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NEW COMMENTARIES

ON

THE LAWS OF ENGLAND.

BOOK II.

OF RIGHTS OF PROPERTY—(*continued*).

PART II.

OF THINGS PERSONAL.

THE subjects of property were divided, as we may recollect, into things real, and things personal (*a*). The first of these being sufficiently discussed—so far at least as concerns the division of rights, as distinguished from that of wrongs (*b*),—we proceed now to the consideration of the second, namely, things personal.

(*a*) Vide sup. vol. I. p. 167. (*b*) Ibid. p. 138.

CHAPTER I.

OF THINGS PERSONAL IN GENERAL, AND OF PROPERTY THEREIN, IN GENERAL.

"THINGS personal" fall under the older and more general denomination of *chattels*, or *goods and chattels* (*a*)—the term "chattel" being also applicable to any interest in land which does not amount to a freehold, and which we have had occasion already to examine in former chapters, under the appellation of *chattels real* (*b*). With chattels real, however, we have not at present any direct concern; for these are rather species of estates in things real; and although their incidents are in general the same with those of property in moveables, still as regards the distinction between *things* real and *things* personal, they appertain to the division of things real, and have consequently been allotted to the First Part of the present Book. Things personal, on the other hand, to which our attention is now to be invited, include only *moveables*, and the rights connected with moveables; and these, in contradistinction to chattels real, receive the appellation of *chattels personal* (*c*).

Things personal then comprise in the first place all sorts of things moveable, that is, such as may attend a man's person wherever he goes; and, being consequently

(*a*) Co. Litt. 118 b; Ryal *v.* Rolle, 1 Atk. 183.

(*b*) Co. Litt. ubi sup.; Com Dig. Biens, D. 2; vide sup. vol. I. pp. 167, 272.

(*c*) Co. Litt. ubi sup.

for the most part of a perishable quality, were not esteemed of so high a nature, nor paid so much regard to by the law, as things that are in their nature immoveable and more permanent,—as land and houses and the profits issuing thereout. [In fact, our first legislators entertained a very low and contemptuous opinion of all personal estate; which indeed, during the feudal ages, was comparatively very trifling; *e.g.*, a tax of the *fifteenth*, *tenth*, or sometimes a much larger proportion of all the moveables of the subject, was frequently laid without scruple, and frequent forfeitures were inflicted by the common law of *all* a man's goods and chattels, for misbehaviours and inadvertencies that at present hardly seem to have deserved so severe a punishment; but these taxes and forfeitures were, in reality, of little concern, because personal property itself was then of very little amount comparatively. Our antient law books do not often condescend to regulate it; there is not a chapter in Britton or in the Mirrour that can fairly be referred to this head; and the little that is to be found regarding it in Glanvil, Bracton, and Fleta, seems principally borrowed from the civilians. But in modern times, through the extension of trade and commerce, personal property has greatly augmented both in amount and in quality; and we have come now to regard it very differently, and our courts now attach to it an importance almost equal to that which they attach to the realty; but they have adopted a more enlarged and less technical mode of considering it, applying thereto partly the rules of the Roman law, wherever those rules were apposite, but principally considerations of reason and convenience adapted to the circumstances of the times.

Moveables consist, in the first place, of *inanimate* things, as goods, plate, money, and the like; or vegetable productions, as the fruit or other parts of a plant, when severed from the body of it, or the whole plant itself when severed from the ground. And under the name of

[moveables, we have also to arrange *animals*—which have in themselves a principle and power of motion, and (unless particularly confined) can convey themselves from one part of the world to another. Then again there are certain incorporeal rights in moveables, which are deemed chattels personal, and of such incorporeal rights the four principal are *patent right*, *copyright*, the right to a *trade-mark* or *trade-name*, and the right to a *design*, all of which will be in due course considered.

But directing our attention, for the present, to animals,—these, when regarded as the subjects of property, are distinguished into such as are *domitæ naturæ* and such as are *feræ naturæ;* some being of a tame, and others of a wild, disposition. In the case of animals *domitæ naturæ*, *i.e.*, such animals as are of a nature tame and domestic—*e.g.*, horses, kine, sheep, poultry, and the like—a man may have as absolute a property in them as in inanimate things: inasmuch as they continue perpetually in his occupation, and will not stray from his house or person, unless by accident or fraudulent enticement, in either of which cases the owner does not lose his property in them.] But with animals *feræ naturæ*, the case is different; for these latter are, generally speaking, not the subjects of absolute property, at least while living (*d*). Yet, under certain circumstances, a man may be invested with a qualified or special property in them, and this either *per industriam*, or *propter impotentiam*, or *propter privilegium*.

1. [Such a property may arise in them *per industriam* —that is to say, either by *reclaiming* and making them tame by art, industry, and education, or else by so *confining* them that they cannot escape and use their natural liberty (*e*). And some writers have ranked all the domestic

(*d*) Hannam *v.* Mockett, 2 B. & C. 934; Reg. *v.* Read, 3 Q. B. D. 131.

(*e*) Vide post, p. 16.

[animals we have mentioned under the head of animals *feræ naturæ*, apprehending none to be originally and naturally tame, but only made so by art and custom, as horses, swine, and other cattle: which, if originally left to themselves, would have chosen to rove up and down seeking their food at large, and are only made domestic by use and familiarity,—and are, therefore, (say they,) called *mansueta*, *quasi manui assueta*. But however well this notion may be founded, abstractedly considered, our law apprehends the most obvious distinction to be between such animals as we see generally tame, and seldom, if ever, found wandering at large, that is to say, animals *domitæ naturæ*; and such creatures as are usually found at liberty, which are therefore supposed to be more emphatically *feræ naturæ*: though it may happen that the latter shall be sometimes tamed and confined by the art and industry of man; as in the case of deer in a park, hares or rabbits in an inclosed warren, doves in a dove-house, pheasants or partridges in a mew, hawks that are fed and commanded by their owner, fish in a private pond, bees when hived, and the like (*f*).] And with regard to bees, in particular, it hath been said that though a swarm lights upon my tree, I have no more property in them till I have hived them, than I have in the birds which make their nests therein; and therefore if another hives them, he shall be their proprietor; but a swarm which fly from and out of my hive are mine, so long as I can keep them in sight and have power to pursue them; and in these circumstances no one else is entitled to take them. But it hath been also said, that with us the only ownership in bees is *ratione soli*, and the Charta de Forestâ, which allows every freeman to be entitled to the honey found within his own woods, affords great countenance to this doctrine,—viz., that a qualified property may be had in bees, in consideration of the property of the soil whereon they are found (*g*).

(*f*) 2 Bl. Com. 392, citing Puff. l. iv. c. 6, s. 5; Inst. ii. 1, 14.

(*g*) 2 Bl. Com. 392; Bro. Ab. tit. Propertie; 43 Edw. 3, c. 24;

And with regard to animals *feræ naturæ* generally, we should here observe, that unless and until so reclaimed as aforesaid, or confined as aforesaid (*h*), they do not fall properly under the description of chattels personal, but are accessory to and partake of the nature of the *realty*; wherefore, if the owner die seised of an estate of inheritance in the land without having disposed of it by will, animals *feræ naturæ* will, as a general rule, descend with the inheritance to the heir, instead of belonging to the personal representatives of the deceased (*i*).

[Moreover, it is material to remark, with respect to all animals *feræ naturæ*, that they are no longer the property of a man than while they continue in his keeping or actual possession: but if at any time they regain their natural liberty, his property in them instantly ceases; unless indeed they have the *animum revertendi*—which is only to be known by their usual custom of returning (*k*),—or unless instantly pursued by the owner, for during such pursuit his property remains (*l*).] On the other hand, however, a property of this description is protected, while it lasts, by law; so that an action for damages will lie against any one who detains animals *feræ naturæ* from the owner for the time being, or who unlawfully destroys them (*m*); and it is also penal to steal those animals *feræ naturæ*, which, being fit either for food or for the service of man, are either tame and known by the thief to be so, or are so confined that the owner can take them whenever he pleases (*n*); and although, as regards animals kept only for pleasure, curiosity, or whim—amongst which the common law classed dogs and singing birds (*o*), no protection was

9 Hen. 3, c. 13; Tibbs *v.* Smith, T. Raym. 33; Hannam *v.* Mockett, 2 B. & Cr. 944.

(*h*) See Morgan *v.* Abergavenny, 8 C. B. 768.

(*i*) Co. Litt. 8; Case of Swans, 7 Rep. 17 b; 2 Bl. Com. 428; Toll. Exors. 192.

(*k*) Bract. l. ii. c. 1; Inst. ii. 1, 15.

(*l*) 2 Bl. Com. 392.

(*m*) Bro. Abr. Trespass, 407.

(*n*) 1 Hale, P. C. 512; 2 Bl. Com. 390; Hawk. b. i. c. 33, s. 26.

(*o*) 2 Bl. Com. 394; Lamb. Eiren. 275.

at one time afforded by the law, still, by modern legislation, efficient protection is now given to property in all species of confined animals (*p*); and it appears that *cats* were peculiarly protected even by the common law (*q*); also, it seems, *hawks* (*r*), and *ferrets* (*s*).

2. [A qualified property in animals *feræ naturæ* may arise also *propter impotentiam*, that is to say, on account of their own inability. Thus, where hawks, herons, or other birds build in my trees, or coneys or other creatures *feræ naturæ* make their nests or burrows in my land, and have young ones there;—here I have a qualified property in those young ones till such time as they can fly or run away, and then my property expires (*t*). For, in these cases, the law vests a property in the owner of the land in respect of the young, in the same manner as it does of the parents if reclaimed and confined: for these cannot, through weakness, any more than the others through restraint, use their natural liberty, and forsake him.

3. And lastly, a qualified property in animals *feræ naturæ* may arise *propter privilegium;* that is to say, a man may have, in exclusion of other persons, the privilege of hunting, taking, and killing certain animals *feræ naturæ*. Here there is a transient property in these animals (usually called *game*), so long as they continue within one's own liberty (*u*), and the owner of the liberty may restrain any stranger from taking them therein; but the instant they depart into another liberty, the qualified property of the prior owner ceases.]

And passing now from the consideration of animals *feræ naturæ*, to the consideration of personal property generally, we will first observe, that chattels personal may

(*p*) Vide post, bk. VI.

(*q*) 2 Bl. Com. 394.

(*r*) 1 Hale, P. C. 512; 1 Hawk. P. C. 38.

(*s*) 1 Chit. Pr. of Law, p. 18, n. (*z*).

(*t*) Charta de Forestâ, 25 Edw. 1, c. 13. See per Willes, J., in Blades *v.* Higgs, 12 C. B., N. S. p. 504.

(*u*) Child *v.* Greenhill, Cro. Car. 554; Mar. 48; Sutton *v.* Moody, 5 Mod. 376; 12 Mod. 144.

be either in *possession*, or else in *action*,—a distinction which is attended with certain important consequences in the law. And, firstly, property in possession is where a man has the enjoyment, either actual or constructive, of the thing or chattel; and is divided into two sorts, an *absolute* and a *qualified* property; the former being where a man is fully and completely the proprietor or owner of the thing, the latter being where his ownership is of a special or limited kind. And of special property,—as exemplified in the case of animals *feræ naturæ*,—we have already spoken; [but the phrase special property (sometimes called also the qualified property in chattels personal) has another and more important meaning, and which may be illustrated by the case of *bailment;* which is when chattels are delivered by the owner thereof to another person for a particular purpose, as to a carrier to convey to London, or to an innkeeper to secure in his inn, or the like; —here there is no absolute property for all purposes in either the bailor or the bailee, the person delivering the chattels, or him to whom they are delivered:—for the bailor hath only the right, and not the immediate possession—the bailee hath the possession, and only a temporary right; but it is a qualified property in them both; and each of them is entitled to an action against any stranger by whom the goods are wrongfully damaged or taken away,—the bailee on account of his immediate possession and the special property incident thereto, the bailor on account of his general ownership (*x*);] but save as against the bailee, the absolute property for all purposes remains in the bailor. Similarly, where goods are acquired by *finding*, the finder has a special property therein; defeasible, it is true, upon discovery of the rightful owner, but in the meantime valid against the rest of the world (*y*). On the other hand, a servant who has the care of his master's

(*x*) 2 Saund. 47 b.

(*y*) Armory *v.* Delamirie, Str. 505.

goods and chattels—as a butler of plate, a shepherd of sheep, and the like—has not any property therein, either absolute or qualified; but only a mere charge or oversight of the goods, and his master's property therein remains absolute (*z*). And here it may be observed, that when goods are distrained for rent, no property, special or otherwise, is acquired in them by the party distraining or seizing; but they remain *in custodiâ legis* until sold, or otherwise lawfully disposed of, and in the meantime the property of the original owner remains in him unaltered (*a*): though, on the other hand, if goods be taken in execution to satisfy a judgment, the sheriff or other officer executing the process has a special property in them during the interval between the seizure and the actual sale (*b*).

And secondly, property in *action* is where a man has not the enjoyment (either actual or constructive) of the thing in question, but merely a right to recover it by action; from whence the thing so recoverable is called a thing (or *chose*) *in action*. Thus, money due on a bond is a *chose in action*, for there is a right to claim the money when payable; but there is no possession of it, until it is recovered by course of law, or until payment be first voluntarily made. [And so, if a man promise or covenant with me to do any act, and fail in it, whereby I suffer damage, the recompense for this damage is a *chose in action;* for though a right to some recompense vests in me at the time of the damage done, yet what and how large such recompense shall be, can only be ascertained by law, and possession can only be given me by legal judgment and execution; and generally, whenever a man has a right to recover such recompense, whether for breach of contract or for any wrong or tort committed, he is said to be entitled to the recompense as to a chose in action; and therefore a *chose in action* is a thing rather *in potentiâ* than *in esse;*

(*z*) 3 Inst. 108.

(*a*) 2 Saund. by Wms. & Pat. 47, n. (*c*).

(*b*) Wilbraham *v.* Snow, 2 Saund. 47; Giles *v.* Grover, 9 Bing. 128.

[though the owner may have as absolute a property in, and be as well entitled to, things in action, as to things in possession (*c*).]

Property in chattels personal is also subject, whether it be in possession or in action, to distinctions which regard the *quantity* of interest. For a man may have the total property of a chattel, analogous to the fee simple in a real estate; or he may be the owner of it for life only, or for years only; and here it is pertinent to observe, that if a chattel personal (not being a personal annuity) be given by deed or will to A. and the *heirs of his body*, the total property is vested in A., and the remainders over take no effect; for there can be no *estate tail* in a personal chattel (*d*); and this rule applies also to the case of leaseholds so limited (*e*); but if a personal annuity be limited to A. and his heirs or the heirs of his body, A. will in that case have but a fee simple conditional at the common law (*f*).

Personal chattels also, like land, are subject to distinctions with respect to the *time of enjoyment*, and the *number of the owners;* and [firstly, as to the *time of enjoyment.* By the rules of the antient common law, there could be no property in chattels personal to take effect in expectancy, because being things transitory, and by many accidents subject to be lost, destroyed, or otherwise impaired, and the exigencies of trade requiring also a frequent circulation thereof, it would have occasioned—as it was thought—perpetual suits and quarrels, if such limitations in remainder were *generally* tolerated or allowed. But yet in last wills and testaments, such limitations of personal goods and chattels in remainder, after a bequest for life were permitted (*g*); though originally that indulgence was

(*c*) Colonial Bank *v.* Whinney, 30 Ch. Div. 261; 11 App. Ca. 426.

(*d*) Seale *v.* Seale, 1 P. Wms. 290.

(*e*) Leventhorpe *v.* Ashbie, Rolle's Abr. 831, pl. 1.

(*f*) Earl of Stafford *v.* Buckley, 3 Ves. sen. 171.

(*g*) Upwell *v.* Halsey, 1 P. Wms. 652.

[only shown when merely the *use* of the goods, and not the goods themselves, was given to the first legatee (*h*); the property being supposed to continue all the time in the executor of the testator. But now these distinctions are practically disregarded (*i*); for if a man, either by deed or will, limits his books or furniture to A. for life, with remainder over to B., this remainder is good (*k*),] if not as a remainder strictly so called, at all events as an executory interest, which for this purpose is the same thing. Personal chattels, however, cannot by any method be rendered unalienable beyond the period prescribed by the law against perpetuity, which applies to such executory interests in personalty as well as to the like interests in real estate (*l*); and they also fall equally with real estate within the provisions of the Thellusson Act (39 & 40 Geo. III. c. 98), and the Act of 1892 (*m*), slightly amending that Act, and the general effect of which two Acts is (we may remember) to invalidate all directions, whether by will or other instrument, for the accumulation of the annual produce of property for any longer period than the life of the settlor, or (in effect) twenty-one years after the death of the settlor or testator, or (when the accumulations are to be invested in the purchase of land) for a longer period than during minority.

Secondly, as to the *number of owners*. Things personal, as well as things real, may belong to their owners, not only in severalty but also in joint tenancy, or to their owners as tenants in common. They cannot, indeed, be vested in coparcenary, because they do not descend from the *ancestor* to the *heir*, which is necessary to constitute coparceners, but, (in case of the intestacy of a sole owner,) devolve to his administrator, to be by him distributed—though sub-

(*h*) Mar. 106.

(*i*) 2 Freem. 206; Randall *v.* Russell, 3 Meriv. 195; 2 Roper, Leg. 393.

(*k*) Fearne, Cont. Rem. p. 402.

(*l*) Co. Litt. by Harg. 20 a, n. (5); Gilb. Us. by Sugd. 121, n. (4); sup. vol. I. p. 514.

(*m*) 55 & 56 Vict. c. 58; sup. vol. I. pp. 516, 517.

ject to the claims of creditors—among the next of kin. But otherwise things personal follow the same rules as things real, with reference to these modifications of estate which regard the number of owners. [Thus, if a horse or other personal chattel be given to two or more absolutely, they are joint tenants thereof; and unless the jointure be severed, the same doctrine of survivorship shall take place as in estates in lands and tenements (*n*); and in like manner, if the jointure be severed, as by either of them selling his share, the vendee and the remaining part-owner shall be tenants in common, without any *jus accrescendi* or survivorship (*o*); and so also if 100*l.* be given by will to two or more, *equally to be divided* between them, this makes them tenants in common (*p*), as we have formerly seen the same words to have done in regard to a devise of real estate (*q*). And here it may be proper to remark, that, for the encouragement of husbandry and trade, it is held that stock on a farm, though occupied jointly, and also stock used in a joint undertaking by way of partnership in trade, equally with the land involved in such trade, shall always be considered as common, and not as joint property, and there shall be no survivorship therein (*r*).]

It remains to add that, as in the case of things real, so in the case of things personal, the legal property may be vested in one man, to the *use* of or in *trust* for another; but as regards things personal, this division of the ownership is less frequent than in things real (the legal interest being, in general, also the beneficial one); moreover, chattels personal are in no instance affected by the Statute of Uses, or by any of its attendant learning.

(*n*) Litt. s. 281; Shore *v.* Billingsly, 1 Vern. 482.
(*o*) Litt. s. 321.
(*p*) 1 Eq. Ca. Ab. 292.
(*q*) Vide sup. vol. I. p. 342.
(*r*) Buckley *v.* Barber, 6 Exch. 169; Waterer *v.* Waterer, L. R., 15 Eq. 402.

CHAPTER II.

OF TITLE TO THINGS PERSONAL—AND FIRST OF TITLE BY OCCUPANCY.

HAVING in the preceding chapter considered the *nature* of the property in things personal, we shall now proceed to consider the *title* to things personal, or the various means of acquiring and of losing such property as may be had therein (*a*); both which considerations (namely, the acquisition and the loss) shall be blended together in one and the same view,—as was done in our observations upon real property, since it is, for the most part, impossible to contemplate the one without contemplating the other also. Now there are six modes of making title to things personal, which we shall have occasion to consider, and these are: 1. By occupancy; 2. By invention; 3. By gift and assignment; 4. By contract; 5. By bankruptcy; and 6. By will and administration.

[And, first, the title by *occupancy*; which, we have more than once remarked, was the original and only primitive method of acquiring any property at all; and which, although it has since been restrained and abridged by the positive laws of society, in order to maintain peace and harmony among mankind, yet is still permitted to subsist in certain cases.

1. Thus, in the first place, it hath been said, that anybody may seize to his own use such goods as belong to an

(*a*) Vide sup. p. 8.

[alien enemy (*b*) ; for such enemies, not being looked upon as members of our society, are not entitled, during their state of enmity, to the benefit or protection of our laws. But this doctrine is restrained, as regards seizures on the high seas, to such captors as are authorized by the authority of the crown (*c*) ; and, as regards inland seizures, to such goods as are brought into this country by an alien enemy, after declaration of war, without a safe-conduct or passport. And therefore it hath been holden, that where a foreigner is resident in England, and afterwards a war breaks out between his country and ours, his goods are not liable to be seized (*d*) ;] and if a contract be made with a foreigner during peace, the right of action upon it is not absolutely forfeited by the subsequent outbreak of war between his country and ours, but is simply suspended until peace be again restored (*e*). But where the circumstances of the case render the capture from an enemy legal, the title by capture, *i. e.*, by occupancy, is good ; and so good in fact that, by our more antient law, such title would sometimes have prevailed, even against the claim of the former true British owner, from whom the goods had been previously taken by the same enemy, the law of this country in such a case having been that goods and chattels so re-captured became vested in the recaptor, unless the recapture was on the same day as the first capture, and the owner before sunset put in his claim to them (*f*),—a [doctrine agreeable also to the law of nations, as understood in the time of Grotius (*g*). But the law of recapture at sea was much modified after the time of Grotius ; and the later authorities required, that, before the goods be-

(*b*) Finch, L. 178.

(*c*) The King *v.* Williamson, Freem. 40 ; Brymer *v.* Atkins, 1 H. Bl. 189.

(*d*) Bro. Ab. tit. Propertie, 38, Forfeiture, 57.

(*e*) Alcenous *v.* Nigreu, 4 Ell. & Bl. 217 ; Clemontson *v.* Blessig, 11 Exch. 135.

(*f*) 2 Bl. Com. 401 ; Bro. Ab. tit. Propertie, 38, Forfeiture, 57.

(*g*) De Jure B. ac P. l. 3, c. 6, s. 3.

[came the property of the recaptors, they must have been brought into port, and have continued a night *infra præsidia*, in a place of safe custody (*h*); and, further, that, in order to vest such property in the recaptors so as to bar the title of the original owner thereto, the vessel must have been condemned *as prize*, by legal sentence (*i*).] And now, as regards British owners, according to the present law of England, whatever period of time may have intervened between the capture and any such recapture, and whether sentence of condemnation of the vessel shall have been obtained or not, the goods must in all cases be restored to the original owners on payment of *salvage*, or money in lieu of salvage, according as shall have been determined in the Admiralty division of the High Court of Justice (*k*); and the same rule would probably be applicable also to all owners who for the time being were subjects of the Queen. On the other hand, as regards captures from the enemy (that is to say from alien owners being enemies), the law as to such captures is portion of the law maritime; and goods so captured are called *naval prize of war*, and the title thereto and the distribution of such goods is matter falling within the jurisdiction of the *Prize Courts*, which jurisdiction is now ordinarily exercised by the High Court of Admiralty (*l*), and may (in certain cases) be exercised by the Colonial Courts of Admiralty (*m*).

2. [Again, with regard to animals *feræ naturæ*, all mankind had an original natural right to pursue and take any fowl of the air, any fish of the sea, and any beast of the field; and this right still continues in every individual,

(*h*) 2 Bl. Com. 401; Bynkersh. Quæst. Jur. Pub. b. 1, c. 4; Rocc. de Assecur. not. 66.

(*i*) 1 Rob. Rep. 139; 3 ib. 97; 1 Kent, Com. 97.

(*k*) 1 Bl. Rep. 27; 43 Geo. 3, c. 160; 3 & 4 Vict. c. 65.

(*l*) 3 Bl. Com. 108; Elphinstone *v.* Bedreechund, Knapp's Rep. 316; Dobree *v.* Napier, 2 Bing. N. C. 781; 3 Chit. Commercial Law, 608—618; and 27 & 28 Vict. c. 25, "An Act for regulating Naval Prize of War."

(*m*) 53 & 54 Vict. c. 27; 57 & 58 Vict. c. 39.

[unless so far as it has been restrained by the civil laws of his own country (*n*).] By the laws of this realm, accordingly, all persons may, on their own lands, or on the high seas, in general exercise this right, it being always remembered, however, that it is the exclusive right of the sovereign to take certain royal fish, such as the whale; and captures thus made by a private individual become, if reclaimed or confined, his *qualified* property, or, if dead, his *absolute* property; so that to steal them or otherwise invade his property therein, is, according to the nature of the case, sometimes a criminal offence, sometimes a civil injury. But the right to take animals *feræ naturæ* is subject to many arbitrary restrictions and regulations imposed by the legislature, as, *e.g.*, the restrictions and regulations contained in the statutes severally passed for the protection of *sea-birds* and certain other wild birds (*o*); and for the protection of *sand-grouse* (*q*); and for the protection of *clam* and other bait (*r*); and for the protection of *fresh-water* fish (*s*) and *shell-fish* generally (*t*). And inasmuch as the law of fisheries generally (including sea-fisheries) is fully discussed elsewhere in this treatise, we will here only discuss, with any approach to detail, the laws relative to *game*.

Antiently, none were permitted to take or sell game unless duly *qualified* in respect of property,—the ordinary qualification (as imposed by the Qualification Act, 22 & 23 Car. II. c. 25) having been the ownership of lands or tenements in possession, for an estate of inheritance of the yearly value of 100*l.*; or an ownership for life, or for ninety-nine years or upwards, of lands of the yearly value of

(*n*) 2 Bl. Com. 403.

(*o*) 32 & 33 Vict. c. 17; 35 & 36 Vict. c. 78; 39 & 40 Vict. c. 29; 43 & 44 Vict. c. 35; 44 & 45 Vict. c. 51; 57 & 58 Vict. c. 24; Whitehead *v.* Smithers, 2 C. P. D. 552.

(*q*) 51 & 52 Vict. c. 55.

(*r*) 44 & 45 Vict. c. 11.

(*s*) 41 & 42 Vict. c. 39; Price *v.* Bradley, 16 Q. B. D. 148; 47 & 48 Vict. c. 11; 49 Vict. cc. 2, 39; and 51 & 52 Vict. c. 41, s. 3.

(*t*) 57 & 58 Vict. c. 26.

150*l.*; and this qualification (it is said, and said truly) was originally imposed chiefly for the preservation of the different species of game, although at the same time it prevented (or tended to prevent) idleness and dissipation in the lower ranks of the people; but the Qualification Act has now been repealed (*u*). However, and principally with a view to the benefit of the revenue, although doubtless also with some view to the preservation of the different species of game from the brutal ravages of the idle and dissipated poor, it was subsequently made necessary for sportsmen to take out a yearly game *certificate*, attesting the payment by them of a certain amount of duty; and now, by 1 & 2 Will. IV. c. 32, it has been provided in substance, that the exclusive right to kill game upon any land shall be vested *ratione soli* in the owners of such land, who may of course let or grant the right to others (*x*); and by the 1 & 2 Will. IV. c. 32 (as amended by the 23 & 24 Vict. c. 90) all persons killing, taking, or pursuing game are required to take out a yearly *excise licence*—which stands in the place of the former *game certificate* (*y*); and persons who (having no such licence) *deal* in game, are required to take out an excise licence for this latter purpose (*z*); and further, by 33 & 34 Vict. c. 57, s. 7, an excise licence of 10*s.* has been imposed on every person *using or carrying a gun; scilicet*, being persons who have not at the time a valid licence to kill game. And we may here usefully observe, that the revenue from gun-licences, dog-licences, licences to kill game, and certificates to deal in game, has now been granted to the County Councils under the Local Government Act, 1888 (*a*). There are also many penal provisions, intended for the better preservation of game (*b*), and for the protection

(*u*) 1 & 2 Will. 4, c. 32.

(*x*) Ibid. ss. 7—17.

(*y*) Ibid. s. 23; 23 & 24 Vict. c. 90, s. 4.

(*z*) 1 & 2 Will. 4, c. 32, s. 25; 23 & 24 Vict. c. 90, s. 14; 24 & 25 Vict. c. 91, s. 17.

(*a*) 51 & 52 Vict. c. 41, s. 20, Schedule I.

(*b*) 1 & 2 Will. 4, c. 32, ss. 3, 4,

of landowners against *poaching* (whether by night or otherwise), and generally against unlawful trespasses in sporting (*c*).

In the Game Acts, "game" is defined generally as including hares, pheasants, partridges, grouse, heath or moor game, black game, and bustards (*d*); though some portions of the Acts are also directed to deer, woodcocks, snipes, quails, landrails, and rabbits (*e*). And as regards hares and rabbits, there are certain special provisions contained in the Game Acts, 11 & 12 Vict. c. 29, and 23 & 24 Vict. c. 90, the short effect of which is, that, in the absence of special agreement to the contrary, any occupier of inclosed lands, or any owner thereof with the right of killing game thereon,—may kill *hares* on such land without an excise licence; and any one may pursue *hares* with greyhounds, beagles, or other hounds without an excise licence, subject of course to any question of trespass (*f*); and no licence need be obtained by one who is merely assisting another in the pursuit of game which his employer is duly licensed to kill (*g*). Also, under the Game Act, 43 & 44 Vict. c. 47, the right of the occupier (*h*) to kill hares and rabbits (*i.e.*, *ground game*), concurrently with the landowner or other person entitled under him to such game, is made a right inseparable from his occupation, and he cannot contract himself out of his concurrent right; and he need not procure any licence to kill such game. But in consequence of the great decrease in the number of hares in this country arising from the almost indiscriminate slaughter thereof which appears to have resulted from the

24; Saunders *v.* Baldy, Law Rep., 1 Q. B. 87; Guyer *v.* The Queen, 23 Q. B. D. 100.

(*c*) 1 & 2 Will. 4, c. 32, s. 30 et seq.; 25 & 26 Vict. c. 114; Brown *v.* Turner, 13 C. B., N. S. 485; Hall *v.* Knox, 4 B. & Smith, 515; The Queen *v.* Pratt, 4 Ell. & Bl. 860; Spicer *v.* Barnard, 1 E. & E. 748; Cornwell *v.* Sanders, 3 B. & Smith, 206.

(*d*) 1 & 2 Will. 4, c. 32, s. 2.

(*e*) Sects. 31, 32; 23 & 24 Vict. c. 90, ss. 4, 5.

(*f*) 11 & 12 Vict. c. 29, s. 4.

(*g*) 23 & 24 Vict. c. 90, s. 5.

(*h*) Allhusen *v.* Brooking, 26 Ch. Div. 559.

last-mentioned Act, a close season for these animals, extending from March to July, both months inclusive, has now been introduced, by the 55 & 56 Vict. c. 8.

It needs hardly to be mentioned, that all the provisions of the Game Acts, the general effect of which has been in part above stated, must be read as not interfering in any way with the rights incident to the right of forest, park, chase, or warren; and the following distinctions, with reference to the acquisition of title in birds and beasts of game, are therefore to be known and observed, that is to say: Firstly, if a man starts any such bird or beast on his own ground, and follows it into another's, and kills it there, the property remains in himself (*i*); but if (being a trespasser) he starts it on another man's land, and kills it there, the property belongs to him in whose ground it is killed (*k*); and this, even though the trespasser may have sold the dead game to a third person (*l*). But, secondly, if a stranger starts game in one man's chase or free warren, and hunts it into another's liberty, the property continues in the owner of the chase or warren (*m*). And these distinctions seem to show, that although in general property is acquired by occupancy, yet the title by occupancy cannot prevail against the better claim either of him in whose grounds the animal is both killed and started (and who therefore may be said to be entitled *ratione soli*); or of him in whom, as having a right of free warren, there is already a qualified property in the game, *ratione privilegii*. And in conclusion upon this head, we may observe that the person who is owner of the game will be liable in a civil action for damages, should he damage the occupier of the land by overstocking it with game (*n*).

3. [A third species of title grounded on the right of occupancy, is the title by *accession*. According to the

(*i*) Sutton *v.* Moody, Lord Raym. 251; 2 Salk. 556; 3 Salk. 290.
(*k*) Sutton *v.* Moody, ubi sup.
(*l*) Blades *v.* Higgs, 11 H. of L. Cas. 621.
(*m*) Sutton *v.* Moody, ubi sup.
(*n*) Farrer *v.* Nelson, 15 Q. B. D. 258.

[Roman law, if any corporeal object received an accession, whether by natural or by artificial means,—as by the growth of vegetables, the pregnancy of animals, the embroidering of cloth, or the conversion of wood or metal into vessels and utensils,—the owner of the original corporeal object remained the owner of it in such its altered or improved condition (*o*); but if, by reason of such operation, the original object was changed into a different species,—as by making wine, oil, or bread out of another's grapes, olives, or wheat,—then in such a case the original object became the property of the operator, who was only required in that case to make a satisfaction to the original proprietor for the materials used (*p*); and these doctrines of the Roman law were implicitly adopted, and it is sometimes said even copied, by Bracton (*q*); and they have since been confirmed by many resolutions of the courts (*r*). For with respect to accession by breeding from animals, in particular, it has been held, that the brood of all tame and domestic animals belongs to the owner of the dam or mother,—the English law thus agreeing with the civil, that *partus sequitur ventrem* in the brute creation, though for the most part, in the human species, it disallows that maxim. And therefore in the laws of England (*s*), as well as of Rome (*t*), "*si equam meam equus tuus prægnantem fecerit, non est tuum sed meum quod natum est.*" And for this Puffendorf gives a sensible reason (*u*), not only because the male is frequently unknown, but also because the dam, during the time of her pregnancy, is almost wholly useless to the proprietor, and must be maintained with greater expense and care: wherefore, as the owner is a loser by her pregnancy, he ought to be a gainer by her brood. An exception to this rule obtains,

(*o*) Inst. 2, 1, 25, 26, 31; Ff. 6, 1, 5.

(*p*) Inst. 2, 1.

(*q*) L. 2, c. 2.

(*r*) Year Books, 5 Hen. 7, 15; 12 Hen. 8, 10; Bro. Ab. Propertie, 23; Moore, 20; Popham, 38.

(*s*) Bro. Ab. Propertie, 29.

(*t*) Ff. 6, 1, 5.

(*u*) De J. N. & G. l. 4, c. 7.

[however, in the case of swans, for the young cygnets belong equally to the respective owners of the cock and hen birds (*x*); but here the reason of the general rule ceases, and *cessante ratione legis cessat et ipsa lex;* for the male is well known by his constant association with the female; and for the same reason, the owner of the one doth not suffer more disadvantage, during the time of pregnancy and nurture, than the owner of the other (*y*).

4. A fourth species of title grounded on occupancy is the title by *confusion*, being a title which arises where the goods of two persons become so intermixed that the several portions can be no longer distinguished. And here the English law partly agrees with, and partly differs from, the Roman; for if the intermixture be by consent, then, by both laws, the proprietors have an interest in common, in proportion to their respective shares (*z*); but if the intermixture be without consent, as where one man wilfully intermixes his corn or hay with that of another man, or casts gold into another's melting-pot or crucible, without the knowledge or approbation of the latter, the civil law, though it gave the sole property of the whole to him who had not interfered with the mixture, yet allowed a satisfaction to the other for what he so improvidently lost; but our law gives in such case the entire property, without account, to him whose original dominion is invaded (*a*), *scil.* to him whose consent was not obtained.] However, this rule of the English law applies only to cases where the confusion is such as to render it impossible to subsequently apportion the respective shares; for if the goods continue to be distinguishable, as in the instance of articles of furniture thrown together, the confusion makes no alteration in the property (*b*); or if the quality of the

(*x*) Case of Swans, 7 Rep. 17.

(*y*) 2 Bl. Com. 390, 391.

(*z*) Inst. 2, 1, 27, 28; 2 Bl. Com. 405; Buckley *v.* Gross, 3 B. & Smith, 566.

(*a*) Ward *v.* Ayre, Cro. Jac. 366; 2 Bulst. 323; 1 Hale, P. C. 513; Colwill *v.* Reeves, 2 Camp. 576.

(*b*) Colwill *v.* Reeves, ubi sup.

articles is uniform, and the original quantities are known, as in the case of 500*l.* of trust money mixed with 300*l.* of the trustee's own money, the party by whose act the confusion took place would still be entitled to claim his proper quantity, subject only to the quantity of the other proprietor being first made good out of the whole mass (*c*).

(*c*) 2 Kent's Com. 298; Lupton *v.* White, 15 Ves. 442; In re Hallett's Estate, Knatchbull *v.* Hallett, 13 Ch. Div. 696.

CHAPTER III.

OF TITLE BY INVENTION.

WE come now to the title by *invention;* and under this title are included patent rights, copyrights, the right to trade-marks or trade names, and the right to a design; all which four classes or species of rights may with propriety be considered together, within the compass of the same chapter.

I. By a "patent right" we are to understand a privilege granted by the crown to the first inventor of any new contrivance in the manufactures, that he alone shall be entitled, during a limited period, to benefit by his own invention. It is so called, because the instrument, by which it is bestowed has always been in the form of *letters-patent*, which is the established mode of royal grant. To confer, indeed, on any individual the exclusive right of carrying on a particular trade or manufacture is, in general, beyond the lawful bounds of the royal prerogative; for such a grant amounted, at common law, to what was termed a monopoly (*a*); and was declared by the Statute of Monopolies, 21 Jac. I. c. 3, to be "altogether "contrary to the laws of this realm." But an exception was always made in favour of inventors of *new* manufactures; because with regard to them, grants of exclusive privileges for a reasonable period, while they tended to

(*a*) 3 Inst. 181; et vide post, bk. VI. c. XI.

encourage useful ingenuity, encroached on no right of which others were already in possession (*b*); and in accordance with that exception of the common law, the statute of James against monopolies excepts, from its general operation, all letters-patent for the term of *fourteen years* or under, by which the privilege of sole working or making any new manufactures within this realm, which others at the time of granting the letters-patent shall not use, shall be granted to the true and first inventor thereof; "so as they be not contrary to law, nor "mischievous to the state, nor to the hurt of trade, nor "generally inconvenient."

Since that statute, no patent right has been valid unless it range itself within the terms of the exception above referred to; for where not within those terms, it necessarily falls under the general declaration against monopolies contained in the Act (*c*); and it results from this consideration, that no patent right can be legally granted (at least in the first instance) for any period longer than fourteen years; and also that the subject of a patent must be a "new manufacture within this realm," for such are the terms of the exception. And, first, it must be a *manufacture*, that is, some article fabricated by the hand of man (*d*); though a patent may be taken out not only for an entire article, but for an addition, by way of improvement, to one already existing (*e*); or even for a chemical process of production (*f*). The manufacture must also be *new;* and the statute has added to that condition, that it must be such as "others at the time of granting such "letters-patent shall not use." If a patent, therefore, be granted for an article already used, or known, or commu-

(*b*) 3 Inst. 184.

(*c*) Boulton *v.* Bull, 2 H. Bl. 486.

(*d*) Hornblower *v.* Boulton, 8 T. R. 99; Kay *v.* Marshall, 5 Bing. N. C. 492.

(*e*) Hornblower *v.* Boulton, ubi sup.; Crane *v.* Price, 4 Man. & G. 580.

(*f*) Badische Anilin *v.* Levinstein, 29 Ch. D. 366; 12 App. Ca. 710.

nicated to the public in this country—whether the prior use or discovery be known to the patentee or not—the grant will be void (*g*); but, on the other hand, it is sufficient that it be new *within this realm* at the time the patent is granted; and the previous notoriety of the article, in a foreign country, is no objection to the validity of the patent (*h*). Moreover, the mere exhibition of an invention at a public show, which used to amount to a prior publication of it, will not now have any such effect, provided the intending patentee give previous notice to the Patent Office of his intention to exhibit it, and within six months thereafter make due application for his patent (*i*).

The patent right can be granted only to the "true and first inventor"; and here we may observe as to the word *inventor*, that it implies some exertion of ingenuity, and supposes some difficulty surmounted; so that when the new manufacture is of an obvious character, requiring no skill or contrivance for its production, it is not the fit subject-matter of a patent (*k*); and as to being the *true* and *first* inventor, no one can claim this character, if it appear that the novelty in question was first suggested to him by some other person in this country (*l*). Yet, where the secret is acquired abroad by one who afterwards introduces it into the realm, he is considered by the law (for the purpose now under consideration) as the true inventor; for it is immaterial whether the benefit bestowed on the public be the result of a man's travel and observation, or the fruit of his original genius (*m*); and in the case of two simultaneous discoverers, he who first procures

(*g*) 3 Inst. 184; Morgan *v.* Seaward, 2 Mee. & W. 544; Patterson *v.* Gaslight and Coke Company, 3 App. Ca. 239.

(*h*) Beard *v.* Egerton, 3 C. B. 97.

(*i*) 46 & 47 Vict. c. 57, s. 39; 49 & 50 Vict. c. 37, s. 3.

(*k*) Walker *v.* Congreve, Godson, 68, (n.) edit. 1832.

(*l*) Lewis *v.* Marling, 10 Barn. & Cress. 22; Marsden *v.* Saville Street Company, 3 Ex. D. 203.

(*m*) Edgeberry *v.* Stephens, 2 Salk. 447; Otto *v.* Steel, 31 Ch. D. 241; Harris *v.* Rothwell, 35 Ch. Div. 416.

a patent, before the matter is made public, is entitled to enjoy the exclusive privilege it confers (*n*).

The grant of a patent right is not *ex debito justitiæ*, but is an act of royal favour; though in a fit case it is never refused. The mode of proceeding to obtain it used to be regulated principally by the statutes 15 & 16 Vict. c. 83, and 16 & 17 Vict. c. 5, and c. 115 (*o*), but is now regulated by the 46 & 47 Vict. c. 57, being the Patents, Designs, and Trade Marks Act, 1883, amended by the Patents, Designs, and Trade Marks Acts, 1885, 1886, and 1888 (*p*). The general course of proceeding under the last-mentioned statutes is as follows:—The applicant may be a British subject or a foreigner, and one or more persons may be joint applicants (*q*); and the application is made by petition contained in, and supported by, a solemn declaration that the petitioner is the true and first inventor, and that the invention is not in use in this country by any other person, to the best of his knowledge and belief; and the application, which must be left at, or sent to, the Patent Office (*r*), must be accompanied by either a provisional or a complete specification (*s*)—the provisional specification describing the nature of the invention, and being accompanied in general by drawings illustrative thereof; and the complete specification particularly describing and ascertaining the nature of the invention, and in what manner it is to be performed or put in use, and being accompanied in general by drawings illustrative thereof, or else referring to the drawings thereof which accompanied the provisional specification (*t*). The complete specification, if not left with the application, must

(*n*) Godson on Patents, 31.

(*o*) The earlier statutes were 5 & 6 Will. 4, c. 83; 2 & 3 Vict. c. 67; and 7 & 8 Vict. c. 69.

(*p*) 48 & 49 Vict. c. 63; 49 & 50 Vict. c. 37; 51 & 52 Vict. c. 50.

(*q*) 46 & 47 Vict. c. 57, s. 4; 48 & 49 Vict. c. 63, s. 5.

(*r*) 46 & 47 Vict. c. 57, s. 5, sub-s. 1.

(*s*) Ibid. sect. 5, sub-s. 2; In re Newall, 4 C. B., N. S. 269.

(*t*) 49 & 50 Vict. c. 37, s. 2.

be sent not later than nine months (extendible) from the date of the application, otherwise the application is taken to have been abandoned (*u*). The application is referred, by the comptroller of patents, to an examiner; and the examiner reports thereon (*v*), firstly, whether the invention is fairly described; secondly, whether the application, with the accompanying specification, is in proper form; and, thirdly, whether the title sufficiently indicates the subject-matter of the invention; and (so soon as the complete specification is left) whether, fourthly, the invention described in that specification agrees with that in the provisional one. If the report on these three or (as the case may be) four heads is in the affirmative, then the patent is said to be "accepted;" and thereupon the comptroller gives notice of its acceptance to the applicant. After such acceptance the inventor enjoys, during the interval between the date of the application and the date of sealing the patent, the right to use his process without prejudice to the patent thereafter to be granted,—this immunity of enjoyment being known as his "provisional protection" (*x*); and in case a complete specification has been left with the original application, or so soon as being thereafter left it has been "accepted," then in addition the applicant has, during the interval between the acceptance of the complete specification and the date of sealing the patent, the like rights as if the patent had been already granted, but without any right of action for an infringement unless and until the patent is in fact granted (*y*).

So soon as the complete specification has been accepted, the comptroller advertises its acceptance (*z*); and after such advertisement, the specification is open to inspection at the Patent Office; and within two months after the advertise-

(*u*) 49 & 50 Vict. c. 37, s. 8; 48 & 49 Vict. c. 63, s. 3.

(*v*) 46 & 47 Vict. c. 57, s. 6.

(*x*) Ibid. sect. 14.

(*y*) Ibid. sect. 15; Ex parte Bates and Redgate, L. R., 4 Ch. App. 578; Ex parte Henry, L. R., 8 Ch. App. 167.

(*z*) 46 & 47 Vict. c. 57, s. 10.

ment, any person may give notice at the Patent Office of opposition to the grant of the patent (*a*), on the ground of the applicant having obtained the invention from him, or from a person of whom he is the legal representative, or on the ground that the invention has been patented in this country on an application of prior date, or on the ground of an examiner having reported to the comptroller that the specification appears to him to comprise the same invention as is comprised in a specification bearing the same or a similar title and accompanying a previous application, but on no other ground. If notice of opposition be given at the Patent Office, the comptroller gives notice thereof to the applicant; and after the expiration of the two months, and after hearing the applicant and his opponent or opponents, the comptroller decides on the case, with an appeal to the law officer; and on such appeal, the law officer hears the parties, and (with or without the assistance of an expert) determines whether the patent shall be granted or not (*b*). But if there is no opposition to the grant, or if the opposition thereto is decided in favour of the applicant and against his opponent or opponents, then the comptroller causes a patent to be sealed with the seal of the Patent Office (*c*),—a simplification of the former practice, under which a warrant for the purpose was first passed by the Commissioners of Patents, and the Lord Chancellor thereupon caused letters-patent for the invention to be sealed with the Great Seal of the United Kingdom (*d*).

By the letters-patent (which are in general not to be granted after the expiration of fifteen months from the date of the application) (*e*), there is granted to the applicant the exclusive right of using his invention within the United Kingdom and the Isle of Man, for the full term of fourteen

(*a*) 46 & 47 Vict. c. 57, s. 11.
(*b*) Ibid.
(*c*) Ibid. s. 12.
(*d*) Vincent's Patent, L. R., 2 Ch. App. 341.
(*e*) 46 & 47 Vict. c. 57, s. 12; 48 & 49 Vict. c. 63, s. 3.

years, subject to the patentee making the prescribed payments (*f*); and such patent right holds good against the crown (*g*), at least *quodam modo;* that is to say, the crown may still use the patent, paying therefor what shall be agreed or (failing agreement) what the Treasury shall appoint (*h*).

The object of the complete specification is, of course, to put the public in full possession of the inventor's secret, so that any person may be in a condition to avail himself of it, when the period of exclusive privilege has expired. And to prevent this object from being defeated by an evasive or careless description, the specification is construed with great strictness by the courts; and the object is held to be defeated, and the letters-patent to be consequently void, whenever the specification is in any part of it materially false or defective. It is a principal rule on this subject, that, in describing the nature of the invention, the specification whether provisional or complete, must commence with the title of the patent; and, in the case of a complete specification, must end with a distinct statement of the invention claimed (*i*); for the office of the complete specification is to set forth, with more particularity, the subject indicated in the provisional specification or in the patent itself; and if one thing be claimed by the patent and another by the specification, the grant is void (*k*). It is also an objection to the specification, if it covers too much; that is, includes, in its claim of new invention, anything which in fact has been already known and practised; and therefore if the entire article for which the patent is being taken out comprises some matter of this description, in connection with others that are new, the claim ought to be made in such form as to apply to the latter only; or if the combination of several

(*f*) 46 & 47 Vict. c. 57, s. 17.

(*g*) Ibid. ss. 27, 44; Feather *v.* The Queen, 6 B. & S. 257.

(*h*) Nobel's Explosives *v.* Anderson.

(*i*) Sect. 5, sub-s. 5; Siddell *v.* Vickers, 39 Ch. D. 92.

(*k*) The King *v.* Wheeler, 2 Barn. & Ald. 345.

known things happens to be the only novelty, it is to the combination only that the claim should be directed (*l*). As to the description of the manner of performance or production, the general rule is, that the specification should enable persons of ordinary skill to make the patent article, by simply following the directions given without resorting to contrivances of their own (*m*). In addition to which, we may remark, that no circumstance can be safely passed over in framing the specification which is advantageous, whether absolutely essential or not, in the conduct of the process; and that if several methods are stated, the specification will be defective and the patent void, if *either* of them be found to fail in effecting the promised result (*n*).

A patent right is *assignable;* and the assignment may be of part even of the patent (*o*), or may be for some specific place or country only (*p*); but in every case the assignment must be in writing under hand and seal (*q*)—a circumstance not, in general, required for the assignment or sale of moveables. It is also competent to the patentee, without an entire alienation of his interest, to grant deeds of *licence*, to any one or more persons to manufacture the article; and for the due working of the invention he may (by an order of the Board of Trade) be even compelled to grant such licences (*r*); and every assignment, and also every licence (in order to affect the right of the original patentee), must be registered at the Patent Office in the "Register of Patents" (*s*). And for the better conduct

(*l*) Proctor *v.* Bennis, 36 Ch. D. 740.

(*m*) Hills *v.* Evans, 31 L. J., Ch. 457.

(*n*) Wood *v.* Zimmer, Holt, N. P. 58; Morgan *v.* Seaward, 2 Mee. & W. 544; Heath *v.* Smith, 3 Ell. & Bl. 256; Clark *v.* Adie, 2 App. Ca. 423; Bailey *v.* Robinson, 3 App. Ca. 1055; Siddell *v.* Vickers, 39 Ch. D. 92.

(*o*) Dunnicliff *v.* Mallett, 7 C. B. (N. S.) 209.

(*p*) 46 & 47 Vict. c. 57, s. 36.

(*q*) Chanter *v.* Leese, 5 Mee. & W. 700; Power *v.* Walker, 3 M. & Sel. 9.

(*r*) 46 & 47 Vict. c. 57, s. 22.

(*s*) Ibid. s. 23.

of patent business,—and with a view also to the public benefit, and to the due publication of the invention,—a patent journal, reports of patent cases, and indexes of specifications, &c., have been provided at the Patent Office (*t*); but so, nevertheless, that warlike inventions may (by order of the War Office) be kept secret (*u*); and patent agents must now be registered, if they would describe themselves as such (*x*).

In favour of a patentee who had not reaped the full benefit of his invention, the legislature frequently interfered, by passing a private Act of Parliament to secure him the continuance of the privilege for a further term of years, in addition to that first limited by the letters-patent. But a less costly mode of relief in such cases is now in use; for the grantee may, under such circumstances, apply *by petition* to the crown for a prolongation of the existing term—his intention to do so being first duly advertised (*y*), and the petition being actually presented six calendar months, at least, before the expiration of the original term; and, if upon consideration of the nature and merits of the invention in relation to the public, of the profits made by the patentee as such, and of the whole matter, and after hearing any party who may choose to enter a "caveat," the Judicial Committee of the Privy Council reports in favour of the application (*z*), the crown is empowered either to grant to such patentee—or to his assignee, or to both conjointly, as the case may be (*a*)—new letters-patent for any term not exceeding seven years, or (in exceptional cases) fourteen years, to commence after the expiration of the first patent (*b*); or to order the grant of a new patent for the term therein mentioned, and

(*t*) 46 & 47 Vict. c. 57, s. 40.

(*u*) Ibid. s. 44.

(*x*) 51 & 52 Vict. c. 50, s. 1.

(*y*) 46 & 47 Vict. c. 57, s. 25; Herbert's Patent, Law Rep., 1 P. C. 399; Allan's Patent, ib. 507.

(*z*) 46 & 47 Vict. c. 57, s. 25, sub-s. 5; Lockwood's Case, (1894) A. C. 347.

(*a*) Ibid.; Ledsam *v.* Russell, 1 H. of L. Cas. 687; Newton's Patent, 9 App. Ca. 592; Brandon's Patent, ib. 589.

(*b*) Mallet's Patent, Law Rep., 1 P. C. 308.

containing any restrictions, conditions, and provisions that the judicial committee may think fit; but, of course, the petition may also be refused altogether (*c*).

If a patent right be infringed, the inventor has his remedy by action, to recover damages for the injuries sustained (*d*); and in such action, he must deliver (along with his statement of claim) a document called "particulars of the breaches" of which he complains (*e*); and he may in such action obtain an order (that is to say, an injunction) restraining the wrongdoer from the further use of the invention, and compelling him to account for the profits which he may have already derived therefrom (*f*); but the penalty of 50*l.* in addition, which was provided by 5 & 6 Will. IV. c. 83, s. 7, when any person, without licence, used the name, stamp, or mark of any patentee, has been abolished. The defendant to such action may, of course, defend it, either on the ground that no infringement has taken place, or on the ground that the patent is invalid; and with his statement of defence, he must deliver "particulars of his objections" to the patent (*g*). The invalidity of the patent may be established by showing, that the article was not a fit subject for a patent, or else that the patentee was not the first inventor, or that the specification was insufficient. Nor is this the only method of defeating claims founded on an alleged patent right; for, whether there be any complaint of infringement or not, it used to be competent to the crown (or to any subject of the realm in the sovereign's name, by leave of the attorney-general) to institute a proceeding called a *scire facias*, for the formal impeachment of the patent; and by the effect of this (if

(*c*) In re Yates and Kellett's Patent, 12 App. Ca. 147.

(*d*) 46 & 47 Vict. c. 57, s. 29; Talbot *v.* La Roche, 15 C. B. 310; Jones *v.* Lee, 25 L. J., Exch. 241.

(*e*) Smith *v.* London and North Western Railway Company, 2 Ell. & Bl. 69; United Telephone Co. *v.* Sharples, 29 Ch. D. 194.

(*f*) 46 & 47 Vict. c. 57, s. 30; Gittens *v.* Symes, 15 C. B. 362; Bridson *v.* M'Alpine, 8 Beav. 229.

(*g*) 46 & 47 Vict. c. 57, s. 29; Palmer *v.* Cooper, 9 Exch. 231; Crompton *v.* Anglo-American Brush Co., 35 Ch. D. 283.

found open to any of the objections above enumerated, or to any other sufficient exception in point of law), the patent would have been cancelled (*h*); and this species of relief is now obtainable on petition to the court, the petition being presented either by the attorney-general, or by any one authorized by him, or by any aggrieved person (*i*),—the petitioner delivering to the inventor a particular of the objections to the patent which are to be put forward by him at the trial of the petition (*k*).

For the protection of patentees, the Acts of Parliament above mentioned have introduced some other provisions of great importance to which we will now briefly refer. Firstly, the Acts enable the applicant or patentee, by request in writing left at the Patent Office, to obtain leave to amend his specification, by way of disclaimer, correction, or explanation; and the amendment may be allowed with or without terms, but no amendment is allowable which would make the specification as amended claim an invention substantially larger than, or substantially different from, the invention claimed by the specification as it stood before amendment (*l*). Secondly, if, in any action for infringement, the court has certified that the validity of the patent came in question, in any subsequent action for infringement, the plaintiff, on obtaining judgment in his favour, may have his full costs, charges and expenses as between solicitor and client (*m*). Thirdly, if a patent is lost or destroyed, a duplicate thereof may be sealed (*n*). Also, note that a person claiming to be a patentee may not by circulars, advertisements, or otherwise, without just and probable cause, use threats of legal proceedings against

(*h*) Smith *v.* Upton, 6 Man. & Gr. 251.

(*i*) 46 & 47 Vict. c. 57, s. 26; In re Avery's Patent, 36 Ch. Div. 307.

(*k*) Union Electrical, &c. Co. *v.* Electrical Storage Co., 38 Ch. Div. 325.

(*l*) 46 & 47 Vict. c. 57, s. 18; Spilsbury *v.* Clough, 2 Q. B. 467; Stocker *v.* Warner, 1 C. B. 148.

(*m*) 46 & 47 Vict. c. 57, s. 31; Cole *v.* Saqui, 40 Ch. Div. 132.

(*n*) Ibid. s. 37.

persons manufacturing or dealing in articles alleged to be (but not really being) infringements of his patent; and an injunction may be obtained against the continuance of such threats, with or without damages (*o*).

II. By *copyright*, we are to understand the right of an author to print and publish his own original work, exclusively of all other persons (*p*). It does not appear that the Roman Law recognised in any specific way this right of property (*q*); though the sale of literary copies, for the purposes of recital or multiplication, is certainly as antient as the times of Terence (*r*), Martial (*s*), and Statius (*t*); and with us in England this right of authors was not specifically recognised until a comparatively late period of our legal history. But in the reign of Queen Anne it became at length the subject of positive regulation; for by 8 Anne, c. 21, it was enacted, that the author of any book, and his assigns, should have the sole liberty of printing and reprinting it, "for the term of fourteen years, and no longer,"—in analogy apparently to the exception in the Statute of Monopolies, 21 Jac. I. c. 3,—which allowed a patent for fourteen years, to any inventor of a new manufacture (*u*); and the right so recognized was protected by means of penalties and forfeitures inflicted on all those who infringed the copyright; moreover, by the Act of Queen Anne, as amended by 15 Geo. III. c. 53, and 41 Geo. III. c. 107, if, at the end of the fourteen years, the

(*o*) 46 & 47 Vict. c. 57, s. 32; Driffield *v.* East Riding, &c. Co., 31 Ch. D. 638; Halsey *v.* Brotherhood, 15 Ch. Div. 514; 19 Ch. Div. 386.

(*p*) As to the right of *foreigners* to acquire copyright in respect of their works published by them while resident in this country, see Ollendorf *v.* Black, 20 L. J. (Ch.) 165; Jefferys *v.* Boosey, 4 House of Lords Cases, 815; Low *v.* Routledge, Law Rep., 1 Ch. App. 42; Low *v.* Ward, ib. 6 Eq. Ca. 415.

(*q*) 2 Bl. Com. 407.

(*r*) Prol. in Eunuch, 20.

(*s*) Epigr. i. 67; iv. 72; xiii. 3; xiv. 194.

(*t*) Juv. vii. 83.

(*u*) 2 Bl. Com. 407.

author himself should be living, the copyright returned to him for another term of the same duration.

The true nature and extent of copyright were not, however, definitely settled by the statute of Queen Anne; for it was left in uncertainty, whether at the common law, and independently of that statute, an author did or did not possess an exclusive privilege (without limitation in point of time) of publishing and republishing his own works; and whether supposing that he did, the statute had not permitted that privilege to remain without abridgment—the limitation which it contained in point of time being thought by some to apply to the new statutory protection only, and not to the old common law right itself. Nor were these questions set at rest until the year 1774; when it was solemnly decided, that any exclusive privilege which may have belonged at the common law to authors in respect of their works was at any rate taken away by the legislative enactments above mentioned, and that these statutes thenceforth constituted the only basis on which a claim to copyright could rest: a majority of the judges at the same time incidentally declaring it as their opinion, that by the common law an author *did* possess a copyright in his own works, and that in perpetuity (*x*).

Afterwards, in the reign of George the third, the period of literary proprietorship was extended by Acts, which conferred upon the author an exclusive right for twenty-eight years instead of fourteen, and in the event of his surviving that term, then for the residue of his natural life. The law of copyright, however, is now mainly regulated by the Copyright Act 1842 (5 & 6 Vict. c. 45), which has repealed the earlier Acts and provided (in favour of authors) that the copyright of every *book*—under which word is included, in the construction of the Act, "every volume, part or division of a volume, pamphlet,

(*x*) Donaldson *v.* Beckett, 2 Bro. P. C. 145; 4 Burr. 2408; Jefferys *v.* Boosey, 4 House of Lords Cases, 815; Tuck *v.* Priester, 19 Q. B. D. 48, 629.

" sheet of letter-press, sheet of music, map, chart, or plan, " separately published in the united kingdom " (*y*),—which shall be published in the lifetime of its author (whether a subject of the Queen or not) (*z*), shall endure for his natural life, and for seven years longer; or if the seven years shall expire before the end of forty-two years from the first publication, shall endure for such period of forty-two years; and that when the work is posthumous, the copyright shall endure for forty-two years from the first publication, and shall belong to the proprietor of the author's manuscript; and we may here observe, that copyright is personal property (*a*); and further that, as regards articles which are first published in periodical works, the copyright (unless there is some agreement to the contrary) remains vested in the author (*b*); the statute has also given the proprietor of a copyright infringed, by the book being unlawfully printed within the British dominions, a remedy by action, to be commenced within twelve calendar months; and such action is to recover damages for the injury already suffered, and claims also an injunction to prevent the continuance of the infringement or piracy. Moreover, as regards books unlawfully reprinted in any place out of the British dominions, and imported into the United Kingdom, they may be seized as forfeited, by any officer of the customs or excise, and the offenders are liable to penalties. The statute has also authorized, in every case of copyright, the registration by the proprietor of his title at Stationers' Hall (*c*); and it provides, that, without previous registration, no action or other proceeding shall be commenced (*d*),

(*y*) 5 & 6 Vict. c. 45, s. 2.

(*z*) Routledge *v.* Low, Law Rep., 3 H. of L. Ca. 100.

(*a*) 5 & 6 Vict. c. 45, s. 25.

(*b*) Richardson *v.* Gilbert, 1 Sim. (N. S.) 336; Sweet *v.* Benning, 16 C. B. 459.

(*c*) 5 & 6 Vict. c. 45, s. 11; Mathieson *v.* Harrod, Law Rep., 7 Eq. Ca. 270.

(*d*) Chappell *v.* Davidson, 18 C. B. 194; Thomas *v.* Turner, 33 Ch. Div. 292.

though an omission to register is not otherwise to affect the copyright itself; and on the other hand a wrongful registration of copyright may be ordered to be expunged (*e*).

To an action for infringement,—being an action commenced after registration,—if the defendant proposes to defend the action, he must give the plaintiff notice in writing of the particulars of any objections on which he means to rely at the trial; and if his defence be, that the plaintiff was not the author or first publisher, or is not the proprietor, or that some other person was or is so, then the defendant shall include such particulars in his notice of objections; or otherwise shall give no evidence at the trial that the plaintiff was not the author or first publisher, or was or is not the proprietor (*f*). And here we may observe, that it is no violation of the copyright in a novel to dramatize it for the stage (*g*); also, that some amount of copying by one author from another is permissible; and the question is, in all cases, one of degree, and is usually to this effect, namely, does the copying amount to a substantial taking by the one author of the labours of the other,—and so of the peculiar utility and consequent fruits of his labour (*h*). And note also, that the Copyright Act having given to the author the sole right of printing or otherwise "*multiplying copies*," an action for infringement will lie to restrain even a gratuitous distribution of the work, or of written copies thereof (*i*).

A copyright, we need hardly observe, is (like patent right) assignable,—the Copyright Act, 1842, s. 3, ex-

(*e*) 5 & 6 Vict. c. 45, s. 14; Ex parte Davidson, 2 Ell. & Bl. 577.

(*f*) 5 & 6 Vict. c. 45, s. 16.

(*g*) Reade *v.* Conquest, 9 C. B. N. S. 755.

(*h*) Sweet *v.* Benning, 16 C. B. 459; Kelly *v.* Morris, Law Rep., 1 Eq. Ca. 697; Maple & Co. *v.* Junior Army and Navy Stores, 21 Ch. Div. 369.

(*i*) Novello *v.* Sudlow, 12 C. B. 177; Warne *v.* Seebohm, 39 Ch. D. 73.

pressly granting the copyright to the author and *his assigns* (*k*); and such assignment may be by writing under the hand, without being also under the *seal*, of the proprietor,—it being enacted, by 5 & 6 Vict. c. 45, s. 13, that an assignment, properly entered in the book of registry at Stationers' Hall, shall be as effectual as if made by deed, and shall be exempt from the payment of any stamp or other duty (*l*). And doubtless also, an author might (as in the case of patent right) make a limited assignment of his copyright; or might licence (that is to say, authorize) any reproduction of his works. And the Copyright Act contains also an express provision declaring that it is "expedient to provide against the suppression of books of "importance to the public"; and accordingly enacts, that it shall be lawful for the judicial committee of the privy council, on complaint made to them that the proprietor of a copyright, (after the death of the author,) has refused to republish, or allow the republication of any book, by reason whereof the work is withheld from the public, to grant a licence authorizing the complainant to publish, on such conditions as such committee may think fit.

No copyright can be claimed in any production which is immoral, blasphemous, or seditious in its tendency, or which is defamatory of private character, or which (with a view to defraud the public) is published as the work of one who is not in truth the author (*m*); for, in the eye of the law, the publication of such works with such an object in view is a crime. Copyright may exist in the mere title of a book, *e. g.*, "Trial and Friendship" (*n*); at least, a quasi-copyright by time and use, but not by mere registra-

(*k*) Cumberland *v.* Planché, 1 Ad. & El. 580; Davidson *v.* Bohn, 6 C. B. 456; Shepperd *v.* Conquest, 17 C. B. 427.

(*l*) Leyland *v.* Stewart, 4 Ch. D. 419.

(*m*) Southey *v.* Sherwood, 2 Meriv. 435; Wright *v.* Tallis, 1 C. B. 893.

(*n*) Weldon *v.* Dicks, 10 Ch. Div. 247; Dicks *v.* Yates, 18 Ch. Div. 76.

tion, may exist therein (*o*); also, in the mere external appearance of a newspaper, *e. g.*, *The Times* (*p*).

Such being the general law of copyright, it will be proper to notice, in this place, that the sovereign has the exclusive right of promulgating to the people all acts of state and government (*q*); and as the supreme head of the Church, the sovereign has the same prerogative with respect to the liturgies, the books of divine service, and the authorized translation of the Bible; though, as regards the Bible (and also certain law books), the right has been considered as depending upon the circumstance of the same having been first made at the crown's expense (*r*). These privileges are held, moreover, to extend to the crown's grantees; in which capacity the Universities of Oxford and Cambridge, within their respective jurisdictions, and the queen's printer, claim the right of printing the Bible and Book of Common Prayer, and Acts of Parliament and other acts of state, to the exclusion of all other presses (*s*). These Universities enjoy also, by Act of Parliament (15 Geo. III. c. 53), the sole liberty of printing *for ever*, at their own presses, all books of which the copyright has been bequeathed or otherwise given to them, or their respective colleges, in perpetuity; and a similar right belongs to the colleges of Eton, Westminster, and Winchester. And it may be noticed, that the above Universities (and also certain public libraries) are entitled to demand the delivery of a copy of every work which shall be published; and a copy must also be delivered, without such demand, to the British Museum (*t*).

It was at one time a question, whether the law of copy-

(*o*) Licensed Victuallers' Newspaper Co. *v.* Bingham, 38 Ch. Div. 139; Schove *v.* Schmincke, 33 Ch. Div. 546.

(*p*) Walter *v.* Howe, 17 Ch. Div. 708.

(*q*) 2 Bl. Com. 410; Basket *v.* Cambridge University, 2 Burr. 661; 1 W. Bl. 105.

(*r*) 2 Bl. Com. 410; 4 Burr. 2329.

(*s*) Godson, 454, 2nd ed.; Basket *v.* Cambridge University, supra.

(*t*) 5 & 6 Vict. c. 45, ss. 7—9.

right extended to the case of an *oral lecture;* or whether, on the other hand, it was lawful for the hearer to commit the instruction he received to his note-book, or his memory, and to publish it afterwards for his own benefit,—a question the importance of which was in some measure superseded by the provisions of the statute, 5 & 6 Will. IV. c. 65, under which the sole liberty of printing and publishing any lecture, of the intended delivery of which notice in writing had been given to two justices, living within five miles of the place of delivery, two days before it was delivered, was secured to the lecturer; the Act, however, did not extend to lectures delivered in a university or college or in a public school, or to lectures delivered by any individual in virtue of any gift, endowment or foundation; but a professor's right to restrain generally the unauthorized publication of his lectures to students has latterly been fully established in the House of Lords (*u*).

Other kinds of literary composition, not being books, are now also protected from piracy; and, in particular, with regard to *dramatic pieces* (*x*) and musical *performances* (*y*), it has been provided by 3 & 4 Will. IV. c. 15, and 5 & 6 Vict. c. 45, ss. 20, 21, amended by the Copyright (Musical Compositions) Act, 1882 (45 & 46 Vict. c. 40), and by the Copyright (Musical Compositions) Act, 1888 (51 & 52 Vict. c. 17), that the author of such productions shall have, as his own property, the sole liberty of bringing them out upon the stage; but on every copy published, the right of public representation or performance must be expressed to be reserved,—any inadvertent infringement of the copyright in a song being, however, now dealt with (both as regards costs and otherwise) wholly as the court may in its discretion direct (*z*).

(*u*) Caird *v.* Sime, 12 App. Ca. 326.

(*x*) Hatton *v.* Kean, 7 C. B. (N. S.) 268; Boucicault *v.* Chatterton, 5 Ch. D. 267; Chatterton *v.* Cave, 3 App. Ca. 483.

(*y*) Planché *v.* Braham, 4 Bing. N. C. 17; Planché *v.* Hooper, ib. 877, n.; Eaton *v.* Lake, 20 Q. B. D. 378.

(*z*) 51 & 52 Vict. c. 17, ss. 1—3.

The law recognizes also a species of copyright in some other productions of genius; for an exclusive privilege of the same general character may now be claimed,—under the statutes 8 Geo. II. c. 13, 7 Geo. III. c. 38, and 17 Geo. III. c. 57 (*a*), in respect of *engravings and prints;* and under "The Sculpture Copyright Acts" (*b*), in respect of *sculptures, models, copies, and casts;* and under "The Patents, Designs, and Trade Marks Act" (*c*), in respect of *designs for articles whether of ornament or of utility;* and under the statute 25 & 26 Vict. c. 68, in respect of *paintings, drawings, and photographs* (*d*),—the requisites prescribed by the several Acts for ensuring the privileges respectively thereby conferred being, of course, first duly complied with.

And in conclusion on the law of copyright, we will here mention that, by the 10 & 11 Vict. c. 95, works entitled to copyright in the United Kingdom were declared entitled also to copyright in the colonies, and were protected against infringements accordingly; and by the 49 & 50 Vict. c. 33, s. 8, the colonists have, on their parts, the like copyright privileges for their original productions which foreigners have under the international copyright Acts nextly mentioned, that is to say:—

By the statutes 7 & 8 Vict. c. 12, 15 & 16 Vict. c. 12, 25 & 26 Vict. c. 68, 38 & 39 Vict. c. 12, and 49 & 50 Vict. c. 33, commonly called the International Copyright Acts, it is provided, that her majesty by order in council may,—as regards such *books, prints, articles of sculpture,*

(*a*) Avanzo *v.* Mudie, 10 Exch. 203; Moore *v.* Clarke, 9 Mee. & W. 692; Gambart *v.* Sumner, 5 H. & N. 5.

(*b*) 38 Geo. 3, c. 71; 54 Geo. 3, c. 56.

(*c*) 46 & 47 Vict. c. 57, ss. 47—61, repealing the earlier Designs Acts, 5 & 6 Vict. c. 100; 6 & 7 Vict. c. 65; 13 & 14 Vict. c. 104; 21 & 22 Vict. c. 70; 24 & 25 Vict. c. 73; and 38 & 39 Vict. c. 93; Heywood *v.* Potter, 1 Ell. & Bl. 439; Le May *v.* Welch, 28 Ch. Div. 24.

(*d*) Graves *v.* Ashford, Law Rep., 2 C. P. 410; Ex parte Beal, ib. 3 Q. B. 387; Pollard *v.* Photographic Co., 40 Ch. Div. 345.

paintings, drawings, photographs and other works of art, as shall be, after a future time to be specified in such order, first published in any foreign country to be named in such order,—allow the respective authors, inventors, artists, designers, engravers or makers, and their personal representatives, privilege of copyright therein for any period not exceeding the term for which the like productions would be protected if first published in the United Kingdom; and may,—as regards such *dramatic pieces and musical compositions* as shall be, after a future time specified in such order, first publicly represented or performed in any foreign country named in such order,—allow the authors to have the sole liberty of representing and performing them within the British dominions during any period, not exceeding the time during which they would be entitled by law to such sole liberty, if the first representation or performance had been in the United Kingdom (*e*); and may, as regards *translations* of books first published,—or of dramatic pieces first publicly represented,—in any foreign country, direct that the authors of such books or dramatic pieces shall be empowered to prevent the publication, in the British dominions, of any *translation* of such books, or the representation of any *translations* of such dramatic pieces not authorized by them, for such time as shall be specified in her majesty's order; but no such order in council is to have effect, unless, on the face of it, it be grounded on a due reciprocal protection secured by the foreign power therein named, for the benefit of parties interested in works first published in the dominions of her majesty; nor unless, within a limited time, the work sought to be protected be duly registered, and a copy thereof,—if it be a book, a print, or a printed dramatic piece, or musical composition,—deposited at Stationers' Hall; nor (in the case of translations) unless the original

(*e*) Wood *v.* Boosey, Law Rep., 2 Q. B. 340; Boosey *v.* Fairlie, 7 Ch. D. 301.

work be registered, and a copy deposited in the United Kingdom, in the manner required for original works as above mentioned; nor unless the author notifies on the title page his intention to reserve the right of translation; nor unless a translation, sanctioned by the author, be published within ten years at the most; nor unless such translation be registered, and a copy thereof deposited, as in the case of original works (*f*). Moreover, a *print* first published in a foreign country, must (by 8 Geo. 2, c. 13) have the name of the proprietor on each copy as well as on the plate (*g*).

III. The right to a *trade mark* or *trade name* is the third variety of the title by *invention* which we are now considering; and the first thing to observe is, that, prior to the Trade Marks Registration Acts to be presently mentioned, there was no property in any trade mark or trade name which the law recognized (*h*); there was however, a sort of qualified right therein, which the law recognized for the purpose of preventing the fraudulent use thereof by another in connection with the same classes of goods as those to which it had been appropriated by the original inventor thereof (*i*),—the ground of the court's interference to prevent such fraudulent use being to save the public from a fraud, incidentally saving the inventor from a loss (*k*). By the Trade Marks Registration Acts, 1875, 1876, and 1877 (*l*), a trade mark and even certain trade names might be registered, and for the first time and upon such registration, the right to the mark or name

(*f*) Wood *v.* Chart, Law Rep., 10 Eq. Ca. 193.

(*g*) Avanzo *v.* Mudie, 10 Exch. 203.

(*h*) Farina *v.* Silverlock, 6 De G. M. & G. 217; Mitchell *v.* Henry, 15 Ch. Div. 181.

(*i*) Cocks *v.* Chandler, L. R., 11 Eq. 446; Singer Manufacturing Co. *v.* Loog, 8 App. Ca. 15.

(*k*) Farina *v.* Silverlock, supra; Leather Cloth Co.'s Case, 33 L. J., Ch. 199; Borthwick *v.* Evening Post, 37 Ch. Div. 449.

(*l*) 38 & 39 Vict. c. 91; 39 & 40 Vict. c. 33; 40 & 41 Vict. c. 37.

became the property of the inventor. All the three last-mentioned Acts have, however, now been repealed; but their provisions are re-enacted, with amendments, in the Patents, Designs, and Trade Marks Act, 1883 (*m*), by the 76th section of which Act it is provided, that the registration of a person as proprietor of a trade mark shall be *primâ facie* evidence of his right to the exclusive use of the trade mark, and shall, after the expiration of five years from the date of the registration, be conclusive evidence of his right to the exclusive use of the mark; but the trade mark is to be registered only for particular goods or classes of goods (*n*), and is assignable and transmissible only in connection with the goodwill of the business concerned with such goods, and determines with that goodwill (*o*); and a register of trade marks is established by the Acts, and is kept at the Patent Office (*p*); and for Sheffield ware, there is a corresponding register situate at Sheffield, the Cutlers' Company being the comptroller there (*q*). In order to be registered under the Act, the trade mark must consist of or contain one at least of the following essential particulars, namely, (1) the name of an individual or firm printed, impressed or woven in some particular and distinctive manner; or (2) a written signature (or copy thereof) of the individual or firm applying for registration thereof as a trade mark; or (3) a distinctive device, mark, brand, heading, label, or ticket; or (4) an invented word or invented words; or (5) a word or words (commonly called "*fancy words*") having no reference to the character or quality of the goods, and not being a geographical name,—there being added (if the applicant chooses) any letters, words, or figures, or combination thereof, the application carefully expressing what are the essential particulars of the trade mark, and disclaiming the

(*m*) 46 & 47 Vict. c. 57; 49 & 50 Vict. c. 37; 51 & 52 Vict. c. 50.

(*n*) 46 & 47 Vict. c. 57, s. 65; Edwards *v.* Dennis, 30 Ch. Div. 454.

(*o*) Ibid. s. 70.

(*p*) Ibid. s. 78.

(*q*) 51 & 52 Vict. c. 50, s. 20.

exclusive use of such additional matter; any distinctive letter, figure, or word, or combination of such, used as a trade mark before the 13th August, 1875, being also registrable as a trade mark under the Acts (*r*). And it follows from the Acts, that the owner of a trade mark or trade name, being of course duly registered, may now, without any proof of fraud, obtain an injunction and damages for the unauthorized use of his mark or trade name (*s*); but the registration of a trade mark, when it has been registered without sufficient cause, may be ordered to be expunged (*t*),—on the application of anyone "aggrieved" thereby (*u*). Also by the Merchandise Marks Act, 1887, the forgery of any registered trade mark or its false application to goods like those in respect of which the mark has been registered, together with many other incidental acts of the like false and fraudulent character, are made criminal offences, and punishable accordingly (*x*).

IV. The fourth and last variety of this species of title by *invention* is the right to a *design*, some reference to which has been already made in speaking of copyright generally; and the law relative to designs may be briefly stated as follows:—In the year 1842, by the Copyright in Designs Act, 1842 (5 & 6 Vict. c. 100), which repealed all the previous Designs Acts, and was itself amended by various subsequent Acts (*y*), the proprietor of every new and original design not previously published, (whether such design was applicable to the *ornamentation* of any article of manufacture, or was for

(*r*) 51 & 52 Vict. c. 50, s. 10; In re Trade Mark "Alpine," 29 Ch. Div. 877; In re Arbenz, 35 Ch. Div. 248; Eno *v.* Dunn, 15 App. Ca. 252.

(*s*) Upmann *v.* Forester, 24 Ch. D. 231.

(*t*) 46 & 47 Vict. c. 57, s. 90.

(*u*) Powell *v.* Birmingham Vinegar Co., (1894) A. C. 8.

(*x*) 50 & 51 Vict. c. 28; Starey *v.* Chilworth Co., 24 Q. B. D. 90; Wood *v.* Burgess, ib. 162.

(*y*) These subsequent Acts were principally 6 & 7 Vict. c. 65; 13 & 14 Vict. c. 104; 21 & 22 Vict. c. 70; and 24 & 25 Vict. c. 73.

the pattern, shape or configuration, or any combination thereof,) was enabled to register his design, and thereafter became entitled to the copyright therein as applied to the specified article for the varying periods in the Act specified. Every such article thereafter published or exposed for sale was to be marked with the design, and with the letters "Rd." (*scil.* registered) together with a number or letter showing the date of the registration (*z*); and the proprietor obtained on registration a certificate of his title, and such certificate was *primâ facie* evidence of such title (*a*). By the Amending Act, 6 & 7 Vict. c. 65, the provisions of the principal Act were extended to articles of manufacture having reference to some purpose of *utility*, provided the design was for the shape and configuration of such articles. All these Acts have now been repealed, and their provisions re-enacted, with amendments, by the Patents, Designs, and Trade Marks Act, 1883 (46 & 47 Vict. c. 57), s. 113; and under that Act, as amended by the Patents, Designs, and Trade Marks Act, 1888 (51 & 52 Vict. c. 50), it is provided (in effect) that the proprietor of any registrable design may register same; and he need not distinguish what is new from what is old, nor describe his design with the same nicety and accuracy as is required in the specification of a patent (*b*); but in order to be registered at all, the design must be for something new or original, and not already published in the United Kingdom (*c*); but the novelty may consist in the mere combination (*d*); and the novelty is not now lost by exhibiting the design at any public show, provided the precautions in that behalf appointed by the Act (being the like precautions as those we referred to when speaking

(*z*) Blank *v.* Footman, Pretty & Co., 39 Ch. Div. 678.

(*a*) 5 & 6 Vict. c. 100, s. 16.

(*b*) McCrea *v.* Holdsworth, L. R., 6 Ch. App. 420.

(*c*) 46 & 47 Vict. c. 57, s. 47; Harrison *v.* Taylor, 4 H. & N. 816; Le May's Registered Design, 28 Ch. Div. 24.

(*d*) R. *v.* Firmin, 3 H. & N. 304; Lazarus *v.* Charles, L. R., 16 Eq. 117.

of the like exhibition of a patent invention) (*e*), are observed (*f*). The registration of the design will be made on request to the comptroller, accompanied with the prescribed number of drawings, photographs, or tracings, or of specimens of the design itself (*g*); and there is to be kept at the Patent Office a book called "the register of designs," in which the names of all registered proprietors are to be entered, and all assignments of their titles; and the register is *primâ facie* evidence of such title (*h*). Upon registration, the proprietor becomes entitled to the copyright of his design for five years from the date of the registration (*i*); and during the existence of such copyright, it is provided that it shall not be lawful for any person (without the licence or written consent of the registered proprietor) to apply such design, or any fraudulent or obvious imitation thereof, in the class or classes of goods in which such design is registered, for purposes of sale to any article of manufacture, or to any substance, artificial or natural, or partly artificial and partly natural; and further, that it shall not be lawful for any person to publish or expose for sale any article of manufacture, or any substance to which such design, or any fraudulent or obvious imitation thereof, shall have been so applied, knowing that the same has been so applied, without the consent of the registered proprietor; and any person who acts in contravention of this Act is made liable for every offence to forfeit a sum not exceeding 100*l.* to the registered proprietor of the design, who may recover such sum, as a simple contract debt, by action in any court of competent jurisdiction (*k*). Or, in lieu of such penalty, the registered proprietor of any design may (if he elects to do so) bring an action for the recovery of any damages

(*e*) Vide supra, p. 25.

(*f*) 46 & 47 Vict. c. 57, s. 39; 49 & 50 Vict. c. 37, s. 3.

(*g*) 46 & 47 Vict. c. 57, ss. 47, 48; Sched. II. Form E.

(*h*) Ibid. s. 50.

(*i*) Ibid. s. 55.

(*k*) 46 & 47 Vict. c. 57, s. 58, as amended by 51 & 52 Vict. c. 50, s. 7.

arising from the application of any such design, or of any fraudulent or obvious imitation thereof, for the purpose of sale, to any article of manufacture or substance, or from the publication, sale, or exposure for sale by any person of any article or substance to which such design, or any fraudulent or obvious imitation thereof, shall have been so applied, such person knowing that the proprietor had not given his consent to such application (*l*).

And thus much for these four varieties of the title by invention.

(*l*) 46 & 47 Vict. c. 57, s. 59.

CHAPTER IV.

OF TITLE BY GIFT, AND BY ASSIGNMENT.

IT is proposed now to consider the acquisition of chattels personal, by transfer from the true owner thereof,—a mode of acquisition which corresponds with the alienation of real estate by conveyance (*a*).

The property in things personal is transferable with absolute freedom, to the extent of the true owner's interest; and if they are assigned absolutely by one man to another, subject to a prohibition against disposing of them, the prohibition is void, both as being repugnant to the gift itself, and as being against the policy of the law (*b*). There are some cases, however, where the right of disposal is, in respect of the incapacity of the owner, suspended; as to which it will be sufficient in this place to remark, that the law relating to the disability of infants, insane persons, and persons under duress, applies in general to personal as well as to real property (*c*); and as regards a married woman, she, too, is in general under an incapacity to make any transfer of things personal, equally as of things real, not being property settled or acquired, or which by the effect of recent legislation is to be deemed held, for her separate use (*d*). There are also some few cases where, in respect of the nature of the interest itself, its transfer is absolutely prohibited; *e.g.*, the pay or half-

(*a*) Vide supra, vol. I. p. 439.

(*b*) Co. Litt. 223 a; Brandon *v.* Robinson, 18 Ves. 429.

(*c*) Vide supra, vol. I. p. 446.

(*d*) Bk. III. c. II., infra.

pay of a military or naval officer, or the salary attached to any public office of trust, is, on a principle of public policy, not assignable; the object of the rule being to secure to such persons, even against their own improvidence, the possession of those means which are essential to the maintenance of their station, and to the due performance of its duties (*e*),—at least while they either are engaged in, or are liable to be recalled to, the exercise of such duties (*f*). So also, and for the like reason, the assignment of alimony is illegal (*g*). Again, the assignment or sale of a public appointment is contrary to the policy of the law (*h*), and is prohibited in most cases by the express enactments even of the legislature (*i*). But besides these exceptions, we must notice two others of a different and more general kind, relative (1) to property *in futuro* and (2) to *choses in action* (*k*), which two exceptions have now become of a nominal rather than of a substantial character, but they demand nevertheless our particular consideration.

And firstly, as regards property *in futuro*, *e.g.*, goods not yet manufactured, or goods and machinery not yet (but which may hereafter be) brought upon any specified premises, these used not to be assignable at law,—but in equity the purported assignment of them was deemed a contract to assign them, which contract (when for value) was considered as being (in effect) performed, and so the assignment was deemed effectual in equity; and since the fusion of law and equity which was effected by the Judicature Act, 1873, to be presently mentioned, the effect of

(*e*) Lidderdale *v.* Duke of Montrose, 4 T. R. 248; Barwick *v.* Read, 1 H. Bl. 627; Wells *v.* Foster, 8 Mee. & W. 149; Apthorpe *v.* Apthorpe, 12 P. Div. 192.

(*f*) Lucas *v.* Harris, 18 Q. B. D. 127; Ex parte Webber, In re Webber, ib. 111.

(*g*) In re Robinson, 27 Ch. Div. 160; Linton *v.* Linton, 15 Q. B. Div. 239.

(*h*) 2 Sand. Uses, p. 38; Ex parte Butler, 1 Atk. 210.

(*i*) 5 & 6 Edw. 6, c. 16; 49 Geo. 3, c. 126; 6 Geo. 4, cc. 82, 83.

(*k*) Termes de la Ley, tit. Chose in Action.

these assignments of property *in futuro* appears to remain as we have stated it (*l*).

And secondly, as regards choses in action. By the strict rule of the antient common law, no *chose in action* could be assigned or granted over, because it was thought that if a man were allowed to make over to a stranger his right of going to law, it would be a great encouragement of litigation (*m*). But this nicety had long been practically disregarded under cover of an assignment in the nature of a declaration of trust, with an agreement to permit the assignee to make use of the name of the assignor, in order to recover the possession (*n*); and it became the practice to sue in the original creditor's name on a debt or bond thus assigned over; moreover, the crown was always an exception to the doctrine, having always been held entitled to grant or to receive a chose in action by assignment (*o*). And the doctrines of the courts of equity having infringed very greatly on the old common law regarding the assignability of choses in action, and certain policies of assurance having also been made assignable by statute (*p*), it was eventually enacted by the Judicature Act, 1873 (in accordance with the rules of equity), that any *absolute* assignment *in writing* under the hand of the assignor (not purporting to be by way of charge only) of any debt or other legal chose in action, of which *express notice in writing* had been given to the debtor, trustee, or other person from whom the assignor would have been entitled to receive or claim such debt or chose in action, should be deemed effectual in law to pass the legal right to such debt or chose in action (*q*).

(*l*) Bac. Max. Reg. 14; Holroyd *v.* Marshall, 10 H. L. Ca. 191; Brice *v.* Bannister, 3 Q. B. D. 569; Izon *v.* Tailby, 17 Q. B. D. 88; and *S. C.* (*sub nom.* Tailby *v.* Official Receiver), 13 App. Ca. 523.

(*m*) 2 Bl. Com. 442; Colonial Bank *v.* Whinney, 11 App. Ca. 426.

(*n*) 2 Bl. Com. 442.

(*o*) Breverton's case, Dyer, 30 b.

(*p*) 30 & 31 Vict. c. 144; 31 & 32 Vict. c. 86.

(*q*) 36 & 37 Vict. c. 66, s. 25, sub-s. (6); Young *v.* Kitchin, 3 Ex. D. 127; Coombe *v.* Carter, 36 Ch. Div. 348.

The modes of acquiring property in things personal by transfer *inter vivos* are two: first, by gratuitous donation, usually called a *gift;* and, secondly, by transfer not gratuitous but founded on some valuable consideration, the proper legal designation of which latter is *an assignment*.

1. A gift (being, in its nature, purely gratuitous) is open—particularly when made in favour of a stranger, and not a relative—to some degree of suspicion (*r*); and, as against the creditors of the grantor at the time of the donation, such transaction, so far as creditors are defrauded or delayed thereby, is made void by the statute 13 Eliz. c. 5, of which we had occasion to speak (in connection with the transfer of land) in a former volume (*s*). And by 3 Hen. VII. c. 4, deeds of gift of goods, made in trust *to the use of the donor*, were made void, because otherwise persons might have been tempted to commit crimes by this method of escape from the forfeiture of goods, which at that period ordinarily resulted therefrom (*t*); and also because the creditors of the donor might otherwise have been defrauded thereby of their rights.

Even as against the donor himself, a gift, to be valid and binding, must be accompanied either by the solemnity of a deed, or by that of delivery of possession (*u*); and a delivery not completed is not sufficient to give the donee a title (*x*). But when the gift is once perfected, either by execution of the deed or by a complete delivery of the thing, it is not in the donor's power to retract it, though made without any consideration or recompense,—unless, indeed, he was under some legal incapacity (as infancy, duress, or the like,) or was drawn in, circum-

(*r*) 2 Bl. Com. 144.

(*s*) Vide supra, vol. I. p. 468.

(*t*) 2 Bl. Com. 441.

(*u*) See Jenk. Cent. 109; Irons *v.* Smallpiece, 2 B. & Ald. 552; Shower *v.* Pilck, 4 Exch. 478; Cochrane *v.* Moore, 25 Q. B. D. 57; Kilpin *v.* Ratley, (1892) 1 Q. B. 582.

(*x*) Morgan *v.* Malleson, Law Rep., 10 Eq. Ca. 475; Warriner *v.* Rogers, ib. 16 Eq. Ca. 340.

vented, or imposed upon by false pretences, surprise, or other unlawful inducement, to make the gift.

There is also a species of gift, which, though made *inter vivos*, does not take effect till after the death of the donor; and which is consequently (in some respects) in the nature of a legacy, being, *e.g.*, subject to the claims of creditors in case of a deficiency of the other assets (*y*), and also to legacy duty (*z*), and formerly to account (and now to estate) duty (*a*). [This species of gift is called a *donatio mortis causâ;* and arises when a person in his last sickness, apprehending his dissolution near, delivers or causes to be delivered to another the possession of any personal goods to keep in case of his decease (*b*). This gift, if the donor die, needs not the assent of his executor, yet is accompanied with this implied trust or condition, that if the donor lives, the property shall revert to himself,—being given only in contemplation of death, or *mortis causâ* (*c*);] and, being in the nature of a legacy, this donation may be made by a husband to his wife, though an ordinary gift could not formerly have taken place directly between them in his lifetime (*d*). But, to render a *donatio mortis causâ* in any case effectual, it must be accompanied by a delivery of the chattel (*e*); or of the instrument—such as a bond or note, and the like—by which it is secured; the executor or administrator of the donor being bound to put such instrument in suit for the benefit of the donee (*f*). Upon such delivery, too, the possession must be permanently retained by the donee; for if it be resumed by the donor, the gift is void (*g*). This

(*y*) Ward *v.* Turner, 2 Ves. sen. 434.

(*z*) 36 Geo. 3, c. 52, s. 7; 8 & 9 Vict. c. 76, s. 4.

(*a*) 44 & 45 Vict. c. 12, s. 38; 57 & 58 Vict. c. 30.

(*b*) Tate *v.* Hilbert, 2 Ves. jun. 119.

(*c*) 2 Bl. Com. 514; Tate *v.* Hilbert, 2 Ves. jun. 111; Blount *v.* Barrow, 4 Bro. C. C. 72; Hills *v.* Hills, 8 Mee. & W. 401.

(*d*) Miller *v.* Miller, 3 P. Wms. 358.

(*e*) Farquharson *v.* Cave, 2 Coll. 356; Beak *v.* Beak, Law Rep., 13 Eq. Ca. 489.

(*f*) Duffield *v.* Hicks, 1 Bli. N. S. 497; Rolls *v.* Pearce, 5 Ch. D. 730.

(*g*) Bunn *v.* Markham, 7 Taunt. 224.

mode of gift is said to have been handed down to us from the Roman lawyers, who themselves borrowed it from the Greeks (*h*).

2. An assignment (meaning thereby a transfer for value) of chattels personal may in general be made by parol, that is, either by mere writing, or simply by word of mouth (*i*); and does not require the solemnity of a deed, nor even the delivery of possession (*k*). And if made in writing, it may be either in the form of a mere note or memorandum, or by a regular deed of assignment; which last is ordinarily denominated (whether the transaction be between buyer and seller or not) a *bill of sale*. And in the case of goods sent from abroad by ship to a person resident in this country, the transfer of the property therein is commonly authenticated, or (as the case may be) originally effected, by an instrument (not under seal) termed a *bill of lading*; which is in its form a receipt from the captain to the shipper (usually termed the *consignor*), undertaking (subject to what are called the "perils of the sea") to deliver the goods (on payment of freight) to some person whose name is therein expressed, or indorsed thereon by the consignor (*l*); and the delivery of this instrument (equally with the actual delivery of the goods) will suffice to pass and transfer to the party so named (usually termed the *consignee*), or to his *indorsee*, the property in such goods, and that so as even to put an end to the unpaid consignor's right to stop the goods *in transitu* (*m*). Moreover, by 18 & 19 Vict. c. 111, it is now expressly provided, that every consignee or indorsee of a bill of lading to whom

(*h*) 2 Bl. Com. 514, where it is remarked, "that there is a very "complete *donatio mortis causâ* in "the Odyssey, b. 17, v. 78, made "by Telemachus to his friend "Piræus; and another in the "Alcestes of Euripides, v. 1020, "made by Hercules."

(*i*) Perk. s. 57; Heath *v.* Hall, 4 Taunt. 326.

(*k*) Shep. Touch. 224; Martindale *v.* Booth, 3 B. & Adol. 507; Com. Dig. Biens, D. 3.

(*l*) Sanders *v.* Maclean, 11 Q. B. D. 327.

(*m*) Lickbarrow *v.* Mason, 2 T. R. 63; Gurney *v.* Behrend, 3 E. & B. 622; 40 & 41 Vict. c. 39, s. 5.

the property shall pass by reason of such consignment or indorsement, shall also (by reason thereof) have transferred to him all rights of suit, and be subject to the same liabilities, in respect of the goods, as if the contract in the bill of lading had been made with himself (*n*).

But though generally, and by the common law, personal property may be transferred without the use of writing, there are certain cases in which the statute law has required writing; for, as we shall see in the following chapter, a writing is by statute made essential to a contract for the sale of goods to the value of 10*l.* and upwards (*o*); and writing is also required for the transfer of ships (*p*); and for the assignment of a patent or of a copyright (*q*); and to these we may add, that a bill of exchange or promissory note, when made payable to the *order* of a particular person, can be assigned by him only under a written indorsement of his name.

Again, though the property in a chattel personal will (on a sale) pass without *delivery of possession*—yet it is to be remembered that by the statute of 13 Eliz. c. 5, every gift of chattels (as well as of lands), made with an intent to defeat or delay creditors, is void as against such creditors, though good and effectual as against the grantor himself (*r*); and one of the principal badges of fraud under this statute has always been deemed to be the retention of the goods by the original owner, if contrary to the purport of his assignment (*s*). Where possession, therefore, is so retained, it is *primâ facie* a case of fraud, entitling the creditors of the donor to impeach the transaction; but supposing it to be consistent with the apparent

(*n*) Smurthwaite *v.* Wilkins, 11 C. B. (N. S.) 842; Burdick *v.* Sewell, 10 Q. B. D. 363; 10 App. Ca. 74.

(*o*) 56 & 57 Vict. c. 71, s. 4, superseding 29 Car. 2, c. 3, s. 17, and 9 Geo. 4, c. 14, s. 7; Harman *v.* Reeve, 18 C. B. 595.

(*p*) 17 & 18 Vict. c. 104, s. 55; c. 120, sched. (repealing a former Act of 8 & 9 Vict. 89); 18 & 19 Vict. c. 91, s. 11.

(*q*) Vide supra, pp. 30, 38.

(*r*) 3 Rep. 82.

(*s*) Twyne's case, 3 Rep. 81; Shep. Touch. 66; Read *v.* Blades, 5 Taunt. 212.

object of the parties that possession should for the present be retained, as where the gift is by way of mortgage, the transaction is free from any *primâ facie* complexion of fraud (*t*).

Under the head of fraudulent dispositions of property, we may take occasion, also, to notice the antient rule, that where judgment was obtained in a court, and a writ of execution issued thereon, the property in the goods of the judgment debtor was, in all cases, bound from the time of issuing the writ (*u*). But by the Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), s. 26, continuing the like provision contained in the Statute of Frauds, (29 Car. II. c. 3,) s. 16, it has been provided, in favour of *bonâ fide purchasers* from the debtor after judgment, that no such writ shall as against them (but not as between the judgment creditor and the judgment debtor) bind the property in the goods, but from the time that such writ is delivered to be executed; and under the proviso contained in section 26, which continues the like provision contained in the Mercantile Law Amendment Act, 1856 (19 & 20 Vict. c. 97), s. 1, no writ of execution against the goods of a judgment debtor is now to prejudice the title thereto acquired by any person *bonâ fide*, and for a valuable consideration, unless such person had, at the time he acquired his title, notice that a writ, by virtue of which the goods might be seized or attached, had been delivered to, and remained unexecuted in the hands of, the sheriff (*x*). On the other hand, there are certain enactments having in view the protection of *execution creditors* and others from antecedent sales and other dealings of a secret character by the judgment debtor; for by 41 & 42 Vict. c. 31 (the Bills of Sale Act, 1878)—in substitution for a previous Act on the same subject—and recently amended by the Bills

(*t*) Edwards *v.* Harben, 2 T. R. 587; Martindale *v.* Booth, 3 B. & Ad. 498; Reeves *v.* Capper, 5 Bing. N. C. 136, 138.

(*u*) Farrer *v.* Brookes, 1 Mod. 188; 8 Rep. 171; 2 Bl. Com. 447; Comb. 33; 12 Mod. 57; Samuel *v.* Duke, 6 Dowl. P. C. 536.

(*x*) Williams *v.* Smith, 4 H. & N. 559.

of Sale Act Amendment Act, 1882 (45 & 46 Vict. c. 43), a bill of sale of personal chattels made at any time by the defendant in an action, will be void as against the plaintiff on whose behalf process of execution shall be issued, so far as regards any personal chattels comprised in such bill of sale which are left in the defendant's possession or apparent possession,—unless such bill of sale shall have been duly *registered* in the Central Office of the Supreme Court within *seven days* from its date; and unless such registration shall have been renewed once in every period of *five* years during the subsistence of the security (*y*); and unless the other provisions of the Acts are complied with (*z*). And regarding these other provisions, we shall here only remark, that under the Act of 1878, the execution of the bill of sale must have been, but since the Act of 1882 need not now be, duly attested by a solicitor of the Supreme Court; and the attestation must have stated, but need not now state, that the effect of the bill of sale had been explained to the grantor, before its execution (*a*).

In what has been hitherto said of transferring chattels, we have supposed the property to be vested in the person who assumes to transfer it; and in general, this circumstance is essential to the validity of the transaction (*b*). There are exceptional cases, however, in which a man may confer property in chattels, of which he is not himself the owner, and of which he is not even authorized to make a disposition; for if current coin of the realm be paid over for valuable consideration to an innocent party, his title thereto will be complete, although it should have been wrongfully obtained by the party who made the pay-

(*y*) Ex parte Furber, (1893) 2 Q. B. 122.

(*z*) Blaiberg *v.* Park, 10 Q. B. D. 90; Davis *v.* Burton, 10 Q. B. D. 414; 11 Q. B. D. 537; Hetherington *v.* Groome, 13 Q. B. D. 789; Roberts *v.* Roberts, ib. 794; Davies *v.* Rees, 17 Q. B. D. 408; Watkins *v.* Evans, 18 Q. B. D. 286; Calvert *v.* Thomas, 19 Q. B. D. 204; In re Yates, 38 Ch. D. 112.

(*a*) 41 & 42 Vict. c. 31, s. 10; 45 & 46 Vict. c. 43, s. 10.

(*b*) Peer *v.* Humphry, 2 Ad. & El. 495; Lunn *v.* Thornton, 1 C. B. 379.

ment (*c*). And the case is the same with respect to notes of the Bank of England; and also with respect to the transfer, in regular course, of bills of exchange, promissory notes, and of such other negotiable instruments as are transferable by mere delivery (*d*); and also with respect to goods sold in open market, or (as it is expressed in the language of the law) in *market overt* (*e*). But with reference to negotiable instruments, what we have above stated must be understood of instruments which are negotiable by the law of England (*f*); and post office orders or postal orders are not negotiable, either in themselves or by reference to the law of estoppel (*g*); but on these subjects, and also on the title arising upon sales by factors and trade-vendees, more ample information will be afforded in the course of the following chapter.

And in conclusion of the present chapter, we will refer to the Forged Transfers Act, 1891 (54 & 55 Vict. c. 43), whereby (as amended by the 55 & 56 Vict. c. 36), companies and local authorities may, as regards the shares, stocks, and securities issued by them, compensate the purchaser thereof for the loss he sustains through purchasing under a forged transfer thereof, or in pursuance of a forged power of attorney to transfer same; which transfer is, of course, ineffective (*h*); and the company or authority paying such compensation is remitted to all the rights and remedies of the innocent purchaser as against the person liable for the loss.

(*c*) Millar *v.* Race, 1 Burr. 452.

(*d*) Brandão *v.* Barnett, 1 Man. & Gran. 908; Raphael *v.* Bank of England, 17 C. B. 161.

(*e*) Peer *v.* Humphry, 2 Ad. & El. 495.

(*f*) Picker *v.* London & County Banking Co., 18 Q. B. D. 515; London & County Banking Co. *v.* River Plate Bank, 20 Q. B. D. 232; 21 ib. 535.

(*g*) Fine Art Society *v.* Union Bank of London, 17 Q. B. D. 705; and Goodwin *v.* Robarts, 1 App. Ca. 476.

(*h*) Barton *v.* North Staffordshire Rail. Co., 38 Ch. D. 458.

CHAPTER V.

OF TITLE BY CONTRACT.

WE have next to address ourselves to the subject of *contract*, and to the mode of acquiring title thereby to things personal; and of contracts, there is so infinite a variety, that it is impossible, in an elementary work, to do more than glance at their more prominent characteristics, and to enlarge a little on those varieties of contract, the legal incidents of which demand for them a more particular consideration.

Now, a contract is a *promise;* but it is also something more; for a promise is where one man voluntarily engages himself to another; but a *contract* is where two or more persons voluntarily engage themselves, the one to the other, by a promise on either side. And of contracts, some are by *parol*, *i. e.*, without deed or other specialty; and others are by specialty, in which case they are termed *bonds* or *covenants;* and a *parol* contract is called also a *simple* contract, and that irrespectively of whether it is in writing or merely by word of mouth,—the contract in either case involving the idea of mutuality, which a mere single promise does not do (*a*).

[A simple contract, then, may in general be either *written* or *verbal* (*b*); there are some engagements, however, of so important a nature, that they ought not to rest for their proof on verbal evidence only; and accordingly by

(*a*) 2 Bl. Com. 446.

(*b*) Rann *v.* Hughes, 7 T. R. 350.

[the Statute of Frauds, 29 Car. II. c. 3 (*c*), which is said to have been the joint production of Sir Matthew Hale, Lord Keeper Guildford, and another, it has been enacted (by sect. 4) that in the five following cases no verbal promise shall be sufficient to ground an action upon (*d*); but at the least some note or memorandum of the agreement shall be made in writing, and signed by the party to be charged therewith, or by some other person thereunto by him lawfully authorized (*e*), that is to say, in the five following cases:—1. Where an executor or administrator promises to answer damages out of his own estate (*f*). 2. Where a man undertakes to answer for the debt, default, or miscarriage of another, and for which that other remains liable. 3. Where any agreement is made upon consideration of marriage (*g*). 4. Where any contract or sale is made of or concerning lands, tenements, or hereditaments, or any interest in them (*h*). And, 5. Where there is any agreement that is not to be performed within a year from the making thereof (*i*).] And the student must be careful to note, that mere writing will not (under this statute) make that a contract which was not a contract; for if the other essentials of an agreement are wanting, such as the *assensus ad idem* of the parties, there is no contract, even although there is the writing required (*k*); moreover, the writing must, in general, contain all the terms, and not some of them only, together with the names of both the contracting parties; but a written offer of

(*c*) 29 Car. 2, c. 3.

(*d*) Leroux *v.* Brown, 12 C. B. 801.

(*e*) Smith *v.* Webster, 3 Ch. D. 49.

(*f*) Rann *v.* Hughes, 7 T. R. 350.

(*g*) Harrison *v.* Cage, 1 Ld. Raym. 386; Cork *v.* Baker, 1 Str. 34.

(*h*) Sainsbury *v.* Matthews, 4 Mee. & W. 343; Wright *v.* Stavert, 2 Ell. & Ell. 721; Angell *v.* Duke, Law Rep., 10 Q. B. 174; Marshall *v.* Green, 1 C. P. D. 35; Lavery *v.* Pursell, 39 Ch. D. 508.

(*i*) Boydell *v.* Drummond, 11 East, 142; Sykes *v.* Dixon, 9 Ad. & El. 693; Souch *v.* Strawbridge, 2 C. B. 808; Knowlman *v.* Bluett, Law Rep., 9 Exch. 1; Jones *v.* Victoria Graving Dock Co., 2 Q. B. D. 314.

(*k*) Williams *v.* Lake, 2 Ell. & Ell. 349.

the defendant's may be accepted verbally by the plaintiff (*l*).

For the same reason also,—that is to say, by reason of the importance of the subject-matter, and the necessity of protecting the parties to contracts, it has been enacted by the statute 9 Geo. IV. c. 14, (usually called Lord Tenterden's Act,) ss. 1, 8, that no acknowledgment or promise, without writing signed by the party chargeable, or else without writing signed by his agent duly authorized (*m*), shall suffice to revive a debt which would otherwise be barred by lapse of time, or shall confirm a debt contracted during infancy (*n*); but, indeed, regarding debts contracted during infancy, and which are not of a nature to have been originally binding on the infant, even a written acknowledgment will not now suffice to confirm such debts (*o*).

Besides these *express* contracts, there is also a numerous class of *implied* contracts; for in general, the law will imply that a man actually promises to fulfil that which the law says he ought to fulfil (*p*); *e. g.*, in the case of a common innkeeper, the law, imposing on him the duty of receiving the goods of his guests in the inn, therefore implies also a contract by him with each of his guests to take due care of such goods (*q*); and so also, if I employ a person to transact any business, or to perform any work for me, the law implies that I promise to pay him so much as his labour deserves; or if I take up wares from a tradesman, without any agreement as to price, a promise that I will pay him the reasonable value; or if I undertake any office, employment, or duty, an engagement that I will perform it with integrity. A common carrier, also, always impliedly undertakes to be answerable for the

(*l*) Reuss *v.* Picksley, L. R., 1 Exch. 342.

(*m*) 19 & 20 Vict. c. 97, s. 13.

(*n*) Hartley *v.* Wharton, 11 Ad. & El. 934; Maccord *v.* Osborne, 1 C. P. D. 568.

(*o*) 37 & 38 Vict. c. 62.

(*p*) Callander *v.* Oelricks, 5 Bing. N. C. 58.

(*q*) 3 Bl. Com. 165.

goods he carries; a farrier, to shoe a horse without laming him; and a tailor or other workman, to perform his business in a workmanlike manner; though if I employ a person to transact any of these concerns, whose common profession and business it is not, the law implies no such general undertaking; and the matter turns, in such a case, on the express agreement (if any) which is made between us (*r*); but in his own proper trade or business, the artificer undertakes (and the law implies on his part the duty) to exercise his art with reasonable skill,—*spondes peritiam artis* (*s*). [And there is annexed to all contracts, conditions, and covenants whatsoever, this implied contract, namely, that if I fail in my part of the agreement, I shall pay the other party such damages as he has sustained by reason of my failure or refusal; and, in short, almost all the rights of personal property depend upon contracts of one kind or another; wherefore the civil law refers the greater part of all the duties and rights of which it treats, to the head of obligations arising either *ex contractu* or *quasi ex contractu* (*t*).] But as regards all these implied contracts, this principle must be borne in mind, namely, that where there is an express promise, the law does not raise an implied one, with reference to the same matter, for *expressum facit cessare tacitum* (*u*); also an express parol contract cannot stand beside a specialty contract to the same effect; but in such a case, the express parol contract will be merged and extinguished in the specialty contract (*x*).

[Again: a simple contract may be either *executed*,—as if A. agrees to change horses with B., and they do it immediately,—in which case the possession and the right are transferred together; or it may be *executory*,—as if they agree to change next week—in which case the right only

(*r*) 3 Bl. Com. 165, 166.

(*s*) Harmer *v.* Cornelius, 5 C. B. (N. S.) 236.

(*t*) Inst. 3, 14, 2.

(*u*) Toussaint *v.* Martinnent, 2 T. R. 105.

(*x*) 6 Rep. 45 a; Price *v.* Moulton, 10 C. B. 561; Sharp *v.* Gibbs, 16 C. B. (N. S.) 527.

[vests, and their reciprocal property in each other's horse is not in possession but in action; for a contract executed conveys a chose in possession, while a contract executory conveys only a chose in action, so to speak.]

It is now time to advert to some of the principal rules by which contracts are governed; and the first and foremost rule which governs all simple contracts is, that a promise by parol only, is not binding in law unless made upon a *consideration*. By consideration is here meant some compensation, or *quid pro quo*, to be afforded by the promisee; as where, in return for certain services which another is to render me, I promise to pay him 100*l*.; but if, without reference to services or other equivalent, I simply promise to pay him 100*l*., there exists in this case a mere naked promise, with no consideration for it (*y*); and however a man may or may not be bound in honour or in conscience to perform a naked promise, our law certainly upholds the maxim *ex nudo pacto non oritur actio* (*z*); that is to say, our law holds, that out of a promise neither attended with any particular solemnity (such as belongs to a deed or other specialty), nor otherwise clothed with any consideration, no legal liability can arise, although the promise should be in writing, and although its fulfilment was intended at the time; but of course such a naked promise, once it is *executed*, is as good as (or rather better than) a promise upon consideration; but being *executory*, it is as good as void. On the other hand,

(*y*) Considerations have been classed by the Civilians (Blackstone, vol. ii. p. 443) in four species:—1. *Do ut des*, as where I give money to you, in order that you should give money to me; 2. *Facio ut facias*, as where I do work for you, in order that you should do work for me; 3. *Facio ut des*, as where I do work for you, in order that you should give money to me; and 4. *Do ut facias*, which is the third species inverted—all which contracts have been termed by modern jurists *innominate* contracts. (See Lord Mackenzie, p. 203.)

(*z*) Bro. Ab. tit. Debt, 79; Salk. 129.

any degree of reciprocity, whether in the way of benefit bestowed by the promisee, or of disadvantage sustained by him, will prevent the promise from being naked (*a*); and the pact will in such a case become a *pactum vestitum*, that is to say, a promise clothed with a legal consideration; and when such a consideration exists, the *adequacy* of it is not a question which the law will in general consider (*b*).

Secondly, the consideration for a simple contract may (like the contract itself) be either *executed* or *executory*: and its character in this respect is determined by the relation which its performance bears in point of time to the promise; *e.g.*, if I bail a man's servant, and the master afterwards promises to indemnify me, this is an executed consideration; but if a man promises to indemnify me in the event of my bailing his servant, the consideration is then executory. And with respect to an executed consideration, the rule is, that where the consideration was executed without any prior request (either express or implied) of the promisee, then it is but a mere voluntary courtesy, and will not support the promise (*c*); wherefore the law will in some few cases imply the needful prior request,—but in some few cases only, as, *e.g.*, where A. voluntarily does something which B. was legally (and which A. was not legally) compellable to do, and B. subsequently promises to A. (*d*).

Thirdly, the consideration may be either *concurrent* or *continuing;* and a consideration is said to be concurrent, when it is simply contemporaneous with the promise; and it is said to be continuing, when it exists before the promise, and also continues after it is made (*e*). Under the head of

(*a*) Wennall *v.* Adney, 3 Bos. & Pul. 251, (n.); Edwards *v.* Baugh, 11 Mee. & W. 647.

(*b*) Hitchcock *v.* Coker, 6 A. & E. 456; Strickland *v.* Turner, 7 Exch. 208.

(*c*) Lampleigh *v.* Brathwait, Hob. 105; Hunt *v.* Bate, Dy. 272 a; Eastwood *v.* Kenyon, 11 Ad. & El. 452.

(*d*) Exall *v.* Partridge, 8 T. R. 310; Pownal *v.* Ferrand, 6 Barn. & Cress. 444.

(*e*) Bac. Ab. Assumpsit (D.).

concurrent considerations, fall *mutual promises*, as where A. makes a promise to B., in consideration of a contemporaneous promise made by B. to A.; and under the head of *continuing* considerations, fall in general all *legal liabilities*, as where, in consideration of a sum of money being legally due, the debtor promises to pay. Which latter promise has no immediate reference to any act done or to be done by the other party, or to any consideration strictly so called, and yet is not a *nudum pactum;* for the legal duty itself supplies the consideration, or, in other words, the law itself in such a case implies the promise (*f*). And even a legal liability that is wholly *past* will, in some cases, supply sufficient consideration to support a subsequent express promise; as if a man justly owes a debt, but which is barred by lapse of time, and he expressly promises to pay such debt (acknowledging it in writing), that promise is deemed to be on full and ample consideration (*g*).

Fourthly, the consideration of "blood" or natural love and affection,—though it is an apt as well as a sufficient consideration in certain classes of conveyances (*h*),—is not any consideration whatever in the case of a simple contract, and will not suffice to sustain a promise; and the same may be said also, in general, of considerations which are of a merely *moral* nature, binding, indeed, on the conscience or feelings of the promiser, but not of any *legal* obligation on him (*i*). And further, if the consideration (or the promise founded upon it) is *illegal*,—whether as being contrary to some particular provision, or as being contrary to the general policy, of the law,—*e. g.*, contracts in general restraint of trade (*k*), or contracts tainted with champerty (*l*), or contracts which tend to interfere with the due course of

(*f*) 2 Bl. Com. 445; Wennall *v.* Adney, 3 Bos. & Pul. 249.

(*g*) Misa *v.* Currie, 1 App. Ca. 554.

(*h*) Vide supra, vol. I. p. 499.

(*i*) Beaumont *v.* Reeve, 8 Q. B. 483.

(*k*) Mallam *v.* May, 11 Mee. & W. 653; Sainter *v.* Ferguson, 7 C. B. 716.

(*l*) Herman *v.* Jeuchner, 15 Q. B. D. 561.

justice (*m*),—or if the consideration (or the promise founded upon it) is of an *immoral* character,—in any and all of such cases, the contract is utterly void, and of no effect (*n*); but a promise or contract that is merely *fraudulent*, is, in general, voidable only, although, by express enactment, it may be absolutely void. And as regards betting contracts and the like, although these (at least where they were not intrinsically immoral or unchaste), were not invalid by the common law, still betting contracts (*o*) and lotteries (*p*) are now made void by statute; and further, betting advertisements (*q*) and betting-houses (*r*) may be criminally suppressed (that is to say, the guilty parties may be prosecuted). And (as regards *infants* in particular) the mere inciting them to betting and wagering, or to the borrowing of money, has now been made a criminal offence (*s*). Nevertheless, an income derived from betting is liable to income tax (*t*). And with reference more particularly to contracts dealing with stocks and shares, the statute 7 Geo. II. c. 8, which prevented gambling in the public funds, was held not to extend to gambling in shares or in foreign stocks (*u*); and the Act was repealed by the 23 & 24 Vict. c. 28; so that this matter of gambling in shares and foreign stocks, and in the public funds, now depends on the provisions of the common law, aided, as these provisions have been aided, by the 8 & 9 Vict. c. 109, and 55 & 56 Vict. c. 9. And it seems that, prior to the statute 55 & 56 Vict. c. 9, contracts between buyers and sellers to pay or receive only the differences between the

(*m*) Lound *v.* Grimwade, 39 Ch. D. 605.

(*n*) Shep. Touch. 164.

(*o*) 8 & 9 Vict. c. 109; 55 & 56 Vict. c. 9; Read *v.* Anderson, 13 Q. B. D. 779; Bridges *v.* Savage, 15 Q. B. D. 363; Cohen *v.* Kittell, 22 Q. B. D. 680.

(*p*) Taylor *v.* Smetten, 11 Q. B. D. 207.

(*q*) Cox *v.* Andrews, 12 Q. B. D. 126.

(*r*) Jenks *v.* Turpin, 13 Q. B. D. 505; and Snow *v.* Hill, 14 Q. B. D. 588.

(*s*) 55 & 56 Vict. c. 4.

(*t*) Partridge *v.* Mallandaine, 18 Q. B. D. 276.

(*u*) Hibblewhite *v.* McMorine, 5 Mee. & W. 462.

prices on one day and the prices on a subsequent day were (as between the contracting parties) not enforceable contracts (*x*); and yet at the same time were not illegal (*y*); and these contracts for differences, otherwise sometimes called "*time-bargains*," used therefore to be regarded as valid to some intents, entitling, *e. g.*, the broker to be indemnified by his client against the liability which, at the client's request, he had incurred to the jobber (*z*); but, by the 55 & 56 Vict. c. 9, this implied agreement to indemnify is now made unenforceable.

Fifthly, it is a rule with regard to the consideration for a simple contract, that the consideration for the promise must *move* from the promisee into the promiser; by which means a privity of contract is established between them,—and either of them can take advantage of the contract. But if there be a contract between A. and B., for a sufficient consideration, as between themselves, that B. shall pay a sum of money to C., and B. accordingly promises A. to make such payment to C., yet C., being a stranger to the consideration, and therefore in no privity with B., can maintain no action on this promise (*a*).

Passing now to the *construction* and *effect* of written contracts, we may first observe generally, that the maxims or rules applicable to the construction of deeds which we expounded in the first volume of this work (*b*), apply in general both to sealed and to unsealed agreements; and that the rules which we also then briefly referred to, relating to the capacity or incapacity of the parties to contracts and conveyances to enter into such contracts or to execute such conveyances, also apply, in general, to written and other simple contracts; infants and lunatics, and also married

(*x*) Barry *v.* Crosskey, 2 J. & H. 1; Grisewood *v.* Blane, 11 C. B. 526.

(*y*) Fitch *v.* Jones, 5 Ell. & Bl. 238.

(*z*) Thacker *v.* Hendy, 4 Q. B. D. 685; In re Rogers, 15 Ch. D. 207; In re Ward, 22 Ch. D. 132.

(*a*) Crow *v.* Rogers, Str. 592.

(*b*) Vide supra, vol. I. p. 469.

women, it will be remembered, having been at one time, and to some extent still being, more or less subject to incapacity, as was there shown. And it is convenient here to add to what was then mentioned, that a contract made *under duress* may be avoided by the person whose free will has been restrained, although of course he may also choose to insist upon the contract as a binding transaction (*c*); also, that a person not under the guidance of reason (whether from insanity, idiocy, or extreme inebriety) is absolutely incapable, while that condition lasts, of entering into a valid contract; but lunatics (like infants) are chargeable for necessaries suitable to their station in life (*d*); and it has been determined that lunatics are even liable on their contracts for non-necessaries, provided the goods have been actually supplied to them, without notice of their lunacy, and without any fraudulent intention (*e*).

And with regard to contracts to do things which at the time are, or which subsequently become illegal,—the rule of law is, that a contract to do a thing illegal at the time when the agreement is made is void; and the *performance* of any contract is held to be excused, whenever, by a subsequent alteration of the law, such performance becomes illegal,—it being, of course, always understood that the promiser is not meanwhile in default. Thus, if a man covenants to do a certain act, and afterwards, *and before the time for doing it arrives*, a statute is passed by which the act is prohibited, the statute impliedly repeals the covenant (*f*). On the other hand, no excuse is in general afforded by the circumstance, that what a man has absolutely engaged to do has since become impossible; for it was his own fault to have made an unconditional con-

(*c*) 1 Roll. Ab. 688; Atlee *v.* Backhouse, 3 Mee. & W. 650.

(*d*) Beavan *v.* Macdonnell, 10 Exch. 184; Matthews *v.* Baxter, Law Rep., 8 Exch. 132.

(*e*) Molton *v.* Camroux, 4 Exch. 17; Imperial Loan Co. *v.* Stone, (1892) 1 Q B. 599.

(*f*) Ld. Raym. 321; Baily *v.* De Crespigny, L. R. 4 Q. B. 180.

tract (*g*). So also, if the performance be hindered by the opposite party, the party making the engagement is excused (*h*); wherefore, also, the performance will be excused if the promisee has failed on his part to perform the consideration. Also, where the performance of the contract or covenant is secured by a penalty, the obligation will be discharged, not only where the performance of the condition is prevented by the opposite party, but also where it is prevented by the *act of God* (*i*), although in general the *act of God* is no excuse in the case of an ordinary covenant or promise (*k*). And independently of the general law of promise and consideration, it is to be observed that where (as often happens) a contract, whether by deed or parol, contains stipulations on both sides of such a nature, that the performance of some act by one of the parties, must be considered as a *condition precedent* to the performance of some act by the other, in every such case the non-performance or breach of the prior obligation will, in general, excuse the performance of the posterior obligation; and at the same time, some given particular clause in a mutual agreement may be of such a nature, that the breach of it may not be sufficient to excuse the opposite party from the performance of his part of the contract, but may entitle the latter only to an action for damages: and whether any such clause is to be construed as a condition precedent or not, turns less on any technical rules of interpretation—though many are to be found in the books (*l*)—than on the intention fairly imputable to the parties in each particular case; and usually that construction will be adopted which is the more consistent with natural reason and convenience (*m*); but in all cases, the guiding question will be,

(*g*) Co. Litt. 209 a; 1 Shep. Touch. by Prest. 164; Cook *v.* Jennings, 7 T. R. 384.

(*h*) Co. Litt. 209 a.

(*i*) Ibid. 206 a.

(*k*) Hall *v.* Wright, E. B. & E. 746; Taylor *v.* Caldwell, 3 B. & Sm. 833; Howell *v.* Coupland, 1 Q. B. D. 258.

(*l*) Stavers *v.* Curling, 3 Bing. N. C. 355.

(*m*) Fishmongers' Company *v.*

whether the non-performance of the prior particular act goes to the root and essence of the matter.

In speaking of contracts we have hitherto supposed them to be made between the principal contracting parties themselves: but a contract, of whatever kind, may be entered into either by the parties in person, or by their agents in that behalf lawfully authorized; and this consideration naturally leads us to take some notice of the relation of *principal and agent*.

An agent may be constituted, either by express appointment, or by implication of law arising from the circumstances in which the parties are placed. The appointment, when express, may in general be made by word of mouth, but this is not always so (*n*); for where a lease of lands for above three years, or whereon less than two-thirds of the full improved value is to be reserved as rent, or where any uncertain interest in land is to be created by an agent, or (except in the case of copyhold) to be assigned or surrendered by an agent, the agent's authority must, by the Statute of Frauds, be in writing (*o*): and an agent for a corporation aggregate must in general be constituted not only by writing but by deed (*p*): and in every case where a deed is to be executed by one man as agent (or "attorney") for another, the agent must himself be authorized by deed for that purpose (*q*). But people, *e.g.*, infants (or married women) who are not (or who were not) competent to bind themselves as principals, may lawfully as agents bind the principals who have constituted them their agents (*r*).

Robertson, 5 Man. & G. 198; Ireland *v.* Harris, 14 Mee. & W. 437; Macintosh *v.* Midland Counties Railway, ib. 548.

(*n*) Paley's Princ. and Ag. 132.

(*o*) 29 Car. 2, c. 3, ss. 1, 2, 3.

(*p*) Plowd. 91; Mayor of Ludlow *v.* Charlton, 6 Mee. & W. 815.

(*q*) Elliott *v.* Davies, 2 Bos. & Pul. 338.

(*r*) Lindus *v.* Bradwell, 5 C. B. 583; Smith *v.* Marsach, 6 C. B. 484.

An agency, in whatever way constituted, determines *ipso facto* by the death of the principal (*s*); and is also capable of being revoked by him in his lifetime, with as little ceremony as it was created, or, in some cases, with even less ceremony and at his mere pleasure: but where an authority is given in pursuance of a contract with another party, and *by way of security to him*,—as where a man assigns property by way of security for money lent and appoints the lender his attorney to sue for and to recover or receive the property; or where a man assigns his effects in trust for his creditors, and executes a power of attorney to the trustee to enable him to recover the outstanding book debts,—in any of these cases, the authority is not revocable (*t*). And it has been provided by the Conveyancing Act, 1881 (*u*), that the donee of a power of attorney, not having notice of the revocation of the power by the death, lunacy, bankruptcy, or express revocation of the donor, shall be protected in respect of all payments made or acts done by him, in purported execution of the power; and by the Conveyancing Act, 1882 (*x*), it has been further provided, that where a power of attorney is given for value and is expressed to be irrevocable, or, whether given for value or not, is expressed to be irrevocable for a given time, not exceeding one year, then it is not to be revoked (*as against a purchaser*) by the death, marriage, lunacy, or bankruptcy of the donor of the power, or by his express revocation, as regards any acts done under such power; neither are such acts to be invalidated by reason of the donee or purchaser having notice of what would otherwise have operated in law as a revocation of the power.

An agent may be either *general* or *special*,—the agent being called a general agent where he is empowered to act generally in the affairs of another, or to act for him gene-

(*s*) Smout *v.* Ilbery, 10 Mee. & W. 1.

(*t*) Paley, Princ. and Ag. 156.

(*u*) 44 & 45 Vict. c. 41, ss. 46, 47.

(*x*) 45 & 46 Vict. c. 39, ss. 8, 9.

rally in some particular capacity or business, and being called a special agent, where he is authorized to act for him only in some particular matter,—a circumstance which involves some particular limitation of his authority. A general agent may also, on his part, be subject, as between himself and his principal, to some express particular restriction; but in such a case, in favour of strangers who deal with the agent *without notice of such particular restriction*, the agent being a general agent is presumed to have authority for what he does, provided it falls within the scope of his general agency, that is to say, within the limits ordinarily belonging to the kind of employment which he exercises (*y*). On the other hand, the power of a *special* agent, that is to say, of one employed in a single particular transaction, is strictly bounded by the express authority he has received, and a stranger dealing with such special agent has no right to assume that his acts are binding on his principal, if the express instructions of the latter have been in fact violated or exceeded (*z*). However, in the case of all the acts and transactions of an agent (whether he be a general or a special agent), when such acts are in fact beyond his authority, whether general or special, they do not bind his principal (*a*); but in some such cases, they may bind the agent himself (*b*). But, of course, acts which in the first instance are done without sufficient authority, are capable of being made good by the subsequent assent or ratification of the principal: and the effect, in such event, is exactly the same as if full power had been originally given; for *omnis ratihabitio retrotrahitur, et mandato priori æquiparatur.*

A contract duly made by an agent is in law the contract of the principal; and the principal is entitled to

(*y*) Howard *v.* Sheward, Law Rep., 2 C. P. 148; Henkel *v.* Pape, ib. 8 Exch. 7.

(*z*) Fenn *v.* Harrison, 4 T. R. 177; Trueman *v.* Loder, 11 Ad. & El. 593.

(*a*) British Mutual Bank *v.* Charnwood Forest R. C., 18 Q. B. D. 714.

(*b*) Collins *v.* Wright, 8 El. & Bl. 647; Firbank *v.* Humphreys, 18 Q. B. D. 54.

enforce it by suit in his own name, and is also liable to be personally sued thereon: and the case will be the same, though the agent should have made the contract as if he were himself the party interested, and without disclosing the existence of his principal; but in the latter case, the agent, having pledged his own personal credit, would be also liable (not less than the principal) to be personally charged on the contract, although in general, where an agent contracts as such, no such liability attaches to him (*c*).

And in conclusion it may be added, that an agent is always incompetent, without special authority for that purpose, to appoint another person to act in his stead; for *delegatus non potest delegare* (*d*).

Having now traced the principal outlines of the law of contract, we shall devote the remainder of this chapter to a detailed examination of some particular contracts; and we shall begin with,—

I. *The Contract of Sale.*—This is a contract whereby the property in goods is transmuted from one man to another, for a price (*e*). For [if the commutation be goods for goods, it is more properly an *exchange;* but if it be a transferring of goods for money, it is called a *sale;* which is a method of exchange introduced for the convenience of mankind, and effected through money as an universal medium; whereas, if goods were only to be exchanged for goods, by way of barter, it would be difficult to adjust the respective values, and the carriage would be intolerably cumbersome; all civilized nations have therefore adopted more or less the use of money (*f*): though the practice of exchange still subsists among savage nations. But

(*c*) Paterson *v.* Gandasequi, 15 East, 62; Addison *v.* Gandasequi, 4 Taunt. 574; Thomson *v.* Davenport, 9 Barn. & Cress. 78; Cooke *v.* Wilson, 1 C. B. (N. S.) 153; Kelner *v.* Baxter, Law Rep., 2 C. P. 174; Barwick *v.* English Joint Stock Bank, ib. 2 Exch. 259.

(*d*) 9 Rep. 77 b; Coles *v.* Trecothick, 9 Ves. 251; Blore *v.* Sutton, 3 Meriv. 237.

(*e*) Noy, Max. 42.

(*f*) Gen. c. XXIII. v. 16.

[with regard to the *law* of sales and exchanges, there is little or no difference between them; and we shall treat of both under the general denomination of sales.]

The contract of sale is now regulated by the Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), a codifying statute, by which (sect. 1) a contract of sale is defined as a contract whereby the seller transfers or agrees to transfer the property in goods to the buyer for a price,—the contract being called a sale when the property in the goods is thereby transferred, and being called an agreement to sell when the property in the goods is not immediately transferred thereby. For it is to be understood, that every contract of sale implies a bargain, or mutual agreement between the parties as to terms; and the law as to the transmutation of property under such contracts may be stated generally as follows:—If the vendor says the price of the goods is 4*l*., and the vendee says he will give 4*l*., the bargain is struck; and if the goods, or any portion of them by way of *earnest*, be thereon delivered or tendered (*g*); or if the price be paid or tendered, or if any part of the price be paid down and accepted (if it be but a penny); or antiently if the parties even shook hands upon the bargain (*h*),—in any of these cases, the property in the goods is thereupon transmuted, and vests immediately in the bargainee (*i*); so that in the event of their being subsequently damaged or destroyed, the vendee and not the vendor must in general stand the loss (*k*). This supposes the case of a sale for ready money; but if it be a sale of goods on credit, *i.e.*, a sale of goods to be delivered forthwith, but to be paid for afterwards, the property passes to the vendee immediately upon the striking of the bargain, without either delivery of the goods on the one

(*g*) *Earnest* is called in the civil law *arra* (see Inst. 3, t. 23).

(*h*) 2 Bl. Com. 488; Stiernh. de Jure Goth. l. 2, c. 5.

(*i*) Act 1893, ss. 17, 18.

(*k*) Act 1893, s. 20; Shep. Touch. 224, 225; Hinde *v.* Whitehouse, 7 East, 571; M'Bain *v.* Wallace, 6 App. Ca. 588.

hand, or payment or tender of payment on the other (*l*); but no property would, in such a case, pass, if the purporting vendee was a mere fraudulent person who had no intention whatever of paying the price (*m*). Moveover, these remarks as to the property passing must be understood as referring only to a sale of *specific* goods; for, in other cases, the property passes not until the particular goods are ascertained, and (so to speak) made *specific* by weighing out, or by severance or otherwise (*n*); and also as referring to cases where the goods are at the time of sale in a condition to be immediately delivered; for while any previous act remains to be done to them on the part of the vendor, the property in the goods remains in him, and the goods accordingly continue at his risk (*o*); and sometimes, as in the case of ships which are being built under a contract to pay piecemeal as certain parts of the vessel are completed (*p*), the property passes piecemeal from the vendor into the vendee. It must be borne in mind, however, that there is a great distinction between the vesting of the property in goods and the vesting of the right to the possession thereof (*q*); for even in the case of a sale of specific and finished goods (if for ready money), the vendee cannot take the goods until he pays or tenders the whole price agreed on (*r*); though if he tenders the money to the vendor, and the latter refuses it, the vendee may seize the goods, or have an action against the vendor for detaining them (*s*).

Also, what we have said with regard to the contract of sale, must be taken as subordinate to the specific provision

(*l*) Hob. 41; Noy, Max, 87; Dy. 30, 76; Shep. Touch. 222; Clarke *v.* Spence, 4 Ad. & El. 469.

(*m*) Noble *v.* Adams, 7 Taunt. 59; Cundy *v.* Lindsay, 3 App. Ca. 459.

(*n*) Act 1893, s. 16; Simmons *v.* Swift, 5 Barn. & Cr. 864; Dixon *v.* Yates, 5 Barn. & Ad. 340.

(*o*) Young *v.* Matthews, Law Rep., 2 C. P. 127.

(*p*) Clarke *v.* Spence, 4 Ad. & El. 448; Seath *v.* Moore, 11 App. Ca. 350.

(*q*) 2 Kent, Com. 387.

(*r*) Act 1893, s. 38.

(*s*) Waterhouse *v.* Skinner, 2 Bos. & P. 447.

contained in the Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), s. 4, repealing but re-enacting the like provision contained in the Statute of Frauds, (29 Car. II. c. 3,) s. 17, whereby it has been enacted, that no contract for the sale of any goods, wares, or merchandizes, *for the price of* 10*l. sterling, or upwards*, shall be enforceable by action (formerly, should be allowed to be good),—except the buyer shall either accept part of the goods, and actually receive the same (*t*); or unless he shall give something in earnest to bind the bargain, or in part payment (*u*); or unless some memorandum or note in writing of the bargain be made and signed by the party to be charged with such contract, or his agent thereunto lawfully authorized (*x*). And it has been further specifically provided, by the Sale of Goods Act, 1893, repealing but re-enacting the like provision contained in the 7th section of Lord Tenterden's Act (9 Geo. IV. c. 14), that the requisites above stated shall apply to every contract for the sale of goods of the value aforesaid, notwithstanding that the goods may be intended to be delivered at some future time (*y*), or may not, at the time of the contract, be actually made, procured, or provided, or fit or ready for delivery, or notwithstanding that some act might be requisite for the making or completing thereof, or for rendering the same fit for delivery (*z*). And we will here observe, that where the contracting parties rely on the memorandum or note in writing, such memorandum or note must (as in the case of the like memorandum or note under the 4th section of the Statute of Frauds) (*a*) contain all the terms of the contract, although these may be made out from two

(*t*) Act 1893, s. 35; Morton *v.* Tibbett, 15 Q. B. 428; Chapman *v.* Withers, 20 Q. B. D. 824.

(*u*) Walker *v.* Nussey, 16 Mee. & W. 302.

(*x*) Richardson *v.* Dunn, 2 Q. B. 218; Sarl *v.* Bourdillon, 1 C. B. (N. S.) 188; Buxton *v.* Rust, Law Rep., 7 Exch. 279; Plevins *v.* Downing, 1 C. P. D. 220.

(*y*) Harman *v.* Reeve, 18 C. B. 587.

(*z*) Elliott *v.* Pybus, 10 Bing. 512.

(*a*) Vide supra, p. 60.

or more writings provided they connect together on the face of them (*b*). It is to be noted, also, that a contract under the 4th section of the Sale of Goods Act, 1893, is not now void, (as it used to be under the repealed 17th section of the Statute of Frauds,) for non-compliance with the statute, so that sect. 4 of the Statute of Frauds and sect. 4 of the Sale of Goods Act, 1893, are now of an effect exactly similar, the contract being in neither case void, but only non-actionable. And note that a contract for the sale of shares in a limited company is not usually within the 4th section of the Statute of Frauds, and hardly ever, if ever, within the 4th section of the Sale of Goods Act, 1893 (*c*); and on the other hand, the mortgage debentures of such a company are almost invariably within the 4th section of the Statute of Frauds (*d*). And we will here further observe, that on a sale of goods by auction, the auctioneer may in general sign as agent for the buyer as well as for the seller,—where such sales are (as they usually are) evidenced by the memorandum or note in writing: and upon such sales,—just as upon the sale of land by auction (*e*),—unless the right to bid is reserved, it is fraudulent on the seller's part to employ anyone to bid on his behalf; but under such reserved right, the seller or any one agent on his behalf may now bid at the auction (*f*).

If the vendor of goods transmit them to the vendee, without receiving payment of the price, and afterwards becomes apprised that the latter is insolvent, the law allows him the privilege of *stoppage in transitu;* that is to say, it entitles him *while the goods are still in their transit, and not yet delivered to the vendee*, to reclaim them, and to

(*b*) Bordell *v.* Drummond, 11 & El. 205; Tempest *v.* Kilner, 3 East, 142; Peirce *v.* Corf, Law Rep., 9 Q. B. 210; and (as to *bought and sold notes*) Sieveright *v.* Archibald, 20 L. J., Q. B. 529; Parton *v.* Crofts, 16 C. B. 11.

(*c*) Humble *v.* Mitchell, 11 Ad. & El. 205; Tempest *v.* Kilner, 3 C. B. 249; Bowlby *v.* Bell, ib. 284; Watson *v.* Spratley, 10 Exch. 223.

(*d*) Driver *v.* Broad, (1893) 1 Q. B. 744.

(*e*) 30 & 31 Vict. c. 48.

(*f*) 56 & 57 Vict. c. 71, s. 58.

determine, or at least to suspend the performance of, the contract of sale (*g*); nor will this right be affected by the vendor having consigned the goods to the vendee under a bill of lading (*h*); but if the vendee or consignee under such a bill has indorsed the bill to a third party for valuable consideration, and the indorsee has received the bill without notice that the consignee was insolvent and the consignor unpaid, his claim, as assignee of the bill of lading, is paramount to the consignor's right of stoppage *in transitu* (*i*); but such an indorsement must (in order to have this effect) be absolute; and if it be by way of pledge or charge only, the right of the unpaid vendor is not defeated thereby, but (subject to the pledge or charge) remains (*k*); and generally the exercise by the vendor of his right of stoppage *in transitu* does not operate of itself to rescind the contract (*l*).

Though, in general, it is only from the owner that any property in goods can be derived, yet goods may, in certain cases, be effectually transferred to a purchaser by one who has himself no title to them; for it is expedient that the buyer, by taking proper precautions, may be secure of his purchase, otherwise all commerce between man and man would be at an end. And, therefore, a sale in market *overt* shall not only be good between the parties, but also be binding on all those that have any right of property in the thing so sold therein (*m*). [And for this purpose, the Mirrour informs us, were tolls established in markets, viz. to testify the making of contracts (*n*); the antient Saxons prohibited, in fact, the sale of anything above the value of 20*d*., unless in open market, and directed every bargain and sale to be contracted in the

(*g*) Act 1893, s. 44; Wentworth *v.* Outhwaite, 10 Mee. & W. 436; Bird *v.* Brown, 4 Exch. 786; Gurney *v.* Behrend, 3 Ell. & Bl. 622; Heinekey *v.* Earle, 8 Ell. & Bl. 410.

(*h*) 18 & 19 Vict. c. 111, s. 2.

(*i*) Act 1893, s. 47; Lickbarrow *v.* Mason, 2 T. R. 63.

(*k*) Act 1893, s. 47; Sewell *v.* Burdick, 10 App. Ca. 74.

(*l*) Act 1893, s. 48.

(*m*) Act 1893, s. 22.

(*n*) Cap. 6, s. 8.

[presence of credible witnesses (*o*). Market overt, in the country, is only held on the special days provided as market days, for particular towns, by charter or prescription; but in the city of London every day, except Sunday, is a market day (*p*). The market place, or spot of ground set apart by custom for the sale of particular goods, is also in the country the only market overt (*q*); but in London every shop in which goods are exposed publicly for sale is a market overt, though only for such things as the owner ordinarily trades in there (*r*). But to the general rule as to the binding effect of a sale in market overt, there are certain exceptions. For if the goods be *crown* property, such a sale will not bind the crown, although it binds infants, femes covert, idiots, or lunatics, and men beyond seas, or in prison. But this assumes that the sale is *bonâ fide;* and therefore if it is not *bonâ fide*, *e.g.*, if the buyer knoweth the property not to be in the seller; or if there be any other fraud in the transaction, as if he knoweth the seller to be an infant or under other disability; or if the sale be not originally and wholly made in the market, or not at the usual hours (*s*),—in any of these cases, the sale is not binding. Moreover, if a man buy his own goods in a market, the sale shall not bind him (so that he shall be compelled to render the price), unless the property had been previously altered by a former sale (*t*). And notwithstanding any number of intervening sales, if the original vendor, who sold without having the property, should come again into possession of the goods, the original owner may take them when found in his hands who was guilty of the first breach of justice (*u*). By which wise regulations, the law has secured the right of the proprietor in personal chattels from being improperly

(*o*) Wilkins's Leg. Anglo-Sax. Ll. Ethel. 10, 12, Ll. Eadg. 80.

(*p*) Taylor *v.* Chambers, Cro. Jac. 68.

(*q*) Godb. 131.

(*r*) 5 Rep. 83; 12 Mod. 521.

(*s*) 2 Inst. 713, 714.

(*t*) Perk. s. 93.

(*u*) 2 Inst. 713.

[divested: so far at least as is consistent with that other necessary policy, that *bonâ fide* purchasers in an open and regular manner shall not be afterwards put to difficulties by reason of the previous knavery of the seller.]

Where there has been a *bonâ fide* purchase in market overt, if the property so bought was *stolen* from the owner, the true owner may prosecute the offender to conviction and thereupon obtain an order of restitution, to which order he will be entitled notwithstanding the intervening sale in market overt (*x*), the *bonâ fide* purchaser in such a case receiving only such (if any) compensation, out of the property of the thief, as the convicting judge may direct (*y*). And if my goods are stolen or in any other way wrongfully taken from me and sold *out* of market overt, my property therein is not altered, and I may re-take them wherever I find them, even from an innocent vendee (*z*); and in aid of this right, it has been enacted by the Pawnbrokers Act, 1872 (in substitution for a previous provision to the same general effect), that a person suspecting any article of which he is the owner to have been unlawfully pawned, and on oath satisfying a justice that there is good cause and probable ground for such suspicion, may obtain a warrant for searching the house of the pawnbroker; and if on such search the goods shall be found, and the property of the claimant proved, he shall be entitled to have them restored (*a*).

There are some species of personal property, moreover, with regard to the transfer of which by sale, special regulations have been made by the legislature. Thus, with regard to *horses*, a purchaser gains no property in one which has been stolen, unless he not only buys it in a fair

(*x*) 2 Inst. 714; 1 Hale, P. C. 543; Act 1893, s. 24; Scattergood *v.* Sylvester, 15 Q. B. 506; Bentley *v.* Vilmont, 12 App. Ca. 471.

(*y*) 30 & 31 Vict. c. 35, s. 9.

(*z*) White *v.* Spettigue, 13 Mee. & W. 603; Cundy *v.* Lindsay, 3 App. Ca. 459.

(*a*) 35 & 36 Vict. c. 93, s. 36; Singer Manufacturing Co. *v.* Clark, 5 Exch. D. 37.

or market overt, but also in accordance with the directions of the statutes 2 & 3 P. & M. c. 7, and 31 Eliz. c. 12 (*b*); by which statutes it was [enacted, that (in effect) a horse so purchased must have been openly exposed in the time of such fair or market for one whole hour together, between ten in the morning and sunset, in the public place used for such sales, and not in any private yard or stable; and that even such sale shall not take away the property of the owner, if within six months after the horse was stolen he puts in his claim before some magistrate where the horse shall be found, and within forty days more after such claim shall prove his property, by the oath of two witnesses, and shall tender to the person in possession such price as the latter *bonâ fide* paid for the horse in market overt (*c*).] And again, with regard to the shares and stock of *joint stock banking companies*, it has in our own times been enacted (by 30 & 31 Vict. c. 29, commonly called Leeman's Act), that all contracts, agreements, and tokens for the sale or transfer of such shares or stock shall be null and void, unless the same shall set forth and designate in writing the distinguishing number or numbers of such shares or stock (*d*),—a provision, however, which is generally ignored on the Stock Exchange, and which appears, at the most, to be applicable only to the sale of shares or stock which the vendor is not (at the time of the sale) possessed of or entitled to dispose of (*e*).

A very interesting question has sometimes been raised in connexion with the sale of personal chattels,—the question being whether the seller warrants his own title to the goods sold: And upon this question it is to be remarked that if a person sell goods and chattels as his own, and the price be paid, and the title prove deficient, he may, in

(*b*) 2 Inst. 713; Act 1893, s. 22.

(*c*) Com. Dig. Market (E); Lee *v.* Boyes, 18 C. B. 599.

(*d*) Seymour *v.* Bridge, 14 Q. B. D. 460; Loring *v.* Davis, 32 Ch. Div. 625.

(*e*) Neilson *v.* James, 9 Q. B. D. 546; Perry *v.* Barnett, 14 Q. B. D. 467; 15 Q. B. D. 388.

general, be compelled to refund the money to the purchaser, on the ground of a total failure of the consideration; and the better opinion was, that a warranty of *title* is implied on a sale of goods unless the circumstances of the sale are such as to fairly exclude the implication (*f*); and that is the view now adopted by the Sale of Goods Act, 1893, s. 12,—which Act has also (by the same section) added an implied warranty for quiet enjoyment. But with regard to the *soundness* of the wares purchased, the vendor is not (according to our law) bound to answer, unless he expressly warrants them to be sound (*g*); or unless he knew them to be faulty, and yet represented them to be sound or used any art to disguise them (*h*)—the maxim in such cases being, in general, *caveat emptor;* and the application of this maxim is not affected by the circumstance, that the price was such as is usually given for a sound commodity. But the civil law was more favourable to the purchaser in these particulars (*i*); and even in our own law, the maxim is subject to qualification; for upon a contract for the purchase of goods of any particular denomination, where the purchaser has no opportunity of inspecting them before they are delivered, there is an implied warranty, on the part of the seller, that they shall be of a quality saleable in the market under the denomination in question (*k*); and, whether there is an opportunity of inspection by the buyer or not, the seller of an ordinary commodity manufactured in the particular instance by himself, and bought for a known and ordinary purpose, impliedly warrants that it has no latent defect to make it unfit for such known and ordinary purpose (*l*); and all these principles are recognized by, and re-formulated in, the Sale of Goods Act, 1893,

(*f*) Sims *v.* Marryat, 17 Q. B. 281; Hall *v.* Conder, 2 C. B. (N. S.) 40.

(*g*) Act 1893, s. 14; Chandeler *v.* Lopus, Cro. Jac. 4; Ormrod *v.* Huth, 14 Mee. & W. 664; Hall *v.* Conder, ubi sup.

(*h*) 2 Roll. Rep. 5.

(*i*) Maynz, Elćments du Droit Romain, s. 296.

(*k*) Act 1893, ss. 13, 15; Brown *v.* Edgington, 2 Man. & Gr. 279; Gompertz *v.* Bartlett, 2 Ell. & Bl. 849.

(*l*) Act 1893, s. 14; Chanter *v.*

ss. 13—15. Of course, there may in all cases be, if the parties so choose, an *express* warranty, either as to title or as to the soundness or other quality of the article; and the use of the word *warrant* is not in any case essential, for a mere representation may amount to a warranty, if a warranty was thereby intended (*m*)—which intention will be a question for the jury (*n*).

In mercantile transactions, the sale of goods is frequently effected by means of *factors* or *brokers*,—both being agents remunerated by a commission, though otherwise differing considerably in their capacities; for factors are entrusted with the possession of the goods, and are authorized to sell them in their own names, as the apparent owners; while brokers as such have no such possession or authority, but act avowedly as agents simply for the two contracting principals; also, within the city of London, brokers were at one time required to be licensed or admitted by the lord mayor and aldermen, but this is no longer so (*o*), so that factors and brokers are now in that particular alike. Furthermore, neither factors nor brokers are, generally speaking, answerable for the due payment of the price by the party to whom they sell (*p*); but if a factor makes sales on what is called the *del credere* system, he undertakes to be responsible for the price, receiving on that account a higher commission from his employer (*q*); and by the custom of merchants or of any particular trade, the broker may also be personally responsible (*r*).

Hopkins, 4 Mee. & W. 399; Shepherd *v.* Pybus, 2 Man. & Gr. 868; Randall *v.* Newson, 2 Q. B. D. 102; Drummond *v.* Van Ingen, 12 App. Ca. 284.

(*m*) Act 1893, s. 11; Thorogood's case, 2 Co. Rep. 9 a, b.

(*n*) Vernon *v.* Keyes, 12 East, 632; Hopkins *v.* Tanqueray, 15 C. B. 130.

(*o*) 6 Anne, c. 68; and 57 Geo. 3 (local), both repealed by 33 & 34 Vict. c. 60, and 47 Vict. c. 3.

(*p*) Baring *v.* Corrie, 2 Barn. & Ald. 137; Parton *v.* Crofts, 16 C. B. (N. S.) 11; Barry *v.* Croskey, 2 J. & H. 1; Perry *v.* Barnett, 15 Q. B. D. 388.

(*q*) Couturier *v.* Hastie, 8 Exch. 40, 56; 9 Exch. 102; Sutton *v.* Grey, 1894, 1 Q. B. 285.

(*r*) Pike *v.* Ongley, 18 Q. B. D. 708.

At common law, if a factor or broker, or any agent entrusted with the possession of goods, disposed of them to a stranger in a way not warranted by the nature of his authority,—or even if he pledged them when authorized only to sell,—the title so derived from him would have been ineffectual against his principal (*s*). But, for the protection of third persons dealing with factors and other persons entrusted with the possession of goods, or with the written *indicia* of property therein, and the extent of whose authority there was no practicable means of ascertaining, the statutes 4 Geo. IV. c. 83; 6 Geo. IV. c. 94; 5 & 6 Vict. c. 39; and 40 & 41 Vict. c. 39, commonly called the "Factors Acts, 1823 to 1877," were from time to time passed by the Legislature; the short effect of which statutes was, that sales and mortgages effected by factors with *bonâ fide* purchasers and *bonâ fide* mortgagees were in general rendered valid as against the principals of such factors (*t*); and although all these four last-mentioned Acts have now been repealed, their provisions have been re-enacted, with amendments, by the Factors Act, 1889 (52 & 53 Vict. c. 45); and this last-mentioned Act is of such importance in the law of mercantile contracts, that some detailed statement of its provisions may here be acceptable. The Act, then, after defining a "mercantile agent" as one "who in the customary course of his business as agent has authority either to sell goods, or to consign goods for the purpose of sale, or to buy goods, or to raise money on the security of goods," provides (in effect) as follows:—(1) That where a mercantile agent is, with the consent of the owner, in possession of goods or of the documents of title to goods (that is to say, of the bill of lading, delivery order, or the like), any sale, pledge, or other disposition of the goods made by him in the ordinary course of his business shall

(*s*) Paterson *v.* Tash, 2 Str. 1178; Daubigny *v.* Duval, 5 T. R. 604.

(*t*) Sheppard *v.* The Union Bank of London, 7 H. & N. 661; Kaltenbach *v.* Lewis, 10 App. Ca. 617.

be as valid as if he were expressly authorized by the owner to make the sale, pledge, or disposition, *scil.* in favour of third persons taking under the disposition in good faith (sect. 2); and (2) That a pledge of the documents of title to goods shall be deemed to be a pledge of the goods (sect. 3); but (3) That where the pledge is for an antecedent debt, the pledgee shall acquire no further right than the pledgor had at the time (sect. 4); and with reference to the consideration necessary for the validity of any such sale, pledge, or other disposition, the Act provides, (4) That it may be either a payment in cash or the delivery or transfer of other goods (or of the documents of title to other goods) or the delivery or transfer of a negotiable security, or (in fact) any other valuable consideration; but where the consideration is the delivery or transfer of other goods (or of the documents of title to other goods) or of a negotiable security, the pledgee shall acquire no right or interest in the pledge beyond the value of the consideration (sect. 5). And with regard to consignors and consignees, the Act provides, (5) That, where the consignor has so parted with the possession as aforesaid, for such purposes of disposition by or through a third party as aforesaid, the consignee shall, in respect of advances made by him to or for the use of such third party on pledge of the goods, have the same lien on the goods as if such third party were the owner of the goods, and may transfer such lien accordingly (sect. 7). And with regard to sellers and buyers generally, the Act provides, (6) That where the seller (after a sale thereof) continues in possession of the goods (or of the documents of title thereto), any delivery or transfer made (on a purported sale or pledge) by the seller (or by his mercantile agent) of the goods (or of the documents of title thereto) to any person receiving the same in good faith, shall have the same effect as if the delivery or transfer were fully authorized (sect. 8); (7) That where the buyer (*scil.*, being a trade-vendee who buys to re-sell, but not an

ordinary buyer, surely) obtains, with the consent of the seller, possession of the goods (or of the documents of title thereto) before payment, any delivery or transfer made (on a purported sale or pledge) by the buyer (or by his mercantile agent) of the goods (or of the documents of title thereto) to any person receiving the same in good faith, shall have the same effect as if the delivery or transfer were fully authorized (sect. 9) (*u*); and (8) That where the lawful transferee of a document of title to goods transfers the document to any person receiving the same in good faith and for value, such second transfer shall defeat any lien or right of stoppage *in transitu* which the first transferor would have had, or would have been entitled to exercise over the goods (sect. 10). But all these provisions being designed merely for the protection of *bonâ fide* purchasers and pledgees, and only to the extent of their purchases or pledges, it follows of course (and the Act also expressly provides) (sect. 12), That (subject always to the purchase or pledge being treated as valid) the principal (or owner) may (1) recover the goods from the agent (or from his trustee in bankruptcy) at any time before the actual sale or pledge thereof; or (2) redeem the goods at any time (before the sale thereof) on satisfying the pledgee the amount of the pledge; or (after a sale of the pledge) recover from the pledgee the surplus sale proceeds; or (3) recover from the buyer (subject to any right of set-off between him and the agent) the price remaining unpaid in the hands of the buyer. Also, save in cases to which the Act applies, the common law rule would still be applicable; so that, *e.g.*, an agent intrusted with jewellery to sell on commission, could not make a valid pledge thereof, for he is not a "mercantile agent" within the meaning of the Act (*v*).

(*u*) Sale of Goods Act, 1893, s. 25; Lee *v.* Butler, (1893) 2 Q. B. 318; Helby *v.* Matthews, (1894) 2 Q. B. 262.

(*v*) Hastings *v.* Pearson, (1893) 1 Q. B. 62.

II. *The Contract of Bailment.*—Bailment, from the French *bailler*, to deliver, is a delivery of goods for some purpose, upon a contract, express or implied, that, after the purpose has been fulfilled, the goods shall be re-delivered to the bailor, or shall be otherwise dealt with according to the bailor's directions, and shall in the meantime be kept till he reclaims them (*x*). [Thus, if cloth be delivered to a tailor, to make a suit of clothes, he has the cloth upon an implied contract to render it again when made; or again, if money or goods be delivered to a common carrier, to convey from Oxford to London, he is under a contract to carry them to the place appointed (*y*); and if a horse or other goods be delivered to an innkeeper, he is bound to keep them safely, and to restore them when his guest leaves the house (*z*). So also, if a man take in a horse or other cattle to graze and depasture in his grounds, which the law calls *agistment*, he takes them upon an implied contract to return them, on demand, to the owner (*a*). And if a debtor bail goods to his creditor by way of pledge or *pawn*, the pawnee has them on the condition of restoring them on the debt being discharged (*b*); and a pawnbroker who receives plate or jewels as security for the repayment of money lent, has them upon a contract or condition to restore them if the borrower redeem them in due time (*c*);] which he may do at any time while the goods still remain in the hands of the pawnbroker unsold (*d*): and in the case of pawnbrokers, and in order to provide for the due execution of this contract where the loan does not exceed 10*l*., many useful provisions are contained in the Pawnbrokers Act,

(*x*) 2 Bl. Com. 451; Jones on Bailm. 1; Story on Bailm. 2.

(*y*) Lane *v*. Cotton, 12 Mod. 482; Black *v*. Baxendale, 1 Exch. 410.

(*z*) Cross *v*. Andrews, Cro. Eliz. 622.

(*a*) Chapman *v*. Allen, Cro. Car. 271; Corbett *v*. Packington, 6 Barn. & Cress. 268.

(*b*) Jones on Bailm. pp. 36, 118.

(*c*) Ratcliff *v*. Davis, Cro. Jac. 245.

(*d*) Walter *v*. Smith, 5 Barn. & Ald. 439.

1872 (*e*). Again, if one should deliver anything to his friend to keep for him, the friend is bound to restore it on demand (*f*),—this being the contract of *depositum ;* and if you lend any chattel (*e.g.*, your reading-desk) to your friend, although for your friend's use in the meantime, he is bound to return it when the period of the loan is expired,—this being the contract of *commodatum ;* and these two contracts, namely, depositum and commodatum are both of them gratuitous, that is to say, without fee or reward ; but if a chattel be let out on hire for a stipulated time, or for a particular service, the hirer is under an obligation to restore it when the time is run out, or the service performed,—this being the contract of *locatio rei*, which is always for payment; and there may also be a *locatio operarum*, which is in fact simply a contract for services to be rendered ; and a *locatio operis faciendi*, which is merely a contract for the construction of some building or other work (*g*).

And with reference to the duties of the bailee, it is to be observed, that there is a difference in the degree of the responsibility attaching to each ; for first, upon a bailment which is for the mutual benefit of bailor and bailee, the latter is liable for *negligence*, viz. for the omission of that degree of diligence which a man of common prudence takes of his own concerns ; secondly, upon a bailment from which the bailee derives no benefit, nothing short of *gross* negligence will make him responsible ; and thirdly, upon a bailment for the bailee's own exclusive benefit, he will be chargeable even for *slight* negligence ; but in no case is a bailee as such liable for a robbery or other casualty (*h*). These rules, however, are subject to excep-

(*e*) 35 & 36 Vict. c. 93, repealing 39 & 40 Geo. 3, c. 99, and other previous enactments with regard to pawnbrokers.

(*f*) 2 Bl. Com. p. 452.

(*g*) Jones on Bailm. 118, 119.

(*h*) Coggs *v.* Bernard, Ld. Raym. 909 ; Doorman *v.* Jenkins, 2 Ad. & El. 256 ; Wilson *v.* Brett, 11 Mee. & W. 113 ; Syred *v.* Carruthers, 1 E. & E. 469.

tions in the case of some particular kinds of bailees (as we shall have occasion presently to explain); and they are in every case liable to be controlled by any express contract of the parties.

[Moreover, in all bailments a special or qualified property is transferred (along with the transfer of the possession) from the bailor to the bailee (*i*); not, however, an absolute property, because of the bailee's contract for restitution; and the absolute property remains therefore in the bailor. Nevertheless, and on account of this qualified property of the bailee, he, as well as the bailor, may maintain an action against such as injure or take away the chattel; therefore, the tailor, the carrier, the innkeeper, the agisting farmer, the pawnbroker, the borrower, the hirer, or any other bailee, may respectively vindicate, in their own right, this their possessory interest, against any stranger or third person (*k*).] For the bailee being responsible to the bailor, if the goods be damaged while in his custody, or if he do not deliver them up on lawful demand, it is reasonable that he should have a right of action against those who may injure them or take them away; so that he may always be ready to answer the call of the bailor.

Bailees have also, in certain instances, a right of *lien*, in respect of the goods committed to their charge,—this lien being the right which the bailee has to retain the possession of the chattel entrusted to him until his claim upon it is satisfied; and the rule of law is, that every person to whom a chattel has been delivered for the purpose of bestowing his labour upon it, has a lien thereon; and that he may withhold it from the owner (in the absence at least of any usage or special agreement to the contrary) until the price of that labour is paid; *e.g.*, the tailor is not bound to deliver up the clothes which he has made, except upon receiving the price which is justly due for the

(*i*) Vide supra, p. 8.

(*k*) Heydon's case, 13 Rep. 69.

making (*l*); and the lien in all such cases is what is called a *particular* lien. But the law also recognizes a *general* lien; which is the right of a bailee, in particular cases or under particular circumstances, to detain a chattel from its owner until payment be made, not only of the expenses incurred on that particular article, but of any balance that may be due to the bailee on a general account between the bailor and himself. These general liens depend entirely upon the contract between the parties, whether such contract is express or is only implied from the usage of the particular trade or from the previous course of dealings (*m*); which usage it has been expressly decided exists in the case of solicitors, bankers, auctioneers, factors, packers, and warehousemen; and all such bailees have consequently a lien for the amount of the general balance due to them from their customers (*n*); which lien (we have just seen) exists also, under the Factors Act, 1889 (*o*), in favour of consignees of goods and others (*p*); and, of course, a pledgee or pawnee has a right to detain the chattel until the amount of the loan is discharged; and besides, he may sell the chattel, and also sub-pledge it,—but, in either case, only for the necessary purposes of the bailment.

And we must now consider more particularly these two classes of bailees, namely, *innkeepers* and *carriers*. And first, a *common innkeeper*, which term includes in law the keeper of every tavern or house of public entertainment in which lodging for travellers is provided (but not a boarding-house

(*l*) Chapman *v.* Allen, Cro. Car. 272.

(*m*) Reeves *v.* Capper, 5 Bing. N. C. 136; Legg *v.* Evans, 6 Mee. & W. 36; British Empire Shipping Company *v.* Soames, 1 E. & E. 353; Weeks *v.* Goode, 6 C. B. (N. S.) 367.

(*n*) Hollis *v.* Claridge, 4 Taunt. 807; Cumpston *v.* Haigh, 2 Bing. N. C. 449; Robinson *v.* Rutter, 4 Ell. & Bl. 954; Snead *v.* Watkins, 1 C. B. (N. S.) 267; Brunsdon *v.* Allard, 2 Ell. & Ell. 19; Webb *v.* Smith, 30 Ch. Div. 192.

(*o*) Vide supra, p. 85.

(*p*) As to certain *interim hypothecations* of goods not requiring to be registered as bills of sale, see 53 & 54 Vict. c. 53; 54 & 55 Vict. c. 35.

keeper (*q*), nor a lodging-house keeper) (*r*), is held responsible by the common law for the goods and chattels brought by any traveller to his inn, in the capacity of guest there, in every case where they are either lost, damaged, or stolen (*s*); to which rule there is no exception permitted by the common law, except where it would be obviously unjust to apply the rule, as, for example, where the goods are stolen from the traveller's own person or by his own servant or companion, or from a room which he occupied otherwise than as a mere guest (*t*); or where they are lost entirely through the guest's own gross negligence (*u*). However, by the Act 26 & 27 Vict. c. 41, the rule of the common law has been to some extent modified, it being thereby enacted to the effect following, that is to say,—that no innkeeper shall be liable to make good to a guest any loss or injury to goods or property brought to his inn (not being a horse or other live animal or any gear appertaining thereto, or any carriage—the liability as to which remains as at common law), to a greater amount than 30*l.*, except the goods be stolen, lost, or injured through the wilful act, default, or neglect of the innkeeper or his servant, or unless they have been deposited expressly for safe custody with the landlord; and in order to claim the benefit of the Act, it is only required of the innkeeper, that a copy of this provision should be conspicuously exhibited in his inn (*x*). And note, that a common innkeeper is one who has no option as to the customer with whom he will deal, being legally bound to receive and entertain every traveller who presents himself for that purpose, and who is ready to pay his expenses, provided only there be suffi-

(*q*) Dansey *v.* Richardson, 3 Ell. & Bl. 144.

(*r*) Holder *v.* Soulby, 8 C. B. (N. S.) 254.

(*s*) Thompson *v.* Lacy, 3 B. & Ald. 283; Doe *v.* Laming, 4 Camp. 77.

(*t*) Richmond *v.* Smith, 8 Barn. & Cress. 11.

(*u*) Calye's case, 8 Rep. 32; Morgan *v.* Ravey, 6 H. & N. 265; Oppenheim *v.* The White Lion Hotel Company (Limited), Law Rep., 6 C. P. 515.

(*x*) Spice *v.* Bacon, 2 Ex. D. 463.

cient room in the inn, and no impropriety of conduct in the traveller himself (*y*). And note also, that an innkeeper is not entitled to detain the person of his guest, or strip off his clothes, in order to secure the payment of the charges which have been incurred; but he has a lien on any goods brought by the defaulter into or upon the premises (*z*); and by the Innkeepers Act, 1878 (*a*), in aid of his lien, he is invested with the right to sell by public auction (after an interval of six weeks, and having first given due notice to the owner) any goods, chattels, carriages, horses, wares, or merchandise deposited or left with him on his premises, in cases where the party depositing or leaving the same has become indebted to him for board or lodging, or for the keep of a horse or other animal left at livery; and any surplus of the sale-proceeds is to be paid over to the owner.

Secondly, a *common carrier*, that is to say, one who professes to carry from one place to another such goods as shall be delivered to him for carriage by any person (*b*), is looked upon by the common law as an insurer of the goods delivered to him to be carried; that is to say, he is answerable for every loss or injury to such goods, not occasioned by the act of God, or the Queen's enemies (*c*); he is moreover bound to receive, and without unreasonable delay to forward to their destination (being within the limits of his accustomed journeys), the goods of every applicant who is ready to pay the price of carriage, provided he has room for them in his conveyance (*d*); but to this liability of

(*y*) Fell *v.* Knight, 8 Mee. & W. 269; The Queen *v.* Rymer, 2 Q. B. D. 136.

(*z*) Broadwood *v.* Granara, 10 Exch. 417; Allen *v.* Smith, 12 C. B. (N.S.) 638; Mulliner *v.* Florence, 3 Q. B. D. 484; Angus *v.* McLachlan, 23 Ch. Div. 330.

(*a*) 41 & 42 Vict. c. 38.

(*b*) Bennett *v.* The Peninsular Steam Boat Company, 6 C. B. 787.

(*c*) Co. Litt. 89; Coggs *v.* Bernard, Ld. Raym. 918; Nugent *v.* Smith, 1 C. P. D. 19; Patscheider *v.* Great Western Railway Company, 3 Ex. D. 153.

(*d*) Riley *v.* Horn, 5 Bing. 217; Pickford *v.* Grand Junction Railway Company, 9 Dowl. 769.

carriers, an exception is permitted in case of any gross negligence in the way of packing or otherwise on the part of the owner of the goods (*e*); and the liability may be varied by a special contract between the parties relative to the terms on which any particular goods are to be carried. It was competent also to the carrier, by a public notice of the terms on which he would deal (as by a notice that he would not be liable for goods beyond a certain value, unless booked as such, and paid for at a higher rate), to limit to a certain extent the measure of his liability; for upon proof—direct or presumptive (*f*),—that such notice came to the knowledge of the customer, before the goods were sent, the law would suppose a special contract between the parties conformable to the terms of the notice (*g*); and such is still the law with respect to the liability of common carriers (whether by land or water), except as otherwise provided for by statute,—the statutory provisions which have modified in some respects the common law liability being shortly as follows:—

First, as to carriers *by land*:—The Carriers Act (11 Geo. IV. & 1 Will. IV. c. 68) has provided, that no public notice shall limit or in anywise affect the carrier's liability as existing at common law, for any goods in respect whereof he is not entitled to protection under the Act; and it proceeds to enact, that no carrier by land shall be liable for any loss or injury to gold or silver coin, jewellery, lace (not including machine-made lace) (*h*), engravings, and a variety of other articles specified in the Act, *when the aggregate value of the parcel delivered for carriage shall exceed ten pounds*,—unless at the time of delivery the value and nature of the contents shall have been declared, and such increased freight paid thereon, as by a

(*e*) Robinson *v.* Dunmore, 2 Bos. & Pul. 419.

(*f*) Davis *v.* Willan, 2 Stark. R. 279; Mayhew *v.* Eames, 3 Barn. & Cress. 604.

(*g*) Nicholson *v.* Willan, 5 East, 507; Garnett *v.* Willan, 5 B. & Ald. 61.

(*h*) 28 & 29 Vict. c. 94.

legible notice affixed in the office of the carrier shall have been previously advertised to the public as the scale by which such articles will be charged for (*i*); and that if no such notice shall have been affixed, or increased charge demanded on the value being declared (*k*), or if the carrier shall refuse (on being paid the increased charge) to give a receipt acknowledging the parcel to be insured, or if loss or injury arise from the *felonious* act of a servant in the carrier's employ (*l*), then he shall not be entitled to the benefit of the statute, but shall remain liable as at common law; and the Act contains also a proviso, that nothing contained therein shall affect any *special* contract between the carrier and the customer, or shall protect any servant of the carrier from liability or loss occasioned by his own personal neglect or misconduct. Moreover, the liability of *railway, canal,* and *navigation companies* in respect of the carriage of goods is the same (except as varied by any special enactment) with that of other carriers; and the brief general effect of the Acts relating especially to these companies may (so far as this question of liability is concerned) be stated as being, to prevent such companies (regarded as common carriers) from entering into special contracts limiting their common law liability with respect to the receipt, forwarding, and delivery of goods, unless the conditions of the special contract are *reasonable;* and the contract must be a written contract, signed by or on behalf of the consignor; and the reasonableness of the conditions is determined by the judge, before whom the action comes to be tried, in which the special contract is raised as a defence by the company (*m*).

(*i*) Hearn *v.* L. & S. W. Railway Company, 10 Exch. 800; Bernstein *v.* Baxendale, 6 C. B. (N. S.) 251; Woodward *v.* London & N. W. Railway Company, 3 Ex. D. 121.

(*k*) Behrens *v.* The Great Northern Railway Company, 7 H. & N. 950.

(*l*) Way *v.* Great Eastern Railway Company, 1 Q. B. D. 692; Stephens *v.* London and South Western Railway Co., 18 Q. B. D. 121.

(*m*) 8 & 9 Vict. cc. 20, 42; 17 & 18 Vict. c. 31; 31 & 32 Vict. c. 119;

But, of course, as regards passengers' luggage, the contract of carriage being for the carriage of the passenger himself as well, if he interfere with the luggage, he may himself be taken to have contributed to the loss of it; and when, *e. g.*, he takes it into the carriage with him, he may reasonably be deemed to have assumed the entire custody of it; and the liability of the carrying company in such cases is very difficult to determine, being mostly dependent on the particular facts in each case of loss (*n*). There are also, as regards the carriage of such substances as petroleum and dangerous explosives generally, specific statutory provisions which it does not fall within the scope of this discussion to further refer to, than as referred to in the footnote (*o*).

Nextly, as to carriers *by sea*:—It is to be observed, that the liability of a ship-owner—though he is in contemplation of law a common carrier, if the ship be ordinarily hired to carry goods—does not usually rest on the common law rule, but on a special contract created between the parties, by the bill of lading or charterparty which usually attends a shipment of goods (*p*); and such contract is commonly framed so as to exempt the carrier by sea from loss or injury occasioned by the act of God, or of the Queen's enemies, or by the perils of the deep (*q*). And the Merchant Shipping Act, 1894 (57 & 58 Vict. c. 60), s. 502, continuing the like provision contained in the Merchant Shipping Act, 1854 (17 & 18 Vict. c. 104), has provided, that no owner of any sea-going ship, or of any share therein, shall be liable to make good any loss or

36 & 37 Vict. c. 48; 51 & 52 Vict. c. 25; 55 & 56 Vict. c. 44; and 57 and 58 Vict. c. 54; Peek *v.* The North Staffordshire Railway, 10 H. L. 473; Great Western Railway Company *v.* McCarthy, 12 App. Ca. 218.

(*n*) Bergheim *v.* G. E. Rail. Co., 3 C. P. D. 221; G. W. Rail. Co. *v.* Bunch, 13 App. Ca. 31.

(*o*) 38 & 39 Vict. c. 17; 42 & 43 Vict. c. 47; 44 & 45 Vict. c. 67; 57 & 58 Vict. c. 60, ss. 446—450.

(*p*) Laveroni *v.* Drury, 8 Exch. 166; Shand *v.* Peninsular and Oriental Company, 3 Moore, P. C. (N. S.) 272.

(*q*) De Rothschild *v.* Royal Mail Steam Packet Company, 7 Exch. 734.

damage, *occurring without his own actual fault or privity*, to goods or things on board, by reason of fire breaking out on board; or to any gold, silver, diamonds, watches, jewels, or precious stones, occasioned by robbery or embezzlement,—unless the true nature and value of such articles shall have been declared in writing to the master or owner; and in the cases to which the foregoing provisions do not extend, the same Act (by sect. 503) has further provided, in continuance of the like provision contained in the 25 & 26 Vict. c. 63, that, in respect of any loss or damage to goods which occurs *without his own actual fault or privity*, no shipowner shall be answerable to an aggregate amount exceeding 8*l.* for each ton of the ship's tonnage (*r*), such tonnage in the case of sailing vessels being their registered tonnage, and in the case of steam vessels their gross tonnage without deduction of engine room.

III. *The Contract of Loan.*—The contract now referred to (being for the loan of money, and which was called *mutuum* by the civilians in order to distinguish it from the *commodatum* already spoken of) differs from the ordinary contract of bailment, inasmuch as the money which forms its subject is not to be re-delivered to the lender, or disposed of according to his direction, but is to be applied to the use and according to the wishes or the necessities of the borrower, the borrower yielding afterwards to the lender an equal sum by way of re-payment; in addition to which re-payment, there is commonly also yielded an increase, by way of compensation for the use of the sum advanced, and which increase is called *interest*. [In former times, it was considered by many good and learned men, that all increase of money by way of interest was against conscience, for that it was forbidden by the law of Moses; and also that it was against nature even, for (as Aristotle had said) (*s*) money was barren; and to make it breed

(*r*) The Warkworth, 9 Prob. Div. 20, 145.

(*s*) Polit. l. 1, c. 10.

[money therefore was preposterous, and a perversion of the very purpose of its institution, which was only to serve as the medium of exchange, and the canon law accordingly proscribed the taking of interest as a mortal sin (*t*).

All which objections have been at all times little regarded, and perhaps have been the least regarded of all people by the very people to whom the law of Moses is an object of the supremest regard; and the practice of taking interest on loans has in general been sanctioned by all legislators both antient and modern, and there has prevailed at the most a desire to restrict by positive enactment the exorbitancy of the interest which might be lawfully taken. For example, the Romans, whose law of the Twelve Tables prescribed *fœnus unciarium* (or 10*l.* per cent. per annum), afterwards allowed *centesimæ*, that is to say, 1*l.* per cent. monthly, or 12*l.* per cent. per annum; but Justinian reduced it (as the general rate) to 4*l.* per cent., allowing higher interest (rising even to 12*l.* per cent.) to be taken where the hazard was greater (*u*). So, too, as Grotius informs us, the rate of interest in Holland was in his day 8*l.* per cent. in the case of common loans, but 12*l.* in the case of loans to merchants (*x*); and Lord Bacon was desirous of introducing a similar policy into England (*y*), where in general the amount of interest was limited, and did not vary according to the hazard, and all interest beyond the legal limit (or *usury*) was prohibited: but the legal rate with us has persistently varied downwards as the wealth of the kingdom has increased, by accessions of trade, the introduction of paper credit, and other circumstances; *e.g.*, the statute 37 Hen. VIII. c. 9, limited the rate of interest to 10*l.* per cent.; which limit was retained by the statute 13 Eliz. c. 8; but the statute 21 Jac. I. c. 17, reduced it to 8*l.* per cent.; and the statute 12 Car. II. c. 13, reduced it to 6*l.* per cent.;] and

(*t*) Decretal. l. 5, tit. 19.

(*u*) Cod. 4, 32, 36; Nov. 33, 34, 35; Maynz. s. 266; Lord Mackenzie, p. 196.

(*x*) De Jure B. et P. l. 2, 12, 22.

(*y*) Essays, c. 41.

lastly, the statute 13 Ann. c. 15, reduced it to 5*l.* per cent., —which last-mentioned rate continued the maximum legal rate, in this country, until all the laws in restraint of usury were repealed, as will be presently mentioned.

There were, however, at all times certain cases in which the legal rate of interest (even before the repeal of the laws against usury) was subject to no restriction whatever; *e.g.*, when the contract bearing interest was made in a foreign country, in which case the interest was payable according to the law of the country in which the contract was made (*z*): and again, when the right to recover the money lent was, by the terms (express or implied) of the loan, put in jeopardy,—which latter species of hazard being a very different matter from the ordinary risks of insolvency, was esteemed a sufficient consideration for allowing a rate of interest higher than the legal rate; and this class of case always stood clear of the enactments against usury (*a*). The sort of peculiar hazard referred to was supposed to occur in the case of *bottomry* (or *respondentia*) bonds, and in the case of *annuities upon lives;* and it is proper here to make some few observations on each of these two peculiar species of loans.

[And first, *bottomry* is in the nature of a mortgage of a ship, when the owner takes up money to enable him to carry on his voyage; and pledges the keel or *bottom* of the ship (*partem pro toto*) as a security for the re-payment (*b*); and this pledge may be given, and a valid contract of bottomry (or of hypothecation) (*c*) entered into, even by the master of the vessel,—*scil.* in a case of absolute necessity and to the extent only of the necessity (*d*). And it is one of the terms of this contract of bottomry, that, if the

(*z*) 1 Eq. Ca. Ab. 289; Ekins *v.* East India Company, 1 P. Wms. 395.

(*a*) Morse *v.* Wilson, 4 T. R. 356; Mason *v.* Abdy, Carth. 67.

(*b*) Busk *v.* Fearon, 4 East, 319; Simonds *v.* Hodgson, 3 B. & Adol. 50.

(*c*) 2 Bl. Com. 457.

(*d*) The Pontida, 9 Prob. Div. 177.

[ship be lost, the lender loses also his whole money (*e*); but if it returns in safety, then he shall receive back his principal, and also the premium or interest agreed upon; and such premium or interest, whatever its amount, has always been allowed to be a valid contract in all trading nations, for the benefit of commerce, and by reason of the extraordinary hazard run by the lender (*f*),—the ship and tackle being answerable (as well as the person of the borrower) for the money lent; in which particulars, a bottomry bond (properly so called) differs from a *respondentia* bond, the latter not extending to the ship and tackle, but extending only to the goods and merchandize, so that, in general, only the borrower himself personally is bound to answer the contract. These contracts, or contracts analogous thereto, are also sometimes effected on the mere hazard of the voyage itself,—as when a man lends a merchant 1,000*l.*, to be employed in a beneficial trade, upon the condition of being repaid with extraordinary interest, in case such voyage be safely performed (*g*); and the interest or recompense which is payable to the lender on this kind of agreement is called sometimes *fœnus nauticum*, and sometimes *usura maritima* (*h*). And in connection with this subject, we will here mention, that the master of a vessel (in the absence of some special agreement to that effect) is not entitled, under the 24 Vict. c. 10, s. 10, to a lien on the vessel (or *maritime lien*) for his necessary disbursements thereon,—at least as against a purchaser or mortgagee of the vessel (*i*); although the contrary was at one time very generally assumed to be the law (*k*).

Secondly, *annuities for lives* are contracts in which the

(*e*) Thompson *v.* Royal Exchange Company, 1 M. & S. 31.

(*f*) Molloy de Jur. Mar. 361; Bacon's Essays, c. 41; Simonds *v.* Hodgson, 3 B. & Adol. 57.

(*g*) 1 Sid. 27.

(*h*) Malyne, Lex Mercat. b. 1, c. 31.

(*i*) Hamilton *v.* Baker, 14 App. Ca. 209.

(*k*) The Ringdove, 11 Prob. Div. 120; The Orienta, (1894) P. 271.

[borrower of money, being unable to give the lender any tangible security for the return of the money at any given period of time, undertakes or promises (in effect) to repay annually, during his life, some part of the money borrowed, together with interest for so much of the principal as annually remains unpaid, rendering also some additional compensation for the hazard run by the lender of losing the whole or portion of the principal entirely, by the contingency of the borrower's death; all which considerations, being calculated and blended together, will constitute the just proportion or *quantum* of the annuity which ought to be granted.] And as the right to recover the principal was in jeopardy, a transaction of this kind was never looked upon as an usurious bargain (*l*), not even when the life of the borrower was insured for the benefit of the lender, and the amount of the annuity was adjusted to cover the expense of the insurance, or the borrower himself insured his own life, at his own expense, for the benefit of the lender (*m*). But when such annuities were granted, in such manner as to be charged upon or made to issue out of lands, then, in order that it might be ascertained by subsequent purchasers and mortgagees what life annuities had been so charged, they were required at one time to be enrolled under an Act called the Annuity Act (*n*); and that Act having been repealed by the 17 & 18 Vict. c. 90 (the same Act which, as we shall presently see, abolished also the old laws against usury), it was therefore, in the following year, enacted by 18 & 19 Vict. c. 15, ss. 12, 14, that any annuity or rent-charge granted after the passing of the Act, (and not given by marriage settlement or by will,) for one or more life or lives, or for any term of years, or greater estate determinable on one or more life or lives, should not affect any lands, tenements or hereditaments as to purchasers,

(*l*) Lawley *v.* Hooper, 3 Atk. 280; Morris *v.* Jones, 2 Barn. & Cress. 232; Ex parte Naish, 7 Bing. 150.

(*m*) Downes *v.* Green, 12 Mee. & W. 481; Hawkins *v.* Bennet, 7 C. B. (N. S.) 553.

(*n*) 53 Geo. 3, c. 141.

mortgagees or creditors, until a memorandum,—containing the name and the usual or last known place of abode, and the title, trade or profession of the person whose estate was intended to be affected thereby, and the date of the instrument whereby the annuity or rent-charge was granted, and the amount of the annual sum to be paid,—had been left with the senior master of the common pleas (now the registrar of judgments) (*o*); and the particulars aforesaid were to be entered by him in alphabetical order, in the name of the person whose estate was intended to be affected by the annuity or rent-charge, together with the year and the day of the month when every such memorandum or minute was so left with him; and these provisions appear to be still in force.

And recurring for a moment to the subject of the interest on money lent, the opinions of different ages and countries have varied as we have seen,—and naturally so; for on the one hand, it is necessary to protect the needy and the improvident from extortion; and on the other hand, the laws against usury are apt to promote the very evil which they seek to repress; and they impose besides an inconvenient and impolitic restraint upon the price of money, which, like other commodities, might be left (it has been argued) to find its own level in the market; and in our own country, and under the influence of these latter views, the total abandonment of all restrictions upon the rate of interest was accordingly at length resolved upon by the legislature; and this resolution was carried into effect by the 17 & 18 Vict. c. 90, which enacted that the several Acts mentioned in the schedule thereto, and "all existing laws against usury," should be repealed (*p*),—the statute containing the proviso, usual in the case of repealing Acts, that the repeal should not affect the rights, or alter the liabilities, of any person in respect of anything

(*o*) Ord. lxi. rule 22; Judicature Act, 1879, s. 5.

(*p*) Hughes *v.* Lumley, 4 Ell. & Bl. 274.

done previously to the passing of the Act; and also this further proviso, namely, that where interest was at the date of the passing of the Act payable on any contract (express or implied) to pay the legal or current rate of interest,—or where, upon any debt or sum of money, interest was then payable by any rule of law,—the same rate of interest should be recoverable as if the statute had not been passed. But the repeal of the usury laws has in no way interfered with the right to be relieved in a court of equity against exorbitant or iniquitous bargains (*q*).

On the subject of interest, it remains only to remark, that interest may accrue not only upon a contract of loan, but in other cases also; *e.g.*, on a balance admitted to be due. For although the general rule of the common law was against *implying* any contract for the payment of interest on money due, yet to this rule there were certain exceptions, as in the case of overdue bonds, bills, and notes; or where there was a special usage of trade for the allowance of interest; or where the same parties had, in former accounts of the same description, claimed interest on the one side, and allowed it on the other, without objection (*r*). And it has now been provided generally, by the Act 3 & 4 Will. IV. c. 42, s. 28, "that upon all debts "or sums certain (*s*), payable at a certain time or other-"wise," the jury, on the trial of any issue or on any inquisition of damages, may, "if they shall think fit, "allow interest to the creditor at a rate not exceeding the "current rate of interest, from the time when such debts "or sums certain were payable, provided such debts or "sums were payable by virtue of some written instrument "at a certain time; or if payable otherwise, then from the "time when demand of payment of the debt shall have

(*q*) Earl of Aylesford *v.* Morris, Law Rep., 7 Ch. App. 484; Nevill *v.* Snelling, 15 Ch. Div. 679; Fry *v.* Lane, 40 Ch. Div. 312.

(*r*) Farquhar *v.* Morris, 7 T. R. 124; Frühling *v.* Schrœder, 2 Bing. N. C. 77.

(*s*) Attwood *v.* Taylor, 1 Man. & Gran. 279.

"been made in writing, so as such demand shall give "notice to the debtor, that interest will be claimed from "the date of such demand, until the time of payment" (*t*); and further, that the jury may give *damages in the nature of interest*, in actions for the wrongful seizure or conversion of goods, and in actions on policies of insurance; and moreover, that where proceedings in error (or, now, on appeal) are taken by the defendant in an action, and judgment is given for the original plaintiff, interest shall be allowed him for the delay thereby occasioned (*u*). Moreover, by the Act 1 & 2 Vict. c. 100, s. 17, it has since been enacted, that every judgment debt shall carry interest, at the rate of four per cent., from the time of entering up the judgment, until the same shall be satisfied, and that such interest may be levied, as well as the principal, under a writ of execution; also, interest on the costs of the action is allowed, in an action for debt or the like, as from the date of judgment, and in other actions as from the date of the taxing master's certificate or allocatur (*x*).

IV. *The Contract of Partnership.*—This contract is (or arises) where two or more persons carry on any business or adventure together, upon the terms of mutual participation in its profits and losses; and this, whether they are to participate in equal shares or in any other proportions (*y*); or (as defined by the Partnership Act, 1890 (*z*), sect. 1), partnership is "the relation which subsists between persons carrying on a business in common with a view to profit," they not being companies registered under the Companies Acts, 1862 to 1890, or otherwise incorporated, nor being

(*t*) Mowatt *v.* Lord Londesborough, 4 Ell. & Bl. 1.

(*u*) See Levy *v.* Langridge, 4 Mee. & W. 337.

(*x*) Pyman *v.* Burt, W. N. 1884, p. 100; Schrœder *v.* Cleugh, 46 L. J., C. P. D. 365; Order lviii. r. 19.

(*y*) Saville *v.* Robertson, 4 T. R. 727; Green *v.* Beesley, 2 Bing. N. C. 112; Badeley *v.* Consolidated Bank, 38 Ch. D. 238; Davis *v.* Davis, (1894) 1 Ch. 393.

(*z*) 53 & 54 Vict. c. 39.

Cost Book Mining Companies (*i.e.*, companies engaged in working mines within the Stannaries of Cornwall and Devon) (*a*). The number of persons so associated together for any business must not exceed twenty in ordinary cases and ten in the case of a banking business; otherwise, the association will be illegal, unless it be registered as a company (*b*). A partnership is usually constituted by a written agreement, and which agreement is commonly by deed, the provisions of the deed being denominated the articles of partnership; but a partnership may also be constituted without any writing, and may even be implied from the conduct of the parties (*c*). The partners constitute what in law is called a *firm*, and they trade under the *firm-name* (*d*). A partnership may be dissolved, if the period of its proposed duration be indefinite, at the pleasure of either party (*e*); or if, as is more frequent, the partnership be for a term certain, it may be dissolved either by the natural expiration of that term, or, at an earlier period, by the mutual agreement of the parties, or by a decree in equity, provided there are proper grounds for such decree (*f*); and moreover, the death or bankruptcy of any of the partners will, in any case, amount to a dissolution of the firm; *scilicet*, unless (in the case of death) the partnership articles should (as they may) expressly provide against that event (*g*). And lastly, a partnership will be dissolved on the happening of any event which renders its further continuance illegal (*h*).

One of the most important doctrines attaching to the relation of partnership is, that the contract of any member

(*a*) Ricketts *v.* Bennett, 4 C. B. 686; Brown *v.* Ryan, 16 Mee. & W. 252.

(*b*) Companies Act, 1862, s. 4; and see post, bk. IV. pt. III. ch. I.

(*c*) 53 & 54 Vict. c. 39, s. 2.

(*d*) Ibid. s. 4.

(*e*) Peacock *v.* Peacock, 16 Ves. 56; 53 & 54 Vict. c. 39, s. 32.

(*f*) Harrison *v.* Tennant, 21 Beav. 482; Lyon *v.* Tweddell, 17 Ch. Div. 529; 53 & 54 Vict. c. 39, ss. 32—35.

(*g*) Crawshay *v.* Maule, 1 Swanst. 508; Collins *v.* Barker, (1893) 1 Ch. 578.

(*h*) 53 & 54 Vict. c. 39, s. 34.

of the partnership in matters relating to the business of the partnership is, in point of law, the contract of all the partners, and is consequently binding upon them all; and it is binding in such sense as to render each member liable upon it individually, as well as in respect of the partnership property. This doctrine is totally inapplicable to such associations as, *e.g.*, a *club* (*i*); but, in the case of a partnership, it has been established for the benefit of commerce; and the doctrine is founded on the principle that the relationship of principal and agent exists, reciprocally and by implication, between each partner and his co-partners in matters within the scope of the partnership business, so that by the act of the agent his principal is bound, according to the general rule of law already explained (*k*). And this rule holds good, though the act of the single partner should be one that, as between himself and his co-partners, is contrary to the articles of the partnership, as where he disposes of the joint property for his own private purposes.

But if the person with whom a partner deals is at the time aware, or has reason to suppose, that any given transaction is in the nature of a fraud on the other partners, and unauthorized, it would not in such a case be binding on them (*l*). Similarly, if a partner enters into a transaction in the name of the firm, after notice expressly given by or on behalf of the firm to the person with whom he deals that the act is unauthorized, the co-partners will not be bound by it; for by this express notice their implied sanction is displaced (*m*). And the implied authority is one which extends not to matters extraneous to the joint concern; nor even to matters which, though connected with it, are, by the ordinary usage of business, transacted with the express and formal intervention of all the partners. Thus, it is

(*i*) Flemyng *v.* Hector, 2 Mee. & W. 179; Todd *v.* Emly, 8 Mee. & W. 505; Hopkinson *v.* Exeter, Law Rep., 5 Eq. Ca. 63.

(*k*) Fox *v.* Clifton, 6 Bing. 795; 53 & 54 Vict. c. 39, ss. 5, 6.

(*l*) Vere *v.* Ashby, 10 B. & C. 288; 53 & 54 Vict. c. 39, ss. 7—9.

(*m*) Lord Galway *v.* Matthew, 10 East, 264.

settled law, that one member of a firm has no implied authority to refer to private arbitration a dispute in which the partnership is involved with a stranger, and thus to withdraw it from the province of the courts of law (*n*); nor has he, in any case, an implied authority to execute a deed in the name of the partnership (*o*). In both these instances, the other members of the firm must, therefore, be either actual parties to the transaction, or must at least give their special consent that the one partner should act in their behalf; and in the latter case, that consent must be authenticated, like the transaction itself, by deed. But one partner may, in general, bind the firm by his acceptance of bills,—*scilicet*, in a commercial partnership, where such acceptances are of usual occurrence (*p*).

A partnership may, as regards strangers or third persons, be an actual partnership, although it purport not to be so as between (*q*) the partners themselves; for a man, who is not really a partner, may nevertheless allow his credit to be pledged as a partner: as in the case where his name appears in the firm, or where he interferes in the management of the business, or otherwise holds himself out as a partner, so as to produce a reasonable belief in strangers that he is a partner (*r*). In every such instance, the person so acting is answerable as an ostensible partner, on the obligations of the partnership, to all who deal with the firm without having notice at the time that he is in fact not a partner (*s*).

It frequently happens also that a partnership comprises some member not generally known to be interested in the business or adventure, the firm name not usually containing the names of all the members, and the dealings being

(*n*) Boyd *v.* Emerson, 2 Ad. & E. 198, 199; Hambidge *v.* De la Crouée, 3 C. B. 742.

(*o*) Thomason *v.* Frere, 10 East, 419; 53 & 54 Vict. c. 39, s. 6.

(*p*) Hedley *v.* Bainbridge, 3 Q. B. 316; Norton *v.* Seymour, 3 C. B. 792; Nicholls *v.* Diamond, 9 Exch. 154.

(*q*) Davis *v.* Davis, (1894) 1 Ch. 393.

(*r*) 53 & 54 Vict. c. 39, s. 14.

(*s*) Waugh *v.* Carver, 2 H. Bl. 235, 242, 246.

transacted by particular members only, without disclosing the names of the rest. Partners thus unknown to the public are said to be *dormant;* and every person dealing with the firm is entitled, when he discovers the existence of such dormant partner, to hold him chargeable with the others, on the obligation which was by them contracted (*t*).

A man does not become a partner from merely participating in the profits of the partnership (*u*), although the contrary was at one time supposed. Participation in profits is, however, an important element in determining whether or not, and (in the absence of other considerations) is conclusive that, the parties interested in the common business are partners therein (*x*). And by the Partnership Act, 1890 (*y*), s. 2, which re-enacts (with slight amendments) the like provisions which were contained in the 28 & 29 Vict. c. 86, commonly called "Bovill's Act," it has been enacted:—(1.) That the receipt by a person of a debt or other liquidated amount by instalments or otherwise out of the accruing profits of a business does not of itself make him a partner in the business or liable as such; (2.) That a contract for the remuneration of a servant or agent of a person engaged in a business by a share of the profits of the business, does not of itself make the servant or agent a partner in the business or liable as such; (3.) That a person being the widow or child of a deceased partner, and receiving by way of annuity a portion of the profits made in the business in which the deceased person was a partner, is not, by reason only of such receipt, a partner in the business or liable as such; (4.) That the advance of money by way of loan (*z*) to a person engaged, or about to engage, in any business on a written contract

(*t*) Cheap *v.* Cramond, 4 B. & Ald. 663; Cox *v.* Hickman, 8 H. of L. Ca. 286; Ex parte Tennant, In re Howard, 6 Ch. D. 303.

(*u*) Cox *v.* Hickman, supra; and Davis *v.* Davis, supra.

(*x*) 53 & 54 Vict. c. 39, s. 2; Davis *v.* Davis, supra.

(*y*) 53 & 54 Vict. c. 39.

(*z*) Holme *v.* Hammond, Law Rep., 7 Exch. 218; Pooley *v.* Driver, 5 Ch. D. 458; Ex parte Delhasse, In re Megevand, 7 Ch. D. 511.

with that person that the lender shall receive a rate of interest varying with the profits, or shall receive a share of the profits arising from carrying on the business (the contract being signed by all parties), does not of itself make the lender a partner with the person or persons carrying on the business or liable as such (*a*); and (5.) That a person receiving by way of annuity or otherwise a portion of the profits of a business, in consideration of the sale by him of the goodwill of the business, is not, by reason only of such receipt, a partner in the business or liable as such. But the Act expressly enacts (*b*), that, in the event of the bankruptcy or insolvency of the trader, the lender of money and the vendor of a goodwill under its provisions can only recover the principal and profits or interest for which he has contracted, after all other creditors of the trader for valuable consideration have been first satisfied.

But although an ostensible and a dormant partner are in general exposed to the same liability for the obligations of the firm, yet there is this important difference between them on the retirement of either; that is to say, an ostensible partner, when he retires, continues liable, on the future engagements of the partnership, to all persons who had before dealt with it, unless he have given them previous notice of the fact of his retirement; and continues so liable even to those who had not been previous customers, unless he has given public notice of his retirement in some sufficient way, as by an advertisement in the Gazette (*c*); but a dormant partner, when he retires, is not liable on these future engagements at all.

And where a partnership entered into for a fixed term is continued after the due and full expiration of the term, and there is no new deed of partnership or express new partnership agreement, the rights and duties of the partners under the new partnership remain and continue,

(*a*) In re Hildersheim, (1893) 2 Q. B. 357.

(*b*) Sect. 3; In re Stone, 33 Ch. Div. 541.

(*c*) Kirwan *v.* Kirwan, 4 Tyr. 491; 53 & 54 Vict. c. 39, ss. 36, 37.

after the expiration of the old term, the same as they were before, in so far as they are consistent with the incidents of a partnership at will (*d*); unless, of course, when the partnership is (as it may be) merely continued with a view to the due winding up thereof (*e*).

V. The Contract of *Guarantee* or of *Suretyship*.—This contract is (or arises) where one man contracts, on behalf of another, an obligation to which the latter is and remains primarily liable. As if a sum of money be advanced to A., and B. joins with him in giving a bond for its repayment; or if there be an agreement to supply A. with goods to a certain amount on credit, and B. promises to see the seller paid for all goods that shall be so supplied (*f*); or if A. be appointed a public officer, and B. joins with him in a bond, engaging that the duties of the office shall be faithfully performed by A.

Such contracts as these will not, however, sustain an action, or be legally enforceable, if made by word of mouth only; for by the Statute of Frauds, (29 Car. II. c. 3,) s. 4, no action shall be brought whereby to charge the defendant upon any special promise to answer for the debt, default, or miscarriage of another person, unless the agreement upon which such action shall be brought, or some memorandum or note thereof, shall be in writing, and signed by the party to be charged therewith, or by some other person by him lawfully authorized (*g*); and the writing must of course contain all the terms of the contract; excepting that by 19 & 20 Vict. c. 97, s. 3, no such promise is now to be (although formerly it was) (*h*) invalid to support an action, by reason only that the *consideration*

(*d*) 53 & 54 Vict. c. 39, s. 27; King *v.* Chuck, 17 Beav. 325; Yates *v.* Finn, 13 Ch. D. 839; Daw *v.* Herring, (1892) 1 Ch. 284.

(*e*) 53 & 54 Vict. c. 39, s. 38.

(*f*) Chapman *v.* Sutton, 2 C. B. 634.

(*g*) Goodman *v.* Chase, 1 B. & A. 297; Walker *v.* Hill, 5 H. & N. 419; Mountstephen *v.* Lakeman, Law Rep., 7 Q. B. 196.

(*h*) Wain *v.* Warlters, 5 East, 10.

for the promise does not *appear*, either in the writing or by necessary inference from the written document; but, of course, whenever such contract is (as it usually is) a simple contract, it must have a consideration in fact (*i*). And here it will be useful to observe, that the provisions of the Statute of Frauds as to guarantees having been readily evaded, and found accordingly to afford an insufficient protection to persons in the position of guarantors (*k*), it was afterwards further enacted by Lord Tenterden's Act (9 Geo. IV. c. 14), s. 6, that *representations* by a third party regarding the character or trade-ability of a person, to whom credit was to be given on the faith thereof, should not render such third party answerable for debts contracted on the faith of such trade-ability, unless the representations were in writing and were signed by the party making them.

The contract of guarantee or of suretyship is also of no effect in law, if the surety or guarantor is at the time misled, to the knowledge of the creditor, by any material misrepresentation of the state of the accounts or of other the dealings between the principal parties (*l*); and even where valid and effectual, it is to receive (for the benefit of the guarantor or surety) a strict construction: and will not be extended (in general) to matters not falling within the precise terms of the engagement (*m*). And by 19 & 20 Vict. c. 97, s. 4, in the case of a guarantee to or for a *firm*, there (except where otherwise expressed or necessarily implied) no such guarantee shall be binding in respect of anything done or omitted to be done, after a change in the firm shall have taken place (*n*); and a similar provision is contained in the Partnership Act, 1890 (*o*).

(*i*) Oldenshaw *v.* King, 2 H. & N. 517; Miles *v.* New Zealand Alford Estate Co., 32 Ch. D. 266.

(*k*) Pasley *v.* Freeman, 3 T. R. 51.

(*l*) Stone *v.* Compton, 5 Bing. N. C. 142; Davis *v.* London and Provincial Assurance, 8 Ch. D. 469.

(*m*) Weston *v.* Barton, 4 Taunt. 673; Stewart *v.* M'Kean, 10 Exch. 675.

(*n*) Leathley *v.* Spyer, Law Rep., 5 C. P. 595.

(*o*) 53 & 54 Vict. c. 39, s. 18.

A guarantor or surety will, moreover, be discharged, if the principal debtor be released by the creditor; or if the debt or demand be by any means extinguished as between the two principals; for the surety's obligation, being collateral only, cannot survive the liability of the principal debtor himself (*p*). The surety will also be discharged, if the original risk has been substantially altered by the principals in the transaction (*q*); or even if the creditor, without the surety's permission, consents in a binding manner to give any indulgence to his debtor, in point of time; for there would otherwise be a prolongation of the surety's liability, beyond the period contemplated by the parties at the time when the guarantee was originally given (*r*); and these rules are in general applicable also to the case of a retired partner, who is (in general) liable, as between himself and the continuing partner or partners, as a surety only for the latter (*s*).

The law moreover implies, in favour of the surety, a promise on the part of the principal debtor to reimburse him—as well principal as interest,—for any payment which he is obliged to make upon his guarantee (*t*); and where two or more persons have become sureties in respect of the same debt or demand (whether by the same instrument of guarantee or by different ones), any one of them who pays more than his rateable proportion is entitled, in general, (that is to say, subject to any express agreement excluding or qualifying the right) (*u*) to obtain contribution for such excess from the other sureties,—a right founded, it is said, not on any implied contract, but on a natural principle of justice: and one which was expressly recognized by the

(*p*) Lewis *v.* Jones, 4 Barn. & Cress. 506; Petty *v.* Cooke, Law Rep., 6 Q. B. 790.

(*q*) Holme *v.* Brunskill, 3 Q. B. D. 495.

(*r*) Frazer *v.* Jordan, 8 Ell. & Bl. 303; Watts *v.* Shuttleworth, 5 H. & N. 235.

(*s*) Oakeley *v.* Pasheller, 4 Cl. & F. 207; Rouse *v.* Bradford Bank, (1894) 2 Ch. 32.

(*t*) Batard *v.* Hawes, 2 Ell. & Bl. 287.

(*u*) Turner *v.* Davies, 2 Esp. 478; Batchelor *v.* Lawrence, 9 C. B. (N. S.) 543.

statute 19 & 20 Vict. c. 97, s. 5 (*x*). Moreover, this right of contribution may, in certain cases, be available to the surety before actual payment by him, provided a judgment for the amount has been obtained against him (*y*).

To these rules, reasonably established by the law for the protection of him who guarantees the debt of another, we may add, that when that debt becomes due, the surety may apply to the court to compel the principal debtor to pay off the debt, and so to relieve him from the continued liability (*z*): and that where the surety is himself obliged to make the payment, he is entitled to an assignment of every security which the creditor held in respect of the debt, and to stand in the place of the creditor in respect of every such security, whether as against the principal debtor, or any co-surety (*a*).

We now proceed to consider certain varieties of contracts, which are of a very fixed and determinate nature; and of these, the four following classes, namely: (1) Bonds; (2) Bills of Exchange and Promissory Notes; (3) Policies of Life and Fire Insurance; and (4) Charterparties.

Firstly, *Bonds*.—Bonds are a kind of contract in very extensive use, being adopted in a great variety of cases where the object is to secure either the payment of money, or else the performance of (or abstention from) some act; a bond being an instrument under seal, whereby the obligor obliges himself to the obligee to pay a certain sum of money at a day specified; and that peculiar species of bonds called "Lloyd's Bonds" are in reality only bonds of this character, being instruments under the seal of a company,

(*x*) Reynolds *v.* Wheeler, 10 C. B. (N. S.) 561; Ward *v.* National Bank of New Zealand, 8 App. Ca. 755.

(*y*) Wolmershausen *v.* Gullick, (1893) 2 Ch. 514.

(*z*) Antrobus *v.* Davidson, 3 Mer. 579.

(*a*) 19 & 20 Vict. c. 97, s. 5; Copis *v.* Middleton, 1 Turn. & Russ. 224; Re M'Mynn, 33 Ch. Div. 575; Manisty *v.* Churchill, 39 Ch. Div. 174.

usually a railway company, admitting the company's indebtedness to the obligee in the sum specified in the bond, and containing a promise by the company to the obligee to pay him such amount with interest on a future day (*b*). And bonds given by way of securing the payment of money are called *single* bonds, (*simplex obligatio*); but where (as very frequently is the case) there is a condition added, that if the obligor does (or abstains from doing) some particular act, the obligation shall be void, or else shall remain in full force, then the bond is no longer a single bond, but is *a bond with a condition;* and in that case, the sum mentioned in the obligatory part of the bond is in the nature of a *penal sum* (or *penalty*), sufficient to cover any possible damage arising from a breach of the condition. The nature of the condition will in each case depend upon the particular object intended to be secured; [thus, it may be the repayment (with interest) of a principal sum borrowed of the obligee; or it may be the periodical payment to him of an annuity; or it may be the faithful performance, by a third person, of the duties of an office; but whatever the condition be, in case it is not performed, the bond becomes forfeited at law, and the obligation absolute; and such obligation charges the obligor, while living, and, after his death, his executor, or administrator, and also his heir or devisee (*c*).

If the condition of a bond be impossible at the time of making it, or be uncertain (or insensible), the condition alone is void, and the bond shall stand single and unconditional; for it is the folly of the obligor to enter into such an obligation, from which he can never be released (*d*).] On the other hand, if the condition be to do a thing that is either illegal at common law, or contrary to the provi-

(*b*) Blackmore *v.* Yates, Law Rep., 2 Ex. 225; In re Cork and Youghall Railway Company, ib. 4 Ch. App. 748.

(*c*) Vide supra, vol. I. pp. 403 *et seq.*

(*d*) Campbell *v.* French, 6 T. R. 211.

sions of an Act of Parliament, the whole bond is void (*e*): for it is an unlawful contract, and the obligee shall take no advantage of such a transaction. And the effect will be the same, even though the condition be *ex facie* legal, if the bond was in reality given upon an illegal consideration; or if it be to effect an unlawful object which the condition does not disclose; for though, by the general rule of law, the parties to any deed are in general *estopped* from contradicting it, or assigning to it any intent beyond that which appears on the instrument itself (*f*), yet an exception is permitted in this case, upon the obvious ground of public policy (*g*). On the other hand, if a bond have several conditions, some of which are legal and the others illegal—and of a nature entirely distinct, and not dependent upon each other—the general rule is, that the latter conditions only shall be void; and that the bond shall continue in force, and be subject only to the valid conditions (*h*). But if the condition of a bond was possible at the date of the making of the bond, and afterwards becomes impossible either through the act of God, or by reason of the conduct of the obligee; or if it becomes by any means illegal,—in either of these cases the bond becomes void, and the obligor is discharged from all liability; for no prudence or foresight on his part could have guarded against such a contingency; in all which respects, bonds differ from estates granted subject to conditions; for, in all these cases, the estate (as we have seen) becomes absolute (*i*).

On the forfeiture of the bond, the whole *penalty* was formerly recoverable at law; but courts of equity would not permit a man to take more than his principal, interest,

(*e*) 1 Saund. by Pat. & Will. 66 a, n. (1); Co. Litt. 206 b.

(*f*) Vide supra, vol. I. p. 454.

(*g*) Collins *v.* Blantern, 2 Wils. 341.

(*h*) Green *v.* Price, 13 Mee. & W. 695.

(*i*) Supra, vol. I. p. 295; Co. Litt. 206 a, 209 a; Bro. Ab. tit. Condition, pl. 127; 2 Bl. Com. 341; Shep. Touch. 157.

and costs, where the bond was conditioned for the payment of money; or the amount of the damage actually sustained by the breach, where the bond was conditioned for the performance of (or abstention from) some act; and, with respect to money bonds, this principle of equity was in due course introduced into the practice of the courts of law (*k*), and such practice was confirmed by statute (*l*); and on the same equitable principle, and with respect to bonds conditioned for the performance of (or abstention from) some act, it was enacted by 8 & 9 Will. III. c. 11, (and the provisions on this subject were recognized and preserved by "The Common Law Procedure Act, 1852," and are adopted into the new practice under the Judicature Acts (*m*)), that, when an action was brought upon an instrument of this description a jury should always inquire of the damages which the plaintiff had actually sustained by breach of the condition; and though (for his better security in the event of any future breach) he was still allowed to enter up *judgment* for the penalty, yet he was prevented from taking out *execution* to a larger amount than the damages which the jury should assess (*n*).

The subject of bonds is nearly related to that of *contracts secured by penalties*,—these latter being covenants or promises in writing to do (or abstain from doing) a certain act, the instrument providing that, in the event of such covenant or promise being broken, the covenantor or promiser shall pay to the covenantee or promisee a sum of money; and in the case of such contracts, the question usually arising is, whether the sum shall be considered as a penalty, or as liquidated damages. And this distinction is important; for if the sum is a penalty, then the covenantee or promisee, on bringing his action and proving the breach, is

(*k*) 2 Bl. Com. 241; Stern *v.* Vanburgh, 2 Keb. 553, 555; Anon., 6 Mod. 11.

(*l*) 4 & 5 Ann. c. 3.

(*m*) Order xiii. rule 14; now Order xlviii. B (July, 1894).

(*n*) James *v.* Thomas, 5 Barn. & Adol. 40; Bishop of London *v.* M'Neil, 9 Exch. 490.

compelled, as has just been mentioned, to limit his *execution* to the amount of damages which the jury shall have assessed, though he may enter up judgment for the whole amount (*o*) ; but where the sum is liquidated damages, the plaintiff, on proving the breach, is entitled to judgment and also to execution for the entire sum, the parties themselves being in that case considered as having settled and agreed the damages. But the question whether, in any particular case, a given sum is a penalty or is liquidated damages, is often somewhat difficult to determine, depending (as it does) partly upon the nature and terms of the contract itself, and partly upon considerations of equity. Thus, if the sum was expressed and intended by the parties themselves to be a penalty, the court will always so regard it (*p*) ; but where the expressed intention of the parties is to stipulate for liquidated damages, that expression of their intention is not conclusive of the real intention of the parties ; for if the sum appears to be essentially a penalty, the law will so construe it, and will accordingly restrain the plaintiff's execution to the amount of the actual damage (*q*). Therefore, where the agreement is to pay a certain sum of money, with a proviso for payment of a much larger sum in case of default, the larger sum will be treated as a penalty ; and upon the same principle, where a contract contains a variety of provisions involving, *inter alia*, the payment of money to a fixed amount, and providing for the payment of a larger sum upon breach of all or any one of the provisions, that sum will be held a penalty (*r*). On the other hand, there are cases in which both reason and justice require an opposite construction ; thus, where a man engaged with a woman to marry nobody but her, and (on marrying with any other woman) to pay

(*o*) Order xlviii. B (July, 1894).

(*p*) Smith *v.* Dickenson, 3 Bos. & Pul. 630 ; Lord Elphinstone *v.* Monkland Iron Co., 11 App. Ca. 332.

(*q*) Astley *v.* Weldon, 2 Bos. & Pul. 346.

(*r*) Atkyns *v.* Kinnier, 4 Exch. 776.

her 1,000*l.*, she was held entitled, on breach of this engagement, to judgment and execution for the entire sum, supposing the action to be maintainable at all: but the contract was ultimately adjudged to be illegal, as being in general restraint of marriage, and so not capable of being enforced at all (*s*). So where, on the dissolution of a partnership between two solicitors, one of them covenanted with the other not to carry on the business of a solicitor within fifty miles from a place named, nor to interfere with the clients of the late partnership, and (for any breach of that covenant) to pay 1,000*l.* as and for liquidated damages, and not by way of penalty, the sum specified was held to be the true measure of the damages, and to be recoverable as such in full (*t*); and these decisions proceed upon the consideration, that (save by the contract itself of the parties) the amount of the true damages is not ascertainable.

Secondly, *Bills of Exchange* and *Promissory Notes*,—which are a species of written mercantile instruments by which men enter into contracts for the payment of money; and the whole law regarding these has been codified by the Bills of Exchange Act, 1882 (45 & 46 Vict. c. 61). We shall consider, firstly, Bills: and secondly, Notes.

1. [First, then, *a bill of exchange* is a security originally invented by merchants for the more easy remittance of money from one country to another, but which is now of almost universal use in all pecuniary transactions; and it has been commonly defined as an open letter of request from one man to another, desiring him to pay on the sender's account a sum named therein to a third person (*u*)]; but, as defined by the Bills of Exchange Act,

(*s*) Lowe *v.* Peers, 4 Burr. 2225. 778.

(*t*) Galsworthy *v.* Strutt, 1 Exch. 659; Carnes *v.* Nesbitt, 7 H. & N. 778.

(*u*) Peto *v.* Reynolds, 9 Exch. 410.

1882, it is "an unconditional order in writing addressed by one person to another, signed by the person giving it, requiring the person to whom it is addressed to pay on demand, or at a fixed or determinable future time, a sum certain in money to, or to the order of, a specified person or to bearer." [By means of such a bill, a man in the most distant parts of the world may have money remitted to him from any trading country, without danger of robbery or loss: and this great utility of these bills procured their adoption at a very early period in the world's history; for they appear to have been known to the antients (*x*); and their use appears to have been introduced into the Mogul Empire in China as early as the year 1236 (*y*); but the invention was in truth first brought into general use by the Jews and Lombards, who, when obliged to flee from one country to another, adopted this method in order the more easily to withdraw their effects out of France and England into those countries to which they had to transfer their residence,—the Jews being banished out of Guienne in 1287, and out of England in 1290 (*z*).

A bill of exchange is, in common speech, frequently called a *draft;* and the person who makes it is called in law the *drawer*, and he on whom it is made is called the *drawee;* and the third person, in whose favour it is made, is called the *payee.*] Bills of exchange are either *inland* or *foreign*,—an inland bill being one which is, or on the face of it purports to be, drawn within (and also made payable, or drawn upon any person resident, within) the United Kingdom of Great Britain and Ireland (which for this purpose includes the islands of Man, Guernsey, Jersey, Alderney, and Sark, and the islands adjacent to any of them being part of the Queen's dominions) (*a*); and a foreign bill being any other bill, that is to say, being a

(*x*) Park, Inst. Introd. xix. n. (b), 7th edit.

(*y*) Mod. Un. Hist. iv. 499.

(*z*) 2 Carte, Hist. Eng. 203—206.

(*a*) 45 & 46 Vict. c. 61, s. 4, following 19 & 20 Vict. c. 97, s. 7.

bill which is either drawn by a person residing abroad upon some person within the United Kingdom and made payable within the United Kingdom, or *vice versâ*, or which is both drawn and payable abroad. Formerly, foreign bills of exchange were much more regarded in the eye of the law than inland ones, being thought of more public concern in commerce; but for a very long time there has not been, nor is there now, any difference between them as regards their material legal incidents (*b*), although of course, in minor matters (*e. g.*, as regards stamps, &c.), there are still certain differences between them.

A bill of exchange, payable to bearer or *to order*, is said to be *negotiable* (*c*), a term which in law is applicable to any instrument the right of action on which is, by exception from the common rule, freely assignable from man to man (*d*), and that either by simple delivery or (as the case may require) by indorsement coupled with delivery,—dock warrants, delivery warrants, and the like, not being negotiable in the strict sense of the word (*d*). The indorsement of a bill consists in writing one's name on the back thereof; and may be either in *blank* or in *full*,—in blank, if the payee simply writes his own name; in full, if he writes "Pay X. or order" and signs his own name thereto; and in either case he delivers over the bill so indorsed (*e*): and the *indorsee* may indorse in like manner to another, and so on, *in infinitum*, until the bill is due; and even when it is overdue; but an overdue bill is no longer strictly negotiable, at least when it requires a fresh indorsement for its transfer (*f*). If the bill be payable simply to a person named, *and to him only*, and not to

(*b*) 2 Bl. Com. p. 467.

(*c*) 45 & 46 Vict. c. 61, s. 8; Bayley on Bills, 31, 5th edit.; Plimley *v.* Westley, 2 Bing. N. C. 249; Colonial Bank *v.* Whinney, 30 Ch. Div. 261; 11 App. Ca. 426.

(*d*) Kingsford *v.* Merry, 1 H. & N. 503.

(*e*) 45 & 46 Vict. c. 61, s. 21 (*bills*), and s. 84 (*notes*); Emmett *v.* Tottenham, 8 Exch. 884.

(*f*) 45 & 46 Vict. c. 61, s. 36; Brown *v.* Turner, 7 T. R. 630.

order, or to bearer, it is not negotiable at all; and, on the other hand, if made payable to *bearer*,—as is often the case with that species of bill which is called a *cheque on a banker* (*g*),—it is negotiable without any indorsement, and by mere delivery; and the case is the same where a bill, which was originally payable to order, has been indorsed in *blank* by the payee. But note, that although an instrument may be negotiable by the law of a foreign country, it is not necessarily negotiable also in this country (*h*); also, that post-office orders and postal orders are not negotiable (*i*), although, for purposes of collection, they may be (and very commonly are) indorsed to a banker. On the other hand, certain documents which are not in themselves negotiable instruments may become negotiable by estoppel (*k*). And with regard to crossed cheques (including "stock dividend warrants"), it has been provided, by the Bills of Exchange Act, 1882, sects. 76—82, re-enacting with amendments the like provisions contained in the Crossed Cheques Act, 1876 (39 & 40 Vict. c. 81), as follows, that is to say:—(1.) That when a cheque is crossed "generally" (*i.e.*, without the words "not negotiable"), the banker on whom it is drawn shall not pay it otherwise than to a banker; and where it is crossed "specially" (*i.e.*, with the words "not negotiable"), the banker shall pay it only to the particular banker to whom it is crossed, or to his agent for collection: (2.) That where a banker has, in good faith and without negligence, paid according to its tenor a cheque, crossed either "generally" or "specially," both he and (if the cheque has come into the hands of the payee) the drawer shall be in the same position as they would respectively have been in, if the amount of the cheque had been paid to the true owner

(*g*) Hewitt *v.* Kaye, Law Rep., 6 Eq. Ca. 200.

(*h*) London and County Banking Co. *v.* River Plate Bank, 20 Q. B. D. 232; 21 ib. 535.

(*i*) Fine Art Society *v.* Union Bank of London, 17 Q. B. D. 705.

(*k*) Goodwin *v.* Robarts, 1 App. Ca. 476.

thereof; though, on the other hand, if the banker pays it otherwise than in accordance with its tenor, he is liable to the true owner for any loss the latter may sustain thereby; and (3.) That when a person takes a crossed cheque with the words "not negotiable," he shall not have (and not be capable of giving) a better title to the cheque than that which the person from whom he took it had (*l*).

When the time arrives at which a bill is intended to be payable, it is said to be *due*, or *at maturity*; three days of grace being in such case allowed, so that the bill is in general due and at maturity on the last of the days of grace (*m*); but no days of grace are allowed on a bill (*e.g.*, cheque) that is payable on demand, or now on a bill payable "at sight" or "on presentation" (*n*); *secus*, if payable so many days after demand, or sight, or presentation (*o*).

At any time after it becomes due,—and even (although not usually) before it becomes due,—it is presented to the drawer for his acceptance: and the drawer will in general accept the bill, although (in certain cases) he may lawfully refuse to accept it, *e.g.*, where he owes nothing to the drawer, who therefore has no pretence of any title to draw upon him. And an acceptance, as to the manner of it, must be in writing on the bill itself, it being provided by 45 & 46 Vict. c. 61, s. 17, repealing and re-enacting sect. 6 of the Mercantile Law Amendment Act, 1856 (*p*), that no acceptance of any bill of exchange, whether inland or foreign, shall be sufficient to bind or charge any person, unless the same be in writing on such bill, and signed by the acceptor or by some person duly authorized by him. Moreover, an acceptance will be sufficient if the acceptor merely writes his name across the face of the bill (*q*); and

(*l*) Smith *v.* Union Bank of London, 1 Q. B. D. 31.

(*m*) 45 & 46 Vict. c. 61, s. 14.

(*n*) Ibid. s. 10.

(*o*) Ibid. s. 11.

(*p*) 19 & 20 Vict. c. 97.

(*q*) 45 & 46 Vict. c. 61, s. 17, repealing and re-enacting the like provisions contained in the Bills of Exchange Act, 1878 (41 & 42 Vict. c. 13), passed in consequence of the decision in Hindhaugh *v.* Blakey, 3 C. P. D. 136.

a bill may be accepted either simply (without specifying where it will be paid); or *specially*, that is, as payable at some specified place, "and not elsewhere,"—but an acceptance at a banker's without such restrictive negative words as last mentioned, is not a special acceptance, nor has it the effect of making the bill payable at such banker's *only*,—such mode of acceptance being merely for the convenience of the acceptor, and in no respect qualifying his liability (*r*). After acceptance, any person, who, as payee, or by transfer (whether before or after acceptance), is the holder of the bill at its maturity, is entitled to immediate payment of the amount for which it is drawn, upon *presenting* it to the acceptor,—or, in case of a special acceptance, at the place where he has made it payable (*s*)—for *payment*, and being ready to deliver it up on payment being made (*t*): and if under such circumstances the money be not then paid, the holder has a right to bring an action against the acceptor for the amount; or he may have recourse to the drawer; and to every person whose name was on the bill, as indorser, when it came to the holder's hands: for each of these parties is a warrantor for the payment of the bill, and it is on the credit of their names (though also on that of the acceptor, where it was negotiated after acceptance), that the holder is supposed to have taken the bill. The right of the holder, however, to have recourse to the drawer and indorsers, is subject to these conditions; first that he shall have presented the bill to the drawee for payment, on the precise day when it became due; and next, that he shall have given reasonable notice of "dishonour," that is to say, that it has not been paid. The notice, under ordinary circumstances, must be given on the following day; or if the persons to receive it do not reside in the same town,

(*r*) 45 & 46 Vict. c. 61, s. 19; Turner *v.* Hayden, 4 Barn. & Cress. 1.

(*s*) De Bergareche *v.* Pillin, 3 Bing. 476.

(*t*) Hansard *v.* Robinson, 7 B. & C. 90; Ramulz *v.* Crowe, 1 Exch 167.

then by the post of that day; or if it be a foreign bill, then by the next ordinary conveyance; and it must be sent to all parties whom it is intended to charge, or at the least to him whose name was last placed on the bill, in order that the latter may advise the party next before him, and so in succession, each party being allowed, in turn, a day for the purpose (*u*). And by the Bills of Exchange Act, 1882 (*x*), ss. 14, 92, if the day of payment of a bill (or the last day of grace, where days of grace are allowed) falls on a Sunday, Christmas Day, Good Friday, or any public fast day or thanksgiving day, the bill is considered to be due and payable on the last *preceding* "business day"; and if the day of payment or (as the case may be) the last day of grace falls on a bank-holiday, the bill is considered to be due and payable on the next *succeeding* "business day," as it is also when the last day of grace is a Sunday, and the preceding Saturday happens to be a bank-holiday (*y*).

An indorser who is called upon and obliged to pay the bill, may in his turn have recourse to the drawer, or to any indorser prior to himself in order, provided such party shall have had due notice of the non-payment; and the same right attaches successively to each indorser, in his turn. But the original payee has of course no prior party to resort to but the drawer; and the drawer can resort to no party but the acceptor; and on the acceptor rests in

(*u*) 45 & 46 Vict. c. 61, ss. 39—52; Jennings *v.* Roberts, 4 Ell. & Bl. 616; Paul *v.* Joel, 4 H. & N. 355; Hirschfield *v.* Smith, Law Rep., 1 C. P. 340; Berridge *v.* Fitzgerald, ib. 4 Q. B. 639.

(*x*) 45 & 46 Vict. c. 61, adopting the Bank Holidays Act, 1871 (34 & 35 Vict. c. 17), by which last-mentioned Act, Easter Monday, the Monday in Whitsun-week, the first Monday in August, and the 26th December (if a week day), and any other day specially proclaimed as such by her Majesty, either locally or throughout the kingdom, are created bank-holidays, a provision originally intended for the relaxation of bank officials only, but which has been extended by 38 & 39 Vict. c 13, under certain restrictions, to the Customs, Inland Revenue Offices, Bonding Warehouses, and Docks.

(*y*) 45 & 46 Vict. c. 61, ss. 49, 92.

general all the while the primary liability, and the drawer, or any other party compelled to take up and pay the bill, is always entitled to look for satisfaction to the acceptor.

But, as we have said, the drawee may *refuse* acceptance of the bill; and the law will imply such refusal on his part, if he does not accept immediately on presentment, or within twenty-four hours after the bill is left with him for acceptance (*z*). On such refusal, the holder of the bill becomes apprised, of course, that the bill is no bill at all, so far as the drawee is concerned; and he is therefore entitled to charge the other parties, viz. the drawer and prior indorsers; and even to charge them *instanter*, as liable to immediate payment, though the bill has not yet arrived at maturity (*a*); and so much is this the case, that the Statute of Limitations will, on this refusal of acceptance, run from the date of the refusal (*b*). But to justify any recourse against these parties, notice of the non-acceptance must be given to them according to the same law and course of proceeding that was before stated with reference to giving notice of dishonour for non-payment; and such of them as are consequently obliged to take up the bill are entitled, as in that case, to their remedy over against all prior parties.

The holder may, however, take his chance that the bill may, notwithstanding his refusal to accept, be ultimately paid by the drawee; and may accordingly present it to him for that purpose when it comes to maturity, without thereby waiving his right of recourse against the other parties (*c*). For generally, it is at the option of the holder whether he will present the bill for acceptance or not, the object of such presentment being only to ascertain whether the bill is likely to be paid by the acceptor, and to strengthen its credit, if possible, by the additional security

(*z*) 45 & 46 Vict. c. 61, s. 42.

(*a*) Bright *v.* Purrier, Bull. N. P. 269.

(*b*) Whitehead *v.* Walker, 9 Mee. & W. 506.

(*c*) 45 & 46 Vict. c. 61, s. 48.

of the latter's name; though if a bill be (as it often is) drawn payable at a specified period *after sight* or *after demand*, a presentment for acceptance is in that case indispensable, in order to give sight to the drawee, or to make demand upon him; and thereby to fix the time at which the bill is to become due (*d*).

Independently of the notice of non-acceptance or of non-payment, the holder is also entitled to have the bill, of which either acceptance or payment is refused, *protested*. And the *protest*—which is a formal declaration that the bill has been refused acceptance or payment, and that the holder intends to recover all the expenses to which he may be put in consequence thereof—must be made in writing under a copy of such bill of exchange, by some notary public; or if no such notary be resident in the place, then by any other substantial inhabitant in the presence of two credible witnesses (*e*). In the case of a foreign bill, such protest is essential to the right of the holder to recover from the drawer or indorsers (*f*): and when made, due notice of dishonour having been also given, the protest will entitle the holder to recover the amount of the bill, with interest, and all expenses, including the re-exchange, occasioned by returning it to the country where it was drawn (*g*), together with interest on such re-exchange (*h*). But upon an inland bill, the principal and interest may be recovered from these parties (due notice being given) without a protest (*i*); which is indeed a ceremony not usually observed with respect to inland bills (*k*): though by the statutes 9 Will. III. c. 17 and 3 & 4 Anne, c. 8, an inland bill was made liable to

(*d*) 45 & 46 Vict. c. 61, s. 39

(*e*) 2 Bl. Com. 469; Poth. pl. 84; Chit. Bills, 216; 45 & 46 Vict. c. 61, s. 51.

(*f*) Chit. Bills, 332; Campbell *v.* Webster, 2 C. B. 258; 45 & 46 Vict. c. 61, s. 51, sub-s. 2.

(*g*) Mellish *v.* Simeon, 2 H. Bl. 378.

(*h*) 45 & 46 Vict. c. 61, s. 57; In re Commercial Bank of South Australia, 36 Ch. D. 522.

(*i*) Windle *v.* Andrews, 2 Barn. & Ald. 701.

(*k*) Chit. Bills, 335, 465.

be protested, and under the 45 & 46 Vict. c. 61, s. 51, sub-sect. 1, such a bill may, if the holder think fit, be protested.

A bill, of which acceptance has been refused by the drawee, is sometimes accepted *supra protest*, that is to say, for the *honour of the drawer* or (as the case may be) *for the honour of the indorser*; that is, some friend of the drawer (or indorser) intervenes, to prevent the bill from being sent back upon him as unpaid, by placing his own name upon it as acceptor, after a protest has been drawn up declaratory of its dishonour by the drawee (*l*); and where an acceptance for honour does not express for whose honour it is made, it is deemed to be an acceptance for the honour of the drawer (*m*). An acceptance *supra protest*, or for honour, operates, not as an absolute engagement to pay, but only as an engagement to pay in the event of the bill being presented for payment to the drawee, when it arrives at maturity,—of its being again dishonoured by him, and protested for non-payment,—and of its being afterwards duly presented for payment to the "acceptor for honour," with due notice of these facts; and on these conditions being fulfilled, the latter is then absolutely liable, as if he had accepted in the capacity of drawee, so far as regards the claim of any person whose name stands subsequent to his for whose honour the acceptance was made; while, on the other hand, such an acceptor, upon being obliged to pay, has a right of recourse against the person for whose honour he accepted, or against any party antecedent to him in the series of names (*n*).

2. A *promissory note* (or *note of hand*) is commonly defined as an open letter of engagement from one man to

(*l*) 45 & 46 Vict. c. 61, s. 15, and ss. 65—68; Geralopulo *v.* Wieler, 10 C. B. 690; In re Overend, Gurney & Co., Law Rep., 6 Eq. Ca. 350.

(*m*) 45 & 46 Vict. c. 61, s. 65.

(*n*) 45 & 46 Vict. c. 61, ss. 66—68; Williams *v.* Germaine, 7 Barn. & Cress. 468; Mitchell *v.* Baring, 10 Barn. & Cress. 4.

another, promising to pay him a certain sum of money therein specified; and it may be made payable, like a bill of exchange, either "to A. B. or his order," or "to the order of A. B.," or "to A. B." without the word order, or "to bearer" (*o*); and in the Bills of Exchange Act, 1882 (*p*), it is defined as "an unconditional promise in writing made by one person to another, signed by the maker, engaging to pay on demand, or at a fixed or determinable future time, a sum certain in money, to or to the order of a specified person, or to bearer." These instruments (if payable to order or bearer) were, by the statutes 3 & 4 Anne, c. 8, and 7 Anne, c. 25, placed upon the same footing, as to negotiability and otherwise, with inland bills of exchange (*q*); so that almost every point of law which applies to the one, may be taken generally as applicable also to the other; with only this difference, that as a note is originally made between but two parties, viz. the maker and the payee, (there being no third party, or drawee, as in the case of a bill,) all those legal incidents of a bill which regard the position of the drawee, and the nature and effect of an acceptance, are of course foreign to a note. The maker of the note stands, in fact, in the place of both drawer and acceptor; and he is the party in every case primarily liable; and to him, accordingly, the holder presents the note in the first instance for payment, when it arrives at maturity; and, on his failure to pay, the holder may then resort to the indorsers, each of whom has a successive right of recourse against the names anterior to his own, leaving to the first indorser, or original payee, no remedy except against the maker himself (*r*). And there is this further difference to be noted between bills and notes, namely, that a note if made payable at any specified place, must be presented *there* for payment, though the

(*o*) Bayley on Bills, 16.

(*p*) 45 & 46 Vict. c. 61, s. 83.

(*q*) Carlon *v.* Kenealy, 12 Mee. & W. 139; Flight *v.* Maclean, 16 Mee. & W. 51; Storm *v.* Stirling, 3 El. & Bl. 832.

(*r*) 45 & 46 Vict. c. 61, s. 87; Sands *v.* Clarke, 8 C. B. 751.

restrictive negative words "and not elsewhere" should not have been added (*s*).

Bills of exchange and promissory notes (as compared with other contracts) possess some legal properties of a peculiar kind. For, firstly, although choses *in action*, they are negotiable (*t*); that is to say, the assignee of them (*scilicet*, the transferee) takes them, as a general rule, free from the equities affecting them in the hands of the assignor; so much so that, though by the general rule of law a party can give no better title to a thing personal than he himself possesses, yet he who has obtained by wrongful means, or even by felonious means, the possession of a bill or note drawn payable to order and indorsed in *blank*, or drawn payable to bearer,—is competent to make a valid transfer of the instrument and its contents, by merely delivering it for valuable consideration to a person unaware and unsuspicious of the defect in his title (*u*); but this is not so where the bill or note requires indorsement as well as delivery. Thus, if a bill be drawn by A. in favour of B. or order, who indorses it *in blank* to C., and it be afterwards stolen by D., and by him merely delivered to E. for a valuable consideration before it is due,—the latter (supposing him to have taken it *bonâ fide*) will become the lawful holder of it, even as against C., from whom it was stolen (*x*); but it would be otherwise, if C.'s indorsement continued necessary. In this particular the instruments in question—and indeed all others of a negotiable kind, which are transferable by *mere delivery*—are, for the benefit of commerce, placed upon the same basis with the current coin of the realm; which (as we have already had occasion to observe) passes freely from man to man, without regard to any defect in the

(*s*) Spindler *v.* Grellett, 1 Exch. 384.

(*t*) 2 Bl. Com. 468.

(*u*) Gill *v.* Cubitt, 3 Barn. & Cress. 466; Backhouse *v.* Harrison, 3 Barn. & Adol. 1098.

(*x*) 45 & 46 Vict. c. 61, s. 34; Beckwith *v.* Corral, 3 Bing. 444; Goodman *v.* Harvey, 4 Ad. & El. 870.

title of him who pays it over, provided it be paid for valuable consideration, to an innocent party (*y*). And this is a convenient place to observe, that by an express provision contained in section 60 of the Bills of Exchange Act, 1882, which repeats a like provision contained in the 16 & 17 Vict. c. 59, a banker who, in the case of a draft or order upon himself, pays the amount thereof to the purported indorsee or bearer is not liable to make good to his own customer the amount so paid away, although it should be afterwards shown that the indorsement was a forgery (*z*); but in all other cases of a wrongful payment by a banker, the bank is the loser and cannot charge its own customer with the amount paid,—unless, of course, the customer by his own extreme negligence has caused the wrongful payment (*a*).

Secondly, although in other cases of simple contract the party who sues thereon for the breach of contract, is obliged to prove the *consideration* on which the promise was made, and on failure of such proof will be defeated; yet no evidence of the consideration is required from the holder of a bill or note, for he is in general called upon to prove nothing beyond the signature thereto of the party charged, every bill or note being deemed, in law, to carry with it, *primâ facie*, a sufficient consideration (*b*); although indeed, if the defendant is in a condition to show that he received *no* consideration, and also (in the case of his being sued by a third party) that the holder gave none, and, *semble*, that no consideration passed between any of the prior holders, the claim of the plaintiff will be defeated (*c*); for as regards bills and notes, equally with other simple contracts, the maxim holds good, that *ex nudo pacto non oritur actio:* and

(*y*) Vide supra, pp. 57, 119.

(*z*) Ogden *v.* Bevan, L. R., 9 C. P. 513.

(*a*) Vagliano *v.* Bank of England, (1891) A. C. 107.

(*b*) 45 & 46 Vict. c. 61, ss. 27—30; 2 Bl. Com. 446; Byles on Bills, p. 72.

(*c*) Crofts *v.* Beale, 11 C. B. 172.

hence it is usual to express on the face of these instruments, that *value* has been *received* by the drawer or maker; though, even without such words, a good consideration for the contract will be presumed in the absence of any proof to the contrary (*d*).

And thirdly and lastly, any material alteration in a bill or note used to avoid the instrument (*e*); and this rule extended to Bank of England notes (*f*); and the rule still holds good, excepting that, by the Bills of Exchange Act, 1882 (45 & 46 Vict. c. 61), s. 64, which section is not retrospective (*g*), an alteration that is "not apparent" does not avoid the bill or note in the hands of a holder in due course.

Such, in a general view, is the state of the law relative to bills of exchange and promissory notes. It remains only to add (as to the *amount* for which a bill or note may be drawn), that by the statute 48 Geo. III. c. 88, s. 2, all promissory notes, bills of exchange, drafts, and undertakings in writing, being negotiable or transferable, for the payment of less than 20*s*., were declared to be null and void, and it was made penal to utter or publish them; and that by the statute 7 Geo. IV. c. 6, the making or issuing of promissory notes payable on demand *to bearer*, for any sum less than 5*l*., was prohibited under a penalty. However, by the 23 & 24 Vict. c. 111, s. 19, it was made lawful for any person to draw upon *his banker*, holding money to his use, any draft or order for the payment, either to the bearer or to order on demand, of any sum of money though less than 20*s*.; and by the statute 45 & 46 Vict. c. 61, the restriction imposed by the 48 Geo. III. c. 88, has been wholly repealed.

(*d*) 2 Bl. Com. 468; Hatch *v.* Trayes, 11 Ad. & El. 702.

(*e*) Pigot's case, 11 Rep. 26 b; Aldous *v.* Cornwell, L. R., 3 Q. B. 753.

(*f*) Suffell *v.* Bank of England, 7 Q. B. D. 270; 9 ib. 555.

(*g*) Leeds Bank *v.* Walker, 11 Q. B. D. 84.

Thirdly, *Policies of Insurance*,—which are instruments in writing by which one party, in consideration of a premium, engages to indemnify another against a contingent loss, by making him a payment in compensation, if and when the event happens by which the loss is to accrue. The effect of such a contract is obviously to protect the latter party (or the *assured* or *assuré*, as he is called) from the hazard to which he would otherwise be exposed, and to throw that hazard upon the *insurer*, or party giving the indemnity; who, if he carries on a general insurance business, by balancing the good against the bad, and by adjusting the premium as the circumstances seem to require, may not only himself escape loss, but may even secure for himself considerable profit from the result. Moreover, as contracts of insurance are most safe and beneficial to all parties concerned, when the indemnity is given by a competent number of persons, and not merely by an individual,—a body of insurers affording by their collective liability a stronger security to the assured, than if he had to depend upon the solvency of a single contractor, and, on the other hand, the insurers being themselves thereby protected, in the ratio of their numbers, from the ruin which might otherwise be the result of a heavy loss, or of a long-continued series of misadventures,—therefore associations and other companies and corporations have been established for carrying on the business of insurance on a large scale; and further, the risks of any particularly heavy insurance are usually distributed among a great number of insurers. The losses most commonly insured against are those occasioned by the storms and perils of the sea; and by fire and death,—which insurances are therefore called respectively marine insurance, fire insurance, and life insurance; but insurances may be (and at the present day very usually are) effected also against losses resulting from other accidental causes; and a valid insurance has been effected even

against loss sustained to a trading port through the attacks of foreign enemies therein (*h*). But it is sufficient if we discuss the subject of insurance in its three principal branches already mentioned.

(1.) *Marine Insurance* (a mercantile invention of incalculable importance in the interests of commerce) is stated by writers of the highest eminence to have been unknown to the antients (*i*); and the system or practice of such insurance is said to have been originally introduced into this country by the Lombards, in the course of the thirteenth century (*k*). No trace of the invention, however, is to be discovered in our legal history prior to the reign of Elizabeth; in that reign we find, however, that a statute (43 Eliz. c. 12) was passed, whereby a particular court, called the court of policies of assurance, was established for the trial, in a summary way, of causes relating to contracts of this description (*l*); the proceedings of which court were further regulated by the statute 14 Car. II. c. 23; but owing to the preference given to the ordinary tribunals, this special court fell into disuse. Marine insurances are most commonly undertaken by individuals or firms carrying on business in private partnership (*m*); and a certain number of these persons usually subscribe the instrument (or *policy*, as it is called), each engaging, on his or their own separate account, to indemnify the assured to the extent of a particular sum of money, being a proportion of the whole value of the subject of insurance; and such persons are called, with reference to the method used of thus subscribing their names, *underwriters;* and they belong, for the most part, to an association called "Lloyd's," the members of which under-

(*h*) Carter *v.* Boehm, 3 Burr. 1905.

(*i*) Grotius de Jure Belli, l. 2, c. 12, f. 3; Bynkershoek, Quæst. Juris Publici, l. 1, c. 21.

(*k*) Park's Insurance, Introd. xxxvii. 7th edit.

(*l*) 6 Rep. 47 b.

(*m*) Gray *v.* Gibson, Law Rep., 2 C. P. 120.

write each other's policies (*n*); and the association, for the better protecting its members against avoidable losses, is enabled (with the sanction of the Board of Trade) to establish signal stations and signal houses, and to arrange for telegraphic communication therewith (*o*). But marine insurances may also be made by bodies incorporated by private Act or charter; or by limited companies established under the Companies Acts, 1862 to 1890 (*p*); for although the Royal Exchange Assurance at one time enjoyed (under 6 Geo. I. c. 18; 8 Geo. I. c. 15; and 11 Geo. I. c. 30) a practical monopoly of the business of underwriting, this monopoly was abolished by 5 Geo. IV. c. 114.

Special regulations have been made by the legislature relative to marine insurance, whether effected by companies or otherwise. Thus, in order to prevent inconvenience to the public from policies being made *in blank*—that is, without specifying the names of those for whose benefit, or on whose account, they were made (*q*)—it has been provided by 28 Geo. III. c. 56, that no policy of insurance on a ship or cargo shall be valid, unless there be inserted therein, before it is made or effected, the name or usual style of one or more of the persons interested therein (*r*); or if not, then of the consignor or consignee of the goods of which the cargo shall consist, or of the person in Great Britain who shall receive the order for or effect such policy, or of the person who shall give the order to the agent employed to negotiate or effect the same. Until a recent period, moreover, the practice of *re-assurance*, with reference to maritime insurance,—that is to say, a contract whereby an insurer seeks to relieve himself from a risk which he may have incautiously undertaken, by throwing it upon some other underwriter (*s*),—

(*n*) 34 & 35 Vict. c. xxi.

(*o*) "Lloyd's Signal Stations Act, 1888" (51 & 52 Vict. c. 29).

(*p*) 25 & 26 Vict. c. 89, ss. 3, 44.

(*q*) Park's Insurance, 18, 7th ed.

(*r*) Wolf *v.* Horncastle, 1 Bos. & Pul. 316.

(*s*) Park's Ins. 418, 7th ed.; Delver *v.* Barnes, 1 Taunt. 48.

was forbidden by the law, except in certain specified cases (*t*); but the statute 19 Geo. II. c. 37, s. 4, by which this restriction was imposed, has been now repealed (*u*), so that such re-assurances are now freed from illegality, and are practically free from all restrictions. But this contract of re-assurance must be distinguished from what is sometimes called the contract of *double insurance;* which is, where a person, being fully insured by one underwriter, effects another insurance on the same subject, with some other underwriter or underwriters; for this contract was always held lawful, and the amount of the actual loss was recoverable by the assured against any or either of the underwriters. But inasmuch as a marine insurance is a contract of *indemnity* only, the law will not allow the assured to recover anything beyond the single amount of his loss; and therefore if he obtains full satisfaction upon either of his policies, he may not further proceed on the others; but the underwriter who has paid is (like one of several co-sureties) entitled to contribution from the other underwriters who have underwritten the same loss (*x*). And it is to be observed, that by the statute 30 & 31 Vict. c. 23, s. 8, no policy upon any ship, or upon any share therein, may be made for any certain term exceeding twelve calendar months; and by the statute 31 & 32 Vict. c. 86, an assignee of the policy, provided he be beneficially interested therein, may sue on it in his own name.

The subject-matter insured is most usually the ship, or the goods, or both; though it is also a common practice to insure the freight which the vessel is about to earn, or the profits expected from the cargo (*y*). The risks insured against are (unless excepted) usually the following:—perils of the seas, which comprise all the dangers incident

(*t*) Mackenzie *v.* Whitworth, 1 Ex. D. 36.

(*u*) 27 & 28 Vict. c. 56, s. 1; 30 & 31 Vict. cc. 23, 59.

(*x*) Park's Ins. 422, 7th ed.

(*y*) Miller *v.* Warre, 6 Barn. & Cress. 538; Deveaux *v.* Steele, 6 Bing. N. C. 358.

to navigation (*z*); capture by a public enemy, or by pirates or thieves (*a*); fire (*b*); *jettisons* (*c*), that is, the voluntary throwing overboard of goods or merchandize, to ease the ship in time of danger or distress; arrests or embargoes laid on by public authority (*d*); and fraudulent conduct (or *barratry*) on the part of the master or mariners (*e*). Against all these risks the underwriters (in consideration of a premium paid down) severally engage to give their indemnity to the extent of a specified sum, during the particular voyage mentioned in the policy; and even if the vessel should have been lost at the time when the policy is executed (such fact being then unknown to both parties), the insurance is, by the ordinary form of these contracts, still binding,—it being the practice in our English policies to insure "lost or not lost," words not usually inserted in the insurances of other nations (*f*). But the voyage marked out in the policy must be always exactly pursued; for the slightest *deviation* from it, except under circumstances of absolute necessity, will render the insurance ineffectual; and that whether the loss be occasioned by the deviation or not, and whether the ship resume her proper course or not before the loss happens (*g*). Every marine policy, too, is made under an implied warranty, that the ship shall, at the time of her setting sail,

(*z*) Lawrie *v.* Douglas, 15 Mee. & W. 746; Chope *v.* Reynolds, 5 C. B. (N. S.) 642; Thames and Mersey Insurance Co. *v.* Hamilton, 12 App. Ca. 484.

(*a*) Le Cheminant *v.* Pearson, 4 Taunt. 367.

(*b*) Busk *v.* Royal Exchange Assurance Company, 2 Barn. & Ald. 73.

(*c*) Fletcher *v.* Alexander, Law Rep., 3 C. P. 375; Royal Exchange Shipping Co. *v.* Dixon, 12 App. Ca. 11.

(*d*) Schroder *v.* Thompson, 7 Taunt. 462.

(*e*) Roscoe *v.* Corson, 8 Taunt. 684; Grill *v.* General Iron Screw Colliery Company, Law Rep., 1 C. P. 600; Lewen *v.* Suasso, 1 Arnould on Insurance, 3rd ed. p. 712.

(*f*) Park's Ins. 33, 7th edit.; Marsh. Ins. 338, 3rd edit.; Sutherland *v.* Pratt, 11 Mee. & W. 296.

(*g*) Hamilton *v.* Sheddon, 3 Mee. & W. 49; Oliverson *v.* Brightman, 8 Q. B. 781; Pratt *v.* Ashley, 1 Exch. 257.

be *seaworthy*, that is, in a condition to perform the voyage; and, if the fact turns out to have been otherwise, the assured is not entitled to recover in the event of a loss, whether the loss have proceeded from the defects in her condition, or from any other cause (*h*).

The assured in a policy of marine insurance is entitled to claim upon the policy, not only where he is able to give direct proof of loss, but where he can show circumstances from which a loss may reasonably be presumed: as that a sufficient time has elapsed for receiving intelligence of the vessel since her departure, and that none has been received: for under such circumstances it will be inferred that she has foundered (*i*). But where direct proof of the calamity is given, it may turn out that the loss is either a *total*, or a *partial* (called also an *average*), loss (*k*); and a total loss may be either actual or constructive,—being actual, where the thing insured is absolutely destroyed, so as to remain no longer in specie, or where it is so damaged that it cannot ever arrive in specie at the port of destination; and being constructive, where the injury sustained is so great, as to make it reasonable that the assured should claim as for a total loss, leaving the underwriter to recover what he can out of the shipwreck or other calamity (*l*); and such constructive loss arises, whenever the nature of the loss is such as to afford reasonable ground to the assured for relinquishing the voyage altogether, or where the goods are so damaged as not to be worth the expense of being forwarded (*m*). But in order to claim as for a total

(*h*) Park's Ins. 221, 229; Hollingsworth *v.* Brodrick, 7 Ad. & El. 40; Barr *v.* Gibson, 3 Mee. & W. 390; Knill *v.* Hooper, 2 H. & N. 277; Daniels *v.* Harris, Law Rep., 10 C. P. 1; The Glenfruin, 10 P. Div. 103.

(*i*) 1 Park's Ins. 106; Koster *v.* Reed, 6 Barn. & Cress. 19.

(*k*) Ralli *v.* Johnson, 6 Ell. & Bl. 422; The Great Indian Peninsular Company *v.* Saunders, 1 B. & Smith, 41; Farnworth *v.* Hyde, Law Rep., 2 C. P. 204; Kidston *v.* The Empire Marine Insurance Company, ib. 357.

(*l*) Park's Ins. 143, 146; Roux *v.* Salvador, 3 Bing. N. C. 281.

(*m*) Hudson *v.* Harrison, 2 Brod. & Bing. 97; Roux *v.* Salvador, ubi sup.; Cossman *v.* West, 13 App. Ca. 160.

loss, when in fact it is so by construction only, the assured is bound formally to cede or *abandon* all his remaining right in the property to the underwriter; and unless notice be given of such abandonment or cession, within a proper time after intelligence of the circumstance is received, the loss will be treated as partial only (*n*). In every case of partial loss, the underwriter is liable to pay such proportion of the sum he has subscribed, as the damage sustained by the subject of insurance bears to its whole value at the time of insurance; but in the case of a total loss, he is liable to the entire amount of his subscription (*o*).

Also, by a clause usually introduced into marine policies (*p*), they are commonly made to extend to indemnifying the assured against *salvage*, that is, against payments properly made for the defence, safeguard, or recovery of the ship or goods (*q*), or now of life (*r*); and also against *general average*, which latter subject requires a more particular consideration. The term *general* average (otherwise, but not usually, called *gross* average) expresses the contribution which, by the commercial law of every country in Europe (*s*), is made by the general body of proprietors of the ship or cargo, towards the loss sustained by any individual of their number, whose property has been sacrificed for the common safety; as where, in a storm, jettison is made of any goods, or sails or masts are cut away, *levandæ navis causâ* (*t*). But to found this obligation, it is essential that the ship should be eventually saved; and that the sacrifice so made should have in fact conduced to her pre-

(*n*) Dean *v.* Hornby, 3 Ell. & Bl. 180; Hudson *v.* Harrison, ubi sup.; Roux *v.* Salvador, ubi sup.

(*o*) Lewis *v.* Rucker, 2 Burr. 1172.

(*p*) Le Cheminant *v.* Pearson, 4 Taunt. 367.

(*q*) 3 Chit. Com. L. 502; 57 & 58 Vict. c. 60, ss. 544—565, superseding 17 & 18 Vict. c. 104, ss. 458, 484; The Werra, 12 P. Div. 52.

(*r*) 57 & 58 Vict. c. 60, s. 544.

(*s*) Park, Ins. 121.

(*t*) Miller *v.* Tetherington, 7 H. & N. 954; Kemp *v.* Halliday, Law Rep., 1 Q. B. 520; Mavro *v.* Ocean Marine Company, ib. 9 C. P. 595.

servation; and also that the cargo so jettisoned was laden in a proper manner: for goods stowed upon the deck (unless where a special custom authorizes deck stowage) are not the subject of general average (*u*). By our law, not only the ship and cargo, but also the freight, is liable to contribute to a general average (*x*); and the way of settling the contribution among the several parties, on the arrival of the ship at the port of destination, is to ascertain the proportion that the value of the property sacrificed bears to the entire value of the whole ship, cargo, and freight,—such estimate being made according to the net value of the several articles, if there brought to sale,—and to make the property of each owner (including the property sacrificed) contribute to the common loss, in the proportion so found. A party obliged to make payment of such quota to the owner of the property sacrificed, is entitled, upon the ground already stated, to seek, in his turn, compensation from the underwriters with whom he may have effected an insurance upon the property liable to the contribution; and this contribution is the payment which the policy (where it includes general average) extends to indemnifying the assured against; and the mutual contributions are settled by the award of persons called *average adjusters* or *staters*.

(2.) *Fire Insurance.* } —A *fire policy* engages, that, in
(3.) *Life Insurance.* } consideration of a single or (as the case may be) periodical payment of premium, the company will pay to the assured such loss as may occur by fire to his property as therein described, within the period or periods therein specified, to an amount not exceeding a particular sum fixed for that purpose by the policy; and on the other hand, a *life policy* usually engages, that, in consideration of a single or (as the case may be) periodical payment of premium, the company will pay, on the death

(*u*) Gould *v.* Oliver, 4 Bing. N. C. 134; 2 Man. & Gr. 209.

(*x*) Da Costa *v.* Newnham, 2 T. R. 407.

of some individual, or on his death within a limited period, a certain sum of money therein specified; that is, will pay it to the party effecting the insurance (supposing it to be effected by a stranger having an interest in the life insured), or to the executors or administrators of the party whose life is insured, supposing him to effect it for his own benefit; and under the 30 & 31 Vict. c. 144, any person becoming entitled to a life policy by assignment or other derivative title, and having a right in equity to give an effectual discharge to the insurance company, has been enabled, on giving notice of such assignment to the company, to sue on the policy in his own name as soon as it becomes a claim (*y*).

It is a rule regarding all insurance contracts, whether against fire, or on life, or against loss at sea, that the assured must have an *interest* in the subject-matter thereof (either in his own right or at least as a trustee), equal to the amount of the sum insured; and beyond the extent to which he possesses such interest, the contract will not be effectual (*z*); and the interest must be one of a pecuniary kind (*a*). A practice nevertheless formerly obtained in *marine* insurances, of insuring large sums without having

(*y*) By the Life Assurance Companies Act, 1870 (33 & 34 Vict. c. 61), a variety of provisions have been made, placing societies established for the purpose of life assurance under the general superintendence of the Board of Trade; and compelling them (among other things designed for the protection of their customers) to furnish annual statements of their accounts, and to give copies thereof to each shareholder and to each policy holder of the company, which statements are to be laid before parliament; and the Act has been amended by 34 & 35 Vict. c. 58, and 35 & 36 Vict. c. 41. The failure of the Albert and European Life Assurance Companies,—to wind up whose affairs a special tribunal in the nature of a court of arbitration was established by 34 & 35 Vict. c. xxxi, and 35 & 36 Vict. c. cxlv,—was the proximate occasion of life assurance societies being subjected to the control of the Board of Trade.

(*z*) Hebdon *v.* West, 3 B. & S. 579; Seagrave *v.* Union Marine Insurance Company, Law Rep., 1 C. P. 305.

(*a*) Halford *v.* Kymer, 10 B. & C. 724; Inglis *v.* Stock, 10 App. Ca. 263.

any property on board, which were called insurances "interest or no interest" (*b*); and though the policies in such cases amounted obviously to a species of wager, yet there was nothing at the common law which prevented their taking effect according to the design of the parties, that is, as wagers, although not as policies (*c*); but it was thought proper to repress these wagering bargains by positive regulation, and the statute 19 Geo. II. c. 37, s. 1, accordingly enacted that all insurances on British ships or goods (*d*), "interest or no interest," or without further proof of interest than the policy itself, or by way of gaming or wagering, or without benefit of salvage to the insurer, should be totally void, subject only to certain exceptions in the Act specified. And as regards policies of insurance generally, it has been enacted by a later statute, namely, the 14 Geo. III. c. 48, that no insurance shall be made on the life or lives of any person or persons, or on any other event or events whatsoever, wherein the person or persons for whose benefit, or on whose account, such policies are made, have no interest, or by way of gaming or wagering; and every insurance so made is rendered void (*e*); and that it shall not be lawful to make any policy, without inserting therein the name of the person interested, or for whose use, benefit, or account it is made (*f*); and that no greater sum shall be recovered from the insurer than the amount of the interest of the assured, in the life or lives, or other event or events. But with reference to *life* policies, a man has always been considered as having an interest in his own life (though not in that of his wife or child), of a kind that justifies his effecting an

(*b*) 2 Bl. Comr. 460.

(*c*) Cousins *v.* Nantes, 3 Taunt. 513.

(*d*) Berridge *v.* The Man On Insurance Company, 18 Q. B. D. 346.

(*e*) Shilling *v.* Accidental Death Company, 2 H. & N. 42; Hebdon *v.* West, 3 B. & Smith, 579; Wilson *v.* Jones, Law Rep., 2 Exch. 139.

(*f*) Hodson *v.* Observer Life Assurance Company, 8 Ell. & Bl. 40; Evans *v.* Bignold, Law Rep., 4 Q. B. 622.

insurance upon it to any amount (*g*); and a policy effected on the life of one's debtor has always been valid to the extent of the amount of the debt; and it has, moreover, been decided (*h*), that the statute 14 Geo. III. c. 48, does not invalidate a policy on the life of another, in which the assured was interested at the time of effecting the policy, merely because such interest has ceased before the death; and it has also been decided (*i*), that in the case of an insurance against accidents, the assured may recover, on the accident policy, the full amount of his insurance, though he shall also have recovered damages against the party by whom the accident was caused. And it is further to be observed, that under the Married Women's Property Act, 1882 (45 & 46 Vict. c. 75), a husband may insure his own life for the benefit of his wife and children, and (subject thereto) for his own benefit; also, that a wife may effect a policy on either her own life or on that of her husband (*k*), for her own benefit, with or without her child or children; and there is nothing to prevent a father insuring his child's life for the child's own benefit, although in such a case, the father as administrator to the child (dying under twenty-one years of age) would or might become entitled to the policy for his own benefit (*l*).

Another rule which is applicable to all insurance contracts is this, that independently of *fraud*,—which in these, as in other contracts, always of course entitles the party imposed upon to annul the transaction,—any *misrepresentation* of fact, on the part of the assured (whether made by himself or by his agent without his knowledge), upon a point material for the insurer's guidance in esti-

(*g*) Halford *v.* Kymer, 10 B. & C. 729.

(*h*) Dalby *v.* The India and London Life Assurance Company, 15 C. B. 365.

(*i*) Bradburn *v.* South Western Railway Company, Law Rep., 10 Exch. 1.

(*k*) Holt *v.* Everall, 2 Ch. Div. 266; Seyton *v.* Satterthwaite, 34 Ch. Div. 511; In re Davies' Policy, (1892) 1 Ch. 90.

(*l*) Worthington *v.* Curtis, 1 Ch. Div. 419.

mating the risk, will discharge the latter from his liability; and this is so, whether the loss which actually happens has any connection with the matter misrepresented or not (*m*). And the law is the same with respect to the *concealment* of any circumstance of the like description, provided it were known to the assured at the time of effecting the policy; for all insurances are contracts *uberrimæ fidei* (*n*). And it is proper here to observe, that although where a policy is void *ab initio*, from a cause not amounting to fraud or illegality on the part of the assured—as where, in a marine insurance, the ship, though believed to be seaworthy, turns out not to have been so, contrary to the implied warranty on that subject; or sails alone, contrary to an express warranty to sail with convoy, —the insurer is bound in every such case to refund the premium: for he was never legally in risk, and therefore cannot retain the consideration (*o*); but where, on the other hand, a policy is void *ab initio* for illegality, or is voidable for fraud in the assured, the assured cannot reclaim even the premium, the mutuality of the fault making no difference; for in this latter class of cases the maxim applies,—*in pari delicto, potior est conditio possidentis* (*p*).

Fourthly, *Charterparties*,—which are instruments in writing (with or without seal), by which one exporting goods from this country, or importing them from abroad, engages for the hire of an entire vessel for the purpose, at a freight or reward thereby agreed on; and upon the execution of such an instrument, the ship is said to be

(*m*) Park, Ins. 177; Perrins *v.* Marine, &c. Insurance Society, 2 Ell. & Ell. 317; Blackburn *v.* Vigors, 12 App. Ca. 531; Blackburn *v.* Haslam, 21 Q. B. D. 144.

(*n*) Park, Ins. 178; Russell *v.* Thornton, 4 H. & N. 788; 6 H. & N. 140; Holland *v.* Russell, 1 B. & Smith, 424; Davis *v.* London and Provincial Marine Insurance, 8 Ch. Div. 469.

(*o*) Park, Ins. 372; Fisk *v.* Masterman, 8 Mee. & W. 165.

(*p*) Park, Ins. 372, 377; Boehm *v.* Bell, 8 T. R. 154; Morck *v.* Abel, 3 Bos. & Pul. 35; Brooking *v.* Maudslay, 38 Ch. D. 636.

chartered or *freighted*, and the party by whom she is engaged is called the *charterer* or *freighter*. But where, instead of taking the entire vessel, the owner of goods merely bargains for their conveyance, for freight, by any particular vessel (other goods being at the same time conveyed in her for other proprietors), she is described, not as a chartered but as a *general* ship; and in this latter case, no charterparty is usually executed, but merely a bill of lading, of which we have already spoken (*q*).

A charterparty is commonly made between either the owner or the master of the ship (as the case may be) on the one part, and the owner of the goods on the other (*r*); and purports to be an agreement, that the ship shall be employed in the conveyance of goods for a certain voyage (or for a certain period of time), at a certain amount of freight, calculated at so much per ton, or at so much per month during the voyage; and the instrument also usually engages, Firstly, on the part of the ship-owner or master, that, being seaworthy and provided with necessaries, the ship shall receive a full cargo on board,—not exceeding what she can reasonably carry (*s*),—and that the same shall be properly stowed; and that the ship shall then immediately sail (wind and weather permitting) on the specified voyage, and deliver the cargo (the act of God or of the king's enemies excepted) at the port of destination, to the charterer or his assignees, in as good order as they were received on board; and, Secondly, on the part of the charterer, that he will supply a full cargo (*t*), and load and unload the goods within a certain number of days (usually called *lay* or *running* days), and pay freight as agreed upon; and that, if he detains the vessel beyond the running days, he will also pay *demurrage*, that is, a certain

(*q*) Vide supra, pp. 54, 78, 95.

(*r*) Read *v.* Hoskins, 4 Ell. & Bl. 979; Nelson *v.* Dahl, 12 Ch. D. 568; 6 App. Ca. 38; Nielsen *v.* Wait, 14 Q. B. D. 516; 16 Q. B. D. 67.

(*s*) Gould *v.* Oliver, 4 Bing. N. C. 134.

(*t*) Capper *v.* Foster, 3 Bing. N. C. 938.

amount *per diem* for the whole period of such extraordinary detention (*u*).

In the performance of this contract, it is the duty of the ship-owner or master to take good care of the cargo during the voyage (*x*): and the ship-owner will be liable to make satisfaction for any damage resulting from the master's negligence in this respect; or for the loss or non-delivery of any of the goods of which the cargo consists, unless occasioned by causes within the exceptions of the charterparty; but, under the ordinary exceptions, the ship-owner is protected from liability for the accidents of wind and weather, not imputable to his own negligence; for these fall within the exception of the "act of God." Supposing the goods, on the other hand, to arrive safely, the ship-owner or master is not bound to deliver them (unless there be some stipulation to that effect), unless and until he receives payment of the freight; for there is in general a lien on the goods for the freight, and the delivery and payment are considered in law as contemporaneous (*y*); yet where the charterparty is in such form as to amount to an actual demise of the vessel to the charterer, and there is no express stipulation for the payment of freight simultaneously with the delivery of the cargo,—such delivery cannot lawfully be withheld, on the ground that the freight is not paid: for the goods are, in that case, in the ship-master's possession as servant, *pro hâc vice*, of the charterer (*z*).

If the ship-owner or master, being prevented by an accident for which he is not responsible from entirely performing his contract, yet performs it in part, by carrying the cargo safely during a certain portion of the voyage, and the charterer receives the benefit of such part perform-

(*u*) Parker *v.* Winslow, 7 Ell. & Bl. 942; Kay *v.* Field, 8 Q. B. D. 594; 10 Q. B. D. 241; and Dahl *v.* Nelson, supra; and Nielsen *v.* Wait, supra.

(*x*) Abbott on Shipping, 255.

(*y*) Yates *v.* Railston, 8 Taunt. 293.

(*z*) Christie *v.* Lewis, 2 Brod. & Bing. 410; Horncastle *v.* Farran, 3 Barn. & Ald. 497.

ance, freight will then be due *pro ratâ itineris*. Thus, if the cargo be captured by an enemy during the voyage, and be retaken, and ultimately come to the charterer's hands; or if the ship be lost by stress of weather before the termination of the voyage, and the cargo be sent on by another vessel to the charterer,—he will be liable, in either of these cases (at least in the event of his accepting the goods), to pay the owner of the chartered vessel freight *pro ratâ*, that is, an amount proportioned to the distance for which the goods have been carried; this right not being founded on the charterparty, but on the contract which the law *implies* in every case where a service has been rendered, viz., that the party who consents to take the benefit of it, shall pay in respect thereof as much as it is reasonably worth (*a*), or, in other words, shall pay as upon a *quantum meruit*.

In concluding this chapter, it may be proper to advert, briefly, to the subject of *debt*, which is a matter closely connected with the subject of contracts, a debt being a legal obligation which results out of some contract, express or implied. And in general, whenever a contract is such as to give one of the parties a right to receive a liquidated sum of money from the other—as in the case of a bond for payment of money, or an implied promise to pay, for goods supplied, so much as they shall be reasonably worth,—a debt is then said to exist between these parties; while, on the other hand, if the demand be of an uncertain amount,—as where an action is brought against a bailee, for injury done through his negligence to the article committed to his care,—it is described, not as a *debt*, but as a claim for *damages* (*b*). As debts may thus arise out of contracts, and the contracts may be either specialty contracts or simple contracts, so the debts resulting therefrom are denominated either *specialty debts*, or *simple contract*

(*a*) Pinder *v.* Wilks, 5 Taunt. 512; Vlierboom *v.* Chapman, 13 Mee. & W. 230.

(*b*) 2 Bl. Com. 464.

debts (*c*). Debts may arise, however, not only by deed or simple contract, but by *matter of record;* and in that case, they receive the designation of judgment debts or *debts of record.* A debt of record is a sum of money which appears to be due upon the evidence of a court of record: thus it may be due upon a *statute merchant* or *statute staple* or upon a *recognizance* (*d*). And touching *recognizances,* we may here observe (having already elsewhere treated of *statutes merchant* and *statutes staple*), that they are obligations of record, entered into before some court or magistrate duly authorized, whereby the party bound acknowledges that he owes to the crown or (as the case may be,) to a private plaintiff, a certain sum of money, with condition to be void if he shall do some particular act,—as if he shall appear at the assizes, keep the peace, pay a certain debt, or the like (*e*); and recognizances, when forfeited, are said to be *estreated* (that is, extracted or taken out from among the other records); and usually they are sent up to the Exchequer, to be enforced; but if ordered to be estreated by a court of *quarter sessions*, or of *gaol delivery*, then they are levied by the sheriff and returned by the clerk of the peace to the lords of the Treasury (*f*). Judgment debts are also (as already indicated) debts of record; and they are, in fact, the most usual species of such debts; for when any sum is, in an action in any court of record, adjudged to be due from one party to the other, whether that sum was originally liquidated so as to constitute a *debt* between them, or was fixed and ascertained for the first time by the verdict of a jury, the claim having been originally in the nature of *damages*, that is a judgment debt, and a debt of record. Debts may also result otherwise than from contracts and judgments; for if, by Act of parliament a penalty is

(*c*) Vide supra, p. 59.
(*d*) 2 Bl. Com. 465.
(*e*) 2 Bl. Com. 465; Bro. Ab. tit. Recognizance, 24.
(*f*) 22 & 23 Vict. c. 21, s. 28.

annexed to some particular offence, and is made recoverable by the informer,—any person committing the offence becomes indebted in the amount of the penalty to the informer, so soon as the information is laid; also, a man who has never contracted at all, to pay (*e.g.*) a rent-charge issuing out of land, may become liable therefor as for a debt (*g*), and that merely by reason of his having taken and enjoyed the land out of which the rent-charge issues,—a contract being implied by law in such a case to pay the rent-charge.

(*g*) Lillingston's case, 7 Rep. 39 b; Thomas *v.* Sylvester, L. R. 8 Q. B. 368; Searle *v.* Cooke, 43 Ch. D. 519.

CHAPTER VI.

OF TITLE BY BANKRUPTCY.

THE property of a bankrupt is, by the statute law, divested out of him and vested in the bankruptcy trustee, for distribution by the latter among the general creditors of the bankrupt. The title of the trustee and (through him) of the creditors of the bankrupt, is consequently *by bankruptcy;* and it extends not merely to the personal estate, but also to the real estate, of the debtor.

The foundation of the law of bankruptcy in this country is a statute of 34 & 35 Hen. VIII. c. 4, which described *bankrupts* as those "who obtain other men's goods and then suddenly flee to parts unknown, or keep their houses and there consume their substance, without paying their debts:" and the Act (as subsequently amended by the 13 Eliz. c. 7) provided that, upon complaint in writing to the Lord Chancellor, not only the property but also the person of the debtor, should be made available for the payment of all the creditors rateably, according to their debts; and in both these Acts (as will have been observed) the bankrupt was (in a sense) regarded as a criminal, and he met with no favour at the hands of the legislature. At length, however, it came to be considered harsh to strip a man of all his resources, and at the same time not to relieve him from his difficulties; and it was accordingly provided, by the statute 4 & 5 Ann. c. 4, in imitation probably of the Roman law of *cession* (*a*), that a bankrupt

(*a*) 2 Bl. Com. p. 472, citing Cod. 7, 71; Inst. 4, 6, 40.

trader, who had been compelled to surrender the whole of his effects, and had in all matters conformed to the law of bankruptcy, should be entitled to his discharge from all further liability for his debts theretofore contracted.

By divers subsequent statutes, further provisions were enacted,—applicable some of them to traders, and others of them to non-traders,—for bringing debtors within the law relating to bankrupts; and further, any debtor, (whether a trader or not,) was enabled, under these provisions, to institute voluntary proceedings against himself, with the view of becoming a bankrupt, and so of obtaining a discharge from his debts and liabilities; and the administration of the law of bankruptcy (which had originally been entrusted to commissioners appointed by the Lord Chancellor, and acting for each case separately,) came at length to be assigned (for all bankruptcies arising within the metropolitan area) to a particular court called the "Court of Bankruptcy," and (for all bankruptcies arising outside of that area) to district bankruptcy courts, and which latter courts are now represented by such of the county courts as have jurisdiction in bankruptcy.

The statutes of Henry, Elizabeth, and Anne above referred to, and some subsequent Acts on the same subject, were repealed by the Act 6 Geo. IV. c. 16, and a new system was then established for bankruptcy administrations; which new system continued in force for a considerable time, but was afterwards abandoned; and in the course of the present reign, several attempts have been made to provide a satisfactory system for the administration of bankrupt estates (*b*); and the existing system is that which has been provided by the Bankruptcy Act, 1883 (*c*), the Bankruptcy (Discharge and Closure) Act,

(*b*) 12 & 13 Vict. c. 106 (The Bankruptcy Act, 1849); 24 & 25 Vict. c. 134 (The Bankruptcy Act, 1861); and 32 & 33 Vict. c. 71 (The Bankruptcy Act, 1869).

(*c*) 46 & 47 Vict. c. 52; General Rules, October, 1886; and Scale of Fees and Percentages, October, 1886; and Order as to Stamps, October, 1886.

1887 (*d*), and the Bankruptcy Act, 1890 (*e*), and the rules made thereunder; which system is, in all its branches, subject to the control of the Board of Trade,—an entirely new feature in our bankruptcy law (*f*): and for the due administration of this system, there is the London Court of Bankruptcy (now the Bankruptcy Division of the High Court of Justice) possessing jurisdiction within the City of London and the liberties thereof, and also within the districts of the various metropolitan county courts; and there are also, of course, for the rest of England and for Wales the various county courts (above referred to) having jurisdiction in bankruptcy.

(*d*) 50 & 51 Vict. c. 66.

(*e*) 53 & 54 Vict. c. 71.

(*f*) This control of the Board of Trade is rendered effective by the following (among other) provisions of the Bankruptcy Act, 1883, that is to say, the trustee is required, not less than twice in each year during his tenure of office, to send to the Board of Trade, or as they direct, an account of his receipts and payments as trustee; and the Board of Trade is to cause the accounts so sent to be audited; and for the purposes of the audit, the trustee is to furnish the Board with such vouchers and information as the Board may require; and the Board may at any time require the production of, and inspect, any books or accounts kept by the trustee; and when such account has been audited, one copy thereof is to be filed and kept by the Board, and the other copy is to be filed with the court, and each copy is to be then open to the inspection of any creditor, or of the bankrupt, or of any person interested (sect. 78). And further, the trustee is required as often as may be prescribed, and in any case not less than once in every year during the continuance of the bankruptcy, to transmit to the Board of Trade a statement showing the proceedings in the bankruptcy up to the date of the statement, containing the prescribed particulars, and made out in the prescribed form; and the Board of Trade is to cause the statements so transmitted to be examined; and is to call the trustee to account for any misfeasance, neglect, or omission which may appear on the said statement, or in his accounts, or otherwise; and may require the trustee to make good any loss which the estate of the bankrupt has sustained by his misfeasance, neglect, or omission (sect. 81); and if at any time the trustee keeps in his hands for more than ten days any sum exceeding 50*l*., he must pay interest on the same at the rate of 20*l*. per cent., and is liable, moreover (unless he can satisfy the Board of Trade as to the retention), to be dismissed from his office without remuneration.

In proceeding to consider the existing law of bankruptcy, we shall first of all inquire, *who is capable of being made* (*or of becoming*) *bankrupt;* secondly, *under what circumstances and in what manner he is adjudicated bankrupt;* thirdly, *the effect of the bankruptcy on his estate;* and fourthly, *the proceedings in the bankruptcy generally, subsequently to adjudication, or subsequently to the receiving order* (which in general precedes the adjudication); and we shall conclude by giving some account of the *compositions or schemes of arrangement* which debtors now not unfrequently enter into, and which (although they formed no part originally of the law of bankruptcy) are now become closely connected with it; and here let us premise this one observation, namely, that upon every court having jurisdiction in bankruptcy as now established, there has been conferred a general power of deciding all questions of priorities, and all questions whatsoever, whether of law or of fact, which may arise in any case of bankruptcy, and which it may be deemed by that court necessary or expedient to decide for the purpose of doing complete justice, or of making a complete distribution of the property of the bankrupt; and in the execution of its powers, the Bankruptcy Division of the High Court is not liable to be restrained by the order of any other court (*g*).

I. Who is capable of being made a bankrupt.

This is a predicament which has always been, and still is, applicable to none but *debtors;* and the term "debtor" has the same sense in bankruptcy as under the general law, and imports a party bound (at law or in equity) to pay another a certain and liquidated sum of money; but we must bear in mind, of course, that although a judgment debtor is a "debtor," not every judgment or order of the

(*g*) 46 & 47 Vict. c. 52, s. 102, re-enacting a similar provision in 32 & 33 Vict. c. 71, s. 72; Ex parte Dickin, In re Pollard, 8 Ch. D. 377; and In re Lowenthal, 13 Q. B. D. 238.

court for the payment of money makes a man a "debtor" (*h*).

Under the earlier Bankruptcy Acts, the debtor must, in general, have been a trader; and by the Bankruptcy Act, 1869 (32 & 33 Vict. c. 71), ss. 4, 5, it was provided that "the term 'trader' should mean the several persons in that behalf mentioned in the first schedule to the Act,"—that is to say, generally, such persons as used "the trade of merchandise by way of bargaining, &c., in gross or by retail;" or who sought their living by "buying and selling, &c., goods or commodities" (*i*); and more particularly, persons engaged in the specific employments mentioned in the note below (*k*); but not *farmers* or *graziers;* or common labourers or workmen for hire. It had also been long settled by decisions in bankruptcy, that, to bring a man under the definition of a trader liable to be made bankrupt as such, his trading must have been one that was carried on either within, or at least to or from, the realm (*l*); and that in the interpretation of the words *buying* and *selling*, buying only, or selling only, would not have sufficed, but there must have been both a buying and a selling, and also the endeavour to obtain a livelihood thereby (*m*); and that one single act of buying and selling would not have made a man a

(*h*) In re Sacker, Ex parte Sacker, 22 Q. B. D. 179, explaining Ex parte Harris, 2 Ch. Div. 423; 53 & 54 Vict. c. 71, s. 1.

(*i*) Gibson *v.* King, 10 Mee. & W. 667; Ex parte Salaman, In re Taylor, 21 Ch. D. 394.

(*k*) Alum makers; apothecaries; auctioneers; bankers; bleachers; brokers (including *pawnbrokers* (Rawlinson *v.* Pearson, 5 B. & Ad. 124) and *shipbrokers* (Pott *v.* Turner, 6 Bing. 702)); brickmakers; builders; calenderers; carpenters; carriers; cattle or sheep salesmen; coach proprietors; cow-keepers; dyers; fullers; keepers of inns, taverns, hotels, or coffee houses; lime burners; livery stable keepers; market gardeners; millers; packers; printers; sharebrokers; shipowners; shipwrights; stockbrokers; stockjobbers; victuallers; warehousemen; wharfingers; persons using the trade or profession of a scrivener or receiving other men's monies or estates into their trust or custody; persons insuring ships or their freight or other matters against the perils of the sea.

(*l*) Allen *v.* Cannon, 4 Barn. & Ald. 418.

(*m*) 2 Bl. Com. p. 476; Sutton *v.* Weeley, 7 East, 442.

trader, at least if unconnected with any intention of general dealing (*n*); also, that the trading would not have sufficed if it consisted of buying and selling only under particular restraints or for particular purposes: as where the buying was of provisions of war; and the selling, the disposal of the surplus and refuse thereof (*o*); or if a schoolmaster bought books and sold them to his scholars (*p*). A trading carried on by a clergyman sufficed, however, to support an adjudication against him as a trader, notwithstanding that (by the statute 1 & 2 Vict. c. 106, and 4 & 5 Vict. c. 14) such trading was forbidden by the law (*q*). But though an unmarried woman of full age might be made bankrupt as a trader, yet a *feme covert* could not have been made bankrupt at all, even where she carried on business as a sole trader under a custom—as of London (*r*); nor even where—no such custom being applicable—she traded with property which, under the Married Women's Property Act, 1870, was absolutely her own (*s*). Under the existing bankruptcy system, however, it is not necessary (with the single exception to be presently mentioned) that the debtor, in order to be made a bankrupt, should be a trader; nor is the distinction between traders and non-traders maintained for any purpose in the Bankruptcy Act, 1883. And here note, that an infant, even though engaged in trade, could not (*t*), and still cannot (*u*), be made a bankrupt; and as regards married women, the Married Women's Property Act, 1882 (*x*), section 1, subsection 5, provides, that if they carry on trade separately

(*n*) Bl. Com. p. 476; Ex parte Salkeld, 3 M. D. & D. 175.

(*o*) Newton *v.* Trigg, 1 Salk. 110; Gibson *v.* Thompson, 3 Keb. 451.

(*p*) Valentine *v.* Vaughan, Peake, 76.

(*q*) Ex parte Meymott, 1 Atk. 196.

(*r*) 2 Bl. Com. 477; Ex parte Franks, 7 Bing. 762.

(*s*) 33 & 34 Vict. c. 93, ss. 1, 11; Ex parte Holland, In re Heneage, Law Rep., 9 Ch. App. 307; Ex parte Jones, In re Grissell, 12 Ch. Div. 484.

(*t*) Ex parte Lynch, 2 Ch. D. 227.

(*u*) Ex parte Jones, In re Jones, 18 Ch. Div. 109.

(*x*) 45 & 46 Vict. c. 75; 46 & 47 Vict. c. 52, s. 152.

from their husbands, they may, in that case and in respect of their separate property, be made bankrupts. Also, persons who (as being either peers or members of parliament) used to have certain privileges or protection from civil process, are no longer protected from the liability to be made bankrupts (*y*); and aliens, denizens, and persons naturalized, are as amenable to the law of bankruptcy as natural-born subjects (*z*). But the debtor must be domiciled in England, or (within a year before the date of the presentation of the petition) must have had his residence or place of business in England, in order to be made a bankrupt.

II. Under what circumstances and in what manner a debtor may be made a bankrupt.

In order to be made a bankrupt, it is essential that the debtor shall have committed one or more of the following nine (formerly eight, and originally six) *acts of bankruptcy*, viz.: (1.) That he has, in England or elsewhere, made a conveyance or assignment of his property to a trustee or trustees for the benefit of his creditors generally; (2.) That he has, in England or elsewhere, made a *fraudulent* conveyance, gift, delivery, or transfer of his property, or of any part thereof; (3.) That in England or elsewhere, he has made any conveyance or transfer of his property, or any part thereof, or created any charge thereon, which would, under the Bankruptcy Act, 1883, or any other Act, be void as a fraudulent preference if he were adjudged bankrupt; (4.) That he has, with intent to defeat or delay his creditors, done any of the following things, viz., departed out of England; or, being out of England, remained out of England; or departed from his dwelling-house, or otherwise absented himself; or begun to keep

(*y*) Duke of Newcastle *v.* Morris, Law Rep., 4 H. of L. Ca. 661; 34 & 35 Vict. c. 50, ss. 6—8; 46 & 47 Vict. c. 52, ss. 32, 33; In re Russell, Law Rep., 7 Ch. App. 519.

(*z*) Allen *v.* Cannon, 4 Barn. & Ald. 418.

house (*a*); (5.) That execution issued against him has been levied by seizure and sale of his goods, under process in an action in any court or in any civil proceeding in the High Court; (6.) That execution issued against him has been levied by seizure of his goods under such process as last-mentioned, and the goods (without having been actually sold by the sheriff) have been held by him for twenty-one days (*b*); (7.) That the debtor has filed in the court a declaration admitting his inability to pay his debts, or has presented a bankruptcy petition against himself (*c*); (8.) That a creditor has obtained a final judgment against him for any amount, and execution thereon not having been stayed, has served on him in England, or, by leave of the court, elsewhere, a "bankruptcy notice" under the Act, requiring him to pay the judgment debt in accordance with the terms of the judgment, or to secure or compound for it to the satisfaction of the creditor or of the court, and he has not, within seven days after service of the notice in case the service is effected in England, and in case the service is effected elsewhere then within the time limited in that behalf by the order giving leave to effect the service, either complied with the requirements of the notice or satisfied the court that he has a counter-claim, set-off, or cross-demand which equals or exceeds the amount of the judgment debt, and which he could not set up in the action in which the judgment was obtained; and (9.) That the debtor has given notice to any of his creditors that he has suspended, or is about to suspend, payment of his debts. And here it is to be noted (as being in some sense a 10th act of bankruptcy), that on an application under the Debtors Act, 1869 (32 & 33 Vict. c. 83), s. 5, made by a judgment creditor for an order of

(*a*) Ex parte Meyer, In re Stephany, Law Rep., 7 Ch. App. 188; Ex parte Coates, In re Skelton, 5 Ch. D. 979.

(*b*) 53 & 54 Vict. c. 71, s. 1.

(*c*) Ex parte Duignan, In re Bissell, Law Rep., 6 Ch. App. 605.

committal against the judgment debtor, the court may (in lieu of committing) make a receiving order against the debtor, provided the creditor consent thereto; and in such a case, the debtor is deemed to have committed an *act of bankruptcy* at the time such order is made.

And it is to be here observed, that the act of bankruptcy on which the petition against the debtor is founded, must have occurred within three months (formerly six months) before the presentation of the petition (*d*). And of the nine acts of bankruptcy above specified, the third and ninth are entirely new; the fifth and sixth are considerably modified (not being now limited to executions for 50*l.* or upwards) (*e*); and the eighth is a great extension of the former analogous proceeding by debtor's summons (*f*). And as regards the first and second of the nine acts of bankruptcy, it should be further observed, that the character of the transaction, as being innocent or fraudulent, is to be determined with regard exclusively to the creditors of the debtor; and that, from this point of view, any transfer is fraudulent which is void under the statute 13 Eliz. c. 5; or which substantially conveys the debtor's whole property in consideration of a pre-existing debt (*g*); or which conveys even a portion of his property in consideration of such a debt, if made *voluntarily* and *in contemplation of bankruptcy;* or if it otherwise has the effect of defeating or delaying creditors (*h*).

Such being the different acts of bankruptcy, we are next to advert to the manner of obtaining an adjudication; and this is, in general, by filing a petition in the court, praying that a receiving order may be made against the debtor, and alleging, as a ground therefor, one or more of the above

(*d*) 46 & 47 Vict. c. 52, s. 6.

(*e*) Ex parte Villars, In re Rogers, Law Rep., 9 Ch. App. 432.

(*f*) See Ex parte Johnson, Law Rep., 5 Ch. App. 741; Ex parte Wier, ib. 7 Ch. App. 319.

(*g*) Worsley *v.* De Mattos, 1 Burr. 467; Ex parte Ellis, 2 Ch. Div. 798; Ex parte Chaplin, 26 Ch. Div. 333.

(*h*) Alton *v.* Harrison, L. R., 4 Ch. App. 626.

acts of bankruptcy (*i*). Such petition may be filed either by the debtor himself, or by any single creditor whose debt amounts to 50*l.* or upwards; but any two or more creditors whose debts in the aggregate amount to 50*l.* may be the *petitioning creditor* or *creditors*. The debt must be a liquidated sum due either at law or in equity (*k*), and payable either immediately or at some certain future time; and it must, of course, be an actionable debt (*l*). And if the debt of the petitioner should be a secured debt, then the creditor must, in his petition, state that he is willing to give up his security for the benefit of the creditors in the event of an adjudication of bankruptcy; or else he must give an estimate of the value of the security, and then he is deemed to be a petitioning creditor in respect only of the balance of his debt (*m*). The petition, which must be on oath (*n*), is to be filed either in the county court (which has, for this purpose, all the jurisdiction of the High Court) or in the High Court (*o*), according to the following distinctions, that is to say: If the debtor against or by whom a bankruptcy petition is presented has resided or carried on business within the London bankruptcy district for the greater part of the six months immediately preceding the presentation of the petition, or for a longer period during those six months than in the district of any county court, or is not resident in England, or if the petitioning creditor is unable to ascertain the residence of the debtor, the petition shall be presented to the High Court; and in any other case, the petition shall be presented to the county court for the district in which the debtor has resided or carried on business

(*i*) Forms in Appendix to General Rules, 1886 (debtor's own petition), No. 4, and (creditor's petition), No. 10.

(*k*) Ex parte Blencowe, Law Rep., 1 Ch. App. 393.

(*l*) Ex parte Sturt, In re Pearcy, Law Rep., 13 Eq. Ca. 309.

(*m*) Ex parte Cunningham, 13 Q. B. D. 418.

(*n*) 46 & 47 Vict. c. 52, s. 7.

(*o*) Sect. 95; Reg. Gen. 145 (October, 1886).

for the longest period during the six months immediately preceding the presentation of the petition. The petition (unless indeed it is filed by the debtor himself) must be duly served on the debtor,—and in order to prevent his avoiding such service, the debtor may (in a proper case) be arrested under the Absconding Debtors Act, 1870 (*p*), as amended by sect. 25 of the Bankruptcy Act, 1883. Upon the hearing of the petition, unless the same is dismissed, a receiving order will be made; and, in fact, at any time after the presentation of the petition, the court may make an interim *receiving order;* and after such order, no creditor may commence any action or other proceeding against the debtor or his property, and the court may even stay any pending action or execution or other legal process (*q*). Notice of the receiving order is sent to the official receiver and to the Board of Trade, and is advertised; and the effect of it is, to constitute the official receiver interim receiver of the property of the debtor; and such official receiver may also (sect. 12) appoint a special manager until a trustee is appointed. As soon as may be after the receiving order is made, a general meeting (called the first meeting) of the creditors is to be held, for the purpose of considering whether the debtor shall be made a bankrupt or not; and if the creditors at such first meeting, or at any adjournment thereof, by ordinary resolution, resolve that the debtor be adjudged bankrupt; or if they pass no resolution, or do not even meet,—the court adjudges the debtor a bankrupt; and thereupon the property of the bankrupt becomes divisible among his creditors, and for that purpose vests in a trustee (*r*). The adjudication order is then forthwith published in the London Gazette, and in such local papers as may be prescribed; and the production of a copy of the Gazette, containing a copy of the order, is

(*p*) 33 & 34 Vict. c. 76.
(*q*) 46 & 47 Vict. c. 52, ss. 5, 9, 10; Ex parte Anderson, Law Rep., 5 Ch. App. 473.
(*r*) Sect. 20.

made conclusive evidence of the debtor having been adjudged a bankrupt, and of the date of the adjudication (*s*). Such is the ordinary mode of obtaining an adjudication of bankruptcy: and we need only further observe here, that a debtor may also be adjudicated a bankrupt, either (1) for failing without reasonable excuse to submit to the official receiver his statement of affairs hereinafter mentioned (sect. 16); or (2) for default in the payment of any instalment due in pursuance of any composition or scheme of arrangement arrived at as hereinafter mentioned (sect. 18); or (3) on the application of a judgment creditor (under the Debtors Act, 1869, s. 5) for a committal order against the debtor (sect. 103).

III. The effect of the bankruptcy on the property of the bankrupt.

Upon a receiving order being made, the property of the bankrupt vests immediately in the official receiver until a trustee is appointed (*t*). The trustee's appointment becomes effective upon, and as from the date of, the certificate of the Board of Trade (*u*); and upon such appointment becoming effective, all the property of the bankrupt forthwith passes out of the official receiver, and vests in the bankruptcy trustee (*x*); so that, by the mere effect of this appointment, the whole property of the bankrupt passes to the trustee; and the certificate of the Board of Trade is conclusive evidence of the appointment (*y*).

By force of his appointment, and subject to the exceptions which will presently be mentioned, the trustee takes, for the benefit of the creditors, all the lands, tenements, and hereditaments of the bankrupt, together with all his personal estate and effects, present and in expectancy, and wherever situate; in other words, all such "property" as

(*s*) Sect. 20.
(*t*) 46 & 47 Vict. c. 52, ss. 9, 12; In re Parker, 15 Q. B. D. 196.
(*u*) 46 & 47 Vict. c. 52, s. 21.
(*x*) Sect. 20.
(*y*) Sect. 138.

may belong to or be vested in the bankrupt at the commencement of the bankruptcy, or which (with the exceptions about to be noticed) may be acquired by or devolve on him before his discharge (*z*); and also all powers which he is entitled to exercise for his own benefit, except the right of nomination to any vacant ecclesiastical benefice (*a*). Moreover, in certain cases, the property even of *strangers*, if found in the bankrupt's possession, vests in the trustee; it being one of the enactments of the bankrupt law (introduced to protect creditors from fraud and fallacious appearances), that where a bankrupt shall, at the commencement of the bankruptcy, have in his possession, order or disposition, by consent and permission of the true owner, any goods or chattels whereof he, the bankrupt, was reputed owner, or whereof he had taken upon himself the sale or disposition as owner, they shall be deemed to form part of the property of the bankrupt divisible amongst his creditors,—things in action (other than book debts) being, however, expressly excluded from this order and disposition clause (*b*). And it is to be observed that goods and chattels comprised in a mortgage deed (as, *e.g.*, a duly registered bill of sale) may be, and usually are, held to remain in the order and disposition of the debtor (*c*),—although it is difficult to see the justice of such a provision, more especially as the provision does not now apply to a registered bill of sale given otherwise than by way of mortgage (*d*). On the other hand, there passes not to the trustee any property in respect of what the bankrupt may earn by his personal labour or services

(*z*) Sect. 44. (See Ex parte Dewhurst, Law Rep., 7 Ch. App. 185.)

(*a*) Sect. 44; Badham *v.* Mee, 7 Bing. 695.

(*b*) Ex parte Union Bank of Manchester, Law Rep., 12 Eq. Ca. 354; In re Sillence, 7 Ch. D. 70; In re Blanshard, 8 Ch. D. 601; Ex parte Nottingham Bank, 15 Q. B. D. 441; Colonial Bank *v.* Whinney, 30 Ch. Div. 261; 11 App. Ca. 426.

(*c*) 45 & 46 Vict. c. 43, s. 15.

(*d*) 41 & 42 Vict. c. 31, s. 20; Swift *v.* Pannell, 24 Ch. D. 210.

purely, after the bankruptcy has commenced (*e*); nor any in respect of his right of action for a personal wrong (*f*); nor in respect of what belongs to the bankrupt in the capacity of trustee for others (*g*), or of any appointment to an office which cannot legally be sold (*h*); nor in respect of his military or other pay under the crown (*i*); nevertheless, the court may (with the sanction of the chief officer of the department to which the bankrupt belongs or belonged) order portions of such pay to be applied in payment of his debts (*k*); and (with the sanction of the bishop) the like provision may be made for the payment of the debts of a beneficed clergyman who is a bankrupt (*l*). The Bankruptcy Act, 1883, also expressly provides, that the tools of the bankrupt's trade (if any) and the necessary wearing apparel of himself, his wife and children, to a value (inclusive of tools, apparel and bedding) of the sum of 20*l*., shall not vest in the trustee (*m*); nor do any moneys vest in the trustee which the bankrupt has received, or for which he is accountable, as a mere collector or officer of a friendly or other like society (*n*). And when any property of the bankrupt, acquired by the trustee, consists of land of any tenure burthened with onerous covenants, of unmarketable shares in companies, of unprofitable contracts, or of any other property that is not readily saleable, by reason of its binding the possessor thereof to the performance of any onerous act, or to the payment of money, the trustee may,

(*e*) Elliot *v.* Clayton, Law Rep., 16 Q. B. 581; Emden *v.* Carte, 17 Ch. D. 768; Ex parte Benwell, 14 Q. B. Div. 301; In re Rogers, Ex parte Collins, (1894) 1 Q. B. 425.

(*f*) Rogers *v.* Spence, 13 Mee. & W. 571; Ex parte Vine, In re Wilson, 8 Ch. D. 364.

(*g*) 46 & 47 Vict. c. 52, s. 44.

(*h*) Co. B. L. 298; M'Bean *v.* Deane, 30 Ch. Div. 520.

(*i*) Co. B. L. 299; Gibson *v.* East India Company, 5 Bing. N. C. 262.

(*k*) 46 & 47 Vict. c. 52, s. 53; In re Wicks, 17 Ch. D. 70.

(*l*) Ibid. s. 52.

(*m*) Sect. 44.

(*n*) 38 & 39 Vict. c. 60, s. 15; 46 & 47 Vict. c. 52, s. 40; In re Miller, Ex parte Official Receiver, (1893) 1 Q. B. 32.

at any time within (formerly three, but now) twelve months from the date of his appointment as trustee, and provided he shall not have omitted for twenty-eight days to reply to any due written inquiry made to him asking whether he intends to disclaim or not, by writing under his hand, *disclaim* such property, but in the case of leases, not without the leave of the court, unless in the case of certain small bankruptcies (*o*); and the disclaimer, as from the date thereof, operates to determine the rights, interests, and liabilities of the bankrupt and of his property, in or in respect of the property disclaimed, and also discharges the trustee of all personal liability in respect of the property disclaimed, as from the date when the property vested in him (*p*). Under the Bankruptcy Act of 1869, upon the execution of such a disclaimer (which might have been without leave) the property, if a contract, was deemed to have determined from the date of the adjudication (*q*); if a lease, to have been surrendered on the same date (*r*); if shares, to have been then forfeited; and if any other species of property, to have reverted to the person entitled on the determination of the bankrupt's estate: and if there was no such person in existence, then in no case was any interest in the property to remain in the bankrupt (*s*); but the Act contained a provision, that any person injured by the operation of this enactment, should be deemed a creditor of the bankrupt to the extent of such injury, and might prove the same as a debt; and the Act of 1883 contains similar provisions; and in particular, and as regards disclaimers of the leases of the bankrupt, the Act of 1883 (as amended) has provided, that the court may make an order for the vesting of such leases in anyone appearing to the court to be interested therein,—*e.g.*, in an underlessee of the bankrupt or in his mortgagee (whether by

(*o*) 46 & 47 Vict. c. 52, s. 55; r. 232.

(*p*) Ibid. sub-s. 2.

(*q*) In re Sneezum, 3 Ch. D. 463.

(*r*) Ex parte Stephens, In re Lavies, 7 Ch. D. 127.

(*s*) See 32 & 33 Vict. c. 71, s. 23.

demise or by assignment),—provided such underlessee or mortgagee will assent to undertake the liabilities incident to the lease, that is to say, such of them as would have attached to any absolute assignee of the lease under an express assignment thereof, which for this purpose is to be deemed to have been executed at the date of the filing of the bankruptcy petition; and in such case, the vesting order may limit the liabilities aforesaid to the leaseholds comprised in the vesting order,—*scilicet*, where these leaseholds are portion only of the property comprised in the original lease, or head-lease (*t*).

The appointment of the trustee of a bankrupt used to have a *retrospective* relation, so that the bankruptcy was deemed to have commenced at the time the debtor committed any act of bankruptcy within twelve months next preceding the order of adjudication; and thus it overreached and annulled all alienations and executions which were of a date subsequent to the commencement of the bankruptcy (*u*). This, indeed, had been the principle of the bankrupt law ever since the time of Queen Elizabeth; and it prevailed, at that period, with an austerity which put wholly out of sight the consideration due to innocent parties, and the safety of commercial transactions (*x*). And even in our own days it continued so to operate, and to produce (as it still does), in particular instances, results of a harsh character; but under the Bankruptcy Act, 1869, its harshness was considerably obviated, protection having been extended by that Act to various *bonâ fide* transactions of the debtor, although they fell within the

(*t*) 46 & 47 Vict. c. 52, s. 55, sub-s. 7, amended by 53 & 54 Vict. c. 71, s. 13; Smalley *v.* Hardinge, 7 Q. B. D. 524; Harding *v.* Preece, 9 Q. B. D. 281; Ex parte Allen, In re Fussell, 20 Ch. D. 341; In re Cock, Ex parte Shilson, 20 Q. B. D. 343; In re Finley, 21 Q. B. D. 475.

(*u*) 32 & 33 Vict. c. 71, s. 11; Lomax *v.* Buxton, Law Rep., 6 C. P. 107; Re Campbell, Ex parte Wolverhampton Banking Co., 14 Q. B. D. 32.

(*x*) 2 Bl. Com. 486.

period covered by the relation back of the trustee's appointment. And now, under the Bankruptcy Act, 1883, sect. 43, it has been provided, that the bankruptcy of any debtor, whether the same takes place on the debtor's own petition or upon that of a creditor or creditors, shall be deemed to have relation back to, and to commence at, the time of the act of bankruptcy being committed on which the receiving order is made against him; or, if the bankrupt is proved to have committed more acts of bankruptcy than one, to have relation back to, and to commence at, the time of the first of the acts of bankruptcy proved to have been committed by the bankrupt within three months next preceding the date of the presentation of the bankruptcy petition; and under the Bankruptcy Act, 1890, sect. 20, where the adjudication follows upon a receiving order made (in lieu of a committal order) under sect. 103 of the Bankruptcy Act, 1883, the bankruptcy relates back to, and commences at, the time of such order, or (in the case of any previous act of bankruptcy) the time of the first of such acts within the three months next preceding the date of the receiving order; and it is provided (by the Bankruptcy Act, 1883), that (subject to the provisions hereinafter mentioned regarding certain executions, and regarding the avoidance of voluntary settlements and fraudulent preferences) the following transactions with the debtor shall be good, notwithstanding they may fall within the period covered by the relation back (*y*), that is to say—(1) Any payment by the bankrupt to any of his creditors; (2) Any payment or delivery to the bankrupt; (3) Any conveyance or assignment by the bankrupt for valuable consideration; and (4) Any contract, dealing, or transaction by or with the bankrupt for valuable consideration; provided that both the following conditions are complied with, namely—(1) The payment, delivery, conveyance, assignment, contract, dealing, or transaction, as the case

(*y*) Sect. 49; see In re Wright, 3 Ch. D. 70.

may be, must have taken place before the date of the receiving order; and (2) The person (other than the debtor) to, by, or with whom the payment, delivery, conveyance, assignment, contract, dealing, or transaction, was made, executed, or entered into, must not at the time of the payment, delivery, conveyance, assignment, contract, dealing or transaction, have had notice of any available act of bankruptcy committed by the bankrupt before that time. And with regard to executions (*z*), whether by *fieri facias* against the goods, or by *elegit* against the lands, or by garnishee order, the Act provides, in particular, that these shall in general hold good, if perfected before the date of the receiving order, and before notice of the presentation of any petition by or against the debtor, or of the commission of any act of bankruptcy by him,—an execution against land being perfected upon the seizure thereof (if legal), or upon the appointment of a receiver thereof (if equitable), and an execution against goods being perfected by seizure and sale, and a garnishee order being perfected by the receipt of the debt.

There are cases, however, in which transactions are void as against the trustee, even independently of the doctrine of relation. For, firstly, as regards fraudulent conveyances,—the trustee's title will prevail against all dispositions of property, under colour either of alienation or of legal execution, which are not *bonâ fide*, but of a merely feigned or collusive character,—whether a prior act of bankruptcy has been committed or not (*a*); and it will prevail, also, against all alienations and payments voluntarily (that is to say, without pressure) made by the debtor shortly before his bankruptcy with the intention of giving a preference to some particular creditor or creditors (*b*); for a transaction of this kind evidently tends to

(*z*) Sect. 45; Ex parte Sulger, In re Chinn, 17 Ch. D. 839; Hood *v.* Newby, 21 Ch. D. 605.

(*a*) Jackson *v.* Irving, 2 Camp. 48.

(*b*) Atkinson *v.* Brindall, 2 Bing. N. C. 225; Strachan *v.* Barton, 11 Exch. 647.

defeat the main principle of the bankruptcy law (*c*); and an express provision is accordingly inserted in the Bankruptcy Act, 1883, similar to one in the Bankruptcy Act, 1869, to the following effect:—that every conveyance or transfer of property or charge thereon made, every payment made, every obligation incurred, and every judicial proceeding taken or suffered, by a person unable to pay his debts as they become due from his own moneys, in favour of any creditor, or of any trustee for such creditor, with a view to giving such creditor a preference over the other creditors, shall, if the insolvent become bankrupt within three months afterwards, be deemed fraudulent and void as against the trustee; but this section is not to affect the rights of any person making title in good faith and for valuable consideration through or under a creditor of the bankrupt (*d*).

And secondly, as regards executions,—the Act of 1883 provides, that where goods have been taken in execution and sold for a judgment above 20*l*., or (by the Bankruptcy Act, 1890, s. 11) where money has been paid in order to avoid a sale of the goods, the trustee, on giving notice of the bankruptcy within fourteen days from such sale, or payment to avoid a sale, shall be entitled to claim the sale-proceeds or money less the sheriff's expenses; and if the goods have not been actually sold, and the sale thereof has not been avoided as aforesaid, the goods are to be handed over to the trustee, subject to a charge thereon for the sheriff's expenses (*e*),—this latter provision not being confined to executions for 20*l*., but applying to all executions whatsoever.

And thirdly, as regards voluntary settlements,—it is enacted, that every settlement (including every conveyance or transfer) of property made by a debtor—not being a

(*c*) Linton *v*. Bartlett, 3 Wils. 47.

(*d*) 46 & 47 Vict. c. 52, s. 48; Tomkins *v*. Saffery, 3 App. Ca. 213; Ex parte Stubbins, In re Wilkinson, 17 Ch. D. 78.

(*e*) Sect. 46; In re Hinks, Ex parte Berthier, 7 Ch. D. 882; In re Pearce, Ex parte Crossthwaite, 14 Q. B. D. 966.

settlement made before and in consideration of marriage, or in favour of a purchaser or incumbrancer, *bonâ fide* and for valuable consideration, or a family settlement of property accruing after marriage in right of the settlor's wife, —shall, if the settlor become bankrupt within two years after its date, be void as against his trustee; and shall, if he become bankrupt within ten years, be also void against the trustee, unless the parties claiming thereunder can prove that at the time it was made the settlor was solvent without the aid of the property settled, and that the interest of the settlor had passed to the trustees of the settlement on the execution thereof (*f*); and further, that any covenant or contract made in consideration of marriage, for the future settlement on the settlor's wife or children of property wherein at the date of his marriage the settlor had no estate or interest, and not being property coming to him in right of his wife, shall, upon his becoming bankrupt before such property has been actually transferred or paid pursuant to such contract or covenant, be void as against his trustee (*g*).

The practical duties of the trustee consist in realizing and distributing the property of the debtor; and he is, from time to time, to declare a dividend amongst the creditors (*h*); that is to say, he is to declare what payment shall be made to them out of the balance then at the bank to the credit of the Bankruptcy Estates Account; for he is required to pay, into an account so designated, all sums from time to time received by him, into such local bank as the committee of inspection shall appoint, and, failing such appointment, into the Bank of England (*i*); and with regard to such payment of dividends, the Act provides, that, subject to the retention of such sums as may be necessary for the costs of administration, or otherwise, the

(*f*) 46 & 47 Vict. c. 52, s. 47; Ex parte Dawson, Law Rep., 19 Eq. Ca. 433.

(*g*) Sect. 47, sub-s. 2; In re Roberts, 21 Ch. D. 553.

(*h*) Sects. 58—63.

(*i*) Sect. 74.

trustee shall, with all convenient speed, declare and distribute dividends amongst the creditors who have proved their debts; and that the first dividend, if any, shall be declared and distributed within four months after the conclusion of the first meeting of creditors, unless the trustee satisfies the committee of inspection that there is sufficient reason for postponing the declaration to a later date; and that subsequent dividends shall, in the absence of sufficient reason to the contrary, be declared and distributed at intervals of not more than six months (*k*); and that when the trustee has realized all the property of the bankrupt, or so much thereof as can, in the joint opinion of himself and of the committee of inspection, be realized without needlessly protracting the trusteeship, he shall declare a final dividend; but before so doing, he is to give notice, in the prescribed manner, to the persons whose claims to be creditors have been notified to him, but not established to his satisfaction, that if they do not establish their claims to the satisfaction of the court within a time limited by the notice, he will proceed to make a final dividend without regard to their claims (*l*); and on the expiration of the time so limited, or of any extension thereof that may have been granted to any claimant, the remaining assets of the debtor are divided amongst the creditors who have proved their debts, without regard to the claims of any other persons; and if any surplus remains after paying every creditor in full, with interest where that is allowed (*m*), and after paying the costs, charges, and expenses of the administration, that surplus belongs to the bankrupt (*n*).

Dividends are paid rateably among all the creditors, according to the *quantity* of their debts, no regard being in general had to the *quality* of them; hence judgments and recognizances, and other debts by record or specialty,

(*k*) Sect. 58.
(*l*) Sect. 62.
(*m*) Sect. 40, sub-s. 5; First Schedule, rule 20.
(*n*) Sect. 65.

are all put on a level with debts by mere simple contract; and equitable debts are on the same footing as legal debts. But a creditor, who has a specific security on the property of the bankrupt (such as a mortgage or pledge) is entitled, notwithstanding the bankruptcy, either to give up his security and prove for his whole debt, or else to realize such security, or give credit for its value, and to prove and receive a dividend *pari passu* with the other creditors in respect of any overplus remaining unpaid (*o*). So a landlord, who is desirous, after the commencement of the bankruptcy, to distrain for rent on the bankrupt's goods, is entitled to make such distress available for his separate payment to the extent of (not exceeding) half a year's rent (formerly one year's rent) accrued due prior to the date of the order of adjudication (*p*); though for the remainder he must come in *pari passu* with the rest of the creditors (*q*). And to this we may add, that a priority is given (and to some extent even as against the landlord's preferential right of distress) to parochial and other local rates, and to any assessed, land, property or income tax due from the bankrupt, to the extent of one year's assessment; and also to what is due as wages or salaries to any of his clerks or servants, not exceeding 50*l*., due in respect of services rendered during four months before the date of the receiving order; and also to what is due as wages to any labourer or workman, not exceeding 25*l*., due in respect of services rendered during two months before the date of the receiving order; all which last mentioned classes of debts are to be paid in full, if the property of the bankrupt is sufficient, and in priority to all others (*r*), but abate *inter se* if the property of the bankrupt is insufficient for their payment; but, with these exceptions, all

(*o*) 46 & 47 Vict. c. 52, ss. 6, 39; Second Sched., rules 9—17; In re Turner, 19 Ch. D. 105.

(*p*) Sect. 42; 53 & 54 Vict. c. 71, s. 28; Ex parte Voisey, In re Knight, 21 Ch. D. 442.

(*q*) Sect. 42; Paull *v.* Best, 3 B. & S. 537.

(*r*) Sect. 40; 51 & 52 Vict. c. 62.

debts provable under the bankruptcy are to be paid *pari passu*.

And with regard to the distribution of the bankrupt's estate, it is to be further observed, that demands in the nature of unliquidated damages arising otherwise than by reason of a contract, promise, or breach of trust, are *not* proveable in bankruptcy (*s*); and that no person having notice of any act of bankruptcy available against the bankrupt can prove for any debt or liability contracted by the bankrupt subsequently to the date of such notice having been received (*t*); but, with these exceptions, all debts and liabilities, present or future, certain or contingent, to which the bankrupt is subject at the date of the receiving order, or to which he may become subject before his discharge by reason of any obligation incurred previously to such date, may be proved (*u*); and where the debt or liability does not bear a certain value by reason of its being *e.g.* subject to any contingency, the same shall (where possible) be estimated by the trustee, and, in case of dispute, according to the order of the court, either with or without the intervention of a jury, and the proof shall be for the sum thus assessed (*x*); and the term "liability" includes any compensation for work or labour done, any obligation or possibility of an obligation to pay money or money's worth on the breach of any express or implied covenant, agreement, contract, or undertaking, whether likely or not to occur before the close of the bankruptcy, and generally any express or implied engagement, agreement, or undertaking to pay, or capable of resulting in the payment of, money or money's worth, whether fixed or unliquidated, present, future or contingent, and whether capable of being ascertained by fixed rules or by jury only, or as matter of opinion (*y*).

(*s*) 46 & 47 Vict. c. 52, s. 37, sub-s. 1; see Ex parte Baum, Law Rep., 9 Ch. App. 673; Watson *v.* Holliday, 20 Ch. D. 780.

(*t*) Ibid. sub-s. 2.

(*u*) Ibid. sub-s. 3.

(*x*) Ibid. sub-ss. 4, 7; Ex parte Blakemore, 5 Ch. D. 372.

(*y*) Ibid. sub-s. 8.

IV. Having now shown upon what grounds and in what manner a debtor is adjudicated bankrupt, and the effect of such bankruptcy on his property, we have next to advert more particularly to the proceedings which take place after such adjudication, or after the receiving order has been made, other than the matters relative to the realisation and distribution of the bankrupt's property by the trustee which have been already considered incidentally in treating of the effect of the bankruptcy on the debtor's property,—the proceedings we are now to consider being matters of procedure properly so called, and which commence at the date of the receiving order, and end with the bankrupt's obtaining his *order of discharge*.

And firstly, during that interval, or afterwards if it should be found desirable, the court may, on the application of the official receiver or of the trustee, summon before it the bankrupt (or his wife), or any other person known or suspected to have in their possession any of the estate or effects belonging to the bankrupt, or supposed to be indebted to him, or thought capable of giving information as to him, his dealings or property; and, in case of such person not appearing (having no lawful impediment allowed by the court), may direct him to be arrested and brought before it; and, on his appearing, voluntarily or otherwise, may *examine* him, either by word of mouth or by written interrogatories, concerning the bankrupt, his dealings or property (*z*).

Secondly, it is to be observed, that within seven days from the date of the receiving order made on the petition (if the same is a creditor's petition), and within three days from that date (if the petition is that of the debtor himself), the debtor makes out and submits to the official receiver a statement of his affairs, showing the particulars of his assets and liabilities (*a*); and as soon as conveniently may

(*z*) 46 & 47 Vict. c. 52, s. 27; Ex parte Reynolds, 20 Ch. Div. 294.
(*a*) Sect. 16.

be after such receiving order has been made and advertised as already mentioned, the official receiver is to summon a general meeting (usually called the *first* meeting) of the creditors, of which seven days' notice is given in the London Gazette (*b*), and in a local paper; and the notice is, in the general case, for a day not later than fourteen days from the date of such receiving order (*c*); and the official receiver sends to each of the creditors mentioned in the debtor's statement of affairs a summary of that statement (*d*). At such first meeting, the creditors, if they then resolve that the debtor shall be made a bankrupt, proceed to appoint some creditor or other fit person to fill the office of *trustee* of the bankrupt's property (*e*); and to appoint from among the creditors fit persons, not exceeding five nor being less than three in number, who shall form a *committee of inspection*, for the purpose of superintending the administration of the bankrupt's property by such trustee (*f*). And in case the creditors neglect at such meeting to appoint a trustee, the Board of Trade appoints one until such time as the creditors shall have made the appointment; but the creditors may leave it to the committee of inspection to make the appointment (*g*). The first meeting is, as the general rule, presided over by the official receiver (or his nominee) (*h*), in whom (as we have seen) the property of the bankrupt vests, from the date of the receiving order, until some other trustee is appointed (*i*). At the first or any other meeting, or at any time after the adjudication, any creditor may *prove his debt*, by an affidavit which is sent (prior to the appointment of the trustee) to the official receiver of the court, and (after such appointment) to the trustee himself; and no person is entitled to vote as a creditor, either at the first or at any

(*b*) Sect. 15; First Schedule.
(*c*) First Schedule, rule 1.
(*d*) Ibid. rule 3.
(*e*) Sect. 21.
(*f*) Sect. 22.
(*g*) Sect. 21, sub-s. 6; In re Finney, Law Rep., 6 Ch. App. 79.
(*h*) First Schedule, rule 7.
(*i*) Sect. 54.

subsequent meeting, unless he has first duly proved his debt in the prescribed manner (*k*).

The duty of the creditor's trustee thus chosen is, generally, to exercise his best discretion in the management of the estate until the bankruptcy is closed, and until he (the trustee) has obtained his release (*l*); and until that event, the trustee may from time to time summon general meetings of the creditors, for the purpose of ascertaining their wishes; and he may also from time to time apply to the court for directions, in relation to any particular matter arising in the bankruptcy; and as the bankruptcy proceeds, he consults with the committee of inspection as to his proceedings. And with a view to the full and due realization by the trustee of the assets of the bankrupt, power is specifically given to him, by the Bankruptcy Act, 1883, to exercise all the divers powers which are enumerated in the note below, and that either of his own authority or with the sanction of the committee of inspection according as in the note is expressed (*m*),—all which powers are, of

(*k*) Second Schedule, rule 2.

(*l*) Sect. 82.

(*m*) These are (*of his own authority*),—to sell all or any part of the property of the bankrupt (including the goodwill of the business, if any, and the book debts due or growing due to the bankrupt) by public auction or private contract, with power to transfer the whole thereof to any person or company, or to sell the same in parcels; to give receipts for any money received by him, which receipts shall effectually discharge the person paying the money from all responsibility in respect of the application thereof; to prove, rank, claim, and draw a dividend in respect of, any debt due to the bankrupt; to exercise any powers the capacity to exercise which is vested in the trustee under this Act, and to execute any powers of attorney, deeds, and other instruments for the purpose of carrying into effect the provisions of this Act; and to deal with any property to which the bankrupt is beneficially entitled as tenant in tail in the same manner as the bankrupt might have dealt with it; and sections 57 to 73 (both inclusive) of the Act of the session of the 3rd and 4th years of the reign of King William the Fourth (chapter 74) "for the abolition of fines and recoveries, and for the substitution of more simple modes of assurance," shall extend and apply to proceedings under this Act as if those sections were here re-enacted and made applicable in

course, in addition to those which we have already discussed in the text.

Thirdly, it is to be mentioned, that as soon as conveniently may be after the expiration of the time for the submission of the debtor's statement of affairs, the court holds a public sitting for the examination of the debtor (called his *public examination*); and of the date of such public sitting the official receiver gives notice by advertisement in the London Gazette and in a local paper; and the court has power to adjourn the public examination from time to time (*n*). This public examination of the debtor

terms to these proceedings. (Sect. 56.) Moreover (*with the sanction of the committee of inspection*) the trustee may carry on the business of the bankrupt so far as may be necessary for the beneficial winding up of the same; bring, institute, or defend any action or other legal proceeding relating to the property of the bankrupt; employ a solicitor or other agent to take any proceedings or to do any business which may be sanctioned by the committee of inspection; accept as the consideration for the sale of any property of the bankrupt a sum of money payable at a future time, subject to such stipulations as to security and otherwise as the committee think fit; mortgage or pledge any part of the property of the bankrupt for the purpose of raising money for the payment of his debts; refer any dispute to arbitration; compromise all debts, claims, and liabilities, whether present or future, certain or contingent, liquidated or unliquidated, subsisting or supposed to subsist, between the bankrupt and any person who may have incurred any liability to the bankrupt, on the receipt of such sums, payable at such times, and generally on such terms, as may be agreed on; make such compromise or other arrangement as may be thought expedient with creditors, or persons claiming to be creditors, in respect of any debts proveable under the bankruptcy; make such compromise or other arrangement as may be thought expedient with respect to any claim arising out of or incidental to the property of the bankrupt, made or capable of being made on the trustee by any person, or by the trustee on any person; and divide in its existing form among the creditors, according to its estimated value, any property which from its peculiar nature or other special circumstances cannot be readily or advantageously sold (sect. 57). The trustee may also (*with the sanction of the committee*) employ the bankrupt himself to superintend the management of his property; and make an allowance to him for his support, or in consideration of his services (sect. 64).

(*n*) Sect. 17.

proceeds upon the *statement of his affairs*; and the official receiver, the trustee, and the court, may put questions to him; as likewise may any creditor who has tendered a proof of his debt; and it is the duty of the debtor to answer all such questions; and the debtor is of course bound, on the day appointed for his public examination, and on any adjournment of such examination, to attend the court; and, a note of his examination having been taken down in writing, such note is read over to and signed by him, and is afterwards open to the inspection of any of his creditors, and may be used in evidence against him. The court, when it is satisfied that the affairs of the debtor have been sufficiently investigated, makes an order declaring that his public examination is concluded; but such order is not to be made until after the day appointed for the first meeting of the creditors (*o*).

Fourthly, it is to be observed, that the bankrupt, besides submitting his statement of affairs, and besides attending on his public examination and on any adjournment thereof, is required also to attend the meetings of his creditors; to wait on the official receiver or trustee; to execute necessary powers and instruments; to furnish an inventory of his property; and generally to do everything in relation to his property and the distribution of its proceeds amongst his creditors which may reasonably be required by the trustee or which may be ordered by the court (*p*). Moreover, the bankrupt will be guilty of a misdemeanor, and under the provisions for the punishment of fraudulent debtors contained in the Debtors Act, 1869 (32 & 33 Vict. c. 62), as modified by the Bankruptcy Act, 1883, ss. 163—167, and by the Bankruptcy Act, 1890, s. 26, will be liable, on conviction at the assizes or quarter sessions, to be imprisoned for any time not exceeding *two years*, with or without hard labour,—if he shall (*with*

(*o*) Sect. 17; In re Angerstein, Law Rep., 7 Ch. App. 662.
(*p*) Sect. 24.

intent to defraud) be guilty of any of the following acts,—that is to say: 1. If he does not, to the best of his knowledge and belief, discover to his trustee all his property, and the mode in which he has disposed of any part thereof, except in the ordinary way of his trade (if any), or in the ordinary expenses of his family. 2. If he does not deliver up all such part of his property as is in his custody or control, and which he is required by law to deliver up. 3. If he does not deliver up all books, documents, papers and writings in his custody or control, which relate to his property or affairs. 4. If, after the presentation of a petition, or within four months before, he conceals any part of his property to the value of 10*l.* or upwards, or conceals any debt due to or from him. 5. If, within the same period, he removes any part of his property to the value of 10*l.* or upwards. 6. If he makes any material omission in any statement relating to his affairs. 7. If, knowing or believing that a false debt has been proved against his estate, he fails for the period of a month to inform his trustee thereof. 8. If, after the presentation of a petition, he prevents the production of any book or document, affecting or relating to his property or affairs. 9. If, after the presentation of a petition, or within four months before, he (either as party or privy) conceals, destroys, mutilates or falsifies any book or document affecting or relating to his property or affairs. 10. If, within the same period, he makes, or is privy to the making of, any false entry in any such book or document. 11. If, within the same period, he parts with, alters, or makes any omission in any such document. 12. If, after presentation of a petition, or at any meeting of his creditors held within four months before, he attempts to account for any part of his property by fictitious losses or expenses. 13. If, within four months next before a petition, he, by false representation or other fraud, has obtained property on credit, and has not paid for the same. 14. If, within the same period, he obtains under

the false pretence of carrying on business and dealing in the ordinary way of his trade (if any), any property on credit and has not paid for the same. 15. If, within the same period, he pawns, pledges, or disposes of, otherwise than in the ordinary way of his trade (if any), any property which he has obtained on credit, and has not paid for. 16. If he is guilty of any false representation or other fraud, for the purpose of obtaining the consent of his creditors, or any of them, to any agreement with reference to his affairs, or to his bankruptcy or liquidation (*q*).

Moreover, any such bankrupt or person against whom a receiving order has been made, shall be deemed guilty of a misdemeanor, and liable on conviction to imprisonment for *one* year, with or without hard labour, who shall (*with intent to defraud his creditors*) do any of the following things:—1. If, in incurring any debt or liability, he has obtained credit under false pretences, or by means of any other fraud. 2. If he has made, or caused to be made, any gift, delivery, or transfer of, or any charge on, his property. 3. If he has concealed or removed any part of his property, within two months before the date of any unsatisfied judgment, or order for payment of money, obtained against him (*r*). And in the following case, he will be guilty of *felony*, and be liable to two years' imprisonment with or without hard labour, that is to say, if, after the presentation of the petition (or four months before), he shall, with intent to defraud his creditors, quit (or attempt, or make preparation, to quit) England, and shall take (or attempt to take) with him any part of his property, to the amount of 20*l.* or upwards, which ought by law to be divided among his creditors (*s*).

Fifthly, it is to be observed, that to every bankrupt who conforms in all points to the directions of the statute, the law makes full amends for all this rigour and severity: for

(*q*) 32 & 33 Vict. c. 62, s. 11; 53 & 54 Vict. c. 71, s. 26.

(*r*) Sect. 13.

(*s*) Sect. 12.

he may, at any time after being adjudged bankrupt, apply to the court for an *order of discharge;* and this application will be heard in open court as soon as conveniently can be after his public examination is concluded, but not before (*t*); and on the hearing of the application, the court may grant him an absolute order of discharge, the effect of which shall be to release him from all debts and liabilities whatever which are proveable under the bankruptcy, save only such as were incurred or forborne by means of fraud or *fraudulent* breach of trust, or such as are due to the crown, or incurred for some offence against the revenue laws, or as estreated bail for any person charged with such offence (*u*); and a bankrupt, duly discharged, is moreover entitled (when the discharge is absolute and unconditional) to enjoy, free from the claims of his creditors (other than those before mentioned as continuing, and other than his new creditors), all future acquisitions of property; so that, in the language often applied to the case of a discharge under former statutes, "he becomes a clear man again" (*x*), subject only to continuing to give to the trustee such assistance as may be required for the realization and distribution of the property of the bankrupt, failing which his discharge may be revoked (*y*),—in all which respects, the order of discharge appears to have the same effect as the so-called *certificate of conformity* which used to be granted to bankrupts under the earlier Bankruptcy Acts, or as the *order of discharge* (in the case of bankruptcy properly so called) and the *certificate of discharge* (in the case of liquidating debtors) granted under the Bankruptcy Act, 1869, used to have (*z*). But it is hardly necessary to observe, that the bankrupt's

(*t*) 46 & 47 Vict. c. 52, s. 28, rr. 178—182; 53 & 54 Vict. c. 71, s. 8.

(*u*) Sect. 30; Cooper *v.* Prichard, 11 Q. B. D. 351.

(*x*) Ebbs *v.* Boulnois, L. R., 10 Ch. App. 479; In re Pettitt's Estate, 1 Ch. D. 478.

(*y*) Act 1890, s. 8, sub-s. 8.

(*z*) Bousfield *v.* Dove, 28 Ch. Div. 687.

discharge does not free from liability any surety for, or co-surety or co-contractor with, the bankrupt, or any partner of the bankrupt; and on the other hand, the bankrupt cannot, by any promise of his, revive a debt from which he has been duly discharged, whether by order of discharge, or by certificate of discharge or of conformity (*a*). Also, since the Bankruptcy Act, 1890, s. 10, the order of discharge does not release even the bankrupt himself from his liability on a judgment for seduction, or under an affiliation order, or upon a judgment against him as a co-respondent in a divorce action.

But the bankrupt is not, as a matter of course, entitled to the absolute and unconditional order of discharge above referred to; for the court takes into consideration the report of the official receiver as to the bankrupt's conduct and affairs (including a report as to his conduct during the bankruptcy proceedings); and it is provided, that the court *may* refuse an absolute order of discharge, or suspend the operation of such an order for a specified time, or grant the order subject to any conditions with respect to any earnings or income which may afterwards become due to the bankrupt, or with respect to his after-acquired property; and *shall* refuse the order of discharge in all cases where the bankrupt has committed any misdemeanor of the class already specified; and further, that the court *shall* either refuse the order or suspend the operation of it for a period of not less than two years or until a dividend of not less than 10*s*. in the pound has been paid to the creditors, or grant the order subject to such conditions as aforesaid, or require the bankrupt (as a condition of his discharge) to consent to judgment being entered up against him for any unsatisfied balance of the debts proveable, such judgment to be satisfied out of the future earnings and after-acquired property of the bankrupt subject always to the

(*a*) Act 1883, s. 30, sub-s. 4; Rimini *v.* Van Praagh, Law Rep., 8 Q. B. 1; Elmslie *v.* Corrie, 4 Q. B. D. 295; Ex parte Barrow, In re Andrews, 18 Ch. D. 464.

control of the court,—upon proof—(1) That the bankrupt has omitted to keep such books of account as are usual and proper in the business carried on by him, and as sufficiently disclose his business transactions and financial position within the three years immediately preceding his bankruptcy: or (2) That the bankrupt has continued to trade after knowing himself to be insolvent: or (3) That the bankrupt has contracted any debt proveable in the bankruptcy without having at the time of contracting it any reasonable or probable ground of expectation (proof whereof shall lie on him) of being able to pay it: or (4) That the bankrupt has brought on his bankruptcy by rash and hazardous speculations or unjustifiable extravagance in living: or (5) That the bankrupt has put any of his creditors to unnecessary expense by a frivolous or vexatious defence to any action properly brought against him: or (6) That the bankrupt has, within three months preceding the date of the receiving order, and when unable to pay his debts as they become due, given an undue preference to any of his creditors: or (7) That the bankrupt has on any previous occasion been adjudged bankrupt, or made a composition or arrangement (statutory or otherwise) with his creditors: or (8) That the bankrupt has been guilty of any fraud or fraudulent breach of trust (*b*); or (since the Bankruptcy Act, 1890) upon proof (9) That the bankrupt's assets are not of a value equal to 10*s.* in the pound on the amount of his unsecured liabilities, such deficiency of value not being shown to have proceeded from justifiable causes: or (10) That the bankrupt has failed to account satisfactorily for any loss of assets or for any deficiency of assets to meet his liabilities: or (11) That the bankrupt has, within three months preceding the date of the receiving order, incurred unjustifiable expense by bringing a frivolous or vexatious action: or (12) That the bankrupt has, within three months preceding the date of the receiving order,

(*b*) Scct. 28; Ex parte Campbell, 15 Q. B. D. 213.

incurred liabilities with a view of making his assets equal to 10*s.* in the pound on the amount of his unsecured liabilities. Also, where before his marriage the debtor has made a settlement, or entered into a covenant to settle property, on his wife and children, when he was not really in a position to do so, and such settlement or covenant was in reality designed to defeat or delay his creditors, the order of discharge may be either refused or suspended (*c*); and it is an express provision of the Bankruptcy Act, 1883 (*d*), that an undischarged debtor who has been adjudged bankrupt under that Act shall be guilty of a misdemeanor under the Debtors Act, 1869, and be punishable accordingly, if he obtains credit to the extent of 20*l.* or upwards from any person without informing such person that he is an undischarged bankrupt. Under the previous Bankruptcy Act, 1869, the order of discharge might have been granted if the creditors had passed a special resolution, to the effect that the bankruptcy or failure to pay a dividend of 10*s.* in the pound had, in their opinion, arisen from circumstances for which the bankrupt could not justly be held responsible, and that they desired that the discharge should be granted (*e*); but that mode of obtaining his discharge is no longer available to a bankrupt. However, after the expiration of two years from the date of the order of discharge (being a conditional order), if the bankrupt satisfies the court that there is no reasonable probability of his being in a position to comply with the conditions annexed to his discharge, the court may now grant him his discharge or otherwise modify the conditions thereof (*f*); and the disqualifications attaching to a bankrupt under the Bankruptcy Act, 1883, sect. 32, —viz., his incapacity to hold certain offices,—are not now to continue for more than five years from the date of the order of discharge (*g*). Also, by the Bankruptcy (Dis-

(*c*) Sect. 29.
(*d*) Sect. 31.
(*e*) Ex parte Hamilton, 9 Ch. D. 694.
(*f*) Act 1890, s. 8.
(*g*) Ibid. s. 9.

charge and Closure) Act, 1887 (*h*), sects. 2—4, specific provision has been made (1) For the discharge of bankrupts under the Bankruptcy Act, 1869, or any prior Act or Acts, who have not obtained their discharge under these Acts; (2) For the closing of unclosed bankruptcies under the Bankruptcy Act, 1869; and (3) For superseding the old creditor's assignee (under the Bankruptcy Acts prior to 1869), by the appointment of an official assignee in his place; which official assignee is (in such cases) exempt from all liability for the acts or neglects of the trustee or assignee whom he supersedes (*i*); and he may (as may also any ordinary trustee in bankruptcy) in due course obtain his release (*k*),—and also the due remuneration for his services in connection with the bankruptcy (*l*).

V. Having now given some account of the existing system under which the law of bankruptcy is administered, we will conclude the chapter by some explanation of an alternative method of proceeding, which is to some extent recognized by the Bankruptcy Act, 1883, and which has always been in very extensive use, being found in some respects more convenient than a bankruptcy. And we will first premise generally, that, although the machinery adopted for this alternative method differs in some of its details from that which has been devised for a bankruptcy, the general principles of the law of bankruptcy are applicable to it; and it has been expressly provided, by the Bankruptcy Act, 1883, that the trustee (if any) under a *composition* or *scheme of arrangement* under that Act shall have the same powers and perform the same duties as a trustee under a bankruptcy; and that the property of the debtor shall be distributed in the same manner as in a bankruptcy; and generally that all the provisions of that Act with reference to bankruptcy, shall also apply (*mutatis*

(*h*) 50 & 51 Vict. c. 66.
(*i*) Sect. 6.
(*k*) Act 1883, s. 82; Act 1887, s. 6.
(*l*) Act 1883, s. 72; Act 1890, s. 15.

mutandis) to such a composition or scheme of arrangement (*m*).

It has always been considered within the true spirit of our modern bankrupt laws to provide a means for carrying into effect any amicable arrangements between a debtor and his creditors: and such arrangements have, in general, been freed from any external interference, excepting so far as the prevention of fraud and the interests of commercial morality have otherwise seemed to require,—*e.g.*, a debtor who has no assets at all cannot, in common reason or justice, be permitted to escape by any such arrangement (*n*).

Two methods of proceeding by arrangement, or (as the phrase is) by *composition* or *scheme of arrangement*, have accordingly been authorized by the legislature; and these are either before adjudication or after adjudication,—the former being under sect. 18 of the Bankruptcy Act, 1883, as amended by sect. 3 of the Bankruptcy Act, 1890, and the latter being under sect. 23 of the Bankruptcy Act, 1883.

And, firstly, *before* the debtor has been adjudged a bankrupt, the Acts provide, that when a debtor intends this sort of arrangement, he shall, within five days of submitting his statement of affairs, lodge with the official receiver his proposal to that effect; and thereupon the official receiver is to hold a meeting of the creditors before the public examination is concluded (first sending to each creditor a copy of the debtor's proposal); and thereupon the creditors may, at the first meeting or any adjournment thereof, resolve to entertain the proposal or any amended proposal or scheme of arrangement of the debtor's affairs; but the scheme is not to be binding on the creditors, unless it is carried by a resolution passed by a majority in number representing three-fourths in value of all the creditors who have proved; nor unless it is approved by the court, the application for that purpose

(*m*) Act 1883, s. 18, sub-ss. 12, 13.

(*n*) Ex parte Aaronson, 7 Ch. D. 713; Ex parte Ball, In re Parnell, 20 Ch. D. 670; Ex parte Campbell, 15 Q. B. D. 213.

being made either by the official receiver or by the debtor; but such application is not to be heard until after the public examination is concluded; no subsequent meeting for the purpose of confirming the resolution appears, however, now to be required; and the court is required, before approving a composition or scheme, to hear a report of the official receiver as to the terms of the composition or scheme, and as to the conduct of the debtor, and any objections which may be made by or on behalf of any creditor; and no composition or scheme is to be approved which does not provide for the payment, in priority to other debts, of all debts directed to be so paid in the distribution of the property of a bankrupt. If the court is of opinion that the terms of the composition or scheme are not reasonable, or are not calculated to benefit the general body of creditors, or in any case in which the court is required under the Act where the debtor is adjudged bankrupt to refuse his discharge, the court *shall* refuse to approve the composition or scheme; also, if any such facts are proved as would under the Act justify the court in refusing, qualifying, or suspending the debtor's discharge, the court *shall* (unless reasonable security is given for the payment of 7*s.* 6*d.* in the pound on the unsecured debts) refuse to approve the composition or scheme; and in all other cases, the court *may* in its discretion, refuse to approve the composition or scheme (*o*). If the court approves the composition or scheme, the same may be signified by the order of the court or by the seal of the court being attached to the proposal; and the composition or scheme so approved is binding on all the creditors so far as relates to any debts due to them from the debtor and proveable in bankruptcy; and operates to release the debtor to the same extent as (but not further or otherwise than) the like order of discharge would release him; and

(*o*) Ex parte Campbell, 15 Q. B. D. 213; Ex parte Milman, In re Milman, ib. 605.

the provisions of the composition or scheme may thereafter be enforced by the court, on application by any person interested, and any disobedience to an order of the court made on the application is deemed a contempt of court. But if default is made in payment of any instalment due in pursuance of the composition or scheme, or if it appears to the court, on satisfactory evidence, that the composition or scheme cannot, in consequence of legal difficulties or for any sufficient cause, proceed without injustice, or undue delay, to the creditors or to the debtor, or that the approval of the court was obtained by fraud, the court may, if it thinks fit, on application by any creditor, adjudge the debtor bankrupt and annul the composition or scheme, without prejudice to anything that may in the meantime have been done under the composition or scheme (*p*).

Secondly, *after* the debtor has been adjudged a bankrupt, the Act provides, that where a debtor is adjudged bankrupt, the creditors may, if they think fit, at any time after the adjudication, by special resolution, resolve to entertain a proposal for a composition in satisfaction of the debts due to them under the bankruptcy, or for a scheme of arrangement of the bankrupt's affairs, and thereupon the same proceedings shall be taken, and the same consequences shall ensue as in the case of a composition or scheme accepted before adjudication. If the court approves the composition or scheme, it may make an order annulling the bankruptcy, and vesting the property of the bankrupt in him or in such other person as the court may appoint, on such terms, and subject to such conditions, if any, as the court may declare. But if default is made in payment of any instalment due in pursuance of the composition or scheme, or if it appears to the court that the composition or scheme cannot proceed without injustice or undue delay, or that the approval of the court was obtained by fraud,

(*p*) Bramble *v.* Moss, Law Rep., 3 C. P. 458; Ex parte Chesney, In re Dempster, 9 Ch. D. 701.

the court may, if it thinks fit, on the application of any person interested, adjudge the debtor bankrupt, and annul the composition or scheme, without prejudice to anything that may in the meantime have been done under the composition or scheme.

Under the former bankruptcy law, as established by the Bankruptcy Act, 1869, the special resolution of the creditors, for liquidating the affairs of the debtor otherwise than in bankruptcy, was required to be presented to the registrar, who registered it, on being satisfied that it was *bonâ fide* and had been passed as directed by the Act (*q*); and until such registration, the resolution was of no validity; but when registered, it was binding on all the creditors whose names and addresses and the amount of the debts due to them were set down in the statement of the debtor produced at the meeting at which the resolution was passed; and, being registered, it was summarily enforceable by the court of bankruptcy (*r*). But under the present bankruptcy law, where a composition or scheme has been approved by the court, the approval being (as we have seen) testified either by the seal of the court being attached to the proposal, containing its terms, or by these terms being embodied in the order of the court,—the provisions of the scheme become thereby summarily enforceable; and no registration of the resolution itself seems now to be required, or necessary for any purpose.

The statutory arrangement arrived at, or composition accepted, under the provisions of the Bankruptcy Acts, 1883—1890, is to be distinguished from a debtor's deed of arrangement or composition at the common law, in respect that the latter arrangement or composition is not binding on the minority, even although accepted by a majority, of the creditors (*s*); and in respect that, not being sealed with the seal of the court, or embodied in an

(*q*) Sect. 126; In re Page, 2 Ch. D. 323.

(*r*) Breslauer *v.* Brown, 3 App. Ca. 672.

(*s*) Sibree *v.* Tripp, 15 Mee. & W. 23.

order of the court, it is not summarily enforceable. Every such deed of arrangement or composition at the common law is, moreover, now described as a "Deed of Arrangement," and as such is required to be registered as a bill of sale (*t*); still no provision appears to have been made for summarily enforcing it, although it may be (or the registration thereof may be) rectified on summary application. But, as we have already mentioned above (*u*), the fact of such a deed of arrangement having been entered into by the debtor, is (equally with a statutory composition or scheme of arrangement) an element for the consideration of the court on the debtor's application for his discharge in any subsequent bankruptcy (*v*).

(*t*) 50 & 51 Vict. c. 57 (Deeds of Arrangement Act, 1887), s. 5.

(*u*) Supra, p. 180.

(*v*) 50 & 51 Vict. c. 57, s. 16.

CHAPTER VII.

OF TITLE BY WILL AND BY ADMINISTRATION.

We now proceed to consider the two methods of acquiring property by *will* and by *administration;* and these we shall consider in one and the same chapter, they being in their nature sufficiently connected for this purpose.

When considering the law of devises with reference to *real estate*, our attention was directed to the subject of wills or testaments, and we were led on that occasion to expound the nature and origin of testamentary dispositions in general; and to notice a variety of matters respecting wills which it may be material to recall thus generally to the reader's recollection, but which it is not necessary to repeat (*a*). Our present object is to treat exclusively of a will or of an administration considered as a method of acquiring title to *personal estate*, including chattels real, which subject until recently belonged (by an anomaly peculiar to our law) to the jurisdiction of the Ecclesiastical Courts, but has been now transferred to the Probate Division of the High Court of Justice, the successor of the Court of Probate, a new secular court established by Act of Parliament.

It is proposed, First, To trace the history of the title to personal estate by will and by administration; Secondly, To show the manner of making a will, and its requisites, when considered as a disposition of personal estate; Thirdly, To

(*a*) Vide supra, vol. I. pp. 543—587.

show the manner of granting an administration; And, Lastly, to select some few of the general heads appertaining to the office and duty of executors and administrators.

I. [Though wills operating on personalty have been of immemorial use in England, it is to be understood that this power of bequeathing did not extend originally to *all* a man's personal estate. On the contrary, Glanvil informs us that, by the law as it stood in the reign of Henry the second, a man's goods were to be divided into three equal parts; of which one went to his lineal descendants, another to his wife, and the third only was at his own disposal: or if he died without a wife, he might then have disposed of one moiety, and the other moiety went to his children; and so *è converso*, if he had no children, the wife was entitled to one moiety, and he might bequeath the other: but if (and only if) he died without either wife or issue, the whole was at his own disposal (*b*); and the shares of the wife and children were called their *reasonable* parts; and the writ *de rationabili parte bonorum* was given to recover them (*c*).

This continued to be the law of the land at the time of Magna Charta (*d*); which provided that the king's debts should first of all be levied, and then that the residue of the goods should go to the executor to perform the will of the deceased, saving to the widow and children their reasonable parts,—"*salvis uxori ipsius et pueris suis rationabilibus partibus suis*" (*e*). In the reign of King Edward the third, this right of the wife and children was still held to be the universal or common law (*f*); though frequently pleaded as the local custom of Berks, Devon, and other counties (*g*); and Bracton lays down the doctrine of the "reasonable part" to be the common law, in a passage which appears to have been misunderstood by Sir Edward

(*b*) L. 7, c. 5; Bracton, l. ii. c. 26; Flet. l. ii. c. 57.

(*c*) F. N. B. 122.

(*d*) See cap. 18.

(*e*) Ibid.

(*f*) M. 30 Edw. 3, 25; H. 17 Edw. 3, 9.

(*g*) Reg. Brev. 142; Co. Litt. 176.

[Coke (*h*); also Glanvil, Magna Charta, Fleta, the Year Books, and Fitzherbert, do all agree with Bracton that this right to the *pars rationabilis* was by the common law; and in the reign of Charles the first, Sir Henry Finch lays it down, expressly, to be the general law of the land (*i*); and the like law appears to have obtained (and to still obtain) in the law of Scotland, the widow's share being called her *jus relictæ*, and the children's share their *legitim* (*k*), upon an apparent analogy to the *quarta legitima* of the Roman law (*l*). But in England the common law in this particular has been now completely altered, although by imperceptible degrees: and a man may bequeath, and for a long time has been able to bequeath, the whole of his goods and chattels to whomsoever he will. The restricted power of bequest continued, however, in the province of York, the principality of Wales, and the city of London, until quite modern times; but was eventually abolished, by the statute 4 W. & M. c. 2, (explained by 2 & 3 Ann. c. 5,) for the province of York; by the statute 7 & 8 Will. III. c. 38, for the principality of Wales: and by the statute 11 Geo. I. c. 18, for the city of London,—these several statutes having successively enacted that persons within those districts, and liable to their customs, might (if they thought proper) dispose of *all* their personal estates by will, whereby the claims of the widow, children, and other relations to the contrary were totally barred. However, even after this uniformity was introduced, every testator was originally bound (or at least was, by the custom of many places, originally bound) to remember his lord and the Church, by leaving to them respectively his two best chattels; which was the original of heriots, and of mortuaries; and then (and then only) he was left free to bequeath the remainder as he pleased.

(*h*) L. 2, c. 26, s. 2; 2 Inst. 33.

(*i*) Finch, Law, 175.

(*k*) Dalrymple on Feudal Property, 145; Ersk. Instit. b. iii. tr. 9, s. 15.

(*l*) Just. Inst. l. ii. t. 18, De Inofficioso Testamento.

[Where a man made no disposition of such of his goods as were testable, he was said to die *intestate*; and thereupon by the old law the king, as *parens patriæ*, was entitled to seize upon his goods (*m*),—a prerogative which the king used to exercise through his ministers of justice; but more commonly, he granted the franchise to lords of manors and others, who accordingly long enjoyed a prescriptive right to grant administration to their intestate suitors, in their own courts baron and other courts; or to have the wills of such suitors there proved, in case they made testamentary dispositions (*n*). And in favour also of the Church, the crown invested divers prelates with this branch of the prerogative; which was done, saith Perkins, because it was intended by the law, that spiritual men were of better conscience than lay men, and that they had more knowledge what things would conduce to the benefit of the soul of the deceased (*o*). The goods, therefore, of intestates were in this manner given to the ordinary: that is, to the ordinary ecclesiastical judge of the place; who was (generally speaking) the bishop of the diocese; and he might seize the goods, and keep them without wasting, and might also give, alien, or sell them at his will, and dispose of the money *in pios usus*; but, if he did otherwise, he broke the confidence which the law reposed in him (*p*); so that, properly, the whole interest and power thus given or granted to the ordinary, was but that of being the king's almoner within his diocese,—in trust to distribute the intestate's goods in charity to the poor, or in such uses as the zeal of the times denominated pious (*q*). And, as the ordinary had thus the administration of the effects of intestates, a jurisdiction in the matter of wills, also, of course followed; for it was thought just and natural, that the will of the deceased should be proved to the satisfaction of the prelate whose

(*m*) 9 Rep. 38.
(*n*) Hensloe's case, 9 Rep. 37 b.
(*o*) S. 486.
(*p*) Finch, Law, 173, 174.
(*q*) Plowd. 277.

[right of distributing the dead man's chattels was superseded thereby (*r*).

The goods of the intestate being thus vested in the ordinary, the prelates were originally accountable only to God and to themselves (*s*); and this led to abuse even in Fleta's time (*t*); and the abuse appears to have been carried to a great length (*u*); so much so that popish clergy in fact appropriated to themselves (under the name of the Church and the poor) the whole residue of the deceased's estate after the *partes rationabiles* of the wife and children, without paying the lawful debts of the deceased at all. For which reason it was enacted by the statute of Westminster the second (*x*), that the ordinary should be bound to pay the debts of the intestate, so far as his goods extended, in the same manner that executors were bound in case the deceased had left a will. But inasmuch as, after that statute, the *residuum*, after payment of the debts, still remained in the hands of the priests, to be applied to whatever purposes the conscience of the ordinary approved; wherefore the legislature again interposed, to prevent the ordinaries from keeping administrations in their own hands, or in those of their dependents; and, by the statute 31 Edw. III. c. 11, provided, that, in case of intestacy, the ordinary should depute the nearest and most lawful friends of the deceased to administer his goods; which administrators were put upon the same footing, with regard to suits and to accounting, as executors appointed by will; and that was the original of *administrators*, who were originally only the officers of the ordinary, appointed by him in pursuance of this statute. And the statute of Edward III., as will have been observed, singled out the *next and most lawful* friends of the intestate; who were interpreted to be the *next of*

(*r*) 3 Bl. Com. 96, citing Lindewode, fol. 263; Cardinal Othobon, 52 Hen. 3; Bracton, lib. 5, c. 10.

(*s*) Plowd. 277.

(*t*) L. ii. c. 57, s. 10.

(*u*) Decretal. l. v. t. 3, c. 42.

(*x*) 13 Edw. 1, c. 19; Snelling's case, 5 Rep. 83 a.

[*blood* under no legal disabilities (*y*); but afterwards the statute 21 Hen. VIII. c. 5, enlarged the power of the ecclesiastical judge, and permitted him to grant administration, *either* to the widow, *or* to the next of kin, or to both of them, at his own discretion; and, where two or more persons were in the same degree of kindred, gave the ordinary his election to accept whichever he pleased.]

Upon this footing stood the laws of wills and administrations, from at least as early as the commencement of the twelfth century, down to the year 1857, although in almost all other, even popish, countries, these matters had come to be under the jurisdiction of the civil magistrates (*z*). But, in our own times, the opinion gradually obtained, that the subjects in question were not handled by the ecclesiastical courts as effectively, expeditiously, and cheaply as the interests of justice required; and this opinion at length led to the introduction, by Act of Parliament, of a new system, whereby the jurisdiction which these courts had during eight centuries enjoyed over wills and intestacies was wholly taken away. We are referring, of course, to the statute 20 & 21 Vict. c. 77, whereby, as amended by the 21 & 22 Vict. c. 95, and (for domiciled Scotchmen having pure personal estate in England) 21 & 22 Vict. c. 56, and 22 Vict. c. 30, the jurisdiction in the matter of wills and intestacies (so far as concerned personal estate) was directed to be thenceforth exercised in the "Court of Probate" (a new tribunal then created, of a secular character); and this jurisdiction was afterwards assigned to the High Court of Justice (*scil.*, to the Probate Division thereof) by the Judicature Act, 1873 (*a*).

II. We shall now consider the manner and requisites of wills, considered as dispositions of personal estate; and

(*y*) 9 Rep. 39.
(*z*) 3 Bl. Com. 95, 97.
(*a*) 36 & 37 Vict. c. 66, ss. 3, 34.

under this head we propose to consider these four matters, namely,—(1) The *capacity* to be a testator; (2) The *solemnities* required for the will; (3) The *appointment* of the executor; and (4) The *probate* of the will.

1. The *capacity* of persons to be testators.—Now, as to this, the rule is, that all persons are capable, unless made otherwise by the special exceptions of the law (*b*); and the law in this particular being the same as before laid down with regard to alienation generally, these exceptions apply firstly, to all persons who labour under unsoundness of mind (whether total or partial) (*c*), or who by duress are restrained of their freedom of will; and secondly, to married women, infants, and the like.

For, with regard to married women, they were (as a general rule) incompetent to make a will, and that purely and absolutely so by reason of their coverture; in which particular our constitution differed materially from the civil law (*d*), according to which a married woman was fully competent to make a will (*e*). But with us it was otherwise; inasmuch as a married woman's personal chattels belonged in general to her husband, who might have disposed of them and also of her chattels real; so that the law could not consistently give her also a power of disposing of them, by will or otherwise, to another (*f*). Yet by her husband's licence or with his *assent*, she might have disposed of her personalty by will (*g*),—he assenting to the particular will (*h*),—whereby he waived his own general right of administering to his wife's effects; so that, unless he survived her, in which case only he would be her administrator, his assent was not sufficient (*i*). But this rule as to the incapacity of married women was subject to exceptions; and firstly, the queen

(*b*) 2 Bl. Com. 496.

(*c*) Smith *v.* Tebbitt, Law Rep., 1 P. & D. 398; Banks *v.* Goodfellow, Law Rep., 5 Q. B. 549.

(*d*) 2 Bl. Com. 497.

(*e*) Ff. 31, l. 77.

(*f*) 4 Rep. 51.

(*g*) Dr. & St. d. 1, c. 7.

(*h*) Bro. Abr. Devise, 34; Tucker *v.* Inman, 4 Man. & G. 1076.

(*i*) Stevens *v.* Bagwell, 15 Ves. 153.

consort might dispose of her chattels by will, even without the consent of the king (*k*); and secondly, any married woman might make her will of goods which were in her possession *in autre droit*, as executrix or administratrix (*l*); and might, under a *power* in that behalf conferred upon her, bequeath any property by will, her will in that case amounting to an appointment of the property in execution of the power (*m*); and might also by will dispose of any property settled *to her separate use*, either under the provisions of the Married Women's Property Acts, 1870, 1882 (*n*), or under the trusts of any instrument (*o*); and inasmuch as the property of a married woman is now, by virtue of the Married Women's Property Act, 1882, just mentioned, in almost all cases made her separate property, a married woman may now, more often than not, make a will of her property; nevertheless it used to be safer, until recently, to adhere to the old law, and to regard the provisions of these modern Acts as exceptional (*p*). However, now, by force of the Married Women's Property Act, 1893 (56 & 57 Vict. c. 63), the necessity for this precaution is removed, that Act (sect. 3) enabling married women (as regards their separate property) to make their wills during coverture, and exempting them from any necessity to re-execute the will when they are left widows.

With regard to infants and the like, the incapacity to make a will used in their case to arise wholly from immaturity of age: and the rule until a recent period was, that a male was competent to make a will at the age of fourteen; a female at twelve; but neither of them at an earlier period (*q*),—which was also the regulation of the

(*k*) Co. Litt. 133.

(*l*) Godolph. 1, 10.

(*m*) Southby *v.* Stonehouse, 2 Ves. 610; supra, vol. I. p. 225.

(*n*) 33 & 34 Vict. c. 93, ss. 1, 7; and 45 & 46 Vict. c. 75, ss. 1, 2, 5.

(*o*) Peacock *v.* Monk, 2 Ves. sen. 191; Taylor *v.* Meads, 24 L. J., Ch. 203.

(*p*) In re Price, 28 Ch. Div. 709; Dye *v.* Dye, 13 Q. B. D. 147.

(*q*) 2 Bl. Com. 497; Godolph. p. 1, c. 8; Went. 212; Gilb. Rep. 74.

civil law (*r*). But it was expressly provided by the Wills Act, 1837,—and the law still is,—that the will of a person under twenty-one years of age is not valid (*s*),—this provision referring, of course, to testators generally, and not to soldiers and sailors in actual service.

2. Nextly, the *solemnities* required for the execution of a will. Formerly, a testament (as regarded personal property) might be either *written* or *verbal* (otherwise called *nuncupative*), the former being *published* or declared by the testator as his written will, the latter depending merely upon oral evidence, and being declared by the testator *in extremis* before a sufficient number of witnesses, and being only afterwards reduced into writing. But as nuncupative wills were liable to great impositions, and occasioned many surprises and perjuries, the Statute of Frauds (29 Car. II. c. 3) laid them under many restrictions, except when made by mariners at sea, and soldiers in active service; and indeed surrounded them by so numerous a train of requisites, that the things themselves fell into disuse long before they were expressly abolished (*t*). And as regards *written* wills, the general rule was, that no witnesses were required for their authentication (*u*); and if written in the testator's own hand (though it had neither his signature nor his seal, and although no witness had been present at its publication), the will was good, on proof of the handwriting merely (*x*); and even if written in another man's hand, and never signed by the testator, it was good, on proof that the writing was according to his (the testator's) instructions, and had been approved by him (*y*),—in all which particulars a will of pure personal estate differed very considerably from a will of real estate. Eventually, therefore, the obvious improvement was introduced, of establishing one uniform rule (as regards solemnities and

(*r*) 2 Bl. Com. 497; Co. Litt. by Harg. 98 b, n. (6).

(*s*) 7 Will. 4 & 1 Vict. c. 26, s. 7.

(*t*) 2 Bl. Com. 501.

(*u*) Ibid.

(*x*) Godolph. p. 1, c. 21; Gilb. Rep. 260.

(*y*) Comyns, 452, 453, 454.

otherwise) for every will (whether of real or of personal estate); and the Wills Act, 1837, accordingly requires that every will (and also every codicil to a will) shall be a written instrument, signed by the testator (or by some other person in his presence and by his direction) and attested by two or more witnesses present at the same time and in the presence of each other,—no further or express publication of the will being required (*z*). And with reference to the operation of a will on *personal* estate, it has moreover been enacted, by the 24 & 25 Vict. c. 114, but only as regards pure personal estate, that every will and other testamentary instrument made *within* the United Kingdom, by any British subject who shall die after the 6th August, 1861, shall be a valid will and be admitted to probate—whatever may be his *domicile* either at the time of making the will or at the time of his death—provided only it be executed according to the forms required by the laws for the time being in force in that part of the United Kingdom where the same was made; and that every will made *out* of the United Kingdom by a British subject who shall die after the 6th August, 1861, shall be a valid will and be admitted to probate—whatever may be his *domicile* either at the time of making the will, or at the time of his death—provided only it be made according to the forms required either by the law of the place where it was made, or of the place of the testator's then domicile, or of his domicile of origin,—this importance being given to the testator's domicile, inasmuch as it is the domicile of a deceased intestate which in general determines the distribution of his personal estate (*a*); and no subsequent change of domicile is to render the will invalid (*b*).

3. The *appointment of the executor*.—In every will by which personal estate is bequeathed, an executor ought

(*z*) Vide supra, vol. I. p. 549.

(*a*) Doglioni *v.* Crispin, 1 App. Ca. 301.

(*b*) 24 & 25 Vict. c. 114, s. 3; 24 & 25 Vict. c. 121.

regularly to be appointed (*c*); but he is capable of being appointed either by express words or by clear implication (*d*); for the executor is he to whom the testator commits the execution of his last will and testament; and all persons are capable of being executors who are capable of making wills, and many others besides; for infants,—nay (it is said) even infants *en ventre sa mère* (*e*),—may be made executors; likewise married women, although (in their case) the husband might have refused to allow his wife to act, by reason of the liability which (prior to the Married Women's Property Act, 1882) he himself incurred for her devastavits (*f*),—a reason which has now practically ceased to exist.

4. The *probate*.—The probate is the authentication of the will; and such authentication is essential to the completion of any title to be made under the will to the personal estate (including chattels real) comprised therein (*g*),—in which respect a will of personal estate still differs from a will of real estate, no probate of the latter being required (*h*). The executor—if he accepted the office, for of course he might in his discretion refuse to accept the office, that is to say, *renounce* the probate (*i*)—was required, until recently (that is to say, until the 20 & 21 Vict. c. 77), to prove the will (*i.e.*, obtain probate of the will) before the *ordinary;* and such proof was either in *common form*, which was upon the executor's own oath, before such ordinary or his surrogate; or *per testes*, in more solemn form of law,—which was only necessary when the proof was contested, by the entry of some

(*c*) Went. Off. Ex. c. 1; Plowd. 281.

(*d*) 2 Bl. Com. 503; Re William Bradley, 8 P. D. 215.

(*e*) West. Symb. p. 1, s. 635.

(*f*) Pemberton *v.* Chapman, 1 Ell., Bl. & Ell. 1056; 45 & 46 Vict. c. 75, ss. 18, 23.

(*g*) Bl. Com. ubi sup.; Doe *v.* Mew, 7 A. & E. 240; Matson *v.* Swift, 8 Beav. 368.

(*h*) Barraclough *v.* Greenhough, Law Rep., 2 Q. B. 612.

(*i*) Venables *v.* East India Company, 2 Exch. 633; 20 & 21 Vict. c. 77, s. 79; 21 & 22 Vict. c. 95, s. 16.

caveat; and otherwise, that is to say, in the absence of any contest, the probate was granted *ex debito justitiæ* (*k*). And when the will was so proved, the original was deposited in the registry of the ordinary; and a copy thereof on parchment was made out under his seal, and delivered to the executor, together with a certificate of its having been duly proved before him; and that official copy of the will was the *probate* thereof, as such term was commonly understood. It is to be observed, however, that probate before the ordinary was, in general, the proper course, only in case all the goods of the deceased lay, at the time of his death, within the same diocese; for if the deceased had *bona notabilia* (*i.e.*, chattels to the value of a *hundred shillings*) in two distinct dioceses, then the will had to be proved before the metropolitan of the province, by way of special prerogative (*l*); whence the courts of the metropolitan wherein such will was tried, and the offices of such courts, were called respectively the *prerogative courts*, and the *prerogative offices*, of the provinces of Canterbury and York respectively; and by means of such courts, the necessity for as many separate probates as there were dioceses was saved. But, under the present system, the law as to *bona notabilia* is disused; the effect of the statute 20 & 21 Vict. c. 77 (by which the jurisdiction of the Ecclesiastical Courts in these matters was taken away), being that the whole jurisdiction and authority in relation to granting probates, and the depositing and preserving of the original wills, is now exercised without reference to the locality in which the property of the deceased may lie (*m*). The distinction, however, still obtains between proving a will in *common form*, and proving it in a case of *contention* (*n*); for there are subordi-

(*k*) Godolph. vol. 1, c. 20, s. 4; 3 Bl. Com. 98.

(*l*) 4 Inst. 335; 2 Bl. Com. p. 509; Gurney *v.* Rawlins, 2 Mee. & W. 87; Easton *v.* Carter, 5 Exch. 8; and 10 & 11 Vict. c. 98, s. 6.

(*m*) 20 & 21 Vict. c. 77, s. 4.

(*n*) Moore *v.* Holgate, Law Rep., 1 P. & D. 101; Peacock *v.* Lowe, ib. 311.

nate jurisdictions throughout the country called "District Probate Registries," appointed severally for the districts set forth in a schedule to the Act, and each of them presided over by a "District Registrar"; and, in general, and at the option of the parties interested, a will may be proved (or administration granted) either in London or in the registry of the district in which the deceased had, at the time of his death, a fixed place of abode:—that is to say, provided the probate (or administration) be in "*common form*"; but if the grant involves any matter of contention, then recourse must be had to the principal court itself (*o*). And here we may conveniently observe, that (under the 20 & 21 Vict. c. 77, s. 62) a devise of real estate may also be authenticated by the probate of the will,—for if the will is proved in *solemn form* (as in case of contention, or opposition to the will), then the probate is made conclusive evidence of the devise. In general, also, every probate (or now the affidavit used on the application for the grant) must be stamped with the proper stamp duty; and this stamp duty is now, by the Finance Act, 1894 (57 & 58 Vict. c. 30), converted into a duty called Estate Duty.

III. Our third head of inquiry is, the manner of granting *administration*; and until the change in the law to which we have already, more than once, adverted, if the deceased died intestate, then letters of administration were granted by the ordinary or else by the metropolitan,—according to the distinctions with respect to *bona notabilia* already stated; but the grant is now made under the provision for that purpose contained in the 20 & 21 Vict. c. 77, s. 4; and as to the person to whom the office of administrator is to be granted, the court follows, except under special circumstances, certain rules which used to be obligatory also on the ordinary, that is to say,—

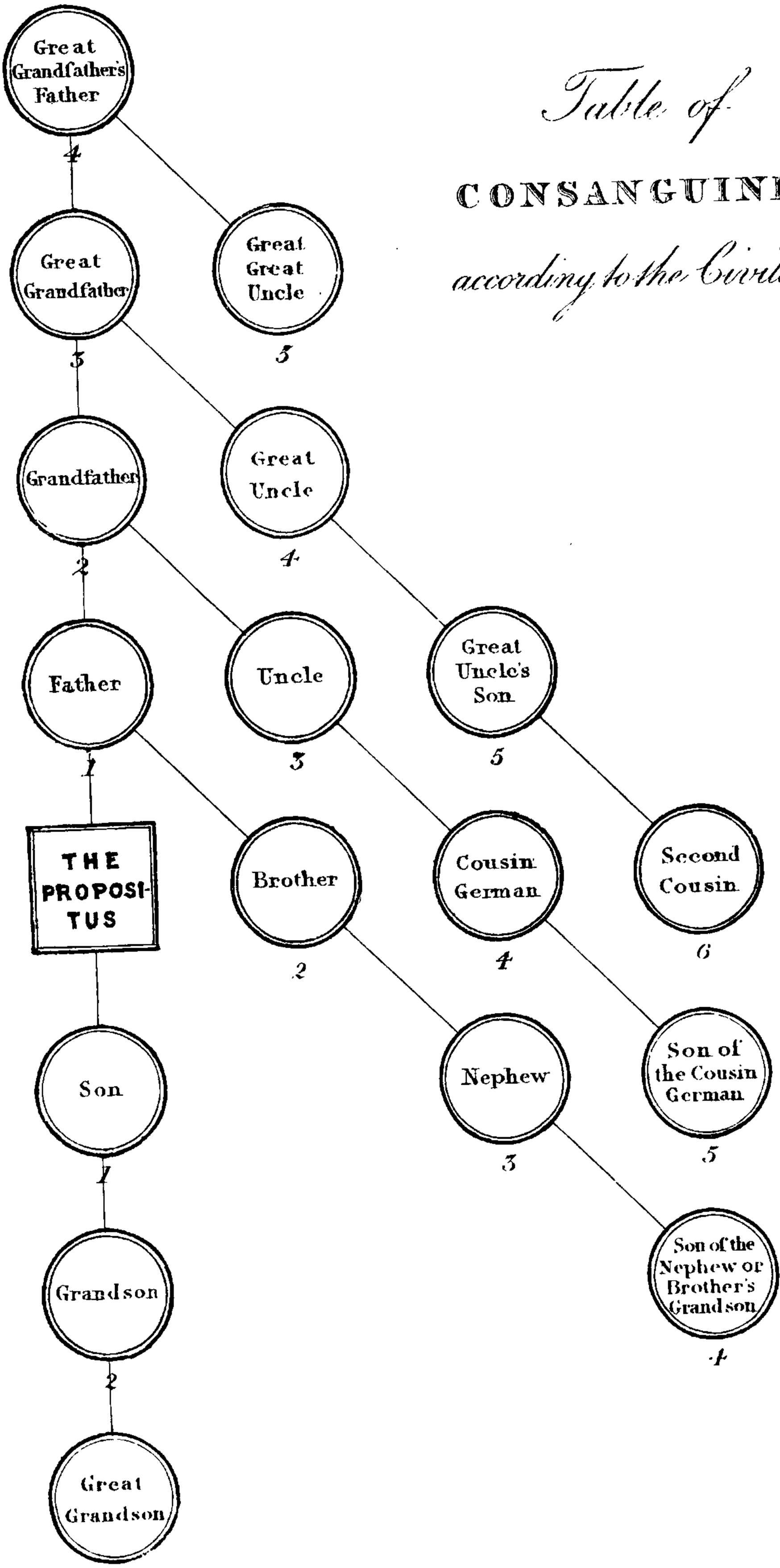
1. Administration of the goods and chattels of the wife

(*o*) 20 & 21 Vict. c. 77, ss. 2, 46—48.

Table of

CONSANGUINITY

according to the Civilians.



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must be granted to the husband or his representatives (*p*); and administration of the husband's effects must be to the widow, or next of kin, but the court may grant it to either, or both, at its discretion (*q*); the court prefers, however, a sole administrator (*r*); and will not, as a rule, pass over the widow (*s*). 2. Among the kindred, those are to be preferred that are the nearest in degree to the intestate; but of persons in equal degree, the court may take which it pleases; and in general it will prefer males to females (*t*). 3. This nearness or propinquity of degree is reckoned according to the computation of the civilians, as expressed in the annexed Table (*u*); which allows one degree for each person in the line of descent, exclusively of him from whom the computation begins; and in the direct line counts the degrees from the deceased to his relative, but between collaterals, the sum of the degrees from the deceased to the common ancestor, and from the common ancestor to the relative; in which computation the civil law differs (as regards collaterals) from the canonists, who begin from the common ancestor and reckon downwards, and in whatever degree the two persons, or the most remote of them, is distant from the common ancestor, consider them as related in that degree to each other (*x*). [And, therefore, in the first place, the children, or (on failure of children) the parents of the deceased are entitled to the administration: for though both children and parents are in the first degree,—with us, the children are allowed the preference (*y*); and then follow brothers and sisters (*z*), and after them grandfathers and grandmothers;

(*p*) Johns *v.* Rowe, Cro. Car. 106; 29 Car. 2, c. 3; Squib *v.* Wyn, 1 P. Wms. 381.

(*q*) Fawtry *v.* Fawtry, 1 Salk. 36; Stra. 532.

(*r*) Re Newbold, Law Rep., 1 P. & D. 285.

(*s*) Re Middleton, 14 P. Div. 23.

(*t*) Iredale *v.* Ford, 1 Swab. & Trist. 305.

(*u*) Prec. Chan. 593; Gilb. Ten. 9; R. *v.* Dr. Hay, 1 Bl. Rep. 541.

(*x*) 2 Bl. Com. 206, 207, 504; Toller's Executors, 87—90, 2nd ed.

(*y*) Godolph. p. 2, c. 35, s. 1; Toller's Executors, ubi supra.

(*z*) Prec. Chancery, 527; Blackborough *v.* Davis, 1 P. Wms. 41.

[for though all these are in the second degree, yet we give the preference to brothers and sisters (*a*); and after all these, come uncles and nephews (*b*), and the females of each class respectively; and lastly, cousins. 4. The half blood is admitted to the administration as well as the whole, for they are of the kindred of the intestate: and though they were formerly (as we have seen) excluded from the inheritance of *land*, yet this was upon feudal reasons only, which have nothing to do with personal estate: therefore the brother of the half blood shall exclude the uncle of the whole blood (*c*); and the court may at its discretion grant the administration either to the sister of the half blood or to the brother of the whole blood (*d*). 5. Again, no preference obtains between relatives *ex parte paternâ* and those *ex parte maternâ;* but administration may be committed to either (*e*). 6. If none of the kindred will take out administration, a creditor may do it (*f*). 7. And lastly, the court may, in defect of all these, commit administration to such discreet person as it approves of (*g*); or may grant him letters *ad colligenda bona defuncti*, which makes him neither executor nor administrator,—his only business (in that case) being to keep the goods in his custody (*h*), but not to dispose thereof (*i*). And here let us observe, that if a bastard (who has no kindred, being *nullius filius*), or anyone else that has no kindred, dies intestate, and without wife or child, it was at one time held, that the ordinary might seize his goods and dispose of them *in pios usus* (*k*); but latterly the usual course, in such cases, was for anyone who could establish an equitable (*scil.*, moral) claim, to procure letters patent, or

(*a*) Evelyn *v.* Evelyn, Amb. 191; 3 Atk. 762; Toller's Executors, 91.

(*b*) Blackborough *v.* Davis, ubi supra.

(*c*) 1 Ventr. 425.

(*d*) Aleyn, 36; Styl. 74.

(*e*) Moor *v.* Barham, 1 P. Wms. 53.

(*f*) Gidley *v.* Williams, Salk. 38; Re Bradshaw, 13 P. Div. 18.

(*g*) Davis *v.* Chanter, 14 Sim. 212; Re Webb, 13 P. Div. 71.

(*h*) Went. ch. 14.

(*i*) 2 Inst. 398.

(*k*) Manning *v.* Napp, Salk. 37.

[other authority from the crown, and the court would then grant administration to the person therein named (*l*)]; and the present practice is, to grant administration to the solicitor of the treasury, or to his nominee,—on behalf of the Crown; and any claim to the goods (whether it be a legal claim or such moral claim as aforesaid) must be established against him within the period of twenty years (*m*),—and the like practice is applicable, when the Prince of Wales in right of his Duchy of Cornwall (*n*), or the Queen in right of her Duchy of Lancaster (*o*), becomes entitled to the goods of bastards.

In what has been stated on this subject, the administration granted is supposed to be a *general* one; as is always the case where the deceased dies wholly intestate, without making any will at all. But it may happen, that he has made a will without naming any executor, or has named an incapable person; or the executor may refuse to accept the office, or may himself die intestate before he has administered (*p*); in any of which cases, the court will grant administration *cum testamento annexo*, to some other person; in the choice of whom, it prefers the residuary legatee, if any such be nominated in the will, to the next of kin (*q*): and we are informed by Glanvil, that this species of administration was in use so early as the reign of Henry the second (*r*). Again, if there be a sole executor who is under the age of twenty-one, a temporary administration *cum testamento annexo et durante minore ætate* may be granted to the guardian of such infant executor or to such other person as the court shall think fit (*s*); for (by a provision of 38 Geo. III. c. 87, s. 6) probate must not be granted to the infant executor himself, till he attains

(*l*) Jones *v.* Goodchild, 3 P. Wms. 33.

(*m*) 47 & 48 Vict. c. 71, s. 2.

(*n*) Re Griffiths, 9 P. D. 63.

(*o*) Re Avard, 11 P. Div. 75.

(*p*) 2 Bl. Com. 503, 505.

(*q*) 1 Sid. 281; 1 Roll. Ab. 907.

(*r*) L. 7, c. 6.

(*s*) Veret *v.* Duprez, Law Rep., 6 Eq. 329; Monsell *v.* Armstrong, 14 Eq. Ca. 423.

his majority; though if there be several executors named, and any of them be of full age, these latter may act without the co-operation of those under age (*t*). So also a temporary administration may be granted *durante absentiâ* —as when an executor is out of the realm; or *pendente lite*, as where a suit is commenced touching the validity of a will (*u*).

[The title by administration never devolves from one person to another, by representative right; in which respect it differs from the title by will; for the interest vested in the executor by the will of the deceased, may be continued and kept alive by the will of the same executor; so that the executor of A.'s executor is, to all intents and purposes, the executor and representative of A. himself (*x*); and, however long may be the series of executors, the ultimate one is still the representative of A.; but the executor of A.'s administrator, or the administrator of A.'s executor, is not the representative of A. (*y*). For the power of an executor is founded upon the special confidence and actual appointment of the deceased; and such executor is therefore allowed to transmit that power to another, in whom he has equal confidence,—but the administrator of A. is merely the officer of the court, in whom the deceased has reposed no trust at all: and therefore, on the death of that officer, it results back to the court, to appoint another. Also, with regard to the administrator of A.'s executor, he has clearly no privity with or relation to A., being only commissioned to administer the effects of the intestate executor, and not of the original testator; wherefore, in both these cases, and whenever the course of representation from executor to executor is interrupted by any one administration, it is necessary for the court to commit administration afresh, of

(*t*) Wms. Exors., p. 235, 8th ed.

(*u*) 20 & 21 Vict. c. 77, ss. 70—78; 21 & 22 Vict. c. 95, ss. 18, 20.

(*x*) 25 Edw. 3, st. 5, c. 5; 1 Leon. 275; 20 & 21 Vict. c. 77, s. 79; 21 & 22 Vict. c. 95, s. 16.

(*y*) Bro. Ab. tit. Administrator, 7.

[such of the goods of the deceased as have *not* been administered by the former executor or administrator; and an administrator *de bonis non* may have, and in fact usually does have, but a *limited* or *special* administration committed to his care, *e. g.*, an administration limited to a term of years, or the like (*z*).]

Every person to whom administration is granted must give a bond (and, if so required, with one or more sureties) conditioned for duly collecting and administering the estate; and if the condition of the bond be broken, the bond is assigned by the court to some person to be chosen for the purpose, who sues thereon in his own name, and recovers, as trustee for the parties interested, the full amount recoverable thereon (*a*).

IV. Our last general head of inquiry involves the consideration of some of the chief points relative to the office of an executor or an administrator. And we will, in the first place, refer to the well-known principle applicable without distinction to both executors and administrators, namely, that, in all matters in which the personal estate is concerned, they *represent* the person of the testator or intestate, as the heir does that of his ancestor (*b*); so that they, together with the heir of a deceased party, are sometimes described respectively as his *real and personal representatives*. And we may nextly observe, that the executor or administrator has the same property in the chattels of the deceased (including his chattels *real*), as the deceased himself had when living; and, in general, succeeds to his rights of action, and is subject (so far as the *assets* in his hands will extend) to his liabilities (*c*); and this title of the executor will override even the title of a

(*z*) 1 Roll. Abr. 908; Godolph. p. 2, c. 30; Salk. 36.

(*a*) 20 & 21 Vict. c. 77, ss. 81—83; 21 & 22 Vict. c. 95, s. 15; Sandrey *v.* Mitchell, 3 B. & Smith, 405; In the Goods of Young, Law Rep., 1 P. & D. 186.

(*b*) Co. Litt. 209.

(*c*) 4 Edw. 3, c. 7; 3 & 4 Will. 4, c. 42.

specific legatee of the chattel, *e. g.*, in the case of a specific legacy of stock (*d*); but it is to be particularly noted, that upon contracts made by himself (although in his representative capacity) the executor is personally liable (*e*), with, in general, a right to recoup himself out of the estate.

[The duties incumbent upon executors and administrators respectively are, moreover, very much the same; excepting, first, that the executor is bound to perform a will, which an administrator is not, unless where a testament is annexed to his administration, and then he differs still less from an executor; and, secondly, that an exccutor may do many acts before he proves the will (*f*), being acts proper for an executor to do (*g*), but an administrator may do nothing till letters of administration are issued (*h*); for the former derives his power from the will and not from the probate, while the latter owes his power entirely to the appointment of the court (*i*); but once the letters of administration are, in fact, granted, they also will relate back to the death (*k*). If any person takes upon him to act in the affairs of the deceased, without any just authority,—as by intermeddling with his goods,—he is called in law an executor *de son tort;* and is liable to all the trouble of an executorship, without any of its indemnities or advantages (*l*); but merely doing acts of necessity or humanity, as locking up the goods, or burying the corpse, will not amount to such an intermeddling as will charge a man as executor of his own wrong (*m*); furthermore, an executor *de son tort* cannot

(*d*) 33 & 34 Vict. c. 71, s. 23.

(*e*) Ashby *v.* Ashby, 7 B. & C. 444; Prior *v.* Hembrow, 8 M. & W. 873; Evans *v.* Evans, 34 Ch. Div. 597; Hobbs *v.* Wayet, 36 Ch. Div. 256.

(*f*) Wentw. ch. 3; Whitehead *v.* Taylor, 10 Ad. & El. 210.

(*g*) Re Moore, 13 P. Div. 36.

(*h*) Lucy *v.* Walrond, 3 Bing. N. C. 841.

(*i*) Comyns, 151.

(*k*) Morgan *v.* Thomas, 8 Exch. 302.

(*l*) 43 Eliz. c. 8; 5 Rep. 53; Meyrick *v.* Anderson, 14 Q. B. 726; Sykes *v.* Sykes, Law Rep., 5 C. P. 113; In re Lovett, 3 Ch. D. 198.

(*m*) Dyer, 166; Serle *v.* Waterworth, 4 Mee. & W. 9.

[himself bring an action in right of the deceased; but actions may be brought against him (*n*); and he is chargeable with the debts of the deceased, so far as assets come to his hands (*o*); though, as against creditors in general, he is allowed all payments made to any other creditor in the same or a superior degree, himself only excepted (*p*); and though, as against the rightful executor or administrator, he cannot plead such payment, yet it shall be allowed him in mitigation of damages (*q*); unless, perhaps, upon a deficiency of assets, whereby the rightful executor may be prevented from satisfying his own debt (*r*).]

We shall now proceed to enumerate the specific powers and duties of executors, premising only that what is here stated as to the executor, applies in general to an administrator also; and these powers and duties are as follows:—

1. [He must *bury* the deceased in a manner suitable to the estate which he leaves behind him; the necessary funeral expenses being allowed before all other debts or charges (*s*). But if he be extravagant, or misapply the assets, in this or in any other particular, such a misapplication is a *devastavit;* that is to say, a devastation or waste of the substance of the deceased: and shall only be prejudicial to himself, and not to the creditors or legatees of the deceased (*t*).

2. He must, in the next place, *prove the will* of the deceased; — or (as it is otherwise expressed) take out *probate;* and in default of any will, the person entitled to be administrator must also, at this period, take out letters

(*n*) Bro. Ab. tit. Administrator, 8; Rowsell *v.* Morris, Law Rep., 17 Eq. 20.

(*o*) Dyer, 166; Job *v.* Job, 6 Ch. D. 562; Re Mary Miller, 8 P. D. 108.

(*p*) 1 Chan. Cas. 33; 5 Rep. 20; Moor. 527; Thompson *v.* Harding, 2 Ell. & Bl. 630.

(*q*) 12 Mod. 441.

(*r*) Wentw. ch. 14.

(*s*) Bisset *v.* Antrobus, 4 Sim. 512; Corner *v.* Shew, 3 Mee. & W. 356.

(*t*) Shelley's case, 1 Salk. 296; Godolph. p. 2, c. 26, s. 2; Camden *v.* Fletcher, 4 Mee. & W. 378.

[of administration. And in order to obtain probate of the will or letters of administration, he is required to pay a certain stamp duty on the amount of the personal estate, a duty formerly called probate duty, and which used to be impressed on the probate or letters of administration, but latterly by the 44 Vict. c. 12, ss. 27—30, it was paid on the affidavit required to be sworn to obtain the grant, and the grant itself carried on it merely a certificate of the due payment of the duty; but estates under 100*l.* were exempt (*u*). And now under the Finance Act, 1894 (57 & 58 Vict. c. 30), the duty payable is called estate duty, in the case of all persons dying after the 2nd day of August, 1894, the old exemption of estates under 100*l.* being continued, and estates under 300*l.* paying a fixed duty of 30*s.*, and estates under 500*l.* paying a fixed duty of 50*s.*; and when the estate duty is paid, no affidavit duty is payable, nor the account duty which was formerly payable under the 44 Vict. c. 12, s. 38, and the 52 & 53 Vict. c. 7, s. 11, besides certain other duties hereafter referred to (*x*).

3. The executor must also make an *inventory* of all the goods and chattels; or, in other words, of all the personal estate, including the chattels real, whether in possession or in action, of the deceased; and this inventory he is to deliver into the court, upon oath, if and when thereunto lawfully required (*y*).]

4. He is to *collect* all the goods and chattels so inventoried; and, to that end, is to bring actions, if necessary, against all persons who withhold them (*z*); and inasmuch as all the personal estate of the deceased, whether in possession or in action, is *assets* in the hands of the personal representative, and liable as such to pay the creditors of the deceased, the executor as such is allowed to sell so much of the personal estate as does not already consist of

(*u*) 27 & 28 Vict. c. 56, s. 5.
(*x*) Vide bk. IV. pt. I. chap. VII.
(*y*) 21 Hen. 8, c. 5; Griffiths *v.* Antony, 5 Ad. & El. 623.
(*z*) Webb *v.* Atkins, 14 C. B. 401; Farley *v.* Briant, 3 Ad. & El. 839.

money, in order to answer the demands that may be made upon him; and on this subject we may remark, that if there be two or more executors who have proved the will, a sale, receipt, or release by one of them shall be good against all the rest (*a*),—save that (by the specific rules of certain corporations, *e. g.*, the Bank of England) the concurrence of all the executors may be sometimes required, *e. g.*, to the transfer of the stock standing in the name of the deceased (*b*),—a consideration and distinction which can hardly arise in the case of an administrator; for he (as we have seen) is in general a single administrator (*c*).

5. He must *pay* the *debts* of the deceased; and in payment of debts must observe the rules of priority, according to the several degrees which the law has established in this matter; but he may in his discretion pay a debt which is barred by the Statutes of Limitation (*d*); unless, *semble*, it be a debt which the bar of time has wholly extinguished. And, first, he must pay all funeral charges, and the expense of proving the will, and the like. Secondly, debts due to the crown, on record or other specialty (*e*). Thirdly, such debts as are, by particular statutes, to be preferred to all others, *e. g.*, income tax, poor-rates, and the like (*f*). Fourthly, debts of record: such as debts due on duly registered judgments (*g*) and recognizances (*h*); and amongst debts of this degree are to be reckoned also decrees in equity and orders in bankruptcy (*i*). Fifthly, all other debts *pari passu*—whether they are on simple contract (that is, on contract by word of mouth or by writing unsealed), or whether they arise or are secured by any bond, deed, or other instrument

(*a*) Dyer, 23.

(*b*) 33 & 34 Vict. c. 71, s. 23.

(*c*) Hudson *v.* Hudson, 1 Atk. 460; Williams' Law of Executors, p. 954, 8th ed.

(*d*) In re Greaves, Bray *v.* Tofield, 18 Ch. D. 551.

(*e*) 1 And. 129.

(*f*) 17 Geo. 2, c. 38; 38 & 39 Vict. c. 60, s. 7.

(*g*) 23 & 24 Vict. c. 38, and 27 & 28 Vict. c. 112.

(*h*) 4 Rep. 60; Cro. Car. 363.

(*i*) Shafto *v.* Powell, 3 Lev. 355; Morrice *v.* The Bank of England, 3 Swanst. 573.

under seal or otherwise made or constituted a specialty debt (*k*). And although, under the Acts called Locke King's Acts (*l*), mortgage debts are now a primary charge on the real estate comprised in the mortgage, that is no exemption to the executor from the duty of seeing that these debts are paid, or (at all events) provided for (*m*). And note, that among debts of equal degree, the executor, if a creditor of the testator, is allowed to pay himself first, by retaining so much of the legal assets in his hands as his debt amounts to (*n*); which right is called his right of *retainer;* and the personal representative is in that particular different from the real representative (namely, the heir), who is not entitled to retain his debt (*o*); but an executor of his own wrong is not allowed to retain; for that would tend to encourage creditors to strive who should first take possession of the goods of the deceased; and besides, would be permitting them to take advantage of their own wrong, which is contrary to the policy of the law (*p*). Also, among several creditors of equal degree, he shall be first paid who shall first obtain judgment against the executor for his debt; for the executor or administrator cannot resist the action on the ground that nothing will be left for the other creditors; but he may resist it, on the ground that there is not enough to pay some creditor of higher degree (if there should be any such); which latter defence he is *bound* to make, if he have notice that a higher debt is outstanding (*q*); for otherwise, on a deficiency of assets, he must answer for it out of his own estate: and of all debts of record, he has notice by construction of law (*r*).

(*k*) 32 & 33 Vict. c. 46; Shirreff *v.* Hastings, 6 Ch. D. 610.

(*l*) Vide supra, vol. I. p. 299.

(*m*) Bowles *v.* Hyatt, 38 Ch. D. 609.

(*n*) Glaholm *v.* Rowntree, 6 Ad. & El. 710; Campbell *v.* Campbell, 16 Ch. D. 198; Norton *v.* Compton, 30 Ch. D. 15.

(*o*) Davidson *v.* Illidge, 24 Ch. Div. 654; 27 Ch. Div. 478.

(*p*) 5 Rep. 30.

(*q*) Dy. 32; 2 Leon. 60; Sawyer *v.* Mercer, 1 T. R. 690.

(*r*) 2 Bl. Com. p. 511.

If an executor, after exhausting (in a due course of administration) the whole assets which have come to his hands, be afterwards sued by a creditor remaining unpaid, he is entitled to defend himself by proving that he has fully administered the assets; and this is called the plea of *plene administravit* (*s*); upon which plea, the creditor is only entitled to judgment for payment of his debt (and costs) out of any future assets that shall come to the defendant's hands; that is to say, to judgment out of assets *quando acciderint*. But executors (including administrators) have now been protected generally in their administration of estates; for under the statutes 13 & 14 Vict. c. 35, ss. 19—25, and 23 & 24 Vict. c. 38, s. 14, they might obtain an order at chambers, for taking an account of the outstanding debts and liabilities; also, under Lord St. Leonards' Act (22 & 23 Vict. c. 35), in the case of leases subject to onerous rents and covenants, they might obtain protection against all liability for such rents on assigning the lease to a purchaser, and following in other respects the course pointed out by the Act (ss. 27, 28); also, under the same Act (s. 29), on giving the prescribed notices to creditors and others, they were enabled afterwards, when the time named in the notices had expired, to distribute the assets among the parties entitled; also, under the same statute (s. 30), as amended by the 23 & 24 Vict. c. 38, s. 9, they might apply to the court for advice or direction respecting the administration of the assets; and if they acted under such advice or direction, they were discharged so far as regards their own responsibility; and under Ord. LV. rr. 3—10 of the Rules of the Supreme Court, 1883, such advice or direction, or even a partial or complete administration of the estate, may now be obtained on a simple originating summons at chambers.

6. [When the debts are all discharged, the *legatees* claim, and are entitled, to be next paid; and they are to

(*s*) Palmer *v.* Waller, 1 Mee. & W. 689; Dawson *v.* Gregory, 7 Q. B. 757.

[be paid by the executor so far as the assets will extend, the legacy duty being first paid thereon (*t*); but the executor may not, if a legatee, give himself any such preference as in the case of debts (*u*). And upon the subject of legacies, it will be convenient to consider here some particular rules of law regarding them.

Now a legacy is a bequest by will of goods or chattels,—such bequest being, in general, subject (as above indicated) to legacy duty; but in case the chattel is a leasehold or chattel real, the bequest thereof will be subject to what is called succession duty, and not to legacy duty (*x*). And every bequest of goods or chattels transfers to the legatee, on the death of the testator, an inchoate property in that which is given, but his interest therein is not perfect without the assent of the executor. For if I am entitled to receive a *pecuniary* legacy of 100*l.*, or a *specific* one of a piece of plate, I cannot in either case take the legacy without the consent of the executor (*y*); for in him all the chattels are in the first instance vested; and it is his business to see, whether there is a sufficient fund to pay all the debts of the testator (*z*),—the rule being, that a man must be just before he is permitted to be generous; or, as Bracton expresses the sense of our antient law, "*de bonis defuncti primo deducenda sunt ea quæ sunt necessitatis, et postea quæ sunt utilitatis, et ultimo quæ sunt voluntatis*" (*a*). Also, in case of a deficiency of assets, all the *general* (*i.e.*, *pecuniary*) legacies must abate proportionably; nay, even if the legatees have been paid, they must refund a rateable part, in case debts come in afterwards, which more than exhaust the *residuum* after legacies paid (*b*); which law is also as old as Bracton and Fleta, who tell us, "*si plura sint debita, vel plus legatum fuerit, ad quæ catalla defuncti*

(*t*) 44 Vict. c. 12, ss. 36—43.

(*u*) 2 Vern. 434; 2 P. Wms. 25.

(*x*) 16 & 17 Vict. c. 51, s. 19.

(*y*) Co. Litt. 111; Richards *v.* Browne, 3 Bing. N. C. 493.

(*z*) Smith *v.* Day, 2 Mee. & W. 684.

(*a*) L. 2, c. 26.

(*b*) Newman *v.* Barton, 2 Vern. 205.

[*non sufficiant, fiat ubique defalcatio, excepto regis privilegio*" (*c*). However, a *specific* legacy of a piece of plate, or of a horse, or the like, is not to abate at all, unless there be not sufficient without such abatement to pay the debts of the deceased (*d*);] but, on the other hand, a specific legacy is liable to *ademption*,—which arises where the thing so bequeathed is afterwards disposed of in some other manner by the testator himself before his death: and where a specific legacy is thus adeemed, the legatee has no longer any claim under the will (*e*).

Also, if the legatee die before the testator, the legacy is in general lost or *lapses*, and shall sink into the *residuum*; but by a provision in the Wills Act, 1837, s. 33, referred to in the chapter on Devises, an exception to this rule has been introduced, in cases where the bequest is to a child, or other issue of the testator, for any estate or interest not determinable at or before the death of the legatee, and the legatee leaves issue, who survive the testator, and no intention to the contrary appears on the face of the will (*f*).

As regards a *contingent* legacy, if a legacy be left to anyone, when he shall attain, or if he attain, the age of twenty-one, and he die before that time, it is a lapsed legacy, even though he survive the testator (*g*); but a legacy to one "to be paid" when he attains the age of twenty-one years, is a *vested* legacy,—an interest, that is to say, which, as to title, commences *in præsenti*, although it be *solvendum in futuro*: and if the legatee in such a case die under age, his representatives shall in general receive it out of the testator's personal estate (*h*); but if the legacy is charged upon real estate, it shall, in general, lapse for the benefit of the heir, unless there be something

(*c*) Bract. l. 2, c. 26; Fleta, l. 2, c. 57, s. 11.

(*d*) 2 Vern. 111.

(*e*) In re Gibson, Matthews *v.* Foulsham, Law Rep., 2 Eq. Ca. 669.

(*f*) Vide supra, vol. I. p. 561.

(*g*) Dyer, 59; 1 Eq. Cas. Ab. 295; 2 Bl. Com. 513.

(*h*) 2 Bl. Com. 513; 1 Eq. Cas. Ab. 295.

further in the will, sufficient to show a contrary intention (*i*). And note, that if a legacy, due immediately, be charged on land, interest (at the rate of 4*l.* per cent. per annum) shall be payable thereon from the testator's death (*k*); but if not so charged, it will only carry interest from the end of the year after the death of the testator; for that is the time generally allowed by law for the payment of legacies (*l*); on the other hand, a specific legacy of an income-bearing fund (say, of stock) carries with it the dividends or income as from the death (*m*).

There is another species of contingent legacy; as where personal estate is bequeathed to A., and upon his dying *without issue*, then over to B.; which expression was formerly considered as importing an indefinite failure of issue; and the bequest over, as being too remote and tending to a perpetuity, was consequently held to be void (*n*); but a contrary rule was established by the Wills Act, 1837, s. 29, as more fully explained in the chapter on Devises (*o*); for by that rule, this expression is now to be construed (unless a contrary intention appear on the face of the will) as importing a failure of issue in the life-time or at the death of A.; and such a bequest over as that just mentioned will, consequently, now be good.

7. When all the debts and legacies are discharged and paid, and the duties on the legacies are also paid, and the residuary accounts have been duly passed by the executors, then the surplus, or *residuum* (if any), must be paid to the residuary legatee, appointed by the will; or if there be none, then to the next of kin of the deceased. For although it was long a settled notion, that such surplus devolved to the executor's own use, by virtue of his

(*i*) Duke of Chandos *v.* Talbot, 2 P. Wms. 601; Co. Litt. by Butl. 237 a, note (1).

(*k*) 2 Bl. Com. p. 513.

(*l*) Maxwell *v.* Wettenhall, 2 P. Wms. 26, 27.

(*m*) Kirby *v.* Potter, 4 Ves. 751; Barrington *v.* Tristam, 6 Ves. 349.

(*n*) Fearne, Cont. Rem. 485, 9th edit.; vol. I. p. 514.

(*o*) Vide supra, vol. I. p. 561.

executorship (*p*), that doctrine was always understood as subject to this restriction, that wherever there was sufficient, on the face of the will, to show that the executor was *not* intended to have the residue, it should go to the next of kin (*q*); and it has now been provided generally, by 11 Geo. IV. & 1 Will. IV. c. 40, that unless it shall positively appear on the will that the executor was intended to have the residue, he shall be deemed to be a trustee of it for such persons (if any) as would have been entitled (had the testator died intestate) to claim it as his next of kin; so that now the executor (or administrator) would be entitled to such residue or surplus, only in the absence of any next of kin (*r*).

8. The Statute of Distributions (22 & 23 Car. II. c. 10) was passed with reference to the case of an *intestacy*, and to provide for the *residuum* of the estate which remained after payment of the dead man's debts; for here, too, it was formerly much doubted whether the administrator could be compelled to make any distribution of the surplus (*s*). [And though—after the administration was taken from the ordinary, and transferred to the relations of the deceased,—the spiritual court endeavoured to compel a distribution, and took bonds of the administrator for that purpose, such bonds were prohibited by the temporal courts and declared void at law (*t*); all which controversies were disposed of by this Statute of Distributions, which, as explained by 29 Car. II. c. 3, provided as follows, namely, that the surplusage of intestates' estates,—except in the case of femes covert, the administration and enjoyment of whose estates belonged, by the principles of the common law, to their husbands,—should, after the expiration of one full year from the death of the intestate, be distributed in the following manner, that is to say:—

(*p*) Perkins, 525.

(*q*) 2 Bl. Com. 515; 11 Geo. 4 & 1 Will. 4, c. 40.

(*r*) Camp *v.* Coe, 31 Ch. Div. 460.

(*s*) Godolph. p. 2, c. 32.

(*t*) Hughes *v.* Hughes, 1 Lev. 233; Edwards *v.* Freeman, 2 P. Wms. 447.

[one-third should go to the widow of the intestate, and the residue in equal proportions to his children, or, if they were dead, to their representatives, that is their lineal descendants; if there were no children or legal representatives of such children subsisting, then a moiety was to go to the widow, and a moiety to the next of kindred in equal degree, and their representatives; and if no widow, the whole was to go to the children; if neither widow nor children, the whole was to be distributed among the *next of kin* in equal degree, and their representatives: but no representatives (as such) were admitted, among collaterals, farther than the children of the intestate's brothers and sisters (*u*). The next of kindred here referred to are to be ascertained by the same rules of consanguinity, as those which indicate who are entitled to letters of administration, of which we have already sufficiently spoken (*x*); and, therefore, according to 22 & 23 Car. II. c. 10, the father, or if he were dead, the mother, succeeded to all the personal effects of their children who died intestate and without wife or issue; in exclusion of the other sons and daughters, the brothers and sisters of the deceased; and so the law still remains with respect to the father; but by the stat. 1 Jac. II. c. 17, if the father be dead, and any of the children die intestate without wife or issue, in the lifetime of the mother, she and each of the remaining children, or their representatives, shall divide his effects in equal portions. All which distribution of an intestate's estate bears (as will have been observed) a near resemblance to our antient English law *de rationabili parte bonorum*, spoken of at the beginning of this chapter; and it bears also a very considerable resemblance to the Roman law of succession *ab intestato* (*y*); which, and because the Act was also penned by an eminent civilian (Sir W. Walker) (*z*),

(*u*) Raym. 496; Pett's case, 1 P. Wms. 27.

(*x*) Vide supra, p. 201.

(*y*) Ff. 38, 15; 1 Nov. 118, cc. 1, 2, 3; 127, c. 1.

(*z*) 1 Ld. Raym. 574.

[has occasioned a notion that the parliament of England copied it from the Roman prætor.

By another provision of the Statute of Distributions, it is enacted that no children of the intestate (except his heir-at-law) on whom he may have settled in his lifetime any estate in lands or pecuniary portion, equal to the distributive shares of the other children, shall have any part of the surplusage with their brothers and sisters; but that if the estates so given them by way of advancement shall not be quite equivalent to the other shares, the children so advanced shall have so much as will make them equal,—a just and equitable provision also said to be derived from the *collatio bonorum* of the Roman law, which it certainly resembles in some points, though it differs widely from it in others (*a*). And it may not be amiss to here observe, that this doctrine of advancement, with regard to goods and chattels, was part of the antient custom of London (*b*), of the province of York, and of the kingdom of Scotland (*c*); and with regard to lands descending in coparcenary, it has always been, and still is, the common law of England, under the name of *hotchpot* (*d*).

It must be particularly observed also, with regard to the Statutes of Distributions, that personal estate is sometimes divided *per capita*, and sometimes *per stirpes;* whereas the common law knows no other rule of succession save that *per stirpes* only (*e*); that is to say, personal estate is divided *per capita*,—to every man an equal share,—when all the next of kin claim in their own rights, as in equal degree of kindred, and not *jure repræsentationis*, as in the right of another person. Thus, if the next of kin be the intestate's three brothers, A., B., and C.; here his effects are divided into three equal portions, and distributed *per capita*, one to each: but if one of these brothers, A., had been dead,

(*a*) Ff. 37, 6, 1.

(*b*) Kemps *v.* Kelsey, Prec. Ch. 596.

(*c*) Ersk. Inst. b. 3, tr. 9, ss. 24, 25.

(*d*) Vide supra, vol. I. p. 337.

(*e*) Ibid. p. 383.

[leaving three children, and another, B., leaving two; then the distribution must have been *per stirpes;* viz. one-third to A.'s three children, another third to B.'s two children, and the remaining third to C., the surviving brother; but if C., in the case supposed, had also been dead, without issue, then A.'s and B.'s children, being all in equal degree to the intestate, would have taken in their own rights *per capita;* viz., being five in all, each of them one-fifth part (*f*).] However, as regards the *lineal* descendants of the intestate, the distribution is in all cases *per stirpes*, and not *per capita;* e.g., if A. dies intestate leaving three grandchildren by her son B., and one grandchild by her daughter C., the one moiety of the estate goes to the three children of B., and the other moiety to the one child of C. (*g*).

By the Statute of Distributions the customs of the city of London, of the province of York, and of all other places having peculiar customs of distributing intestates' effects, were expressly excepted and reserved. So that, though in those places the restraint of *devising* had been long removed, their antient customs, with respect to the estates of *intestates*, still remained in full force (*h*). Any special customs, however, concerning the distribution of estates in these or other places have now been wholly abolished; save only with respect to the estates of those who may have died on or before the 31st December, 1856; for, by 19 & 20 Vict. c. 94, it was enacted, that the distribution of the personal estate of all persons dying intestate on or after the 1st January, 1857, should take place as if the rules for the

(*f*) Prec. Chan. 54.

(*g*) In re Natt, Walker *v.* Gammage, 37 Ch. Div. 517, following Lockyer *v.* Vade, Barn. Ch. 444.

(*h*) 2 Bl. Com. 518, 519, where it is mentioned that, in London, if the deceased left a widow and children, her apparel and bedroom furniture, (called the *widow's chamber*,) was, in the first place, set aside for her own use; and the residue of the estate was then divided into three parts, whereof she took one; the children another; and the third (or *dead man's part*) went to, and was retained by, the administrator (Matthews *v.* Newby, 1 Vern. 133).

distribution of the personal estates of intestates, generally prevalent in the province of Canterbury, prevailed throughout the whole of England and Wales,—any law, custom, or statute to the contrary notwithstanding.

And before we conclude, and by way of concluding, this chapter, we must mention, that, by the 53 & 54 Vict. c. 29 (the Intestates' Estates Act, 1890), in the case of husbands who die intestate after the 1st September, 1890, and leave no issue, the whole estate (real and personal) of the deceased now passes to his widow, if it be under a total value of 500*l.*; and where such estate exceeds that value, she now takes 500*l.* out of it, in priority to all persons entitled under the Statutes of Distribution; and then (and subject to these special provisions in the widow's favour), the residue of the personal estate is distributable according to the former law, that is to say, one-half to the widow and the remaining one-half among the next of kin. But the Act, it will have been observed, does not apply if the intestate husband leaves any issue surviving him.

CONCLUSION.

OF SOME MIXED OR IRREGULAR SUBJECTS OF PROPERTY.

WE have thus taken a general survey of the law of property under its two great divisions of "things real" and "things personal"; which, as we have seen, are strongly distinguished from each other, not only as regards the natural qualities of immobility on the one hand, and mobility on the other, but also as regards the legal incidents to which each class is respectively liable. There is, however, no science which admits of an arrangement so perfect as to be without some anomalies; and in the law of property, there are, accordingly, some few cases of a mixed character, with the consideration of which we will close the Second Book of these Commentaries; that is to say, there are things real which are attended with some of the legal incidents of things personal; and there are things personal which are attended with some of the legal incidents of things real.

Firstly, Chattels real, having some of the legal incidents of chattels personal: and hereunder we shall consider (1) Emblements; (2) Fixtures; and (3) Shares.

1. *Emblements* are the growing crops annually produced by the labour of the cultivator. All natural growths, until they are actually severed from the soil, are, of course, in legal contemplation, parcel of the realty, not

less than the soil itself; but upon severance, change their character, and are converted into personalty (*a*). They are consequently governed, when in the first predicament, by all those rules, as to estate and title, which are incident to things real; but when in the second predicament, they are governed by the rules which attach to things personal. Thus trees, while still implanted in the ground, are parcel of the freehold, and as such will pass, on the death of the fee simple owner thereof, to his heir or devisee; but when felled or blown down, they become part of his personal estate, and belong on his decease to his executor or administrator. To this general doctrine, however, emblements, or *fructus industriales*, are an exception; for these, while still in union with the soil, follow in several particulars, the nature of personal, as distinguished from real estate.

For, in the first place, emblements may be lawfully severed from the soil, and removed by the tenant whose cultivation has produced them, though his interest in the land may be too limited to entitle him to cut down trees or the like; thus, a tenant, whose estate comes to an end at a period which he was not in a condition to foresee, is entitled to cut and carry away, when ripe, even after his tenancy has determined, the emblements which he has sown or planted; and, again, upon the death of a terre-tenant seised in fee, the emblements on his land growing at the time of his decease will devolve, by this rule of law, upon his executor, or, in case of his intestacy, on his administrator; and will not descend to his heir: for which the reason seems to be, that they were sown with the intention of being reaped by himself, and of being thus ultimately converted into, so as to form portion of, his personal estate. The law, however, maketh in this latter case a distinction between an heir and a devisee; for the devise to a man of a particular piece of land, will (unlike

(*a*) In re Ainslie, Swinburn *v.* Ainslie, 28 Ch. Div. 89; 30 Ch. Div. 485.

a descent) suffice to carry also with it the emblements growing thereon at the testator's death (*b*).

Further, the emblements of a terretenant are subject, like his moveables, to be distrained upon for any arrears of rent that he may owe to his landlord. Formerly, indeed, this was otherwise; for, at common law, it was the moveables only of the tenant that were liable to distress; and the emblements were considered, for this purpose, as parcel of the freehold itself, and to be consequently exempt (*c*); but now, by stat. 11 Geo. II. c. 19, landlords are permitted to distrain corn, grass, hops, or other produce of a similar nature, growing on the demised premises (*d*). Moreover, in case of a judgment against the terretenant, his emblements are liable to be taken upon a writ of *fieri facias*; a rule not, like the last, introduced by statute, but the effect of legal construction, founded on the similarity which exists, in other particulars, between the law of emblements and that of personal property: and more particularly on the circumstance of their devolving on the personal representative, and not on the heir (*e*). And here it should be stated, that emblements comprise not only corn of all kinds, but other annual products of the labour of the cultivator, such as hops, hemp, flax, saffron, melons, cucumbers, turnips, and carrots (*f*); but do not comprise fruits growing on trees, or the natural grasses (*g*).

2. *Fixtures* may be defined as things of an accessory character, annexed to houses or lands; and in that sense, they include, not only such matters as grates in a house, or steam-engines in a colliery (which follow in some respects the law of personal chattels), but such things also as

(*b*) Anon., Cro. Eliz., 61; Co. Litt. by Hargrave, 55 b.

(*c*) 1 Roll. Abr. 666; ib. pl. 4; 3 Bl. Com. 9, 10; Co. Litt. by Harg. 47 b, n. (1).

(*d*) Clark *v.* Calvert, 8 Taunt. 742.

(*e*) Gilb. Exec. 19; Poole's case, 1 Salk. 368; Peacock *v.* Purvis, 2 Brod. & Bing. 368.

(*f*) Co. Litt. 55 b; Toller, Exec. 193.

(*g*) 2 Bl. Com. 123; Toller, ubi supra.

windows and palings, which are for every purpose parcel of the realty. To be a fixture, however, the thing must not constitute a part of the principal subject-matter itself; *e.g.*, the walls or floors of a house, being an intrinsic part of the house, are never described as fixtures; and yet the fixture must be in some union or connection (actual or constructive) with the principal subject-matter, and not merely brought into contact with it, as in the case of a picture suspended on hooks against a wall, or a wooden barn resting, by its weight alone, upon a brick foundation (*h*).

By an antient rule of the common law (the result, perhaps, of that paramount regard which in former times was paid to land as compared with personal property), every fixture, or thing annexed to the realty, became, immediately on the annexation, part of the realty itself,—the maxim being that *quicquid plantatur solo, solo cedit* (*i*); and the application of this maxim implied that, in general, the fixture was thereafter governed by the same law which applied to the land, or other subject real, with which it was incorporated, and that it ceased to follow the law applicable to personal estate (*k*). There are, however, numerous cases in which the contrary is now true, and in which the fixture now retains, after its annexation, the quality of a personal chattel,—these cases forming, in truth, the exceptions which have been gradually introduced in the course of judicial decision, reason and convenience seeming to require that, with regard to them, the old common law rule should be qualified (*l*). And, accordingly, we find the law to be:—

First, as between a tenant in fee's heir (or devisee) and his personal representatives, the fixtures will in general follow the land; even such of them as have been put up

(*h*) Elwes *v.* Maw, 3 East, 55.

(*i*) Lee *v.* Risdon, 7 Taunt. 191; Swinburn *v.* Ainslie, 30 Ch. Div. 485.

(*k*) Horn *v.* Baker, 9 East, 215; Sheen *v.* Rickie, 5 Mee. & W. 175.

(*l*) Buckland *v.* Butterfield, 2 Brod. & Bing. 54.

merely for ornament or domestic use, devolving to the real representative, inasmuch as they are not capable of removal without material damage to the freehold, and are essential to its enjoyment, if not in its natural, at least in its acquired or factitious, character (*m*); and the same rule seems to apply also (*scilicet*, as between these parties) to such fixtures as have been placed or erected for purposes connected with trade (*n*).

Secondly, as between the tenant of a particular estate and the person entitled in remainder, though in general the former is bound to commit no *waste*, but to keep the inheritance entire and unimpaired; yet it would seem that trade fixtures, and also ornamental or domestic fixtures, if put up by himself, may be lawfully removed by him, or by his personal representative, as the case may be; and that either during the continuance of his estate, or on its determination.

Thirdly, as between mortgagors and mortgagees, the old common law rule for a long time asserted its predominance,—and even trade fixtures were in general esteemed parcel of the realty, whether expressly mentioned or not (*o*); and it is difficult to say, that the old rule is not still applicable in this particular, although in the Bills of Sale Acts, 1878 and 1882 (41 & 42 Vict. c. 31 and 45 & 46 Vict. c. 43), requiring registration of a mortgage of personal chattels, they are undoubtedly treated as being (for the purposes of registration) mere personal chattels (*p*). But where, after the mortgage, the mortgagor leases to another, and the lessee erects trade fixtures on the land demised, his (the lessee's) right to remove these fixtures is not lost by reason of the mortgage, and the mortgagee

(*m*) 2 Bl. Com. 428; D'Eyncourt *v.* Gregory, Law Rep., 3 Eq. 382.

(*n*) Toller, Ex. 198; Elliott *v.* Bishop, 10 Exch. 496; Fisher *v.* Dixon, 12 Cl. & Fin. 312.

(*o*) Climie *v.* Wood, Law Rep., 3 Ex. 257; 4 Exch. 328; Longbottom *v.* Berry, ib. 5 Q. B. 123.

(*p*) Topham *v.* Greenside Firebrick Co., 37 Ch. D. 281; Batchelor *v.* Yates, 38 Ch. Div. 112.

cannot therefore sell such fixtures as if they were (by force of the old common law rule) comprised in his security (*q*); also, in general, chattels bought by the mortgagor, and brought upon and affixed to the mortgaged land subsequently to the mortgage,—will not pass to the mortgagee, if the seller reserve his property therein until the price therefor is paid (*r*), and in these two particulars, the exigencies of modern business clearly demanded a modification in the general law.

Fourthly, as between landlord and tenant, it is held that the latter, though guilty in general of waste if he despoils the freehold, may nevertheless take away during the continuance of his term—though not (unless by permission) after he has quitted the premises (*s*)—such fixtures as he has himself put up, either for the purposes of trade, or for the ornament or furniture of the premises demised (*t*); and of course, the legal representative of the tenant (including his trustee in bankruptcy) has the like right of removal (*u*). But this right does not extend to erections of such a nature, that their removal would be of material detriment to the freehold; for these fall under the general rule, and not under the exception, and must consequently be yielded up to the landlord, at the end of the term, as parcel of the inheritance (*x*). Nor did this right extend, at common law, to things annexed to the realty for purposes merely *agricultural;* but by 14 & 15 Vict. c. 25, s. 3, if a tenant of a farm or lands (with the consent in writing of his landlord), at his own expense, erects any building or machinery, either for agricultural or trade purposes (being under no previous obligation to do so), such erection remains the

(*q*) Sanders *v.* Davis, 15 Q. B. D. 218.

(*r*) Cumberland Bank *v.* Maryport Iron Co., (1892) 1 Ch. 415.

(*s*) Heap *v.* Barton, 12 C. B. 274; Leader *v.* Homewood, 5 C. B. (N.S.) 546.

(*t*) Wilde *v.* Waters, 16 C. B. 687; Elliott *v.* Bishop, 11 Exch. 113.

(*u*) In re Walker, 13 Q. B. D. 454; In re Moser, ib. 738.

(*x*) Buckland *v.* Butterfield, 2 Brod. & Bing. 54.

property of and is removable by the tenant, though, in removing it, he is not to injure the premises demised; and the landlord may (on receiving notice) elect to purchase the fixture, at a value to be ascertained by two referees or their umpire. Also, more recently, by the Agricultural Holdings Act, 1883 (*y*), re-enacting a similar provision contained in the Agricultural Holdings Act, 1875 (*z*), it has been enacted generally, and not merely as regards the holdings principally affected by that Act, that where after the commencement of the Act (*scil.*, after the 31st day of December, 1883), a tenant affixes to his holding any engine, machinery, fencing, or other fixture, or erects any building for which he is not, under the Act or otherwise, entitled to compensation, and which is not so affixed or erected in pursuance of some obligation in that behalf, or instead of some fixture or building belonging to the landlord, then such fixture or building shall be the property of, and be removable by, the tenant before, or within a reasonable time after, the termination of the tenancy, subject nevertheless to these provisions, namely:—(1) Before the removal of the fixture or building, the tenant is to pay all rent, and to satisfy all other his covenants in respect of the holding; and (2) In the removal, he is not to do any avoidable damage to the holding; and (3) Immediately after the removal, he is to make good all the damage occasioned to the holding by the removal; also (4) The tenant is not to remove the fixture or building without giving one month's previous notice in writing to the landlord of his intention to remove it; whereupon (5) At any time before the expiration of the notice, the landlord, by counter-notice in writing given by him to the tenant, may elect to purchase the fixture, and thereupon it is to be left by the tenant, and becomes the property of the landlord, he duly paying therefor the price thereof, as agreed between them or (failing such agreement) as ascertained by valuation.

(*y*) 46 & 47 Vict. c. 61, s. 34.

(*z*) 38 & 39 Vict. c. 92, s. 53.

And here we may conveniently observe, that, in extension of what theretofore was in many cases expressly contracted for, or by custom impliedly agreed upon, between the landlords and tenants of agricultural land, there is by the same Act (namely, the Agricultural Holdings Act, 1883, repeating and extending the Agricultural Holdings Act, 1875) provided, in favour of such tenants, a species of tenant-right or right to compensation for what are called unexhausted improvements,—and which compensation is primarily payable by the landlord (and not by the incoming tenant) (*a*); and the provisions which on this head are contained in the Act may be briefly stated as follows, it being first premised that any agreement which purports to exclude the Act is void (*b*): And firstly the Act applies, as the name of the Act partly denotes, only to cases of an agricultural character, that is to say, to a holding which is either wholly agricultural or wholly pastoral, or partly the one and partly the other (including, *semble*, market-gardens) (*c*): And secondly, it enables the tenant to claim from his landlord, on the determination of the tenancy, compensation in respect of any improvement which he (the tenant) has executed on his holding,—being an improvement which comes within any or either of the three classes specified in the first schedule to the Act (*d*),—which compensation (unless the amount thereof is agreed upon between them) is to be settled and ascertained by arbitration according to certain rules laid down in the Act (*e*), and which rules are intended to supply the basis upon which the arbitrators shall estimate the amount of the compensation payable,—an appeal being allowed to the county court from the decision of the arbitrators or of their umpire, and (in a matter of law) from the county court to the High Court (*f*),—the Act nevertheless ex-

(*a*) Bradburn *v.* Foley, 3 C. P. D. 129; Mansell *v.* Norton, 22 Ch. D. 769.
(*b*) Sect. 55.
(*c*) Sect. 54.
(*d*) Sect. 1.
(*e*) Sects. 6—22.
(*f*) Sect. 23.

pressly providing, that the tenant (claiming compensation under the Act) shall not be entitled to compensation also under any custom of the country, or under any contract in respect of the same subject-matter,—but otherwise the tenant is to remain entitled to such last-mentioned compensation (*g*): and the Act limits also the claim to compensation, in respect of improvements executed within (in effect) one year of the determination of his tenancy, to manures only (*h*). And somewhat similar provisions for compensation are also (we may observe) contained in the 50 & 51 Vict. c. 26, as regards cottage gardens; and as regards allotments not exceeding two acres; and these last-mentioned provisions are, it is to be observed, expressly made substitutive of the like provisions contained in the Agricultural Holdings Act, 1883.

Fifthly, with regard to the rights of execution creditors and of landlords to seize and sell fixtures, the creditor on a writ of *fieri facias* and the landlord on a distress,—the rule appears to be, that, upon a *fieri facias* issued against the tenant for years, who is entitled to remove them, they may be seized and sold under such writ (*i*); but that upon the like writ issued against the tenant of the freehold, they are exempt from the operation of any such process (*k*); also, that fixtures are not ordinarily subject to a distress for rent (*l*),—at least in cases where they cannot (on payment of the rent) be restored, after removal, in the like plight and condition (*m*).

3. *Shares in public undertakings connected with land;*—The property in the land belonging to public undertakings, such as mines, canals, and railroads, to which the public subscribe, and which are vested in such subscribers as a body corporate, is in the nature of realty, so far as regards the land itself or the right of using it; and, for some

(*g*) Sect. 57.

(*h*) Sect. 59.

(*i*) Poole's case, Salk. 368.

(*k*) Gilb. Execution, 19; Winn *v.* Ingilby, 5 Barn. & Ald. 625.

(*l*) Co. Litt. 47 b; Gorton *v.* Falkner, 4 T. R. 565.

(*m*) Darby *v.* Harris, 1 C. B. 895; Hellawell *v.* Eastwood, 6 Exch. 295.

purposes, as regards the fixtures connected with the concern (*n*). But the *shares* of the individual corporators in the undertaking, that is to say, the rights which each individual possesses as a partner or participator in the surplus profit derived from the employment of the capital, are in the nature of personalty (*o*); and are usually (by the divers statutes relating to the companies) expressly declared to be personal estate (*p*).

Secondly: Chattels personal having some of the legal incidents of chattels real; and hereunder, we shall consider (1) Animals *feræ naturæ;* (2) Title-deeds; and (3) Heirlooms.

1. Animals *feræ naturæ* are ranked as parcel of the freehold, by the *general law* of the realm, because they are necessary to the well-being of the inheritance (*q*); and we have sufficiently discussed already the law as to animals *feræ naturæ* (*r*), which (as we have seen), when they are confined upon a man's estate but not domesticated, pass, if he were seised of an estate of inheritance, to his heir or devisee; and if he was possessed for a term of years, pass to his executor or administrator (*s*); and if domesticated, they become goods and chattels, equally with animals naturally tame; in which latter case, they belong, in every instance, on the death of the owner, to his personal representative (*t*).

2. Title-deeds, including charters, court rolls, and other evidences of title to the land, together with the chests in which they are contained, pass together with the inheritance, and go not to the executor (*u*); and the reason

(*n*) Stoughton *v.* Leigh, 1 Taunt. 402; Minshall *v.* Lloyd, 2 Mee. & W. 450.

(*o*) Bligh *v.* Brent, 2 Y. & Col. 268.

(*p*) 25 & 26 Vict. c. 89, s. 22.

(*q*) 2 Bl. Com. 427.

(*r*) Vide supra, pp. 4, 5, 15.

(*s*) Co. Litt. 8 a; Wentworth's Off. Ex. 53; Liford's case, 11 Rep. 50; Morgan *v.* Abergavenny, 6 C. B. 768; Bain *v.* Brand, 1 App. Ca. 762.

(*t*) Wentworth's Off. Ex. 154.

(*u*) Bro. Ab. tit. Chattels, 18; Co. Litt. 6 a; Com. Dig. Biens, B.; Charters A.; Wright *v.* Robotham, 33 Ch. Div. 106.

is, because such documents are necessary to the well-being of the inheritance, and so (by the general law) pass with it, and as parcel of the freehold; and their custody is with the legal freeholder, although he should be only entitled to the lands for his life (*x*). But where title-deeds have been deposited by the owner as a security for money lent, they are chattels in the hands of the mortgagee, and his special property in them will pass, on *his* decease, to his personal representative (*y*).

Moreover, the coat armour of a man's ancestor, hung up in a church with the pennons and other ensigns of honour suited to his degree, pass with the inheritance (*z*); and the case is the same with regard to a monument or tombstone; for all these are fixtures of a peculiar kind; and, contrary to the common rule, they do not combine with the subject real to which they are visibly attached, that is to say, to the churchyard or to the church-fabric, which is the freehold of the parson; and accordingly, albeit the chattels in question are annexed to that freehold, yet neither the parson nor the personal representative of the ancestor can take them away, or in any way deface them; but each is liable, for any such removal or defacement, to an action, at the suit of the heir of the ancestor (*a*).

3. *Heir-looms* are such personal chattels as, by the *special custom* of a particular place, pass upon death together with the inheritance of the messuage or land with the occupation of which they are connected:—the termination *loom* being of Saxon original, in which language it signified a limb or member, so that an heir-loom is nothing else but a limb or member of the inheritance (*b*); and under the denomination of heir-looms, even carriages, pictures, utensils, and other household implements, may be in-

(*x*) Allwood *v.* Heywood, 1 H. & C. 745; Leathes *v.* Leathes, 5 Ch. D. 231.

(*y*) Shep. Touch. 469.

(*z*) Spooner *v.* Brewster, 3 Bing. 136.

(*a*) 12 Rep. 105; Co. Litt. 18 b.

(*b*) 2 Bl. Com. 427; Co. Litt. 18 b; Termes de la Ley; Spelm. Gloss. 277; 14 Vin. Ab. 291.

cluded (*c*),—provided the custom to so include them be strictly proved (*d*); and the antient jewels of the crown are also said to be heir-looms (*e*); and all such vest in and descend upon the heir, or other the person entitled to the inheritance for a freehold estate therein, whereas all chattels personal whatsoever (other than those of this peculiar character) vest in the personal representatives of the deceased owner (*f*). Also, it is said, that heir-looms, though mere chattels, cannot be devised away from the inheritance by will; for that such a devise is void, even when made by a tenant in fee simple; the owner might, it is true, during his life, have sold or disposed of them, as he might of the timber on the estate; since, as the inheritance was his own, he might mangle or dismember it as he pleased; yet they being at his death instantly vested in the heir, the devise of them (which is subsequent, and not to take effect till after his death) is postponed to the custom, whereby they have already descended (*g*).

The term "heir-looms" is, however, often applied, in ordinary speech, in a much wider sense, and so as to include, for example, pictures, plate, furniture, and the like, directed by will or settlement to follow the limitations, thereby made, of some family mansion or estate; but the word is not then employed in its strict and proper sense; nor is the disposition itself, beyond a certain point, effectual; for the articles will, in such a case, belong absolutely to the first person who, under the limitations, would take a vested estate of inheritance in them, supposing them to be real estate; and the person so becoming entitled to them may clearly dispose of them by his will; and if he die intestate, they will pass to his personal representative, and not to his heir (*h*).

(*c*) Corven's case, 12 Rep. 105; Francis *v.* Ley, Cro. Jac. 366.

(*d*) 2 Bl. Com. 428; Co. Litt. 18, 185.

(*e*) Co. Litt. 18.

(*f*) Co. Litt. 388.

(*g*) 2 Bl. Com. 429; Co. Litt. 185 b; Woodd. Vin. Lect. vol. ii. p. 380.

(*h*) Gower *v.* Grosvenor, Barnard. Ch. Rep. 54; Co. Litt. by Harg. 18 b, n. (7).

By the Settled Land Act, 1882 (*i*), s. 37, it has been provided, that where personal chattels are settled on trust so as to devolve with land until a tenant in tail by purchase is born or attains the age of twenty-one years, or so as otherwise to vest in some person becoming entitled to an estate of freehold of inheritance in the land, a tenant for life of the land may sell the chattels or any of them; and that the money arising by the sale shall be capital money arising under the Act, and shall be paid, invested, or applied and otherwise dealt with, in like manner in all respects as by the Act is directed with respect to other capital money arising under the Act, or may be invested in the purchase of other chattels, of the same or any other nature, which, when purchased, shall be settled and held on the same trusts, and shall devolve in the same manner as the chattels sold; but that a sale or purchase of chattels under this section shall not be made without an order of the court (*k*); and apparently, these provisions would extend to the sale of heir-looms strictly so called.

(*i*) 45 & 46 Vict. c. 38; Marlborough (Duke) *v.* Marjoribanks, 32 Ch. D. 1; Marlborough (Duke) *v.* Sartoris, 32 Ch. D. 616; Earl Radnor's Will Trust, 45 Ch. D. 402.

(*k*) See vol. I. p. 678.

BOOK III.

OF RIGHTS IN PRIVATE RELATIONS.

CHAPTER I.

OF MASTER AND SERVANT.

HAVING now considered at some length the rights of persons individually as regards both real and personal estate, we will now proceed, according to the method formerly marked out, to consider the rights of persons in their private relations (*a*).

[The three great relations in private life are:—First, That of *master and servant*, which is founded in convenience; Secondly, That of *husband and wife*, which is founded in nature, but modified by civil society; and, Thirdly, That of *parent and child*, which is consequential on that of marriage, being its principal end and design; but since the children require, during their infancy, to be protected and educated, and that even after the deaths of their parents,—therefore the law has provided a Fourth relation in private life, namely, that of *guardian and ward;* all which four relations now fall to be considered.

Firstly, the relation of *master and servant;*—in discussing which, we shall first consider the several sorts of servants, and how this relation is created and destroyed; secondly,

(*a*) Vide sup. vol. I. p. 138.

[the effect of this relation with regard to the parties themselves; and, lastly, its effect with regard to third persons.

I. As to the several sorts of servants:—It is known to every reader, that slavery, or that civil relation in which one man possesses absolute power over the life, liberty, and fortune of another, does not and cannot subsist in England; our law abhors slavery; and though an attempt was once made to introduce it, by the 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 the statute was repealed in two years afterwards (*b*). And in modern times, it has been laid down that a negro or other slave, the instant he lands in England, becomes a freeman (*c*);] and though in our West Indian Colonies, a most galling system of slavery was long suffered to prevail, that reproach to our humanity has been now wholly removed, as we had occasion to explain in a former volume (*d*). But while the English law thus absolutely rejects the relation of slavery, it sanctions and upholds the mere obligation of service,—the engagement, that is to say, of a man *sui juris* and free to contract, to enter for pay into the service of another, and to devote to him his personal labour, for such period as may be mutually agreed upon; for liberty is not thereby compromised, but is shown in the very exercise of it.

The first sort of servants, therefore, acknowledged by the laws of England, are *menial servants*, so called from

(*b*) 3 & 4 Edw. 6, c. 16.

(*c*) Smith *v.* Brown, Salk. 666; Somersett's case, 11 St. Tr. 340; Lofft, 1.

(*d*) Vide sup. vol. I. pp. 108—110.

being employed *intra mœnia*, as domestics (*e*),—the contract between whom and their masters arises upon the hiring. And it is usual to engage them at a fixed amount of wages by the year; but there is generally no express stipulation as to the time that the service is to last; and, in such case, the hiring is thus understood,—that it is *by the year*, but that either party may at any time determine it at pleasure, upon giving a month's notice, for which a month's wages (on the part of the master at least) are considered as an equivalent (*f*); and the domestic may be dismissed, for misconduct, at any time, and without either notice or wages in lieu of notice (*g*). A person who serves as clerk in an office of business, or who has been hired as a tutor or governess, though employed *intra mœnia*, is nevertheless not a domestic servant within the sense of our present remarks; therefore, he or she, if engaged without express agreement as to time, cannot be dismissed (save for misconduct) without a reasonable notice, expiring, or not expiring, at the end of the current year of the service (*h*); for it may be taken (with regard to the time at which the notice must expire) that there is no inflexible rule of law on the subject, but that each case must depend on its own circumstances (*i*). And note, that these contracts of service may, having regard to the terms thereof, require (but in general they do not require) to be in writing, as contracts not to be performed within a year from the making thereof, within the meaning of these words in the Statute of Frauds (*k*).

A second species of servants are *labourers* employed in agriculture, and *workmen* engaged in trades or manufac-

(*e*) Nowlan *v.* Ablett, 2 C. M. & R. 54.

(*f*) Gordon *v.* Potter, 1 F. & F. 644.

(*g*) Baylis on Domestic Servants, p. 5; Smith on the Law of Master and Servant, p. 74 (3rd ed.).

(*h*) Todd *v.* Kerrich, 8 Exch. 151; Brown *v.* Symons, 8 C. B. (N. S.) 208.

(*i*) Fairman *v.* Oakford, 5 H. & N. 635.

(*k*) Bracegirdle *v.* Heald, 1 B. & Ald. 722; Britain *v.* Rossiter, 11 Q. B. D. 123.

tures. Such labourers and workmen are usually engaged by the year, or for other specified periods, and, when so hired, cannot terminate their contract by giving only a month's notice, if engaged for a longer time. And it may be noticed, that the justices of the peace have the power of compelling persons without any visible livelihood to go out to labour in husbandry or in certain specific trades, for the promotion of honest industry; but this is a power which is rarely, if ever, exercised at the present day. The justices have also, in a variety of cases, jurisdiction to determine complaints between labourers and workmen and their employers; and to arrange by arbitration, under their direction, such differences as admit of that mode of settlement (*l*); and the legislature has also, by 30 & 31 Vict. c. 105, authorized the establishment of *equitable councils* of arbitration or conciliation, to adjust differences between masters and workmen, *scil.*, of the artizan class. Besides all which provisions, the justices, when sitting "as a court of summary jurisdiction," have also now conferred upon them, by the Employers and Workmen's Act, 1875 (38 & 39 Vict. c. 90), a concurrent *civil* jurisdiction with the county courts, in disputes between parties standing in that relation to each other, where the sum claimed does not exceed 10*l.* (*m*); but domestic (or menial) servants are, of course, not within the Act (*n*). And it deserves remark, that though some of the earlier statutes regulating this subject were chiefly framed for the protection of the *master*, this has not been the case under later legislation; it being now thought just and proper to protect, so far as possible, either party against the misconduct or breach of contract of the other.

(*l*) See 1 Ann. st. 2, c. 22; 13 Geo. 2, c. 8; 22 Geo. 2, c. 7; 31 Geo. 2, c. 11; 17 Geo. 3, c. 56; 39 & 40 Geo. 3, c. 77; 5 Geo. 4, c. 96; 1 & 2 Will. 4, c. 37; 7 Will. 4 & 1 Vict. c. 67; 6 & 7 Vict. c. 40; 8 & 9 Vict. cc. 77, 128; 30 & 31 Vict. cc. 105, 130; 35 & 36 Vict. c. 46; 38 & 39 Vict. c. 86.

(*m*) Hindley *v.* Haslam, 3 Q. B. D. 481.

(*n*) Sect. 10.

Another species of servants are called *apprentices*, from *apprendre*, to learn; and these are bound by indenture, usually for a term of years, to serve their masters, who on their part agree to maintain and instruct them during such period (*o*). This binding is generally to persons of trade, in order to learn their art and mystery; and by a provision of the 5 Eliz. c. 4, which remained in force until modern times, it was in general required, that every person who would exercise a trade in England must have previously served as apprentice to it for seven years (*p*); but by 54 Geo. III. c. 96, and 5 & 6 Will. IV. c. 76, all enactments, customs and bye-laws which had the effect of prohibiting trades and occupations to persons who had not served therein as apprentices, were abolished,—neither of the above statutes applying, however, to the city of London, the customs and bye-laws whereof on this subject remain consequently as before. Apprentices are usually infants bound out by their friends; though their own consent or purported consent (testified by their executing the indentures) is essential to the validity of the transaction (*q*). But there is a class called *parish* apprentices, who are bound under different conditions (*r*); for the children of parents unable to maintain them may be apprenticed till the age of twenty-one to such persons as shall, by the poor law authorities, be thought fit to receive them,—and this without their own consent or becoming parties to indentures,—the apprenticing authority being, in the case of a parish which forms part of a poor law union, the *guardians* (*s*); and in all other cases, the parish *overseers*, which latter must, however, obtain the sanction of two justices (*t*). Moreover, the persons selected for the masters of such ap-

(*o*) 1 Bl. Com. 426; Phillips *v.* Clift, 4 H. & N. 168; Eaton *v.* Western, 9 Q. B. D. 636.

(*p*) 11 Rep. 54; 1 Bl. Com. 427.

(*q*) R. *v.* Arnesby, 3 Barn. & Ald. 581.

(*r*) 7 & 8 Vict. c. 101, s. 12.

(*s*) Ibid.

(*t*) The Queen *v.* The Inhabitants of St. George's, Bloomsbury, 4 Ell. & Bl. 520.

prentices were formerly also compellable to take them (*u*); but by 7 & 8 Vict. c. 101, s. 13, the reception of a parish apprentice is no longer compulsory. A variety of statutes regulate the manner in which parish apprentices are to be bound, assigned, registered and maintained (*x*),—a subject which (as being a matter relating to the Public Health) is also now placed under the paramount control of the Local Government Board; who have power to introduce new rules, from time to time, as they may think fit; and there are also numerous enactments by which justices of the peace are empowered to settle disputes between apprentices (whether bound by the parish or not) and their masters; and to discharge apprentices from their indentures upon reasonable cause shown (*y*). The Employers and Workmen's Act, 1875, to which reference has already been made, provides also, that any dispute between an apprentice to whom that statute applies and his master, may be heard and determined by "a court of summary jurisdiction" (*z*),—and occasionally by the county court,—equally as if the dispute was one between an "employer and a workman"; moreover, the court of summary jurisdiction may make an order directing the apprentice to perform his duties, and may enforce the order by imprisonment for a period not exceeding fourteen days (*a*); or the court may rescind the instrument of apprenticeship, and require the whole or any part of the premium paid on the binding of the apprentice to be refunded.

And here we may observe, that by the Master and Servant Act, 1889 (52 & 53 Vict. c. 24), a number of Acts of

(*u*) Salk. 67, 491.

(*x*) 43 Eliz. c. 2, s. 5; 8 & 9 Will. 3, c. 30; 18 Geo. 3, c. 47; 42 Geo. 3, c. 46; 56 Geo. 3, c. 139; 7 & 8 Vict. c. 101, ss. 12, 13; 14 & 15 Vict. c. 11; 17 & 18 Vict. c. 104, ss. 141—145; 38 & 39 Vict. c. 86, s. 16; and 39 & 40 Vict. c. 61, s. 27.

(*y*) 5 Eliz. c. 4, s. 35; 32 Geo. 3, c. 57; 33 Geo. 3, c. 55; 54 Geo. 3, c. 96; 56 Geo. 3, c. 139; 4 & 5 Will. 4, c. 76, ss. 15, 61; 5 & 6 Vict. c. 7; and 38 & 39 Vict. c. 68.

(*z*) 38 & 39 Vict. c. 90, s. 5.

(*a*) Sect. 6.

parliament (long grown obsolete) relative to masters and servants have been repealed.

II. As to the effect of the relation of master and servant, with regard to the parties themselves:—A domestic servant, in the absence of special agreement to the contrary, is entitled to be properly fed and lodged by his or her employer; and if prevented for a time, by sickness or other accident supervening, from the performance of his or her duties, this does not justify the master in the servant's dismissal without such notice or wages as might otherwise be claimed (*b*). And where the master or mistress of any apprentice or servant shall be legally liable to provide necessary food, clothing, medical aid, or lodging, and shall wilfully, and without lawful excuse, refuse or neglect so to do, so that the servant or apprentice's health shall be (or shall be likely to be) permanently injured thereby,—such master or mistress is guilty of a criminal offence, and liable to heavy punishment (*c*). On the other hand, the master, as a general rule, is not legally bound to provide his domestic servants either with medicine or with medical attendance; for, if unable to provide such for themselves, they have, like other paupers, a right to relief from the public, under the poor-laws (*d*); but an apprentice bound under indentures is differently situated (*e*). A master was not, in general, liable to his servant (domestic or otherwise) for an injury which was the result of the negligence of his fellow-servant (*f*); and this was upon the principle *volenti non fit injuria* (*g*). But the law in this respect has been materially altered by the Employers' Liability Act,

(*b*) Cuckson *v.* Stones, 1 Ell. & Ell. 482.

(*c*) See 38 & 39 Vict. c. 86, s. 6; et vide post, bk. VI.

(*d*) Wennell *v.* Adney, 3 Bos. & Pul. 247.

(*e*) R. *v.* Smith, 8 Car. & P. 153.

(*f*) Priestley *v.* Fowler, 3 Mee. & W. 1; Gallagher *v.* Piper, 16 C. B., N. S. 669; Tunney *v.* Midland Railway Co., Law Rep., 1 C. P. 291; Lovell *v.* Howell, 1 C. P. D. 161.

(*g*) Membury *v.* Great Western Rail. Co., 14 App. Ca. 179.

1880 (43 & 44 Vict. c. 42), in all cases in which the fellow-servant (whose negligence is the cause of the accident) is in some position of authority over the injured servant (*h*); and even independently of that Act, the master was and is, in general, liable to his servant for injuries sustained through defects in the premises or in the machinery whereon or with which the servant is ordinarily engaged (*i*). But if a servant be guilty of moral misconduct, or of wilful disobedience, or habitual neglect of his master's lawful commands, he may in any such case be dismissed without notice; and no wages can in such a case be claimed save what have actually fallen due before the dismissal (*k*); and a master may even correct his servant (being his apprentice), provided he do it with moderation (*l*); but he may not so correct his domestic (or menial) servants (*m*). A servant, duly discharging the duties of his service, is entitled to recover his wages, in preference or priority to the general creditors, in case of the death insolvent or of the bankruptcy of his master (*n*); and under the Acts commonly known as the Truck Acts (*o*), his wages must be paid to him in cash, and not in goods.

A servant, we need hardly observe, is not liable for the goods of his master taken out of his possession by robbery, provided his own conduct has been free from blame (*p*). Also when a servant quits his place, the master is not obliged, in point of law, to give him or her a character (*q*);

(*h*) Cox *v.* Great Western Rail. Co, 9 Q. B. D. 106; Morgan *v.* London General Omnibus Co., 13 Q. B. D. 832; Millward *v.* Midland Rail. Co., 14 Q. B. D. 68.

(*i*) Heske *v.* Samuelson, 12 Q. B. D. 30; Cripps *v.* Judge, 13 Q. B. D. 583.

(*k*) Turner *v.* Robinson, 5 Barn. & Adol. 789; Lomax *v.* Arding, 10 Exch. 734.

(*l*) Gylbert *v.* Fletcher, Cro. Car. 179; Winstone *v.* Linn, 1 Barn. & Cress. 469.

(*m*) 1 Bl. Com. 428.

(*n*) 38 & 39 Vict. c. 77, s. 10; 51 & 52 Vict. c. 62, s. 1.

(*o*) 1 & 2 Will. 4, c. 37; 50 & 51 Vict. c. 46.

(*p*) 4 Rep. 84 a; Nickson *v.* Broban, 10 Mod. 109.

(*q*) Carrol *v.* Bird, 3 Esp. 201.

but if he gives a false character, imputing from malicious motives a fault which does not really exist, he is liable to an action at the suit of the party thus injured (*r*); but express malice is an essential ingredient in this cause of action; and no action will lie upon a representation, though false in fact, and injurious to the character of the servant (*s*), provided it was made *bonâ fide* and under such circumstances as rendered it, in other respects, a privileged communication.

III. [The effect of the relation of master and servant with regard to third persons:—that is to say, how a master may behave towards others, on behalf of his servant, and what a servant may do on behalf of his master.

And, first, the master may *maintain*, that is, abet and assist, his servant in any action against a stranger; whereas, in general, it is an offence against public justice to encourage suits and animosities by helping to bear the expense of them; which offence is called, in law, maintenance (*t*). A master also may bring an action against any man for beating or maiming his servant; but in such a case he must assign, as a special reason for so doing, his own damage by the loss of the service; and this loss must (under the name of special damage) be proved at the trial (*u*). A master, likewise, may justify an assault in defence of his servant, and a servant in defence of his master (*x*): 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. Also, if any person do cause or procure my servant to leave me, or do hire or

(*r*) Fountain *v.* Boodle, 3 Q. B. 5. bk. vi. c. ix.

(*s*) Child *v.* Affleck, 9 Barn. & Cress. 403; Taylor *v.* Hawkins, 16 Q. B. 308; Somerville *v.* Hawkins, 10 C. B. 583.

(*t*) 2 Roll. Ab. 115; vide post,

(*u*) 9 Rep. 113; Hall *v.* Hollander, 4 Barn. & Cress. 660.

(*x*) 2 Roll. Ab. 546; 1 Hawk. b. i. c. 60, ss. 23, 24; Hodsoll *v.* Stallebrass, 11 A. & E. 301.

[retain my servant, being in my service, whereby the servant departs from me and goes to serve another, I may have an action for damages against both the new master and the servant, or either of them; but if the new master did not know that he was my servant, no action lies against him; unless indeed he afterwards refuses to restore my servant upon information and demand (*y*). 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 or may not do on behalf of his master, this general principle may be laid down, namely, that the master is answerable in all cases for the act of his servant, if done by his command or authority, either expressly given or implied,—the maxim being *qui facit per alium, facit per se* (*z*); and in this respect, the law makes no distinction between ordinary servants and those who are more properly and usually termed *agents;* but there are certain differences when the agents are contractors or sub-contractors, for these latter are in general solely liable (*a*); we propose at present, however, to consider only the case of ordinary servants.

According to this principle, then, if the servant commit a trespass by the command or encouragement of his master, the master shall be guilty of it; though the servant is not thereby excused, for he is only to obey his master in matters that are honest and lawful; wherefore it has been

(*y*) F. N. B. 167, 168; Blake *v.* Lanyon, 6 T. R. 221; Bowen *v.* Hall, 6 Q. B. D. 333; Chamberlain *v.* Boyd, 11 Q. B. D. 407.

(*z*) 4 Inst. 109; Quarnam *v.* Burnett, 6 Mee. & W. 509; Milligan *v.* Wedge, 12 Ad. & Ell. 737; Burgess *v.* Gray, 1 C. B. 578; Cox *v.* Midland Railway Company, 3 Exch. 268; Reedie *v.* London and North Western Railway Company, 4 Exch. 244.

(*a*) Overton *v.* Freeman, 11 C. B. 867; Bower *v.* Peate, 1 Q. B. D. 321; Tarry *v.* Ashton, ib. 314; Percival *v.* Hughes, 9 Q. B. D. 441; Heaven *v.* Pender, 11 Q. B. D. 503; Elliott *v.* Hall, 15 Q. B. D. 315.

[laid down, that if the drawer at a tavern sell a man bad beer, whereby his health is injured, he may bring an action against the master (*b*); for although the master did not expressly order the servant to sell the beer to that person in particular, yet his permitting him to draw and sell it at all is impliedly a general command (*c*). Upon the same principle, too, if a servant, by his negligence, do any damage to a stranger, the master shall answer for his neglect; *e.g.*, if a smith's servant lame a horse while he is shoeing him, an action lies against the master. But in all these cases, the damage must be done while actually employed in the master's service; otherwise the master is not liable (*d*); and it was accordingly held at the common law, that 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 set fire to a house; for there he was not in his master's immediate service (*e*); but if my neighbour's house is burnt down by reason of a fire *accidentally* and without negligence arising in my house, the stat. 14 Geo. III. c. 78, s. 86, prevents his maintaining any action against me (*f*). A master is also chargeable if any of his family layeth or casteth anything out of his house into the street or common highway, to the damage of any individual or to the common nuisance of her majesty's liege people; for the master hath the superintendence and charge of all his household (*g*); and this also agrees with the civil law, which holds that the *pater familias*, in this and similar cases, "*ob alterius culpam tenetur, sive servi, sive liberi*" (*h*).

(*b*) Roll. Abr. 95. Storey *v.* Ashton, ib. 4 Q. B. 476.

(*c*) Venables *v.* Smith, 2 Q. B. D. 279.

(*d*) See Randleson *v.* Murray, 8 Ad. & El. 109; The Queen *v.* Stephens, Law Rep., 1 Q. B. 702;

(*e*) Noy's Max. c. 44.

(*f*) 1 Bl. Com. 431; Filliter *v.* Phippard, 11 Q. B. 347.

(*g*) Noy's Max. c. 44.

(*h*) Ff. 9, 3, 1; Inst. 4, 5, 1.

[On the other hand, the master is not bound by what the servant does *without* his authority, express or implied: even though it may be done in the course of, or in relation to, his service (*i*). Thus, if I pay money to a gentleman's servant not usually employed to receive money for his master, and such servant embezzles it, I must pay it over again. So if I usually deal with a tradesman by myself, or constantly pay him ready money, I am not answerable for what my servant takes upon trust if he purloin it, so that it comes not to my use; for here is no implied order to the tradesman to trust my servant. But if I usually send my servant upon trust, or sometimes on trust and sometimes with ready money, I am answerable for all the servant takes up; for the tradesman cannot possibly distinguish when he comes by my order, and when upon his own authority (*k*).] Upon the same ground, the master is not liable for a wilful injury, such as an assault,—committed by the servant without his command or encouragement; not even though it be in the course of, or in relation to, the service (*l*).

While the master is thus, in the cases above mentioned, liable for the acts of his servant, the latter is, in many instances, not himself personally liable for what he does in that capacity. For, with respect to his purchases from tradesmen for his master's use, if he be known by the person with whom he deals to be acting merely as a servant, and if his authority to purchase be sufficient, he cannot himself be charged for the price of the goods. Similarly, a servant cannot be sued for an act of negligence committed in the course of his service, by one whose dealing was with his master; *e.g.*, when a parcel is mislaid by a stage coachman, the owner of the coach is

(*i*) M'Manus *v.* Crickett, 1 East, 106; Udell *v.* Atherton, 7 H. & N. 172; Limpus *v.* London Omnibus Company, 1 Hurl. & Colt. 526.

(*k*) Dr. & Stud. d. 2, c. 42; Noy's Max. c. 44; Rusby *v.* Scarlett, 5 Esp. 76.

(*l*) M'Manus *v.* Crickett, 1 East, 106; The Queen *v.* Stephens, Law Rep., 1 Q. B. 702.

liable to the sender, but not the coachman himself (*m*). But a servant cannot shelter himself under the authority of his master, if he commit a crime, or inflict on another a wilful injury of a private character; for in the first case, he is himself criminally responsible; in the latter, he may be sued for damages (*n*), either separately from, or jointly with, his master (*o*).

(*m*) Williams *v.* Cranstoun, 2 Stark. Rep. 82.

(*n*) Wilson *v.* Peto, 6 Moore, 47.

(*o*) Heugh *v.* Earl of Abergavenny, 23 W. R. 40.

CHAPTER II.

OF HUSBAND AND WIFE.

THE next relation to be treated of is that arising on marriage; which includes the reciprocal rights and duties of husband and wife, or of *baron* and *feme*.

And here it may be proper to premise, that as, in the Roman Catholic faith, marriage ranks as a sacrament of the Church, so it naturally fell, during the period when that was the established religion of this country, under the cognizance of the Ecclesiastical Courts, which courts accordingly acquired jurisdiction in various matters of a matrimonial description, including judicial separation; divorce; alimony; besides also suits for the restitution of conjugal rights; and suits called suits *causâ jactitationis matrimonii*, and the now obsolete suit to compel the celebration of a marriage pursuant to a contract of marriage (*a*); and (notwithstanding the reformation in religion) this jurisdiction remained undisturbed until recently. But the same session of parliament which deprived the spiritual courts of their jurisdiction in causes testamentary, stripped them also of their jurisdiction in causes matrimonial; for, by the statute 20 & 21 Vict. c. 85 (*b*), a secular court was constituted under the title of the "Court of Divorce and Matrimonial Causes;" and on this tribunal was conferred jurisdiction over such matters

(*a*) 3 Bl. Com. 94.

(*b*) This Act was amended by 21 & 22 Vict. c. 108; 22 & 23 Vict. c. 61; 23 & 24 Vict. c. 144; and 31 & 32 Vict. c. 77.

matrimonial as formerly fell under the cognizance of the courts ecclesiastical; and (by a statute of the following year, 21 & 22 Vict. c. 93) jurisdiction was given to the new court to entertain applications also for declarations of legitimacy, and of the validity of the marriages of the applicant's parents or grand-parents, and of the applicant's right to be deemed a natural-born subject (*c*); and the jurisdiction of the Court so established has now been transferred to the High Court of Justice established by the Judicature Act, 1873 (*d*), but with a procedure comparatively unaltered.

In considering the relation of husband and wife, we shall, in the first place, inquire how that relation is contracted; secondly, its legal effect; and, lastly, the mode of its dissolution.

I. The manner in which the relation of husband and wife is contracted.—And here it may be observed generally, that our law considers marriage in the light of a *contract*, and applies to it the ordinary principles which attach to other contracts; nevertheless, there are important respects in which the contract of marriage is differently treated from other contracts. And regarding marriage as a contract, the first inquiry that arises is,—who may enter into the contract; and who are under legal disabilities to enter into it? And in general, all persons may enter into this, as into other contracts,—save for any legal disability; which disability is either *canonical* or *civil*.

A *canonical* disability made the marriage voidable only by a judicial sentence, but not void *ipso facto* (*e*), differing in this respect from a *civil* disability which makes the purported marriage no marriage at all, but void *ab initio*, and not merely voidable. And as an example of a canonical disability, may be mentioned natural inability, at the time

(*c*) Frederick *v.* Attorney-General, L. R., 3 P. & M. 196, 270; Bosvile *v.* Attorney-General, 12 P. D. 177.

(*d*) 36 & 37 Vict. c. 66, ss. 3, 34.

(*e*) 1 Bl. Com. 434.

of the marriage, to procreate children (*f*); and of this nature, also, was the disability of a pre-contract or engagement to another person (*g*), but this latter ceased to be a disability, as regards all marriages solemnized in the face of the Church, after the statute 32 Hen. VIII. c. 38; and by the 26 Geo. II. c. 33 (re-enacted in the subsequent Marriage Act of 4 Geo. IV. c. 76), it was declared that no proceedings should be had in any Ecclesiastical Court to compel the celebration of a marriage in pursuance of a pre-contract. Moreover, no canonical disability would or will avail to avoid the marriage, unless an actual sentence to that effect has been or is given while both parties are living; for such marriage may not be called in question after the death of either of the parties (*h*).

Disabilities of the *civil* kind are commonly grouped under these classes, namely, (1) A prior marriage still subsisting; (2) Insanity; (3) Blood-relationship; and (4) Want of age; and each of these four disabilities will now be considered. And,—

1. The first of them, namely, a prior marriage still subsisting, wants no particular observation, excepting this, that the second marriage is to all intents and purposes void (*i*).

2. Insanity, or want of reason, is the second civil disability; for without a competent share of reason, no matrimonial contract is valid (*k*); and accordingly, by our law, it is established that a marriage contracted under circumstances of duress overpowering the will is void (*l*); also, that the marriage of a lunatic, not being in a lucid interval, is absolutely void (*m*). And as it might be diffi-

(*f*) 1 Bl. Com. 434; 1 Roll. Ab. 360; 5 Rep. 98; Moor. 225; 2 Leon. 169; Dy. 187 a, pl. 40.

(*g*) Bl. Com., ubi sup.

(*h*) 1 Bl. Com. 434; Co. Litt. 33 a; Bury's case, 5 Rep. 98; 1 Roll. Ab. 367.

(*i*) Bro. Ab. tit. Bastardy, pl. 8; Cro. Eliz. 858; 1 Salk. 121; R. *v.* Harborne, 2 Ad. & El. 540.

(*k*) 1 Roll. Ab. 357.

(*l*) Scott *v.* Sebright, 12 P. D. 21.

(*m*) Hancock *v.* Peaty, Law Rep., 1 P. & D. 335.

cult, in the case of lunatics, to prove the exact state of the party's mind at the actual celebration of the nuptials, the 51 Geo. III. c. 37 has specifically provided, that the marriage of a person already found lunatic under a commission under the great seal, or committed by Act of Parliament to the care and custody of trustees, shall be totally void, unless he or she has been previously declared by the Lord Chancellor, or the major part of such trustees, to have, at the date of the celebration, regained a sound mind.

3. The third civil incapacity is that in respect of proximity of relationship,—whether of consanguinity or of affinity. For the stat. 32 Hen. VIII. c. 38 (*n*), which declared that every marriage contracted between lawful persons, when solemnized in the face of the Church, and consummated with bodily knowledge or fruit of children, should be good and indissoluble, yet excepted marriages contrary to "God's law" (*o*), and marriages "within the Levitical degrees" (*p*),—the principal object of this statute having been to remove the vexatious impediments to marriage on the ground of kindred, which prevailed in the times of popery, but which might be bought off for money (*q*); and the permanent effect resulting from the statute has been, that the only marriages which are now illegal in respect of proximity of degree (as being either contrary to God's law or within the Levitical degrees), are the following, viz.,—those between persons in the ascending and descending line *in infinitum* (*r*),—and those between collaterals to the third degree inclusive, according to the mode of computation in the civil law (*s*); which reckons the sum of the degrees from, (but exclusively of,) one of

(*n*) Hist. Eng. L. by Reeves, vol. iv. p. 220.

(*o*) Vaughan, 220, 305; 2 Inst. 687.

(*p*) Levit. xviii., xx.; Brook *v.* Brook, 9 H. of L. Cas. 232.

(*q*) 1 Bl. Com. p. 435.

(*r*) Gibs. Cod. 413; Burn, tit. Marriage, I.; Extrav. de Consanguin. &c. Can. 8; Grot. de Jure Belli et Pacis, l. 2, c. 5, s. 12.

(*s*) Vaughan, 218; R. *v.* Chadwick, 11 Q. B. 173.

the persons related, up to the common stock and so down to the other person. Moreover, the prohibitions in the case of collaterals extend not only to *consanguinei*, or those related by blood, but to *affines*, or those related by marriage; *e. g.*, a man can marry neither his sister, nor his deceased wife's sister (*t*), for both are related to him in the second degree; nor his sister's daughter, nor his deceased wife's sister's daughter (*u*), for both are in the third degree; but he may marry his first cousin, for she is in the fourth degree (*x*). The *consanguinei* of the wife, it may be remarked, are always related by affinity to the husband, and the *consanguinei* of the husband to the wife; but on the other hand, the *consanguinei* of the husband are not at all necessarily related to the *consanguinei* of the wife; hence two brothers may marry two sisters, or father and son a mother and daughter (*y*). Nor is the husband related to the *affines* of the wife, nor *vice versâ;* therefore a man may marry the widow of his deceased wife's brother (*z*). But the prohibitions as to collaterals extend to such as are related, although by the half blood only; and they also apply, though one of the parties be a bastard; for notwithstanding this latter circumstance, the law recognizes for moral purposes his relationship to his natural parent (*a*). The incapacity in respect of proximity of relationship was formerly only a canonical, and not a civil, disability (*b*); but by the statute 5 & 6 Will. IV. c. 54, it has been enacted, that all marriages thereafter celebrated between persons within the prohibited degrees of consanguinity or affinity, shall be absolutely void to all purposes whatever—which brings the objection within the class of civil disabilities (*c*).

(*t*) Vaughan, 302; Brook *v.* Brook, 9 H. of L. Ca. 193.

(*u*) Sir T. Raym. 464; Sir T. Jones, 191; The Queen *v.* Brighton (Inhabitants of), 1 B. & S. 447.

(*x*) See the Table of Degrees of Consanguinity, opposite to p. 200, *supra.*

(*y*) 1 Bl. Com. 435.

(*z*) Ibid.

(*a*) Bac. Ab., Marriage, A.

(*b*) Sir T. Raym. 464; R. *v.* Inhabitants of Wye, 7 Ad. & El. 771.

(*c*) The Queen *v.* Chadwick, 11

4. The want of age, being the fourth and last of the civil disabilities above referred to, is a disability which avoids other contracts; *à fortiori*, therefore, it ought to avoid this, the most important contract of any (*d*). But it is not necessary to the contract of marriage that the parties should have attained their full age of twenty-one; for a male person is enabled by law to consent to matrimony at the age of fourteen, and a female at the age of twelve (*e*), subject (where subject) to the consent of their parents or guardians; and, indeed, even though the male be under fourteen, or the girl under twelve, the marriage is not absolutely void, but is inchoate only and imperfect (*f*); and either of the parties, upon coming to the proper age for his or her consent, may in such latter case disagree to (and so avoid) the marriage (*g*); but a marriage between people, either of whom is under the age of seven years, is absolutely void (*h*). [In addition to all which it is to be observed, that if the husband be of years of discretion, and the wife under twelve, it is said, that when she comes to years of discretion, he may disagree as well as she: and so it is *vice versâ*, when the wife was of years of discretion, and the husband below the age of consent (*i*); but if at the age of consent they agree to continue together, they need not be married again. The doctrine of disability in respect of age is founded, we may observe, on the Roman civil law (*k*); for the canon law paid greater regard to the constitution than to the age of the parties, holding that if they were *habiles ad matrimonium*, it was a good marriage, whatever their age might be (*l*).]

What is above stated on the subject of the age for matri-

Q. B. 173; Brook *v.* Brook, 9 H. of L. Ca. 193; Howarth *v.* Mills, Law Rep., 2 Eq. Ca. 389.

(*d*) 1 Bl. Com. 436.

(*e*) Co. Litt. 79 a; 1 Hale, P. C. 17.

(*f*) Co. Litt. by Harg. 79 b, n. (1).

(*g*) Co. Litt. 79 a, 79 b; Bac. Ab. Infancy, A.

(*h*) Burn's Ecc. L. tit. Marriage, I.; Hist. Eng. Law, by Reeves, vol. iv. p. 53; Co. Litt. 33 a.

(*i*) Ib.; 1 Bl. Com. 436.

(*k*) Leon. Constit. 109.

(*l*) Decretal. l. 4, tit. 2, qu. 3.

mony is to be understood of the actual marriage contract and ceremony, by which the parties become man and wife; for a promise to marry at a future time,—which, like other contracts, gives a right of action for damages in case of its violation (*m*),—is not binding on the defendant unless he or she be of the full age which the law provides for other cases of contract, viz. twenty-one years (*n*); and where there are mutual promises to marry made by two persons, one of the age of twenty-one, and the other under that age, the first is bound by the contract so as to be liable to an action if it be broken; but on the part of the minor, it used to be voidable (*o*), and it is now void (*p*).

In what manner the contract of marriage is to be solemnized, is a matter which formerly depended altogether upon the rules of the ecclesiastical law (*q*). And, by that law, it was required that there should not only be a mutual contract of espousal *per verba de præsenti*, that is to say, with words in the present tense,—but that it should be solemnized by a priest in holy orders, without which it was considered as no complete legal marriage (*r*),—[which last requisite, however, was merely *juris positivi*, not *juris naturalis aut divini*, Pope Innocent the third having been the first to ordain the celebration of marriage in church (*s*).]

The manner, however, of contracting marriage in this country, and the formalities proper to its due celebration, are now prescribed by the supreme authority of the legislature itself, though certain portions of the canon law on this subject have been thereby preserved. The principal Marriage Acts, now in force, are 4 Geo. IV. c. 76 and 6 & 7 Will. IV. c. 85; and of these we shall here treat

(*m*) Wild *v.* Harris, 7 C. B. 999.

(*n*) Co. Litt. by Harg., ubi sup.

(*o*) Hood *v.* Ward, Str. 937; Warwick *v.* Bruce, 2 Mau. & Sel. 305.

(*p*) Infants' Relief Act, 1874 (37 & 38 Vict. c. 62); Coxhead *v.* Mullis, 3 C. P. D. 439; Northcote *v.* Doughty, 4 C. P. D. 385.

(*q*) Hist. Eng. L. by Reeves, vol. iv. pp. 52—65.

(*r*) Haydon *v.* Gould, 1 Salk. 119.

(*s*) Moor. 770.

in the order of their date, and (on account of the importance of the subject) with some degree of minuteness.

Firstly, then, by the statute of 4 Geo. IV. c. 76 (which repealed a previous Marriage Act, 26 Geo. II. c. 33, commonly called "Lord Hardwicke's Act"), and in conformity with the canon law, as set forth in the Book of Common Prayer, this first formality is required, namely, the previous publication of *banns* upon three successive Sundays in the church where the marriage is to be solemnized (*t*); or, in lieu thereof, a *licence* from the proper ecclesiastical authority, that the marriage shall be had without banns (*u*),—that is, a "special" licence from the Archbishop of Canterbury (*x*), or a "common" licence from the ordinary of the place or his surrogate (*y*); and, of course, the banns must be published, and the licence granted, in the true names of the marrying parties (*z*); also, the marriage must be solemnized within, at the latest, three months after the complete publication of the banns, or grant of the licence (*a*). The Act also requires that the marriage shall be in a church (or chapel) wherein banns may be lawfully published (*b*); and the Act required also, that (except in the case of a special licence) the marriage should take place between the hours of eight and twelve in the forenoon (now eight in the forenoon, and three in the afternoon); and should moreover be solemnized by a person in holy orders, and before not less than two credible witnesses besides (*c*); and a marry-

(*t*) 4 Geo. 4, c. 76, s. 2; Lyndw. 273, 274.

(*u*) 4 Geo. 4, c. 76, s. 10; Can. 101; 20 & 21 Vict. c. 85, s. 6.

(*x*) 25 Hen. 8, c. 21; 4 Geo. 4, c. 76, ss. 10, 20; 6 & 7 Will. 4, c. 85, s. 1.

(*y*) 10 & 11 Vict. c. 98, s. 5.

(*z*) R. *v.* Wroxton, 4 Barn. & Adol. 641; Gompertz *v.* Kensit, Law Rep., 13 Eq. Ca. 369; Fendall *v.* Goldsmid, 2 P. D. 263.

(*a*) 4 Geo. 4, c. 76, ss. 9, 19.

(*b*) 58 Geo. 3, c. 45; 59 Geo. 3, c. 134; 4 Geo. 4, c. 76, ss. 3, 4, 12, 13; 5 Geo. 4, c. 32; 6 Geo. 4, c. 92; 11 Geo. 4 & 1 Will. 4, c. 18; 6 & 7 Will. 4, c. 85, ss. 26—34; 7 Will. 4 & 1 Vict. c. 22; 1 & 2 Vict. c. 107, ss. 16, 33, 34; 7 & 8 Vict. c. 56; 20 Vict. c. 19, s. 9; 23 Vict. c. 24.

(*c*) 4 Geo. 4, c. 76, ss. 21, 28, as amended by 49 Vict. c. 14.

ing priest may not, of course, be the celebrant of his own marriage (*d*). These are the principal regulations of the statute; and in addition, the statute directs generally that the rules prescribed by the rubric prefixed to the office of matrimony in the Book of Common Prayer, and not altered by the Act, shall be duly observed.

But as it is the policy of our law to prevent the marriage of persons under the age of twenty-one without the consent of their parents or guardians,—the statute also provides, that in the case of the publication of banns of a person under twenty-one, not being a widower or a widow, (either of whom are deemed emancipated by their first marriage,) if the parent or guardian of the infant openly signifies his dissent at the time the banns are published, the publication shall be void. And in furtherance of the same object, and to secure that the requirements of the law have been duly observed, no licence to marry may be granted, unless oath shall be first made by one of the parties that he or she believes that there is no impediment of kindred or alliance, or of any other lawful cause, to the proposed union; and that one of the said parties hath, for the space of fifteen days immediately preceding the issue of such licence, had his or her usual place of abode within the parish or chapelry within which such marriage is to be solemnized; and where either of the parties (not being a widower or widow) shall be under the age of twenty-one years,—that the consent of the person or persons whose consent is required has been obtained; or, else, that there is no person who has authority to give such consent; and a caveat may be entered against the grant of the licence. The consent required is that of the father, or if the father be dead, then that of a guardian lawfully appointed (*e*); and failing him, then of the mother being unmarried: and failing her, then of the guardian appointed by the High

(*d*) The Queen *v.* Millis, 10 Cl. & F. 534; Beamish *v.* Beamish, 9 H. L. C. 274.

(*e*) 4 Geo. 4, c. 76, ss. 11, 16—18, 36.

Court of Justice (*f*). Provision is also made for the case of the person whose consent is requisite being *non compos*, or in parts beyond the seas, or unreasonably, or from improper motives, withholding his or her consent; in all which cases, relief is given on petition to the Lord Chancellor (*g*).

In some instances, the neglect of the prescribed statutory formalities (though penal) does not invalidate the marriage (*h*); but the Act declares the marriage to be *null and void* in the following cases, that is to say, if persons knowingly and wilfully intermarry (unless by special licence) in a place other than a church or chapel wherein banns may be lawfully published; or knowingly and wilfully intermarry without either due publication of banns, or else a licence; or knowingly and wilfully consent to or acquiesce in the solemnization of their marriage according to the office of the Church, by a person not being in holy orders. On the other hand, where a marriage by licence or banns has been solemnized between persons either of whom is under age, by means of the false oath or fraudulent procurement of one of the parties, then the marriage remains valid,—the Act merely providing, in such case, that the party so offending shall be liable to forfeit all property which would otherwise accrue to him or to her from the marriage (*i*). Moreover, divers Acts have, from time to time, been passed for curing, *ex post facto*, apparent and unsubstantial irregularities in certain marriages,—where the marriage would otherwise be, beyond all question, valid (*k*); and the Act 51 & 52 Vict. c. 28, rendered valid,

(*f*) 4 Geo. 4, c. 76, s. 16; 36 & 37 Vict. c. 66, s. 34.

(*g*) 4 Geo. 4, c. 76, s. 17; 36 & 37 Vict. c. 66, s. 94.

(*h*) R. *v.* Bramley, 6 T. R. 331, n.

(*i*) 4 Geo. 4, c. 76, s. 23; Att.-Gen. *v.* Clements, Law Rep., 12 Eq. Ca. 32; In re Martindale, (1894) 3 Ch. 193.

(*k*) 3 Geo. 4, c. 75; 4 Geo. 4, cc. 5, 91; 3 & 4 Will. 4, c. 45; 5 & 6 Will. 4, c. 54; 5 & 6 Vict. c. 113; 10 & 11 Vict. c. 58; 12 & 13 Vict. c. 68, s. 20; 14 & 15 Vict. c. 97, s. 25; 16 & 17 Vict. c. 122; 17 & 18 Vict. c. 88; 18 & 19 Vict. c. 66, c. 81, s. 13; 19 & 20 Vict. c. 70; 20 & 21 Vict. c. 29; 22 Vict.

ex post facto, the marriages solemnized by a notorious felon, W. E., who had falsely pretended to be a priest.

The Marriage Act of Geo. IV. having adhered to the principle of the common law, that all marriages taking place in England must be solemnized according to the rites and ceremonies of the Church of England, excepting where both the parties were Quakers or Jews, who were allowed to marry according to their own usages (*l*); and this principle, being subsequently thought to operate with harshness upon dissenters,—therefore, secondly, by the Marriage Act of 6 & 7 Will. IV. c. 85 (*m*), certain new regulations were introduced, with a view to the relief of dissenters from this real or apparent hardship; and other persons (whether dissenters or not) who were desirous of marrying according to the ceremonial of the Church, were thereby enabled to resort, if they pleased, to a preliminary proceeding of a secular character, in lieu of either banns or ecclesiastical licence, that is to say:—they might obtain (with a view to their intermarrying) the *certificate* of the Superintendent Registrar of Marriages for the district; and which certificate might be either *without licence*, or *with licence*. For,—(1.) A person intending to be married on a registrar's certificate *without licence*, must deliver to the superintendent registrar of the district within which both the persons about to marry have dwelt for not less than seven days—or if they have dwelt in different districts for that time, then to the superintendent registrar of each district—a "notice" in the prescribed form of his or her intention to marry (*n*); and the notice is entered by the registrar (who is entitled to the fee of one shilling for the entry), in a book called *The Marriage Notice Book*, open

c. 24; 23 Vict. c. 1; 24 & 25 Vict. c. 16; 28 & 29 Vict. c. 81; 36 & 37 Vict. cc. 1, 25, 28; 41 & 42 Vict. c. 61; 47 & 48 Vict. c. 20; and 49 Vict. c. 3.

(*l*) Sect. 23; 23 & 24 Vict. c. 18; 35 & 36 Vict. c. 10.

(*m*) The 6 & 7 Will. 4, c. 85, has been amended by 7 Will. 4 & 1 Vict. c. 22; 3 & 4 Vict. c. 72; 19 & 20 Vict. c. 119; and 23 Vict. c. 18.

(*n*) See 6 & 7 Will. 4, c. 85, s. 4; 19 & 20 Vict. c. 119, s. 3, and Sch. (A).

at all reasonable times, and without fee, to all persons desirous of inspecting the same (*o*). The notice particularizes the church or other building in which the marriage is to be solemnized—which must in general be within the district where one of the parties has dwelt for the period to which the notice refers (*p*); and the notice specifies also whether the marriage is to be with or without licence; and the person giving the notice subscribes thereto a solemn *declaration*, that he or she believes that there is no impediment of kindred or alliance or other lawful hindrance to the marriage; and that the party has, for the space of *seven* days immediately preceding, had his or her usual place of abode and residence within the district of the registrar to whom the notice is given; and (when the party, not being a widower or widow, is under the age of twenty-one), that the consent of the person whose consent to such marriage is by law required has been given, or (as the case may be) that there is no person whose consent is by law required (*q*); and this notice, (or a copy thereof, under the hand of the registrar,) is suspended or affixed by him in some conspicuous place in his office, during *twenty-one* successive days next after the day when it was entered in the Marriage Notice Book (*r*). The next step is to obtain the registrar's "certificate" of the notice having been duly entered; and it is provided, that any person whose consent would have been required by law to the marriage of the

(*o*) 6 & 7 Will. 4, c. 85, s. 5.

(*p*) 3 & 4 Vict. c. 72, s. 1. The building stated in the notice may, however, in the case of *Quakers and Jews*, be one out of the district or districts in which the parties dwell (3 & 4 Vict. c. 72, s. 5; 19 & 20 Vict. c. 119, s. 13); and may also be so, in the case of *other* parties, where there is not within the district in which either of the parties dwells any registered building in which marriage may be solemnized in the form such parties desire to adopt (3 & 4 Vict. c. 72, s. 2). The building stated may also be out of such district or districts, provided it be the usual place of worship of the parties, or one of them, and not more than two miles from the district in which the notice is given (19 & 20 Vict. c. 119, s. 14).

(*q*) Sect. 2.

(*r*) Sect. 4.

contracting parties, under an *ecclesiastical* licence, immediately before the passing of the 6 & 7 Will. IV. c. 85, shall be authorized to forbid the issue of such certificate (*s*); and may do so by writing the word "forbidden" opposite the entry of the notice, and subscribing thereto his or her name and place of abode, and the character in which he or she is authorized to interfere; and in case the issue of the certificate is thus lawfully forbidden, the notice and all proceedings thereon are utterly void (*t*); and a caveat may also be entered against the issue of the certificate or against the grant of the licence (*u*). Supposing, however, that during the period for which the notice has been suspended in the office, no valid impediment to its issue has been shown to the satisfaction of the registrar—nor the issue forbidden in manner above mentioned—the certificate, after the expiration of the twenty-one days, is to be issued upon the request of the person delivering the notice (*x*); and the certificate expresses, that notice of the intended marriage in such a church or building has been duly entered, and that the issue of the certificate has not been forbidden by any person authorized so to do; and for this document, the registrar is entitled to receive the fee of one shilling (*y*). Then, immediately upon the certificate being issued—or at any time afterwards within three calendar months from the entry of the notice—the marriage may take place (*z*); and may be solemnized according to any one of the following methods authorized by the Acts, that is to say: Firstly, the marriage may be solemnized in *some building certified as a place of religious worship and registered for the solemnization of marriage*, and according to such form and ceremony as the parties may think fit to adopt (*a*), it

(*s*) 6 & 7 Will. 4, c. 85, ss. 9, 10.

(*t*) Ibid. s. 9.

(*u*) Ibid. s. 13.

(*x*) 19 & 20 Vict. c. 119, s. 4, and Sch. (B).

(*y*) Sect. 4.

(*z*) Ibid.

(*a*) 6 & 7 Will. 4, c. 85, ss. 18—20; 7 Will. 4 & 1 Vict. c. 22, s. 35; 18 & 19 Vict. c. 81; 19 & 20 Vict. c. 119, ss. 17, 24.

being, however, provided (*b*), that (whatever the form adopted) every such marriage shall be solemnized before some "registrar of the district" (either acting personally or by deputy) (*c*), and two or more credible witnesses, and also with open doors, between the hours of eight and twelve in the forenoon; or, *semble*, now between the hours of eight in the forenoon and three in the afternoon; and that in some part of the ceremony, and in the presence of the registrar and witnesses, each of the parties shall say—"I "do solemnly declare that I know not of any lawful "impediment why I, A. B., may not be joined in matri-"mony to C. D.;" and that each of the parties shall say to the other, "I call upon these persons here present to "witness that I, A. B., do take thee, C. D., to be my "wedded wife (*or* husband)." Or, secondly, the marriage may be solemnized at *the office of the superintendent registrar*, in his presence and in that of some "registrar of the district," and also of two other witnesses, and with open doors, and between the hours aforesaid; and the parties are to make the same declaration and use the same words, as in the case of marriage in a certified and registered place of worship (*d*), but at no marriage had in such office shall any *religious* service be read (*e*), although the parties may, of course, and usually do, add the religious ceremony afterwards,—such latter celebration being, however (in such case), without any effect in law. Or, thirdly, the marriage may be solemnized according to the mode of marriage in the Church of England, the church in which the marriage is solemnized being within the district of the superintendent registrar by whom the certificate is issued, and the consent of the minister being obtained, and the marriage being solemnized by a duly qualified clergyman according to the

(*b*) 6 & 7 Will. 4, c. 85, s. 20.
(*c*) Ibid., ss. 17, 20; c. 86, s. 7; 1 Vict. c. 22; 19 & 20 Vict. c. 119, ss. 15, 16.
(*d*) 6 & 7 Will. 4, c. 85, s. 21.
(*e*) 19 & 20 Vict. c. 119, s. 12.

office of the Church (*f*). Or, fourthly, the marriage may be solemnized according to the usages of the Quakers or of the Jews, where the parties are of those persuasions respectively (*g*). Such, then, are the different methods in which, in a marriage upon a registrar's certificate without licence, the solemnization may be had; but as to each of them, it is material to repeat, that the building in which the marriage takes place must, in general, be that specified in the notice and certificate (*h*).

(2.) A person intending to be married on a registrar's certificate *with licence*, is to give a notice to that effect and obtain a certificate as in the former case; and the course of proceeding and the state of the law applicable to such notice and certificate are in either case the same, subject only to the following differences:—First, if both the persons about to marry do not dwell in the same superintendent registrar's district, notice need not be given to the registrar of *each* district, but only to the registrar of the district in which *one* of such persons resides; and it will be sufficient also, if the notice states how long he or she has there resided, without making any statement of the same kind with respect to the other party (*i*). Secondly, the declaration subscribed to the notice must state, that the person giving it hath, for the space of *fifteen* days immediately preceding, had his or her usual place of abode and residence within the district of the registrar to whom the notice is given (*k*). Thirdly, it is not requisite, that either the notice, or a copy thereof, should be affixed in the office of such registrar (*l*). Fourthly, the certificate may be obtained after the expiration of *one* whole day (instead of *twenty-one* days) next after the entry

(*f*) 6 & 7 Will. 4, c. 85, ss. 1, 4; 7 Will. 4 & 1 Vict. c. 22, s. 36; 19 & 20 Vict. c. 119, s. 11.

(*g*) 6 & 7 Will. 4, c. 85, ss. 2, 39; 3 & 4 Vict. c. 72, s. 5; 19 & 20 Vict. c. 119, s. 21; 23 Vict. c. 18; 35 Vict. c. 10.

(*h*) 6 & 7 Will. 4, c. 85, s. 42.

(*i*) 19 & 20 Vict. c. 119, s. 6.

(*k*) Sect. 2.

(*l*) Sect. 5.

of the notice (*m*). And having obtained the certificate, the applicant next procures from the registrar a *licence*, and for this the officer is entitled to receive from the party the sum of 1*l.* 10*s.* over and above the amount paid for the necessary stamps on the instrument (*n*). Then, after the issue of the licence, and within three calendar months from the entry of the notice, the marriage may take place (*o*);—and it may be solemnized according to any of the several methods before stated, except that of the Church of England,—subject to the rules and distinctions already laid down in respect of them (*p*). But it is provided that the registrar may not grant any licence for marriage in a church or chapel of the Church of England (*q*),—it being the design of the legislature not to interfere with the exclusive privilege in that respect previously vested in the archbishop and other ecclesiastical authorities; but in this case, equally as in the case of a civil marriage by certificate without licence, the religious ceremony may be subsequently added,—such ceremony, however, having (as in the former case) no effect in law.

The Acts also provide, that no marriage upon the certificate of a registrar (either *with* or *without* licence), shall be solemnized in any building registered and certified for religious worship, without the consent of the minister thereof,—or of one of the trustees, overseers, deacons, or managers;—nor in any registered building of the *Church of Rome*, without the consent of the minister officiating therein (*r*). And the Acts provide generally, that, whenever a marriage shall not be had within three calendar months after the entry of the notice, such notice, and any certificate and licence which may have been granted and all other proceedings thereupon, shall be utterly void (*s*);

(*m*) Sect. 9.

(*n*) Sect. 10.

(*o*) 19 & 20 Vict. c. 119, s. 9, and Sch. (C).

(*p*) 6 & 7 Will. 4, c. 85, ss. 2, 20—22; 19 & 20 Vict. c. 119, s. 21.

(*q*) 6 & 7 Will. 4, c. 85, s. 11.

(*r*) 19 & 20 Vict. c. 119, s. 11.

(*s*) 6 & 7 Will. 4, c. 85, s. 15; 7 Will. 4 & 1 Vict. c. 22, s. 3; 19 & 20 Vict. c. 119, Sch. (B).

and that if any persons knowingly and wilfully intermarry in a place other than that specified in the notice and certificate, or without due notice to the superintendent registrar, or without certificate duly issued, or without licence (where licence is required), or in the absence of the "registrar of the district" or of the superintendent registrar (where his or their presence is required), the marriage shall be *null and void* (*t*); and further, that a valid marriage, procured by means of a wilfully false notice, certificate, or declaration, shall expose the party offending to the same consequences as are provided under the Marriage Act of 4 Geo. IV. c. 76, with regard to marriages procured by false oath or fraudulent procurement, viz. a forfeiture of all the property which would otherwise accrue to the offending party from the marriage (*u*).

With regard to all marriages, whether taking place under the 4 Geo. IV. c. 76, or under the more recent Marriage Acts, they are required by law to be *registered.* For by the 6 & 7 Will. IV. c. 86, and 7 Will. IV. & 1 Vict. c. 22, it is provided, that where a marriage takes place in a church, the clergyman shall, immediately after the office of matrimony has been solemnized by him, register the same in duplicate in two books, in a prescribed form; and every rector, vicar, or curate (as the case may be), is required to deliver to the *superintendent registrar of the district*, in the months of April, July, October, and January, in every year, a copy (certified under his hand, and on durable materials) of all entries of marriages in such book for the current quarter: and one copy of such book, when filled, is to be delivered by the clergyman to the district registrar, and the other copy thereof is to remain in his own keeping, together with the other parish registers (*x*); and where the marriage takes place, not in a church, but in a registered building, or in the

(*t*) 6 & 7 Will. 4, c. 85, s. 42.
(*u*) 19 & 20 Vict. c. 119, s. 19.
(*x*) See 7 Will. 4 & 1 Vict. c. 22; 3 & 4 Vict. c. 92; 21 & 22 Vict. c. 25.

office of the superintendent registrar, or according to the usages of the Quakers or of the Jews, there are provisions to the same effect,—the duty of registration, in the two first of these cases, being entrusted to the registrar of marriages for the district, and in the last two, either (as the case may require) to the registering officer among the Quakers, or to the secretary of the Synagogue among the Jews (*y*). Moreover, due provision has been made by the 42 & 43 Vict. c. 8, for the registration, when celebrated abroad, of the marriages of the officers and soldiers of the Queen's land forces (*z*).

It is hardly necessary to remark, that none of the Marriage Acts extend to the royal family; nor do these Acts, in fact, extend to the marriages contracted by British subjects, in Scotland or in Ireland, or in any foreign country, all which last-mentioned marriages are therefore (so far as regards the celebration thereof) considered as valid by our law, provided they are made in such form as is sufficient by the law of the place where they are solemnized (*a*); and the case appears to be the same, even though the parties have eloped out of England, on purpose to evade the forms of marriage prevailing in England (*b*). And further, by virtue of the 4 Geo. IV. c. 91, marriages solemnized by a minister of the Church of England in the chapel or house of a British ambassador or resident minister or in the chapel of a British factory abroad, or in the house of any British subject residing at such factory; or by a chaplain (or officer or other person officiating by authority of the commanding officer) within the lines of a British

(*y*) 6 & 7 Will. 4, c. 86, ss. 31 et seq.; 19 & 20 Vict. c. 119, s. 22.

(*z*) And see (as to entering in the official log marriages celebrated on board a merchant ship) 57 & 58 Vict. c. 60, s. 240.

(*a*) Doe *v.* Vardill, 5 Barn. & Cress. 438; Scrimshire *v.* Scrimshire, 2 Hagg. 395; Forster *v.* Forster and Berridge, 4 B. & Smith, 187.

(*b*) Co. Litt. by Harg. 79 b, n. (1); Dalrymple *v.* Dalrymple, 2 Hagg. 52.

army abroad—are as valid as if solemnized in the British dominions in due form of law (*c*).

And by the Consular Marriages Act, 1849 (12 & 13 Vict. c. 68), as amended by the 53 & 54 Vict. c. 47, and as further amended by the 54 & 55 Vict. c. 74,—the provisions of all which Acts have been now (with certain further amendments) consolidated by the Foreign Marriages Act, 1892 (55 & 56 Vict. c. 23),—all marriages solemnized as thereby provided, in any foreign place where there was a British consul duly authorized to act in that behalf, were valid, if either of the parties thereto was a subject of the realm; and the consul, at the British consulate, with open doors, and in the presence of two or more witnesses, either himself solemnized the marriage, or (at the option of the parties) allowed the same to be solemnized in his presence, either according to the rites of the Church of England, or according to any other form and ceremony the parties thought fit to adopt; and the marriage was thereafter registered in accordance with the law for registering marriages in England, so far as the circumstances of the case admitted; and by the same Act, certain past marriages celebrated abroad were confirmed (*d*). And as regards all marriages celebrated abroad within any of Her Majesty's possessions, it was provided generally, by the 28 & 29 Vict. c. 64, that any law passed by the legislative body in such possession for the purpose of establishing the validity of any marriage solemnized therein, should give such marriage the same validity out of the limits of such possession as it would, previously to the Act, have given within those limits,—provided, however, that no marriage

(*c*) The Waldegrave Peerage, 4 Cl. & Fin. 649.

(*d*) See also 17 & 18 Vict. c. 88; 21 & 22 Vict. c. 46; and 22 & 23 Vict. c. 64, confirming certain other marriages abroad; 23 & 24 Vict. c. 86, confirming certain marriages in the Ionian Islands, and making provision for future marriages there; 30 & 31 Vict. c. 93, legalizing certain marriages solemnized at Morro Velho in Brazil; 41 & 42 Vict. c. 61, as to certain marriages in Fiji; and 42 & 43 Vict. c. 29, as to certain marriages on board the Queen's ships on foreign stations.

shall be thereby made valid, unless the parties thereto were competent to contract the same according to the law of England (*e*); and all these provisions of this last-mentioned Act are still in force. And under the Foreign Marriages Act, 1892, just referred to, the procedure for the solemnization of the marriage, and the provisions for its due registration thereafter, are as nearly as may be the provisions which are in force in England in the case of marriages celebrated at the office of the Superintendent Registrar of Marriages, and which provisions we have already explained,—an official called a "marriage officer" (and who is, in effect, a consul or consular agent or sub-agent) taking the place of the Superintendent Registrar.

II. The legal effect of the relation of husband and wife. —For some purposes, the husband and wife become, by their marriage, a single person in the eye of the law (*f*); and it was accordingly a principle of the old common law (before it had been modified by the divers Acts, relative to the property of married women, hereinafter referred to), that a man could not grant anything to his wife, or enter into any covenant with her; that no action could be brought by either of them against the other (*g*); and that all compacts between them, made before marriage, were avoided (or at least suspended) by their intermarrying (*h*). The husband, however, might have granted to or contracted with a trustee for his wife (*i*); and, by conveying land to a third person to her use, he might have conferred upon her the legal estate in the land; also, he might have devised or bequeathed anything to her by will, —for his will did not take effect till the union was severed by his death (*k*); also, where the wife acted in the execu-

(*e*) In re Bethell, Bethell *v.* Hildyard, 38 Ch. Div. 220; 52 & 53 Vict. c. 38.

(*f*) Co. Litt. 112 a.

(*g*) Ibid.; Beard *v.* Beard, 3 Atk. 72.

(*h*) 8 Rep. 136 a.

(*i*) Co. Litt. 112 a.

(*k*) Ibid.

tion of a mere power or authority, she might have conveyed an estate to her husband; *e. g.*, if she had authority under a will to sell, she might have effectually sold without him and even to him (*l*); and she might have been agent for her husband, for that implied no separation from, but was rather a representation of, her lord (*m*). The principle of the unity of husband and wife never applied, however, for any of the above purposes to the Queen in her relation to the Prince Consort (*n*).

The husband and wife thus forming together one legal person, and an identity of practical interests always or for the most part subsisting between them, and the policy of the law being to prevent as much as possible domestic dissensions or distrusts, it long remained also a fundamental rule in our law of evidence, that husbands and wives could not in trials of any sort, whether civil or criminal, be received as witnesses for or against each other (*o*); excepting that in a criminal prosecution against the husband for treason, or for violence to the person of his wife, the evidence of the latter was admitted (*p*); but in modern times, it came to be deemed expedient greatly to relax these rules of the earlier law; and accordingly by 14 & 15 Vict. c. 99, 16 & 17 Vict. c. 83, and 32 & 33 Vict. c. 68, the husbands and wives of the parties to legal proceedings were made both competent and compellable to give evidence, save only,—1. That in *criminal* proceedings, no husband was or is competent or compellable to give evidence for or against his wife—or any wife to give evidence for or against her husband; and, 2. That no husband or wife was or is compellable to disclose any communication made to him or her by the other during the marriage;

(*l*) Co. Litt. 112 a.

(*m*) 1 Bl. Com. 442; M'George *v.* Egan, 5 Bing. N. C. 196.

(*n*) Finch, 4. 86.

(*o*) Hawk. b. 2, c. 46, s. 16; 1 Hale, P. C. 301; Wedgwood *v.* Hartley, 10 Ad. & El. 619.

(*p*) 1 Chit. Bl. 444, n.; Lord Audley's case, State Trials; Hale, ubi sup.; 1 East, P. C. 454.

and it has also and more recently been provided (*q*), that as regards the criminal proceedings which are now competent between husband and wife touching the statutory separate property of the wife, the wife may give evidence against her husband, and the husband evidence against his wife; and on the hearing of charges under the Criminal Law Amendment Act, 1885 (*r*), husbands and wives are, by that Act, made competent (but are not compellable) to give evidence against each other.

But though the wife was thus considered in law for some purposes as the same person with her husband, she was in other points of view held to be a distinct but subordinate person, being under his cover, protection, and influence; and therefore was called, in our law-French, a *feme coverte*, *fœmina viro cooperta* (*s*), and her condition during marriage was and still is called her *coverture* (*t*); and we have now to consider the effect of such coverture, in respect 1. Of her person; 2. Of her property; and 3. Of her contracts and other transactions.

1. [*As to her person.* The custody of this belongs of right to her husband (*u*); and by some antient authorities it was considered that he might give her moderate correction,—*non aliter quam ad virum, ex causâ regiminis et castigationis uxoris suæ, licitè et rationabiliter pertinet* (*x*). The Roman law gave the husband a much larger authority over the person of his wife, allowing him, for some misdemeanors, *flagellis et fustibus acriter verberare uxorem* (*y*); but with us, in the reign of Charles the second, the power of correction even began to be doubted (*z*); and a wife may now have security of the peace against her husband (*a*), and a husband against his wife (*b*); although

(*q*) 45 & 46 Vict. c. 75, s. 12; and 47 & 48 Vict. c. 14; Queen *v.* Brittleton, 12 Q. B. D. 266.

(*r*) 48 & 49 Vict. c. 69.

(*s*) 1 Bl. Com. 444.

(*t*) Ibid.

(*u*) In re Cochrane, 8 Dowl. 635.

(*x*) Moore, 874; F. N. B. 80.

(*y*) Nov. 117, c. 14.

(*z*) 1 Sid. 113; Lord Leigh's case, 3 Keb. 433.

(*a*) 2 Lev. 128.

(*b*) Sim's case, Str. 1207.

[indeed our law still permits a husband to restrain his wife of her liberty, in case of gross misbehaviour (*c*).]

2. *As to her property.* Any *freehold estate* of which the wife is seised at the time of the marriage, or of which she becomes seised afterwards, becomes (subject to the exceptions presently to be mentioned) by law vested in her husband and herself during the coverture, and the husband is entitled to the profits, and has the sole control and management (*d*); though he cannot convey or charge the wife's lands for any longer period than while his own interest continues (*e*), except in the way of a lease for a term not exceeding twenty-one years, under the Settled Estates Act, 1877, or by any disposition authorized by the Settled Land Act, 1882, as explained in a former volume. Also, if the wife is seised in actual possession at any time during the marriage of an estate *of inheritance*, (whether in fee simple or in fee tail,) and there is a child of the marriage born alive and capable of inheriting the property, then the husband, upon his wife's decease, becomes solely seised of such estate for his life; and is said in that case to be *tenant by the curtesy of England* (*f*). And save to the extent of these limited rights of the husband, the freeholds of the wife were not affected by the marriage; and with regard to the alienation of the wife's freeholds, there was indeed, originally, no mode by which they could, even with the husband's concurrence, be conveyed during the coverture; for the rigour of the antient law declared the wife incapable, in any case, of binding herself or her heirs in any direct mode of alienation (*g*); although indirect modes of alienation were introduced,—at one time, the ordinary mode having been the *fine*, in the course of levying which the wife was privately examined as to whether her act was voluntary; and the mode of

(*c*) Child *v.* Hardyman, Str. 875.

(*d*) 1 Wms. Saund. 253, n. 4; Robertson *v.* Norris, 11 Q. B. 916.

(*e*) Bac. Ab. Leases, (C.); 2 Saund. by Wms. 180, n. (*q*).

(*f*) Litt. s. 35.

(*g*) Vide sup. vol. I. p. 448.

alienation now being a deed duly acknowledged by the wife,—her husband concurring in, and not merely consenting to, the deed (*h*).

And as regards the *leaseholds* of which a wife is possessed at the time of her marriage, or which accrue to her during coverture, the husband (with the exceptions presently to be noticed) becomes by force of the marriage possessed of them, in her right (*i*); and he is not only entitled to the profits and management thereof during the joint lives, but he may also dispose of them as he pleases, by any act during the coverture; and they are even liable for his debts; and if he survive her, they are absolutely his own (*k*); but (if she survive him) he cannot bequeath them by his will (*l*); and if he has not parted with them before death, and she survives him, they remain to her by virtue of her original title, and shall not go to his executors, nor (if he die intestate) to his administrator. But, of course, these rights of the husband do not extend to property held by the wife *in autre droit* (as in the capacity of executrix) (*m*).

As regards the *personal chattels* of the wife belonging to her at the time of the marriage, or accruing to her during coverture, they become in general (with the exceptions presently to be noticed) the absolute property of the husband (*n*); but this does not apply, of course, to property to which she is only entitled *in autre droit* (*o*).

But with reference to the wife's *choses in action*, these do not in general become the husband's until he recovers them by law, or reduces them into possession (*p*); and if he die before doing so, they remain or survive to the wife surviving her husband; and if she, having so survived, should die

(*h*) 3 & 4 Will. 4, c. 74, ss. 77—80.

(*i*) Co. Litt. 46 b, 351 a, 300 a; Rast. 655 a; Wallis *v.* Harrison, 5 Mee. & W. 142.

(*k*) Com. Dig. Bar. & Feme, E.; 2 Bl. Com. 434.

(*l*) Plowd. 418; Com. Dig. ubi sup.

(*m*) 2 Bl. Com. 434; 1 Roll. Ab. 88.

(*n*) Co. Litt. 351 b; Ayling *v.* Whicher, 1 Nev. & Per. 416; Carne *v.* Price, 7 Mee. & W. 183.

(*o*) Went. Off. Ex. 7.

(*p*) Co. Litt. 351 b; 2 Bl. Com. 434; Fitzgerald *v.* Fitzgerald, 8 C. B. 592.

before the choses are reduced into possession, they are part of her estate (*q*), and pass to her personal representatives accordingly. But if she should have predeceased her husband, then, as he is entitled to obtain administration of her effects for his own benefit, he upon becoming administrator of his wife's estate becomes the owner of them in right of that title, and for his own benefit, subject only to the debts (if any) of the wife; and if he, having so survived, should die before the choses are reduced into possession, then his legal personal representatives on taking out administration to the wife may recover them, for the benefit of the deceased husband's estate, subject only to the debts of the wife (*r*). And here note, that the *paraphernalia* of the wife, viz. her apparel, and the ornaments of her person, if not disposed of by the husband in his lifetime, remain to her, if she survives him, but subject to the husband's debts; and do not pass to his representatives.

However, no part of the law of property has in modern times been so considerably altered as the law relating to the property of married women; and it is incumbent upon us, therefore, to give some detailed account of the provisions of the divers recent Acts of Parliament by which these alterations have been effected.

And firstly, it was provided by the Married Women's Property Act, 1870, but only with regard to property coming to the wife during marriage, that where any freehold, copyhold, or customaryhold property should *descend* upon any woman who was married after the passing of that Act (viz. 9th August, 1870) as heiress or co-heiress of an intestate,—or where such woman should, during her marriage, become entitled to any personal property as next of kin or one of the next of kin of an intestate, or to any sum of money not exceeding 200*l.* under any deed or will,—the rents and profits of the real estate and the absolute interest in the personal estate should, subject and

(*q*) Fleet *v.* Perrins, Law Rep., 4 Q. B. 500.

(*r*) Smart *v.* Tranter, 43 Ch. D. 587.

without prejudice to the trusts of any settlement affecting the same, belong to such woman "for her separate use," and her receipts alone should be a good discharge for the same (*s*).

Secondly, under the Married Women's Property Act, 1882 (*t*), as from the 1st day of January, 1883, every woman who marries on or after that date is to hold as her separate estate all her property, either then already belonging to her or afterwards coming to her in any manner, and whether such property be real or personal, and including wages, earnings, and gains earned or made by her in any occupation which she carries on separately from her husband; and any woman already married before the 1st day of January, 1883, is to hold as her separate estate all property the title to which (of whatever character that title may be) shall come to her after that date, and whether real or personal, and including such wages, earnings, and gains as aforesaid.

Thirdly, with regard to a wife's reversionary interests in pure personal estate, whether vested or contingent, it has been provided by the 20 & 21 Vict. c. 57, commonly called Malins' Act, that she may dispose of these (unless restrained by the instrument under which she is entitled thereto, and unless they are secured to her by her own marriage settlement) by any deed in which her husband concurs, and which is duly acknowledged in the manner required by 3 & 4 Will. IV. c. 74, with regard to her conveyance of real estate.

Fourthly, under the provisions of the 20 & 21 Vict. c. 85, 21 & 22 Vict. c. 108, and 27 & 28 Vict. c. 44, if a wife be *deserted* by her husband without reasonable cause, she may obtain an order, which is called a "protection order," under which any money or property she shall acquire by her own lawful industry, or become possessed of, after the

(*s*) 33 & 34 Vict. c. 93, ss. 7, 8.

(*t*) 45 & 46 Vict. c. 75; Reid *v.* Reid, 31 Ch. Div. 402.

desertion, will be *protected* and belong to her as if she were a *feme sole* (*u*); and by 20 & 21 Vict. c. 85, s. 25, if a wife is *judicially separated* from her husband, she is to be deemed a feme sole as regards all her property acquired subsequently to the judicial separation; and by the Matrimonial Causes Act, 1878 (*x*), where a husband is convicted of an aggravated assault on his wife within the meaning of the statute 24 & 25 Vict. c. 100, s. 43, the Court or magistrate, being satisfied that the wife is in peril, may order that the wife shall be exempt from the liability to cohabit for the future with her husband, and such an order has the force of a *judicial separation;* and under the Married Women (Maintenance in Case of Desertion) Act, 1886 (*y*), a woman on being deserted by her husband may obtain a magistrate's order against him (if he appear to be of ability) to pay her a weekly sum (not exceeding 2*l.*) for her maintenance.

The Married Women's Property Act, 1882, has further provided, in continuation and amplification of the like provisions contained in the Married Women's Property Act, 1870, that a wife (whenever married) may effect an insurance upon her own or her husband's life "for her separate use," and may also acquire property independently of her husband in such deposits as she shall have made in a savings bank, or other bank, or as she shall have invested in the funds, in a joint-stock company, or in an industrial, provident, friendly, benefit building, or loan society—provided always, that she shall not have used her husband's moneys without his consent, and shall not have deposited or invested such moneys in fraud of his creditors.

The reader will not fail to observe, that in consequence of the statutes just referred to, the law now gives the husband the most meagre rights over the property of his

(*u*) Ramsden *v.* Brearley, Law Rep., 10 Q. B. 147.

(*x*) 41 Vict. c. 19; Hetherington *v.* Hetherington, 12 P. D. 112; Haddon *v.* Haddon, 18 Q. B. D. 778.

(*y*) 49 & 50 Vict. c. 52; Pape *v.* Pape, 20 Q. B. D. 76.

wife (*z*); while at the same time it still affords her all or nearly all her old advantages. For, firstly, unless some act has been done to defeat or abridge her right, she is entitled, in the event of her surviving her husband, to *dower;* that is, to hold to herself, for the term of her natural life, the third part of all the lands and tenements of which her husband was seised or possessed in fee simple or fee tail at any time during the coverture, and of which any issue that she might have had could have been heir (*a*). And, secondly, besides this provision after his death, the husband is liable during his life to maintain her, that is, to provide her with necessaries according to his station in life; and if he fail to do so, he is not only liable under the poor laws, but she has power to provide herself with them, at his expense, in a manner to be presently stated (*b*). But still the husband and wife appear to remain one legal entity, or one person in law,—if not as between themselves, at least as against third persons; wherefore, if real or personal estate is given to husband and wife and a third person, the one moiety thereof still belongs, in general, to the husband and wife, and the other moiety belongs to the third person; but as between the husband and wife, the wife takes one-fourth, and the husband the remaining one-fourth (*c*).

3. *As to her transactions.*—A married woman may act independently of her husband in all matters in *autre droit*, —as where she is executrix, or exercises a mere authority or power (*d*); at least, she may freely act in all these matters notwithstanding her coverture; but her husband has in general (and in his own interest) been in the habit of controlling her, or at least, of guiding her in these matters. And in respect of transactions on her own account, her coverture used to subject her to a variety

(*z*) Butler *v.* Butler, 14 Q. B. D. 831.

(*a*) Litt. ss. 36, 53.

(*b*) Montague *v.* Benedict, 3 Barn. & Cress. 635.

(*c*) Jupp *v.* Buckwell, 39 Ch. D. 148.

(*d*) Com. Dig. Bar. & Feme (P); Pemberton *v.* Chapman, 1 Ell. Bl. & Ell. 1056.

of disabilities; thus, she was incompetent, except under special circumstances, to make a will, either of lands or of chattels; and incapable generally of contracting, or of doing any other act which would bind either herself or her husband (*e*),—unless as his agent by his express or implied authority (*f*),—and acts done by her of her own authority with that intention were merely void (*g*); and she was also, in general, incapable of bringing any action to obtain redress for an injury sustained to her person or property, unless the action was brought with her husband's concurrence, and in his name as well as in her own (*h*). And even as regards her position as an executrix, she could neither sue nor be sued without joining her husband (*i*); but it has now been provided, by the Married Women's Property Act, 1882, that where she is an executrix (and her husband does not intermeddle), she may both sue and be sued in her own name. The same Act also provided, that, as regards all her own property by the Act made her separate property, she might make a will (*k*), and by the statute 56 & 57 Vict. c. 63, s. 3, she is now, in this particular, placed on an equal footing with testators generally; and she may also now execute a valid deed without the necessity of acknowledging same (*l*); enter into any contracts (*m*); and generally act in all respects as a *feme sole;* and as regards such property, she may maintain an action, or be made a defendant thereto, in her own name (*n*); and she may have an injunction even against her own husband (*o*). And, as

(*e*) Co. Litt. 112 b.

(*f*) Lane *v.* Ironmonger, 13 Mee. & W. 368; Brown *v.* Ackroyd, 5 Ell. & Bl. 819; Johnson *v.* Sumner, 3 H. & N. 261.

(*g*) 1 Bl. Com. 444; Com. Dig. Bar. & Feme.

(*h*) Ayling *v.* Whicher, 6 Ad. & El. 259.

(*i*) Mounson *v.* Bourn, Cro. Car. 510.

(*k*) In re Price, Stafford *v.* Stafford, 28 Ch. Div. 709.

(*l*) Riddell *v.* Errington, 24 Ch. Div. 220.

(*m*) Conolan *v.* Leyland, 27 Ch. Div. 632; Scott *v.* Morley, 20 Q. B. D. 120.

(*n*) Weldon *v.* Winslow, 13 Q. B. D. 785; Weldon *v.* De Bathe, 14 Q. B. D. 339.

(*o*) Symonds *v.* Hallett, 24 Ch. Div. 346.

regards her contracts, it has now been expressly provided by the 56 & 57 Vict. c. 63, s. 1, that every contract entered into by a wife (otherwise than as agent) after the 5th December, 1893, shall be deemed to be a contract entered into by her with respect to and to bind her separate property, whether she is or is not in fact possessed of or entitled to any separate property at the time when she enters into such contract; and shall bind all separate property which she may at that time or thereafter be possessed of or entitled to; and shall also be enforceable, by process of law, against all property which she may thereafter, while discovert, be possessed of or entitled to, not being, of course, property settled to her separate use and without power of anticipation.

The old law, in consideration of a married woman's incapacity to sue, gave her certain special privileges or exemptions; thus, as regards rights and causes of action accruing to her during coverture, she was exempted from those limitations of time within which other persons are, in general, bound to assert their legal claims; and she was allowed for that purpose a certain period after the coverture was determined; but, since the Married Women's Property Act, 1882, this indulgence or exemption, at least as regards all property which is made her separate property by that Act, appears to have become unnecessary (*p*). And again, inasmuch as the husband is bound to maintain his wife, her contracts made for the purpose of supplying herself with necessaries suitable to her station as his wife are binding upon him, and not upon her; for if she be living with her husband, his authority to her to act as his agent, to that extent, will *primâ facie* be presumed; though the presumption is capable of being repelled by special circumstances,—as by notice to the particular tradesman by whom she is supplied not to trust her, or even, *semble*, by a simple

(*p*) Lowe *v.* Fox, 15 Q. B. D. 667.

determination of her agency (*p*). Also, in the event of a separation *by consent*, the husband is, in general, liable on her contracts for necessaries (*q*); for the tradesman is then considered (even though he have notice not to trust her) as standing in her place, and as indirectly enforcing her right to be maintained (*r*); however, the husband incurs no such liability, if the separation be against his will and without sufficient excuse arising from his ill-treatment (*s*); or if she be dismissed from him for adultery; or if, during the separation she commit adultery (*t*); or if she has agreed to accept from him a certain allowance for her maintenance during separation, and the allowance is regularly paid; or if sufficient provision is otherwise made for her while they are living apart (*u*); and in the case of a judicial separation, if alimony has been decreed the wife, and it is paid, she may not bind him for necessaries (*x*). But a wife may contract as a *feme sole* so as to bind herself, and may sue or be sued, or do any other act as a *feme sole* —in case her husband be civilly dead (*y*): or where (by the custom) she carries on trade within the city of London on her own sole account, and without any interference on the part of her husband; although, even in this last case, she could not have been adjudicated a bankrupt (*z*); but now, under the Married Women's Property Act, 1882, she may, if she be trading separately, be made a bankrupt.

(*p*) Manby *v.* Scott, 1 Sid. 109; Debenham *v.* Mellon, 5 Q. B. D. 394; 6 App. Ca. 24.

(*q*) Bazeley *v.* Forder, Law Rep., 3 Q. B. 559.

(*r*) Montague *v.* Benedict, 2 B. & C. 635; Wilson *v.* Glossop, 20 Q. B. D. 354.

(*s*) Atkyns *v.* Pearse, 2 C. B. (N. S.) 763.

(*t*) Cooper *v.* Lloyd, 6 C. B. (N. S.) 519.

(*u*) Johnson *v.* Sumner, 3 H. & N. 261; Eastland *v.* Burchell, 3 Q. B. D. 432.

(*x*) 20 & 21 Vict. c. 85, s. 26; Wilson *v.* Ford, L. R., 3 Exch. 63; Smith *v.* Smith, 7 P. D. 84.

(*y*) Co. Litt. 133 a; Marsh *v.* Hutchinson, 2 Bos. & Pul. 226; De Wahl *v.* Braune, 1 H. & N. 178.

(*z*) Beard *v.* Webb, 2 B. & P. 93, 101; Ex parte Jones, In re Grissell, 12 Ch. D. 484.

And among the other protections or privileges and exemptions to which a married woman's coverture entitled her, we ought to particularly mention, that she could not, in general, be sued, either on contract or for a tort, without her husband being made a co-defendant (*a*); and such was the rule, as regards not only causes of action arising against her after the marriage, but also such as arose before the marriage; for the law considered her husband as being responsible for her in respect of all demands of a civil nature, having by the marriage adopted her and her circumstances together (*b*). Yet, as the law now stands, under the Married Women's Property Acts, 1870 to 1893, the husband thus sued jointly with his wife in respect of a cause of action arising against her before the marriage, is liable only to the extent of such assets as he received or might (but for his own default) have received with her (*c*); and if he received none, then he shall have his costs of defence, and the judgment for the debt or damages shall be separate against the wife, and may be satisfied out of her separate estate, if she has any (*d*); and as regards the wife's contracts made during the marriage (other than contracts made by her as his agent), these are deemed *primâ facie* to be made by her with reference to her separate estate only, and the husband would not now be liable thereon; but as regards her torts committed during the coverture, the husband appears to be still liable for these, although jointly with his wife (*e*).

Having thus examined the rules of the common law with regard to the conjugal relation, it now becomes desirable to advert to the manner in which these doctrines were modified by the principles of equity, even before any of the statutes above specified were made for the wife's

(*a*) 1 Bl. Com. 443; Hancocks & Co. *v.* Lablache, 3 C. P. D. 197.

(*b*) Bl. Com. ubi sup.; Dodgson *v.* Bell, 5 Exch. 967.

(*c*) 37 & 38 Vict. c. 50, s. 5; 45 & 46 Vict. c. 75, s. 14.

(*d*) 45 & 46 Vict. c. 75, s. 15; Scott *v.* Morley, 20 Q. B. D. 120.

(*e*) Seroka *v.* Kattenburg, 17 Q. B. D. 177.

protection. And, firstly, contracts between husband and wife, and grants by either party to the other, being sufficiently evidenced, were effectual in equity (*f*); trusts also in favour of the wife, whether created by the husband or by a stranger, were sustained in equity. And though by the old common law her property (with the qualifications already stated) vested in her husband in such manner that she could have no separate property, yet in contemplation of equity she had always a separate and independent estate in whatever property was secured to her through the medium of a *trustee*,—provided the intention in that behalf of the grantor was distinctly declared (*g*); and it being a rule in equity that a trust should never fail for want of a trustee, it followed that where the intention to give a married woman property for her *separate use* was sufficiently declared, such gift would be effectual, and the property would be her separate estate, even though the donor should have omitted to name any trustee,—an omission the consequence of which was that the property vested at law in the husband; for to effectuate the gift, the court of equity, in such a case, considered the husband himself as her trustee (*h*),—a principle which has now been adopted in the Married Women's Property Act, 1882 (45 & 46 Vict. c. 75), s. 1, sub-s. 1. And, secondly, as regards property to which a married woman became entitled during the coverture, and which was *not* settled to her separate use, although the courts of equity followed the common law, so far as to allow the husband to claim it as his own; yet these courts would not have assisted the husband's claim, where such assistance was necessary, except upon the condition of his making an adequate provision for her out of the fund,—a provision which was effectuated, for her and her children, by means of the

(*f*) Slanning *v.* Style, 3 P. Wms. 334.

(*g*) Fonb. Tr. Eq. 94; In re Tarsey's Trust, Law Rep., 1 Eq. Ca. 561; Massy *v.* Rowen, ib. 4 H. of L. Ca. 288.

(*h*) Bennet *v.* Davis, 2 P. Wms. 316.

doctrine called her *equity to a settlement* (*i*); and latterly the woman might herself have actively asserted her right to this provision for herself and her children (*k*). Thirdly, equity would allow the separate estate of a married woman to be conveyed or charged by her at her pleasure, and that either *inter vivos* or by will; and such property was also subject in equity to her debts contracted on the faith of her separate estate (*l*). Gifts of property, however, to the separate use of a married woman, are often accompanied with a clause in restraint of *anticipation*; that is, a proviso against her making any assignment of her interest, by way of anticipation of the income during the coverture: and such a proviso (notwithstanding the general rule invalidating restrictions on alienation) is held effectual in courts of equity (*m*),—and to such an extent was this carried that even for her debts contracted on the faith of her separate estate and for her own active frauds (*n*), the property could not have been made liable; and the court considered itself powerless (apart from statute) to lift off the restraint on anticipation, even when it was for the woman's own clear benefit to do so (*o*); but by the Conveyancing Act, 1881, s. 39, the court is now enabled to remove the restraint when it is for her benefit that it should be removed (*p*), and she consents thereto; also, such property is now, by the Trustee Act, 1893 (*q*), repeating a similar provision contained in the Trustee Act, 1888 (*r*), made liable for her active frauds; and, by the Married Women's Property Act, 1893, s. 2, the costs of

(*i*) Fonb. Tr. Eq. 95; Co. Litt. by Butler, 351 a, n.; Poulter *v.* Shackell, 39 Ch. Div. 471.

(*k*) In re Bryan, 14 Ch. Div. 516.

(*l*) Bac. Ab. Bar. & F. 507; Taylor *v.* Meads, 34 Law Journ., Ch. 203; Pike *v.* Fitzgibbon, 14 Ch. D. 837.

(*m*) Woodmeston *v.* Walker, 2 Russ. & M. 197; Brown *v.* Pocock, ib. 210; Harnett *v.* Macdougall, 8 Beav. 187.

(*n*) Ellis *v.* Johnson, 31 Ch. Div. 537.

(*o*) Settled Land Act, 1882 (45 & 46 Vict. c. 38), s. 61, sub-s. 6.

(*p*) Harrison *v.* Harrison, 40 Ch. Div. 418.

(*q*) 56 & 57 Vict. c. 53, s. 45.

(*r*) 51 & 52 Vict. c. 59, s. 6.

unrighteous litigation instituted by her or on her behalf may now be ordered to be paid out of such property.

Before concluding the subject of married women's property, it will be desirable (in this place) to consider, although briefly, the subject of *marriage settlements*, and the subject of *separation deeds* between husband and wife.

1.—With respect to *Marriage Settlements*.—When a marriage is contemplated, it is a common practice for the intended husband to make a settlement for the benefit of the intended wife, usually by securing to her, through the medium of trustees, a sufficient provision during the joint lives or at least during the coverture (to be paid into her own proper hands), and which provision is intended for the wife's *pin-money*—and also by securing to her a further sufficient provision for her during her life, in the event of her surviving him, and which last-mentioned provision is intended for the wife's *jointure*, and is usually made and accepted in lieu of dower (*s*). On the intended wife's part, if she possesses property of her own, and the amount is large, a settlement thereof is (or ought to be) made, providing sufficiently for the wife, and conferring beneficial interests therein on the husband, and providing for the children of the marriage, and in the case of the failure of issue providing for the return of the property (in whole or in part) to the wife herself or to her relations, subject always to the estates or interests which may have taken effect (*t*). And if there is hereditary rank or a title to be supported, or if it is in contemplation to found a family, the settlement generally contains also provisions for entailing the bulk of the landed estate on the issue of the marriage, by limiting it to the father for life, and, after his death, to the first and other sons successively in tail, and then to the daughters in tail. And a marriage settlement may be made, either in contemplation of the marriage, or after the marriage has taken place,—

(*s*) Jodrell *v.* Jodrell, 9 Beav. 45.

(*t*) Hayes, Conv. 249, n.

an ante-nuptial settlement being made on what the law deems a valuable consideration, viz. the future marriage; so that such a settlement cannot, in the absence of fraud, be impeached even by those to whom the husband is indebted at the time he makes it (*u*), but is binding and valid against all the world (*x*). A post-nuptial settlement, on the other hand, is in general considered *voluntary* (*y*), that is, for no valuable consideration; and, if it relate to lands or tenements, it used to be void, by the effect of the statute 27 Eliz. c. 4, as against subsequent purchasers of the same lands for valuable consideration, whether they purchased with notice of the settlement or not,—the husband being allowed to defeat in this way his own previous gift (*z*); and a mortgagee, and also a lessee (*a*), was esteemed a purchaser within the meaning of this Act; but now, by the 56 & 57 Vict. c. 21, a voluntary settlement of lands will, in all such cases, be and remain valid, provided only it be *bonâ fide* and without any actual fraudulent intent. But a post-nuptial settlement, whether relating to real or personal property, was, and still is, by the effect of the statute 13 Eliz. c. 5, void as against all creditors to whom the husband was indebted at the time of the settlement, without possessing adequate means of payment: and also as against his subsequent creditors, if he made it with the fraudulent view of defeating their future claims (*b*); but as against all other persons, such a settlement, though voluntary in its nature, is effectual; and there are instances in which it is even deemed to be not voluntary, but valid as against all the world; as in the case where it

(*u*) Spirett *v.* Willows, Law Rep., 4 Ch. App. 407; Kent *v.* Riley, ib. 14 Eq. Ca. 190.

(*x*) Brown *v.* Jones, 1 Atk. 190; Campion *v.* Cotton, 17 Ves. 272.

(*y*) Everitt *v.* Everitt, Law Rep., 10 Eq. Ca. 405.

(*z*) Johnson *v.* Legard, 6 Mau. & Sel. 60.

(*a*) Cracknall *v.* Janson, 11 Ch. Div. 1; In re Walhampton Estate, 26 Ch. Div. 391.

(*b*) Stileman *v.* Ashdown, 2 Atk. 481; Freeman *v.* Pope, L. R., 5 Ch. App. 538.

is executed either in pursuance of a written agreement to that effect entered into before the marriage (*c*), or as the condition of the husband's obtaining possession of the property to which the wife is equitably entitled (*d*), or in consideration of an additional portion paid to him by her friends after the marriage (*e*). But the Bankruptcy Act, 1883, contains (as we have seen) various enactments as to the avoidance of these voluntary settlements, and as to the avoidance also of certain ante-nuptial settlements (*f*).

2. With respect to *Separation Deeds*.—Although the law looks with the greatest disfavour on any agreement the object of which is to relieve the parties from the duties of the conjugal relation, yet where the husband and wife have actually come to a resolution to live apart, the courts have repeatedly recognized the validity of agreements made on their separation, and which agreements are commonly called *separation deeds* (*g*). And in a separation deed, the husband usually covenants with trustees appointed on behalf of the wife, or now even with the wife herself (*h*), that he will provide certain sums for the wife's separate maintenance—the trustees on their part (or now the wife herself) covenanting with the husband to indemnify him against the debts of the wife, and the wife releasing, or covenanting to release, all claims for jointure and dower, or thirds; and the deed also contains, in general, clauses by which both the husband and the wife covenant with the trustees, or with each other, not to molest or interfere the one with the other of them (*i*), and not to sue for the restitution of conjugal rights (*k*). Under such an agree-

(*c*) Doe *v.* Rowe, 4 Bing. N. C. 737; Brown *v.* Jones, 1 Atk. 190.

(*d*) Wheeler *v.* Caryl, Amb. 121.

(*e*) Russell *v.* Hammond, 1 Atk. 13.

(*f*) Vide sup. bk. II. pt. II. ch. VI.

(*g*) Westmeath *v.* Westmeath, Jac. Rep. 126; Hamilton *v.* Hector, Law Rep., 13 Eq. Ca. 511; Charlesworth *v.* Holt, ib. 9 Exch. 38.

(*h*) M'Gregor *v.* M'Gregor, 21 Q. B. D. 424.

(*i*) Fearon *v.* Earl of Aylesford, 14 Q. B. D. 792.

(*k*) Clark *v.* Clark, 10 P. D. 188; Tress *v.* Tress, 12 P. D. 128.

ment, the wife is entitled to receive her separate allowance, so long as the separation continues, and while she observes the covenants on her part in the deed contained; and (in the absence of an express stipulation therein) she will not forfeit her allowance even by the commission of adultery (*l*). It is to be observed, however, that though the law allows provision to be made for a separation already determined on, yet it will not sanction any agreement, the effect of which is to provide for the contingency of a future separation at the pleasure of the parties,—because this (it has been justly considered) has a tendency to promote that very event (*m*); moreover, a separation deed (so far as it is a separation deed and nothing more) is invariably avoided by a subsequent reconciliation (*n*); but this avoidance would not follow, if the deed was expressed, or was clearly intended, to have a continuing operation after the reconciliation (*o*); and the avoidance, even in the case of the ordinary separation deed, has no relation back (*p*). But it must always be remembered, that a married woman, though thus voluntarily separated from her husband, is not thereby divested, as regards her position toward third parties or otherwise, of the condition of coverture (*q*).

III. The mode of the dissolution of the relation of husband and wife.—This relation may be dissolved either by death or by divorce; and here the first matter to observe is, that, prior to the Divorce Act (20 & 21 Vict. c. 85), there were two kinds of divorce obtainable by suit in the Ecclesiastical Courts,—the one *à mensâ et thoro*, and the other *à vinculo matrimonii*. [Divorce *à mensâ et thoro*, or separation from bed and board, was pronounced in cases

(*l*) Hart *v.* Hart, 18 Ch. D. 670.

(*m*) Hindley *v.* Marquis of Westmeath, 6 Barn. & Cress. 200; Cocksedge *v.* Cocksedge, 14 Sim. 244.

(*n*) Nicol *v.* Nicol, 30 Ch. Div. 143; 31 Ch. Div. 143.

(*o*) Haddon *v.* Haddon, 18 Q. B. D. 778; Nicol *v.* Nicol, supra.

(*p*) Crouch *v.* Waller, 4 De G. & Jo. 302.

(*q*) Marshall *v.* Rutton, 8 T. R. 545.

[where, there having been no illegality in the union at its commencement, yet from some supervenient cause it became improper for the parties to live together; as for the cause of intolerable cruelty in the husband, adultery in either of the parties, and in some few other cases (e.g., "intolerable ill temper") mentioned in the books (*r*); but this species of divorce was never granted on the prayer of the husband on the ground of *adultery*, if the wife recriminated and proved that he also had been unfaithful to the marriage vow; or if it appeared that after knowledge of her adultery, he had cohabited with her or otherwise condoned her offence (*s*). The sentence for this divorce, though it effected a judicial separation, did not bastardize the issue of the marriage, or enable either of the parties to contract a fresh union;] and by the effect of this divorce, the wife, if the innocent party, generally became entitled to *alimony* (*t*); that is, an allowance for her support out of her husband's estate to an amount settled at the discretion of the judge on a consideration of all the circumstances of the case, and usually proportioned to the rank, quality and means of the parties (*u*); but no alimony was in such case allowed to the wife if the divorce was on the ground of her adultery, or if she already had from other sources a sufficient income (*x*).

[Divorce *à vinculo* was a declaration by the Ecclesiastical Court that the marriage was a nullity, as having been absolutely unlawful from the beginning; and it separated the parties *pro salute animarum* (*y*), bastardized the issue (*z*), and enabled the parties severally to contract another marriage at their pleasure (*a*). This particular species of divorce was always founded on some *canonical* disability,

(*r*) 1 Bl. Com. 441; Evans *v.* Evans, 1 Hagg. 36.

(*s*) 1 Ought. 317; Burn. Eccl. Law, Marriage, xi.

(*t*) 1 Bl. Com. 441; 2 Bl. Com. 94.

(*u*) Bl. Com. ubi sup.

(*x*) Ibid.; Cowel, tit. Alimony.

(*y*) 1 Bl. Com. 440.

(*z*) Ibid.; Co. Litt. 235.

(*a*) Moore, 666; Stephens *v.* Totty, Cro. Eliz. 908.

[and was never for any cause supervenient to the marriage, not even for adultery itself (*b*); for the canon law regarded the nuptial tie as sacred, and in that regard went even beyond the divine revealed law which expressly assigns incontinence as a cause (and indeed the only cause) why a man may lawfully put away his wife and marry another (*c*).] But though divorce *à vinculo* for adultery could not, prior to the Divorce Act of 20 & 21 Vict. c. 85, be obtained in the regular course of law, either in the ecclesiastical or in the secular courts, yet it was very frequently granted by a private Act of Parliament,—it having become the practice of the legislature to exercise its paramount authority in this manner, by way of extraordinary relief to a husband thus injured; but *semble*, not to a wife.

By the Divorce Act, however, above mentioned, and the subsequent statutes passed for its amendment or incidentally affecting its provisions,—this former state of the law has been subjected to changes of a fundamental and most important character (*d*); and not only has the jurisdiction of the ecclesiastical courts in causes matrimonial been taken from them, and been transferred to the new Divorce Court created in the year 1857, and thence transferred to the appropriate division of the High Court of Justice, subsequently established under the Judicature Act of 1873 (*e*); but many novel provisions have been introduced into the law of divorce itself; the main effect of which may be summarily stated as follows, that is to say:—

1. A *judicial separation* (in lieu of the divorce *à mensâ et thoro*) may now be decreed, on the petition of either husband or wife; and this decree has all the effect that belonged to the old divorce *à mensâ et thoro* (*f*); and

(*b*) 1 Bl. Com. 441; Moore, 683; Bac. Ab. Marriage, 3 E. 3; but see 3 Salk. 138.

(*c*) Matt. xix. 9.

(*d*) Wilkinson *v.* Gibson, Law Rep., 4 Eq. Ca. 162.

(*e*) 20 & 21 Vict. c. 85, ss. 2, 6.

(*f*) Sect. 7.

judicial separation may be decreed on the ground of adultery, or cruelty (*g*); or on the ground of desertion without cause for two years and upwards (*h*); and during the continuance of the decree, the wife acquires, as to property and for many other purposes, the condition of a feme sole (*i*).

2. A *divorce* or dissolution of the marriage (corresponding with the old divorce *à vinculo matrimonii*) may also now be obtained, on the petition of either husband or wife (*k*); and where *he* is the petitioner, it may be on the ground that since the marriage she has been guilty of adultery (*l*); but where *she* is the petitioner, it may only be on the ground that he has since the marriage been guilty of incestuous adultery, or of bigamy with adultery, or of rape, or of unnatural crime, or of adultery coupled with such cruelty as would, without adultery, have formerly entitled her to a divorce *à mensâ et thoro;* or of adultery coupled with desertion, without reasonable excuse, for two years or upwards (*m*). But no divorce can be decreed, if the petitioner (whether husband or wife) has been accessory to (*n*), or connived at, or has condoned, the adultery; or if the petition is presented or prosecuted by collusion (*o*); and the court is not *bound* to decree the divorce, if the petitioner has been guilty of adultery during the marriage; or of cruelty; or of desertion or wilful separation; or of such wilful neglect or misconduct as has conduced to the adultery; or if there has been undue delay (remaining unexplained) in presenting the petition (*p*).

3. Every decree for a divorce is, in the first instance, a decree *nisi*, to be made absolute after the expiration of

(*g*) Otway *v.* Otway, 13 P. D. 12, 141.

(*h*) Sect. 16; Drew *v.* Drew, 13 P. D. 97.

(*i*) Sect. 25.

(*k*) A private Act may still be necessary, under special circumstances; see Whitaker's Divorce Act, 1894.

(*l*) 20 & 21 Vict. c. 85, s. 27.

(*m*) 20 & 21 Vict. c. 85, s. 27; Drew *v.* Drew, 13 P. D. 97.

(*n*) Heyes *v.* Heyes, 13 P. D. 11.

(*o*) Sects. 30, 31.

(*p*) 20 & 21 Vict. c. 85, s. 31: M. (otherwise D.) *v.* D., 10 P. D. 75; Heyes *v.* Heyes, supra.

such a period, not less than six months, as by general or special order from time to time directed (*q*); and at the expiration of that time, the petitioner may apply to have the decree nisi made absolute (*r*); but, during this interval, any person may show cause why the decree should not be made absolute, either by reason of collusion or of some material facts not brought forward at the hearing of the original petition; and on cause being so shown, the case is dealt with, either by making the decree nisi absolute, or by reversing that decree, or by requiring further inquiry, or otherwise ordering as justice may require (*s*).

4. On a decree for dissolution of marriage, the appeal is first to the Court of Appeal; and thereafter there may (in certain cases) be an appeal to the House of Lords, within one calendar month if the House of Lords is then sitting, and otherwise within one fortnight after the House next sits (*t*); and when a marriage is dissolved, it is lawful for either party to marry again, as if the prior marriage had been dissolved by death (*u*).

5. On a decree for judicial separation, (on the wife's petition,) or on a decree for dissolution of the marriage, an order may be made assigning alimony to the wife (*x*), and providing with regard to the custody, maintenance, and education of the children (*y*); and on a decree for divorce, or judicial separation on the ground of adultery in a wife entitled to any property, an order may be made providing

(*q*) See 29 Vict. c. 32, s. 3; Wormen *v.* Villars, 2 Ex. D. 359.

(*r*) Ousey *v.* Ousey and Atkinson, 1 P. D. 56.

(*s*) 23 & 24 Vict. c. 144, s. 7.

(*t*) 44 & 45 Vict. c. 68, s. 9, modifying 31 & 32 Vict. c. 77, s. 3. (Westhead *v.* Westhead, 2 P. D. 1; Gladstone *v.* Gladstone, ib. 143; Cleaver *v.* Cleaver, 9 App. Ca. 631.)

(*u*) 20 & 21 Vict. c. 85, s. 57.

(*x*) 20 & 21 Vict. c. 85, ss. 17, 32. See Saunders *v.* Saunders, 1 Swab. & Trist. 72; Ex parte Holden, 13 C. B. (N. S.) 641; Sidney *v.* Sidney, Law Rep., 1 P. & D. 78; Wallis *v.* Wallis, 2 P. D. 141; Dunn *v.* Dunn, 13 P. D. 91.

(*y*) 22 & 23 Vict. c. 61, s. 4. (See Gladstone *v.* Gladstone, 2 P. D. 143; Bradley *v.* Bradley, 3 P. D. 47.)

for a portion of such property being settled upon the innocent party and the children of the marriage (*z*).

6. After a final decree for the dissolution of a marriage, a supplementary inquiry may also take place into the existence of any ante-nuptial or post-nuptial settlements made on the parties whose marriage is the subject of the decree; and on such inquiry, such orders may be made as shall seem fit, with reference to the application of the whole or a portion of the property settled,—for the benefit either of the children of the marriage, or of their respective parents (*a*).

7. A decree of *nullity of marriage* may also be obtained on any ground which would formerly have justified a divorce *à vinculo*; and every such decree is also a decree *nisi* in the first instance (*b*); and the like orders touching the property of the parties may, in the case of this decree, be made as in the case of a decree for divorce, and that although there are no children (*c*); also, where there are any children, the due orders may be made for their custody, &c. (*d*).

8. Where the Queen's Proctor, or any other person, intervenes or shows cause against the rule nisi for a divorce or for a judgment of nullity, such order may be made as to the costs thereby occasioned as shall seem just (*e*).

(*z*) 20 & 21 Vict. c. 85, s. 45; 23 & 24 Vict. c. 144, s. 6. (See Gladstone *v.* Gladstone, 1 P. D. 442.) The like provision may also be made, on a decree that the marriage is void. (Langworthy *v.* Langworthy, 11 P. D. 85.)

(*a*) 22 & 23 Vict. c. 61, s. 5.

(*b*) 20 & 21 Vict. c. 85, ss. 6, 10, 22, 35, 41; 36 Vict. c. 31; 41 & 42 Vict. c. 19, s. 2.

(*c*) 41 & 42 Vict. c. 19; Maudslay *v.* Maudslay, 2 P. D. 256; A. *v.* M., 10 P. D. 178.

(*d*) 22 & 23 Vict. c. 61, s. 4.

(*e*) 41 & 42 Vict. c. 19, s. 2; Conradi *v.* Conradi, L. R., 1 P. & D. 391; Crawford *v.* Crawford, 11 P. D. 150.

CHAPTER III.

OF PARENT AND CHILD.

THE next relation to be treated of, is the relation of parent and child; and children being either legitimate or illegitimate, this leads us to consider, First, the law of legitimacy,—Secondly, the reciprocal duties and rights between parents and their legitimate offspring,—And, Thirdly, the rights and incapacities of illegitimate children (otherwise called bastards (*a*)).

I. A legitimate child is commonly described as a child born in wedlock; but (speaking more accurately) he is a child between whose parents the relation of marriage subsisted either at the time when he was begotten, or at the time when he was born, or at some intervening period (*b*). For a child begotten of parents married at the time, or married afterwards (but before he was born) is *primâ facie* legitimate, though in consequence of the death of one of them, or of their divorce, the marriage may have been dissolved before he was born; and the case is the same with a child born of parents married at the time of his birth, though they were unmarried when he was begotten,—our law making it an indispensable condition, that the parents should in such a case intermarry at some period

(*a*) Co. Litt. by Butler, 243 b, n. (2).

(*b*) Co. Litt. 7 b, 244 a; 1 Bl. Com. 446; Doe *d.* Burtwhistle *v.* Vardill, 6 Bing. N. C. 385; Gardner *v.* Gardner, 2 App. Ca. 723.

before the child's birth (*c*), and differing in this respect from the civil and canon laws according to which it was sufficient, if the parents should intermarry even after the birth (*d*). [But it being one main end of the law of marriage to ascertain the parent, this end is better attained by our law than by the civil and canon laws; and our law possesses also this further advantage, namely, it excludes the caprices of parents, whereas, by the Roman law, the child of a marriage *ex post facto* might, according to the partialities of the father and mother, have been either continued a bastard, or made legitimate; and, moreover, the Roman law encouraged unlawful cohabitation, whereas our law guards against that indecency, at the same time sufficiently allowing for the occasional aberrations or indiscretions of youth; and it was 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 (*e*).]

What has been hitherto said supposes, it will be observed, the true parentage in each case to be established; but that is a point which, even as regards the ostensible issue of married persons, the law permits (although with reluctance and under severe restrictions) to be brought into controversy. 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 (*f*); and (contrary to what was at one

(*c*) Doe *d.* Burtwhistle *v.* Vardill, 6 Bing. N. C. 385.

(*d*) Co. Litt. by Butler, 245 a, n. (1).

(*e*) "*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 unâ voce responderunt, quod nolunt leges Angliæ mutare quæ huc usque usitatæ et approbatæ.*"—Stat. 20 Hen. 3, c. 9. See the remarks upon this statute in Doe *d.* Burtwhistle *v.* Vardill, 6 Bing. N. C. 385.

(*f*) 1 Bl. Com. 457; Co. Litt. 244.

time supposed to be the law (*g*)) children born during marriage may also now be proved bastards by other evidence,—*e. g.*, by proof of the impotency of the husband; or that the husband and wife had no opportunity—though both within the realm—of sexual intercourse within such period as is consistent with their being the parents (*h*); or even by proof of circumstances tending strongly to the inference that no such intercourse (supposing it to be possible) in fact took place (*i*). So it was held, while divorces *à mensâ et thoro* and *à vinculo* were within the jurisdiction of the Courts Ecclesiastical, that, if the wife bred children during the former kind of divorce, they were *primâ facie* bastards: for the law presumed the parties to live conformably to the sentence: and that, after a divorce *à vinculo* had been adjudged, all the children were necessarily to be deemed bastards, because such latter sentence was then always on the ground of the nullity of the marriage *ab initio* (*k*). But except where a divorce has taken place between the married parties, or evidence has been given of facts sufficient to disprove their sexual intercourse, the law has always *primâ facie* presumed in favour of the legitimacy of a child born to the wife during the marriage (*l*). Also, and upon the same principle, legitimacy will always be presumed (subject to the same exceptions) with respect to children born after the coverture has ceased by reason of the husband's death,—unless the birth takes place so long afterwards that the child clearly could not be begotten by him; and what shall be considered as the *ultimum tempus pariendi*, or the extreme period between the conception and the birth, is a matter of fact which the law leaves to be

(*g*) Co. Litt. 244 a.

(*h*) Hawes *v.* Draeger, 23 Ch. Div. 173; Glenister *v.* Harding, 29 Ch. D. 985; Bosvile *v.* Att.-Gen., 12 P. D. 177.

(*i*) R. *v.* Lubbenham, 4 T. R. 251; Morris *v.* Davies, 5 Cl. & Fin. 163.

(*k*) 7 Rep. 42; 3 P. Wms. 275; 1 Salk. 123.

(*l*) Bl. Com. ubi sup.; R. *v.* Mansfield, 1 Q. B. 449; Saye and Sele Peerage, 1 H. of L. Cas. 507; Hargrave *v.* Hargrave, 9 Beav. 552.

determined, in each particular case, according to the circumstances of the case, and the testimony which persons of experience may give of the course of nature on this subject; but in general, nine calendar months or forty weeks has been considered the outside limit (*m*).

[In connection with this matter, we may notice a proceeding in our antient law (of which there have been instances also in modern times) applicable to the case where a widow is suspected to feign herself with child, in order to produce a supposititious heir to the estate; an attempt which the rigour of the Gothic constitutions esteemed equivalent to the most atrocious theft, and therefore punished with death (*n*). In this case, with us, the heir presumptive may have a writ *de ventre inspiciendo*, to examine whether the widow be with child or not, and if she be, to keep her under proper restraint till delivered (*o*); which is entirely conformable to the practice of the civil law (*p*): but if the widow upon due examination be declared not pregnant, the presumptive heir shall be admitted to the inheritance, though liable to lose it again on the birth of a child within the forty weeks from the death of the husband (*q*). 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 ordinarily legitimate; and it is said, that he may, when he arrives to years of discretion, choose which of the fathers he pleases (*r*); to prevent which inconvenience, the civil law ordained that no widow should marry *intra annum luctûs* (*s*),—a rule which obtained so early as the reign of

(*m*) 1 Bl. Com. 457; Co. Litt. by Harg. 123 b, n. (1); Alsop *v.* Bowtrell, Cro. Jac. 541.

(*n*) Stiernh. De Jure Goth. l. 3, c. 5.

(*o*) Bract. l. 2, c. 32; Aiscough's case, 2 P. Wms. 591; Ex parte Wallop, 4 Bro. C. C. 90; Co. Litt. by Harg. 8 b, and n. (3); ib. 123 b, n. (1).

(*p*) Ff. 25, tit. 4, per tot.

(*q*) Britton, c. 66.

(*r*) Co. Litt. 8 a; but see n. (7), by Harg.

(*s*) Cod. 5, 9, 2.

[Augustus, if not of Romulus (*t*); 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 (*u*); but although the hasty re-marriages of widows are indecent, and (in some instances) have been revolting, there is nothing in our law which prohibits them.]

II. We are next to consider the duties of parents towards, and their powers over, their legitimate children and the reciprocal duties of such children towards their parents.

1. And first, the duties of the parents: which principally consist in three particulars; the maintenance of the children, their protection, and their education. For the duty of parents to provide for the maintenance of their children is a principle of natural law; an obligation, says Puffendorf (*x*), laid on them not only by nature herself, but by their own proper act, in bringing them into the world: and as Montesquieu very justly observes (*y*), the establishment of marriage in all civilized states is built on this natural obligation of the father to provide for his children. Wherefore, the municipal laws of all well-regulated states have taken care to enforce this duty, though Providence has more or less effectually provided for it also, by implanting in the breast of every parent that natural στοργη, or insuperable affection, which not even the deformity or the wickedness of the children, can totally suppress or extinguish. [The Roman civil law, in particular, obliged the parent to provide maintenance for his child (*z*); and it carried this matter so far, that it would not suffer a parent at his death totally to disinherit his

(*t*) Ov. Fast. l. 27.

(*u*) "*Sit omnis vidua sine marito duodecim menses.*"—Wilk. Leg. Anglo-Sax. Ll. Ethel. A.D. 1008; Ll. Canut. c. 71.

(*x*) L. of N. l. 4, c. 11.

(*y*) Sp. L. b. 23, c. 2.

(*z*) Ff. 25, 3, 5.

[child, without expressly giving his reason for so doing (*a*); and if the parent alleged no reason, or a bad one, or a false one, the child might set the will aside, *tanquam testamentum inofficiosum*, a testament contrary to the natural duty of the parent (*b*),—a law which Grotius and others have considered as going too far (*c*).] But certainly our own common law may be said to have gone not far enough; for the obligation at common law of a father to provide for the maintenance of his children is one which the common law supplies no direct means of enforcing (*d*); very slight circumstances, however, will be sufficient to raise a contract on the father's part to provide for (or to pay for necessaries provided for) his infant children (*e*).

The deficiencies of the common law in this respect have been in some measure supplied by statute; the acts relating to the poor having made it compulsory upon all, whose circumstances enable them to do so, to provide a maintenance for their progeny, when in poverty, of whatever age they may be; and indeed whenever, through infancy, disease, or accident, they are unable to support themselves; and the manner in which this obligation is to be performed is thus pointed out by the legislature (*f*):—The father and mother, grandfather and grandmother, of any poor person not able to work, are to maintain him or her at their own charges, if of sufficient ability, according as the quarter sessions, or two justices in petty sessions, shall direct; and if a father *runs away* and leaves his children chargeable to the parish, the churchwardens and overseers, upon obtaining an order of the magistrates for the purpose, may seize his rents, goods and chattels, and dispose of them towards the required relief (*g*); moreover, the parent himself, in

(*a*) Nov. 115.

(*b*) Puff. L. 4, c. 11, s. 7.

(*c*) De J. B. et P. l. 2, c. 7, n. 3.

(*d*) Urmston *v.* Newcomen, 4 Ad. & E. 899; Queen *v.* Hogan, 20 L. J. (M. C.) 219.

(*e*) Law *v.* Wilkin, 6 Ad. & El. 718; Bazeley *v.* Forder, Law Rep., 3 Q. B. 559.

(*f*) 43 Eliz. c. 2; 5 Geo. 1, c. 8; 59 Geo. 3, c. 12, s. 26.

(*g*) 4 & 5 Will. 4, c. 76, s. 78; 11 & 12 Vict. c. 110, s. 8.

such a case, may be punished under the Vagrant Acts (*h*); as he may also be, if, being able, he wilfully *refuses* or *neglects* to maintain his family, whereby they become chargeable (*i*); also, all poor law relief given to any children under the age of sixteen, (such children not being blind, or deaf and dumb,) is considered as given to the father, or (if he is dead) to his widow (*k*). Also, every person is liable to maintain the children of his wife born before his marriage with her, (whether legitimate or illegitimate,) as part of his own family; and is chargeable with all poor law relief granted to them, until they attain the age of sixteen, or until the death of the mother (*l*); and by other statutes (*m*), in any case in which any child is detained in a certified "reformatory" or "industrial" school, the parent, or step-parent, or other person liable for his maintenance, if of sufficient ability, is made liable to contribute to his support, maintenance, and training therein, to the extent of five shillings a week, or such lesser sum as shall be directed.

[No person, however, is bound to provide a maintenance for his issue, unless where the children are impotent and unable to work, either through infancy, disease, or accident; and then he is only obliged to find them in necessaries; 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, who were able to maintain themselves, in ease and indolence; and 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. But, as has

(*h*) 5 Geo. 4, c. 83, s. 24; Nixon *v.* Nanny, 1 Q. B. 747.

(*i*) 5 Geo. 4, c. 83, s. 3; 31 & 32 Vict. c. 122, s. 37; The Queen *v.* Downes, 1 Q. B. D. 25.

(*k*) 4 & 5 Will. 4, c. 76, ss. 56, 57.

(*l*) The Queen *v.* Inhabitants of Shavington-cum-Gresty, 17 Q. B. 48.

(*m*) 29 & 30 Vict. cc. 117, 118.

[been before observed (*n*), our law (setting aside the antient right of the children to the *pars rationabilis*) has made no provision to prevent the disinheriting of children by will; leaving every man's property at his own disposal; though perhaps it had not been amiss, if the parent had been bound to leave them at the least a necessary subsistence. However, among persons of any rank or fortune, a competence is generally provided by the marriage articles for younger children, while the bulk of the estate is settled upon the eldest son.

From the duty of maintenance we pass to the duty of protection, which also is a natural duty, and rather permitted than enjoined by our municipal law; and this duty is also distinctly recognized in the English jurisprudence; for a parent may maintain and uphold his children in their lawsuits, without being guilty of the offence of maintaining quarrels (*o*): and he may also justify an assault and battery, in defence of their persons (*p*).

The third duty of parents to their children is to give them an education suitable to their station in life, a duty which is also pointed out by reason; for, as Puffendorf observes, it is not easy to imagine or allow, that a parent had conferred any considerable benefit upon his child by bringing him into the world if he afterwards entirely neglected his culture and education; and suffered him to grow up like a mere beast, to lead a life useless to others and shameful to himself (*q*).] And in our own country, ample provision for the education of children has from the earliest times been made,—by our churches and chapels and by the munificence of wealthy individuals and corporations; but by reason of the vast increase of the population, the supply (at least of elementary schools) has never outstripped the demand; and the matter received the special attention of the Government in the year 1870, when by the Public

(*n*) Vide sup. p. 190.
(*o*) 2 Inst. 564.
(*p*) 1 Hawk. P. C. 131.
(*q*) L. of N. b. 6, c. 2, s. 12.

Elementary Education Act, 1870 (33 & 34 Vict. c. 75), very extensive further provision was made for the education of the poorer classes of children, and the duty of seeing to their education was made compulsory on the parent; but of this statute, and of those by which it has been amended, we shall give a more particular account hereafter (*r*).

2. [Proceeding nextly to consider the power of parents over their children,—this power is derived from their duty towards them; and the municipal laws of some nations have given a much larger authority to parents, than we find in others. Thus, the antient Roman law gave the father a power of life and death over his children,—upon the principle that he who gave, had also the power of taking away (*s*); but the rigour of that law was softened by subsequent enactments; and we find a father banished by the Emperor Hadrian for killing his son, though he had committed a very heinous crime,—upon this maxim, that "*patria potestas in pietate debet, non in atrocitate, consistere*" (*t*). But still parents, under the Imperial institutions, 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 (*u*). However, under our law, the power of parents is much more moderate; but still it is sufficient to keep children in order and obedience; and a father may lawfully correct his child, being under age, in a reasonable manner; for that is for his benefit (*x*); and the father may also delegate part of his parental authority to a tutor or schoolmaster; 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

(*r*) Vide post, bk. IV. pt. III. ch. IV.

(*s*) Ff. 28, 2, 11; Cod. 8, 47, 10.

(*t*) Ff. 48, 9, 5.

(*u*) Inst. Lib. ii. tit. 9, 1.

(*x*) 1 Hawk. P. C. 130.

[employed (*y*).] Moreover, a father, generally speaking, is guardian of the property of his infant child; and, if such child has any real estate, the father is entitled to take charge of it, and to receive the rents and profits thereof during the minority, subject to a liability to account for them on the child's attaining full age. The father is also entitled, as the general rule, to the possession and custody of the person of his child (*z*); and it is only in very extreme cases that he will be deprived of that custody (*a*); and in general, if the possession or custody be withheld from him, he may regain it by writ of *habeas corpus*, or by an application to the Chancery Division of the High Court of Justice (*b*); but the court may now, in its discretion, refuse to grant the writ or to make the order,—but only on just grounds (*c*). The right of the father, mother, or other guardian, to the possession of their children, is also, to a certain extent, protected by the provisions of the criminal law, under which it is made highly penal, either by force or fraud, to take or entice away, or to detain, any child under the age of fourteen, with intent to deprive its parent, guardian, or other person having lawful charge of such child, of the possession thereof; or, with such intent, to receive or harbour it, knowing the child to have been so taken or detained; or unlawfully to take, or cause to be taken, any unmarried girl, under the age of sixteen, out of the possession and against the will of her father or mother, or other person having her lawful care or charge (*d*). Moreover, the assent of the father to the marriage of his child, if under age, is also requisite under the Marriage Acts, —as was explained at large in the previous chapter (*e*). [But the legal power of a father over the persons or property of his children extends not in any case beyond the

(*y*) 1 Bl. Com. 461.

(*z*) Bl. Com. ubi sup.

(*a*) Wellesley *v*. Beaufort, 2 Russ. 21; Skinner *v*. Skinner, 13 P. D. 90.

(*b*) Earl of Westmeath's case, Jacob, 251; Ex parte Witte, 13 C. B. 680.

(*c*) 54 & 55 Vict. c. 3.

(*d*) Vide post, bk. VI.

(*e*) Vide sup. pp. 254, 258.

[age of twenty-one: for they are then enfranchised by arriving at years of discretion; but until that age arrives, or till their marriage, (which is another species of emancipation,) this empire of the father continues even after the father's death; for he may by will appoint a guardian to such of his unmarried children as are infants (*f*).]

With respect to the mother, she has no legal power over the child in the father's lifetime, (at least as against him,) except that in a proper case she may obtain an order from the High Court of Justice that she shall have access to any of her children under the age of sixteen, or that they shall remain in her custody or control according to such regulations as the court shall direct (*g*). But after the father's death she was always considered to be entitled to the custody of the infant until twenty-one; and by the Marriage Acts, where there was no other guardian appointed, the widow, while she remained unmarried, stood in the father's place, after his death, as to the consent required to the child's marriage during minority. She could not, however, have appointed a guardian by will, as she was not mentioned in the statute of Charles the second, by virtue of which alone the father enjoyed that privilege (*h*); but if she had purported to appoint such a guardian, the Court would have had regard to her wishes (*i*); and it has latterly been expressly provided by the Guardianship of Infants Act, 1886 (*k*), s. 3, that the mother may by deed or will appoint a guardian after her own death and the death of the father of the children, to act jointly with the guardian (if any) appointed by the father. And by the same Act, section 2, the mother (if she survive the father) is constituted the guardian of her infant children generally, to act jointly with the guardian (if any) appointed by the father; but in such a case, the

(*f*) 12 Car. 2, c. 24.

(*g*) 36 & 37 Vict. c. 12; In re Goldsworthy, 2 Q. B. D. 75.

(*h*) Vaughan, 180; Ex parte Edwards, 3 Atk. 519.

(*i*) In re Kaye, Law Rep., 1 Ch. App. 387.

(*k*) 49 & 50 Vict. c. 27.

Court may associate one or more guardians with her (*l*). And it is also now well settled, that the mother is the natural guardian of her illegitimate child (*m*).

3. [The duties of children to their parents fall nextly to be considered; and these are duties which arise from natural justice and retribution; for to those who gave us existence, we naturally owe subjection, honour and reverence: they, who protected the weakness of our infancy, are entitled to our protection in the infirmity of their own age; they, who by sustenance and education have enabled their offspring to prosper, ought in return to be supported by their offspring; and that is the principle upon which proceed all those duties of children to their parents, which are enjoined by positive laws. In this country, the law has not deemed it necessary to make much provision on the subject of the filial obligations; it is, nevertheless, a provision of our law, that a child is justified in defending the person and maintaining the cause or suit of his parent, just as (we have seen) a parent is justified in performing the same duties for his child (*n*);] and by the statutes relating to the poor, the children of any old, blind, lame, impotent, or other poor person not able to work, shall, if of sufficient ability, at their own charges relieve and maintain him or her, in the manner and according to the rate which the justices of the peace at their quarter sessions shall direct (*o*).

III. We are next to consider the case of illegitimate children or bastards; and by our law the duty of parents with regard to these is principally that of maintenance; [for, though bastards are not looked upon as children for any civil purposes, yet the support of the offspring by the parent is a matter of natural obligation (*p*).] And the

(*l*) In re Scanlan, 40 Ch. D. 200.
(*m*) The Queen *v.* Nash, 10 Q. B. D. 454.
(*n*) 1 Bl. Com. 454.
(*o*) Vide post, bk. IV. pt. III. ch. II.
(*p*) Nov. 89, c. 15.

method in which the English law provides maintenance for an illegitimate child, during its infancy, is as follows:—The mother is entitled to the custody of the child (as it would seem) in preference to the putative father (*q*); and is bound to maintain it until the child attains the age of sixteen, or gains a settlement in its own right, or (being a female) marries (*r*); and in the event of the mother's marriage, the same liability attaches to her husband (*s*), but ceases with her death (*t*). If the mother be of sufficient ability to maintain her bastard, and neglects that duty, so that it becomes chargeable to the parish, she is made liable, by 7 & 8 Vict. c. 101, s. 6, to be punished as a vagrant; but if, on the other hand, she be not of sufficient ability, the law affords her the means of relieving herself from her liability as its mother, and of compelling the putative father to supply a fund for its maintenance (*u*). And, in particular, by the 7 & 8 Vict. c. 101, as amended by the 35 & 36 Vict. c. 65, and 36 & 37 Vict. c. 9, a single woman may either before the birth of her bastard child, or at any time within twelve months afterwards, make application to a justice of the peace, charging a person by name as the father of such child; and where the alleged father has within twelve months next after its birth paid money for the maintenance of the child, such application may be made at any subsequent period whatever without limitation in regard to time (*x*); and upon such application the justice issues his summons to the party charged to appear at a petty sessions, or (in London) before the police magistrate (*y*), and the evidence on both sides is heard; and if the evidence of the mother as to the paternity of

(*q*) Ex parte Anne Knee, 1 Bos. & P. (N. S.) 148; The Queen *v.* Nash, 10 Q. B. D. 454.

(*r*) 4 & 5 Will. 4, c. 76, ss. 57, 71; R. *v.* Wendron, 7 Ad. & Ell. 819.

(*s*) 4 & 5 Will. 4, c. 76, ss. 57, 78.

(*t*) Ruttinger *v.* Temple, 4 B. & Smith, 491.

(*u*) Potts *v.* Cumbridge, 8 Ell. & Bl. 847; The Queen *v.* Pickford, 1 B. & Smith, 77; The Queen *v.* Shingler, 17 Q. B. D. 49.

(*x*) 35 & 36 Vict. c. 65, s. 3.

(*y*) 8 & 9 Vict. c. 10, s. 9.

the child be corroborated in some material particular by other testimony to the satisfaction of the justices in petty sessions, or (in London) of the police magistrate, the man charged may be adjudged to be the "putative father" of the child in question (*z*); and in that case the justices or magistrate may (if they or he see fit under the circumstances) make an order on him (called a bastardy, affiliation, or maintenance order) for the payment to the mother—or to some other person to be appointed for the custody of the child in the case of her death, insanity, or imprisonment—of a weekly sum of money for its maintenance and education; and such order remains in force until the child dies or attains the age of thirteen, or (occasionally) the age of sixteen (*a*); and such order is not discharged by, but continues enforceable after, the mother's marriage (*b*); and the father's liability under the order (as we have seen in a former chapter) is not discharged by any order of discharge in bankruptcy. The father is, however, entitled to appeal from the order, upon entering into his recognizance to try the appeal and to pay such costs as shall be adjudged thereon, and upon otherwise complying with the prescribed conditions and regulations (*c*); and on the hearing of such appeal, the case is to be tried *de novo* (*d*).

Bastards, although their maintenance is thus provided for, during the period of their childhood, labour under many disadvantages; for a bastard is, for legal purposes, *filius nullius*, or *filius populi* (*e*); and hence is not entitled by law either to the name of his mother or to that of his father (*f*); although he may (if he choose) assume the surname of either, or in fact any other surname (*g*); and a

(*z*) Cole *v.* Manning, 2 Q. B. D. 611.

(*a*) 35 & 36 Vict. c. 65, s. 5; Pearson *v.* Heys, 7 Q. B. D. 260.

(*b*) Sotheron *v.* Scott, 6 Q. B. D. 518; Williams *v.* Davies, 11 Q. B. D. 74.

(*c*) 42 & 43 Vict. c. 49; The Queen *v.* Shingler, 17 Q. B. D. 49.

(*d*) 35 & 36 Vict. c. 65, s. 9.

(*e*) Fortesc. de Leg. c. 4.

(*f*) Co. Litt. 3 b; Wilkinson *v.* Adam, 1 Ves. & B. 452.

(*g*) Falconer's "Surnames," 1862,

bastard cannot take property by the mere description of *child* of his putative parent, until he has in some way acquired the reputation of standing in that relation to him; also, with regard to the acquisition of property *jure sanguinis*, *i.e.*, by descent, or under the Statutes of Distribution, he is in a different position from others—for he can neither himself be heir or next of kin to any one, nor have any heir or next of kin except the issue of his own body. If, therefore, he purchase land, though he may take in fee, so far as the power of disposing of the same to others is concerned, it is not, while it remains in his own seisin (*scil.*, is held by his own title), a fee in the sense of being descendible to heirs generally, but its descent is confined to the heirs of his own body (*h*); and if he die seised of such estate without having devised it, and without lawful issue, it will escheat to the crown or other lord of the fee; and if he die intestate, and without wife or lawful issue, the crown is entitled to the beneficial administration of his personal estate (*i*); yet the royal claim to the real or personal estate of a bastard, under such circumstances, is not strictly enforced; and upon a proper petition, the crown's right will in general be transferred to the nearest member of his reputed family (*k*). There are some other points also, as to which a bastard is peculiarly circumstanced; *e.g.*, he does not follow (as legitimate children do) his father's place of parochial settlement under the laws relating to the poor; but his primary settlement (*i. e.* if born antecedently to 14th August, 1834) is in the parish where he was born (*l*); and if born after that date,—that is to say, after the passing of the Poor Law Amendment Act, 4 & 5 Will. IV. c. 76,—then he has and follows the settlement of his mother till he attains the age of sixteen,

and Supplement, 1863; Doe *dem.* Luscomb *v.* Yates, 5 Barn. & Ald. 544.

(*h*) Ld. Raym. 1152; 1 Prest. Est. 468.

(*i*) Re Perton's Estate, Pearson *v.* Att.-Gen., W. N. 1885, p. 164.

(*k*) Toller, Ex. 107; 59 Geo. 3, c. 94; 47 & 48 Vict. c. 71.

(*l*) Hard's case, Salk. 427.

or acquires a settlement for himself (*m*). On the other hand, to authorize his marriage under twenty-one, the consent of his father or mother is not required (*n*); but a licence to marry may be granted to him, upon oath made that there is no person authorized to give such consent (*o*); and though a father may in general by deed or will appoint a guardian for his infant child, he has no such privilege if the child be illegitimate. On the other hand, the laws relative to incest, and to marriages within the prohibited degrees of consanguinity or affinity, apply to a bastard with equal force as to those who are born in wedlock, the principle of his being *nullius filius* having no effect in these particulars (*p*); and it may be stated generally, that, except in the several points above enumerated, the legal position of a bastard is the same with that of another man; and he is capable, moreover, of being, by the transcendent power of Parliament, made legitimate to all purposes, even that of inheriting land: as was done by a statute of Richard II. in the case of John of Gaunt's bastard children.

(*m*) 4 & 5 Will. 4, c. 76, s. 71; 39 & 40 Vict. c. 61, s. 35.

(*n*) Priestley *v.* Hughes, 11 East, 1.

(*o*) See 4 Geo. 4, c. 76, s. 14; 6 & 7 Will. 4, c. 85, s. 12.

(*p*) 3 Salk. 66; 1 Ld. Raym. 68; The Queen *v.* Brighton (Inhabitants of), 1 B. & Smith, 447, 453.

CHAPTER IV.

OF GUARDIAN AND WARD—AND HEREIN OF INFANCY.

THE fourth private relation, and that which now alone remains to be considered, is that existing between guardian and ward; and we shall consider, first, the legal condition of the infant or ward; next, the different species of guardians; and, lastly, the rights and duties of guardians.

I. The legal condition of the infant or ward.—Infancy (or minority) is the period of life, whether in males or females, which precedes the age of twenty-one,—an age at which they are competent for all that the law requires them to do, and which is therefore designated as *full age* (*a*). And full age is gained on the day preceding the twenty-first anniversary of the infant's birth (*b*); and as in the computation of time the law for this purpose allows no fraction of a day, a child born on the evening of the 1st January, is of age on the morning of the 31st December in the twenty-first year afterwards (*c*). [Among the antient Greeks and Romans *women* never came of age, but were subject to perpetual guardianship, 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 in males, full age was not till twenty-five years (*d*). Thus by the constitutions of different

(*a*) 1 Hale, P. C. 28.

(*b*) Co. Litt. 171 b; Salk. 44, 625; Ld. Raym. 480, 1096.

(*c*) Christian's Blackst. vol. i. p. 463, (n.).

(*d*) Pott. Antiq. b. 4, c. 11.

[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 recognized twenty-one as the age of majority (*e*).]

An infant has various special privileges, and is subject to various incapacities. He cannot be sued but under the protection, and with the benefit of the defence, of his guardian (*f*); that is, his guardian *ad litem*, appointed by the court for the purpose of the particular action; and, on the other hand, he may sue either by a guardian *ad litem* appointed by the court, or, what is much the most usual course, by his next friend or *prochein amy*, that is, by any friend willing to undertake his cause (*g*). It is also a privilege belonging to infants, that they lose nothing during their minority by non-claim or neglect of demanding their rights; for though persons of full age are barred by their omission to take any step towards the recovery of their rights within a certain period of time, it is otherwise with respect to infants; who are not bound to claim upon a title or cause of action which first accrues to them while they are under age, until after the expiration of a period commencing from their attainment of majority. It is indeed laid down as a maxim, that no laches or negligence shall be imputed to an infant; but this is chiefly true of the exemption which he enjoys from the ordinary bar by lapse of time; and it cannot safely be understood in a much larger sense (*h*). It is also laid down generally, that an infant can neither make any conveyance or purchase that will bind him; nor enter into a binding contract; nor be sworn as a juror (*i*); nor sit and vote in parliament (*k*); nor hold any public office of pecuniary trust, or

(*e*) Stiernhook de Jure Sueonum, l. 2, c. 2.

(*f*) Co. Litt. 135 b; Castledine *v.* Mundy, 4 Barn. & Adol. 90.

(*g*) Co. Litt. ubi sup.; Collins *v.* Brook, 4 H. & N. 270.

(*h*) Co. Litt. 380 b.

(*i*) Bac. Ab. Infancy, E.; 6 Geo. 4, c. 50, s. 1.

(*k*) Whitelock, c. 50; 4 Inst. 47; 7 & 8 Will. 3, c. 25.

of a judicial kind (*l*); nor, in short, do any legal act (*m*); but to this general incapacity, there are exceptions; and it will be proper here to advert to some of these: And firstly, though an infant is generally under disability where he acts on his own account, yet he is under none when acting as *agent* for another person (*n*); for the person by whom he is appointed agent is (for that purpose) the best judge of his ability. [So an infant who has an advowson, that is, the perpetual right to present to a benefice, may present to the benefice when it becomes void (*o*); for the law in this case dispenses with one rule, in order to maintain another of far greater consequence; it permits an infant to present a clerk, who, if unfit, may be rejected by the bishop,—rather than suffer the church to be unserved, or the infant's right to be barred by lapse.] So an infant may be sworn as a witness, however young, provided he understands the nature of an oath (*p*). An infant may also at the age of twelve take the oath of allegiance (*q*); and at the age of fourteen, if a male, or of twelve, if a female, may consent to marriage. Again, though infants cannot, as a general rule, so aliene or purchase estates but that the transaction shall be voidable at their pleasure, on their attainment of full age (*r*),—yet they may make a feoffment at the age of fifteen of their gavelkind lands; also, by the statute 18 & 19 Vict. c. 43, any male infant of twenty years, or female infant of seventeen years, may, with the sanction of the court, make a valid and binding settlement either of real or personal estate, in contemplation of his or her marriage. And although, as a general rule, an infant cannot enter into a contract that shall bind him, yet there are many exceptions to the rule: and regarding the contracts of infants, the law

(*l*) Claridge *v.* Eveline, 5 Barn. & Ald. 81; Bac. ubi sup.

(*m*) 1 Bl. Com. 466.

(*n*) Prestwick *v.* Marshall, 7 Bing. 565.

(*o*) Co. Litt. 89 a, note (1); 172 b.

(*p*) 2 Hale, P. C. 278.

(*q*) Co. Litt. 172 b.

(*r*) Co. Litt. 2 b; Zouch *v.* Parsons, 3 Burr. 1794.

may be said to be as follows:—(1) All contracts which are manifestly to the infant's prejudice are void; (2) All contracts which are manifestly for his benefit are valid; and (3) Contracts which fall not distinctly under the one predicament or the other, used to be voidable at his election (*s*); and according to these distinctions, his contract to pay a penalty was absolutely void, being evidently to his detriment (*t*); and his contract of service for a fixed period was void, where it contained a stipulation enabling the master to stop the work at pleasure, and during such period of suspension to stop also the wages (*u*); and, on the other hand, an infant may apprentice himself in the ordinary form of such a contract, —that being manifestly for his benefit (*x*); and he may bind himself to pay for his meat, drink, apparel, physic, and other such necessaries; and likewise for his good teaching and instruction, whereby he may profit himself afterwards (*y*). For as a general rule all an infant's contracts for things called necessaries are binding upon him, equally as upon an adult contractor; and in determining what shall be necessaries, regard is to be had in each particular case to the infant's degree or station in life (*z*); and necessaries for him may include also necessaries for his wife (if any), and for his child or children (*a*). But an infant is not liable on his contracts for necessaries if supplied to him while living unmarried under the roof of his parent, by whom his wants of this nature are sufficiently provided for (*b*). And as regards such of his

(*s*) Keane *v.* Boycott, 2 H. Bl. 511.

(*t*) Co. Litt. 172 a.

(*u*) Queen *v.* Lord, 12 Q. B. 757.

(*x*) Gylbert *v.* Fletcher, Cro. Car. 179; Meakin *v.* Morris, 12 Q. B. D. 352.

(*y*) Co. Litt. 172 a; Clements *v.* L. & N. W. Rail. Co., (1894) 2 Q. B. 482.

(*z*) Brooker *v.* Scott, 11 Mee. & W. 67; Barnes *v.* Toye, 13 Q. B. D. 410; Johnstone *v.* Marks, 19 Q. B. D. 509.

(*a*) Turner *v.* Trisby, 1 Str. 168; Chapple *v.* Cooper, 13 Mee. & W. 252.

(*b*) Dalton *v.* Gibb, 5 Bing. N. C. 198.

contracts (including his purchases and alienations) as used to be "voidable," he might by confirmation, or, in some cases, by mere acquiescence, after he became of age, have rendered himself liable to perform them; and his acquiescence would still have that effect, at least in equity, and as regards matters falling within the jurisdiction of equity (*c*); but in law, and as regards his ordinary legal contracts, the Infants' Relief Act, 1874 (37 & 38 Vict. c. 62), has now provided, that all contracts by infants for the repayment of money lent or to be lent, or for goods supplied or to be supplied (other than contracts for necessaries), and all accounts stated with them, shall be absolutely void; and further, that no action shall be brought whereby to charge any person upon any promise made after full age to pay any debt (not being for necessaries) contracted during infancy, or upon any ratification made after full age of any such promise or contract made during infancy, whether there shall or shall not be any new consideration for the promise or ratification after full age (*d*).

But though infants are thus, to a certain extent, exempted from liability for mere breach of contract, the law allows them no such privilege in respect of injuries of any other kind; for not only are they answerable for crimes long before their attainment of full age, but an action also may be brought against them to recover damages for their torts (being injuries independent of contract), such as trespass, slander, and the like (*e*).

II. The guardians recognized by our law are of the following varieties:—

1. Guardianship *by nature*.—Which is that which belongs to the father in respect of the person of his heir apparent, or of his heiress presumptive (*f*),—there being, properly

(*c*) Carter *v.* Silber, (1892) 2 Ch. 278; Edwards *v.* Carter, (1893) A. C. 360.

(*d*) Coxhead *v.* Mullis, 3 C. P. D. 439; Northcote *v.* Doughty, 4 C. P. D. 385.

(*e*) Defries *v.* Davies, 1 Bing. N. C. 692; Jennings *v.* Rundall, 8 T. R. 335.

(*f*) Co. Litt. by Harg. 88, notes 63—71, 15th ed.; 3 Rep. 38 b.

speaking, no other kind of guardianship by nature than this; and the term natural guardian, as applied to the father or mother with reference to all their children, is rather a popular than a technical mode of expression,—for when a father's right to the person of a child who is not his heir apparent is intended, his guardianship is properly that next to be noticed (*g*).

2. Guardianship *for nurture*.—Which is a species of guardianship that applies to all the children; and, like the last, extends to the person only. It belongs to the father, and, at his decease, to the mother, and is said to last only to the age of fourteen, both with males and females (*h*); but though after that age the father or mother may not be properly designated as guardian for nurture, yet the parent is understood to stand substantially in the capacity of guardian to his children so long as they are minors, by having the care and control of their persons during that period (*i*).

3. Guardianship *in socage*.—This is a species of guardianship which extends to the estate as well as to the person; and it occurs only where the legal estate in lands held in socage *descends* upon a minor (*k*); in which case the guardianship devolves upon his next of blood to whom the inheritance cannot descend (*l*); for though proximity of blood is a natural recommendation to this office, the law at the same time judges it improper to trust the person of an infant in his hands, who may by possibility become the heir; so that there may be no temptation, or even suspicion of temptation, for him to abuse his trust (*m*). Guardianship in socage, like that for nurture, continues only until the minor is fourteen years of age; except in

(*g*) Co. Litt. by Harg. 88, notes 63—71, 15th ed.

(*h*) Co. Litt. by Harg. 88, n. (13); Ratcliffe's case, 8 Rep. 38 b.

(*i*) 1 Bl. Com. 461; Mellish *v.* De Costa, 2 Atk. 14; Mendes *v.* Mendes, 3 Atk. 624.

(*k*) Co. Litt. by Harg. 87 b, n. (1).

(*l*) Ibid. 88; Bac. Ab. Guardian, B.

(*m*) Glanv. l. 7, c. 11; St. Hibern. 14 Hen. 3.

the case of lands held in gavelkind, where the office lasts a year longer (*n*).

4. Guardianship *by statute.*—By 12 Car. II. c. 24, a father may, by deed or will, dispose of the custody of such of his children as are infants and unmarried at his death, or born posthumously, to any person he pleases, as against all persons claiming to be guardians in socage or otherwise; and the guardian thus appointed has the custody of the person of the ward (*o*); and of his or her estates both real and personal (*p*). But the statute made no mention of the mother; and she therefore remained incapable of appointing a guardian to her children (*q*); but her incapacity in this respect has, to some extent, been removed by the Guardianship of Infants Act, 1886, already mentioned (*r*).

5. Guardianship *by election.*—Which is a species of guardian recognized by the law, though not of frequent occurrence. For an infant having lands in socage may, after fourteen, when the guardianship in socage terminates, elect a guardian for himself, if there be no other then ready to take charge of him and his property; and, according to Lord Coke, the same thing may be done in certain cases by an infant under fourteen. But the law on this subject is obscure; and as such an election, at whatever age it is made, will in no case supersede the authority of the court to interfere for the infant's protection, this kind of guardianship is now almost wholly disused (*s*).

6. Guardianship *by appointment of the High Court of Justice.*—This species of guardian is of modern origin;

(*n*) Bac. Ab. Guardian, A. 2.

(*o*) Re Andrews, Law Rep., 8 Q. B. 153; Andrews *v.* Salt, ib. 8 Ch. App. 622; In re Agar-Ellis, 10 Ch. D. 49; In re Clarke, 21 Ch. D. 817.

(*p*) 12 Car. 2, c. 24, s. 8; Co. Litt. by Harg. 88; Lord Shaftesbury's case, 2 P. Wms. 103.

(*q*) Ex parte Edwards, 3 Atk. 519; Re Ethel Brown, 13 Q. B. D 614.

(*r*) 49 & 50 Vict. c. 27.

(*s*) Co. Litt. by Harg. 88; Curtis *v.* Rippon, 4 Madd. 462.

and gradually established itself after the introduction, by the statute of Charles the second, of guardians by the father's appointment. For it was soon found expedient to provide for cases in which the father failed to exercise his statutory power (*t*); and the court, on application made to it on behalf of an infant possessed of property, appointed a guardian for the protection both of the person and of the estate of the infant (*u*); and indeed this jurisdiction would be exercised, if sufficient reason appeared, notwithstanding the existence of a guardian in socage (*x*); and the court interfered in favour even of *bastards*, so that where the father had named a guardian by will for his bastard child (which he had no authority under the statute to do) (*y*), the court in general appointed that person the guardian, confirming the putative father's appointment (*z*). So, also, where there had been a guardian appointed under the statute, the court would regulate his conduct, and even deprive him of all authority where necessary for the real interests of the infant (*a*). By the institution, also, of a suit as to the estate of an infant, and even by an order for his maintenance being made on summons without suit, the infant becomes a *ward of the court* (*b*); and any person marrying a ward of court, without permission, is guilty of a contempt of court, and is punishable by commitment to prison (*c*). But an infant *not possessed of property* cannot be made a ward; nor will the court in general appoint a guardian for an infant so circumstanced; though to this there are certain exceptions (*d*): *e.g.*, under the Marriage Act of 4 Geo. IV. c. 76, the court has authority to appoint

(*t*) 3 Bl. Com. 426; De Manneville *v.* De Manneville, 10 Ves. 52; In re Besant, 11 Ch. D. 508.

(*u*) In re Kaye, Law Rep., 1 Ch. App. 387.

(*x*) 2 Fonb. Tr. Eq. 235.

(*y*) Sleeman *v.* Wilson, L. R., 13 Eq. 36.

(*z*) Peckham *v.* Peckham, 2 Cox, 46.

(*a*) Spence's Equitable Jurisdiction, vol. i. p. 613.

(*b*) De Pereda *v.* De Mancha, 19 Ch. Div. 451.

(*c*) Herbert's case, 3 P. Wms. 116.

(*d*) Ex parte Becher, 1 Bro. C. C. 556.

a guardian for the purpose of consenting to the marriage of any infant having no father, or unmarried mother, or other guardian; and in certain instances, also, to give its judicial sanction to the marriage, where the consent of the father, mother, or guardian cannot be obtained (*e*). Also, by 3 & 4 Vict. c. 90, the court might take any infant (whether possessed of property or not) who had been convicted as a felon, out of the control of his parent or other guardian, and might assign the custody of him to any other person willing to be entrusted with the charge, and able to provide for his maintenance and education; and by the Criminal Law Amendment Act, 1885 (48 & 49 Vict. c. 69), s. 12, the custody of a girl under sixteen years of age may, for the reasons mentioned in the Act, be taken away from her parents and committed to any person willing to have the charge of her; and under the Guardianship of Infants Act, 1886 (49 & 50 Vict. c. 27), s. 7, a divorced father may be declared unfit to have, and be accordingly removed from, the guardianship of his children (*f*); and under the Custody of Children Act, 1891 (54 & 55 Vict. c. 3), the court may (as we have seen) refuse to order back to the father or other guardian the custody or possession of his children; and under the Prevention of Cruelty to Children Act, 1894 (57 & 58 Vict. c. 41), ss. 6, 7, the Court may (for good cause) take away from the father, or step-father, or other quasi-guardian, and commit to some other fit person, the custody or care of a child under sixteen years of age; and apart from all statutory provisions, the Court of Chancery always could, and the Chancery Division of the High Court still can and will, remove a father from the guardianship of his children, for sufficient cause affecting the children (*g*).

7. Guardianship *ad litem*.—This is where a person (usually the father or other ordinary guardian) is ap-

(*e*) 4 Geo. 4, c. 76, ss. 16, 17; 19 & 20 Vict. c. 119, s. 2.

(*f*) Skinner *v.* Skinner, 13 P. D. 90.

(*g*) Wellesley *v.* Beaufort, 2 Russ. 21; In re Besant, 11 Ch. Div. 508.

pointed by any court of justice to prosecute, or more commonly to defend, for an infant in any action or litigious proceeding therein pending, to which such infant may be party—a practice to which we have already had occasion to refer in the course of this chapter (*h*).

8. Guardianship *by custom*.—This species of guardianship is described in the books as being of two kinds; first, that which exists in lands of copyhold tenure, and which, of common right, belongs to the next of blood to whom the copyhold cannot descend; though, by special custom, it may be claimed by the lord of the manor or his nominee (*i*); and, secondly, that which is founded on local custom, of which the custom of London was the most remarkable; for it entitled the mayor and aldermen, in their Court of Orphans (*k*), to the custody of the person, lands and chattels of every infant whose parent was free of the city of London (at least if he also died within the city): and such custody lasted, in the case of males, till twenty-one, and in the case of females, till eighteen or marriage; but this custom is now fallen in disuse (*l*).

III. Lastly, as regards the rights and duties of guardians in general.

1. The legal custody of the person of an infant belongs in general to the guardian; who, if the child be detained from him, may sue out a writ of *habeas corpus*, to have his ward brought before the court, and delivered over (if of tender age) to himself (*m*); and where the father is the guardian, he is entitled in general to this remedy, even as against the mother (*n*); though, on the other hand, the mother of an illegitimate child may claim the possession of

(*h*) Vide sup. p. 306.

(*i*) 2 Watk. Cop. 101; Co. Litt. by Harg. 88; 3 Salk. 177.

(*k*) Pulling's Customs of London, p. 196.

(*l*) Co. Litt. 88 b.

(*m*) Earl of Westmeath's case, Jac. 251; Reg. *v.* Clarke, 7 Ell. & Bl. 186; Reg. *v.* Barnardo, 24 Q. B. D. 283.

(*n*) Murray's case, 5 East, 223; R. *v.* Greenhill, 4 Ad. & El. 624.

it upon *habeas corpus*, in preference to the reputed father (*o*). A child, however, of age sufficiently mature to exercise a choice on such a subject will in no case be delivered over upon *habeas corpus* to the legal guardian, not even to the father, but will be allowed to leave the court in freedom (*p*). Also, generally, where an infant, of whatever age, is possessed of property, so as to fall within the jurisdiction of the court, it will always be protected against a guardian (even though he be also the parent), whose conduct renders him grossly unfit for the office (*q*); and the guardian may not take his ward out of the jurisdiction of the court, unless by the leave of the court (*r*).

2. With respect to the property of the ward, a guardian in socage is said to have, not barely an authority over, but an actual estate in the land, as *dominus pro tempore;* and to have a right either to demise it, or to occupy it himself for the ward's benefit (*s*); and to be entitled, in his own name, to bring actions against trespassers (*t*); and the law appears to be the same with respect to a guardian by statute: but no guardian can (apart from statute) aliene the ward's estate, except by way of lease during the ward's minority; and a demise for a longer period becomes void as soon as the period of guardianship determines (*u*). A guardian by appointment of the court has, in some respects, even less power over the ward's property; for he can receive of the profits of the infant's estate no more than the court shall think fit to allow for the infant's maintenance; and such guardian can grant no leases except

(*o*) Ex parte Anne Knee, 1 N. R. 149; In re Elderton, 25 Ch. Div. 220.

(*p*) The Queen *v.* Clarke, 7 Ell. & Bl. 186.

(*q*) Shelley *v.* Westbrook, Jac. 266; 48 & 49 Vict. c. 69, s. 12; 54 & 55 Vict. c. 3; 57 & 58 Vict. c. 41.

(*r*) Elliott *v.* Lambert, 28 Ch. Div. 186.

(*s*) Plowd. 293; R. *v.* Sutton, 3 Ad. & El. 597.

(*t*) Wade *v.* Baker, Lord Raym. 131.

(*u*) Bac. Ab. Leases, I. 9; Roe *v.* Hodgson, 2 Wils. 129, 135; Camden (Marquis) *v.* Murray, 16 Ch. D. 161.

with the sanction of the court; though, on the other hand, such sanction will enable him or any other guardian to make a lease that will bind the infant even after he attains twenty-one (*x*), or to surrender a lease vested in an infant, with a view to its renewal (*y*). Finally, it is to be observed, that every guardian of the estate is bound to give the ward, when he comes of age, an account of all that he has transacted on his behalf, and must answer for all losses from wilful default or negligence; and the ordinary method of enforcing such liability is by proceedings in equity for that purpose, which may be instituted even during the ward's minority (*z*); but in taking such account, allowance will be made to the guardian for all his reasonable costs and expenses (*a*); but he is not permitted in any case to make a profit out of his ward's estate (*b*).

(*x*) 11 Geo. 4 & 1 Will. 4, c. 65, s. 17.

(*y*) Sect. 12.

(*z*) Eyre *v.* Shaftesbury, 2 P. Wms. 119.

(*a*) Litt. s. 123.

(*b*) Plowd. 293.

BOOK IV.

OF PUBLIC RIGHTS.

PART I.

OF THE CIVIL GOVERNMENT.

HAVING now considered the rights and duties attaching to a man, individually considered, as regards both his person and his property; and having also now examined the rights and duties attaching to him in his private or domestic relations, or as member of a family; we have next to contemplate him as a citizen or member of the community at large: and to treat of the rights and duties attaching to him in his public capacity, and which he consequently exercises in common with the rest of the community; and this we propose to do under the head of *public rights*,—understanding *duties* as the correlative of *rights*, and deeming it, therefore, unnecessary to refer to duties by any separate designation. Public rights, then, concern either the relation subsisting between persons in authority and those subject to their authority,—or they concern the social condition in general; and inasmuch as persons in authority are either of a civil or of an ecclesiastical character, so the whole subject of public rights resolves itself into, and may be discussed under, the following three titles—the Civil Government—the Church—and the Social Economy:—and we shall in the first instance devote our attention to the Civil Government.

CHAPTER I.

OF THE PARLIAMENT.

[THE public rights which first claim our attention, are those which concern the relation in which men stand to one another, 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 and secondary sphere.

In all tyrannical governments, the supreme magistracy, or the right both of *making* and of *enforcing* the laws, is vested in one and the same man, or one and the same body of men; and wherever these two powers are united together, there can be no true public liberty. But where the legislative and the executive authority are in distinct hands, the former will take care not to entrust the latter with so large a power as may tend to the subversion of its own independence, and therewith of the public liberty. With us, therefore, in England, this supreme power is divided into two branches; the one legislative, to wit, the parliament, consisting of sovereign, lords, and commons; and the other executive, consisting of the sovereign alone. It will be the business of this chapter to consider the British parliament in which the legislative power is vested by our constitution.

The first institution of parliament is one of those matters

[which lie hidden in the dark ages of antiquity; but the word *parliament* itself (*parlement* or *colloquium*) is comparatively of modern date, being derived from the French, and having been first applied to general assemblies of the states under Louis VII. in France, about the middle of the twelfth century (*a*); though what was in later times termed in that country a parliament, was only a high court of justice. In England, the term seems not to have been used till the reign of Henry the third (*b*), or of Edward the first (*c*); and yet it is certain that, long before the introduction of the Norman language into England, all matters of importance were debated and settled in the great councils of the realm,—a practice which seems to have been universal among the northern, particularly the German, nations (*d*). In England, this general council hath been held immemorially, under the several names of *michel-synoth* or great council, *michel-gemote* or great meeting, and more frequently *wittena-gemote* or the meeting of wise men; and it was also variously styled, in Latin, *commune concilium regni*, *magnum concilium regis*, *curia magna*, *conventus magnatum vel procerum*, *assisa generalis*, and *communitas regni Angliæ* (*e*). We have instances of its meeting to order the affairs of the kingdom, to make new laws, and to mend the old,—or, as Fleta 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 (*f*); and after the union of the different Saxon kingdoms, the Mirrour (*g*) informs us, that King Alfred ordained for a perpetual usage, that these councils should

(*a*) Mod. Un. Hist. xxiii. 307; Lappenberg's England under the Saxons, vol. ii. p. 284.

(*b*) Prynne on 4 Inst. 2.

(*c*) Mill, Eng. Gov. 11, 85; and the preamble to the statute of Westminster I., 3 Edward 1, A.D. 1275.

(*d*) "*De minoribus rebus principes consultant, de majoribus, omnes.*"—Tac. de Mor. Germ. c. 11.

(*e*) Glanvil. l. 13, c. 32; l. 9, c. 10; Pref. 9 Rep.; 2 Inst. 156.

(*f*) Fleta, l. 2, c. 2.

(*g*) C. 1, s. 3.

[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. The subsequent Saxon and Danish monarchs also held frequent councils of this sort, as appears from their respective codes of laws; the titles whereof usually show them to be enacted, either by the king with the advice of his wittenagemote, or by the wittenagemote with the advice of the king, or by both of them together (*h*). And there appears to be no doubt, that these great councils were also held under the first princes of the Norman line; for Glanvil, who wrote in the reign of Henry the second, speaking of the particular amount of an amercement in the sheriff's court, says it had never been yet ascertained by the general assize, or assembly, but was left to the custom of particular counties (*i*), the general assize here spoken of being none other than the wittenagemote or parliament, whose statutes are put in contradistinction to custom; and in the case of the Abbey of St. Edmund's-bury, in Edward the third's time, an Act of Parliament, made in the reign of William the Conqueror, was pleaded, and judicially allowed by the court (*k*).

Hence it indisputably appears that parliaments, or general councils, were coeval with the kingdom itself. How those parliaments were constituted is another question, and, particularly, whether the commons were originally summoned at all, or when they began to form a distinct assembly (*l*); but it is generally agreed, that the constitution of parliament, as it now stands, was in the main marked out so long ago as the seventeenth year of

(*h*) "All their laws" (the laws of the Anglo-Saxons) "express the "assent of this council, and there "are instances where grants made "without its concurrence have "been revoked. It was composed "of prelates and abbots, of the "aldermen of shires, and, as it is "generally expressed, of the noble "and wise men of the kingdom."—Hallam, Mid. Ages, vol. ii. p. 388, 7th ed.

(*i*) Fleta, l. 9, c. 10.

(*k*) Year Book, 21 Edw. 3, 60.

(*l*) Hallam's Mid. Ages, vol. iii. c. 8.

[King John, A.D. 1215, in the great charter granted by that prince; wherein he promised 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, within forty days' notice, to assess aids and scutages when necessary. And this constitution has in fact subsisted at least from the year 1264, 49 Hen. III.; there being still extant writs of that date to summon knights, citizens and burgesses to parliament (*m*). We may proceed, therefore, to inquire wherein consists this constitution of parliament, as it now stands, and has stood for the space of at least six hundred years; and in the prosecution of this inquiry we shall consider, first, the manner and time of the assembling of parliament; secondly, its constituent parts; thirdly, the laws and customs of the parliament, considered as one supreme council; fourthly and fifthly, the laws and customs of each house separately; sixthly, the methods of proceeding, and of making statutes, in both houses; and lastly, the manner of the adjournment, prorogation, and dissolution of parliament.

I. *As to the manner and time of the assembling of Parliament.*—It is a branch of the royal prerogative, that no parliament can be convened of its own authority, or by the authority of any, except the sovereign alone,—a prerogative founded in reason; for, in the first place, it is highly necessary that the parliament should be called together for a determinate time and place; and it is also highly becoming the dignity and independence of parlia-

(*m*) "It is well known that the earliest writs of summons to cities and boroughs, of which we can prove the existence, are those of Simon de Montfort, Earl of Leicester, bearing date 12th December, 1264, in the forty-ninth year of Henry the third. After a long controversy, almost all judicious inquirers seem to have acquiesced in admitting this origin of popular representation."—Hallam, Mid. Ages, vol. iii. p. 40.

[ment, that it should be called together by one of its own constituent parts, that is to say, by the sovereign, whose will is uniform and steady, who is the first person in the nation, and who has a separate existence, and is capable of performing any act, at a time when no parliament is in being. Nor is it an exception to this rule that, by some modern statutes, on the demise of the sovereign, if there be then no parliament in being, the last parliament revives; in which case, it sits again for six months, unless sooner dissolved; for this revived parliament is merely the old parliament, and which was originally summoned by the crown.

It is true that, by a statute, 16 Car. I. c. 1, it was enacted, that if the king neglected to call a parliament for three years, the peers might assemble and issue out writs for choosing one; and in case of neglect of the peers, the electors for counties and boroughs might meet and choose their own representatives; but that Act was esteemed so highly detrimental and injurious to the royal prerogative, that it was repealed by the statutes 13 Car. II. st. 1, cc. 7 and 14. It is also true, that the convention-parliament, which restored King Charles the second, met above a month before his return: the lords by their own authority, and the commons in pursuance of writs issued in the name of the keepers of the liberty of England by authority of parliament: and that the said parliament sat till the 29th of December, full seven months after the Restoration; and enacted many laws, several of which are still in force; but that was for the necessity of the thing, which supersedes all law; 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 writ (*n*); but inasmuch as it was at that time a great doubt among the lawyers, whether even this healing Act made it a good parliament (*o*), many people holding in the negative,

(*n*) Stat. 12 Car. 2, c. 1.

(*o*) 1 Sid. 1.

[although upon too nice a scruple, it was thought necessary to confirm its Acts in the next parliament, by the statutes 13 Car. II. st. 2 cc. 7 and 14. It is likewise true, that at the time of the Revolution, A.D. 1688, the lords and commons, of 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; and in such a case as the palpable vacancy of the crown, it follows *ex necessitate rei*, that the form of the royal writs must be laid aside equally as if the whole royal line had become extinct; in which latter event 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 of 1688 assemble; so that these two capital exceptions, which were justifiable only on a principle of necessity, do in fact prove the rule, that the sovereign, only, can convoke parliament.

And this, by the antient statutes of the realm, the sovereign was bound to do every year, or oftener, *if need be* (*p*); which words "*if need be*," appear to have been so loosely collocated, that such of our sovereigns as were averse to parliaments could readily dispense with them, on the pretence that there was "*no need*" of them: but to remedy this, it was enacted by the statute 16 Car. II. c. 1, that the sitting and holding of parliaments should not be intermitted above three years at the most; and by the statute 1 W. & M. sess. 2, c. 2, that for redress of all grievances, and for the amending, strengthening, and preserving the laws, parliaments ought to be held *frequently*; besides

(*p*) 4 Edw. 3, c. 14; 36 Edw. 3, c. 10.

[which, it was by a subsequent statute, 6 & 7 W. & M. c. 2, s. 2, further provided, that a new parliament should be called within three years after the determination of a former one. The importance of these provisions has been, however, much lessened in modern times by the course of public business, the exigencies of which invariably lead to the assemblage of parliament in every year. And we may here note, that (by Magna Charta) forty days were required to intervene between the date of the King's writ for the assembling of parliament, and the actual assembling,—a provision re-enacted by 7 & 8 Will. 3, c. 25; but (by 15 & 16 Vict. c. 23) the forty days have been reduced to thirty-five; and no particular interval of time need apparently intervene between the end of one session and the commencement of another session of one and the same parliament.

II. *The constituent parts of Parliament.*—These are the sovereign in his royal political capacity, and the three estates of the realm, to wit, the lords spiritual, the lords temporal, and the commons; the sovereign and these three estates together forming the great corporation or body politic of the kingdom (*q*); of which the sovereign is said to be *caput, principium, et finis;* that is to say, upon their coming together, the sovereign meets them, and without him there can be no beginning of a parliament; and the crown also has alone the power of dissolving them (*r*); and the lords spiritual and temporal sit (with the sovereign) in one house; and the commons sit by themselves in another.

It is highly necessary for preserving the balance of the constitution, that the executive power should be a branch, and only a branch, of the legislative; for if the executive and the legislative powers were absolutely one and identi-

(*q*) 4 Inst. 1, 2; stat. 1 Eliz. c. 3; Hale, of Parl. 1.
(*r*) 4 Inst. 6.

[cal, that would be productive of tyranny; and, on the other hand, the total disjunction of the executive and the legislative powers would in the end become equally tyrannical; *e. g.*, the long parliament of Charles the first, when it assumed the power of legislation, in exclusion of the royal authority, soon afterwards assumed likewise the reins of administration, and established a worse oppression than any which it pretended to remedy. To hinder therefore any such oppression, the sovereign is himself a part of parliament: but the share of legislation, which the constitution has placed in him, consists in the power of rejecting rather than of resolving, this being deemed sufficient to answer the end proposed. For, as Cicero observes of the negative of the Roman tribunes, the crown has not any power of doing wrong, but merely of preventing wrong from being done (*s*); that is to say, the crown cannot begin of itself any alteration in the established laws; but it may disapprove of the alterations proposed to be made therein by the two houses; and the true excellence of the English government has in fact been stated to consist in this, that all the parts of it form a check upon each other: the people a check on the nobility, and the nobility a check upon the people, by the mutual privilege of rejecting what the other has resolved; while the sovereign is a check upon both; and his executive power again is 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 sovereign, but of his ministers (*t*).]

Let us now consider these constituent parts of parliament separately and in detail, passing over for the present the sovereign, whose majesty will be the subject of the next and many subsequent chapters, and considering in this place only the three estates of the realm.

(*s*) "*Sulla—tribunis plebis sud lege injuriæ faciendæ potestatem ademit, auxilia ferendi reliquit.*" De Leg. 3, 9.

(*t*) See stat. 12 Car. 2, c. 30.

And the first in order are the "spiritual lords." These consist of the Archbishops of Canterbury and York; the Bishops of London, Durham, and Winchester; and twenty-one other bishops,—being twenty-four bishops in all, besides the two archbishops; [and they hold, or are supposed to hold, certain antient baronies under the crown; for William the Conqueror thought proper to change the spiritual tenure of frank-almoign, or free alms, under which the bishops had held their lands during the Saxon government, into the feudal or Norman tenure by barony; which subjected their estates to all civil charges and assessments from which they were before exempt (*u*); and in right of their succession to those baronies, which were unalienable from their respective dignities, the bishops were allowed seats in the house of lords (*x*),—although they are not, strictly speaking, "*peers of the realm*" (*y*). And we may here observe, that, prior to the dissolution of the monasteries by Henry the eighth, the spiritual lords comprised also twenty-seven mitred abbots and two priors (*z*); also, that after the union with Ireland, in 1801, there also sat and voted in the house of lords the Archbishop of Dublin (or of Armagh alternately) and three Irish bishops; but that by the Irish Church Disestablishment Act, 1869 (32 & 33 Vict. c. 42), after the 1st January 1871, no archbishop or bishop of the Church of Ireland might sit in the house of lords. The lords spiritual are, in the eye of the law, a distinct estate from the lords temporal, and are so distinguished in many Acts of parliament; yet in practice they are usually blended together under the one name of "the lords,"—they intermixing their votes, and the majority of votes on such intermixture binding both estates. And from this want of a

(*u*) Gilb. Hist. Exch. 55; Spelm. W. I. 291.

(*x*) Co. Litt. by Harg. 134 b, n. (1); Hallam's Hist. Mid. Ages, vol. iii. pp. 6—8, 7th ed.

(*y*) Staunford, P. C. 158; 1 Bl. Com. p. 157.

(*z*) Co. Litt. 97; Seld. Tit. Hon. 2, 5, 27.

[separate assembly and separate negative of the prelates, some writers have argued very cogently, that the lords temporal and spiritual are now, in reality, only one estate (*a*); 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 its validity, though every lord spiritual should vote against it; of which Selden (*b*) and Sir Edward Coke give many instances (*c*): as, on the other hand, it would presumably be 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 whether, in the latter case, the act would not be an ordinance, rather than an Act (*d*).]

And here we may observe, that the Bishop of Sodor and Man is not entitled to sit as a spiritual lord; and that with regard to bishoprics of recent creation (such as Manchester, St. Albans, Truro, Liverpool, &c.), the bishops are summoned as spiritual lords successively, according to their seniorities, on the occurrence of any vacancy in one or other of the twenty-four antient bishoprics, other than those of London, Durham, and Winchester (*e*).

The "lords temporal" consist exclusively of *peers*,—or, as they are otherwise described, persons of the rank of nobility, by whatever title of nobility distinguished, dukes, marquesses, earls, viscounts, or barons: of which dignities

(*a*) Whitelock on Parliam. c. 72; Warburt. Alliance, b. ii. c. 3; Dyer, 60.

(*b*) Baronage, p. 1, c. 6.

(*c*) 2 Inst. 585—587; Keilw. 184.

(*d*) 4 Inst. 25.

(*e*) As to *Manchester*, see 10 & 11 Vict. c. 108; 13 & 14 Vict. c. 41; 23 & 24 Vict. c. 69; *St. Albans*, 38 & 39 Vict. c. 34; and *Truro*, 39 & 40 Vict. c. 54; 41 & 42 Vict. c. 44; 50 & 51 Vict. c. 12. See also the Bishoprics Act, 1878 (41 & 42 Vict. c. 68), providing for the foundation of additional bishoprics at *Liverpool*, *Newcastle*, *Southwell*, and *Wakefield*; and the Bishopric of Bristol Act, 1884 (47 & 48 Vict. c. 66), providing for the constitution of a bishopric of Bristol separate from that of Gloucester and Bristol; and under the earlier Act, a bishopric of *Liverpool* and one for *Newcastle* have been already established; and under the later Act (amended by the 57 & 58 Vict. c. 21), a separate bishopric for Bristol will shortly be established.

we shall speak more hereafter. These for the most part sit in their own right, but a certain number of them sit in a representative capacity. The representative peers are they who, under the Acts of Union with Scotland and Ireland (*f*), are elected respectively to represent in the house of lords the body of the Scottish and Irish nobility respectively,—the Scottish representative peers being sixteen in number, and the Irish twenty-eight (*g*): and the former are elected for one parliament only, but the Irish for life; and these last, therefore, hold their seats in parliament on the same tenure as the peers of England. [The aggregate number of the lords temporal for the time being is indefinite, and may be increased at will by the power of the crown; and, in the reign of Queen Anne, there was an instance of creating no less than twelve together; in contemplation of which, in the reign of King George the first, a bill passed the house of lords, and was countenanced by the then ministry, for limiting the number of the peerage; but the bill miscarried in the house of commons, whose members were then desirous of keeping the avenues to the other house as open and easy as possible. And the distinction of rank and honours is necessary in every well-governed state,—in order to reward eminent public services in a manner the most desirable to individuals, and the least burdensome to the community, and which excites a laudable and generous emulation in others. A body of nobility is also necessary in our mixed constitution, in order to support the rights of both the crown and the people, by forming a barrier to withstand the encroachments of either; but the nobility are of more particular importance, as forming the immediate support of the throne; wherefore, in the time of the Great Rebellion, when the commons determined to extirpate the monarchy,

(*f*) Vide sup. vol. I. pp. 87, 96.

(*g*) See (as to the election of the sixteen Scottish peers) 6 Ann. c. 11; 2 & 3 Will. 4, c. 63; 10 & 11 Vict. c. 52; and 14 & 15 Vict. c. 87; and (as to the election of the twenty-eight Irish peers) 39 & 40 Geo. 3, c. 67, and 20 & 21 Vict. c. 33.

[they abolished also the house of lords. And the nobility being thus expedient to the state, it is expedient also that they should form an independent branch of the legislature, because otherwise their privileges might be overborne in some popular tumult, or (what is perhaps more probable) their social pre-eminence might end by corrupting the popular representation. 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," who form the third and remaining estate in parliament, consist of the representatives of the nation at large (exclusive of the peerage), elected by the means that we shall have occasion to explain in the course of this chapter. In a free state, every man ought to be in some measure his own governor; and therefore a branch at least of the legislative power should reside in the whole body of the people. And this power, when the territories of the state are small, and its citizens easily known, may be exercised by the people in their aggregate or collective capacity, as was 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; and when, therefore, after the social war, all the burghers of Italy were admitted to be free citizens of Rome, and each had a vote in the public assemblies, it became impossible to distinguish the spurious from the real voter, and from that time all elections and popular deliberations grew tumultuous and disorderly; which paved the way for Marius and Sylla, Pompey and Cæsar, to trample on the liberties of their country, and at last to dissolve the commonwealth. In so large a state as ours, it is therefore very wisely contrived that the people should do, by their representatives, what it is impracticable for them to perform in person; and to do this, by representatives chosen for separate dis-

[tricts, wherein all the voters are, or easily may be, distinguished.] Accordingly the counties (*h*) were represented in our parliament by those members who were technically called knights of shires; and the cities and boroughs were represented by those who were, in like manner, termed citizens and burgesses; but this distinction between knights and burgesses (which had long been merely social) has now entirely ceased, as a consequence of the assimilation of the county with the borough franchise, under the Representation of the People Act, 1884 (*i*), and the Redistribution of Seats Act, 1885 (*k*). The universities, also, of Oxford, Cambridge, and London, are represented by persons chosen by their respective graduates; as are also the Scotch universities, and the Dublin University. The collective number of English and Welsh representatives prior to the changes made by the Redistribution of Seats Act, 1885, was 491, of Scottish representatives 60, and of Irish representatives 105, in all 656 (*l*); but under and in consequence of the last-mentioned Act, the aggregate number of representatives is now 670, of which 495 are English representatives, 72 are Scotch representatives, and 103 are Irish representatives. [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 commonwealth; to advise the crown (as appears from the writ of summons)

(*h*) 1 Bl. Com. p. 159.

(*i*) 48 Vict. c. 3.

(*k*) 48 & 49 Vict. c. 23.

(*l*) By 7 & 8 Vict. c. 53, and 15 & 16 Vict. c. 9, the boroughs of Sudbury and St. Albans were wholly disfranchised for bribery; and the same punishment was inflicted, and for the same cause, by 30 & 31 Vict. c. 102, and 31 & 32 Vict. c. 6, on the boroughs of Totnes, Reigate, Great Yarmouth, and Lancaster; and by 33 & 34 Vict. c. 21, on the boroughs of Bridgwater and Beverley; and as to the city of *Norwich*, see 39 & 40 Vict. c. 72; and as to Boston, Canterbury, Chester, Gloucester, Macclesfield, Oxford, and Sandwich, see the Corrupt Practices (Suspension of Elections) Act, 1882 (45 & 46 Vict. c. 68); and now the Redistribution of Seats Act, 1885, s. 3.

["*de communi consilio super negotiis quibusdam arduis et urgentibus, regem, statum, defensionem regni Angliæ et ecclesiæ Anglicanæ concernentibus*" (*m*). And therefore he is not bound to consult with, or take the advice of, his constituents upon any particular point, unless he himself thinks proper and prudent so to do; but possibly, by keeping in close touch with his constituents, he will best grasp and comprehend the real wants of the nation.

These are the several parts of parliament: the king, the lords spiritual and temporal, and the commons: parts, of which each is so necessary that the consent of all three is required to make any new law that shall bind the subject. Whatever is enacted for law, by one, or by two only, of the three, is no statute; and to it no regard is due, unless in matters relating to their own privileges. For though, in the time of the Great Rebellion, the commons once passed a vote (*n*), "that whatever is enacted or declared "for law by the commons in parliament assembled, hath "the force of law; and all the people of this nation are "concluded thereby, although the consent and concurrence "of the king or house of peers be not had thereto;"—yet when the constitution was restored in all its forms, it was particularly enacted, by the statute 13 Car. II. st. 1, c. 1, that if any person should advisedly affirm that both or either of the houses of parliament have any legislative authority without the king, such persons should incur all the penalties of a *præmunire;* that is, the forfeiture of lands and goods, imprisonment, and loss of all civil rights (*o*).

III. We are next to examine *the laws and customs* relating to parliament, thus united together and considered as one aggregate body. And the power and jurisdiction of parliament, says Sir Edward Coke, is so transcendent

(*m*) 4 Inst. 14.
(*n*) 4th Jan. 1648.
(*o*) Vide post, bk. VI.

[and absolute, that it cannot be confined, either for causes or persons, within any bounds (*p*); 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, indeed, sovereign and uncontrollable authority in the making, confirming, enlarging, restraining, abrogating, repealing, reviving and expounding of laws, concerning matters of all possible denominations, ecclesiastical or temporal, civil, military, maritime, or criminal; this being the place where that absolute despotic power, which must in all governments reside somewhere, is intrusted by the constitution of these kingdoms. All mischiefs and grievances, operations and remedies, that transcend the ordinary course of the laws, are within the reach of this extraordinary tribunal; it can regulate or new model the succession to the crown,—as was done in the reigns of Henry the eighth and William the third; it can alter the established religion of the land,—as was done in a variety of instances, in the reigns of king Henry the eighth and his three children; it can change and create afresh even the constitution of the kingdom and of parliaments themselves,—as was done by the Acts of Union, and the several statutes for triennial and septennial elections; it can, in short, do everything that is not naturally impossible; and therefore some have not scrupled to call its power, by a figure rather too bold, the omnipotence of parliament. True it is, that what the parliament doth, no authority upon earth can undo; so that it is a matter most essential to the liberties of this kingdom, that such members be delegated to this important trust as are most eminent for their probity, their fortitude and their knowledge; for it was a known apophthegm of the great lord treasurer Burleigh, "that England could never be ruined but by a parliament;" and, as Sir Matthew Hale observes, "this being the

(*p*) 4 Inst. 36.

[" 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 sub- " jects of this kingdom are left without all manner of " remedy " (*q*); and the president Montesquieu even ventures to predict that as Rome, Sparta, and Carthage have lost their liberty, and perished, so the constitution of England will in time lose its liberty, and will also perish, that is to say, will perish when the legislative power shall, if ever, become more corrupt than the executive (*r*).

In order to prevent the mischiefs which might arise from an assembly, which should be (either from incapacity or from any other cause) not sufficiently representative of the nation, it is part of the custom and law of parliament, that no one shall sit or vote in either house, unless he be twenty-one years of age (*s*),—a matter which has also been expressly declared by the statute 7 & 8 Will. III. c. 25 (*t*); and further, that an alien, unless naturalized, cannot serve in parliament (*u*); and in fact, although naturalized, he could not, at one time, have so served (*x*); but since 1870, this too stringent rule has been relaxed (*y*). Also, by the statutes 30 Car. II. st. 2, and 1 Geo. I. st. 2, c. 13, no member could at one time either vote or sit in either house till he had taken the several oaths of allegiance, of supremacy, and of abjuration;] however, in place of these, a single oath was provided by 29 & 30 Vict. c. 19 (the Parliamentary Oaths Act, 1866); and under that Act, and the 31 & 32 Vict. c. 72, the oath was so framed as to suit (it was hoped) all members whether they belonged to the Church of England or not; and the more especially so, as any members who (as being Quakers, Moravians, or Separatists) were permitted by law to *affirm* (*z*), might on taking their

(*q*) Of Parliaments, 49.
(*r*) Sp. L. 11, 6.
(*s*) Whitelock, c. 50; 4 Inst. 37.
(*t*) Com. Journ. 16 Dec. 1690.
(*u*) Com. Journ. 10 March, 1623.
(*x*) 12 & 13 Will. 3, c. 2.
(*y*) Naturalization Act, 1870 (33 & 34 Vict. c. 14).
(*z*) See (as to *Quakers* and *Moravians*) 3 & 4 Will. 4, c. 49; and (as to *Separatists*) 3 & 4 Will. 4, c. 82; also 1 & 2 Vict. c. 77.

seats make and subscribe their "affirmation" in the same form as, but in lieu of taking, the oath (*a*). But inasmuch as the relaxation in question did not extend to openly professed Atheists (*b*), it has now been provided, by the Oaths Act, 1888 (51 & 52 Vict. c. 46), that anyone objecting to be sworn, and stating, as the ground of his objection, either that he has no religious belief or that the taking of an oath is contrary to his religious belief, may make a solemn affirmation to the effect of the appropriate oath, and in lieu of such oath,—a provision which is clearly applicable to parliament as well as to courts of justice.

It is also law, that [if any person be made a peer by the crown, or elected to serve in the house of commons by the people, yet the respective houses, upon complaint of any crime in such person and proof thereof, may adjudge him disabled and incapable to sit as a member; and this, by the custom of parliament (*c*). For, as every court of justice hath laws and customs for its governance, so the high court of parliament hath also its own peculiar law, called the *lex et consuetudo parliamenti* (*d*); the whole of which law and custom has its original from this one maxim, "that whatever matter arises concerning either "house of parliament ought to be examined, discussed, "and adjudged in that house to which it relates, and not "elsewhere" (*e*). Hence, for instance, the lords will not suffer the commons to interfere in settling the election of a peer of Scotland; and the commons, on the other hand, will not allow the lords to judge of the election of a burgess.

(*a*) 29 & 30 Vict. c. 19, s. 4; 31 & 32 Vict. c. 72, s. 11.

(*b*) Clarke *v.* Bradlaugh, 7 Q. B. D. 38, 151; 8 Q. B. D. 63; 8 App. Ca. 354.

(*c*) Whitelock of Parl. c. 102; Lords' Journ. 3 May, 1620; 13 May, 1624; 26 May, 1725; Com. Journ. 14 Feb. 1580; 21 Jun. 1628; 21 Jan., 9 Nov. 1640; 6 Mar. 1676; 6 Mar. 1711; 3 Feb. 1769; 17 Feb. 1769; 3 May, 1783; and vide post, p. 362.

(*d*) 1 Inst. 11; 4 Inst. 50.

(*e*) 1 Inst. 15; Burdett *v.* Abbott, 14 East, 148; Stockdale *v.* Hansard, 9 Ad. & El. 1; Bradlaugh *v.* Gossett, 12 Q. B. D. 271.

[The *privileges* of parliament are also very considerable, and were originally established for the protection of its members, as well from being molested by their fellow subjects, as also from being oppressed by the crown (*f*). The extent of these privileges is nowhere clearly defined; and in the thirty-first year of Henry the sixth, Sir John Fortescue declared, "that it hath not been used aforetime "for the justices to in anywise determine the privileges of "the High Court of Parliament; the determination and "knowledge of which belongs to the lords of parliament, "and not to the justices" (*g*);] but Lord Holt, at a later period, more justly observed, "that the authority of parlia-"ment is from the law, and as it is circumscribed by law, "so it may be exceeded; and if they do exceed those legal "bounds and authority, their acts are wrongful and cannot "be justified, any more than the acts of a private man" (*h*); and therefore, in an action for an alleged violation of private right, wherein the defendant pleaded, that the act was done under the authority of an order of the house of commons, the court held that it was not precluded, on the ground of parliamentary privilege, from considering whether such authority constituted, in point of law, a sufficient justification of the act; nor from giving judgment in favour of the plaintiff, if it deemed the justification insufficient (*i*).

[The more notorious privileges of parliament are privilege of speech and privilege from arrest. First, as regards privilege of speech:—It was declared by the statute 1 W. & M. sess. 2, c. 2, to be one of the liberties of the people, "that the freedom of speech and debates and pro-"ceedings in parliament, ought not to be impeached or "questioned in any court or place out of parliament;" and

(*f*) 1 Bl. Com. 164.

(*g*) Seld. Baron. part i. c. 4; 3 Wils. 183; Burdett *v.* Abbott, 14 East, 1; 4 Taunt. 401.

(*h*) Salk. 505; 2 Ld. Raym. 1114.

(*i*) Stockdale *v.* Hansard, 9 Ad. & Ell. 1; 11 Ad. & Ell. 253; Howard *v.* Gossett, 10 Q. B. 359.

[this privilege is specifically demanded of the sovereign by the speaker of the house of commons, at the opening of every new parliament (*k*).] Secondly, as regards privilege from arrest:—A peer is (by virtue of his dignity) exempt from arrest in civil cases at all times (*l*); and a member of the house of commons is (by the privilege of parliament) so exempt while the house is sitting, and also for such a period before the first meeting, and after the dissolution of a parliament, as may enable him conveniently to come to the house from, and to return to, any part of the kingdom (*m*). [This immunity continues also for forty days after every prorogation, and for forty days before the next appointed meeting (*n*); which is now in effect so long as the parliament subsists, it seldom being prorogued for more than fourscore days at a time. The courts antiently took cognizance of this exemption by issuing a writ of privilege in the nature of a supersedeas, to deliver the member out of custody when arrested in a civil suit (*o*); for to have acted upon a mere letter from the speaker to the judges requiring them to stay proceedings against a privileged person, was regarded (and was rightly regarded) by the judges as being contrary to their oath of office (*p*); but when the 12 & 13 Will. III. c. 3, had enacted that no privileged person should be subject to arrest or imprisonment, it was held that such arrest was irregular *ab initio*, and that the party might accordingly be discharged upon motion (*q*). There is no precedent of any such writ of privilege, but only in civil suits; and the statutes 1 Jac. I. c. 13, and 12 & 13 Will. III. c. 3, spoke only of civil actions; and the claim of privilege was usually guarded

(*k*) May's Laws of Parl. p. 64.

(*l*) 6 Rep. 62; 9 Rep. 49 a, 68 a; Couche *v.* Lord Arundel, 3 East, 127; 1 Vent. 298; Davis *v.* Lord Rendlesham, 7 Taunt. 679; R. *v.* Bishop of St. Asaph, 1 Wils. 332.

(*m*) Cassidy *v.* Steuart, 2 Man. & Gr. 169.

(*n*) 2 Lev. 72; Goudy *v.* Duncombe, 1 Exch. 430.

(*o*) Dy. 59; 4 Pryn. Brev. Parl. 757.

(*p*) Latch. 48; Noy, 83.

(*q*) Str. 989.

[with an exception as to indictable crimes (*r*), *i.e.*, of treason, felony, and breach of the peace (*s*). And so fully was this exception established, that instances are not wanting wherein privileged persons were convicted of misdemeanors, and committed, or prosecuted to outlawry, even in the middle of a session (*t*); which proceeding afterwards received the sanction and approbation of parliament (*u*); and in particular, as regards the writing and publishing of seditious libels, it was resolved by both houses that there was no privilege in such a case (*x*); a resolution, the principle of which extends equally to every indictable offence; moreover, the privilege is not available, where the arrest is for contempt of court or on a writ of attachment (*y*). Even in indictable cases, however, there belongs to the houses of parliament the right of receiving immediate information of the imprisonment or detention of any member, with the reason for which he is detained (*z*),—a practice recognized by the divers temporary statutes for suspending the *Habeas Corpus* Act, whereby it has been usually 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 house has been obtained for his commitment (*a*); but the usage has uniformly been, ever since the Revolution, that the communication has been subsequent to the arrest,—a usage which has been adopted, as being in fact the only practicable one (*b*).

(*r*) Com. Journ. 17th Aug. 1641.

(*s*) 4 Inst. 25; Com. Journ. 20th May, 1675.

(*t*) Mich. 16th Edw. 4, in Scacc. Ld. Raym. 1461.

(*u*) Com. Journ. 16th May, 1726.

(*x*) Ib. 24th Nov.; Lords' Journ. 29th Nov. 1763.

(*y*) Gent-Davis *v.* Harris, 40 Ch. Div. 190.

(*z*) Com. Journ. 20th Apr. 1762.

(*a*) See particularly 17 Geo. 2, c. 6; 44 Vict. c. 4 (Protection of Person and Property (Ireland) Act, 1881); 44 & 45 Vict. c. 5 (Peace Preservation (Ireland) Act, 1881), continued by the 49 & 50 Vict. c. 24, and by the 50 & 51 Vict. c. 20, and now expired.

(*b*) See Mr. Gray's case, M. P. for Dublin, 1882, committed for contempt of court by Lawson, J.

[There were formerly also privileges of parliament, protecting the lands and goods of the members, and even their menial servants, not only from illegal violence, but also from seizure under the civil processes of the courts of law; and even now to assault by violence a member of either house, or his menial servants, is a high contempt of parliament, and is there punished with the utmost severity; and peculiar penalties were at one time annexed to this offence by the statutes 5 Hen. IV. c. 6, and 11 Hen. VI. c. 11.] But all parliamentary exemptions from liability to civil process, save only as to the freedom of the *person* of the member himself, are now at an end; having been first restrained, and at length totally abolished, by the legislature. For by 10 Geo. III. c. 50, it was enacted (in extension of certain previous statutes (*c*)), that any action might be brought against a member of either house, or against his servants, or against any other person entitled to privilege of parliament; and that none such, nor any process, or proceeding thereupon, should be impeached, stayed or delayed by pretence of privilege,—except that the *person* only of a member should not thereby be subjected to any arrest or imprisonment.

In addition to the privileges of freedom of speech and of freedom from arrest, the right of parliament freely to publish their own reports, papers, votes, and other proceedings, is specially protected by statute; for it has been provided by 3 & 4 Vict. c. 9, that any one on being sued or prosecuted on account of the publication of such matters by authority of either house, may have the proceedings against him stayed, and all process therein superseded, on production to the court of a proper certificate of such authority; and that no person shall be liable to any civil or criminal proceeding for printing extracts or abstracts of parliamentary documents, provided he do so *bonâ fide* and without malice (*d*). It is moreover clearly settled, that in

(*c*) 12 & 13 Will. 3, c. 3; 2 & 3 Anne, c. 18; 11 Geo. 2, c. 24.

(*d*) Stockdale *v.* Hansard, 11 Ad. & El. 297.

any case in which the privileges of either house of parliament have been violated, that house has power to commit to prison the person guilty of such contempt (*e*); and also, by its order, to set at liberty any one who, in breach of its privileges, has been arrested in respect of any act by him done in his capacity of member of parliament (*f*).

Such are the general heads of the laws and customs relating to parliament, considered as one aggregate body. We will next proceed to consider the laws and customs of each house separately; and firstly, of the House of Lords; and secondly, of the House of Commons.

IV. The laws and customs relating to the house of lords are easily stated. [One very antient privilege (only worth mentioning as illustrative of a former era) is that declared by the Charter of the Forest (*g*), confirmed in parliament in the ninth year of Henry the third: 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.] In the next place, the peers have a right to be attended by the judges (and also by certain of her Majesty's counsel) for the greater dignity of their proceedings; and in the exercise of their appellate jurisdiction, it has often been their practice to request the opinion of the judges, in point of law, upon the question which is before them for their determination. [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 and other persons above mentioned) their regular writs of summons issued out at

(*e*) Burdett *v.* Abbott, 14 East, 158.

(*f*) 1 Jac. 1, c. 13.

(*g*) C. 11.

[the beginning of every parliament, *ad tractandum et consilium impendendum*, though not *ad consentiendum* (*h*); but whenever of late years they have been members of the house of commons (*i*), their attendance on the lords hath fallen into disuse (*k*). And another privilege is that every peer, by licence obtained from the Crown, may make another lord of parliament his proxy, to vote for him in his absence (*l*),—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 (*m*); but by the orders of the house itself, no proxy may vote on a question of guilty or not guilty; and only a spiritual lord shall be proxy for a spiritual lord, and a temporal lord for a temporal lord; and the use of proxies may also be suspended on divisions; and if a peer, after appointing a proxy, appears personally in parliament, his proxy is thereby *ipso facto* revoked (*n*).

Each peer has also a right, by leave of the house, when a vote passes contrary to his sentiments, to enter his dissent on the journals of the house, with the reasons for such dissent; which is usually styled his *protest* (*o*). All bills likewise, that may in their consequences 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; which latter house has, however, the power of rejecting them altogether.

(*h*) Stat. 31 Hen. 8, c. 10; Smith's Commonw. b. 2, c. 3; Moor. 551; 4 Inst. 4; Hale of Parl. 140.

(*i*) Com. Journ. 11th April, 1614; 8th Feb. 1620; 10th Feb. 1625; 4 Inst. 48.

(*k*) There are several resolutions before the Restoration, declaring the attorney-general, on account of this attendance, incapable of sitting among the commons; and Sir Heneage Finch is said to have been the first attorney-general who so sat.

(*l*) Seld. Baronage, p. 1, c. 1.

(*m*) 4 Inst. 12; Com. Dig. Parl. D. 19; 1 Woodd. 41.

(*n*) 4 Inst. 13.

(*o*) Lord Clarendon relates, that the first instances of protests with reasons, in England, were in 1641, before which time they usually only set down their names as dissentient to a vote. (1 Ld. Mountm. 402.)

[There are also certain statutes which are peculiarly relative to the house of lords. Thus the statutes 6 Ann. cc. 11 and 78 (*p*), regulate the election of the sixteen Scotch representative peers; prescribe the oaths which are to be taken by the electors; direct the mode of balloting; prohibit the peers electing from being attended in an unusual manner: and expressly provide that no other matter shall be treated of in that assembly save only the election, on pain of incurring a *præmunire*.] Provisions are also made by 39 & 40 Geo. III. c. 67, and 20 & 21 Vict. c. 33, as to the manner of electing the Irish representative peers. And by 34 & 35 Vict. c. 50, every peer who becomes *bankrupt* is disqualified from sitting or voting in the house of lords, until his bankruptcy shall have been determined as in that Act mentioned (*q*),—a provision which is maintained in the Bankruptcy Act, 1883 (*r*); and the disqualification is now to be removed only if the adjudication is annulled, or if the bankrupt obtains his discharge with a certificate that the bankruptcy was caused by misfortune, and not by misconduct.

V. [The laws and customs that are peculiar,—distinctively peculiar,—to the house of commons concern either (1.) the raising of taxes, or (2.) the election of members.

Firstly, with regard to *taxes*:—It is the antient indisputable privilege and right of the house of commons, that all grants or subsidies, or parliamentary aids, do begin in their house, and are first bestowed by them (*s*); although their grants are not effectual to all intents and purposes, until they have the assent of the other branch 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 tax themselves, through

(*p*) Amended by 10 & 11 Vict. c. 52; 14 & 15 Vict. c. 87; and 15 & 16 Vict. c. 35.

(*q*) 34 & 35 Vict. c. 50, s. 4.

(*r*) 46 & 47 Vict. c. 52, s. 32.

(*s*) 4 Inst. 29.

[their representatives in that house,—a reason which would be unanswerable if the commons taxed none but themselves, but it is notorioŭs that a very large share of property in the possession of members of the house of lords is equally taxable, and also taxed, with the property of the commons; and the true reason seems rather to be this :—The lords being an hereditary body, created by the sovereign, are more liable than the commons to be influenced by the crown,—the commons being an elective body, freely elected by the people, and liable to be rejected at the next election. It would therefore be extremely dangerous to give the lords any power of framing new taxes ; it is sufficient that they have the power of rejecting any which a too lavish or an improvident house of commons may grant ; and so reasonably jealous are the commons of this valuable privilege, that they will not permit the least alteration or amendment to be made by the lords in the mode of taxing the people by a *money bill*,—being any bill 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, or for private benefit, and collected in any particular district, as by turnpikes, parish rates, and the like; and the rule is even extended to all bills imposing pecuniary penalties or fines (*t*).]

Secondly, with regard to *elections* :—The election of members to serve in the house of commons is (in a general sense) the act of the people at large. For, in our mixed and free constitution, the law concedes to the people, not only the right of being represented in the legislative body,

(*t*) According to Sir Matthew Hale (On Parliaments, 65, 66), it is allowable for the lords to alter a money bill by *shortening* the period for which a tax is granted; and in such case, he is of opinion that the bill need not be sent back to the commons for their concurrence, but may receive the royal assent without further ceremony. (See Year Book, 33 Hen. 6, 17 ; Com. Journ. 22nd April, 1671 ; but see 1 Bl. Com. p. 170 ; May's Laws of Parl. p. 594, 8th edit.)

but also the choice of their own representatives; and this being a prerogative of the highest importance, it has been guarded with great anxiety from usurpation or abuse by many salutary provisions, which may be reduced to these three points:—1. The qualifications of the electors; 2. The qualifications of the elected; and 3. The proceedings at elections.

1. [As to the qualifications of the *electors*.—The reason of requiring any qualification at all in voters, has always been to exclude such persons as are in so mean a situation that they are esteemed to have no will of their own, and to be specially open to the undue influence of others. For if it were probable that every man would give his vote freely and without influence of any kind, then, upon the true theory and genuine principles of liberty, every member of the community, however poor, should have a vote in electing those delegates, to whose charge is committed the disposal of his property, his liberty, and his life;] and it has been one of the main objects of our constitution, to secure some share in the election of representatives (so far as possible) to every person capable of an independent exercise of the privilege. At the same time, the rights of property have always been regarded; and therefore a person who possesses in more places than one the prescribed qualification as to property, has always hitherto been allowed to vote in the election for each place, and consequently to share in returning several representatives to parliament; at least this has been the general principle of our constitution, and (subject to the changes presently to be mentioned) it is still the established law in England (*u*).

(*u*) Blackstone remarks (vol. i. p. 170), that the English system is framed on a wiser principle than either the voting by centuries or by tribes among the Romans; for, by the former method, it was chiefly property which turned the scale (and so laws were produced tending too much to aggrandize the patricians), and, in the latter, numbers only were regarded, which resulted in laws of a too levelling tendency.

And, firstly, of the qualifications which belong to the electors for *counties*.—The knights of shires, (that is to say, the members for counties, or divisions of counties,) have been considered as the representatives of the land-holders, or landed interest; and their electors, therefore, have always hitherto been required by law to have estates in lands or tenements within the county represented (*x*); and an estate to the value of 40*s*. per annum of free tenure, and in which the interest of the voter was freehold, was formerly the invariable qualification; and the law so continued until the year 1832, when by the Reform Act, 1832 (2 & 3 Will. IV. c. 45), new provisions were made with respect to the nature and value of the estates by which county (as well as other) electors should be qualified; and the qualification of electors has since been further regulated by the Representation of the People Act, 1867 (30 & 31 Vict. c. 102), and by the Representation of the People Act, 1884 (48 Vict. c. 3). And under the combined effect of this legislation, the lands or tenements in respect of which a vote may be claimed for the county, may now be either of freehold, of copyhold, or of any other tenure; and may be held either in fee or for life, or for years, or even by mere occupation (*y*). It is provided, however, that no mortgagee of any lands or tenements shall have any vote by reason of any mortgage thereon, unless he be in the actual possession or receipt of the rents and profits; but that the right of voting shall be in the mortgagor who remains in the actual possession or in the receipt of the rents and profits of the estate; moreover, the trustee of lands or tenements, shall not in any case have a right to vote by reason of his trust estate therein; but the *cestui que trust* in the actual possession or in the receipt of the rents and profits is to vote for the same (*z*).

(*x*) 8 Hen. 6, c. 7; 10 Hen. 6, c. 2.

(*y*) 2 & 3 Will. 4, c. 45, ss. 18, 20; 30 & 31 Vict. c. 102, ss. 5, 6.

(*z*) 2 & 3 Will. 4, c. 45, s. 23; 6 & 7 Vict. c. 18, s. 74.

And with regard to the value of the qualifying estate, it differed according to the different tenures; for (1.) As to *freeholds*.—With respect to all freeholders of inheritance —and also with respect to all freeholders for *life*, (provided these latter were in the actual *bonâ fide* occupation, or had acquired their freeholds by marriage, marriage settlement, devise, or promotion to any benefice or office,)—the qualification remained the same after as well as before the passing of the Reform Act, 1832, viz. "40*s.* by the year at least, above all charges" (*a*); which last-mentioned qualification had been established by 8 Hen. VI. c. 7, and was then of substantial amount, the sum of 40*s.* having been equal to 12*l.* in the reign of Queen Anne, and to 20*l.* in the time of George III. And with respect to freeholders *not* of inheritance, but for life only, and who were not themselves in the actual *bonâ fide* occupation, nor had acquired their estates in any of the ways just mentioned, their lands or tenements must have been of "the clear yearly value of "not less than 5*l.* (formerly 10*l.*), above all rents and "charges payable out of or in respect of the same" (*b*); but whereas a freehold rentcharge was at one time a qualification (*c*), it has now (under sect. 4 of the Representation of the People Act, 1884) ceased to be so, unless it be a tithe rentcharge. And (2.) As to *copyholds* and customary *freeholds*.—Persons seised thereof at law or in equity for life or lives, or for any larger estate, were qualified to vote for the county, if the property was of the "clear yearly value of not less than 5*l.*, over and above all "rents and charges payable out of or in respect of the "same" (*d*). And (3.) As to *leaseholds*.—Every person entitled, as lessee or assignee, to any lands or tenements (of whatever tenure) for the unexpired residue of a term which was originally for not less than sixty years (*e*)

(*a*) 2 & 3 Will. 4, c. 45, s. 18.

(*b*) 30 & 31 Vict. c. 102, s. 5; 2 & 3 Will. 4, c. 45, s. 18.

(*c*) Nichols *v.* Bulwer, Law Rep., 6 C. P. 281.

(*d*) 30 & 31 Vict. c. 102, s. 5.

(*e*) Trotter *v.* Watson, Law Rep., 4 C. P. 434; Warburton *v.* Denton, ib. 6 C. P. 267.

(whether determinable on life or not), was qualified to vote, if the lands were of "the clear yearly value of 5*l.* (formerly "10*l.*) or upwards, over and above all rents and charges "payable out of or in respect of the same" (*f*); and if the term was originally for not less than twenty years (whether so determinable or not), then if the lands were of the clear yearly value of 50*l.* or upwards—over and above such rents and charges (*g*), the person entitled thereto, as lessee or assignee, was also entitled to vote; but as regards a sub-lessee, or an assignee of an under-lease, it was required, that, in order to vote in respect of such term of twenty years, he should be also in the actual occupation of the premises (*h*).

And besides the qualification of *ownership*, there was also (under the Reform Act, 1832) the qualification of occupation, commonly called *the franchise by occupation;* for by that Act, every one was qualified to vote at an election for the county, who occupied, *as tenant*, any lands or tenements within the county, for which he was liable to a yearly rent of not less than 50*l.* (*i*); and by 6 & 7 Vict. c. 18, s. 73, in the case of joint occupation, each occupier might have voted if the rent when divided by the number of the occupiers gave at least 50*l.* for each of them; also, by the Representation of the People Act, 1867, s. 6, every person was qualified who, *as owner or tenant*, occupied any lands or tenements within the county, of the rateable value of 12*l.* a year or upwards (*k*); and in the case of a joint ownership, if the rateable value on being divided by the number of the joint occupiers gave a value which would confer on each occupier a vote, each of them might vote, but not so that more than two should vote in respect of the same premises, unless they derived their title thereto by descent, succession, marriage, marriage settlement, or devise;

(*f*) 30 & 31 Vict. c. 102, s. 5.
(*g*) 2 & 3 Will. 4, c. 45, s. 20.
(*h*) Ibid.
(*i*) Ibid.
(*k*) 30 & 31 Vict. c. 102, s. 6; Mather *v.* Allendale, Law Rep., 6 C. P. 272.

or unless they were partners carrying on business therein (*l*); but, under the Representation of the People Act, 1884 (48 Vict. c. 3), s. 4, one only of such co-owners may now vote, unless in the case of persons so deriving title as aforesaid, or unless in the case of partners *bonâ fide* occupying land for partnership purposes.

Latterly, however, the legislature resolved upon an assimilation of the qualifications of electors in both counties and boroughs; and accordingly, by the Representation of the People Act, 1884 (48 Vict. c. 3), s. 2, a uniform "*household franchise*" (and a uniform "*lodger franchise*") at elections has been established in all counties (and boroughs) throughout the United Kingdom; and every man possessed of a household qualification (or of a lodger qualification) is entitled, if the qualifying premises are situate in a county, to be registered as a voter, and (when registered) to vote at an election for such county; and the Act defines a household qualification as the qualification enacted by the 3rd section of the Representation of the People Act, 1867, and a lodger qualification as the qualification enacted by the 4th section of the same Act,—these respective qualifications having been enacted by the Act of 1867 as the qualifications respectively for householders and lodgers voting at elections for *borough* constituencies as hereinafter mentioned (*m*); and (by sect. 3) a servant or employé inhabiting offices (which his master does not inhabit) is entitled to vote as an "*inhabitant occupier*" of such offices. The Act of 1884 has also provided (by sections 5 and 6), that every man occupying any land or tenement in a county (or borough) in the United Kingdom of the clear yearly value of not less than 10*l.* shall be entitled to be registered as a voter, and (when registered) to vote at an election for such county (or borough) in respect of such occupation, subject to the like conditions respectively as a man was, at the passing of the Act, entitled to

(*l*) 30 & 31 Vict. c. 102, s. 27.

(*m*) Vide infra, p. 358.

be registered as a voter, and to vote at an election for such county in respect of the "*county occupation franchise*" (and at an election for such borough in respect of the "borough occupation franchise"), the county occupation franchise here referred to being (by sect. 7) declared to be the *franchise by occupation* above referred to as having been introduced for county elections by section 6 of the Representation of the People Act, 1867. It is, however, provided, that no one shall be entitled to be registered as a voter, or to vote at any election for a county, in respect of the occupation of any dwelling-house, lodgings, land, or tenement situate in a borough; but nothing in the Act is to deprive any person who at the date of the passing of the Act was registered in respect of any qualification to vote for any county (or borough) of his right to be from time to time registered and to vote for such county (or borough) in respect of such qualification; though if any one is so registered in respect of the county (or borough) occupation franchise (*n*), by virtue of a qualification which also qualifies him for the franchise under the Act, he is to be entitled to be registered in respect of such latter franchise only (*o*).

And in completion of the assimilation of counties with boroughs, and by means of the Redistribution of Seats Act, 1885 (48 & 49 Vict. c. 23), the representation of numbers has been (as nearly almost as may be) rendered general in counties (as also in boroughs) all over the kingdom,—each of the counties at large that are named in the Seventh Schedule to the Act returning the number of members named in the schedule, and being divided into the same number of parliamentary divisions as the number of members, and each division returning one member (*p*). And here it is convenient to note, that prior to the Redistribution of Seats Act, 1885, just referred to, certain counties and boroughs returned more than one member,

(*n*) 48 Vict. c. 3, s. 7, sub-ss. 6, 7.
(*o*) Sect. 10.
(*p*) 48 & 49 Vict. c. 23, s. 9.

e. g., Yorkshire returned ten members and Lancashire eight members; London returned four members, and Manchester, Liverpool, Birmingham, and Leeds respectively three; and while that state of the representation of counties and boroughs continued, it was enacted, by the Representation of the People Act, 1867 (30 & 31 Vict. c. 102), ss. 9, 10, that, at a contested election for any county or borough returning three or more than three members, no person should vote for more than two candidates; or, in the city of London, for more than three; and in Wales the right of election for some of the principal towns or boroughs represented was shared by other boroughs, which were thence called "contributory boroughs" (*q*),—all which provisions are now superseded by reason of the one member one constituency principle; nevertheless, the city of London, although it returns two members, yet is not two constituencies.

And it is in all cases an essential requisite to the right of voting, that the voter shall have been first duly *registered* as such (*r*). And as regards the registration of electors:—The overseers of every parish and township are required, by the Parliamentary Registration Acts (*s*), by public notice (*t*), in every year to call on all persons entitled to vote for the county, who are not already on the register, or who have changed their qualification or abode, and who are desirous of having their names inserted in the register about to be made, to send in to them a notice of claim in writing, before the 20th July; and the overseers are to make out lists of persons who have sent in such notices accordingly (*u*). And the overseers are further

(*q*) 31 & 32 Vict. c. 58, s. 16.

(*r*) 2 & 3 Will. 4, c. 45, s. 26; 6 & 7 Vict. c. 18, s. 2; 28 & 29 Vict. c. 36; 30 & 31 Vict. c. 102, ss. 3—6, &c.

(*s*) These are 6 & 7 Vict. c. 18 (1843), and 41 & 42 Vict. c. 26 (1878), and any enactment amending the same or otherwise relating to the registration of parliamentary electors. (See 48 Vict. c. 3, s. 8; 48 Vict. c. 15, s. 19.)

(*t*) See 41 & 42 Vict. c. 26, s. 9; 48 Vict. c. 15, s. 1.

(*u*) The clerk of the peace of each county is to supply the over-

required, by the Representation of the People Act, 1867 (30 & 31 Vict. c. 102), to cause to be made out a list of all persons having a right to vote for the county in respect of the occupation of premises (*x*). And with regard to the new county voters who are entitled to be registered under the Representation of the People Act, 1884 (48 Vict. c. 3), in respect either of a "*household qualification*" or a "*lodger qualification*," it has been provided generally (*y*), that all the enactments of the Registration Acts which relate to the registration of persons entitled to vote in boroughs in respect of the like qualifications respectively, shall, with the necessary variations and alterations, apply to counties as well as to boroughs: and this assimilation of the county with the borough franchise as regards registration has been carried out with the most elaborate detail by the Registration Act, 1885 (*z*). And the several lists, together with the register of the preceding year, are afterwards examined into by *revising barristers* appointed for the purpose (*a*), who hold open courts in order to determine in every case of objection the validity of the votes, and from whose decision on any point of law there is an appeal to the Queen's Bench Division (*b*). These

seers with proper forms for this purpose, and with copies of such parts of the register for the current year as relate to each parish or township (28 & 29 Vict. c. 36, s. 3). And the registrar of births and deaths of the sub-district is to transmit to such overseers returns of persons *dying* therein (41 & 42 Vict. c. 26, s. 11; and 48 Vict. c. 15, 2nd sched., pt. 1, r. 18).

(*x*) 30 & 31 Vict. c. 35, s. 30.

(*y*) 48 Vict. c. 3, s. 8, sub-s. 4.

(*z*) 48 Vict. c. 15.

(*a*) Under the Parliamentary and Municipal Registration Act, 1878 (41 & 42 Vict. c. 26), it is provided that where the whole or part of the area of a municipal borough is co-extensive with or included in the area of a parliamentary borough, the lists of parliamentary voters and the "burgess lists" shall, as far as practicable, be made out and revised together (sects. 15, 28).

(*b*) As to the appeal, see 41 & 42 Vict. c. 26, s. 37; and 44 & 45 Vict. c. 68, s. 14. As to the appointment of "revising barristers," their duties, salaries, authority and qualification, and as to assistant revising barristers, see 6 & 7 Vict. c. 18, ss. 28 et seq.; 26 & 27 Vict. c. 122, s. 4; 28 & 29 Vict. c. 36; 29 & 30 Vict. c. 54; 35 & 36 Vict.

lists and registers, when corrected, are transmitted by the revising barristers to the clerk of the peace for the county, who is to copy and cause them to be printed into a book (*c*), which book is to be delivered complete, on or before the last day of December, to the sheriff, to remain in his custody, and in that of his successors (*d*); and it thereupon becomes the *register* of the electors for the county for the then succeeding year (*e*). It is provided, however, that (subject to an exception presently to be mentioned) no person shall be so registered in any year, as a freeholder, copyholder, customary tenant, or tenant in antient demesne, unless he shall have been in the actual possession of the property in respect of which he claims, or in the receipt of the rents and profits thereof for his own use, for *six calendar months* at least, next previous to the fifteenth day of July in such year (*f*); nor as leaseholder, assignee, or occupying tenant at the rent of 50*l.* or upwards, unless he shall have been in such receipt, possession or occupation (as the case may require) for *twelve* calendar months next previous to such date (*g*). But this is subject to the exception just referred to, viz., that if the lands or tenements entitling such owner, holder, or occupier to vote, shall have come to the person claiming to be registered, at any time within these respective periods, by descent, succession, marriage, marriage settlement, devise, or pro-

c. 84; 36 & 37 Vict. c. 70; 37 & 38 Vict. c. 53; 41 & 42 Vict. c. 26; 48 & 49 Vict. c. 57; 49 & 50 Vict. c. 42; and 51 & 52 Vict. c. 10, ss. 9, 10; Willis *v.* Maclachlan, 1 Ex. D. 376. And as to the expenses of elections, see 41 & 42 Vict. c. 26, s. 30; 51 & 52 Vict. c. 10, s. 4; and 54 & 55 Vict. c. 18.

(*c*) 6 & 7 Vict. c. 18, s. 47.

(*d*) Ibid.; 30 & 31 Vict. c. 102, s. 38.

(*e*) 6 & 7 Vict. c. 18, s 49; and see 52 & 53 Vict. c. 19 (a temporary Act).

(*f*) 2 & 3 Will. 4, c. 45, s. 26; see 30 & 31 Vict. c. 102, s. 5; 41 & 42 Vict. c. 26, s. 7.

(*g*) By 6 & 7 Vict. c. 18, s. 73, tenant occupiers might vote for the *county* in respect of *different* premises occupied in immediate succession for the twelve calendar months,—a provision which, by 30 & 31 Vict. c. 102, s. 26, was extended to the occupation of *different* premises in immediate succession in *boroughs*.

motion to any benefice in a church, or by promotion to any office, he may claim to have his name inserted as a voter in the then next lists, and be registered accordingly, no length of possession or receipt of profits being in that case required (*h*). Moreover, with regard to the franchise acquired (under the Representation of the People Acts, 1867 and 1884) by the occupation, as owner or tenant, of lands or tenements of the qualifying value, it is required that the party shall during the preceding twelve months have been rated to all poor rates (if any) made in respect of the premises, and shall, before the 20th July in the same year, have paid *all* the rates which became payable up to the preceding 5th January. We may add to the foregoing remarks, that a person once entered on the county register need make no fresh claim for any succeeding year, so long as the nature of his qualification and his place of abode remain the same (*i*).

Secondly, of the qualifications which belong to the electors for *boroughs*.—The electors of citizens and burgesses (or the representatives of the cities and towns) were supposed to be the mercantile part, or trading interest, of the kingdom. And inasmuch as trade used to be of a fluctuating nature, and seldom long fixed in a place, it used formerly to be left to the crown to summon, *pro re natâ*, the most flourishing towns to send representatives to parliament (*k*); and thus, as towns increased in trade and grew in population, they became, one by one, raised to the rank of parliamentary boroughs. But the crown appears to have grown lax in the exercise of this prerogative; whence many towns, which from an obscure original had risen to high importance, remained unrepresented, except as forming part of the county in which they lay (*l*); and, on the other hand, many towns which had lost their importance still continued to return members to the house

(*h*) 2 & 3 Will. 4, c. 45, s. 26.

(*i*) See 6 & 7 Vict. c. 18, ss. 5, 6, 79.

(*k*) 1 Bl. Com. p. 174.

(*l*) See Chit. Prerog. of the Crown, 67, 68; 1 Doug. Elect. 69.

of commons (*m*),—the natural result of which (in the case of such latter towns), was, to place the elective franchise practically in the hands of some private proprietor, locally connected with the borough, and who was thus enabled to send his own nominees to parliament. But by the Reform Act, 1832 (2 & 3 Will. IV. c. 45), a new arrangement was made, under which the representation of the trading and manufacturing interest was, in both these particulars, placed upon a different basis,—no towns of conspicuous importance being then left unrepresented, and those which had fallen into comparative insignificance being deprived of their rank as parliamentary boroughs (*n*). And afterwards, by the Representation of the People Act, 1867 (30 & 31 Vict. c. 102), some further efforts were made in the same direction, by reducing on the one hand the number of members returnable for places of comparatively small population, and by increasing on the other hand those returnable for some of the most important towns, and by the creation at the same time of certain new boroughs in districts hitherto insufficiently represented (*o*); and by the

(*m*) A few, however, had from time to time been eased of their parliamentary franchise, upon their own petition, having been desirous of avoiding the burthen then incumbent upon boroughs of paying *wages* to their representatives; which burthen also then lay upon counties,—the wages for a knight of the shire being 4*s*. a day, and for a citizen or burgess, 2*s*.,—according to the rate established in the reign of Edward the third. (1 Bl. Com. p. 174; Prynne's Fourth Register of Parliamentary Writs; Henry's Hist. of Great Britain, vol. viii. p. 107.)

(*n*) The boroughs thus disfranchised are mentioned in 2 & 3 Will. 4, c. 45, sched. A. In Sched. O. of 2 & 3 Will. 4, c. 64, the different places then sending members to parliament are enumerated, and their boundaries defined. (See 2 & 3 Will. 4, c. 64, s. 35.) By 30 & 31 Vict. c. 102, s. 48, boundary commissioners were appointed to revise these boundaries; and a subsequent Act (31 & 32 Vict. c. 46) settled and described (in accordance with their Report) the limits of certain boroughs, and the divisions of certain counties, for the purpose of parliamentary elections. As to *detached* parts of counties, see 7 & 8 Vict. c. 61.

(*o*) By 30 & 31 Vict. c. 102, s. 17, any borough which, at the census of 1861, had a population of less than 10,000 was thenceforth to

Redistribution of Seats Act, 1885 (48 & 49 Vict. c. 23), the representation of numbers has been (as nearly almost as may be) rendered general, in boroughs (as in counties), all over the kingdom. For, firstly, the seventy-eight English boroughs, the two Scotch boroughs, and the seventeen Irish boroughs mentioned in the first part of the first schedule to the Act are deprived of their representation as boroughs, and are thrown into their respective counties (*p*); and the five counties of cities or of towns (including Berwick-upon-Tweed) mentioned in the second part of the same schedule are in like manner thrown into the counties in which they are locally situate; and, secondly, the city of London is reduced to returning two members only, and the thirty-six English boroughs, and three Irish boroughs mentioned in the second schedule are to return one member only (*q*); and, thirdly, the fourteen English boroughs, three Scotch boroughs, and two Irish boroughs mentioned in the third schedule are to have an increased number of members (*r*); and, fourthly, a large number of new parliamentary boroughs has been created, those, namely, which are specified in the fourth schedule to the Act (*s*); and, fifthly, the parliamentary boroughs mentioned in the sixth schedule to the Act are divided into the parliamentary return not more than a single member—a provision which deprived thirty-eight boroughs of one of their members. But on the other hand, Manchester, Liverpool, Birmingham, and Leeds each thereafter returned three members instead of two (sect. 18).

(*p*) Sect. 2.

(*q*) Sect. 4.

(*r*) Sect. 5. That is to say, the total number of members of the specified boroughs is to be as follows:—Liverpool, nine; Birmingham, Tower Hamlets, and Glasgow, seven each; Manchester, six; Leeds and Sheffield, five each; Bristol, Edinburgh, Belfast, and Dublin, four each; Bradford, Hull, Nottingham, Salford, Southwark, and Wolverhampton, three each; and Swansea and Aberdeen, two each.

(*s*) Sect. 6. Of these new boroughs, the most important are Bethnal Green (two members), Camberwell (three members), Finsbury (three members), Hackney (three members), Islington (four members), Lambeth (four members), St. Pancras (four members), Shoreditch (two members), and West Ham (two members).

tary divisions specified in the same schedule, and each division is to return the number of members (usually one only) specified in the schedule (*t*).

With respect to the universities of Oxford and Cambridge, their franchise rests upon a different principle: and antiently they were not as a rule specially represented in parliament; [though once, in the twenty-eighth year of Edward the first, 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 (*u*). But it was King James the first who indulged these universities with the permanent privilege of sending members of their own body to protect in the legislature the rights of the republic of letters.] And a similar privilege has since been conferred on the universities of London, Dublin, Edinburgh, St. Andrew's, Glasgow, and Aberdeen (*x*).

And here it may be useful, or at all events interesting, to state as regards the right of elections in boroughs, that until the Reform Act, 1832, the right of election for citizens and burgesses depended entirely upon the several charters, customs, and constitutions of the respective boroughs (*y*),—a variety which formerly occasioned infinite disputes, and was in some measure remedied by the statutes 2 Geo. II. c. 24; 28 Geo. III. c. 52, and 34 Geo. III. c. 83, which provided, that the determination of a committee of the house of commons, as to the right of voting for any particular place, should be thereafter conclusive on the subject for ever; and that under the system

(*t*) Sect. 8.

(*u*) 1 Prynne's Parl. Writs, 345.

(*x*) The universities of Edinburgh and St. Andrew's send one representative, and those of Glasgow and Aberdeen another (see 2 & 3 Will. 4, c. 88, and 31 & 32 Vict. c. 48). As to London, see 30 & 31 Vict. c. 102.

(*y*) 1 Bl. Com. 174; Oldfield's Representative History, vol. iii. pp. 1, 2, 9.

established by the Reform Act, 1832, the rights of voting in boroughs consisted, first, of certain antient rights reserved during the lives of those individuals who enjoyed them at the date of that Act (*z*); secondly, of certain antient rights reserved in perpetuity (*a*); and, thirdly, of certain new rights conferred by the Act. And, firstly, the antient rights reserved during the lives of the parties, were chiefly those which the customs of some boroughs permitted to be claimed by the *scot and lot* inhabitants (*i. e.*, such as paid the poor's rate as inhabitants), by the inhabitant householders, and by the *potwallers* (*i. e.*, such as cooked their own diet in a fire-place of their own); but the number of individuals who can claim these franchises has now become so diminished by death, as to be of little practical importance. Secondly, the antient rights reserved in perpetuity were such as may be claimed in respect of being a "burgess or freeman" of a parliamentary borough (*b*), or (in counties corporate) of being a "freeholder or burgage tenant"; therefore, all who, by the custom of the place, would have been entitled to vote on these grounds if the Reform Act, 1832, had not been

(*z*) See Russell's Reform Act, p. 30.

(*a*) By the Honorary Freedom of Boroughs Act, 1885 (48 & 49 Vict. c. 29), persons of eminence may be admitted as honorary freemen of the borough, but not so as to acquire thereby any right of voting, parliamentary or municipal.

(*b*) It may be remarked that in the *city of London*, the qualification was being *a freeman* and *liveryman;* and the freedom of that city can be obtained in three different methods: 1. By *patrimony*, i. e. as the son of a freeman born after the father has acquired his freedom; 2. By *servitude*, i. e. by serving an apprenticeship of seven years to a freeman; and 3. By *redemption*, i. e. by purchase. But besides being free of the city, it was requisite, in order to have a vote as a "freeman and liveryman," to be entitled to wear the *livery* of some one of the companies, guilds, or fraternities of which the corporation of the city of London consists; and the power of calling to the livery is vested in the court or ruling body of the particular company. (See 2 Brownl. 286; Minutes of Common Council, 9th March, 1836; Pulling on the Customs of London, 81; and, as to making out the lists of liverymen, see 6 & 7 Vict. c. 18, s. 20.)

passed, were still permitted to exercise the franchise (*c*)—provided their title accrued on an admission prior to March, 1831, or was founded on *servitude*, (*i.e.* apprenticeship). Thirdly, the new rights conferred by the Act were in respect of the occupation within a parliamentary borough (either as owner or as tenant) *of any house, warehouse, counting-house, shop, or other building*, being either separately of the clear yearly value of not less than 10*l.* (*d*), or of that value jointly with land in the same borough, occupied by the same party as owner, or as tenant under the same landlord (*e*); and to this qualification (which has been usually called the "borough occupation franchise" to distinguish it from the "county occupation franchise" above referred to) the following restrictions were annexed:—The voter could not be registered in any year unless he had occupied the building—or some other building in the borough of the required value, in immediate succession (*f*)—for *twelve* calendar months next previous to the fifteenth day of July in such year (*g*); and had also, during such period of occupation, been rated to all the poor rates of the place (*h*); and had, on or before the 20th of July in that year, paid up all the poor rates and assessed taxes which had become payable from him, in respect of the premises, before the 5th of January then last (*i*); and had also resided for six calendar months, next previous to the fifteenth day of July in the same year, within the borough, or within *seven* statute miles thereof (*k*).

(*c*) 2 & 3 Will. 4, c. 45, s. 32.

(*d*) As to what is included under the words *house, &c.*, see 41 & 42 Vict. c. 26, s. 5; Piercy *v.* Maclean, Law Rep., 5 C. P. 252.

(*e*) 2 & 3 Will. 4, c. 45, s. 27.

(*f*) Sect. 28; 30 & 31 Vict. c. 102, s. 26.

(*g*) 41 & 42 Vict. c. 26, s. 7.

(*h*) See 30 & 31 Vict. c. 102, s. 7; 32 & 33 Vict. c. 41, s. 6; 42 & 43 Vict. c. 10; Stamper *v.* Overseers of Sunderland, Law Rep., 3 C. P. 388.

(*i*) See 2 & 3 Will. 4, c. 45, s. 27; and 11 & 12 Vict. c. 90.

(*k*) See 2 & 3 Will. 4, c. 45, s. 27; 6 & 7 Vict. c. 18, s. 76; and 41 & 42 Vict. c. 26, s. 7.

Such were the qualifications for borough electors under the Reform Act of 1832, and such they remained for a period of thirty-five years; but in the year 1867 the legislature, at the same time that it effected the alterations in the county franchise, and the partial redistribution of seats, both for counties and boroughs, already mentioned, modified also the borough franchise, by adding two fresh qualifications, namely, 1st, *the household franchise*, being the qualification in respect of being "an inhabitant occupier" (either as owner or tenant) of *any dwelling-house* (*l*) within the borough, such occupation having been a sole (and not a joint) occupation, and having continued for the whole of the twelve months preceding the fifteenth day of July in any year (*m*), and the voter having during such period been rated in respect of the premises to all the poor rates (if any), and having on or before the 20th of July in the same year, paid all of the same rates which became payable up to the preceding 5th day of January (*n*); and 2ndly, the *lodger franchise*, being the qualification in respect of being a *lodger*, the lodger having occupied in the borough and having resided in, as sole tenant, for the twelve months preceding the fifteenth day of July in any year, the same lodgings, being lodgings part of one and the same dwelling-house of a clear yearly value, if let unfurnished, of ten pounds or upwards, and having

(*l*) As to what is included under the term "dwelling-house," see 41 & 42 Vict. c. 26, s. 5; Cook *v.* Humber, 11 C. B., N. S. 33; Thompson *v.* Ward, Law Rep., 6 C. P. 327. By the House Occupiers' Disqualification Removal Act, 1878 (41 & 42 Vict. c. 3), a man may be registered and vote, though, during a part of the qualifying period, *not exceeding four months in the whole*, he shall, by letting or otherwise, have permitted the qualifying premises to be occupied as a furnished house by some other persons; and by the Electoral Disabilities Removal Act, 1891 (54 & 55 Vict. c. 11), although he may have been absent or out of residence, on official business, for the like period (i. e. not exceeding four months).

(*m*) 41 & 42 Vict. c. 26, s. 7.

(*n*) 30 & 31 Vict. c. 102, s. 3; Brewer, app., M'Gowen, resp., Law Rep., 5 C. P. 239; Smith *v.* Lancaster, ib. 246.

claimed to be registered as a voter at the next ensuing registration of voters (*o*).

As in the case of electors for counties, so in that of electors for boroughs, *registration* is an indispensable requisite to entitle the voter to the exercise of his franchise; and the manner of registration for boroughs is in general similar to that for counties; and as regards occupation voters, the similarity has been made almost exact by the Registration Act, 1885, as above mentioned. The electors need not (except in the case of a lodger) make any *claim* of their right to vote; their names are to be entered on the lists, whether any claim has been made or not (*p*). The lists are to be made out, in general, by the overseers of the poor, as in the case of counties (*q*); and, when settled by the revising barrister, are forthwith delivered to the town clerk for the borough, who is to provide a book, into which they are to be printed (*r*). This book is to be delivered over by the town clerk, on or before the last day of December in each year (*s*), to the returning officer of the borough, to be by him and his successors kept in safe custody: and it then becomes the register of the electors entitled to vote at any election for the borough to which it relates, for the next succeeding year (*t*); but no person,

(*o*) 30 & 31 Vict. c. 102, s. 4; 41 & 42 Vict. c. 26, ss. 6, 7, 22.

(*p*) Any elector, however, whose name is omitted from the list, or who desires to be registered for a different qualification than that which therein appears, must give notice of his claim. (6 & 7 Vict. c. 18, s. 15.)

(*q*) 6 & 7 Vict. c. 18, s. 13. The overseers are provided with the proper forms by the town clerk; or, if there be none, by the person appointed for the purpose by the returning officer. (Sect. 11.) The lists of *freemen* (in places where there are those who vote as such) are, however, made out by the town clerks (see 5 & 6 Will. 4, c. 76, s. 4; 6 & 7 Vict. c. 18, ss. 13, 14; The Queen *v.* Allday, 7 Ell. & Bl. 799); and the "freemen and livery lists" in the city of London, by the clerks of the different livery companies. (6 & 7 Vict. c. 18, s. 20.)

(*r*) 6 & 7 Vict. c. 18, s. 48. If there is no town clerk, the delivery is to the returning officer.

(*s*) See 30 & 31 Vict. c. 102, s. 38.

(*t*) 6 & 7 Vict. c. 18, ss. 48, 49.

though registered, was entitled to vote, unless his qualification as to *residence* continued at the time of polling (*u*),—a requisite which, *semble*, ought still to be observed; but the register being conclusive as to the right to vote (*x*), this requisite is not an effective one.

Such is the substance of the present law with respect to the qualification of electors for counties and for boroughs generally considered; and it remains only to notice certain electoral incapacities and restrictions. And firstly, no vote can be given by any female (*y*), nor by any but a man of full age, not subject to any legal incapacity, such, for example, as arises from being a lunatic, idiot, or outlaw in a criminal suit (*z*), or from having been convicted of perjury, felony (*a*), bribery, treating, or undue influence at any election (*b*). Secondly, no person can vote in right of any estate conveyed to him for the purpose of conferring the franchise, if made subject to a condition for defeating the conveyance when that object is accomplished; indeed, the effect of such a transaction is to vest the estate absolutely in the grantee, and any person who executes or prepares the conveyance, or gives his vote under it, is made liable to forfeit 40*l.* (*c*). Thirdly, only one person can be admitted to vote in respect of the same house or tenement (*d*); but this is only when a splitting of interests is made for election purposes, and in order to multiply votes,

(*u*) 6 & 7 Vict. c. 18, s. 79.

(*x*) Stowe *v.* Jolliffe, Law Rep., 9 C. P. 734; and vide infra, pp. 369, 370.

(*y*) See 7 & 8 Will. 3, c. 25, s. 8; 2 & 3 Will. 4, c. 45; Chorlton *v.* Lings, Law Rep., 4 C. P. 374. Females may vote in Municipal Elections (45 & 46 Vict. c. 50, s. 63); also, in County Council Elections (51 & 52 Vict. c. 41, s. 2).

(*z*) Rogers, Elect. p. 162.

(*a*) But a *pardon*, or the endurance of the punishment, restores competency. (See Rogers, p. 161.) *Secus*, as to convict with ticket of leave. (See 27 & 28 Vict. c. 47.)

(*b*) 17 & 18 Vict. c. 102, s. 6.

(*c*) 10 Anne, c. 23, s. 1.

(*d*) 7 & 8 Will. 3, c. 25, s. 7; 53 Geo. 3, c. 49. The practice of splitting votes for election purposes was not in modern times viewed with jealousy (Rogers, Elect. p. 174); but "faggot votes" have now been effectually abolished, by the 48 Vict. c. 3, s. 4.

as by the creation of "faggot votes"; and the restriction consequently extends not to cases of *bonâ fide* joint occupation or tenancy, nor to cases where there is a division by operation of law, as in descents (*e*); nor to the lodger franchise conferred by the 30 & 31 Vict. c. 102, nor to the household qualification conferred by the 48 Vict. c. 3. Fourthly, no English peer can be allowed to vote at any election (*f*). Fifthly, no metropolitan police magistrate can vote within his jurisdiction (*g*). Sixthly, no person shall be entitled to be registered in any year as a voter in the election for a county (*h*), city, or borough, who shall, within the twelve calendar months next previous to the 15th day of July in that year, have received parochial relief, or disqualifying alms (*i*). Seventhly, no person can vote at a *county* election in right of a house or other building, the occupation of which would (either separately or jointly with land occupied therewith) confer a vote in respect of the representation of any parliamentary *borough* under 2 & 3 Will. IV. c. 45, s. 27 (*k*); and this whether the right to vote for such borough, in respect of such building,

(*e*) 48 Vict. c. 3, s. 4.

(*f*) See Rogers, Elect. p. 162; 13 Com. Journ. 14 December, 1699. This point was again so decided by the Common Pleas in the year 1872, on a claim to vote advanced by the Marquis of Salisbury.

(*g*) 2 & 3 Vict. c. 71, s. 6. There used to be a similar incapacity attaching to members of the metropolitan police force (10 Geo. 4, c. 44, s. 18); to the police of the city of London (2 & 3 Vict. c. xciv. s. 7); and to the rural police (2 & 3 Vict. c. 93, s. 9); but all these incapacities have now been removed by the Police Disabilities Removal Act, 1887 (50 & 51 Vict. c. 9). At one time, all *persons employed in the collection or management of her Majesty's revenues* were also disqualified; but the enactments on this subject were repealed by 31 & 32 Vict. c. 73, and 37 & 38 Vict. c. 22.

(*h*) 30 & 31 Vict. c. 102, s. 40. Prior to this enactment, disqualification by reason of the receipt of parochial relief, did not apply in the case of a *county* voter.

(*i*) 2 Will. 4, c. 45, s. 36; 41 & 42 Vict. c. 26, s. 7. As to the nature of the alms the reception of which disqualifies, see R. *v.* Halesworth, 3 B. & Ad. 717; Hedon, 25 Com. Journ. 275. As to disqualifying relief, see also 41 & 42 Vict. c. 26, s. 12. *Medical* relief is no longer a disqualification (48 & 49 Vict. c. 46).

(*k*) Chorlton *v.* Johnson, Law Rep., 4 C. P. 426.

shall have been actually acquired or not; but this must now be understood only of such boroughs as are not thrown into any "parliamentary county" (*l*).

2. As to the qualification of the *elected*.—As regards the persons *to be elected* members of the house of commons, there are certain disqualifications, some of which depend upon the law and custom of parliament, declared by the house of commons itself, while others depend upon particular statutes (*m*); and, again, some are in respect of personal incapacity or misconduct, and others in respect of holding some office or employment considered to be incompatible with a seat in parliament.

And firstly, among the *personal* disqualifications are being an English peer (*n*), an infant (*o*), a married woman (*p*), or other female, a lunatic, an idiot (*q*), or having been convicted of treason or felony (*r*), or having been outlawed in a criminal prosecution (*s*), or being a notorious atheist (*t*). Also, under the Parliamentary Elections Act, 1868, any candidate reported by the judge to have known and consented to the commission of bribery at an election, or found guilty of bribery in any proceeding in which after notice of the charge he has had an opportunity of being heard, is disqualified from serving in the house of commons for the period of seven years (*u*); and under the law of bankruptcy, when any member of the house of commons was adjudged bankrupt under the Bankruptcy Act, 1869, he was thereby incapacitated for

(*l*) 2 & 3 Will. 4, c. 45, ss. 24, 25.

(*m*) 1 Bl. Com. p. 175; 4 Inst. 47, 48.

(*n*) But an Irish peer is eligible, unless he has been previously elected to serve in the House of Lords as a representative peer (39 & 40 Geo. 3, c. 67, Art. 4).

(*o*) Vide sup. p. 333.

(*p*) Beresford-Hope *v.* Lady Sandhurst, 23 Q. B. D. 79.

(*q*) Com. Journ. 1623, 1625; Com. Dig. Parliament, D. 9; Sheph. Elect. 109.

(*r*) 54 Geo. 3, c. 144; and (Irish Act) 19 & 20 Geo. 3, c. 25, s. 9.

(*s*) Rogers Elect. (8th ed.), p. 206.

(*t*) Att.-Gen. *v.* Bradlaugh, 14 Q. B. D. 667; but consider now the effect of the Oaths Act, 1888 (51 & 52 Vict. c. 46).

(*u*) 31 & 32 Vict. c. 125, ss. 43, 45.

the space of one year from sitting or voting, unless the order of adjudication was annulled, or his creditors were fully paid or satisfied; and if at the expiration of such period the order was not annulled or his debts were not paid, his seat became vacant (*x*); and now under the Bankruptcy Act, 1883, a debtor adjudged bankrupt cannot be elected to sit or vote in the house of commons, unless and until his adjudication is annulled, or else he obtains his discharge, together with a certificate that his bankruptcy was caused by misfortune, and not by misconduct (*y*). And by the Lunacy (Vacating of Seats) Act, 1886 (49 & 50 Vict. c. 16), it is provided that any member of the house of commons becoming a lunatic and being received into an asylum or house for lunatics may be visited by the Lunacy Commissioners and examined and (after six calendar months) again visited and examined by them; and if they report on each occasion that he is or continues a lunatic, his seat thereupon becomes vacant.

Secondly, among the *offices* and occupations or employments which incapacitate for a seat in parliament (and which are too numerous for complete enumeration in this work), we may specify the following persons who are disqualified on this ground:—judges of the superior courts in England (*z*), or Ireland (*a*); judges of the English county courts (*b*), or of the Court of Session or Exchequer in Scotland (*c*); officers of any court having jurisdiction in bankruptcy; clergy of the Established Church of England, or ministers of the Scottish Church, or of the Church of Rome (*d*); metropolitan police magistrates (*e*); and (within

(*x*) Ex parte Pooley, In re Russell, Law Rep., 7 Ch. App. 519.

(*y*) 46 & 47 Vict. c. 52, s. 32.

(*z*) Com. Journ. 9th Nov. 1605; 1 Bl. Com. 175; Judicature Act, 1873 (36 & 37 Vict. c. 66), s. 9.

(*a*) 1 & 2 Geo. 4, c. 44.

(*b*) See 25 & 26 Vict. c. 99, s. 4, renewing a prohibition to the same effect, contained in 10 & 11 Vict. c. 102, s. 18.

(*c*) 7 Geo. 2, c. 16, s. 4.

(*d*) 41 Geo. 3, c. 63, s. 4; 10 Geo. 4, c. 7, s. 9. Upon the controverted question as to the eligi-

(*e*) 10 Geo. 4, c. 44, s. 18; 3 & 4 Will. 4, c. 19, s. 19.

their respective jurisdictions) sheriffs of counties, returning officers of boroughs (*f*), recorders (*g*), and revising barristers (*h*). To this list we may add any person who holds any new office or place of profit under the crown, created since 25th October, 1705 (*i*); and any person who holds a royal pension, either during pleasure or for a term of years (*k*). Moreover, by 22 Geo. III. c. 45, a disqualification attaches to persons holding any contract with government on account of the public service (*l*); though as to these there is an exception in the case of members of an incorporated trading company, and also a provision, that where the completion of any contract shall devolve on any person by descent or limitation, will, or marriage, the incapacity shall not attach until twelve calendar months after he shall have become interested in such contract. Finally, by 6 Anne, c. 41, s. 26, any person already chosen a member of parliament (not being an officer in the army or navy accepting a new commission), who accepts any office of profit from the crown, is made to vacate his seat thereby: though if

bility of clergymen prior to the 41 Geo. 3, c. 63, Blackstone inclined to the negative, assigning as the reason that the beneficed clergy are represented in *convocation*. But this reason, as has been justly remarked, is not satisfactory (Coleridge's Blackstone, vol. i. p. 175); and the authorities were on the whole in favour of their eligibility. (Case of the Borough of Newport, 2 Luders, 260.)

(*f*) Bro. Ab. tit. Parliament, 7; 4 Inst. 48; Whitelocke of Parl. ch. 99, 100, 101; Com. Journ. 25th June, 1604; 14th April, 1614; 22nd March, 1620; 2nd, 4th, and 15th June, 17th Nov. 1685; Hal. of Parl. 114; Rogers, Elect. (8th ed.), p. 185. As to sheriff's substitute in Scotland, see 21 Geo. 2, c. 19, s. 11; 2 & 3 Will. 4, c. 65, s. 36.

(*g*) 5 & 6 Will. 4, c. 76, s. 103.

(*h*) 6 & 7 Vict. c. 18, s. 29.

(*i*) 6 Ann. c. 41, s. 25; 15 Geo. 2, c. 22; 22 Geo. 3, c. 82; 57 Geo. 3, cc. 62, 63, 84; and (Irish Act) 33 Geo. 3, c. 41. By 41 Geo. 3, c. 52, persons ineligible for England or Ireland were disqualified for the united parliament.

(*k*) 6 Ann. c. 41, and 1 Geo. 1, st. 2, c. 56. See 22 & 23 Vict. c. 5, with regard to the eligibility of persons holding certain *diplomatic* pensions; and 32 & 33 Vict. c. 15, as to persons who hold *civil service* pensions or *superannuation allowances*.

(*l*) As to this provision, see Rogers on Elections, 10th ed., App. p. 1, and Boyce *v.* Birley, Law Rep., 4 C. P. 296.

the office is one created prior to 25th of October, 1705, he is rendered capable of being re-elected; but by 30 & 31 Vict. c. 102, s. 32, no vacation of the seat or necessity for re-election arises where a member has been returned since his acceptance of any of the offices mentioned below, merely by reason of his subsequent acceptance of some other office in that list in immediate succession the one to the other (*m*). Subject to these standing restrictions and disqualifications, every subject of the realm is eligible as a member of the house of commons (*n*). [But there are

(*m*) The following are the offices referred to in the text: Lord High Treasurer; Commissioner for executing the offices of Treasurer of the Exchequer of Great Britain and Lord High Treasurer of Ireland; President of the Privy Council; Vice-President of the Committee of Council for Education; Comptroller, Treasurer, and Vice-Chamberlain of her Majesty's Household; Equerry or Groom in Waiting on her Majesty; any Principal Secretary of State; Chancellor and Under Treasurer of her Majesty's Exchequer; Paymaster-General; Postmaster-General; Lord High Admiral; Commissioner for executing the office of Lord High Admiral; Commissioners of her Majesty's Works and Public Buildings; President of the Board of Trade; Chief Secretary for Ireland; Poor Law Commissioner; Chancellor of the Duchy of Lancaster; Judge Advocate-General; Attorney-General for England or Ireland; Solicitor-General for England, Scotland, or Ireland; Lord Advocate for Scotland. (30 & 31 Vict. c. 102, Sched. H.)

(*n*) Blackstone (vol. 1, p. 175) says, that formerly the rule was, that all members should be inhabitants of the places for which they were chosen (1 Hen. 5, c. 1; 23 Hen. 6, c. 14); but that this (having been long disregarded) was at length entirely repealed by 14 Geo. 3, c. 58. Qualifications, however, were up to a much more recent period, required in regard to *property*, the changes on which subject have been as follows:—Formerly the provision was, that all knights of the shire should either 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." Afterwards the qualification was made to consist (without regard to rank or title) simply in real estate, which by the 9 Ann. c. 5, was fixed at 600*l*. per annum of freehold or copyhold estate for a county member, and 300*l*. of the like estate for a burgess. Afterwards it was, by 1 & 2 Vict. c. 48, made to consist of the like value in *real* estate in these several cases, but with the admission of *personal* estate, or of real and personal combined, as an equivalent; and now by 21 & 22 Vict. c. 26, all property qualifica-

[instances wherein persons in particular circumstances have forfeited that common right, being declared ineligible for that parliament by a vote of the house, or for ever ineligible by an act of the legislature (*o*). It was, however, an unconstitutional prohibition which was grounded on an ordinance of the house of lords (*p*), and inserted in the king's writs for the parliament holden at Coventry, in the sixth year of Henry the fourth,—that no apprentice or other man of the law should be elected a knight of the shire therein (*q*); and our legal historians have branded this parliament with the name of *parliamentum indoctum*, or the lack-learning parliament (*r*), Sir Edward Coke observing that there was never a good law made thereat (*s*).]

3. The third point, regarding elections, is the method of proceeding therein (*t*),—a matter which is regulated by the law of parliament and by the statutes which have been from time to time passed on the subject; and we shall give here some account of the method of proceeding in England and Wales (*u*). Now, as soon as the parliament is summoned the lord chancellor, on behalf of the crown, sends his warrant to the clerk of the crown in chancery: who thereupon issues out writs to the proper "returning officer" of each county or borough—that is to say, as the general rule, to the sheriff in the case of a county, and to the mayor in the case of a borough—commanding such officer to proceed in due course to the election (*x*). And the returning officer

tion is dispensed with. And the 43 Vict. c. 17, has made the like dispensation regarding municipal officers.

(*o*) 7 Geo. 1, st. 1, c. 28.

(*p*) 4 Inst. 10, 48; Pryn. Plea for Lords, 379; 2 Whitelocke, 359, 368.

(*q*) Pryn. on 4 Inst. 13.

(*r*) Walsingh. A.D. 1405.

(*s*) 4 Inst. 48.

(*t*) Com. Dig. Parl. D. 11.

(*u*) The principal statute now in force is the Ballot Act, 1872 (35 & 36 Vict. c. 33).

(*x*) The expenses and charges of the returning officer at a parliamentary election, are regulated and controlled by 38 & 39 Vict. c. 84, as amended by the 48 & 49 Vict. c. 62; and under these Acts, he is also entitled to require *security* to

must, in the case of a county election, within two days after the day on which he receives the writ,—and in the case of a borough election, on the day or on the day following the day on which he receives the same,—give public notice at some time between the hours of 9 A.M. and 4 P.M., of the day and place of election, or for the poll if the election is a contested one, and of the time and place where forms of nomination papers may be obtained (*y*). Such day of election in the case of a county or district borough must not be later than the ninth day (and in the case of other boroughs than the fourth day), after that on which the writ is received; and the place of election must be some convenient room in the town wherein the same is to be held; and the time must formerly have been during such two hours, between the hours of 10 A.M. and 3 P.M., as were in that behalf appointed by the returning officer (*z*); but by the Elections (Hours of Poll) Act, 1884 (47 & 48 Vict. c. 34), in the case of any parliamentary borough having registered electors exceeding in number 3,000, the time is now between eight o'clock in the forenoon and eight o'clock in the evening (*a*).

A candidate for election is nominated in writing subscribed by two registered electors of the county (or borough) as proposer and seconder, and by eight other registered electors as assenting to the nomination (*b*); and if at the expiration of one hour after the time appointed for the election, no more candidates stand nominated than there are vacancies to be filled up, such candidates are returned to the clerk of the crown in chancery as having been duly elected; but otherwise the returning officer shall adjourn

be given by the candidate, for the charges which may become payable under the Act. Some attempt has been made, by the 49 & 50 Vict. c. 57, to control the amount of these expenses, and for the taxation thereof.

(*y*) 35 & 36 Vict. c. 33, First Sched. (1).

(*z*) Ibid. (2), (3), (4).

(*a*) By 41 & 42 Vict. c. 4, in the case of a parliamentary election in the *metropolis*, the time for polling was made from 10 A.M. to 8 P.M.

(*b*) 35 & 36 Vict. c. 33, s. 1.

the election until a future day, on which the poll shall be taken in due course (*c*).

Up to a comparatively recent period, the poll in a contested election was taken by each voter openly stating at the polling booth the name of the candidate for whom he intended to vote; but, in the hope of diminishing the temptation to corrupt voting and its attendant evils, an important change was made, by the Ballot Act, 1872 (35 & 36 Vict. c. 33), which although passed only for a period of six years (*d*), has been successively continued, and is still in force. And by the provisions of that Act, in the case of a poll at an election, the votes are now given *by ballot* (*e*)—that is to say, by each voter handing in a ballot paper previously supplied to him, whereon are inscribed the names of each candidate, against one or more of whom, as the case may require, the voter secretly puts a mark and then places the paper in a closed box (*f*); and these ballot boxes having been taken charge of and examined by the returning officer, the result of the poll is ascertained by his counting the votes given to each candidate, and he then returns the name of such candidate or candidates, as the case may be, to whom the majority of votes have been given, to the clerk of the crown in chancery (*g*). And in the case of an equality of votes, but not otherwise, the returning officer, if himself a duly registered elector, may give a vote (*h*).

Such is the course of proceeding towards a general election upon the summoning of a new parliament. In the case of a particular vacancy, by death or otherwise, in an existing parliament, the course as regards the election for the particular place is the same, except that the warrant

(*c*) 35 & 36 Vict. c. 33, s. 1. As to the *polling districts*, see sect. 5.

(*d*) Sect. 33.

(*e*) Sect. 2.

(*f*) Ibid.

(*g*) Sect. 2. It may be here observed, that the system of voting provided by the Ballot Act, 1872, for parliamentary elections is, by the same statute (s. 29) applied also to contested *municipal* elections; and see 38 & 39 Vict. c. 40, amending the law regulating municipal elections; Pickering *v.* James, Law Rep., 8 C. P. 489.

(*h*) Sect. 2.

for the writ is given by the speaker, acting by order of the house, or (supposing the vacancy to occur during a prorogation or adjournment) by the speaker without any such order (*i*).

As to the elections for the Universities of Oxford, Cambridge, and London (to which the provisions of the Ballot Act as to the manner of voting do not apply), it has been provided by 24 & 25 Vict. c. 53, with regard to the two first named, and by 30 & 31 Vict. c. 102, with regard to the last, that any elector therein shall be at liberty to record his vote without personal attendance at the poll, by means of a *voting paper*, signed by him and delivered on his behalf, to the Vice-Chancellor (*k*), or to his deputy, at one of the appointed polling places (*l*)—by some other elector of the same university, previously nominated for that purpose by the elector so voting (*m*); and the polling at any election for either of the Universities of Oxford, Cambridge, or London, is not to continue for more than five days at the most (*n*).

Besides the points hitherto noticed there are some others which require attention, and which are common to all elections in England or Wales, whether for counties or boroughs, namely, the following:—

1. While no one is competent to vote unless his name appears on the register of electors (*o*), the law does not permit the qualification of any person, who has been so registered, to be questioned at the time of polling (*p*); and no inquiry whatever is allowed to be made on that

(*i*) 24 Geo. 3, sess. 2, c. 26; 52 Geo. 3, c. 144; 21 & 22 Vict. c. 110; 26 & 27 Vict. c. 20.

(*k*) 16 & 17 Vict. c. 68, s. 4; 30 & 31 Vict. c. 102, s. 41.

(*l*) As to the polling places for the Universities of Oxford and Cambridge, see 16 & 17 Vict. c. 68, s. 5.

(*m*) See 31 & 32 Vict. c. 65.

(*n*) 16 & 17 Vict. c. 68, s. 4; 30 & 31 Vict. c. 102, s. 43.

(*o*) 35 & 36 Vict. c. 33, s. 7.

(*p*) 6 & 7 Vict. c. 18, s. 79; Pryce *v.* Belcher, 3 C. B. 58; 4 C. B. 866; Stowe *v.* Jolliffe, Law Rep., 9 C. P. 734.

occasion, relative to the right of any person to vote, except only as follows,—that the sheriff or other returning officer shall (if required on behalf of any candidate to do so) put to the voter at the time of tendering his vote, and not afterwards, two questions (or either of them), worded in such manner as the Act of Parliament in that behalf prescribes (*q*),—the object of which is to ascertain, first, the identity of the proposed voter with the registered person in respect of whose qualification he proposes to vote; and, secondly, that the proposed voter has not already voted at that election (*r*); and the voter may also (upon the like requisition) be put to his oath upon these matters (*s*). But the law provides, that no person claiming to vote shall be excluded from doing so, unless it appears upon his answers to the questions, that he is not entitled to vote; or unless he refuses to take such oath (*t*).

2. Though no person can vote unless his name be on the register, yet a person who has been excluded therefrom by the decision of the revising barrister, may nevertheless tender his vote at the election; and the returning officer is bound to enter it in the poll book as having been tendered, distinguishing, however, all votes so claimed from votes admitted; and in the event of a petition complaining of an undue election or return, the correctness of the register, either as to votes excluded or admitted, may be impeached before the judge before whom the trial of the petition is conducted; and the vote may be either allowed

(*q*) Sect. 81. Analogous regulations are made for the university elections, with reference to objections to *voting papers*. (See 24 & 25 Vict. c. 53.)

(*r*) R. *v.* Thwaites, 1 Ell. & Bl. 704; 35 & 36 Vict. c. 33, First Sched. (27); and 43 Vict. c. 18, s. 3.

(*s*) 6 & 7 Vict. c. 18, s. 82. By 2 Geo. 2, c. 24, and 43 Geo. 3, c. 74, an oath in regard to *bribery* also might be put to the voter; but these enactments have been repealed. (See 17 & 18 Vict. c. 102, Sched. A.; 35 & 36 Vict. c. 33, Sched. 4.)

(*t*) R. *v.* Harris, 7 Car. & P. 253; R. *v.* Dodsworth, 8 Car. & P. 218; 6 Vict. c. 18, s. 82; 35 & 36 Vict. c. 33.

or rejected on such scrutiny, and the poll altered accordingly (*u*).

3. 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 (*x*). It is accordingly provided, that on every day appointed for the nomination, or for the election, or for taking the poll for the election, of a member to serve in parliament,—no soldier, within two miles of the city, borough, or place where the nomination or election is to be declared or poll taken, shall be allowed to go out of the barracks or quarters in which he is stationed, unless for the purpose of mounting or relieving guard, or for giving his vote at such election; and every soldier allowed to go out for any such purpose, within the limits aforesaid, must return to his barracks or quarters with all convenient speed, as soon as his guard shall have been relieved or vote tendered; but these provisions do not apply in the case of soldiers attending as guards to her majesty or any of the royal family, or in the case of soldiers usually stationed within the Bank of England (*y*). It has also been resolved, by vote of the house of commons, that no lord of parliament, or lord lieutenant of a county, hath any right to interfere in the election of commoners; and by the 2 W. & M. c. 7, the lord warden of the Cinque Ports was prohibited from recommending any members there (*z*). Officers of the excise, customs, stamps and certain other branches of the revenue, as well as justices and officers

(*u*) 31 & 32 Vict. c. 125, s. 26; Ryder *v.* Hamilton, Law Rep., 4 C. P. 559.

(*x*) 1 W. & M. sess. 2, c. 2; 9 Com. Journ. 191; 17 Journ. 507.

(*y*) 10 & 11 Vict. c. 21. The rule formerly was, that, as soon as the time and place for the election were fixed, all soldiers quartered in the place were 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 was ended. (8 Geo. 2, c. 30.) But this enactment, being found inconvenient, is now repealed by the statute above cited.

(*z*) 1 Bl. Com. 179. (See 30 & 31 Vict. c. 59.)

appointed under the Metropolitan Police Acts, are also expressly prohibited, under heavy pecuniary penalties and loss of office, from any interference (*a*). Moreover, riots have been frequently determined to make an election void; and by the Reform Act, of 1832, it was provided, that where, at any place of election, the proceedings were interrupted by riot, or open violence, the sheriff or other returning officer should adjourn the poll at such place till the following day; and, if necessary, should then further adjourn the same until the interruption should have ceased (*b*).

While the electors were thus secured against violence at elections, and against other such external interferences with the exercise of the right of voting, they remained open to the internal dangers of what have been called the infamous practices of bribery and corruption (*c*); and careful provision has from time to time been made by parliament to check these insidious influences. Bribery at elections was an offence even at the common law, and was punishable with fine and imprisonment (*d*): but for the more easy repression of bribery and of other cognate offences, specific provision has, from time to time, been made by certain Acts of Parliament; and it is convenient to shortly state these provisions here.

Firstly, by "The Corrupt Practices Prevention Act, 1854" (17 & 18 Vict. c. 102) (*e*), these three offences are

(*a*) 1 Bl. Com. 179; 2 & 3 Vict. c. 71, s. 6.

(*b*) 2 Will. 4, c. 45, s. 70.

(*c*) Bl. Com. ubi sup.

(*d*) 3 Burr. 1335, 1359; 4 Doug. 292. Blackstone says (vol. i. p. 179), that the first instance that occurs of election bribery is as early as 13 Eliz., when one Thomas Longe, being a simple man and of small capacity to serve in parliament, acknowledged that he had given the corporation by which he was returned 4*l*.; and for this offence he was removed, and the corporation was fined 20*l*.

(*e*) This Act was passed only for a limited time, but (with the various amending Acts, 21 & 22 Vict. c. 87; 26 & 27 Vict. c. 29, and 31 & 32 Vict. c. 125) has been from time to time continued (41 & 42 Vict. c. 70; 42 & 43 Vict. c. 75; 43 Vict. c. 18; 45 & 46 Vict. c. 64; and 57 & 58 Vict. c. 48).

prohibited, namely:—(1.) The offence of *bribery*, which is defined as the gift or promise of money or valuable consideration, or the gift procurement or promise of any office place or employment, in order to induce a voter to vote or refrain from voting, or on account of his having already voted; and both as regards him from whom the gift procurement or promise proceeds, and also as regards him who agrees to vote for any money valuable consideration office place or employment, the offence is declared to be a criminal offence (*f*). (2.) The offence of *treating*, which is defined as the providing by any candidate, before during or after an election, any meat drink entertainment or provision, in order corruptly to influence any person to vote or to refrain from voting, or on account of his having voted (*g*). And (3.) Any *undue influence*, which the Act defines in such manner as to comprise, generally, any force violence or restraint, or the infliction of or threat to inflict any injury, or the practice of any intimidation, in order to induce any person to vote or refrain from voting, or on account of his having voted (*h*). Moreover, the Act prohibits the providing by a candidate, either for any voter or for any inhabitant of the county city or place, of any *cockade or other mark of distinction* (*i*); and also the providing of *refreshment* to any voter on the day of nomination or of polling, on account of his having polled or being about to poll (*k*); and it further enacts, that all payments made on any such account, or on account of any *chairing bands of music flags or banners*, shall be deemed illegal payments within the Act (*l*). And with a view

(*f*) 17 & 18 Vict. c. 102, ss. 2, 3.

(*g*) Sect. 4.

(*h*) Sect. 5; R. *v.* Barnwell, 29 L. T. p. 107.

(*i*) Sect. 7.

(*k*) Sect. 23.

(*l*) Sect. 7. So also, by 30 & 31 Vict. c. 102, s. 36, payment of any money on account of the *conveyance of any voter to the poll*, either to the voter himself or to any other person, unless for carriage by sea where that is necessary (sect. 48), was made an illegal payment under 17 & 18 Vict. c. 102,—except only in the case of the boroughs of *East Retford*, *Shoreham*, *Cricklade*, *Much Wenlock* and *Aylesbury*; but this excep-

to the more effectual prevention of all illegal payments, the Act provided also for the annual appointment of certain officers, called *election auditors* (*m*), to whom was committed the duty of taking and publishing the accounts of all expenses incurred at elections (*n*); and no payment in respect of any election, or the expenses thereof, was to be made by, or by authority of, any candidate, except by or through the election auditor for such election (*o*), any payment that was otherwise made being declared illegal (*p*),—enactments which, with the substitution of election agent for election auditors, are substantially maintained in the 46 & 47 Vict. c. 51, presently to be mentioned.

Secondly, "The Representation of the People Act, 1867" (30 & 31 Vict. c. 102), has declared it to be bribery, if any person shall, directly or indirectly, corruptly pay any rate on behalf of a rate-payer, for the purpose of enabling him to be registered as a voter, thereby to influence his vote at any future election; or shall, directly or indirectly, pay any such rate on the voter's behalf, for the purpose of inducing him to vote or refrain from voting (*q*).

Thirdly, "The Corrupt and Illegal Practices Act, 1883" (46 & 47 Vict. c. 51), has extended the provisions against *treating* contained in the Corrupt Practices Prevention Act, 1854, to persons other than the candidate or candidates (*r*); and a "*corrupt practice*" is, by the Act, made to extend to and include treating and undue influence, bribery and personation, and aiding or assisting therein,

tion now extends to all boroughs (43 Vict. c. 18; 46 & 47 Vict. c. 51, s. 7). As to travelling expenses, see also 21 & 22 Vict. c. 87, s. 1; Cooper *v.* Slade, 6 H. of L. Cas. p. 746; Simpson *v.* Yeend, Law Rep., 4 Q. B. 626. And as to employers of labour allowing their workmen and employees leave of absence to vote, without deducting from their wages for loss of time, see 48 & 49 Vict. c. 56.

(*m*) 21 & 22 Vict. c. 87, ss. 2, 4.

(*n*) 17 & 18 Vict. c. 102, ss. 26—28; The Queen *v.* Griffiths, 7 Ell. & Bl. 952; Edwards *v.* Whitehurst, 5 H. & N. 131.

(*o*) Nurton *v.* Dickson, 5 H. & N. 637.

(*p*) 17 & 18 Vict. c. 102, s. 18; and as to who is a "candidate," see 21 & 22 Vict. c. 87, s. 3.

(*q*) 30 & 31 Vict. c. 102, s. 49.

(*r*) Sect. 1.

or counselling the same (*s*); and further the Act declares the following to be "*illegal practices*," namely, (1) Payments or contracts to pay, for or on account of the conveyance of electors, or to any elector on account of the use of any premises for the exhibition of bills notices and the like, or on account of any use (in excess of the permitted use) of committee-rooms (*t*); or (2) Payments made or expenses incurred in excess of the maximum election expenses and of the payments specified in the first schedule to the Act (*u*); or (3) Subornation of voters; or (4) Fictitious withdrawal of any candidate or candidates (*x*), or any corrupt withdrawal of candidates (*y*); or (5) Payments for ribbons cockades and the like (*z*); or (6) Paid employment of agents, other than the election agent and sub-agent and polling agent or agents mentioned in the first schedule to the Act (*a*); or (7) Printing and publishing bills and the like, without the name and address of the printer and publisher (*b*); or (8) Using as committee-room any premises, where intoxicating liquors or refreshments are ordinarily sold or provided (*c*).

The following punishments for offences thereunder are also prescribed by the Corrupt and Illegal Practices Act, 1883, that is to say:—

Firstly, for "Corrupt Practices,"—If by the candidate, the election is avoided, and he is rendered ineligible for ever for that constituency (*d*); but if the candidate was only guilty through his agents, his ineligibility is limited to seven years (*e*); and the candidate or any other person being convicted of any corrupt practice (other than personation) is liable to imprisonment not exceeding one year, with or without hard labour, or to a fine not exceeding

(*s*) Sect. 3.
(*t*) Sect. 7; and see sects. 13, 14.
(*u*) Sect. 8.
(*x*) Sect. 9; and see sect. 15.
(*y*) Sect. 15.
(*z*) Sect. 16.
(*a*) Sect. 17.
(*b*) Sect. 18.
(*c*) Sect. 20.
(*d*) Sect. 4.
(*e*) Sect. 5.

200*l.*; and being convicted of personation, is liable to imprisonment (with hard labour) not exceeding two years; and moreover, after conviction, cannot for seven years vote at any election whatever, parliamentary or municipal; or hold any office, public or judicial, or be elected a member of parliament (*f*).

Secondly, for "Illegal Practices,"—Any person convicted thereof is liable to a fine not exceeding 100*l.*, and for five years cannot vote at any election, parliamentary or municipal, within the county or borough in which the offence was committed (*g*): and if the election commissioners, after hearing an election petition, report the prevalence of illegal practices, the candidate, if he is reported to have known thereof or assented thereto, loses his election, and becomes ineligible for that constituency for seven years, or (if the candidate was only guilty through his agents) during the then parliament (*h*); and the candidate or any person convicted of an illegal practice is liable to a fine not exceeding 100*l.* (*i*).

The election being closed, the sheriff or other returning officer returns the writ, with the names of the persons elected by the majority (*k*), to the clerk of the crown in chancery, to whom also the poll books are delivered, for their future safe custody (*l*). If the returning officer wilfully delays neglects or refuses duly to return any person who ought to be returned, he is liable to an action at the suit of the party aggrieved,—in case it shall be determined on the hearing of an election petition, in manner to be presently described, that such party was entitled to have been returned; but no such action is to be commenced, save within one year after the commission of

(*f*) Sect. 6.

(*g*) Sect. 10.

(*h*) Sect. 11.

(*i*) Sect. 21. The Act 47 & 48 Vict. c. 70 (extending the 35 & 36 Vict. c. 60), contains very similar provisions regarding "corrupt practices" and "illegal practices" at *municipal* elections.

(*k*) See 23 Hen. 6, c. 14.

(*l*) 6 & 7 Vict. c. 18, s. 93.

the injury, or within six months after the conclusion of the trial relating to the election (*m*); and the members returned by the returning officer are the sitting members until the return shall be declared false and illegal. And here we may observe, that the Reform Act, 1832, provided, that a returning officer, or any other person wilfully contravening its provisions, should be liable to be sued by the party aggrieved thereby, in which action the jury might find a verdict for such sum as they should think just, to the extent of 500*l.* (*n*).

The form and manner of proceeding to impugn the return of a member, are regulated by "The Parliamentary Elections Act, 1868" (31 & 32 Vict. c. 125) (*o*), and by "The Corrupt and Illegal Practices Prevention Act, 1883" (46 & 47 Vict. c. 51), and are in substance as follows:—Any person who voted, or had a right to vote, at the election, or claiming to have had a right to be returned or to have been elected, or alleging himself to have been a candidate thereat,—may (within the period of fourteen days after the return, or, in case of an alleged corrupt or illegal practice, then within twenty-eight days after the date of such alleged practice) subscribe a petition, complaining of an undue return or election (*p*); and such petition shall thereupon be served by the petitioner on the respondent, that is to say, on the candidate or candidates who have been returned (*q*),—the petitioner giving security, to the amount of one thousand pounds, for the payment of all

(*m*) 31 & 32 Vict. c. 125, s. 48.

(*n*) 2 Will. 4, c. 45, s. 76. By 6 & 7 Vict. c. 18, s. 97, a similar action, with damages to the extent of 100*l.*, was given for the wilful breach of the provisions of that Act. (See Pryce *v.* Belcher, 3 C. B. 58; 4 C. B. 866; 30 & 31 Vict. c. 102, s. 59.)

(*o*) Pease *v.* Norwood, Law Rep., 4 C. P. 235; Waygood *v.* James, ib. 361; Stevens *v.* Tillett, ib. 6 C. P. 147.

(*p*) 31 & 32 Vict. c. 125, s. 6; and 46 & 47 Vict. c. 51, s. 40. Prior to these Acts, the petition was disposed of before a select committee of the House of Commons itself, under the provisions of 11 & 12 Vict. c. 98, and 28 & 29 Vict. c. 8; both of which Acts were repealed by 31 & 32 Vict. c. 125.

(*q*) 31 & 32 Vict. c. 125, s. 5.

costs charges and expenses (*r*). The trial is conducted before two of the judges, sitting *de die in diem*, in open court, and without a jury, and as the general rule, in the borough or county the election whereat has been impugned (*s*); and the director of public prosecutions (now being the Solicitor to the Treasury) must, by himself or by his deputy, attend the trial (*t*). At the conclusion of the trial (at which witnesses are examined on oath), the judges determine whether the member whose return or election is complained of, or any or what other person, was duly returned or elected, or whether the election was void; and they certify the same in writing to the speaker,—the determination of the judges being final to all intents and purposes; and on such certificate being received, the house itself gives directions as to confirming or altering the return, or issuing a writ for a new election, as circumstances may require (*u*). But if it appears to the judges trying an election petition that any questions of law, or as to the admissibility of evidence or otherwise, require further consideration by the court in banc, it is lawful for them to postpone the grant of their certificate until the court has determined such questions (*x*). Also, where any charge is made, in the petition, of any corrupt or illegal practice, the judges are required to certify as to the same, or to make any special report such as the occasion may require (*y*),—in which latter case, the house

(*r*) 31 & 32 Vict. c. 125, s. 6; Hill *v.* Peel, Law Rep., 5 C. P. 172; Hughes *v.* Meyrick, ib. 407; 46 & 47 Vict. c. 51, s. 44.

(*s*) 31 & 32 Vict. c. 125, s. 11; 42 & 43 Vict. c. 75; and 46 & 47 Vict. c. 51, s. 42. The judges are directed, on or before the third day of Michaelmas term, in every year, to select, by a majority of votes, certain of their number to be placed on a rota for the trial of election petitions during the ensuing year.

(*t*) 46 & 47 Vict. c. 51, s. 43; 47 & 48 Vict. c. 58, s. 2.

(*u*) 31 & 32 Vict. c. 125, s. 13.

(*x*) Ibid. s. 12.

(*y*) Ibid. s. 11. With regard to the *witnesses* at the trial of the petition, it may be noticed that under this Act they are made entitled not only to their reasonable expenses, but also to an *indemnity*. (Sects. 33, 34.)

of commons may make such order in respect of any special report as they shall think proper (*z*); and on a report by the judges that any corrupt or illegal practice has been committed, either by a candidate (personally, or through an agent with his knowledge and consent), or by any other person, the guilty party is subjected to such incapacities penalties and disqualifications as have been already mentioned (*a*). And where it is represented to her Majesty, by a joint address of both houses of parliament, that there is reason to believe, or that an election court has reported to the speaker, that corrupt or illegal practices have extensively prevailed in any county borough or other place sending a member or members to parliament, her Majesty may appoint commissioners to make inquiry into these alleged practices; and it has been the practice of the legislature, where the report of such commissioners has been unfavourable, to deprive such place, either permanently or for a time, of its right to send members to parliament (*b*).

When a member is once duly elected, and has been duly sworn, or has duly affirmed (*c*), he is compellable to discharge the duties of the public trust thus conferred upon him, and is bound to be present at every call of the house, unless he can show such cause as shall be deemed a sufficient excuse for his non-attendance. Nor is he enabled by law to resign his seat; and the only way of

(*z*) 31 & 32 Vict. c. 125, s. 14.

(*a*) Vide supra, p. 375. By 34 & 35 Vict. c. 77, several persons having been reported to the House as having been guilty of bribery at an election for a certain borough, such persons were by name severally prohibited from voting *at any time* at any parliamentary election for such borough.

(*b*) This course was taken with regard to the boroughs mentioned sup. p. 330, n. As to the practice pursued at such inquiries, see Fitzgerald's case, Law Rep., 5 Q. B. 1; ib. 5 Exch. 21; and as to certificates of indemnity given to witnesses by such commissioners, see 46 & 47 Vict. c. 51, s. 59; The Queen *v.* Hulme, Law Rep., 5 Q. B. 377; The Queen *v.* Price, ib. 6 Q. B. 411; and as to the expenses of such inquiries, see 32 & 33 Vict. c. 61, continued by 36 & 37 Vict. c. 75.

(*c*) Vide sup. p. 333.

relinquishing his seat, is to obtain some office, such as will have the effect of making the seat void; which office, however, is now granted as a matter of course, it having long been usual for the crown to bestow on any member wishing to vacate his seat the stewardship of the Chiltern Hundreds,—which office, though merely nominal, is by the practice of parliament considered sufficient for that purpose (*d*).

And this abstract of the law of parliamentary elections concludes our inquiries into the laws and customs more peculiarly relative to the house of commons.

VI. [We proceed now to the method of making laws,—which is much the same in both houses. But first it must be premised, that, for dispatch of business, each house of parliament has its *speaker*. The speaker of the house of lords—whose office it is to preside there, and to manage the formalities of business—is the lord chancellor, or keeper of the great seal, or any other appointed by royal commission: and if none be so appointed, the house of lords (it is said) may elect. The speaker of the house of commons is one of its members chosen by the house (*e*); but he must be approved by the sovereign (*f*). And herein the usage of

(*d*) 2 Hats. 41. It is said by Mr. Hatsell, that this practice is believed to have begun not earlier than about the year 1750, and that it would be difficult, from the form of appointment to the Chiltern Hundreds, to show that it *is* an office. The stewardships of the manors of East Hendred, Northstead, or Hempholme, are also granted for this purpose, when the Chiltern Hundreds are occupied. (See May's Laws of Parl. (8th ed.) p. 657.) An Irish member accepts, in order to effect the same object, the nominal office of "escheator of Munster." (See 21 & 22 Vict. c. 110, s. 4.)

(*e*) Com. Dig. Parl. E. 5. As to his salary, &c., see 30 Geo. 3, c. 10; 2 & 3 Will. 4, c. 105; 4 & 5 Will. 4, c. 70. As to the *deputy* speaker, see 18 & 19 Vict. c. 84.

(*f*) Sir Edward Coke, upon being elected speaker in 1592, in his address to the throne, declared, "this "is only as yet a nomination, and "no election, until your majesty "giveth allowance and approba-"tion." (2 Hats. 164.) But the house of commons at present, says Mr. Christian (1 Bl. Com. p. 181), would scarce admit their speaker to hold such language.

[the two houses differs, that the speaker of the house of commons cannot give his opinion or argue any question in the house (*g*); but the speaker of the house of lords, if a lord of parliament, may. In each house, the act of the majority binds the minority; and this majority is declared by votes, openly and publicly given, not privately or by ballot,—which latter method may be serviceable to prevent intrigues and unconstitutional combinations, but is impossible to be practised, at least in the house of commons, where every member's conduct is subject to the future censure of his constituents.] In the house of commons, the speaker never votes, except when the votes of the house are otherwise equal, in which latter case he has a casting vote (*h*); but the speaker of the house of lords has his vote counted with the rest of the house, and in the case of an equality of votes there, the negative opinion prevails (*i*).

[To introduce a bill in either house, if the relief sought by it is of a private nature, it is first necessary to prefer a petition; which petition must be presented by a member, and usually sets forth the grievance desired to be remedied; and the 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 report it to the house; and then, or otherwise, upon the mere petition, leave is given to bring in the bill (*k*). And in the house of lords, if the bill begin there, and it is of a private nature, it is (or used to be) referred to two of the judges, to examine and report the state of facts alleged, to see that all necessary parties consent, and to settle all points of technical propriety;] but this duty is now discharged by means of certain officers called examiners, appointed by the house

(*g*) But when the house resolves itself into a committee, the case is otherwise. Vide post, p. 384.

(*h*) May's Laws of Parl. 8th ed. p. 375.

(*i*) 33 Lords' J. 519; 14 Lords' J. 167, 168.

(*k*) Com. Dig. Parl. G. 11; 41 Geo. 3, c. 105.

itself (*l*). In public matters, a bill originating in the commons is brought in upon motion made to the house to obtain leave for that purpose; and then no petition is required; but there are many "standing orders" relative to the introduction of public bills, and of private bills too, which are of too minute a nature to be detailed in this place (*m*). [Formerly all bills were drawn in the form of petitions to the crown (*n*), 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 (*o*): and, at the end of each parliament, the judges drew them up in the form of a

(*l*) In the house of commons, the examiners of private bills are appointed by the speaker.

(*m*) See 7 Will. & 1 Vict. c. 83, as to the deposit of *plans and documents* in the case of private bills;—14 & 15 Vict. c. 49 (repealing 11 & 12 Vict. c. 129), as to the *preliminary inquiries* to be made on all applications for local Acts affecting navigation;—10 & 11 Vict. c. 69; 12 & 13 Vict. c. 78; 28 & 29 Vict. c. 27; 34 & 35 Vict. c. 3; and 42 & 43 Vict. c. 17, as to *costs* on private bills; and 34 & 35 Vict. c. 83, as to the power of committees of the house to administer oaths to witnesses.

(*n*) The commons, for nearly two centuries, continued the style of very humble petitioners. Their petitions frequently began with "Your poor commons beg and "pray," and concluded with "for "God's sake, and as an act of "charity;" —"*Vos poveres communes prient et supplient, pur Dieu et en œuvre de charité.*" (Rot. Parl. passim.) And it appears that, prior to the reign of Henry the fifth, it had been the practice of the kings to add and enact more than the commons petitioned for; in consequence of which (remarks Mr. Christian, 1 Bl. Com. p. 181), there was a very memorable petition from the commons in 2 Hen. 5, which stated that it was the liberty and freedom of the commons that there should be no statute without their assent, considering that they had ever been as well assenters as petitioners; and therefore they prayed that, for the future, there might be no additions or diminutions to their petitions; and in answer, the king granted that from henceforth they should be bound in no instance without their assent, save his royal prerogative to grant and deny what he pleased of their petitions. (Ruff. Bref. xv.; Rot. Parl. 2 Hen. 5, No. 22.)

(*o*) See, among numberless other instances, the *Articuli Cleri*, 9 Edw. 2. As to the antient form of our statutes, much information will be found in Hist. Eng. Law, by Reeves, vol. i. p. 215; vol. ii. pp. 142, 153, 354; vol. iii. pp. 143, 252, 379; vol. iv. pp. 111, 130, 411.

[statute, which was entered on the *statute rolls*; and in the reign of Henry the fifth, to prevent mistakes and abuses, the statutes were drawn up by the judges before the end of the parliament; but in the reign of Henry the sixth, bills in the form of Acts, according to the modern custom, began to be introduced.] The style now used in an Act of Parliament, is as follows:—"Be it enacted by the queen's "most excellent majesty, by and with the advice and con-"sent of the lords spiritual and temporal, and commons, "in this present parliament assembled, and by the authority "of the same."

Supposing the bill to commence in the house of commons and to be of a public nature, the persons directed to bring in the bill present it to the house drawn out in a proper form (*p*); and the bill is then read a first time and is ordered to be printed; and after a convenient interval it is read a second time; and after each reading, the speaker opens to the house the substance of the bill, and puts the question whether it shall proceed any further (*q*). The introduction of the bill may be originally opposed, as the bill itself may be at either of its readings; and if the opposition to its introduction succeeds, the bill must be dropped for that session; as it must also be, if opposed with success in any of its subsequent stages (*r*). Then [after the second reading, it is *committed*, that is, referred to a committee; which is either selected by the house, or else the

(*p*) 1 Bl. Com. p. 182. See 52 & 53 Vict. c. 63 (The Interpretation Act, 1889), repealing but re-enacting the provisions of 13 & 14 Vict. c. 21 (often called Lord Romilly's Act) as to shortening the language used in Acts of parliament. We may also notice here, that, in order to avoid the necessity of repeating in many different Acts, the various provisions usually introduced into such as authorize the execution of undertakings of a public nature by companies and others, and also in order to secure uniformity, those provisions are now consolidated in divers general Acts; and into any subsequent statute passed with reference to such undertakings, one or more of such "Consolidation Acts," or certain of their clauses (as the case may require), are incorporated by reference.

(*q*) Com. Dig. Parl. G. 12, 13, 14.

(*r*) 1 Bl. Com. p. 182.

[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 in that case, the speaker sits and debates as a private member. In these committees, the bill is debated clause by clause, amendments are made, and blanks are filled in; and sometimes the bill is entirely new-modelled. After it has gone through committee, the chairman reports it to the house, with such amendments as the committee may have made; and then the house reconsiders the whole bill again, and the question is repeatedly put upon every clause and amendment.] When the house hath agreed or disagreed to the amendments of the committee, and sometimes added new amendments of its own, the bill is then ordered to be reprinted (*s*); and it is then read a third time, and amendments are sometimes made to it at this stage also, and new clauses added (*t*). The speaker then again opens the contents, and, holding it up in his hands, puts the question, whether the bill shall pass (*u*). If this is agreed to, the title to the Act is then settled; and the title used to be a general one for all the Acts passed in the session, till (in the time of Henry the eighth) distinct titles were introduced for each chapter (*x*). [After this, the bill is printed fair by the Queen's printer, and one of the members is directed to carry it to the lords, and to desire their concurrence; and the member thus deputed, attended by several more, carries it to the bar of the house of lords, and there delivers it to their speaker, who comes down from the woolsack to receive it.

(*s*) 90 Com. J. 337; 105 Ibid. 372. At this stage of the proceedings, the former practice was to *engross* the bill on one or more pieces of parchment; but this engrossing was discontinued in 1849. See May's Laws of Parl. (8th ed.) p. 535. And see, per Willes, J., Claydon *v.* Green, Law Rep., 3 C. P. 521.

(*t*) Noy, 84.

(*u*) 1 Bl. Com. p. 183.

(*x*) Bl. Com. ubi sup. It is said that this custom first began in the fifth year of Henry the eighth. (Hist. Eng. Law by Reeves, vol. iv. p. 412.) As to the title being no part of the Act, vide sup. vol. I. p. 67, n. (*d*).

[It there passes through the same forms as in the house of commons, and, if rejected, no more notice is taken; but the matter passes *sub silentio*, to prevent unbecoming altercations. But if it is agreed to, the lords send a message, (which upon matters of high dignity or importance used to be conveyed by two of the judges,) that they have agreed to the same; and the bill remains with the lords, if they have made no amendment to it. But if any amendments are made, such amendments are sent down with the bill, to receive the concurrence of the commons. If the commons disagree to the amendments, a conference sometimes follows between members deputed from each house; who, for the most part, settle and adjust the differences; but if both houses remain inflexible, the bill is dropped (*y*). If the commons agree to the amendments, the bill is sent back to the lords by one of the members, with a message to acquaint them therewith. The same forms are observed, *mutatis mutandis*, when the bill begins in the house of lords (*z*). And when both houses have done with any bill, it is deposited in the house of peers, to wait the royal assent, except in the case of a bill of supply, which (after receiving the concurrence of the lords) is sent back to the house of commons (*a*).

The royal assent may be given either in person or by commission: 1. Where it is given in person: the sovereign comes to the house of peers, and, sending for the commons to the bar, the titles of all the bills that have passed both houses are read; and the sovereign's answer is declared by the clerk of the parliament in Norman-

(*y*) Com. Dig. Parliament, G. 24.

(*z*) No motion or permission to present the bill, however, is here necessary,—every peer being at liberty to present a bill and lay it on the table of the house. See May's Laws of Parl. (8th ed.) p. 484.

(*a*) Com. Journ. 24th July, 1660. When an act of grace or pardon is passed, it is first signed by the sovereign, and then read once only in each of the houses, without any amendment. (D'Ewes' Journ. 20, 73; Com. Journ. 17th June, 1747.)

[French (*b*). If the sovereign consents to a public bill, the clerk usually declares "*le roy* (or *la reine*) *le veut;*" if to a private bill, "*soit fait comme il est desiré.*" If the sovereign refuses his assent, it is in the gentle language of "*le roy* (or *la reine*) *s'avisera*" (*c*); but when a bill of supply is passed, it is carried up and presented to the sovereign by the speaker of the house of commons (*d*); and the royal assent is thus expressed, "*Le roy* (or *la* "*reine*) *remercie ses loyal subjects, accepte lour benevolence,* "*et aussi le veut.*" 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 assemblés,* "*au nom de touts vous autres subjects, remercient très hum-* "*blement votre majesté, et prient à Dieu vous donner en santé* "*bone vie et longue*" (*e*). 2. When the royal assent is given by commission: this is by virtue of the statute 33 Hen. VIII. c. 21, which enabled the king to give his assent by letters-patent under his great seal, signed with his hand, and notified in his absence to both houses

(*b*) The language of the statutes prior to the reign of Richard the third, is generally Latin or French. (See Christian's Blackstone, vol. i. p. 184.) But all Richard the third's statutes are in English, and so they have continued to be drawn in all subsequent periods.

(*c*) The words *le roi s'avisera* correspond to the phrase formerly used by courts of justice, when they required time to consider of their judgment, viz. *curia advisari vult.* And there can be little doubt, but originally the phrase implied a serious intent on the part of the sovereign, to take the subject into consideration. The last occasions on which the prerogative of rejecting bills was exerted, were in the year 1692, by William the third, who at first refused his assent to the bill for triennial parliaments, but was prevailed upon to permit it to be enacted two years afterwards (De Lolme, Const. of Eng. p. 404); and in 1707, when Queen Anne refused her assent to a Scotch militia bill. (18 Lords' Journ. 506.)

(*d*) Rot. Parl. 9 Hen. 4, in Pryn.; 4 Inst. 22, 28.

(*e*) D'Ewes' Journ. 35. But see May's Laws of Parl. (8th ed.) p. 549.

[assembled together in the higher 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 (*f*);] and by the 33 Geo. III. c. 13, the clerk of parliament is directed to indorse on every Act, immediately after the title thereof, the day, month, and year when the same passed, and received the royal assent; and such indorsement is part of the Act, and is the date of the commencement of the Act where no other time for its commencement is prescribed (*g*).

[The statute or Act is placed among the records of the kingdom, there needing no formal promulgation of it to give it the force of a law, (as was necessary by the civil law with regard to the emperor's edicts,) because every man in England is, in judgment of law, party to the making of an Act of parliament, being present thereat by his representatives. However, the Queen's printer is bound, by virtue of his office, to print each Act for the information of the whole land (*h*). And, formerly, before the invention of printing, all Acts used to be published by the sheriff of every county, the king's writ being sent to him at the end of every session, together with a transcript of all the Acts made at that session, commanding him, "*ut statuta illa, et omnes articulos in eisdem contentos, in*

(*f*) R. *v.* Justices of Middlesex, 2 B. & Ad. 818.

(*g*) As to the law with respect to the time when a statute begins to operate, see also sup. vol. I. p. 69.

(*h*) 104 Com. Journ. 51. *Public* statutes (as to which vide sup. vol. I. p. 67) need no proof in courts of justice, being judicially noticed (see Taylor on Evidence, ss. 5, 1368); and by 41 Geo. 3, c. 90, s. 9, copies of Acts of Great Britain and Ireland, printed by the king's printer prior to the Union, are made conclusive evidence of the Acts, as between the two countries. And by 8 & 9 Vict. c. 113, ss. 3, 4, all copies of private Acts, and of the journals of either house, if purporting to be printed by the printers to the crown or to either house of parliament, are admitted as evidence thereof; and by the 45 Vict. c. 9 (Documentary Evidence Act, 1882), s. 2, if purporting to be printed under the superintendence or authority of her Majesty's stationery office.

["*singulis locis ubi expedire viderit, publicè proclamari, et "firmiter teneri et observari faciat.*" And the usage was to proclaim them at the county court of the sheriff, and there to keep them, that whoever would might read or take copies thereof; which custom continued till the reign of Henry the seventh (*i*).

An Act of parliament thus made, is the exercise of the highest authority that this kingdom acknowledges upon earth; and it binds every subject in the land, and the dominions thereunto belonging; nay, even the sovereign 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 sovereign might in some cases dispense with penal statutes (*k*); but by the 1 W. & M. sess. 2, c. 2, it was declared that the suspending or dispensing with laws, by regal authority without consent of parliament, was altogether illegal; and such suspension or dispensation on the part of the crown therefore now requires an Act of parliament enabling the crown in that behalf (*l*).

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 (*m*).

An *adjournment* is no more than a continuance of the session from one day to another, as the word itself signifies; and this is done by the authority of each house separately every day; and sometimes for a fortnight or a month

(*i*) 3 Inst. 41; 4 Inst. 26.

(*k*) Finch's L. 82, 234; Bacon's Elem. c. 19.

(*l*) The 38 & 39 Vict. c. 80, *e.g.*, enables the crown to dispense with penalties under 21 Geo. 3, c. 49 (Lord's Day Observance Act).

(*m*) Com. Digest, Parliament, N. O. P.

[together, as at Christmas or Easter, or upon other particular occasions; but the adjournment of one house is no adjournment of the other (*n*). It hath also been usual, when the sovereign hath signified his pleasure that both or either of the houses should adjourn themselves to a certain day, to obey the royal pleasure so signified, and to adjourn accordingly (*o*). Otherwise, besides the indecorum of a refusal, a prorogation would assuredly follow: which would often be very inconvenient to both public and private business: for a 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; and a prorogation is by the royal authority alone—usually expressed by the lord chancellor, in the presence of, or by commission from, the crown, or else by proclamation (*p*). And by 30 & 31 Vict. c. 81, such last mode of announcing the royal intention is expressly made sufficient notice thereof, provided the day of prorogation be to some day not less than fourteen days from the day for which parliament then stood summoned or prorogued; and provided also that the prorogation be not at the close of a session, to which case the Act is not to apply. Both houses are necessarily prorogued at the same time,—the prorogation not being 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 were passed or some judgment

(*n*) 4 Inst. 28.

(*o*) Com. Journ. passim; e. g., 11th June, 1572; 21st May, 1768.

(*p*) See 1 Bl. Com. by Christian, p. 186, where it is remarked, that when it is intended that parliament should meet upon the day to which it stands prorogued *for dispatch of business*, notice to that effect is given by proclamation.

given in parliament, it would in truth be no session at all (*q*). And formerly the usage was, for the sovereign from time to time to give the royal assent to all such bills as he approved, and then to prorogue the parliament; though sometimes only for a day or two, and thus end the session (*r*); which custom obtained so strongly, that it was at one time made a question whether giving the royal assent to a single bill did not, as of course, put an end to the session (*s*). [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 afterwards, in the reign of Charles the second, we find a proviso frequently tacked to a bill, that his majesty's assent thereto should not determine the session of parliament (*t*). But it now seems to be allowed, that a prorogation must be expressly made, in order to determine the session.] The prorogation is to a day fixed; but by the joint effect of the 37 Geo. III. c. 127, the 39 & 40 Geo. III. c. 14, and "The Meeting of Parliament Act, 1870" (33 & 34 Vict. c. 81), the sovereign may now at any time, without regard to the period to which parliament may stand prorogued or adjourned, appoint it to re-assemble for dispatch of business at the expiration of six days from the date of the proclamation.

A *dissolution* is the civil death of the parliament; and this may be effected in three ways (*u*), that is to say:—

1. [A parliament may be dissolved by the sovereign's will, expressed either in person or by representation: for as he has the sole right of convening the parliament, so also it is a branch of the royal prerogative, that he may (whenever he pleases) either prorogue the parliament for a time, or put a final period to its existence. If none but

(*q*) 1 Bl. Com. p. 187; 4 Inst. 28; Hale of Parl. 38; Hut. 61.

(*r*) Com. Journ. 21st Oct. 1553.

(*s*) Ibid. 21st Nov. 1554.

(*t*) See, for example, stat. 12 Car. 2, c. 1; 22 & 23 Car. 2, c. 1.

(*u*) Com. Dig. Parl. 1, 2.

[itself had a right to prorogue or dissolve a parliament, 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 to 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 it.]

2. Until recently it was the rule that any parliament in being was dissolved by the demise of the crown. And, by the common law, this dissolution 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 (*x*). 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 6 Ann. c. 41 (*y*), that the parliament in being should continue for *six months* (but no longer) after the demise of the crown, unless sooner prorogued or dissolved by the successor; and that, if it were at the time of such demise separated by adjournment or prorogation, it should re-assemble immediately. It was also enacted by 37 Geo. III. c. 127, that in case of such demise between a dissolution and the day appointed by the writs of summons for the meeting of a new parliament, the last preceding

(*x*) 1 Bl. Com. p. 188. Accordingly, offices held under the crown, are, in general, vacated by the demise of the sovereign, Bac. Ab. Courts (C.); but by 7 & 8 Will. 3, c. 27, s. 21, 1 Ann. c. 2, 6 Ann. c. 41, s. 8, and 1 Geo. 2, c. 5, commissions under the crown (whether civil or military) are continued for six months after the demise; and by 11 Geo. 4 & 1 Will. 4, c. 43, no fees or stamp duties shall be charged on the renewal of them. As to the commissions of the *judges*, vide post, Chap. x., On Magistrates.

(*y*) 1 Bl. Com. p. 188. See also 7 & 8 Will. 3, c. 15, repealed by 30 & 31 Vict. c. 59.

parliament should immediately convene for six months, unless sooner prorogued or dissolved by the succeeding sovereign; and that in the event of such demise on or after the day appointed for assembling the new parliament, but before it had in fact assembled, then the new parliament should in like manner convene for six months, unless sooner prorogued or dissolved. The law on this subject, however, is now further regulated by the 30 & 31 Vict. c. 102, s. 51, which enacts, that (anything in the 6 Ann. c. 41, notwithstanding) "the parliament in being at any future demise of the crown shall not be determined or dissolved by such demise, but shall continue so long as it would have continued but for such demise, unless sooner prorogued or dissolved by the crown."

3. [Lastly, a parliament may be dissolved or expire by length of time. For if either the legislative body were perpetual, or might last for the life of the prince who convened it (as formerly), if it were once corrupted, the evil would be past all remedy; but when different bodies succeed each other, if the people see cause to disapprove of the present, they may rectify its faults in the next. A legislative assembly, also, which is sure to be separated again (whereby its members will themselves become private men, and subject to the laws which they have themselves enacted), will think itself bound, in interest as well as in duty, to make only such laws as are good. The utmost extent of time that the same parliament was allowed to sit, by the statute 6 W. & M. c. 2, was *three* years (*z*); after the expiration of which, reckoning from the return of the first summons, the parliament was to have no longer continuance. But by the statute 1 Geo. I. st. 2, c. 38—in order, professedly, to prevent the great and continued expenses of frequent elections, and the violent heats and animosities consequent thereupon, and for the peace and

(*z*) Before the Triennial Act, the duration of parliament was only limited by the pleasure or death of the king. (Christian's Blackstone, vol. i. p. 189.)

[security of the government, then just recovering from the late rebellion—this term was prolonged to *seven* years; and, what alone is an instance of the vast authority of parliament, the very same house that was chosen for three years, enacted its own continuance for seven. 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 crown] (*a*).

(*a*) It may be stated that in its judicial capacity as a Court of Appeal, the House of Lords sits notwithstanding any prorogation (Appellate Jurisdiction Act, 1876, 39 & 40 Vict. c. 59, s. 8); and may (by authority of the sovereign under the sign-manual) sit even during a dissolution (Ibid. s. 9). And see 50 & 51 Vict. c. 70 (The Appellate Jurisdiction Act, 1887).

CHAPTER II.

OF THE SOVEREIGN, IN HIS GENERAL RELATION TO THE PEOPLE; AND HEREIN, OF THE LAW OF SUBJECT AND ALIEN.

THE supreme executive power of the United Kingdom of Great Britain and Ireland and its dependencies is vested by our laws in a single person, the king or queen, under such style and title as are appointed by royal proclamation under the great seal of the United Kingdom (*a*); and it matters not to which sex the crown descends, the person entitled thereto, whether male or female, being immediately invested with all the ensigns, rights, and prerogatives of sovereign power, as was declared by the statute 1 Mar. sess. 3, c. 1 (*b*). And for the better understanding of the law and laws relating to this supreme executive power, we shall consider the sovereign, Firstly, with regard to his people in general; Secondly, with regard to his title; Thirdly, with regard to his family; Fourthly, with regard to his councils; Fifthly, with regard to his prerogative; Sixthly, with regard to his revenue; and Seventhly, with regard to his forces.

And, firstly, with regard to the relation which subsists between the sovereign and his people.—[The first and principal duty of the sovereign is to govern his people

(*a*) See 39 & 40 Geo. 3, c. 67; 39 & 40 Vict. c. 10. The present style and title adopted by our gracious sovereign is "Victoria by the grace of God of the United Kingdom of Great Britain and Ireland Queen, Defender of the Faith, Empress of India" (vide sup. vol. I. p. 115).

(*b*) 1 Bl. Com. p. 190.

[according to law. *Nec regibus infinita aut libera potestas*, was the constitution of our German ancestors on the continent (*c*); 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, who wrote under Henry the third, "ought not to be subject to man, but to God, and "to the law; for the law maketh the king; he is not truly "king where will and pleasure rule, and not the law (*d*): "for the king hath a superior, namely, God, and also the "law, by which he was made a king" (*e*). Fortescue also, after distinguishing between (on the one hand) a monarchy, absolutely and despotically regal, which is introduced by conquest and violence, and (on the other hand) a political or civil monarchy, which arises from mutual consent, (of which latter species he asserts the government of England to be,) lays it down as a principle, that the king of England "must rule his people according "to the laws thereof, being bound, by an oath at his "coronation, to the observance and keeping of such "laws" (*f*). And these provisions of the common law have been embodied and declared in the statute 12 & 13 Will. III. c. 2, in the words following, namely:—"that "the laws of England are the birthright of the people "thereof; and all the kings and queens who shall ascend "the throne of this realm ought to administer the govern-"ment of the same according to the said laws: and all "their officers and ministers ought to serve them respec-"tively according to the same: and therefore all the laws

(*c*) Tac. de Mor. Germ. c. 7.

(*d*) L. 1, c. 8.

(*e*) L. 2, c. 16, s. 3. This is also well and strongly expressed in the Year Books, "*La ley est le plus haute inhéritance que le roy ad; car par la ley il même et touts ses sujets sont rulés, et si la ley ne fuit, nul roi, et nul inhéritance sera.*"—19 Hen. 6, 63.

(*f*) C. 9, and c. 34. And compare Justinian's Institutes, L. ii. t. 17, 8, recording the opinion of the Emperors Severus and Antoninus,—"*Licet enim legibus soluti sumus, attamen legibus vivimus.*"

[" and statutes of this realm, for securing the established " religion, and the rights and liberties of the people thereof, " and all other laws and statutes of the same now in force, " are ratified and confirmed accordingly." And to the like effect is the coronation oath, which, by the statute 1 W. & M. c. 6, is administered to every king and queen succeeding to the imperial crown of these realms, and which oath is administered by one of the archbishops or bishops of the realm, in the presence of the people in the following manner:—*The archbishop or bishop says*,—" Will " you solemnly promise and swear to govern the people of " this kingdom of England, and the dominions thereto " belonging, according to the statutes in parliament agreed " on, and the laws and customs of the same?" *The king or queen says*,—" 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 judg- " ments?" *King or queen*,—" I will." *Archbishop or bishop*, —" Will you to the utmost of your power maintain the " laws of God, the true profession of the gospel, and the " protestant reformed religion established by the law? " And will you preserve unto the bishops and clergy of " this realm, and to the churches committed to their " charge, all such rights and privileges as by law do or " shall appertain unto them, or any of them?" *King or queen*,—" All this I promise to do." *After this the king or queen, laying his or her hand upon the holy Gospels, shall say*,—" The things which I have here before promised I " will perform and keep; so help me God:" *and then shall kiss the book.*

The coronation oath, as regards its principal articles, appears to be at least as antient as the Mirrour of Justices (*g*), and even as the time of Bracton (*h*), the wording of it only having varied (*i*); and in whatever

(*g*) Cap. 1, s. 2.
(*h*) L. 3, tr. 1, c. 9.
(*i*) In the old folio abridgment of the statutes, printed by Lettou

[form conceived, it expresses the duty of protection on the sovereign's part,—a duty which is as much incumbent on him before coronation, as after, just as allegiance on the part of his subjects is due (as we shall presently see) to the king immediately on the descent of the crown, before they have taken the oath of allegiance, or whether or no they ever take it at all.

The present form of the coronation oath expresses, it is to be observed, 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 regard to the first of these, enough has been said; and, with regard to the second of these (which involves both the humanity of our laws and the exercise of the prerogative of mercy), more will be said hereafter in the course of these Commentaries; but with regard to the third of them, it is convenient here to remark that the maintenance of the established religion is further provided for by statute as follows:—(1) By the Bill of Rights (1 W. & M. sess. 2, c. 2) and the Act of Settlement (12 & 13 Will. III. c. 2), every king and queen regnant of the age of twelve years, either at their coronation, or on the first day of the first parliament, (whichever event shall first happen,) upon the throne in the house of peers, is required to repeat and subscribe the declaration against Popery, according to 30 Car. II. st. 2, c. 1; and (2) By the Act of Union with Scotland (6 Ann. c. 11), two preceding statutes are recited and confirmed,—one of Scotland, and the other of England, the former requiring that every king, at his accession, shall take and subscribe an oath to preserve the protestant religion and Presbyterian church government in Scotland, and the latter

and Machlinia in the reign of Edward the sixth, there is preserved a copy of the old coronation oath, which is given by Blackstone in a note to p. 236 of his first volume. Blackstone adds that Prynne has also given us a copy of the coronation oaths of Richard the second (Signal Loyalty, ii. 246); Edward the sixth (ib. 251); and James the first and Charles the first (ib. 269).

[requiring that at his coronation he shall take and subscribe a similar oath, to preserve the settlement of the church of England as by law established (*k*).

It is a maxim in the law, that protection and subjection are reciprocal (*l*); and we may therefore now pass from the duties of the sovereign to his people, to the duties of the people to their sovereign; in other words, to the subject of *allegiance*. Allegiance is the tie or *ligamen*, which binds the subject to the sovereign, in return for that protection which the sovereign affords to the subject. Under the feudal system, there was a mutual trust or confidence subsisting between the lord and his vassal, that the lord should protect the vassal in the enjoyment of the territory he had granted him, and that the vassal should be faithful to the lord, and defend him against all his enemies; which obligation on the part of the vassal was called his *fidelitas*, or fealty, and an oath of fealty was required to be taken by all tenants to their lord. This oath of fealty was couched in almost the same terms as our antient oath of allegiance (*m*), except that it usually contained a saving or exception of the faith due to some superior lord by name, as where the lord, being but a *mesne* lord, was himself also a tenant or vassal; but where the lord was the absolute superior himself, and was vassal to no man, it was no longer called the oath of fealty, but the oath of allegiance; and therein the tenant swore to bear faith to his sovereign lord in opposition to all men, without any saving or exception—"*contra omnes homines, fidelitatem fecit*" (*n*). Land held by this exalted species of fealty was called *feudum ligium*, a liege fee; the vassals *homines ligii*, or liegemen; 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

(*k*) 1 Bl. Com. 236; 6 Ann. c. 11, art. xxv. s. 8.

(*l*) Calvin's case, 7 Rep. 5 a.

(*m*) 2 Feud. 5, 6, 7; et vide sup. vol. I. p. 182.

(*n*) 2 Feud. 99.

[*simple* homage,—which was only an acknowledgment of the tenure,—and *liege* homage, which included the fealty before mentioned, and the services consequent upon it (*o*). Thus, when our Edward the third, in 1329, did homage to Philip the sixth 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 (*p*). But with us, in England—it becoming a settled principle of tenure that *all* lands in the kingdom are holden of the king as the sovereign and lord paramount,—no oath but that of fealty could ever be taken to inferior lords, and the oath of allegiance was necessarily confined to the person of the king alone. By an easy analogy, the term of allegiance was soon brought to signify all other engagements due from subjects to their prince, as well as those duties which were simply and merely territorial. And the oath of allegiance, as administered in this country for upwards of six hundred years, contained a promise "to be "true and faithful to the king and his heirs, and truth and "faith to bear of life and limb and terrene honour; and "not to know or hear of any ill or damage intended him, "without defending him therefrom" (*q*). Upon which Sir Matthew Hale makes this remark, that it was short and plain, and not entangled with long or intricate clauses or declarations, and yet was comprehensive of the whole duty from the subject to his sovereign (*r*). But at the Revolution, the terms of this oath being thought perhaps to favour too much the notion of non-resistance, another form was introduced by the convention parliament, which is more general and indeterminate than the former (*s*); the subject only promising "that he will be faithful and

(*o*) Calvin's case, 7 Rep. 7.

(*p*) 2 Cart. 401; Mod. Un. Hist. xxii. 420.

(*q*) Mirrour, c. 3, s. 35; Fleta, 3, 16; Britton, c. 29; Calvin's case, 7 Rep. 6 b.

(*r*) 1 Hal. P. C. 63. Sir M. Hale also informs us that the oath of allegiance might be tendered to all persons above the age of twelve years, and that either in the court leet of the manor or in the sheriff's tourn. (Ib. 64.)

(*s*) 1 W. & M. c. 8.

[bear *true* allegiance" to the sovereign, without mentioning "his heirs," or specifying in the least wherein that allegiance consists.] And in the oath of allegiance as administered up to the 23rd July, 1858, the style so introduced was still retained: and in connection therewith, there were also used, up to the same date, oaths of supremacy and abjuration, as prescribed, after the Revolution, by Acts in the reign of King William the third (*t*); though their forms had been re-settled by statutes of later reigns (*u*). From the day above mentioned, however, a single oath was substituted, by the 21 & 22 Vict. c. 48, to be taken in the same cases as the several oaths of allegiance, supremacy, and abjuration previously in force; and by 30 & 31 Vict. c. 75, such substituted oath was re-framed, so as to adapt it to the use not only of Protestants, but also of Roman Catholics and Jews. The form of oath, however, was again altered by 31 & 32 Vict. c. 72 (The Promissory Oaths Act, 1868); and, as so settled (*x*), is now used (with a few exceptions) whenever an oath of allegiance is required to be taken by a subject—that is to say, as the general rule, on the acceptance of any of the chief offices of state, or of a judicial appointment in the Supreme Court of Judicature, or of the office of justice of the peace (*y*), or the like.

But besides this express engagement, the law also holds that there is an implied, original, and virtual allegiance

(*t*) 1 W. & M. c. 8; and 13 & 14 Will. 3, c. 6.

(*u*) 1 Geo. 1, st. 2, c. 13; 6 Geo. 3, c. 53.

(*x*) The Promissory Oaths Act, 1871 (34 & 35 Vict. c. 48), does not affect the *form* of the oath thus settled.

(*y*) The oath of allegiance is also required to be taken by aliens before they can claim the benefits of naturalization (see 33 & 34 Vict. c. 14, s. 9). The oath, as framed by 31 & 32 Vict. c. 72, s. 2, is in the following simple terms:—"I, A. B., "do swear that I will be faithful "and bear true allegiance to her "Majesty Queen Victoria, her heirs "and successors, according to law. "So help me God;" and such oath (being taken by affirmation, under the 51 & 52 Vict. c. 46), remains, as to the body of it, the same, the introductory words being: "I, A. B., do solemnly, sincerely, "and truly declare and affirm."

owing from every subject to his sovereign, antecedently to and independently of 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 duties of sovereignty before his coronation; so the subject is bound to his prince by an intrinsic allegiance, before the superinduction of those outward bonds of oath, homage, and fealty; which were only instituted to remind the subject of this his previous duty, and for the better securing its performance. [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, 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" (z). The sanction of an oath, it is true, in case of violation of duty, makes the guilt still more accentuated, 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*. We may remark, too, that the doctrine of allegiance is held to be applicable, not only to the political capacity of the sovereign or regal office, but to his natural person and blood royal; and it was for the misapplication of their allegiance, viz., to the regal capacity or crown, exclusive of the person of the king, that the Spencers were banished in the reign of Edward the second (*a*). And from hence arose that principle of personal attachment and affectionate loyalty which induced our forefathers (and, if occasion required, would doubtless induce their sons) to hazard all that was dear to them, life fortune and family, in defence and support of their liege lord and sovereign.

(z) 2 Inst. 121.

(a) 1 Hale, P. C. 67.

[Allegiance, both express and implied, is however, distinguished by the law into two sorts or species, the one natural, the other local. *Natural* allegiance is such as is due from natural-born subjects (*b*). This is a tie which (subject to a qualification of recent introduction, and presently to be explained) cannot be severed or altered by any change of time, place, or circumstance, nor by anything but the united concurrence of the legislature; for *nemo potest exuere patriam*. An 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. For it was a principle of our law, that the natural-born subject of one prince could not by any act of his own, no, not by swearing allegiance to another, put off or discharge his natural allegiance to the former; for this natural allegiance was intrinsic and primitive, and antecedent to the other; and could not be divested without the concurrent act of that prince to whom it was first due (*c*). It is true that the natural-born subject of one prince, to whom he owed allegiance, might be entangled by subjecting himself absolutely to another (*d*); but it was his own act that brought 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 have been able at pleasure to unloose those bands by which he was connected to his natural prince (*e*).] In

(*b*) Calvin's case, 7 Rep. 6 b. As to the persons who fall within the description of natural-born subjects, vide post, p. 405.

(*c*) 1 Hale, P. C. 68.

(*d*) Marryat *v.* Wilson, 1 Bos. & Pul. 443.

(*e*) Sir Michael Foster (p. 184) observes that the maxim *nemo potest exuere patriam*, comprehendeth the whole doctrine of natural allegiance The operation of the maxim is exemplified in Æneas Macdonald's case (A.D. 1746), who was a native of Great Britain, but having received his education from early infancy in France, and having spent his riper years in a profitable employment in that kingdom, had accepted a commission in the service of the French king; and while acting under that commission he was taken in arms against the king of England, and therefor was indicted and convicted of high treason, but was pardoned upon con-

certain cases, indeed, by adhering to a foreign power, he might forfeit his rights as a British subject, but he remained always liable to his duties as such: and if in the course of such employment he violated the laws of his native country, he would be exposed to punishment when he came within reach of her tribunals.

[Local allegiance, on the other hand, 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 (*f*); and it ceases the instant such stranger transfers himself from this kingdom to another. Natural allegiance is therefore perpetual; and local temporary only; and that for this reason, evidently founded upon the nature of government,—that allegiance is a debt due from the subject, upon an implied contract with the prince, that so long as the one affords protection, so long the other will demean himself faithfully. As therefore the prince is always under a constant tie to protect his natural-born subjects at all times and in all countries, for this reason their allegiance due to him is equally universal and permanent. But, on the other hand, as the prince affords his protection to an alien only during his residence in this realm, the allegiance of an alien is confined (in point of time) to the duration of such his residence, and (in point of locality) to the dominions of the British empire. From which considerations Sir Matthew Hale deduces this consequence, that though there be an usurper of the crown, yet it is treason for any subject, while the usurper is in full possession of the sovereignty, to practise any thing

dition of his leaving the kingdom, and continuing abroad during his life. (See Christian's Blackstone, vol. i. p. 370.)

(*f*) Calvin's case, 7 Rep. 6 a. Sir M. Foster informs us, that it was laid down in a meeting of all the judges, that "if an alien, seeking the protection of the crown, "and having a family and effects "here, should, during a war with "his native country, go thither, "and there adhere to the king's "enemies, *for purposes of hostility*, "he may be dealt with as a traitor." —Fost. 185.

[against his crown and dignity (*g*). And accordingly we find, in fact, that even after the true prince has regained the sovereignty, 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*. As an example of which, we may remark, that after Edward the fourth recovered the crown which had been long detained from his house by the line of Lancaster, treasons committed against Henry the sixth were capitally punished, though Henry had been declared an usuper by parliament.]

The doctrine, however, of the perpetual character of natural allegiance as above set forth, must under the existing law be taken with considerable qualification. For by the Naturalization Acts of 1870 and 1872 (*h*), it has been now provided that any British subject who, when in any foreign state and not under any disability, shall have voluntarily *become naturalized* in such state, shall thenceforth be deemed to have ceased to be a British subject and be regarded as an alien; though provision is at the same time made to enable such person, on the same conditions as other aliens, to obtain from the secretary of state a certificate of re-admission to British nationality which will re-admit him to the status of a British subject (*i*). The Act also provides, that any person who, by reason of having been born within the dominions of her Majesty, is a natural-born subject, but who also at the time of his birth became, under the law of any foreign state, a subject of such state—or who is born out of her Majesty's dominions of a father being a British subject—may make

(*g*) 1 Hale, P. C. 60.

(*h*) 33 & 34 Vict. c. 14; 35 & 36 Vict. c. 39.

(*i*) 33 & 34 Vict. c. 14, ss. 6, 8. Any British subject who, *before the passing of the Act*, had become naturalized in a foreign state, was enabled to preserve his British nationality by making a declaration of his desire so to do within a limited period, viz., two years after the 12th May, 1870. (Sect. 6.)

a declaration of alienage, and shall thenceforth cease to be a British subject (*k*).

The distinction between a natural-born subject and an alien is not, however, confined to the doctrine of allegiance, —there being between them this additional and important difference, that while every one of the former class is entitled to the full benefit and protection of the laws, the latter is still subject to some civil disabilities. But the capacity of an alien may be enlarged in this respect by his becoming a *denizen*, or by his being *naturalized*. There arise, therefore, in this manner, four distinguishable conditions, viz., (1.) Natural-born subjects; (2.) Aliens; (3.) Denizens; and (4.) Persons naturalized: and some notice shall here be taken of each of these in their order.

1. As to *natural-born subjects*.—All persons born within the united kingdom, or in the colonies, fall within this description (*l*). And this extends even to those born of aliens residing in this country, provided their parents were not at the time in enmity with our sovereign. But if a man be born within the realm, of parents who are alien enemies (as may be the case with the children of prisoners of war here confined), or be born of whatever parents in a country not parcel of the British dominions, even though belonging to the sovereign—he is an alien by the common law, though on this rule certain important exceptions have been now grafted by statute, which will be presently noticed. Hence it became necessary, after the Restoration, to pass a particular Act of Parliament, "for the naturalization of children of His Majesty's "English subjects born in foreign countries during the "late troubles" (*m*). This doctrine is founded on a general principle, that every man owes natural allegiance where he is born; and cannot owe two such allegiances, or serve

(*k*) Sect. 4.

(*l*) Calvin's case, 7 Rep. 18 a; Vaughan, 286. As to petitioning for a decree declaratory of the right to be deemed a natural-born subject, vide sup. p. 247.

(*m*) 1 Bl. Com. 373; Stat. 29 Car. 2, c. 6.

two masters, at once. However, the children of the sovereign and the heirs of the crown, wherever born, have always been held natural-born subjects. And the case has always been the same with regard to the children of our ambassadors, born abroad (*n*); for as the father, though in a foreign country, owes not even a local allegiance to the prince to whom he is sent, therefore the son is held (by a kind of *postliminium*) to be born under the queen's allegiance, represented by his father the ambassador. And there seems to have been formerly no other exception than these to the rule, that persons born out of the dominions of the crown are aliens. But other very material ones have at divers times been introduced.

[For to encourage foreign commerce, it was enacted, by statute 25 Edward III. st. 3, that all children born abroad, provided *both* their parents were, at the time of their 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 (*o*); and accordingly it hath been so adjudged on behalf of merchants (*p*). And by several more recent statutes, the restriction of the common law has been still further relaxed (*q*); so that now persons born abroad whose *fathers* (or *grandfathers* by the father's side) were natural-born subjects, are deemed to be natural-born subjects themselves, to all intents and purposes.]

2. As to *aliens*.—The legal notion of an alien has been already sufficiently defined (*r*). As to his rights; they are now largely assimilated to those of natural-born subjects; but there are still certain distinctions, to some of which it will be proper to advert shortly. And in the first place, an

(*n*) Calvin's case, ubi sup.

(*o*) Doe *v.* Jones, 4 T. R. 300.

(*p*) Bacon *v.* Bacon, Cro. Car. 601; Mar. 91; Jenk. Cent. 3.

(*q*) 7 Ann. c. 5; 4 Geo. 2, c. 21; 13 Geo. 3, c. 21.

(*r*) Vide sup. p. 403; and vol. I. pp. 411, 449. At one period of our history persons born in this kingdom, whose parents professed the religion of the *Jews*, seem to have been regarded almost as aliens. Some account of the present legal condition of such British subjects as are of that faith, will be found post, bk. IV. pt. II. c. II.

alien could not in general inherit lands within this realm; nor (except as regards such of his descendants as were natural-born subjects) had he any inheritable blood, so as to transmit an estate in land, by descent (*s*). Again, though an alien might purchase lands, yet by the general rule it was not for his own use, for the king was thereupon entitled to them (*t*); for (it was said) 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 owed to his own natural liege lord: besides that thereby this nation might in time be subject to foreign influence, and feel many other inconveniences. On the other hand, an alien, the subject of a friendly state and being a merchant, has always been allowed to acquire, in this realm, a property in goods, money, and other personal estate, or to hire a house for his habitation: though he must comply with the regulations contained in 6 & 7 Will. IV. c. 11, in respect of the registration of aliens, a statute passed with the object of holding them under proper control (*u*). Also, an alien might always bring an action in this country concerning personal property, and might make a will, and dispose of his personal estate (*x*). Though as to all the rights above mentioned, they must be understood of alien friends only, or such whose countries are in peace with ours; for alien enemies have no rights or

(*s*) Vide sup. vol. I. p. 412.

(*t*) 1 Bl. Com. 372; vide sup. vol. I. p. 449.

(*u*) When political circumstances, however, have rendered it expedient to adopt greater caution as to aliens, the course has been to pass a temporary Act, empowering a secretary of state, during a period specified, to order any particular alien to quit the realm, where information has been received showing the expediency of his removal. The 11 & 12 Vict. c. 20, commonly called the "Alien Act," is an instance of such an Act; and the "Alien Act" was re-enacted and again put in force by the statute 45 & 46 Vict. c. 25, s. 15.

(*x*) 2 Roll. Rep. 94. Blackstone (vol. i. p. 372) observes, that the old French law in this matter was very different, the king on the death of an alien being held entitled to all he was worth, by the *droit d'aubaine* or *jus albinatus*.

privileges (unless by the king's special favour) during the time of war (*y*).

But, as before observed, aliens are by the law, as it now stands, placed in a position far more favourable than they held under the modified privileges previously accorded to them,—the Naturalization Act, 1870 (33 & 34 Vict. c. 14), having enacted, that real and personal property of every description may be now taken, acquired, held, and disposed of by an alien—and that a title to such property may be derived through, from, or in succession to an alien—in the same manner in all respects as by, through, from, or in succession to a natural-born British subject (*z*); but this enactment is not to qualify an alien for any office or for any municipal, parliamentary, or other franchise, or to entitle him to any rights or privileges as a British subject, except those thereby expressly given to him (*a*); and it is further provided by the Act, that nothing therein shall qualify an alien to be the owner of a British ship (*b*).

3. As to *denizens*.—[A denizen is one alien born, but who has obtained *ex donatione regis* letters-patent to make him, to a certain extent, an English subject,—a high and incommunicable branch of the royal prerogative (*c*). A denizen is in a kind of middle state, between an alien and a natural-born subject, and partakes of both of them. But no denizen can be of the privy council, or of either house of parliament, or have any office of trust, civil or military; and he could not receive any grant of lands from the crown (*d*).] The Naturalization Act, 1870, expressly pro-

(*y*) Bl. Com. ubi sup. As the general rule, the right of action upon a contract, entered into with an alien during peace, is *suspended* on war being declared against the country of which he is a native. (See Alcenous *v*. Nigreu, 4 Ell. & Bl. 217.)

(*z*) 33 & 34 Vict. c. 14, s. 2. It has, however, been decided that this provision does not give an alien a good title to real estate purchased prior to its date. (Sharpe *v*. St. Sauveur, Law Rep., 7 Ch. App. 343.)

(*a*) 33 & 34 Vict. c. 14, s. 2.

(*b*) Sect. 14.

(*c*) Calvin's case, 7 Rep. 25; see Com. Dig. Aliens, D. 1; Wilson *v*. Marryatt, 8 T. R. 31.

(*d*) 12 & 13 Will. 3, c. 2.

vides, that nothing therein contained shall affect the grant of any letters of denization by her Majesty (*e*); but apparently, as an alien now can, so a denizen also may hold lands in England.

4. As to *aliens naturalized*.—Naturalization can be effected either by Act of Parliament, or by the certificate of a secretary of state. By naturalization according to the first method, an alien is usually put in exactly the same state as if he had been born in the king's ligeance. It has therefore a retrospective effect, in which (among other articles) it differs from mere denization. And, consequently, if a man was naturalized by Act of Parliament, his son, born before, might inherit land in this realm (*f*). As for the second species of naturalization, viz., that by certificate of the secretary of state, it is a modern method introduced in the year 1844 by 7 & 8 Vict. c. 66, in order to enable foreigners coming to reside and settle in the United Kingdom to obtain the advantages of naturalization in a less expensive and tedious way than by procuring a private Act (*g*). That statute, indeed, has been repealed (*h*); but by the Acts on this subject now existing, viz., the Naturalization Acts, 1870, 1872, an alien who has resided in the United Kingdom (or has been in the service of the crown) for not less than five years, and intends when naturalized either to reside in the United Kingdom or to serve under the crown, is enabled to apply for a certificate of naturalization to one of the secretaries of state; who may, after receiving the necessary evidence in support of the application, issue, if he shall so think fit, to the applicant a certificate accordingly; whereupon, and upon his taking the oath of allegiance (*i*), the alien shall in the United Kingdom be entitled to all political and other

(*e*) 33 & 34 Vict. c. 14, s. 13.

(*f*) Co. Litt. 129 a; vide sup. vol. I. p. 412.

(*g*) A private Naturalization Act is even yet, however, occasionally obtained.

(*h*) By 33 & 34 Vict. c. 14.

(*i*) See the Naturalization Oaths Act, 1870 (33 & 34 Vict. c. 102).

rights, powers, and privileges, and be subject to all the obligations, to which a natural-born British subject is entitled or subject in the United Kingdom (*k*).

These are the principal distinctions between aliens, denizens, and natives: distinctions which it was once endeavoured to lay almost totally aside, by passing one general Naturalization Act for all foreign Protestants—an attempt which was 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. 9, with the exception of one clause for naturalizing the children of English parents born abroad. However (long prior to the Naturalization Acts of the present reign), it was enacted (*l*), that foreign Protestants and Jews, upon their residing seven years in any of the American colonies without being absent above two months at a time,—and all foreign Protestants serving two years in a military capacity there, or being three years employed in the whale fishery, without afterwards absenting themselves from the king's dominions for more than one year, and none of them falling within certain incapacities,—should, upon taking the oaths of allegiance and abjuration, be naturalized to all intents and purposes, as if they had been born in this kingdom (*m*),—except indeed as to sitting in parliament, or in the privy council, and as to holding offices or accepting grants from the crown (*n*).

(*k*) 33 & 34 Vict. c. 14, s. 7.

(*l*) 13 Geo. 2, c. 7; 20 Geo. 2, c. 44; 13 Geo. 3, c. 25,—all repealed by 33 & 34 Vict. c. 14.

(*m*) By 13 Geo. 2, c. 3, the same effect was made to follow service for two years on board an English ship in time of war; but this statute was repealed by 30 & 31 Vict. c. 59.

(*n*) In the year 1753 was passed the famous Jew Bill (26 Geo. 2, c. 26), to enable all foreigners who were Jews to be naturalized without taking the sacrament; but the popular dislike of it was so great that it was repealed in the next session, by 27 Geo. 2, c. 1. However, by 6 Geo. 4, c. 67, the necessity for taking the sacrament on being naturalized was taken away altogether.

CHAPTER III.

OF THE ROYAL TITLE.

[THE supreme executive power being by the law of England vested in a single person, a rule of succession has been laid down,—uniform, universal, and permanent,—to mark out with precision, who is that single person; and it being of the highest importance to the public tranquillity, that this rule should be clear and indisputable, our constitution has not left us in the dark upon this material occasion. It will be our endeavour in this chapter to trace out the constitutional doctrine of the royal succession.]

The fundamental maxim, upon which the *jus coronæ*, or right of succession to the throne, of these kingdoms depends, seems to be that the crown is, by common law and constitutional custom, hereditary; but in a manner peculiar to itself: and that the right of the reigning prince may from time to time be set aside by Act of Parliament, in favour of a new sovereign; in whom the crown will still continue hereditary as before, except so far as the succession may have been otherwise limited by the same parliamentary authority (*a*). And this proposition it will be the business of this chapter to prove, in all its branches;

(*a*) The maxim, as stated by Blackstone (vol. i. p. 191), is as follows:—"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."

first, that the crown is hereditary; secondly, that it is hereditary in a manner peculiar to itself; thirdly, that the right of the reigning prince to it may be set aside, in favour of another, by parliament; and lastly, that, except as otherwise limited by parliament, it is hereditary, as before, 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 no instance is known wherein the crown of England has ever been claimed to be elective. Yet, by the assertion of an hereditary title, a *jure divino* title to the throne is by no means intended, save so far as kingdoms, like other things, are in the disposition of Providence. Nor indeed have a *jure divino* and an hereditary right any necessary outward connection with each other; for the hereditary right which the laws of England acknowledge, owes its origin to the founders of our constitution, and to them only. It has no relation to, nor depends upon, the civil laws of the Jews, the Greeks, the Romans, or any other nation upon earth; but it depends upon the municipal laws of our own country; and the founders of the English monarchy chose, and upon good reason, to establish originally a succession by inheritance,—which choice having been acquiesced in by general consent, has ripened by degrees into the common law.

An elective monarchy might seem to be the most obvious, and best suited of any, to the rational principles of government, and to the freedom of human nature; and we find from history, that, in the infancy and first rudiments of almost every state, the leader, chief magistrate, or prince hath usually been elected. But history and observation alike inform us that, in a more advanced stage of society, the election of the supreme magistrate is an event round which passion and prejudice eddy, and self-seeking artifices boil and rage; all which excesses and extravagances, often resulting in assassination and bloodshed, are avoided by

[accepting the principle of an hereditary succession, which species of succession to the crown is therefore now established in this country.

2. Secondly, as to the particular mode of inheritance.—This corresponds in general with the feodal law of descents, chalked out by the common law in the succession to landed estates; for, like estates, the crown descends lineally to the issue of the reigning monarch; as it did from King John to Richard the second, through a regular pedigree of six lineal generations. And, as in common descents, the preference of males to females, and the right of primogeniture among the males, are strictly adhered to: *e. g.*, Edward the fifth succeeded to the crown, in preference to Richard, his younger brother, and to Elizabeth, his eldest sister. Also, 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; "*neque enim sexum in imperiis discernunt*" (*b*): *e. g.*, the first Mary succeeded to Edward the sixth; and the line of Margaret Queen of Scots, the daughter of Henry the seventh, succeeded on failure of the line of Henry the eighth, 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 particular; and therefore Queen Mary on the death of her brother succeeded to the crown alone, and not in parcenary 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: *e. g.*, Richard the second succeeded his grandfather Edward the third, in

(*b*) In Vit. Agricolæ. See Coleridge's Blackst., vol. i. p. 194, n. (1).

[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 sovereign, provided they are lineally descended from the blood royal, that is, from that royal stock which originally acquired the crown: *e. g.*, Henry the first succeeded to William the second, John to Richard the first, and James the first to Elizabeth, being all derived from the Conqueror, who was then the only regal stock. And herein there was never any objection to the succession of a brother, an uncle, or other collateral relation, of the half blood (*c*) : that is, where the relationship proceeds not from the same couple of ancestors (which constitutes a kinsman of the whole blood), but from a single ancestor only ;—as when two persons are derived from the same father, and not from the same mother, or *vice versâ ;*—provided only, that the one ancestor, from whom both are descended, be that from whose veins the blood royal is communicated to each : *e. g.*, Mary the first inherited to Edward the sixth, and Elizabeth inherited to Mary,—all children of the same father, King Henry the eighth, but all by different mothers.

3. The doctrine of hereditary right does by no means imply an indefeasible right to the throne. It is unquestionably in the breast of the supreme legislative authority of this kingdom,—the sovereign 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

(*c*) It will be remembered that until the Inheritance Act of 1833, the half blood did not succeed in the case of an ordinary descent. Vide sup. vol. I. p. 394.

[right, generally subsisting in the royal person; so the word "successors," distinctly taken, must imply that this inheritance must 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; and the power can nowhere be properly lodged but in the two houses of parliament, by and with the consent of the reigning sovereign; who, it is not to be supposed, will agree to anything unduly prejudicial to the rights of his own descendants. And therefore in the king, lords, and commons, in parliament assembled, our laws have expressly lodged it.

4. But, fourthly, however the crown may be limited or transferred, it still retains its descendible quality, and becomes hereditary in the wearer in the same manner as it was before hereditary in his predecessor, save and except so far as in the words of limitation to the new successor it is otherwise ordered and expressed; exactly as in the case of inheritances in lands, in which, 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.

These four points in the law of the hereditary right to the throne will be made clear beyond all dispute, by a short historical view of the succession to the crown of England, by the doctrines of our antient lawyers, and by 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, the succession, through fraud or force, or sometimes through necessity, when in hostile times the crown descended on a minor or the like, has been very frequently

[suspended; but it has generally at last returned back into the old hereditary channel, though sometimes a very considerable period has intervened.

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 (*d*). The other kingdoms of the heptarchy he acquired, some by conquest, but most by a voluntary submission. And it is an established maxim in civil polity, and the law of nations, that when one country is united to another in such a manner, as that one keeps its government and status, and the other loses them; the latter entirely assimilates with or is melted down in the former, and must adopt its laws and customs (*e*). 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 (*f*).

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 of the

(*d*) According to Turner, Egbert succeeded as the only surviving descendant of Cerdic, who at the head of a colony of Saxons had invaded the western parts of the island A.D. 495, and founded what was afterwards called Wessex, or the West Saxon Kingdom. (Turner's Hist. Anglo-Sax. vol. i. pp. 269, 270, 271, 420, 6th edit.)

(*e*) Puff. L. of N. and N. b. 8, c. 12, § 6.

(*f*) According to Turner, Egbert did not acquire the other Anglo-Saxon kingdoms, except in the sense of establishing the general predominance of Wessex. "Alfred "was the first monarch of the "Anglo-Saxons, and Athelstan "the first monarch of England;" and "it was not until Athelstan "completely subjugated the Anglo-"Danish power, that the monarchy "of England arose." (Turner, ubi sup. vol. i. p. 429; vol. ii. p. 190; vol. iii. p. 173, 6th edit.)

[same royal family, though the course of descent in other respects was subject to some irregularities (*g*); the most material of which were, that the king last mentioned, and one of his predecessors, Athelstan, were illegitimate, and that each took the crown in the lifetime of a legitimate brother (*h*).

King Edmund Ironside was obliged, by the hostile irruption of the Danes, at first to divide his kingdom with Canute, King of Denmark; and after Edmund's death, Canute 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 this newly 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, the surviving son of Ethelred, the father and predecessor of Edmund Ironside (*i*).

On the decease of Edward without issue, Harold the second usurped the throne; and almost at the same instant came on the Norman invasion; the right to the crown being all the time in Edgar, surnamed Atheling (which signifies in the Saxon language *illustrious*, or of royal blood), who was the son of Edward the Outlaw, and

(*g*) With reference to these irregularities, Mr. Hallam says, "The "Saxons, like most European na- "tions, while they limited the "inheritance of the crown exclu- "sively to one royal family, were "not very scrupulous about the "devolution upon the nearest "heir." (Hallam's Mid. Ages, vol. ii. p. 380, 7th edit. See also Turner, ubi sup. vol. iii. p. 150.)

(*h*) See Turner's Hist. Anglo-Sax. vol. ii. pp. 176, 223, 326, 355; Palgrave's Hist. of the Anglo-Saxons, cap. X.; Pearson's Hist. of the Early and Middle Ages of England, pp. 124, 151. Blackstone (vol. i. p. 198) points out also that the sons of Ethelwolf succeeded each other 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 that Edred, the uncle of Edwy, reigned for about nine years, in troublesome times, in right of his nephew, a minor.

(*i*) Turner, ubi sup. vol. ii. p. 355.

[grandson of Edmund Ironside; or as Matthew Paris well expresses the sense of our old constitution, "*Edmundus autem Latusferreus, rex naturalis de stirpe regum, genuit Edwardum; et Edwardus genuit Edgarum, cui de jure debebatur regnum Anglorum*" (*k*).

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, "*absque generali senatûs et populi conventu et edicto*" (*l*); which also very plainly implies, that it was then 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 now 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 once so transferred, all the inherent properties of the crown were with it transferred also. For the victory obtained at Hastings not being a victory over the nation collectively (*m*), but only over the person of Harold, the only right that the conqueror acquired thereby, was the right to possess the crown of England, not to alter the nature of the government. And therefore, as the English laws still remained in force, he necessarily took the crown subject to those laws, and with all its inherent properties, the first and principal of which was its descendibility. Here

(*k*) A.D. 1066.
(*l*) William of Malmsb. 1. 3.
(*m*) Hale, Hist. C. L. c. 5; Seld. Review of Tithes, c. 8.

[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 ressort* of kings,) a strong and undisputed title to the inheritable crown of England.

Accordingly it descended from him to his sons William the second and Henry the first. It must be owned that his eldest son, Robert, 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 (*n*),—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 Robert died without issue, Henry at last had a good title to the throne, whatever he might have had at first.

Stephen of Blois, who succeeded to Henry, was indeed the grandson of the Conqueror, by Adelicia, his daughter, and claimed the throne by a feeble kind of hereditary right: not as being the nearest of the male line, but as the nearest male of the blood royal, excepting his elder brother Theobald, who was Earl of Blois, and who therefore seems to have waived, as he certainly never insisted on, so troublesome and precarious a claim. The real right was, however, in the Empress Matilda or Maud, the daughter of Henry the first, 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, while the Empress Maud did not fail to assert her hereditary right by the sword (*o*); which dispute was attended with

(*n*) See Lord Lyttelton's Life of Henry the second, vol. i. p. 467.

(*o*) "*Ego Stephanus, Dei gratiâ assensu cleri et populi in regem An-*

[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 further to the English. He was lineally descended from Edmund Ironside, of the Saxon race of hereditary kings (*p*). 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 the first; who by him had the Empress Maud, the mother of Henry the second. 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 the second the crown descended to his eldest son, Richard the first, 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 the crown, as appears from his charters, by hereditary right (*q*); 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;

glorum electus, &c."—(Cart. A.D. 1136; Ric. de Hagustald. 314; Hearne ad Guil. Neubr. 711.)

(*p*) Blackstone's expression is, "the *last* of the Saxon race of "hereditary kings." But this description belongs to Edward the Confessor.

(*q*) "—*Regni Angliæ; quod nobis jure competit hæreditario.*"—Spelm. Hist. R. Joh. apud Wilkins, 354.

[and it is to be remembered that, in the reign of King Henry the second, it was a point undetermined, 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 (*r*); and that it long afterwards remained undecided, in the collateral succession to the fiefs of the empire, whether the order of the stocks, or the proximity of degree, should take place (*s*). However, on the death of Arthur, and his sister Eleanor, without issue, a clear and indisputable title vested in Henry the third, 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 we find it declared in parliament, "that the law of the crown of England is, and always "hath been, that the children of the King of England, "whether born in England or elsewhere, ought to bear "the inheritance after the death of their ancestors. Which "law our sovereign lord the king, the prelates, earls, and "barons, and other great men, together with all the "commons in parliament assembled, do approve and affirm "for ever" (*t*).

Upon Richard the second's resignation of the crown, he having no children, the right resulted to the issue of his grandfather Edward the third. That king had many children besides his eldest, Edward the black prince of Wales, the father of Richard the second; but to avoid confusion, we shall only mention three: William the second son, who died without issue: Lionel Duke of Clarence, his third son: and John of Gaunt Duke of Lancaster, his fourth. By the rules of succession, therefore, the posterity of Lionel Duke of Clarence were entitled to the throne upon the resignation of King Richard; and had accordingly been declared by the king, many years before, the presumptive heirs of the crown; which declaration was

(*r*) Glanv. l. 7, c. 3.
(*s*) Mod. Un. Hist. xxx. 512.
(*t*) Stat. 25 Edw. 3, st. 1.

[also confirmed in parliament (*u*). But Henry Duke of Lancaster, the son of John of Gaunt, having then a large army in the kingdom, the pretence of raising which was to recover his patrimony from the king, and to redress the grievances of the subject, it was impossible for any other title to be asserted with any safety; and he became king under the title of Henry the fourth. But, as Sir Matthew Hale remarks (*x*), though the people unjustly assisted Henry the fourth 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 (*y*),—but as a successor, descended by right line of the blood royal; as appears from the rolls of parliament in those times. And in order to this, he set up a show of two titles: the one upon the pretence of being the first of the blood royal in the entire male line, whereas the Duke of Clarence left only one daughter Philippa, from which female branch, by a marriage with Edmund Mortimer Earl of March, the house of York descended: the other, by reviving an exploded rumour, first propagated by John of Gaunt, that Edmund Earl of Lancaster (to whom Henry's mother was heiress), was in reality the elder brother of king Edward the first: 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 the second, in case the entire male line was allowed a preference to the female; or even prior to that unfortunate prince, if the crown could descend through a female, while an entire male line was existing.

However, as in Edward the third's time we find the parliament approving and affirming the law of the crown as before stated, so in the reign of Henry the fourth they actually exerted their right of new-settling the succession to the crown. And this was done by the statute

(*u*) Sandford's Geneal. Hist. 246.
(*x*) Hist. C. L. c. 5.
(*y*) Seld. Tit. Hon. 1, 3.

[7 Hen. IV. c. 2, whereby it is enacted, "that the in-
" heritance of the crown and realms of England and
" France, and all other the king's dominions, shall be set
" and remain in the person of our sovereign lord the
" king, and in the heirs of his body issuing;" and Prince Henry is declared heir apparent to the crown, to hold to him and the heirs of his body issuing, with remainder to the Lord Thomas, Lord John, and Lord Humphry, the king's sons, and the heirs of their bodies respectively; which is indeed nothing more than the law would have done before, provided Henry the fourth had been a rightful king. It, however, serves to show that it was then generally understood, that the king and parliament had a right to new-model and regulate the succession to the crown; and we may also observe with what caution and delicacy the parliament then avoided declaring any sentiment of Henry's original title. However, Sir Edward Coke more than once expressly declares, that at the time of passing this Act the right of the crown was in the descent from Philippa, daughter and heir of Lionel Duke of Clarence (*z*).

Nevertheless the crown descended regularly from Henry the fourth, to his son and grandson Henry the fifth and Henry the sixth; 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 the fourth; at whose 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

(*z*) 4 Inst. 37, 205.

[the rightful heir. In the statute 1 Edw. IV. c. 1, the three Henrys are styled, "late kings of England successively in deed, and not of right." And in all the known charters of King Edward, wherever he has occasion to speak of any of the line of Lancaster, he calls them "*nuper de facto, et non de jure, reges Angliæ.*"

Edward the fourth left two sons and a daughter; the eldest of which sons, King Edward the fifth, 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 the fourth, to make a show of some hereditary title. After which he is generally believed to have murdered his two nephews, upon whose death the right of the crown devolved to their sister Elizabeth.

The tyrannical reign of King Richard the third gave occasion to Henry Earl of Richmond to assert his title to the crown. A title the most remote and unaccountable that was ever set up, and which nothing could have given success to, but the universal detestation of the then usurper Richard. For, besides that he claimed under a descent from John of Gaunt, whose title was now exploded, the claim (such as it was) was through John Earl of Somerset, a bastard begotten by John of Gaunt upon Katherine Swinford, and the lineal ancestor of Richmond through his mother Margaret. It is true that, by an Act of Parliament of the twentieth year of Richard the second, 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, "*exceptâ dignitate regali*" (*a*).

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

(*a*) 4 Inst. 36.

[declares, in Elizabeth, eldest daughter of Edward the fourth (*b*); and his possession was established by parliament, holden the first year of his reign. In the Act for which purpose, the parliament seems to have copied the caution of their predecessors in the reign of Henry the fourth; and therefore (as Lord Bacon, the historian of this reign, observes) carefully avoided any recognition of Henry the seventh'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 the seventh and the "heirs of his body;" thereby providing for the future, and at the same time acknowledging his present possession; but not determining either way, whether that possession was *de jure* or *de facto* merely. However, he soon after married Elizabeth of York, the undoubted heiress of the Conqueror, and thereby gained—as Sir Edward Coke declares—by much his best title to the crown (*c*). 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,—his eldest brother, Prince Arthur, having died without issue, —and transmitted it to his three children in successive order. But in his reign we find the parliament, at several times, busy in regulating the succession to the kingdom; as firstly, by the statute 25 Hen. VIII. c. 22, which recites the mischiefs which had and might ensue by disputed titles, because no perfect and substantial provision had been made by law concerning the succession; and then enacts, that the crown shall be entailed to his majesty,

(*b*) 4 Inst. 37.

(*c*) Ibid.

[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 heirs of the body of the Lady Elizabeth; "and so 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 to the same: and "for default of such issue, then to the king's right heirs "for ever"; which single statute is an ample proof of all the four positions we at first set out with.

But, upon the king's divorce from Anne Boleyn, this statute was, with regard to the settlement of the crown, repealed by the statute 28 Hen. VIII. c. 7: wherein the Lady Elizabeth was also, as well as the Lady Mary, bastardized, and the crown settled on the king's children by Queen Jane Seymour, and his future wives; and, in default of such children, then with this remarkable remainder, "to such persons as the king by letters-patent, or last will and testament, shall 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 the statute 35 Hen. VIII. c. 1, the king's two daughters were legitimated again; and the crown was limited to Prince Edward by name, after that to the Lady Mary, and then to the Lady Elizabeth, and the heirs of their respective bodies; which succession took effect accordingly, being indeed no other than the usual course of the law with regard to the descent of the crown.

But lest there should remain any doubt in the minds of the people, through this jumble of Acts for limiting the succession,—Queen Mary's hereditary right to the throne was acknowledged by the statute 1 Mar. sess. 2, c. 1, and

[recognized in these words: "The crown of these realms "is most lawfully, justly, and rightly descended and come "to the queen's highness that now is, being the very, true, "and undoubted heir and inheritrix thereof." And again, upon the Queen's marriage with Philip of Spain, by the statute which settled the preliminaries of that match, the hereditary right to the crown was thus asserted and declared: "As touching the right of the Queen's in-"heritance 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" (*d*). 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 was recognized in still stronger terms than her sister's; the parliament acknowledging, "that the queen's highness is, and "in very deed and of most mere right ought to be, by the "laws of God, and the laws and statutes of this realm, our "most lawful and rightful sovereign liege lady and queen; "and that her highness is rightly, lineally, and lawfully "descended and come of the blood royal of this realm of "England; in and to whose princely person, and the heirs "of her body lawfully to be begotten, after her, the "imperial crown and dignity of this kingdom are vested, "limited, and annexed" (*e*).] And in the same reign, by the statute 13 Eliz. c. 1, we find the right of parliament to direct the succession of the crown distinctly asserted,—it being provided that it shall be treason to affirm that the laws and statutes do not bind the right of the crown, and the descent, limitation, inheritance, or government thereof. And, further, that any person who shall, during the queen's life, by any written or printed work, expressly affirm, print, or publish, before the same is established by parliament,

(*d*) 1 Mar. sess. 3, c. 2.

(*e*) Stat. 1 Eliz. c. 3.

that any particular person is or ought to be heir and successor to the queen, except the same be the natural issue of her body,—shall, for the first offence, suffer imprisonment and the loss of half his goods, and for the second the penalty of a *præmunire* (*f*).

[On the death of Queen Elizabeth without issue, the line of Henry the eighth became extinct. It therefore became necessary to recur to the other issue of Henry the seventh, by Elizabeth of York his queen; whose eldest daughter, Margaret, having married James the fourth, 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 the eighth, centred all the claims of different competitors, from the Conquest downwards, he being indisputably the lineal heir of the Conqueror. And what is still more remarkable, in his person also centred the right of the Saxon monarchs, which had been suspended from the Conquest, till his accession. For 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 the second, by a descent from Matilda their daughter, is generally called the restorer of the Saxon line. But it must be remembered, that Malcolm by his Saxon queen had sons as well as daughters; and that the royal family of Scotland, from that time downwards, were the offspring of Malcolm and Margaret. Of this royal family, King James the first was the direct lineal heir; and therefore, united in his person every possible claim by hereditary right to the English as well as to the Scottish throne. And the English parliament, by the statute 1 Jac. I. c. 1, did "recognize and acknowledge that immediately upon

(*f*) Vide post, bk. VI.

["the dissolution and decease of Elizabeth, late queen of "England, the imperial crown thereof did by inherent "birthright, and lawful and undoubted succession, descend "and come to his most excellent majesty, as being lineally, "justly, and lawfully, next and sole heir of the blood "royal of this realm" (*g*).

It was absurd, therefore, when so many hereditary rights had centred in King James the first, that the parliament of his son and heir, King Charles the first, should have told that unhappy monarch that he was merely an elective prince; elected by his people, and therefore accountable to them, in his own proper person, for his conduct; and the confusion which followed the fatal catastrophe of the death of King Charles the first, is a standing argument in favour of hereditary monarchy; and on the restoration of his son King Charles the second, which was the result of a solemn parliamentary convention of the states, it was declared by both houses of parliament, "that according to their duty and allegiance they did "heartily, joyfully, and unanimously acknowledge and "proclaim, that, immediately upon the decease of our late "sovereign lord King Charles, the imperial crown of these "realms did by inherent birthright and lawful and un-"doubted succession descend and come to his most excel-"lent majesty Charles the second, as being lineally, justly, "and lawfully, next heir of the blood royal of this realm: "and thereunto they most humbly and faithfully did "submit and oblige themselves, their heirs, and posterity "for ever" (*h*).

Thus, it clearly appears, from the highest authority this nation is acquainted with, that the Crown of England hath

(*g*) Elizabeth of York, the mother of Queen Margaret of Scotland, was heiress of the House of Mortimer. And Mr. Carte observes, that the house of Mortimer, in virtue of its descent from Gladys, only sister to Llewellin ap Jorwerth the Great, had the true right to the principality of Wales. (Hist. Eng. iii. 705.)

(*h*) Com. Journ. 8th May, 1660.

[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 since the Restoration 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 the fourth, Henry the seventh, Henry the eighth, Queen Mary, and Queen Elizabeth.

The first instance in point of time, is the famous bill of exclusion, which raised such a ferment in the latter end of the reign of King Charles the second. It is well known that the purport of this bill was to have set aside the king's brother and presumptive heir, the Duke of York, from the succession, on the score of his being a papist; that it passed the house of commons, but was rejected by the lords; the king having also declared beforehand, that he never would be brought to consent to it. And from this transaction we may collect two things: 1. That the crown was universally acknowledged to be hereditary, and the inheritance indefeasible unless by parliament; else it had been needless to prefer such a bill. 2. That the parliament had a power to have defeated the inheritance; else such a bill had been ineffectual. The commons acknowledged the hereditary right then subsisting; and the lords did not dispute the power, but merely the propriety of an exclusion. However, as the bill took no effect, King James the second succeeded to the throne of his ancestors; and might have enjoyed it during the remainder of his life, but for his own infatuated conduct, which, with other concurring circumstances, brought on the Revolution in 1688.

The true ground and principle upon which that memorable event proceeded was an entirely new case in politics, which had never before happened in our history—the abdication of the reigning monarch, and the vacancy of the throne thereupon. It was not a defeasance of the right of succession, and a new limitation of the crown, by the king and both houses of parliament; it was the act of

[the nation alone, upon a conviction that there was no king in being. For in a full assembly of the lords and commons, met in a convention upon the supposition of this vacancy, both houses came to this resolution: "That King "James the second, having endeavoured to subvert the "constitution of the kingdom by breaking the original "contract between king and people—and, by the advice of "jesuits and other wicked persons, having violated the "fundamental laws, and having withdrawn himself out of "this kingdom—has abdicated the government, and that "the throne is thereby vacant" (*i*). Thus ended at once, by this sudden and unexpected vacancy of the throne, the old line of succession; which from the Conquest had lasted above six hundred years, and from the union of the heptarchy in King Egbert almost nine hundred. The facts themselves thus appealed to, the king's endeavour to subvert the constitution by breaking the original contract, his violation of the fundamental laws, and his withdrawing himself out of the kingdom, were evident and notorious; and the consequences drawn from these facts,—namely, that they amounted to an abdication of the government, which abdication did not affect only the person of the king himself, but also all his heirs, and rendered the throne absolutely and completely vacant,—it belonged to our ancestors to determine. And that these consequences were fairly deduced from these facts, our ancestors solemnly determined, in a full parliamentary convention, representing the whole society; and it is not competent for us now to inquire into the reasons for that determination; the fact is to be accepted.

This single postulatum, the vacancy of the throne, being once established, the rest that was then done followed almost of course. For if the throne be at any time vacant (which may happen by other means besides that of abdication; as if all the blood royal should fail, without any successor

(*i*) **Com. Journ. 7th Feb. 1688.**

[appointed by parliament); if, we 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, as the trustees and representatives of the nation. For there are no other hands in which it can so properly be entrusted; and there is a necessity of its being entrusted somewhere, else the whole frame of government must be dissolved and perish. The lords and commons having therefore determined this main fundamental article, that there was a vacancy of the throne, they proceeded to fill up that vacancy in such manner as they judged the most proper. And this was done by their declaration of 12th February, 1688, in the following manner:—"that "William and Mary, prince and princess of Orange, be "and be declared king and queen, to hold the crown and "royal dignity during their lives, and the life of the sur-"vivor of them; and that the sole and full exercise of the "legal 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" (*k*).

Perhaps, upon the principles before established, the convention might (if they pleased) have vested the regal dignity in a family entirely new, and strangers to the royal blood; but they were too well acquainted with the benefits of hereditary succession, and the influence which it has by custom over the minds of the people, to depart any further 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

(*k*) Com. Journ. 12th Feb. 1688.

[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 a son of Mary his eldest sister. This settlement included all the protestant posterity of King Charles the first, except such other issue as King James might at any time have; which was totally omitted, through fear of a popish succession. And this order of succession took effect accordingly.

These three princes, therefore, King William, Queen Mary, and Queen Anne, did not take the crown by hereditary right or *descent*, but by way of donation or *purchase*, in the technical sense. 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 in their eye, and paid a great, though not exclusive, regard to it. Let us see how the succession would have stood, if no abdication had happened, and King James had left no other issue than his two daughters, Queen Mary and Queen Anne. It would have stood thus: Queen Mary and her issue; Queen Anne and her issue; King William and his issue. But we may remember that Queen Mary was only nominally Queen, jointly with her husband King William, who alone had the regal power; and King William was personally preferred to Queen Anne, though his issue was postponed to hers. Clearly therefore these princes were successively in possession of the crown, by a title different from the usual course of descents.

It was towards the end of King William's reign, when all hopes of any surviving issue from any of these princes died with the duke of Gloucester, the last surviving child

[of the Princess Anne, 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 provision was made at the Revolution further than for the issue of Queen Mary, Queen Anne, and King William. The parliament had previously, by the statute of 1 W. & M. sess. 2, c. 2, enacted, that every person who should be reconciled to, or hold communion with, the see of Rome, profess the popish religion, or marry a papist,—should be excluded from, and be for ever incapable to inherit, possess, or enjoy the crown; and that in such case the people should be absolved from their allegiance; and the crown should descend to such persons, being protestants, as would have inherited the same, in case the persons so reconciled, holding communion, professing, or marrying, were naturally dead. To act therefore consistently with themselves, and at the same time to pay as much regard to the old hereditary line as their former resolutions would admit, they turned their eyes on the Princess Sophia, electress and duchess dowager of Hanover, the most accomplished princess of her age (*l*). For, upon the impending extinction of the protestant posterity of Charles the first, the old law of regal descent directed them to recur to the descendants of James the first; and the Princess Sophia, being the youngest daughter of Elizabeth, queen of Bohemia, who was the daughter of James the first, was the nearest of the 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

(*l*) Sandford, in his genealogical history, published A.D. 1677, speaking (p. 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.

[by the statute 12 & 13 Will. 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 the fourth 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 Anne, c. 41, 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 treason; or if he maintains the same by only preaching, teaching, or advised speaking, shall incur the penalties of a *præmunire*.]

The Princess Sophia dying before Queen Anne, the inheritance thus limited descended on her son and heir, George the first; and having on the death of Anne taken effect in his person, from him it descended to George the second; from him to his grandson and heir, George the third; from him to his son George the fourth; who was succeeded by his brother William the fourth; and from the monarch last mentioned, the crown descended to his heiress,—the daughter of his brother Edward Duke of Kent—our present gracious sovereign lady Queen Victoria.

[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; afterwards William the Conqueror; and now it is the Princess Sophia, in whom the inheritance was vested by the new king and parliament. Formerly, the descent

[was absolute, and the crown went to the next heir without any restriction; but now, upon the new settlement, the inheritance is conditional; being limited to such heirs only of the body of the Princess Sophia as are protestant members of the Church of England, and as are married to none but protestants.

In the due medium which has been explained between a merely elective body on the one hand, and absolute hereditary right on the other, consists 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 in duration, it is to be hoped, the most permanent. It was the duty of an expounder of our laws to lay this constitution before the reader in its true and genuine light; it is the duty of every good Englishman to understand, to revere, to defend it.]

CHAPTER IV.

OF THE ROYAL FAMILY.

It is to be observed that when a female sits on the throne of these realms in her own right, she is styled queen *regnant*; *e.g.*, Queen Mary, Queen Elizabeth, and Queen Anne; also, our present gracious sovereign. A queen regnant has the same powers, prerogatives, rights, dignities, and duties as if she were a king, and this is expressly declared by the statute 1 Mary I. sess. 3, c. 1 (*a*). On the other hand, the wife of a reigning king is styled merely the queen *consort*, although she also, by virtue of her marriage, is participant of divers prerogatives above other women (*b*).

[And, first, the queen consort is a public person, exempt and distinct from the king; and not, like other married women, so closely connected as to have lost all legal or separate existence so long as the marriage continues. For the queen consort is (and always has been) 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 of her lord), which no other married woman can (or until very recently could) do (*c*); a privilege

(*a*) Mary being the first queen that sat upon the English throne, this statute was passed, as it declares, for "the extinguishment of "the doubt and folly of malicious "and ignorant persons," who might be induced to think that a queen could not exercise all the prerogatives of a king. (1 Bl. Com. p. 218, *in notis*.)

(*b*) Bl. Com. ubi sup.; Finch, L. 86.

(*c*) 4 Rep. 23.

[as old as the Saxon era (*d*). She is also capable at common law of taking a grant from the king (*e*); which no other wife is (or until very recently was) capable of doing 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, was equally capable of making a grant to, and receiving one from, the emperor (*f*). Moreover, the queen consort of England hath separate courts and offices distinct from those of the king, 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 (*g*). She may likewise sue and be sued alone, without joining her husband. She may also have a separate property in goods as well as in lands, and she 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 a married woman (*h*). 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 consort a power of transacting her own concerns, without the intervention of the king, as if she was an unmarried woman.

The queen consort hath also many exemptions and minute prerogatives. For instance, she pays no toll: nor is she liable to any amercement in any court (*i*). 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,

(*d*) Seld. Jan. Ang. l. 42.

(*e*) 2 Geo. 3, c. 1; 15 Geo. 3, c. 33; 39 & 40 Geo. 3, c. 88; 47 Geo. 3, sess. 2, c. 45.

(*f*) Cod. 5, 16, 26.

(*g*) Seld. Tit. Hon. 1, 6, 7; et vide post, bk. v. c. III.

(*h*) Finch, L. 86; Co. Litt. 133.

(*i*) Co. Litt. ubi sup.; Finch, L. 185.

[and not his equal: in like manner, as in the imperial law, "*Augusta legibus soluta non est*" (*k*).

The original revenue of our queens consort, before and soon after the Conquest, seems to have consisted in certain reservations or rents out of the demesne lands of the crown, which were expressly appropriated to her majesty, distinct from the king. It is frequent in Domesday book, after specifying the rent due to the crown, to add likewise the quantity of gold or other renders reserved to the queen (*l*). These were frequently appropriated to particular purposes: to buy wool for her majesty's use, to purchase oil for her lamps, or to furnish her attire from head to foot (*m*); which was frequently very costly, as one single robe in the fifth year of Henry the second stood the city of London in upwards of fourscore pounds (*n*). 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 (*o*). And for a further addition to her income, the duty of queen-gold (*aurum reginæ*) 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. For this queen-gold was due on every voluntary offering or fine to the king amounting to ten marks and upwards, in consideration of any privileges, grants, licences, pardons, or other matters of royal favour, in the proportion of one-tenth of such offering or fine (*p*). But it was not payable in respect of any aid or subsidy granted by parliament or convocation; nor on fines imposed by courts on offenders; nor on any voluntary present to the king without consideration moving from him to the subject; nor on any sale or contract whereby the revenues

(*k*) Ff. i. 3, 31.

(*l*) Pryn. Append. to Aur. Reg. 2, 3.

(*m*) Domesd. ib.; Mag. Rot. Pip. 2 Hen. 2; Madox, Hist. Exch. 419.

(*n*) Mag. Rot. 5 Hen. 2; Madox, ubi sup. 250.

(*o*) Cic. in Verrem, l. 3, c. 33.

(*p*) Pryn. Aur. Reg. 2.

[or possessions of the crown were granted away or diminished (*q*). There are traces, though obscure, of the payment of queen-gold in the book of Domesday, and in the great pipe-roll of Henry the first (*r*). 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 (*s*), written in the time of that prince, and usually attributed to Gervase of Tilbury. From that time downwards it was regularly claimed and enjoyed by all the queens consort of England till the death of Henry the eighth; though, after the accession of the Tudor family, the collecting of it seems to have been much neglected; and there being no queen consort afterwards till the accession of James the first, a period of nearly sixty years, its very nature and quantity became then a matter of doubt; and being referred by the king to the chief justices and chief baron, their report of it was so very unfavourable, that his consort Queen Anne (though she claimed it), yet never thought proper to exact it (*t*). In 1635, in the eleventh year of Charles the first, a time fertile of expedients for raising money upon dormant precedents in our old records, (of which ship money was a fatal instance,) the king, at the petition of his queen, Henrietta Maria, issued out his writ for levying it (*u*); 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,

(*q*) 12 Rep. 21; 4 Inst. 358; Pryn. 6; Madox, Hist. Exch. 242.

(*r*) Madox, Disceptat. Epistol. 74; Pryn. Aur. Reg. App. 5.

(*s*) Lib. 2, c. 26.

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

(*u*) 19 Rym. Fœd. 721.

[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 for that reason, only, worthy of 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 the 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 balenâ vero sufficit, si rex habeat caput, et regina caudam*" (*y*).

But further; though the queen consort is in all respects a subject, yet, in point of the security of her life and person, she is put on the same footing with the king. It is equally treason (by the statute 25 Edw. III.) to compass or imagine the death of our lady the king's companion, as of the king himself: and to violate, or defile, the queen consort amounts to the same high crime; as well in the person committing the fact, as in the queen herself, if consenting. A law of Henry the eighth made it treason also for any woman, who was not a virgin, to marry the king without informing him thereof (*z*): but this law was soon after repealed (*a*), it trespassing too strongly as well on natural justice as on female modesty. If, however, the queen (whether consort or dowager) be accused of any species of treason, she shall be tried by the peers of parliament; as Queen Anne Boleyn was, in the twenty-eighth year of Henry the eighth.]

It is to be observed, that the husband of a queen

(*x*) Bracton, l. 3, c. 3; Britton, c. 17; Flet. l. 1, cc. 45, 46.

(*y*) The reason of this whimsical division, assigned by our antient records, was to furnish the queen's wardrobe with whalebone (see Pryn. Aur. Reg. 127); but this reason is more whimsical than the division, for the whalebone lies entirely in the head. (Christian's Blackstone, vol. i. p. 222.)

(*z*) Stat. 33 Hen. 8, c. 21.

(*a*) Mr. Christian (ubi sup.) says, that it was not repealed till the 1 Edw. 6, c. 12, which abrogated all treasons created since the memorable statute in the twenty-fifth year of Edward the third.

regnant is her subject, as Prince George of Denmark was to Queen Anne, and as his late royal highness Prince Albert, (under the title of the Prince Consort,) was to her Majesty (*b*).

A queen *dowager* is the widow of a king, and, as such, retains most of the privileges which belonged to her as queen consort; though it is not high treason to conspire her death, or to violate her chastity, because the succession to the crown is not thereby endangered. [Yet still, *pro dignitate regali*, no man may marry a queen dowager without special licence from the king, on pain of forfeiting his lands and goods; which, Sir Edward Coke tells us, was enacted in parliament in the sixth year of Henry the sixth, though the statute be not in print (*c*). A queen dowager, alien born, is entitled by the common law to dower after the king's demise, though the alien wife of a subject was not, at one time, entitled in all cases to claim dower. Again, a queen dowager, if she marry a subject, doth not lose her regal dignity, as peeresses dowager, when commoners by birth, lose their peerage when they marry commoners. For Catherine, the widow of King Henry the fifth, though she married a private gentleman, Owen ap Meredith ap Theodore, commonly called Owen Tudor, yet, by the name of Catherine "queen of England," maintained an action against the Bishop of Carlisle. And so, the queen dowager of Navarre, marrying with Edmund 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 (*d*).

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

(*b*) The Act of naturalization of Prince Albert (3 & 4 Vict. c. 2) required, in the usual form, that he should take the oaths of allegiance and supremacy.

(*c*) 2 Inst. 18; Riley's Plac. Parl. 72; Co. Litt. 31. Mr. Hargrave, in a note to Co. Litt. 133, says, that no such statute can be found. Lord Coke there refers to it by 8 Hen. 6, No. 7; in 2 Inst. 18, by 6 Hen. 6, No. 41. In Riley's Plac. Parl. it is called 2 Hen. 6.

(*d*) 2 Inst. 50.

[eldest daughter of the sovereign, are all likewise peculiarly regarded by the laws (*e*). For, by statute 25 Edw. III., to compass or conspire the death of the former, or to violate the chastity of either of the latter, are as much treason as to conspire the death of the king, or to violate the chastity of the queen. And this, 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 sovereign is also inheritable as sole heir to the crown, on failure of issue male, and therefore more respected by the laws than any of her younger sisters (*f*); insomuch that upon this, united with other (feudal) 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 (*g*)

(*e*) The undermentioned annuities (charged on the consolidated fund) have from time to time, as occasion required, been granted by parliament to members of the royal family: The *Princess Royal*, 8,000*l.* (20 & 21 Vict. c. 2); the *Prince of Wales*, 40,000*l.* (26 & 27 Vict. c. 1); the *Princess Helena*, 6,000*l.* (29 & 30 Vict. c. 7); the *Prince Alfred* (*Duke of Edinburgh*), 15,000*l.* (29 & 30 Vict. c. 8), and 10,000*l.* (36 & 37 Vict. c. 80); the *Princess Mary of Cambridge*, 2,000*l.* (29 & 30 Vict. c. 48); the *Princess Louise*, 6,000*l.* (34 Vict. c. 1); the *Prince Arthur* (*Duke of Connaught and Strathearn*), 15,000*l.* (34 & 35 Vict. c. 64), and 10,000*l.* (41 & 42 Vict. c. 46); the late *Prince Leopold* (*Duke of Albany*), 15,000*l.* (37 & 38 Vict. c. 65), and 10,000*l.* (45 & 46 Vict. c. 5); and the *Princess Beatrice*, 6,000*l.* (48 & 49 Vict. c. 24). A provision on her marriage was in like manner also made for the late *Princess Alice*. On the occasion of the marriage of Princess Louise of Wales to an English subject, no specific grant to her was made, but a sum of 36,000*l.* was granted generally (by 52 & 53 Vict. c. 35) for the benefit of the family of the Prince of Wales.

(*f*) This statute perhaps was not meant to be extended to the princess royal when she had younger brothers living; for the issue of their wives must inherit the crown before the issue of the princess royal; yet their chastity is not protected by the statute.

(*g*) This creation has not been confined to the heir apparent, for both Queen Mary and Queen Elizabeth were created by their father, Henry the eighth, Princesses of Wales; each of them at the time, (the latter after the illegitimation of Mary,) being heir *presumptive* to the crown. (4 Hume, 113.)

[and Earl of Chester, by special creation and investiture, *i.e.* by letters patent under the great seal (*h*); but, in virtue of being the sovereign's eldest son, he is, by inheritance, Duke of Cornwall (during the life of the sovereign), without any new creation (*i*).

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. The more confined sense includes only those who are within a certain degree of propinquity to the reigning prince, and to whom, therefore, the law pays an extraordinary regard and respect; but after that degree is past, they fall into the rank of ordinary subjects, and are seldom considered any farther, unless called to the succession upon failure of the nearer lines. For though collateral consanguinity is regarded indefinitely, with reference to inheritance or succession, yet by the natural constitution of things and the dictates of positive law, it is and can only be regarded within some certain limits, in any other respect (*k*).

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

(*h*) 1 Bl. Com. p. 224.

(*i*) The Prince's case, 8 Rep. 1; Seld. Tit. of Hon. 2, 5; and see Simpson *v.* Clayton, 4 Bing. N. C. 758; Clayton *v.* Lord Grey, 1 Arnold, 312, n. (*c*). As to leasing, selling, or exchanging the property of the Prince of Wales, in his duchy of Cornwall, see 7 & 8 Vict. c. 65; 25 & 26 Vict. c. 49; 26 & 27 Vict. c. 49; and 31 & 32 Vict. c. 35. As to his mines there, see 21 & 22 Vict. c. 109. And as to limitation of suits by him in relation to his real property in the duchy, see 9 Geo. 3, c. 16; 7 & 8 Vict. c. 105; 23 & 24 Vict. c. 53; 24 & 25 Vict. c. 62, s. 2.

(*k*) See Essay on Collateral Consanguinity, in Law Tracts, 4to. Oxon. 1771.

[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 explains to signify grandson or *nepos* (*l*)—or brother's or sister's son. Therefore, after these degrees are past, peers or others of the blood royal are entitled to no place or precedence, except what belongs to them by their personal rank or dignity: which made Sir Edward Walker complain, that by the hasty creation of Prince Rupert to be Duke of Cumberland, and of the Earl of Lennox to be the 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 (*m*).

Indeed under the description of the king's children his grandsons are held to be included, without having recourse to Sir Edward Coke's interpretation of "nephew;" and therefore when King George the second 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 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 (*n*). But when, on the accession of King George the third, 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:

(*l*) 4 Inst. 362.
(*m*) Tracts, p. 301.
(*n*) Lords' Journ. 24th April, 1760.

[so that when the Duke of Gloucester, his majesty's second brother, took his seat in the house of peers (*o*), he was placed on the upper end of the earls' bench (on which the dukes usually sit), next to his royal highness the Duke of York. And in 1718, upon a question referred to the judges by King George the first, it was resolved, by the opinion of ten against the other two, that the education and care of the king's grandchildren, while minors, did belong of right to his majesty, as king of this realm, even during their father's life (*p*); and they all agreed, that the care and approbation of their marriages, when grown up, belonged to the king their grandfather. And the judges more recently concurred in opinion, that this care and approbation extended 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 (*q*). The most frequent instances of the crown's interposition go no further than nephews and nieces; but examples are not wanting of its reaching to more distant collaterals (*r*). 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 (*s*): "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" (*t*). Therefore by the statute 28 Hen. VIII. c. 18, (repealed, among other statutes of treasons, by 1 Edw. VI. c. 12,) it was made treason for any man to

(*o*) Lords' Journ. 10th Jan. 1765.

(*p*) Fortesc. Al. 401—440. The authorities and arguments of the two dissenting judges, Price and Eyre, are so full and cogent that, if this question had arisen before the judges were independent of the crown, one would have been inclined to have suspected the sincerity of the other ten, and the authority of the decision. (See Harg. St. Tr. vol. xi. 295.)

(*q*) Lords' Journ. 28th Feb. 1772.

(*r*) A variety of examples are cited by Blackstone, vol. i. p. 226, *in notis*.

(*s*) The occasion of this statute was the marriage of Catherine, mother to Henry the sixth, with Owen Tudor. (Vide sup. p. 442.)

(*t*) Ril. Plac. Parl. 672.

[contract marriage with the king's children or reputed children, his sisters or aunts *ex parte paternâ*, or the children of his brethren or sisters; being exactly the same degrees to which precedence is allowed by the statute 31 Hen. VIII. before mentioned. And now, by statute 12 Geo. III. c. 11, no descendant of the body of King George the second, (other than the issue of princesses married into foreign families,) is capable of contracting matrimony without the previous consent of the sovereign, signified under the great seal and declared in council: and any marriage contracted without such consent is void; and all persons solemnizing, assisting or being present at any such prohibited marriage, incur the penalties of the statutes of *præmunire*. It is, however, provided that such of the said descendants as are above the age of twenty-five may, after a twelvemonth's notice given to the 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.]

CHAPTER V.

OF THE ROYAL COUNCILS, AND OF THE OFFICERS OF STATE.

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

1. The first of these is the high court of parliament, whereof we have already treated at large (*a*).

2. [Secondly, all the peers of the realm are by their birth hereditary counsellors of the crown, and may be called together by the sovereign to impart their advice in 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 (*b*). Accordingly Bracton, speaking of the nobility of his time, says they might probably be called "*consules, a consulendo; reges enim tales sibi associant ad consulendum*" (*c*). And in our law books it is laid down, that peers are created for two reasons: 1, *ad consulendum;* and 2, *ad defendendum, regem;* on which account the law gives them certain great and high privileges; such as freedom from arrest in civil cases, even when no parliament is sitting: because it intends, that they are always assisting the sovereign with their counsel for the common-

(*a*) Vide sup. p. 318.
(*b*) Co. Litt. 110.
(*c*) L. 1, c. 8.

[wealth, or keeping the realm in safety by their prowess and valour (*d*).

Instances of conventions of the peers, to advise the crown, have been in former times very frequent, though now fallen into disuse by reason of the more regular meetings of parliament. Sir Edward Coke (*e*) 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 mode of convoking them had been so long left off, that when King Charles the first, 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 mentions it as a new invention, not before heard of; that is, as he explains himself, so old that it had not been practised in some hundreds of years (*f*). 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 summoned 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 sovereign; and to lay before

(*d*) 7 Rep. 34; 9 Rep. 49; 12 Rep. 96.

(*e*) 1 Inst. 110.

(*f*) Hist. b. 2.

[him, with decency and respect, such matters as he shall judge of importance to the public weal. And therefore, in the reign of Edward the second, it was made an article of impeachment in parliament against the two Hugh Spencers, father and son, for which they were banished the kingdom, "that they by their evil covin would not "suffer the great men of the realm, the king's good coun-"sellors, to speak with the king, or to come near him: "but only in the presence and hearing of the said Hugh "the father and Hugh the son, or one of them, and at "their will, and according to such things as pleased "them" (*g*).

3. A third council belonging to the sovereign are, according to Sir Edward Coke, his judges of the courts of law, for law matters (*h*). And this appears frequently in our statutes, particularly 14 Edward III. c. 5, and in other books of law. For when the king's council is mentioned generally, it must be defined, particularized, and understood *secundùm subjectam materiam.* And therefore when by stat. 16 Ric. II. c. 5, it was made a high offence to import into this kingdom any papal bulls, 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" must be understood the judges of his courts of justice, the subject-matter being legal; this being the general way of interpreting the word council (*i*).

4. But the principal council belonging to the sovereign is his privy council, which is generally called, by way of eminence, *the council.* And this, according to Sir Edward Coke's description of it (*k*), 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 sovereign's will is the sole constituent of a privy councillor;

(*g*) 4 Inst. 53.
(*h*) 1 Inst. 110; 4 Rep. 56 a.
(*i*) 3 Inst. 125.
(*k*) 4 Inst. ubi sup.

[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, in 1679, limited it to thirty: whereof fifteen were to be the principal officers of the state, and those to be councillors *virtute officii*; and the other fifteen were composed of ten lords and five commoners of the king's choosing (*l*). But since that time the number has been much augmented, and now continues indefinite.] No inconvenience, however, arises from this extension of number, as, with the exception of such of them as are called *cabinet ministers*, the privy councillors are not in modern practice ordinarily summoned to advise the sovereign on affairs of state. The cabinet ministers (or cabinet council) are those privy councillors who, being more immediately honoured with the sovereign's confidence, actually conduct the business of the government, and assemble for that purpose from time to time, as the public exigencies require. It is this body, and not the privy council at large, that is always understood when mention is made of the king's (or queen's) "administration,"—though strangely enough it is a body unknown to the law, and one whose members are never officially made known to the public, nor its proceedings recorded (*m*). Each of its members is usually invested with one of the principal offices of state, among which are the following:—those of the lord high chancellor; of the first lord of the treasury; of the lord president of the council; of the lord privy seal; of the first lord of the admiralty (*n*); of the chancellor of the exchequer; and of the five principal secretaries of

(*l*) Temple's Mem. part 3.

(*m*) Lord Macaulay's Hist. of Eng. vol. i. p. 220. See also Hallam's Hist. vol. 3, c. xv. as to the origin of the *Cabinet* as distinct from the general body of the Privy Council, and the effect of the change on the individual responsibility of members of the government.

(*n*) Commissioners are now usually appointed to execute the antient office of "Lord High Admiral of the United Kingdom."

state (*o*), viz.—the secretary for the home department, for foreign affairs, for the colonies, for the war department (*p*), and for India (*q*).

Privy councillors are made by the sovereign's nomination, without either patent or grant (*r*), and, on such nomination, they become privy councillors (with the title of "right honourable,") during the life of the sovereign that chooses them, but subject to removal at his discretion.

[The duty of a privy councillor appears from the oath of office (*s*), which consists of seven articles:—1. To advise the king according to the best of his cunning and discretion. 2. To advise for the king's honour and good of the public, without partiality through affection, love, need, doubt, or dread. 3. To keep the king's counsel secret. 4. To avoid corruption. 5. To help and strengthen the execution of what shall be 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 (*t*).]

(*o*) As to the office of secretary of state, see Entick *v.* Carrington, 2 Wils. 289. It may be observed here, that the office of secretary for the war department was created on the occasion of the Crimean war. (See 18 & 19 Vict. c. 117.) Before that time there was a secretary *at war*, whose office was finally abolished by 26 & 27 Vict. c. 12; but he was not a principal secretary of state. By 21 & 22 Vict. c. 106, s. 4, any four of her Majesty's principal secretaries of state, and any four *under secretaries*, may sit and vote as members of the House of Commons, but not more than four of either may sit in the house at the same time. As to this enactment, see 27 & 28 Vict. c. 34. A secretary for Scotland has been appointed by the 48 & 49 Vict. c. 61, amended by the 50 & 51 Vict. c. 52, and 52 & 53 Vict. c. 16.

(*p*) As to the secretary for the war department, see 18 & 19 Vict. c. 117; 33 & 34 Vict. c. 17; and 52 & 53 Vict. c. 16.

(*q*) As to the secretary for India, see 21 & 22 Vict. c. 106, s. 3.

(*r*) 1 Bl. Com. p. 230.

(*s*) As to this oath, see 31 & 32 Vict. c. 72, s. 14.

(*t*) By stat. 3 Hen. 7, c. 14, it was formerly felony for any of the king's menial servants to conspire or imagine to take away the life of a privy councillor; and by 9 Anne, c. 21, it was made felony for *any*

Though the privy council at large does not in general assemble to advise on affairs of state, there are other occasions on which it meets to discharge official duties: the summonses in these cases being usually confined however to a certain portion of its members. [It forms part of its jurisdiction to inquire into all offences against the government, and to commit the offenders to safe custody, in order to take their trial in some of the courts of law. But its office herein is only to inquire, and not to punish; and all persons committed by it are entitled to their *habeas corpus* by statute 16 Car. I. c. 10, as much as if they had been committed by an ordinary justice of the peace. And by the same statute, the Court of Star Chamber and the Court of Requests, both of which consisted of privy councillors, were dissolved; and it was declared illegal for the council to take cognizance of any matter of property belonging to the subjects of this kingdom.] In addition to its inquisitorial powers, the privy council has also, in certain cases, the *judicial* authority of a court of justice; viz. in colonial causes; in appeals from the ecclesiastical or maritime courts (*u*); in applications to prolong the term of patents for new inventions (*x*); and in certain cases arising out of the Copyright Acts (*y*). [As to colonial causes, it is to be observed, that this jurisdiction is both original and appellate. For whenever a question arises between two provinces out of the realm, as concerning the extent of their charters and the like, the crown in council exercises *original* jurisdiction therein, upon the principles of feudal sovereignty. And so, likewise, when any person claims an island or a province, in the nature of a feudal principality, by grant from the king or his ancestors, the determination

person to attempt to kill, or to assault strike or wound one while in the execution of his office; but both statutes are now repealed by 9 Geo. 4, c. 31. c. 38.

(*u*) 2 & 3 Will. 4, c. 92; 3 & 4 Will. 4, c. 41, ss. 2, 31; 6 & 7 Vict.

(*x*) 5 & 6 Will. 4, c. 83; 2 & 3 Vict. c. 67; 7 & 8 Vict. c. 69, s. 2; 46 & 47 Vict. c. 57, s. 25; vide sup. p. 31.

(*y*) 5 & 6 Vict. c. 45, s. 5; 7 & 8 Vict. c. 12; vide sup. p. 38.

[of that right belongs to the sovereign 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.] And to the same great tribunal there is, besides, in causes of a certain amount, an appeal in the last resort from the sentence of every court of justice throughout the colonies and other dependencies of the realm (*z*). But under the provisions of modern statutes, all the judicial authority of the privy council is now exercised by a select number of its members, called the Judicial Committee; and these hear the allegations and proofs, and make their report thereon to her Majesty in council, by whom the judgment is finally given.

This judicial committee, as constituted by 3 & 4 Will. IV. c. 41 (*a*), and 14 & 15 Vict. c. 83, s. 15, comprises the lord president of the council, the lord chancellor, the lords justices, and such other of the members of the privy council at large as shall hold, or shall have held, certain judicial or other offices enumerated in the Acts; or shall be specially appointed to serve on the committee by the crown. But by the 34 & 35 Vict. c. 91, (a statute passed in the year 1871,) her Majesty was enabled to appoint by warrant under her sign manual four additional judges (each being or having been a judge of one of the superior courts at Westminster, or a chief justice in Bengal, Madras, or Bombay) to act as members of the judicial committee,—

(*z*) This includes the sentences not only of colonial courts of primary jurisdiction, but of courts of appeal also; see 13 & 14 Vict. c. 15, as to the courts of appeal in certain of the West India Colonies.

(*a*) This statute has been amended and extended by 6 & 7 Vict. c. 38, 7 & 8 Vict. c. 69, 8 & 9 Vict. c. 30, 14 & 15 Vict. c. 83, 34 & 35 Vict. c. 91, 39 & 40 Vict. c. 59, and 44 Vict. c. 3, in which Acts are contained a variety of regulations as to the manner of proceeding before the judicial committee, and particularly on appeals from the colonies. See, as to its jurisdiction, Ex parte Smyth, 1 Tyr. & Gran. 222; Pen *v.* Baltimore, 1 Ves. sen. 444; Chesterton *v.* Farlar, 7 Ad. & El. 713.

the judges so appointed to hold office during good behaviour, and notwithstanding the demise of the crown, (though removable upon the address of both houses of parliament,) and each to be paid a salary of 5,000*l.* a year.

There are also the following committees of the privy council, exercising jurisdiction on particular subjects, viz.: the committee appointed for the consideration of matters relating to trade and foreign plantations, commonly called the Board of Trade; and the committee for receiving applications for aid from the parliamentary grants for the purpose of education, commonly called the Education Committee (*b*). The Board of Trade is charged with many miscellaneous duties (*c*)—among others, the comptrolling of corn returns for the purpose of the tithe commutations (*d*), the supervision and regulation of railways (*e*), the superintendence of all matters relating to merchant ships and seamen (*f*), and the discharge of various functions under the Acts for the formation of piers and harbours (*g*), and under such as relate to trading companies and other associations (*h*), and to the copyright of designs (*i*). It is also charged with the carrying out of the provisions relating to life assurance companies contained in the Act concerning such companies, which was passed in 1870 (*k*); and it exercises a general control over all

(*b*) 7 & 8 Vict. c. 37; 18 & 19 Vict. c. 131; 19 & 20 Vict. c. 116.

(*c*) As to the powers of the Board of Trade, see 37 & 38 Vict. c. 40.

(*d*) 6 & 7 Will. 4, c. 71, s. 56; 27 & 28 Vict. c. 87.

(*e*) 14 & 15 Vict. c. 64; 36 & 37 Vict. c. 48, s. 10; 37 & 38 Vict. c. 40.

(*f*) 57 & 58 Vict. c. 60 (Merchant Shipping Act, 1894), which repeals, but re-enacts and consolidates, the provisions contained in (among other Acts) the 16 & 17 Vict. c. 129; 17 & 18 Vict. c. 104; 25 & 26 Vict. c. 63.

(*g*) 24 & 25 Vict. c. 45; and see 25 & 26 Vict. cc. 19, 69.

(*h*) 25 & 26 Vict. c. 89.

(*i*) 13 & 14 Vict. c. 104. It may be here remarked, that in addition to the duties mentioned in the text, the Board also collects and arranges statistical returns exhibiting the extent of the revenues, commerce, manufactures, and other resources of the kingdom, and containing a variety of useful details of a miscellaneous character. See as to *cotton* statistics, 31 & 32 Vict. c. 33.

(*k*) 33 & 34 Vict. c. 61.

proceedings under the Bankruptcy Act, 1883 (*l*), and the Companies (Winding-up) Act, 1890 (*m*).

[The dissolution of the privy council depends upon the sovereign'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 sovereign's demise, as deriving all its authority from him. But now, to prevent the inconveniences of having no council in being at the accession of a new prince, it has been enacted, by statute 6 Anne, c. 41, that the privy council shall continue for six months after the demise of the crown, unless sooner determined by the successor (*n*).]

(*l*) 46 & 47 Vict. c. 52; vide sup. pp. 150, 159.

(*m*) 53 & 54 Vict. c. 63.

(*n*) But, as noticed above (p. 454), the four paid members of the *judicial committee* of the council appointed under 34 & 35 Vict. c. 91, are to retain their offices during good behaviour and notwithstanding the demise of the crown; and a lord justice of appeal, who is by the effect of the statutes 39 & 40 Vict. c. 59, and 44 Vict. c. 3, a member of the judicial committee, would in like manner retain his office of privy councillor, *semble*. And see 50 & 51 Vict. c. 70.

CHAPTER VI.

OF THE ROYAL PREROGATIVE.

By the word prerogative we are to understand the character and power which the sovereign hath over and above all other persons, in right of his regal dignity; and which, though part of the common law of the country, is out of its ordinary course. [This is expressed in its very name, for it signifies, in its etymology, something that is required or demanded, *before*, or in preference to, all others; and, accordingly, Finch 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 (*a*).] It will now be our business to consider the nature of this prerogative minutely; and, in the first place, to point out the limits within which it is confined, and the safeguards which our political constitution has provided against its improper extension. [For one of the principal excellencies of that constitution, is the limitation of the sovereign'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.

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 nature and limits of the prerogative; a topic,

(*a*) Finch, L. 85.

[which in former ages was not suffered to be pried into by any but such as were initiated in its service; and 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 prero-"gative 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 sedi-"tion 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 principle always recognized in England, as in all the Germanic systems of government established in Europe; and in support of the principle, we may refer to the sentiments of Bracton and Fortescue, at the distance of two centuries from each other. And Sir Henry Finch, under Charles the first, after the lapse of two centuries more, though he lays down the law of prerogative in very strong and emphatical terms, yet qualifies it with a general restriction in regard to the liberties of the people. The king (says he) hath a prerogative in all things that are not injurious to the subject: for in them all it must be remembered, that the king's prerogative stretcheth not to the doing of any wrong,—*Nihil enim aliud potest rex, nisi id solum quod de jure potest* (*e*). And here it may be some

(*b*) D'Ewes, 479.
(*c*) Ibid. 645.
(*d*) King James's Works, 531, 577.
(*e*) Finch, L. 84, 85; Bracton, l. 3, tr. 1, c. 9.

[satisfaction to remark how widely our own law differs from the civil law, 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 are informed by 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*" (*f*). We shall not long hesitate to which of them to give the preference, as most conducive to those ends for which societies were framed, and are kept together; especially as the Roman lawyers themselves seem to be sensible of the unreasonableness of their own constitution. "*Decet tamen* "*principem,*" says Paulus, "*servare leges, quibus ipse solutus* "*est*" (*g*),—which (being interpreted) means, that the king, although not legally bound by the law, nevertheless ought to observe the law.

The just limitation of the king's prerogative is indeed essential to the idea of *political* or *civil liberty*, a subject which shall here be briefly considered. 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 the most desirable, possesses a right which may be denominated his *natural* liberty. But of this every man gives up a part in consideration of the advantages he gains by becoming a member of society, and consents to conform to those restrictions which the community has thought proper to establish. *Political*, therefore, or *civil*, liberty is no other than natural liberty, so far restrained by human laws (and no further) as is necessary and expedient for the general advantage of the public. Hence we may collect that a law which restrains a man from doing mischief to his fellow creatures, though it diminishes the natural, increases the civil, liberty of

(*f*) Nov. 105, s. 2.

(*g*) Ff. 32, 1, 23. And see the opinion of the Emperors Severus and Antoninus, cited p. 395, n. (*f*), supra.

[mankind;—that any law which would regulate and constrain our conduct in matters of mere indifference, without any good end in view, is destructive of liberty;—but that if any public advantage can arise from observing the precept imposed, the control of our private inclinations, in one or two particular points, will not militate against our general freedom in others of more importance. Thus the statute of King Edward the fourth (*h*), which forbade the fine gentlemen of those times (under the degree of a lord) to wear pikes upon their shoes or boots of more than two inches in length, was a law that savoured of oppression; because, however ridiculous the fashion then in use might appear, the restraining of it by pecuniary penalties could serve no purpose of common utility. But the statute of King Charles the second (*i*), which prescribed a thing seemingly as indifferent, viz. a dress for the dead, (who were all ordered to be buried in woollen,) was a law consistent with public liberty, for it was intended to encourage the staple trade 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, where there is no law there is no liberty (*k*); while, 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. Civil liberty, as thus defined, has appeared at its best in our country; and it was the opinion of Montesquieu, that the English was the only nation in the world where political liberty was the direct end of its constitution (*l*).

The political liberty of England has, however, been at some periods endangered by overbearing princes; while at

(*h*) 3 Edw. 4, c. 5.

(*i*) 30 Car. 2, st. 1, c. 3, repealed by 54 Geo. 3, c. 108.

(*k*) On Government, p. 2, s. 57.

(*l*) Montesquieu, Sp. L. 5.

[others it has been so luxuriant as even to tend to anarchy, a worse state than tyranny itself, inasmuch 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 constitutional liberty has settled again to its proper level. The particular rights or liberties at different periods found most liable to the invasions of the prerogative have been, on various occasions of apprehended danger, asserted in parliament. First by the *Great Charter* of liberties, which was obtained sword in hand from King John, and afterwards with some alterations confirmed by King Henry the third, his son: which charter contained very few new grants; but, as Sir E. Coke observes, was for the most part declaratory of the principal grounds of the fundamental laws of England (*n*). Afterwards by the statute called *Confirmatio Chartarum* (25 Edw. I.), whereby the Great Charter is directed to be allowed as the common law—and all judgments contrary to it are declared void (*n*). Next, by a multitude of subsequent corroborating statutes, from the first Edward to Henry the fourth (*o*). Then, after a long interval, by the *Petition of Right*, (3 Car. I.,) a parliamentary declaration of the liberties of the people assented to by King Charles the first, in the beginning of his reign;—which was closely followed by the still more ample concessions made by that unhappy prince to his parliament, before the fatal rupture between them; and by the many salutary laws, particularly the *Habeas Corpus*

(*m*) 2 Inst. proëm.

(*n*) 1 Bl. Com. p. 128. This statute (as to which vide sup. vol. I. p. 195) not only confirmed Magna Charta, (directing it to be read twice a year in all cathedral churches, and awarding excommunication as the penalty of its infringement,) but enacted that none but the antient aids, tasks, or prizes should be taken but by the common assent of the realm, and for the common profit thereof;—a provision which establishes the great principle of immunity from arbitrary taxation. (See Hallam, Mid. Ages, vol. iii. p. 5, 7th ed.)

(*o*) 2 Inst. ubi sup.

[*Act*, passed under Charles the second (*p*). To these succeeded the *Bill of Rights*, a declaration delivered by the lords and commons to the Prince and Princess of Orange, (13th February, 1688,) and afterwards enacted in parliament, when they became king and queen: which declaration concludes in these remarkable words, "And they do "claim, demand, and insist upon, all and singular the "premises, as their undoubted rights and liberties" (*q*). And the statute itself (1 W. & M. sess. 2, c. 2) recognizes all and singular the rights and liberties, asserted and

(*p*) 31 Car. 2, c. 2, extended by 56 Geo. 3, c. 100.

(*q*) By the Bill of Rights, it is asserted:—

1. That the pretended power of suspending of laws, or of their execution, by regal authority, without consent of parliament, is illegal.

2. That the pretended power of dispensing with laws, or with their execution, by regal authority, as it had been then of late assumed and exercised, is illegal.

3. That the commission for erecting the court of commissioners for ecclesiastical causes, and all other commissions and courts of like nature, are illegal and pernicious.

4. That levying money for or to the use of the crown by pretence of prerogative without grant of parliament, for longer time or in other manner than the same is granted, is illegal.

5. That it is the right of the subject to petition the king, and all commitments and prosecutions for such petitioning are illegal.

6. 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.

7. That the subjects which are protestants may have arms for their defence, suitable to their conditions, and as allowed by law.

8. That the election of members of parliament ought to be free.

9. That the freedom of speech, and debates or proceedings in parliament, ought not to be impeached or questioned in any court or place out of parliament.

10. That excessive bail ought not to be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

11. That jurors ought to be duly impannelled and returned, and jurors which pass upon men in trials for high treason ought to be freeholders. (This provision, respecting the qualification of jurors in cases of treason, was, however, repealed by 6 Geo. 4, c. 50.)

12. That all grants and promises of fines and forfeitures of particular persons before conviction are illegal and void.

13. And that for redress of all grievances, and for the amending, strengthening, and preserving of the laws, parliaments ought to be held frequently.

[claimed in the said declaration, to be the "true, antient, "and indubitable rights of the people of this kingdom." Lastly, these liberties were again asserted at the commencement of the eighteenth century, in the *Act of Settlement*,—a statute passed in the twelfth and thirteenth year of the reign of William III. And some new provisions were added at the same era, for better securing our religion, laws, and liberties (*r*); which the statute declares to be the "birthright of the people of "England," according to the antient doctrine of the common law (*s*).]

There are two of the rights and liberties thus asserted, which are of a nature to require particular notice; as being in the nature of permanent safeguards, provided by our political system for the preservation of the rest, and being additional to the powers and privileges of parliament itself, of which we have already spoken at large. These are:—

(*r*) The Act of Settlement (12 & 13 Will. 3, c. 2) provides:—

1. That whosoever shall hereafter come to the possession of this crown shall join in communion with the Church of England as by law established.

2. That in case the crown and imperial dignity of this realm shall hereafter come to any person, not being a native of this kingdom of England, this nation be not obliged, without the consent of parliament, to engage in any war for the defence of any dominions or territories which do not belong to the crown of England.

3. That judges' commissions be made *quamdiu se bene gesserint*, and their salaries ascertained and established; but that upon the address of both houses of parliament it may be lawful to remove them.

4. That no pardon under the great seal of England, be pleadable to an impeachment by the commons in parliament.

Besides the above provisions, this Act contained others,—

As, 1. Against the sovereign going out of the united kingdom without consent of parliament. (Repealed by 1 Geo. 1, st. 2, c. 51.)

2. As to the matters to be transacted in the privy council. (Repealed by 4 & 5 Ann. c. 20, s. 24.)

3. As to aliens naturalized or made denizens. (For the present law on this subject, vide sup. p. 408.)

4. As to officers of the crown sitting in parliament. (See as to this, sup. pp. 364, 365.)

(*s*) Plowd. 55.

1. The free and uncontrolled dispensation of the law, in the ordinary courts of justice.

[Now since the law is in England the supreme arbiter of every man's life, liberty, and property, the courts must at all times be open to the subject, and the law be duly administered therein. The emphatical words of *Magna Charta* (*t*), spoken in the person of the king, who in judgment of law, says Sir E. Coke (*u*), is ever present and repeating them in all his courts, are these; *nulli vendemus, nulli negabimus, aut differemus, rectum vel justitiam;* "and, therefore, every subject," continues the same learned author, "for injury done to him *in bonis, in terris,* "*vel personâ*, 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 with-"out any denial, and speedily without delay." It were endless to enumerate all the *affirmative* acts of parliament, wherein justice is directed to be done according to the law of the land; and what that law is, every subject knows or may know if he pleases: for it depends not upon the will of the crown, or of any judge, but is permanent, fixed, and unchangeable, unless by authority of parliament. It may be proper, however, to mention a few *negative* statutes, whereby abuses, perversions, or delays of justice, especially by the prerogative, are restrained. Thus, it is ordained, by *Magna Charta* (*t*), that no freeman shall be outlawed, that is, put out of the protection and benefit of the laws, but according to the law of the land. By 2 Edw. III. c. 8, and 11 Rich. II. c. 10, it is enacted, that no commands or letters shall be sent under the great seal, or the little seal, the signet, or privy seal, in disturbance of the law; or to disturb or delay common right; and though such commandments should come, the judges shall not cease to do right; which is also made a part of their oath by statute 20 Edw. III. c. 4. And by 1 W. & M. sess. 2,

(*t*) C. 29. (*u*) 2 Inst. 55.

[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.

The method of proceeding cannot, any more than the substance of the law, be altered but by parliament; for if once these outworks were demolished, there would be an inlet to all manner of innovation in the body of the law itself. The sovereign, it is true, may erect new courts of justice, but then they must proceed according to the old established forms of the common law. For which reason it is declared in the statute of 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 courses 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 tried and determined in the ordinary courts of justice, and by course of law.

To the head now under consideration must be also referred the provisions which have been made to secure the dignity and political independence of the judges. It was enacted, by the statute 12 & 13 Will. III. c. 2, that their commissions should be made (not, as formerly, *durante bene placito*, but) during good behaviour, *quamdiu se bene gesserint*; but that it might be lawful to remove them on the address of both houses of parliament. And afterwards, by the statute 1 Geo. III. c. 23, enacted at the earnest recommendation of the king himself from the throne, the judges were continued in their offices notwithstanding any *demise of the crown*, and their full salaries were also absolutely secured to them during the continuance of their commissions (*x*). It deserves particular remark that, in

(*x*) The main object of this statute was not the independence of the judges, but to secure them in their offices notwithstanding the demise

[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 rendered secure from the improper influence of the executive power,—a danger which (as shown by the history of the Court of Star Chamber) is not by any means imaginary (*y*).

2. The right of petitioning the sovereign, or either house of parliament, for the redress of grievances.

In Russia (we are told) 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 (*z*). 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 the provisions made by the legislature to restrain the abuse of this privilege of the subject, will be noticed when the offence of tumultuous petitioning comes under our consideration hereafter (*a*).

We will now proceed to consider the proper nature of

of the crown, which had been insufficiently provided against by 1 Anne, c. 2. It has, however, been now in part repealed, as mentioned post, chap. x., On Magistrates. With regard to the independence of the judges, see also Hall. Const. Hist. vol. iii. p. 262.

(*y*) Vide sup. p. 453.

(*z*) Montesq. Sp. L. xii. 26.

(*a*) Vide post, bk. VI.

that prerogative, against the excesses of which the law has so carefully guarded.

Prerogatives—for by this plural use of the word we commonly express the different branches of that prerogative of which a definition was given at the outset of the chapter—are either by way of *exception* or are *direct*. Those by way of exception, are such as exempt the crown from some general rules established for the rest of the community—as, for example, that costs shall be recovered against the crown only in certain proceedings (*b*); and that the king's debt shall be preferred before a debt to any of his subjects. These maxims, however, and others of the same class, will be better understood in connection with the rules themselves, to which these prerogatives are exceptions. And, therefore, we will at present only dwell upon the sovereign's *direct* prerogatives.

[The direct (or substantive) prerogatives are divided into three kinds; being such as regard, firstly, the royal character; secondly, the royal authority; and, thirdly, the royal income. These are necessary to secure reverence to the sovereign's person, obedience to his commands, and an affluent supply for the ordinary expenses of his government; without all of which it is impossible to maintain the executive power in due independence and vigour. In the present chapter we shall consider only the two first of these divisions, those, namely, which relate to the royal character and authority,—the third, the royal revenue, requiring a distinct examination. And here we may observe that the feudal writers also distinguished the royal prerogatives into the *majora* and *minora regalia*, in the latter class of which the rights of the revenue were

(*b*) By 18 & 19 Vict. c. 90, ss. 1, 2; 25 & 26 Vict. c. 14; and 40 & 41 Vict. c. 13, s. 5, the subject is now allowed his costs from the crown in proceedings under the Acts relating to the *public revenue;* and by 23 & 24 Vict. c. 34, s. 12, in a *petition of right*, under that Act. And see the provisions generally of the Crown Suits Act, 1865 (28 & 29 Vict. c. 104), as modified by Ord. lxviii. rr. 1–4, issued under the Judicature Acts, 1873, &c.; also, the Crown Office Rules, 1886.

[ranked; for to use their own words, "*majora regalia imperii præ-eminentiam spectant; minora vero ad commodum pecuniarium immediatè attinent; et hæc propriè fiscalia sunt, et ad jus fisci pertinent*" (*c*.)

First, then, as to the political character of the sovereign.

1. It comprises the attribute of *sovereignty* or *pre-eminence*. "*Rex est vicarius*," says Bracton, "*et minister Dei, in terrâ: omnis quidem sub eo est, et ipse sub nullo, nisi tantum sub Deo*" (*d*).

The king is said to have imperial dignity; and in charters before the Conquest is frequently styled *basileus* and *imperator*, the titles respectively assumed by the emperors of the east and west (*e*). His realm is declared to be an empire, and his crown imperial, by many Acts of Parliament, particularly the statutes 24 Henry VIII. c. 12, and 25 Henry VIII. c. 22: 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 notion that an emperor could do many things which a king could not, and that all kings were in some degree subordinate and subject to the Emperor of Germany or of Rome. The meaning therefore of the legislature, when it useth these terms of empire and imperial, and applies them to the realm and crown of England, is only to assert that our sovereign is equally supreme and independent within these his dominions, as any emperor is in his empire, and owes no kind of subjection to any other potentate upon earth (*f*).]

With the sovereignty of pre-eminence to which we have referred, is connected the exemption from certain disabilities. Thus it was a maxim (even while the now

(*c*) Peregrin. de Jure Fisc. l. 1, c. 1, num. 9.

(*d*) L. i. c. 8.

(*e*) Seld. Tit. of Hon. 1, 2.

(*f*) "*Rex allegavit, quod ipse omnes libertates haberet in regno suo, quas imperator vindicabat in imperio.*"—M. Paris, A.D. 1095.

abolished doctrine of corruption of blood on attainder flourished in full vigour), that in the sovereign there could be no stain or corruption of blood; for if the heir to the crown were attainted of treason or felony, and afterwards the crown should descend to him, this *ipso facto* would purge the attainder (*g*). [And therefore when Henry the seventh, 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 sovereign, in judgment of the common law, as sovereign, 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 (*h*). It is true, that by 28 Hen. VIII. c. 17, power was given to future kings to rescind and revoke all Acts of Parliament that should be assented to by them while under the age of twenty-four; but this was repealed by 1 Edward 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, however, 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 (*i*).] And the appointment of a regent is to be considered only as an expedient devised to meet a particular contingency,—

(*g*) Finch, L. 82.

(*h*) Co. Litt. 43; 2 Inst. proëm. 3.

(*i*) The methods of appointing this guardian or regent have been so various, and the duration of his power so uncertain, that from hence alone it may be collected that his office is unknown to the common law; and, therefore (says Sir Edward Coke), the surest way is to have him made by authority of the great council in parliament. (4 Inst. 58.)

like the statute in the present reign, which provided for the administration of the government by lords justices, in case of the next successor to the crown being out of the realm at the time of the demise of the sovereign (*k*); or that in a former reign, which appointed the heir apparent to the regency, while the sovereign was disabled, by a severe visitation of Providence, from conducting affairs of state (*l*). [Another principle referable to the pre-eminence of the sovereign is, that the law ascribes to him, in his political capacity, an absolute immortality. The king never dies. Henry, Edward, or George may die, but the king survives them all. For immediately upon the decease of the reigning prince in his natural capacity, his kingship or imperial dignity, by act of law, without any interregnum or interval, is vested at once in his heir, who is, *eo instanti*, king to all intents and purposes. And so tender is the law of supposing even a possibility of his death, that his natural dissolution is generally called his demise, an expression which signifies merely a transfer of property. For, as is observed in Plowden (*m*), when we say the demise of the crown, (*demissio regis, vel coronæ,*) we mean only that, in consequence of the disunion of the sovereign'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 the natural death of the king (*n*).]

2. Another attribute of the royal character is *irresponsibility;* it being an antient fundamental maxim, that *the king can do no wrong* (*o*). This is not to be understood as if everything transacted by the government was of

(*k*) 7 Will. 4 & 1 Vict. c. 72.
(*l*) 51 Geo. 3, c. 1.
(*m*) Plowd. 177, 234.
(*n*) M. 49 Hen. 6, pl. 1–8.
(*o*) 1 Bl. Com. p. 246.

course just and lawful. Its proper meaning is only this,—that no crime or other misconduct must ever be imputed to the sovereign personally. However tyrannical or arbitrary, therefore, may be the measures pursued or sanctioned by him, he is himself sacred from punishment of every description. [If any foreign jurisdiction had the power to punish him, as was formerly claimed by the Pope, the independence of this kingdom would be no more; and if such a power were vested in any domestic tribunal, there would soon be an end of the constitution, by destroying the free agency of one of the constituent parts of the legislative power. On the same principle, no action can be brought against the sovereign, even in civil matters. Indeed, his immunity, both from civil suit and from penal proceeding, rests on another subordinate reason also, viz. that no court can have jurisdiction over him. For all jurisdiction implies superiority of power, and proceeds from the crown itself. But who, says Finch, shall command the king? (*p*).]

While the sovereign himself however is, in a personal sense, incapable of doing wrong, yet his acts may in themselves be contrary to law, and are in some cases subject to reversal on that ground. For, first, his grants, when they are of that description, are avoided or set aside by the law; but yet in such manner as to maintain the respect due to this inviolable maxim. [Thus, if the crown should be induced to grant any franchise or privilege to a subject contrary to reason, or in anywise prejudicial to the commonwealth or to any private person, the law will not suppose the sovereign to have meant either an unwise or an injurious action, but declares that the sovereign was *deceived* in his grant; and thereupon such grant is rendered void, but merely upon the foundation of fraud or deception either by or upon those agents whom the crown had thought proper to employ. So if any person has in respect

(*p*) Finch, L. 83.

[of property a just demand upon the sovereign, though he cannot bring an action against him,] he may petition him in the High Court of Justice, [and obtain redress as a matter of grace, though not upon compulsion (*q*). And this is entirely consonant to what is laid down by the writers on natural law. "A subject," says Puffendorf, "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 a contract, in one of his "own courts, the action itself proceeds rather upon natural "equity, than upon the municipal laws" (*r*). For the end of such an action is not to *compel* the prince to observe the contract, but to *persuade* him.] As to any cause of complaint which a subject may have against the sovereign in respect of some personal injury of a private kind, but distinct from a claim to property, this would seem not to be a proper subject for a petition, and consequently no remedy would lie against the crown in such a case; but it is well observed by Mr. Locke, that "the harm which the sovereign can do in his own person not being likely to happen often, nor extend itself far, the inconveniency of some particular mischiefs is well recompensed by the peace of the public and the security of government" (*s*).

It is also to be observed, that, notwithstanding this personal perfection which the law attributes to the sovereign, the constitution hath allowed a latitude of supposing the contrary, in respect of both houses of Parliament; each of which in its turn hath exerted the right of remonstrating and complaining to the sovereign, 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

(*q*) Finch, L. 255.
(*r*) Law of N. and N. b. viii. c. 10.
(*s*) On Government, p. 2, s. 205.

an undoubted right to consider these acts of state in any light whatever, and accordingly to treat them in their addresses as proceeding personally 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 his administration. But the privilege of canvassing thus freely the personal acts of the sovereign 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 for suggesting, that his majesty's answer to the address of the commons "contained high words to fright the members "out of their duty" (*t*); and another 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 con-"stitution" (*u*). And still less are the houses of parliament precluded from imputing blame to those evil councillors or ministers by whose aid or advice any private wrong or public oppression, or other violation of the rights and liberties of the people, may have been practised; for the constitution has provided, that no man shall dare to assist the crown in contradiction to the laws of the land; and any man so offending is liable to be prosecuted and punished through the medium of an indictment or of a parliamentary impeachment.

If it be asked, what remedy is afforded to the subject for such public oppressions or acts of tyranny as have not in fact been instigated by bad advisers, but have proceeded from the personal delinquency of the monarch himself, the answer is, that there is no more remedy than in the case before supposed of a personal injury inflicted by the sovereign on an individual. To suppose a remedy, indeed, in either case, (that is, a compulsory remedy,)

(*t*) Com. Journ. 18th Nov. 1685. (*u*) Ibid. 4th Dec. 1717.

would be to suppose a superior coercive authority in some other hand, to correct the abuse; the very notion of which destroys the idea of sovereignty. For such abuses, therefore, whether they spring from the sovereign or from either house of parliament, the law is manifestly unable to make provision; but if ever they unfortunately happen, the prudence of the times must provide new expedients upon new emergencies.

[Indeed, it is found by experience, that whenever 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 further, we may now be allowed to lay down the law of redress against public oppression. If, therefore, any future prince should endeavour to subvert the constitution by breaking the original contract between king and people, should violate the fundamental laws, and should withdraw himself out of the kingdom,—we are now authorized to declare, that this conjunction of circumstances would amount to an abdication, and the throne would be thereby vacant. But it is not for us to say, that any one or two of these ingredients would amount to such a situation; for there our precedent would fail us.]

In further pursuance of the same principle of the sovereign's incapability of doing wrong, the law also determines that in him there can be no negligence or *laches*. *Nullum tempus occurrit regi*, was formerly therefore the standing

maxim on all occasions (*x*); and no delay in resorting to his remedy was held to bar the king's right (*y*). From this doctrine it followed, not only that the civil claims of the crown received no prejudice by the lapse of time, but that criminal prosecutions, (which are always instituted in the sovereign's name,) might be commenced at any distance of time from the commission of the offence (*z*). And all this is still law in a general point of view; but by statute it has been, in modern times, largely qualified in particular instances. For by 9 Geo. III. c. 16, the crown is now barred from its civil right in suits relating to landed property, by the lapse of sixty years (*a*); and by 32 Geo. III. c. 58, is barred in informations for usurping corporate offices or franchises, by the lapse of six years (*b*); and by 7 & 8 Will. III. c. 3, an indictment for treason, (except for an attempt to assassinate the king,) must be found within three years after the commission of the act of treason.

[Next, as to the royal authority or power—it is a subject which involves a great variety of prerogatives, in the exertion whereof consists the executive part of government. This, by the British constitution, is wisely placed in a single hand, 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

(*x*) 1 Bl. Com. p. 247.

(*y*) Finch, L. 82; Co. Litt. 41 b, 90.

(*z*) The Queen *v.* Thompson and others, 20 L. J. (M. C.) 183.

(*a*) This Act has been amended, in certain respects, by 24 & 25 Vict. c. 62; et vide sup. vol. I. pp. 634, 636. The subject of the limitation of actions with reference to the crown is more particularly treated post, bk. v.

(*b*) By the Municipal Corporations Act (7 Will. 4 & 1 Vict. c. 78) applications for a *quo warranto* must have been made under that Act within *one* year after the election or disqualification of the officer (sect. 23); and by the Municipal Corporations Act, 1882 (45 & 46 Vict. c. 50), s. 73, the limit of time is the same.

[work of more time and delay than the exigencies of state will afford. The sovereign is therefore not only the chief, but properly the sole, magistrate of the nation: and all others act only by commission from and in due subordination to him.

The reader can be at no loss to reconcile with what has been alleged in the preceding part of this chapter as to the freedom of the British constitution, the following principle, which that constitution no less certainly recognizes, viz., that in the exertion of lawful prerogative, the sovereign is and ought to be absolute; that is, so far absolute that there is no legal authority that can either delay or resist him; unless, indeed, 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. And as to the nature of these prerogatives more particularly considered, they may be arranged as follows:—

1. The sovereign has the sole power of sending ambassadors to foreign states and receiving ambassadors at home (*c*). This is, in the nature of things, incident to his royal capacity. For it is evident that with regard to foreign concerns, the sovereign is the delegate or representative of his people. It is impossible that the individuals

(*c*) As to the salaries, pensions, &c., of those who are in the diplomatic service, see 32 & 33 Vict. c. 43. It may be remarked here, that in the year 1848, it was considered expedient, by 11 & 12 Vict. c. 108, expressly to authorize her Majesty to enter into diplomatic relations with the sovereign of the Roman States,—provided that no person in holy orders in the Church of Rome, or jesuit, or member of any other religious order, community, or society of that church, bound by monastic or religious vows, should be received at the court of London as ambassador or other diplomatic agent; and provided also that nothing in the Act should be taken to repeal, weaken, or affect any laws then in force for upholding the supremacy of the crown, in all matters civil and ecclesiastical. But this statute is one of those repealed by 38 & 39 Vict. c. 66, "as having by change of circumstances" become unnecessary.

[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 councils. In the sovereign, 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 might scruple to enter into an 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 royal concurrence is the act only of private men (*d*).

The prerogative which we are now considering naturally leads, though at the expense of a short digression, to the inquiry how far the municipal laws of England intermeddle with or protect the rights of those messengers from one potentate to another, whom we call ambassadors.

The rights, the powers, the duties, and the privileges of ambassadors are determined by the law of nations, and not by any municipal constitutions. For, as they represent the persons of their respective masters, who owe no subjection to any laws but those of their own country, their actions are not subject to the control of the private law of that state wherein they are appointed to reside. He that is subject to the coercion of laws is necessarily dependent on that power by whom those laws were made: but an ambassador ought to be independent of every power, except that by which he is sent; and of consequence ought not to be subject to the mere municipal laws of that nation wherein he is to exercise his functions (*e*). If he grossly offends, or makes an ill use of his character,

(*d*) 4 Inst. 152.

(*e*) It may be incidentally noticed here, that an ambassador who resides at a foreign court retains his existing *domicil*, which is, in most cases, the country which he represents. (See Dicey on the Law of Domicil, p. 137.)

[he may be sent home and accused before his master (*f*); who is bound either to do justice upon him, or else to avow himself the accomplice of his crimes (*g*). But there is some dispute among the writers on the law of nations, whether this exemption of ambassadors extends to all crimes, as well natural as positive; or whether it only extends to such as are *mala prohibita*, as coining, and not to those that are *mala in se*, as murder (*h*). Our law seems to have formerly allowed the exemption in the restricted sense only. For it hath been held, both by our common lawyers and civilians, that though an ambassador is privileged by the law of nations, yet—by that law—if he commits any offence against the law of reason and nature, he shall lose his privilege (*i*); and that, therefore, if an ambassador conspires the death of the sovereign in whose land he is, he may be condemned and executed for treason; though if he commits any other species of offence, it is otherwise, and he must be sent to his own country (*k*). And these positions seem to be built upon good appearance of reason. For since, as we have formerly shown (*l*), all municipal laws act in subordination to the primary law of nature, and, where they annex a punishment to natural crimes, are only declaratory of, and auxiliary to, that law; therefore, to this natural universal rule of justice, ambassadors, as well as other men, are subject in all countries; and of consequence it is reasonable that, wherever they transgress it, there they shall be liable to make atonement (*m*). 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

(*f*) As was done with Count Gyllenberg, the Swedish minister to Great Britain, A.D. 1716. De Foro Legator, c. 17—19.

(*g*) Sp. L. 26, 21.

(*h*) Van Leeuwen in Ff. 50, 7, 17; Barbeyrac's Puff. l. 8, c. 9, s. 9, and 17; Van Bynkershoek,

(*i*) 1 Roll. Rep. 175; 3 Bulstr. 227; 4 Inst. 153.

(*k*) 1 Roll. Rep. 185.

(*l*) Vide sup. vol. I. p. 33.

(*m*) Foster's Discourses, 188.

[Grotius, that the security of ambassadors is of more importance than the punishment of a particular crime (*n*). And therefore, since the middle of the seventeenth century, few (if any) examples have happened where an ambassador has been punished for any offence, however atrocious in its nature (*o*).

In respect of civil suits, all the foreign jurists agree, that neither an ambassador, nor any of his train or *comites*, can be proceeded against for any debt or contract in the courts of that kingdom wherein he is sent to reside (*p*). Yet Sir Edward Coke maintains, that if an ambassador make a contract which is good *jure gentium*, he shall answer for it here (*q*). But the truth is, so few cases (if any) had arisen, wherein the privilege was either claimed or disputed, even with regard to civil suits, that our law-books are (in general) quite silent upon it, previous to the reign of Queen Anne; when an ambassador from Peter the Great, Czar of Mus-

(*n*) "*Securitas legatorum, utilitati quæ ex pœnâ est, præponderat.*"—(De Jure B. et P. l. 2, c. 18, s. 4.)

(*o*) In the year 1654, during the protectorate of Cromwell, Don Pataleon Sa, the brother and secretary of the Portuguese ambassador, was tried, convicted, and executed for an atrocious murder. Mr. Hume (vol. 7, p. 237) observes upon this case, that "the laws of nations "were here plainly violated." His view of the facts, however, is erroneous; for he supposes that Don Pataleon Sa was "joined with "his brother in the same com- "mission,"—a statement which, (though he cites Thurlow in support of it,) appears to be incorrect. See the Life of Chief Justice Rolle, in Lord Campbell's Lives of the Chief Justices. See also a Treatise De Legati Delinquentis Judice Competente, by Dr. Richard Zouch, one of the delegates who assisted at the trial; by which it appears, that if the prisoner could have proved that he was a colleague in the embassy, (according to his plea,) the plea, in the opinion of the doctor at least, must have been allowed.

(*p*) It may be observed that a "secretary of legation," acting in the absence of the ambassador as chargé d'affaires, is protected in the same manner as the ambassador himself; and does not lose his privilege, (at all events to the extent of being protected against process,) by engaging even in mercantile transactions. See Taylor *v.* Best, 14 C. B. 487; Att.-Gen. *v.* Kent, 1 Hurl. & Colt. 30; Magdalena Steam Navigation Company *v.* Martin, 2 Ell. & Ell. 95, 109.

(*q*) 4 Inst. 153.

[covy, was actually arrested and taken out of his coach in London, 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; and seventeen were committed to prison; most of whom were prosecuted by information in the Court of Queen's Bench, at the suit of the attorney-general; and at their trial before the lord chief justice were convicted of the facts by the jury, the question of law, how far those facts were criminal, being reserved, to be afterwards argued before the judges; which question was never determined (*r*). In the meantime 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 (*s*). But Queen Anne (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" (*t*). 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 (*u*), and afterwards passed into a law,—to prevent and punish such outrageous insolence for the future (*x*). And with a copy of this Act elegantly em-

(*r*) Com. Journ. 14th, 21st, 25th, 29th, July, 23rd October, 1708, and Boyer's Annals of Queen Anne. In 3 Burr. 1480, Lord Mansfield says, the persons convicted were never brought up to receive judgment, "for no punishment would "have been thought by the Czar "an adequate reparation. Such a "sentence as the court would have "given, he would have thought an "insult."

(*s*) Com. Journ. 17th September, 1708; Boyer's Annals of Queen Anne.

(*t*) Com. Journ. 11th January, 1709; Boyer's Annals of Queen Anne; Un. Mod. Hist. xxxv. 454.

(*u*) Com. Journ. 23rd December, 1708.

(*x*) 7 Anne, c. 12. In 3 Burr. 1480, Lord Mansfield declares, that

[bossed and illuminated, accompanied by a letter from the queen, an ambassador extraordinary was commissioned to appear at Moscow; who declared, "that though her "majesty could not inflict such a punishment as was "required, because of the defect in that particular of the "former established constitutions of her kingdom, yet, with "the unanimous consent of the parliament, she had caused "a new Act to be passed, to serve as a law for the future." This humiliating step was accepted as a full satisfaction by the Czar; and the offenders, at his request, were discharged from all further prosecution (*y*).

This statute recites the arrest which had "been made "in contempt of the protection granted by her majesty, "contrary to the law of nations, and in prejudice of the "rights and privileges which ambassadors and other public "ministers have at all times been thereby possessed of, "and ought to be kept sacred and inviolable;" wherefore it enacts, that for the future all writs and process whereby the person of any ambassador, or of his 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 violators of the law of nations, and disturbers of the public repose; and shall suffer such penalties and corporal punishment as the lord chancellor and the two chief justices, or any two of them, shall think fit. But it is expressly provided, that no trader, within the description of the bankrupt laws, who shall be in the service of any ambassador, shall be privileged or protected by the Act: nor shall any

"the statute of Queen Anne was "not occasioned by any doubt "whether the law of nations, par-"ticularly the part relative to pub-"lic ministers, was not part of the "law of England, and the infrac-"tion criminal; and that it was "not thereby intended to vary an "iota of such law." And he proceeds to say, that Lord Talbot, Lord Hardwicke, and Lord Holt were clearly of the same opinion. Moreover, in Viveash *v.* Becker, (3 Mau. & Sel. 284,) this statute was held to be declaratory only of the common law and of the law of nations.

(*y*) Boyer, ubi sup.

[one be punished for arresting an ambassador's servant, unless the name of such servant be registered with the secretary of state, and by him transmitted to the sheriffs of London and Middlesex (*z*): exceptions that are strictly conformable to the rights of ambassadors, as observed in the most civilized countries. And in consequence of this statute, thus declaring and enforcing the law of nations, these privileges are now held to be part of the law of the land, and are as such allowed in the courts of common law (*a*).

2. It is also the sovereign's prerogative to make treaties, leagues and alliances with foreign states and princes (*b*). For it is by the law of nations essential to the goodness of a league, that it be made by the sovereign power (*c*): and then it is binding upon the whole community; and in England the sovereign power, *quoad hoc*, is vested in the person of the king. Whatever contracts therefore he engages in, no other power in the kingdom can legally delay, resist, or annul. And yet, lest this plenitude of authority should be abused to the detriment of the public, the constitution (as was hinted before) hath here interposed a check by the means of parliamentary impeachment,—for the punishment of such ministers as from criminal motives advise or conclude any treaty, which shall afterwards be judged to derogate from the honour and interest of the nation.] And the provisions of the treaty, once it is made, require, in general, an act of parliament to be passed for their due execution (*d*); and this operates as a further constitutional protection of the subject.

(*z*) Seacomb *v.* Bowlney, 1 Wils. 20.

(*a*) 2 Stra. 797; Triquet *v.* Bath, 1 Bl. Rep. 471; Viveash *v.* Becker, 3 M. & S. 284; Musurus Bey *v.* Gadbau, (1894) 1 Q. B. 533; (1894) 2 Q. B. 352.

(*b*) Com. Dig. Prerogative, B. 2, 3; 1 Chitty's Commercial Law, 38, 615..

(*c*) Puff. L. of N. b. 8, c. 9, s. 6.

(*d*) 57 & 58 Vict. c. 2 (Behring Sea Award Act, 1894).

3. Upon the same principle the sovereign has also the prerogative of making war and peace (*e*). For it is held by the writers on the law of nations, that the right of making war, which by nature subsisted in every individual, has become vested in the sovereign power of each society (*f*); and that this right is given up, not only by individuals but even by the entire body of a 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 it should justify their proceedings. Such unauthorized volunteers in violence are not ranked among open enemies, but are treated like pirates and robbers (*g*); according to that rule of the civil law, "*hostes hi sunt qui nobis, aut quibus nos, publicè bellum decrevimus; cæteri latrones aut prædones sunt*" (*h*). Indeed, the reason given by Grotius, 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 of right), but that it may be certainly clear that the war is not undertaken by private persons, but by the will of the whole community (*i*); whose right of willing is in this case transferred to the supreme magistrate by the fundamental laws of society. Accordingly, with us in England, in order to make a war completely effectual, it is necessary that it be publicly declared and duly proclaimed by the sovereign's

(*e*) Com. Dig. Prerogative, C. 1, 2, 3; Bac. Ab. Prerog. D. 4; 1 Chit. Commercial Law, 392, 414.

(*f*) Puff. b. 8, c. 6, s. 8, and Barbey. in loc.

(*g*) By 2 Hen. 5, st. 1, c. 6, such conduct was made to amount to the crime of *treason*; but this species of treason was afterwards abolished by 20 Hen. 6, c. 11.

(*h*) Ff. 50, 16, 118.

(*i*) De Jure B. et P. l. 3, c. 3, s. 11.

[authority; and then all parts of both the contending nations, from the highest to the lowest, are bound by it. And in whatever body the right resides of beginning a national war, in that body also must reside the right of ending it, or the power of making peace. But 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.

4. As delay in declaring 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 authorizing the issue by the crown, upon due demand made, of letters of *marque and reprisal;* 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. This expedient is justifiable by the law of nations, whenever the subjects of one state are oppressed and injured by those of another; justice being denied by that state to which the oppressor belongs (*k*). In such a case, letters of marque and reprisal,—the latter word signifying a taking in return, and the former the passing the frontiers in order to such taking (*l*),—may be obtained, in order to seize (wherever they may be found) the bodies or goods of the subjects of the offending state, until satisfaction be made. And indeed this custom of reprisal seems dictated by nature herself; for which reason we find in the most antient times very notable instances of it (*m*).

(*k*) De Jure B. et P. l. 3, c. 2, ss. 4, 5.

(*l*) Dufresne, tit. Marca.

(*m*) See, for example, the account given by Nestor, in the eleventh book of the Iliad, of the reprisals made by himself on the Epeian nation; from whom he took a

[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 Henry V. c. 7, that if any subjects of the realm are oppressed by any foreigners in the time of truce, the king will grant marque in due form, to all that feel themselves grieved. Which form is thus directed to be observed: the sufferer must first apply to the lord privy seal, and he shall make out letters of request under the privy seal; and if, after such request of satisfaction made, the party required do not within convenient time make due satisfaction or restitution to the party grieved, the lord chancellor shall make him out letters of marque under the great seal; and by virtue of these, he may attack and seize the property of the aggressor nation, without hazard of being condemned as a robber or pirate.] But this manner of granting letters of marque has been long disused, and the term itself is now somewhat differently applied. For as during war, if a subject should take an enemy's ship without commission from the king, the prize would, by the effect of the prerogative, become an admiralty *droit*, and would belong, not to the captor, but to the crown,—therefore, in order to encourage merchants and others to fit out privateers, or armed ships, the lords of the admiralty have been empowered by various Acts of Parliament, and sometimes by proclamation of the king in council, to grant commissions, in time of war, to the owners of such ships, and to direct that the prizes captured by them shall be divided between such owners, the captains, and the crews (*n*). These commissions, when

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.

(*n*) Vin. Abr. Prerog. N. A. pl. 22; Nicholl *v.* Goodall, 10 Ves. 155.

granted, have been usually denominated "letters of marque;" and it is in that sense alone, that the term occurs in our own times (*n*).

5. [Upon exactly the same reason stands the prerogative of granting safe-conducts; without which, by the law of nations, no member of one society has a right to intrude into another (*o*). And therefore Puffendorf very justly resolves (*p*), 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. By our laws great tenderness is shown 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, they enjoy the right of residence here with other large privileges, which have already been sufficiently explained (*q*). But no subject of a nation at war with us can come into the realm, nor travel himself upon the high seas, or send his goods and merchandize from one place to another, without danger of being seized by our subjects, unless he has letters of safe-conduct; which by divers antient statutes must be granted under the great seal and inrolled in chancery, or else are of no effect (*r*): the crown being supposed the best judge of such emergencies, as may deserve exemption from the general law of arms. But passports under the sovereign's sign manual,

(*n*) In the Crimean war with Russia, no "letters of marque" were issued to privateers; but by order in council, dated 29th March, 1854, "general reprisals" were granted against the ships, vessels, and goods of the Emperor of all the Russias, to give the benefit of the prizes taken by her Majesty's ships to the captors. (See 17 & 18 Vict. c. 18.)

(*o*) Com. Dig. Prerogative, B. 5; 1 Chitty's Commercial Law, 60, 487.

(*p*) Law of N. & N. bk. 3, c. 3, s. 9.

(*q*) Vide sup. pp. 406 et seq.

(*r*) 15 Hen. 6, c. 3; 18 Hen. 6, c. 8; 20 Hen. 6, c. 1.

[or licences from his ambassadors abroad, are now more usually obtained than letters of safe-conduct, and are allowed to be of equal validity (*s*).

The law of England,—a commercial country,—pays (it may be remarked) a very particular regard to foreign merchants. Thus, for example, by Magna Charta, (cap. 30,) if a war breaks out between us and their country, they shall be attached (if in England) without harm of body or goods, till the king or his chief justiciary be informed how our merchants are treated in the land with which we are at war; and, if ours be secure in that land, they shall be secure in ours. This seems to have been a common rule of equity among all the northern nations; for we learn from Stiernhook, that it was a maxim among the Goths and Swedes, "*quam legem exteri nobis posuere, eandem illis ponemus*" (*t*). But it is somewhat extraordinary that it should have found a place in Magna Charta, a mere interior treaty between the king and his natural-born subjects: which occasions the learned Montesquieu to remark with a degree of admiration, "that "the English have made the protection of *foreign* mer- "chants one of the articles of their national liberty" (*u*). But indeed it well justifies another observation which he has made, "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 com- "merce" (*x*).

(*s*) As to the offence of violation of safe-conducts or passports, vide post, bk. VI.

(*t*) De Jure Sueon. l. 3, c. 4.

(*u*) Sp. L. 20, 13.

(*x*) Ibid. 20, 7. Blackstone takes occasion here (vol. i. p. 261) to contrast the "genius of the Roman "people, who in their manners, "their constitution, and even in "their laws, treated commerce as "a dishonourable employment;" and he cites C. 3, 63, 4. He adds, that the *canonists* went so far in the same direction "as to declare trade "inconsistent with Christianity," extending this denunciation also to "the profession of the law." This (he says) was so determined at the council of Melfi, under Pope Urban the second, A.D. 1090; and he cites Decret. 1, 88, 11; Act, Concil. apud Baron, c. 16.

[The prerogatives of the sovereign hitherto considered relate to 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 other characters, which will now lead us to the enumeration of many additional prerogatives.

6. The sovereign is a constituent part of the supreme legislative power; and, as such, has the prerogative of rejecting such provisions in parliament as he judges improper to be passed. The expediency of which constitution has been before evinced at large (*y*).] We shall only remark here, that the crown is not in general bound by Act of Parliament, unless named therein by special and particular words (*z*). The most comprehensive words that can be devised (as "any person or persons, bodies politic or corporate," and the like,) affect not the sovereign so as to restrain or diminish in the least any of his rights or interests (*a*); [for it would be of most mischievous consequence to the public, if the strength of the executive power were liable to be curtailed, without its own express consent, by constructions and implications of the subject. Yet, where an Act of Parliament is expressly made for the preservation of public rights and the suppression of public wrongs, and does not interfere with the established rights of the crown, it is said to be binding as well upon the sovereign as upon the subject (*b*): and, likewise, the sovereign may take the benefit of any Act, though he be not specially named therein (*c*).

(*y*) Vide sup. pp. 324 et seq.

(*z*) Bac. Ab. Prerogative, E. 5.

(*a*) Magdalen College case, 11 Rep. 74. Thus, the Bankruptcy Act, 1869, was not binding on the crown (see In re Henley, 9 Ch. Div. 469); but the Bankruptcy Act, 1883, is binding on the crown, but to the extent only that is expressly mentioned in the Act. (See Re Oriental Bank, 28 Ch. Div. 643.)

(*b*) Magdalen College case, 11 Rep. 71.

(*c*) 7 Rep. 32.

[7. The sovereign is considered, in the next place, as the first in military command within the kingdom; for in a monarchy the military power must be trusted in the hands of the prince; and in this capacity, the sovereign has the sole power of raising and regulating fleets and armies. Of the manner in which they are raised and regulated we shall speak more, when we come to consider the royal forces. 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 the first: but, upon the restoration of his son, was solemnly declared, by the statute 13 Car. II. c. 6, to be in the king alone: for that the sole supreme government and command of the militia within all his majesty's realms and dominions, and of all forces by sea and land, and of all forts and places of strength, ever was and is the undoubted right of his majesty, and his royal predecessors, kings and queens of England; and that both or either house of parliament cannot, nor ought to, pretend to the same.

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 of manning and governing, which belongs to the sovereign in his capacity of general of the kingdom (*d*); and all lands were frequently subject to a tax, for building of castles wherever he thought proper. This was one of the three things, from contributing to the performance of which no lands were exempted; and therefore

(*d*) 2 Inst. 30; Com. Dig. Prerogative, C. 4. Notice may be taken here of 23 & 24 Vict. c. 109, an Act for defraying the expenses of constructing fortifications for the protection of arsenals and dockyards, and of erecting a central arsenal; and of 23 & 24 Vict. c. 112, for making better provision for acquiring land for the defence of the realm; and of 52 & 53 Vict. c. 8, an Act to make further provision for *naval defence* and to defray the expenses thereof. See also 51 & 52 Vict. c. 31 (as to *national defence*), and 51 & 52 Vict. c. 32 (as to *imperial defence*).

[called by our Saxon ancestors, the "*trinoda necessitas*: scil. *pontis reparatio, arcis constructio, et expeditio contra hostem*" (*e*). And this they were called upon to do so often, that, as Sir Edward Coke from Matthew Paris assures us (*f*), there were, in the time of Henry the second, 1115 castles subsisting in England. The inconveniences of which, when granted out to private subjects, the lordly barons of those times, were severely felt by the whole kingdom; for, as William of Newburgh remarks in the reign of King Stephen, "*erant in Angliâ quodammodo tot reges vel potius tyranni, quot domini castellorum;*" but it was felt by none more sensibly than by the two succeeding princes, King John and King Henry the third. And, therefore, the greatest part of them being demolished in the barons' wars, the kings of after times were very cautious of suffering them to be rebuilt in a fortified manner: and Sir Edward Coke lays it down, that no subject can build a castle, or house of strength embattled, or other fortress defensible, without the licence of the king, for the danger which might ensue, if every man at his pleasure might do it (*g*).

It is partly upon the same, and partly upon a fiscal foundation, to secure his marine revenue, that the sovereign has the prerogative of appointing *ports* and *havens*, that is, such places as he in his wisdom sees proper, for persons and merchandize to pass into and out of the realm (*h*). By the feodal law all navigable rivers and havens were computed among the *regalia*, and were subject to the sovereign of the state (*i*). And in England it hath always been holden, that the sovereign is lord of the whole shore (*k*), and particularly is the guardian of the ports and havens, which are the inlets and gates of the realm (*l*):

(*e*) Cowel's Interpr. tit. Castellorum Operatio; Seld. Jan. Ang. 1, 42.

(*f*) 2 Inst. 31.

(*g*) 1 Inst. 5.

(*h*) Hale de Portibus Maris.

(*i*) 2 Feud. t. 26; Crag. 1, 15, 15.

(*k*) F. N. B. 113; vide sup. vol. I. p. 423.

(*l*) Dav. 9, 56. Among these

[and therefore, so early as the reign of King John, we find ships seized by the king's officers for putting in at a place that was not a legal port (*m*). These legal ports were undoubtedly at first assigned to the crown; since to each of them a court of portmote was incident, the jurisdiction of which must flow from the royal authority (*n*). The *great ports* of the sea are also referred to, as well known and established, by statute 4 Hen. IV. c. 20, which prohibited the landing elsewhere under pain of confiscation; and the statute 1 Eliz. c. 11, recited that the franchise of landing 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 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

mention must be made of the *cinque ports*, viz. Hastings, Romney, Hythe, Dover, and Sandwich. On these ports extensive privileges were conferred by our early sovereigns, particularly by William the Conqueror and King John; and two other towns, Winchelsea and Rye, were subsequently added to their number. From their position, lying more immediately exposed to attacks from the French coast, they were supposed to be among the most important places in the kingdom, and were placed under the especial custody of a *lord warden;* and before the Reform Act, 1832, they sent (including certain boroughs attached to them) no less than sixteen members to parliament. These, however, by the effect of that Act, were reduced to eight; and the Redistribution of Seats Act, 1885 (48 & 49 Vict. c. 23), has further modified their representation; but the cinque ports still possess a peculiar maritime jurisdiction; as to which see 51 Geo. 3, c. 36; 1 & 2 Geo. 4, c. 76, ss. 1—5, 15, 16, 18; 5 & 6 Will. 4, c. 76; 6 & 7 Will. 4, c. 105, ss. 10, 11; 17 & 18 Vict. c. 120, ss. 8, 11, in sched.; 18 & 19 Vict. c. 48, s. 10; and 32 & 33 Vict. c. 53. At one time the lord warden of the cinque ports and the constable of Dover castle had, also, a local jurisdiction in relation to civil suits and proceedings;—but this was taken away by 18 & 19 Vict. c. 48 (amended by 20 & 21 Vict. c. 1. and 32 & 33 Vict. c. 53). See also 27 & 28 Vict. c. 80, as to *petty sessions* within the cinque ports.

(*m*) Madox, Hist. Exch. 530; Foreman *v.* Whitstable, Law. Rep., 4 Eng. & Ir. Ap. 266.

(*n*) 4 Inst. 148.

[revenue of the customs was much impaired and diminished, by fraudulent landings in obscure and private corners.] This abuse occasioned statutes to be passed enabling the crown to ascertain the limits of all ports, and to assign proper quays therein for the exclusive landing and loading of merchandize (*o*); and this duty, as well as those of appointing ports and sub-ports, and declaring the limits thereof, is now confided, by 39 & 40 Vict. c. 36, s. 11, to the commissioners of her majesty's treasury (*p*). There are also, with regard to ports or harbours, several other Acts of importance (*q*). By 19 Geo. II. c. 22, certain nuisances in harbours are restrained. By 46 Geo. III. c. 153, (amended by 25 & 26 Vict. c. 69, s. 15,) no pier, quay, wharf, jetty, breast, or embankment shall be erected in or near to any public harbour in the United Kingdom or any river communicating therewith, so far as the tide flows up the same, without giving one month's notice to the Board of Trade,—with a saving, however, of the privileges of the city of London. By 54 Geo. III. c. 159, the Admiralty is entrusted with the duty of regulating the mooring of vessels in all ports and harbours (*r*). By

(*o*) See 1 Eliz. c. 11; and 13 & 14 Car. 2, c. 11; both of which Acts were repealed by 6 Geo. 4, c. 105.

(*p*) By 39 & 40 Vict. c. 36, s. 12, the commissioners may appoint "warehousing ports," and by s. 14, "sufferance wharves," for the purpose of the customs.

(*q*) In addition to the more general enactments referred to in the text, there are also the following Acts on this subject in regard to particular harbours:—13 & 14 Vict. c. 116, 20 & 21 Vict. c. 32, and 28 & 29 Vict. c. 100, as to the harbour of refuge in the *Isle of Portland;* 10 & 11 Vict. c. 76, 17 & 18 Vict. c. 44, (amended by 25 & 26 Vict. c. 69, s. 17,) and 37 & 38 Vict. c. 30, as to the *Holyhead harbours;* 26 & 27 Vict. c. 86, 27 & 28 Vict. c. 62, and 35 & 36 Vict. c. 23, as to the harbours of the *Isle of Man;* 23 & 24 Vict. cc. 109, 112, 25 & 26 Vict. c. 78, 27 & 28 Vict. c. 109, 28 & 29 Vict. c. 61, and 30 & 31 Vict. cc. 24, 145, as to the ports of *Dover* and *Portland;* 26 & 27 Vict. c. 71, (amended and continued by 27 & 28 Vict. c. 102, and 28 & 29 Vict. c. 120,) as to the harbour of *Harwich;* 6 & 7 Will. 4, c. 117, and 28 & 29 Vict. c 67, as to the harbours of *Dublin* and *Kingstown;* and 26 & 27 Vict. c. 72, as to the harbour of *Howth*.

(*r*) By 54 Geo. 3, c. 159, ss. 14, 16, the duty of regulating the

10 & 11 Vict. c. 27, the provisions ordinarily inserted in local Acts passed for the construction and improvement of particular harbours, docks, and piers—are consolidated into a single statute, so as to be embodied, by way of reference, in any special Act without needless repetition; and with the object of obviating the necessity, in certain cases, of obtaining, at great expense, a special local Act for such construction, the Board of Trade is now enabled by 24 & 25 Vict. c. 45, as amended by 25 & 26 Vict. cc. 19, 69, to make provisional orders authorizing the construction of any pier, harbour, quay, wharf, jetty, or excavation by private undertakers, upon application made to the Board (*s*); but such orders are of no validity or force until the confirmation thereof by Act of Parliament (*t*).

[The erection of beacons, lighthouses, and sea-marks is also incident to this branch of the royal prerogative; whereof the first were antiently used in order to alarm the country in case of the approach of an enemy; and all of them are signally useful in guarding and preserving vessels at sea, by night as well as by day. For this purpose the sovereign hath power, by commission under his Great Seal (*u*), to cause them to be erected in fit and convenient places (*x*), as well upon the lands of the subject,

manner in which *ballast* or *shingle* may be taken from the shores or banks of ports and harbours was also entrusted to the Admiralty,—and by 25 & 26 Vict. c. 69, s. 6, this jurisdiction was transferred to the Board of Trade.

(*s*) Such orders may also empower the undertakers to levy rates and borrow money for such works; and funds in aid of the works may be advanced out of the consolidated fund, and by the Public Works Loan Commissioners, as to whom see 24 & 25 Vict. cc. 47, 80; 25 & 26 Vict. c. 69, ss. 20—22; 26 & 27 Vict. c. 81; 29 & 30 Vict. c. 30; 32 & 33 Vict. c. 76; 44 & 45 Vict. c. 38; 45 & 46 Vict. c. 62; 46 & 47 Vict. c. 42; 47 & 48 Vict. c. 49; 48 & 49 Vict. c. 65; 53 & 54 Vict. c. 50; 54 & 55 Vict. c. 59; 55 & 56 Vict. c. 61; and 56 & 57 Vict. c. 24.

(*t*) The 30 & 31 Vict. c. 33, is an example of such a confirmatory Act; but in fact the number of private Acts every session for making or enlarging harbours is very great.

(*u*) 3 Inst. 204; 4 Inst. 148.

(*x*) Rot. Claus. 1 Rich. 2, m. 42; Prynne on 4 Inst. 136.

[as upon the demesnes of the crown (*y*).] A power, however, of the same general nature is now, by statute, also vested in certain bodies subordinate to the crown; viz., in the Trinity-house, for England and Wales and the Channel Islands; and in other authorities, for Scotland, the Isle of Man, and Ireland, respectively (*a*). And as the regulation of beacons, lighthouses, and sea-marks chiefly falls under their jurisdiction, the subject shall be postponed until we arrive at a division of the work in which some notice is taken of the Trinity-house and lighthouse authorities, who will be found to be placed under the general superintendence of the Board of Trade (*b*).

To this branch of the prerogative may also be referred the power vested in her majesty by statute 39 & 40 Vict. c. 36, to prohibit, by proclamation or order in council, the *importation* of arms, ammunition, gunpowder, or other goods (*c*); or the *exportation* (and the carriage *coastwise*) of the articles above specified, or of military and naval stores, or of any provisions capable of being used as food by man (*d*). [To the same head belongs the right which the sovereign has, whenever he sees proper, of confining his subjects to stay within the realm, or of recalling them when beyond the seas. It is true that, by the common law, every man, as the general rule, may go out of the realm for whatsoever cause he pleaseth, without obtaining the sovereign's leave, which liberty was expressly declared in King John's great charter, though left out in that of Henry the third (*e*); but yet, inasmuch as every man ought of right to defend the sovereign and his realm, the sovereign at his pleasure may command him by his writ that he go not beyond the seas or out of the realm without licence; and if he do the contrary, he shall be punished

(*y*) Sid. 158; 4 Inst. 149.
(*a*) 17 & 18 Vict. c. 104, s. 389.
(*b*) Vide post, bk. IV. pt. III.
(*c*) 39 & 40 Vict. c. 36, s. 43.
(*d*) Ib. s. 138.
(*e*) F. N. B. 85.

[for disobeying the sovereign's command. And some persons there antiently were, that, by reason of their stations, were under a perpetual prohibition of going abroad without licence obtained: among which were reckoned all peers, on account of their being councillors of the crown; all knights, who were bound to defend the kingdom from invasions; all ecclesiastics, who were expressly confined by the fourth chapter of the constitutions of Clarendon, on account of their attachment, in the times of popery, to the see of Rome; and all archers and other artificers, lest they should instruct foreigners to rival us in their several trades and manufactures (*f*). This was said in the time of Britton, who wrote in the reign of Edward the first; and Sir Edward Coke gives us many instances to this effect, in the time of Edward the third (*g*). In the succeeding reign the affair of travelling wore a very different aspect; an Act of Parliament being made 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 (*h*): but this Act was repealed by the statute 4 Jac. I. c. 1. At present everybody has, or at least assumes, the liberty of going abroad when he pleases, and without licence. Yet undoubtedly if the sovereign, by writ of *ne exeat regno* (*i*), under his great seal or privy seal, were to think proper to prohibit a man from so doing, or to send a writ to any man, when abroad, commanding his return, and in either case the subject were to disobey (*k*)—it would be a high

(*f*) Britton, c. 123.

(*g*) 3 Inst. 179.

(*h*) 5 Rich. 2, c. 2.

(*i*) The writ *ne exeat regno* is not now used for state purposes, but has become a mere process in a suit; and it is used to prevent one of the parties from withdrawing his person or property from the jurisdiction of the court by going abroad, unless he shall first give security for the satisfaction of such claim as the other party shall establish. (See Lord Bacon's Ordinances, No. 89; Ex parte Brunker, 3 P. Wms. 312; Dick *v.* Swinton, 1 Ves. & B. 373; Goodman *v.* Sayers, 5 Mad. 471; Sobey *v.* Sobey, Law Rep., 15 Eq. Ca. 200; Drover *v.* Beyer, 13 Ch. D. 242.)

(*k*) 3 Inst. 84, against Fugitives.

[contempt of the royal prerogative: and it is said that in such case the offender's lands shall be seized till he return, and that then he is liable to fine and imprisonment (*l*).

8. Another capacity in which the sovereign is considered in domestic affairs, is as the fountain of justice and general conservator of the peace of the kingdom (*m*). By the fountain of justice the law does not mean the *author* or *original*, but only the *distributor*. Justice is not derived from the sovereign as from his *free-gift;* but he is the steward of the public, to dispense it to whom it is *due* (*n*). He is not the spring, but the reservoir; from whence right and equity are conducted, by a thousand channels, to every individual.] The original power of judicature by the fundamental principles of society, is lodged in the society at large; but as it would be impracticable to render complete justice to every individual, by the people in their collective capacity, therefore that power has been usually committed to certain select magistrates to hear and determine complaints; and in England these magistrates are considered as in some sense the substitutes of the crown, in the exercise of the authority so vested in them. For the sovereign is himself, according to the prerogative now under consideration, the fountain of that justice which they administer, though it would be impossible, as well as improper, that he should personally carry into execution this great and extensive trust. And hence it is, that the jurisdiction of all courts is either mediately or immediately derived from the crown; that the magistrates or judges who preside there are appointed also by the authority of the crown, and that the proceedings run generally in the sovereign's name, pass under his seal, and are executed by his officers. [Indeed, it is probable, and almost certain, that in very early times, before our con-

(*l*) 1 Hawk. P. C. 22.

(*m*) Bac. Ab. Prerog. D.; Com. Dig. Prerog. D. 28.

(*n*) ***Ad hoc autem creatus est rex,*** *ut justitiam faciat universis.*—Bract. l. 3, tr. 1, c. 9, s. 3.

[stitution arrived at its full perfection, our sovereigns in person often heard and determined causes between party and party. But at present, by the long and uniform usage of many ages, our sovereigns 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 nor any other authority than an Act of Parliament (*o*).

In criminal proceedings, or in prosecutions for offences, it would, indeed, be very absurd if the sovereign personally sat in judgment; because, in regard to these he appears in another capacity, that of *prosecutor*. For all offences are considered as either against the king's peace or against his crown and dignity; and it was formerly necessary in every indictment so to describe them. 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 sovereign,—yet as the public, which is an invisible body, has delegated all its power and rights, with regard to the execution of the laws, to one visible magistrate, all affronts to that power, and breaches of those rights, are immediately offences against that magistrate; who 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 sovereign 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 sovereign's coronation oath, *dicebatur fregisse juramentum regis juratum* (*p*). And hence also arises another branch of the

(*o*) 2 Hawk. P. C. 1.

(*p*) Stiern. de Jure Goth. l. 3, c. 3. A notion somewhat similar to this may be found in the Mirrour, c. 1, s. 5. And so also when the Chief Justice Thorpe was con-

[prerogative, that of *pardoning* offences; for it is reasonable that he only who is injured should have the power of forgiving. Of prosecutions and pardons more will be said hereafter; and they are mentioned here in this cursory manner, only to show the constitutional grounds of this power of the crown, and how regularly connected all the links are, in this vast chain of prerogative. The *remission of penalties* for criminal offences is also a branch of this prerogative of the sovereign (*q*).

A consequence of the particular prerogative now under consideration is the legal *ubiquity* of the sovereign. In the eye of the law he is always present in all his courts, though he cannot personally distribute justice (*r*). His judges are the mirror by which his 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 to pronounce judgment, for the benefit and protection of the subject.] And this ubiquity is illustrated by certain technical distinctions applicable to proceedings to which the crown is a party. Thus the sovereign can never be *nonsuited* (*s*), for that supposes the non-appearance of the plaintiff in court, though the attorney-general may enter a *non vult prosequi*, which has much the same effect. [For the same reason also, in the forms of legal proceedings, the king is never said to appear by attorney, as other men may do; for, in contemplation of the law, he is always present in court (*t*).

From the same original, of the sovereign's being the fountain of justice, we may also deduce the prerogative of issuing proclamations, which is vested in him alone (*u*).

demned to be hanged for bribery, he was said "*sacramentum domini regis fregisse.*" Rot. Parl. 25 Edw. 3.

(*q*) 22 Vict. c. 32; 38 & 39 Vict. c. 80; Todd *v.* Robinson, 12 Q. B. D. 530; Bradlaugh *v.* Clarke, 8 App. Ca. 354.

(*r*) Fortesc. c. 8; 2 Inst. 186.

(*s*) Co. Litt. 139.

(*t*) Finch, 1, 81.

(*u*) Such proclamations may be *primâ facie* proved by producing the London Gazette announcing the same, or by a copy printed by any government printer, or under the

[These proclamations have then a binding force, when—(as Sir Edward Coke observes)—they are grounded upon and enforce the laws of the realm (*x*). For though the making of laws is entirely the work of a distinct part, the legislative branch of the supreme power, yet the manner, time, and circumstances of putting those laws in execution, must frequently be left to the discretion of the executive magistrate. And therefore royal constitutions or edicts concerning these points, which we call proclamations, are binding upon the subject, where, neither contradicting the old laws, nor tending to establish new ones, they only enforce the execution of such laws as are already in being, in such manner as the sovereign shall judge necessary. For example, the established law is, that the sovereign may prohibit any of his subjects from leaving the realm: a proclamation therefore forbidding this in general, for three weeks, by laying an embargo upon all shipping in time of war, has been held equally binding as an Act of Parliament, because founded upon a prior law (*y*).] But a proclamation laying an embargo, in time of peace, upon all vessels laden with wheat, being contrary to law, and particularly to the statute 22 Car. II. c. 13,—the advisers of such a measure (though it was in a time of public scarcity), and all persons acting under the proclamation, found it necessary to be indemnified by a special Act of Parliament, viz., 7 Geo. III. c. 7. [It is true, that by the statute 31 Hen. VIII. c. 8, it was once 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 (*z*).]

superintendence of her Majesty's Stationery Office, or by a certified extract from the Privy Council minutes. (See 31 & 32 Vict. c. 37; 40 & 41 Vict. cc. 21, 53; 45 Vict. c. 9.)

(*x*) 3 Inst. 162.

(*y*) 4 Mod. 177, 179.

(*z*) Stat. 1 Edw. 6, c. 12.

9. The sovereign is also, as *parens patriæ*, invested with a kind of guardianship over various classes of persons who from their legal disability stand in need of protection (*a*). This branch of the prerogative in regard to *infants* has been already noticed (*b*); but it also extends to the case of *idiots* and *lunatics*,—and these we will now consider.

[An *idiot* (or natural fool) is one that hath had no understanding from his nativity; and therefore is by law presumed never likely to attain any: but none is to be held such who hath any glimmering of reason (*c*), so that he can tell his parents, his age, or the like common matters (*d*). The custody of an idiot and of his lands was formerly vested in the lord of the fee (*e*); but by reason of the manifold abuses of this power by subjects, it was at last provided by common consent, that it should be given to the king as the general conservator of his people, in order to prevent the idiot from wasting his estate, and reducing himself and his heirs to poverty and distress (*f*). This prerogative is declared in parliament by the statute *De Prærogativâ Regis* (*g*), which directs, in affirmance of the common law (*h*), that the king shall have ward of the lands of natural fools, taking the profits without waste or destruction, and finding them necessaries; and that after the death of such idiots he shall render the estate to the heirs;—in order to prevent such idiots from aliening their lands, and their heirs from being disinherited (*i*).]

(*a*) 3 Bl. Com. 427; De Manneville *v.* De Manneville, 10 Ves. jun. 52.

(*b*) Vide sup. p. 311.

(*c*) F. N. B. 233; 3 Bligh, N. S. 1.

(*d*) Blackstone adds here (vol. i. p. 304), that "a man who is born "deaf, dumb, and blind, is looked "upon by the law as in the same "state with an idiot, he being sup- "posed incapable of any under- "standing, as wanting all those "senses which furnish the human mind with ideas"; and he cites Co. Litt. 42 (b); Fleta, l. 6, c. 40.

(*e*) Fleta, lib. 1, c. 11, s. 10.

(*f*) F. N. B. 232.

(*g*) 17 Edw. 2, st. 1, c. 9.

(*h*) 4 Rep. 126; Memorand. Scacc. 20 Edw. 1 (prefixed to Maynard's Year Book of Edward 2), fol. 20, 24; 2 Inst. 14.

(*i*) This statute seems not to extend to the *copyhold* lands of idiots or lunatics, (Bac. Ab. Idiots, &c. (C.); Scriven on Copyholds, 6th ed.,

In the old common law, there was a writ *de idiotâ inquirendo*, to inquire whether a man be an idiot or not (*k*): which was tried by a jury of twelve men: and if they found him *purus idiota*, the profits of his lands and the custody of his person might be granted by the sovereign to any subject who had interest enough to obtain them (*l*). [Such a result must of course have been always considered as a hardship upon private families; and in the eighth year of James the first, 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 (*m*). But no grievance of this kind ever now occurs; for that part of the prerogative which relates to idiots has long been, in effect, dormant; being merged, as it were, in the part of it which relates to lunatics, to the consideration of which we will now proceed (*n*).

A *lunatic* is a person who hath had understanding, but by disease, grief, or any other cause, hath lost the use of his reason (*o*), or has become *non compos*, that is, of mind so unsound as to be incapable of conducting himself or his affairs.] And this last term (according to Sir E. Coke) is the most legal; the term lunatic being in its derivation applicable only to one that has lucid intervals, depending, as some formerly imagined, upon the change of the

by Brown, p. 49;) but the crown's prerogative extends to their persons, goods and chattels, as well as to their freehold lands (Beverley's case, 4 Rep. 126 a; F. N. B. ubi sup.).

(*k*) F. N. B. ubi sup.

(*l*) This power, though in modern times never exerted, appears to be alluded to in the expression of *begging* a man for a fool.

(*m*) 4 Inst. 203; Com. Journ. 1610.

(*n*) Accordingly, in 16 & 17 Vict. c. 70, s. 2, it was enacted, that the word "lunatic" should be "construed to mean any person found "by inquisition *idiot*, *lunatic*, or of "unsound mind, and incapable of "managing himself and his affairs;" and the Lunacy Act, 1890 (53 Vict. c. 5), s. 116, appears (for this purpose) to have a correspondingly wide extent.

(*o*) "*Idiota a casu et infirmitate.*" —Mem. Scacc. 20 Edw. 1 (in Maynard's Year Book of Edward 2), 20; and see Re J. B., 1 Myl. & Cr. 538.

moon (*p*), though now used technically, as well as popularly, in the more extended sense of a person affected by any species of insanity supervening since his birth. [To all lunatics, as well as to idiots, the sovereign is guardian, but to a very different purpose: for the law always imagines that these accidental misfortunes may be removed; and therefore only constitutes the crown a trustee for the unfortunate persons, to protect their property, and to account to them for all profits received, if they recover, or, after their decease, to their representatives: and hence it is declared by the statute *De Prærogativâ Regis* (*q*) before mentioned, 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 that the king shall take nothing to his own use; and if the parties die in such a state, 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 (*r*). On the first attack of lunacy, 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 (*s*);] but it often becomes desirable and even necessary, for the more effectual protection of the lunatic's person and the regulation and administration of his property and affairs, to apply for the exercise of the royal prerogative in relation to this subject.

The course taken for this purpose is as follows. The lord chancellor,—to whom, by special authority from the sovereign, the custody of both idiots and lunatics is intrusted (*t*),—upon petition or information, grants a com-

(*p*) See 1 Bl. Com. p. 304.

(*q*) 17 Edw. 2, st. 1, c. 10.

(*r*) Vide sup. pp. 192 et seq.

(*s*) As to lunatic asylums, vide post, bk. IV. pt. III. c. V.

(*t*) 3 P. Wms. 107; 2 Atk. 553; 3 Atk. 635. The lords justices of appeal (or some of them) are usually entrusted with the lunacy jurisdiction, a warrant for that purpose

mission in the nature of the antient writ *de lunatico inquirendo*, (which is analogous to that *de idiotâ inquirendo* before mentioned,) to inquire into the party's state of mind. The proceedings on such commission are regulated by the Lunacy Act, 1890 (53 Vict. c. 5), which repeals, but in substance re-enacts, the three earlier Lunacy Acts, namely, 16 & 17 Vict. c. 70 (*u*); 25 & 26 Vict. c. 86; and 45 & 46 Vict. c. 82 (*x*). Under this Act, as amended by the Lunacy Act, 1891 (54 & 55 Vict. c. 65), the commission is directed to certain judicial officers called Masters in Lunacy (*y*); but the inquiry into the state of mind of the party, as authorized by such commission, usually takes place before a *jury* (*z*)—on an issue directed by

being made out under the queen's sign manual. (See Judicature Act, 1873, s. 51; Re Lamotte, 4 Ch. Div. 325; and see 53 Vict. c. 5, s. 108.) The king himself used formerly to commit the custody of insane persons to proper committees in every particular case; but now, to avoid solicitations, a warrant is issued by the king, under his royal sign manual, to the chancellor to perform this office for him. (3 Bl. Com. 427.)

(*u*) By this statute many previous ones on the same subject—viz., 6 Geo. 4, c. 53; 1 Will. 4, c. 65; 3 & 4 Will. 4, cc. 36, 84; 5 & 6 Vict. c. 84; 15 & 16 Vict. c. 48—were either wholly or in part repealed. As to matters in lunacy, there were also the General Orders made 7th Nov. 1853, 3rd July, 1854, 12th Jan. 1855, 1st Aug. 1856, 8th Nov. 1856, 7th Nov. 1862, 10th Feb. 1866, 10th Jan. 1870, 30th May, 1873, 22nd Dec. 1874, and 3rd Aug. 1876; the Lunacy Orders, 1883; The General Order of 6th Feb. 1889; and the General Order of 6th May, 1889.

(*x*) The orders and rules under the Lunacy Act, 1890, were firstly the Rules of 1890 (dated the first July, 1890), now repealed; and secondly, the Rules of 1892 (dated the 6th Feb. 1892), which are still in force, and have been added to by the Order of 11th Aug. 1892, and the Rules of 15th June, 1893.

(*y*) 53 Vict. c. 5, s. 92. The commission may be either a special one applicable to some particular case, or a general commission issued to the "Masters in Lunacy," directing their inquiry into such cases, generally, as shall be referred to them.

(*z*) On the other hand, where the alleged lunatic does not demand an inquiry before a jury,—or where the lord chancellor is satisfied by personal examination that he is incompetent to form and express a wish in that behalf, and deems it inexpedient that the inquiry should be before a jury,—the masters in lunacy may, without either jury or special commission, inquire into the party's state of mind, and certify their finding thereon. (Sects. 91, 92.)

the lord chancellor to be determined in that manner (*a*). The verdict on such inquisition must be upon the oath of twelve men at the least (*b*); and (unless in special cases) the verdict is to be given after the due examination of the alleged lunatic, both before the taking of the evidence, and also at the close of the proceedings, before they consult as to their verdict (*c*). And such examination may be either in open court or in private, as the judge trying the issue shall direct (*d*). If by the verdict the party be found *non compos*, the care of his *person*, with a suitable allowance for his maintenance (*e*) in some private or public asylum (where an asylum is requisite), is usually committed to some friend, who is then called his *committee* (*f*). [In order to prevent sinister practices, the next heir is seldom permitted to be this committee, because it is his interest that the party should die; but it hath been said, that there lies not the same objection against his next-of-kin, provided he be not also the heir; for it is his interest to pre-

(*a*) 53 Vict. c. 5, s. 94. Unless the judge trying such issue shall otherwise direct, no evidence as to anything said or done (or as to the demeanour or state of mind of the person who is the subject of the inquiry) at any time more than *two years* before the inquiry, shall be receivable in proof of insanity; and the rule is the same, where the inquiry takes place before a master without a jury. (Sect. 98.)

(*b*) As to such jury and as to the trial of the issue, see 53 Vict. c. 5, ss. 97, 99, 100, repealing 8 & 9 Vict. c. 100; 16 & 17 Vict. c. 70, s. 46; 25 & 26 Vict. c. 86, s. 4; and as to a new trial, or a fresh inquiry, see sect. 103 of the Lunacy Act, 1890.

(*c*) 53 Vict. c. 5, s. 94.

(*d*) Ibid.; In re Scott, 27 Ch. Div. 116.

(*e*) In re French, Law Rep., 3 Ch. App. 317.

(*f*) See 53 Vict. c. 5, ss. 108, 116. The civil law agreed with ours in assigning persons of unsound mind curators to manage their persons and estates: though, in one respect, the Roman law went much beyond the English: for if a man, by notorious prodigality, was in danger of wasting his estate, he, too, was committed to the care of a curator (Ff. 27, 10, 1); but with us, when a man on an inquest of idiocy hath been returned an *unthrift*, and not an idiot, no further proceedings have been had. (Bro. Abr. tit. Idiot, 4; 1 Bl. Com. p. 306.)

[serve the lunatic's life, in order to increase the personal estate by the savings which he or his family may hereafter be entitled to enjoy (*g*). And 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; but he is accountable to the court, and to the *non compos* himself, if he recovers; or otherwise, to his administrators (*h*).] Moreover, by the provisions of the successive Lunacy Acts of the present reign above mentioned, every person found by inquisition to be lunatic is to be personally visited, seen, and reported upon, by official *visitors*, four times at the least in every year, and at such other times as the lord chancellor may direct (*i*). Our statute law contains, also, a variety of other provisions for the protection and management of persons labouring under this deplorable calamity,—but they are not of a nature to be conveniently stated in this place, and shall be reserved therefore for a subsequent division of the work (*k*).

10. [The sovereign is likewise the fountain of honour, of office, and of privilege; and this in a different sense from that wherein he is styled the fountain of justice: for here he is really the parent of them. It is impossible that government can be maintained without a due subordination of rank; in order that the people may know and dis-

(*g*) 2 P. Wms. 638. It may be remarked here, that in a modern case a portion of the lunatic's estate was directed to be applied towards the maintenance of some of the next of kin who were in needy circumstances. (In re Frost, Law Rep., 5 Ch. App. 699; and see also In re Weld, 46 L. T., N. S. 397; In re Evans, 21 Ch. D. 297; In re Weaver, ib. 615.)

(*h*) The committee is empowered in many cases to represent or act for the lunatic (53 Vict. c. 5, ss. 116, 120, 125, 126, 128, and 133—143; vide sup. vol. I. p. 450). As to *charging* the lunatic's property for his benefit, see 53 Vict. c. 5, ss. 117, 118; and In re Plenderleith, (1893) 3 Ch. 332.

(*i*) Where the real and personal property of the lunatic is of small amount (under 200*l*.) the county court judge may, under certain circumstances, make orders for its application for the lunatic's benefit (53 Vict. c. 5, s. 132).

(*k*) Vide post, bk. IV. pt. III. c. V.

[tinguish such as are set over them, so as 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 as the law supposes that no one can be so good a judge of their several merits and services, as the sovereign himself who employs them, it has, therefore, intrusted to him the sole power of conferring dignities and honours, in confidence that he will bestow them upon none but such as deserve them. Hence, all degrees of nobility, of knighthood, and other titles, are received by immediate grant from the crown; either expressed in writing, by writs or letters patent, as in the creation of peers and baronets; or by corporeal investiture, as in the creation of a simple knight.] And the law of England prohibits all subjects of the realm from accepting any title or decoration from a foreign prince, unless with the consent of their own sovereign (*l*).

[From the same principle also arises the prerogative of erecting and disposing of offices; for honours and offices held under the crown are in their nature convertible and synonymous. All such offices carry in the eye of the law an honour along with them; because they imply a superiority of parts and abilities, being supposed to be always filled with those that are most able to execute them. And, on the other hand, all honours, in their original, had duties or offices annexed to them: an earl, *comes*, was the conservator or governor of a county; and a knight, *miles*, was bound to attend the king in his wars. For the same reason, therefore, that honours are in the disposal of the sovereign, public offices ought to be so likewise; and as he may create new titles, so may he create new offices. But with this restriction,—that he cannot create new offices with new fees annexed to them, nor annex new fees to old offices (*m*): for this would be a tax upon the subject, which cannot be imposed but by Act of Parliament (*n*).

(*l*) Jac. Dict. *in tit.* "Peers."
(*m*) Com. Dig. Prerog. D. 3.
(*n*) 2 Inst. 533.

[Wherefore, in the thirteenth year of Henry the fourth, 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 by parliament and declared void.

Upon the same or the like reason, the sovereign has also the prerogative of conferring privileges upon private persons; such as granting place or precedence to any of his subjects, as shall seem good to his royal wisdom (*o*).] He cannot, however, on the creation of a peer, give him precedence before others of the same rank, the power of the crown being in that respect restrained by 31 Hen. VIII. c. 10, which settles the place and precedence of all the nobility and great officers of state (*p*). The sovereign may also erect *corporations*, whereby a number of private persons are united and knit together, and enjoy many liberties, powers, and immunities in their politic, of which they were utterly incapable in their natural, capacity (*q*).

In connection with this branch of the prerogative it may also be mentioned, that by the Civil List Act passed at the queen's accession (1 & 2 Vict. c. 2,) her Majesty was empowered to grant pensions to the amount of 1,200*l.* per annum, chargeable on her civil list revenues: which pensions are intended to make provision for the support of persons who have just claims on the royal beneficence; or who, by their services or discoveries, have merited the gratitude, while they need the aid, of their country (*r*).

11. [Another light in which the laws of England con-

(*o*) 4 Inst. 361.

(*p*) See Hovenden's Blackstone, vol. i. p. 272, where the 4th art. of the Act of Union with Ireland is also cited.

(*q*) 1 Bl. Com. p. 272. As to corporations, vide sup. vol. I. p. 345; and post, bk. IV. pt. III. c. I.

(*r*) By 50 Vict. c. 2 (session 2), the Acts authorizing the issue of secret service money (which was not to exceed 10,000*l.* per annum) were repealed. Pensions for distinguished services in former times granted by parliament are now subject to commutation; see 45 & 46 Vict. c. 44.

[sider the sovereign, with regard to domestic concerns, is as the arbiter of commerce; and the royal prerogative, so far as it relates to this subject, 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 (*s*). These can only be set up by virtue of the royal grant, or by long and immemorial usage and prescription, which supposes such a grant to have been originally made (*t*); or else by Act of Parliament (*u*). The limitations of these public resorts to such time and such place as may be most convenient for the neighbourhood, form a part of economics, or domestic polity; which, considering the kingdom as a large family, and the sovereign as the master of it, he clearly has a right to dispose and order as he pleases.

Secondly, the regulation of *weights and measures*. These, for the advantage of the public, ought to be universally the same throughout the kingdom; being the general criterions which reduce all things to the same or an equivalent value. But as weight and measure are things in their nature arbitrary and uncertain, it is therefore expedient that they be reduced to some fixed rule or standard; which standard it is impossible to fix by any written law or oral proclamation; for no man can, by words only, give another an adequate idea of a foot-rule, or a pound-weight. It is therefore necessary to have recourse to some visible, palpable, material standard; by forming a comparison with which, all weights and measures may be reduced to one uniform size: and the prerogative of fixing this standard our antient law vested in the crown, as in Normandy it belonged to the duke (*v*).

(*s*) Vide sup. vol. I. p. 609.

(*t*) 2 Inst. 220; Scriven on Copyholds, 6th ed., by Brown, pp. 238—240; and vide sup. vol. I. p. 628.

(*u*) Manchester Corporation *v.* Lyons, 22 Ch. D. 287; Abergavenny Commissioners *v.* Straker, 42 Ch. D. 83.

(*v*) Gr. Coustum. c. 16.

[This standard was originally kept at Winchester; and we find in the laws of King Edgar, near a century before the Conquest, an injunction that the one measure, which was kept at Winchester, should be observed throughout the realm (*w*). Most nations have regulated the standard of measures of length, by comparison with the parts of the human body: as the palm, the hand, the span, the foot, the cubit, the ell, the pace, and the fathom (*x*). But as these are of different dimensions in men of different proportions, our antient historians 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 (*y*). 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

(*w*) Cap. 8.

(*x*) A cubit (*cubitus*) is the distance from the elbow to the extremity of the middle finger, *i. e.*, the fourth part of a well-proportioned man. A fathom (derived from a Saxon word) is the space to which a man can extend with both arms. (Johnson's Dict.)

(*y*) Will. Malmsb. in Vita Hen. I.; Spelm. Hen. I. apud Wilkins, 299.

[regulations have been generally made by the king in parliament. Thus, under King Richard the first, in his parliament holden at Westminster, A.D. 1197, it was ordained that there should be only one weight and one measure throughout the kingdom; and that the custody of the assize, or standard of weights and measures, should be committed to certain persons in every city and borough (*z*): from whence the antient office of the king's aulnager seems to have been derived; whose duty it was, for a certain fee, to measure all cloths made for sale, till the office was abolished by the statute 11 & 12 Will. III. c. 20. In King John's time, this ordinance of King Richard was frequently dispensed with for money; which occasioned a provision to be made for enforcing it, in the great charters of King John and his son (*a*). These original standards were called *pondera regis* (*b*), and *mensuræ dominæ regis* (*c*); and were directed by a variety of subsequent statutes to be kept in the exchequer, and all weights and measures to be made conformable thereto. But Sir Edward Coke observes, that though this had so often by authority of parliament been enacted, yet it could never be effected; so forcible is custom with the multitude (*d*).] In our own times, however, new parliamentary enactments have from time to time been devised on this subject, and other weights and measures substituted for those which antiently obtained. And by the Weights and Measures Act, 1878 (41 & 42 Vict. c. 49) (*e*), a fresh effort has been recently made to promote the desirable objects of simplicity and uniformity in this important matter. Accordingly, this statute repeals almost the whole of the enactments previously in force on the subject, and proceeds to establish

(*z*) Hoved. Matth. Paris.

(*a*) 9 Hen. 3, c. 25.

(*b*) Plac. 35 Edw. 1, apud Cowel's Interpr. tit. *Fondus regis*.

(*c*) Flet. 2, 12.

(*d*) 2 Inst. 41.

(*e*) The Act has been amended by the 52 & 53 Vict. c. 21, which provides for all weighing instruments being verified and stamped by an inspector of weights and measures.

in their place a series of provisions, amongst which the following seem to be the most material to be here noticed (*f*), that is to say:—After a general enactment that the same weights and measures shall be used throughout the United Kingdom (*g*), the Act proceeds to provide that the standards of *measure and weight* described in the schedules thereto shall continue to be the imperial standards for determining the length of a yard, and the weight of a pound (*h*); and it proceeds to lay down careful regulations by which these standards shall be made subservient to the object of correctly ascertaining the length of the yard (which shall be the only unit or standard measure of extension from which all others shall be ascertained), and the weight of the pound (which shall be the only unit or standard measure of weight from which all other weights, and all measures having reference to weight, shall be ascertained); and with regard to the unit or standard measure of capacity (from which all other measures, as well for liquids as for dry goods, are to be ascertained),—it shall be the gallon containing ten imperial

(*f*) The repealed statutes include the following:—5 Geo. 4, c. 74 (with the exception of sect. 25, which refers only to liquors imported into the city of London); 6 Geo. 4, c. 12; 5 & 6 Will. 4, c. 63; 18 & 19 Vict. c. 72; 22 & 23 Vict. c. 56; 24 & 25 Vict. c. 75, s. 6; 27 & 28 Vict. c. 117; and 29 & 30 Vict. c. 82. The following are some of the cases which arose on the construction of one or other of the above Acts: Washington *v.* Young, 5 Exch. 403; Thomes *v.* Stephenson, 2 Ell. & Bl. 108; Queen *v.* Jarvis, 3 Ell. & Bl. 640; Rossiter *v.* Cahlmann, 8 Exch. 361; L. & N. W. Rail. Co. *v.* Richards, 2 B. & Smith, 326; Carr *v.* Stringer, Law Rep., 3 Q. B. 433; and see Reg. *v.* Justices of Kent, 24 Q. B. D. 181.

(*g*) 41 & 42 Vict. c. 49, s. 3. By one of the previous statutes (5 & 6 Will. 4, c. 63) an attempt had been made in the same direction by abolishing the use of the "Winchester bushel," as well as of all other "local and customary measures."

(*h*) The imperial standard yard is a solid square bar of bronze or gun metal; and the standard for determining the weight of a pound is of platinum in the form of a cylinder, with a groove or channel round it for the insertion of the points of the ivory fork by which it is to be lifted. (First Sched. pt. 5.)

standard pounds weight of distilled water in such manner as described in the Act (*i*). And the Act provides, that every contract having reference to weight or measure is to be deemed to be made according to the imperial weights or measures ascertained by the Act, and if otherwise made is to be void (*k*) ; and the use of local or customary measures, and of the heaped measure (in common use on the sale of a variety of things previously to the Act), is again expressly prohibited and the seller made liable to a penalty. The Act further contains a regulation (as in the earlier statutes), that all articles sold by weight shall be sold by *avoirdupois* weight,—except gold, silver, platina, diamonds, or other precious stones, which may be sold by *troy* weight (*l*) ; and drugs, which (when sold by retail,) may be sold by *apothecaries'* weight (*l*) : and further, that it shall be penal for any person to sell by any denomination of weight or measure, other than one of the imperial weights or measures or some multiple or part thereof (*m*). And it being considered expedient, for the promotion and extension of our internal as well as our foreign trade and for the advancement of science, to legalize (without making compulsory) the use of the *metric* system of weights and measures, the Act contains a provision on this subject, and sets forth a table containing the equivalents of imperial weights and measures expressed in terms of the metric system; and the Act declares that such table may be lawfully used for computing and expressing in weights and measures, weights and measures of the metric system (*n*). In conclusion, we may observe that the custody

(*i*) 41 & 42 Vict. c. 49, s. 15. As to the verification of *local* standards, and the official inspection from time to time of the weights and measures which are in use, see sects. 37, 40—49.

(*k*) Sect. 19. By 22 & 23 Vict. c. 66 (amended by 23 & 24 Vict. c. 146, and 24 & 25 Vict. c. 79), special regulations are made as to the measures to be used in the sale of *gas*.

(*l*) 41 & 42 Vict. c. 49, s. 20.

(*m*) Sect. 19. As to the law prior to this enactment, see Hughes *v.* Humphreys, 3 Ell. & Bl. 954; Jones *v.* Giles, 10 Exch. 119.

(*n*) Sect. 18.

of the standards and the general carrying out of the whole system is now entrusted to the *Board of Trade*, and not (as at one time) to the Exchequer and the Treasury (*o*).

[Thirdly, as *money* is the medium of commerce, it is the sovereign's prerogative, as the arbiter of domestic commerce, to give it authority or make it current. Money is the representative or sign of value between buyer and seller, or debtor and creditor; and metals are well calculated for this sign, because they are durable and are capable of many subdivisions: and a precious metal is especially calculated for this purpose, because it is the scarcest and most portable.] In all civilized countries, therefore, it is the metals which are used for money (*p*), and for this purpose they are first *coined*, or fabricated into certain pieces by public authority; it being also declared, by such authority, at what value in relation to other known pieces or quantities of metal they are to be taken. How far, as so coined and after its issue, a piece of metal always retains the same value in relation to commodities, is a point that deserves consideration. [Above a thousand millions of bullion are calculated to have been imported into Europe from America within less than three centuries; and the quantity until very recently was daily increasing (*q*). The consequence was, that, until quite recently, more money had to be given for any commodity, of which the quantity had not increased in the same proportion, than was given an hundred years ago. And if (for any cause) the quantity of gold and silver were to diminish, their value would proportionately rise, as in fact it has done in quite recent

(*o*) Sect. 33.

(*p*) The circulating medium in this country consists, not only of coin, but of paper, that is, of notes of the Bank of England; but as these notes are convertible at the pleasure of the holder into coin, the circulating medium is in effect, though not in a literal sense, exclusively metallic.

(*q*) 1 Bl. Com. p. 276. The modern discovery of regions abounding with gold in California and Australia, greatly increased the importation; but there has latterly been a great falling off in the gold supply.

[times, and from that very cause. A horse, that was formerly worth ten pounds, is now perhaps worth twenty; but by any failure or diminution of current specie, the price might be reduced again 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.] It must be confessed, however, that a rise of this kind in the price of commodities, tends to the injury of all those whose income expressed in money remains the same. For if a horse that could formerly have been purchased at ten pounds cannot afterwards be purchased for less than twenty, in consequence only of such augmentation in the quantity of gold throughout the realm, as has reduced the value of the sovereign by one-half,—it follows that a person whose income in pounds sterling is constant, will find the purchase of the horse twice as expensive and difficult as he would have done at the earlier period.

The value of money when coined becomes known on inspection; and as, when not so authenticated, it cannot be easily ascertained, it is the rule of the common law that there can be no *legal tender* (or in other words, that no tender of payment of any debt is valid and sufficient), unless made in the common coin of the realm (*r*). This rule, however, is qualified by the statute law; for by 3 & 4 Will. IV. c. 98, s. 6, a tender may be made in Bank of England notes, payable to bearer on demand, for all sums above 5*l.*,—so long as the Bank continues to pay on demand in legal coin.

[With respect to coinage in general, there are three things to be considered; the materials, the impression, and the denomination. And with regard to the materials,

(*r*) Wade's case, 5 Rep. 114. By 33 & 34 Vict. c. 10, s. 11, her Majesty may direct the establishment of a branch of the Mint *in any British possession*, and determine the extent to which coins issued therefrom are to be current and a legal tender.

[it was laid down by Sir Edward Coke that the money of England must either be of gold or silver (*s*); and, indeed, none other was ever issued by the royal authority till 1672, when copper farthings and halfpence were coined by King Charles the second, and ordered by proclamation to be current in all payments under the value of sixpence, and not otherwise.] And recently, instead of pure copper, coins composed of *bronze* or other mixed metal have been authorized to be issued as current coin of the realm. Payment in silver or in copper (bronze) coin is only a legal tender up to a certain amount; it being provided by 33 & 34 Vict. c. 10, s. 4, that gold coin shall be the only legal tender, except as regards sums not exceeding forty shillings, which may be tendered in silver coin; or not exceeding the sum of one shilling, which may be tendered in bronze coins (*t*).

[As to the impression, the stamping of money 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, this was usually done by special grant from the king, or by prescription, which supposes one (*u*); and therefore was derived from, and not in derogation of, the royal prerogative. Moreover, 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, is likewise in the breast of the sovereign; and, if any unusual pieces are coined, that value must be ascertained by proclamation. In order to fix the value, the weight and the fineness of the metal are to be taken into consideration together. When a given weight of gold or silver is of a given fineness, it is then of the true

(*s*) 2 Inst. 577.

(*t*) By this statute a previous Act in relation to the issue of bronze coins (viz., 22 & 23 Vict. c. 30) is repealed.

(*u*) 1 Hist. P. C. 191.

[standard, and called *esterling* or *sterling* metal (*v*); a name for which there are various reasons given, but none of them entirely satisfactory (*x*). And of this sterling or esterling metal all the gold and silver coin of the kingdom must be made, by the statute 25 Edw. III. c. 13 (*y*). So that the royal prerogative seemeth not to extend to the debasing or enhancing the value of the coin, below or above the sterling value (*z*): though Sir Matthew Hale appears to be of another opinion (*a*). The sovereign may also, by his proclamation, legitimate foreign coin, and make it current here (*b*); declaring at what value it shall be taken in payment, by comparison with the standard of our own coin (*c*); and may, moreover, at any time decry (or cry down) any coin of the kingdom, and make it no longer current (*d*). But though the regulation of the

(*v*) See 33 & 34 Vict. c. 10, ss. 3, 16, 17. The standard of gold and silver has frequently varied, but is now thus settled, in accordance with what was provided by 56 Geo. 3, c. 68. The pound troy of gold, consisting of twenty-two carats fine, and two of alloy, is divided into $46\frac{89}{129}$ sovereigns, or into 46*l.* 14*s.* 6*d.* And the pound troy of silver, consisting of eleven ounces and two pennyweights pure, and eighteen pennyweights alloy, is divided into sixty-six shillings. (See 33 & 34 Vict. c. 10, 1st sched.)

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

(*y*) The ascertaining whether coin is of the proper standard is called *pixing* it; and there are occasions on which resort is had, for this purpose, to an antient mode of inquisition called the *trial of the pyx*, before a jury of members of the Goldsmiths' Company. (See 33 & 34 Vict. c. 10, s. 17.) For information on this subject, see Archæologia, vol. xvi.; Rudding's Annals of the Coinage. The constitution of the Mint was remodelled in the year 1815, and again in 1870, when the Chancellor of the Exchequer for the time being was made the *Master of the Mint*; the custody of the standard weights committed to the Board of Trade; and the general superintendence of the Mint entrusted to the Treasury. (33 & 34 Vict. c. 10, ss. 13, 14, 16, 17.)

(*z*) 2 Inst. 577.

(*a*) 1 Hale, P. C. 194.

(*b*) 33 & 34 Vict. c. 10, s. 11.

(*c*) 1 Hale, P. C. 197.

(*d*) Ibid.

[coinage thus forms part of the prerogative of the crown, yet it is a subject over which parliament also exercises a control; and since the Revolution it is under the authority of parliament that the coinage has been in fact principally regulated (*e*).

12. The sovereign is, also, considered by the laws of England as the head and supreme governor of the Established Church; but to enter into the reasons upon which this prerogative is founded, is matter rather of divinity than of law. It will be sufficient therefore to 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, on earth, of the Church of England; and shall have annexed to the imperial crown of this realm, as well the title and style thereof, as all jurisdictions, authorities and commodities to the said dignity of the supreme head of the Church appertaining. And another statute to the same purport was made, 1 Eliz. c. 1.

In virtue of this authority the sovereign convenes, prorogues, restrains, regulates, and dissolves all ecclesiastical synods, or convocations. This is an inherent and antient prerogative of the crown; as appears by the statute 8 Hen. VI. c. 1, and the many authors, both lawyers and historians, vouched by Sir Edward Coke (*f*). It is to

(*e*) As to *offences* relating to the coin, vide post, bk. vi. We may mention here, the statutes of 7 & 8 Vict. c. 22; 17 & 18 Vict. c. 96; and 18 & 19 Vict. c. 60, as to the *standard of gold wares* and *the assaying of gold and silver wares;* and the statute 46 & 47 Vict. c. 45, as to selling *medals* resembling in size, figure, substance, or colour the queen's current *gold* or *silver coin*.

(*f*) 4 Inst. 322, 323. It may be observed here, that in the Revised Statutes, recently published by authority, the 8 Hen. 6, c. 1, appears as one still in force; but the 26 Hen. 8, c. 1, was repealed by 1 & 2 Ph. & M. c. 8, s. 4, and the repeal was confirmed by 1 Eliz. c. 1, s. 4.

[be observed, that a convocation in England differs considerably in its constitution from the synods of other Christian kingdoms; these consisting wholly of bishops (*g*); but with us, the convocations (of which there are two, one for the province of Canterbury, the other for that of York), are more in the nature of a parliament,—all the beneficed clergy having representatives therein, who share with the bishops and other dignitaries such rights as the convocations possess. This constitution is said to be owing to the policy of Edward the first; who at one and the same time let into these assemblies the inferior clergy and also introduced a method of taxing ecclesiastical benefices by consent of convocation (*h*).]

All deans and archdeacons are members of the convocation of their province; each chapter sends one proctor or representative; and the beneficed parochial clergy in each diocese in Canterbury, two proctors: but on account of the small number of dioceses in the province of York, the beneficed clergy in each archdeaconry of that province elect two proctors. There are two distinct houses of either convocation, of which the archbishop and bishops form the upper house, and the lower house consists of deans, archdeacons, the proctors for the chapters, and the proctors for the parochial clergy (*i*). The convocations, however, can make no *canons*, or even confer for that purpose, without licence from the sovereign; nor can they make any repugnant to the common or statute law; and none of their canons (as observed in a former place) bind the laity unless they pass both houses of parliament (*k*). And though till

(*g*) 1 Bl. Com. p. 279.

(*h*) Gilb. Hist. of Exch. c. 4.

(*i*) The note by Christian to 1 Bl. Com. p. 280, appears to be inaccurate in stating that the convocation of York consists only of one house. In that province, however, the two houses have not always sat separately. As to non-residentiary prebendaries not being able to vote at an election of a proctor, see Randolph *v.* Milman, Law Rep., 4 C. P. 107.

(*k*) As to the canons of convocation passed in 1603, vide sup. vol. I. p. 42, and the case of Middleton *v.* Croft, Str. 1056, there cited.

the 15 Car. II. c. 10, the beneficed clergy continued to tax themselves in convocation, they have not done so since; it being now judged more advantageous to include them in the money bills passed by the commons, and to allow them on the other hand to vote for members of parliament —a privilege that did not before belong to them. Under these circumstances the convocations, though still regularly summoned and assembled together on such summons, have long ceased in fact to exercise any legislative power (*l*). This is subject, however, to a solitary and recent exception; for, on the 26th February, 1861, they proceeded under the royal licence, to the exercise of such power in a particular instance, viz., as to the repeal of the 29th of the Canons of 1603 (referring to the proper *sponsors* for infants who are baptized), and the substitution of a new canon convenient for the service of Almighty God, and the better government of His Church; it being at the same time provided in the royal licence, that such substituted canon should be of no force or effect until, by letters patent under the great seal, it should be confirmed (*m*).

[From this prerogative also, of being the head of the Church, arises the king's right of nomination to vacant bishoprics, and certain other ecclesiastical preferments; which will more properly be considered when we come to treat of the Church (*n*). It will be sufficient at present to observe, that this right now rests upon the statute 25 Hen. VIII. c. 20.]

(*l*) To the long suspension of the *legislative power* of convocation, is to be added the suspension down to nearly the same period of their *discussions*. These circumstances are attributable to the violent wranglings into which the assembly had been frequently led; and the consequent introduction in the reign of Geo. 1 of a practice by which government arrested its proceedings, as a matter of course, by a sudden prorogation immediately after it assembled. Of late years, however, this practice has not been followed.

(*m*) As to convocations, see 4 Inst. 322; Gilb. Exch. c. 4; Burn's Eccl. Law, Convoc.: Com. Dig. Convoc.; Hallam's Constit. Hist. vol. 3, pp. 236, 324 (3rd edit.).

(*n*) Vide post, bk. IV. pt. II. c. I.

As head of the Church, the sovereign is likewise the *dernier ressort* in all ecclesiastical causes; and this ultimate appeal is heard before the Judicial Committee of his Privy Council (*o*).

(*o*) See 3 & 4 Will. 4, c. 41, s. 36; 6 & 7 Vict. c. 38, s. 11; 7 & 8 Vict. c. 69, s. 9; Gorham *v.* Bishop of Exeter, 15 Q. B. 52. As to the Judicial Committee, vide sup. p. 454.

CHAPTER VII.

OF THE ROYAL REVENUE.

[HAVING now considered those branches of the sovereign's prerogative, which regard, firstly, the royal character or dignity; and, secondly, the royal authority or executive power of the government, we proceed now to examine, in the third place, the royal income, or the sovereign's fiscal prerogatives, according to the distribution of the royal prerogatives which was made in the preceding chapter.

The royal revenue, formerly under the control of the lord treasurer, is now under that of the lords commissioners of the treasury (*a*); who, in modern times, have been appointed in substitution for the lord treasurer; but the revenue has always been more immediately under the management of the Exchequer (*b*), which is an establishment of very remote antiquity (*c*)—consisting of two departments—the first being the office of the receipt of the exchequer, for collection of the royal revenue, the second having been the old Court of Exchequer, and now being a division or branch of the High Court of Justice (*d*): but it is with the receipts department, and with that department exclusively, that we have now to deal.] The receipts department of the exchequer was newly constituted and regulated by the statute 4 & 5

(*a*) 4 Inst. 103.

(*b*) 2 Inst. 197.

(*c*) Madox, Hist. of Exch.; Gilb. Court of Exch.

(*d*) As to this Division of the High Court, further information will be found, post, bk. v.

Will. IV. c. 15; and more recently, by 29 & 30 Vict. c. 39, the exchequer and *audit* departments were consolidated and placed under a "comptroller and auditor-general," and an assistant, all appointed by the crown and holding their offices during good behaviour (*e*); and by these Acts the commissioners of customs, of inland revenue, the post-master-general, and other persons accountable to the crown, are directed to make their payments at the Bank of England, into an account to be there opened to the credit of the royal exchequer; and regulations are also made as to the manner of placing sums to the credit of that account, and of making payments thereout, and of auditing the same (*f*); and these regulations (with divers intervening additions thereto) have now been consolidated by the Inland Revenue Regulation Act, 1890 (53 & 54 Vict. c. 21).

[The revenue of the crown is either ordinary or extra-ordinary,—the *ordinary* revenue being 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 sovereign's hereditary revenues as were found inconvenient to the subject; and when we say that the ordinary revenue has subsisted time out of mind, we do not intend it to be understood that the crown is at present in the actual possession of the whole of this revenue; on the contrary, much of it is at this day in the hands of subjects, to whom it has been granted out from time to time by the kings of England; which has rendered the crown in some measure dependent on the people for its ordinary support and subsistence. The extraordinary revenue of the crown is the revenue derived from taxation; but we shall first consider the different heads of the ordinary revenue; and we shall then pass from that to

(*e*) By 29 & 30 Vict. c. 39, s. 5, the former "Commissioners of Audit" are abolished. As to temporary advances for the public service out of the "Treasury Chest Fund," see 40 & 41 Vict. c. 45.

(*f*) 29 & 30 Vict. c. 39, s. 10.

[consider the extraordinary revenue, or revenue from taxation.

I. The first of the heads of the ordinary revenue is of an ecclesiastical kind, viz. the custody of the temporalities of bishops; by which are meant all the lay revenues, lands and tenements, (in which is included the barony,) which belong to the see of an archbishop or bishop. And these, upon the vacancy of the bishopric, are immediately the right of the sovereign, as a consequence of his prerogative in church matters; whereby he is considered as the founder of all archbishoprics and bishoprics, and to whom during the vacancy they revert. And for the same reason, before the dissolution of the abbeys, the crown had the custody of the temporalities of all such abbeys and priories as were of royal foundation (but not of those founded by subjects), on the death of the abbot or prior. Another reason may also be given why the policy of the law hath vested this custody in the sovereign: 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 sovereign, not the temporalities themselves, but their custody, till such time as a successor is appointed, with power of taking all the intermediate profits, without any account to 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. 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 by the statute 14 Edw. III. st. 4, cc. 4 and 5, the king might, after the vacancy, lease the temporalities to the dean and chapter; saving to himself all advowsons, escheats, and the like (*g*). Our antient kings, and particularly William Rufus, were not only remarkable for

(*g*) This Act is repealed by 26 & 27 Vict. c. 125.

[keeping the bishoprics a long time vacant (*h*), for the sake of enjoying the temporalities, but also committed horrible waste of the woods and other parts of the estate; and, to crown all, would never, when the see was filled up, restore to the bishop his temporalities again, unless he purchased them at an exorbitant price. To remedy which, King Henry the first granted a charter at the beginning of his reign, promising neither to sell, nor let to farm, nor take anything from the domains of the Church, till the successor was installed (*i*). And it was made one of the articles of the great charter, that no waste should be committed in the temporalities of bishoprics, neither should the custody of them be sold (*k*); and the same is ordained by the statute of Westminster the first (*l*): and the statute 14 Edw. III. st. 4, was still more explicit on this head. It was also a frequent abuse, that the king would, for trifling or no causes, seize the temporalities of bishops, even during their lives, into his own hands; but this was guarded against by the statute 1 Edw. III. st. 2, c. 2.

This revenue, 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 temporalities entire and untouched from the crown; and at the same time does homage to his sovereign; and then, and not sooner, he has a fee simple in his bishopric, and may maintain an action for the profits (*m*).

II. The next head of the ordinary revenue is also of an ecclesiastical kind, and consists in the first fruits and tenths of all spiritual preferments in the kingdom (*n*).

(*h*) An instance of this occurred as late as the reign of Queen Elizabeth, who kept the see of Ely vacant nineteen years, in order to retain the revenue.—Strype, vol. iv. 351.

(*i*) Matth. Paris.

(*k*) 9 Hen. 3, c. 5.

(*l*) 3 Edw. 1, c. 21.

(*m*) Co. Litt. 67, 341.

(*n*) Blackstone notices (vol. i. p. 284), as two other branches of the royal revenue, first, the right of

[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 the fifth and John the twenty-second, about the beginning of the fourteenth century. The first fruits, (*primitiæ* or *annates*,) were the first year's whole profits of the spiritual preferment, according to a rate or *valor* made in the time of Pope Innocent the fourth, by Walter, Bishop of Norwich; and were afterwards advanced in value, in the time of Pope Nicholas the fourth, under a taxation by the king's precept; which valuation (called that of Pope Nicholas) was begun in 1288, and finished in 1292, and is still preserved in the Exchequer (*o*). The tenths, or *decimæ*, were the tenth part of the annual profit of each living by the same valuation; which was also claimed by the holy see, under the pretence of that precept of the Levitical law, which directs, 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" (*p*). But these pretensions of the pope met with a vigorous resistance from the English parliament; and a variety of Acts were passed to prevent and restrain them,

the crown to a *corody* out of every bishopric,—that is, the right to send one of the royal chaplains to be maintained by the bishop, or to have a pension allowed him, till the bishop promotes him to a benefice, which right is in the nature of an incorporeal hereditament; secondly, the right of the crown to the *tithes arising in extra-parochial places;* but the former he apprehends to be fallen into total disuse; and he doubts if either of them is properly to be considered as a part of the royal revenue.

(*o*) 3 Inst. 154; Report on Public Records; Phillips on Evidence, vol. i. p. 384, 6th edit., where it is also observed that this taxation of Pope Nicholas is an important document, because all the taxes, as well those paid to our kings as those paid to the pope, were regulated by it, till the survey made in the twenty-sixth year of Henry the eighth; and, also, because the statutes of colleges, which were founded before the Reformation, are still interpreted by this criterion.

(*p*) Numb. xviii. 26.

[particularly the statute 6 Hen. IV. c. 1, which calls the payment of first-fruits a horrible mischief and damnable custom (*q*). But the popish clergy, blindly devoted to the will of a foreign master, still kept the papal claims on foot; sometimes more secretly, sometimes more openly and avowedly: so that in the reign of Henry the eighth, it was computed, that in the compass of fifty years 800,000 ducats had been sent to Rome for first-fruits only. And, as the clergy expressed this willingness to contribute so much of their income to the head of the Church, it was thought proper (when in the same reign the papal power was abolished, and the king was declared the head of the Church of England,) to annex this revenue to the crown; which was done by the statute 26 Hen. VIII. c. 3, and which statute (confirmed by 1 Eliz. c. 4) enacted, that commissioners should be appointed in every diocese, to certify the value of every ecclesiastical benefice and preferment, and that according to this valuation the first-fruits and tenths should be collected and paid in future; and this valuation of benefices, or *Valor Beneficiorum*, was accordingly made, and is what is commonly called the *King's Books;* and the clergy are at present rated in accordance with it (*r*).

By the statutes last mentioned 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 the payment, the incumbent lives but half a year, he shall pay only one quarter of his first-fruits; if but one whole year, then half of them; if a year and a half, three quarters; and if two years, then the whole; and not otherwise. The archbishops and bishops have four years allowed for the payment, and shall pay one quarter every year, if they live so long upon the bishopric; but other dignitaries of the Church pay upon

(*q*) This Act is repealed by 26 & 27 Vict. c. 125.

(*r*) This *valor* will be found in Ecton's Thesaurus.

[the same principle as rectors and vicars. 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 both of first-fruits and of 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; and 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; to which end she granted her royal charter, confirmed by the statute 2 & 3 Anne, c. 11 (sometimes cited as c. 20), 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; and this fund, which is usually called *Queen Anne's Bounty*, has been still further regulated by subsequent statutes (*s*).

III. The next branch of the ordinary revenue of the sovereign, (which, as well as the subsequent branches, is of a lay or temporal nature,) consists in the rents and profits of the demesne lands of the crown. These demesne lands, *terræ dominicales regis*, being either the share reserved to the crown on the original distribution of landed property, or such as came to it afterwards by forfeitures

(*s*) 1 Geo. 1, st. 2, c. 10; 3 Geo. 1, c. 10; 43 Geo. 3, c. 107; 45 Geo. 3, c. 84, s. 4; 1 & 2 Will. 4, c. 45; 1 & 2 Vict. c. 20; c. 23, ss. 3, 4; c. 106, ss. 72, 119; c. 107, s. 10; 2 & 3 Vict. c. 49; 3 & 4 Vict. c. 20; c. 113, s. 76; 4 & 5 Vict. c. 39, s. 4; 6 & 7 Vict. c. 37; 17 & 18 Vict. c. 84; 23 & 24 Vict. c. 59, s. 7; 28 & 29 Vict. c. 69; 33 & 34 Vict. c. 89; 44 & 45 Vict. c. 25; and 49 & 50 Vict. c. 34.

[or other means, were antiently very large and extensive; comprising divers manors, honours, and lordships, the tenants of which had very peculiar privileges, as has been shown in a former book of these Commentaries, when we spoke of the tenure in antient desmesne (*t*). At present they are contracted within a very narrow compass, having been almost entirely granted away to private subjects. This has occasioned parliament frequently to interpose; and particularly, after King William the third had greatly impoverished the crown, an Act was passed, by the effect of which, and of subsequent statutes on the same subject, all grants or leases from the crown of any royal manors, messuages, lands, tenements, rents, tithes, woods, or other hereditaments for any longer term than *thirty-one years*, are in general, and subject to certain exceptions, declared to be void (*u*). And no reversionary lease can be made, so as to exceed, together with the estate in being, the same term of thirty-one years: that is, where there is a subsisting lease, of which there are *e. g.*, twenty years still to come, the crown 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.] In modern times, the superintendence of the royal demesnes has been vested in the Commissioners of Woods, Forests, and Land Revenues (*x*).

(*t*) Vide sup. vol. I. p. 220.

(*u*) 1 Anne, c. 1; 10 Anne, c. 28, s. 10; 39 & 40 Geo. 3, c. 88; 4 Geo. 4, c. 18; 10 Geo. 4, c. 50; 1 & 2 Vict. c. 95, s. 4; 25 & 26 Vict. c. 37; 36 & 37 Vict. c. 61; 57 & 58 Vict. c. 43.

(*x*) 14 & 15 Vict. c. 42, s. 1. By this Act, the board of "Commissioners of Woods, Forests, Land Revenues, Works and Buildings," was divided into a board of "Commissioners of Woods, Forests, and Land Revenues," and a board of "Commissioners of Works and Public Buildings." As to the powers of the former board, see 15 & 16 Vict. c. 62, and 16 & 17 Vict. c. 56. To the latter board (as to which see 57 & 58 Vict.

To the same branch of the royal revenue properly belong also such rights and interests as the crown enjoys in the "foreshore." But by 29 & 30 Vict. c. 62, ss. 7—15, these have now been transferred to the Board of Trade in aid of the reduction of the national debt, and compensation out of the consolidated fund is to be made to the crown for any consequent diminution of its land revenue (*y*).

But none of the provisions or restrictions above mentioned extend to any of the *private* estates of the crown; that is (in general) to such as have been or shall be hereafter purchased or acquired by her Majesty with moneys

c. 23) belonged, *inter alia*, the management of the royal parks in and near London (see 14 & 15 Vict. c. 42, s. 21; 35 & 36 Vict. c. 15, "An Act for the Regulation of "the Royal Parks and Gardens;" and the case of Bailey *v.* Williamson, Law Rep., 8 Q. B. 118); but by the 50 & 51 Vict. c. 34, the management of these was transferred to the Metropolitan Board of Works; and it is now vested in the London County Council as the successors of the Metropolitan Board, under the Local Government Act, 1888. See also, as to "Victoria Park," 14 & 15 Vict. c. 46; and as to "Battersea Park," 14 & 15 Vict. c. 77; and as to open spaces generally, as well in the metropolis as throughout England, 50 & 51 Vict. c. 32. As to the pleasure grounds on Kennington Common, see 15 & 16 Vict. c. 29. As to the public statues within the Metropolitan Police District, see 17 & 18 Vict. c. 33. As to acquisition of space for the western approach to Westminster New Bridge, see 22 & 23 Vict. c. 58. As to extension of Downing Street Public Offices, 18 & 19 Vict. c. 95. As to acquisition of site for public buildings near Whitehall and the palace at Westminster, 22 Vict. c. 19. As to acquisition of additional land for the purposes of the public offices, 24 & 25 Vict. c. 33; 45 & 46 Vict. c. 32; and as to acquisition of part of St. James's Park for the same object, c. 88. As to sale of premises at Windsor, 25 & 26 Vict. c. 57. See further, as to acquiring additional land for public offices, 25 & 26 Vict. c. 74; and (for police offices) 49 & 50 Vict. c. 22; and 50 & 51 Vict. c. 45. As to the sale of the Royal Military Canal, see 30 & 31 Vict. c. 140. And as to the National Gallery, see 19 & 20 Vict. c. 29; 41 & 42 Vict. c. 55; and (as to lending works of art to other galleries) 46 & 47 Vict. c. 4.

(*y*) The "foreshore" for the purposes of this Act includes "the "shore and bed of the sea, and "of every channel, creek, bay, "estuary, and of every navigable "river of the United Kingdom, "as far up the same as the tide "flows." (Sect. 7.)

out of her privy purse, or with other moneys not appropriated to any public service; or which have or shall come to her, her heirs or successors, by gift, devise or inheritance from any of her or their ancestors, or from any other person or persons not being kings or queens of this realm (*z*).

IV. [Hither also might have been referred the advantages which used to arise to the king from the profits of his military tenures, to which most lands in the kingdom were subject, till the statute 12 Car. II. c. 24, which in great measure abolished them all; as has already been explained at large in a former book of these Commentaries (*a*). Hither also might have been referred the profitable prerogative of purveyance and pre-emption; which was a right enjoyed by the crown of buying up provisions and other necessaries, by the intervention of the king's purveyors, for the use of his royal household, at an appraised valuation, in preference to all others, and even without consent of the owner: and also of forcibly impressing the carriages and horses of the subject, to do the king's business on the public roads, in the conveyance of timber, baggage, and the like, however inconvenient to the proprietor, upon paying him a settled price, —a prerogative which prevailed pretty generally throughout Europe, during the scarcity of gold and silver, and the high valuation of money consequential thereupon. In those early times the king's household, (as well as those of inferior lords,) were supported by specific renders of corn and other victuals, from the tenants of the respective demesnes; and there was also a continual market kept at the palace gate, to furnish viands for the royal use (*b*). And this answered all purposes in those ages of simplicity, so long as the king's court continued in any certain place.

(*z*) 25 & 26 Vict. c. 37, amended by 36 & 37 Vict. c. 61.

(*a*) Vide sup. vol. I. pp. 187 et seq.

(*b*) 4 Inst. 273.

[But when it removed from one part of the kingdom to another, (as was formerly very frequently done,) it was found necessary to send purveyors beforehand, to get together a sufficient quantity of provisions and other necessaries for the household. And, lest the unusual demand should raise them to an exorbitant price, the powers before mentioned were vested in these purveyors; who in process of time very greatly abused their authority, and became a great oppression to the subject, though of little advantage to the crown; ready money in open market (when the royal residence was more permanent, and specie began to be plentiful,) being found upon experience to be the best provider of any (*c*). And having fallen into disuse during the suspension of monarchy, King Charles at his restoration consented, by the same statute, (12 Car. II. c. 24,) to resign entirely these branches of his revenue and power; and the parliament, in part recompense, settled on him, his heirs and successors for ever, an excise duty on all beer and ale and certain other liquors sold in the kingdom. So that this hereditary excise, the nature of which shall be further explained in the subsequent part of this chapter, now forms the fourth branch of her majesty's ordinary revenue (*d*).

V. Another branch of the ordinary revenue of the sovereign is usually reckoned to consist in the profits arising from his forests. The nature of forests has been sufficiently explained in a former book of these Commentaries; and what we here refer to are only those profits arising to the sovereign from hence, which consisted prin-

(*c*) Blackstone adds (vol. i. p. 288, citing Mod. Un. Hist. xxxiii. 220), that the powers of purveyance have declined in foreign countries as well as in our own; and, particularly, were abolished in Sweden by Gustavus Adolphus, toward the beginning of the seventeenth century.

(*d*) As to the excise, vide post, p. 557.

[cipally in amercements or fines levied for a variety of offences against the forest laws in the forest courts (*e*).]

VI. The profits arising from the sovereign's courts of justice make another branch of his ordinary revenue. And these consist not only in fines imposed on offenders, forfeitures of recognizances, and amercements levied upon defaulters (*f*); but also in certain fees due to the crown in a variety of legal matters. However, the receipts on the latter account have, by the effect of recent improvements in the administration of justice, been considerably reduced, and are, moreover, now in great measure prepaid by way of *stamps* affixed to the various documents in use; so that but little, on this head, is now directly returned into the royal exchequer.

VII. We shall class together, as a seventh branch of the sovereign's ordinary revenue, his right to royal fish, wrecks, treasure-trove, waifs, and estrays. Our reason for so classing them is, that they are all of the nature of *bona vacantia*, or things found without any apparent owner; and vest in the crown, by way of exception from the general rule of law. For, by that general rule, *bona vacantia* are considered as returning, as it were, into the common stock of mankind, and consequently belong (as in a state of nature) to the first occupant or finder; though he is bound, before he appropriates them, to take reasonable pains to discover the former owner, whose right remains, unless they were designedly abandoned by him (*g*). The particular subjects of claim, however, which are above enumerated, are all held to vest in the crown; the true general origin of which peculiarity probably is, (though

(*e*) As to forests, vide sup. vol. I. p. 611. As to forest courts, vide post, bk. v. c. IV.

(*f*) See 3 & 4 Will. 4, c. 99, containing provisions for the more speedy recovery of fines and penalties.

(*g*) Britt. c. 17; Finch, 177; Armory *v.* Delamirie, Str. 505; Merry *v.* Green, 7 Mee. & W. 623.

with respect to some of them other reasons are assigned in the books,) that they were formerly of sufficient value, or of sufficiently frequent occurrence, to attract attention, and to be made the subject of particular regulation; while the other cases of finding were, from their insignificance, neglected, and left to the operation of the ordinary rule of law. The regulation which it was thought proper to make, was that of allotting them to the crown; either to prevent the strife and contention which the mere title of occupancy is apt to create and continue, or else to provide for the support of public authority in the manner the least burdensome to individuals (*h*). In point of fact at least, we find that, while the property in *bona vacantia* generally is vested in the finder, subject to the rights of the original owner, it is annexed to the crown in the particular instances above enumerated (*i*). To consider these instances more particularly. And, first, in the case of—

1. [Royal fish. These are whale and sturgeon, which, when either thrown ashore, or caught near the coast, are the property of the sovereign, on account (as it is said in the books) of their superior excellence (*k*). 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; and from one of these it was probably derived to our princes (*l*). It is expressly claimed and allowed in the statute *De Prærogativâ Regis* (*m*); and the most antient treatises of the law now extant make mention of it; though they seem to have made a distinction between a whale and a sturgeon, as was incidentally observed in a former chapter (*n*).

(*h*) 1 Bl. Com. p. 299.

(*i*) Bract. l. 1, c. 12.

(*k*) Plowd. 315. It is said, in the Case of Swans, 7 Rep. 16 a, that a swan is, in like manner, a royal fowl; and that all swans, which have no other known owner, do belong to the king by his prerogative.

(*l*) Stiernh. de Jure Sueonum, l. 2, c. 8; Gr. Coustum. c. 17.

(*m*) 17 Edw. 2, c. 11.

(*n*) Vide sup. p. 441.

2. [Shipwrecks are also declared to be the king's property, by the same statute *De Prærogativâ Regis;* and were so, long before, at the common law. It is worth 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 (*o*). But this was undoubtedly adding sorrow to sorrow, and was consonant neither to reason nor humanity. Wherefore it was ordained by King Henry the first, that, if any person escaped alive out of the ship, it should be no wreck (*p*); and afterwards, King Henry the second, by his charter (*q*), declared, that if on the coast 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 (*r*), 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 brethren and sisters, should retain the property; and in default of brother or sister, then the goods should remain in the king (*s*). And the law, as

(*o*) Dr. & St. d. 2, c. 51.

(*p*) Spelm. Cod. apud Wilkins, 305.

(*q*) 26th May, 1174; 1 Rymer's Fœd. 36.

(*r*) Rog. Hoved. in Ric. 1.

(*s*) In like manner, Constantine the Great, finding that by the imperial law the revenue of wrecks was given to the prince's treasury or fiscus, restrained it by an edict, and ordered them to remain to the

[laid down by Bracton in the reign of Henry the third, seems still to have improved in its equity. For then, if only a dog (for instance) escaped, by which the owner might be discovered—nay, if any certain mark were set on the goods, by which they might be known again,—it was held to be no wreck (*t*). And this is certainly most agreeable to reason; the rational claim of the crown being only founded upon this, that the true owner cannot be ascertained. Afterwards, in the statute of Westminster the first (3 Edw. I.) c. 4, the time of limitation of claims given by the charter of Henry the second was extended to a year and a day, according to the usage of Normandy (*u*); and it was enacted, that if a man, a dog, or a cat, escaped alive, the vessel should not be adjudged a wreck. These animals (as in the passage from Bracton) were only put for examples (*x*); for it was established, that not only if any live thing escaped, but if proof could be made of the property of any of the goods or lading which came to shore, they were not forfeited as wreck (*y*). The statute further ordained, that the sheriff of the county should be bound to keep the goods a year and a day,—as in France for one year, agreeably to the maritime laws of Oleron (*z*), and in Holland for a year and a half,—so that if any man could prove a property in them, either in his own right or by right of representation, they should be restored to him without delay; but if no such property were proved within that time, they then should be the king's (*a*). If the goods were of a perishable nature, the sheriff might sell them, and the money was to be liable in their stead (*b*).

owners, adding this humane expostulation, "*quod enim jus habet fiscus in alienâ calamitate, ut de re tam luctuosâ compendium sectetur?*" (Cod. ii. 5, 1.)

(*t*) Bract. l. 3, c. 3, s. 5.

(*u*) Gr. Coustum. c. 17.

(*x*) Flet. l. 1, c. 44; 2 Inst. 167; 5 Rep. 107.

(*y*) Hamilton *v.* Davies, 5 Burr. 2732.

(*z*) Ll. Ol. s. 28.

(*a*) 2 Inst. 168.

(*b*) Plowd. 466.

[This revenue of wrecks was frequently granted out to lords of manors as a royal franchise; but if any one were thus entitled to wrecks in his own land, and the goods of the sovereign were wrecked thereon, the sovereign might claim them at any time, even after the year and a day (*c*).

It is to be observed, that, in order to constitute a legal *wreck*, the goods must come to land (*d*). If they continue at sea, the law distinguishes them by the barbarous and uncouth appellations of *jetsam*, *flotsam*, and *ligan*. Jetsam is where goods are cast into the sea, and there sink and remain under water; flotsam is where they continue swimming on the surface of the waves; ligan is where they are sunk in the sea, but tied to a cork or buoy, in order to be found again (*e*). Such goods are also the crown'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 (*f*): 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 accounted so far a distinct thing from the former, that by the royal grant to a man of *wrecks*, things jetsam, flotsam, and ligan will not pass (*g*).

Wrecks, in their legal acceptation, are at present not very frequent; for if any goods come to land, it rarely happens, since the improvement of commerce, navigation, and correspondence, that the owner is not able to assert his property within the year and day limited by law; and

(*c*) 2 Inst. ubi sup.; Bro. Abr. tit. Wreck.

(*d*) Palmer *v.* Rouse, 3 H. & N. 505.

(*e*) Constable's case, 5 Rep. 106.

(*f*) So, in the civil law, "*Quæ enim res in tempestate levandæ navis causâ ejiciuntur, hæ dominorum permanent. Quia palam est, eas non eo animo ejici quod quis eas habere nolit.*" (Inst. 2, 1, 48.)

(*g*) Constable's case, 5 Rep. 108.

[in order to preserve this property entire for him, and in a spirit quite opposite to those savage laws which formerly prevailed in all the northern regions of Europe, our laws have made many humane regulations (*h*).] For by the common law, if any persons (other than the sheriff) took any goods cast on shore, which are not legal wreck, the owners might have a commission to inquire and find them out, and compel restitution (*i*); and, in accordance therewith, it was provided by the statute 27 Edw. III. c. 13, that if any ship were lost on the shore, and the goods came to land, (which cannot, says the statute, be called wreck,) they should presently be delivered to the merchants, paying only a reasonable reward (or *salvage*) to those that saved and preserved them. And many additions to the law of wreck and salvage, whereby these subjects were placed on a more satisfactory footing, were, in more modern times, made by the 17 & 18 Vict. c. 104 (called "The Merchant Shipping Act, 1854"), and by the numerous Acts by which that Act was, from time to time, amended (*k*); all which Acts have now been repealed, and their provisions consolidated, by the Merchant Shipping Act, 1894 (57 & 58 Vict. c. 60). And by the existing enactments it is provided, that the Board of Trade shall have the general superintendence of all matters relating to wreck (*l*)—which, for the purpose of the Act, includes

(*h*) On the coasts of the Baltic Sea, in particular, the inhabitants were long permitted to seize on whatever they could get as lawful prize; or, as an author of their own expresses it, "*in naufragorum miseriâ et calamitate, tanquam vultures ad prædam currere.*" (1 Bl. Com. p. 293, citing Stiernh. de Jure Sueon. l. 3, c. 5.)

(*i*) F. N. B. 112.

(*k*) See more particularly the 18 & 19 Vict. c. 91, ss. 19, 20; the 24 & 25 Vict. c. 10, s. 9; the 25 & 26 Vict. c. 63; also, the 39 & 40 Vict. c. 80, ss. 29—33, appointing *wreck commissioners* to investigate into shipping casualties; and the 45 & 46 Vict. c. 76 (The Merchant Shipping Colonial Enquiries Act, 1882); the Merchant Shipping (Expenses) Act, 1882 (45 & 46 Vict. c. 55); and the Merchant Shipping Acts, 1889, c. 43 (tonnage); c. 68 (pilotage); and c. 73 (flags).

(*l*) As to wreck removed in order to free navigation, see 57 & 58 Vict. c. 60, ss. 530—534.

things jetsam, flotsam, and ligan (*m*) ;—and power is given to such board, with the consent of the treasury, to appoint *receivers of wreck* in different districts; who are authorized to summon as many men as may be necessary, to demand help from any ship near at hand, or to press into their service any neighbouring waggons, carts, or horses, for the purpose of preserving or assisting any stranded or distressed vessel, or her cargo, or for the saving of human life; and a penalty is established in case their demands are not complied with (*n*). The Act contains also copious provisions with reference to salvage for services rendered, and the manner in which its amount is to be assessed in case of dispute; which is either made the subject of an action in the proper division of the High Court of Justice, or (in cases below a certain amount) may be determined by the judge of a neighbouring county court, or before justices of the peace (*o*). And as to *wreck found*, it is provided, that any finder (other than the owner) must deliver the same, as soon as possible, to the receiver of the district; and, even if the owner, must give notice to that officer (*p*). And if no owner establishes his claim to wreck so found, before the expiration of a year, and no person, other than the crown, is proved to be entitled to the same—then it is to be sold by the receiver, and the proceeds thereof, after payment of all expenses and the salvage, if any, are to be paid (during the life of the Queen) to the Mercantile Marine Fund created or regulated by the Act, and (after the death of the Queen) to her heirs and successors (*q*). Other

(*m*) But see Palmer *v.* Rouse, 3 H. & N. 505. The word "wreck" under 57 & 58 Vict. c. 60 (sect. 510) also includes "derelict" found in or on the shores of the sea or any tidal water. Things derelict are such as are voluntarily abandoned as worthless. (See Legge *v.* Boyd, 1 C. B. 112.)

(*n*) 57 & 58 Vict. c. 60, ss. 511—514.

(*o*) Ibid., ss. 547—549.

(*p*) Ibid., s. 518.

(*q*) Sect. 525. But such of the proceeds of wreck as shall belong to her Majesty in right of her *duchy of Lancaster*, or as shall belong to the *duchy of Cornwall*, shall form part of the revenues of such duchies respectively. (57 & 58 Vict. c. 60,

provisions have also been made, with a view to prevent the disgraceful practices of *wrecking* which formerly obtained on some parts of our sea coast. For, by sect. 515 of the Act of 1894, continuing an earlier provision to the like effect in the Act of 1854, if any ship, stranded or in distress on or near the shore, be plundered or damaged by persons riotously and tumultuously assembled together, compensation shall be made to the owner, by (in effect) the *hundred* (or other district in the nature thereof) in or nearest to which the offence is committed, in the manner by law provided in cases of the destruction of churches and other buildings by riotous assemblages (*r*). Moreover, by 24 & 25 Vict. c. 96, s. 64, persons plundering or stealing wreck are made liable to penal servitude for fourteen years. And by 24 & 25 Vict. c. 97, s. 47, persons exhibiting any false light or signal, with intent to bring a ship into danger, or doing any other malicious act tending to the immediate loss of a ship, may be sentenced to penal servitude for *life* (*s*).

3. [Treasure-trove, *thesaurus inventus*, is where any money, coin, gold, silver, plate, or bullion, is found hidden in the earth, or other private place, the owner thereof being unknown. And in such case the treasure found belongs to the crown; but if he that hid it be known, or afterwards found out, the owner, and not the sovereign,

s. 525.) As to salvage within the boundaries of the *cinque ports*, see 1 & 2 Geo. 4, c. 76, ss. 1—5, 15, 16, and 18; 57 & 58 Vict. c. 60, s. 571.

(*r*) The provision for compensation for riotous damage to buildings is now contained in the Riot Damages Act, 1886 (49 & 50 Vict. c. 38): see also 24 & 25 Vict. c. 97, ss. 11, 12, the previous enactments in 7 & 8 Geo. 4, c. 31, having been repealed by 24 & 25 Vict. c. 95.

(*s*) By the civil law, to destroy persons shipwrecked, or to prevent their saving the ship, was punishable with death; and to steal even a plank from a vessel in distress, or wrecked, made the party liable to answer for the whole ship and cargo. (Ff. 47, 9, 3.) In our own law, the provision previously in force on this subject, (7 Will. 4 & 1 Vict. c. 89, s. 5,) made this offence of wilfully bringing a ship into danger by false lights, &c. a crime punishable with death.

[is entitled to it (*u*). It is the hiding, we may observe, and not the abondonment, that gives the king a property: Bracton defining it, in the words of the civilians, to be "*vetus depositio pecuniæ*" (*x*). For if a man scatters his treasure into the sea, or upon the surface of the earth, it belongs, by the general rule of law already noticed, not to the sovereign but to the first finder (*y*).

Formerly indeed, by the effect of that general rule, treasure-trove, whether hidden, lost, or abandoned, belonged to the finder. But 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; as distinguished from such as is either casually lost or designedly abandoned by the former owner. And that the prince shall be entitled to this hidden treasure is now grown to be, according to Grotius, "*jus commune, et quasi gentium;*" for it is not only observed, he adds, in England, but in Germany, France, Spain, and Denmark (*z*). The finding of deposited treasure was much more frequent, and the treasures themselves more considerable, in the infancy of our constitution, than at present (*a*). Hence the punishment of such as concealed from the king the finding of hidden treasure was formerly no less than death (*b*).

4. Waifs, *bona waviata*, are such goods stolen as are waived (or thrown away) by the thief in his flight, for fear of being apprehended. These (according to the books) are given by the law to the sovereign, as a punishment upon the owner for not himself pursuing the felon, and taking away his goods from him (*c*). And therefore if the party robbed do his diligence immediately to follow and appre-

(*u*) 3 Inst. 132; Dalton of Sheriffs, c. 16.

(*x*) L. 3, c. 3, s. 4.

(*y*) Bract. l. 3, c. 3; 3 Inst. 133; sup. p. 534.

(*z*) De Jur. B. & P. l. 2, c. 8, s. 7.

(*a*) 1 Bl. Com. p. 296.

(*b*) Glanv. l. 1, c. 2; Crag. l. 16, 40; 3 Inst. 133.

(*c*) Cro. Eliz. 694.

[hend the thief, (which is called making *fresh suit*,) or do prosecute him to conviction, he shall have his goods again (*d*). So if the party robbed can re-take them before they are seized for the crown, though at the distance of twenty years, the crown shall not have them (*e*). It is also to be observed, that if the goods are hid by the thief or left anywhere by him, so that he had them not about him when he fled, and therefore did not throw them away in his flight,—these are not *bona waviata*, but the owner may have them again when he pleases (*f*). Also the goods of a foreign merchant, though stolen and thrown away in flight, shall never be waifs (*g*); 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 presumably a stranger to our laws, our usages, and our language.

5. 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 sovereign; 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 crown or in the crown-grantee, estrays 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 sovereign or his substitute without redemption (*h*), even though the owner be a minor, or under any other legal incapacity (*i*). If the owner claims them within

(*d*) Finch, L. 212.

(*e*) Ibid.

(*f*) Constable's case, 5 Rep. 109.

(*g*) Fitz. Abr. tit. Estray, 1; 3 Bulstr. 19.

(*h*) Mirr. c. 3, s. 19.

(*i*) Constable's case, 5 Rep. 108; Bro. Abr. tit. Estray; Cro. Eliz. 716. So, by the old Gothic constitution, all things found were to be proclaimed "*primum coram comitibus et viatoribus obviis, deinde in proximâ villâ vel pago, postremo coram ecclesiâ vel judicio;*" and a year was allowed for the owner to reclaim his property. (Stiernh. de Jure Goth. l. 3, c. 5.)

[the year and day, he must pay the charges of finding, keeping, and proclaiming them. The crown or lord has no property in such animals till the year and a day has 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 (*k*). Any beasts may be estrays, that are by nature tame or reclaimable, and in which there is a valuable property, as sheep, oxen, swine, and horses,—all, indeed, which we in general call cattle; and so Fleta defines them, "*pecus vagans, quod nullus petit, sequitur, vel advocat*" (*l*). But animals *feræ naturæ*, and not held by the antient law to be valuable, as a dog or cat, bear or wolf, cannot be considered as estrays (*m*): though swans are said to be an exception to this rule (*n*). The reason why in general the doctrine of estrays is applicable only to animals *domitæ naturæ*, seems to be that 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 expenses of the lord of the franchise in keeping them the year and a day. For he that takes an estray is bound, so long as he keeps it, to find it in provisions, and to preserve it from damage (*o*): and he may not (it is said) use it by way of labour, but is liable to an action for so doing (*p*). Yet he may milk a cow, or the like; for that tends to the preservation, and is for the benefit, of the animal (*q*).

VIII. Another branch of the ordinary revenue is the royal right to mines; which right has its original from the sovereign's prerogative of coinage, in order to supply him with materials; and therefore those mines which are properly royal (*r*), and to which the crown is entitled

(*k*) Finch, L. 177.
(*l*) L. 1, c. 43.
(*m*) 1 Bl. Com. 298.
(*n*) Case of Swans, 7 Rep. 17 a.
(*o*) 1 Roll. Abr. 879.
(*p*) Cro. Jac. 147.
(*q*) Ib. 148; Noy, 119.
(*r*) As to the coal and other mines in the royal forest of Dean, see 1 & 2 Vict. c. 43; 24 & 25 Vict.

[when found, are only those of silver and gold (*s*). But by the old common law, if gold or silver were found in mines of base material, 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 1 W. & M. c. 30, 5 W. & M. c. 6, and 55 Geo. III. c. 134, this difference is made immaterial; it being thereby enacted that no copper, tin, iron, or lead mines shall be deemed royal mines, whatever quantity of gold or silver may be extracted from them; but that the sovereign (or his grantees) may have the ore on paying for the same a price stated in the Acts. [This is 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 sovereign 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 in which it is supposed to be; to which base metal the landowner is by reason and law entitled (*u*).]

IX. and X. The two remaining branches of the crown's ordinary revenue are those which arise from escheats and the custody of idiots; but though in point of order they require here to be enumerated, the mere enumeration will suffice, as they have been both discussed, as far as the plan of the work permits, in former chapters (*x*).

c. 40; 34 & 35 Vict. c. 85; also, Bainbridge on Mines, by Brown, pp. 160—165.

(*s*) 2 Inst. 577.

(*t*) Plowd. 336.

(*u*) The tin ore in Devon and Cornwall is excepted from these Acts. As to such ore, see 1 & 2 Vict. c. 120; as to tin ore in Cornwall, 2 & 3 Vict. c. 58, s. 1; as to lead ore in Durham, 21 & 22 Vict. c. 58; as to mines and minerals, generally, in Cornwall, see 21 & 22 Vict. c. 109; and see, generally, Bainbridge on Mines, by Brown, pp. 146—160.

(*x*) As to escheats, vide sup. vol. I. pp. 407 et seq.; and as to the crown's custody of idiots, vide sup. p. 500.

Until recently, another branch of the revenue consisted in the forfeiture of a felon's lands and goods which ensued on conviction; and these were called *bona confiscata* by the civilians, because they belonged to the *fiscus* or imperial treasury; or, as our lawyers termed them, *forisfacta*, that is, such whereof the property is "*gone away from*" the owner. And it may be observed, that the ground of forfeiture of property for crime, appears to consist in the fact that property itself 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 sacrifices by being member of a social community. But, as we shall have occasion to explain more particularly hereafter, by the present law of England, no forfeiture of property takes place on the conviction of its owner for felony (*y*); and therefore this branch of the ordinary *census regalis* no longer exists for any practical purposes. But before we pass on from this head we will make some mention of one species of forfeiture, called a *deodand*, which arose from the misfortune rather than from the crime of the owner.

Whatever personal chattel was the immediate and accidental occasion of the death of any reasonable creature was called a deodand, and at one time became forfeited to the crown. 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: 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 (*z*). With regard to the law of deodands, it

(*y*) Vide post, bk. VI.

(*z*) 1 Bl. Com. 301; Fitz. Abr. tit. Enditement, pl. 27; Staunf. P. C. 20, 21. Blackstone further remarks, with reference to deodands, that they were in part grounded on the idea that such misfortunes were always more or less owing to the negligence of the owner of the chattel, who was, therefore, properly punished by the forfeiture. He adds, "a like punishment is, in

may be mentioned that where a thing not in motion was the cause of a man's death, that part only which was the immediate cause was forfeited; as if a man, climbing up the wheel of a cart, was killed by falling from it, the wheel alone was a deodand (*a*); but whenever the thing was in motion, not only that part which immediately gave the wound (as the wheel which ran over his body), but all things which moved with it, and helped to make the wound more dangerous (as the cart and loading, which increased the pressure of the wheel), were forfeited (*b*). And it mattered not whether the owner were concerned in the killing or not; for if a man killed another with my sword, the sword was forfeited as an accursed thing (*c*). Hence, in all indictments for homicide, the value of the instrument of death as well as its description used to be found by the grand jury, to enable the crown or its grantee to claim the deodand; for it was no deodand unless it were presented as such by a jury (*d*). But in modern times juries very frequently took 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 were hardly warrantable by law, the Court of Queen's Bench generally refused to interfere (*e*). It was however obviously better that a law so repugnant to the feelings of mankind should be abandoned, than that the solemn oath under which a juror gives his verdict should be thus evaded. This improvement was accordingly carried

" like cases, inflicted by the Mosa-
" ical law (Ex. xxi. 28): '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, whatever
" was the cause of a man's death,
" by falling on him, was extermi-
" nated or cast out of the domi-
" nions of the republic."

(*a*) 1 Hale, P. C. 422.

(*b*) 1 Hawk. P. C. c. 26.

(*c*) Doct. & Stud. d. 2, c. 51.

(*d*) 3 Inst. 57; The Queen *v.* The Eastern Counties Railway, 10 M. & W. 58; R. *v.* Brownlow, 11 Ad. & El. 19; R. *v.* Polwart, 1 Q. B. 818.

(*e*) 1 Bl. Com. 300.

into effect by 9 & 10 Vict. c. 62, which enacted, that from 1st September, 1846, there should be no forfeiture of any chattel in respect of the same having moved to or caused the death of man. Deodands and other forfeitures (as well as wrecks, treasure-trove, royal fish, mines, waifs, and estrays) might be granted by the sovereign to particular subjects, as a royal franchise; and indeed they used to be for the most part granted out to the lords of manors, or of other liberties, to the perversion of their original design (*f*).

[What we have now stated will suffice to show that the sovereign's ordinary revenue was not only very large formerly, but was 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 Conquest, been vested in the hands of the king by forfeiture, escheat, or otherwise.] But both the hereditary landed revenue, and the casual profits arising from the other branches of the *census regalis*, are now, by the gradual effect of improvident management, by royal grants to subjects, and by other causes, reduced to comparative insignificance (*g*). This diminution, however, has been attended with no real loss or disparagement to the crown; for as its ordinary revenue, even when most flourishing, did not suffice on all occasions for the exigencies of the state, our ancestors were obliged, at very early periods of the national history, to supply the public necessities by contributions from their private means; which formed an *extraordinary* revenue for the crown, in addition to its proper patrimony; and these burthens gradually increased, until at length, in later times, they grew into the modern system of *taxation*, by means of

(*f*) 1 Bl. Com. 300; Scriven on Copyholds, 6th ed., by Brown, pp. 229—244.

(*g*) See 16 & 17 Vict. c. 56, and 29 & 30 Vict. c. 62, s. 11, as to certain charges on, and arrangements as to, the hereditary possessions and landed revenue of the crown.

which a large annual sum is now raised, applicable generally to the whole expenditure of the state,—comprising not only what is required for the public service in the strict sense of the term, but for the maintenance and dignity of the royal person and household; and such of the patrimonial revenues of the crown as yet remain to it are no longer specifically applied to the sovereign's private purposes, but are now mixed with the crown's extraordinary revenue, or revenue from taxation, so as to form part of a common fund which thus constitutes the national income.

These contributions by way of taxation have been at different periods called by the synonymous names of aids, subsidies, and supplies; and they are granted by the Commons of Great Britain and Ireland in Parliament assembled; who, when they have voted a supply to the crown, and settled the *quantum* of that supply, usually resolve themselves into what is called a *committee of ways and means*, to consider the ways and means of raising the supply so voted. And in this committee any member may propose such scheme of taxation as he thinks will be least detrimental to the public; though this matter is looked upon as the peculiar province of the Chancellor of the Exchequer, to whom it belongs to bring forward annually his financial statement for the year, usually called his Budget.

The following are the taxes now imposed by law, namely,—I. The Land-tax; II. The Customs; III. The Excise and Assessed Taxes; IV. The Post-Office Duties; V. The Stamp Duties; VI. The Duty on Offices and Pensions; and VII. The Income Tax: but this last, although of late years it has more and more assumed the character of a *permanent* tax, used not to be so; and in that respect it differed from the others in the list. Of each of these taxes we will now give some account.

I. [*The Land-tax.*—This has come in the place of the

[antient method of rating property, or persons in respect of their property, by tenths or fifteenths, subsidies on lands, hydages, scutages, or talliages; a short explication of which will, however, greatly assist us in understanding our antient laws and history. Tenths and fifteenths were temporary aids issuing out of personal property, and granted to the king by parliament (*h*). They were formerly the real tenth or fifteenth part of all the moveables belonging to the subject, at a time when such moveables (or personal estates) were a very different and much less considerable thing than they are at this day. Tenths are said to have been first granted under Henry the second; who took advantage of the fashionable zeal for crusades, to introduce this new taxation, in order to defray the expense of a pious expedition to Palestine, which he really or seemingly had projected against Saladin, emperor of the Saracens: whence it was originally denominated the Saladine tenth (*i*). But afterwards fifteenths were more usually granted than tenths. Originally the amount of these taxes was uncertain; being levied by assessments newly made at every fresh grant of the commons, a commission for which is preserved by Matthew Paris (*k*); but it was at length reduced to a certainty in the eighth year of Edward the third, when, by virtue of the king's commission, taxations were made of every township, borough, and city in the kingdom, which were recorded in the Exchequer: and such 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

(*h*) 2 Inst. 77; 4 Inst. 34. 719; Hume, i. 329.
(*i*) Hoved. A.D. 1188; Carte, L. (*k*) A.D. 1232.

[it; that is, the same identical sum that was assessed by the same aid, in the eighth of Edward the third; 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 land-tax: for we may trace up the original of that charge as high as to the introduction of our military tenures, when every tenant of a knight's fee was bound, if called upon, to attend the king in his army for forty days in each year. But this personal attendance growing troublesome in many respects, the tenants found means of compounding for it; first by 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 such assessments were then, it would seem, mere arbitrary compositions, as the king and the subject could agree. But this precedent being afterwards abused in 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 expenses), it became thereupon a matter of national complaint; and King John was obliged to promise in his Magna Charta (c. 12), 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 the third, where we only find it stipulated, that scutages should be taken as they were used to be in the time of King Henry the second (*l*). Yet afterwards by a variety of statutes under Edward the first and his grandson (*m*), it was provided, that the king should not take any aids or

(*l*) 9 Hen. 3, c. 37.

(*m*) 25 Edw. 1 (Confirmatio Chartarum); 34 Edw. 1, st. 4, c. 1; and 14 Edw. 3, st. 2, c. 1.

[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 (*n*). But they all gradually fell into disuse upon the introduction of subsidies, about the time of King Richard the second, and King Henry the fourth. 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 (*o*). 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 sank 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 that the speaker, Serjeant Glanville, made it manifest to the house how very inconsiderable a sum twelve subsidies amounted to, by telling them he had computed what he was to pay for them himself; and when he named the sum, he being known to be possessed of a great estate, it seemed not worth any further deliberation (*p*).

(*n*) Madox, Hist. Exch. 480.

(*o*) Blackstone adds here (vol. i. p. 310), "But this assessment was "also made according to an antient "valuation; wherein the computa- "tion was so very moderate, and "the rental of the kingdom was "supposed to be so exceedingly "low, that one subsidy of this sort "did not, according to Sir E. Coke, "amount to more than 70,000*l.*; "whereas a modern land-tax, at "the same rate, produces about "two millions."

(*p*) Hist. b. 2. Blackstone adds, (vol. i. p. 310,) "And, indeed, upon "calculation, we shall find that the "total amount of these twelve sub- "sidies, to be raised in three years, "is less than what would be now "raised in one year, by a land-tax "of 2*s.* in the pound."

[The grant of scutages, talliages, or subsidies, by the commons, did not extend to spiritual preferments; those being usually taxed at the same time by the clergy themselves, in convocation: but these 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 livings in the king's books; and amounted, as Sir Edward Coke tells us, to about 20,000*l.* (*q*). 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 the statute 15 Car. II. c. 10; since which, another method of taxation has generally prevailed, which takes in the clergy as well as the laity; in recompense for which (as already mentioned), the clergy have from that period been allowed to vote at the election of members of parliament in respect of their benefices (*r*); and thenceforward the practice of giving ecclesiastical subsidies has fallen into total disuse.]

No subsidies were granted either by laity or clergy after the year 1633 (*s*), but periodical assessments of a specific sum upon the several counties of the kingdom, to be levied by a pound rate on lands and personal estates, were granted as the national emergencies required—a practice which was first introduced by the parliament of Charles the first in order to support themselves and their measures (*t*). [These periodical assessments, the subsidies which preceded them, and the more antient scutage, hydage, and talliage, were to all intents and purposes, so far as they charged the land, a land-tax; and the assessments were sometimes

(*q*) 4 Inst. 33.

(*r*) Dalt. of Sh. 334; Gilb. Hist. of Exch. c. 4.

(*s*) The latest were by 15 Car. 2, cc. 9, 10.

(*t*) 1 Bl. Com. 312.

[expressly called so (*u*). Yet a popular opinion has prevailed, that the land-tax was first introduced in the reign of King William the third; because in the year 1692 a new assessment or valuation of estates was made throughout the kingdom; which, though by no means a perfect one, had this effect, that a supply of 500,000*l.* was equal to one shilling in the pound of the value of the estates given in.]

According to the enhanced valuation just mentioned, the land-tax was imposed by 4 W. & M. c. 1; and has ever since continued a permanent charge upon land (*x*); for by 38 Geo. III. c. 60, this tax (which had long become an annual) was converted into a perpetual one, and fixed at four shillings in the pound, a particular sum being charged on each county in accordance with the valuation referred to, and the proportion of each individual liable being assessed by commissioners appointed by the crown (*y*). The land-tax is subject to redemption by the landowner (*z*). The tenant of the land is also, by 38 Geo. III. c. 5, s. 17, liable to a distress, in the event of this tax remaining in arrear: but is, by the same enactment, entitled to deduct the amount which he has paid for it, (unless he has expressly agreed to pay all taxes,) out of the first sum that shall become due for rent; the tax being, as between landlord and tenant, a charge upon the former, in the absence of any special engagement; yet if the tenant has, to any extent, a beneficial interest, and

(*u*) Com. Journ. 26 June, 9th Dec. 1678.

(*x*) Under 4 W. & M. c. 1, (as in the case of the periodical assessments referred to in the text,) the sum granted was levied on *personal* as well as landed property; but this was altered by 3 & 4 Will. 4, c. 12.

(*y*) 7 & 8 Geo. 4, c. 75; 42 & 43 Vict. c. 52; 56 & 57 Vict. c. 27.

(*z*) 42 Geo. 3, c. 116, s. 180; 43 Geo. 3, c. 51; 45 Geo. 3, c. 77; 57 Geo. 3, c. 100; 16 & 17 Vict. c. 74; c. 90, s. 8; c. 117; 19 & 20 Vict. c. 80, s. 3; 24 & 25 Vict. c. 91, ss. 39—46; and 44 & 45 Vict. c. 16; Kilderbee *v.* Ambrose, 10 Exch. 454; Whidborne *v.* Ecclesiastical Commissioners, 7 Ch. D. 375.

does not hold at a rack-rent, he becomes liable *pro tanto*, and can only charge the residue on his landlord—the tax being one imposed by the law on the *beneficial proprietor* of the land (*a*).

II. [*The customs; i.e.*, 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, have been said to be two (*b*) :—1. Because he gave the subject leave to depart the kingdom, and to carry his goods along with him; and 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. But however this may be, the right of the crown to these customs clearly originated in the grant of parliament (*c*); and indeed this is in express words confessed by the statute 25 Edward I. (*Confirmatio Cartarum*), 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, at first, 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

(*a*) Ward *v.* Const, 10 Barn. & Cress. 635; Graham *v.* Wade, 16 East, 29; Queen *v.* Land Tax Commissioners, 2 Ell. & Bl. 694; Charing Cross Bridge Company *v.* Mitchell, 4 Ell. & Bl. 549; Lord Colchester *v.* Kewney, Law Rep., 2 Exch. 253; also 42 Geo. 3, c. 116; 54 Geo. 3, c. 173; 6 Geo. 4, c. 32; 4 & 5 Will. 4, c. 60; 5 & 6 Will. 4, c. 20; 6 & 7 Will. 4, c. 80; 7 Will. 4 & 1 Vict. c. 17; 1 & 2 Vict. cc. 57, 58; 5 & 6 Vict. c. 37; 16 & 17 Vict. cc. 74, 90, 117; 17 & 18 Vict. c. 85; 19 & 20 Vict. c. 80, ss. 2, 4; 20 & 21 Vict. c. 46; 24 & 25 Vict. c. 91, ss. 39—46; 32 & 33 Vict. c. 14, Part II.; 34 Vict. c, 21.

(*b*) Dyer, 165.

(*c*) 2 Inst. 58, 59.

[those ports where the king's staple was established, in order to be there first rated and then exported. These duties were also called *custuma antiqua sive magna;* and they 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. But there was afterwards a duty known as the *custuma parva et nova*, which was an impost of three-pence in the pound, due from merchant strangers only, for all commodities, as well imported as exported. This was usually called the alien's duty, and was first granted in the thirty-first year of Edward the first (*d*); but it has long since been abolished.

There is also another very antient hereditary duty (or custom) belonging to the crown, called the *prisage* or *butlerage* of wines; which is taken notice of in the great roll of the exchequer, 8 Richard I. (*e*). Prisage was a right of taking two tuns of wine from every ship (English or foreign) importing into England twenty tuns or more; one before and one behind the mast; but this, by charter of Edward the first, was exchanged into a duty of two shillings for every tun imported by merchant strangers, and was then called butlerage, because paid to the king's butler (*f*).

Other customs payable upon exports and imports were distinguished into subsidies, tonnage, poundage, and other imposts. Subsidies were such as were imposed by parliament upon any of the staple commodities before mentioned, over and above the *custuma antiqua et magna:* tonnage was a duty upon all wines imported, over and above the prisage and butlerage aforesaid: poundage was a duty imposed *ad valorem*, at the rate of twelve pence in the pound, on all other merchandize whatsoever: and the other imposts were such as were occasionally laid on by

(*d*) 4 Inst. 29.
(*e*) Madox, Hist. Exch. 526, 532.
(*f*) Dav. 8; 2 Bulstr. 254; Stat. of Estreats, 16 Edw. 2; Com. Journ. 27th April, 1689.

[parliament, as circumstances and time required (*g*). The imposts of tonnage and poundage in particular were first granted, as the old statutes (and particularly 1 Eliz. c. 20) expressed it, for the defence of the realm, and the keeping and safeguard of the seas, and for the intercourse of merchandize safely to come into and pass out of the same. They were at first usually granted only for a stated term of years; as, for two years in the fifth year of Richard the second (*h*): 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 the fourth, 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 Lord Clarendon expresses it, his ministers were not sufficiently solicitous for a renewal of this legal grant (*i*). 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 the king, previously to the commencement of hostilities, gave the nation satisfaction for the error which had been committed, by passing an Act (16 Car. I. c. 8), 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 it was afterwards, by three several statutes, (9 Anne, c. 6, 1 Geo. I. st. 2, c. 12, and 3 Geo. I. c. 7,) made perpetual, and mortgaged for the debt of the public. The customs were at first chiefly con-

(*g*) Dav. 11, 12.
(*h*) Dav. 12.
(*i*) Hist. Reb. b. 3.

[tained in two books of rates, set forth by parliamentary authority (*k*), one signed by Sir Harbottle Grimstone, speaker of the House of Commons, in Charles the second's time: and the other, an additional one, signed by Sir Spencer Compton, speaker in the reign of George the first; to which also successive additions were afterwards made.] But in the year 1787 was passed the 27 Geo. III. c. 13, called the Customs Consolidation Act, by which the amount of duties and the articles on which they should be levied were defined, and these two books of rates declared to be of no avail for the future. The law of customs, thus simplified and consolidated, was in the reign of William the fourth reduced into several statutes repealing all former provisions, and forming a new code upon the subject. But these statutes were themselves afterwards repealed, and the enactments at present in force will be found chiefly in the 39 & 40 Vict. c. 35 (*l*),—called "The Customs Tariff Act, 1876;" and the 39 & 40 Vict. c. 36,—called "The Customs Consolidation Act, 1876," as amended by the statutes mentioned in the note (*m*).

By the customs established by these Acts, we understand duties directed to be paid by the merchant at the quay, upon certain imported and exported commodities. It is obvious that, though paid by the merchant, such charges must tend to increase the price of the articles to the consumer; [and yet these are the duties least felt by the public; for, when prudently managed, the people can hardly be said to pay them at all (*n*); on the other hand,

(*k*) Stat. 12 Car. 2, c. 4; 11 Geo. 1, c. 7.

(*l*) 26 Vict. c. 7.

(*m*) The amending statutes are 40 & 41 Vict. c. 13; 41 & 42 Vict. c. 15; 42 & 43 Vict. c. 21; 44 Vict. c. 12; 45 & 46 Vict. cc. 41, 72; 46 & 47 Vict. cc. 10, 55; 47 & 48 Vict. cc. 25, 62; 48 & 49 Vict. c. 51; 49 & 50 Vict. cc. 18, 41; 50 & 51 Vict. cc. 7, 15; 51 & 52 Vict. cc. 8, 14; 52 & 53 Vict. c. 7; 53 & 54 Vict. cc. 21, 56; and the subsequent annual Acts.

(*n*) According to Blackstone (vol. i. p. 317), the Emperor Nero gained the reputation of abolishing the tax on the sale of slaves, though he only transferred it from the buyer to the seller: "so that it

[these imposts, if too heavy, become a check and cramp upon trade: and especially when the value of the commodity bears little or no proportion to the quantity of the duty imposed. This, in consequence, gives rise also to smuggling, which then becomes a very lucrative employment: and its natural and most reasonable punishment, viz. confiscation of the commodity, is in such cases quite ineffectual; the intrinsic value of the goods, which is all that the smuggler has paid, and therefore all that he can lose, being very inconsiderable when compared with his prospect of advantage in evading the duty.

There is also another ill consequence which attends high imposts on merchandize; 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 government; otherwise he loses the use and interest of the money which he so advances.] But the inconvenience here pointed at is obviated, to a certain extent, under our present system of duties; for by the *warehousing regulations* (of which those at present in force are contained in 16 & 17 Vict. c. 107, ss. 85—100, and 32 & 33 Vict. c. 103,) the importer is now enabled to bring his goods into this country, without being obliged to pay the duties until he finds for his venture either a foreign or a home purchaser (*o*). This improvement (great and obvious as it is) was not introduced till the year 1803.

III. *The excise.*—This is properly a duty upon certain commodities, charged, in most cases, on the manufacturer.

"was, as Tacitus expresses it "(Ann. l. 13, c. 31), *remissum* "*magis specie, quam re: quia cum* "*venditor pendere juberetur, in par-* "*tem pretii emptoribus accrescebat.*"

(*o*) As to the appointment of warehousing places, see also 23 & 24 Vict. c. 36. As to the warehousing of British spirits, see 27 & 28 Vict. c. 12, and 41 & 42 Vict. c. 15, s. 24; and see generally the Customs Acts enumerated on p. 556, and in n. (*m*) on that page.

The frauds that might be here committed unless a strict watch is kept, make it necessary to give the officers of revenue a power of entering and searching the places of business of such as deal in exciseable commodities, at any hour of the day; and (in presence of a constable) of the night likewise: and the proceedings, in case of transgressions, are of a summary kind, before the commissioners of revenue or justices of the peace; subject, however, (in either case,) to an appeal (*p*). This apparent rigour gives the tax itself a character that has been thought incompatible with the temper of a free nation. [For which reason, though Lord Clarendon tells us (*q*), that to his knowledge the Earl of Bedford (who was made lord treasurer by King Charles the first, to oblige his parliament,) intended to have set up the excise in England, yet it never made a part of that unfortunate prince's revenue; being first introduced, on the model of its Dutch prototype, by the parliament itself, after its rupture with the crown. Yet such was the opinion of its general unpopularity, that when in 1642 "aspersions were "cast by malignant persons upon the House of Commons, "that they intended to introduce excises, the House for "its vindication therein did declare, that these rumours "were false and scandalous; and that their authors "should be apprehended and brought to condign punish-"ment" (*r*). However, its original establishment was in 1643, 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 (*s*). At first it was laid only on those commodities where it was supposed the hardship would be least perceivable, viz. beer, ale, cider, and perry (*t*). But the parliament soon imposed it on flesh, wine, tobacco,

(*p*) Vide post, bk. VI.
(*q*) Hist. b. 3.
(*r*) Com. Journ. 8th Oct. 1642.
(*s*) Lord Clar. b. 7.
(*t*) Com. Journ. 17th May, 1643.

[sugar, and such a multitude of other commodities, that it might fairly be denominated general; in pursuance of the plan laid down by Mr. Pymme, (who seems to have been the father of the excise,) in his letter to Sir John Hotham, 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" (*u*). And afterwards, when the nation had been accustomed to it for a series of years, the succeeding champions of liberty boldly and openly declared "the "impost of excise to be the most easy and indifferent levy "that could be laid upon the people" (*x*); and accordingly continued it during the whole usurpation. In the twelfth year of Charles the second, it having then been long established and its produce well known, some part of it was given to the crown, by way of purchase (as was before observed) for the feudal tenures and other oppressive parts of the hereditary revenue; and since that period it has constantly formed part of our system of taxation.] And however odious its name formerly was to the people of England, it is now viewed with toleration; and it is allowed not only to be a convenient and effective species of impost, but to be attended with this collateral advantage, that the supervision of the revenue authorities tends to protect commodities subject to excise from fraudulent adulteration. Its advantages indeed are such that, under recent Acts of Parliament, many imposts have been classed (probably for greater convenience in collection) under this head of duties, which are not properly in the nature of

(*u*) Com. Journ. 30th May, 1643; Dugdale of the Troubles, 120. According to the translator and continuator of Petavius's Chronological History (Lon. 1659, fol.), the excise was first moved for in the house of commons by Mr. *Prynne*, 28th March, 1648; but Blackstone suggests (vol. i. p. 319), that, as Mr. Prynne was not a member of the house till 7th November, 1648, it is probably a mistake of the printer for Mr. Pymme, who was intended for chancellor of the exchequer under the Earl of Bedford.

(*x*) Ord. 14th Aug. 1649, c. 50; Scobel, 72; Stat. 1656, c. 19; Scobel, 453.

excise (*y*). Such is the case with regard to the licences which the law requires to be annually taken out by those who manufacture or deal in certain articles, or who follow certain employments (*z*); and also with regard to the licence which must be taken out by every person who keeps a dog (*a*), uses a gun (*b*), or deals in game (*c*). To this branch of the revenue,—which used to be, and (until the change contemplated by the Local Government Act, 1888, s. 20, is effected) will continue to be, under the management of the Commissioners of Inland Revenue (*d*), —have also been now assigned not only the duties payable in respect of the above licences, as well as the duties on stage and hackney carriages, on railway passengers, on race-horses, on wine licences and refreshment houses,—but also such as are known by the name of the *assessed taxes*, these last being duties assessed and charged upon persons in respect of houses they inhabit, and of certain articles by them used or kept (*e*); and such assessed taxes comprise

(*y*) 7 & 8 Geo. 4, c. 53; 9 Geo. 4, c. 44; 1 & 2 Will. 4, c. 22; 2 & 3 Will. 4, c. 16; 4 & 5 Will. 4, c. 51; c. 76, ss. 9, 10; 7 Will. 4 & 1 Vict. c. 49; 3 & 4 Vict. c. 17; 4 & 5 Vict. c. 20; 5 & 6 Vict. cc. 25, 79, 93; 8 & 9 Vict. c. 15; 10 & 11 Vict. c. 42; 11 & 12 Vict. c. 121, ss. 9—11, 18, 28; 12 & 13 Vict. c. 1; 15 & 16 Vict. c. 61; 16 & 17 Vict. cc. 37, 127; 17 & 18 Vict. cc. 27, 30; 18 & 19 Vict. cc. 38, 94; 19 & 20 Vict. c. 34; 23 & 24 Vict. cc. 90, 113, 114, 129; 24 & 25 Vict. c. 91; 25 Vict. c. 22; 27 & 28 Vict. c. 9; 28 & 29 Vict. c. 66; c. 96, ss. 23—29; 30 & 31 Vict. c. 90, ss. 1—19; 33 & 34 Vict. c. 32, Part II.; 43 & 44 Vict. c. 20; 44 & 45 Vict. c. 12; and (as to bottled wines) 51 & 52 Vict. c. 14.

(*z*) See 27 & 28 Vict. c. 56, s. 6. Among these are appraisers, pawnbrokers, hawkers, pedlars, and house agents. The proceeds of these (with certain other) "local taxation licences" are now transferred to the county councils under the Local Government Act, 1888 (51 & 52 Vict. c. 41), s. 20; see First Schedule. And see also, as to pedlars, 34 & 35 Vict. c. 96; 44 & 45 Vict. c. 45; and as to hawkers, 51 & 52 Vict. c. 33.

(*a*) 30 & 31 Vict. c. 5; 41 & 42 Vict. c. 15, ss. 17—23.

(*b*) 33 & 34 Vict. c. 57.

(*c*) 1 & 2 Will. 4, c. 32; 6 & 7 Will. 4, c. 65, s. 9.

(*d*) 43 Geo. 3, c. 99; 5 & 6 Will. 4, c. 20; 9 & 10 Vict. c. 56; 12 & 13 Vict. c. 1; 24 & 25 Vict. c. 91, s. 46; 31 & 32 Vict. c. 124.

(*e*) 32 & 33 Vict. c. 14; 33 & 34 Vict. c. 32, Part V.

also the duties on male servants, on carriages, and on armorial bearings (*f*). And the collection of all these taxes is now regulated by the Taxes Management Act, 1880 (43 & 44 Vict. c. 19); and the payment may, in general, be compounded for (*g*). A person liable to pay, and who fails to pay these taxes, may (in default of a sufficient distress to answer them) be committed to prison until payment,—and that by the order of two of the Inland Revenue Commissioners (*h*).

IV. [Another branch of the revenue is the post office, or duty for the carriage of letters,—which (like the excise) owes its first legislative establishment to the parliament of 1643. It is true there existed postmasters in much earlier times; but their business was probably confined to the furnishing of post horses to persons who were desirous to travel expeditiously, and to the dispatching of extraordinary packets upon special occasions. King James the first 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; and in 1635, King Charles the first erected a letter office for England and Scotland, and settled certain rates of postage (*i*); but this extended only to a few of the principal roads, the times of carriage were uncertain, and the postmasters on each road were required to furnish the mail with horses at the rate of twopence halfpenny a mile. On the breaking out of the civil war, great confusions and interruptions were necessarily occasioned in the conduct of this letter

(*f*) 43 Geo. 3, cc. 99, 161; 48 Geo. 3, c. 141; 3 Geo. 4, c. 88; 4 & 5 Will. 4, c. 60; 3 Vict. c. 17; 5 & 6 Vict. cc. 37, 80; 6 & 7 Vict. c. 24; 7 & 8 Vict. c. 46; 14 & 15 Vict. c. 36; 16 & 17 Vict. c. 90, s. 8; 17 & 18 Vict. c. 1, s. 5; c. 85; 19 & 20 Vict. c. 80; 24 & 25 Vict. c. 91, ss. 45, 46; 30 & 31 Vict. c. 90, ss. 25, 26; 32 & 33 Vict. c. 14, Part V. and Sched. (E.).

(*g*) 8 & 9 Vict. c. 36; 13 & 14 Vict. c. 96; 26 & 27 Vict. c. 33.

(*h*) 43 Geo. 3, c. 99, s. 3; 32 & 33 Vict. c. 14, s. 30.

(*i*) 20 Rym. Fœd. 192, 630.

[office (*k*); and about that time the outline of a more extended and regular plan was conceived by Mr. Edmund Prideaux, attorney-general to the commonwealth, after the death of King Charles. He was chairman of a committee of the House of Commons, in 1642, for considering what rates should be set upon inland letters (*l*), and was afterwards appointed postmaster-general by an ordinance of both the Houses (*m*); in the execution of which office he first established a weekly conveyance of letters into all parts of the nation (*n*), thereby saving to the public the charge of maintaining postmasters, which amounted to 7,000*l.* per annum. And the emoluments of the postmaster-general 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, which declared that the office of postmaster is and ought to be in the sole power and disposal of the parliament (*o*). 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 (*p*).] After the Restoration a similar office, with some improvements, was established by the statute 12 Car. II. c. 35; but the rates for letters have been since altered, and further regulations added, by many subsequent statutes (*q*); and by the

(*k*) Blackstone says (vol. i. p. 322) that at one time the office of postmaster was claimed by Lord Stanhope (Latch, 87); but was confirmed by Charles the first to one William Frizell, then to Thomas Witherings, and afterwards to Philip Burlamachy (20 Rym. Fœd. 429).

(*l*) Com. Journ. 28th Mar. 1642.

(*m*) Ibid. 7th Sept. 1644.

(*n*) Ibid. 21st Mar. 1649.

(*o*) Ibid.

(*p*) Ibid. 9th June, 1657; Scobel, 511.

(*q*) 7 Will. 4 & 1 Vict. cc. 33, 36; 1 & 2 Vict. cc. 97, 98; 2 & 3 Vict. c. 52; 3 & 4 Vict. c. 96; 10 & 11 Vict. c. 85; 11 & 12 Vict. c. 88; 23 & 24 Vict. c. 65; 33 & 34 Vict. c. 79 ("The Post Office Act, 1870"); 34 Vict. c. 30; 38 & 39 Vict. c. 22 (*Post Cards*); 43 & 44 Vict. c. 33 (*Money Orders*); 45 & 46 Vict. c. 2 (*Reply Post Cards*); 45 & 46 Vict. c. 74 (*Parcels*); 48 & 49

38 & 39 Vict. c. 22, s. 6, the duties authorized by the Post Office Acts are declared to be stamp duties, and are placed under the management of the Commissioners of Inland Revenue.

It has been asserted that no more eligible method of raising money upon the subject can be devised than this tax, inasmuch as it affords to both the government and the people a mutual benefit; because the government acquire a revenue, and the people do their business with greater ease, expedition, and cheapness, than they would be able to do if no such tax, (and of course no such office,) existed (*r*); and of late years, the convenience of the public and the promotion of the commercial interests of the country have been more and more considered; and in the year 1840, by the statute 3 & 4 Vict. c. 96, the privilege formerly exercised by all members of parliament, of *franking*, or sending and receiving letters free of duty, was wholly abolished; and the postage has gradually since the year 1840 become reduced to an uniform rate, irrespective of distance, and amounting at present only to the sum of one penny for every letter conveyed between places in the United Kingdom, provided it does not exceed one ounce in weight; and in further development of the system, *books*, *newspapers*, and other *postal packets* are now also conveyed at even lower rates than letters, in proportion to the weight conveyed; and since the year 1875, *post-cards* (being open letters) have come into use, bearing a half-penny stamp only (*s*); and yet the produce arising from this branch of the revenue is steadily increasing.

The machinery of the Post Office is also now used (as we shall see in the following volume) (*t*) for the manage-

Vict. c. 45 (*Sites*); 54 & 55 Vict. c. 46 (*Circulars*); 55 & 56 Vict. c. 59 (*Telegraphs*); and 56 & 57 Vict. c. 38 (*Mails on Tramways*). And as to the Isle of Man and Channel Islands, see 55 & 56 Vict. c. 24.

(*r*) 1 Bl. Com. 323.

(*s*) 38 & 39 Vict. c. 22, s. 1; and as to reply post cards, see 45 & 46 Vict. c. 2.

(*t*) Vol. III. bk. IV. pt. III. c. III.

ment of that class of savings bank which is called the Post Office Savings Bank; and it is used for the issuing of money orders and of postal orders (*u*); and for the granting of small life-insurances and life-annuities (*x*); and for the conveyance of small parcels by parcels post (*y*); and for a considerable number of years the Post Office has also had the direction of the electric telegraphs of the kingdom (*z*); and specific provisions have been made for the punishment of offences relating specifically to the Post Office in its various departments and branches (*a*).

V. A fifth branch of the revenue (also under the management of the commissioners of inland revenue) consists in the stamp duty, which is a tax imposed upon a great variety of legal and other documents (*b*); and in fact on almost all instruments between man and man which are written on parchment or paper; as also upon cards and dice (*c*). This tax (which varies in its amount according to the nature of the thing stamped), though in some cases heavily felt, yet affords some compensatory advantage to the public, by authenticating instruments, and rendering it more difficult to forge deeds of any antiquity; since, as the officers of this branch of the revenue vary their stamps frequently, by marks known to none but themselves, a man that would forge a deed of antient date, must know and be able to counterfeit the stamp of that time (*d*). The first institution of the stamp

(*u*) 43 & 44 Vict. c. 33; and 46 & 47 Vict. c. 58.

(*x*) 45 & 46 Vict. c. 51.

(*y*) Ibid. c. 74.

(*z*) The Telegraph Acts, 1863 to 1885, are 26 & 27 Vict. c. 112; 29 & 30 Vict. c. 3; 31 & 32 Vict. c. 110; 32 & 33 Vict. c. 73; 33 & 34 Vict. c. 88; 41 & 42 Vict. c. 76; and 48 & 49 Vict. c. 58; and by the last-mentioned Act the so-called "sixpenny" telegram has been introduced.

(*a*) 47 & 48 Vict. c. 76.

(*b*) See 28 & 29 Vict. c. 45, and 38 & 39 Vict. c. 77, s. 26, as to *court fees;* 32 & 33 Vict. c. 49, as to *fines and fees* to local authorities; and 42 & 43 Vict. c. 58, as to fees to public officers generally.

(*c*) 25 Vict. c. 22, ss. 27—37.

(*d*) 1 Bl. Com. 324.

duties was by statute 5 & 6 W. & M. c. 21 (*e*); but they have long since been increased vastly beyond the original design (*f*); and there are also three specific duties on property classed under this branch of the revenue, which are of such importance as to deserve a particular mention, viz., the duty payable under the Legacy Duty Acts (*g*); the duty payable under the Succession Duty Act, 1853 (*h*); and the estate duty payable under the Customs and Inland Revenue Act, 1888 (*i*),—or (in the case of deaths after the 1st August, 1894) under the Finance Act, 1894 (*k*).

Firstly, the *legacy duty* is chargeable in respect of personal estate on all legacies and shares of residue,

(*e*) 1 Bl. Com. 324.

(*f*) The principal Stamp Acts are the 55 Geo. 3, c. 184; the Stamp Act, 1891 (54 & 55 Vict. c. 39), which repeals the Stamp Act, 1870 (33 & 34 Vict. c. 97); the Stamp Management Act, 1891 (54 & 55 Vict. c. 38); and the Customs and Inland Revenue Acts, 1881 (44 & 45 Vict. c. 12, ss. 26—43); 1888 (51 & 52 Vict. c. 8, ss. 10—20); 1890 (53 & 54 Vict. c. 8, ss. 18—21); 1893 (56 & 57 Vict. c. 7, ss. 3, 4); and 1894 (57 & 58 Vict. c. 30, ss. 39, 40). See also the following statutes containing enactments on this subject: 11 Geo. 4 & 1 Will. 4, c. 43; 1 & 2 Will. 4, c. 22; 2 & 3 Will, 4, c. 120; 5 & 6 Will. 4, c. 20; 18 & 19 Vict. c. 36; 19 & 20 Vict. c. 27; 21 & 22 Vict. c. 11; 28 & 29 Vict. c. 45; 30 & 31 Vict. c. 90, ss. 20—24; 33 & 34 Vict. c. 32, Part III.; c. 98; 34 & 35 Vict. c. 4; 37 & 38 Vict. c. 19; 45 & 46 Vict. c. 72, ss. 8—17; and 48 & 49 Vict. c. 51, ss. 11—20.

(*g*) See 36 Geo. 3, c. 52; 45 Geo. 3, c. 28; 55 Geo. 3, c. 184, sched.; 8 & 9 Vict. c. 76, s. 4; 13 & 14 Vict. c. 97; 44 & 45 Vict. c. 12, ss. 26—43; 52 & 53 Vict. c. 7, ss. 5—18.

(*h*) 16 & 17 Vict. c. 51; amended by the 51 & 52 Vict. c. 8, s. 21; and 52 & 53 Vict. c. 7, ss. 10—15. See The Att.-Gen. *v.* Hallett, 2 H. & N. 368; Att.-Gen. *v.* Baker, 4 H. & N. 19; Att.-Gen. *v.* Upton, Law Rep., 1 Exch. 224; Att.-Gen. *v.* Mitchell, 6 Q. B. D. 548; and Re Warner, 17 Ch. D. 711.

(*i*) 52 & 53 Vict. c. 7, ss. 5—9. By the statute 48 & 49 Vict. c. 51 (ss. 11—20), the property of bodies corporate and unincorporate theretofore exempt from, have been subjected to, succession duty, being at the rate of 5*l.* per cent. upon their net profits or income; but there are still some exceptions to this liability, *e. g.*, the crown, charities, and the like. (See the Case of the Incorporated Council of Law Reporting, 22 Q. B. D. 273; 52 & 53 Vict. c. 7, ss. 16—18.)

(*k*) 57 & 58 Vict. c. 30.

husbands and wives being exempt from the duty in respect of such bequests to each other, but legacies under 20*l.* being no longer exempt from this duty. The duty payable by a child of the deceased, or by the descendant of such child, or by the father or mother or any lineal ancestor of the deceased, used to be 1*l.* per cent.; but when the probate and account duty payable on obtaining probate or letters of administration under the 44 Vict. c. 12, s. 27, had been paid, this duty of 1*l.* was not also payable (sect. 41); and now where the Finance Act, 1894, is applicable, if the estate duty appointed by that Act has been paid, the duty of 1*l.* per cent. is not to be paid (sect. 1). The duty payable by a brother or sister of the deceased is 3*l.* per cent.; and that payable by a brother or sister of the father or mother of the deceased, or by their descendants, is 5*l.* per cent.; and that payable by a brother or sister of the grandfather or grandmother of the deceased, or by their descendants, is 6*l.* per cent.; and that payable by any more distant relation or by a stranger is 10*l.* per cent.; and all these last-mentioned duties still remain payable, in addition to the estate duty just mentioned.

Secondly, the *succession duty* is payable in respect of real estate and of all other successions to property not within the Legacy Duty Acts,—husbands and wives being exempt as in the case of bequests of personal estate. The rate of duty was at the same rate, varying, from 1*l.* to 10*l.* per cent., with the nearness of the successor's relation to the deceased, as in the case of legacy duty; but in the case of successions covered by the account duty above mentioned, the duty at 1*l.* per cent. ceased to be payable, if the account duty had been paid. There used also to be payable a duty of 10*s.* per cent. in addition to and in all cases in which the duty of 1*l.* per cent. was payable; and a duty of 30*s.* per cent. in addition to and in all cases in which the duty at 3*l.*, 5*l.*, 6*l.*, or 10*l.* was payable; but now, in all cases where the Finance Act, 1894, is applicable, if the estate

duty appointed by that Act has been paid, the succession duty of 1*l.* per cent. and the additional succession duties are no longer payable (sect. 1); but otherwise succession duty is payable in addition to estate duty.

Thirdly, a duty called *estate duty* imposed by the 52 & 53 Vict. c. 7 (and which in the Finance Act, 1894, is referred to as the *temporary* estate duty), was made payable in respect of estates or successions (real or personal) exceeding 10,000*l.* in value; and such temporary estate duty was in addition to the probate (or affidavit duty) and account stamp duty payable on obtaining probate or administration, and was also in addition to legacy duty and succession duty; and it was at the rate of 1*l.* per cent. of the value of the estate as shown in the statement of value required to be delivered to the authorities (*l*). But now, in the case of deaths after 1st August, 1894, that temporary estate duty is no longer payable, when the estate duty appointed by the Finance Act, 1894, is payable; and regarding this new estate duty (and which is now to be called the *estate duty* simply), it is convenient here to make these few observations:—The duty is payable on the principal value of the aggregated real and personal property passing on the death of the deceased, and whether such property is in settlement or not (sect. 1); and the duty is a graduated duty (sect. 1), rising from 1*l.* per cent. to 8*l.* per cent. (sect. 17) (*m*); and when the property is in settlement, a *further estate duty*, called settlement estate duty at the rate of 1*l.* per cent. on the principal value of the property settled is also payable (sect. 17); and the duty carries 3 per cent. interest from the date of the death until

(*l*) In re Bourne, Martin *v.* Martin, (1893) 1 Ch. 188.

(*m*) The rates per cent. are 1*l.* up to 500*l.*; 2*l.* up to 1,000*l.*; 3*l.* up to 10,000*l.*; 4*l.* up to 25,000*l.*; 4*l.* 10*s.* up to 50,000*l.*; 5*l.* up to 75,000*l.*; 5*l.* 10*s.* up to 100,000*l.*; 6*l.* up to 150,000*l.*; 6*l.* 10*s.* up to 250,000*l.*; 7*l.* up to 500,000*l.*; 7*l.* 10*s.* up to 1,000,000*l.*; and 8*l.* beyond 1,000,000*l.*

it is due to be paid; which is, in the general case, on the delivery by the executor of the affidavit for probate or letters of administration or on delivery by the accountable party of the account requiring to be delivered (which affidavit and account respectively are to be delivered within six months from the death); but the duty on the real property comprised in such account may (at the option of the party delivering that account) be paid by instalments, either eight equal yearly instalments or sixteen equal half-yearly instalments, with interest at 3 per cent. per annum on the amount for the time being remaining unpaid, such interest being computed from the date when the first instalment falls due, which is twelve months from the death (sect. 6). When the estate duty is paid, it supersedes the probate or affidavit duty, and the account duty; and also the additional succession duties of 10*s.* and 30*s.* per cent. just referred to above, and the temporary estate duty also just referred to; and it supersedes also the legacy and succession duties when payable at the rate of 1*l.* per cent., but does not supersede these last mentioned duties generally (sect. 1). The Act contains also provisions for the due ascertainment of this duty, and for its collection and recovery (sects. 6—10); and also for the inland revenue commissioners granting certificates of the duty having been duly paid or discharged (sects. 11—15). And as regards real property subject to the duty, the duty (that is to say, the duty apportioned to that part of the estate) is made a first charge on such property (sect. 9); and the executor, if he pay (but he need not pay) that apportioned part of the duty, becomes entitled to the benefit of that charge, and may repay himself out of the property charged, or out of any available moneys held on the like uses as the real property on which the duty is paid; and these rules apply also to all property which is of a nature to be subject to succession duty (sect. 9); and the due incidence of the charge for estate duty may be

apportioned, so that each property may bear only its just proportion of the charge (sect. 14) (*n*).

VI. The last branch of the revenue to be here noticed, is the duty which is charged upon all offices of profit and pensions payable by the crown, exceeding the value of 100*l.* per annum. This was first imposed in the reign of George the second for a limited period (*o*); but, after having been from time to time continued, was made perpetual by 6 & 7 Will. IV. c. 97 (*p*).

VII. The taxes of which notice has now been taken comprise the whole of those which are permanently fixed upon the subjects of this realm. But in the year 1842, the revenue being then insufficient to meet the public expenditure, it was thought proper to revive, with some modifications, a tax which had been levied on former occasions of emergency, for a limited period, viz. an *income tax*. Accordingly, by 5 & 6 Vict. c. 35, this tax was re-imposed, in the first instance for a term of three years only, on the yearly profits arising from property, professions, trades, and offices; but at the expiration of that term, and since by frequent renewals up to the present time, the existence of this tax has been prolonged, though the rate in the pound has been the subject of variation in the successive Acts (now become annual) by which the tax itself has been continued (*q*); and the basis on which, and

(*n*) This estate duty and the succession duty, which (with the legacy duty) are commoniy called the "Death Duties," are more fully considered in bk. II. pt. I. c. XXVI.

(*o*) See 31 Geo. 2, c. 22.

(*p*) As to this duty, see 39 & 40 Vict. c. 16, s. 12, and 40 & 41 Vict. c. 10. See also 2 & 3 Vict. c. 94, exempting from it the pension to the Duke of Marlborough and his posterity.

(*q*) The *Income* (sometimes called *Property*) tax was first introduced in 1798,—abolished in 1802,—revived in 1803, again abolished in 1816, and again revived in 1842; see (besides the 5 & 6 Vict. c. 35) 6 & 7 Vict. c. 24, s. 7; 14 & 15 Vict. c. 12; 16 & 17 Vict. cc. 34, 91; 17 & 18 Vict. c. 85; 18 & 19 Vict. c. 35; 19 & 20 Vict. c. 80; 22 & 23 Vict. c. 18; 23 Vict. c. 14; 24 & 25 Vict. c. 91, ss. 36, 37, 38, 45, 46; 25 Vict. c. 22, ss. 42

mode in which, it is to be assessed, both generally and in particular cases, are defined in the Acts (*r*).

All of the above taxes are levied to discharge the expenses annually incurred by the government, in respect of the public service, including therein the maintenance of the royal dignity; and a very large proportion of these expenses consist in payments made on account of the interest of the *national debt*,—a subject of which it is proper therefore to take some notice in this place.

The national debt is in part *funded* and in part *unfunded*; the former being that which is secured to the national creditor upon the public funds, (the nature of which will be presently explained,) the latter, that which is not so provided for. The unfunded debt is ordinarily but of small amount, and is generally secured by *exchequer bills and bonds*, which are instruments issued by the exchequer, under the authority (for the most part) of Acts of Parliament passed for the purpose; and containing an engagement, on the part of the government (*s*), for the repayment of the principal sums advanced, with interest in the meantime (*t*). But of the funded debt, a more particular account must here be attempted.

—45; 27 & 28 Vict. c. 18, s. 15, sched. D.; 30 Vict. c. 23, sched. C.; 32 & 33 Vict. c. 14, Part II.; 33 Vict. c. 4; 33 & 34 Vict. c. 32, Part IV.; 34 Vict. cc. 5, 21; 35 & 36 Vict. c. 82; 36 Vict. c. 8; 41 & 42 Vict. c. 15, Part II.; 42 & 43 Vict. c. 21, Part II.; 44 Vict. c. 12, s. 19; 45 & 46 Vict. c. 41, ss. 9—12; 46 & 47 Vict. c. 10; 47 & 48 Vict. c. 25; 48 & 49 Vict. c. 51; 49 & 50 Vict. c. 18, ss. 4—8; 50 & 51 Vict. c. 15, ss. 17—21; and other the annual Acts; and as to the remuneration paid to the *Collectors of Income Tax*, see 54 & 55 Vict. c. 13; and 55 & 56 Vict. c. 25.

(*r*) Coltness Iron Company *v.* Black, 6 App. Ca. 315; Mersey Docks *v.* Lucas, 8 App. Ca. 891; Last *v.* London Assurance Corporation, 10 App. Ca. 438; Paddington Burial Board *v.* Inland Revenue Commissioners, 13 Q. B. D. 9. The assize courts, and generally all public buildings, are exempt (Coomber *v.* Berks Justices, 9 App. Ca. 61).

(*s*) Exchequer bills issued under the authority of Parliament are charged upon and paid out of the *consolidated fund* (29 & 30 Vict. c. 25).

(*t*) As to exchequer bills and bonds, see 57 Geo. 3, c. 48, and 29 & 30 Vict. c. 25.

[In order to a proper view of this part of the national debt, it must be borne in mind, that after the Revolution, when our new connexions with Europe introduced a new system of foreign politics, the expenses of the nation,—not only in settling the new establishment, but in maintaining long wars 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 kindred purposes,—increased to such an unusual degree 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 those times to anticipate the revenues of their posterity, by borrowing immense sums for the current service of the State, and to lay no more taxes upon the subject than would suffice to pay the annual interest of the sums so borrowed: by this means converting the principal debt into a new species of property, transferable from one man to another at any time and in any quantity. A system which seems to have had its original in the state of Florence, A.D. 1344, which government then owed about 60,000*l.* sterling; and, being unable to pay it, formed the principal into an aggregate sum, called metaphorically a mount or bank, the shares whereof were transferable like our stocks, with interest at five per cent., the prices varying according to the exigencies of the State (*u*).] This policy of the English parliament laid the foundation of what is called the national debt (for a few long annuities created in the reign of Charles the second will hardly deserve that name): and the example then set has been only too faithfully followed in more modern times, particularly during the wars in the reign of Queen Anne,

(*u*) "*Pro tempore, pro spe, pro commodo, minuitur eorum pretium atque augescit.*"—Aretin. See Mod. Un. Hist. xxxvi. 116.

and afterwards in the war with the revolted provinces of America, and in that with revolutionary France, so that the capital of the unredeemed funded debt of Great Britain and Ireland amounted, on the 31st March, 1894, to 587,631,096*l.*, independently of an outstanding unfunded debt to the extent of 21,446,300*l.* more (*x*).

The form of the security held by the public creditors, in respect of the funded debt, is that of annuities granted by parliament to those who originally advanced the money, and granted for the most part in perpetuity, affording a certain rate of interest for ever upon the principal sum due. These annuities are denominated the *public funds:* and are not only transferable by the holder, but pass by law to his representatives; and are subject, indeed, in every material particular, to all the incidents ordinarily attaching to other personal property (*y*). The public faith is pledged to the payment of them; but the annuitants have no right to call for such payment, so far as regards the principal of the debt, which payment would amount to a redemption of the annuities: on the other hand the government has always the right of redemption; and such right has been recently exercised to a very considerable extent, provisions having been made by the National Debt (Conversion) Act, 1888 (*z*), for the conversion of the stock theretofore called the New Three per Cents. into a new stock to be called $2\frac{3}{4}$ per Cent. Consolidated Stock till the 5th April, 1903, and to be called $2\frac{1}{2}$ per Cent. Consolidated Stock after that date; and in the same Act, as supple-

(*x*) This does not include the value in stock of terminable annuities, of which (at the same date) the estimated capital value was 57,076,898*l.* See the Finance Accounts for the year ending 31st March, 1894, usually published in the month of August in each year.

(*y*) In the National Debt Act, 1870, (33 & 34 Vict. c. 71,) there are a variety of enactments relating to the national debt; chiefly with reference to the payment of dividends, unclaimed dividends, and the issue to stockholders of stock certificates with coupons annexed made payable to *bearer*.

(*z*) 51 & 52 Vict. c. 2, amended by 51 & 52 Vict. c. 15.

mented by the National Debt Redemption Act, 1889 (*a*), are contained provisions for the compulsory redemption of all existing Consolidated Three per Cent. Stock and Reduced Three per Cent. Stock, and for the corresponding increase of the new stocks created under the National Debt (Conversion) Act, 1888, just referred to. Also, by the National Debt Redemption Act, 1893 (*b*), the like provision has been made for the redemption after the 1st January, 1894, of the New Three Pounds Ten Shillings per Cent. Annuities referred to in the Act, and which were made redeemable after that date by the National Debt Redemption Act, 1870 (*c*).

The liability thus fastened upon the present generation, to discharge the interest of a public debt, the bulk of which was contracted before they came into existence, may at first sight present an air of hardship; but there can be no reasonable doubt of the right of our ancestors to impose this burthen. The loans out of which the debt principally arose, were incurred in the support of wars which they deemed necessary for the maintenance of the public freedom, honour, and prosperity—objects of a lasting and descendible kind, in which their successors were not less interested than themselves. The supplies required for the purpose were too large to have been defrayed in their own times; nor would it have been just that our ancestors alone should have struggled under the burthen, when their descendants were to share the benefit. Though the necessity for engaging in these wars should now appear to be in any instance questionable, the argument remains unaltered; for it is in the order of Providence, that the interests of unborn generations should be confided to the management (sometimes the mismanagement) of their predecessors. Moreover, the funding system is attended in some respects with considerable advantage to the public,

(*a*) 52 & 53 Vict. c. 4; and see 52 & 53 Vict. c. 6.

(*b*) 56 & 57 Vict. c. 64.

(*c*) 33 & 34 Vict. c. 71.

affording (as it does) a ready, safe, and easily convertible species of investment for capital which would otherwise either lie unproductive, or be laid out in securities of a more troublesome and hazardous kind; and at the same time, it is so far a source of strength to the country, that it gives that numerous class of individuals who constitute the fund-holders, and whose dividends depend upon the produce of the taxes, a direct interest in the stability of the national institutions, and in the preservation of the public welfare. It cannot, however, be denied, that these taxes, in their more direct operation, tend to impair the productive ability of the industrial classes; and that the amount of them required to discharge the interest of the enormous debt for which the nation is now liable, weighs heavily upon the country (*d*); but the recent conversions and redemptions of the great bulk of the debt, and the consequent reduction of the future interest thereon, coupled with the arrangement for the ultimate permanent reduction of the principal of the debt by means of a *sinking fund* (*e*), have, for this generation at least, relieved the public mind of all anxiety.

[To return to the subject of the taxes: it is to be observed, that the respective produces of customs, excise, stamps, and several other taxes, 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, to reduce the number of these separate funds by uniting and blending them together. There were formerly three capital funds in existence, which had been thus produced by the aggre-

(*d*) At the period when Blackstone wrote, the capital of the national debt, funded and unfunded, was only 136,000,000*l*. Yet he says (vol. i. p. 328), "The enormous "taxes that are raised upon the "necessaries of life, for the pay- "ment of the interest of this debt, "are a hurt both to trade and "manufactures, &c."

(*e*) As to the sinking fund, see 32 Geo. 3, c. 69; 10 Geo. 4, c. 27; 3 & 4 Will. 4, c. 24; 29 & 30 Vict. c. 11; 38 & 39 Vict. c. 45; 45 & 46 Vict. c. 72; 48 & 49 Vict. c. 43; and 49 & 50 Vict. c. 19.

[gation of several component parts: the *aggregate* fund, the *general* fund (so called from such union and addition), and the *South Sea* fund,—the last being the produce of the taxes appropriated to pay the interest of such part of the national debt as was advanced by the South Sea Company and its annuitants.] But in the year 1787 the public accounts were again newly arranged, by abolishing these divisions and including the whole in one, called the *consolidated fund* (*f*); which was latterly combined with that of Ireland, and formed with it the *Consolidated Fund of the United Kingdom* (*g*).

This consolidated fund,—comprising the produce of all the taxes which have been enumerated in this chapter, together with some small receipts from the royal hereditary revenue (surrendered, as before explained, to the public use), and from other sources (*h*)—constituted almost the whole of the ordinary public revenue of the United Kingdom of Great Britain and Ireland; and the net receipts of income paid into the exchequer in the financial year ending 31st March, 1894 (after deducting repayments, &c.), amounted to 98,297,362*l.* (*i*). The consolidated fund is pledged for the payment of the whole of the interest of the national debt of Great Britain and Ireland (*k*): and, besides this, is liable to several other specific charges imposed upon it at various periods by Act of Parliament, —such as the *civil list* and the salaries of ambassadors, and the salaries and pensions of the judges (including county court judges) (*l*), and the salaries of certain other official persons (*m*); after payment of which, the surplus is to be

(*f*) See 27 Geo. 3, c. 13.

(*g*) See 56 Geo. 3, c. 98; 19 & 20 Vict. c. 59.

(*h*) See, for example, 31 & 32 Vict. c. 9, as to casual receipts by persons holding public offices.

(*i*) This amount includes the sum of 7,163,952*l.* paid to local taxation accounts.

(*k*) 56 Geo. 3, c. 98. See also 2 & 3 Will. 4, c. 116; 19 & 20 Vict. c. 108.

(*l*) 51 & 52 Vict. c. 43, ss. 23, 24.

(*m*) See also as to "superannuation allowances" or "retiring pensions" the following Acts:—(as to prison officials) 40 & 41 Vict. cc. 21, 49, 53; 41 & 42 Vict. c. 63;

indiscriminately applied to the service of the United Kingdom under the direction of parliament (*n*). And of the *civil list* it will be proper here to give some further explanation.

The Civil List is an annual sum granted by parliament at the commencement of each reign, for the expense of the royal household and establishment, as distinguished from the general exigencies of the State; and it is the provision before stated to be made for the crown out of the taxes, in lieu of the crown's proper patrimony, and in consideration of the assignment of that patrimony to the public use. This arrangement has prevailed from the time of the Revolution downwards, though the amount fixed for the civil list has been subject in different reigns to considerable variation. At the commencement of the present reign, a civil list was settled on her Majesty for life to the amount of 385,000*l.* per annum, payable quarterly out of the consolidated fund; of which the sum of 60,000*l.* is assigned for her Majesty's private purse, and the remainder is applicable chiefly to the salaries and expenses connected with her household (*o*). In return for which grant it was

49 Vict. c. 9; and (as to the police) 19 & 20 Vict. c. 69; 22 & 23 Vict. c. 32; 28 & 29 Vict. c. 35; 35 & 36 Vict. c. 94; 48 & 49 Vict. c. 68; 53 & 54 Vict. c. 45; 56 & 57 Vict. c. 26; and (as to subordinate officials generally) 22 Vict. c. 26; 23 & 24 Vict. c. 89; 28 & 29 Vict. cc. 68, 113; 29 & 30 Vict. c. 68; 32 & 33 Vict. c. 60; 34 & 35 Vict. c. 36; 35 & 36 Vict. cc. 12, 83; 36 Vict. c. 23; 38 Vict. c. 4; 38 & 39 Vict. c. 28; 39 & 40 Vict. cc. 53, 68; 50 & 51 Vict. c. 67.

(*n*) By 17 & 18 Vict. c. 94, in order to bring the national income and expediture under the more immediate view and control of parliament, certain payments and salaries formerly charged on the consolidated fund were directed, for the future, to be paid out of supplies from time to time provided, and annually appropriated by parliament for the purpose. See 49 & 50 Vict. c. 26; 52 & 53 Vict. c. 70; 56 & 57 Vict. cc. 3, 16, 28, 46, 60.

It may be here noticed that, out of the consolidated fund, advances of money for public works and fisheries, for the employment of the poor, and for other purposes, are from time to time authorized by Act of Parliament. Of such an Act, with reference to advances for *Public Works*, the 56 & 57 Vict. c. 24, is an example.

(*o*) The Act for this purpose is

at the same time provided, that the hereditary revenues of the crown (with the exception of the duties of excise on beer, ale, and cider, which were to be discontinued during the present reign) should, during the present queen's life, be carried to, and form part of, the consolidated fund (*p*). The civil list is therefore granted by the public in exchange for the whole of that part of the consolidated fund, which is the produce of the revenue of the sovereign in his own distinct capacity; the remainder of that fund being rather the revenue of the public or its creditors, though collected and distributed again in the name and by the officers of the crown (*q*). The civil list, therefore, now stands in the same place as the hereditary income did formerly; but with this great difference, that it is not chargeable, as the hereditary income was, with the general and public expenses of the government (*r*). [The whole revenue of Queen Elizabeth amounted to 600,000*l.* a year (*s*); that of King Charles the first was 800,000*l.* (*t*); and the revenue voted for King Charles the second was 1,200,000*l.* (*u*); though complaints were made (in the first years at least) that it did not amount to so much (*x*). But it must be observed, that under these sums were included all manner of public expenses; among which Lord Clarendon in his speech to the parliament computed, that the charge of the navy and land forces amounted annually to 800,000*l.*, which was ten times more than before the former troubles (*y*). The same revenue, subject to the same charges, was settled on King James the second (*z*); but, by the increase of trade and more frugal management, it amounted on an average to a million and a

1 & 2 Vict. c. 2. See the Finance Accounts for the year ending 31st March, 1894.

(*p*) 1 & 2 Vict. c. 2. As to the revenue derived from *wreck*, vide sup. pp. 534 et seq.

(*q*) 1 Bl. Com. 332, 333.

(*r*) Ibid.

(*s*) Lord Clar. Continuation, 163.

(*t*) Com. Journ. 4th Sept. 1660.

(*u*) Ibid. 14th Sept. 1660.

(*x*) Ibid. 4th June, 1663; Lord Clar. Continuation, 165.

(*y*) Ibid.

(*z*) 1 Jac. 2, c. 1.

[half per annum—besides other additional customs granted by parliament, which produced an annual revenue of 400,000*l.* (*a*)—out of which his fleet and army were maintained at the yearly expense of 1,100,000*l.* (*b*).

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 upon 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 feudal hardships, and other odious branches of the prerogative. And though complaints have sometimes been made of the increase of the civil list, and of the expense of providing for the junior members of the royal family, 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, and, above all, the diminution of the value of money, compared with what it was worth in former reigns,—we must acknowledge these complaints to be void of any rational foundation: and that it is impossible to support that dignity, which a sovereign of this country should maintain, with an income in any degree less than what is now established by parliament;] nor are the additional provisions in any respect excessive which the liberality and justice of modern parliaments have made for the due support of the family of the Queen (*c*).

(*a*) Caps. 3, 4.

(*b*) Com. Journ. 1st March and 20th March, 1688.

(*c*) 52 & 53 Vict. c. 35; and see supra, p. 443, n. (*e*).

CHAPTER VIII.

OF THE ROYAL FORCES.

WHEN we were considering that branch of the royal prerogative which relates to the command of the forces (military and naval) of the kingdom, we postponed the consideration of the manner in which these forces are raised and maintained; and we now come to the consideration of this latter subject; but we shall first make some preliminary remarks on the history of the army and navy.

[In the time of our Saxon ancestors, as appears from Edward the Confessor's laws (*a*), the military force of this kingdom was in the hands of the dukes (or heretochs), who were constituted through every province and county in the kingdom; being taken out of the principal nobility, and such as were most remarkable for being "*sapientes, fideles, et animosi.*" Their duty was to lead and regulate the English armies, with a very unlimited power; "*prout eis visum fuerit ad honorem coronæ et utilitatem regni.*" And because of this great power they were elected by the people in their full assembly, or folkmote, in the same manner as sheriffs were elected: following still that old fundamental maxim of the Saxon constitution, that where any officer was entrusted with such power as if abused might tend to the oppression of the people, that power should be delegated to him by the vote of the people

(*a*) Wilkins, Leg. Anglo-Sax. Ll. Edw. Confess. c. *De Heretochiis.*

[themselves (*b*). So, too, the antient Germans, the ancestors of our Saxon forefathers, 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, "*reges ex nobilitate, duces ex virtute sumunt*" (*c*). In constituting their kings, the family or blood royal was regarded; in choosing their dukes or leaders, warlike merit: just as Cæsar relates of their ancestors in his time, that whenever they went to war, by way either of attack or of defence, they elected leaders to command them (*d*).

It seems universally agreed by all historians, that King Alfred first settled a national militia in this kingdom, and by his prudent discipline made all the subjects of his dominion soldiers; but he seems to have left too large a power in the hands of the dukes or heretochs; which enabled Duke Harold, on the death of Edward the Confessor, to mount the throne of this kingdom, in prejudice of Edgar Atheling, the rightful heir.

Upon the Norman conquest the feudal system was introduced, which system was essentially military, as the particulars of it which have been already given sufficiently show; and it is only necessary here to recall the fact, that under this system, all the land in the kingdom held by tenure in chivalry was divided into what were called knights' fees, in number about sixty thousand; and that for every knight's fee a knight or soldier (*miles*) was bound to attend the king in his wars for forty days in the year (*e*); in which space of time, before war was re-

(*b*) "*Isti vero viri eligebantur per commune consilium, pro communi utilitate regni, per provincias et patrias universas, et per singulos comitatus, in pleno folkmote, sicut et vicecomites, provinciarum et comitatuum, eligi debent.*"—Ll. Edw. Confess. ubi sup. 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 præsint, deliguntur.*"—De Bell. Gall. l. 6, c. 22.

(*e*) We frequently read of *half* a knight (as that for so much land

[duced to a science, the campaign was generally finished, and a kingdom either conquered or victorious; and by these means the king had, without any expense, an army of sixty thousand men always ready at his command. And we find among the laws of William the Conqueror (*f*), one which in the king's name commands and firmly enjoins the personal attendance of all knights and others; "*quod habeant et teneant se semper bene in armis et in equis, ut decet et oportet: et quod sint semper prompti et parati ad servitium suum integrum nobis explendum et peragendum, cum opus adfuerit, secundum quod debent de feodis et tenementis suis de jure nobis facere;*" which personal service in process of time degenerated into pecuniary commutations or aids; and at last the tenure in chivalry itself was abolished at the Restoration, by the statute 12 Car. II. c. 24.

In the meantime we are not to imagine that the kingdom was left wholly without defence in case of domestic insurrections, or of foreign invasions. Besides those who, by their military tenures were bound to perform forty days' service in the field, first the assize of arms, enacted 27 Hen. II. (*g*), and afterwards the statute of Winchester (*h*), under Edward the first, 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; and these weapons were changed by the statute 4 & 5 Ph. & M. c. 2, into others of more modern service. All these (with some other similar) provisions were repealed in the reign of James the first (*i*); but while they continued in force, it

three knights and a half, &c., were to be returned); and this means that the feudal service was divided, *e.g.*, a whole knight served half the time. (Christian's Blackstone, vol. i. p. 409.)

(*f*) C. 58. See Co. Litt. 75, 76.

(*g*) Hoved. A.D. 1181.

(*h*) 13 Edw. 1, c. 6.

(*i*) 1 Jac. 1, c. 25; 21 Jac. 1, c. 28.

[was usual from time to time for our princes to issue commissions of array, and to 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 fifth year of Henry the fourth, so as to prevent the insertion therein of any new penal clauses (*k*); and it was then also provided, 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 to provide soldiers unless by consent of parliament (*l*). About the reign of King Henry the eighth, or his children, *lieutenants* of counties began to be introduced, as standing representatives of the crown, in military matters (*m*); and they are mentioned as known officers in the statute 4 & 5 Ph. & M. c. 3; and Camden speaks of them (*n*), in the time of Queen Elizabeth, as extraordinary magistrates constituted in times of difficulty and danger (*o*). The introduction of these commissions of lieutenancy, which contained in substance the same powers as the old commissions of array, caused the latter commissions to fall into disuse.

After the repeal of the statutes of armour (in the reign of King James the first), the crown naturally continued to issue these commissions of lieutenancy; and King Charles the first having, during his northern expedition, issued such commissions, it was made a question with the long parliament how far the power of the militia did inherently reside in the king; and this question, long agitated with great heat and resentment on both sides, became at length the immediate cause of the fatal rupture between that king

(*k*) Rushworth, part iii. pp. 662, 667; 8 Rym. 374, &c.

(*l*) 1 Edw. 3, st. 2, cc. 5, 7; 25 Edw. 3, st. 5, c. 8.

(*m*) 15 Rym. 75.

(*n*) Brit. 103, edit. 1594.

(*o*) The office of lord lieutenant was rendered necessary, and (it is said) was first created in the third year of Edward the sixth, by reason of the many disturbances occasioned by the followers of the old religion against the new establishment.

[and his parliament;—the two houses not only denying this prerogative of the crown, but also seizing into their own hands the entire power of the militia (*p*).

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 upon a more regular military footing.] And the order in which the militia now stands by law, is principally built upon the statutes which were then enacted —viz., 13 Car. II. st. 1, c. 6; 14 Car. II. c. 3; and 15 Car. II. c. 4. It is true these have been repealed (*q*); but, by subsequent militia laws, many of their provisions are re-enacted, with the addition of new regulations; and the present system is chiefly founded on the General Militia Act (42 Geo. III. c. 90), and on the Militia Act, 1882 (45 & 46 Vict. c. 49), which latter statute repealed and re-enacted with amendments the Militia (Voluntary Enlistment) Act, 1875 (38 & 39 Vict. c. 69); and the scheme of the present system is to train, at stated periods of the year (*r*), for the internal defence of the country, a certain number of the inhabitants of every county, such troops being enlisted for a period not exceeding six years, and being officered by gentlemen commissioned by the crown for that purpose. The militia is raised, in default of voluntary enlistment, by compulsory levy in the way of ballot; but it has not latterly been found necessary to have recourse to that expedient; and the men are entitled

(*p*) The statute 13 Car. 2, c. 6, declares that the supreme command of all the militia of the realm is, and ever was, the undoubted right of the sovereign. (And see 34 & 35 Vict. c. 86, Part II.)

(*q*) 26 & 27 Vict. c. 125.

(*r*) Although thus periodically called together for the purpose of being trained, the militia can only be *drawn out and embodied* in case of imminent national danger or great emergency, the occasion being first communicated to parliament, if sitting; or, if not sitting, proclaimed by order in council. (45 & 46 Vict. c. 49, s. 18.)

to pay, while on service and during the period of training (*s*).

Besides the *militia* we are to take into account our unpaid yeomanry and volunteers,—a description of forces which originated in the menace of French invasion in the reign of King George the third (*t*). The yeomanry cavalry still exists; and though the other volunteers then raised were laid aside after that emergency passed over, their place is now supplied by volunteers of a different and more modern description (*u*); and by means of such volunteers, the defensive military force of the country has been immensely increased; and the necessity for maintaining it appears to be now universally acknowledged, in consequence of the very large and constant additions made to the armaments of the continental powers.

The occasions of war, however, require soldiers more completely and perfectly disciplined than those of the militia or volunteers; and our military establishment consequently comprises, besides these, a large body of *regular* forces who are raised by voluntary enlistment. Our constitution indeed looks with jealousy upon levies of this description. [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, 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 (*x*). But, as the fashion of keeping standing

(*s*) 37 & 38 Vict. c. 29; 42 & 43 Vict. c. 67.

(*t*) The principal Act relating to the volunteers raised in the reign of Geo. 3, was the 44 Geo. 3, c. 54, since repealed by 26 & 27 Vict. c. 65.

(*u*) By 26 & 27 Vict. c. 65 (amended by 32 & 33 Vict. c. 81), the previous Acts relating to the volunteer force in Great Britain were consolidated, with amendments.

(*x*) Stat. 1 W. & M. st. 2, c. 2.

[armies,—which was first introduced by Charles the seventh of France, in the year 1445 (*y*),—came afterwards to prevail universally over Europe, it has also for a long time been judged necessary by our legislature (in respect of the safety of the kingdom, the defence of the realm, 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 (*z*).] It consequently became the practice for an Act (known as the Mutiny Act) to be passed in every year (whether in peace or war), authorizing, during its continuance, but for no longer, the maintenance of the regular forces deemed necessary for the service of the state (*a*); and containing temporary provisions as to their enlistment, discipline, and regulation.

In the year 1879, however, a code on this subject of a more permanent character was embodied in the 42 & 43 Vict. c. 33, amended by the Regulation of the Forces Act, 1881 (44 & 45 Vict. c. 57), and repealed and re-enacted with amendments by the Army Act, 1881 (44 & 45 Vict. c. 58); which last statute is directed to come into force during the continuance of an annual Act, to be passed for that purpose, but for no longer period; and to be subject, and by the Reserve Forces Act, 1882 (45 & 46 Vict. c. 48), as amended by the 53 & 54 Vict. c. 42, for establishing a *reserve force* of men who have been in her Majesty's service and called the *Army Reserve;* and also a *reserve force* of militia, called the *Militia Reserve.* As to artillery and rifle ranges, see 48 & 49 Vict. c. 36; 54 & 55 Vict. c. 54; 55 & 56 Vict. c. 43; and the Drill Grounds Act, 1886 (49 Vict. c. 5); and as to military tramways, see 50 & 51 Vict. c. 65; and as to barracks, 53 & 54 Vict. c. 25; and as to schools, 54 & 55 Vict. c. 16.

(*y*) Robertson, Hist. of Cha. V. i. 24.

(*z*) Lord Macaulay's Hist. vol. v. pp. 1 et seq. The first Mutiny Act was in the reign of William and Mary, in the year 1689. (MacArthur on Courts Martial, vol. i. p. 40.)

(*a*) The paid forces, now authorized, consist of 151,867 men, exclusive of the forces actually serving in India. By 22 & 23 Vict. c. 40, provision was made for the establishment of a *reserve force* of seamen volunteers; by 24 & 25 Vict. c. 74, for the enlistment, in the general forces of her Majesty, of soldiers transferred from her *Indian* forces;

moreover (when so brought into force), to such provisions as may be specified or referred to in the annual Act (*b*).

In this military code, provision is made for the manner in which the troops are to be enlisted and "billeted," that is, dispersed among the several innkeepers and victuallers throughout the kingdom (*c*). And regulations are therein laid down for the government of the army, and for every person subject to military law. By these the sovereign is empowered to make *Articles of War*, which shall be judicially taken notice of by all judges, and in all courts whatsoever; and to erect or grant authority to convene *courts-martial*, with a jurisdiction to try and punish offences according to such Articles of War, and the provisions of the Act (*d*); and the military adviser of the crown is the Judge Advocate General. And in order, however, to limit, as far as possible, the power conceded to the crown in this matter, it is enacted that nothing therein contained shall exempt any officer or soldier from being proceeded against by the ordinary course of law (*e*); and that where he is accused of any offence against a subject of the realm, punishable by the known laws of the land, he shall be delivered over to the civil magistrate (*f*): and moreover, that no person shall, by such Articles of War, be subjected to suffer any punishment extending to life or limb, or to be kept in penal servitude, for any crime which is not expressed to be so punishable by the Army Act, 1881,

(*b*) By the 42 & 43 Vict. c. 32, the Army Act was to come into force in the United Kingdom, the Channel Islands and the Isle of Man from 25th July, 1879, to 30th April, 1880, and no longer, unless otherwise provided by Parliament, —a provision annually supplied by the Army Annual Acts, 1882, c. 7; 1883, c. 6; 1884, c. 8; 1885, c. 8; 1886, c. 8; 1887, c. 2; 1888, c. 4; 1889, c. 3; 1890, c. 4; 1891, c. 5; 1892, c. 2; 1893, c. 4; and 1894, c. 3.

(*c*) As to the period of enlistment (which cannot be entered into for a longer period than twelve years), see 44 & 45 Vict. c. 58, s. 76.

(*d*) 44 & 45 Vict. c. 58, ss. 69, 70; 1 Bl. Com. p. 418, note by Coleridge; Home *v.* Lord Bentinck, 2 Brod. & Bing. 130; In re Mausergh, 1 B. & Smith, 400.

(*e*) 44 & 45 Vict. c. 58, s. 69.

(*f*) Ibid. s. 162.

itself; nor shall be punished in any manner which shall not accord with its provisions; and the Act itself accordingly fixes the punishments to be inflicted, and makes provision as to certain specific offences: many of which (especially when committed on active service) render the offender liable to suffer *death;* and such penalty (in particular) attaches to cowardice, desertion, and wilful disobedience (*g*).

The system of military law thus devised for the army is made applicable to a certain extent by other statutes to the militia and volunteers also, when on duty (*h*). And no relief can be afforded by the ordinary courts of law from the sentences (however erroneous) of the courts-martial, so long as they exceed not their jurisdiction, the only remedy being an application to the sovereign in council, praying for a revision of the proceedings (*i*).

The establishment of such a system in this country involves (no doubt), notwithstanding the care with which its provisions are guarded, a partial departure from the principles of our free constitution; and this is recognized in the Act itself; for it is set forth in the preamble thereof, that "no man can be forejudged of life or limb, or subjected in time of peace to any kind of punishment within this realm, by martial law, or in any other manner than by judgment of his peers, and according to the known and established law of this realm" (*k*),—a doctrine entirely conformable to, and apparently founded on, the Petition of Right, which enacts, that no commission shall issue to proceed within this land according to martial law (*l*). But the policy of the Army Acts may be easily defended, it being impossible by any other means to maintain the proper severity of military discipline: and their legality is

(*g*) Sects. 4, 5, 41, 44.

(*h*) 42 Geo. 3, c. 90, ss. 89, 103; 42 & 43 Vict. c. 33, s. 173; 44 & 45 Vict. c. 58, ss. 175—184.

(*i*) Grant *v.* Gould, 2 H. Bl. 100, 101; and see the Army Act, 1881, sects. 54 and 57.

(*k*) 42 & 43 Vict. c. 32.

(*l*) 3 Car. 1, c. 1; 31 Car. 2, c. 1; Hale, Hist. C. L. c. 2.

put beyond all question by the omnipotence of parliament; the authority of which would be at any time sufficient to supersede altogether the established course of justice, and to proclaim martial law in its stead (*m*).

On the other hand, careful provisions have been made by law for the benefit of soldiers, the most material of which are the allowance of certain pensions to those who are sick, hurt, and maimed (*n*); and the establishment of the royal hospital at Chelsea for such as are worn out in their duty (*o*); and army chaplains (*p*), and army schools (*q*) are provided for the religious and general welfare of our soldiers. And, moreover, soldiers, if on actual service, may make *nuncupative* wills, and dispose of their goods, wages, and other personal chattels, without those solemnities which the law requires in other cases (*r*); but the English law does not 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 anything in bloody letters on his shield, or in the

(*m*) Thus by the statute passed in Ireland, in 1798, for the suppression of the rebellion there, it was provided that the lord lieutenant might during the rebellion, whether the courts of justice were open or not, issue his orders to the officers of the forces and others, to take the most vigorous measures for suppressing it, and to punish all rebels by death or otherwise, as to them should seem expedient, &c., and to cause all persons arrested as rebels to be tried in a summary manner by courts-martial, &c.; and upon the same principle, the Habeas Corpus Act may, upon emergency, be suspended, a course which has been more than once taken; but save by means of such special Act authorising it, martial law cannot be proclaimed in this country; and the Court of Chivalry which took cognizance of it (4 Inst. 123; 2 Hawk. 5, 9), is now extinct.

(*n*) 44 & 45 Vict. c. 46, and 49 & 50 Vict. c. 30, as to the *patriotic fund;* and 44 & 45 Vict. c. 58, and 47 & 48 Vict. c. 55, as to *pensions*, &c.

(*o*) 7 Geo. 4, c. 16; 2 & 3 Will. 4, c. 106, ss. 3, 4; 6 & 7 Vict. c. 31; 10 & 11 Vict. c. 4; 26 & 27 Vict. c. 12; 30 & 31 Vict. c. 110; 39 & 40 Vict. c. 14; and 47 & 48 Vict. c. 32; and as to *Chelsea Hospital out-pensioners*, see 19 & 20 Vict. c. 15.

(*p*) 31 & 32 Vict. c. 83.

(*q*) 54 & 55 Vict. c. 16.

(*r*) 29 Car. 2, c. 3; 7 Will. 4 & 1 Vict. c. 26.

dust of the field with his sword, it was held by the civil law to be a very good military testament (*s*). And on their death, soldiers' effects are collected and (subject to the payment of the debts called *regimental debts*) the balance is remitted to the persons entitled thereto (*t*).

And as to our *naval* forces, the law relating to these is very similar to that which regulates the army. [The Royal Navy of England hath ever been its greatest defence and ornament; it is its natural strength,—the floating bulwark of the island; an army from which, however strong and powerful, no danger can ever be apprehended to liberty: and accordingly it has been assiduously cultivated, even from the earliest ages; and yet, so vastly inferior were our ancestors to the present age in point of naval power, that even in the maritime reign of Queen Elizabeth, Sir Edward Coke thinks it matter of boast that the royal navy of England then consisted of *three and thirty* ships (*u*).

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 service.

1. First, with regard to their supply.—The power of *impressing* seafaring men for the sea service by the royal commission has been a matter of some dispute, and was submitted to with great reluctance. Yet it hath been very clearly and learnedly shown, by Sir Michael Foster (*x*), 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 (*y*). And its legality is now so fully established, that it cannot admit of a doubt in any

(*s*) Cod. 6, 21, 15.

(*t*) 26 & 27 Vict. c. 57; 31 & 32 Vict. c. 90; 56 & 57 Vict. c. 5.

(*u*) 4 Inst. 50.

(*x*) Rep. 154.

(*y*) See also Comb. 245; Barr. 334. Blackstone remarks (vol. i. p. 420), that *ferrymen* are said to be privileged from impressment at common law.

[court of justice (*z*); indeed, it has been recognized and made the subject of particular provisions in various Acts of Parliament. Thus the statute 2 Ric. II. st. 1, 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 the same statute provided a remedy against their running away. Again, by the 2 & 3 Ph. & M. c. 16, which, however, was repealed by 7 & 8 Geo. IV. c. lxxv. s. 1, if any waterman, using the river Thames, hid himself during the execution of any commission of pressing for the king's service, he was made liable to heavy penalties. By the 5 Eliz. c. 5 (since repealed by the 31 & 32 Vict. c. 45), no fisherman was to be taken by royal commission to serve as a mariner, but the commission was first to be brought to two justices of the peace, inhabiting near the sea coast where the mariners were to be taken; to the intent that the justices might choose out and return such a number of able-bodied men, as in the commission was contained, to serve her majesty. And by several other Acts, especial protections were allowed to seamen in particular circumstances to exempt them from being impressed.]

But besides this method of impressing, which is only defensible from public necessity, to which all private considerations must give way, the royal navy is also largely, and in ordinary times exclusively, supplied by voluntary enlistment (*a*); and great advantages in point of wages are given to volunteer seamen; also where they are already engaged in the merchant service, they are enabled to leave it, without punishment or forfeiture, in order to engage in her Majesty's navy (*b*); and provision has been made for the formation of a *naval reserve* (*c*).

(*z*) R. *v.* Tubbs, Cowp. 512.

(*a*) 5 & 6 Will. 4, c. 24; 16 & 17 Vict. c. 69; the Naval Enlistment Act, 1884 (47 & 48 Vict. c. 46).

(*b*) 57 & 58 Vict. c. 60, ss. 195—197, continuing the like provisions contained in 17 & 18 Vict. c. 104, s. 214; 26 & 27 Vict. c. 69; 35 & 36 Vict. c. 73; 36 & 37 Vict. c. 77.

(*c*) 22 & 23 Vict. c. 40.

2. The method of ordering seamen in the royal fleet is closely analogous to that established for the government of the army; but the scheme of naval discipline, (comprised in what are known as "The Articles of the Navy,") was embodied in a statute 22 Geo. II. c. 33 (amended by subsequent Acts), and is now laid down in the 29 & 30 Vict. c. 109, called the "Naval Discipline Act, 1866," as amended by the 47 & 48 Vict. c. 39; and the navy constituting the Indian Marine Service is subject to the rules of discipline contained in the 47 & 48 Vict. c. 38; and all these Acts are permanent in their character, and do not require (as in the case of the army) to be brought into force for a specified time by an annual Act passed for that purpose (*d*). [From whence this distinction arose, it is hard to assign a reason, unless it proceeded from the perpetual establishment of the navy, which rendered a permanent law for its regulation expedient, and the temporary duration of the army, which subsisted only from year to year. But whatever was apprehended at the first enactment of the Mutiny Act, the annual renewal of the statute authorizing our standing force has made this distinction idle. For if from experience past we may judge of future events, the army is now lastingly engrafted into the British constitution; with this singularly fortunate circumstance, that any branch of the legislature may put an end to its legal existence, merely by refusing to concur in its further continuance.]

These Acts for the government of the navy, after defining a great variety of offences—some of them having reference to a state of war (*e*), and others being of a nature

(*d*) The first parliamentary enactment for the government of the fleet was 13 Car. 2, st. 1, c. 9, but this statute was repealed by 22 Geo. 2, c. 33, which last Act, says Blackstone (vol. i. p. 421), was passed after the peace of Aix la Chapelle, "to remedy some defects "which were of fatal consequence "in conducting the preceding "war."

(*e*) These are chiefly misconduct in the presence of the enemy, communications with the enemy, neglect of duty, mutiny, insubordination, and desertion. Many

to which the ordinary law applies,—and fixing in each case the appropriate punishment for each offence, proceed to provide that any offence triable under the Acts may be tried and punished by court-martial (*f*); the law relative to which is in general the same as with respect to offences of the military kind; and any offence triable under the Acts not committed by an officer, and not thereby made capital, may, under such regulations as the Admiralty may from time to time issue, be summarily tried and punished by the officer in command of the ship to which the offender belongs; subject, however, to certain restrictions thereby laid down; at the same time, nothing in the Acts is to supersede the authority or power of any court of ordinary civil or criminal jurisdiction in her Majesty's dominions, in respect of any offence mentioned therein, which may be punishable or cognizable by the common or statute law (*g*).

3. With regard to the privileges conferred on sailors, they are pretty much the same with those conferred on soldiers. And careful provisions are made for their relief also, when maimed, wounded, or superannuated (*h*); and they have also the same power of making nuncupative wills.

Besides seamen ordinarily so called, we may remark here, that in her Majesty's fleet and naval service is comprised that species of force commonly termed the *Royal Marines*; and the discipline and regulation of these also,

of these, as defined by the Articles of War established in the Act, are capital; but the punishment of death (except in the case of mutiny), awarded by the sentence of a court-martial, is not to be inflicted till the sentence has been confirmed by the Admiralty or the commander-in-chief on a foreign station. (29 & 30 Vict. c. 109, s. 53.)

(*f*) 29 & 30 Vict. c. 109, s. 56.

(*g*) Sect. 101.

(*h*) 8 & 9 Vict. c. 22; 12 & 13 Vict. c. 28; 13 & 14 Vict. c. 24; 32 & 33 Vict. c. 44; 33 & 34 Vict. c. 100; 47 & 48 Vict. cc. 44, 55; and see, as to the *patriotic fund*, 44 & 45 Vict. c. 46; and 49 & 50 Vict. c. 30; and as to *Greenwich Hospital*, 19 & 20 Vict. c. 15; 26 & 27 Vict. c. 12; 28 & 29 Vict. c. 89; 35 & 36 Vict. c. 67; 46 & 47 Vict. c. 32; and 48 & 49 Vict. c. 42.

—when quartered (as they often are) on shore, or sent to do duty on board of transports or merchant ships, or under other circumstances in which they are not subject to the Naval Discipline Act, 1866,—is one of the objects of the Army Act, 1881, the provisions of which, with certain modifications, include the Royal Marine forces. And thus much for the law relating to the *military* and *naval* forces of the crown (*i*).

[We have now mapped out all the principal outlines of the law relating to the supreme executive magistrate, or the king's majesty. But before we entirely dismiss this subject, it may not be improper to take a short comparative review of the prerogative or power of the executive magistrate, as it stood in former days, and as it stands at present. And we cannot but observe, that most of the laws for ascertaining, limiting and restraining this prerogative have been made within the compass of little more than two centuries past: from the Petition of Right in the third year of Charles the first, 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; 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, and by the many excellent provisions enacted under Charles the second, especially the abolition of military tenures, purveyance and pre-emption; by the Habeas Corpus Act, and by the Act to prevent the discontinuance of parliaments for above three years.

(*i*) See also, as to *naval coast volunteers*, 16 & 17 Vict. c. 73; as to the *coast guard*, 19 & 20 Vict. c. 83; as to the *Naval Medical Supplemental Fund Society*, 24 & 25 Vict. c. 108; and 26 & 27 Vict. c. 111; as to *Chatham Dockyards*, 24 & 25 Vict. c. 41; and as to *providing fortifications to protect dockyards*, &c., 25 & 26 Vict. c. 78; and as to *naval defences* generally, see 52 & 53 Vict. c. 8; and as to *national defences* generally, see 51 & 52 Vict. c. 31; and as to *imperial defences*, see 51 & 52 Vict. c. 32.

[And, again, (since the Revolution,) by the strong and emphatical words in which our liberties are asserted in the Bill of Rights and in the 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 royal pardon from obstructing parliamentary impeachments. Besides all this, if we consider how the crown is impoverished and stripped of all its antient revenues, so that it must greatly rely on the liberality of parliament for its necessary support and maintenance, we may perhaps be led to think that the balance is inclined pretty strongly to the popular scale; and that the executive magistrate has neither independence nor power enough left to form that check upon the lords and commons, which the founders of our constitution intended.

But, on the other hand, it is to be considered that every prince, in the first parliament after his accession, has by long usage a truly royal addition to his hereditary revenue settled upon him for his life. 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 monarchy is now in no danger of being overborne by either the nobility or the people. The instruments of power are not perhaps so open and avowed as they formerly were, and therefore are the less liable to jealous and invidious reflections; but they are not the weaker upon that account. For—not to speak of the patronage which is vested in different departments of the executive power with reference to the selection of our naval and military officers, and with reference to colonial appointments and to the judicial and other offices of the civil service—the placing in the hands of the crown of the entire collection and management of our vast public

[revenue has 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 officers of customs, and the multitude of dependents on the customs, in every port of the kingdom; the officers of excise and their numerous subalterns in every inland district; the surveyors, assessors and collectors of the taxes; the post-masters and their servants, planted in every town and upon every public road; the distributors of stamps, who are full as scattered and full as numerous; and a variety of other officers. All these are either mediately or immediately appointed by the crown, and removable at pleasure without any reason assigned; these, it requires but little penetration to see, must give that power, on which they depend for subsistence, an influence most amazingly extensive. To this may be added the frequent opportunities of conferring particular obligations on individuals, which will greatly increase this influence; and that over those persons whose attachment, on account of their wealth, is frequently the most desirable. All this is the natural, though perhaps the unforeseen, consequence of erecting our funds of credit, and, to support them, establishing our present perpetual taxes; the whole of which is entirely new since the Restoration in 1660; and by far the greatest part since the Revolution in 1688. 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.]

CHAPTER IX.

OF THE NOBILITY AND OTHER RANKS.

It has been shown in a former place, that the sovereign is the fountain of honour; it being a part of his prerogative to confer titles of honour (or, in the language of the law, *dignities*), and other personal distinctions, upon such of his subjects as may appear to deserve those marks of his royal favour (*a*). Among these dignities, the principal is that of the peerage, of which we had occasion to speak when the constitution of parliament was under discussion (*b*), the peerage or lords of parliament being then considered as a branch of the legislature. But, besides this, the peers constitute a distinct order of persons, individually elevated above the rest of their fellow-subjects by superior rank and privilege; and in this latter sense they are termed the *nobility* of the realm, as distinguished from the *commonalty*; the commonalty comprising all persons alike (whatever their difference of rank and station in other respects), who are not of the nobility or peerage,—there being, in a legal sense, but two general divisions of rank in this country, that of the peers (or nobles) and that of the commoners, including in the latter even the children of the nobility.

Firstly, then, as to the nobility or peerage.—It is to be observed, that all degrees of nobility are not of equal

(*a*) 4 Inst. 363.

(*b*) Vide sup. p. 327.

antiquity, those now in use among us being dukes, marquesses, earls, viscounts, and barons (*c*).

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 (*d*), and the title of Prince or Princess, which appertains exclusively to the issue of the sovereign not ranking as a degree of nobility. Among the Saxons, the Latin name of dukes, *duces*, is very frequent; and signified, as among the Romans, the commanders or leaders of their armies, whom in their own language they called heꝑeꞇoʒa (*e*); and in the laws of Henry the first (as translated by Lambard), we find them called *heretochii*. But after the Norman conquest, though the kings themselves continued for many generations *dukes* of Normandy, they did not honour many of their subjects with this title till the time of Edward the third; who 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, 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 (*f*).

2. A *marquess*, *marchio*, is the next degree of nobility. His office formerly (for dignity and office were at one time more generally in combination than at present) was 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

(*c*) Selden's Titles of Honour.

(*d*) Camden's Brit. tit. Ordines.

(*e*) This is apparently derived from the same root as the German **herzogen**, the antient appellation of dukes in that country. (See Seld. Tit. of Hon. pt. 2, c. 1, xxii.)

(*f*) Camden's Britan. tit. Ordines; Spelman, Gloss. 191.

[enemy's country. The persons who had command there, were called lords marchers, or *marquesses;* whose authority in Wales was abolished by the 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 the second, in the eighth year of his reign (*g*).

3. An *earl* is a title of nobility so antient that its original cannot clearly be traced out. Thus much seems tolerably certain: that among the Saxons there were *ealdormen*, *quasi* elder men, signifying the same as *senior* or *senator* among the Romans, and synonymous, or nearly so, with *eorls;* and that these were also called *schiremen*, because they had each of them the civil government of a several division or shire. In Latin, earls were called *comites* (a title first used in the empire), from being the sovereign's attendants: "*a societate nomen sumpserunt, reges enim tales sibi associant*" (*h*). After the Norman conquest they were for some time called *counts* or *countees*, from the French; but they did not long retain that name themselves, though their shires are from thence called counties to this day. The name of *earl* is now become a mere title, and he has nothing to do with the civil government of the county (*i*); which is now entirely devolved on his deputy, *i.e.*, the sheriff. In writs and commissions, and other formal instruments, the king, when he mentions any peer of the degree of an earl, usually styles him "trusty and well beloved *cousin*," an appellation as antient as the reign of Henry the fourth: who, being either by his wife, his mother, or his sisters, actually related or allied to every earl then in the kingdom, artfully and constantly acknowledged that connexion in all his letters and other public

(*g*) 2 Inst. 5.

(*h*) Bracton, l. 1, c. 8; Flet. l. 1, c. 5.

(*i*) The *military* superintendence of each county is committed by the crown to a *lord lieutenant*, as to whom vide sup. p. 582.

[acts: from whence the usage has descended to his successors, though the reason has long ago ceased.

4. The sheriff of the county being the earl's deputy, or *vice-comes*, that name 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 (*k*).

5. A *baron's* is the most general and universal title of nobility; for antiently every one of the peers of superior rank had also a barony annexed to his other titles (*l*).] At the time of the Conquest, indeed, the temporal nobility consisted only of earls and barons; and by whatever right the earls and the mitred clergy before that time might have attended the general council of the nation, it clearly appears that they afterwards sat in parliament in the character of barons only (*m*). [But it hath sometimes happened, that when a peer with a barony annexed to his title hath been raised to a new degree of peerage, in the course of a few generations the two titles have descended differently; one perhaps to the male descendants, the other to the heirs general; whereby the earldom or other superior title hath subsisted without a barony; and there are also modern instances where earls and viscounts have been created without annexing a barony to their other honours: so that now the rule doth not hold universally that all peers are barons. The original and antiquity of baronies have occasioned great inquiries among our English antiquaries. The most probable opinion seems to be that the barons were the same as the lords of manors, or other estates, holding of the king *in capite* (*n*). For it may be collected from King John's *Magna Charta*, that originally all lords or owners of estates holding under that tenure were called

(*k*) 2 Inst. 5.
(*l*) Ibid.
(*m*) Christian's Blackstone, vol. i. p. 398.
(*n*) Spelm. Glos. Baronia.

[barons, and 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 to summon only the principal tenants, called the greater barons, in person; leaving the smaller 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 (*o*). 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 a barony a mere title of honour, by conferring it on divers persons by his letters patent (*p*).

Having made this short inquiry into the original of our several degrees of nobility, we shall next consider the manner in which they may be created. The right of peerage seems to have been originally territorial: that is, annexed to lands, honours, castles, manors, and the like; the proprietors and possessors of which were, in right of those estates, allowed to be peers of the realm, and were summoned to parliament to do suit and service to their sovereign. And, when the land was alienated, the dignity passed with it as appendant. Thus the bishops still sit in the house of lords in right of succession to certain antient baronies annexed, or supposed to be annexed, to their episcopal lands (*q*): so also, in the eleventh year of Henry the sixth, the possession of the castle of Arundel was adjudged to confer on its possessor an earldom *by tenure* (*r*); of which mode of title to a peerage, there are several other examples on record (*s*). But afterwards,

(*o*) Gilb. Hist. of Exch. c. 3; Seld. Tit. of Hon. pt 2, c. 5, xxi.

(*p*) Co. Litt. 9 b; Seld. Jan. Angl. 2, § 66.

(*q*) Vide sup. p. 326.

(*r*) Seld. Tit. of Hon. pt. 2, c. 9, v.

(*s*) Cruise, Dig. vol. iii. p. 185. It is stated in the Fourth Report of the Lords' Committee on Peerages, p. 338, that there were then (in

[when alienations grew to be frequent, the dignity of peerage was confined (as a general rule) 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; and the alienation of his territorial possessions had no longer, except in the rare cases above referred to, the effect of transferring the peerage itself. And a peerage may now be created without connecting it even nominally with any particular locality (*t*); though it has remained usual in creating a man a peer to name him baron, earl, or the like, of some specified place.

[Peers are now created either by writ, or by patent: for those who claim by prescription must suppose either a writ or a patent made to their ancestors; though by length of time it is lost. The creation by writ, or the king's letter, is a summons to attend the house of peers, by the style and title of that barony which the king is pleased to confer; that by patent, is a royal grant to a subject of any dignity and degree of peerage. The creation by writ is the more 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 (*u*). And therefore the most usual, because the surest way, is to grant the dignity

1825) two dignities, that of Earl of Arundel and Baron of Abergavenny, which had always been claimed as dignities *by tenure*. Since that date, the question as to whether a barony could be claimed by tenure, was closely sifted in the case of the Berkeley Peerage (reported 8 House of Lords' Cases, p. 21); and, with reference to that claim, it was decided (26th February, 1861), that no legal right to be summoned to and sit in parliament can exist, at the present day, in any tenant for life or devisee of hereditaments, the possession of which conferred a barony in the reign of Henry 2. It was also observed (in the same case), that no *earldom* by tenure now exists,—that of Arundel having (as such) been put an end to by 3 Car. 1, c. iv.

(*t*) Cruise, Dig. vol. iii. p. 219.

(*u*) Whitelocke of Parl. ch. 114.

[by patent; which enures to a man according to the limitations thereof, though he never himself makes use of it (*x*). Yet it is frequent to call up the eldest son of a peer to the house of lords by a 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 the heirs general—that is, male and female—of his body (*y*), without any words to that purport in the writ (*z*). But in letters patent there must be words to direct the inheritance, else the dignity enures only to the grantee for life (*a*). For a man or woman may be created noble for their own lives, and the dignity not descend to their heirs at all (*b*).] A peerage, however,

(*x*) Co. Litt. 16 b.

(*y*) Cruise, Dig. vol. iii. p. 223; Devon Peerage case, 5 Bligh, N. S. 313; Lord Coke (Co. Litt. 9, 16), and after him Blackstone (vol. i. p. 401), says "to him and his *heirs:*" but this must be understood heirs *of the body;* for dignities created without words of express limitation, are not descendible to the heirs collateral. (See Wiltes Claim of Peerage, Law Rep., 4 H. of L. Ca. 126.)

(*z*) The mode of descent, however, may by express words in the writ of summons be confined to males. (Cru. Dig. vol. iii. p. 205.) And where the father's barony is limited by patent to him and the heirs male of his body, and his eldest son is called up to the House of Lords by writ with the title of this barony, such writ will not create a fee or a general estate tail, so as to make a female capable of inheriting the title, but upon the death of the father the two titles unite, or become one and the same. (See case of Barony of Sidney, Dom. Proc. 17th June, 1782.)

(*a*) Co. Litt. 9, 16.

(*b*) Accordingly letters-patent were issued conferring on the late Mr. Baron Parke (under the title of Lord Wensleydale) the dignity of baron *for life*. But the committee for privileges held (on the 22nd Feb. 1856) that such patent, though accompanied with the usual writ of summons, did not enable the grantee to sit and vote in the House of Lords. However, since that decision, there has been passed the 39 & 40 Vict. c. 59 (the Appellate Jurisdiction Act, 1876), by which (as amended by the 50 & 51 Vict. c. 70), every lord of appeal in ordinary appointed under the Act to aid the House of Lords in the hearing and determination of appeals, if he is not otherwise entitled to sit as a member of the

is usually conferred by the letters-patent on the grantee and the heirs male of his body (*c*); though it may be on the grantee and the heirs female of his body, or on him and the heirs general of his body (*d*). Or it may be made to descend to some particular heirs male,—as where it 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 (*e*). It may also be limited to the grantee and his heirs collateral as well as lineal; and if a peerage be granted to a man "*and his heirs male*," it will descend, in default of heirs male of his body, to his heirs male collateral (*f*). The right of primogeniture takes place between males in the descent of dignities; but it is otherwise as to females (*g*). For if a man holds a peerage to him and the heirs of his body, and dies, leaving only daughters, the dignity is in suspense or abeyance, and the sovereign may bestow it on which of them he pleases.

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

House of Lords, shall by virtue of his appointment be entitled during his life to rank as a baron, and to sit and vote in the House of Lords.

(*c*) Cru. Dig. vol. iii. pp. 218, 245; Devon Peerage case, 5 Bligh, N. S. 313; Wiltes Claim of Peerage, Law Rep., 4 H. of L. Ca. 126.

(*d*) It may be observed that where there is no charter or instrument of creation in existence, and nothing to show how the dignity is to descend, the *primâ facie* presumption of law is that it is descendible to the heirs male. (See Mar Peerage, Kellie's claim, 1 App. Ca. 1; and see the 48 & 49 Vict. c. 48, "An Act for the restitution of the *antient* dignity and title of Earl of Mar.")

(*e*) 1 Bl. Com. 401.

(*f*) Devon Peerage case, ubi sup. In a conveyance of *land*, the effect of such a limitation would be different; for, if the crown were the grantor, the grant would be *void* (Earl of Oxford's case, Jones, W. 105); and if the conveyance were between subject and subject and *inter vivos*, it would operate as a conveyance in fee simple; or if by devise, as an estate tail. (Vide sup. vol. I. p. 240.) It may be noticed here that a peerage cannot be limited so as to transfer the dignity, on the happening of a collateral event, from the existing peer and his heirs to a new holder. Such a clause in a patent is invalid. (See The Buckhurst Peerage case, 2 App. Ca. 1.)

(*g*) Cru. Dig. vol. iii. p. 244.

of the crown; both of which we have already considered. And first we must observe, that when accused of heinous crime, a peer of the realm is tried by his *peers*; for it has been said that the [great are always obnoxious to popular envy; and 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 Charta*, c. 29. In the case, however, of libel, perjury, conspiracy, and other misdemeanors, this rule is not observed, and a peer is tried by an ordinary jury in the court where the indictment is found (*h*). And it is said, that the privilege does not extend to bishops; who, though they are lords of parliament, and sit there by virtue of their baronies, which they hold *jure ecclesiæ*, are yet not ennobled in blood, and consequently not peers with the nobility (*i*). As to peeresses, there was no precedent for their trial in cases in which their lords would have been tried by their peers, till after Eleanor, Duchess of Gloucester, wife of 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 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 (*k*). If a woman, noble in her own right, marries a commoner, she still remains noble and shall be tried by her peers: but she communicates no rank to her husband (*l*). 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

(*h*) See 1 Bl. Com. p. 401, where it is observed that the privilege extends only to cases of *treason* and *felony*, et vide post, bk. VI.

(*i*) 3 Inst. 30, 31.

(*k*) Isabel Countess of Rutland's case, Moore, 769; 2 Inst. 50; 6 Rep. 3; Staundf. P. C. 215.

(*l*) Harg. Co. Litt. 326 b; 29 b, n. (1).

[gained, by marriage it is also lost (*m*). Yet if a duchess dowager marries a baron, she continues a duchess still; for all the nobility are *pares*, and therefore it is no degradation (*n*). And by courtesy, or the usage of society, all dowager peeresses, though afterwards married to commoners, are ordinarily addressed by their former title. Moreover, peers have some peculiar privileges annexed to their peerage, with reference to judicial proceedings (*o*). A peer sitting in judgment on his peers, gives not his verdict upon oath, like an ordinary juryman, but upon his honour (*p*); he used to answer also to proceedings in chancery upon his honour, and not upon his oath (*q*); but, when he is examined as a witness, either in civil or criminal cases, he must be sworn (*r*): for the respect which the law shows to the honour of a peer does not extend so far as to overturn a settled maxim, that *in judicio non creditur nisi juratis* (*s*). The honour of peers is, however, so highly esteemed by the law, that it has been made more penal to

(*m*) Dyer, 79; Co. Litt. 16.

(*n*) Co. Litt. 16 b; 2 Inst. ubi sup. Mr. Hargrave, in a note on the passage in Co. Litt., observes that it is laid down in Ow. 82, and Bend. 37, S. C., that she takes in such case the dignity of the second husband; and Mr. Cruise states, that, at the coronation of King George the third, the Duchess Dowager of Leeds, then the wife of Lord Portmore, claimed to walk as a duchess; but it was refused. (Cruise, Dig. vol. iii. p. 220.)

(*o*) As in respect of freedom from *arrest* in civil cases. (2 Hale, P. C. 195; Bac. Abr. Priv.) The privilege called *benefit of clergy*—(as to which vide post, bk. VI.)—extended to *peers*, free from the conditions with which it was accompanied in the case of lay commoners (1 Edw. 6, c. 12; and as to *peeresses*, Duchess of Kingston's case, 11 Harg. St. Tr. 264); but *benefit of clergy* was abolished altogether by 7 & 8 Geo. 4, c. 28; and peers are now, in respect of punishment for crimes, on the same footing with other subjects of the realm. (4 & 5 Vict. c. 22.)

(*p*) 2 Inst. 49.

(*q*) 1 P. Wms. 146.

(*r*) Meers *v.* Lord Stourton, Salk. 512. So, if a peer be examined as a witness in the high court of parliament, he must be sworn. Thus the Bishop of Oxford was sworn in the impeachment of Lord Macclesfield, and Lord Mansfield (then Lord Stormont) in that of Mr. Hastings. (Christian's Blackstone, vol. i. p. 401.)

(*s*) Earl of Lincoln's case, Cro. Car. 64.

[spread false reports of them, and certain other great officers of the realm, than of other men: such scandal being called by the peculiar name of *scandalum magnatum*, and subjected to peculiar punishments by divers antient statutes (*t*).] With respect to the dignity and privileges of peerage here mentioned, it is lastly to be observed, that they are not extended by the law to such persons as hold foreign titles of nobility, for such are in this country no more than commoners. But (since the Union with Scotland) all the peers of Scotland are peers of Great Britain with all attendant privileges, save only those belonging to a seat in the House of Lords, which are confined to the sixteen representative peers; and (since the Union with Ireland) all peers of Ireland, with the exception of such as are elected members of the House of Commons, have all the privileges of peerage—save only those belonging to a seat in the House of Lords, which are confined to the twenty-eight representative peers of that country. And here it is convenient to observe, that the peerage regarded as a dignity, (being the light in which we have been treating of it in this chapter,) presents the following varieties, that is to say:—Peerages are, first, such as in their creation were peerages of England; secondly, such as were peerages of the United Kingdom of Great Britain; thirdly, such as were peerages of the united peerages of Great Britain and Ireland; fourthly, such as were peerages of Scotland; fifthly, such as were peerages of Ireland: the dates of the first class being antecedent to the Union with Scotland in 1707; of the second class being subsequent to that event, and antecedent to the Union with Ireland in 1801; of the third class being subsequent to the union last-mentioned; of the fourth class being antecedent to the union with Scotland; of the fifth class being either antecedent to the Union with Ireland or subsequent; several Irish peerages having been created since that event

(*t*) 3 Edw. 1, c. 34; 2 Ric. 2, st. 1, c. 5; 12 Ric. 2, c. 11.

under a power for creating such peerages contained in the articles of the Irish Union.

[A peer cannot surrender or 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 Neville, Duke of Bedford, by Act of Parliament, on account of his poverty, which rendered him unable to support his dignity (*u*). But this is a singular instance, which serves at the same time, by having happened once, to show the power of parliament; and, by having happened but once, to show how tender the parliament hath been in exerting so high a power. It was once asserted, indeed, that if a baron wastes his estate, so that he is not able to support the degree, the king may degrade him (*x*); but it is expressly held by later authorities, that a peer cannot be degraded but by *Act of Parliament* (*y*).] If, however, a peer become a bankrupt, he was, by the Bankruptcy Act, 1869 (34 & 35 Vict. c. 50), disqualified thereby from sitting and voting in the House of Lords until his bankruptcy was determined: and so long as he was disqualified, no writ of summons should be issued to him; and the like disqualification is maintained in the Bankruptcy Act, 1883 (46 & 47 Vict. c, 52).

Secondly, the commonalty,—who, like the nobility, are divided into several degrees. But, as the lords, though different in rank, yet all of them are peers in respect of their nobility, so in the same sense, the commoners, though some are greatly superior to others, yet all are in law

(*u*) 4 Inst. 335. The preamble to the Act is remarkable: "Forasmuch as oftentimes it is seen, that "when any lord is called to high "estate, and hath not convenient "livelihood to support the same "dignity, it induceth great poverty "and indigence, and causeth oftentimes great extortion, embracery, "and maintenance to be had; to "the great trouble of all such "countries where such estate shall "happen to be; therefore," &c.

(*x*) Moore, 768.

(*y*) Earl of Shrewsbury's case, 12 Rep. 107; Knowle's case, 12 Mod. 56.

peers amongst themselves, in respect of their want of nobility (*z*).

[The first name of dignity, next beneath a peer, was antiently that of *vidames*, *vice-domini*, *vavasores* or *valvasors* (*a*): who are mentioned by our antient lawyers (*b*) as *viri magnæ dignitatis;* and Sir Edward Coke speaks highly of them. Yet they are now quite obsolete; and our legal antiquaries are not even agreed upon their original or antient office.

At the present time, therefore, the first personal dignity, after the nobility, is a *knight* of the order of St. George, or *of the Garter;* first instituted (in the opinion of Selden) by Edward the third, in the eighteenth year of his reign (*c*). Next (but not till after certain *official* dignities, including, among others, privy councillors, and the judges) follows a *knight banneret* (*d*). Who indeed, by statute 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 the first, in the tenth year of his reign (*e*). 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 (*f*). 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 (*g*). It was first instituted by King James the first, in the year 1611; in order to raise a competent sum for the reduction of the province of Ulster in Ireland (*h*); for which reason all baronets have the arms of Ulster

(*z*) 2 Inst. 29.

(*a*) Camden, Britan. tit. Ordines.

(*b*) Bracton, l. 1, c. 8.

(*c*) Selden, pt. 2, c. 5, xl. citing Froissart, vol. i. c. 101.

(*d*) See the Table of Precedence, post, p. 611.

(*e*) Seld. Tit. of Hon. pt. 2, c. 11, iii.

(*f*) 4 Inst. 6.

(*g*) Re Carnac, 30 Ch. Div. 136.

(*h*) One hundred gentlemen advanced each one thousand pounds; for which this title was conferred upon them.—2 Rap. 185 fo. (Christian's Blackstone, vol. i. p. 403.)

[superadded to their family coat (*i*).] Next follow *knights of the Bath;* an order instituted by King Henry the fourth, revived by King George the first, and newly regulated in the present reign (*k*). They are so called from the ceremony, formerly observed, of bathing the night before their creation. [The last of these inferior nobility are *knights bachelors* (*l*); the most antient, though the lowest, order of knighthood amongst us: for we have an instance of King Alfred's conferring this order on his son Athelstan (*m*). 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 (*n*). Hence some derive the usage of knighting, which has prevailed all over the western world, since its reduction by colonies from those northern heroes. Knights are called in Latin *equites aurati: aurati*, from the gilt spurs they wore; and *equites*, because they always served on horseback; for it is observable (*o*), that almost all nations call their knights by some appellation derived from a horse (*p*). They are also

(*i*) The arms of Ulster are, a hand *gules*, or a bloody hand, in a field *argent*. (Christian's Blackstone.)

(*k*) See London Gazette, 25 May, 1847; 16 Aug. 1850. The Order of the Bath is now divided into two divisions; one *military*, and the other *civil*.

(*l*) The most probable derivation of the word bachelor is from *bas* and *chevalier*, an inferior knight; and thence latinized into the barbarous word *baccalaureus*. (Ducange, Bac.) The lowest graduates in the universities are styled *bachelors*, and were, formerly, addressed with *sir* before their surname; as in Latin they are still called *domini*. It is somewhat remarkable, that whilst this feudal word has long been appropriated to single men, another feudal term of higher dignity, viz. *baron*, should, in legal language, be applied to those who are married. (Christian's Blackstone.)

(*m*) Wil. Malms. lib. 2.

(*n*) Tac. de Morib. Germ. 13.

(*o*) Camd. Brit. tit. Ordines; Co. Litt. 74.

(*p*) It does not appear that the English word *knight* has any reference to a horse: for knight, or cnihz

[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 amounted to 20*l. per annum*, —was obliged to be knighted, and to attend the king in his wars, or else pay a fine for his non-compliance (*q*). 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 by the recent example of Queen Elizabeth. But it was by the statute 16 Car. I. c. 20, abolished; and this kind of knighthood has since that time fallen into great disregard.

These, Sir Edward Coke says, are all the names of *dignity* in this kingdom, esquires and gentlemen being only names of *worship* (*r*); but before these last, the heralds rank all colonels, serjeants at law, and doctors in the three learned professions (*s*).

in the Saxon, signified *puer*, *servus*, or attendant. (See Seld. Tit. Hon. pt. 2, c. 5, xxxiii.; Christian's Blackstone, vol. i. p. 464.)

(*q*) See St. de Milit., 1 Edw. 2; 2 Inst. 594.

(*r*) 2 Inst. 667. The various orders or decorations granted by the Queen as Empress of India appear to be also mere names of *worship*. Sed quære.

(*s*) The Table of Precedence as given by Blackstone (vol. i. p. 405) is here subjoined, but its authority in some points at the present day can scarcely be relied upon as conclusive, except with regard to those which are marked * (who are entitled to the rank there allotted them, by statute 31 Hen. 8, c. 10); those marked † (who are entitled by statute 1 W. & M. c. 21); and those marked ‖ (who are entitled by letters patent, 9, 10, and 14 Jac. 1). As to those marked,‡ their place depends on antient usage and custom; and the following authorities may be consulted:—Seld. Tit. of Hon.; Camden's Britannia, tit. Ordines; Milles's Catalogue of Honour, edit. 1610; and Chamberlayne's Present State of England. It is to be observed, moreover, that the Judicature Acts, 1873 to 1884, contain provisions with regard to the rank and precedence among themselves of the judges of the *Court of Appeal* and of the *High Court of Justice* and of certain officers therein. (See 36 & 37 Vict. c. 66, s. 11; 38 & 39 Vict. c. 77, s. 6; 40 & 41 Vict. c. 9; 42 & 43 Vict. c. 78; 44 & 45 Vict. c. 68; and 47 & 48 Vict. c. 61.)

[Esquires and gentlemen are confounded together by Sir Edward Coke; who observes, that every esquire is

TABLE OF PRECEDENCE.

* The king's children and grandchildren.
* ——— brethren.
* ——— uncles.
* ——— nephews.
* Archbishop of Canterbury.
* Lord Chancellor or Keeper, if a baron.
* Archbishop of York.
* Lord Treasurer,
* Lord President of the Council,
* Lord Privy Seal,
* Lord Great Chamberlain,
* Lord High Constable,
* Lord Marshal,
* Lord Admiral,
* Lord Steward of the Household,
* Lord Chamberlain of the Household,

above all peers of their own degree. — if barons.

* Dukes.
* Marquesses.
‡ Dukes' eldest sons.
* Earls.
‡ Marquesses' eldest sons.
‡ Dukes' younger sons.
* Viscounts.
‡ Earls' eldest sons.
‡ Marquesses' younger sons.
* Secretary of State, if a bishop.
* The Bishop of London.
* ——— Durham.
* ——— Winchester.
* Bishops.
* Secretary of State, if a baron.
* Barons.
† Speaker of the House of Commons.
† Lords Commissioners of the Great Seal.
‡ Viscounts' eldest sons.
‡ Earls' younger sons.
‡ Barons' eldest sons.
‖ Knights of the Garter.
‖ Privy Councillors.
‖ Chancellor of the Exchequer.
‖ Chancellor of the Duchy.
‖ Chief Justice of the King's Bench (or of England).
‖ Master of the Rolls.
‖ Chief Justice of the Common Pleas (now obsolete).
‖ Chief Baron of the Exchequer (now obsolete).
The Judges [and Barons of the Coif].
‖ Knights Bannerets, royal.
‖ Viscounts' younger sons.
‖ Barons' younger sons.
‖ Baronets.
‖ Knights Bannerets.
‡ Knights of the Bath.
‡ Knights Bachelors.
‖ Baronets' eldest sons.
‖ Knights' eldest sons.
‖ Baronets' younger sons.
‖ Knights' younger sons.
‡ Colonels.
‡ Serjeants-at-law.
‡ Doctors.
‡ Esquires.
‡ Gentlemen.
‡ Yeomen.
‡ Tradesmen.
‡ Artificers.
‡ Labourers.

N.B. Married women and widows are entitled to the same rank among each other as their husbands would respectively have borne between themselves, unless 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.

[a gentleman (*t*), and a gentleman is defined to be one *qui arma gerit*, who bears coat armour, the grant of which adds gentility to a man's family; in like manner as civil nobility, among the Romans, was founded in the *jus imaginum*, or having the image of one ancestor at least who had borne some curule office. It is indeed a matter somewhat unsettled, what constitutes the distinction, or who is a real *esquire*; for it is not an estate, however large, that confers this rank upon its owner (*u*). Camden, who was himself a herald, distinguishes esquires the most accurately: and he reckons up four sorts of them (*x*),—1. The eldest sons of knights, and their eldest sons, in perpetual succession (*y*); 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* (*z*); 3. Esquires created by the king's letters-patent, or other investiture, and their eldest sons (*a*); and, 4. Esquires by virtue of their offices; as justices of the peace, and others who bear any office of trust under the crown, and who are named esquires in their commission or appointment (*b*). To these, however, may be added barristers-at-law (*c*); and the esquires of knights of the Bath, each knight constituting three at his installation; and all foreign peers. For not only these, but the eldest sons of peers of Great Britain (though

(*t*) 2 Inst. 668.

(*u*) See Perrins *v.* The Marine and General Travellers' Insurance Company, 2 Ell. & Ell. 317.

(*x*) 2 Inst. ubi sup.

(*y*) Ibid. 667.

(*z*) Gloss. 43.

(*a*) The creation of esquires by way of investiture has long been disused. When so created, they used to be invested *calcaribus argentatis*, to distinguish them from the *equites aurati*. In the Life of Chaucer, we are told that he was created *scutifer* to Edward the third. Scutifer is the same as armiger; and our word *esquire* is derived from *scutum*, or the French *escu*, a shield. (Christian's Blackstone, vol. i. p. 406.)

(*b*) See Talbot *v.* Eagle, 1 Taunt. 510.

(*c*) R. *v.* Brough, 1 Wils. 244. It is stated in Blount's Law Dict. and Glossary, that barristers were named *esquires* in the Acts for poll-money.

[frequently titular lords), are only esquires in the law, and must be so named in all legal proceedings (*d*). As for *gentlemen*, says Sir Thomas Smith, 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 (*e*). 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 the law requires one that is *probus et legalis homo* (*f*).

The rest of the commonalty are *tradesmen*, *artificers*, and *labourers*; and as to these (as well as others) it was provided by the statute 1 Hen. V. c. 5, that they must be styled by the name and addition of their estate, degree or mystery, and the place to which they belong, or where they have been conversant, in all *indictments* or other legal proceedings on which process of outlawry might 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;] but no indictment (under the law as it now stands) is insufficient for want of, or by reason of any imperfection in, the addition of a defendant (*g*).

(*d*) 3 Inst. 30; 2 Inst. 667.

(*e*) Commonw. of Eng. b. 1, c. 20.

(*f*) 2 Inst. 668.

(*g*) Vide post, bk. VI.

CHAPTER X.

OF MAGISTRATES AND OTHER PUBLIC OFFICERS.

[It will be recollected that we distinguished magistrates into supreme and inferior or secondary (*a*); and having now considered the former, we proceed to inquire into the rights and duties of the latter, that is to say, the rights and duties of the principal subordinate magistrates and officers. But in this inquiry, we shall not be called upon to investigate the powers and duties of her Majesty's great officers or principal secretaries of state, because they have not any considerable share of magistracy conferred upon them, the power of commitment (which is vested in them) in order to bring to trial persons accused of treason, or other crimes against the state (*b*),] and the miscellaneous functions which they exercise by virtue of certain modern statutes (*c*), not being of such a nature as to constitute them subordinate magistrates. Nor shall we, in this inquiry, treat of the office and authority of the lord chancellor, or of the judges of the High Court of Justice, or of the other courts of justice, because they will find a more proper place in a subsequent part of these Commentaries (*d*). But [the magistrates and officers, whose rights and duties it will be proper in this chapter to consider, are such as have a jurisdiction and authority dispersedly throughout the kingdom;

(*a*) Vide sup. p. 318.

(*b*) Com. Dig. Officer, E. 8; Entick *v.* Carrington, 2 Wils. 275.

(*c*) 5 & 6 Will. 4, c. 38; 6 & 7 Vict. c. 34, ss. 5, 7, &c.

(*d*) Vide post, bk. v. c. v.

[and these are principally *sheriffs*, *coroners*, *justices of the peace*, and *constables*.]

And we shall firstly remark on the nature of *offices* in general, which are a species of incorporeal hereditament; but they are not (unless they concern the realty) in the nature of tenements (*e*). An office has been defined as consisting in the right to exercise a public or private employment (*f*); but we here use the word in its more limited and usual sense, comprising employment only of a public nature—such as entitles a man to act in the affairs of others, without their appointment or permission (*g*). The right of nomination to an antient office belongs, in most cases, to the crown; in some, to a subject; and new offices may be created by the crown; but not such as are contrary to the constitution, or prejudicial to the public (*h*). In some instances offices are granted for life, or during good behaviour; in others, during pleasure only; and in the case of particular offices, where no inconvenience can arise to the public from such a mode of limitation, they may be granted to a man and his heirs, or to a man for life, remainder over, or for a term of years; and if they relate to the realty, they are capable even of being entailed (*i*). They are either offices of trust (comprising those which are judicial), or offices merely ministerial,—the former, unless by special enactment, not being capable of being performed by deputy, although the latter usually may (*k*); and a judicial office cannot be granted in reversion (*l*); but a ministerial office, being capable, in general, of performance by deputy, may be so granted (*m*).

By the 5 & 6 Edw. VI. c. 16, no judicial office, or other

(*e*) Co. Litt. 20 a.

(*f*) 2 Bl. Com. 36.

(*g*) R. *v.* Burnell, Carth. 478.

(*h*) Bac. Ab. Offices, B.

(*i*) Co. Litt. 20 a.

(*k*) Com. Dig. Officer, D.; R. *v.* Ferrand, 3 B. & Ald. 260; R. *v.* Gravesend, 2 B. & C. 602; R. *v.* Roberts, 3 Ad. & El. 771.

(*l*) Co. Litt. 3 b; Com. Dig. Officer, B. 14.

(*m*) Com. Dig. Officer, B. 13; 11 Rep. 4.

office of trust, can as a general rule be sold under pain of disability to hold the same; for the law presumes that he who buys an office will, by bribery, extortion, or other unlawful means, make a profit by his purchase, to the manifest detriment of the public (*n*); and by 49 Geo. III. c. 126, it is made highly penal to buy, sell, or negotiate for the sale or purchase of, any such office, or of any other of the public appointments in that Act specified (*o*).

Where the right of appointment to an office is in the crown, the appointment (at least in the case of the more important offices) is made by letters patent; and, to render the appointment complete, the grantee in some cases must be *sworn in*; for, in addition to the oath of allegiance, an "official" oath (well and truly to serve her Majesty) is required to be taken by the chief officers of state (*p*); and a "judicial" oath (to do right to all manner of people, after the laws and usages of this realm, without fear or favour, affection or ill will) is administered to every judge of the Court of Appeal or of the High Court of Justice (*q*),

(*n*) Certain offices in the Queen's Bench and Common Pleas were saleable by the chief justices of those courts respectively till the year 1825, when this custom was discontinued by 6 Geo. 4, cc. 82, 83.

(*o*) Vide post, bk. VI. It may be here remarked, that under certain statutes (termed by 38 & 39 Vict. c. 16, "The Army Brokerage Acts"), the system so long prevailing, under which officers in the army *purchased* their commissions, was clearly illegal, though the practice was openly carried on and sanctioned by the issue of a royal warrant, regulating the prices at which such commissions might be purchased, sold, or exchanged. But in the year 1871, it was resolved by parliament, that this system should no longer prevail; and accordingly an Act (34 & 35 Vict. c. 86, amended by 38 & 39 Vict. c. 16, called "The Regimental Exchange Act, 1875") was passed, by which (the regulations above referred to having been first cancelled and determined by royal warrant) it was provided, that no person should be punished for any offence committed in relation to the purchase, sale, or exchange of any commission having a regulation price, prior to 1st November, 1871; and that proper compensation should be awarded to all officers holding saleable commissions at that date.

(*p*) 31 & 32 Vict. c. 72 ("The Promissory Oaths Act, 1868").

(*q*) 38 & 39 Vict. c. 77, s. 5.

and to all justices of the peace; and special oaths are taken by privy councillors, by archbishops and bishops, by peers, baronets and knights, by recruits in the army and marines; and on the acceptance of certain inferior offices, for which oaths were formerly required (*r*), the grantees are called upon to make a solemn declaration to faithfully perform the duties of the same (*s*).

An office, after it has been granted and duly entered upon, may be forfeited by misconduct; and such misconduct may either consist in neglecting, ceasing, or refusing to perform the duties, (such neglect being by Lord Coke termed *non-user*,) or in an improper use of the power entrusted (as in the case of a gaoler voluntarily permitting a prisoner to escape), which he calls *abuser* (*t*): and it is also laid down in the books, that where incompatible offices are granted, the first becomes in some cases void, in others voidable only; and that the grant of an office is also void, if made to a person incapable, from his position, to perform its duties with impartiality (*u*).

Lastly, it is to be observed, that though offices conferred by the sovereign are in general vacated on the demise of the crown, an exception was made by statute in favour of the *judges*, whose commissions were continued by 1 Geo. III.

(*r*) This was, in particular, required by the Act passed in the year 1714, "for the security of his Majesty's person and government," viz. the 1 Geo. 1, st. 2, c. 13; which required certain oaths to be taken within six months after accepting any office, on peril of incurring its loss, as well as other disabilities and forfeitures. But every year an act of indemnity used to pass to relieve from forfeiture such persons as had omitted to qualify. (See Lord Mahon's Hist. of Eng. vol. i. p. 374.) And all these requirements were swept away by 29 & 30 Vict. c. 22; 30 & 31 Vict. c. 62; and the 31 & 32 Vict. c. 72.

(*s*) 31 & 32 Vict. c. 72, ss. 5, 6, 12.

(*t*) Co. Litt. 233 a; Bac. Ab. Office, M. Persons having offices or employments in the public service, are frequently required to give security by means of sureties for the due performance of their duties. (See 38 & 39 Vict. c. 64, "The Government Offices Security Act, 1875.")

(*u*) Com. Dig. Officer, B. 6; Arkwright *v.* Cantrell, 7 Ad. & El. 565; R. *v.* Patteson, 4 B. & Ad. 9.

c. 23, notwithstanding that event (*x*); and, as we have seen (*y*), a variety of other offices are also in that event continued by various statutes for a period of six months longer.

To return now to the particular officers enumerated at the outset;

I. And, firstly, the *Sheriff*.—[The sheriff is an officer of very great antiquity in this kingdom, his name being derived from two Saxon words, ꝑcıꝑe ȝeꝑeꝑa, the reeve, bailiff, or officer of the shire. He is called in Latin *vice-comes*, as being the deputy of the earl or *comes;* to whom the custody of the shire is said to have been committed at the first division of this kingdom into counties; but the earls, becoming in process of time, by reason of their high employments and attendance on the king's person, unable to transact the business of the county, the burden thereof was laid on the sheriff (*z*). So that now the sheriff does all the king's business in the county: and is entirely independent of the earl, the crown committing *custodiam comitatûs* to the sheriff, and to him alone.

Sheriffs were formerly chosen by the inhabitants of the several counties: in confirmation of which it was ordained by the 28 Edw. I. c. 8, that the people should have the election of sheriffs in every shire where the shrievalty was not of inheritance. For antiently in some counties the sheriffs were hereditary (*a*); the City of London, also,

(*x*) This enactment has been in part repealed by 42 & 43 Vict. c. 59, as one which has either "ceased to be in force or become unnecessary."

(*y*) Vide sup. p. 391, n.

(*z*) Dalton Of Sheriffs, c. 1.

(*a*) A shrievalty of inheritance might descend on and be executed by a female; for example, the shrievalty of Westmoreland having been granted by King John to Robert de Veteripont and his heirs, it vested at one period in Anne, Countess of Pembroke; who exercised the office in person, and at the assizes at Appleby sat with the judges on the bench (see Harg. Co. Litt. 326). Afterwards this particular shrievalty came by descent to the Earl of Thanet; and on the death of that nobleman in 1849, without issue, it became a question

[having at one time the inheritance of the shrievalty of Middlesex vested in their body by charter (*b*). The reason of these popular elections was assigned in the 28 Edw. I. c. 13, "that the commons might chuse such as would not be "a burthen to them;" but the popular elections under that Act, in all probability, required also the royal approbation (*c*); and growing tumultuous, they were put an end to by the statute 9 Edw. II. st. 2; which enacted that the sheriffs should thenceforth be assigned by the chancellor, treasurer, and the judges; and the statute of Cambridge (12 Ric. II. c. 2) ordained that all that should be called to name or make justices of the peace, *sheriffs*, and other officers of the king, should 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 should

whether the office passed under a devise thereof in his will, or escheated to the crown; to remedy which inconvenience, all hereditary claims and title to the office of sheriff of Westmoreland, were by the 13 & 14 Vict. c. 30 abolished, and the crown was empowered to appoint as in other counties,—a provision which is continued in the Sheriffs Act, 1887 (50 & 51 Vict. c. 55), s. 31.

(*b*) The election of the sheriffs of London and Middlesex was granted to the citizens of London for ever by a charter of Henry the first, upon condition of their paying 300*l.* a year to the king's exchequer; and the Sheriffs Act, 1887, s. 33, recognized and continued this right of election; but the Local Government Act, 1888 (51 & 52 Vict. c. 41), s. 46, has now provided that the Queen (and not the city) shall appoint the sheriff of Middlesex; and (by sect. 40) that the Queen shall appoint the sheriff for the county of London created by that Act, and that (with the consent of the city) such sheriff may exercise his jurisdiction in the city also; and (by sect. 41) that the city sheriffs shall have no jurisdiction except in the city. In the year 1799, the corporation of London made a bye-law imposing a fine of 400*l.* upon every person who, being elected, should refuse to serve the office of sheriff. (Evans *v.* The Chamberlain of London, 2 Burn, E. L. 185.) As to the shrievalty of London and Middlesex, see also 1 Man. & Gr. 544, n.; and Pulling's Customs of London, 134.

(*c*) Blackstone (vol. i. p. 340), assigns as his reason for this belief, that in the Gothic constitutions, in the election of the sheriffs, the people (*incolæ territorii*) chose twelve electors, who nominated *three* persons, *ex quibus rex unum confirmabat;* and that such election required confirmation by the king. He cites Stiern. De Jure Goth. l. i. c. 3.

[judge to be the best and most sufficient (*d*). And the custom ever since the time of Fortescue (*e*), who was chief justice and chancellor to Henry the sixth, was that all the judges, together with the other great officers and privy councillors, should meet in the Exchequer (*scil.*, Queen's Bench Division of the High Court of Justice) (*f*) on the morrow of St. Martin,—and then and there the judges should propose three persons for each county to be reported (if approved of) to the king, who afterwards should appoint one of them to be sheriff (*g*).] But the ceremony above described was not observed upon the *occasional* appointment of a sheriff, as on the death of an existing officer; for in such case the appointment was the mere act of the crown (*h*),—the appointment of such *pocket* sheriff (as he was called) being, however, of questionable legality (*i*). [And though in one case it was laid down that Queen Elizabeth might, by her prerogative, make a sheriff without the election of the judges, *non obstante aliquo statuto in contrarium* (*k*), yet this was afterwards adjudged bad law, the doctrine of *non obstante*, which sets the prerogative above the law, having been effectually demolished by the Bill of Rights (*l*).] And under the Sheriffs Act, 1887 (*m*), s. 6, the annual appointment of Sheriffs is made at the Royal Courts of Justice on the 12th day of November in every year, in the manner heretofore in use, and by the same high officers (or two of them) together with the judges (or two of them); and by the same Act, in continu-

(*d*) See also 14 Edw. 3, st. 1, c. 7; 23 Hen. 6, c 9; 21 Hen. 8, c. 20; 24 Geo. 2, c. 48, s. 12; 36 & 37 Vict. c. 66, s. 96.

(*e*) De Leg. c. 24.

(*f*) 44 & 45 Vict. c. 68, s. 16.

(*g*) See 24 Geo. 2, c. 48, s. 12, prior to which Act the judges met for this purpose on the morrow of *All Souls*.

(*h*) By 8 & 9 Vict. c. 11, the manner of assigning and appointing sheriffs in *Wales* was made the same as in England,—a provision continued by the Sheriffs Act, 1887, s. 31.

(*i*) 1 Bl. Com. p. 342.

(*k*) Dy. 225, 226.

(*l*) Bl. Com. ubi sup.; 2 Inst. 559.

(*m*) 50 & 51 Vict. c. 55.

ance of a similar provision in 3 & 4 Will. IV. c. 99, it is provided, that whenever any person shall be duly pricked or nominated to be sheriff of any county the same shall be forthwith notified in the London Gazette, and a warrant made out and signed by the clerk of the privy council, and transmitted by him to the person so appointed, and the appointment of sheriff so made is to be of the same effect as if made by patent under the great seal; and a duplicate of the warrant is within ten days from the date thereof to be transmitted by the clerk of the privy council to the clerk of the peace for the county,—the counties of Cornwall, Lancaster, and Middlesex being exempted as before. And the sheriff continues in office until his successor is duly and fully appointed; and in case of his dying within the term of his office, the under sheriff takes his place and acts as *occasional* sheriff (*n*).

[Sheriffs, by virtue of several old statutes, were declared to continue in office for one year, and no longer (*o*); nevertheless, they held office during the king's pleasure (*durante bene placito*) (*p*), as indeed the form of their appointment expressed (*q*). Their office determined therefore on their death, or by the expiration of the year of office, whichever event first happened; and formerly it determined also on the demise of the crown, but it is not now determined by that event (*r*). And by the Sheriffs Act, 1887, s. 5, continuing a like provision in 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, if there be other sufficient person within the county.] But, with this qualification, the discharge of the office is compulsory upon the party chosen, and if he refuses to serve,

(*n*) 50 & 51 Vict. c. 55, s. 25.

(*o*) By Sheriffs Act, 1887, s. 28, continuing a like provision contained in 3 & 4 Will. 4, c. 99, s. 7, the sheriff, on expiration of his office, delivers to his successor a correct list of all prisoners in his custody, and of all unexecuted process.

(*p*) 4 Rep. 32 b.

(*q*) Dalt. Of Sheriffs, 8.

(*r*) 50 & 51 Vict. c. 55, s. 3.

having no legal exemption, he is liable to indictment or information (*s*); and it is said that no man can be exempt from this office but by Act of Parliament or letters patent, though, on the other hand, there are several causes of *disability* mentioned in the books (*t*).

Also, by the Sheriffs Act, 1887, s. 4, continuing a like provision contained in 14 Car. II. c. 21, no person shall be assigned for sheriff unless he have sufficient lands within the same county to answer the king and his people: and, this is the only qualification required by statute for the office. That it was the intention, however, of our ancestors that the lands of a sheriff should be considerable, appears from their having this provision frequently repeated, and that on the occasions when they obtained a confirmation of *Magna Charta* and their most valuable liberties (*u*). As the sheriff may have the custody of men of the greatest property in the country, his own estate ought certainly to be large, that he may be above all temptation to permit them to escape, or to join them in their flight. In antient times, accordingly, this office was frequently executed by the nobility and persons of the highest rank in the kingdom, and not infrequently by bishops; though it is now committed, in general, to commoners, and exclusively to laymen (*x*).

The powers and duties of the sheriff are various, and are chiefly as follows:—

1. He is charged with duties, to which sufficient reference has been made in another place (*y*), in regard to parliamentary elections: and he is bound to hold a county court whenever the holding of such court is required for

(*s*) 9 Rep. 46; Harrison *v.* Evans, 2 Burn, E. L. 185; R. *v.* Woodrow, 2 T. R. 731; Mayor of Norwich *v.* Bury, 4 Beav. 2114.

(*t*) Watson on the Office and Duty of a Sheriff, p. 5.

(*u*) 9 Edw. 2, st. 2; 2 Edw. 3, c. 4; 4 Edw. 3, c. 9; 5 Edw. 3, c. 4.

(*x*) Christian's Blackstone, vol. i. p. 346 (n.), cites Spelm. Gloss. Vicecom.

(*y*) Vide sup. pp. 366, 376.

the purpose of an election or for any other specific purpose only, but not otherwise (*z*). To the sheriff also, formerly, by 3 & 4 Will. IV. c. 42, might be directed writs for the trial of disputed facts arising in actions in certain cases; but by 30 & 31 Vict. c. 142, s. 6, he was relieved from this burthen; he still remains charged, however, with the assessment of damages under writs of inquiry on interlocutory judgments, and also with the assessment of compensation in certain cases of compulsory purchase under the Lands Clauses Consolidation Act, 1845.

2. [In his character as keeper of the king's peace, both by common law and special commission, he is, during his office, the first man in the county, and superior in rank to any nobleman therein (*a*). He may apprehend and commit to prison all persons who break the peace, or attempt to break it; and he may bind any one in a recognizance to keep the peace; and he is bound, *ex officio*, to pursue and take all traitors, murderers, and other misdoers, and to commit them to gaol for safe custody. He is also to defend his county against any of the king's enemies when they come into the land; and for this purpose, as well as for keeping the peace and pursuing offenders, he may command all the people of his county to attend him; which is called the *posse comitatûs*, or power of the county (*b*); and this summons every person above fifteen years old, and under the degree of a peer, is bound to attend upon warning (*c*), under pain of fine and imprisonment (*d*).]

3. The sheriff is also bound to execute process issuing from the High Court of Justice; and to attend on the judges when they come into the county at the assizes (*e*);

(*z*) 50 & 51 Vict. c. 55, s. 18; The Queen *v.* Diplock, Law Rep., 4 Q. B. 549.

(*a*) 1 Roll. Rep. 237.

(*b*) Dalt. c. 95; 50 & 51 Vict. c. 55, s. 8.

(*c*) Lamb. Eiren. 315.

(*d*) 2 Hen. 5, st. 1, c. 8; 50 & 51 Vict. c. 55, s. 8.

(*e*) If necessary, the sheriff must attend with javelin men to keep order; but by 22 & 23 Vict. c. 32, the magistrates of the county may, if they think fit, direct order to be

and in these functions he is considered as an officer of the court. In civil causes, supposing the case to be such that an order issues for the arrest and imprisonment of the defendant under the provisions of the Debtors Act, 1869, in order to prevent his quitting England and so prejudicing the plaintiff in the prosecution of his action, he is to effect the arrest and take the prescribed security that the defendant will not quit England without leave of the court (*f*); and in any action, when the cause comes to trial, he must summon and return the jury: and when it is determined, he must see the judgment of the court carried into execution (*g*). And in all these matters he is liable, like other ministerial officers, to an action for the negligent or improper discharge of his duty, at the suit of the party grieved, *e.g.*, for an escape out of legal custody (*h*). In criminal matters, also, he returns the jury; and he is responsible for the due execution of the sentence of the court, when it consists in the imposition of a fine, or when it extends to the infliction of death (*i*).

[Owing to the nature of the duties last referred to, the sheriff, though, as we have seen, the principal conservator of the peace in his county, yet, by the express directions of the Great Charter (*k*), he, together with the constable,

kept at the Assizes by the county police instead; and these provisions are continued by 50 & 51 Vict. c. 55, s. 9.

(*f*) See 32 & 33 Vict. c. 62, s. 6.

(*g*) As to fees and poundage payable to the sheriff on the execution of civil process, see 29 Eliz. c. 4; 7 Will. 4 & 1 Vict. c. 55; 5 & 6 Vict. c. 98, s. 31; 50 & 51 Vict. c. 55, s. 20; Maybery *v.* Mansfield, 9 Q. B. 754; Wrightup *v.* Greenacre, 10 Q. B. 1; Burton *v.* Lawrence, 1 L. M. & P. 668.

(*h*) Formerly he was liable for the escape of a prisoner (Barrack *v.* Newton, 1 Q. B. 525; Gordon *v.* Laurie, 9 Q. B. 60); but this is now otherwise, as regards prisoners confined in any prison subject to the Prison Act, 1877 (40 & 41 Vict. c. 21, s. 31).

(*i*) 50 & 51 Vict. c. 55, s. 13; and as to his jurisdiction and responsibility in respect of prisoners under sentence of death, see 28 & 29 Vict. c. 126, and 40 & 41 Vict. c. 21, s. 32; and as to his duties in respect of persons arrested on civil process, see 50 & 51 Vict. c. 55, s. 14.

(*k*) Cap. 17.

[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;] and the Sheriffs Act, 1887, in continuance of these provisions, expressly enacts that he shall not hold pleas of the crown; and his tourn is abolished (*l*). [For it would be highly unbecoming, that the executioners of justice should be also the judges; should impose, as well as levy, fines and amercements; should one day condemn a man to death, and personally execute him the next. Neither may the sheriff act as an ordinary justice of the peace during the time of his office (*m*); for this would be equally inconsistent, the sheriff being in many respects the servant of the justices.]

It is also to be observed, that though the sheriff's authority extends in general over the whole of his county, yet there exist many *liberties* therein exempt from his jurisdiction (*n*),—these being districts in regard to which grants have been antiently made by the crown to individuals, conferring on them or their bailiffs the exclusive privilege (or franchise) of executing legal process therein (*o*); and when it became necessary to execute a writ within such a liberty, the course was to direct it to the sheriff of the county as in ordinary cases, but the *execution* of it belonged by law to the bailiff of the liberty,—unless, indeed, the writ was framed with a clause of *non omittas*, (as it was called,) specially authorizing the sheriff to enter (*p*),—which clause was usually inserted (*q*); and now, under the Sheriffs Act, 1887, s. 34, while these

(*l*) 50 & 51 Vict. c. 55, s. 18.

(*m*) 1 Mar. sess. 2, c. 8; 50 & 51 Vict. c. 55, s. 17.

(*n*) Any town being a county of itself was also exempt, in general, from the jurisdiction of the county within which it was situate, and had a sheriff of its own; and these exemptions are recognized by the Sheriffs Act, 1887, s. 36.

(*o*) 2 Bl. Com. 37; 5 Geo. 2, c. 27, s. 3.

(*p*) Dean *v.* Green, 8 P. D. 79.

(*q*) Judicature Act, 1875 (38 & 39 Vict. c. 77), App. F., Nos. 6, 7. By 13 & 14 Vict. c. 105, a *liberty* might be made to merge in the county jurisdiction.

liberties are recognized, it is provided that the lord of such liberty (in the Act called the bailiff of such franchise) shall either hold the office himself or appoint responsible bailiffs (for whom he shall be answerable) for the return and execution of writs, and the sheriff appoints a deputy at the lord's expense, the deputy residing in or near the franchise, and receiving and opening in the sheriff's name all writs the return or execution of which belongs to the bailiff of the franchise, and issuing to such bailiff the warrant required for the due execution of such writs; after which the bailiff of the franchise is made liable for the non-execution, mis-execution or insufficient return of the writs, and for all misconduct incident thereto; and in the case of the *non-return* of any such writ, the sheriff, on returning that he has delivered the writ to the bailiff, may be ordered to execute the writ notwithstanding the franchise, and to cause the bailiff to attend before the High Court of Justice and answer for his non-execution of the writ.

4. [It is, further, the sheriff's business as the king's bailiff to preserve the rights of the crown 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 was divided into bailiwicks, as that of England into counties (*r*). He must seize to the sovereign's use all lands devolved to the crown by escheat for want of heirs; must levy all fines and forfeitures; and must seize and keep all waifs, wrecks, estrays, and the like,—unless they be granted to some subject (*s*); and he was formerly charged also with collecting the king's rents within his bailiwick, but he has now been relieved of this duty (*t*).

To execute these various offices, the sheriff has under him many inferior officers,—an under-sheriff, a deputy,

(*r*) Fortesc. de Leg. c. 24.

(*s*) Dalt. c. 9. See 3 & 4 Will. 4, c. 99, and 50 & 51 Vict. c. 55, ss. 21, 22, as to the regulations for auditing the sheriff's accounts, &c.

(*t*) 3 & 4 Will. 4, c. 99, s. 12.

[and bailiffs (*u*); and these must neither buy, sell, nor farm their offices, on forfeiture of 500*l.* (*x*);] and the sheriff himself may not "*let to farm*" his county, or any part thereof (*y*). And by the Sheriffs Act, 1887 (50 & 51 Vict. c. 55), s. 23, continuing the like provision of 3 & 4 Will. IV. c. 99, it is provided that every sheriff shall, within one calendar month next after the notification of his appointment in the Gazette, by writing under his hand, nominate some fit person to be his *under-sheriff*, and transmit a duplicate thereof to the clerk of the peace of the county, to be by him filed among the records of his office; and by sect. 24 of the same Act, every sheriff is to appoint a sufficient *deputy* (having an office within a mile of the Inner Temple Hall) for the receipt of writs, granting warrants thereon, making returns thereto, and accepting all rules and orders made as to the execution of any process or writ directed to the sheriff; and the delivery of process to the deputy is, in law, delivery to the sheriff (*z*).

The under-sheriff usually performs all the duties of the office of sheriff (*a*); except a few where the personal presence of the high sheriff is necessary. But this inferior minister is only to a certain extent recognized by the law; which holds the sheriff himself responsible, in general, for all acts done or omitted by his under-sheriff; and even considers the latter, where the duty is improperly performed, as exempt from any action for negligence at the suit of the party grieved (*b*). It was enacted by the statute 42 Edw. III. c. 9, that no under-sheriff should abide in his office above one year; and if he did, by statute 23 Hen. VI. c. 7, he was made to forfeit 200*l.*, a very

(*u*) Blackstone (vol. i. p. 345) adds *gaolers*; but these are not now sheriff's officers (vide sup. p. 624, n. (*h*); and post, bk. VI.

(*x*) 3 Geo. 1, c. 15; 50 & 51 Vict. c. 55, s. 27.

(*y*) 50 & 51 Vict. c. 55, s. 19.

(*z*) Woodland *v.* Fuller, 11 A. & E. 859.

(*a*) 38 & 39 Vict. c. 69, s. 94.

(*b*) Cameron *v.* Reynolds, Cowp. 403. But as to the *criminal* liability of the under-sheriff and others, see sect. 29 of the Sheriffs Act, 1887.

large penalty in those early days; also, by 3 Geo. I. c. 15, s. 8, if the sheriff died, the under-sheriff continued in his office until a new high sheriff was appointed,—all which provisions are substantially repeated in the Sheriffs Act, 1887.

[Bailiffs or sheriffs' officers (*c*) are either *bailiffs of hundreds* or *bound* bailiffs, which latter are sometimes called *special* bailiffs. Bailiffs of hundreds are appointed over those respective districts, by the sheriffs, to collect fines therein and to summon juries; to attend the judges and justices at the assizes and quarter sessions; and to execute writs and processes in the several hundreds (*d*). But, as these are generally plain men, and not much inclined to this latter part of their office,—that of serving writs, making arrests, and levying executions,—it is now usual to join other bailiffs with them; who are generally mean persons, employed by the sheriffs on account only of their adroitness and dexterity in hunting and seizing their prey; and the sheriff being civilly responsible for the official misdemeanors of these bailiffs (*e*), they are therefore annually bound to him 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.] It is to be observed, however, that besides these officers the sheriffs may appoint, on the application of any party to a civil suit, persons named by such party, for the purpose of executing any particular process therein; and persons so appointed

(*c*) Besides the *sheriff's bailiffs*, there are also *bailiffs of liberties* (vide sup. p. 626); *bailiffs of county courts* (as to whom, see 51 & 52 Vict. c. 43, ss. 33—37, replacing 9 & 10 Vict. c. 95, ss. 31—34; 12 & 13 Vict. c. 101, s. 10; 13 & 14 Vict. c. 61, s. 4; 19 & 20 Vict. c. 108, ss. 14, 16, 55, 60, 83, 84; 30 & 31 Vict. c. 142, s. 30); and *bailiffs of inferior courts* generally (as to whom, see 7 & 8 Vict. c. 19; Braham *v.* Watkins, 16 Mee. & W. 77; Tarrant *v.* Baker, 14 C. B. 199).

(*d*) As to bailiffs' fees, see Walbank *v.* Quarterman, 3 C. B. 94.

(*e*) Drake *v.* Sykes, 7 T. R. 113; Barsham *v.* Bullock, 10 A. & E. 23.

are properly called *special* bailiffs; and whenever a party thus chooses his own officers, he is held to discharge the sheriff from all responsibility for what is done by them in the execution of the process (*f*).

[The vast expense which custom had introduced in serving the office of high sheriff at one period grew to such a burthen upon the subject, that by statute 14 Car. II. c. 21, no sheriff (not being one of the sheriffs of London or Middlesex, the sheriff of Westmoreland or the sheriff of a county corporate) should (under the penalty of 200*l.*) keep any table at the assizes except for his own family, or give any presents to the judges or their servants, or have more than forty men in livery; and on the other hand, for the due maintenance of the majesty of the law and of civil order and decency, he may not have less than twenty men in England or twelve in Wales.

II. The office of the *Coroner* is also a very antient one at the common law (*g*), having been indeed of equal antiquity with that of the sheriff (*h*), the coroner having been ordained with him to keep the peace, when the earls gave up the wardship of the county. He was called coroner, *coronator*, because he had formerly a great deal to do with pleas of the crown, or such wherein the sovereign was more immediately concerned (*i*); and in this light, the lord chief justice of the Queen's Bench (*scil.*, of England) was the principal coroner in the kingdom, and might (if he pleased) exercise the jurisdiction of a coroner in any part of the realm (*k*). But there were also particular coroners for every county in England,—usually four, but sometimes six, and sometimes a smaller number (*l*).

(*f*) Ford *v.* Leche, 6 Ad. & El. 699; Balson *v.* Meggat, 4 Dowl. 557; Alderson *v.* Davenport, 13 Mee. & W. 42; Botten *v.* Tomlinson, 16 L. J. (C. P.) 138.

(*g*) See Jervis on the Office and Duties of Coroners; Com. Dig. Officer, G.

(*h*) Mirrour, c. 1, s. 3.

(*i*) 2 Inst. 31; 4 Inst. 271.

(*k*) 4 Rep. 57.

(*l*) F. N. B. 163.

[The coroner used to be chosen by the freeholders at a county court held for that purpose, under the presidency of the sheriff or under-sheriff,—as by the policy of our antient laws the sheriffs themselves were chosen, as well as the conservators of the peace, and all other officers who were concerned in matters that affected the liberty of the people (*m*); and as were also the verderers of the forest, whose business it was to stand between the prerogative and the subject in the execution of the forest laws. For this purpose there was a writ at common law, *de coronatore eligendo* (*n*): in which it was expressly commanded the sheriff "*quod talem eligi faciat, qui melius et sciat, et velit, et possit, officio illi intendere.*"] This mode of election was continued by the Coroners Act, 1887 (*o*); but by the Local Government Act, 1888 (*p*), the writ *de coronatore eligendo* is now to be directed to the county council, and the county council are made the electors.

[In order to secure that the persons to be elected coroners should be of suitable estate, it was enacted by the statute of Westminster the first (*q*), that none but lawful and discreet knights should be chosen as coroners; and there was an instance in the fifth year of Edward the third, of one being removed from his office because he was merely a merchant (*r*); but it was subsequently thought sufficient (*s*), if a man had lands enough to be made a knight, that is, lands to the amount of 20*l.* per annum, a qualification very inadequate in modern times to the object.] And accordingly at one period it was made matter of complaint that the office of coroner was no longer undertaken by gentlemen of property; and that though formerly no coroners would condescend to be paid for serving their country, they now only desired to be chosen for the sake

(*m*) 2 Inst. 558.

(*n*) F. N. B. ubi sup.; 23 & 24 Vict. c. 116, s. 9.

(*o*) 50 & 51 Vict. c. 71, s. 11.

(*p*) 51 & 52 Vict. c. 41, s. 5.

(*q*) 3 Edw. 1, c. 10.

(*r*) 2 Inst. 32.

(*s*) F. N. B. 163; Com. Dig. Officer, G. 4.

of the perquisites (*t*). In our own times, however, the coroners have been in general persons of unquestionable respectability, and their position in life, in general, such as to cast no discredit on their employment; and by the Coroners Act, 1887, s. 12, it is required that every coroner for a county shall have land in fee sufficient in the county to answer to all manner of people.

By 7 & 8 Vict. c. 92 (*u*), coroners might be appointed for *districts* within counties, instead of for the county at large; and by that Act, as well as by 23 & 24 Vict. c. 116, provisions were made as to the manner of their election (*x*); and, by the latter statute, all former provisions for the remuneration of county coroners by fees, mileage, and allowances were repealed, and in lieu thereof they were to be paid by salary (*y*); and if any coroner refused or neglected to hold an inquest, it was made lawful for the attorney-general to apply to the Queen's Bench Division, for a rule calling on him to show cause why such inquest should not be held (*z*),—a provision which is continued by the Coroners Act, 1887, s. 6. With respect to the election of coroners, however, it is to be observed that the Crown (as regards the coroner of the household), and certain lords of franchises (as regards franchise-coroners), may appoint coroners for the household and for their respective liberties or franchises, by their own mere grant, and without election (*a*); and that by the Municipal Corporations Act, 1882 (45 & 46 Vict. c. 50), re-enacting a like provision contained in the Municipal Corporations Act, 1835 (5 & 6 Will. IV. c. 76), the council of every borough

(*t*) 1 Bl. Com. p. 348.

(*u*) This Act repealed 58 Geo. 3, c. 95; The Queen *v.* Lechmere, 16 Q. B. 284.

(*x*) The Queen *v.* Diplock, Law Rep., 4 Q. B. 549. As to the coroners for the counties of Durham and Chester, see 7 Will. 4 & 1 Vict. c. 64, and 23 & 24 Vict. c. 116, s. 7; and as to coroners for the county of Lancaster, see 50 & 51 Vict. c. 71, s. 39.

(*y*) 23 & 24 Vict. c. 116, s. 3; Ex parte Driffield, Law Rep., 7 Q. B. 207.

(*z*) 23 & 24 Vict. c. 116, s. 5.

(*a*) Ibid. s. 9.

having a separate court of quarter sessions was enabled to appoint a fit person to be coroner for the borough; but in other boroughs, the coroner for the county at large was to act (*b*); all which provisions as regards the Queen's Household (sect. 29), and as regards liberties or franchises (sects. 30—32), are continued by the Coroners Act, 1887; and as regards such boroughs (sect. 33), these provisions were continued by the Coroners Act, 1887, and have not been materially affected by the Local Government Act, 1888 (51 & 52 Vict. c. 41), s. 34, as regards *county boroughs* (*c*); but as regards other boroughs, the choice of the coroners has been given to the county council established by the last mentioned Act (*d*).

[The coroner used to be chosen for life; but might be removed by being made sheriff, that office being deemed incompatible with the other; or by the 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, or lives in an inconvenient part of, the county (*e*);] and by 25 Geo. II. c. 29, and 23 & 24 Vict. c. 116, s. 6, extortion, neglect, inability, or misbehaviour were also made causes of removal (*f*); and under the Coroners Act, 1887, s. 8, the lord chancellor may remove any coroner for inability or for misbehaviour; and by the same section of that Act, if a coroner is adjudged guilty of extortion or of corruption, or of wilful neglect of duty, or of misbehaviour in the discharge of his duty, the Court convicting him of same may remove him from his office, and a new coroner is in such case to be duly appointed in his place.

(*b*) The Queen *v.* Grimshaw, 16 Q. B. 747.

(*c*) *County boroughs* are the boroughs named in the Third Schedule to the Local Government Act, 1888; and are boroughs each of which on the 1st June, 1888, either had a population of not less than 50,000 or was a county of itself (sect. 31).

(*d*) 51 & 52 Vict. c. 41, ss. 36—38.

(*e*) F. N. B. 163, 164; Ex parte Parnell, 1 Jac. & Walk. 451.

(*f*) Re Ward, 30 L. J. (Ch.) 775.

By 6 & 7 Vict. c. 83, reciting that at the time of that Act passing, the coroners of boroughs and liberties were empowered by law to appoint *deputies* to act in their stead in certain cases, but that the coroners of counties were not,—it was provided that it should be lawful for every coroner of a county, city, riding, liberty or division, by writing under his hand and seal, to appoint from time to time a proper person (to be approved by the lord chancellor) to act for him as his deputy in the holding of inquests, or during his illness or absence from any lawful or reasonable cause (*g*); and by the Coroners Act, 1887, s. 13, every county coroner is enabled (subject to the approval of the lord chancellor) to appoint such a deputy (*h*); and by the Coroners Act, 1892 (*i*), every coroner (whether for a county or a borough) is both enabled and required to appoint a deputy, such deputy being some one approved by the mayor or chairman, as the case may be, of the council.

[The office of a coroner is in part judicial and in part ministerial, but principally *judicial;* and his office was in great measure ascertained by the statute 4 Edward I., *De officio coronatoris*, and consisted, first, and principally, in inquiring, when any person was slain, or died suddenly, or in prison, concerning the manner of his death.] When such a death happened, it was the duty of the township to give notice of it to the coroner (*k*), and the coroner thereupon issued a precept to the constables of the four, five, or six next townships, to return a competent number of good and lawful men to appear before him at such a place, to make an inquisition concerning the matter; and under the Coroners Act, 1887, s. 3, when the coroner is informed of a dead body lying within his jurisdiction, and that there is reasonable cause to suspect that the death was violent, or unnatural, or inexplicably sudden, or was in prison, or in any other proper case, he is to issue his warrant for the

(*g*) R. *v.* Perkin, 7 Q. B. 165.

(*h*) Ex parte Deputy Coroner for Middlesex, 6 H. & N. 501.

(*i*) 55 & 56 Vict. c. 56.

(*k*) R. *v.* Justices of Kent, 11 East, 230.

summoning of not less than twelve nor more than twenty-three good and lawful men to inquire as jurors touching the death. The inquisition of the coroner must be held before the coroner as presiding officer, and his court is a court of record (*l*). The jury—who must always have consisted, and who must still consist of twelve at least (*m*)—are to be sworn and charged by the coroner, to inquire how the party came by his death (*n*). [The inquisition must be had *super visum corporis*; and at the first sitting of the inquest, the coroner and jurors must view the body (*o*); for if the body be not found the coroner cannot sit, except by virtue of a special commission issued for the purpose (*p*). By the common law, he was also to sit at the very place where the death happened, though not necessarily at the same place where the body was viewed; for the jury might have adjourned elsewhere to see the body if found more convenient (*q*);] but latterly, by 6 & 7 Vict. c. 12, it was provided that the coroner only within whose jurisdiction the body was *lying dead*, should hold the inquest, though the cause of death might not have arisen within his jurisdiction; and that in the case of any body found dead in the sea, or in any creek, river, or navigable canal within the flowing of the sea, (where there should be no deputy coroner for the jurisdiction of the admiralty of England,) the inquest should be held only by the coroner having jurisdiction in the place where the body was first brought to land (*r*); and these provisions are continued by the Coroners Act, 1887, s. 7; and by the same Act, s. 40, for the purpose of inquests, every detached part of a county, riding or division, is to be deemed to be within that county, riding or division, by which the same is wholly surrounded,

(*l*) 4 Inst. 271; Garnett *v.* Ferrand, 6 B. & C. 626.

(*m*) 2 Hale's P. C. 59.

(*n*) Ibid. 60.

(*o*) 50 & 51 Vict. c. 71, s. 4.

(*p*) 2 Hale's P. C. 58; 2 Hawk. P. C. c. 9, s. 23; R. *v.* Ferrand, 3 B. & Ald. 260.

(*q*) 2 Hawk. P. C. c. 9, s. 25; R. *v.* Great Western Railway Company, 3 Q. B. 340.

(*r*) R. *v.* Hinde, 5 Q. B. 544; R. *v.* Ellis, 2 Car. & Kir. 470.

or where it is partly surrounded by two or more counties, ridings, or divisions, within that one with which it has the longest common boundary.

Upon this inquisition, the coroner and jury must hear such evidence as is offered, either on the part of the crown, or of the party suspected, and generally all evidence whatsoever tendered by anyone; and such evidence is to be given upon oath (*s*), or now on affirmation (*t*); moreover, by the Coroners Act, 1887, s. 21, continuing a like provision contained in the 6 & 7 Will. IV. c. 89, it is provided, that whenever it appears to the coroner that the deceased was attended at his death, or during his last illness, by any legally qualified medical practitioner, he may order the attendance of such practitioner as a witness at the inquest, and (where the deceased was not so attended) the attendance of any legally qualified medical practitioner, being at the time in actual practice in or near the place where the death happened; and the Coroners Act, 1887, s. 4, enables him to examine all persons whatsoever having knowledge of the facts whom he may think it expedient to examine. And by s. 21 of the last-mentioned act, he may also direct a *post mortem* examination, with or without an analysis of the contents of the stomach or intestines; provided, however, that if a sworn statement be made to him of the belief of the deponent, that the death was caused entirely or in part by the improper or negligent treatment of any person by him named, such person shall not be allowed to perform or assist at the *post mortem* examination; and further, that when it shall appear to the majority of the jury that the cause of death has not been satisfactorily explained by the witnesses in the first instance, they may name to the coroner, in writing, any other legally qualified practitioners, and require their attendance as witnesses, or for a *post mortem* examination, whether

(*s*) R. *v.* Scorey, 1 Leach, C. C. 50; 2 Hale's P. C. 62.

(*t*) 51 & 52 Vict. c. 46.

one shall have been previously performed or not. And by sect. 22 of the same Act, the medical witnesses are to be allowed proper remuneration for their attendance and trouble (*i.e.* one guinea for attending and two guineas for making a *post mortem* examination and attending); and on the other hand they forfeit 5*l.* for every neglect to obey an order for their attendance; but there is a proviso, that in case of death in any hospital, infirmary, or lunatic asylum, no remuneration shall be allowed to any person whose duty it was to attend the deceased, as a medical officer of the institution.

The verdict must be found with the concurrence of at least twelve of the jury (*u*), and there are provisions to prevent the inquisition from being quashed on account of merely technical defects (*x*). If by such verdict any person be found guilty of murder or other homicide, or of being an accessory to murder before the fact, the coroner is to commit him to prison for further trial, and he must certify the inquisition, under his own seal and the seals of the jurors, to the Queen's Bench, or to the next assizes (*y*); but, in general, an *indictment* is laid before the grand jury at the same assizes to which the coroner's inquisition is returned; and by 7 Geo. IV. c. 64, s. 4, the coroner is required to put in writing the evidence or so much thereof as shall be material (*z*); and by the same Act, and the Coroners Act, 1887, s. 5, he has authority to bind by recognizance all who know or declare any thing material touching such offence, to appear at the court at which the

(*u*) 2 Hale's P. C. 161; Lambert *v.* Taylor, 4 B. & C. 148. By 37 & 38 Vict. c. 88, ss. 16, 20, the coroner is directed, after the inquest, to inform the "registrar of deaths" for the district, of the finding of the jury as to the particulars of death required to be registered.

(*x*) 50 & 51 Vict. c. 71, s. 20, amending 6 & 7 Vict. c. 83; R. *v.* Evett, 6 B. & C. 247; In re Culley, 5 B. & A. 230; Ex parte Daws, 8 A. & E. 936.

(*y*) 33 Hen. 8, c. 12; 1 & 2 P. & M. c. 13; 50 & 51 Vict. c. 71, s. 5; 2 West. Symb. s. 310; Cromp. 264; Tremain's P. C. 621; Reg. *v.* White, 6 Jur. (N. S.) 750.

(*z*) Reg. *v.* McIntosh, 32 L. T. 146 (Q. B.).

trial is to be, either to prosecute or to give evidence against the party charged: and he is to certify and subscribe the evidence, and the recognizances, together with the inquisition, and is to deliver the same to the proper officer of the court in which the trial is to be, before or at the opening of the court (*a*); and by the Coroners Act, 1887, s. 5, amending the 22 Vict. c. 33, on a verdict of manslaughter, the coroner may, at his discretion, accept sufficient bail for the person so charged, for his appearance to take his trial at the next assize and general gaol delivery for the county. All expenses of the inquest (including the payments to the medical witnesses) are paid out of the county or borough rate (*b*).

It may be here noticed that, by the Capital Punishment Amendment Act, 1868 (31 Vict. c. 24), the coroner of the jurisdiction to which the prison belongs, wherein judgment of death is executed on any offender, is expressly required to hold an inquest on the body within twenty-four hours after the execution, and to inquire thereat into and ascertain the identity of the body, and whether the judgment was duly executed on the offender; and it is directed that at such inquest neither any officer of the prison, nor any prisoner confined therein, shall be a juror (*c*).

[Another branch of the coroner's office is to inquire concerning treasure trove, who were the finders, and where the treasure is, or whether any one be suspected of having found and concealed it (*d*); but although it was formerly

(*a*) In cases of suicide, on a verdict of *felo de se*, the coroner at one time directed the remains to be interred in some public highway, a stake being previously driven through the body; but under 4 Geo. 4, c. 52, a private interment in the usual churchyard or burial place was latterly directed instead; and the statute 45 & 46 Vict. c. 19, which has repealed the 4 Geo. 4, c. 52, contains provisions to the like effect.

(*b*) 7 Will. 4 & 1 Vict. c. 68, ss. 2, 3; 50 & 51 Vict. c. 55, ss. 25—27; 51 & 52 Vict. c. 41, s. 32.

(*c*) 31 Vict. c. 24, s. 5; 50 & 51 Vict. c. 55, s. 36.

(*d*) 50 & 51 Vict. c. 55, s. 36; 1 Bl. Com. 349; Att.-Gen. *v.* Moore, (1893) 1 Ch. 676.

[part of his duties to inquire also concerning shipwrecks, and to certify whether it was wreck or not, and who were in possession of the goods, he is now relieved of that duty, and also of the duty of holding inquests on royal fish (*e*); and he does not now take pleas of the crown, nor inquire as to the goods of felons, nor hold any inquest of felonies, save on inquisitions of death (*f*).

The coroner also, as conservator of the king's peace, becomes a magistrate by virtue of his appointment, having power to cause offenders to be apprehended, whether an inquisition has been found against them or not (*g*). But the *ministerial* office of the coroner is only as the sheriff's substitute in executing process; for when just exception can be taken to the sheriff for suspicion of partiality, as that he is himself interested in the action, or of kindred to either plaintiff or defendant,—the process must then be awarded to the coroner, and not to the sheriff (*h*).

III. The next species of subordinate magistrates that we are to consider, are *Justices of the Peace:* the principal of whom in each county is the *custos rotulorum*, or keeper of the records (*i*). 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; and 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;* and those that were so *virtute officii* still continue; but the latter sort are superseded by the modern justices.

The king is, by his office and dignity royal, the principal

(*e*) 50 & 51 Vict. c. 71, s. 44.

(*f*) Ibid.

(*g*) Jervis on Coroners, 2nd ed. p. 30.

(*h*) 4 Inst. 271; Coroners Act, 1887, s. 15.

(*i*) Harding *v.* Pollock, 6 Bing. 25; 4 Bl. C. 272.

[conservator of the peace within all his dominions (*k*); and may give authority to any other to see the peace kept, and to punish such as break it: hence it is called the king's peace. The lord chancellor or keeper; the lord treasurer; the lord high steward of England; the lord mareschal and the lord high constable of England (when any such officers are in being); and the judges of the High Court (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 (*l*). The coroner is also (as we have seen) a conservator of the peace within his own county (*m*); as is also the sheriff (*n*); and both of them may take a recognizance or security for the peace. Constables, tithing men, and the like, are also conservators of the peace within their own jurisdictions; and may apprehend all breakers of the peace, and commit them till they find sureties for keeping it (*o*).

Those that were, without any office, simply and merely conservators of the peace, either claimed that power by prescription (*p*); or were bound to exercise it by the tenure of their lands (*q*); 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*" (*r*). But when Queen Isabel, the wife of Edward the second, had contrived to depose her husband and to set up his son Edward the third in his place, the new king (or his mother in his name) sent writs to all the sheriffs in England,—the form of which is preserved by Thomas Walsingham,—giving a plausible account of the manner of his obtaining the crown (*s*), and withal commanding each sheriff that the

(*k*) Lambard, Eirenarch. 12.
(*l*) Lamb. 12.
(*m*) Britton, 3.
(*n*) F. N. B. 81.
(*o*) Lamb. 14.
(*p*) Lamb. 15.
(*q*) Ibid. 17.
(*r*) Ibid. 16.
(*s*) Hist. A.D. 1327.

[peace be kept throughout his bailiwick, on pain and peril of disinheritance, and loss of life and limb; and it was ordained in parliament, that, for the better maintaining and keeping of the peace in every county, good men and lawful, which were no maintainers of evil, or barretors, should be *assigned* to keep the peace (*t*),—which assignment was construed to be by the king's commission (*u*); and when shortly afterwards the statute 34 Edw. III. c. 1, gave them the power of trying felonies, they acquired the more honourable appellation of justices of the peace (*x*), and were uniformly thereafter *assigned* by the sovereign, and no longer chosen by the freeholders.

The justices of the peace for each county (and who are usually called the county justices) are selected on the recommendation of the lord lieutenant of the county (*y*), and are appointed by special commission under the Great Seal, the form of which was settled by the judges, in the year 1590, and continues with little alteration to this day (*z*); and according to such form, the appointment is of them all, jointly and severally, to keep the peace in the particular county named (*a*); and of any two or more of

(*t*) 1 Edw. 3, st. 2, c. 16; Lamb. 20.

(*u*) 4 Edw. 3, c. 2; 18 Edw. 3, st. 2, c. 2.

(*x*) Lamb. 23; 36 Edw. 3, c. 12; Hist. Eng. Law, by Reeves, vol. ii. p. 472; vol. iii. pp. 216, 242, 265, 290; vol. iv. p. 154; Harding *v.* Pollock, 6 Bing. 25.

(*y*) As to the justices in *boroughs* (whose office within their borough is for the most part similar to that of the county justices within their county), vide post, bk. IV. pt. III. ch. 1. As to the justices in and near the metropolis (and the commissioners and assistant commissioners, receiver, and constables of the *police* of the metropolis), see 2 & 3 Vict. c. 47, c. 71; 3 & 4 Vict. c. 84; 11 & 12 Vict. c. 42, s. 29; c. 43, s. 33; 17 & 18 Vict. c. 94 (Sched. B.); 19 & 20 Vict. c. 2; 23 & 24 Vict. c. 135; 24 & 25 Vict. c. 51, c. 124; 27 & 28 Vict. c. 55; 30 & 31 Vict. c. 39; 31 & 32 Vict. c. 67; 32 & 33 Vict. c. 67; 34 & 35 Vict. c. 35; 38 & 39 Vict. c. 48; 40 & 41 Vict. c. 58; 47 & 48 Vict. c. 17.

(*z*) Lamb. 43. See the form of the writ, ib. 36.

(*a*) As to the power of county magistrates to act in *counties corporate* and other places of exclusive jurisdiction within the county, see 9 Geo. 1, c. 7, s. 3; 11 & 12 Vict. c. 42, s. 6. As to their jurisdiction

[them to inquire of and determine offences in such county committed,—some particular justices, or one of them, being directed to be always included in such number, and no business to be done without their presence; the words of the commission running thus, *quorum aliquem vestrum* A. B. C. D. &c. *unum esse volumus*,—whence the persons so named are usually called justices of the *quorum*. And formerly it was customary to appoint only a select number of justices, eminent for their skill and discretion, to be of the *quorum*; but now the practice is to advance almost all of them to that dignity, naming them all over again in the *quorum* clause, except perhaps only some one inconsiderable person, for the sake of propriety; and no exception is now allowable, for not expressing in the form of the warrants, &c., that the justice who issues them is of the *quorum* (*b*). When any justice named in the commission intends to act under it, he sues out a writ of *dedimus potestatem* from the clerk of the crown in Chancery, empowering certain persons therein named to administer the oaths to him.] These oaths are the judicial oath and the oath of allegiance prescribed by the Promissory Oaths Act, 1868 (*c*), and (when required) an oath of qualification as to sufficiency of estate (*d*); and having taken these, the justice is at liberty to act; and it is to be observed, that justices of the peace act gratuitously, receiving neither salary nor fees (*e*). By virtue of the 51 & 52 Vict. c. 43, s. 17, continuing a like

in respect of *boroughs* within their county, see 5 & 6 Will. 4, c. 76, s. 11, and now 45 & 46 Vict. c. 50, s. 154. As to their power in *detached parts* of other counties, see 2 & 3 Vict. c. 82; 11 & 12 Vict. c. 42, s. 7.

(*b*) 26 Geo. 2, c. 27; 7 Geo. 3, c. 21; 4 Geo. 4, c. 27.

(*c*) 31 & 32 Vict. c. 72, s. 6.

(*d*) 18 Geo. 2, c. 20.

(*e*) On the other hand, in certain populous districts, viz., in the metropolis and elsewhere, it has become the practice to appoint paid (or *stipendiary*) magistrates, and generally with additional powers. (See 2 & 3 Vict. c. 71, s. 9; 11 & 12 Vict. c. 42, s. 29; c. 43, s. 33; 17 & 18 Vict. c. 20; 21 & 22 Vict. c. 73; 26 & 27 Vict. c. 97; and as to the *deputies* of such stipendiaries, see 32 & 33 Vict. c. 34.)

provision contained in 9 & 10 Vict. c. 95, s. 20, any judge of a county court, whose name shall be inserted in the commission for the county, may act as a justice of the peace without a property qualification.

[Touching the number and qualifications of these justices, it was ordained by the 18 Edw. III. st. 2, c. 2, that *two* or *three* of the best reputation in each county should be assigned to be keepers of the peace; but these being found rather too few for that purpose, it was provided by the 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, should be made justices in every county; and afterwards the number of justices, through the ambition of private persons, became so large, that it was thought necessary, by the 12 Ric. II. c. 10 and 14 Ric. II. c. 11, to restrain them, at first to six, and afterwards to eight in each county. But this rule is now disregarded, and the cause seems to be—as Lambard observed long ago—that the growing number of statute laws committed from time to time to the charge of justices of the peace, have occasioned also (and very reasonably) their increase to a larger number (*f*). 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. st. 1, c. 7, orders them to be of the most sufficient knights, esquires, and gentlemen of the law.] Also by the 2 Hen. V. st. 1, c. 4, and st. 2, c. 1, they must be resident in their several counties, though, by 11 & 12 Vict. c. 42, s. 5, any justice of the peace for two or more adjacent counties may act in any of them, if resident in one. And because, contrary to the antient statutes above mentioned, men of small substance had crept into the commission, whose poverty made them both covetous and contemptible, it was afterwards enacted by the 18 Hen. VI. c. 11, that no justice should be put in the commission, if he had not

(*f*) Lamb. 34.

lands to the value of 20*l.* per annum; and the value of money becoming subsequently greatly altered, it was provided, by 5 Geo. II. c. 18 and 18 Geo. II. c. 20, that every justice of the peace acting for a county (with certain exceptions), must have in possession, and for his own benefit, an estate, either legal or equitable, of freehold, copyhold, or customary tenure, in fee, for life, or such term of years as in the Acts specified, of the clear yearly value of 100*l.* (*g*); or else a reversion, or remainder expectant upon such lease as therein mentioned, with reserved rents of the clear yearly value of 300*l.* per annum (*h*). And by 38 & 39 Vict. c. 54, it has now been further provided that a person who, being of full age, has for the space of two years immediately preceding his appointment been the occupier of a dwelling-house assessed to the *inhabited house duty* at a value of not less than 100*l.*, and who shall have been rated to all rates and taxes in respect of such premises, and who is otherwise eligible, shall be deemed qualified to be appointed a justice of the peace for the county, riding, or division wherein such premises are situate. And it may be conveniently observed, that a justice who acts, without being properly qualified, acts at his own peril (*i*); nevertheless his acts are valid.

[As the office of these justices is conferred by the crown, so it subsists only during the crown's pleasure, and is determinable, 1. By the demise of the crown: but if the same justice is put in the commission by the succeeding sovereign, he shall not be obliged to sue out a new *dedimus* or to swear to his qualification afresh (*k*); nor, by reason of any new commission, to take the oaths more than once

(*g*) Blackstone says (vol. i. p. 353), that this qualification is almost an equivalent to the 20*l.* per annum required in Henry the sixth's time, and cites Bishop Fleetwood's *Chronicon Pretiosum*.

(*h*) Pack *v.* Tarpley, 9 A. & E. 468; Woodward *v.* Watts, 2 Ell. & Bl. 452. Official acts done by a justice not properly qualified, are not *void*; but he acts at his own peril (Margate Pier Company *v.* Hannam, 3 B. & Ald. 266).

(*i*) Margate Pier Company *v.* Hannam, 3 B. & Ald. 266.

(*k*) 1 Geo. 3, c. 13.

[in the same reign (*l*). 2. By express writ under the Great Seal, discharging any particular person from being any longer justice (*m*). 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 to the office of sheriff, which (as we have just seen) disqualifies during the year of shrievalty (*n*); but although it was once thought that if a man was named in any commission of the peace, and had afterwards a new dignity conferred upon him, that determined his office, seeing that he no longer answered the description in the commission: yet afterwards it was provided, that, notwithstanding the accession of such new title of dignity, the justice on whom it was conferred should still continue a justice (*o*).] 6. By becoming a bankrupt—it being provided by the Debtors Act, 1869, that any person assigned justice who shall be so adjudged, or who shall compound or arrange with his creditors under the Bankruptcy Act of that year, shall be incapable of acting as a justice until he has been newly assigned (*p*); and under the Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 32, a debtor adjudged bankrupt is disqualified from being appointed or acting as a justice of the peace, until either his adjudication is annulled, or he obtains his discharge with a certificate that his bankruptcy was caused by misfortune, not by misconduct.

[The power, office, and duty of a justice of the peace depend on the commission, and on the several statutes which have created objects of his jurisdiction. The commission, first, empowers him to conserve the peace, and

(*l*) 7 Geo. 3, c. 9.
(*m*) Lamb. 68.
(*n*) 1 Mar. sess. 2, c. 8.
(*o*) 1 Edw. 6, c. 7.
(*p*) 32 & 33 Vict. c. 62. s. 22.

[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 in apprehending and committing criminals (*q*). It also empowers any two or more of the justices named therein to hear and determine offences, which is the ground of their criminal jurisdiction at *quarter sessions* (*r*), of which more will be said hereafter, when we have occasion to treat of crimes and the manner of their prosecution.] Besides the jurisdiction which the justices of each county at large exercise, in these and other matters, at the quarter sessions, authority is moreover given by various statutes to the justices acting for the several *divisions*, into which counties are for that purpose distributed (*s*), to transact different descriptions of business, at *special sessions* (*t*); and by other Acts, two justices (or in some cases even a single one) are also empowered to try in a summary way, and without jury, such offences as the respective statutes particularize (*u*),—the meeting together of justices, for such and similar purposes, being denominated a *petty sessions* (*x*). And the Local Government Act, 1888 (51 & 52 Vict. c. 41), s. 8, provides that nothing in the Act shall transfer to the county councils

(*q*) 11 & 12 Vict. cc. 42, 43; 42 & 43 Vict. c. 49.

(*r*) 5 & 6 Vict. c. 38; and vide post, bk. VI.

(*s*) 9 Geo. 4, c. 43; 10 Geo. 4, c. 46; 6 & 7 Will. 4, c. 12; 22 & 23 Vict. c. 65.

(*t*) 7 & 8 Vict. c. 33, s. 7.

(*u*) 7 & 8 Geo. 4, c. 30, s. 29; 11 & 12 Vict. c. 43; 18 & 19 Vict. c. 126, ss. 18, 20, 22—24; 19 & 20 Vict. c. 118; 24 & 25 Vict. c. 96, ss. 9, 14, 15, 17—19, 21—25, 33—37, 65, 66, 99, 105—110, 112, 120; 24 & 25 Vict. c. 97, ss. 22—25, 37—39, 41, 52, 62; 24 & 25 Vict. c. 99, ss. 23, 26, 27, 41; 24 & 25 Vict. c. 100, ss. 39, 40, 42—46, 72, 76; 42 & 43 Vict. c. 49. As to an appeal from the determination of justices, on a point of law, decided on a summary conviction, see 20 & 21 Vict. c. 43; 35 & 36 Vict. c. 26.

(*x*) As to providing places for holding *petty sessions*, see 12 & 13 Vict. c. 18; 31 & 32 Vict. c. 22; and 47 & 48 Vict. c. 43; and as to *petty sessional divisions*, see 8 & 9 Vict. c. 10, s. 10; 12 & 13 Vict. c. 18; 18 & 19 Vict. c. 126; and 19 & 20 Vict. c. 118; and as to *clerks* of justices and of special and petty sessions, see 40 & 41 Vict. c. 43.

thereby established any business of the quarter sessions or justices in relation to appeals by overseers or others in connection with rates; but by sect. 9 of the Act, the powers and duties of the quarter sessions and of justices out of session with respect to the county police is now vested in the quarter sessions and the county councils jointly, but the powers and duties of the justices as conservators of the peace are not thereby affected.

[In these and other ways the legislature has from time to time heaped upon the justices such an infinite variety of business, that the country is greatly obliged to any worthy magistrate who, without any sinister views of his own, will engage in this troublesome service; and therefore, if a well-meaning justice makes an undesigned slip in his practice, great lenity and indulgence are shown to him;] and there are statutory provisions expressly made to protect a magistrate in the upright discharge of his office (*y*); which, among other privileges, entitle him, on being sued for any oversight, to receive notice one calendar month beforehand, and exempt him in general from being sued at all after the expiration of six months from the commission of the injury (*z*); and he is also freed from all liability where the matter was one within his jurisdiction, unless it can be proved that he proceeded maliciously and without reasonable and probable cause; but subject to these legislative protections, a justice of the peace is liable to an action by the party injured, for illegal acts done under colour of his office (*a*); and he is also liable to be prosecuted criminally, by indictment or information, if guilty of any corrupt or malicious abuse in the exercise of his judicial

(*y*) 11 & 12 Vict. c. 44; Prickett *v.* Gratrex, 8 Q. B. 1020; Leary *v.* Patrick, 15 Q. B. 266; Taylor *v.* Nesfield, 3 Ell. & Bl. 724; Gelen *v.* Hall, 2 H. & N. 379.

(*z*) Actions against metropolitan police magistrates must be brought within *three* months (2 & 3 Vict. c. 71, s. 53; Hazeldine *v.* Grove, 3 Q. B. 997; Barnett *v.* Cox, 9 Q. B. 717).

(*a*) Fernley *v.* Worthington, 1 Man. & Gr. 491; Cave *v.* Mountain, ib. 257.

discretion; on the other hand, when he acts fairly and *bonâ fide*, leave will not be granted to file an information against him, on account of a mere error in his proceedings (*b*).

It is impossible, on the plan of the present work, to enter minutely into the particulars of the accumulated authority committed to the charge of these magistrates,—and which (as to administrative matters) are now vested for the most part in the county councils established by the Local Government Act, 1888, s. 3, which Act must be studied in detail; and therewith [we recommend to the reader the examination of the later editions of Dr. Burn's Justice of the Peace, where he will find everything relating to this subject, both in antient and modern practice, collected with great care and accuracy;] and with these observations, we will now leave this subject, only further remarking, that the authority of the justices and of the county councils respectively as regards all the miscellaneous subject-matters of their jurisdiction will be touched upon, more or less, in such subsequent parts of these Commentaries as relate to these several matters.

IV. The officers of whom we have hitherto spoken, though all conservators of the peace, are engaged only in the higher departments of that general duty; but we are now to examine the law relating to those inferior officers called *Constables*, to whom the service of maintaining the peace, and bringing to justice those by whom it is infringed, is more immediately committed (*c*).

[The word *constable* is frequently said to be derived from the Saxon koninz-ꝑcaꝑel, and to signify the support of the king; but as we borrowed the name as well as the office of constable from the French, it seems more satis-

(*b*) 2 Burr. 1162; R. *v.* Borron, 3 Barn. & Ald. 432.

(*c*) Hawk. P. C. book ii. c. 10; Burn, by D'Oyley & Williams, *in tit.* "Constable."

[factory to deduce it, with Sir Henry Spelman and Dr. Cowel, from that language; and it is plainly derived from the Latin *comes stabuli*, an officer well known in the empire, and 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 (*d*). This great office of lord high constable hath been disused in England, except only upon great and solemn occasions, such as the king's coronation, and the like, ever since the attainder of Stafford, Duke of Buckingham, under King Henry the eighth; as in France it was suppressed about a century after, by an edict of Louis the thirteenth (*e*); but the constables of whom we now speak are supposed to have originally emanated from this high and important office (*f*).]

These constables are of two sorts, namely, *high* constables (*g*) and *petty* constables. The high constables, who were first ordained by the Statute of Winchester, 13 Edw. I. st. 2, c. 6 (*h*), are appointed at the courts leet of the franchise, or hundred over which they preside; or, in default of that, then by the justices at their special sessions, as directed by 7 & 8 Vict. c. 33, s. 8. The proper duty of the high constable seems to be to keep the peace within the hundred (*i*), as the petty constable does within the parish

(*d*) We may form a judgment of the power of the lord high constable, and the condition of the people of this country in the fifteenth century, from the following clauses in a commission, in the seventh year of Edward the fourth, to Richard Earl Rivers: "*Plenam potestatem et auctoritatem damus et committimus ad cognoscendum et procedendum in omnibus et singulis causis et negotiis de et super crimine læsæ majestatis seu ipsius occasione, cæterisque causis quibuscunque, summariè et de plano, sine strepitu et figurâ judicii, solâ facti veritate inspectâ.*"—Rym. Fœd. tom. xi. p. 582. And see Hist. Eng. Law, by Reeves, vol. iii. p. 194; Hallam, Mid. Ages, vol. iii. p. 223, 7th edit.

(*e*) Phillip's Life of Pole, ii. 111.

(*f*) Lambard, of Constables, 5.

(*g*) These officers are also called by Lord Coke (4 Inst. 267), *chief* constables, but that term is now differently applied.

(*h*) 4 Inst. 276.

(*i*) 1 Bl. Com. 356; 4 Inst. ubi

or township; for the hundred is answerable for all robberies committed therein by daylight, as this must be imputed to the negligence of their officers. And the high constables are also by various statutes charged with other duties; such as serving precepts and warrants on certain occasions. But—the utility of these officers having become questionable—the justices for each county were directed by 32 & 33 Vict. c. 47, to consider and determine whether it was necessary that the office of high constable of each hundred, or other like district, within their jurisdiction, should be continued.

[As to the petty constables, these are inferior officers in every town and parish, subordinate to the high constable of the hundred, and have two offices united in them, the one antient, the other modern,—their antient office being that of headborough, tithing man, or borsholder, of whom we formerly spoke, and who are as antient as the time of King Alfred (*k*); and their modern office being that of constable merely, which was instituted about the reign of Edward the third, for the assistance of the high constable (*l*). Their principal duty is the preservation of the peace (*m*); though they also have other particular duties assigned to them by Act of Parliament, particularly the service of the summonses and the execution of the warrants of the justices of the peace, relative to the apprehension and commitment of offenders. In the execution of these warrants, the petty constable enjoys certain protections similar to some of those

sup. Blackstone remarks, (ubi sup.,) that by the Statute of Winchester, the high constable is to keep *watch and ward* within his jurisdiction. "*Ward* (*custodia*) is "chiefly applied to the day time, "in order to apprehend rioters "and robbers on the highways." "*Watch* is applicable to the night "only, being called among our "Teutonic ancestors, *wacht* or "*wacta* (see Capit. Hludov. Pii, "cap. 1); and it begins at the time "when ward ends."

(*k*) Vide sup. vol. I. p. 125.

(*l*) Lamb. 9.

(*m*) "Of the extent of the power "of constables" (says Blackstone, vol. i. p. 356), "considering what "manner of men are for the most "part put into these offices, it is "perhaps very well that they are "generally kept in ignorance."

[conferred on the justices themselves; *e.g.*, an action cannot be brought against him for what he does in his office, after the expiration of six months from the commission of the act (*n*); and by 24 Geo. II. c. 44, neither he, nor those acting in aid of him, may be sued without making the justice who signed the warrant a joint defendant, and on production of such warrant at the trial of the cause, the jury shall give their verdict for the constable, notwithstanding any defect of jurisdiction in the magistrate (*o*).]

Petty constables were formerly chosen by the jury at the court leet; or, if no court leet were held, then by two justices of the peace (*p*). And, with the object of improving the character of the force, which had in modern times become very inadequate to the performance of its duties, it was provided by 5 & 6 Vict. c. 109 (*q*), that the justices should annually issue precepts to the overseers of each parish in their county (not being within any *borough* under the Municipal Corporations Act), requiring them to return a list of a competent number of men within such parish qualified and liable to serve as constables (*r*); in which class (generally, but subject to numerous exceptions,) is included every able-bodied man there resident, between twenty-five and fifty-five years of age, who is rated to the poor rate or county rate, or is a tenant to the value of 4*l.* per annum; and it was further provided by the same Act that the justices, at a special petty sessions of the peace to

(*n*) Gosden *v.* Elfick, 7 D. & L. 194.

(*o*) In some cases, a constable is also entitled to receive a notice of action (see 10 Geo. 4, c. 44, s. 31; 2 & 3 Vict. c. 71, ss. 41, 42, 43); in other cases, before an action is brought against a constable, a demand must first be made of a perusal and copy of the warrant under which he acted. (24 Geo. 2, c. 44, s. 6.)

(*p*) 1 Bl. Com. 356; R. *v.* Mosley, 3 Ad. & El. 488.

(*q*) The 5 & 6 Vict. c. 109, was extended and amended by 7 & 8 Vict. c. 52; 13 & 14 Vict. c. 20; and 35 & 36 Vict. c. 92.

(*r*) The Queen *v.* The Overseers of North Brierley, 1 Ell. Bl. & Ell. 519; Municipal Corporations Act, 1882 (45 & 46 Vict. c. 50), ss. 190—196; Borough Constables Act, 1883 (46 & 47 Vict. c. 44).

be holden for that purpose, should revise such list, and choose therefrom such number of persons as they should deem necessary, having regard to the extent and population of the parish; but no person who had already served was to be liable to do so again till every other person liable should have served, either in person or by substitute (*s*); and it was also provided, that every person so chosen should serve for a year, or until another should be appointed in his stead, and (in case of his refusal to do so) should incur such penalties as in the Act provided; and fees (payable out of the poor rate) were to be allowed to the constables for the service of summonses and the execution of warrants, and for such other occasional services as the justices might think fit, according to a Table to be settled at quarter sessions, and approved by a secretary of state; and every constable appointed under the Act was to have within his county, (and also within all liberties and franchises, and detached parts of other counties situated therein, and also in every adjoining county,) all the powers and privileges, and be liable to all the duties and responsibilities, which a constable before enjoyed or was subject to within his own constablewick, but should not be bound to act beyond his own parish without the special warrant of a justice of the peace. But inasmuch as the subsequent establishment of an efficient county police has, since this statute, rendered the appointment of parish constables in many places unnecessary, it has been provided by the 35 & 36 Vict. c. 92, that none such shall be appointed after the 24th March, 1873, unless for any parish in regard to which the magistrates for the county shall, at their general or quarter sessions, determine that it is necessary that such appointment shall be made, with a view to the preservation of the peace, or the proper discharge of the public business therein.

With regard to *incorporated boroughs*, which (as above

(*s*) 13 & 14 Vict. c. 20, s. 4; The Queen *v.* Booth, 12 Q. B. 884.

observed) are exempted from the operation of the 5 & 6 Vict. c. 109, a police (or constabulary) force is maintained in each of these for the preservation of the peace therein; and this force used to be appointed by, and to be under the superintendence of, the *watch committee* of the borough (*t*); but as regards boroughs (not being county boroughs) which according to the census of 1881 had a population of less than 10,000, the powers and duties of the watch committee have now ceased, and have been transferred to the council of the administrative county which comprises such borough (*u*).

In addition to the parochial and borough police, there are also the *county constabulary*, under the superintendence of a *chief constable*,—an officer who was formerly appointed by the justices of each county subject to the approval of the secretary of state for the home department, but who is now (in common with the county police) subject to the standing joint committee of the quarter sessions and of the county council (*x*). The Acts relating to the county police are the 2 & 3 Vict. c. 93; 3 & 4 Vict. c. 88; 7 & 8 Vict. c. 33; 19 & 20 Vict. c. 69; 20 Vict. c. 2; 21 & 22 Vict. c. 68; and 22 & 23 Vict. c. 32; to which must now be added the Local Government Act, 1888 (51 & 52 Vict. c. 41); and by these it is (among other things) enacted, that in every county such a force shall be established (*y*), and that the chief constable may (subject to the prescribed approbation) appoint such other constables as may be required, and also a superintendent to be at the head of the constables in each division; and may at his pleasure dismiss any of them (subject to the rules established for the government of the force) (*z*). And the same Acts also provide, that

(*t*) See the Municipal Corporations Act, 1882 (45 & 46 Vict. c. 50), repealing and re-enacting the provisions in that behalf contained in 5 & 6 Will. 4, c. 76; and (as to the watch rate) 7 Will. 4 & 1 Vict. c. 81, s. 3; 3 & 4 Vict. c. 28; and 22 & 23 Vict. c. 32, s. 5.

(*u*) 51 & 52 Vict. c. 41, s. 39.

(*x*) Ibid. s. 9.

(*y*) 19 & 20 Vict. c. 69, s. 1.

(*z*) 2 & 3 Vict. c. 93, ss. 6, 7; 35 & 36 Vict. c. 92, s. 7.

the salaries and allowances of the chief and other constables, and all expenses incurred in putting the Acts into execution, shall be paid out of a police rate to be made by the joint committee of the county council and the quarter sessions; and that it shall be lawful for the justices of any county, and for the council of any incorporated borough situated in or adjoining to such county, to agree together for the consolidation of the county and borough police establishments (*a*); and that the justices of every county—and the watch committee (if any) of each borough or (where none) the county council—shall annually transmit to the secretary of state an account of the crime within such county or borough respectively. And in particular by the County and Borough Police Act, 1856 (19 & 20 Vict. c. 69), it was provided, that her majesty might appoint *inspectors* to report on the efficiency of the police (*b*); and that on a certificate of the secretary of state that the police of any county (or of any borough, with a population amounting to five thousand) had been maintained, during the preceding year, in a state of efficiency as to numbers and discipline, a sum, in aid of its expenses, might be granted by the Treasury, not exceeding one-fourth of the charge, for its pay and clothing (*c*). But it having been now provided by the Local Government Act, 1888, that the proceeds of the duties on local taxation licences (sect. 20) and four-fifths of the probate duties (sect. 21) shall be paid over by the government to the local taxation account appointed by that Act, and that out of such moneys certain ascertained proportions shall be payable to each county council (sect. 22), and to the council of each county borough (sect. 34), in lieu of the grants theretofore made out of the exchequer in aid of local rates, it has by the same Act (sect. 24) been provided that the county council shall (unless the certificate of the efficiency of the

(*a*) 3 & 4 Vict. c. 88, s. 14; 51 & 52 Vict. c. 41, ss. 33, 39.

(*b*) 19 & 20 Vict. c. 69, ss. 14, 15.

(*c*) Sects. 16, 17.

police force is withheld) pay over or transfer to the police account of the county, or to the council of each county borough, one half of the costs of the pay and clothing of the police force of the county or county borough respectively.

There are also *special* constables, who are appointed by the magistrates to execute warrants on particular occasions, or to act in aid of the preservation of the peace on special emergencies, where an increase of the existing police force appears desirable (*d*). This office, in the absence of volunteers, is compulsory; for it is enacted, by 1 & 2 Will. IV. c. 41 and 5 & 6 Will. IV. c. 43, that any two justices, upon due cause shown on the oath of a credible witness, that a tumult or riot has taken place, or may be reasonably apprehended, may (if of opinion that the ordinary officers are insufficient) appoint and swear in any persons fit for the purpose—who need not be householders or even residents within the place for which they are to act, but must be such as have no legal exemption or incapacity from serving the office of constable—to act as special constables for a limited time, for some particular parish, township, or place; and in like manner the lord lieutenant of the county may, by direction of the secretary of state, cause special constables to be appointed to act either for the whole county, or in any portion thereof; and, in either case, any privilege of exemption may, by order of the government, be disallowed; and when special constables are appointed under these Acts, they have (in general) all the same powers as an ordinary constable (*e*).

Another branch of the police of the realm, closely connected with the subject under discussion, consists of *watch-*

(*d*) 41 Geo. 3, c. 78.

(*e*) 1 & 2 Will. 4, c. 41, s. 13; 1 & 2 Vict. c. 80; The Queen *v.* Hamilton, Law Rep., 3 Q. B. 718; The Queen *v.* Lord Newborough, ib. 4 Q. B. 585; and (as to special constables in *boroughs*) see 5 & 6 Will. 4, c. 76, s. 83, repealed and re-enacted by the 45 & 46 Vict. c. 50; The Queen *v.* Cheshire Lines Committee, Law Rep., 8 Q. B. 344.

men, or guardians of the peace by night. These were antiently only the deputies or assistants of the constable, and were appointed by him (*f*); but in modern times they have been appointed without the constable's intervention,—being employed and paid by particular parishes, or sometimes by private individuals, with the view of obtaining a more effectual protection (under special circumstances or on particular occasions) to person and property than can be otherwise afforded. The authority of watchmen, in this modern sense, is recognized by law (*g*); and by 3 & 4 Will. IV. c. 90, regulations were made for the watching and lighting of any parish desirous of adopting the provisions of the Act at their own expense (*h*). But it is not intended that a body of watchmen thus established shall, as the general rule, remain as a separate force *in addition* to the county constabulary, where this latter body is sufficient for the protection of the public; and accordingly, by 3 & 4 Vict. c. 88, s. 20, they are, as such a force, to be discontinued upon its being notified to their inspector by the chief constable of the county, that he is ready to take the charge of the place upon himself; but (by 19 & 20 Vict. c. 69, s. 19) where the population of the place amounts to fifteen thousand, the previous authority of a secretary of state is required for such discontinuance.

(*f*) 1 Bl. Com. 357.

(*g*) 2 Hale, P. C. 98; 3 Inst. 52; 9 Rep. 66.

(*h*) Pilkington *v.* Riley, 6 D. & L. 628; The Queen *v.* Deverell, 3 Ell. & Bl. 372; The Queen *v.* Overseers of King's Winford, ibid.

BOOK IV.

OF PUBLIC RIGHTS—(*continued*).

PART II.

OF THE CHURCH.

HAVING now finished our examination of that division of public rights which concerns the relation between persons in *civil* authority, and those who are subject to that authority,—a division involving the whole law relating to the *State* or *civil* government,—we are next to turn our attention to that other division of public rights which concerns the relation between those who have power in matters *ecclesiastical*, and those over whom that power is exercised, —which latter subject we shall discuss, as proposed in a former place, under the general head of the *Church* (*a*).

The Church, in that sense of the term to which these Commentaries refer, may be defined as an institution established by the law of the land, in reference to religion; in treating of which we shall find it convenient to consider, firstly, the authorities established in the Church; secondly, the law relating to the doctrines, worship, and discipline of the Church; thirdly, the law relating to its benefices or endowments; and, fourthly, the extensions of the original establishment, which have from time to time been effected. And, firstly, of the ecclesiastical authorities:

(*a*) Vide sup. p. 317.

CHAPTER I.

OF THE ECCLESIASTICAL AUTHORITIES.

THE supreme head of the Church is the sovereign, and under her the ecclesiastical authorities consist principally of the *clergy*,—a venerable body of men set apart from the rest of the people (or *laity*), in order to superintend the public worship of Almighty God (including the celebration of the sacraments and of other the ceremonies of religion), and to administer spiritual counsel and instruction.

The clergy consist of such, and such only, as have been admitted into *holy orders;* which are the orders of bishops (including archbishops), priests, and deacons (*a*): and the ordination must take place according to the form prescribed in the Book of Common Prayer (*b*), certain fees being payable thereon (*c*). By 44 Geo. III. c. 43, it is provided (conformably to the canons and the rubric prefixed to the office of ordination in that Book), that none shall be

(*a*) "Bishops, Priests, and Deacons "are the ministerial orders known "to the episcopal establishment of "England. In the *Bishop*, lies the "power of ordination. *Deacons*, "when ordained, may, licensed by "the bishop, preach and administer "the rite of baptism. *Priests*, by "this ceremony, are further em-"powered to administer the Lord's "Supper, and to hold a benefice "with cure of souls."—Report on the Religious Worship of England and Wales, Dec. 1853, p. xxxiv.

(*b*) 2 Burn's Ecc. Law, 103; Wats. C. L. ch. xiv.

(*c*) 30 & 31 Vict. c. 135, which Act also prescribes the fees payable on the visitations hereinafter mentioned of the archbishop (p. 665), of the bishop (p. 667), and of the archdeacon (p. 673); and see Veley *v.* Pertwee, Law Rep., 5 Q. B. 573.

ordained deacon under twenty-three years, nor priest under twenty-four years of age;—though as to deacons, the Archbishop of Canterbury has the privilege of admitting them (by faculty or dispensation) at an earlier period. By the 13 Eliz. c. 12, it was further prescribed that none should be ordained either priest or deacon, without first *subscribing* the Thirty-nine Articles of religion; but in lieu of this, it has now been provided, by 28 & 29 Vict. c. 122, that before ordination the priest or deacon shall make and subscribe a declaration of *assent* to the Thirty-nine Articles, the Book of Common Prayer, and the Ordination Service,—a declaration which includes also an assertion of belief that the doctrine of the Church as set forth in the Book of Common Prayer is agreeable to the Word of God, and a pledge to use the forms thereby prescribed in public worship and in the administration of the sacraments (*d*). It is also requisite that the candidate shall, prior to ordination, take the oath of allegiance to the Queen (*e*), and also the oath of canonical obedience to his bishop (*f*). Moreover, by the canon law, no person shall be admitted into holy orders without a *title;* that is, unless he produce to the bishop a presentation to some ecclesiastical living within the diocese, or such certificate of preferment or provision as in the canon described; unless, indeed, he be a fellow or chaplain in Oxford or Cambridge, or master of arts of five years' standing in either of such universities, and living there at his own charge; or unless the bishop himself intends shortly to admit him to some benefice or curacy (*g*). And we may here conveniently observe, that by the 59 Geo. III. c. 60, s. 3, no person ordained by a *foreign* bishop can officiate in any church or chapel in England, without special permission from the archbishop of the province; or can be admitted to any benefice in England, without the consent

(*d*) 28 & 29 Vict. c. 122, ss. 1, 4.

(*e*) The form of oath is now that prescribed by the 31 & 32 Vict. c. 72 (sect. 14).

(*f*) 28 & 29 Vict. c. 122, s. 12; 31 & 32 Vict. c. 72, s. 14.

(*g*) Can. 33; Wats. C. L. 147.

of both the archbishop and the bishop; and further by 24 Geo. III. s. 2, c. 35, although an alien may be ordained to the office of priest or deacon, and is excused from taking the oath of allegiance to the Queen, still that is only while he exercises his office out of the Queen's dominions.

[In order to enable them to attend the more closely to their duties, the clergy of the established church have certain privileges and exemptions: and had formerly much greater, which were in general abridged at the time of the Reformation, on account of the ill use which was formerly made of them (*h*); but at the same time, by 2 & 3 Edw. VI. c. 21, the prohibition against their marrying was removed. The personal exemptions of the clergy, which still continue, are principally the following:—A clergyman cannot be compelled to serve on a jury; nor can he be chosen to any temporal office, as bailiff, reeve, constable, or the like—in regard of his own continual attendance on the sacred function (*i*);] and during his attendance on divine service, that is to say, *eundo*, *morando*, *et redeundo*, he is privileged from being arrested in any civil suit: and the glebe and tithes of his parsonage are not liable to be seized in execution to satisfy a judgment in the same manner as lay property, but instead are made liable to a *sequestration* (*k*); by which process the sum due on such judgment is directed to be levied by the churchwardens out of the profits of the benefice, for the use of the creditor, but only after making due provision for the service of the church; and under the express provisions of the Sequestration Act, 1871 (34 & 35 Vict. c. 45), on a sequestration, the bishop may, after six months, appoint a curate to the benefice, and assign him a stipend in proportion to the population; and the sequestrator pays this stipend in

(*h*) 2 Inst. 4.

(*i*) Finch. L. 88.

(*k*) Burn's Eccles. Law, in tit. Sequestration; Arbuckle *v.* Cowtan, 3 Bos. & Pul. 326; Marsh *v.* Fawcett, 2 H. Bl. 582; Bishop *v.* Hatch, 1 Ad. & E. 171; Pack *v.* Tarpley, 9 Ad. & E. 468; Harding *v.* Hall, 10 Mee. & W. 42; Phelps *v.* St. John, 10 Exch. 895.

priority to any other claim; and the bishop may, in his discretion, inhibit the incumbent from performing any service in the church while the sequestration remains in force; also, upon the bankruptcy of a beneficed clerk, the profits of the benefice are sequestred in like manner (*l*), subject always to making due provision for the service of the church.

But as the clergy have their privileges, so also they have their disabilities, on account of their spiritual avocations; wherefore, by 41 Geo. III. c. 63, they are made incapable of being elected members of the House of Commons; and by 45 & 46 Vict. c. 50, s. 12, of being councillors or aldermen in boroughs. They are also prohibited from farming or trading; for by 1 & 2 Vict. c. 106, ss. 28—30, (repealing some former enactments on this subject,) no spiritual person holding any cathedral preferment or benefice, or any curacy or lectureship, or allowed to perform the duties of any ecclesiastical office,—shall take to farm for occupation by himself any lands exceeding eighty acres in the whole, without permission in writing from the bishop of the diocese; nor shall such spiritual person, by himself or any other to his use, carry on any trade or dealing for profit, unless it be carried on by more than six partners, or his share in it shall have devolved to him by inheritance, or other such representative title as in the Act specified; and even in these excepted cases, it is illegal for him to act as director or managing partner, or to carry on the trade in person (*m*). But, notwithstanding these prohibitions, a contract made by him is enforceable against him (*n*); but *semble* not by him; also, the Act allows him to carry on the business of a schoolmaster; or to deal with booksellers as to the sale of books; or to be a managing director, partner, or shareholder in any benefit, fire insurance, or life insurance society; or to buy or sell to the

(*l*) 46 & 47 Vict. c. 52, s. 52.
(*m*) 4 & 5 Vict. c. 14.
(*n*) Lewis *v.* Bright, 4 Ell. & Bl. 917.

extent necessarily incidental to his lawful occupation of land, or to sell minerals, the produce of his land,—provided always that none of such transactions be personally conducted by him in any market or place of public sale.

In the ecclesiastical polity there are divers ranks and degrees recognized by the secular laws of England, namely, archbishops and bishops; deans and canons; archdeacons and rural deans; rectors, vicars, and curates; parish clerks and sextons; and we will consider them in this order.

I. Both *archbishops* and *bishops* are constituted by election, confirmation, consecration, and installation; though an archbishop is more properly said to be enthroned and not installed (*o*). And as regards their election, this is 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, that is to say, *per clerum et populum* (*p*); till at 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 temporalities, which now began almost universally to be annexed to this spiritual dignity; without which confirmation and investiture, the elected bishop could neither be consecrated, nor receive any secular profits. This right was acknowledged in the Emperor Charlemagne, A.D. 773, by Pope Hadrian I. and the Council of Lateran, and was uniformly exercised by other Christian princes (*q*); but the policy of the church began by degrees to exclude the laity from any share in these elections, and to confine them wholly to the clergy, which policy was completely

(*o*) Bishop of St. David's *v.* Lucy, 1 Salk. 137; 3 Salk. 72.

(*p*) Palm. 25; Sobrean *v.* Kevan, 2 Roll. Rep. 102; M. Paris, A.D. 1095.

(*q*) Decret. 1, dist. 63, c. 22.

[successful; for the mere form of election appeared to the people to be a thing of little consequence, while the right of election was practically with the king. Hence the right of appointing to bishoprics is said to have been in the crown of England, even in the Saxon times (*r*); because the rights of confirmation and investiture were in effect, (though not in form,) a right of complete donation (*s*). 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 the seventh, towards the close of the eleventh century, published a bull of excommunication against all princes who should dare to confer investitures, and against all prelates who should venture to receive them (*t*). This was a bold step towards effecting the plan then adopted by the Roman see, of rendering the clergy entirely independent of the civil authority; and long and eager were the contests occasioned by this claim. But at length, when the emperor Henry the fifth agreed to remove all suspicion of encroachment on the spiritual character, by conferring investitures, for the future *per sceptrum*, and not *per annulum et baculum*,—and when the kings of England and France consented also to alter the form in their kingdoms, and receive only homage from the bishops for their temporalities, instead of investing them by the ring and crosier, the Court of Rome found it prudent to be content (*u*).

This concession was obtained from King Henry the first in England by Archbishop Anselm (*x*); but King John,

(*r*) Palm. 28.

(*s*) Selden, Jan. Ang. l. 1, s. 39.

(*t*) Decret. 2, caus. 16, qu. 7, c. 12 et 13.

(*u*) Mod. Un. Hist. xxv. 363; xxix. 115.

(*x*) M. Paris, A.D. 1107.

[(about a century afterwards,) in order to obtain the protection of the pope against the discontented barons, was also prevailed upon to give up, by a charter, to all the monasteries and cathedrals in the kingdom, the free right of electing their prelates, whether abbots or bishops; reserving only to the crown the custody of the temporalities during the vacancy, the form of granting a licence to elect (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 (*y*); and this charter was expressly recognized and confirmed in King John's *Magna Charta*, and also by the statute 25 Edward III. st. 6, c. 3 (*z*).

However, by the statute 25 Hen. VIII. c. 20 (*a*), the right of nomination was restored to and re-vested in the crown, as it exists at the present day; for by that statute it was enacted, that on any future avoidance of a bishopric, the king may send the dean and chapter his usual licence (called his *congé d'élire*) 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, who may then by letters-patent appoint such person as he pleases; and this *congé d'élire* issues also (*b*) in the case of the bishoprics created by Henry VIII. himself, viz., Chester, Gloucester, Peterborough, Bristol, and Oxford, although these are (in a sense) donative (*c*), that is, in the gift of the crown. This election or nomination, if it be of a bishop, must be signified by the king's letters-patent to the archbishop of the province; if it be of an archbishop, to the other archbishop and two bishops, or

(*y*) M. Paris, A.D. 1214; 1 Rym. Fœd. 198.

(*z*) Cap. 1, edit. Oxon. 1759.

(*a*) Revived by 1 Eliz. c. 1, ss. 7, 10.

(*b*) The Queen *v.* Archbishop of Canterbury, 11 Q. B. 513.

(*c*) Co. Litt. by Harg. 134 a, n. (*s*).

[to four bishops; in either case requiring them to confirm, invest, and consecrate the person so elected: which they are bound forthwith to perform (*d*). After which, the bishop elect shall sue to the king for his temporalities, shall make oath to the king and none other, and shall take restitution of his secular possessions out of the king's hands only. And if such dean and chapter do not elect in the manner by this Act appointed, or if such archbishop or bishop do refuse to confirm, invest, and consecrate such bishop elect, they shall incur all the penalties of a *præmunire;* that is, the loss of all civil rights, with forfeiture of lands, goods, and chattels, and imprisonment during the royal pleasure.]

There are (as already mentioned) two archbishops for England and Wales (*e*); that is to say, the Archbishop of Canterbury, who has within his province all the bishoprics, except those of Chester, Durham, Carlisle, Ripon, Manchester, Liverpool, Newcastle, and that of Sodor and Man; and the Archbishop of York, whose province comprises the eight bishoprics just named.

Each of the archbishops, and the bishops of London, Durham, and Winchester, and twenty-one other bishops, have the right, in virtue of their respective sees, to sit as lords spiritual, (having first received a writ of summons for the purpose,) in the House of Lords; but the Bishop of Sodor and Man is in no case a lord spiritual; and the bishop most recently appointed (not being one of the above three) does not receive a writ of summons to parliament until a fresh vacancy occurs among those sees which confer a seat in the House of Lords in rotation; and this was so

(*d*) A bishop, when consecrated, must be full thirty years of age (see the rubric prefixed to the office of ordination in the Book of Common Prayer); but antiently there seems to have been no such restriction. (See Godw. Comm. de Præsul. 693.)

(*e*) At one time there were *three* archbishoprics, the third being that of Cærlon in Wales; but in the time of Henry the first, both that see and all Wales became subject to the Archbishop of Canterbury. (Rogers's Eccl. L. 105.)

arranged by the statute 10 & 11 Vict. c. 108, establishing the bishopric of Manchester; and a similar arrangement applies to the bishoprics of subsequent creation.

[An archbishop is the chief of all the clergy in his province; and has the inspection of the bishops of that province, as well as of the inferior clergy; or, as the law expresses it, the power to *visit* them (*f*). Therefore, he confirms the election of the bishops, and afterwards consecrates them (*g*); and upon receipt of the king's writ, he calls the bishops and clergy of his province to meet him in Convocation; but without the king's writ he cannot assemble them (*h*). To him, all appeals in ecclesiastical matters are made from the inferior ecclesiastical jurisdictions within his province (*i*); 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 the archiepiscopal court (*k*). During the vacancy of any see in his province, the archbishop is guardian of the spiritualities thereof, as the king is of the temporalities, and he executes all ecclesiastical jurisdiction therein; but 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 (*l*). The archbishop is entitled to present by lapse, to any ecclesiastical living in the disposal of one of his diocesan bishops, if not filled within six months; and he 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 bishop (*m*);

(*f*) Bishop of St. David's *v.* Lucy, 1 Salk, 134; Re Dean of York, 2 Q. B. 1.

(*g*) 2 Rol. Abr. 223.

(*h*) 4 Inst. 322, 323.

(*i*) The *secular* jurisdiction formerly belonging to the Archbishop of York and to the Bishop of Ely was abolished by 6 & 7 Will. 4, c. 87; 7 Will. 4 & 1 Vict. c. 53; and that belonging to the Bishop of Durham, by 6 & 7 Will. 4, c. 19.

(*k*) Ex parte Denison, 4 Ell. & Bl. 292.

(*l*) 2 Roll. Abr. 22.

(*m*) Bishops are styled *suffragan* (a word signifying *deputy*), in respect of their relation to the archbishops of their province. But at one time bishops also had their

[in lieu of which the bishop used to make over by deed to the archbishop, his executors and assigns, the next presentation of such dignity or benefice within the bishop's disposal, within that see, as the archbishop himself should choose; which, therefore, was called his *option* (*n*); and was only binding on the bishop himself who granted the option, and not on his successors; the prerogative seeming to be derived from the legatine power formerly annexed by the popes to the metropolitan of Canterbury (*o*).] But the law of options must now be taken in connection with the provisions of 3 & 4 Vict. c. 113, s. 42, whereby spiritual persons are forbidden to sell any preferment. [It is also the privilege of the Archbishop of Canterbury to crown the kings and queens of this kingdom (*p*); and he

suffragans to assist them in conferring orders, and in other spiritual offices within their diocese; and, after having for a long period remained in abeyance, these suffragan bishops have recently again been brought into use in some of the dioceses; but such suffragan bishops must not be confounded with the *coadjutors* of bishops, the latter being appointed in case of a bishop's infirmity to superintend his *jurisdiction* and *temporalities*, neither of which is within the interference of the former (1 Gibs. Cod. 1st. edit. 155; Co. Litt. by Harg. 94 a, n. (3)); and as to the election and consecration of suffragan bishops, see 26 Hen. 8, c. 14, amended by the 51 & 52 Vict. c. 56 (Suffragans Nomination Act, 1888), which enables the Queen to vary and add to the towns which may be sees of suffragan bishops.

(*n*) Cowel's Interp. tit. Option.

(*o*) Blackstone remarks (vol. i. p. 283), that the papal claim itself was probably set up in imitation of the imperial prerogative called *primæ* or *primariæ preces;* whereby the emperor had immemorially exercised (Goldast. Constit. Imper. tom. 3, p. 406) a right of naming to the first prebend that became vacant after his accession, in every church of the empire. (Dufresne, v. 806; Mod. Univ. Hist. xxix. 5.) He adds that a similar right was exercised in England by the sovereign in the reign of Edw. I. (Brev. 11 Edw. 1; 3 Pryn. 1264), which probably gave rise to the royal *corodies;* viz., the right (now disused) to send one of the royal chaplains to be maintained by the bishop, or to have a pension allowed him till the bishop promoted him to a benefice.

(*p*) It is said that the Archbishop of York has the privilege to crown the queen consort, and also to be her perpetual chaplain. (1 Burn's Eccl. Law, 178.)

[has also, by the statute 25 Hen. VIII. c. 21 (*q*), the power of granting *dispensations* in any case, not contrary to the Holy Scriptures or to 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 (*r*); and of his giving dispensation to hold two livings and the like (*s*); and on this also is founded the right he exercises of conferring degrees, called Lambeth degrees, in prejudice of the universities (*t*). In unaccustomed cases, however, the archbishop has no power to grant dispensations, but must refer the matter to the sovereign in council (*u*).]

A bishop is the chief of the clergy within his diocese; but is subordinate to the archbishop of the province, to whom indeed he is sworn to pay due obedience (*x*). His dignity is usually called a see (*sedes*), and the church of his diocese a *cathedral*, as distinguished from, *e. g.*, a *collegiate church* (*y*), which latter is a church consisting of a body corporate of dean and canons, such as Westminster, Windsor, &c., independently of any cathedral (*z*). Among the principal powers which the bishop exercises are those of ordaining priests and deacons (whether for England and Wales or for the colonies or foreign countries generally) (*a*); consecrating churches; and inspecting the manners of the clergy (*b*); for which purpose he may *visit*

(*q*) 28 Hen. 8, c. 16; Colt *v.* Bishop of Lichfield, Hob. 147.

(*r*) 4 Geo. 4, c. 76, s. 20.

(*s*) 1 & 2 Vict. c. 106, s. 6; 13 & 14 Vict. c. 98.

(*t*) Bishop of Chester's case, Oxon. 1721.

(*u*) 25 Hen. 8, c. 21, s. 5.

(*x*) A clergyman owes "canonical obedience" to the bishop who ordained him, to the bishop in whose diocese he is beneficed, and also to the metropolitan of such bishop. (4 Bl. Com. 203; 1 Hale, P. C. 381.)

(*y*) 3 & 4 Vict. c. 113; 4 & 5 Vict. c. 39; 27 & 28 Vict. c. 70.

(*z*) There are thirteen *cathedrals of the old foundation; eight conventual cathedrals, constituted with deans and chapters* by Hen. 8; *five cathedrals founded, together with new bishoprics*, by Hen. 8; besides the cathedrals of Ripon, Manchester, &c.

(*a*) 59 Geo. 3, c. 60; 15 & 16 Vict. c. 52, s. 2; 27 & 28 Vict. c. 94; 37 & 38 Vict. c. 77.

(*b*) Re Dean of York, 2 Q. B. 1.

at pleasure every part of his diocese; and it is likewise part of his business to institute and direct induction to all livings in his diocese, to license to perpetual curacies (*c*), and to license temporary curates within the diocese, and to regulate their salaries. In addition to which functions, the bishop is also an ecclesiastical judge; but his chancellor (who must be a bachelor of laws or a master of arts) is appointed to hold his consistory courts for him, and to assist him in matters of ecclesiastical law (*d*).

And here we may conveniently observe, that in case of complaint against a clerk in holy orders, for any ecclesiastical offence (being some act or habit of immorality, and not a mere question of doctrine or of ritual) (*e*), proceedings may be taken under the Clergy Discipline Act, 1892 (55 & 56 Vict. c. 32), which (as to all future proceedings) repeals but re-enacts with amendments the like provisions contained in the Church Discipline Act, 1840 (3 & 4 Vict. c. 86): and by the provisions of the Clergy Discipline Act, 1892, ss. 2—10, the offender may be prosecuted in the consistory court of the diocese in which he holds preferment, and at the suit either of the bishop (*f*) (or by anyone approved by him) or by any of the parishioners of the parish,—the bishop having a discretion to disallow the prosecution in any case in which he thinks the complaint to be either vague or frivolous (*g*); but if the prose-

(*c*) 1 & 2 Vict. c. 106, s. 77.

(*d*) Canons of 1603; Godolph. Ab. 82.

(*e*) Simpson *v.* Flamank, Law Rep., 1 P. C. Ca. 463; Rugg *v.* Bishop of Winchester, ib. 2 P. C. Ca. 223; Martin *v.* Mackonochie, 8 P. D. 191.

(*f*) When the bishop was the patron of the preferment held by the clerk proceeded against, the *archbishop* used to act (Ex parte Denison, 4 Ell. & Bl. 292; The Queen *v.* The Archbishop of Canterbury, 6 Ell. & Bl. 546); but the bishop is now expressly made competent in such a case to act. (Sect. 10, sub-sect. 3.)

(*g*) Under the Church Discipline Act, 1840, the bishop had a discretion as to whether or no he would issue a commission; but the acceptance of the *letters of request* lodging the complaint was not optional. (See The Queen *v.* The Bishop of Chichester, 2 Ell. & Ell. 209; Sheppard *v.* Phillimore & Bennett, Law Rep., 2 P. C. Ca. 480.)

cution proceeds, then (for the decision of any question of fact that may be in dispute) five assessors are (upon the request of either party) to be chosen; and for the decision of the question of fact, the assessors must be unanimous, or else the chancellor of the court and a majority of the assessors must agree upon it; and at the trial, the chancellor presides, and all questions of law are determined by him (sect. 2); and either party may appeal on any matter of law, either to the provincial court or to the Queen in council,—an appeal operating in the meantime to stay the sentence (sect. 4); but no complaint is competent after five years from the date of the offence (sect. 5); and in case the alleged offence is substantiated, the sentence of the court may suspend the clerk from performing divine service, and from enjoying the profits and emoluments of the living, for a specified number of years (*h*); or may absolutely deprive him (sect. 6); and if the sentence be one of deprivation, the offending clerk (unless and until he shall be freely pardoned by the crown) is incapable of holding any preferment, except such as the bishop and archbishop shall (after public notice of their intention in that behalf) allow him to hold (sect. 6); and he may even be deposed from holy orders by the bishop, subject to appeal to the archbishop (sect. 8).

And as regards offences against doctrine, ritual, and the like, by "The Public Worship Regulation Act, 1874" (*i*), the Archbishops of Canterbury and York are empowered to appoint (subject to the approval of her Majesty) a judge of the Provincial Courts, who shall be a barrister of ten years' standing, or one who has been a judge of the superior courts, and in either case a member of the Church of England; and the Act requires such judge to entertain and determine complaints in regard to alterations in the

(*h*) The profits of the living during suspension belong to the bishop, subject to his making due provision for the services. (In re Thakeham Sequestration Moneys, Law Rep., 12 Eq. Ca. 494.)

(*i*) 37 & 38 Vict. c. 85.

fabric or ornaments or furniture of any church, or in respect of the burial ground or of the manner in which the ritual prescribed in the Book of Common Prayer is observed; but he can only act on being required (by way of special case transmitted to him by the bishop at the request of the parties) to decide the matter in dispute; and the bishop only transmits such case, provided he shall have received a "representation" as to the matter complained of from the archdeacon or churchwardens or any three parishioners, or (in the case of a cathedral or collegiate church) from any three inhabitants of the diocese, being male persons of full age; and provided that, after considering the whole circumstances, he is of opinion that proceedings should be taken on such representation; and provided also that the parties to such representation are not willing to submit, without appeal, to the bishop's own decision in the matter (*k*).

Archbishoprics and bishoprics may become void by deprivation for any very gross and notorious crime; and also by resignation. All resignations must be made to some superior. Hence a bishop may resign to his metropolitan; but the archbishop can resign to none but the sovereign himself (*l*). Also, under the provisions of the 32 & 33 Vict. c. 111 (made perpetual by 38 & 39 Vict. c. 19), an archbishop or bishop may resign on the ground of age or mental or permanent physical infirmity, and receive a retiring income charged upon the episcopal revenues; or the dean and chapter may elect a *bishop coadjutor* in aid of the bishop in such a case.

The claims of the crown on archbishoprics and bishoprics, in respect of the custody of the temporalities, and in respect of the first fruits and tenths of all spiritual preferments, have been already noticed, and need not, therefore, be again discussed in this place (*m*). We may,

(*k*) Hudson *v.* Tooth, 3 Q. B. D. 46; Dale's case, 6 Q. B. D. 376; Ex parte Green, 7 Q. B. D. 273; Dean *v.* Green, 8 P. D. 79.

(*l*) Gibs. Cod. 822.

(*m*) Vide sup. p. 524.

however, mention here, that the crown was at one time entitled on the death of a bishop to divers small perquisites in the nature of a *mortuary* or fine on death (*n*); and that when any spiritual person is made an English bishop, the preferments of which he was before possessed become, in general, void upon his consecration, and the sovereign may present to them by his prerogative royal (*o*)—but this prerogative does not extend to colonial bishoprics (*p*), nor to foreign bishoprics generally (*q*).

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 (*r*); for when the other clergy were settled in the several parishes of each diocese, 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, there having been originally *ten* canons for each cathedral (*s*).] And the bishop is the immediate superior and ordinary of the dean and chapter, and exercises over them the power of *visitation* (*t*). And the chapter, as distinct from the dean, consist of certain dignitaries called canons; and those of them who hold *prebends* are also called prebendaries (*u*); and they are sometimes appointed by the crown, sometimes by the

(*n*) This mortuary, or fine on death, comprised six things, viz., the bishop's best horse or palfrey, with his furniture; his cloak or gown, and tippet; his cup and cover; his bason and cover; his gold ring; and, lastly, his *muta canum*, *i. e.*, his mew or kennel of hounds. (See 2 Inst. 491; 2 Bl. Com. 426; Mirehouse *v.* Rennell, 8 Bing. 497.)

(*o*) 1 Bl. Com. 383; Basset *v.* Gee, Cro. Eliz. 790; Grocers' Company *v.* Archbishop of Canterbury, 2 W. Bl. 770.

(*p*) The Queen *v.* Eton College, 8 Ell. & Bl. 610.

(*q*) 5 Vict. c. 6; 5 & 6 Vict. c. 4; 31 & 32 Vict. c. 120.

(*r*) Dean and Chapter of Norwich's case, 3 Rep. 75; Co. Litt. 103, 300.

(*s*) 1 Bl. Com. 382.

(*t*) Re Dean of York, 2 Q. B. 1.

(*u*) 3 & 4 Vict. c. 113, s. 1.

bishop, and sometimes by each other (*x*). At one period the dean was elected by the chapter, on a *congé d'élire* from the crown, in the same manner as bishops; but in those deaneries which were founded by Henry the eighth, out of the spoils of the dissolved monasteries, the title has always been donative, and the installation merely by letters-patent from the crown (*y*); and this is now the course with respect to the antient deaneries also; it being provided by 3 & 4 Vict. c. 113, that from the date of that Act every deanery (except in Wales) shall be in the direct patronage of her Majesty: and that no person shall hereafter be capable of receiving the appointment either of dean, archdeacon, or canon, until he shall have been six years complete in priest's orders,—except, indeed, in the case of a canonry annexed to any professorship, headship, or other office in some university (*z*); and it is further provided, that every dean shall reside for at least eight months in the year (*a*): that the term of a canon's residence shall be at least three months in the year (*b*): that the right of nominating a regulated number of *minor* canons, with salaries, shall in future be in all cases vested in the respective chapters (*c*): and that *honorary* canons, without salaries, shall be appointed for every cathedral church in which there are not already founded any non-residentiary prebends, dignities, and offices; which honorary canonries shall be in the gift of the archbishops and bishops respectively; and since this act, non-residentiary prebendaries have ceased to be members of the chapter (*d*).

Deaneries and canonries may become void by deprivation; or by resignation either to the king or to the bishop (*e*); and under the provisions of 35 & 36 Vict.

(*x*) 3 & 4 Vict. c. 113, ss. 24, 26; and 4 & 5 Vict. c. 39.

(*y*) Co. Litt. 95; and 1 Bl. Com. 383.

(*z*) 3 & 4 Vict. c. 113, s. 27.

(*a*) Sect. 3.

(*b*) Ibid.

(*c*) Sect. 45.

(*d*) Randolph *v.* Milman, Law Rep., 2 C. P. 60.

(*e*) Grendon *v.* Bishop of Lincoln, Plowd. 498.

c. 8, a dean or canon may resign on the ground of age or infirmity, and receive a pension, not exceeding one-third of the value of his living, charged upon the living.

III. [An *archdeacon* hath an ecclesiastical jurisdiction, immediately subordinate to the bishop, either throughout the whole of a diocese or in some particular part of it; and 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 (*f*). He therefore *visits* the clergy; and has his separate court for the punishment of offenders by spiritual censures; and for hearing other causes of ecclesiastical cognizance], all archdeacons throughout England and Wales now exercising full and equal jurisdiction within their respective archdeaconries (*g*); and as a general rule, the jurisdictions of the archdeacon and the bishop are *concurrent*, so that a suit may be commenced in the Court of either (*h*).

IV. [The *rural deans* are very antient officers of the church (*i*), but their authority is almost grown out of use; though their deaneries still subsist as an ecclesiastical division of the diocese, or archdeaconry (*k*).] They seem originally to have been deputies of the bishop, planted all over his diocese, the better to inspect the conduct of the parochial clergy, to inquire into and report dilapidations, and to examine the candidates for confirmation; and they were armed, in minuter matters, with an inferior degree of judicial and coercive authority (*l*).

(*f*) 1 Burn's Eccl. Law, 68, 69.

(*g*) 6 & 7 Will. 4, c. 77, s. 19.

(*h*) Rogers's Eccl. Law, 60.

(*i*) Kennett, Par. Antiq. 633; Dansey, Horæ Decanicæ Rurales.

(*k*) 6 & 7 Will. 4, c. 77, s. 1; 3 & 4 Vict. c. 113, s. 32; and 37 & 38 Vict. c. 63. In the Report on Public Religious Worship, by the Registrar-General, under the census of 1851, it is said there were then 463 rural deaneries in England and Wales (p. xxxvi).

(*l*) Gibs. Cod. 972, 1550.

V. The next, and indeed the most numerous, order of ecclesiastical persons are the *rectors* and *vicars* of churches: concerning whom we will now speak somewhat at large.

1. [The rector (or governor) of a church is also properly called "a parson," *persona ecclesiæ*, that is, one that hath full possession of all the rights of a parochial church (*m*). He is called *parson*, because by his person the church, which is an invisible body, is represented; and this appellation is the most legal, most beneficial, and most honourable title that a parish priest can enjoy; because such a one, (Sir Edward Coke observes,) and he only, is said *vicem seu personam ecclesiæ gerere*. And the freehold of the parsonage house, the glebe, the tithes, and other dues, all vest, during his life, in the parson. But here we must take occasion to explain the doctrine of appropriations, with which the distinction between *rectors* and *vicars* is closely connected.

The appropriation of livings seems to have sprung from the policy of the monastic orders, who were never deficient in subtle inventions for the increase of their own power and emoluments. At the first establishment of parochial clergy, the tithes of the parish were distributed in a fourfold division; one for the use of the bishop, another for maintaining the fabric of the church, a third for the poor, and the fourth to provide for the incumbent. But when the sees of the bishops became otherwise amply endowed, they were prohibited from demanding their usual share of these tithes, and the division was thenceforth into three parts only. Hence it was inferred by the monasteries, that a small part was sufficient for the officiating priest; and that the remainder might well be applied to the use of their own fraternities, (the endowment of which was construed to be a work of the most exalted piety,) subject to the burthen of repairing the church and providing for

(*m*) The proper term for a parson in full possession of his living is, in law, *persona impersonata*, or parson imparsonee. (See Co. Litt. 300.)

[its constant supply. And therefore they begged and bought, for masses and obits, and sometimes even for money, all the advowsons within their reach, and then *appropriated* the benefices to the use of their own corporation. But, in order to complete such appropriation effectually, the king's licence, and the consent of the bishop, had first to be obtained; because both the king and the bishop might some time or other have an interest, by lapse, in the presentation to the benefice (which can never happen if it be appropriated to the use of a corporation, which never dies); and also because the law reposed a confidence in them, that they would not consent to anything that should be to the prejudice of the Church. The consent of the patron to such appropriation was implied: because the appropriation could originally be made to none, but to such spiritual corporation as was also in fact the patron, an appropriation 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 (*n*). When the appropriation was thus made, the appropriators and their successors became perpetual parsons of the church, so as to sue and be sued in all matters concerning the rights of the church, by the name of parsons (*o*).]

Appropriators were thus in their origin always persons spiritual,—such as bishops, prebendaries, monasteries, and other religious houses, nay, even nunneries, and certain military orders; all of which were spiritual corporations. But the case is now different; for by 27 Hen. VIII. c. 28, and 31 Hen. VIII. c. 13, the monasteries and religious houses were dissolved, and the appropriations which belonged to them respectively, amounting to more than one-third of all the parishes in England, were thereby given

(*n*) Grendon *v.* Bishop of Lincoln, Plowd. 496—500.

(*o*) Wright *v.* Gerard, Hob. 307.

to the king in as ample a manner as the appropriators held the same at the time of their dissolution (*p*); a proceeding which, though perhaps scarcely defensible, was not without example; for the same thing was done in former reigns with respect to the alien priories, that is, such as were filled by foreigners only (*q*); and many of the appropriations so vested in the crown by the effect of these several dissolutions, being afterwards from time to time granted out by the crown to subjects, are now in the hands of lay persons,—who are usually styled, by way of distinction, *lay impropriators*, though the term of *appropriators* is in strictness as applicable to these as to the original holders (*r*).

[Appropriations of either class are capable, it is held, of being severed, so that the church may become disappropriate; as if the appropriator presents a clerk, who is instituted and inducted to the rectory: for the incumbent so instituted and inducted is to all intents and purposes a complete parson; and the appropriation, being once severed, can never be reunited again, unless by a repetition of the same solemnities (*s*).]

In appropriations there is generally a spiritual person attached to the same church, under the name of *vicar*, to whom the spiritual duty, or *cure of souls* (as it is termed), belongs: and to whom a certain portion of the tithes, or other emoluments of the church, is assigned by way of exception out of those enjoyed by the appropriator; and the origin of these vicars is as follows (*t*):—

[The appropriating corporations, or religious houses, were wont to depute one of their own body to perform

(*p*) 1 Bl. Com. 386; Seld. Review of Tithes, c. 9; Spelm. Apology, 35.

(*q*) 2 Inst. 584.

(*r*) Burn's Eccl. Law, vol. i. 66; Spelm. Tithes, c. 29.

(*s*) Co. Litt. 46; see also the Somersham Rectory Act, 1882 (45 & 46 Vict. c. 81), converting that rectory into a vicarage.

(*t*) 40 Edw. 3, pl. 27; Britton *v.* Wade, Cro. Jac. 516; Spelm. Tithes, 153; Bird *v.* Relph, 2 Ad. & Ell. 780; Rogers's Eccl. Law, 890.

[divine service, and to administer the sacraments, in those parishes of which the society was 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* (*u*). His stipend was at the discretion of the appropriator; who was however bound of common right to find somebody, *qui illi de temporalibus, episcopo de spiritualibus debeat respondere* (*x*). 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 was enacted by statute 15 Ric. II. c. 6, that in all appropriations of churches the diocesan bishop should ordain, (in proportion to the value of the church,) a competent sum to be distributed among the poor parishioners annually; and that the vicarage should be *sufficiently* endowed. But the vicar, being liable to be removed at the pleasure of the appropriator, was not likely to insist too rigidly on the legal sufficiency of his stipend: and therefore by statute 4 Hen. IV. c. 12, it was ordained, that the vicar should be a secular person, that is to say, not a member of any religious house; that he should be a vicar perpetual, and not removable at the caprice of the monastery; and that he should 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 (*y*). The endowments of vicarages have, in consequence of these statutes, usually been by a portion of the glebe lands

(*u*) Grendon *v.* Bishop of Lincoln, Plowd. 493; Seld. c. 11, s. 1.

(*x*) Seld. Tith. c. 11, 1.

(*y*) From this Act (4 Hen. 4, c. 12) may be dated the origin of the *present* vicarages; before that time the vicar was nothing more than a temporary curate, and was generally one of the *regular* clergy, the monks, who lived according to the rules (*regulas*) of their respective houses, being so denominated; in contradistinction to the parochial clergy, who, as they performed their ministry in the world (*in seculo*), were called *secular* clergy. (Christian's Blackstone, vol. i. p. 387, n.)

[belonging to the parsonage, and a particular share of the tithes, which the appropriators found it most troublesome to collect: the greater part of the tithes being still reserved to their own use. But one and the same rule was not observed in the endowment of all vicarages; wherefore some are more liberally, and others more scantily, endowed: and the tithes of many things, as wood in particular, are in some parishes rectorial, and in some vicarial.]

Such is the history of the distinction between rectors and vicars, the law on which subject may be summarily stated thus:—Of parochial churches some have been appropriated, others have not: in a non-appropriated living there is no vicar, but a rector only, who must be a spiritual person, and who has the cure of souls in the parish; with the exclusive title to all the emoluments (*z*): in an appropriated living, there is generally, besides the appropriator, a vicar: and in cases so circumstanced (termed *vicarages*), the appropriator never (as appropriator) has the cure of souls within the parish; which is committed exclusively to the vicar; and the emoluments of vicarages belong in part to the proprietor, in part to the vicar, according to distinctions already in part referred to, but to be discussed more fully hereafter. To these explanations it may be proper to add, that, in non-appropriated churches, the rector,—in those which are appropriated, the vicar,—is seised for his life only, the fee being in abeyance (*a*); but the appropriator may be seised either in fee or for a less estate, according to the circumstances of his title (*b*),—but in either case, subject to the life-interest of the vicar.

(*z*) By 2 & 3 Vict. c. 30, reciting that there are several benefices, in which more than one spiritual person has the general cure of souls, the bishop is empowered, where such is the case, to order an apportionment of the spiritual services.

(*a*) Vide sup. vol. I. p. 317, n.

(*b*) Grendon *v.* Bishop of Lincoln, Plowd. 493; Duke of Portland *v.* Bingham, 1 Hagg. Consist. Rep. 162.

But it is not in all appropriations that a vicar exists; for in some it happens, in consequence of their being exempted (for particular reasons) from the statute of 4 Hen. IV. c. 12, that no vicar has ever been endowed (*c*). Such churches, however, usually possess a permanent minister in holy orders, of the same general description as a vicar, and who, under the denomination of *perpetual curate*, is charged with the cure of souls; and he is entitled to emolument for his services, and is liable to his successor for dilapidations (*d*), and is in most other respects similarly situated to a vicar (*e*); and by a recent statute (31 & 32 Vict. c. 117), the incumbent of the church of every parish or new parish for ecclesiastical purposes, not being a *rector*, who is entitled to perform marriages, churchings, and baptisms, and to claim the fees thereof for his own use, shall for the purpose of style and designation, but not for any other purpose, be deemed and styled the *vicar*, and his benefice a *vicarage* (*f*).

It is to be observed also, that in former times the rector of a benefice, having cure of souls, sometimes obtained permission to appoint a vicar to officiate under him; so that, by this means, two persons were instituted to the same church, and both had cure of souls; the effect of which was, that by custom the rector became at length entirely relieved from residence, and from all other spiritual duties; whence he came to be called a *sinecure rector*, or rector without cure of souls (*g*). But by 3 & 4 Vict. c. 113, ss. 48, 55, it is now provided, that all ecclesiastical rectories without cure of souls (having a vicar endowed or a perpetual curate), which are in the sole patronage of the

(*c*) 1 Bl. Com. 394; 1 Burn's Eccl. L. 427; Wats. C. L. 172.

(*d*) Mason *v.* Lambert, 12 Q. B. 795.

(*e*) Doe *v.* Thomas, 9 A. & E. 556; Hine *v.* Reynolds, 2 Man. & Gr. 71; Doe *d.* Brammall *v.* Collinge, 7 C. B. 939.

(*f*) 1 Geo. 1, c. 10, ss. 4 and 21; and 34 & 35 Vict. c. 43.

(*g*) 2 Burn's Eccl. L. 347; Rogers's Eccl. L. 890; Gibs. Cod. 753.

crown or of any ecclesiastical corporation aggregate or sole, shall, immediately upon future vacancies, be entirely suppressed; and that the patronage of all others may be at any time sold to the Ecclesiastical Commissioners, and shall thereupon be also suppressed; and that the lands, tithes, and endowments of any such suppressed sinecure rectory may be annexed, when it shall appear expedient, to the vicarage or perpetual curacy attached to such rectory: which shall be thereupon constituted a rectory with cure of souls.

We have thus had occasion to speak of three several kinds of parochial preferments, viz., rectories, vicarages, and perpetual curacies; and as to each of these we may remark, that they are usually comprehended under the general term of *benefice* (*h*); a term indeed which, in its technical sense (though not in its popular acceptation), extends not only to these, but also to any ecclesiastical preferments to which rank or public office is attached, and which are described in our books as ecclesiastical *dignities* or *offices*, such as bishoprics, deaneries, and the like (*i*); but in statutes, these latter are in general distinguished (*k*).

2. The method of becoming a rector and becoming a vicar is much the same. To both there are in general four requisites necessary: *holy orders; presentation; institution;* and *induction.* The method of conferring *holy orders* has been already so far noticed as the purpose of these Commentaries required. We have seen that the age of twenty-three years is now the earliest at which a man (except by faculty or dispensation of the Archbishop of

(*h*) Vide sup. vol. I. p. 173; 5 & 6 Vict. c. 27, s. 15; c. 108, s. 31; 13 & 14 Vict. c. 98, s. 3.

(*i*) 3 Inst. 174.

(*k*) 1 & 2 Vict. c. 106, s. 124, in which Act, but for the purposes of the Act only, *benefices* are distinguished from *cathedral preferments; benefices* denoting all parochial or district churches, and endowed chapels and chapelries; and *cathedral preferments* denoting all deaneries, archdeaconries, and canonries, and (generally) all dignities and offices in any cathedral or collegiate church below the rank of bishop.

Canterbury) may be ordained deacon; and that twenty-four is the earliest age at which he may be ordained priest: and, in reference to this qualification of holy orders, we shall here only add, that (by 13 & 14 Car. II. c. 4, s. 14) no person is capable of being admitted to any benefice unless he shall have been first ordained a priest.

[Any person may be *presented* to a rectory or vicarage; that is, the patron to whom the advowson of the church belongs, may offer his nominee to the bishop of the diocese to be instituted; but if such nominee is a layman or deacon, he must take priestly orders before admission (*l*). Of advowsons, or the right of presentation, being a species of private property, we shall find it more convenient to treat when discussing the endowments and provisions of the church (*m*); and shall for the present only remark, that 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 (*n*); or (2) if the clerk be unfit. And with regard to the unfitness of the clerk (*o*), that may be of several kinds:—First, with regard to his person; as if he be an outlaw, an excommunicate, under age, or the like; but bastardy is no longer a ground of unfitness (*p*). 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 general, 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 (*q*). Or lastly, the clerk may be unfit to discharge the pastoral office for want of learning; or (in Wales) for want of a knowledge of Welsh (*r*). In any of which cases the bishop may refuse the clerk. In case the refusal is

(*l*) 1 Burn's E. L. 103.
(*m*) Vide post, ch. III.
(*n*) 2 Roll. Abr. 355.
(*o*) Glanv. l. 13, c. 20.
(*p*) 1 Bl. Com. 389.
(*q*) Specot's case, 5 Rep. 58; Heywood *v.* Bishop of Manchester, 12 Q. B. D. 404.
(*r*) Abergavenny (Marquis) *v.* Llandaff (Bishop), 20 Q. B. D. 460.

[for heresy, schism, inability of learning, or of language, or other matter of ecclesiastical cognizance, there the bishop must give notice to the patron of such his cause of refusal (*s*); at least if the patron be a layman, for in that case he is presumably unaware of the disability; but if the objection be a temporal one, the bishop is not bound to give such notice (*t*).

If the bishop hath no objections, but admits the patron's presentee, 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. But when the bishop is also the patron, and *confers* the living, the presentation and institution are one and the same act, and are called a *collation* to the benefice.] And before institution or collation (as the case may be), the clerk must renew the "declaration of assent" he made previously to his ordination, and must also make and subscribe the declaration against simony, and take the oath of allegiance to the Queen (as framed by 31 & 32 Vict. c. 72), before the archbishop or bishop or their commissary; and he must also take the oath of canonical obedience to his bishop (*u*). [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 crown till induction: nay, even if a clerk has been instituted upon the crown's presentation, the crown may revoke it before induction, and present another clerk (*x*). Upon institution 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.

(*s*) Bedingfield *v.* Archbishop of Canterbury, Dyer, 292 (*b*); Hele *v.* Bishop of Exeter, 2 Salk. 539; Albany *v.* Bishop of St. Asaph, Cro. Eliz. 119.

(*t*) 2 Inst. 632; 2 Burn, Eccl. L. 157.

(*u*) 28 & 29 Vict. c. 122, s. 5.

(*x*) Co. Litt. 344.

[*Induction* is performed by a mandate from the bishop to the archdeacon, who usually issues out a precept to other clergymen to perform it for him. It is done by giving the clerk corporal possession of the church, as by holding the ring of the door, tolling a bell, or the like; and is a form required by law, the original intent of which was to give all the parishioners due notice and sufficient certainty of their new minister. 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 living, he is then, and not before, in full and complete possession (*y*).] The title, however, of any person instituted, collated, or licensed, to any benefice with cure of souls will be afterwards divested, unless on the first Lord's day on which he officiates in the church of the benefice, or such other Lord's day as the ordinary shall appoint and allow, he shall publicly read therein, in the presence of the congregation, the Thirty-nine Articles of religion, and immediately afterwards repeat the "declaration of assent" prescribed by 28 & 29 Vict. c. 122, which he made previously to his ordination (*z*).

In addition to the methods of acquisition which have been mentioned, there are benefices which a clerk may obtain by mere donation, that is, by deed of gift alone, without presentation, institution, or induction; and they are thence called *donative* benefices. [These last-mentioned benefices are created whenever the king, or any subject by his licence, doth found a church or chapel, and ordains that it shall be merely in the gift or disposal of the patron; be subject to his visitation only, and not to that of the ordinary; and become vested absolutely in the clerk by the patron's deed of donation, without presentation, institution, or induction (*a*). This is said to have been an-

(*y*) Co. Litt. 300.
(*z*) 28 & 29 Vict. c. 122, s. 7.
(*a*) Co. Litt. 344; 2 Bl. Com. 23.

[tiently the only way of conferring ecclesiastical benefices in England; the method of institution by the bishop not having been established before the time of Archbishop à Becket, in the reign of Henry the second (*b*), as may be inferred from the letter (*c*) of Pope Alexander the third to à Becket, in which he severely inveighs against the *prava consuetudo* of investiture conferred by the patron alone. Others, however, contend that the claim of the bishops to make institution is as old as the first planting of Christianity in this island: and in proof of it they allege a letter from the English nobility to the Pope in the reign of Henry the third, recorded by Matthew Paris (A.D. 1239), which speaks of presentation to the bishop as a thing immemorial. The truth seems to be, that where the benefice was to be conferred on a mere layman, he was first presented to the bishop, in order to receive ordination, who was at liberty to examine and refuse him: but where the clerk was already in orders, the living was usually vested in him by the simple donation of the patron; and that this practice prevailed till about the middle of the twelfth century, when the Pope and his bishops endeavoured to introduce a kind of feodal dominion over ecclesiastical benefices, and, in consequence of that, began to claim and exercise the right of institution universally, as a species of spiritual investiture.

However this may be, if the patron of a donative *once* waives his privilege and presents to the bishop, and his clerk is thereon admitted and instituted, the advowson becomes for ever presentative, and shall never be donative any more (*d*). For these exceptions to the common law are ever looked upon unfavourably, and are construed as strictly as possible; and if therefore the patron, in whom such peculiar right resides, does once give up that right, the law, which loves uniformity, will interpret it to be

(*b*) Seld. Tith. c. 12, s. 2.
(*c*) Decretal. l. 3, t. 7, c. 3.
(*d*) Co. Litt. ubi sup.; Farchild *v.* Gayre, Cro. Jac. 63.

[done with an intention of giving it up for ever: and will therefore reduce the donative to the standard of other ecclesiastical livings (*e*).

3. The rights of the clergy in their tithes and ecclesiastical dues will be considered hereafter as part of the endowments and provisions of the Church (*f*). The duties of the clergy are principally of ecclesiastical cognizance, those only excepted which are laid upon them by statute; and these are so numerous, that it is impracticable to recite them here with any tolerable conciseness or accuracy. Some of them we may remark upon as they arise in the progress of our inquiries; but for the rest it will be sufficient to refer to such authors as have compiled treatises expressly upon this subject (*g*): and we shall refer, without any minuteness of detail, only to the article of residence upon the supposition of which the law doth style every parochial minister an *incumbent*.]

The present enactments on the subject of residence will be chiefly found in 1 & 2 Vict. c. 106, 13 & 14 Vict. c. 98, and 50 & 51 Vict. c. 68, commonly cited as the Pluralities Acts, 1838, 1850, and 1887, and the first of which provides, that every spiritual person holding a benefice shall reside thereon, and in the house of residence (if any) belonging thereto; and that if he absents himself for a period exceeding three months, (either accounted together or at several times,) in any one year he shall forfeit, unless resident at some other benefice to him belonging, a proportionate part of the annual value of the benefice at

(*e*) Co. Litt. 344; Wats. C. L. 170; 2 Bl. Com. 23; Reppington *v.* Governor of Tamworth School, 2 Wils. 150; Rennell *v.* Bishop of Lincoln, 8 Bing. 490; The Queen *v.* Foley, 2 C. B. 664.

(*f*) Vide post, bk. IV. pt. II. ch. III.

(*g*) "Among the treatises on the "law of the Church which may "be relied upon with confidence, "are Bishop Gibson's Codex, Dr. "Burn's Ecclesiastical Law, and "the earlier editions of the Clergy-"man's Law, published under the "name of Dr. Watson, but com-"piled by Mr. Place, a barrister." (Note by Blackstone, vol. i. p. 392.)

which he so fails to reside (*h*). But this rule is subject to various exceptions and modifications, of which the principal are as follows: 1st. The heads of all colleges and halls in the universities of Oxford or Cambridge, the warden of the university of Durham, and the head master of Eton, Winchester, or Westminster school, are exempt from its requirements (*i*). And 2ndly. Deans and archdeacons,—and a variety of public professors, readers, preachers, and chaplains specified in the Acts,—as likewise the provost of Eton, the warden of Winchester, the master of the Charterhouse, the principal of St. David's, and of King's College, London, and also (provided they are not absent from their benefices more than *five* months in the year) the fellows of Eton and Winchester—and all canons, minor canons, priest vicars, and vicars choral—are severally entitled to count the time passed at their official residences or in the performance of their duties, as if it had been passed in residence upon their benefices (*k*). 3rdly. If there be no fit residence belonging to the benefice, the bishop may from time to time license the incumbent to reside in some other house within a certain specified distance from his church or chapel; and such house shall thereupon become a legal house of residence for all purposes. 4thly. If there be no fit house of residence, and no convenient house can be obtained within the specified distance, or if the incumbent cannot reside on his benefice by reason of any incapacity of mind or body, or owing to the dangerous illness of his wife or child, (but subject in the latter case to certain restrictions as to time and otherwise,) application may be made to the bishop for a licence of non-residence; and in case of his refusal, there is an appeal to the archbishop of the province (*l*). 5thly. If the incumbent shall occupy, in the same parish, any mansion whereof he is the owner, a similar application for a licence to reside therein may be made, with the same power of

(*h*) 1 & 2 Vict. c. 106, s. 32.
(*i*) Sect. 37.
(*k*) Sects. 38, 39.
(*l*) Sect. 43.

appeal in case of refusal (*m*). 6thly. The bishop is empowered, in any other case besides those enumerated, to grant a licence to reside out of the limits of the benefice:—but in a case of this description the special circumstances and reasons must be transmitted to the archbishop, without whose allowance such licence will be ineffectual (*n*).

It is further provided by the 1 & 2 Vict. c. 106, that annual returns of such of the clergy as are resident, and of such as are non-resident, shall be made to her Majesty in council (*o*); and that, in case of non-residence, the bishop, instead of proceeding to enforce the penalties above mentioned, may, if he thinks fit, issue a monition against the offender, to be followed up by an order to reside; and in case of non-compliance with such order, may proceed to sequester the profits of the benefice, and apply them to the purposes in the Act specified (*p*); and in case of long-continued or repeated sequestration, the benefice is to become void, and a new presentation may be made, as if the former holder were dead (*q*).

For the more effectual promotion of this important duty of residence, among the parochial clergy, there are also contained in the statute book a variety of provisions for repairing the houses of residence, and building or purchasing new ones; and for raising money, for these purposes, by mortgage of the benefices (*r*), the money being lent by the Governors of Queen Anne's Bounty, and repayable as in the Acts provided,—the time for repayment being, in a proper case, extended and further extended (*s*).

(*m*) Sect. 43.

(*n*) Sect. 44.

(*o*) Sects. 51, 53.

(*p*) Sect. 54; Ex parte Bartlett, 12 Q. B. 488; Bartlett *v.* Kerwood, 2 Ell. & Bl. 771.

(*q*) Sect. 58.

(*r*) 17 Geo. 3, c. 53; 21 Geo. 3, c. 66; 43 Geo. 3, cc. 107, 108; 51 Geo. 3, c. 115; 55 Geo. 3, c. 147; 6 Geo. 4, c. 8; 7 Geo. 4, c. 66; 1 & 2 Vict. cc. 23, 29, 106, ss. 25, 62, &c.; 3 & 4 Vict. c. 113, s. 59; 4 & 5 Vict. c. 39, s. 18; 5 & 6 Vict. c. 26 (repealing 2 & 3 Vict. c. 18); 19 & 20 Vict. c. 104, s. 27; 28 & 29 Vict. c. 69; 34 & 35 Vict. c. 43.

(*s*) 49 & 50 Vict. c. 34; 49 & 50 Vict. c. 54, s. 12; and 50 Vict. c. 34.

4. There are many ways by which a clerk may lose his preferment; and 1stly, By *cession*, or taking another benefice (*t*). For by the statute 1 & 2 Vict. c. 106, before mentioned (in substitution for the previous provisions of the 21 Hen. VIII. c. 13, as to pluralities, which the Act repeals), and also by 13 & 14 Vict. c. 98, it was enacted, that thereafter (and subject to exception in the case of rights already vested) no person should hold together any two or more benefices,—except in the case of two whereof the churches were within three miles of one another, by the nearest road, and the annual value of one of which did not exceed 100*l.*, and which being (in a manner) *contiguous* benefices might be united (*u*): that no person, holding a benefice with cure of souls embracing a population of more than 3,000, should hold therewith any other benefice with a population of more than 500: that no person, holding two benefices with cure of souls, should hold therewith a third, or any cathedral preferment (*x*): and that, upon every admission to a new benefice or preferment contrary to the Acts, every benefice previously held should be void *ipso facto* (*y*):—all of which prohibitions, however, in respect of population and yearly value, were subject to a provision whereby the Archbishop of Canterbury was enabled, in certain cases, to grant a dispensation therefrom on recommendation of the bishop of the diocese (*z*): and these regulations and restrictions are still in force, subject to the following modifications introduced by the Pluralities Acts Amendment Act, 1885 (48 & 49 Vict. c. 54), that is to say:—In lieu of the three miles distance, four miles has been

(*t*) 1 Bl. Com. 392.

(*u*) 1 & 2 Vict. c. 106; 13 & 14 Vict. c. 98; 23 & 24 Vict. c. 142; and 34 & 35 Vict. c. 90.

(*x*) 1 & 2 Vict. c. 106, s. 2.

(*y*) Sect. 11; 13 & 14 Vict. c. 98, s. 7.

(*z*) 1 & 2 Vict. c. 106, ss. 5, 6. See also, as regards *persons holding cathedral preferments*, 1 & 2 Vict. c. 106, s. 11; 4 & 5 Vict. c. 39; 13 & 14 Vict. c. 98, s. 11; as regards *deans of cathedrals*, 13 & 14 Vict. c. 94, s. 19; and as regards *heads of colleges*, 13 & 14 Vict. c. 98, ss. 5, 6.

substituted, and in lieu of the 100*l.* value, 200*l.* value has been substituted.

A clerk may lose his preferment, 2ndly, [By *consecration;* for when a clerk is promoted to a bishopric, all his other preferments are void the instant that he is consecrated; but a method was formerly in use, by the favour of the crown, of holding such livings *in commendam*. *Commenda*, or *ecclesia commendata*, was a living commended by the crown to the care of a clerk, to hold till a proper pastor should be provided for it; which might be temporary—for one, two, or three years,—or it might be perpetual: being a kind of dispensation to avoid the vacancy of the living, and called a *commenda retinere:* and it used to be granted to bishops in the poorer sees, to aid the deficiency of their episcopal revenues; and there was also a *commenda recipere*, which was, to take a benefice *de novo*, in the bishop's own gift, or in the gift of some other patron consenting to the same; and this was the same to him as institution and induction are to another clerk (*a*).] But now, by 6 & 7 Will. IV. c. 77, s. 18, no ecclesiastical dignity, office, or benefice shall be held *in commendam* by any bishop, unless he held the same when that Act passed; and every *commendam* thereafter granted, whether to retain or to receive, and whether temporary or perpetual, shall be absolutely void to all purposes (*b*).

A clerk may lose his preferment, 3rdly, [By *deprivation;* which may be on such nonfeasance or neglect, malfeasance or crime, as any penal statutes declare shall avoid the benefice (in which cases, the benefice is *ipso facto* void without any formal sentence of deprivation) (*c*); or it may be upon sentence declaratory under the Clergy Discipline Act, 1892 (55 & 56 Vict. c. 32), on the clerk's conviction of treason or felony or of any misdemeanor involving

(*a*) Colt *v.* Bishop of Lichfield and Coventry, Hob. 144.

(*b*) See also (as to the Bishop of Sodor and Man) 1 & 2 Vict. c. 30.

(*c*) 1 Bl. Com. p. 393; Re Dean of York, 2 Q. B. 1; Ex parte Denison, 4 Ell. & Bl. 292.

[imprisonment with hard labour or any greater punishment (*d*); or on a bastardy order being made against him; or on a finding of the Divorce Court that he has committed adultery; or on a separation order being made against him, either by the Divorce Court or under the 41 & 42 Vict. c. 19,—the bishop in every such case declaring, within twenty-one days after the conviction finding or order become final, his benefice vacant and himself incapable of holding preferment (sect. 1). And a sentence of deprivation may (or might) also be for heresy (*e*), infidelity (*f*), and the like; or on a third conviction of having engaged in trade (*g*); or for simony (*h*), or plurality; or for maintaining any doctrine in derogation of the king's supremacy, or of the Thirty-nine Articles, or of the Book of Common Prayer (*i*)]; or for neglecting to read in church the Thirty-nine Articles, and to make the proper "declaration of assent" at the time appointed by the ordinary (*k*); or for using any other form of prayer than the Liturgy of the Church of England (*l*); or for continued neglect, after order from the bishop followed by sequestration, to reside on the benefice (*m*).

A clerk may lose his preferment, 4thly, By *resignation;* but this is of no avail, till accepted by the ordinary, into whose hands the resignation of the benefice must be made (*n*). And in connection with this last mode of vacating a preferment, it may possibly be useful to notice here an Act, called the Clerical Disabilities Act, 1870 (33 & 34 Vict. c. 91), which was passed with the object of relieving persons who had been admitted to the office of priest or deacon in the Church of England, from certain

(*d*) Bishop of Chichester *v.* Webb, Dyer, 108; Jenk. 210.
(*e*) Ex parte Denison, ubi sup.
(*f*) Fitz. Abr. tit. Trial, 54.
(*g*) 1 & 2 Vict. c. 106, s. 31.
(*h*) 31 Eliz. c. 6; 13 Ann. c. 11.
(*i*) 1 Eliz. cc. 1, 2; 13 Eliz. c. 12.
(*k*) 28 & 29 Vict. c. 122.
(*l*) 1 Eliz. c. 2.
(*m*) 1 & 2 Vict. c. 106, s. 58.
(*n*) Fane's case, Cro. Jac. 198; Martin *v.* Mackonochie, 8 P. D. 191.

disadvantages to which (until protected by that statute) they were exposed; and in order to effect this object, the Act provides, that any person admitted to holy orders may, after having resigned any and every preferment by him held, execute and cause to be enrolled in Chancery a deed of *relinquishment* in a prescribed form, and deliver an office copy of the same to the bishop of his diocese, to be recorded in the diocesan registry; and at the expiration of six months from the time of such delivery, he shall be incapable of acting in any way as a minister of the Church of England, and shall cease to enjoy any right or privilege attaching to such office; and on the other hand, *shall be freed from all disabilities, disqualifications, restraints, and prohibitions* to which he would, under certain statutes, have been subject as a person who had been admitted to such office (*o*), and from all penalties and proceedings to which he might under any law have been amenable, in consequence of any act or thing by him done under such admission (*p*). But it is much more useful to notice here another Act, called the Incumbents Resignation Act, 1871 (34 & 35 Vict. c. 44), by which (as amended by the 50 & 51 Vict. c. 23) a clergyman permanently incapacitated by illness may resign his benefice; and may receive a pension to the amount of one-third the clear annual value charged on the revenues of the benefice, and recoverable as a debt from the subsequent incumbent thereof.

VI. The lowest degree of ecclesiastical persons is the *curate:* who is a clerk in holy orders employed by the rector, vicar, or other incumbent of a living, either to serve in his absence, or as his assistant, as the case may be (*q*).

(*o*) 41 Geo. 3, c. 63; 5 & 6 Will. 4, c. 76, s. 28; 3 & 4 Vict. c. 86.

(*p*) 33 & 34 Vict. c. 91, s. 4; Ex parte a Clergyman, Law Rep., 15 Eq. Ca. 154.

(*q*) Burn's Ecc. Law, by Tyrw. vol. ii. p. 54 (*a*); Arnold *v.* Bishop of Bath, 5 Bing. 316; and as to *lecturers* and *preachers*, see 7 & 8 Vict. c. 59.

Every stipendiary curate, before he enters on his duties, must, however, be *licensed* by the archbishop or bishop of the diocese (*r*); and such licence may be afterwards revoked (*s*); also, before it is granted, the curate must make such declaration as is prescribed by the 28 & 29 Vict. c. 122, as to the *bonâ fide* character of his engagement, which declaration must be signed both by himself and by the incumbent (*t*). He must also on entering on his curacy (unless having been ordained on the same day he has already done so) make and subscribe the "declaration of assent" in that behalf prescribed; and on the first Lord's day on which he officiates, he must publicly and openly repeat such declaration in the presence of the congregation, and during the time of divine service (*u*). For the proper sustentation and payment of licensed curates, the law has made a variety of provisions; thus, by 28 Hen. VIII. c. 11, a curate who shall serve a church during its vacancy, shall be paid such stipend as the ordinary thinks reasonable out of the profits accruing during the vacancy; or, if that be not sufficient, it shall be made up by the successor, within fourteen days after he takes possession (*x*); and by 1 & 2 Vict. c. 106, numerous provisions are made as to the appointment and payment of curates, among which are the following:—that in certain cases of non-residence by the incumbent, the bishop may, in his default, appoint a proper resident curate, with a stipend (*y*); that where the bishop sees reason to believe that the duties of any benefice are inadequately performed, or where it is of a certain value or extent, he may (though in the first case only after referring the matter to certain commissioners appointed by him for that purpose) require the incumbent, whether actually resident or not, to nominate a proper curate with

(*r*) Burn's Ecc. Law, by Tyrw. vol. i. p. 61; Watson, C. L. 147, 207, 335.

(*s*) The Queen *v.* Archbishop of Canterbury, 1 E. & E. 545.

(*t*) 28 & 29 Vict. c. 122, s. 6.

(*u*) Ibid. s. 8.

(*x*) 1 Bl. Com. 10.

(*y*) 1 & 2 Vict. c. 106, ss. 76, 86.

sufficient stipend, and on his default may himself make such appointment (*z*); that the stipend of every curate appointed by the bishop shall be adjusted in proportion to the value and population of the benefice; that the stipend of a curate shall not in any case fall short of 80*l.* per annum, or of the whole annual value of the benefice, if it be under that amount (*a*); and that in all cases of dispute between the incumbent and the curate as to his stipend, the bishop may summarily decide between them without appeal, and may enforce his sentence by monition and sequestration (*b*). Also, by the Pluralities Act, 1885 (48 & 49 Vict. c. 54), it is provided that the bishop may assign to any curate or curates appointed and licensed by him such stipend as he may think fit, not exceeding by 70*l.* the respective stipends allowed to curates by the 1 & 2 Vict. c. 106, s. 77, in the case of non-resident incumbents (*c*); and may in certain cases appoint two or more curates in the case of such non-resident incumbents (*d*), with an adequate provision for each; and it is also provided that whenever the incumbent of any benefice is non-resident with the licence of the bishop, he shall not (without the bishop's permission) resume the duties of the benefice until the expiration of the licence, or generally interfere with the curate or curates thereof appointed by the bishop (*e*).

Thus much of the various orders and degrees of the clergy. There are, however, certain inferior officers connected with the church of whom the secular law takes notice; that is to say, churchwardens, parish clerks, and sextons.

VII. *Churchwardens* (*f*) are the guardians or keepers of

(*z*) Sects. 77, 78.

(*a*) Sect. 85.

(*b*) Sect. 83; Daniel *v.* Morton, 16 Q. B. 198.

(*c*) 48 & 49 Vict. c. 54, s. 8.

(*d*) Sect. 9.

(*e*) Sect. 12.

(*f*) Bac. Abr. and Burn's Ecc. Law, *in tit.* "Churchwardens;" Ex parte Winfield, 3 Ad. & El.

the fabric and furniture of the church, and are the representatives of the general body of the parishioners; but though in some sort ecclesiastical officers, they are always lay persons (*g*). They are sometimes appointed by the minister, sometimes by the parish in vestry assembled (*h*), and sometimes by both minister and parishioners together, as the custom of the place directs (*i*); and where there is no such custom, the election must be according to the directions of the canons (*k*): and these require that churchwardens shall be chosen by the joint consent of the minister and parishioners, if it may be; but if they cannot agree, then the minister is to choose one, and the parishioners another (*l*). The Church Building Acts (*m*), and the New Parishes Acts (*n*), as to the churches respectively within the provisions of those Acts, contain express provisions as to the election of churchwardens. And, in general, all churchwardens are chosen yearly in Easter week, and are generally two in number; they are obliged, when chosen, to serve (*o*); and are sworn to execute their office faithfully (*p*). [They are taken, in favour of the church, to be for some purposes a kind of corporation at common law; that is, they are enabled, by the name of "churchwardens," to have a

614; R. *v.* Marsh, 5 Ad. & El. 468; Bray *v.* Somer, 2 B. & Smith, 374.

(*g*) Per Hale, Hard. 379; 1 Rol. Ab. 653; 2 Rol. Rep. 107.

(*h*) As to vestries, vide sup. vol. I. p. 122.

(*i*) Campbell *v.* Maund, 5 Ad. & El. 865; R. *v.* Rector of Lambeth, 8 Ad. & El. 356; Bremner *v.* Hull, Law Rep., 1 C. P. 748.

(*k*) Catten *v.* Barwick, Str. 145.

(*l*) Canon 89; The Queen *v.* Allen, Law Rep., 8 Q. B. 69.

(*m*) 58 Geo. 3, c. 45, s. 73; 1 & 2 Will. 4, c. 38, ss. 16, 25; and 8 & 9 Vict. c. 70, ss. 7, 8.

(*n*) 6 & 7 Vict. c. 37, s. 17; 19 & 20 Vict. c. 104, s. 28.

(*o*) The following classes of persons are either ineligible or exempted, viz., peers of the realm; members of parliament; clergymen of the Church of England; Roman Catholic clergy; dissenting ministers; barristers; solicitors; clerks in court; physicians, surgeons, and apothecaries (if duly registered); aldermen; and dissenting teachers; and all persons living out of the parish, unless they occupy a house of trade therein. (See Steer's Parish Law, p. 84.)

(*p*) Canon 88; Ex parte Winfield, 3 Ad. & El. 614, 615.

[property in goods and chattels, and to bring actions for them, for the use and profit of the parish (*q*); and it is said that churchwardens in the city of London are a corporation for all purposes (*r*). One of the chief duties of churchwardens is the care and management of the goods belonging to the furniture of the church, such as the organ, bells, bible, and parish books (*s*). But as to the fabric of the church and also as to the churchyard they have no sort of interest in the property thereof; and if any damage be done thereto, the rector only, or vicar, shall have the action (*t*)]; but this last remark, of course, does not apply to the cemeteries and burial grounds set apart under the modern Burial Acts, which are referred to in the third volume of this work.

It is also part of the office of churchwardens, unless other persons are appointed by the ordinary for that purpose, to have the care of the benefice during its vacancy; or while it is under sequestration for the debts of the incumbent (*u*). They are, moreover, required to see to the reparation of the church, and to the making of the *church rates*, by which the expenses thereof are to be defrayed; and these rates are charged on all lands and houses in the parish; are assessed on the occupiers; and are made by the parishioners at large,—that is, by the *majority* of the parishioners present at a vestry to be summoned for that purpose by the churchwardens (*x*). But they are not now as a general rule *compulsory* on the persons rated; and now the only consequence of refusing to pay them is a

(*q*) 9 Geo. 1, c. 7, s. 4; and (in regard to *parish lands*) 59 Geo. 3, c. 12, ss. 8, 17; 5 & 6 Will. 4, c. 69, s. 4; Smith *v.* Adkins, 8 Mee. & W. 362; and (in regard to compensation for the *common rights* of parishes) 45 & 46 Vict. c. 15.

(*r*) Pulling's Laws of London, 263; Rogers's Eccl. L. 185.

(*s*) Bac. Abr. Churchwardens, B.; Wats. C. L. 390; Addison *v.* Round, 4 Ad. & El. 799; Jackson *v.* Adams, 2 Bing. N. C. 402.

(*t*) 1 Bl. Com. 395; Beckwith *v.* Harding, 1 B. & Ald. 508.

(*u*) Steer, P. L. 91.

(*x*) The Braintree case (Burder *v.* Veley), 12 Ad. & Ell. 247; Gosling *v.* Veley, 4 House of Lords Cases, 679.

disqualification from interfering with the moneys arising from the rate,—an important change in the law which was effected in the year 1868, by the 31 & 32 Vict. c. 109, the reason stated for the abolition of their *compulsory* levy being that church rates had for years ceased to be made or collected in many parishes by reason of the opposition thereto, and the levying thereof had given rise to litigation and ill-feeling; but (by section 2) there is excepted from the operation of the Act all rates which, under the name of church rates, are made by the authority of any Act of Parliament, and are applicable in part to other than ecclesiastical purposes; and, also, some other special cases; and these accordingly are governed by the previous law on this subject.

It is a further part of the duties of churchwardens to make such order relative to seats in the church and chancel, not appropriated to particular persons, as the ordinary—who has in general the sole power in this matter (*y*)—shall direct; and, in practice, the arrangements with regard to the sittings are usually made by the churchwardens, without any special direction from the ordinary (*z*). It is incident also to the office of churchwarden to enforce proper and orderly behaviour in the church and its precincts during the performance of divine service (*a*); and, to this end, it has been held that a churchwarden may justify the pulling off a man's hat irreverently worn in the church, or the removal of the offender from the church (*b*). And besides these, there are a multitude of other parochial powers committed to the charge of the churchwardens which cannot be here particularized without descending to inconvenient minuteness. Formerly, also, the churchwardens were entitled (and even obliged), by 1 Eliz. c. 2, to levy a tax of

(*y*) 3 Inst. 202; Clifford *v.* Wicks, 1 B. & Ald. 506; Wats. C. L. 288.

(*z*) Rogers's Eccl. L. 179; Ritchings *v.* Cordingley, Law Rep., 3 Adm. & Ecc. 113.

(*a*) Worth *v.* Torrington, 13 Mee. & W. 781.

(*b*) Hawk. P. C. b. 1, c. 63, s. 29; Hawe *v.* Planner, 1 Saund. 10: S. C., 1 Sid. 301.

one shilling on every householder who failed to resort to his own parish church on Sundays or holidays; but the 1 Eliz. c. 2 was repealed by the 9 & 10 Vict. c. 59; and usually the churchwardens were joined with the overseers in the care and maintenance of the poor; but this duty is now in general taken from them by the effect of the Poor Law Amendment Act, 1834, 4 & 5 Will. IV. c. 76, and of the regulations subsequently introduced, under the authority of that and of later poor law Acts, by the Local Government Board (*c*).

Such, then, in general, are the duties of churchwardens; and for the better discharge of their duties,—or of such of them as require legal knowledge,—they may in general have a *vestry-clerk* to assist them (*d*). We will add, in conclusion, that churchwardens, in case of their wasting the goods of the church, or being guilty of other misbehaviour, are liable to removal (*e*); and that, at the end of their year of office, they are bound to render an account of all their receipts and disbursements (*f*).

VIII. *Parish clerks* and *sextons* are also persons connected with the church; and by the common law, they have freeholds in their offices (*g*); but, under 7 & 8 Vict. c. 59, s. 5, parish clerks may be suspended or removed by the archdeacon or other ordinary for misconduct or neglect. The duties of the parish clerk are too well known to require description; in some few instances, he is in holy orders (*h*); but in general his qualification is only that he should be at least twenty years of age; and that he should be known to the rector, vicar, or other minister, to be of honest conversation, and to be sufficient for his office (*i*). He is generally appointed by the incumbent (*k*); but by custom he may be chosen by the inhabitants of the

(*c*) Vide post, bk. IV. pt. III. ch. II.

(*d*) 13 & 14 Vict. c. 57.

(*e*) Steer, P. L. 95.

(*f*) Ib. 92; Leman *v.* Goulty, 3 T. R. 3; Astle *v.* Thomas, 2 B. & C. 271.

(*g*) Steer, P. L. 96.

(*h*) 7 & 8 Vict. c. 59, ss. 2, 3, 4.

(*i*) Canon 91.

(*k*) Ibid.

parish (*l*); his appointment may be either in writing or by word of mouth (*m*); and his remuneration usually depends upon the custom of the particular parish (*n*). In the case of churches which are subject to the Church Building Acts, he is appointed *annually*, by the minister (*o*); and in the case of a parish constituted under the New Parishes Acts, he is appointed by the incumbent (and also removeable by him), but in each case with the consent of the bishop (*p*). The *sexton* (*q*) is, in the ordinary course, chosen by the incumbent; though sometimes by the parishioners, where a usage to that effect prevails (*r*); and his salary depends on custom; and is paid by the churchwardens out of any funds in their hands for that purpose; his duty is to cleanse the church, to open the pews, to dig the graves for the dead, to provide candles and other necessaries, and to prevent, or assist in preventing, disturbance in the church (*s*). In the case of parishes constituted under the Church Building Acts, the sexton's appointment and his duties and emoluments are prescribed by these Acts (*t*); and in new parishes, his appointment is like that of the parish clerk (*u*). And, in conclusion, we will observe, that besides the parish clerk and sexton, there is sometimes attached to the church a *beadle*, whose business is to attend the vestry, to give notice of its meetings to the parishioners, and to execute its orders (*x*); and in most churches, there are *pew-openers*, *collectors*, and the like; but none of these are (as such) ecclesiastical persons.

(*l*) 13 Rep. 70; Jermyn's case, Cro. Jac. 670; Peake *v.* Bourne, Str. 942; Hartley *v.* Cook, 9 Bing. 728.

(*m*) R. *v.* Inhabitants of Bobbing, 5 A. & E. 682.

(*n*) Steer, P. L. 97.

(*o*) 58 Geo. 3, c. 45; 59 Geo. 3, c. 134; Pinder *v.* Barr, 4 Ell. & Bl. 105; Jackson *v.* Courtenay, 8 Ell. & Bl. 8.

(*p*) 19 & 20 Vict. c. 104, s. 9.

(*q*) Apparently from *sacristan*, the keeper of things belonging to divine worship.

(*r*) Rogers's Eccl. L. p. 884; R. *v.* Inhabitants of Bobbing, ubi sup.; Causfield *v.* Blenkinsop, 4 Exch. 234.

(*s*) R. *v.* Inhabitants of Liverpool, 3 T. R. 119; Shaw's P. L. 71.

(*t*) 59 Geo. 3, c. 134, ss. 6, 10.

(*u*) 19 & 20 Vict. c. 104, s. 9.

(*x*) Shaw's P. L. c. 19.

CHAPTER II.

OF THE DOCTRINES AND WORSHIP OF THE CHURCH, AND HEREIN OF THE LAWS AS TO HERESY AND NONCONFORMITY.

THOUGH this nation has from the earliest times adhered to the principle of an established Church,—that is, a church endowed and protected by the provisions of the temporal law—yet no claim was at first made by the law to interfere with the faith, ceremonies, or discipline of the church; and no such interference was in fact required; for so long as the spiritual supremacy of the Pope was acknowledged within these realms, all such matters were exclusively regulated by the popes and the pontifical councils; but at the era of the Reformation, when the papal supremacy, even in matters of religion, was disowned and discarded within these realms, it was found necessary to resort to the legislature for an authoritative exposition of the true Protestant faith, and for the establishment of appropriate forms of worship; and from that era, the power of the ecclesiastical authorities, even in matters of religion and of worship, has been exercised in subordination to the positive enactments of the supreme legislature (*a*).

Accordingly, the *Articles of Faith*, originally forty-two in number, but afterwards reduced to thirty-nine, (and commonly called the *Thirty-nine Articles*,) were framed by Archbishop Cranmer, with the assistance of other persons

(*a*) Noble *v.* Voysey, Law Rep., 3 P. C. Cas. 357; Sheppard *v.* Bennett, ib. 4 P. C. Cas. 371.

of distinguished learning and piety, in the reign of Edward the sixth; and were reduced to their present form in the convocation of the archbishops and bishops of both provinces, held at London in the reign of Queen Elizabeth, A.D. 1562; and by these Articles (among other matters) the canonical authority of the different books of the bible was settled—a new version of the Holy Scriptures being afterwards made in the reign of James the first, which is still in use under the denomination of King James's Bible, subject only to certain purported revisions thereof, of a comparatively recent date, but which are of no particular merit or importance.

The *Form of Prayer and Church Service*, commonly called the *Liturgy*, was also first framed in the reign of Edward the sixth, and by the same prelates (*b*). Prior to the Reformation various liturgies had been in use in different parts of the realm (*c*). But a new ritual (chiefly founded, however, on the antient services), with *rubrics* prescribing the order and form to be pursued, was then compiled, under the direction of that prince, for the uniform observance of the whole reformed Church of England (*d*). This ritual (which is, for the most part, the same with our present Book of Common Prayer) was established by the statute 2 & 3 Edw. VI. c. 1; and being afterwards revised, was confirmed by 5 & 6 Edw. VI. c. 1, and 1 Eliz. c. 2; and, after two other successive revisions, in the reigns of King James the first and Charles the second, was confirmed in its present form, by 14 Car. II. c. 4, usually described as *the* Act of Uniformity (*e*).

(*b*) Adams, Relig. World Displayed, vol. i. p. 402.

(*c*) See the preamble to the statute 2 & 3 Edw. 6, c. 1; our Liturgy is taken principally from the form called in such preamble "*the use of Sarum;*" but most of it can be traced to periods before the Conquest (see Palmer's Origines Liturgicæ).

(*d*) Elphinstone *v.* Purchas, Law Rep., 3 Adm. & Eccl. 66; Martin *v.* Mackonochie, ib. 4 Adm. & Eccl. 279; 3 P. C. Cas. 52, 409; Hebbert *v.* Purchas, ib. 605.

(*e*) Wats. C. L. p. 321. Since the Act of Uniformity, the following changes have been made, that

As to the *crown's supremacy* in matters ecclesiastical, it was definitely established by 1 Eliz. c. 1, usually called the Act of Supremacy: a statute which, in the first place, provides that no foreign prince or potentate, spiritual or temporal, shall exercise any manner of jurisdiction or privilege, spiritual or ecclesiastical, within this realm or the dominions thereof; and next, that such jurisdictions and privileges as had before been exercised by any spiritual or ecclesiastical power for visitation and correction of the Church, shall for ever be united and annexed to the imperial crown of this realm. But the Act of Elizabeth was merely declaratory; for the ecclesiastical supremacy of the crown had been before declared by 26 Hen. 8, c. 1; and indeed, prior to the Reformation, by the Statute of Præmunire, 16 Ric. 2, c. 5 (*f*).

The new regulations thus introduced by parliament,—taken in connection with other legislative enactments of the same era, but of subordinate importance, and in connection also with the national canon law, (which still gives the rule where the statutes are silent,)—have constituted, from the period of which we speak, and still constitute, the standard of faith, worship, and discipline in the Church of England; and for a beneficed clergyman advisedly to maintain any doctrine in derogation of the king's supremacy, or of the Thirty-nine Articles, or of the Liturgy as by law established,—or to neglect to declare his assent publicly to such Articles and Liturgy at the time and in the place appointed for that purpose, or to use any other form of prayer than that contained in such Liturgy,—is ground for deprivation.

is to say,—the Church services for 30th January, 29th May, 5th November, and 23rd October, were abolished, by 22 Vict. c. 2; the table of lessons contained in the calendar was revised and re-arranged, by the 34 & 35 Vict. c. 37; and certain modifications were made in the order of prayer for use on any day except Sunday, Christmas-day, Ash Wednesday, Good Friday, and Ascension-day, by the 35 & 36 Vict. c. 35.

(*f*) 4 Inst. 42, 331, 341.

And if we now consider,—and it is convenient that we should consider,—whether this standard is binding merely on those who claim the benefits of the church establishment, or generally on all the subjects of the realm, we shall find that the law has passed through some very remarkable changes on this head. For though the statute 1 Eliz. c. 1 effected an emancipation from the papal yoke, and may therefore be justly considered as having laid the foundation of our spiritual freedom, it was not till long afterwards that the nation learned the lesson of religious toleration: and in the mean time our temporal laws proceeded not only to imitate the persecutions of the Popish time, but in some respects to surpass them: for while our law continued to punish (in aid of the ecclesiastical authorities) the offence of *heresy* as before, employing for that purpose the writ *de hæretico comburendo*, which was not abolished until 29 Car. II. c. 9; it began also to exercise new rigours of its own in dealing with the offence of *nonconformity*, *i.e.*, dissent from the worship and ceremonies of the reformed Established Church. And so early as the 5 & 6 Edw. VI. c. 1, non-conformity was made a highly penal offence; it being thereby enacted that even to be present at any other form of worship than that which was by law established, should render the offender liable to imprisonment; and by the same statute, and by 1 Eliz. c. 2, s. 14, a fine of twelve pence, to be levied by the churchwardens for the use of the poor, was (as we observed in the preceding chapter) imposed on such as failed to resort to their proper parish church on Sundays and holidays. And these enactments, though for a long course of time fallen into neglect, yet remained in our statute book, till (in common with many other penal and disabling laws in regard to religious opinions) they were swept away by the statute 9 & 10 Vict. c. 59, to which we shall make further allusion before we close this chapter. In the reign, moreover, of Queen Elizabeth, a schism began to develop itself in the newly-established Protestant Church; certain sectaries, who re-

ceived the appellation of *Puritans*, deserting the use of the Liturgy, and (in defiance of the above enactments) betaking themselves to forms of worship of their own institution (*g*), until ultimately, as they increased in number, they branched out into various divisions of religious opinion, and into various modes of religious ceremonial and Church government; from which stock have indeed descended all those Protestant seceders from the Established Church, described at a later period as *Nonconformists;* and in modern times, as *Dissenters*, and being also variously designated and distinguished by the specific names of Wesleyans, Baptists, Presbyterians, and the like (*h*).

The jealousies to which these growing innovations gave rise, and the alarm from time to time excited by the enterprising spirit of Popery, gave birth to a variety of enactments, which had for their common object the repression of Non-conformity and the discouragement of Papists. Thus, by the Act of Uniformity (14 Car. II. c. 4), it was enacted that the Book of Common Prayer should be used in every place of public worship; and that every teacher of youth should make a written declaration that he would conform to the Liturgy, and should obtain from the ordinary a *licence* to teach. And by the Act of the same reign called the Act against Conventicles, 22 Car. II. c. 1, all meetings consisting of five persons or more, (exclusive of the family,) assembled for the exercise of religion in any manner other than according to the Liturgy and practice

(*g*) Hallam, Const. Hist. vol. i. pp. 246, 251, 280.

(*h*) In 1859, it was reported to the House of Lords, that the religions of England and Wales were distributed in the following proportions:—Churchmen, 67 per cent.; Wesleyans, 13 per cent.; Independents, &c., $7\frac{1}{4}$ per cent.; Baptists, $2\frac{1}{2}$ per cent.; other sects, Jews, &c., $6\frac{3}{4}$ per cent.; and Roman Catholics, $3\frac{1}{2}$ per cent.; but these proportions have since then been very considerably altered; and the *Salvationists* are a new and increasing body of believers, comprising mostly the very poor, but distinguished by many sterling qualities. (See Lea *v.* Cooke, 34 Ch. Div. 528.)

of the Church of England, were prohibited, subject to pecuniary forfeitures.

The Revolution of 1688, however, was the commencement of an era of more liberal legislation in matters of religion; and by the Toleration Act, 1 W. & M. c. 18, persons dissenting from the Church of England (except Papists and Unitarians) were allowed freely to assemble for religious worship according to their own forms, and in places of meeting duly certified (*i*),—on condition, however, of their taking the oaths of allegiance and of supremacy, and making a declaration against transubstantiation, and, in the case of dissenting *ministers*, subscribing also to certain of the Thirty-nine Articles. And in the same spirit of toleration, it was afterwards provided by 19 Geo. III. c. 44, that dissenting preachers or teachers might be entitled to the benefits of the Toleration Act (without signing any of the Articles), on subscribing a declaration professing themselves to be Christians and Protestants, and expressing their belief that the Scriptures contain the revealed will of God, and the rule of doctrine and practice; and by the 52 Geo. III. c. 155, the Act against conventicles was repealed, and dissenters were relieved from the necessity of taking any oaths or subscribing any declaration, unless required so to do by some justice of the peace; and in the next following year, by the 53 Geo. III. c. 160, that clause of the Toleration Act, which excepted Unitarians from the benefit of its enactments, was repealed; and by the 7 & 8 Vict. c. 45, the benefits of 1 W. & M. c. 18; 19 Geo. 3, c. 44; and 53 Geo. 3, c. 160, were extended to endowments for Dissenters made prior to those Acts, although, when made, they were unlawful. And ultimately, and in order to render the benefits of the Universities of Oxford, Cambridge, and Durham more freely accessible to the nation, it

(*i*) The Toleration Act has been amended by 18 & 19 Vict. c. 81, and 19 & 20 Vict. c. 119, ss. 17, 27.

was thought proper to remove the restrictions, tests, and disabilities which formerly operated to debar nonconformists and others from the full enjoyment of the benefits of those Universities; that is to say, by the University Tests Act, 1871 (34 & 35 Vict. c. 26) it was enacted, that any person might take any degree (other than a divinity degree), in any of these universities, and hold any office therein, or in any college thereof, without either subscribing any article or formulary of faith, or making any declaration or taking any oath respecting his religious belief or profession, or conforming to any religious observance, or attending (or abstaining from) any form of public worship, or belonging to any specified church, sect, or denomination (*k*). And as regards Roman Catholics, most of the severer penalties and disabilities to which they were at one time subject were removed by the statutes 18 Geo. III. c. 60, 31 Geo. III. c. 32, and 43 Geo. III. c. 30, on condition of their taking such oaths or making such declarations as in those Acts were provided (*l*); and, in particular, assemblies for Roman Catholic worship were legalized on condition of their being held in places duly certified (*m*); and latterly by the Catholic Emancipation Act, 10 Geo. IV. c. 7 (*n*), Roman Catholics were enabled to exercise any franchise or civil right whatever, except in certain cases where their doing so would presumably be prejudicial to Protestantism, as in the case of presenting to a benefice (*o*); and, therefore, since the above statute, Roman Catholics might hold any office whatever, with the following exceptions: viz., the office of guardian or regent of the United Kingdom; of lord chancellor, or keeper of the great seal; of lord chancellor of Ireland; of lord lieutenant, or other chief governor of Ireland; of lord high commissioner to the

(*k*) The Queen *v.* Hertford College, 3 Q. B. D. 693.

(*l*) 4 Bl. Com. p. 55.

(*m*) 18 & 19 Vict. c. 81, s. 2.

(*n*) The Earl of Shrewsbury *v.* Scott, 6 C. B. (N. S.) 177; also 30 & 31 Vict. c. 62.

(*o*) 10 Geo. 4, c. 7, s. 16.

general assembly of the Church of Scotland; and any office in the Church of England, or in the Church of Scotland, or in the Ecclesiastical Courts, or in the Universities, Colleges, or Public Schools of this kingdom (*p*); and subsequently, by other Acts, and principally by the 9 & 10 Vict. c. 59 and (as to the Lord Chancellor of Ireland) the 30 & 31 Vict. c. 75, almost all the personal disabilities of Roman Catholics were removed; and by the statute 2 & 3 Will. IV. c. 115 (as amended by the 23 & 24 Vict. c. 134), as regards the acquisition and holding of property for religious and charitable purposes, Roman Catholics were placed on the same footing as Protestant dissenters. And with reference to the Jews, although they also were formerly, even in England, subject to many hardships and degradations (*q*); and long remained subject to peculiar disqualifications; still these hardships and degradations have long ceased, and their disqualifications have mostly been now removed (*r*); but a Jew (although an Englishman born) is still under the following disabilities, viz., that of being incompetent to fill certain high offices in the state, from which (as we have seen) Roman Catholics also are excluded; and of being (like Roman Catholics also are) unable to present to any ecclesiastical benefice, the right of appointment to which may belong to any office in her Majesty's gift, which he may happen to fill (*s*). And thus amply has the law at length provided for the freedom of religious opinions. But, with all this toleration, the rights and pre-eminence of the Established Church are maintained inviolate; and the Church retains, in full possession, all those dignities and endowments, which, at the period of the Reformation, were allotted to her. The Church of England has, in fact, proved itself the parent of

(*p*) 10 Geo. 4, c. 7, ss. 12, 16, 17.
(*q*) 2 Inst. 507.
(*r*) 9 & 10 Vict. c. 59; 18 & 19 Vict. c. 86, s. 2; 21 & 22 Vict. c. 49; 29 & 30 Vict. c. 22; 23 & 24 Vict. c. 63; 29 & 30 Vict. c. 19; 34 & 35 Vict. c. 19.
(*s*) 21 & 22 Vict. c. 49, s. 4.

all the Non-Conformist liberties; which liberties, if we may judge from those countries which have continued subject to the Popish domination, would not yet (but for the Church) have attained in this country the full development which they have attained; and doubtless these hardy children will, in due course, recognize their indebtedness to the parent Church in that particular, and respect that Church accordingly.

CHAPTER III.

OF THE ENDOWMENTS AND PROVISIONS OF THE CHURCH.

THE endowments and provisions of the Church consist of lands, advowsons, and tithes; and as regards tithes, they are incident of common right to every parochial church; but in almost every parish, the tithes have now been commuted into a tithe rent-charge, which may be regarded as the representative of and equivalent for tithe. These endowments we propose now to consider; and firstly, the property itself of the church; secondly, the estate which ecclesiastical persons may hold therein; and thirdly, the alienation of church property.

I. The property of the church.—This property consists of lands, advowsons, and tithes (or tithe rent-charge).—And, Firstly, as to *Church Lands*:—We will first observe, that the boundaries of church lands having been often subject to great uncertainty, therefore by the statute 2 & 3 Will. IV. c. 80—after reciting that the dignitaries of the different cathedral and collegiate churches and chapels of England and Wales, and the societies of the colleges and halls of Oxford and Cambridge and Winchester and Eton, are proprietors of divers lands, &c. the boundaries or quantities and identity of which are disputed,—it is provided, that it shall be lawful for any of the said dignitaries and societies (with the consents in the Act mentioned), to agree with their tenants or under-tenants, or the owners of adjoining hereditaments, that any such disputed matters

shall be referred to arbitration; and by this means, the boundaries and identity may be ascertained. And we will nextly observe, that there is in almost every benefice an official house of residence, or parsonage house, which the incumbent is entitled to occupy; but on the other hand, he is bound to keep it in repair; and not only may he be compelled by his bishop to keep the parsonage house in repair during his incumbency, but, if he commits or suffers waste upon it, his successor in the incumbency has a remedy against him or against his personal representatives for the *dilapidation* thereof: and this remedy may be had either in the ecclesiastical (*a*) or in the temporal courts (*b*); and the extent of an incumbent's liability on this head, and the mode of recovering compensation for the dilapidations, are now regulated by the Ecclesiastical Dilapidations Acts 1871 and 1872 (34 & 35 Vict. c. 43, and 35 & 36 Vict. c. 96) (*c*). But the law (having regard to the comparative exiguity of means which distinguishes the great body of the ordinary working clergy) has made provision for aiding a beneficed clergyman in repairing or rebuilding his house of residence, or in providing a new one; for the incumbent may (as we shall presently see) raise money to a limited amount, according to the value of the benefice, by mortgage of its profits, or by sale or exchange of the existing house, for another which is more convenient; and by 19 & 20 Vict. c. 50, it is provided, as to advowsons vested in (or in trustees for) *inhabitants*, or other persons forming a numerous class, and deriving no pecuniary advantage therefrom, that the same may be sold by order of such persons, and the proceeds applied to the beneficial purposes therein specified, and which include the erection

(*a*) 13 Eliz. c. 10; 14 Eliz. c. 11, s. 18; Whinfield *v.* Watkins, 2 Phil. 3.

(*b*) Wise *v.* Metcalfe, 10 B. & C. 299; Bird *v.* Relph, 2 Ad. & El. 773; Ross *v.* Adcock, Law Rep., 3 C. P. 655.

(*c*) Jones *v.* Dangerfield, 1 Ch. D. 438; Gleaves *v.* Marriner, 1 Ex. D. 107; Cadlow *v.* Pixell, 2 C. P. D. 562.

of a parsonage house if there be none, or the rebuilding, repair, or improvement of any parsonage house already existing.

The incumbent of a living, besides being seised of the parsonage house (rectory or vicarage) is in general seised also of the *glebe*, *i. e.* of a portion of land attached to his benefice, and forming part of its endowment; and by 5 & 6 Vict. c. 54, the tithe commissioners have power to ascertain and define the boundaries of the glebe lands of any benefice; and, with the consent of the ordinary and patron, to exchange such glebe lands for other lands within the same or any adjoining parish, or otherwise conveniently situated. The parson is seised also of the fabric or edifice of the church itself; and in rectories, the chancel, and the churchyard also, are the freehold of the rector (*d*); while in vicarages, the churchyard is the vicar's freehold, and the chancel is the freehold of the impropriator (*e*); but the disposal of the pews and seats in the church appertains, by law, to the ordinary; and, practically, to the churchwardens, to whom the authority of the ordinary, in this particular, is delegated; but the chief pew in the church belongs, as of right, to the rector, or, in the case of a vicarage, to the impropriator (*f*); and no monument can be set up without the ordinary's consent (*g*),—save that (under the 30 & 31 Vict. c. 133 and 31 & 32 Vict. c. 47) the donor of land to be added to any consecrated churchyard may reserve the right of burial therein, and of erecting monuments and grave-stones therein, for himself, his heirs and assigns, for ever. Moreover, an aisle or side chapel in the church, or a pew in its nave, may be granted, by *faculty* of the ordinary, to an individual and his heirs

(*d*) Clifford *v.* Wicks, 1 B. & Ald. 498; Churton *v.* Frewen, Law Rep., 1 Eq. Ca. 634.

(*e*) Wats. C. L. 391; Duke of Norfolk *v.* Arbuthnot, 4 C. P. D. 290; 5 C. P. D. 390; Hansard *v.* St. Matthew's, Bethnal Green, 4 P. D. 46.

(*f*) Clifford *v.* Wicks, ubi sup.

(*g*) Beckwith *v.* Harding, 1 B. & Ald. 508; Rich *v.* Bushnell, 4 Hagg. 164.

as appurtenant to a particular messuage in the parish; and in fact a man may prescribe for these, as so appurtenant, without being required to show a faculty (*h*).

Secondly, as to *Advowsons*.—Advowsons are of the class of hereditaments incorporeal, which we have already discussed in the first volume (*i*); but we there omitted from that discussion the subject of advowsons, and also that of tithes, as being matters which would be more conveniently considered in this chapter. And an advowson (*advocatio*) is the right of presentation to a rectory, vicarage, or other ecclesiastical benefice; and the word, which signifies *in clientelam recipere*, the taking into protection, is synonymous with patronage (*patronatus*): and he who has the right of advowson is called the patron (*advocatus*) of the church (*k*). For, in antient times, when lords of manors built churches on their own demesnes, endowed them with glebe, and appointed to be paid to the ministers thereof those tithes which before were given to the clergy in common,—from whence arose the division of parishes,—he who thus built and endowed a church had of common right a power annexed of nominating any person, canonically qualified, to officiate in that church, of which he was the founder and patron (*l*). And this power is, by derivation of title from the lords of manors, now vested in many cases in other private persons, and in corporations, both lay and ecclesiastical (*m*); but neither an alien (unless he be naturalized) nor a Roman Catholic may exercise the rights of a patron, or present to a living; for if an alien purchase an advowson and a vacancy occurs, the crown

(*h*) Wats. C. L. 643, 644; 2 Bl. Com. 429; Crisp *v.* Martin, 2 P. D. 15; Halliday *v.* Phillips, 23 Q. B. D. 48.

(*i*) Vide sup. vol. I. p. 596.

(*k*) 2 Bl. Com. p. 21; Mirehouse *v.* Rennell, 8 Bing. 490.

(*l*) 1 Bl. Com. p. 113; Co. Litt. 119 b; Gibs. Cod. 7, 57, 2nd edit.

(*m*) Keen *v.* Denny, (1894) 3 Ch. 169. Municipal corporations may not exercise any right of presentation (see Hine *v.* Reynolds, 2 Scott, N. R. 394); but by the Municipal Corporations Act, 1882 (45 & 46 Vict. c. 50), ss. 121, 122, they are to sell any advowsons vested in them.

presents (*n*); and if a Roman Catholic, the University of Oxford or of Cambridge (*o*). Apparently, a Jew (although unconverted), provided he be the owner of an advowson in his own right, may present to it (*p*); but should such a person hold any office in the gift of the crown, to which the right of presentation or of appointment to any ecclesiastical benefice is annexed, he may not in such a case present; but in such latter case the right of presentation, in case of a vacancy, will devolve upon the Archbishop of Canterbury for the time being (*q*).

[Advowsons are either *appendant* or *in gross*. Lords of manors being originally the only founders, and of course the only patrons, of churches (*r*), the right of patronage or presentation, so long as it continued annexed to the manor —as some have done from the foundation of the church to this day—is called an advowson appendant (*s*); and it will pass or be conveyed, together with the manor, as incident and appendant thereto, by a grant of the manor only, without adding any other words (*t*).] But where the advowson has been once separated from the manor by legal conveyance, it is called an advowson *in gross* or at large; being annexed no longer to the manor, but to the person of the owner (*u*); and where the inheritance either of the manor or of the advowson has been once thus separately conveyed, the advowson remains for ever afterwards an advowson in gross, and cannot be made appendant again (*x*); and when thus in gross, it may be conveyed in the same manner as any other incorporeal hereditament. But not only the advowson itself, but the next or any number of future *presentations* may be conveyed by the

(*n*) Wats. Clerg. Law. 105; 33 Vict. c. 14, s. 2, sub-s. (2).

(*o*) Rogers, Eccl. L. 17; 3 Jac. 1, c. 5; 1 W. & M. c. 26; 13 Ann. c. 13, s. 1; Edwards *v.* Bishop of Exeter, 5 Bing. N. C. 654.

(*p*) Mirehouse *v.* Rennell, ubi sup.

(*q*) 21 & 22 Vict. c. 49, s. 4.

(*r*) Co. Litt. ubi sup.

(*s*) Ibid. 121.

(*t*) Ibid. 307.

(*u*) Ibid. 120.

(*x*) 2 Bl. Com. 22.

owner during an existing incumbency (*y*); and the grantee of a next presentation thus conveyed becomes, *pro hâc vice*, the patron of the church. And as to either species of patron, this rule is to be observed, that if he dies *after* a vacancy has happened, the right to present on such vacancy or (as it is called) "for the then next turn," (being as it were a fruit fallen,) is considered as personal, and not as real estate, and goes to his executor, and not to his heir (*z*); but the exercise of the right of presentation, by a patron of either description, is subject to the restrictions imposed by the law of *lapse*, and by the law of *simony*; and of each of these subjects, it is now proper to give some account.

[*Lapse* is a species of forfeiture, whereby the right of presentation accrues to the ordinary, by neglect of the patron to present; to the metropolitan, by neglect of the ordinary; and to the crown, by neglect of the metropolitan. For, it being for the interest of religion, and therefore also for the good of the public, that the church should be provided with an officiating minister, the law has, therefore, given this right of lapse in order to quicken the patron, who might otherwise suffer the church to remain vacant; and the right is stated to have been established as early as the reign of Hen. II. (*a*). The period of neglect, after which the title to present by lapse accrues from the one person entitled to the other successively, is six calendar months, that is, 182 days (*b*): and this, exclusive of the day of the avoidance (*c*); but, if the bishop be both patron and ordinary, he shall not have a double time allowed him to collate in (*d*); for the for-

(*y*) Co. Litt. 249 a; Plowd. 150; Alston *v.* Atlay, 7 A. & E. 289; Rogers, Eccl. L. 9.

(*z*) Welch *v.* Bp. of Peterborough, 15 Q. B. D. 432.

(*a*) 2 Roll. Ab. 54, in tit. Presentment; Bract. l. 4, tr. 2, c. 3.

(*b*) Wats. C. L. 109; Bp. of Peterborough *v.* Catesby, Cro. Jac. 166; 2 Inst. 360; Catesby's case, 6 Rep. 62; Regist. 42.

(*c*) 2 Inst. 231; Wats. ubi sup.

(*d*) Gibs. Cod. 769.

[feiture accrues whenever the negligence has continued six months in the same person. And if the bishop doth not collate his own clerk immediately to the living on his right by lapse accruing, and the patron presents, though after the six months have elapsed, yet the patron's presentation is good, and the bishop is bound to institute the patron's clerk (*e*); for as the law only gives the bishop this title by lapse, to punish the patron's negligence, there is no reason that, if the bishop himself be guilty of equal or greater negligence, the patron should be deprived of his turn. So, also, and for the same reason, if the bishop suffers the presentation to lapse to the metropolitan, the patron may present before the archbishop has filled up the benefice; but the ordinary cannot, after lapse to the metropolitan, collate his own clerk to the prejudice of the archbishop (*f*); for (unlike the patron) the ordinary had no permanent right and interest in the advowson, but merely a temporary one, which having neglected to make use of during the time, he cannot afterwards retrieve his neglect. But if the presentation should lapse to the crown, prerogative here intervenes and makes a difference; and the patron shall not recover his right till the sovereign has satisfied his turn by presentation (*g*).

In case the benefice becomes void by death, or by reason of plurality, the patron is bound at his own peril to take notice of the vacancy; and the six months date from its occurrence (*h*); for these are matters of equal notoriety to the patron and ordinary (*i*). But in the case of a vacancy by resignation or through canonical deprivation, or if a clerk presented be refused for insufficiency, these being matters of which the bishop alone is cognizant, here the law requires him to give notice thereof to the patron; in which case the six months date only from the

(*e*) 2 Inst. 273.

(*f*) 2 Roll. Ab. 368.

(*g*) Doctor and Student, d. 2, c. 36; R. *v.* Abp. of Canterbury, Cro. Car. 355.

(*h*) Wats. C. L. 5; Rogers, Eccl. L. 488.

(*i*) 2 Bl. Com. p. 278.

[time when such notice was given (*k*); but as to this, a distinction is made in the case of an *ecclesiastical* patron, who is held not entitled to notice of insufficiency, because he is competent to choose an able clerk (*l*). Neither shall any lapse accrue to the metropolitan or the sovereign in cases where the bishop is precluded, by his having neglected to give notice to the patron, from himself presenting (*m*); for it is universally true, that neither the archbishop nor the crown shall ever present by lapse, but where the immediate ordinary might have collated by lapse within the six months, and hath exceeded his time: for the first step or beginning faileth, *et quod non habet principium, non habet finem* (*n*). Also, if the bishop refuse or neglect to examine and admit the patron's clerk, without good reason assigned, or notice given, he is styled a disturber, by the law, and shall not have any title to present by lapse; for no man shall take advantage of his own wrong (*o*); and if the right to presentation be litigious, *i.e.*, contested, and an action be brought to try the title, making the bishop a defendant, no lapse shall accrue until the question of right be decided (*p*).]

Simony also is a species of forfeiture, whereby the right of presentation is forfeited and vested *pro hâc vice* in the crown,—simony being the corrupt presentation of any person to an ecclesiastical benefice, for money, gift, or reward (*q*); and several Acts of Parliament have been passed to restrain the practice. Thus, by the statute 31 Eliz. c. 6, if any patron, for money or reward, or promise of money or reward, presents a person to any benefice with cure of souls or other ecclesiastical benefice or dignity, both the giver and the taker are to be fined, and the presentation is to be void; and the presentee is rendered incapable of

(*k*) 2 Burn. Ecc. L. 157.
(*l*) 2 Roll. Ab. 364.
(*m*) 2 Bl. Com. ubi sup.
(*n*) Co. Litt. 344, 345.
(*o*) Co. Litt. ubi sup.
(*p*) Bl. Com. ubi sup.; Wats. Ch. L. 112; 2 Burn. Ecc. L. 358.
(*q*) Baker *v.* Rogers, Cro. Eliz. 790.

ever enjoying the same benefice; and the crown presents to it for that turn; but by the statute 1 W. & M. c. 16, such simoniacal contract is not to prejudice any innocent patron in reversion, on pretence of a lapse to the crown or otherwise, unless the presentee, or the patron, was convicted in the lifetime of such presentee of the offence of simony. Again, by the statute 12 Anne, st. 2, c. 12, if any person, for money or reward, or promise of money or reward, procures the next presentation to any living, and is presented thereupon, this is declared to be a simoniacal contract; and the offender is made subject to all the ecclesiastical penalties of simony, and is disabled from ever holding the benefice, and the presentation devolves to the crown. And by the statute 28 & 29 Vict. c. 122, every person instituted or collated to any benefice, or licensed to any perpetual curacy, lectureship, or preachership, must previously make and subscribe, in addition to the other declarations required by that statute, a declaration that he has not committed simony.

Many questions have arisen in our courts with regard to what is, and what is not, simony; and, among others, these points seem to be clearly settled:—1. That the sale of an *advowson*, (whether the living be full or not,) is not simoniacal, unless connected with a corrupt contract or design as to the next presentation (*r*). 2. That to purchase a next *presentation*, the living being actually vacant, is simony, that being expressly in the face of the statute (*s*). 3. That for a *clerk* to purchase, either in his own name or in the name of another, the next presentation, and be thereupon presented at any future time to the living, is simony (*t*). But, 4, a bargain by *any other* person for the next pre-

(*r*) Bac. Ab. tit. Simony, 189; Bishop of Lincoln *v.* Wolferstan, 2 Wils. 175; 3 Burr. 1504; Fox *v.* Bishop of Chester, 6 Bing. 1; Alston *v.* Atlay, 6 Nev. & M. 686; Walsh *v.* Bishop of Lincoln, Law Rep., 10 C. P. 518.

(*s*) Baker *v.* Rogers, Cro. Eliz. 788; Moor. 914, S. C.

(*t*) Winchcombe *v.* Bishop of Winchester, Hob. 165.

sentation, (even if the incumbent be *in extremis*,) if without the privity, and without any view to the nomination, of the particular clerk afterwards presented, is not simony (*u*). 5. That if a simoniacal contract be made with the patron, the clerk presented not being privy thereto, such presentation indeed cannot take effect, but shall devolve to the crown, as a punishment of the guilty patron (*x*); but the clerk who is innocent does not otherwise incur any disability or forfeiture (*y*).

And in addition to these points, we may notice, that it has been an occasional practice for the patron to take from the presentee an engagement (usually called a *resignation* bond) to resign the benefice at a future period; and such engagements, although at one time deemed void, as being simoniacal (*z*), are now, to a certain extent, sanctioned by law; for the statute 9 Geo. IV. c. 94 has enacted, that a written promise to resign shall be valid, if made to the express intent that some particular nominee, or one of two nominees, shall be thereupon presented, subject always to these provisions: first, that where there are two nominees, each of them must be, either by blood or marriage, an uncle, son, grandson, brother, nephew, or grand-nephew of the patron; secondly, that the writing shall in all cases be deposited, within two months after its date, with the registrar of the diocese, and be open to public inspection; and thirdly, that the resignation made in pursuance of such engagement shall be followed by a presentation, within six months, of him therein named as the person for whose benefit it is made.

Thirdly, as to *Tithes*.—These are a species of incorporeal hereditaments; and are capable of being held either by laymen, or by the clergy in right of their churches (*a*);

(*u*) Fox *v.* Bishop of Chester, ubi sup.; 3 Bligh, N. S. 123, S. C.

(*x*) Whish *v.* Hesse, 3 Hagg. 659.

(*y*) 2 Bl. Com. p. 280; 3 Inst. 154; R. *v.* Bishop of Norwich, Cro. Jac. 385.

(*z*) Dashwood *v.* Peyton, 18 Ves. 37; Fletcher *v.* Lord Sondes, 3 Bing. 502; 5 B. & Ald. 835, S. C.

(*a*) Bac. Ab. Tythes, (E).

but when tithes are owned by a layman, it is in his character of impropriator. Tithes are the tenth part of the increase, yearly arising upon lands, and on the personal industry of the inhabitants, of the parish: the first species being either *prædial* (as in the case of corn, grass, hops (*b*), and wood (*c*)), or *mixed* (as in the case of wool, milk (*d*), pigs, &c. (*e*)); and the second species being *personal* (as in the case of manual occupations, trades, fisheries, and the like). Of prædial and mixed tithes, the tenth must be paid in gross; but of personal tithes, only the tenth part of the clear profits is due; nor are tithes of this latter kind generally due at all, except so far as the particular custom of the place may authorize the claim (*f*). [From the above description of tithe, it is clear that whatever is of the substance of the earth, or is not of annual increase, as stone, lime, chalk, and the like, is not in its nature titheable: nor is tithe demandable, except by force of special custom, in respect of animals *feræ naturæ.*

The establishment of tithes in the Christian Church is generally ascribed to the fourth century, though we cannot precisely ascertain the time when they were first introduced into this country. Possibly they were contemporary with the planting of Christianity among the Saxons by Saint Augustine about the end of the sixth century; but the first mention of them in any written English law, occurs in a canon or decree made in a synod held A.D. 786, wherein the payment of tithes to the Church in general is strongly enjoined (*g*); and this canon or decree, which at first bound not the laity, was subsequently confirmed in the parliaments of the two kingdoms of the heptarchy,

(*b*) Trimmer *v.* Walsh, 4 B. & Smith, 18; Law Rep., 2 Ho. Lo. 208.

(*c*) 1 Roll. Ab. 635; 2 Inst. 649; 5 & 6 Will. 4, c. 75.

(*d*) Fisher *v.* Birrell, 2 Q. B. 239.

(*e*) Roll. Abr. ubi sup.; Inst. ubi sup.

(*f*) Roll. Abr. 635; 2 & 3 Edw. 6, c. 13; 7 Bro. P. C. 3; Com. Dig. Dismes (E. 3).

(*g*) Selden, c. 8, s. 2.

[Mercia and Northumberland, only a very few years later than the time that Charlemagne established the payment of tithes in France (*h*), when he also made that famous division of them into four parts; one to maintain the edifice of the church, the second to support the poor, the third for the bishop, and the fourth for the parochial clergy (*i*). And in the laws agreed upon between king Guthrun the Dane, and Alfred and his son Edward the elder, successive kings of England, about the year 900, by the *feudus Edwardi et Guthruni* (which may be found at large in the Anglo-Saxon laws (*k*)), the payment of tithes was not only *enjoined*, but a *penalty* added for their non-payment; and this agreement was maintained and confirmed by King Athelstan, about the year 930 (*l*).

For some time after the introduction of tithes into this country, though every man was obliged to pay tithes in general, yet he might have given them to what priests he pleased, which were called *arbitrary* consecrations of tithes: or he might have paid them into the hands of the bishop, for distribution by him among his diocesan clergy (*m*). But, when dioceses were divided into parishes, the tithes of each parish were allotted to the particular minister of such parish; first, by common consent or by the appointment of lords of manors, and afterwards by the written law of the land (*n*),—an equitable and just arrangement, but one which was not very uniformly or generally observed. For we find that arbitrary consecrations of tithes took place again afterwards, and continued in general use till the time of King John (*o*); which was probably owing to the intrigues of the regular clergy, or monks of the Benedictine and other orders, under Archbishop Dunstan

(*h*) A.D. 778. c. 1.

(*i*) Seld. c. 6, s. 7.

(*k*) Wilkins, Leges Anglo-Sax. p. 51.

(*l*) Wilk. ubi sup.; LL. Athel.

(*m*) Seld. c. 9, s. 4; 2 Inst. 646; Slade *v.* Drake, Hob. 296.

(*n*) LL. Edgar. cc. 1 and 2; Canut. c. 11.

(*o*) Seld. c. 11.

[and his successors, who endeavoured to wean the people from paying their dues to the secular or parochial clergy; and, as a matter of fact, the tithes did come, as regards the great bulk thereof, to the monastic and other religious houses. But, in process of years, the income of the poor laborious parish priests being scandalously reduced by these arbitrary consecrations of tithes, Pope Innocent the third, about the year 1200, in a decretal epistle sent to the Archbishop of Canterbury, and dated from the palace of Lateran (*p*), endeavoured to apply a remedy for this abuse; and this has occasioned Sir Henry Hobart and others to mistake it for a decree of the Council of Lateran, held A.D. 1179 (*q*), which only prohibited what was called the *infeudation* of tithes, or their being granted to mere laymen (*r*); whereas this letter of Pope Innocent to the archbishop enjoined the payment of tithes to the parsons of the respective parishes where every man inhabited, agreeably to what was afterwards directed by the same Pope in other countries (*s*). This epistle, says Sir Edward Coke, bound not the lay subjects of this realm; but, being reasonable and just, it was allowed of, and so became *lex terræ* (*t*); and it put an effectual stop to all the arbitrary consecrations of tithes, except as regards those *portions* of tithes, as they are called, which the parson of one parish hath, though rarely, a right to claim in another (*u*);] and it is now held universally, that tithes are due of common right to the parson of the parish, unless there be a special exception. In some cases, indeed, the vicar, as well as the rector, is entitled to some part of the tithes; but all tithes, *primâ facie*, and by presumption of law, belong to the rector; except such as can be shown, by evidence, to belong to the vicar (*x*); and such evidence may consist

(*p*) Opera Innocent, III. tom. 2, p. 452.

(*q*) Steel *v.* Houghton, 1 H. Bl. 52.

(*r*) Decretal, l. 3, t. 30, c. 19.

(*s*) Ib. cc. 2, 6.

(*t*) 2 Inst. 641.

(*u*) 2 Inst. 641, 653.

(*x*) Daws *v.* Benn, 1 B. & C. 763; 2 Bligh, N. S. 83.

either of a deed of endowment, vesting certain tithes in the vicar; or of such proof of long usage as is sufficient to raise the presumption that an endowment of that description, though now lost, was antiently made (*y*). It sometimes happens, that an endowment of tithes vests all the "small" tithes *eo nomine* in the vicar (*z*); and this raises the question, what are *small* and what *great* tithes—to determine which, no clear line of demarcation seems ever to have been drawn; yet tithes *mixed* and *personal* are universally agreed to be *small* tithes (*a*), which are sometimes called also *privy* tithes (*b*); and on the other hand, tithes of corn, hay, and wood are generally regarded as *great* tithes (*c*).

We have observed that tithes are due of common right, unless by special exception or exemption; and we are therefore now to enquire who may be exempted from their payment. [And here we must notice, first, that some persons are exempt by reason of some personal privilege; *e.g.*, the crown, by its prerogative, is discharged from all tithes (*d*); so a vicar shall pay no tithes to the rector, nor the rector to the vicar; the maxim in such cases being that *ecclesia decimas non solvit ecclesiæ* (*e*); all which privileges (it is to be observed) are personal, that is to say, confined to the crown and clergy; for their tenant or lessee of the lands shall pay tithes, though the lands, if unlet, would not be titheable (*f*).] Next, inasmuch as spiritual corporations (as monasteries, abbots, bishops, and the like), were always capable of having their lands totally discharged of tithes in various ways (*g*); therefore, if a man

(*y*) Jackson *v.* Walker, Gwill. 1231; 2 Bligh, N. S. 94, 103.

(*z*) Bac. Ab. Tithes (K).

(*a*) Ibid.

(*b*) Clee *v.* Hall, 7 C. & F. 744.

(*c*) Com. Dig. Dismes, G. 1.

(*d*) Wright *v.* Wright, Cro. Eliz. 511; Bac. Ab. Tithes (Q); 1 Hardr. 315.

(*e*) Blinco *v.* Marston, Cro. Eliz. 479; Wright *v.* Wright, Cro. Eliz. 311; Sav. 3; Moore, 910, S. C.

(*f*) Blinco *v.* Marston, ubi sup.

(*g*) Wright *v.* Gerrard, Hob. 309.

can show his lands to have been formerly abbey lands, immemorially discharged of tithes, this will be a good exemption (*h*) ; and indeed it is, in general, by means of such proof, that lands in lay hands are at the present day shown to be tithe-free. [Again, any owner of lands may claim an exemption, either partial or total, from tithes in respect thereof, by reason of a *real composition ;* which was an agreement made between the landowner and the incumbent, with the consent of the ordinary and the patron, that the lands should, for the future, be discharged from the payment of tithes, by reason of some land or other *real* recompense having been given in lieu and satisfaction thereof (*i*) ;] and by 2 & 3 Will. IV. c. 100, s. 2, every composition for tithes, which had at the date of that Act been made or confirmed by the decree of any court of equity in England, in a suit to which the ordinary, patron, and incumbent were parties, and which had not been thereafter set aside or departed from, was declared valid in law. [Moreover all persons, spiritual or lay, may claim by custom a *modus* (otherwise called a *modus decimandi*), that is, a *partial* exemption from tithes; as where, by immemorial usage (evidence of a real composition at one time made), a particular manner of tithing has been allowed, different from the payment of one-tenth of the annual increase ; which customary mode of tithing is sometimes a pecuniary compensation,—as twopence per acre for the tithe of land ; sometimes it is a compensation in work and labour,—as that the parson shall have only the twelfth cock of hay and not the tenth, in consideration of the owner's making it for him; and sometimes in lieu of a large quantity of crude or imperfect tithe, the parson shall have a less quantity when arrived to greater maturity,—as a couple of fowls in lieu of tithe eggs, or the like; any means, in short, whereby the general law of tithing is altered, and a new method of taking tithe is introduced, is

(*h*) 2 Black. Com. 31.

(*i*) 2 Inst. 490; 13 Rep. 40.

[called a *modus decimandi*, and operates in law as a limited or partial exemption.

But a *modus decimandi*, in order to be valid, must possess the following characteristics:—1. It must be *certain* and *invariable* (*k*). 2. The thing substituted for tithe must be beneficial to the *parson* himself (*l*); thus, a modus to repair the *church*, in lieu of tithes, is not good, because that is an advantage to the parish only; but to repair the *chancel*, is a good modus, for that is an advantage to the parson. 3. It must be something *different* from the thing compounded for (*m*); *e. g.*, one load of hay in lieu of *all* tithe hay is no good modus, for no parson would *bonâ fide* make a composition to receive less than is due in the same species of tithe: and therefore the law will not suppose it possible for such a composition to have existed. 4. A man cannot be discharged from payment of one species of tithe, by paying a modus for another (*n*); *e. g.*, a modus of one penny for every *milch* cow will discharge the tithe of milch kine, but not of *barren* cattle; for tithe is, of common right, due for both; and therefore a modus for one shall not be a discharge for the other. 5. The recompense must be in its nature as durable as the tithes discharged by it,—that is, an inheritance certain (*o*); and therefore a modus that every *inhabitant* of a house shall pay fourpence a year in lieu of the owner's tithes, is no good modus; for possibly the house may not be inhabited, and then the recompense will be lost. 6. The modus must not be too large, for in that case it is a *rank* modus, and the alleged custom establishing it would be bad; for the real composition (the supposed foundation for the modus) being assumed to have been an equitable contract, if the modus set up is so large as beyond question to exceed the value of the tithes

(*k*) Towerson *v.* Wiuget, 1 Keb. 602.

(*l*) 1 Roll. Abr. 649.

(*m*) Sheppard *v.* Penrose, 1 Lev. 179.

(*n*) Grysman *v.* Lewes, Cro. Eliz. 446; Startupp *v.* Dodderidge, Salk. 657.

(*o*) 2 P. Wms. 462.

[in the time of Richard the first, this modus destroys itself, by this internal evidence of a later original than the time of legal memory.]

Lastly, an exemption from tithes may, under the 2 & 3 Will. IV. c. 100, be claimed, either as a total or as a partial exemption, on the ground of *long usage*; that is, such usage as can be shown to have lasted for a certain period of time, even though short of the time of legal memory,—this statute operating in respect of tithes in a manner analogous to the operation of the Prescription Act, 2 & 3 Will. IV. c. 71, in respect of commons and easements, as explained at large in the first volume of this work; and under the 2 & 3 Will. IV. c. 100, as amended by the 3 & 4 Will. IV. c. 83, tithe claimed by a lay person (not being a corporation sole), or by a corporation aggregate, may be defeated in general by a usage for thirty years; and when claimed by an ecclesiastical corporation sole, may be defeated in general by a usage for sixty-three years (*p*).

Such having been the state of the law with respect to tithes, it remains to mention that a system has been in progress since the year 1836 for the commutation of tithes into tithe rent-charge; for the institution of tithes, though venerable from its antiquity, and though sanctioned alike by scripture and by reason, has always seemed more or less odious to the people; and it was therefore with great wisdom that parliament consented to the adoption of a plan for commuting the tithes of every parish into a tithe rent-charge, the amount thereof to be adjusted annually, according to the average price of corn. This plan was carried into effect by the Tithe Commutation Act, 1836, 6 & 7 Will. IV. c. 71, and the various statutes since passed for the amendment of that Act (*q*); and under that Act

(*p*) Salkeld *v.* Johnston, 1 Ha. 196; S. C., 1 Mac. & G. 242; Dean of Ely *v.* Cash, 15 Mee. & W. 617; Dean of Ely *v.* Bliss, 2 De G. M. & G. 459.

(*q*) These are 7 Will. 4 & 1 Vict. c. 69; 1 & 2 Vict. c. 64; 2 & 3 Vict. c. 62; 3 & 4 Vict. c. 15; 5 & 6 Vict. c. 54; 9 & 10 Vict. c. 73; 10 & 11 Vict. c. 104; 23 & 24 Vict. c. 93;

(as amended), the commutation may be effected in two ways; either 1st, by a voluntary parochial agreement entered into by a certain proportion of the parties interested, and confirmed by the board of commissioners to whom this subject has been entrusted (*r*); or 2ndly, by a compulsory award; and the basis of the commutation is, in general, the clear average value of the tithes of the parish—or of the composition payable for the same, where they have been compounded for—for the period of seven years, ending Christmas, 1835 (*s*); and the payment of the tithe-commutation is to be half-yearly, and the amount thereof is to fluctuate according to the price of corn; the machinery for ascertaining that price being as follows:—In January every year, an advertisement is inserted in the London Gazette, under the authority of the Board of Trade, stating the average price of British wheat, barley, and oats for the seven years ending on the Thursday before the Christmas-day then last preceding (*t*): and every half-year's payment by each parish is to vary so as always to equal the then value (according to the price as so ascertained) of the number of bushels of wheat, barley, and oats, in equal shares, which could then be purchased (according to the prices advertised in January, 1837) by the sum for which the parish tithes were commuted (*u*).

The Acts contain also provisions for the *apportionment* of the total parochial rent-charge (under the superintendence of the commissioners) among the parish lands, having regard to their average titheable produce and productive quality; and after such apportionment has been confirmed,

36 & 37 Vict. c. 42; 41 & 42 Vict. c. 42; 45 & 46 Vict. c. 37; 48 & 49 Vict. c. 32; 49 & 50 Vict. c. 54.

(*r*) 6 & 7 Will. 4, c. 71, s. 2. This Board has been since consolidated with that of the Inclosure and Copyhold Commissioners; and all these commissioners were afterwards called the Land Commissioners (45 & 46 Vict. c. 38, s. 48); and are now called the Board of Agriculture (52 & 53 Vict. c. 30).

(*s*) 6 & 7 Will. 4, c. 71, amended by the Corn Returns Act, 1882 (45 & 46 Vict. c. 37), s. 10.

(*t*) Sect. 56.

(*u*) Sect. 67; 3 & 4 Vict. c. 15, s. 20.

such lands are absolutely discharged from the payment of tithes, and instead thereof are liable for their proportion of the tithe rent-charge (*x*). And the Acts provide also facilities for the *redemption* of the tithe rent-charge, at the price of not less than twenty-five years' purchase (*y*).

The remedy for the recovery of tithe rent-charge (remaining unredeemed) used to be by distress and entry, and not by any sale of the lands, even where the prescribed remedy should prove inefficient, *e. g.*, through the lands charged with the tithe rent-charge going out of cultivation (*z*); and apparently no action of debt lay for any arrears of tithe rent-charge (*a*). However, under the provisions of the Tithe Act, 1891 (54 & 55 Vict. c. 8), whereby the tithe rent-charge is for the future made payable by the owner, and any future contract of the tenant to pay it is made void (*b*), an action in the county court is given for the recovery of tithe rent-charge,—and in that action, the court either appoints its officer to distrain for the arrears (as where the owner is in personal occupation), or appoints some one receiver of the rents and profits of the land (where the owner is in occupation by his tenant); but such receiver may not sell the land, in order to raise the arrears (*c*). But the Act does not apply to the rent-charge payable under the Extraordinary Tithe Redemption Act, 1886 (*d*), by the 1st section of which Act the charge is directed not to be levied on any newly cultivated hop-grounds, orchards, fruit plantations, or market gardens; and provision is made (by sect. 3) for the commissioners ascertaining the capital value of the charge on each farm or parcel of land liable thereto; and upon such capital

(*x*) 6 & 7 Will. 4, c. 71, ss. 33, 54, 67; 23 & 24 Vict. c. 93, ss. 15—17.

(*y*) 9 & 10 Vict. c. 73; 23 & 24 Vict. c. 93, ss. 32—39; 41 & 42 Vict. c. 42, ss. 3, 4; 48 & 49 Vict. c. 32; 49 & 50 Vict. c. 54.

(*z*) Bailey *v.* Badham, 30 Ch. Div. 84.

(*a*) Lamplugh *v.* Norton, 22 Q. B. D. 452, citing Doe *v.* Bridges, 1 B. & Ad. 847.

(*b*) Sect. 1.

(*c*) Sect. 2.

(*d*) 49 & 50 Vict. c. 54.

value, when certified by the commissioners, a rent-charge at the rate of four per cent. is made payable (by sect. 4) in lieu of the extraordinary charge; and such statutory rent-charge is made redeemable on payment by the landowner of the capital value as so certified as aforesaid (sec. 5); and the object of the Act is to extinguish (so soon as the labours of the commissioners are completed) extraordinary tithe altogether (sects. 1, 2).

It is to be observed, in conclusion, that unless by special provision in some parochial agreement, approved by the commissioners, the Tithe Acts do not extend to any Easter offerings, mortuaries, or surplice fees; nor to tithes of *fish*, nor (in general) either to *personal* or to *mineral* tithes (*e*); nor do these Acts extend to payments in lieu of tithes in London (*f*); nor to *ad valorem* tithe payments in any city or town under any custom or private Act; nor to any tithes commuted under any former statute; and it follows that the former tithe law still retains some importance, and requires to be noticed; at the same time some branches of that law have for all practical purposes been now superseded, it being provided by the Tithe Commutation Acts, that if any question shall arise as to any composition real, modus, or exemption from tithe, in respect of any of the lands in any parish, such question shall be settled in the manner provided by these statutes: and in the parochial agreement, or award of the commissioners, due allowance is to be made for every modus or exemption that shall be so established (*g*).

II. With regard to the estates which the clergy, in right of their benefices, have in the several descriptions of church

(*e*) 6 & 7 Will. 4, c. 71, s. 90; 2 & 3 Vict. c. 62, s. 9.

(*f*) 37 Hen. 8, c. 12; 22 & 23 Car. 2, c. 15; 44 Geo. 3, c. lxxxix.; 1 Geo. 4, c. lix.; 4 Geo. 4, c. cxviii.; 6 Geo. 4, c. clxxvi.; 7 Geo. 4, c. liv. and c. cxv.; 44 & 45 Vict. c. cxcvii.; Payne *v.* Esdaile, 13 App. Cas. 613.

(*g*) 6 & 7 Will. 4, c. 71, ss. 21, 24, 44, 45; Barker *v.* Tithe Commissioners, 11 Mee. & W. 320.

property above enumerated, it is to be remarked that the clergy differ from ordinary proprietors in several particulars. A dean and chapter constitute a corporation aggregate; and every bishop, rector, vicar, or other holder of an ecclesiastical benefice, is a corporation sole: and, consequently, all ecclesiastical persons take lands and hereditaments, when granted to them for the use of the benefice in perpetuity, to hold to them and their *successors*, instead of their *heirs* (*h*). But the estate of a rector or vicar, though perpetual (as regards his church), is (as regards himself personally) considered for most purposes as an estate for life only, with the fee simple in abeyance (*i*). Also, ecclesiastical persons, in respect of their corporate character, cannot as such be seised in tail; but they may have an estate determinable upon the death of a person without issue; and they cannot in general, being corporations, hold lands without a licence in mortmain (*k*),—but there are many statutory exceptions to this latter disability; and these exceptions are, for the most part, in the case of lands held upon trusts for charities (*l*).

III. As to the alienation of church property.—At common law, though an ordinary tenant for life could make no alienation to hold good beyond his own life, yet some tenants for life, where the fee simple was in abeyance, might, with the concurrence of such as had the guardianship of the fee, make leases of equal duration with those granted by tenants in fee simple—and this, in particular, was the case in regard to incumbents of livings, provided

(*h*) 3 Inst. 202; Co. Litt. 300; Wats. C. L. 372.

(*i*) Co. Litt. 341 d.

(*k*) Wats. C. L. 372, 374.

(*l*) 29 Car. 2, c. 8; 6 Ann. c. 24, s. 4; 1 Geo. 1, sess. 2, c. 10, ss. 4, 21; 17 Geo. 3, c. 53; 43 Geo. 3, c. 107; 51 Geo. 3, c. 115; 56 Geo. 3, c. 52; 7 Geo. 4, c. 66; 1 & 2 Will. 4, c. 45; 1 & 2 Vict. c. 107, s. 13; 2 & 3 Vict. c. 49; 3 & 4 Vict. c. 20; 4 & 5 Vict. c. 39; 14 & 15 Vict. c. 104; 21 & 22 Vict. c. 57, s. 2; 22 & 23 Vict. c. 46.

they obtained the consent of the patron and ordinary (*m*). So also bishops and deans, and such other sole ecclesiastical corporations as are seised of the fee simple of lands in their corporate right, might, with the concurrence and confirmation of such persons as the law required, have made leases for years, or for life, estates in tail, or in fee, without any limitation or control; *e. g.*, such leases or estates might have been made by archbishops and bishops, with the confirmation of the dean and chapter; and by deans, with the confirmation of the bishop and chapter (*n*); and corporations aggregate might have made what estates they pleased in their church or other lands, without the confirmation of any other person whatsoever (*o*); but now, by several statutes, the powers of ecclesiastical persons in regard to alienation have been greatly altered.

And, first, by the *enabling* statute 32 Hen. VIII. c. 28, persons seised *in fee simple* in right of their churches may make leases for three lives or twenty-one years, so as to bind their successors, provided they observe the several requisites and formalities prescribed by that statute (*p*); and by the *disabling* statute 1 Eliz. c. 19, all grants or leases by archbishops and bishops are void, unless they be for no longer terms than twenty-one years or three lives from the making, and unless they reserve, at the least, the old accustomed yearly rents (*q*). And secondly, by force of the statute 13 Eliz. c. 10 (explained and enforced by the statutes 14 Eliz. cc. 11 and 14, and 18 Eliz. c. 11), ecclesiastical corporations—such as cathedrals, collegiate churches, and the like (*r*),—including also parsons (that is, rectors and vicars) are restrained (subject to the relaxations introduced by more recent Acts) from making any grants

(*m*) Co. Litt. 44; Bac. Ab. Leases (E.); Vivian *v.* Blomberg, 3 Bing. N. C. 311.

(*n*) Dean of Ely *v.* Stewart, 2 Atk. 45; Wats. C. L. c. 44.

(*o*) 2 Bl. Com. p. 319.

(*p*) Ibid.

(*q*) 21 Jac. 1, c. 1.

(*r*) Magdalen Hospital (Governors) *v.* Knotts, 5 Ch. D. 175; 8 Ch. D. 709; 4 App. Ca. 324.

or leases of their lands, unless under the following regulations :—(1.) They must not, in general, exceed twenty-one years, or three lives, from the making ; (2.) The accustomed rent, or more, must be yearly reserved thereon ; (3.) Where there is an old lease in being, no concurrent lease can be made, unless where the old one will expire within three years ; And (4.) No lease shall be made without impeachment of waste. Thirdly, ecclesiastical persons with cure of souls are restrained from *charging* their benefices so as to render them liable for any payment thereout, even in their own time (*s*) ; and this is by force of the statute 13 Eliz. c. 20; under which statute it was held that an instrument framed as a lease, but amounting in substance and design to a charge, was illegal and void: and not only a completed charge, but any voluntary agreement to charge, is equally void (*t*). But loans made to incumbents by the Governors of Queen Anne's Bounty are now excepted from the 13 Eliz. c. 20 (*u*).

Such, from the reign of Queen Elizabeth to that of King William the fourth, continued to be the state of the law in this matter, subject only to the partial relaxations from time to time introduced by various Acts of Parliament (*x*) ; but in the reign last mentioned, a new series of statutes on the subject of alienation by ecclesiastical persons commenced ; and this legislation has continued also (more or less) throughout the present reign (*y*) ;

(*s*) Bac. Abr. Leases (F).

(*t*) Hawkins *v.* Gathercole, 24 L. J., Ch. 332 ; Ex parte Arrowsmith, 8 Ch. D. 100 ; McBean *v.* Deane, 30 Ch. D. 520.

(*u*) 17 Geo. 3, c. 53 ; 21 Geo. 3, c. 66 ; 7 Geo. 4, c. 66 ; 1 & 2 Vict. cc. 23, 106 ; 28 & 29 Vict. c. 69 ; 34 & 35 Vict. c. 43 ; 35 & 36 Vict. c. 96 ; 44 & 45 Vict. c. 25 ; 49 & 50 Vict. c. 34 ; c. 54, s. 12 ; and 50 Vict. c. 8.

(*x*) 17 Car. 2, c. 3, s. 7 (revived by 6 Vict. c. 37) ; 29 Car. 2, c. 8 (extended by 1 & 2 Will. 4, c. 45 ; 1 & 2 Vict. c. 107 ; and 17 & 18 Vict. c. 84) ; 55 Geo. 3, c. 147 ; 1 Geo. 4, c. 6 ; 6 Geo. 4, c. 8 ; and 5 & 6 Will. 4, c. 76, s. 139.

(*y*) See (besides the statutes particularly mentioned in the text) 6 & 7 Will. 4, c. 77, s. 26 ; c. 104, s. 3 ; 1 & 2 Vict. c. 31 ; 17 & 18 Vict. cc. 84, 112 ; 20 & 21 Vict.

and it is necessary to state the short effect of this legislation.

First, by 6 & 7 Will. IV. c. 20 (as amended by 6 & 7 Will. IV. c. 64), relative to the *renewal* of church leases, no ecclesiastical corporation may grant any new lease by way of renewal, until one or more of the persons for whose lives it was granted shall be dead: and then only for the surviving life or lives, together with such new life or lives as should make up the number, not exceeding three, for which the original lease was granted; and where the previous lease was for forty, thirty, or twenty-one years, the renewed lease may not be granted until fourteen, ten, or seven years of the first term shall have expired respectively; and there can be no renewal for life, where the original lease was for years only.

Secondly, by 5 & 6 Vict. c. 27 (with reference to *farming* leases) an incumbent may, with consent of his patron and bishop, demise for a term not exceeding fourteen years any part of the glebe or other church land, provided the best rent that can be gotten be reserved, and be made payable quarterly,—and provided no fine or foregift be taken for the lease, and the lessee be not made dispunishable for waste, and the lease contain such covenants as to cultivation, management, and other matters, as the Act particularly specifies (*z*); and no such lease was to be valid, unless it excepted the house of residence, and at least ten acres of land (*a*).

But, thirdly, by "The Ecclesiastical Leasing Act, 1842" (5 & 6 Vict. c. 108), the lands or houses of a benefice may be demised on an improving and repairing lease for any term not exceeding *ninety-nine* years; and leases or licences with respect to watercourses, wayleaves, railroads, and other like easements upon or over the property (*b*), or with re-

c. 13; and (as regards *colleges and hospitals* in particular) 19 & 20 Vict. c. 88; 21 & 22 Vict. c. 44; 22 & 23 Vict. cc. 19, 34; 23 & 24 Vict. c. 59.

(*z*) 5 & 6 Vict. c. 27, s. 1.

(*a*) Sect. 2.

(*b*) 5 & 6 Vict. c. 108, s. 4.

spect to the mines, minerals, or quarries (*c*), of ecclesiastical persons, may be made or granted,—the provisions of the Act being duly observed. And by "The Capitular and Episcopal Estates Act, 1851" (14 & 15 Vict. c. 104) (*d*), ecclesiastical corporations may, with the approval of the Church Estates Commissioners, sell to their lessees the reversion of the corporation in the premises comprised in the lease; or may enfranchise any copyhold or customary land held of any manor belonging to the corporation; or may effect exchanges with their lessees; or may, on the other hand, purchase the interest of such lessees in any corporation lands, or the interest of any holder of copyhold or customary land belonging to the manor. And by "The Ecclesiastical Leasing Act, 1858" (21 & 22 Vict. c. 57), the Ecclesiastical Commissioners may approve under their seal (such consents having been first obtained as in the Act mentioned) the lease of any part of the lands or other property of any ecclesiastical corporation, aggregate or sole, (except such as are in the Act specially excepted,) for such considerations, and for such terms, and under such covenants or agreements on the part of the lessees, and generally in such manner as to the commissioners shall seem advisable. Also, by the 23 & 24 Vict. c. 124, no lands assigned by the Ecclesiastical Commissioners as the endowment of any see may be granted by the archbishop or bishop otherwise than from year to year, or for a term of years in possession not exceeding twenty-one years, at the best annual rent that can be reasonably gotten, without fine; the lessee not to be dispunishable for, or exempted from liability in respect of, waste; and in every such lease, such or the like covenants, conditions, and reservations are to be entered into, reserved, or contained for the benefit of the archbishop or bishop and his successors, as under the

(*c*) Sect. 6; Doe *d.* Brammall *v.* Collinge, 7 C. B. 954.

(*d*) Amended by 17 & 18 Vict. c. 116; 21 & 22 Vict. c. 94; 22 & 23 Vict. c. 46; 23 & 24 Vict. c. 124; 31 & 32 Vict. c. 114, s. 10; 35 & 36 Vict. c. 88; 39 & 40 Vict. c. 69; and 42 & 43 Vict. c. 67.

5 & 6 Vict. c. 27, are to be contained in a lease for the benefit of the incumbent and his successors, or as near thereto as the circumstances of the case will permit; but the archbishop or bishop may, with the approval of the Church Estates Commissioners, grant mining or building or other leases, for such periods, upon such considerations, and generally in such manner as they may think fit; and a portion of the rent reserved on any such lease may be made payable to the Ecclesiastical Commissioners (*e*). And by 24 & 25 Vict. c. 105, (amended by 25 & 26 Vict. c. 52,) a rector, vicar, perpetual curate, or other incumbent, who after the passing of the Act becomes possessed of or entitled to any manors, lands, tenements, or hereditaments belonging to any ecclesiastical benefice, may not lease or grant out the same in any other way than as authorized by the provisions of the statutes 5 & 6 Vict. cc. 27, 108; 14 & 15 Vict. c. 104; 21 & 22 Vict. c. 57; and 23 & 24 Vict. c. 124,—these Acts not affecting, of course, existing rights.

Finally, by the Glebe Lands Act, 1888 (*f*), the incumbent of any benefice is enabled, on due notice to the bishop of the diocese and to the patron, and with the approval of the Board of Agriculture, to procure *a sale* of the glebe lands (except the parsonage house and the out-buildings, and garden or other land necessary for the convenient enjoyment thereof); but if the bishop or patron objects to the sale, and the Board should consider the objection a good one, the sale is not to proceed (ss. 2, 3); but if a sale is effected, the land is sold free from all incumbrances thereon (s. 6), and also from all annual charges thereon (s. 7),—these incumbrances and charges being respectively transferred to the sale-proceeds; which proceeds are payable to the Board of Agriculture (s. 4), who duly invest the same in the names of the Ecclesiastical Commissioners (s. 4); and the last-mentioned

(*e*) 23 & 24 Vict. c. 124, ss. 2—8.

(*f*) 51 & 52 Vict. c. 20.

commissioners hold these investments upon the same trusts as the lands themselves before sale were (or in effect were) subject to (s. 4). And by the 26 & 27 Vict. c. 120, provision is made for the sale by the Lord Chancellor of any advowsons in his gift, and for the application of the sale-proceeds (or of the income thereof) in augmentation of the income of the same (or of any other poor) benefices.

Having now completed our statement of the law relative to the endowments and provisions of the Church, we shall proceed to notice certain profits, which, as forming a part (however trivial) of the revenues of the clergy, ought to be considered in this chapter. We allude to *surplice fees* (being fees payable on burials, marriages, and the like),—all fees on baptisms being now prohibited (*g*); and to *Easter offerings* and *mortuaries:* all of which are mentioned generally in our books by the name of *oblations*, and are of great antiquity, having been, indeed, at one time, almost the whole revenue of the Church—until, in the fourth century, it was enriched with tithes (*h*).

With respect to *surplice fees* and *Easter offerings*.—It is said that no *surplice fees* are due to the minister as of common right, but that they depend upon special custom only (*i*); while as to *Easter offerings*, it has been laid down, that they are due of common right to him who exercises the spiritual functions of the parish; and that at the rate of twopence per head, for all the parishioners of the age of sixteen and upwards (*k*). However this may be, the liability to pay oblations, generally, is recognized by the statute law; for by 2 & 3 Edw. VI. c. 13, it was provided,

(*g*) 35 & 36 Vict. c. 36.

(*h*) Jac. Law Dict., *Oblations;* Rennell *v.* Bishop of Lincoln, 7 Barn. & Cress. 153.

(*i*) 3 Bl. Com. 90; Com. Dig. Dismes (B. 1); Burdeaux *v.* Lancaster, 1 Salk. 332; Andrews *v.* Cawthorne, Willes, 536; Littlewood *v.* Williams, 6 Taunt. 277; Gilbert *v.* Buzzard, 3 Phill. 360; Nevill *v.* Bridger, Law Rep., 9 Exch. 214.

(*k*) Laurence *v.* Jones, Bunb. 173; Egerton *v.* Still, ib. 198; The Queen *v.* Hall, Law Rep., 1 Q. B. 638.

that all who, by the laws and customs of the realm, ought to pay offerings, shall yearly pay them to the incumbent of the parish at the four most usual offering days; or otherwise at Easter; and by 7 & 8 Will. III. c. 6, and 53 Geo. III. c. 127, that every one shall henceforth pay all offerings, oblations, and obventions to those persons to whom they are due (*l*). And oblations are made recoverable before two justices of the peace, where their amount does not exceed 10*l.*; and no oblations can be recovered, otherwise than before justices, unless the amount exceeds 10*l.* (or, in the case of Quakers, 50*l.*); or unless some matter *of title* comes in question. Also, in churches and chapels built under the Church Building Acts, or the "New Parishes Acts," (of which we shall presently speak more at large,) the payment both of fees and of offerings, to the minister and clerk respectively, is specifically provided for (*m*).

And with regard to *mortuaries*.—These are a sort of ecclesiastical heriots (*n*), being a customary gift claimed by and due to the minister, in very many parishes, on the death of any of his parishioners, and being due by custom only (*o*). [They seem originally to have been, like lay heriots, only a voluntary bequest to the Church; being intended (as Lyndewoode informs us, from a constitution of Archbishop Langham,) as a kind of expiation and amends to the clergy, for the personal tithes and other ecclesiastical duties, which the laity in their lifetime might have neglected or forgotten to pay. For this purpose, after the lord's heriot or best good was taken, the second best chattel was reserved to the Church as a mortuary (*p*); and in the laws of King Canute this mortuary is called soul-scot (ꝑaplꝑceaꞇ), or *symbolum animæ* (*q*). And it was

(*l*) Ayrton *v.* Abbott, 14 Q. B. 1; Willes, 538 (n.).

(*m*) As to the Church Building Acts, vide post, p. 741; as to the New Parishes Acts, post, p. 744.

(*n*) 2 Bl. Com. p. 425.

(*o*) 2 Inst. 491.

(*p*) Co. Litt. 185; Provinc. l. 1, tit. 3.

(*q*) C. 13.

[antiently usual in this kingdom to bring the mortuary to church, along with the corpse when it came to be buried; and thence it is sometimes called a *corse-present*,—a term which bespeaks it to have been once a voluntary donation. However, in Bracton's time, so early as Henry the third, it had grown into an obligation; and bequests of heriots and mortuaries were held to be necessary ingredients in every testament of chattels (*r*). The custom varied in different places, not only as to the mortuary to be paid, but as to the person to whom it was payable. In Wales, a mortuary or corse-present was due upon the death of every clergyman to the bishop of the diocese; but this was abolished, upon a recompense given to the bishop, by the statute 12 Ann. st. 2, c. 6. And in the archdeaconry of Chester, a custom once prevailed, that the bishop should have (at the death of every clergyman dying therein) his best horse or mare, bridle, saddle, and spurs, his best gown or cloak, hat, upper garment under his gown, and tippet, and also his best signet or ring (*s*); but this mortuary also was directed to cease by the 28 Geo. II. c. 6, which settled upon the bishop an equivalent in its room.

The variety of customs with regard to mortuaries, giving frequently a handle to exactions on the one side, and to frauds or expensive litigation on the other, it was thought proper, by the statute 21 Hen. VIII. c. 6, to reduce them to some kind of certainty; and for this purpose, that statute enacted, that all mortuaries or corse-presents to parsons of any parish should (unless where by custom less or none at all was due) be taken in the following manner: viz., for every person dying therein who did not leave goods to the value of ten marks, nothing; for every person who left goods to the value of ten marks, and under thirty pounds, 3*s.* 4*d.*; if above thirty pounds, and under forty pounds, 6*s.* 8*d.*; if above forty pounds, of what value

(*r*) Bract. l. 2, c. 26; Flet. l. 2, c. 57.

(*s*) Hinde *v.* Bishop of Chester, Cro. Car. 237.

[soever, 10*s.* and no more; also, no mortuary was to be paid, in any parish, in respect of a *feme covert;* nor in respect of any child or person not being a householder therein; nor in respect of any wayfaring man, whose mortuary was to be paid in the parish in which he had his usual residence; and upon this statute stands the law of mortuaries to this day (*t*).]

(*t*) 2 Bl. Com. p. 427.

CHAPTER IV.

OF NEW ECCLESIASTICAL DISTRICTS AND PARISHES, AND OTHER EXTENSIONS OF THE ORIGINAL CHURCH ESTABLISHMENT.

THE constitution of the Church of England, in what regards its regular and proper establishment of prelates, ministers, churches, and endowments, is, for the most part, as antient as the common law itself; but in modern times, and particularly of late, various alterations have been introduced, tending greatly to improve and enlarge that establishment—and we shall give some account of these in the course of the present chapter.

The spiritual ministrations of the Church are mainly entrusted to the parochial clergy—in other words, to the rectors and vicars of the different parishes of which the realm is composed, together with the curates whom they may think fit (or are obliged) to employ for their assistance; and each parish contains a church—the parochial division of the kingdon being indeed itself referential to the establishment of churches therein (*a*); and there are, comparatively, but very few and scanty portions of territory which have remained extra-parochial.

But in certain parishes, together with the church, *chapels* were at an early period founded, in which divine service,

(*a*) Hallam, Mid. Ages, vol. ii. p. 205, 7th edit.; and according to Jeffrey's case, 5 Rep. 67 a, "*Parochia est locus in quo degi populus alicujus ecclesiæ.*"

and (in some instances) the rights of sacrament and burial, might be lawfully celebrated, in the same manner as in the parochial churches themselves; and such chapels are of various descriptions. Some are *private* (*b*), being erected for the use only of particular persons of rank, to whom this privilege was conceded by the proper authorities; and such chapels are free from the control of the incumbent of the parish church (*c*); while other chapels are *public*, and designed for the benefit of particular districts lying within the parochial ambit (*d*), these latter having been, in general, founded at some date later than the parish church itself, for the accommodation of such of the parishioners as lived too far from the parish church; whence public chapels so circumstanced are described as *chapels of ease* (*e*); and all such are, in general, subject to the control of the incumbent of the parish church, although (under the 1 & 2 Will. IV. c. 38, and 1 & 2 Vict. c. 107), they may be made independent. But there are some chapels of ease which seem to have been coeval with, and always independent of, the parish church, and to have been designed for the benefit of some particular districts never included within the pale of the parish church, though locally embraced by the parochial division (*f*). With respect to these chapels of ease—also called *chapels belonging to the mother church* (*g*)—they are either *parochial*, in which both divine worship and the rites of sacrament and burial are performed—or *mere* chapels of ease, and designed for divine worship only; but as to chapels of ease of either description, these doctrines equally prevail, that of common right the nomination to them is in the incumbent of the parish church, and cannot be taken

(*b*) Chapman *v.* Jones, Law Rep., 4 Exch. 273; Duke of Norfolk *v.* Arbuthnot, 4 C. P. D. 290; 5 C. P. D. 390.

(*c*) 34 & 35 Vict. c. 66.

(*d*) Godolph. Ab. 145; Farnworth *v.* Bishop of Chester, 4 B. & C. 568.

(*e*) Wats. C. L. 645; Farnworth *v.* Bishop of Chester, ubi sup.; Reg. *v.* Foley, 2 C. B. 664.

(*f*) Craven *v.* Sanderson, 7 Ad. & El. 880.

(*g*) Wats. C. L. 645.

from him except by agreement between himself, the patron, and the ordinary (*h*); and that the establishment of a chapel of ease in any parish does not of itself deprive the inhabitants accommodated therein of the right of resorting to the parish church; nor, on the other hand, does it exempt them from any parochial burthen to which they would otherwise be liable (*i*). Whence also it is, apparently, that the rector or vicar may, under the provisions of the 1 & 2 Will. IV. c. 45, and 28 & 29 Vict. c. 42, annex or appropriate to any such chapel of ease portions of the endowments proper of the parish church.

There are also certain chapels which are called *free chapels*, because not liable to the visitation of the ordinary; and these (it is said) are always of royal foundation; or else have been founded by private persons by virtue of a crown licence in that behalf (*j*).

But to the number of chapels thus created in antient times, considerable additions have been made in comparatively modern periods—many new chapels of ease (particularly in towns) having latterly been built and endowed, to meet the demands of a population beginning to overflow; and among these may be particularly noticed a species of chapel of recent introduction, called *proprietary chapels* (*k*), because they are the property of private persons, who have purchased or erected them with a view to profit or otherwise (*l*).

But these additions to our regular establishment, though numerous, were not found adequate to the growing wants of the population; and in 1818, the legislature began to apply itself, systematically, to the great object of extend-

(*h*) Farnworth *v.* Bishop of Chester, 4 B. & C. 568; Dixon *v.* Kershaw, Amb. 528; Duke of Portland *v.* Bingham, 1 Hagg. 168.

(*i*) Ball *v.* Cross, 1 Salk. 165; see Dent *v.* Rob. 1 You. & C. 1.

(*j*) Wats. C. L. ubi sup.; 1 Burn, E. L. 298.

(*k*) Moysey *v.* Hilcoat, 2 Hagg. 30.

(*l*) Bosanquet *v.* Heath, 9 W. R. 34.

ing the accommodation afforded by the national Church, so as to make it more nearly commensurate with the wants of the people; and a variety of statutes have accordingly been passed for this purpose, which are known by the general denomination of the Church Building Acts (*m*). And under the authority of these Acts, the crown appointed, for a limited period, a body of commissioners (called the Church Building Commissioners), who were directed to ascertain where the accommodation of additional churches and chapels was required; and out of the funds placed at their disposal by parliament, to cause such as they thought necessary to be built, or to assist the parishioners, or any persons subscribing, with grants or loans of money for the purpose; and other extensive powers were also entrusted to these commissioners, with regard to the division of parishes, (so far as ecclesiastical purposes were concerned,) into separate parishes or separate ecclesiastical districts—and also with regard to many other matters of the same general character. But inasmuch as these statutes contain provisions vastly too numerous and complex for particular notice, and their importance has been partly superseded by the other more recent enactments of which we are about to speak, we shall content ourselves with merely observing that in the year 1856, the powers of the Church Building Commissioners were transferred to "The Ecclesiastical Commissioners" (*n*), a body which we have already had occasion to refer to, and of which the origin was as follows:—

During the course of the legislation upon church building, and upon the division of parishes for ecclesiastical

(*m*) 58 Geo. 3, c. 45; 3 Geo. 4, c. 72; 5 Geo. 4, c. 103; 7 & 8 Geo. 4, c. 72; 1 & 2 Will. 4, c. 38; 2 & 3 Will. 4, c. 61; 1 & 2 Vict. c. 106, ss. 25, 80; c. 107; 2 & 3 Vict. c. 49; 3 & 4 Vict. c. 60; 4 & 5 Vict. c. 38, s. 19; 6 & 7 Vict. c. 37, s. 24; 7 & 8 Vict. c. 56; 8 & 9 Vict. c. 70; 9 & 10 Vict. cc. 68, 88; 11 & 12 Vict. c. 37; 14 & 15 Vict. c. 97; 17 & 18 Vict. c. 32; 32 & 33 Vict. c. 94; 34 & 35 Vict. c. 82; 47 & 48 Vict. c. 65.

(*n*) 19 & 20 Vict. c. 55.

purposes, the zeal of the nation was also gradually excited for the improvement of our ecclesiastical establishment in other particulars; and in the year 1835, royal commissioners were appointed to consider the state of the several dioceses, with reference to the amount of their revenues, and with a view to the more equal distribution of episcopal duties; and to consider also the state of the cathedral and collegiate churches, with a view to the suggestion of such measures as might render them more conducive to the efficiency of the Established Church; and to devise the best mode of providing generally for the cure of souls, and with special reference to the matter of the residence or non-residence of the clergy, and as to pluralities. And the report of this royal commission was in due course made, and was followed by an Act of Parliament, 6 & 7 Will. IV. c. 77, incorporating "The Ecclesiastical Commissioners of England," and empowering them to lay before the sovereign in council such Schemes as might be best adapted to carry into effect the various recommendations contained in the report; and which Schemes, when duly ratified by order in council, were to have the same effect as if they formed part of the Act. And in pursuance of this provision, the Ecclesiastical Commissioners, who now include all the bishops of England and Wales, and the chief justice, as well as some other persons of distinction (*o*), and who are required to make an annual report to parliament (*p*), have prepared a variety of Schemes, and these have now acquired the force of legislative enactments (*q*); and thereby (among many

(*o*) 3 & 4 Vict. c. 113, s. 78.

(*p*) 13 & 14 Vict. c. 94, s. 26.

(*q*) 31 Vict. c. 19. The Acts relating to the "Ecclesiastical Commissioners" are the following:— 3 & 4 Vict. c. 113, s. 78; 4 & 5 Vict. c. 39; 6 & 7 Vict. cc. 37, 77; 7 & 8 Vict. c. 94 (repealed as to sect. 17 by 23 & 24 Vict. c. 124, s. 1); 10 & 11 Vict. c. 108; 13 & 14 Vict. cc. 41, 94; 14 & 15 Vict. c. 104; 16 & 17 Vict. cc. 35, 50; 19 & 20 Vict. cc. 55, 104; 23 & 24 Vict. c. 124; 29 & 30 Vict. c. 111; 31 & 32 Vict. c. 114; 33 & 34 Vict. c. 39; 36 & 37 Vict. c. 64; 38 & 39 Vict. c. 71; 48 & 49 Vict. cc. 31, 55.

other improvements) various alterations have been made in the arrangement and limits of dioceses; the sees of Gloucester and Bristol have been united (*r*), and provision has been made for additional bishoprics being established, and for the provision of episcopal residences (*s*); and in order to augment the income of the smaller bishoprics, contribution has been made from time to time from the revenues of the larger bishoprics, the rights of the existing prelates being saved. Also, by the statutes 3 & 4 Vict. c. 113, and 4 & 5 Vict. c. 39, commonly called the Cathedral Acts (*t*), provision has been made for (among other things) the suspension of a large number of canonries, —subject, in certain events, to a power of revival, upon condition of their being newly endowed (*u*); for the suppression of all sinecure rectories, except those in the patronage of private persons (*x*), and for the suppression also of these latter, but only with the concurrence of the patrons thereof (*y*); for the suppression of certain deaneries (*z*); for the vesting of the estates and profits of all such preferments, together with the endowments of non-residentiary prebends, and of some other dignities and offices, in the Ecclesiastical Commissioners (*a*); and for the consolidation of all the property so vested, with the accruing interest, into a common fund, to be applied (in general, and under such authority as in the Acts provided) in making additional provision for the cure of souls, in parishes where such assistance shall be most required (*b*). And for the better management of all matters connected

(*r*) By the stat. 47 & 48 Vict. c. 66, provision has been made for re-constituting Bristol a separate diocese: vide supra, p. 327, n.

(*s*) 5 & 6 Vict. c. 26.

(*t*) See also 6 & 7 Vict. c. 77; 23 & 24 Vict. cc. 59, 124; 31 & 32 Vict. c. 114; and 36 & 37 Vict. c. 39.

(*u*) 3 & 4 Vict. c. 113, s. 20.

(*x*) Sects. 48, 54; 4 & 5 Vict. c. 39, s. 17.

(*y*) 3 & 4 Vict. c. 113, s. 48.

(*z*) 3 & 4 Vict. c. 113, ss. 21, 51; 4 & 5 Vict. c. 39, s. 6.

(*a*) 3 & 4 Vict. c. 113, ss. 49, 51; 4 & 5 Vict. c. 39, ss. 6, 7.

(*b*) 3 & 4 Vict. c. 113, s. 67; 23 & 24 Vict. c. 124, s. 12.

with the sale and purchase or leasing of church lands, a special committee of the Ecclesiastical Commissioners has been appointed, called "The Church Estates Commissioners" (*c*).

Provisions of a not less important character and of a still more recent date, with reference to the same great object of putting the Church into a state of full efficiency, have been made by the 6 & 7 Vict. c. 37, 7 & 8 Vict. c. 94, and 19 & 20 Vict. c. 104, commonly called "The New Parishes Acts," the first and second of them being also sometimes called Sir Robert Peel's Acts, and the third of them the Marquis of Blandford's Act (*d*). And the 6 & 7 Vict. c. 37 ("The New Parishes Act, 1843"), provides, in particular, that the Ecclesiastical Commissioners may form out of the larger and more populous parishes separate districts for spiritual purposes,—the scheme being in each case first laid before the incumbent and patron, so as to give them the opportunity of making such remarks thereon or objections thereto as may occur to them (*e*); and upon the district being thus constituted, a minister is to be nominated thereto, with an income of not less than 100*l.* per annum (*f*): and the right of nomination thereto may be assigned to any ecclesiastical corporation, or to the universities of Oxford, Cambridge, or Durham, or to any of their colleges, or to any private person or his nominee or nominees,—upon condition of contributing, in a certain proportion, to the permanent endowment of the minister, or towards a church or chapel for the district (*g*); but until the patronage is so assigned, the right of nomination belongs, alternately, to her Majesty and to the bishop of the diocese (*h*); and the charity property of the district

(*c*) 13 & 14 Vict. c. 94.

(*d*) There are also the New Parishes Act, 1869 (32 & 33 Vict. c. 94); and the New Parishes Act, 1884 (47 & 48 Vict. c. 65).

(*e*) 6 & 7 Vict. c. 37, s. 9.

(*f*) Ibid.

(*g*) Sect. 20.

(*h*) Sect. 21; 7 & 8 Vict. c. 94, s. 1.

may be apportioned (and the apportionment may be afterwards varied) between and among the separate districts (*i*). And the funds placed in the hands of the Ecclesiastical Commissioners are made available for the purpose of endowing or augmenting the income of the ministers of the new districts, to such an amount, and in such proportion and manner, as the Commissioners may recommend (*j*).

At any time after the constitution of a district, and while it is still unprovided with a church, the bishop is empowered to license any building within the same, for the performance of divine service (*k*); and may license the nominated minister to perform in the district any pastoral duties, with the exception only of burials and marriages; and the minister so licensed shall be considered as having, to that extent, the cure of souls within the district, and that independently of the incumbent of the parish church (*l*): and he shall be a body corporate, with perpetual succession, by the style of the "minister" of such district. But after a church or chapel has been built or purchased for the district, and approved by the Commissioners by an instrument under their common seal, and duly consecrated, —the district (immediately upon such consecration) becomes a *new parish* for ecclesiastical purposes; and thereupon it becomes lawful to solemnize marriages, baptisms, churchings, and burials therein (*m*); and the minister, having been first duly licensed by the bishop to such church, thereupon *ipso facto* becomes the vicar thereof (*n*); but the permanent endowment provided for him must not be less than 150*l.* *per annum* (*o*); and the new church is styled and designated a vicarage, and is deemed

(*i*) 8 & 9 Vict. c. 70; In re Campden Charities, 24 Ch. Div. 213.

(*j*) 6 & 7 Vict. c. 37, s. 19.

(*k*) Sect. 13.

(*l*) Sect. 11.

(*m*) Sect. 15; Cronshaw *v.* The Wigan Burial Board, Law Rep., 8 Q. B. 217.

(*n*) 31 & 32 Vict. c. 117.

(*o*) 6 & 7 Vict. c. 37, s. 9.

to be a benefice with cure of souls to all intents and purposes; and two fit persons, being members of the Church of England, are to be annually chosen, by the vicar and inhabitants of the new parish, as churchwardens; and they are charged with all the ordinary duties of churchwardens in ecclesiastical matters, but not with any duties as overseers of the poor (*p*).

By the statute 7 & 8 Vict. c. 94, no new district could be constituted if there already existed within its limits any consecrated church or chapel in use for divine worship (*q*); but this restriction was taken away by the 19 & 20 Vict. c. 104, being "The New Parishes Act, 1856"; and thereby the Ecclesiastical Commissioners are empowered, on the constitution of any new district, to specify some existing or intended church within it, as the parish church thereof: and the incumbent of such church is made liable for the performance of all pastoral duties within the limits of the new parish (*r*); and the Commissioners are also empowered by this Act to recommend the constitution of such a district, without the permanent endowment required by the Act of 6 & 7 Vict. c. 37,—if it shall appear to them that there is reason to expect, from other sources, an adequate maintenance for the incumbent (*s*). And the Commissioners may also, with the consent of the bishop, order that pew rents may be taken in any church to which a district may be assigned, if other sources of income fail (*t*).

The statute 19 & 20 Vict. c. 104 contains also a variety of additional enactments with regard to the assignment of the patronage of these new churches, in return for the endowment thereof; but these are of a character too minute and complicated for detail in this place (*u*). The Act contains also provisions, in extension of previous powers of the same general description contained in the

(*p*) Sect. 17.
(*q*) Sect. 9.
(*r*) 19 & 20 Vict. c. 104, s. 2.
(*s*) Sect. 3.
(*t*) Sect. 4; 47 & 48 Vict. c. 65, ss. 4, 5.
(*u*) 19 & 20 Vict. c. 104, ss. 16—22.

Church Building Acts; and, under these provisions, the Commissioners may, by a Scheme duly ratified in council, divide *any* parish into two or more distinct and separate parishes for *all ecclesiastical purposes whatsoever*; and may regulate the duties of the incumbents of the respective divisions, as also the performance of the offices and services in the respective churches, and the fees to be taken for the same respectively; as well as any other matters which may become necessary or expedient to arrange for, by reason or in consequence of such division (*x*); but any division of parishes under the Act requires the consent of the patron and bishop of the diocese, and is in no case to take effect until the next avoidance of the church, unless with the consent in writing of the actual incumbent (*y*); moreover, any such division may be subsequently annulled, if (from whatever cause) a church is not duly provided for the separated portion, within a reasonable time (*z*).

(*x*) 19 & 20 Vict. c. 104, s. 25.
(*y*) Ibid.
(*z*) 47 & 48 Vict. c. 65, ss. 2, 3.

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