. 1566.

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5. In October 1787, Mr. Bracken, formerly, professor of humanity in the college of William and Mary, whose office had been discontinued by the visitors of the college, in the year 1779, applied to the general court for a mandamus to restore him to his office; the case was adjourned into the court of appeals for difficulty; it was argued at two terms successively, and in November, 1790, the mandamus was denied on the *merits:* which (according to the president of the court of appeals) was inserted for two purposes. First, to shew the case had been fully entered into, as if the papers had been before the court on the return of the mandamus. Secondly, to meet an obligation warmly insisted upon, that the general court *had no power to intermeddle with the affairs of the college*, upon the *English precedents*, applying to private donations for colleges; but which some of the judges, at least, (of whom *he* was one) thought did not apply to our college, which had a *public*, and not a *private* foundation.

The right of the visitors to change the arrangements of schools, made by the original statutes, and to discontinue the grammar school, was considered by the court as unquestionable. And in a suit against the college for his salary as master of the grammar school, from the period that such arrangement was made, by statute, the whole of the case being found at large in a special verdict, judgment was rendered first in the district court, and finally in the court of appeals in favour of the college. 1 Call's Reports, 164.

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disfranchised, or lose his place in the corporation, by acting contrary to the laws of the society, or the laws of the land: or he may resign it by his own voluntary act [k]. But the body politic may also itself be dissolved in several ways; which dissolution is the civil death of the corporation: and in this case their lands and tenements shall revert to the person, or his heirs, who granted them to the corporation: for the law doth annex a condition to every such grant, that if the corporation be dissolved, the grantor shall have the lands again, because the cause of the grant faileth [l]. The grant is indeed only during the life of the corporation; which *may* endure for ever: but, when that life is determined by the dissolution of the body politic, the grantor takes it back by reversion, as in the case of every other grant for life. The debts of a coporation, either to or from it, are totally extinguished by it's dissolution; so that the members thereof cannot recover, or be charged with them, in their natural capacities [m]: agreeable to that maxim of the civil law [n], "*si quid universitati debetur, singulis non debetur; nec, quod* "*debet universitas, singuli debent.*"

A corporation may be dissolved, 1. By act of parliament, 485
which is boundless in it's operations. 2. By the natural death of all it's members, in case of an aggregate corporation. 3. By surrendering of it's franchises into the hands of the king, which is a kind of suicide. 4. By forfeiture of it's charter, through negligence or abuse of it's franchises; in which case the law judges that the body politic has broken the condition upon which it was incorporated, and thereupon the corporation is void. And the regular course is to bring an information in nature of a writ of *quo warranto*, to inquire by what warrant the members now exercise their corporate power, having forfeited it by such and such proceedings. The exertion of this act of law, for the purposes of the state, in the reigns of king Charles and king James the second, particularly by seising the charter of the city of London, gave great and just offence; though perhaps, in strictness of law, the proceedings in most of them were suffici-

k 11 Rep. 98.
l Co. Litt. 13.
m 1 Lev. 237.
n *Ff.* 3, 4, 7.

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ently regular: but the judgment against that of London was reversed by act of parliament[o] after the revolution; and by the same statute it is enacted, that the franchises of the city of London shall never more be forfeited for any cause whatsoever. And, because by the common law corporations were dissolved, in case the mayor or head officer was not duly elected on the day appointed in the charter established by prescription, it is now provided[p], that for the future no corporation shall be dissolved upon that account; and ample directions are given for appointing a new officer, in case there be no election, or a void one, made upon the prescriptive or charter day.

o Stat. 2 W. and M. c. 8. p Stat. 11 Geo. I, c. 4.

END OF THE FIRST BOOK.

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APPENDIX

TO

VOLUME FIRST. PART SECOND.

OF THE EDITION

OF BLACKSTONE'S COMMENTARIES.

BY

ST. GEORGE TUCKER.

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APPENDIX

TO

VOLUME FIRST. PART SECOND.

OF

BLACKSTONE'S COMMENTARIES.

NOTE G.

OF THE RIGHT OF CONSCIENCE; AND OF THE FREEDOM OF SPEECH AND OF THE PRESS.

1 *Blackstone's Commentaries*, 134.

THE right of personal security in the United States comprehends, likewise, the uninterrupted enjoyment of a person's conscience in all matters respecting religion; and of his opinions in all matters of a civil nature.

The right of personal opinion is one of those absolute rights which man hath received from the immediate gift of his Creator, but which the policy of all governments, from the first institution of society to the foundation of the American republics, hath endeavoured to restrain, in some mode or other. The mind being created free by the author of our nature, in vain have the arts of man endeavoured to shackle it: it may indeed be imprisoned a while by ignorance, or restrained from a due exertion of it's powers by tyranny and oppression; but let the rays of science, or the dawn of freedom, penetrate the dungeon, its faculties are

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instantly rarified and burst their prison. This right of personal opinion, comprehends first, liberty of conscience in all matters relative to religion; and, secondly, liberty of speech and of discussion in all speculative matters, whether religious, philosophical, or political.

1. Liberty of conscience in matters of religion consists in the absolute and unrestrained exercise of our religious opinions, and duties, in that mode which our own reason and conviction dictate, without the control or intervention of any human power or authority whatsoever. This liberty though made a part of our constitution, and interwoven in the nature of man by his Creator, so far as the arts of fraud and terrors of violence have been capable of abridging it, hath been the subject of coercion by human laws in all ages and in all countries as far as the annals of mankind extend. The infallibility of the rulers of nations, in matters of religion, hath been a doctrine practically enforced from the earliest periods of history to the present moment among jews, pagans, mahometans, and christians, alike. The altars of Moloch and of Jehovah have been equally stained with the blood of victims, whose conscience did not receive conviction from the polluted doctrines of blood thirsty priests and tyrants. Even in countries where the crucifix, the rack, and the flames have ceased to be the engines of proselitism, civil incapacities have been invariably attached to a dissent from the national religion: the ceasing to persecute by more violent means, has in such nations obtained the name of toleration*. In liberty

* There is something so truly original in the following observations of the celebrated author of Common Sense, on the subject of toleration, that I shall give it at full length...." Toleration is not the opposite of intolerance, but is the counterfeit of it. Both are despotisms. The one assumes to itself the right of withholding liberty of conscience, and the other of granting it. The one is the pope armed with fire and faggot, and the other is the pope selling, or granting indulgences. The former is church and state; and the latter is church and traffic.

But toleration may be viewed in a much stronger light. Man worships not himself, but his Maker; and the liberty of conscience which he claims, is not for the service of himself, but of his God.

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of conscience says the elegant Dr. Price, I include much more than toleration. Jesus Christ has established a perfect equality among his followers. His command is, that they shall assume no jurisdiction over one another, and acknowledge no

In this case, therefore, we must necessarily have the associated idea of two beings; the mortal who renders the worship, and the immortal being who is worshipped....Toleration, therefore, places itself, not between man and man, nor between church and church, nor between one denomination of religion and another, but between God and man; between the being who worships, and the being who is worshipped; and by the same act of assumed authority by which it tolerates man to pay his worship, it presumptuously and blasphemously sets itself up to tolerate the Almighty to receive it.

"Were a bill brought into any parliament, entitled, "An act to tolerate or grant liberty to the Almighty to receive the worship of a Jew or a Turk," or "to prohibit the Almighty from receiving it:" all men would startle, and call it blasphemy. There would be an uproar. The presumption of toleration in religious matters would then present itself unmasked: but the presumption is not the less because the name of "man" only appears to those laws, for the associated idea of the worshipper and worshipped cannot be separated. Who, then, art thou, vain dust and ashes! by whatever name thou art called, whether a king, a bishop, a church or a state, a parliament or any thing else, that obtrudest thine insignificance between the soul of man and it's Maker? Mind thine own concerns. If he believes not as thou believest, it is a proof that thou believest not as he believeth, and there is no earthly power can determine between you.

"With respect to what are called denominations of religion, if every one is left to judge of it's own religion, there is no such thing as a religion that is wrong; but if they are to judge of each other's religion, there is no such thing as a religion that is right; and, therefore, all the world is right, or all the world is wrong. But with respect to religion itself, without regard to names, and as directing itself from the universal family of mankind to the divine object of all adoration, it is man bringing to his Maker the fruits of his heart; and though those fruits may differ from each other like the fruits of the earth, the grateful tribute of every one is accepted.

"A bishop of Durham or a bishop of Winchester, or the archbishop who leads the dukes, will not refuse a tythe-sheaf of wheat, because it is not a cock of hay; nor a cock of hay, because it is not a sheaf

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master besides himself. It is, therefore, presumption in any of them to claim a right to any superiority or pre-eminence over their bretheren. Such a claim is implied, whenever any of them pretend to tolerate the rest. Not only all christians, but all men

of wheat; nor a pig because it is neither one nor the other; but these same persons, under the figure of an established church, will not permit their maker to receive the varied tythes of man's devotion.

"One of the continual chorusses of Mr. Burke's book is "church and state": he does not mean some one particular church, or some one particular state, but any church and state; and he uses the term as a general figure, to hold forth the political doctrine of always uniting the church with the state in every country; and he censures the national assembly for not having done this in France. Let us bestow a few thoughts on this subject.

"All religions are in their nature, kind and benign, and united with principles of morality. They could not have made proselytes at first, by professing any thing that was vicious, cruel, persecuting, or immoral. Like every thing else they had their beginning; and they proceeded by persuasion, exhortation, and example. How is it then that they lose their native mildness, and become morose and intolerant?

It proceeds from the connection which Mr. Burke recommends. By engendering the church with the state, a sort of mule animal, capable only of destroying, and not of breeding up, is produced, called the church established by law. It is a stranger, even from it's birth, to any parent mother on which it is begotten, and whom in time it kicks out and destroys.

"The inquisition in Spain does not proceed from the religion originally professed, but from this mule animal, engendered between the church and state. The burnings in Smithfield proceeded from the same heterogeneous production; and it was the regeneration of this strange animal in England afterwards, that renewed the rancour and irreligion among the inhabitants; and that drove the people called quakers and dissenters to America. Persecution is not an original feature in any religion; but it is always the strongly marked feature of all law religions, or religions established by law. Take away the law-establishment, and every religion re-assumes it's original benignity. In America, a catholic priest is a good citizen, a good character, and a good neighbour; an episcopalian minister is of the same description: and this proceeds independently of the men, from there being no law-establishment in America.

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of all religions, ought to be considered by a state as equally entitled to it's protection, as far as they demean themselves honestly and peaceably. Toleration can take place only where there is a civil establishment of a particular mode of religion; that is, where a predominant sect enjoys exclusive advantages, and makes the encouragement of it's own mode of faith and worship a part of the constitution of the state; but at the same time thinks fit to suffer the exercise of other modes of faith and worship. Thanks be to God, the new American states are at present strangers to such establishments. In this respect, as well as many others, they have shewn in framing their constitutions, a degree of wisdom and liberality which is above all praise.

Civil establishments of formularies of faith and worship, are inconsistent with the rights of private judgment. They engender strife....they turn religion into a trade....they shore up error.... they produce hypocrisy and prevarication....they lay an undue bias on the human mind in its inquiries, and obstruct the progress of truth....genuine religion is a concern that lies entirely between God and our own souls. It is incapable of receiving any aid from human laws. It is contaminated as soon as worldly motives and sanctions mix their influence with it. Statesmen should countenance it only by exhibiting, in their own example, a conscientious regard to it in those forms which are most agreeable to their own judgments, and by encouraging their fellow citizens in doing the same. They cannot, as public men, give it any other assistance. All, besides, that has been called a public leading in religion, has done it an essential injury, and produced some of the worst consequences.

If also we view this matter in a temporal sense, we shall see the ill effects it has had on the prosperity of nations. The union of church and state has impoverished Spain. The revoking the edict of Nantz drove the silk manufacture from France into England; and church and state are now driving the cotton manufacture from England to America and France. It was by observing the ill effects of it in England, that America has been warned against it; and it is by experiencing them in France, that the national assembly have abolished it; and, like America, have established universal right of conscience, and universal right of citizenship.

Paine's Rights of Man, part 1, p. 58, &c. Albany, 1794.

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The church establishment in England is one of the mildest sort. But even there what a snare has it been to integrity? And what a check to free inquiry? What dispositions favourable to despotism has it fostered? What a turn to pride and narrowness and domination has it given the clerical character? What struggles has it produced in its members to accommodate their opinions to the subscriptions and tests which it imposes? What a perversion of learning has it occasioned to defend obsolete creeds and absurdities? What a burthen is it on the consciences of some of its best clergy, who, in consequence of being bound down to a system they do not approve, and having no support except that which they derive from conforming to it, find themselves under the hard necessity of either prevaricating or starving? No one doubts but that the English clergy in general could with more truth declare that they do not, than that they do give their unfeigned assent to all and every thing contained in the thirty-nine articles, and the book of common prayer: and, yet, with a solemn declaration to this purpose, are they obliged to enter upon an office which above all offices requires those who exercise it to be examples of simplicity and sincerity....Who can help execrating the cause of such an evil?

But what I wish most to urge is the tendency of religious establisments to impede the improvement of the world. They are boundaries prescribed by human folly to human investigation; and enclosures, which intercept the light, and confine the exertions of reason. Let any one imagine to himself what effects similar establishments would have in philosophy, navigation, metaphisics, medicine, or mathematics. Something like this, took place in logic and philosophy, while the *ipse dixit* of Aristotle, and the nonsense of the schools, maintained, an authority like that of the creeds of churchmen; and the effect was a longer continuance of the world in the ignorance and barbarity of the dark ages. But civil establishments of religion are more pernicious. So apt are mankind to misrepresent the character of the Deity, and to connect his favour with particular modes of faith, that it must be expected that a religion so settled will be what it has hitherto been....a gloomy and cruel superstition, bearing the name of religion.

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It has been long a subject of dispute, which is worse in it's effects on society, such a religion or speculative atheism. For my own part, I could almost give the preference to the latter.... Atheism is so repugnant to every principle of common sense, that it is not possible it should ever gain much ground, or become very prevalent. On the contrary, there is a particular proneness in the human mind to superstition, and nothing is more likely to become prevalent....Atheism leaves us to the full influence of most of our natural feelings and social principles; and these are so strong in their operation, that, in general, they are a sufficient guard to the order of society. But superstition counteracts these principles, by holding forth men to one another as objects of divine hatred; and by putting them on harrassing, silenceing, imprissoning and burning one another, in order to do God service....Atheism is a sanctuary for vice, by taking away the motives to virtue arising from the will of God, and the fear of future judgment. But superstition is more a sanctuary for vice, by teaching men ways of pleasing God, without moral virtue; and by leading them even to compound for wickedness, by ritual services, by bodily penances and mortifications; by adoring shrines, going pilgrimages, saying many prayers, receiving absolution from the priests, exterminating heretics, &c....Atheism destroys the sacredness and obligation of an oath. But is there not also a religion (so called) which does this, by teaching, that there is a power which can dispense with the obligation of oaths; that *pious* frauds are right, and that faith is not to be kept with heretics.

It is indeed only a rational and liberal religion; a religion founded on just notions of the Deity, as a Being who regards equally every sincere worshipper, and by whom all are alike favoured as far as they act up to the light they enjoy: a religion which consists in the imitation of the moral perfections of an Almighty but Benevolent Governor of Nature, who directs for the best, all events, in confidence in the care of his providence, in resignation to his will, and in the faithful discharge of every duty of piety and morality from a regard to his authority, and the appprehension of a future righteous retribution. It is only this religion (the inspiring principle of every thing fair and wor-

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thy, and joyful, and which, in truth is nothing but the love of God to man, and virtue warming the heart and directing the conduct). It is only this kind of religion that can bless the world, or be an advantage to society. This is the religion that every enlightened friend to mankind will be zealous to support. But it is a religion that the powers of the world know little of, and which will always be best promoted by being left free and open*. The following passage from the same author, deserves too much attention to be pretermitted: "Let no such monster be known there, [in the United States] as human authority in matters of religion. Let every honest and peaceable man, whatever is his faith, be protected there; and find an effectual defence against the attacks of bigotry and intolerance. In the United States may religion flourish! They cannot be very great and happy if it does not. But let it be a better religion than most of those which have been hitherto professed in the world. Let it be a religion which enforces moral obligations; not a religion which relaxes and evades them....A tolerant and catholic religion; not a rage for proselytism....A religion of peace and charity; not a religion that persecutes curses and damns. In a word, let it be the genuine gospel of peace, lifting above the world, warming the heart with the love of God and his creatures, and sustaining the fortitude of good men, by the assured hope of a future deliverance from death, and an infinite reward in the everlasting kingdom of our Lord and Saviour†."

This inestimable and imprescriptible right is guaranteed to the citizens of the United States, as such, by the constitution of the United States, which declares‡, that no religious test shall ever be required as a qualification to any office or public trust under the United States; and by that amendment to the constitution of the United States§, which prohibits congress from making any law respecting the establishment of religion, or prohibiting the free exercise thereof; and to the citizens of Virginia by the bill of rights||, which declares, "that religion, or the duty

* Price's observations on the American revolution. p. 28 to 34.

† Ibid. p. 39. ‡ Art. 6. § Art. 3.

|| Art. 16. Revised code· Edi. of 1794, p. 4.

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"which we owe to our Creator, and the manner of discharging "it, can be directed only by reason and conviction, not by force "or violence, and therefore all men are equally entitled to the "free exercise of religion, according to the dictates of con-"science: and that it is the mutual duty of all to practice chris-"tian forbearance, love, and charity, towards each other." And further, by the act for establishing religious freedom, by which it is also declared, "that no man shall be compelled to frequent "or support any religious worship, place, or ministry, whatso-"ever, nor shall be enforced, restrained, molested or burthened "in his body or goods, nor shall otherwise suffer on account of "his religious opinions or belief; but that all men shall be free "to profess, and by argument maintain their opinions in matters "of religion, and that the same shall in no wise diminish, en-"large, or affect their civil capacities*."

2. Liberty of speech and of discussion in all speculative matters, consists in the absolute and uncontrollable right of speaking, writing, and publishing, our opinions concerning any subject, whether religious, philosophical, or political; and of inquiring into and, examining the nature of truth, whether moral or metaphysical; the expediency or inexpediency of all public measures, with their tendency and probable effect; the conduct of public men, and generally every other subject, without restraint, except as to the injury of any other individual, in his person, property, or good name. Thought and speech are equally the immediate gifts of the Creator, the one being intended as the vehicle of the other: they ought, therefore, to have been wholly exempt from the coersion of human laws in all speculative and doctrinal points whatsoever: liberty of speech in political matters, has been equally proscribed in almost all the governments of the world, as liberty of conscience in those of religion. A complete tyranny over the human mind could never have been exercised whilst the organ by which our sentiments are conveyed to others, was free: when the introduction of letters among men afforded a new mode of disclosing, and that of the press, a more expeditious method of diffusing their sentiments, writing and printing also became subjects of legal cocrsion†; even the ex-

* Art. 16. Revised code. Edi. of 1794, c. 20. † Stat. 13 and 14, Car. 2.

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pression of sentiments by pictures and hieroglyphics* attracted the attention of the Argus-government, so far as to render such expressions punishable by law. The common place arguments in support of these restraints are, that they tend to preserve peace and good order in government; that there are some doctrines both in religion and politics, so sacred, and others of so bad a tendency, that no public discussion of them ought to be suffered. To these the elegant writer before referred to, gives this answer: "were this a right opinion, all the persecution that has ever been "practised, would be justified. For if it is a part of the duty "of civil magistrates, to prevent the discussion of such doctrines, "they must, in doing this, act on their own judgments of the "nature and tendency of doctrines; and consequently, they "must have a right to prevent the discussion of all doctrines "which they think to be too sacred for discussion, or too dan-"gerous in their tendency; and this right they must exercise in "the only way in which civil power is capable of exercising it, by "inflicting penalties on all who oppose sacred doctrines, or who "maintain pernicious opinions†."

In England during the existence of the court of star chamber, and after it's abolition, from the time of the long parliament to the year 1694, the liberty of the press, and the right of vending books, was restrained to very narrow limits, by various ordinances and acts of parliament; all books printed were previously licensed by some of the great offices of state, or the two universities, and all foreign books were exposed to a similar scrutiny before they were vended. No shopkeeper could buy a book to sell again, or sell any book, unless he were a licensed bookseller. By these and other restrictions the communication of knowledge was utterly subjcted to the control of those, whose interest led them rather to promote ignorance than the knowledge of truth. In 1694, the parliament refused to continue these prohibitions any longer, and thereby, according to De Lolme‡, established the freedom of the press in England.

* 4 Blacks. Com. p. 150.

† Price's Observations on the American Revolution, p. 19.

‡ Page 215.

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But although this negative establishment may satisfy the subjects of England, the people of America have not thought proper to suffer the freedom of speech, and of the press to rest upon such an uncertain foundation, as the will and pleasure of the government. Accordingly, when it was discovered that the constitution of the United States had not provided any barrier against the possible encroachments of the government thereby to be established, great complaints were made of the omission, and most of the states instructed their representatives to obtain an amendment in that respect; and so sensible was the first congress of the general prevalence of this sentiment throughout America, that in their first session they proposed an amendment since adopted by all the states and made a part of the constitution; "that congress shall make no law abridging the freedom "of speech, or of the press *." And our state bill of rights declares, "that the freedom of the press is one of the great bul-"warks of liberty, and cannot be restrained, but by despotic "governments †." And so tenacious of this right, was the convention of Virginia, by which the constitution of the United States was ratified, that they further declared, as an article of the bill of rights then agreed to, "that the people have a right to "the freedom of speech, and of writing and publishing their "sentiments; that the freedom of the press is one of the great-"est bulwarks of liberty, and ought not to be violated ‡." Nay, so reasonably jealous were they of the possibility of this declaration being disregarded, as not forming a part of the constitution, at that time, that the following declaration is inserted in, and forms a part of, the instrument of ratification, viz. "That the "powers granted under the consitution, being derived from the "people of the United States, may be resumed by them, when-"soever the same shall be perverted to their injury or oppres-"sion; and that, every power not granted thereby, remains with "them, and at their will: that, therefore no right; of any deno-"mination, can be cancelled, abridged, restrained, or mo-"dified by the congress, by the senate, or house of represen-"tatives, acting in any capacity; by the president, or any

* Amendments to C. U. S. Art. 3. † State Bill of Rights.-Art. 12.

‡ Bill of Rights agreed to by the convention of Virginia, by which the C. U. S. was adopted Art. 16.

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"department, or officer of the United States, except in those "instances where power is given by the constitution for those "purposes: that among other essential rights, the liberty of "conscience, and of the press, cannot be cancelled, abridg-"ed, restrained, or modified, by any authority of the United "States *."

As this latter declaration forms a part of the instrument by which the constitution of the United States became obligatory upon the state, and citizens of Virginia; and as the act of ratification has been accepted in that form; no principle is more clear, than that the state of Virginia is no otherwise bound thereby, than according to the very tenor of the instrument, by which she has bound herself. For as no free state can be bound to another, or to a number of others, but by it's own voluntary consent and act, so not only the evidence of that consent, but the nature and terms of it, can be ascertained only by recurrence to the very instrument, by which it was first given. And as the foregoing declaration not only constitutes a part of that instrument, but contains a preliminary protest against any extension of the enumerated powers thereby granted to the federal government, it could scarcely have been imagined, that any violation of a principle so strenuously asserted, and made, as it were, the sole ground of the pragmatic sanction, would ever have been attempted by the federal government.

But however reasonable such an expectation might have been, a very few years evinced a determination on the part of those who then ruled the public councils of the United States, to set at nought all such restraints. An act accordingly was passed by the congress†, on the fourteenth of July 1798, whereby it was enacted, that "if any person shall write, print, utter or publish any false and malicious writing against the government of the United States, or either house of congress, or the president, with intent to defame them, or either of them, or to bring them or either of them into contempt, or disrepute; or to excite against

* C. U. S. as ratified by the convention of Virginia.

† L. U. S. 5 Cong. c. 91.

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them or either of them, the hatred of the good people of the United States, then such person, being thereof convicted before any court of the United States having jurisdiction thereof shall be punished by a fine not exceeding two thousand dollars, and by imprisonment not exceeding two years." The act was limited in it's duration to the third day of March, 1801, the very day on which the period for which the then president was elected, was to expire; and, previous to which the event of the next presidential election must be known.

The consequences of this act, as might have been fourseen, were a general astonishment, and dissatisfaction, among all those who considered the government of the United States, as a limited system of government; in it's nature altogether federal, and essentially different from all others which might lay claim to unlimited powers; or even to national, instead of federal authority. The constitutionality of the act was accordingly very generally denied, or questioned, by them. They alleged, that it is to the freedom of the press, and of speech, that the American nation is indebted for its liberty, it's happiness, it's enlightened state, nay more, for it's existence. That in these states the people are the only sovereign: that the government established by themselves, is for their benefit; that those who administer the government, whether it be that of the state, or of the federal union, are the agents and servants of the people, not their rulers or tyrants.... That these agents must be, and are, from the nature and principles of our governments, responsible to the people, for their conduct. That to enforce this responsibility, it is indispensibly necessary that the people should inquire into the conduct of their agents; that in this inquiry, they must, or ought to scrutinize their motives, sift their intentions, and penetrate their designs; and that it was therefore, an unimpeachable right in them to censure as well as to applaud; to condemn or to acquit; and to reject, or to employ them again, as the most severe scrutiny might advise. That as no man can be forced into the service of the people against his own will and consent; so if any man employed by them in any office, should find the tenure of it too severe, because responsibility is inseparably annexed to it, he might retire: if he can not bear scrutiny, he might resign: if

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his motives, or designs, will not bear sifting; or if censure be too galling to his feelings, he might avoid it in the shades of domestic privacy. That if flattery be the only music to his ear, or the only balm to his heart; if he sickened when it is withheld, or turned pale when denied him; or if power, like the dagger of Macbeth, should invite his willing imagination to grasp it, the indignation of the people ought immediately to mark him, and hurl him from their councils, and their confidence forever. That if this absolute freedom of inquiry may be, in any manner, abridged, or impaired by those who administer the government, the nature of it will be instantly changed from a federal union of representative democracies, in which the people of the several states are the sovereign, and the administrators of the government their agents, to a consolidated oligarchy, aristocracy, or monarchy, according to the prevailing caprice of the consituted authorities, or of those who may usurp them. That where absolute freedom of discussion is prohibited, or restrained, responsibility vanishes. That any attempt to prohibit, or restrain that freedom, may well be construed to proceed from conscious guilt. That the people of America have always manifested a most jealous sensibility, on the subject of this inestimable right, and have ever regarded it as a fundamental principle in their government, and carefully engrafted in the constitution. That this sentiment was generated in the American mind, by an abhorrence of the maxims and principles of that government which they had shaken off, and a detestation of the abominable persecutions, and extrajudicial dogmas, of the still odious court of star-chamber; whose tyrannical proceedings and persecutions, among other motives of the like nature, prompted and impelled our ancestors to fly from the pestilential government of their native country, to seek an assylum here; where they might enjoy, and their posterity establish, and transmit to all future generations, freedom, unshackled, unlimited, undefined. That in our time we have vindicated, fought for, and established that freedom by our arms, and made it the solid, and immovable basis and foundation both of the state, and federal government. That nothing could more clearly evince the inestimable value that the American people have set upon the liberty of the press, than their uniting it in the same sentence, and even in

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the same member of a sentence, with the rights of conscience, and the freedom of speech. And since congress are equally prohibited from making any law abridging the freedom of speech, or of the press, they boldly challenged their adversaries to point out the constitutional distinction, between those two modes of discussion, or inquiry. If the unrestrained freedom of the press, said they, be not guaranteed, by the constitution, neither is that of speech. If on the contrary the unrestrained freedom of speech is guaranteed, so also, is that of the press. If then the genius of our federal constitution has vested the people of the United States, not only with a censorial power, but even with the sovereignty itself; if magistrates are, indeed, their agents: if they are responsible for their acts of agency; if the people may not only censure whom they disapprove, but reject whom they may find unworthy; if approbation or censure, election or rejection, ought to be the result of inquiry, scrutiny, and mature deliberation; why, said they, is the exercise of this censorial power, this sovereign right, this necessary inquiry, and scrutiny to be confined to the freedom of speech? Is it because this mode of discussion better answers the purposes of the censorial power? Surely not. The best speech can not be heard, by any great number of persons. The best speech may be misunderstood, misrepresented, and imperfectly remembered by those who are present. To all the rest of mankind, it is, as if it had never been. The best speech must also be short for the investigation of any subject of an intricate nature, or even a plain one, if it be of more than ordinary length. The best speech then must be altogether inadequate to the due exercise of the censorial power, by the people. The only adequate supplementary aid for these defects, is the absolute freedom of the press. A freedom unlimited as the human mind; viewing all things, penetrating the recesses of the human heart, unfolding the motives of human actions, and estimating all things by one invaluable standard, truth; applauding those who deserve well; censuring the undeserving; and condemning the unworthy, according to the measure of their demerits.

In vindication of the act, the promoters and supporters of it, said*, that a law to punish false, scandalous, and malicious wri-

* See the report of a committee of congress, respecting the alien and sedition laws, Feb. 25, 1799.

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tings against the government, with intent to stir up sedition, is a law necessary for carrying into effect the power vested by the constitution in the government of the United States, and consequently such a law as congress may pass. To which it was answered, that even were the premises true, it would not authorize congress to pass an act to punish writings calculated to bring congress, or the president into contempt or disrepute. Inasmuch as such contempt or disrepute may be entertained for them, or either of them, without incurring the guilt of sedition, against the government, and without the most remote design of opposing, or resisting any law, or any act of the president done in pursuance of any law: one or the other of which would seem necessary to constitute the offence, which this argument defends the right of congress to punish, or prevent.

It was further urged in vindication of the act, that the liberty of the press consists not in a licence for every man to publish what he pleases, without being liable to punishment for any abuse of that licence; but in a permission to publish without previous restraint; and, therefore, that a law to restrain the licentiousness of the press, cannot be considered as an abridgment of its liberty*.

To which it was answered that this exposition of the liberty of the press, was only to be found in the theoretical writings of the commentators on the *English* government, where the liberty of the press rests upon no other ground, than that there is now no law which imposes any actual previous restraint upon the press, as was formerly the case: which is very different from the footing upon which it stands in the United States, where it is made a fundamental article of the constitutions, both of the federal and state governments, that no such restraint shall be imposed by the authority of either....That if the sense of the state governments be wanting on the occasion, nothing can be more explicit than the meaning and intention of the state of Virginia, at the moment of adopting the constitution of the United States; by which it will clearly appear that it never was the intention of

* See the report of a committee of congress, respecting the alien and sedition laws, February 25, 1799.

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that state (and probably of no other in the union) to permit congress to distinguish between the liberty and licentiousness of the press; or, in any manner to "cancel, abridge, restrain, or "modify" that inestimable right.

Thirdly it was alleged, that the act could not be unconstitutional because it made nothing penal, which was not penal before, being merely declaratory of the common law*, viz. of England.

To this it was, among other arguments, answered. That the United States as a federal government have no common law. That although the common law of England, is, under different modifications, admitted to be the common law of the states respectively, yet the whole of the common law of England has been no where introduced: that there is a great and essential difference, in this respect, in the several states, not only in the subjects to which it is applied, but in the extent of its application. That the common law of one state, therefore, is not the common law of another. That the constitution of the United States has neither created it, nor conferred it upon the federal government. And, therefore, that government has no power or authority to assume the right of punishing any action, merely because it is punishable in England, or may be punishable in any, or all the states, by the common law.

The essential difference between the British government and the American constitutions was moreover insisted on, as placing this subject in the clearest light. In the former, the danger of encroachments on the rights of the people, was understood to be confined to the executive magistrate. The representatives of the people in the legislature are not only exempt themselves, from distrust, but are considered as sufficient guardians of the rights of their constituents against the danger from the executive. Hence it is a principle, that the parliament is unlimited in it's power, or, in their own language, is omnipotent. Hence too,

* See the report of a committee of congress, respecting the alien and sedition laws, February 25, 1799.

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all the ramparts for protecting the rights of the people, such as their *magna charta*, their bill of rights, &c. are not reared against the parliament, but against the royal prerogative. They are mere legislative precautions against executive usurpations. Under such a government as that, an exemption of the press from previous restraints, by licencers from the king, is all the freedom that can be secured to it, there: but, that in the United States the case is altogether different. The people, not the government, possess the absolute sovereignty. The legislature, no less than the executive, is under limitations of power. Encroachments are regarded as possible from the one, as well as from the other. Hence in the United States, the great and essential rights of the people, are secured against legislative, as well as against executive ambition. They are secured, not by laws paramount to prerogative; but by constitutions paramount to laws. This security of the freedom of the press requires, that it should be exempt, not only from previous restraint by the executive, as in Great-Britain; but from legislative restraint also; and this exemption, to be effectual, must be an exemption, not only from the previous inspection of licencers, but from the subsequent penalty of laws....A further difference between the two governments was also insisted on. In Great-Britain, it is a maxim, that the king, an hereditary, not a responsible magistrate, can do no wrong; and that the legislature, which in two thirds of it's composition, is also hereditary, not responsible, can do what it pleases. In the United States, the executive magistrates are not held to be infallible, nor the legislatures to be omnipotent; and both being elective, are both responsible. That the latter may well be supposed to require a greater degree of freedom of animadversion than might be tolerated by the genius of the former. That even in England, notwithstanding the general doctrine of the common law, the ministry, who are responsible to impeachment, are at all times animadverted on, by the press, with peculiar freedom. That the practice in America must be entitled to much more respect: being in most instances founded upon the express declarations contained in the respective constitutions, or bill of rights of the confederated states*. That even in those

* See the Virginia bill of rights, Art. 12. Massachusetts, Art. 16. Pennsylvania, Art. 12. Delaware, Art. 23. Maryland, Art. 38. North-Carolina,

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states where no such guarantee could be found, the press had always exerted a freedom in canvassing the merits, and measures of public men of every description, not confined to the limits of the common law. That on this footing the press has stood even in those states, at least, from the period of the revolution.

The advocates and supporters of the act alleged, fourthly; That had the constitution intended to prohibit congress from legislating at all, on the subject of the press, it would have used the same expressions as in that part of the clause, which relates to religion, and religious tests; whereas, said they, there is a manifest difference; it being evident that the constitution intended to prohibit congress from legislating at all, on the subject of religious establishments, and the prohibition is made in the most express terms. Had the same intention prevailed respecting the press, the same expression would have been used, viz. "Congress shall make no law respecting the press." They are not, however, prohibited, added they, from legislating at all, on the subject, but merely from abridging the liberty of the press. It is evident, therefore, said they, that congress may legislate respecting the press: may pass laws for it's regulation, and to punish those who pervert it into an engine of mischief, provided those laws do not abridge it's liberty. A law to impose previous restraints upon the press, and not one to inflict punishment on wicked and malicious publications, would be a law to abridge the liberty of the press*.

To this it was answered, that laws to regulate, must, according to the true interpretation of that word, impose rules, or regulations, not before imposed; that to impose rules is to restrain; that to restrain must necessarily imply an abridgment of some former existing rights, or power: consequently, when the con-

Art. 15. South-Carolina, Art. 43. Georgia, Art. 61. The constitution of Pennsylvania, Art. 35, declares, "That the printing presses shall be free to every person who undertakes to examine the proceedings of the legislature or any part of the government. And the bill of rights of Vermont, Art. 15, is to the same effect.

* See the report of a committee of congress, to whom were referred several petitions for the repeal of the alien and sedition laws. February 25, 1799.

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stitution prohibits congress from making any law abridging the freedom of speech, or of the press, it forbids them to make any law respecting either of these subjects. That this conclusion was an inevitable consequence of the injunction contained in the amendment, unless it could be shown, that the existing restraints upon the freedom of the press in the United States, were such as to require a remedy, by alaw regulating (but not abridging) the manner in which it might be exercised with greater freedom and security. A supposition, which it was believed no person would maintain. That the necessary consequence of these things is, that the amendment was meant as a positive denial to congress, of any power whatever, on the subject.

As an evidence on this subject, which must be deemed absolutely conclusive, it was observed, That the proposition of amendments made by congress, is introduced in the following terms: " The conventions of a number of states, having, at the " time of their adopting the constitution, expressed a desire, in " order to prevent misconstruction, or abuse of its powers, that " further declaratory and restrictive clauses should be added; " and, as extending the ground of public confidence in the go- " vernment, will best ensure the beneficent ends of it's institu- " tion:" which affords the most satisfactory and authentic proof, that the several amendments proposed, were to be considered as either declaratory, or restrictive; and whether the one or the other, as correspoding with the desire expressed by a number of states, and as extending the ground of public confidence in the government. That under any other construction of the amendment relating to the press, than that it declared the press to be wholly exempt from the power of congress....the amendment could neither be said to correspond with the desire expressed by a number of the states, nor be calculated to extend the ground of public confidence in the government. Nay more; that the construction employed to justify the " Sedition Act," would exhibit a phœnomenon without a parrallel in the political world. It would exhibit a number of respectable states, as denying first that any power over the press was delegated by the constitution; as proposing next, that an amendment to it should explicitly declare, that no such power was delegated; and finally as concur-

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ring in an amendment actually recognizing, or delegating such a power.

But, the part of the constitution which seems to have been most recurred to, and even relied on, in defence of the act of congress, is the last clause of the eighth section of the first article, empowering congress " to make all laws which shall be necessa- " ry and proper for carrying into execution the foregoing pow- " ers, and all other powers vested by the constitution in the go- " vernment of the United States, or in any department or officer " thereof *."

To this it was answered, that the plain import of that clause is, that congress shall have all the incidental, or instrumental powers, necessary and proper for carrying into execution all the express powers; whether they be vested in the government of the United States, more collectively, or in the several departments, or officers thereof. That it is not a grant of new powers to congress, but merely a declaration, for the removal of all uncertainty, that the means of carrying into execution, those otherwise granted, are included in the grant. Whenever, therefore, a question arises concerning the constitutionality of a particular power, the first question is, whether the power be expressed in the constitution. If it be, the question is decided. If it be not expressed, the next inquiry must be, whether it is properly incidental to an express power, and necessary to its execution. If it be, it may be exercised by congress. If it be not, congress cannot exercise it.....That, if the sedition law be brought to this kind of test, it is not even pretended by the framers of that act, that the power over the press, which is exercised thereby, can be found among the powers expressly vested in congress. That if it be asked, whether there is any express power, for executing which, that act is a necessary and a proper power: the answer is, that the express power which has been selected, as least remote from that exercised by the act, is the power of " suppressing insurrections;" which is said to

* See the report of a committee of congress, Feb. 25, 1799; and the answer of the senate and house of representatives of Massachusetts, (Feb. 9th and 13th, 1799), to the communications from the state of Virginia, on the subject of the alien and sedition laws.

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imply a power to prevent insurrections, by punishing whatever may lead, or tend to them. But it surely cannot, with the least plausibility, be said, that a regulation of the press, and the punishment of libels, are exercises of a power to suppress insurrections. That if it be asked, whether the federal government has no power to prevent, as well as punish, resistance to the laws; the proper answer is, that they have the power, which the constitution deemed most proper in their hands for the purpose. That congress has power, before it happens, to pass laws for punishing such resistance; and the executive and judiciary have a power to enforce those laws, whenever it does actually happen. That it must be recollected by many, and could be shewn to the satisfaction of all, that this construction of the terms "necessary and proper," is precisely the construction which prevailed during the discussions and ratifications of the constitution: and that it is a construction absolutely necessary to maintain their consistency with the peculiar character of the government, as possessed of particular and defined powers only; not of the general and indefinite powers vested in ordinary governments. That if this construction be rejected, it must be wholly immaterial, whether unlimited powers be exercised under the name of unlimited powers, or be exercised under the name of unlimited means of carrying into execution limited powers.

To those who asked, if the federal government be destitute of every authority for restraining the licentiousness of the press, and for shielding itself against the libellous attacks which may be made on those who administer it; the reply given was, that the constitution alone can answer the question: that no such power being expressly given; and such a power not being both necessary and proper to carry into execution any express power; but, above all, such a power being expressly forbidden by a declaratory amendment to the constitution, the answer must be, that the federal government is destitute of all such authority *.

* In the preceding sketch of the arguments used to demonstrate the unconstitutionality of the act of congress, I have extracted a few of those contained in the report of the committee of the house of delegates of Virginia, agreed to by the house, Jan. 11, 1800, and afterwards concurred in by the senate. This most valuable document is very long, and is incapable of being abridged, without manifest injury.

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This very imperfect sketch may be sufficient to afford the student some idea of the magnitude and importance of a question, which agitated every part of the United States, almost to a degree of convulsion: the controversy not being confined to the closets of speculative politicians, or to the ordinary channels of discussion through the medium of the press; but engrossing the attention, and calling forth the talents and exertions of the legislatures of several of the states in the union, on the one hand, and of the federal government, and all its branches, legislative, executive, and judiciary, on the other. For no sooner had the act passed, than prosecutions were commenced against individuals in several of the states: they were conducted, in some cases, with a rigour, which seemed to betray a determination to convert into a scourge that, which it had been pretended was meant only to serve as a shield.

The state of Kentucky was the first which took the act under consideration, and by a resolution passed with two dissenting voices only, declared the act of congress not law, but altogether void, and of no force. The state of Virginia, though posterior to her younger sister in point of time, was not behind her in energy. The general assembly at their first session after the passage of the act, did "explicitly and peremptorily declare, that "it views the powers of the federal government, as resulting "from the compact, to which the states are parties; as limited "by the plain sense and intention of the instrument constituting "that compact; as no further valid than they are authorized by "the grants contained in that compact; and that in case of a de-"liberate, palpable, and dangerous exercise of other powers, not "granted by the said compact, the states who are parties thereto "have the right, and are in duty bound, to interpose for arrest-"ing the progress of the evil, and for maintaining within their "respective limits the authorities, rights, and liberties apper-"taining to them."...." That a spirit hath, in sundry instances, "been manifested by the federal government, to enlarge its pow-"ers, by forced constructions of the constitutional charter which "defines them; and to expound certain general phrases (copied "from the very limited grant of powers in the former articles "of confederation, and therefore less liable to be misconstrued)

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"so as to destroy the meaning and effect of the particular enu-
"meration, which necessarily explains and limits the general
"phrases; so as to consolidate the states, by degrees, into one
"sovereignty." That the "general assembly doth, particularly
"protest against the palpable and alarming infractions of the
"constitution, in the two cases of the alien and sedition acts,
"passed at the last session of congress; the first of which exer-
"cises a power no where delegated to the federal government;
"and the other exercises, in like manner, a power not delegated
"by the constitution; but, on the contrary, expressly and posi-
"tively forbidden by one of the amendments thereto; a power
"which, more than any other, ought to produce universal alarm;
"because it is levelled against that right of freely examining pub-
"lic characters and measures, and of free communication among
"the people thereon, which has ever been justly deemed the only
"effectual guardian of every other right."

"That this state having by its convention, which ratified
"the federal constitution, expressly declared, that among other
"essential rights, "the liberty of conscience, and of the press
"can not be cancelled, abridged, restrained, or modified, by any
"authority of the United States," and from its extreme anxiety to
"guard these rights from every possible attack of sophistry, or
"ambition, having, with other states, recommended an amend-
"ment for that purpose, which amendment was, in due time,
"annexed to the constitution; it would mark a reproachful in-
"consistency and criminal degeneracy, if an indifference were
"now shewn, to the most palpable violation of the rights, thus
"declared and secured; and to the establishment of a preced-
"ent, which may be fatal to the other."

"That feeling the most sincere affection for their sister
"states; the truest anxiety for establishing and perpetuating
"the union; and the most scrupulous fidelity to the constitu-
"tion which is the pledge of mutual friendship; and solemnly
"appealing "to the like dispositions of the other states, in con-
"fidence that they will concur with this commonwealth in de-
"claring, (as it does hereby declare,) that the acts aforesaid are
"unconstitutional; and that the necessary and proper measures

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"will be taken by each, for co-operating with this state, in main-
"taining the authorities, rights and liberties, reserved to the
"states respectively, or to the people*."

Answers were received from the legislatures of seven states, disapproving of the resolutions of Virginia and Kentucky, which had also been transmitted with a similar proposition. The general assembly of Massachusetts, alone, condescended to reason with her sister states; the others scarcely paid them the common respect that is held to be due from individuals, to each other. The assembly of Virginia at their next session, entered into a critical review and examination of their former resolutions, and supported them by a train of arguments, and of powerful, convincing, and unsophistic reasoning, to which, probably, the equal cannot be produced in any public document, in any country †. They concluded this examination and review (which occupied more than eighty pages) with resolving, "That having carefully and respectfully attended to the
"proceedings of a number of the states, in answer to their
"former resolutions, and having accurately and fully re-exa-
"mined and re-considered the latter, they found it to be their
"indispensible duty to adhere to the same, as founded in truth,
"as consonant with the constitution, and as conducive to its
"preservation; and more especially to be their duty, to renew,
"as they do hereby renew their protest against the alien and
"sedition acts, as palpable and alarming infractions of the con-
"stitution."

Mean time, petitions had been presented to congress for the repeal of those obnoxious acts: on the 25th of February 1799, congress agreed to the report of a committee advising them, that it would be inexpedient to repeal them. A majority of four members, only, prevailed on this occasion. During the session which succeeded, strenuous exertions were made for the continuance of the act commonly called the sedition act, (the other concerning aliens, having expired: After a severe

* See the sessions acts of 1798, ad finem.

† See the report of the committee, on this subject, agreed to in the house of delegates, Jan. 11, 1800.

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struggle, the attempt failed, and the act was permitted to expire, at the same moment that put a period to the political importance of those, for whose benefit, alone, it seems to have been intended.

We may now, I trust, say with our former envoys to the republic of France: "The genius of the constitution can not be "overruled by those who administer the government. Among "those principles deemed sacred in America; among those "sacred rights, considered as forming the bulwark of their "liberty, which the government should contemplate with awful "reverence, and approach only with the most cautious circum-"spection, there is none of which the importance is more "deeply impressed on the public mind, than the liberty of the "press *."

It may be asked, perhaps: is there no remedy in the United States for injuries done to the good fame and reputation of a man; injuries, which to a man of sensibility, and of conscious integrity, are the most grievous that can be inflicted; injuries, which when offered through the medium of the press, may be diffused throughout the globe, and transmitted to latest posterity; may render him odious, and detestable in the eyes of the world, his country, his neighbours, his friends, and even his own family; may seclude him from society as a monster of depravity, and iniquity; and even may deprive him of sustenance, by destroying all confidence in him, and discouraging that commerce, or intercourse with him, which may be necessary to obtain the means?

Heaven forbid, that in a country which boasts of rational freedom, and of affording perfect security to the citizen for the complete enjoyment of all his rights, the most valuable of all should be exposed without remedy, or redress, to the vile arts of detraction and slander! Every individual, certainly, has a right to speak, or publish, his sentiments on the measures of government: to do this without restraint, control, or fear of

* See the letters from Messrs Marshall, Pinckney, and Gerry, to Mons. Talleyrand, minister of foreign affairs in France, 1798.

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punishment for so doing, is that which constitutes the genuine freedom of the press. The danger justly apprehended by those states which insisted that the federal government should possess no power, directly or indirectly, over the subject, was, that those who were entrusted with the administration might be forward in considering every thing as a crime against the government, which might operate to their own personal disadvantage; it was therefore made a fundamental article of the federal compact, that no such power should be exercised, or claimed by the federal government; leaving it to the state governments to exercise such jurisdiction and control over the subject, as their several constitutions and laws permit. In contending therefore for the absolute freedom of the press, and its total exemption from all restraint, control, or jurisdiction of the federal government, the writer of these sheets most explicitly disavows the most distant approbation of its licentiousness. A free press, conducted with ability, firmness, decorum, and impartiality, may be regarded as the chaste nurse of genuine liberty; but a press stained with falsehood, imposture, detraction, and personal slander, resembles a contaminated prostitute, whose touch is pollution, and whose offspring bears the foul marks of the parent's ignominy.

Whoever makes use of the press as the vehicle of his sentiments on any subject, ought to do it in such language as to shew he has a deference for the sentiments of others; that while he asserts the right of expressing and vindicating his own judgment, he acknowledges the obligation to submit to the judgment of those whose authority he cannot legally, or constitutionally dispute. In his statement of facts he is bound to adhere strictly to the truth; for any deviation from the truth is both an imposition upon the public, and an injury to the individual whom it may respect. In his restrictures on the conduct of men, in public stations, he is bound to do justice to their characters, and not to criminate them without substantial reason. The right of character is a sacred and invaluable right, and is not forfeited by accepting a public employment. Whoever knowingly departs from any of these maxims is guilty of a crime against the community, as well as against the person injured; and though both

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the letter and the spirit of our federal constitution wisely prohibit the congress of the United States from making any law, by which the freedom of speech, or of the press, may be exposed to restraint or persecution under the authority of the federal government, yet for injuries done the reputation of any person, as *an individual*, the state-courts are always open, and may afford ample, and competent redress, as the records of the courts of this commonwealth abundantly testify.

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NOTE H.

ON THE STATE OF SLAVERY IN VIRGINIA.

IN the preceding inquiry into the absolute rights of the citizens of united America, we must not be understood as if those rights were equally and universally the privilege of all the inhabitants of the United States, or even of all those, who may challenge this land of freedom as their native country. Among the blessings which the Almighty hath showered down on these states, there is a large portion of the bitterest draught that ever flowed from the cup of affliction. Whilst America hath been the land of promise to Europeans, and their descendants, it hath been the vale of death to millions of the wretched sons of Africa. The genial light of liberty, which hath here shone with unrivalled lustre on the former, hath yielded no comfort to the latter, but to them hath proved a pillar of darkness, whilst it hath conducted the former to the most enviable state of human existence. Whilst we were offering up vows at the shrine of liberty, and sacrificing hecatombs upon her altars; whilst we swore irreconcileable hostility to her enemies, and hurled defiance in their faces; whilst we adjured the God of Hosts to witness our resolution to live free, or die, and imprecated curses on their heads who refused to unite with us in establishing the empire of freedom; we were imposing upon our fellow men, who differ in complexion from us, a *slavery*, ten thousand times more cruel than the utmost extremity of those grievances and oppresssions, of which we complained. Such are the inconsistencies of human nature; such the blindness of those who pluck not the beam out of their own eyes, whilst they can espy a moat, in the eyes of their brother; such that partial system of morality which confines rights and injuries, to particular complexions; such the ef-

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fect of that self-love which justifies, or condemns, not according to principle, but to the agent. Had we turned our eyes inwardly when we supplicated the Father of Mercies to aid the injured and oppressed; when we invoked the Author of Righteousness to attest the purity of our motives, and the justice of our cause*; and implored the God of Battles to aid our exertions in it's defence, should we not have stood more self convicted than the contrite publican! Should we not have left our gift upon the altar, that we might be first reconciled to our brethren whom we held in bondage? should we not have loosed their chains, and broken their fetters? Or if the difficulties and dangers of such an experiment prohibited the attempt during the convulsions of a revolution, is it not our duty to embrace the first moment of constitutional health and vigour, to effectuate so desirable an object, and to remove from us a stigma, with which our enemies will never fail to upbraid us, nor our consciences to reproach us? To form a just estimate of this obligation, to demonstrate the incompatability of a state of slavery with the principles of our government, and of that revolution upon which it is founded, and to elucidate the practicability of it's total, though gradual abolition, it will be proper to consider the nature of slavery, its properties, attendants, and consequences in general; it's rise, progress, and present state, not only in this commonwealth, but in such of our sister states as have either perfected, or commenced the great work of it's extirpation; with the means they have adopted to effect it, and those which the circumstances and situation of our country may render it most expedient for us to pursue, for the attainment of the same noble and important end†.

According to Justinian‡, the first general division of persons, in respect to their rights, is into freemen and slaves. It is

* The American standard, at the commencement of those hostilities which terminated in the revolution, had these words upon it....AN APPEAL TO HEAVEN!

† The Editor here takes the liberty of making his acknowledgments to the reverend Jeremiah Belknap, D. D. of Boston, and to Zephaniah Swift, Esq. representative in Congress from Connecticut, for their obliging communications; he hath occasionally made use of them in several parts of this Lecture, where he may have omitted referring to them.

‡ Lib. 1. Tit. 2.

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equally the glory and the happiness of that country from which the citizens of the United States derive their origin, that the traces of slavery, such as at present exists in several of the United States, are there utterly extinguished. It is not my design to enter into a minute inquiry whether it ever had existence there, nor to compare the situation of villeins, during the existence of pure villenage, with that of modern domestic slaves. The records of those times, at least, such as have reached this quarter of the globe, are too few to throw a satisfactory light on the subject. Suffice it that our ancestors migrating hither brought not with them any prototype of that slavery which hath been established among us. The first introduction of it into Virginia was by the arrival of a Dutch ship from the the coast of Africa, having *twenty* negroes on board, who were sold here in the year 1620*. In the year 1638 we find them in Massachusetts†. They were introduced into Connecticut soon after the settlement of that colony; that is to say, about the same period‡. Thus early had our forefathers sown the seeds of an evil, which, like a leprosy hath descended upon their posterity with accumulated rancour, visiting the sins of the fathers upon succeeding generations.....The climate of the northern states less favourable to the constitution of the natives of Africa§, than the southern, proved alike unfavourable to their propagagation, and to the increase of their numbers by importations.... As the southern colonies advanced in population, not only importations increased there, but nature herself, under a climate more congenial to the African constitution, assisted in multiplying the blacks in those parts, no less than in diminishing their numbers in the more rigorous climates of the north; this influence of climate moreover contributed extremely to increase or diminish the value of the slave to the purchasers, in the different colonies. White labourers, whose constitutions were better adapted to the severe winters of the New-England colonies, were there found to be preferable to the negroes‖, who, accus-

* Stith 182.

† Dr. Belknap's Answers to St. G. T.'s queries

‡ Letter from Zephaniah Swift to St. G. T.

§ Dr. Belknap, Zephan. Swift

‖ Ibid.

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tomed to the influence of an ardent sun, became almost torpid in those countries, not less adapted to give vigour to their laborious exercises, than unfavourable to the multiplication of their species: in those colonies, where the winters were not only milder, and of shorter duration, but succeeded by an intense summer heat, as invigorating to the African, as debilitating to the European constitution, the negroes were not barely more capable of performing labour than the Europeans, or their descendants, but the multiplication of the species were at least equal; and, where they met with humane treatment, perhaps greater than among the whites. The purchaser, therefore, calculated not upon the value of the labour of his slave only, but, if a female, he regarded her as "the fruitful mother of an hundred more:" and many of these unfortunate people have there been in this state, whose descendants even in the compass of two or three generations have gone near to realize the calculation....The great increase of slavery in the southern, in proportion to the northern states in the union, is, therefore, not attributable, *solely*, to the effect of sentiment, but to natural causes; as well as those considerations of profit, which have, perhaps, an equal influence over the conduct of mankind in general, in whatever country, or under whatever climate their destiny hath placed them. What else but considerations of this nature could have influenced the merchants of the freest nation, at that time, in the world, to embark in so nefarious a traffic, as that of the human race, attended, as the African slave trade has been, with the most atrocious aggravations of cruelty, perfidy, and intrigues, the objects of which have been the perpetual fomentation of predatory and intestine wars? What, but similar considerations, could prevail on the government of the same country, even in these days, to patronize a commerce so diametrically opposite to the generally received maxims of that government. It is to the operation of these considerations in the parent country, not less than to their influence in the colonies, that the rise, increase, and continuance of slavery in those British colonies which now constitute united America, are to be attributed, as I shall endeavour to shew in the course of the present inquiry. It is now time to inquire into the nature of slavery, in general, and take a view of it's consequences, and attendants in this commonwealth, in particular.

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Slavery, says a well informed writer* on the subject, has been attended with circumstances so various in different countries, as to render it difficult to give a general definition of it..... Justinian calls it a constitution of the law of nations, by which one man is made subject to another, contrary to nature†. Grotius describes it to be an obligation to serve another for life, in consideration of diet, and other common necessaries‡. Dr. Rutherforth, rejecting this definition, informs us, that perfect slavery is an obligation to be directed by another in all one's actions §. Baron Montesquieu defines it to be the establishment of a right, which gives one man such a power over another, as renders him absolute master over his life and fortune‖. These definitions appear not to embrace the subject fully, since they respect the condition of the slave, in regard to his *master*, only, and not in regard to the *state*, as well as the *master*. The author last mentioned, observes, that the constitution of a state may be free, and the subject not so. The subject free, and not the constitution of the state**. Pursuing this idea, instead of attempting a general definition of slavery; I shall, by considering it under a threefold aspect, endeavour to give a just idea of it's nature.

I. When a nation is, from any external cause, deprived of the right of being governed by it's own laws, only, such a nation may be considered as in a state of *political slavery*. Such is the state of conquered countries, and, generally, of colonies, and other dependant governments. Such was the state of united America before the revolution. In this case the personal rights of the subject may be so far secured by wholesome laws, as that the individual may be esteemed free, whilst the state is subject to a higher power: this subjection of one nation, or people, to the will of another, constitutes the first species of slavery, which, in order to distinguish it from the other two, I have called political; inasmuch as it exists only in respect to the governments,

* Hargrave's case of negroe Somerset.

† Lib. 1, Tit. 3. Sec. 2.

‡ Lib. 2. c. 5, Sec. 27.

§ Lib. 1. c. 20. p. 474.

‖ Lib. 15. c. 1.

** Lib. 12. c. 1.

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and not to the individuals of the two countries. Of this it is not our business to speak, at present.

II. Civil liberty, according to judge Blackstone, being no other than natural liberty so far restrained by human laws, and no farther, as is necessary and expedient for the general advantage of the public*, whenever that liberty is, by the laws of the state, further restrained than is necessary and expedient for the general advantage, a state of *civil slavery* commences immediately: this may affect the whole society, and every description of persons in it, and yet the constitution of the state be perfectly free. And this happens whenever the laws of a state respect the form, or energy of the government, more than the happiness of the citizen; as in Venice, where the most oppressive species of civil slavery exists, extending to every individual in the state, from the poorest gondolier to the members of the senate, and the doge himself.

This species of slavery also exists whenever there is an inequality of rights, or privileges, between the subjects or citizens of the same state, except such as necessarily results from the exercise of a public office; for the pre-eminence of one class of men must be founded and erected upon the depression of another; and the measure of exaltation in the former, is that of the slavery of the latter. In all governments, however constituted, or by what description soever denominated, wherever the distinction of rank prevails, or is admitted by the constitution, this species of slavery exists. It existed in every nation, and in every government in Europe before the French revolution. It existed in the American colonies before they became independent states; and notwithstanding the maxims of equality which have been adopted in their several constitutions, it exists in most, if not all, of them, at this day, in the persons of our *free* negroes and mulattoes; whose civil incapacities are almost as numerous as the civil rights of our free citizens. A brief enumeration of them, may not be improper before we proceed to the third head.

* Blacks. Com. 125. I should rather incline to think this definition of *civil* liberty more applicable to *social* liberty, for reasons mentioned in a note, page 145, Vol. I. of Blackstone's Commentaries.

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Free negroes and mulattoes are by our constitution excluded from the right of suffrage*, and by consequence, I apprehend, from office too: they were formerly incapable of serving in the militia, except as drummers or pioneers, but of late years I presume they were enrolled in the lists of those that bear arms†, though formerly punishable for presuming to appear at a muster-field‡. During the revolutionary war many of them were enlisted as soldiers in the regular army. Even slaves were not rejected from military service at that period, and such as served faithfully during the period of their enlistment, were emancipated by an act passed after the conclusion of the war§. An act of justice to which they were entitled upon every principle. All but house-keepers, and persons residing upon the frontiers, are prohibited from keeping, or carrying any gun, powder, shot, club, or other weapon offensive or defensive‖: Resistance to a white person, in any case, was, formerly, and now, in any case, except a wanton assault on the negroe or mulattoe, is punishable by whipping**. No negroe or mulattoe can be a witness in any prosecution, or civil suit in which a white person is a party††. Free negroes, together with slaves, were formerly denied the benefit of clergy in cases where it was allowed to white persons; but they are now upon an equal footing as to the allowance of clergy‡‡. Emancipated negroes may be sold to pay the debts of their former master contracted before their emancipation; and they may be hired out to satisfy their taxes where no sufficient distress can be had. Their children are to be bound out apprentices by the overseers of the poor. Free negroes have all the advantages in capital

* The constitution of Virginia, Art. 7, declares, that the right of suffrage shall remain as then exercised: the act of 1723, c. 4, (Edi. 1733,) Sec. 23, declared, that no negroe, mulattoe, or Indian, shall have any vote at the election of burgesses, or any other election whatsoever. This act, it is presumed, was in force at the adoption of the constitution. The act of 1785, c. 55, (Edi. of 1794, c. 17,) also expressly excludes them from the right of suffrage.

† This was the case under the laws of the state; but the act of 2 Cong. c. 33, for establishing an uniform militia throughout the United States, seems to have excluded all but free white men from bearing arms in the militia.

‡ 1723, c. 2.

§ Oct. 1783, c. 3.

‖ 1748, c. 31. Edi. 1794.

** Ibid. c. 103.

†† 1794, c. 141.

‡‡ 1794, c. 103.

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cases, which white men are entitled to, except a trial by a jury of their own complexion: and a slave suing for his freedom shall have the same privilege. Free negroes residing, or employed to labour in any town, must be registered; the same thing is required of such as go at large in any county. The penalty in both cases is a fine upon the person employing, or harbouring them, and imprisonment of the negroe*. The migration of free negroes or mulattoes to this state is also prohibited; and those who do migrate hither may be sent back to the place from whence they came†. Any person, not being a negroe, having one-fourth or more negroe blood in him, is deemed a mulattoe. The law formerly made no other distinction between negroes and mulattoes, whether slaves or freemen. But now the act of 1796, c. 2, which abolishes the punishment of death, except in case of murder, in all cases where any free person may be convicted, creates a most important distinction in their favour; slaves not being entitled to the same benefit. These incapacities and disabilities are evidently the fruit of the third species of slavery, of which it remains to speak; or, rather, they are scions from the same common stock: which is,

III. That condition in which one man is subject to be directed by another in all his actions; and this constitutes a state of *domestic slavery;* to which state all the incapacities and disabilities of civil slavery are incident, with the weight of other numerous calamities superadded thereto. And here it may be proper to make a short inquiry into the origin and foundation of domestic slavery in other countries, previous to it's fatal introduction into this.

Slaves, says Justinian, are either born such or become so‡. They are born slaves when they are children of bond women; and they become slaves, either by the law of nations, that is, by captivity; for it is the practice of our generals to sell their captives, being accustomed to preserve, and not to destroy them: or by the civil law, which happens when a free person, above the

* 1794, c. 163. † 1794, c. 164.

‡ Inst. lib. 1. tit. 1.

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age of twenty, suffers himself to be sold for the sake of sharing the price given for him. The author of the Commentaries on the Laws of England thus combats the reasonableness of all these grounds: * "The conqueror," says he, "according to the civili-
"ans, had a right to the life of his captive; and having spared
"that, has a right to deal with him as he pleases. But it is an
"untrue position, when taken generally, that by the law of na-
"ture or nations, a man may kill his enemy: he has a right to
"kill him only in particular cases; in cases of absolute necessity
"for self-defence; and it is plain that this absolute necessity did
"not subsist, since the victor did not actually kill him, but made
"him prisoner. War itself is justifiable only on principles of
"self-preservation; and therefore it gives no other right over
"prisoners but merely to disable them from doing harm to us,
"by confining their persons: much less can it give a right to kill,
"torture, abuse, plunder, or even to enslave, an enemy, when
"the war is over. Since, therefore, the right of *making* slaves
"by captivity, depends on a supposed right of slaughter, that
"foundation failing, the consequence drawn from it must fail
"likewise. But, secondly, it is said slavery may begin *jure ci-*
"*vili;* when one man sells himself to another. This, if only
"meant of contracts to serve, or work for, another, is very just:
"but when applied to strict slavery, in the sense of the laws of
"old Rome or modern Barbary, is also impossible. Every sale
"implies a price, a *quid pro quo*, an equivalent given to the seller,
"in lieu of what he transfers to the buyer; but what equivalent
"can be given for life and liberty, both of which, in absolute
"slavery, are held to be in the master's disposal? His property,
"also, the very price he seems to receive, devolves, *ipso facto*,
"to his master, the instant he becomes a slave. In this case,
"therefore, the buyer gives nothing, and the seller receives no-
"thing: of what validity then can a sale be, which destroys the
"very principles upon which all sales are founded? Lastly we are
"told, that besides these two ways by which slaves are acquired,
"they may also be hereditary; "*servi nascuntur;*" the children
"of acquired slaves are, "*jure naturæ*," by a negative kind of
"birthright, slaves also.....But *this, being built on the two former*

* 1 b. c. 423.

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"*rights*, must *fall* together with them. If neither captivity, nor "the sale of one's self, can by the law of nature and reason reduce "the parent to slavery, *much less* can they reduce the offspring." Thus by the most clear, manly, and convincing reasoning does this excellent author refute every claim, upon which the practice of slavery is founded, or by which it has been supposed to be justified, at least, in modern times*. But were we even to admit, that a captive taken in a *just war*, might by his conqueror be reduced to a state of slavery, this could not justify the claim of Europeans to reduce the natives of Africa to that state: it is a melancholy, though well-known fact, that in order to furnish supplies of these unhappy people for the purposes of the slave trade, the Europeans have constantly, by the most insidious (I had almost said infernal) arts, fomented a kind of perpetual warfare among the ignorant and miserable people of Africa; and instances have not been wanting, where, by the most shameful breach of faith, they have trepanned and made slaves of the *sellers* as well as the *sold*†. That such horrid practices have been sanctioned

* These arguments are, in fact, borrowed from the Spirit of Laws. Lib. xv. c. 2.

† "About the same time (the reign of queen Elizabeth) a traffic "in the human species, called negroes, was introduced into England, "which is one of the most odious and unnatural branches of trade "the sordid and avaricious mind of mortals ever invented....It had "been carried on before this period by Genoese traders, who "bought a patent from Charles the fifth, containing an exclusive "right of carrying negroes from the Portuguese settlements in "Africa, to America and the West-Indies; but the English nation "had not yet engaged in the iniquitous traffic.....One William Haw-"kins, an expert English seaman, having made several voyages to "the coast of Guinea, and from thence to Brazil and the West-Indies, "had acquired considerable knowledge of these countries. At his "death he left his journals with his son, John Hawkins, in which he "described the lands of America and the West-Indies as exceedingly "rich and fertile, but utterly neglected for want of hands to improve "them. He represented the natives of Europe as unequal to the "task in such a scorching climate; but those of Africa as well adapted "to undergo the labours requisite. Upon which John Hawkins im-"mediately formed a design of transporting Africans into the wes-"tern world; and having drawn a plan for the execution of it, he "laid it before some of his opulent neighbours for encouragement

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by a civilized nation; that a nation ardent in the cause of liberty, and enjoying it's blessings in the fullest extent, can continue to vindicate a right established upon such a foundation; that a people who have declared, "That *all men* are by nature *equally** *free*

"and approbation. To them it appeared promising and advanta-
"geous. A subscription was opened and speedily filled up, by Sir
"Lionel Ducket, Sir Thomas Lodge, Sir William Winter, and
"others, who plainly perceived the vast profits that would result
"from such a trade. Accordingly three ships were fitted out, and
"manned by an hundred select sailors, whom Hawkins encouraged
"to go with him by promises of good treatment and great pay. In
"the year 1562 he set sail for Africa, and in a few weeks arrived
"at the country called Sierra Leona, where he began his commerce
"with the negroes. While he trafficked with them, he found the
"means of giving them a charming description of the country to
"which he was bound; the unsuspicious Africans listened to him
"with apparent joy and satisfaction, and seemed remarkably fond
"of his European trinkets, food, and clothes. He pointed out to
"them the barrenness of the country, and their naked and wretched
"condition, and promised if any of them were weary of their misera-
"ble circumstances, and would go along with him, he would carry
"them to a plentiful land, where they should *live happy*, and *receive*
"an abundant *recompence* for their labours. He told them the
"country was inhabited by such men as himself and his jovial com-
"panions, and *assured* them of *kind usage* and *great friendship*.
"In short, the negroes were overcome by his flattering promises,
"and *three hundred* stout fellows accepted his offer, and consented
"to embark along with him. Every thing being settled on the most
"amicable terms between them, Hawkins made preparations for his
"voyage. But in the night before his departure his negroes were
"attacked by a large body from a different quarter; Hawkins, being
"alarmed with the shrieks and cries of dying persons, ordered his
"men to the assistance of his slaves, and having surrounded the
"assailants, carried a number of them on board as prisoners of war.
"The next day he set sail for Hispaniola with his cargo of human
"creatures; but during the passage, he treated the prisoners of war
"in a different manner from his volunteers. Upon his arrival, he
"disposed of his cargo to great advantage; and endeavoured to in-
"culcate on the Spaniards who bought the negroes the same distinc-
"tion to be observed: but they having *purchased all at the same*
"*rate*, considered them as slaves of the same condition, and conse-
"quently treated all alike."

* Bill of Rights, Article 1.

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and *independent*," and have made this declaration the first article in the foundation of their government, should in defiance of so sacred a truth, recognized by themselves in so solemn a manner, and on so important an occasion, tolerate a practice incompatible

Hawkins having returned to England, soon after made preparations for a second voyage. "In his passage he fell in with the Minion "man of war, which accompanied him to the coast of Africa. After "his arrival he began as formerly to traffic with the negroes, en-"deavouring by persuasions and *prospects* of *reward*, to induce them "to go along with him....but now they were more reserved and jea-"lous of his designs, and as none of their neighbours had returned, "they were apprehensive he had killed and eat them. The crew "of the man of war observing the Africans backward and suspicious, "began to laugh at his gentle and dilatory methods of proceeding, "and proposed having immediate recourse to force and compulsion "....but Hawkins considered it as cruel and unjust, and tried by per-"suasions, promises and threats, to prevail on them to desist from "a purpose so unwarrantable and barbarous. In vain did he urge "his authority and instructions from the queen: the bold and head-"strong sailors would hear of no restraints. Drunkenness and "avarice are deaf to the voice of humanity. They pursue their vio-"lent design, and, after several unsuccessful attacks, in which *many* "of them lost their *lives*, the cargo was at length completed by bar-"barity and force.

"Hence arose that horrid and inhuman practice of dragging Afri-"cans into slavery, which has since been *so* pursued, in defiance of "every principle of justice and religion. Had negroes been brought "from the flames, to which in some countries they were devoted on "their falling prisoners of war, and in others, sacrificed at the fu-"neral obsequies of the great and powerful among themselves; in "short, had they by this traffic been delivered from *torture* or *death*, "European merchants *might have some excuse* to plead in it's vin-"dication. *But according to the common mode in which it has been* "*conducted*, we must confess it a difficult matter to conceive a *single* "argument in it's defence. And though policy has given countenance "and sanction to the trade, yet every candid and impartial man "must confess, that it is atrocious and unjustifiable in every light in "which it can be viewed, and turns merchants into a band of robbers, "and trade into atrocious acts of fraud and violence." Historical Account of South-Carolina and Georgia. Anonymous. London printed in 1779....page 20, &c.

"The number of negroe slaves bartered for in one year, (viz. "1768), on the coast of Africa from Cape Blanco, to Rio Congo,

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therewith, is such an evidence of the weakness and inconsistency of human nature, as every man who hath a spark of patriotic fire in his bosom must wish to see removed from his own country. If ever there was a cause, if ever an occasion, in which all hearts should be united, every nerve strained, and every power exerted, surely the restoration of human nature to it's unalienable right, is such. Whatever obstacles, therefore, may hitherto have retarded the attempt, he that can appreciate the honour and happiness of his country, will think it time that we should attempt to surmount them.

But how loudly soever reason, justice, and (may I not add) religion*, condemn the practice of slavery, it is acknowledged to have been very antient, and almost universal. The Greeks, the Romans, and the antient Germans also practised it, as well as the more antient Jews and Egyptians. By the Germans it was transmitted to the various kingdoms which arose in Europe out of the ruins of the Roman empire. In England it subsisted for some ages under the name of *villeinage*†. In Asia it seems

" amounted to 104,000 souls, whereof more than half (viz. 53,000) " were shipped on account of British merchants, and 6,300 on the " account of British Americans." The Law of Retribution, by Granville Sharpe, Esq. page 147. note.

* See the various tracts on this subject, by Granville Sharpe, Esq. of London.

† The condition of a *villein* had most of the incidents I have before described in giving the idea of *slavery*, in general. His services were uncertain and indeterminate such as his lord thought fit to require; or as some of our antient writers express it, he knew not in the evening what he was to do in the morning, he was bound to do whatever he was commanded. He was liable to beating, imprisonment, and every other chastisement his lord could devise, except killing and maiming. He was incapable of acquiring property for his own benefit; he was himself the subject of property; as such saleable and transmissible. If he was a villein regardant he passed with the land to which he was annexed, but might be severed at the will of his lord; if he was a villein in gross, he was an heredita-ment, or a chattel real, according to his lord's interest; being descendible to the heir, where the lord was absolute *owner*, and transmissible to the executor where the lord had only a term of years in

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to have been general, and in Africa universal, and so remains to this day: In Europe it hath long since declined; it's first declension there, is said to have been in Spain, so early as the eighth century; and it is alleged to have been general about the

him. Lastly, the slavery extended to the issue, if the father was a villein, our law deriving the condition of the child from that of the father, contrary to the Roman law, in which the rule was *partus sequitur ventrem*....Harg. Case of negro Somerset, p. 26 and 27.

The same writer refers the origin of vassalage in England, principally to the wars between the British, Saxon, Danish, and Norman nations, contending for the sovereignty of that country, in opposition to the opinion of judge Fitzherbert, who supposes villeinage to have commenced at the conquest. Ib. 27, 28. And this he proves from Spelman and other antiqaries. Ib. The writ *de nativo habendo*, by which the lord was enabled to recover his villein that had absconded from him, creates a presumption that all the natives of England were at some period reduced to a state of villeinage, the word *nativus*, which signified a villein, most clearly designated the person meant thereby to be a *native*: this etymon is obvious, as well from the import of the word *nativus*, as from the history of the more remote ages of Britain. Sir Edward Coke's Etymology, "*quia plerumque nascuntur servi*," is one of those puerile conceits, which so frequently occur in his works, and are unworthy of so great a man.

Barrington in his observations upon *magna carta*, c. 4, observes, that the villeins who held by servile tenures were considered as so many negroes on a sugar plantation; the words "*liber homo*", in magna carta, c. 14, with all deference to Sir Edward Coke, who says they mean a *free-holder*, I understand as meaning *a free man*, (1) as contradistinguished from a *villein*; for in the very next sentence the words "et *villanus* alterius quam noster," occur. Villeins must certainly have been numerous at that day, to have obtained a place in the Great Charter (2). It is no less an evidence that their condition was in a state of melioration.

In Poland, at this day, the peasants seem to be in an absolute state of slavery, or at least of villeinage, to the nobility, who are the land-holders.

(1) Liber homo, &c. the title of *freeman* was formerly *confined* to the *nobility* and *gentry* who were *descended* of free ancestors. Burgh's Political Disquisitions, vol. iii. p. 400, who cites Spelman's Glossary, voc. Liber homo.

(2) In the time of the Saxons, the slaves, or vilelins were by much the most numerous class of the community in England. Russel's Modern Europe, vol. i. 54. Philadelphia edtion.

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middle of the fourteenth, and was near expiring in the sixteenth, when the discovery of the American continent, and the eastern and western coasts of Africa gave rise to the introduction of a new species of slavery. It took it's origin from the Portuguese, who, in order to supply the Spaniards with persons able to sustain the fatigue of cultivating their new possessions in America, particularly the islands, opened a trade between Africa and America for the sale of negroes, about the year 1508. The expedient of having slaves for labour was not long peculiar to the Spaniards, being afterwards adopted by other European colonies*: and though some attempts have been made to stop it's progress in most of the United States, and several of them have the fairest prospects of success in attempting the extirpation of it, yet in others, it hath taken such deep root, as to require the most strenuous exertions to eradicate it.

The first introduction of negroes into Virginia happened, as we have already mentioned, in the year 1620; from that period to the year 1662 there is no compilation of our laws, in print, now to be met with. In the revision made in that year, we find an act declaring that no Englishman, trader, or other, who shall bring in any Indians as servants and assign them over to any other, shall sell them for *slaves*, nor for any other time than English of like age should serve by act of assembly†. The succeeding session all children born in this country were declared to be bond, or free, according to the condition of the mother‡. In 1667 it was declared, "That the conferring of baptism doth not alter the "condition of the person baptized, as to his bondage or free-"dom§." This was done, "that divers masters, freed from "this doubt, may more carefully endeavour the propagating of "christianity, by permitting their slaves to be baptized." It would have been happy for this unfortunate race of men if the same tender regard for their bodies, had always manifested itself in our laws, as is shewn for their souls in this act. But this was not the case; for two years after, we meet with an act, declaring, "That if any slave resist his master, or others, by his master's

* Hargrave, ibid.

† 1662, c. 136.

‡ 1662. Sess. d. c. 12.

§ 1667, c. 2.

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orders correcting him, and by the extremity of the correction should chance to die, such death should not be accounted felony: but the master or other person appointed by his master to punish him, be acquit from molestation: *since it could not be presumed that prepensive malice*, which alone makes *murder felony*, should induce any man to destroy his own estate*." This cruel and tyrannical act, was, at three different periods†, re-enacted, with very little alteration; and was not finally repealed till the year 1788‡....above a century after it had first disgraced our code. In 1668 we meet with the first traces of emancipation, in an act which subjects negroe women set free to the tax on titheables§. Two years after||, an act passed prohibiting *Indians* or negroes, manumitted, or otherwise set free, though baptized, from purchasing christian servants**. From this act it is evident that *Indians* had *before* that time been made slaves, as well as negroes, though we have no traces of the original act by which they were reduced to that condition. An act of the same session recites that disputes had arisen whether Indians taken in war by any other nation, and by that nation sold to the English, are servants for *life*, or for a term of years; and declaring that all *servants*, not being christians, imported into this country by *shipping*, shall be *slaves* for their life-time; but that what shall come by land, shall serve, if boys and girls, until thirty years of age; if men and women twelve years, and no longer. On a rupture with the Indians in the year 1679, it was, for the *better encouragement of soldiers*, declared that what *Indian* prisoners should be *taken in war* should be free purchase to the soldier *taking* them††. Three years after it was declared that all *servants* brought into this country by sea or land, not being christians, whether negroes, Moors, mulattoes or Indians, except Turks and Moors in amity with Great-Britain,

* Among the Israelites, according to the Mosaical law, "If a man smote his servant, or his maid, with a rod, and he died under his hand, he should surely be punished....notwithstnnding if he continue a day or two, he should not be punished (1): for, saith the text, he is *his money*. Our legislators appear to have adopted the reason of the latter clause, without the humanity of the former part of the law. (1) Exod. c. 21.

† 1705, c. 49. 1723, c. 4. 1748, c. 31.

‡ 1788, c. 23. § 1668, c. 7. || 1670, c. 5.

** 1670, c. 12. †† 1679, c. 1.

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and all Indians which should thereafter be sold by neighbouring Indians, or any others trafficking with us, as slaves, should be slaves to all intents and purposes*. This act was re-enacted in the year 1705, and afterwards in 1753†, nearly in the same terms. In 1705 an act was made, authorising a free and open trade for all persons, at all times, and at all places, with all Indians whatsoever‡. On the authority of this act, the general court in April term 1787, decided that no Indians brought into Virginia since the passing thereof, nor their descendants, can be slaves in this commonwealth§. In October 1778, the general assembly passed the first act which occurs in our code for prohibiting the importation of slaves||; thereby declaring that no slave should thereafter be brought into this commonwealth by land, or by water; and that every slave imported contrary thereto, should upon such importation be free: with an exception as to such as might belong to persons migrating from the other states, or be claimed by descent, devise, or marriage, or be at that time the actual property of any citizen of this commonwealth, residing in any other of the United States, or belonging to travellers making a transient stay, and carrying their slaves away with them....In 1785 this act unfortunately underwent some alteration, by declaring that slaves thereafter brought into this commonwealth, and kept therein, one whole year together, or so long at different times as shall amount to a year, shall be free. By this means the difficulty of proving the right to freedom will be not a little augmented: for the fact of the first importation, where the right to freedom immediately ensued, might have been always proved

* 1682, c. 1. † 1705, c. 49. 1753, c. 2. ‡ 1705, c. 52.

§ Hannah and other Indians, against Davis. Since this adjudication, I have met with a manuscript act of assembly made in 1691, c. 9, entituled, "An Act for a free trade with Indians," the enacting clause of which is in the very words of the act of 1705, c. 52. A similar title to an act of that session occurs in the edition of 1733, p. 94, and the chapter is numbered as in the manuscript. If this manuscript be authentic (which there is some reason to presume, it being copied in some blank leaves at the end of Purvis's edition, and apparently written about the time of the passage of the act), it would seem that no Indians brought into Virginia for more than a century, nor any of their descendents, can be retained in slavery in this commonwealth.

|| 1778, c. 1.

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without difficulty; but where a slave is subject to removal from place to place, and his right to freedom is postponed for so long a time as a whole year, or perhaps several years, the provisions in favour of liberty may be too easily evaded. The same act declares that no persons shall thenceforth be slaves in this commonwealth, except such as were so on the first day of that session (Oct. 17th, 1785,) and the descendants of the females of them. This act was re-enacted in the revisal made in 1792*. In 1793 an additional act passed, authorising and requiring any justice of the peace having notice of the importation of any slaves, directly or indirectly, from any part of Africa or the West Indies, to cause such slave to be immediately apprehended and transported out of the commonwealth†. Such is the rise, progress, and present foundation of slavery in Virginia, so far as I have been able to trace it. The present number of slaves in Virginia, is immense, as appears by the census taken in 1791, amounting to no less than 292,427 souls: nearly two-fifths of the whole population of the commonwealth‡. We may con-

* See acts of 1794, c. 103. † Edi. of 1794, c. 164.

‡ Although it be true that the number of slaves in the whole state bears the proportion of 292,427, to 747,610, the whole number of souls in the state, that is, nearly as two to five; yet this proportion is by no means uniform throughout the state. In the forty-four counties lying upon the Bay, and the great rivers of the state, and comprehended by a line including Brunswick, Cumberland, Goochland, Hanover, Spottsylvania, Stafford, Prince William and Fairfax, and the counties eastward thereof, the number of slaves is 196,542, and the number of free persons, including free negroes and mulattoes, 198,371 only. So that the blacks in that populous and extensive district of country are more numerous than the whites. In the second class, comprehending nineteen counties, and extending from the last mentioned line to the Blue Ridge, and including the populous counties of Frederick and Berkeley, beyond the Blue Ridge, there are 82,286 slaves, and 136,251 free persons; the number of free persons in that class not being two to one, to the slaves. In the third class the proportion is considerably increased; the eleven counties of which it consists contain only 11,218 slaves, and 76,281 free persons. This class reaches to the Allegany ridge of mountains: the fourth and last class, comprehending fourteen counties westward of the third class, contains only 2,381 slaves, and 42,288 free persons.... It is obvious from this statement that almost all the dangers and in-

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sole ourselves with the hope that this proportion will not increase, the further importation of slaves being prohibited, whilst the free migrations of white people hither is encouraged. But this hope affords no other relief from the evil of slavery, than a diminution of those apprehensions which are naturally excited by the detention of so large a number of oppressed individuals among us, and the possibility that they may one day be roused to an attempt to shake off their chains.

Whatever inclination the first inhabitants of Virginia might have to encourage slavery, a disposition to check its progress, and increase, manifested itself in the legislature even before the close of the last century. So long ago as the year 1699 we find the title of an act*, laying an imposition upon *servants* and *slaves*, imported into this country; which was either continued, revived, or increased, by a variety of temporary acts, passed between that period and the revolution in 1776†.....One of these

conveniencies which may be apprehended from a state of slavery on the one hand, or an attempt to abolish it, on the other, will be confined to the people eastward of the blue ridge of mountains.

* Edi. of 1733. c. 12.

† The following is a list of the acts, or titles of acts, imposing duties on slaves imported, which occur in the various compilations of our laws, or in the Sessions Acts, or Journals.

1699, c. 12. title only retained. Edit. of 1733, p. - -	113
1701, c. 5. the same, - - - - - - - - -	116
1704, c. 4. the same, - - - - - - - - -	122
1705, c. 1. the same, - - - - - - - - -	126
1710, c. 1. the same, - - - - - - - -	239
1712, c. 3. the same, - - - - - - - - -	282
1723, c. 1. repealed by proclamation, - - - - -	333
1727, c. 1. enacted with a suspending clause, and the royal assent refused, - - - - - - - - -	376
1732, c. 3. printed at large, - - - - - - -	469
1734, c. 3. printed at large in Sessions Acts.	
1736, c. 1. the same.	
1738, c. 6. the same.	
1740, c. 2. the same.	
1742, c. 2. the same.	

From this period I have not been able to refer to the Sessions Acts.

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acts passed in 1723, by a marginal note appears to have been repealed by proclamation, Oct. 24, 1724. In 1732 a duty of five per cent. was laid on slaves imported, to be paid by the buyers; a measure calculated to render it as little obnoxious as possible to the English merchants trading to Africa, and not improbably suggested by them, to the privy council in England. The preamble to this act is in these remarkable words, "We your majesty's most dutiful and loyal subjects, &c. taking into our serious consideration the exigencies of your government here, and that the duty laid upon liquors will not be sufficient to defray the necessary expences thereof, do humbly represent to your majesty, that *no other* duty can be laid upon our import or export, without oppressing your subjects, than a duty upon *slaves imported*, to be paid by the buyers, *agreeable to your majesty's instructions* to your lieutenant governor." This act was only for the short period of four years, but seems to have been continued from time to time till the year 1751, when the duty expired, but was revived the next year. In the year 1740 an additional duty of five per cent. was imposed for four years, for the purpose of an expedition against the Spaniards, &c. to be likewise paid by the buyers: and in 1742 the whole duty was continued till July 1, 1747.....The act of 1752, by which these duties were revived and continued (as well as several former acts,) takes notice that the duty had been found *no ways burdensome to the traders* in slaves. In 1754 an additional duty of five per cent. was imposed for the term of three years, by an act for encouraging and protecting the settlers on the Mississippi: this duty, like all the former, was to be paid by the buyers. In 1759 a duty of 20 per cent. was imposed upon

1752, c. 1. printed at large in the Edit. of 1769, - - 281
1754. c. 1. the same, - - - - - - - - - 319
1755, c. 2. Sessions Acts. Ten per cent. in addition to all former duties.
1759, c. 1. printed at large, edition of 1769, - - - 369
1763, c. 1. Journals of that session,
1766, c. 3, 4. printed at large, Edit. of 1769, - - - 461, 462
..... c. 15. additional duty, the title only is printed, being repealed by the crown, Ib. - - - - - 473
1769, c. 7, 8, and 12, title only printed, edition of 1785, - 6, 7
1772, c. 15, title only printed, - - - - Ibidem, 24

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all slaves imported into Virginia from Maryland, North Carolina, or other places in America, to continue for seven years. In 1769 the same duty was further continued. In the same session the duty of five per cent. was continued for three years, and an additional duty of ten per cent. to be likewise paid by the buyers, was imposed for seven years; and a further duty of five per cent. was, by a separate act of the same session, imposed for the better support of the contingent charges of government, to be paid by the buyers. In 1772 all these duties were further continued for the term of five years from the expiration of the acts then in force: the assembly at the same time petitioned the throne*, *to remove all those restraints which inhibited* his majesty's governors assenting to such *laws* as *might check so very pernicious a commerce*, as that of slavery.

* ☞ The following extract from a petition to the throne, presented from the house of burgesses of Virginia, April 1, 1772, will shew the sense of the people of Virginia, on the subject of slavery at that period.

"The many instances of your majesty's benevolent intentions, and most gracious disposition to promote the prosperity and happiness of your subjects in the colonies, encourages us to look up to the throne, and implore your majesty's paternal assistance in averting a calamity of a most alarming nature."

"The importation of slaves into the colonies from the coast of Africa, hath long been considered as a trade of great inhumanity, and under it's *present encouragement*, we have too much reason to fear *will endanger the very existence* of your majesty's American dominions."

"We are sensible that some of your majesty's subjects of *Great Britain* may reap emoluments from this sort of traffic, but when we consider that it greatly retards the settlement of the colonies, with *more useful* inhabitants, and may, in time, have the most destructive influence, we presume to hope, that the *interest of a few* will be disregarded when placed in competition with the security and happiness of such numbers of your majesty's dutiful and loyal subjects."

"Deeply impressed with these sentiments, we most humbly beseech your majesty to *remove all those restraints* on your majesty's governors of this colony, *which inhibit their assenting to such laws as*

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In the course of this inquiry it is easy to trace the desire of the legislature to put a stop to the further importation of slaves: and had not this desire been uniformly opposed on the part of the crown, it is highly probable that event would have taken effect at a much earlier period than it did. A duty of five per cent. to be paid by the *buyers*, at first, with difficulty, obtained the royal assent. Requisitions from the crown for aids, on particular occasions, afforded a pretext, from time to time, for increasing the duty from five, to ten, and finally to twenty per cent. with which the *buyer* was uniformly made chargeable. The wishes of the people of this colony, were not sufficient to counterbalance the interest of the English merchants, trading to Africa, and it is probable, that however disposed to put a stop to so infamous a traffic by law, we should never have been able to effect it, so long as we might have continued dependant on the British government: an object sufficient of itself to justify a revolution. That the legislature of Virginia were *sincerely* disposed to put a stop to it, cannot be doubted; for even during the tumult and confusion of the revolution, we have seen that they availed themselves of the earliest opportunity, to crush forever so pernicious and infamous a commerce, by an act passed in October 1778, the penalties of which, though apparently lessened by the act of 1792, are still equal to the value of the slave; being two hundred dollars upon the importer, and one

might check so very pernicious a commerce." Journals of the house of burgesses, page 131.

This petition produced no effect, as appears from the first clause of our CONSTITUTION, where among other acts of misrule, "the inhuman use of the royal negative," in refusing us permission to exclude slaves from us by law, is enumerated, among the reasons for *separating from Great Britain.*

I have lately been favoured with the perusal of a manuscript copy of a letter from Granville Sharpe, esquire, of London, to a friend of the prime minister, dated March 25, 1794, in which he speaks of this petition thus: "I myself was desired, by a letter from America, to inquire for an answer to this extraordinary Virginia petition. I waited on the secretary of state, and was informed by himself that the petition *was received*, but that (he apprehended) *no answer would be given.*

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hundred dollars upon every person buying or selling an imported slave*.

A system uniformly persisted in for nearly a whole century, and finally carried into effect, so soon as the legislature was unrestrained by "the inhuman exercise of the royal negative," evinces the sincerity of that disposition which the legislature had shewn during so long a period, to put a check to the growing evil. From the time that the duty was raised above five per cent. it is probable that the importation of slaves into this colony decreased. The demand for them in the more southern colonies probably contributed also to lessen the numbers imported into this: for some years immediately preceding the revolution, the importation of slaves into Virginia might almost be considered as at an end; and probably would have been entirely so, if the ingenuity of the merchant had not found out the means of evading the heavy duty, by pretended sales, at which the slaves were bought in by some friend, at a quarter of their real value.

Tedious and unentertaining as this detail may appear to all others, a citizen of Virginia will feel some satisfaction in reading a vindication of his country, from the opprobrium, but too lavishly bestowed upon her of fostering slavery in her bosom, whilst she boasts a sacred regard to the liberty of her citizens, and of mankind in general. The acrimony of such censures must abate, at least in the breasts of the candid, upon an impartial review of the subject here brought before them; and if in addition to what we have already advanced, they consider the difficulties attendant on any plan for the abolition of slavery, in a country where so large a proportion of the inhabitants are slaves; and where a still larger proportion of the cultivators of the earth are of that description of men, they will probably feel emotions of sympathy and compassion, both for the slave and

* It may not be improper here to note, that the first congress of the U. States, at their 3d session, Dec. 1793, passed an act to prohibit the carrying on the slave trade from the United States to any foreign place or country; the provisions of which seem well calculated to restrain the citizens of united America from embarking in so infamous a traffic.

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for his master, succeeded to those hasty prejudices, which even the best dispositions are not exempt from contracting, upon subjects where there is a deficiency of information.

We are next to consider the condition of slaves, in Virginia, or the legal consequences attendant on a state of slavery in this commonwealth; and here it is not my intention to notice those laws, which consider slaves, merely as *property*, and have, from time to time been enacted to regulate the disposition of them, *as such*: for these will be more properly considered, elsewhere: my intention, at present is, therefore, to take a view of such laws, only, as regard slaves, as a distinct class of *persons*, whose rights (if indeed they possess any), are reduced to a much narrower compass, than those, of which we have been speaking before.

Civil, or rather social rights, we may remember, are reducible to three primary heads; the right of personal security; the right of personal liberty; and the right of private property. In a state of slavery the two last are wholly abolished, the person of the slave being at the absolute disposal of his master; and property, what he is incapable, in that state, either of acquiring, or holding, to his own use. Hence it will appear how perfectly irreconcilable a state of slavery is to the principles of a democracy, which, form the *basis* and *foundation* of our government. For our bill of rights, declares, "that all men are, by "nature *equally free*, and independent, and have certain rights "of which they cannot deprive or divest their posterity...name-"ly, the enjoyment of life and *liberty*, with the means of *acquir-"ing* and *possessing property*." This is, indeed, no more than a recognition of the first principles of the law of nature, which teaches us this equality, and enjoins every man, whatever advantages he may possess over another, as to the various qualities or endowments of body or mind, to practise the precepts of the law of nature to those who are in these respects his *inferiors*, no less than it enjoins his *inferiors* to practise them towards *him*. Since he has no more right to insult *them*, than they have to injure him. Nor does the *bare unkindness of nature*, or of fortune condemn a man to a *worse* condition than others, as to the enjoyment of common privileges *. It would be hard to reconcile reducing

* Spavan's Puff. Vol. I, c. 17.

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the negroes to a state of slavery to these principles, unless we first degrade them below the rank of human beings, not only politically, but also physically and morally....The Roman lawyers look upon those only properly as *persons*, who are *free*, putting *slaves* into the rank of *goods* and *chattels*; and the policy of our legislature, as well as the practise of slave-holders in America in general, seems conformable to that idea: but surely it is time we should admit the evidence of moral truth, and learn to regard them as our fellow men, and equals, except in those particulars where accident, or possibly nature, may have given us some advantage; a recompence, for which they, perhaps, enjoy in other respects.

Slavery, says Hargrave, always imports an obligation of perpetual service, which only the consent of the master can dissolve: it also generally gives to the master an arbitrary power of administring every sort of correction, however inhuman, not immediately affecting life or limb, and even these in some countries, as formerly in Rome, and at this day among the Asiatics and Africans, are left exposed to the arbitrary will of a master, or protected only by fines or other slight punishments. The property of the slave, also, is absolutely the property of his master, the slave, himself, being the subject of property, and as such saleable, or transmissible at the will of his master....A slavery, so malignant as that here described, does not leave to it's wretched victims the least vestige of any civil right, and even divests them of all their natural rights. It does not, however, appear, that the rigours of slavery in this country, were ever as great, as those above described: yet it must be confessed, that, at times, they have fallen very little short of them.

The first severe law respecting slaves, now to be met with in our code, is that of 1669, already mentioned, which declared that the death of a slave *resisting* his master, or other person correcting him by his order, *happenning by the extremity of the correction*, should not be accounted felony. The alterations, which this law underwent in three successive acts *, were by

* 1705, c. 49. 1723, c. 4. 1748, c. 31.

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no means calculated effectually to mitigate its severity; it seems rather to have been augmented by the act of 1723, which declared that a person indicted for the murder of a slave, and found guilty of *manslaughter*, should not incur any punishment for the same *.

All these acts were at length repealed in 1788 †. So that homicide of a slave stands now upon the same footing, as in the case of any other person. In 1672 it was declared lawful for any person pursuing any runaway negroe, mulattoe, Indian slave, or *servant for life*, by virtue of an *hue and cry*, to kill them in case of resistance, without being questioned for the same ‡. A few years afterwards, this act was extended to persons *employed to apprehend* runaways §. In 1705, these acts underwent some small alterations; two justices being authorised by proclamation to *outlaw* runaways, who might, thereafter be *killed* and destroyed by any person, whatsoever, by *such ways and means* as he may think fit, without accusation or impeachment of any crime, for so doing ||. And if any such slave were appehended, he might be punished at the discretion of the county court, either by *dismembering*, or in any other manner *not touching life*. The inhuman rigour of this act was afterwards** extended to the venial offence of going abroad by night, if the slave was *notoriously* guilty of it ....Such are the cruelties to which a state of slavery gives birth; such the horrors to which the human mind is capable of being reconciled, by it's adoption. The dawn of humanity at length appeared in the year 1769, when the power of dismembering, even under the authority of a county court, was restricted to the single offence of *attempting* to ravish a white woman††, in which case, perhaps, the punishment is not more than commensurate to the crime. In 1772, some restraints were laid upon the practice

* In December term 1788, one John Huston was tried in the general court for the murder of a slave; the jury found him guilty of manslaugter, and the court, upon a motion in arrest of judgment, discharged him without any punishment. The general assembly being then sitting, some of the members of the court mentioned the case to some leading characters in the legislature, and the act was, at the same session repealed.

† 1788, c. 23.

‡ 1672, c. 8.

§ 1680, c. 10.

|| 1705, c. 49.

** 1723, c. 4. 1748, c. 31.

†† 1769, c. 19.

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of outlawing slaves, requiring that it should appear to the *satisfaction* of the justices that the slaves were out-lying and *doing mischief* *. These loose expressions of the act, left too much in the discretion of men, not much addicted to weighing their import....In 1792, every thing relative to the outlawry of slaves was *expunged* from our code †, and I trust, will never again find a place in it. By the act of 1680, a negroe, mulattoe, or Indian bond or *free*, presuming to lift his hand in opposition to any christian, should receive thirty lashes on his bare back for every offence ‡. The same act prohibited slaves from carrying any club, staff, gun, sword, or other weapon, offensive or defensive. This was afterwards extended to all negroes, mulattoes, and Indians, whatsoever, with a few exceptions in favour of housekeepers, residents on a frontier plantation, and such as were enlisted in the militia §. Slaves, by these and other acts ||, are prohibited from going abroad without leave, in writing from their masters, and if they do, they may be whipped: any person suffering a slave to remain on his plantation for four hours together, or dealing with him without leave in writing from his master, is subject to a fine. A runaway slave may be apprehended and committed to jail and if not claimed within three months (being first advertised) he shall be hired out, having an iron collar first put about his neck: and if not claimed within a year, shall be sold **.... These provisions were, in general, re-enacted in 1792 ††, but the punishment to be inflicted on a negroe or mulattoe, for lifting his hand against a white person, is restricted to those cases, where the former is not wantonly assaulted. In this act the word Indian appears to have been designedly omitted: the small number of these people, or their descendants remaining among us, concurring with a more liberal way of thinking, probably gave occasion to this circumstance. The act of 1748, c. 31, made it felony without benefit of clergy for a slave to prepare, exhibit, or administer any medicine whatever, without the order or consent of the master: but *allowed clergy*, if it appeared that the medicine was not administered with an *ill intent*; the act of 1792, with

* 1772, c. 9.
† Edi. 1794, c. 103.
‡ 1680, c. 10. 1705. 1723, c. 4.
|| 1705, c. 49. 1723, c. 4. 1748, c. 31. 1753, c. 2. 1785, c. 77.
** 1753, c. 2.
†† Edi. of 1794, c. 103, 151.

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more justice, directs that in such case he shall be acquitted *.... To consult, advise, or conspire, to rebel, or to plot, or conspire the death of any person whatsoever, is still felony without benefit of clergy in a slave†....Riots, routs, unlawful assemblies, trespasses and seditious speeches by slaves, are punishable with stripes, at the discretion of a justice of the peace‡....The master of a slave permitting him to go at large and trade as a freeman, is subject to a fine §; and if he suffers the slave to hire himself out, the latter may be sold, and twenty-five per cent. of the price be applied to the use of the county.....Negroes and mulattoes, whether slaves or not, are incapable of being witnesses, but against or between negroes and mulattoes; they are not permitted to intermarry with any white person; yet no punishment is annexed to the offence in the slave; nor is the marriage void; but the white person contracting the marriage, and the clergyman by whom it is celebrated are liable to fine and imprisonment; and this is probably the only instance in which our laws will be found more favourable to a negroe than a white person. These provisions though introduced into our code at different periods, were all re-enacted in 1792 ||.

From this melancholy review it will appear that not only the right of property, and the right of personal liberty, but even the right of personal security, has been, at times either wholly annihilated, or reduced to a shadow: and even in these days, the protection of the latter seems to be confined to very few cases. Many actions, indifferent in themselves, being permitted by the law of nature to all mankind, and by the laws of society to all free persons, are either rendered highly criminal in a slave, or subject him to some kind of punishment or restraint. Nor is it in this respect only, that his condition is rendered thus deplorable by law. The measure of punishment for the same offence, is often, and the manner of trial and conviction is always different in the case of a slave, and a free-man. If the latter be accused

* Edi. 1794, c. 103 † 1748, c. 31. 1794, c. 103.

‡ 1785, c. 77. 1794, c. 103.

§ 1769, c. 19. May 1782, c. 32, 1794, Ibid.

|| Edi. of 1794, c. 103.

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of any crime, he is entitled to an examination before the court of the county where the offence is alleged to have been committed; whose decision, if in his favour, is held to be a legal and final acquittal, but it is not final if against him; for after this, both a grand jury and a petit jury of the country, must successively pronounce him guilty; the former by the concurrent voices of twelve at least, of their body, and the latter, by their unanimous verdict upon oath. He may take exception to the proceedings against him, by a motion in arrest of judgment; and in this case, or, if there be a special verdict, the same unanimity between his judges as between his jurors, is necessary to his condemnation. The title of an act occurs, which passed in the year 1705* for the *speedy* and *easy* prosecution of slaves committing capital crimes. In 1723 † the governor was authorized, whenever any slave was committed for any capital offence, to issue a special commission of oyer and terminer, to *such persons as he should think fit*, the number being left to his discretion, who should thereupon proceed to the trial of such slave, taking for evidence the confession of the defendant, the oath of one or more credible witnesses, or such testimony of negroes, mulattoes, or Indians, bond or free, with pregnant circumstances, as to them should seem convincing, without the solemnity of a jury. No exception, formerly, could be taken to the proceedings, on the trial of a slave,‡ but that proviso is omitted in the act of 1792, and the justices moreover seem bound to allow him counsel for his defence, whose fee shall be paid by his master.§ In case of conviction, execution of the sentence was probably very speedily performed, since the act of 1748, provides that, thereafter, it should not be performed in less than ten days, except in case of insurrection or rebellion; and further, that if the court be divided in opinion the accused should be acquitted. In 1764, an act passed, authorizing general, instead of special commissioners of oyer and terminer, ‖ constituting all the justices of any county, judges for the trial of slaves, committing capital offences, within their respective counties; any four of whom, one being of the quorum, should constitute a court for that purpose. In 1772, one step

* 1705, c. 11.
† 1723, c. 4.
‡ 1748, c. 31.
§ Edi. 1794, c. 103.
‖ 1764, c. 9.

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further was made in favour of humanity, by an act declaring that no slave should thereafter be condemned to die unless four of the court should concur in opinion of his guilt.* The act of 1786, c. 58, confirmed by that of 1792, constitutes the justices of every county and corporation justices of oyer and terminer for the trial of slaves †; requires *five* justices, at least, to constitute a court, and *unanimity* in the court for his condemnation; allows him counsel for his defence, to be paid by his owner, and, I apprehend, admits him to object to the proceedings against him; and finally enlarges the time of execution to *thirty* days, instead of ten (except in cases of conspiracy, insurrection, or rebellion), and extends the benefit of clergy to him in all cases, where any other person should have the benefit thereof, except in the cases before mentioned.

To an attentive observer these gradual, and almost imperceptible amendments in our jurisprudence respecting slaves, will be found, upon the whole, of infinite importance to that unhappy race. The mode of trial in criminal cases especially, is rendered infinitely more beneficial to them, than formerly, though perhaps still liable to exception for want of the aid of a jury: the solemnity of an oath administered the moment the trial commences, may be considered as operating more forcibly on the mind, than a general oath of office, taken, perhaps, twenty years before. Unanimity may also be more readily expected to take place among *five* men, than among *twelve*. These objections to the want of a jury are not without weight: on the other hand it may be observed, that if the number of triers be not equal to a full jury, they may yet be considered as more select; a circumstance of infinitely greater importance to the slave. The unanimity requisite in the court in order to conviction, is a more happy acquisition to the accused, than may at first appear; the opinions of the court must be delivered openly, immediately, and seriatim, beginning with the youngest judge. A single voice in favour of the accused, is an acquittal; for unanimity is not necessary, as with a jury, to acquit, as well as to condemn: there is less danger in this mode of trial, where the suffrages are to be openly delivered, that a few will be brought over to the opinion of the

* 1772, c. 9. † Edit. 1794, c. 103.

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majority, as may too often happen among jurors, whose deliberations are in *private*, and whose impatience of confinement may go further than real conviction, to produce the requisite unanimity. That this happens not unfrequently in civil cases, there is too much reason to believe; that it may also happen in criminal cases, especially where the party accused is not one of their equals, might, not unreasonably, be apprehended. In New-York, before the revolution. a slave accused of a capital crime, should have been tried by a jury if his master required it. This is, perhaps, still the law of that state. Such a provision might not be amiss, in this; but considering the ordinary run of juries in the county-courts, I should presume the privilege would be rarely insisted upon.

Slaves, we have seen, are now entitled to the benefit of clergy in all cases where it was allowed to any other offenders, except in cases of consulting, advising, or conspiring to rebel, or make insurrection; or plotting, or conspiring to murder any person: or preparing, exhibiting, or administring medicine with an *ill* intent. The same lenity was not extended to them formerly. The act of 1748, c. 31, denied it to a slave in case of manslaughter; or the felonious breaking and entering *any* house in the night time: or breaking and entering *any* house in the day time, and taking therefrom goods to the value of twenty shillings. The act of 1764, c. 9, extended the benefit of clergy, to a slave convicted of the manslaughter of a slave: and the act of 1772, c. 9, extended it further, to a slave convicted of house-breaking in the night time, unless such breaking be burglary; in the latter case, other offenders would be equally deprived of it. But wherever the benefit of clergy is allowed to a slave, the court, besides burning him in the hand (the usual punishment inflicted on free persons) may inflict such further corporal punishment as they may think fit;* this also seems to have been the law in the case of free negroes and mulattoes. By the act of 1723, c. 4, it was enacted, that when *any negroe* or *mulattoe* shall be found, upon due proof made, or *pregnant circumstances*, to have given false testimony, every such offender shall, *without further trial*, have his ears successively nailed to the pillory for

* 1794, c. 103.

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the space of an hour, and then cut off, and moreover receive thirty-nine lashes on his bare back, or such other punishment as the court shall think proper, not extending to life or limb. This act, with the exception of the words *pregnant circumstances*, was re-enacted in 1792. The punishment of perjury, in a *white* person, is only a fine and imprisonment. A slave convicted of hog-stealing, shall, for the first offence, receive thirty-nine lashes: any other person twenty-five: but the latter is also subject to a fine of thirty dollars, besides paying eight dollars to the owner of the hog. The punishment for the second and third offence, of this kind, is the same in the case of a free person, as of a slave; namely, by the pillory and loss of ears, for the second offence; the third is declared felony, to which clergy is, however, allowed. The preceding were, until lately, the only positive distinctions which remained between the punishment of a slave, and a white person, in those cases, where the latter is liable to a determinate corporal punishment.* But we must not forget, that many actions, which are either not punishable at all, when perpetrated by a white person, or at most, by fine and imprisonment, only, are liable to severe corporal punishment, when done by a slave; nay, even to death itself, in some cases. To go abroad without a written permission; to keep or carry a gun, or other weapon; to utter any seditious speech; to be present at any unlawful assembly of slaves; to lift the hand in opposition to a white person, unless wantonly assaulted, are all offences punishable by whipping.† To attempt the chastity of a white woman, forcibly, is punishable by dismemberment: such an attempt would be a high misdemeanor in a white free man, but the punishment would be far short of that of a slave.‡ To administer medicine without the order and consent of the master, unless it *appear not to have been done with an ill intent;* to *consult*, advise, or conspire, to rebel or make insurrection; or to *conspire*, or *plot* to *murder* any person, we have seen, are all capital offences, from which the benefit of clergy is utterly excluded. But a *bare intention* to commit a felony, is not punishable in the case

* But herein the law is now altered by the act of 1796, c. 2, which does not extend to slaves. See note, ante p. 22.

† 1794, c. 103. ‡ Ibidem.

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of a free white man; and even the attempt, if not attended with an actual breach of the peace, or prevented by such circumstances, only, as do not tend to lessen the guilt of the offender, is at most a misdemeanor by the common law: and in statutable offences in general, to consult, advise, and even to procure any person to commit a felony, does not constitute the crime of felony in the adviser or procurer, unless the felony be actually perpetrated.

From this view of our jurisprudence respecting slaves, we are unavoidably led to remark, how frequently the laws of nature have been set aside in favour of institutions, the pure result of prejudice, usurpation, and tyranny. We have found actions, innocent, or indifferent, punishable with a rigour scarcely due to any, but the most atrocious, offences against civil society; justice distributed by an unequal measure to the master and the slave; and even the hand of mercy arrested, where mercy might have been extended to the wretched culprit, had his complexion been the same with that of his judges; for, the short period of ten days, between his condemnation and execution, was often insufficient to obtain a pardon for a slave, convicted in a remote part of the country, whilst a free man, condemned at the seat of government, and tried before the governor himself, in whom the power of pardoning was vested, had a respite of thirty days to implore the clemency of the executive authority. It may be urged, and I believe with truth, that these rigours do not proceed from a sanguinary temper in the people of Virginia, but from those political considerations indispensibly necessary, where slavery prevails to any great extent: I am moreover happy to observe that our police respecting this unhappy class of people, is not only less rigorous than formerly, but perhaps milder than in other countries* where there are so many slaves, or so large a proportion of them, in respect to the free inhabitants: it is also, I trust, unjust to censure the present generation for the

* See Jefferson's Notes, 259. The marquis de Chatteleux's travels, I have not noted the page; the Law of Retribution, by Granville Sharpe, p. 151, 238, notes. The Just Limitation of Slavery, by the same author; pa. 15, note, Ibidem, pa. 33, 50. Ib. Append. No. 2, Encyclopedie. Tit. Esclave. Laws of Barbadoes, &c.

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existence of slavery in Virginia: for I think it unquestionably true, that a very large proportion of our fellow-citizens lament that as a misfortune, which is imputed to them as a reproach; it being evident from what has been already shewn upon the subject, that, *antecedent to the revolution*, no exertion to abolish, or even to check the progress of slavery in Virginia, could have received the smallest countenance from the crown, without whose assent the united wishes and exertions of every individual here, would have been wholly fruitless and ineffectual: it is, perhaps, also demonstrable, that at no period since the revolution, could the abolition of slavery in this state have been safely undertaken, until the foundations of our newly established governments had been found capable of supporting the fabric itself, under any shock, which so arduous an attempt might have produced. But these obstacles being now happily removed, considerations of policy, as well as justice and humanity, must evince the necessity of eradicating the evil, before it becomes impossible to do it, without tearing up the roots of civil society with it.

Having, in the preceding part of this inquiry, shewn the origin and foundation of slavery, or the manner in which men have become slaves, as also who are liable to be retained in slavery, in Virginia, at present, with the legal consequences attendant upon their condition; it only remains to consider the mode by which slaves have been, or may be, emancipated; and the legal consequences thereof, in this state....Manumission, among the Israelites, if the bondman were an Hebrew, was enjoined after six year's service, by the Mosaical law, unless the servant chose to continue with his master, in which case the master carried him before the judges, and took an awl, and thrust it through his ear into the door*, and from thenceforth he became a servant for ever: but if he sent him away free, he was bound to furnish him liberally out of his flock, and out of his floor, and out of his wine-press†. Among the Romans, in the time of the commonwealth, liberty could be conferred only three ways. By testament, by the *census*, and by the *vindicta*, or lictor's rod. A man was said to be free by the census, "*liber censu*," when his

* Exod. c. 21. Deut. c. 15. † Ibid.

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name was inserted in the censor's roll, with the approbation of his master. When he was freed by the *vindicta*, the master placing his hand upon the head of the slave, said in the presence of the prætor, it is my desire that this man may be free, "*hunc hominem liberum esse volo*;" to which the prætor replied, pronounce him free after the manner of the Romans, "*dico cum* "*liberum esse more quiritum*."....then the lictor, receiving the vindicta, struck the new freed man several blows with it upon the head, face, and back, after which his name was registered in the roll of freed-men, and his head being close shaved, a cap was given him as a token of liberty*. Under the imperial constitutions liberty might have been conferred by several other methods, as in the face of the church, in the presence of friends, or by letter, or by testament†.....But it was not in the power of every master to manumit at will; for if it were done with an intent to defraud creditors, the act was void: that is, if the master were insolvent at the time of manumission, or became insolvent by manumission, and intentionally manumitted his slave for the purpose of defrauding his creditors. A minor, under the age of twenty years, could not manumit his slave but for a just cause assigned, which must have been approved by a council, consisting of the prætor, five senator's, and five knights‡.....In England, the mode of enfranchising villeins is said to have been thus prescribed by a law of William the Conqueror. "If any person is willing to enfranchise his *slave*, let "him, with his right hand, deliver the slave to the sheriff in a "full county, proclaim him exempt from the bond of servitude "by manumission, shew him open gates and ways, and deliver "him *free arms*, to wit, a lance and a sword; thereupon he is a "free man||."....But after that period freedom was more generally conferred by deed, of which Mr. Harris, in his notes upon Justinian, has furnished a precedent.

In what manner manumission was performed in this country during the first century after the introduction of slavery does

* Harris's Just. in notes.

† Just. Inst. lib. 1. tit. 5. Ib. lib. 1. tit. 6.

‡ Ib. Harris's Just. in notes. || Ibid.

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not appear: the act of 1668, before mentioned*, shews it to have been practised before that period. In 1723, an act passed, prohibiting the manumission of slaves, upon any pretence whatsoever, except for meritorious services, to be adjudged, and allowed by the governor and council †. This clause was re-enacted in 1748, and continued to be the law, until after the revolution was accomplished. The number of manumissions under such restrictions must necessarily have been very few. In May, 1782 an act passed, authorising, generally, the manumission of slaves, but requiring such as might be set free, not being of sound mind or body, or being above the age of forty-five years, or males under twenty-one, or females under eighteen, to be supported by the person liberating them, or out of his estate‡. The act of manumission may be performed either by will, or by deed, under the hand and seal of the party, acknowledged by him, or proved by two witnesses in the court of the county where he resides. There is reason to believe that great numbers have been emancipated since the passing of this act. By the census of 1791, it appears, that the number of free negroes, mulattoes, and Indians, in Virginia, was then 12,856. It would be a large allowance, to suppose that there were 2800 free negroes and mulattoes, in Virginia, when the act took effect; so that upwards of ten thousand must have been indebted to it for their freedom§. The number of Indians and their descendants in Virginia, at present, is too small to require particular notice. The progress of emancipation in Virginia, is at this time continual, but not rapid. The act passed in 1792, accords, in some degree with

* Ante, p. 36. † 1723, c. 4.

‡ May 1782, c. 21.

§ There are more free negroes and mulattoes in Virginia alone, than are to be found in the four New-England states, and Vermont in addition to them. The progress of emancipation in this state is therefore much greater than our Eastern brethren may at first suppose. There are only 1087 free negroes and mulattoes in the states of New-York, New-Jersey, and Pennsylvania, more, than in Virginia. Those who take a subject in the gross, have little idea of the result of an exact scrutiny. Out of 20,348 inhabitants on the Eastern Shore of Virginia, 1185, were free negroes and mulattoes when the census was taken. The number is since much augmented.

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the Justinian code *, by providing that slaves emancipated may be taken in execution to satisfy any debt contracted by the person emancipating them, before such emancipation is made †.

Among the Romans, the *libertini*, or freedmen, were formerly distinguished by a threefold division ‡. They, sometimes obtained what was called the greater liberty, thereby becoming *Roman citizens*. To this privilege, those who were enfranchised by testament, by the census, or by the vindicta, appear to have been alone admitted: sometimes they obtained the lesser liberty only, and became *Latins*; whose condition is thus described by Justinian: "They never enjoyed the right of succession [to estates]....For although they led the lives of free men, yet, with their last breath they lost both their lives and liberties; for their possessions, like the goods of slaves, were detained by the manumittor §." Sometimes they obtained only the inferior liberty, being called *dedititii*: such were slaves

* 1794, c. 103.

† The act of 1795, c. 11, enacts, that any person held in slavery may make complaint to a magistrate, or to the court of the district county or corporation wherein he resides and not elsewhere. The magistrate, if the complaint be made to him, shall issue his warrant to summon the owner before him, and compel him to give bond and security to suffer the complainant to appear at the next court to be admitted to sue *in forma pauperis*. If the owner refuse, the magistrate shall order the complainant into the custody of the officer serving the warrant, at the expence of the master, who shall keep him until the sitting of the court, and then produce him before it. Upon the petition to the court, if the court be satisfied as to the material facts, they shall assign the complainant council, who shall state the facts with his opinion thereon to the court; and unless from the circumstances so stated, and the opinion thereon given, the court shall see manifest reason to deny their interference, they shall order the clerk to issue process against the owner, and the complainant shall remain in the custody of the sheriff until the owner shall give bond and security to have him forthcoming to answer the judgment of the court. And by the general law in case of pauper's suits, the complainants shall have writs of subpœna gratis; and by the practice of the courts, he is permitted to attend the taking the depositions of witnesses, and go and come freely to and from court, for the prosecution of his suit.

‡ Jus. Inst. lib. 1, tit. 5. § Harris's Inst. lib. 3, tit. 8.

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who had been condemned as criminals, and afterwards obtained manumission, through the indulgence of their masters: their condition was equalled with that of conquered revolters, whom the Romans called, in reproach, *deditiii*, *quia se suaque omnia dediderunt*: but all these distinctions were abolished by Justinian *, by whom all freed men in general, were made citizens of Rome, without regard to the form of manumission.....In England, the presenting the villein with *free arms*, seems to have been the symbol of his restoration to all the rights which a feudatory was entitled to. With us, we have seen that emancipation does not confer the rights of citizenship on the person emancipated; on the contrary, both he, and his posterity, of the same complexion with himself, must always labour under many civil incapacities. If he is absolved from personal restraint, or corporal punishment, by a *master*, yet the *laws* impose a restraint upon his actions in many instances, where there is none upon a free white man. If he can maintain a suit, he cannot be a witness, a juror, or a judge in any controversy between one of his own complexion and a white person. If he can acquire property in lands, he cannot exercise the right of suffrage, which such a property would confer on his former master; much less can he assist in making those laws by which he is bound. Yet, even under these disabilities, his present condition bears an enviable pre-eminence over his former state. Possessing the liberty of loco-motion, which was formerly denied him, it is in his choice to submit to that civil inferiority, inseparably attached to his condition in this country, or seek some more favourable climate, where all distinctions between men are either totally abolished, or less regarded than in this.

The extirpation of slavery from the United States, is a task equally arduous and momentous. To restore the blessings of liberty to near a million † of oppressed individuals, who have groaned under the yoke of bondage, and to their descendants, is an object, which those who trust in Providence, will be convinced would not be unaided by the Divine Author of our be-

* Inst. lib. 1, tit. 5, s. 3.

† The number of slaves in the United States at the time of the late census, was about 900,000.

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ing, should we invoke his blessing upon our endeavours. Yet human prudence forbids that we should precipitately engage in a work of such hazard as a general and simultaneous emancipation. The mind of a man must in some measure be formed for his future condition. The early impressions of obedience and submission, which slaves have received among us, and the no less habitual arrogance and assumption of superiority, among the whites, contribute, equally, to unfit the former for *freedom*, and the latter for *equality**. To expel them all at once from

* Mr. Jefferson most forcibly paints the unhappy influence on the manners of the people, produced by the existence of slavery among us. "The whole commerce between master and slave, says he, is a perpetual exercise of the most boisterous passions, the most unremitting despotism on the one part, and degrading submissions on the other. Our children see this, and learn to imitate it; for man is an imitative animal. This quality is the germ of education in him. From his cradle to his grave he is learning what he sees others do. If a parent had no other motive either in his own philanthrophy or his self-love, for restraining the intemperance of passion towards his slave, it should always be a sufficient one that his child is present. But generally it is not sufficient. The parent storms, the child looks on, catches the lineaments of wrath, puts on the same airs in the circle of smaller slaves, gives a loose to his worst of passions; and thus nursed, educated, and daily exercised in tyranny, cannot but be stamped by it with odious peculiarities.... The man must be a prodigy who can retain his manners and morals undepraved by such circumstances. And with what execrations would the statesman be loaded, who permitting one half the citizens thus to trample on the rights of the other, transforms them into despots, and these into enemies, destroys the morals of the one part, and the amor patriæ of the other. For if a slave can have a country in this world, it must be any other in preference to that in which he is born to live and labour for another: in which he must lock up the faculties of his nature, contribute as far as depends on his individual endeavours to the evanishment of the human race, or entail his own miserable condition on the endless generations proceeding from him. With the morals of the people, their industry also, is destroyed. For in a warm climate, no man will labour for himself that can make another labour for him. This is so true, that of the proprietors of slaves a very small proportion indeed are ever seen to labour..... And can the liberties of a nation be ever thought secure when we have removed their only firm basis, a conviction in the minds of the people, that these liberties are of the gift of God? That they are

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the United States, would, in fact, be to devote them only to a lingering death by famine, by disease, and other accumulated miseries: "We have in history but one picture of a similar en-"terprize, and there we see it was necessary not only to open "the sea by a miracle, for them to pass, but more necessary to "close it again to prevent their return*." To retain them among us, would be nothing more than to throw so many of the human race upon the earth without the means of subsistence: they would soon become idle, profligate, and miserable. Unfit for their new condition, and unwilling to return to their former laborious course, they would become the caterpillars of the earth, and the tygers of the human race. The recent history of the French West Indies exhibits the melancholy picture of the probable consequences of a general, and momentary emancipation in any of the states, where slavery has made considerable progress. In Massachusetts the abolition of it was effected by a single stroke; a clause in their constitution†: but the whites at that time were as sixty-five to one, in proportion to the blacks. The whole number of free persons in the United States, south of Delaware state, are 1,233,829, and there are 648,439 slaves; the proportion being less than two to one. Of the cultivators of the earth in the same district, it is probable that there are four slaves for one free white man.....To discharge the former from

not to be violated but with his wrath? Indeed, I tremble for my country when I reflect that God is just: that his justice cannot sleep for ever: that considering numbers, nature, and natural means only, a revolution of the wheel of fortune, an exchange of situation is among possible events: that it may become probable by supernatural interference! The Almighty has no attribute which can take side with us in such a contest....But it is impossible to be temperate and to pursue this subject through the various considerations of policy, of morals, of history, natural and civil. We must be contented to hope they will force their way into every one's mind. I think a change already perceptible, since the origin of the present revolution. The spirit of the master is abating, that of the slave rising from the dust; his condition molifying; the way, I hope, preparing, under the auspices of Heaven, for a total emancipation, and that this is disposed in the order of events, to be with the consent of their masters, rather than by their extirpation." Notes on Virginia, 298.

* Letter from Jas. Sullivan, Esq. to Dr. Belknap.

† Dr. Belknap.

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their present condition, would be attended with an immediate general famine, in those parts of the United States, from which, not all the productions of the other states, could deliver them; similar evils might reasonably be apprehended from the adoption of the measure by any one of the southern states: for in all of them the proportion of slaves is too great, not to be attended with calamitous effects, if they were immediately set free*..... These are serious, I had almost said unsurmountable obstacles, to a general, simultaneous emancipation. There are other considerations not to be disregarded. A great part of the *property* of individuals consists in *slaves*. The laws have sanctioned this species of property. Can the laws take away the property of an individual without his own consent, or without a *just compensation?* Will those who do not hold slaves agree to be taxed to make this compensation? Creditors also, who have trusted their debtors upon the faith of this visible property, will be defrauded, If justice demands the emancipation of the slave, she also, *under these circumstances*, seems to plead for the owner, and for his creditor. The claims of nature, it will be said are stronger than those which arise from social institutions, only. I admit it, but nature also dictates to us to provide for our *own* safety, and authorizes all *necessary* measures for that purpose. And we have shewn that our own security, nay, our very existence, might be endangered by the hasty adoption of any measure for the *immediate* relief of the *whole* of this unhappy race. Must we then quit the subject, in despair of the success of any project for the amendment of their, as well as our own, condition? I think not.....Strenuously as I feel my mind opposed to a simultaneous emancipation, for the reasons already mentioned, the abolition of slavery in the United States, and especially in that

* What is here advanced is not to be understood as implying an opinion that the labour of slaves is more productive than that of freemen....The author of the Treatise on the Wealth of Nations, informs us, "That it appears from the experience of all ages and "nations, that the work done by freemen comes cheaper in the end "than that done by slaves. That it is found to do so, even in Boston, "New-York, and Philadelphia, where the wages of common labour "are very high." Vol. I. p. 123. Lond. edit. oct. Admitting this conclusion, it would not remove the objection that emancipated slaves would not willingly labour.

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state, to which I am attached by every tie that nature and society form, is *now* my *first*, and will probably be my last, expiring wish. But here let me avoid the imputation of inconsistency, by observing, that the abolition of slavery may be effected without the *emancipation* of a single slave; without depriving any man of the *property* which he *possesses*, and without defrauding a creditor who has trusted him on the faith of that property. The experiment in that mode has already been begun in some of our sister states. Pennsylvania, under the auspices of the immortal Franklin*, begun the work of gradual abolition of slavery in the year 1780, by enlisting nature herself, on the side of humanity. Connecticut followed the example four years after†. New-York very lately made an essay which miscarried, by a very inconsiderable majority. Mr. Jefferson informs us, that the committee of revisors, of which he was a member, had prepared a bill for the emancipation of all slaves born after the passing that act. This is conformable to the Pennsylvania and Connecticut laws.....Why the measure was not brought forward in the general assembly I have never heard. Possibly because objections were foreseen to that part of the bill which relates to the disposal of the blacks, after they had attained a certain age‡. It certainly seems liable to many,

* Doctor Franklin, it is said, drew the bill for the gradual abolition of slavery in Pennsylvania.

† It is probable that similar laws have been passed in some other states; but I have not been able to procure a note of them.

‡ The object of the amendment proposed to be offered to the legislature, was to emancipate all slaves born after a certain period; and further directing that they should continue with their parents to a certain age, then be brought up, at the public expence, to tillage, arts, or sciences, according to their geniuses, till the females should be eighteen, and the males twenty-one years of age, when they should be colonized to such a place as the circumstances of the time should render most proper; sending them out with arms, implements of household and of the handicraft arts, seeds, pairs of the useful domestic animals, &c. to declare them a free and independent people, and extend to them our alliance and protection, till they shall have acquired strength; and to send vessels at the same time to other parts of the world for an equal number of white inhabitants; to induce whom to migrate hither, proper encouragements should be proposed. Notes on Virginia, 251.

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both as to the policy and the practicability of it. To establish such a colony in the territory of the United States, would probably lay the foundation of intestine wars, which would terminate only in their extirpation, or final expulsion. To attempt it in any other quarter of the globe would be attended with the utmost cruelty to the colonists, themselves, and the destruction of their whole race. If the plan were at this moment in operation, it would require the annual exportation of 12,000 persons. This requisite number must, for a series of years be considerably increased, in order to keep pace with the increasing population of those people. In twenty years it would amount to upwards of twenty thousand persons; which is near half the number which are now supposed to be annually exported from Africa.....Where would a fund to support this expence be found? Five times the present revenue of the state would barely defray the charge of their passage. Where provisions for their support after their arrival? Where those necessaries which must preserve them from perishing?....Where a territory sufficient to support them?....Or where could they be received as friends, and not as invaders? To colonize them in the United States might seem less difficult. If the territory to be assigned them were beyond the settlements of the whites, would they not be put upon a forlorn hope against the Indians*; would not the expence of transporting them thither, and supporting them, at least for the first and second years, be also far beyond the revenues and abilities of the state? The expence attending a small army in that country hath been found enormous. To transport as many colonists, annually, as we have shewn, were necessary to eradicate the evil, would probably require five times as much money as the support of such an army. But the expence would not stop there: they must be assisted and supported at least for another year after their arrival in their new settlements. Suppose them arrived. Illiterate and ignorant as they are, is it probable that they would be capable of instituting such a government, in their new colony, as would be necessary for their own internal happiness, or to secure them from de-

* Or, perhaps, by incorporating with them, become a formidable accession of strength to those hostile savages?

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struction from without? European emigrants, from whatever country they arrive, have been accustomed to the restraint of laws, and to respect for government. These people, accustomed to be ruled with a rod of iron, will not easily submit to milder restraints. They would become hordes of vagabonds, robbers and murderers. Without the aids of an enlightened policy, morality, or religion, what else could be expected from their still savage state, and debased condition?...." But why not retain and "*incorporate* the *blacks into the state*?" This question has been well answered by Mr. Jefferson*, and who is

* "It will probably be asked, why not retain the blacks among us, and *incorporate them into the state?* Deep rooted prejudices entertained by the whites; ten thousand recollections by the blacks, of the injuries they have sustained; new provocations; the *real distinctions* which *nature* has made; and many other circumstances will divide us into parties and produce convulsions, which will probably never end but in the extermination of one or the other race. To these objections, which are political, may be added others which are physical and moral. The first difference which strikes us is that of colour...&c. The circumstance of superior beauty is thought worthy of attention in the propagation of our horses, dogs, and other domestic animals; why not in that of man? &c. In general their existence appears to participate more of sensation than reflection. Comparing them by their faculties of memory, reason and imagination, it appears to me that in memory they are equal to the whites; in reason much inferior; that in imagination they are dull, tasteless and anamolous, &c. The improvement of the blacks in body and mind, in the first instance of their mixture with the whites, has been observed by every one, and proves that their inferiority is not the effect merely of their condition of life. We know that among the Romans about the Augustan age, especially, the condition of their slaves was much more deplorable, than that of the blacks on the continent of America. Yet among the Romans their slaves were often their rarest artists. They excelled too in science, insomuch as to be usually employed as tutors to their master's children. Epictetus, Terence, and Phœdrus were slaves. But they were of the race of whites. It is not their condition then, but nature which has produced the distinction. The opinion that they are inferior in the faculties of reason and imagination, must be hazarded with great diffidence. To justify a general conclusion requires many observations, &c....I advance it, therefore, as a suspicion only, that the blacks, whether originally a distinct race, or made distinct by time and circumstances, are inferior to the whites both in the en-

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there so free from prejudices among us, as candidly to declare that he has none against such a measure? The recent scenes transacted in the French colonies in the West Indies are enough to make one shudder with the apprehension of realizing similar calamities in this country. Such probably would be the event of an attempt to smother those prejudices which have been cherished for a period of almost two centuries. Many persons who regret domestic slavery, contend that in abolishing it, we must also abolish that scion from it, which I have denominated *civil* slavery. That there must be no distinction of rights; that the descendants of Africans, as men, have an equal claim to all civil rights, as the descendants of Europeans; and upon being delivered from the yoke of bondage have a right to be admitted to all the privileges of a citizen.....But have not men when they enter into a state of society, a right to admit, or exclude any description of persons, as they think proper? If it be true, as Mr. Jefferson seems to suppose, that the Africans are really an inferior race of mankind*, will not sound policy advise their exclusion from a society in which they have not yet been admitted to participate in civil rights; and even to guard againt such admission, at any future period, since it may even-

dowments of body and mind, &c. This unfortunate difference of colour, and perhaps of faculty, is a powerful obstacle to the emancipation of these people. Among the Romans emancipation required but one effort. The slave, when made free, might mix with, without staining the blood of his master. But with us a second is necessary, unknown to history"....See the passage at length, Notes on Virginia, page, 252 to 265.

"In the present case, it is not only the slave who is beneath his "master, it is the negroe who is beneath the white man. No act "of enfranchisement can efface this unfortunate distinction." Chattelleux's Travels in America.

* The celebrated David Hume, in his Essay on National Character, advances the same opinion; Doctor Beattie, in his Essay on Truth, controverts it with many powerful arguments. Early prejudices, had we more satisfactory information than we can possibly possess on the subject at present, would render an inhabitant of a country where negroe slavery prevails, an improper umpire between them.

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tually depreciate the whole national character? And if prejudices have taken such deep root in our minds, as to render it impossible to eradicate this opinion, ought not so general an error, if it be one, to be respected? Shall we not relieve the necessities of the naked diseased beggar, unless we will invite him to a seat at our table; nor afford him shelter from the inclemencies of the night air, unless we admit him also to share our bed! To deny that we ought to abolish slavery, without incorporating the Negroes into the state, and admitting them to a full participation of all our civil and social rights, appears to me to rest upon a similar foundation. The experiment so far as it has been already made among us, proves that the emancipated blacks are not ambitious of civil rights. To prevent the generation of such an ambition, appears to comport with sound policy; for if it should ever rear its head, its partizans, as well as its opponents, will be enlisted by nature herself, and always ranged in formidable array against each other*. We must therefore endeavour to find some middle course, between the tyrannical and iniquitous policy which holds so many human creatures in a state of grievous bondage, and that which would turn loose a numerous, starving, and enraged banditti, upon the innocent descendants of their former oppressors. *Nature*, *time* and *sound policy* must co-operate with each other to produce such a change: if either be neglected, the work will be incomplete, dangerous, and not improbably destructive.

The plan therefore which I would presume to propose for the consideration of my countrymen is such, as the number of slaves, the difference of their nature, and habits, and the state of agriculture, among us, might render it *expedient*, rather than *desirable* to adopt: and would partake partly of that proposed by Mr. Jefferson, and adopted in other states; and partly of such cautionary restrictions, as a due regard to situation and

* It was once proposed among the Romans to discriminate slaves, by a *peculiar habit*; but it was justly apprehended that there might be some danger in acquainting them with their own numbers..... Gibbon's Hist. of the Rom. Emp. Vol. I. p. 59. What policy forbade the martial Romans to do, nature and the federal census have already done in Virginia, and the other southern states.

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circumstances, and even to *general* prejudices, might recommend to those, who engage in so arduous, and perhaps unprecedented an undertaking.

1. Let every female born after the adoption of the plan, be free, and transmit freedom to all the descendants, both male and female.

2. As a compensation to those persons, in whose families such females, or their descendants may be born, for the expence and trouble of their maintenance during infancy, let them serve such persons until the age of twenty-eight years: let them then receive twenty dollars in money, two suits of clothes, suited to the season, a hat, a pair of shoes, and two blankets. If these things be not voluntarily done, let the county courts enforce the performance, upon complaint.

3. Let all negroe children be registered with the clerk of the county or corporation court, where born, within one month after their birth: let the person in whose family they are born, take a copy of the register, and deliver it to the mother, or if she die, to the child, before it is of the age of twenty-one years. Let any negro claiming to be free, and above the age of puberity, be considered as of the age of twenty-eight years, if he or she be not registered as required.

4. Let all the negro servants be put on the same footing as white servants and apprentices now are, in respect to food, raiment, correction, and the assignment of their service from one to another.

5. Let the children of negroes and mulattoes, born in the families of their parents, be bound to service by the overseers of the poor, until they shall attain the age of twenty-one years. Let all above that age, who are not house-keepers, nor have voluntarily bound themselves to service for a year before the first day of February annually, be then bound for the remainder of the year by the overseers of the poor. To stimulate the overseers of the poor to perform their duty, let them receive fifteen

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per cent. of their wages, from the person hiring them, as a compensation for their trouble, and ten per cent. per annum out of the wages of such as they may bind apprentices.

6. If at the age of twenty-seven years, the master of a negro or mulattoe servant be unwilling to pay his freedom dues, above mentioned, at the expiration of the succeeding year, let him bring him into the county court, clad and furnished with necessaries as before directed, and pay into court five dollars, for the servant, and thereupon let the court direct him to be hired by the overseers of the poor for the succeeding year, in the manner before directed.

7. Let no negro or mulatto be capable of taking, holding, or exercising, any public office, freehold, franchise, or privilege*, or any estate in lands or tenements, other than a lease not exceeding twenty-one years....Nor of keeping, or bearing arms†, unless authorised so to do by some act of the general assembly, whose duration shall be limited to three years. Nor of contracting matrimony with any other than a negroe or mulattoe; nor be an attorney; nor be a juror; nor a witness in any court of judicature, except against, or between negroes and mulattoes. Nor be an executor or administrator; nor capable of making any will or testament; nor maintain any real action; nor be a trustee of lands or tenements himself, nor any other person to be a trustee to him or to his use.

8. Let all persons born after the passing of the act, be considered as entitled to the same mode of trial in criminal cases, as free negroes and mulattoes are now entitled to.

The restrictions in this plan may appear to savour strongly of prejudice: whoever proposes any plan for the abolition of slavery must either encounter, or accommodate himself, to prejudice.... I have preferred the latter; not that I pretend to be wholly exempt from it, but that I might avoid as many obstacles as possi-

* The Romans, before the time of Justinian, adopted a similar policy, in respect to their freed-men. Gibbon, vol. 1, 58.

† See Spirit of Laws, 12, 15, 1. Blackst. Com. 417.

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ble to the completion of so desirable a work, as the abolition of slavery‡. Though I am opposed to the banishment of the negroes, I wish not to encourage their future residence among us. By denying them the most valuable privileges which civil government affords, I wish to render it their inclination and their interest to seek those privileges in some other climate. There is an immense unsettled territory on this continent* more congenial to their natural constitutions than ours, where they may perhaps be received upon more favourable terms than we can permit them to remain with us. Emigrating in small numbers, they will be able to effect settlements more easily than in large numbers; and without the expence or danger of numerous colonies. By releasing them from the yoke of bondage, and enabling them to seek happiness wherever they can hope to find it, we surely confer a benefit, which no one can sufficiently appreciate, who has not tasted of the bitter curse of compulsory servitude. By excluding them from offices, we may hope that the seeds of ambition would be buried too deep, ever to germinate: by disarming them, we may calm our apprehensions of their resentments arising from past sufferings; by incapacitating them from holding lands, we should add one inducement more to emigration, and effectually remove the foundation of ambition, and party-struggles. Their personal rights, and their property, though limited, would, whilst they remain among us, be under the protection of the laws; and their condition not at all inferior to that of the *labouring* poor in most other countries. Under such an arrangement we might reasonably hope, that time would either remove from us a race of men, whom we wish not to incorporate with us, or obliterate those prejudices, which now form an obstacle to such incorporation.

‡ If, upon experiment, it should appear advisable to hasten the operation of this plan, or to enlarge the privileges of free negroes, it will be both easier, and safer so to do, than to retrench any privilege once granted, or to retard the operation of the original plan, after it has been adopted, and in part carried into execution.

* The immense territory of Louisiana, which extends as far south as the lat. 25° and the two Floridas, would probably afford a ready asylum for such as might choose to become Spanish subjects. How far their political rights might be enlarged in these countries, is, however, questionable: but the climate is undoubtedly more favourable to the African constitution, than ours, and from this cause it is not improbable that emigrations from these states would in time be very considerable.

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But it is not from the want of liberality to the emancipated race of blacks that I apprehend the most serious objections to the plan I have ventured to suggest....Those slave holders (whose numbers I trust are few) who have been in the habit of considering their fellow creatures as no more than cattle, and the rest of the brute creation, will exclaim that they are to be deprived of their *property*, without compensation. Men who will shut their ears against this moral truth, that all men are by nature *free*, and *equal*, will not even be convinced that they do not possess a *property* in an *unborn* child: they will not distinguish between allowing to *unborn* generations the absolute and unalienable rights of human nature, and taking away that which they *now possess;* they will shut their ears against truth, should you tell them, the loss of the mother's labour for nine months, and the maintenance of a child for a dozen or fourteen years, is amply compensated by the service of that child for as many years more, as he has been an expence to them. But if the voice of reason, justice, and humanity, be not stifled by sordid avarice, or unfeeling tyranny, it would be easy to convince even those who have entertained such erroneous notions, that the right of one man over another is neither founded in nature, nor in sound policy. That it cannot extend to those *not in being;* that no man can in reality be *deprived* of what he doth not possess: that fourteen years labour by a young person in the prime of life, is an ample compensation for a few months of labour lost by the mother, and for the maintenance of a child, in that coarse homely manner that negroes are brought up: and lastly, that a state of slavery is not only perfectly incompatible with the principles of government, but with the safety and security of their masters. History evinces this. At this moment we have the most awful demonstrations of it. Shall we then neglect a duty, which every consideration, moral, religious, political, or *selfish*, recommends? Those who wish to postpone the measure, do not reflect that every day renders the task more arduous to be performed. We have now 300,000 slaves among us. Thirty years hence we shall have double the number. In sixty years we shall have 1,200,000: and in less than another century from this day, even that enormous number will be doubled. Milo acquired strength enough to carry an ox, by beginning with the ox while he was yet a calf. If we com-

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plain that the calf is too heavy for our shoulders, what will the ox be?

To such as apprehend danger to our agricultural interest, and the depriving the families of those whose principal reliance is upon their slaves, of support, it will be proper to submit a view of the gradual operation, and effects of this plan. They will, no doubt, be surprised to hear, that, whenever it is adopted, the number of slaves will not be diminished for forty years after it takes place; that it will even increase for thirty years; that at the distance of sixty years, there will be one-third of the number at it's first commencement: that it will require *above a century* to complete it; and that the number of blacks *under twenty-eight* and consequently bound to service, in the families they are born in, will always be at least as great, as the present number of slaves. These circumstances, I trust, will remove many objections, and that they are truly stated will appear upon inquiry *. It will

* As it may not be unacceptable to some readers to observe the operation of this plan, I shall subjoin the following statement:

PRELIMINARY REMARKS.

1. The number of slaves in Virginia by the late census being found to be 292,427, they may now, in round numbers be estimated at - - - - - - - - - 300,000

2. Let it be supposed that the males and females are nearly or altogether equal in number.

3. According to Dr. Franklin, the people of America double their numbers in about twenty-eight years; and according to Mr. Jefferson, the negroes increase as fast as the whites, they will, therefore, double, at least every thirty years.

4. Let it be supposed that in thirty years one half of the the present race of negroes will be extinct.

5. Let it be supposed that in forty-five years there will not remain more than one-fifth of the present race alive.

6. Let it be likewise supposed, that in sixty years the whole of the present race will be extinct.

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further appear, that females only will arrive at the age of emancipation within the first forty-five years; all the males during that period, continuing either in slavery, or bound to service till the age of twenty-eight years. The earth cannot want cultiva-

7. For conciseness sake, let the present race be called *ante-nati*, those born after the adoption of the plan, *post-nati*.

FROM HENCE IT WILL FOLLOW,

1. That the present number of slaves being - - 300,000

2. In thirty years their numbers will amount to - 600,000

3. But at that period as one half of them will be extinct, (rem. 4.) their numbers will stand thus:

Ante-nati, - - -	150,000	
Post-nati, - - -	450,000	
		600,000

4. The mean increase of the post-nati for the next thirty years will therefore be $\frac{450000}{30}$, annually, or, - 15,000

5. If one half of these be males, who are still to remain slaves, there will, in the first sixteen years, be born - 120,000

6. After the first sixteen years, the post-natæ females will begin to breed; the proportion of males born to slavery in the next twelve years may be estimated at one-fourth of the whole number born after the commencement of that period....Their number will be - - - - - - 52,500

7. The number of slaves living in Virginia at the end of thirty years from the adoption of the plan, will be, ante-nati (prop. 3.) - - - - - - - - - 150,000

Post-nati males born in the first 16 years, -	120,000	
Post-nati males born in the last 12 years, -	52,500	
		322,500

8. The number of negroes at the same time will stand thus:

Slaves, - - - -	322,500	
Post-nati free born, -	277,500	
		600,000

9. After twenty-eight years from the first adoption, this plan of gradual emancipation will first begin to manifest its effects, by the complete emancipation of one twenty-eighth part of the post-nati free born during that period each succeeding year, for twenty-eight years more; their numbers will be, $\frac{277500}{28}$, or, - - - - - - - - 9,910

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tors, whilst our population increases as at present, and three-fourths of those employed therein are held to service, and the remainder compellable to labour. For we must not lose sight of this important consideration, that these people must be *bound*

These will be all females.

10. It being admitted that the negroes double every thirty years, the supposition that in forty-five years, their numbers will be half as many more as in thirty, will not be very erroneous, if so, the whole race of them at that period will be - - - - - - - - - - - 900,000

11. Their numbers will stand thus:

Ante-nati, - - -	60,000	
Post-nati, - - -	840,000	
		900,000

12. After twenty-eight years are past, the number of slaves born must continually diminish. Suppose their number born in the last seventeen years, to be one-fourth as many as those born in the preceding twelve years, they will be $\frac{52500}{4}$, or, - - - - - - - - - 13,125

13. The slaves in Virginia in forty-five years will then be, ante-nati, - - - - - - - 60,000

Post-nati males born in the first sixteen years	120,000	
Ditto, born in the next twelve years, - -	52,500	
Ditto, born in the last seventeen years, -	13,125	
		245,625

At this period the emancipation of males will begin.

14. But after twenty-eight years it has been shewn that 9,910 negroes will annually arrive at the age of emancipation, their whole number in forty-five years will be - 168,470

15. The state of the negroes at the end of 45 years, will then be, slaves, - - - - - - - 245,625

Post-nati fully emancipated (females,) .	168,470	
Post nati not emancipated - - -	485,905	
		900,000

16. In sixty years the whole number of negroes will be 1,200,000

17. At that period the whole of the present race will be extinct; and we also may infer that one half of those born

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to labour, if they do not *voluntarily* engage therein. Their faculties, are at present only calculated for that object; if they be not employed therein, they will become drones of the worst description. In absolving them from the yoke of slavery, we must not forget the interests of society. Those interests require the exertions of every individual in some mode or other; and those who have not wherewith to support themselves honestly, without corporal labour, whatever be their complexion, ought to be compelled to labour. This is the case in England, where domestic slavery has long been unknown. It must also

in the first thirty years will be also extinct; the number of slaves born in that period has been shewn, (prop. 7.) to be 172,500, the number of these then living will be $\frac{277500}{2}$, or, 86,750

18. One half of the post-nati free born, during that period, being now fully emancipated, may be likewise presumed to be extinct; their numbers (prop. 8.) will be, $\frac{172500}{2}$, or, - - - - - : - - - - - - 138,750

19. The state of negroes at the end of sixty years, will therefore be:

Slaves born during the first thirty years,	86,250	
Ditto born after that period, . -	13,125	
Post-nati fully emancipated, - -	138,750	
Post-nati under 28 years of age, - -	961,875	
		1,200,000

20. At the end of ninety years the number of negroes will be - - - - - - - - - - 2,400,000

21. Of this number, those only born after the first thirty years, being supposed to be living, the number of slaves (prop. 12,) will then be reduced to - - - - - 13,125

22. And as the last mentioned number of slaves are supposed to be born within forty-five years, their whole number will be extinct in fifteen years more, that is, in one hundred and five years from the first adoption of the plan.

23. By prop. 19, it appears, that out of 1,200,000 negroes, there will then be 961,875 under the age of twenty-eight years, the period of emancipation.

24. We may, therefore, conclude, that from two-thirds to three-fourths of the whole number of blacks will always be liable to service.

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be the case in every well ordered society; and where the numbers of persons without property increase, there the coercion of the laws becomes more immediately requisite. The proposed plan would necessarily have this effect, and, therefore, ought to be accompanied with such a regulation. Though the rigours of our police in respect to this unhappy race ought to be softened, yet, its regularity, and punctual administration should be increased, rather than relaxed. If we doubt the propriety of such measures, what must we think of the situation of our country, when instead of 300,000, we shall have more than *two millions* of SLAVES among us? This *must happen within a* CENTURY, if we do not set about the abolition of slavery. Will not our posterity curse the days of their nativity with all the anguish of Job? Will they not execrate the memory of those ancestors, who, having it in their power to avert evil, have, like their first parents, entailed a curse upon all future generations? We know that the rigour of the laws respecting slaves unavoidably must increase with their numbers: What a blood-stained code must that be which is calculated for the restraint of *millions* held in bondage! Such must our unhappy country exhibit within a century, unless we are both wise and just enough to avert from posterity the calamity and reproach, which are otherwise unavoidable.*

I am not vain enough to presume the plan I have suggested, intirely free from objection: nor that, in offering my own ideas on the subject, I have been more fortunate than others: but from the communication of sentiment between those who lament the evil, it is possible that an effectual remedy may at length be discovered. Whenever that happens the golden age of our country will begin. Till then,

> ..... *Non hospes ab hospite tutus,*
> *Non Herus a Famulis: fratrum quoque gratia rara.*

† Not to mention the modern codes of the Sugar-Islands, which exhibit awful proofs of the supposed necessity of such a cruel policy, the martial Lacedemonians, and not less martial Romans, held it justifiable, as well as necessary, to adopt the most severe regulations, and the most cruel treatment towards their numerous slaves, upon the principle of self-preservation....See Gibbon's Hist. of the Rom. Emp. Vol. I, p. 57.

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NOTE I.

ABSTRACT OF THE BILL FOR THE MORE GENERAL DIFFUSION OF KNOWLEDGE, IN VIRGINIA.

UNDER this head of subordinate magistrates, we must notice the aldermen, who are directed to be chosen in every county for the purpose of carrying into execution the act to establish public schools.

This act, so far as it extends, is nearly a transcript from the bill, "For the more general diffusion of knowledge," which was prepared by the committee of revisors appointed in 1776, and reported to the general assembly in 1779, but with many others was not acted upon by the legislature, when the consideration of the bills reported was taken up. That bill proposed, that three aldermen should be annually chosen by the freeholders of each county, who should divide the county into hundreds, in each of which a school-house should be built, in such place as the electors of the district should appoint; in which reading, writing, and common arithmetic should be taught gratis to all the free children in the district, for the term of three years; and as much longer at their private expence, as their friends might think proper. That an overseer, or visitor be appointed over every ten schools, to visit them, and examine the scholars. That the teachers' salaries be paid by the counties.

That the several counties be arranged into nineteen districts, in each of which a grammar school should be established, in such

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place as a majority of the overseers, or visitors of the hundred schools within the district, should appoint, containing a school room, a dining room, four rooms for a master and usher, and ten or twelve lodging rooms for scholars; where should be taught the Latin and Greek languages, English grammar, geography, vulgar and decimal fractions, and the extraction of the cube and square root. That one visitor of these schools should be annually chosen in each county by the overseers of the hundred schools. The expence of these establishments to be paid out of the public treasury.

That each hundred overseer, out of the schools visited by him, should annually choose some one boy, of at least two years standing in the school, and of the best and most promising genius and disposition, whose parents might be unable to give him farther education, to proceed to the grammar school of the district, there to be educated, for a further time.

That an annual visitation for the purpose of probation, should be held at each grammar school, at which one third of the boys of one years standing only, and who shall be found to be the least promising, shall be discontinued as public foundationers, and all of two years standing should also be discontinued, save only one, of the best genius and disposition, who should be at liberty to remain four years longer on the public foundation, and thenceforward be deemed a senior.

That the visitors for the districts south of James river, and those north thereof, should, alternately, every year, choose from among the seniors, one of the best learning, and most hopeful genius and disposition in each district school, to proceed to the college of William and Mary, there to be educated, boarded and cloathed for three years at the public expence.

Such are the outlines of a plan that does honour to it's authors, and if ever it be carried fully into effect, will evince of what importance it's speedy adoption, in it's fullest extent, may be to the commonwealth.

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The act of 1795, c. 1, provides, that three aldermen be annually elected at the same time that members of assembly are elected, by the electors qualified to vote for delegates, whose election shall be certified to the county court, and entered of record....That the aldermen, or any two of them, shall meet annually at their court-house on the second Monday in May, and consider of the expediency of carrying the subsequent parts of the act into execution. If they judge it expedient, they are to divide their county into convenient sections, distinguishing each section by a particular name, and returning their division to the county court, there to be recorded. That the householders in each section on the first Monday in September, thereafter, shall meet at such place as the aldermen may direct, and choose the most convenient place within the section for building a school-house; which shall be built and kept in repair by the aldermen, and a teacher appointed by them; who shall teach reading, writing, and common arithmetic; and all the free children, male and female, within the section, shall receive tuition gratis for three years; and as much longer at their private expence as their friends may think proper. That the salary of the teachers, and other expences of the schools, in each section, shall be defrayed by the inhabitants of each county, in proportion to the amount of their public assessment, and county levies, to be ascertained by the aldermen of each county.....The corporate towns are, by the same act, empowered to act distinctly from the counties, in which they are situate.....This act contains the following remarkable proviso. That the court of each county, at which a majority of the acting magistrates shall be present, shall first determine the year, in which the first election of aldermen shall be made, and until they so determine, no such election shall be made. And this subject the courts are to take into consideration in the month of March, annually, until each election be made.

It is easy to perceive, that this proviso, and that which authorises the aldermen, when elected, to consider of the expediency of carrying the act into execution, are calculated to defeat it's execution, in every county where illiberal and parsimonious magistrates may compose the court; or, illiberal and parsimonious persons be chosen as aldermen. They prove also the ex-

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istence of an opposition to the act in the legislature, itself, founded upon the most illiberal, and parsimonious principles, without any regard to the public good. For it must be evident that the act will only be carried into execution in those counties, where liberality of sentiment, and a just estimation of the value of education, prevail, and not in those, where they are most wanted.

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NOTE K.

THE RIGHT OF EXPATRIATION CONSIDERED.

" IT is a principle of universal law, that the natural born " subject of one prince cannot by any act of his own, no, not by " swearing allegiance to another, put off, or discharge his natu- " ral allegiance to the former." Blacks. Com. Vol. I. p. 369.

The positive, and unqualified manner in which the learned commentator advances this to be a principle of universal law, would induce a supposition, that it is a point in which all the writers on the law of nature and nations are perfectly agreed. As my researches have led me to adopt a very different, or, rather, opposite conclusion, it will be the business of this note to examine the subject.

If it be contended that this is a principle of the divine law, I should wish to be informed in which of the books of the old, or new testament it is to be found. The family of the patriarch Jacob voluntarily became subjects to the Egyptian monarch..... And four hundred years afterwards, Moses, their prophet, and deliverer, voluntarily abandoned Egypt, his native country, and dwelt among the Midianites; and then he, with the whole of the descendants of Jacob voluntarily departed out of Egypt, under the immediate protection and guidance of Jehovah, himself..... David also, the man after God's own heart, abandoned his natural liege lord Saul, and went and dwelt with Achish, king of Gath; and even marched in his army against his native country, and liege lord, until the jealousy of the lords of the Philistines obliged him to turn back. I can not therefore believe that the divine law contains in it any such principle.

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Neither can I well conceive how this can be considered as a principle of the law of nature; for according to that law, all men are equal. One man therefore can not owe allegiance to another, in virtue of that law; since there is neither prince nor subject among men according to the principles of it.

Nor yet does this appear to be a principle of the law of nations, though perhaps it may have been the practice of particular nations to prohibit their subjects from migrating to any other: but in this case the prohibition arises from the particular law of the state, and not from the general law and practice of nations towards each other. The law of Solon, which prohibited the Athenians from admitting any person into their commonwealth, except such as were condemned to perpetual banishment from their own country, or else such as removed their whole families to Athens for the convenience of trade, and employment of the arts they professed, was not made so much to keep out foreigners, as to invite them to settle at Athens, by giving them assurance of incorporating them in the body of the commonwealth.... For he made no doubt, says Plutarch, but both these sorts of people would make very good subjects, the one because they voluntarily quitted, and the other, because they were forced out of their own country. Plato says that, at Athens it was lawful for every private man, after he had examined the laws and customs of the republic, if he did not approve of them, to quit the city, and retire where he pleased with his effects. By the constitution of the Roman commonwealth, no citizen could be forced to leave the commonwealth, or if he pleased, not to leave it, when he was made a member of another which he preferred to it. And therefore Cicero says, that a little before his remembrance, several citizens of Rome, men of credit and fortunes, voluntarily left that, and settled themselves in other commonwealths. And the way, says he, lies open from every state to ours, and from ours to every other. This right he extols in the most emphatic manner. "What noble rights! which by the blessing of heaven "have been enjoyed by us and our ancestors, ever since the Ro- "man state begun, that none of us should be forced to leave our "country, or stay in it against our wills. This is the immova- "ble foundation of our liberty, that every man is master of his

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"right, and may keep it or resign it, as he pleases." These instances, which are cited by Puffendorf*, on this subject, prove at least that this principle was neither to be found in the Athenian or Roman institutions.

The practice among more modern nations is various: among the Muscovites, emigration is not permitted.† The citizens of Neufchatel and Valengen, in Switzerland, may quit the country, and carry off their effects in what manner they please; a citizen of Bern may, if he pleases, remove to Fribourg, and reciprocally, a citizen of Fribourg may go and settle in Bern, and he has a right to take all his effects with him. On the other hand it appears from several historical facts, particularly in the history of Switzerland and the neighbouring countries, that the law of nations established there by custom, for some ages past, does not permit a state to receive the subjects of another state into the number of its citizens.‡ This vicious custom, says Vattel, had no other foundation than the slavery to which the people were then reduced. A prince considered his subjects in the rank of his property and riches; he calculated their numbers, as he did his flocks; and to the disgrace of human nature this strange abuse is not yet every where destroyed.§

Although Grotius || denies that emigrants ought to leave the state in troops or large companies, (an opinion which is controverted by Puffendorf,** and Burlamaqui††), yet he allows the case to be quite different when a single person leaves his country; it is one thing, says he, to draw water out of a river, and another to divert the course of a part of that river. And Puffendorf ‡‡ expressly says, where there are no laws about the matter (for the laws of different countries differ in this respect), we must be determined by customs arising from the nature of civil subjection. What custom admits of, every subject is supposed at

* Law of Nature and Nations B. 8. c. 11.

† Grotius of War and Peace, B. 2. c. 5. Sec. 24.

‡ Vattel, B. 1. c. 19. Sec. 225.

§ Ibidem.

|| B. 2. c. 5. Sec. 24,

** B. 8, c. 11. S. 4.

†† B. 2. part 2. c. 5.

‡‡ B. 8.11. Sec. 2.

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liberty to use. But if this gives no light to the matter, and the compact of subjection makes no mention of it; it must be presumed that every man reserves to himself the liberty to remove at discretion. For when a man enters into a commonwealth, it cannot be supposed that he gives up all care of himself and his fortunes, but rather that by so doing he takes the best expedient to defend and secure both. But because it often happens that the nature of the government does not suit with every private man's circumstances, or he thinks, at least, he can make his fortune with more advantage elsewhere; and since it would be unreasonable to reform and make alterations in the commonwealth at the desire, and for the benefit of only a few private subjects, the only method left is, to give them leave to remove and provide for themselves where they think best. Burlamaqui * scruples not to adopt the opinion of Puffendorf, altogether. So that we have the opinion of these four jurists that every man hath a natural right to migrate from one state to another, and that this right can only be restrained under special circumstances, by the state to which he belongs, without imposing upon him an unwarrantable slavery.

Mr. Locke, in his essay on civil government † seems to have examined thoroughly the foundation of this pretended right in governments to prohibit the emigration of their subjects, or citizens. There are no examples, says he, so frequent in history, both sacred and profane, as those of men withdrawing themselves, and their obedience from the jurisdiction they were born under, and the family or community they were bred up in, and setting up new governments in other places: this has been the practice of the world, from its first beginning to this day; nor is it now any more hindrance to the freedom of mankind, that they are born under constituted and antient politics, that have established laws, and set forms of government, than if they were born in the woods, among the unconfined inhabitants that run loose in them. For those who would persuade us, that by being born under any government, we are naturally subjects to it, and have no more any title, or pretence, to the freedom of the state of nature, have no other reason (bating that of paternal

* B. 2. part 2. c, 5. † Sect. 115, &c.

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power) to produce for it, but only because our fathers, or progenitors passed away their natural liberty, and thereby bound up themselves and their posterity to a perpetual subjection to the government, which they themselves submitted to. 'Tis true, that whatever engagements, or promises, any one has made for himself, he is under the obligation of them, but cannot by any compact whatsoever bind his children, or posterity. For his son, when a man, being altogether as free as the father, any act of the father can no more give away the liberty of the son, than it can of any body else: he may, indeed, annex such conditions to the land he enjoyed, as a subject of any commonwealth, as may oblige his son to be of the community, if he will enjoy those possessions, which were his fathers; because that estate being his father's property he may dispose, or settle it as he pleases. And this has generally given the occasion to mistake in this matter; because commonwealths not permitting any part of their dominions to be dismembered, nor to be enjoyed by any but those of their community, the son cannot ordinarily enjoy the possession of his father, but under the same terms his father did, by becoming a member of the society; whereby he puts himself presently under the government he finds established, as much as any other subject of that commonwealth. And thus the consent of freemen, born under government, which, only, makes them members of it, being given separately in their turn, as each comes of age, and not in a multitude together; people taking no notice of it, and thinking it not done at all, or not necessary, conclude they are naturally subjects, as they are men.

And this mistake, it is evident Sir Matthew Hale has fallen into*, when he tells us, that a lawful prince who hath the prior obligation of allegiance, can not lose that interest without his own consent, by his subjects resigning himself to the subjection of another; so that the natural born subject of one prince can not, by swearing allegiance to another prince, put off, or discharge himself from that natural allegiance; for this natural allegiance, says he, was intrinsic, and primitive, and antecedent to the other, and cannot be divested without the concurrent act of that prince to whom it was first due. And the authorities which he

* 1 Hale, H. P. C. 68.

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brings in support of this opinion clearly prove that he fell into mistake from the very reason assigned by Mr. Locke. For, in the next paragraph he tells us*, that there were very many that had been antiently *ad fidem regis Angliæ et Franciæ*, especially before the loss of Normandy: such were the *comes marescallus* that usually lived in England, and *M. de Feynes*, *manens in Francia*, who were *ad fidem utriusque regis;* but they ordered their homages and fealties so, that they swore or professed allegiance, only to one, viz. [that king in whose dominions they respectively resided;] the homage they performed to the other, [in whose dominions they held lands, but did not reside therein,] being not purely *liege homage*, but rather feudal: and therefore when war happened between the two crowns, *remaneat personaliter quilibet eorum cum oe, cui fecerat ligeanteam; et faciat servitium debitum ei, cum quo non steterat in persona*, namely the service due from the feud, or fee he held: but this did not always satisfy the prince, *cum quo non steterat in persona*, but their possessions were usually seized, and rarely, or not without difficulty restored, without a capitulation to that purpose between the two crowns. And all the cases which he there cites in support of his opinion proceed upon the same ground; namely, the right which each prince exercised to seize the lands and possessions within his dominions, which belonged to the subjects of the other with whom he was at war. Which clearly proves that the right of confiscation thus mutually claimed and exercised, did not proceed upon the ground that the party whose lands were seized had broken his natural allegiance, or that which he might be supposed to owe to the prince in whose dominions he was born; but that feudal obligation, only, which every inferior tenant owed to his superior lord, (whether such a superior were a sovereign prince, or merely a private person) of whom he held his lands†. Now this power which a prince might possess over the lands and possessions of a man who never resided within his dominions, can not be construed to give him any right over the person of such a man; neither on the other hand can that prince in whose territories he happens to be born claim any right to detain him therein, merely because he first saw the light there,

* 1 Hale, H, P. C. 68, 69. † Co. Litt. Sec. 85, 91, &c.

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as Mr. Locke has most clearly shewn; the most that he can do is to prohibit him from carrying his property with him; which if it be lands he can not, and if it be goods, he may not (if the laws of the state forbid) carry away without the consent of the government.

From the whole that we have seen, it appears, that the right of emigration is a right strictly natural; and that the restraints which may be imposed upon the exercise of it, are merely creatures of the *juris positivi*, or municipal laws of a state. And consequently that wherever the laws of any country do not prohibit, they permit emigration, or, as I rather chuse to call it, expatriation. Now I apprehend it is altogether immaterial to us in America, whether the laws of England, France or Spain, permit the subjects of those countries, respectively, to expatriate themselves, inasmuch as I have shewn, or at least endeavoured so to do, that the municipal law of no other country upon earth hath any force, or obligation over the citizens of the United States, as such; or over the citizens of any one state in the union, otherwise, or in any greater degree than the constitution or laws of such particular state may have adopted the same: and then it obtains a force and operation, so far, and so far only, as the act of adoption extends, and not on account of any intrinsic obligation which it might be supposed to possess, or derive from any other source. And, although Virginia has adopted the common law of England, under certain restrictions, yet Virginia by a positive act of her legislature, so long since as the year 1783*, declared it to be a natural right which all men have, to relinquish that society in which birth or accident may have thrown them, and seek subsistence and happiness elsewhere, and accordingly pointed out the mode in which any citizen might exercise it. The constitution of Vermont, and the first constitution of Pennsylvania contain similar declarations. Can it then be doubted that the citizens of those states, respectively, possess the right of exercising this natural privilege, whatever may be the laws of the other states in the union? If a doubt exists upon what principle it is founded? perhaps it will be answered, upon the power granted to

* Oct. 1783, c. 16. Edi. 1794, c. 110.

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congress by the constitution to establish an uniform rule of naturalization. I have given an answer to this, in a preceding tract*. Perhaps; upon the faith of our treaties with France, England, and other European nations. But those treaties only stipulate for the conduct of the citizens of the United States, so long as they remain such; not, for their conduct after they shall have abandoned that character in the manner which the laws of the respective states permit.

If a person violates the treaties, and remains a citizen, the treaties stipulate that he shall be punished, or be abandoned by the U. States, as a pirate, and robber. But, if before he attaches himself to any other nation, he renounces his character of an American citizen, I cannot see that he is any longer amenable to the United States for his conduct; nor can they be considered as any longer responsible for a conduct which in ninety nine cases out of an hundred, they can by no possibility control, or punish; the parties having forever bidden adieu to their territory and jurisdiction.

* Upon the common law; Note E. part I.

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NOTE L.

OF THE RIGHTS OF ALIENS IN THE UNITED STATES.

LET us now compare the situation and rights of aliens in England with those in America. An alien in England remained the subject of that king or government under which he was born; he migrated to England for the temporary purposes of merchandise, and not of perpetual residence; because, as he continued to be the subject of a foreign power, he was always supposed to retain the *animum revertandi* to his *natural* sovereign; and, consequently, whenever a war broke out between his own nation and that of Great Britain, he was (however attached to the place of his residence, it's laws or government,) considered as an enemy, unless he could obtain a special letter of license from the crown to remain in England; he could not be made a denizen, but by the *special favour* of the crown; nor be naturalized, but by the *like favour* of the supreme legislature, (whose power extends even to an alteration of the constitution itself.) Both these acquisitions must be obtained as a matter of the highest grace and favour, and not of *right*. Yet, under all these circumstances, an *alien*, whose *nation* is in *amity* with England, is clearly and indisputably entitled to the full protection of the laws in every matter that respects his personal liberty, his personal security, and his personal property, as fully and completely as if he had been naturalized by act of parliament, or had acquired all the rights of an Englishman by his birth*.

*2 Inst. p. 55.

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An alien in America, antecedent to the revolution, was entitled to *all* the rights and privileges of an alien in England, and *many more ;* to *all* that an alien in England could claim, because, as has been remarked elsewhere, the *common law* of *England* and every statute of that country *made for the benefit of the subject*, before our ancestors migrated to this country, were, so far as the same were applicable to the nature of their situation, *and for their benefit, brought over hither by them ;* and wherever they are not repealed, altered, or amended by the constitutional provisions, or legislative declaration, of the respective states, every beneficial statute and rule of the common law still remains in force. An alien in America was also entitled to *many more rights* than an alien in England. 1st, By the very act of migrating to, and settling in, America, he became *ipso facto* a *denizen*, under the express stipulations of the colonial charters, (all of which, it is believed, contained similar clauses) whereby it was stipulated for the better encouragement of all who would engage in the settlement of the colonies, that they, and every of them that should thereafter be inhabiting the same, should, and might, have all the privileges of free *denizens*, or persons native of England*. 2d, By the same act of migrating he had a right to be *naturalized* under the sanction of a *pre-existing* law, made not only for the benefit, but for *the encouragement*, of *all* in a similar situation with himself†. The operation of these laws was *immediate*, not *remote ;* he became a denizen, as of right, *instantly ;* he became naturalized upon payment of the legal fees for his letters of naturalization, and taking the usual oaths.

By the adoption of the constitution of the United States, the rights of aliens to become citizens was by no means intended to be taken away....on the contrary, it is expressly provided, that congress shall have power to establish an *uniform rule of naturalization*, throughout the United States. The dissimilarity in the rules of naturalization, in the several states, was supposed to have laid the foundation for intricate and delicate questions, under that article of the confederation which declares, that the

* Queen Elizabeth's charter to Sir Walter Raleigh.

† L. V. 1705, c. 11. Edi. 1769.

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free inhabitants of each state, paupers, vagabonds, and fugitives from justice excepted, should be entitled to all privileges and immunities of free citizens in the several states; under which provision, it seems to have been apprehended, that the *free inhabitants* of one state, although *not citizens* thereof, might be entitled to all the privileges of *citizens* in every other: to obviate this and similar inconveniencies, this power of prescribing an uniform rule of naturalization was vested in the federal government *. And here we may observe, that congress are authorised to prescribe the *mode* by which aliens may be naturalized, but it never was intended to authorise it to take away the *right*. For, among the acts of misrule alleged against our rejected sovereign, George the third, in the declaration of independence, it is asserted, "that he had endeavoured to prevent the population of these states; for that purpose obstructing the laws for naturalization of foreigners, and refusing to pass others to encourage their migration hither." Every alien coming into the United States, in time of peace, therefore acquired an *inchoate right*, under the constitution, to become a citizen; and when he has, in compliance with the laws, made the requisite declarations of his intention to become a citizen, and to renounce for ever all allegiance and fidelity to any foreign prince, or state, and particularly that prince or state whereof he was last a citizen or subject, he seems to have acquired a *right*, of which no *subsequent* event can divest him, without violating the principles of political justice, as well as of moral obligation. For the government, in requiring this declaration of renunciation on the part of the alien, previous to his admission to the rights of citizenship, and that at a very considerable period before his right can, by the rule prescribed, be consummated, tacitly engages not to withdraw its protection from him; and much more, not to *betray him*, by sending him back to that sovereign, whose allegiance he had, in the most solemn manner, disclaimed, and whose subject and adherent he could no longer be considered to be, whatever political relations the two nations may thereafter stand in, with respect to each other. If this position be just with respect to those who might, under different circumstances, have been regarded as *alien ene-*

* Federalist, No. 42.

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mies, (as being *antecedently* subjects of a power with which the United States may *thereafter* be at war), how much more powerfully will the same reasoning apply in favour of those who can, under no possible view of the case, be considered in that light? And, in fact, nothing could more effectually *discourage* emigration, (no, not even a total incapacity ever to be naturalized,) than such an interpretation of our constitution and laws, as would lay a snare for every foreigner disposed to settle in this country; from whence, upon any personal pique or national quarrel, in which he had no part or share, he might be banished, and sent back to that very sovereign whom he must have offended by making the declarations prescribed by our laws.

Aliens, in the United States, are at present of two kinds. Aliens by birth; and aliens by election....1. Aliens by birth, are all persons born out of the dominions of the United States, since the fourth day of July, 1776, on which day they declared themselves an independent and sovereign nation, with some few exceptions, viz. 1. In favour of infants, "wheresoever born, whose "father, if living, or otherwise, whose mother was a citizen at "the time of the birth of such infants; or who migrated hither, "their father, if living, or otherwise their mother becoming a "citizen of the commonwealth; or who migrated hither without "father, or mother," during the continuance of the act of May, 1779, c. 55, declaring who should be deemed citizens, which was repealed October, 1783, c. 16, of that session, so far as relates to the two latter cases; but continued as to the first. 2. Such persons as have obtained a right to citizenship under the existing laws of the state, whether infants, or otherwise. Edi. 1794, c. 110. 3. Such persons as have been naturalized under the act of 1 Cong. 2 Sess. c. 3. 4. Such persons as have, or may acquire the rights of citizenship pursuant to the act of 3 Cong. c. 85, and the children of such persons duly naturalized dwelling within the United States, and being under the age of twenty-one years, at the time of such naturalization; and the children of citizens of the United States, born out of the limits and jurisdiction of the United States. But the same act declares that the right of citizenship shall not descend to persons, whose fathers have never been resident in the United States.....All persons born before the

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fourth day of July, 1776, who were not natural born subjects of the crown of Great-Britain; nor were on that day residents within, or inhabitants of the United States; nor have since that time become citizens of the United States, or some one of them, are also aliens by birth.

2. Aliens by election are all such natural born, or naturalized subjects of the crown of Great-Britain, as were born, or naturalized before the fourth day of July, 1776, and have not since become actual citizens of the United States; or, having been actual citizens, have at any time thereafter during the revolutionary war, voluntarily joined the armies of Great-Britain, and borne arms against the United States, or any of them; or been owner or part owner of any privateer or other vessel of war; or a member of the refugee board of commissioners at New-York; or have acted under their authority; or have been for any other cause proscribed by any state in the union. See V. L. 1779, c. 14 and 55. Oct. 1779, c. 18. Oct. 1783, c. 16, 17. Edi. 1785. 1786, c. 10. 1794, c. 110. L. U. S. 1 Cong. 2 Sess. c. 3. 3 Cong. c. 85.

This distinction between aliens by birth, and those by election, is of importance. Aliens by birth are generally subject to all the incapacities to which aliens are subject by the rules of the common law. Aliens by election (although during the revolutionary war they were subject to many incapacities, and even penalties) are now upon a much more eligible footing; possessing rights, (partly derived from the rules of the common law, and partly from the provisions contained in the treaty of peace in 1783, and the treaty of London in 1794) to which aliens by birth can have no claim, except as they may be derived (under the treaty of 1794) by descent, devise, or purchase, from aliens by election.

Aliens by election may then be shortly described to be Those subjects of the crown of Great-Britain on the fourth day of July, 1776, who have elected to remain such, and have not since become, and continued to be, citizens of the United States, or some one of them. These, by the common law, upon the sepa-

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ration of the two countries, were still capable of inheriting and holding lands in the United States, notwithstanding such separation; and on the other hand, the citizens of the United States born before the separation, had the like capacity to inherit, or hold lands in the British dominions. 7 Co. Calvin's case. But it is conceived that upon the death of these *antenati*, as they are called, their lands in both countries, would have been liable to escheat, if their heirs should be *postnati*, or born after the separation. But that is provided against by the treaty of London, 1794, Art. 9, whereby it is agreed, "that British subjects, who THEN held lands in the territories of the United States; and American citizens who *then* held lands in the British dominions, shall continue to hold them according to the nature and tenure of their respective estates, and titles, therein: and might grant, sell or devise the same to whom they please, in like manner as if they were natives; and that neither they, their heirs or assigns, shall, so far as may respect the said lands and the legal remedies incident thereto, be regarded as aliens."

The citizens of each state shall be entitled to all privileges and immunities in the several states. C. U. S. Art. 4.

What other rights those aliens who may have taken the oath of allegiance to any state, since the adoption of the federal constitution, but have not been naturalized under the laws of the United States, may be entitled to, will be noticed under the head of *denizens*.

In the appendix to the succeeding volume, we shall have occasion to resume the subject of the rights of aliens to hold lands in Virginia; and shall take a view of the laws concerning escheats and forfeitures from British subjects, passed in Virginia, during the revolutionary war.

The manner in which aliens may be naturalized in the United States, will form the subject of a note under the head of naturalization. *post.* note 12.

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NOTE M.

SUMMARY VIEW OF THE LAWS RELATIVE TO GLEBES AND CHURCHES.

THE act of 1661, c. 1, enacts, "that there be a church decently built in each parish, unless any parish as then settled by reason of the fewness or *poverty* of the inhabitants be incapable of sustaining so great a charge; in which case such parishes shall be joined to the next great parish of the county, and a chapel of ease be built in such place, at the particular charge of that place.

1661, c. 2, For the making and proportioning the levies and assessments for building and repairing churches and chapels, provision for the poor, maintenance of the minister, and such other necessary uses, and for the more orderly managing all parochical affairs, vestries are appointed to be elected: but none shall be admitted to be of the vestry, who do not subscribe to be conformable to the doctrine and discipline of the church of England.

1661, c. 3, No minister shall be admitted, but such as shall produce to the governor a testimonial of his ordination by some bishop in England, and subscribe to be conformable to the orders and constitutions of the church of England.

1661, c. 10, Church wardens to keep the church in repair; to provide books, ornaments, &c. as the ability of the parish will permit.

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1661, c. 3, [*purvis*]...That for the better encouragement and accommodation of the ministry, there be glebes laid out in every parish, and a convenient house built for the reception and abode of the minister according to his majesty's instructions.

1667, c. 3, [*purvis* 156]....The like liberty shall be granted for two acres of land, and no more, for erecting churches, as by that act is granted for the erection of mills (as at present) provided that in case of desertion of any structure the land shall revert to the first proprietor, he paying what he received for it.

1696, c. 11*. Recites, that whereas the law then in force entitled "glebes to be laid out" in making such provision, doth appear very deficient and uncertain, it is therefore enacted, that the said act be repealed. And it is further enacted, that every vestry shall be, and are authorised and impowered, where the same is not already done, to purchase and lay out a tract of land for the glebe, in their discretion, and at the charge of their respective parishes; and likewise to build and erect a convenient dwelling house for the reception and abode of the minister of such parish. Provided always, that if the vestry of any parish shall find their parish to be so small and poor, as not to be able to allow and maintain a minister as aforesaid, that then upon application of the vestry to the governor, for the time being, that their parish may be united and consolidated to the next adjacent parish, the said governor is thereby desired to unite and consolidate the said parishes.

1727, c. 6, [Edi. 1733]....In parishes where glebes are not already purchased and appropriated, with convenient tenements for the habitation of the ministers, the vestry may purchase 200 acres of land at the least, for a glebe, and may erect thereon a convenient mansion house, and other necessary outhouses for the habitation of the ministers; and it is further enacted and

* The title of this act, occurs in the Edi. of 1733, page 109. "An act for the better support and maintenance of the clergy."....In a manuscript (page 175,) collection of public papers lent me by Mr. William Hornsby, which appears to be very old, there is a copy of the act at large, from which I have extracted what is here inserted. See also V. L. abridged, Edi. 1722, p. 17.

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declared that the vestry of every such parish are thereby authorised, impowered, and required to levy the charge of the said several buildings, and purchase of the glebe on the titheable persons in their respective parishes.....And the vestries of vacant parishes are impowered and required to put all the buildings upon the glebe of the parish into good and sufficient repair for the reception of the succeeding minister.

1748, c. 28, Re-enacts the provisions contained in the last mentioned act of 1727, c. 6, vestries right of presentation for twelve months.

1776, c. 2, Oct. Sess. All dissenters of whatever denomination, from the church by law established, shall be totally free and exempt from all levies, taxes, and impositions, whatever, towards supporting and maintaining the said church, as it now is, or hereafter may be established, and it's ministers. With an exception as to arrears of salary, and engagements already entered into by vesteries, and provision for the poor....The act then proceeds....There shall, in all time coming, be saved and reserved to the use of the church, by law established, the several parts of the glebe land already purchased, the churches and all arrears of money or tobacco, arising from former assessments, or otherwise; and there shall be, moreover, saved and reserved, to the use of such parishes as may have received private donations for the better support of the said church and it's ministers, the perpetual benefit and enjoyment of all such donations.

1779, c. 36, Oct. Sess. Repeals all and every act providing salaries for the ministers, and authorising the vestries to levy the same; provided nevertheless, that the vestries might levy and assess all salaries and arrears of salaries due to ministers for their services to January 1, 1777, and moreover might make such assessment on all titheables, as will enable them to comply with their legal engagements, entered into before the same day, &c.

1784, c. 88. The act for incorporating the protestant episcopal church, enacts, that every minister of the protestant epis-

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copal church now holding a parish, either by appointment from a vestry, or induction from a governor, and all the vestrymen in the different parishes now instituted, or which hereafter may be instituted within the commonwealth, that is to say, the minister and vestrymen of each parish respectively, or in case of a vacancy, the vestry of each parish, and their successors for ever, are thereby made a body corporate and politic, by the name of "the ministry and vestry of the protestant episcopal church, in the parish where they respectively reside, and by the name, stile, and title aforesaid they and their successors shall, for ever, lawfully have, hold, use, and enjoy all and every tract or tracts of glebe land, already purchased, the churches and chapels already built, with the burying grounds belonging to them, and such as were begun and contracted for, before the first day of January, 1777, for the use of the parishes, with their hereditaments and appurtenances; and all books, plate, and ornaments, appropriated to the use of, and every other thing, the property of the late established church, to the sole and only proper use and benefit, of the protestant episcopal church, in the parish where the respective ministers and vestries reside; (except the glebe in the county of Augusta) and where the property is situate, and being, agreeable to the true intent for which it was purchased or given: and by the name, stile, and title, aforesaid, they shall be capable in law to hold, maintain, and recover, all their estates, rights, and privileges, and to sue and be sued, &c. and have a common seal: and to take, acquire, and purchase lands, and to demise, alien, improve, and leave the same, glebe lands intended for the ministers' residence excepted, unless during a vacancy; and to build and repair churches, and dwelling houses for the use of the minister, &c. All former laws relating to vestries and church-wardens, and to the support of the clergy repealed, and all former vestries dissolved, the next Easter day, &c. &c. &c.

1785, c. 37. Provides for the election of vestries, where the same had not been done pursuant to the last-mentioned act of 1784, c. 88.

1786, c. 12. Repeals the act for incorporating the protestant episcopal church: saving to all religious societies the property

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to them respectively belonging, who are thereby authorised to appoint, from time to time, according to the rules of their sect, trustees, who shall be capable of managing and applying such property to the religious use of such societies. And to guard against all doubts and misconstructions, it is further enacted and declared, that so much of all laws then in force as prevents any religious society from regulating it's own discipline, shall be, and are thereby repealed.

1788, c. 47. Declares, that the trustees appointed in the several parishes to take care and manage the property belonging to the protestant episcopal church, and their successors, shall, to all intents and purposes, be considered as successors to the former vestries, and shall have the same power of holding and managing all the property formerly vested in them, whether for charitable purposes, by private donation, or in trust for the use of individuals.

1788, c. 53. Enacts, that the trustees of any religious society, shall have full power and authority to prosecute suits heretofore instituted, and now depending, upon bond, or otherwise, for any arrearages due to the different parishes, with the churchwardens.

1798, c. 9. Recites, that "Whereas the constitution of the state of Virginia, hath pronounced the government of the king of England, to have been totally dissolved by the revolution: hath substituted in place of the civil government so dissolved, a new civil government; and hath, in the bill of rights, excepted from the powers given to the substituted government, the power of reviving any species of ecclesiastical or church government, in lieu of that so dissolved, by referring the subject of religion to conscience: And whereas the several acts presently recited, do admit the church established under the regal government, to have continued so, subsequently to the constitution; have bestowed property upon that church; have asserted a legislative right to establish any religious sect; and have incorporated religious sects, all of which is inconsistent with the principles of the constitution, and of religious freedom, and manifestly tends

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to the establishment of a national church: For prevention whereof....It is, therefore, enacted:

That the several laws, the titles whereof are as follow: "An "act, for exempting the different societies of dissenters, from "contributing to the support and maintenance of the church as "by law established, and its ministers, and for other purposes "therein mentioned"...." An act, to repeal so much of the act, "for the support of the clergy, and for the regular collecting "and paying the parish levies, as relates to the payment of the "salaries heretofore given to the church of England"...." An "act, for incorporating the protestant episcopal church"...." An "act, to authorise the election of certain vestries."...." An act "to repeal the act, for incorporating the protestant episcopal "church, and for other purposes"...."and, "An act for giving "certain powers to the trustees of the property of the protes-"tant episcopal church," be, and the same are hereby repealed, and declared to be void and of none effect. And it is further declared, that the law, intituled, "An act, for establishing re-"ligious freedom," is a true exposition of the principles of the bill of rights and constitution.

1801, c. 5, Further recites, that, "Whereas the general assembly, on the twenty-fourth day of January, one thousand seven hundred and ninety-nine, by their act of that date repealed all the laws relative to the late protestant episcopal church, and declared a true exposition of the bill of rights and constitution respecting the same, to be contained in the act, intituled "An act for establishing religious freedom," thereby recognizing the principle, that all property formerly belonging to the said church, of every description, devolved on the good people of this commonwealth, on the dissolution of the British government here, in the same degree in which the right and interest of the said church was derived therein from them: And although the general assembly possesses the right of authorising a sale of all such property indiscriminately, yet being desirous to reconcile all the good people of this commonwealth, it is deemed inexpedient at this time to disturb the possession of the present incumbents."

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It is therefore enacted by the general assembly, That the overseers of the poor and their successors, or a majority of them, within each county of this commonwealth, wherein any glebe land is vacant, or shall become so, by the death or removal of any incumbent, shall have full power and authority, and they or a majority of them are hereby directed, on giving at least thirty days public notice, at the front door of the court-house of their county, to sell all such lands and appurtenances, and every other species of property incident thereto, on the premises, to the highest bidder, on twelve months credit, taking bond with good secutity for the amount thereof payable to themselves and their successors; provided that no sale of any such property shall take place, where any person is in possession thereof, under a lease from any person or persons in behalf of the said church, whether called trustees or not, prior to the passing of this act, until the said lease shall expire; and all sums of money or tobacco due thereon, or to become due, shall be recovered by action in the names of the said overseers of the poor, or a majority of them conducting every such sale, or their successors, on receiving satisfactory security for the amount thereof, be, and they are hereby authorised and directed, to convey all such property sold by them as aforesaid, to the purchaser or purchasers thereof, by good and sufficient deeds for that purpose; that in all cases where any person or persons may have received any sum or sums of money or tobacco, for the use of the episcopal church as established under the former government, and shall not have paid the same as directed by law, the said overseers of the poor and their successors, or a majority of them, shall be entitled to receive the same, and on non-payment thereof, to recover it by action in any court of record within this commonwealth: That when any person or persons, other than an incumbent or his tenant, shall have had the use of any glebe land or other property incident thereto, and may not regularly have accounted for the profits of the same, they shall hereafter account to the said overseers of the poor, or a majority of them, of the county in which such property lies; and in case any such person or persons, their executors or administrators refuse to account accordingly, the said overseers of the poor or their successors, may sue for and recover the same, in any court of record within this commonwealth. That in all

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cases where such property is in possession of any incumbent or his tenant, either or both of them shall be restrained from the commission of waste, in like manner as other tenants for life or years may be, by the said overseers of the poor or their sucessors, in whom the right of action for that, and the purpose of carrying this act into effect, is hereby vested. That in every case where the overseers of the poor, or any one or more of them in any county, shall have good reason to believe, that the incumbent therein shall be about to remove any or the whole of the personal estate, which he holds as formerly belonging to the episcopal church from such county, they or any one or more of them shall upon application to any magistrate therein, obtain from him an attachment which he is hereby authorised to grant, against the estate so about to be removed, upon the execution of which, and the return thereof, being made to the next court of such county, the said court may compel the said incumbent, on due proof thereof, to give bond with sufficient security; not to remove the said property, or any part thereof, from the premises; and, in case of refusal, the said court may order the said property to be delivered to the said overseers of the poor, and their successors, or a majority of them, to be by them disposed of, as in other cases. That in all cases, where there shall be any just demand, unpaid by any parish, the said overseers of the poor and their successors, or a majority of them, in every county comprehending such parish, or the greater part thereof, shall, from any of the funds aforesaid, before they are otherwise applied, pay the same: and shall then be entitled to a credit with the overseers of the poor of the county comprehending the residue of such parish, for their proportion thereof. That in cases where a glebe shall be in, or a parish run into, more counties than one, the overseers, as aforesaid, of the county wherein the glebe, or the greater part thereof, shall lie, shall sell the same, as aforesaid; and in all cases, the said overseers, and their successors, or a majority of them, shall appropriate the money arising therefrom, to the poor of such parish or to any other objects, which a majority of the freeholders and housekeepers therein, may direct, by a writing from under their hands directed to the said overseers. And in all other cases the the money arising therefrom, as aforesaid, shall be, by the said overseers of the poor, or a majority of them, in the counties re-

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spectively, applied in like manner, unless directed otherwise as aforesaid; *Provided*....That nothing herein contained, shall authorise an appropriation to any religious purpose, whatsoever.... That the said overseers of the poor or a majority of them, or their successors, shall meet as often as they may deem it necessary, for the purpose of carrying this act into effect. That the overseers of the poor, and their successors in each county where any such property remains, shall perform all the duties required of them, respectively, by this act, under the penalty of two hundred dollars each, to be recovered in any court of record, by any one who will sue for the same. That the said overseers and their successors or a majority of them, who shall perform the duties hereby required, shall be entitled to receive for advertising, selling and conveying, any of the said property, a commission of three per cent. and for collecting and appropriating any of the funds by them received. three per cent. more; and shall be accountable to their successors, as in other cases. That nothing herein contained shall authorise a sale of the churches and the property therein contained, or the church-yards, nor in any manner affect any private donation made prior to the first day of January one thosand seven hundred and seventy-seven, for church and other purposes, where there is any person in being entitled to take the same under any private donor; nor to affect the property of any kind, which may have been acquired by private donations, or subscriptions by the said church, since the date last mentioned."

Thus far what may be considered as public acts....there are a multiplicity of private acts *, scattered among the sessions acts of our legislature which may contribute to throw an additional light upon this subject.

* See acts of 1734, c. 19, 20. 1736, c. 16, 22. 1738, c. 20. 1740, c. 4. 1742, c. 30, 31. 1744, c. 19, 23, 25, 27, 31. 1747, c. 2. 1753, c. 19, 21. 1755, c. 19. 1762, c. 26, 28, 31, 33, 34. 1769, c. 45, 49, 50, 51, 61, 62, 64, 67. 1772, c. 47, 49, 58. Octo. 1776, c. 44. May 1777, c. 21, 25, 26. Octo. 1777, c. 30, 34, 37. May 1778, c. 13. Octo. 1778, c. 31. May 1779, c. 37, 39. Octo. 1779. c. 36, 46, 49. Octo. 1780, c. 19..... The above are all private acts.

See also 1730, c. 18, 19. 1732, c. 16, 18.

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From the whole of these private acts, it may be collected, that the glebes and churches were purchased at the expence of the parishoners generally....That they were considerd as having an interest therein....that on the division of parishes, the inhabitants of one part of the parish, were frequently reimbursed by the other for their contributions towards the purchase of the glebe and church for the first parish....or the glebes were sold, the money divided between the parishes in proportion to their number of titheables, and vested in the vestries respectively for the purpose of purchasing other glebes. It also appears that in some instances, by a special provision in the acts, the vestries were declared to be persons capable of taking the conveyances and holding the lands.

Since the preceding note was transcribed for the press, the following report of a case in the high court of chancery at Richmond, has been published in several of the newspapers; although the editor cannot vouch for its authenticity, he deems it of too much importance to be pretermitted

The question relative to the glebe lands which has, for many years, excited so much attention in this country, has been discussed at much length, during the present term of the high court of chancery. At the last session of assembly an act passed, declaring that the overseers of the poor in each parish, where there was no incumbent, should proceed to sell the glebe, and apply the money to such a purpose as the majority of the parishioners should direct. This property which was formerly claimed and held by the church of England, has, since the revolution, been claimed by the protestant episcopal church as the successors of the church of England. The overseers of the poor in the parish of Manchester and county of Chesterfield, were about to proceed to execute the law of the last session; and, in order to stop their proceedings, the church wardens and vestry of that parish applied to the chancellor for an injunction to stay the sale: In their bill the complainants contended that the property in the

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glebe was vested in the vestry and church wardens for the benefit of the church of England; that all the rights of that church now belonged to the protestant episcopal church; that the legislature had, by many successive acts, recognized and secured the rights of the present church; and that the last act of the legislature attempting to devest those rights was void.

In opposition to this, it was contended....that the revolution had completely destroyed every thing like an established church in this country; that the bill of rights guaranteed the right of religious freedom, and inhibited any preference of one sect to another; that the church of England being destroyed by the revolution, the property given to support it revested in the community; that the acts which had passed since the revolution, some of which vested the property of the church of England in the protestant episcopal church, and one of which incorporated that church, were contrary to the bill of rights and constitution, and therefore void; that it followed that the act of the last session was valid, and that the court ought not to award the injunction.

After the arguments on both sides were concluded the chancellor proceeded to give his decision. He examined into the rights of the church....the effect of the revolution on them: he inquired how far the principles of civil and religious freedom, as declared by our bill of rights, and secured by our constitution, were inconsistent with the pretensions of the church; and their enjoyment of property, which was originally given for the support of an English hierarchy; he refuted the arguments which attempted to shew any injustice in the act of the legislature; and demonstrated, that by restoring it to be disposed of by the majority of the parishioners, it effectuated the purposes of justice, without contravening the rights of property, or violating the approved maxims and rules of law; and finally decided that the law of the last session (1801. c. 5.) was valid, and refused to award an injunction to stay the sale of the glebe of the Manchester parish which was, confessedly, vacant.

Similar applications being made respecting a glebe in the parish of Loudon, and one in the county of Fauquier, as the bill

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stated that they had incumbents at the time the law passed, and at present; and, as they did not come within the law, provided the allegations were true, he awarded the injunctions; leaving it to the overseers of the poor to controvert the fact of the incumbency if they thought fit....He further directed the bill, in the case in which the validity of the law was called in question, to be amended, that the attorney-general, on the part of the commonwealth, might be made a party; so that by a demurrer to the bill, he might, if he chose, bring on the question in such a shape as would allow an appeal to the court of appeals, that this subject which has so long agitated this country should receive the solemn decision of that tribunal*.

During the pendency of this important question, it would be equally presumptuous, and indecorous in the editor to express any opinion upon the subject, (had he formed one) as it might relate either to the merits of the question, or the constitutionality of the several laws, on which each party seems to rely for the support of their opposite claims. Nevertheless, he cannot, consistently with his own feelings and impressions, refrain from addressing some few hints to those who may be called upon to discharge the important duty of legislators, upon the subject of a general provision to be made by law for the support of those who may be willing to undertake the office of instructors in morality and religion, without regard to sects, or denominations, and without preference to any. This he does with the greater diffidence, as he has reason to believe the subject was once discussed in the legislature, with consummate ability, both by the advocates, and opposers of the measure. As he was not happy enough to hear the debate, a difference of sentiment from that which then prevailed, is perhaps attributable to that cause, only. He therefore respectfully submits to the candid opinion of his enlightened countrymen, the following questions.

Is it not presumable that a steadfast belief, and thorough conviction of the existence of a Supreme Being; of his attributes, and his providence; of the immortality of the soul, and of a fu-

* Extracted from the Petersburg Intelligencer of September, 28, 1802.

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ture state of conscious existence, hath, or may have a powerful effect upon the moral conduct of all who sincerely embrace and believe in those doctrines? And is it not equally presumable that the moral character of every man hath a powerful influence over his social conduct?

Is it probable, that the great bulk of mankind, by the mere light of their own reason and reflection, unassisted by the reason and reflections of others, will imbibe such a conviction, and belief in these respects, as to produce an equal effect upon their moral conduct, as if they had received such aids?

Is it not probable, that those who have devoted their lives to the study of the divine nature, and of the nature of moral obligation and social duty; and who feel an unfeigned conviction of their truth and importance, will be more capable of enforcing a sincere conviction and belief of them in others, than those who have not received the benefits of education, or, who are compelled by imperious necessity to devote the greater part of their time to other avocations and pursuits?

Is not the culture of morals, and of social duty, an object worthy of the attention of every wise legislature?

Doth any clause or article of the bill of rights or constitution of the commonwealth inhibit the legislature from imposing a reasonable tax for those purposes?

If those purposes can be most effectually promoted by the employment of men of learning and ability, and of exemplary lives and conversation as teachers of the duties enjoined by religion and morality, will not a wise legislature have recourse to such means for the culture of morals, and of social duty?

If the last question be answered in the affirmative, it may not be deemed improper to suggest the following skeleton of a plan for that purpose.

Let the courts of the several counties within the commonwealth impose a yearly tax within their respective counties, in

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proportion to the taxes payable to the commonwealth for the same year, and not exceeding one tenth, nor less than one twentieth part of the tax, which each person pays to the commonwealth, to be set apart and unalienably appropriated to the support of teachers of religion and morality, and for the erection and keeping in repair places of worship, and public schools. Let all persons whose tax to the state shall amount to less than one dollar, be wholly exempt from this tax.

Let the tax be collected by the sheriffs at the same time that the taxes to the state are collected, and let them be allowed the same commissions thereon, and be subject to the same penalties in case of default; and let them pay the same to the clerk of the county, within ten days of the time that the public taxes are payable into the treasury. Let one fourth part of the sum so collected, be unalienably appropriated to the erection of places of worship and public schools, in such parts of the county as the court, or a majority of the inhabitants of the several parishes, sections, or sub-divisions of the county, respectively, may chuse; and let the residue be paid annually to such teacher of religion and morality, duly authorised by law to solemnize marriages, as the person paying the same may direct.

Let the clerk of the county be allowed a moderate commission on the sums which he may receive and pay. Let him enter, gratis, the names of all persons paying any tax for the support of the teachers of religion and morality, together with the name or names of the person to whom the payer shall direct the same to be paid, and the amount of each person's tax, in a book to be kept for that purpose; let him, when required, furnish the persons entitled to receive the tax with a list of the names of those who pay it, and the amount thereof, after deducting his commissions and the sheriffs, and the fourth part set apart for useful and necessary buildings, as before mentioned. Let him receive one cent, and no more, for every name contained in such list, from the person requiring it.

Let any person be at liberty, at any time, to withdraw the payment of his tax from the person to whom he may formerly

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have directed the same to be paid, and to authorise the payment thereof to another, provided the same be done before the tax shall come into the hands of the clerk.

Let every teacher of religion, claiming any benefit under these regulations, be required and compelled to reside in the county from which the tax is collected; and to keep a public school therein, for the teaching of reading, writing, and arithmetic; and to instruct the children of all persons who do not pay a tax of two dollars yearly to the state, for three years, gratis; and all other children within the county, on moderate terms.

If there be any thing in this imperfect sketch incompatible with the most perfect liberty of conscience in matters of religion, the writer has not made the discovery; and making it, would be among the first to disapprove of it.

THE END.

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