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(without reſerving any thing to himſelf), but ſince the ſtat. 31 Ed. III. by the next and moſt lawful friends, in ſuch proportion to each of thoſe objects, as ſeemed good to the perſon diſtributing. It is made a queſtion by Lyndwood, whether under the deſcription of *conſanguinei* or *propinqui*, any thing could be demanded *de jure* by baſtards and ſpurious children; which he anſwers himſelf in the negative: but he thinks they ought to be conſidered under the light of poor perſons, and ſhould be provided for *per viam eleemoſynæ*[t].

SUCH was the rule of the eccleſiaſtical law reſpecting the diſtribution of inteſtates' effects, if that can be called a rule which was no direction, and that law which had no ſanction to enforce it; for the proportion to be aſſigned to each of the objects intended to be benefited, is no where aſcertained. This was to depend, firſt, on the diſcretion of the adminiſtrator; and, ſecondly, on that of the biſhop, to whom he was to be accountable; and the perſon who was to be intruſted with this charge, was to be choſen by the biſhop, under no other reſtriction than that of being next and moſt lawful friend of the deceaſed. It cannot likewiſe but be remarked, that the poſtponing of the widow to the deſcendants and aſcendants *in infinitum*, and to the *agnati* and *cognati* as far as the tenth degree, was a very inequitable and unjuſt diſpoſal of the huſband's property, and could hardly be palliated by the probability of his having lands, out of which ſhe would be intitled to dower.

The *rationabile pars*.

THE correction of theſe inconveniences was to be ſought elſewhere. In different parts of the kingdom particular cuſtoms prevailed, which controuled the general law of inteſtacy. The cuſtom of a province, of a county, of a city, or a diſtrict, was to be found in numberleſs places, and the property of deceaſed perſons was thereby divided

[t] Lynd. 180. o.

with

with more certainty, and with leſs interference and diſcretion of ſtrangers. In ſome places it was the cuſtom, if the deceaſed left a wife and no children, that half of the goods were conſidered as the part of the deceaſed, and the other half went to his wife; the ſame if he left only children; if a wife and children, then a third belonged to the deceaſed, and the other two-thirds to the wife and children; if there was no wife, nor children, then the whole belonged to the deceaſed. In ſome the wife took all; in others, the children: and when goods were in places where different cuſtoms prevailed, they were to be diviſible according to the cuſtom of the place where they were reſpectively found[r]. If no diſpoſition was made of the deceaſed perſon's third, or half, as the caſe might be, that alſo became ſubject to a like diviſion, according to the cuſtom.

Of all theſe cuſtoms, that which gave a third to the wife, another to the children, and a third to the deceaſed, and in caſe of only a wife, or only children, the half, was moſt frequently met with; and it ſeems to have ſo generally pervaded the kingdom, as to be miſtaken for the general law of inteſtacy. Indeed this claim of the wife and children, where it prevailed, had been carried ſtill further: it had been conſtrued to be ſuch an inherent right in them, as to reſtrain the power of diſappointing them of this *reaſonable part of the goods* by will; the poſſeſſor, it was contended, having a power of diſpoſing by will of nothing but his portion, or *dead man's part*.

We have before had occaſion to relate the diſcuſſion that this claim, at different times, raiſed in our temporal courts[s]. The queſtion had all along been, whether this was a common-law right, or one ſupported only by the ſpecial cuſtom of different places; and the laſt determinations in the reign of Edward III. ſeem to countenance the latter opinion. Conformably with thoſe deciſions, we

[r] Lynd. 172. i. m. 178. a.

[s] Vid. ant. 67, &c.

 find

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find an action in the reign of Henry VI. [t] and another in the reign of Edward IV. [u] againſt an executor for a reaſonable part, where a ſpecial cuſtom of a county is alledged. There is an inſtance of one action, which was grounded upon the uſage generally, without ſtating it to be of the realm, or of any county or place [x]. If we look a little further on in our juridical hiſtory, we find it laid down poſitively by Fitzherbert and others, in the reign of Henry VIII. that this claim of the wife and children was by the common law that prevailed through the whole realm; and that the action *de rationabili parte* might be maintained againſt the executors [y]; ſo that the power of making a will was, in caſe of leaving a wife or children, confined to the dead man's part. This opinion ſeems to be ſtrenuouſly maintained by Brooke, ſome time after the reign of Henry VIII. Thus ſtood this queſtion about ſucceſſion to perſonal property, whether in caſe of a will or inteſtacy, in the reigns of Edward VI. and Queen Mary, and for ſome years after.

BEFORE we leave the ſubject of wills and inteſtacy, it will be proper to lay before the reader ſuch few notices on the point of juriſdiction, as are to be found in the books of common law. And firſt with regard to executors, and the ſuits they might bring, or be liable to, we find it very early laid down, that a man could not generally ſue an executor in the ſpiritual court for the teſtator's debt; yet if the teſtator enjoined the executor to pay ſuch debt, then he might ſue for it in the ſpiritual court, becauſe of the injunction and promiſe: and this was conſidered as law, ſo low down as the reign of Henry VIII [z]. An executor might ſue another in this court for the teſtator's goods: as where goods were bequeathed, and a ſtranger obſtructed him

[t] 28 Hen. VI. 4.
[u] 7 Ed. IV. 20, 21.
[x] 30 Hen. VI. 25. Bro. Racion. Part. 7.
[y] Bro. Racion. Part. 6.
[z] 6 Hen. III. Fitz. Proh. 17. and vid. Goodall, &c.

in

in beſtowing the legacy, the executor might ſue him in this court [a]; but if the goods bequeathed were taken from the executor, he muſt bring treſpaſs, and could not ſue in this court [b]. So generally was it ſettled that legacies ſhould be ſued for in this court, and not in the temporal, that if a termor bequeathed his crop, this court would hold plea of it [c]. Where one ſued in this court for goods deviſed, which another claimed by deed of gift, and thereupon brought a prohibition, it was held, that being a legacy, it could only be determined in this court [d]. Conſidering the legatee had ſuch action, it was held, that he could not take the goods without the executor's conſent [e]; beſides, the law did not oblige the executor to pay them, till the debts of the teſtator were paid [f]. But where land was deviſed, the deviſee might enter immediately, as he had no ſuit to demand it in the ſpiritual court [g]. If any thing was bequeathed for the reparation of the fabric of a church, the executors might be ſued in this court [h].

Of tithes.

THE article of tithes has not hitherto been mentioned in any other way than as an object of judicial cogniſance, which was at different times diſputed between the temporal and ſpiritual courts [i]. It is only once that we were called upon to notice the nature of this proviſion for the clergy, and this was on the occaſion of the ſtatute of *ſylva cædua* [k]. In no other inſtance had the legiſlature thought it neceſſary to interpoſe for ſettling queſtions of tithe; and our temporal courts had no authority to preſcribe any rules on this head. The deciſion, therefore, to aſcertain "what was tithe, and what not," remained wholly with the ſpiritual court, and the clerical legiſlature. The nature of tithes, in this country, muſt be collected from the conſtitutions of

[a] 4 Hen. III. Fitz. ibid.
[b] 2 Ric. III. 17.
[c] 37 Hen. VI. 9. 8 Hen. III. Fitz. Prohi. 19.
[d] 46 Ed. III. 32.
[e] 29 Ed. IV. 9.
[f] 2 Hen. VI. 15.
[g] Vid. ant. vol. I. 455.
[h] Reg. 48. b. Vid. An Apologie, &c. 22, 23, 24.
[i] Vid. ant. vol. I. 70.
[k] Vid. ant. vol. II. 388.

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provincial ſynods, the volumes of the canon law, and the opinions of learned doctors. To theſe we muſt now reſort; and we ſhall, with the aſſiſtance of our countryman Lyndwood, lay before the reader what appears to have been the opinions on this ſubject, which prevailed in our eccleſiaſtical courts during the reigns of Henry VI. and Edward IV.

THE text of our law of tithes is chiefly compriſed in three conſtitutions of the time of Edward II. Theſe were made by *Robert Winchelſey*, archbiſhop of Canterbury, in different ſynods held for his province. The firſt of theſe is ſtated, at the opening of it, to be for preventing diſputes, and for rendering the claim of tithes uniform thro' the whole province. It ordains, that the tithe of fruits ſhould be paid in full [l], without any deduction for the expence of raiſing them, or any diminution whatever: the ſame of the tithe of fruits of trees, the tithe of all ſorts of ſeeds, and the tithe of herbs in gardens, unleſs any adequate [m] compoſition was made for them. It declares, that tithe ſhould be demanded of hay, whereſoever it grew, whether in large meadows or ſmall, or even in the highways. The tithe of lambs was ordered in this way: if the number was ſix or leſs, ſix *oboli* were to be given by way of tithe; if they were ſeven, the ſeventh was to be given as a tithe, and the parſon was to return three *oboli* to the perſon paying it, as a compenſation to reduce the tithe to a fair tenth; if there were eight, the parſon was to have the eighth, and give only a denarius as a compenſation; if nine, the parſon had the option to take the ninth, and give one *obolus* * to the pariſhioner, or to wait till the next year, when he might have his tenth lamb. The parſon ſo waiting was allowed to take the ſecond or third lamb, at leaſt, of the ſecond year, in conſideration of his

[l] *Integrè.*

* The word in the original is *competens*.

[m] Theſe are the terms in the conſtitution; and I do not pretend to ſolve the difficulties there are in the Latin names for our old money.

forbearance

forbearance in the firſt year. The ſame rule which was here laid down about lambs, was directed to be obſerved in caſe of the tithe of wool. But if ſheep were fed during winter in one place, and during ſummer in another, the tithe was to be apportioned. In like manner, if in the interval between thoſe ſeaſons any one bought or ſold ſheep, and it was certain from what pariſh they came, the tithe of ſuch ſheep was to be apportioned as the tithe of a thing which had two domicils: if the former pariſh was not known, then that pariſh within which they were ſheered was to have the whole of the tithe.

It was required that tithe ſhould be paid of milk; that is, of cheeſe in the ſeaſon for making cheeſe; and of the milk itſelf in autumn and winter, when it was not uſual to make cheeſe. But for theſe the pariſhioners might make an adequate compoſition, which was always to be to the value of the tithe, and in favour of the church. Tithe was required to be paid of the produce of mills; of paſture of all ſorts [a], as well that which was not common as that which was, according to the time and the number of them. Tithe was required of fiſheries and of bees, and of all other goods which were juſtly acquired, and were renewed annually. Perſonal tithes were alſo to be demanded of artificers and merchants for the gains of their trade, and of all workmen receiving a certain ſtipend; unleſs the ſtipendiary choſe to contribute ſomething in certain for the uſe or ornament of the church, and the parſon conſented to accept it *.

The foregoing proviſion about the tithe of wool ſeems to have not ſufficiently obviated the difficulties that followed upon the removal of ſheep from one paſture to another. To aſcertain this more minutely, it was provided by a ſubſequent conſtitution of the ſame prelate as follows:

[a] The words in the original are *de paſturis et paſcuis*, which are paſtures of different kinds, in the conſtruction of the canoniſts; the latter ſignifying paſture for ſheep, in places not cultivated nor ploughed; the former, all ſorts of paſture.

* Lynd. 191 to 196.

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The tithe of wool, milk, and cheeſe, was to be fully paid to the church of the pariſh where the ſheep were continually fed and couched, between the time of ſheering (which was after the middle of May, and before the middle of June and the feaſt of St. Martin), although they were afterwards removed into another pariſh, and there ſheered: and to be certain of this payment, the ſheep were not to be removed till ſecurity was given to the parſon for payment of the tithe. If they were removed within thoſe times to another pariſh, each church was to receive a proportion of the tithe, according to the portion of time; provided that no account ſhould be taken of any ſpace of time leſs than thirty days. This proviſion muſt be conſidered as applying only to the tithe of wool, that of milk and cheeſe being to be received inſtantly at the pariſh where the ſheep were fed and couched. Again, if the ſheep fed in one pariſh, and couched in another, the tithe was to be divided between the two churches. If after the feaſt of St. Martin ſheep were carried to other paſtures, and till the time of ſheering were fed in one or ſeveral pariſhes, either in the paſtures of their owners or of others, it was ordained, that the feeding ſhould be eſtimated according to the number of ſheep, and tithe ſhould be demanded of the owners according to ſuch eſtimation.

The tithe of milk and cheeſe from cows and goats, was to be paid where they fed and couched; and if they fed in one pariſh and couched in another, the tithe was to be divided between the parſons. Lambs, calves, colts, and other tithable youngkings, were to be tithed proportionably, having reſpect to the ſeveral places where they were begotten, born and fed, and the time they were in the ſeveral pariſhes. It was left to the cuſtom of different places to decide what ſhould be paid for tithe, where the milk for the ſmall number of cows was not ſufficient for making cheeſe; and what for lambs, calves, colts, fleeces, geeſe,

geeſe, or ſuch things as are too ſmall to pay a certain tithe. If ſheep were killed, or died by accident, after the feaſt of St. Martin, tithe was to be paid to the pariſh-church. If ſheep belonging to one pariſh were ſhorn in another, the tithe was to be given to the parſon of the pariſh where they were ſhorn; unleſs it could be ſhewn that ſatisfaction had been made for the tithe elſewhere [o].

To theſe two conſtitutions may be added a third of the ſame prelate, in which the articles ſubject to tithe are briefly ſummed up. It ordains, that tithe ſhould be paid of milk [p]; of the profits of woods, pannage, of woods and of trees, if ſold; vivaries, piſcaries, rivers, ponds, trees, cattel [q], pigeons [r], ſeeds, fruits, beaſts in warrens; of fowling; of gardens; curtilages, wool, flax, wine and grain, turves in places where they were dug and made; ſwans, capons [s], geeſe, ducks, eggs, hedge-rows [t], bees, honey, and wax; of mills, hunting, handicrafts, and merchandiſe; as alſo of lambs, calves, colts, according to their value. In ſhort, ſays the conſtitution, let ſatisfaction be made of all other things to the churches whereunto they by law belong; no deduction being made, in calculating the tithe, for the expences attending the production of the thing, except only in handicrafts and merchandiſe [u].

Sylva cædua.

In the following reign, we find a conſtitution of archbiſhop Stratford upon the ſubject of *ſylva cæaua*. Perſons, ſays that ordinance, had refuſed to pay tithe *de ſylvis cæduis, et lignis arborum cæduarum excifis*, though theſe coſt leſs labour than the fruits of trees; alledging that they had

[o] Lynd. 197, 198, 199.

[p] The conſtitution adds, that this tithe ſhall be paid in Auguſt as well as the other month; it is therefore probable, that people claimed to be exempt from ſuch tithe during this month. This being the principal harveſt month, men might think it hard to pay tithe of milk, while they were paying tithe of corn, and were obliged to feed their harveſters with the milk. Johnſ. Canons, *ad locum.*

[q] *Pecorum.*

[r] *Columbarum.*

[s] *Caponum*; the Oxford copy has it *pavonum.*

[t] *Thuccii agrorum.*

[u] Lynd. 199, 200, 201.

never

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never before paid it; and expreſſing a doubt, what was properly *ſylva cædua*. To remove this doubt it was now ordained, that *ſylva cædua* was that wood, of any kind, which was kept on purpoſe to be cut, and which being cut, grew again from the ſtump or root: of ſuch wood, it was declared that a real or prædial tithe ſhould be paid [x]. This is a more ſatisfactory explanation than the negative proviſion made by parliament on this head, in the ſame reign, which has been before mentioned [y]; and which merely declared, that wood of twenty years growth felled for ſhip-building, or the like uſes, ſhould not be conſtrued to be *ſylva cædua*: this ſtatute, however, is a ſort of evidence, that the definition contained in the above conſtitution was not ſufficiently attended to.

UPON theſe legiſlative regulations for the due payment of tithes, ſeveral obſervations ariſe, which have not eſcaped the accurate and diſcerning Lyndwood. Theſe contribute to open ſome difficulties, with which the ſubject would be otherwiſe embarraſſed. As to the uniformity which the firſt of theſe conſtitutions was to introduce through the whole province, it had, according to Lyndwood, no other meaning than that tithes ſhould be univerſally paid; for the different cuſtoms that prevailed in various parts of the kingdom, were ſtill to govern with reſpect to the mode in which they were to be collected. Various were the cuſtoms by which tithe uſed to be collected. Thus it was the cuſtom in ſome places to tithe corn in ſheaves, in others it was tithed while looſe; in ſome it was tithed in the field, in others in the owner's barn; in others it was carried to the parſon's barn [z]. The time of winter and ſummer, mentioned in the above conſtitutions, depended on the cuſtoms of different countries: in ſome places, ſheep were removed from one paſture to another about Michaelmas, and were there fed till Candlemas, or St. Peter, or

[x] Lynd. 190.
[y] Vid. ant. vol. II. 388.
[z] Lynd. 192. f.

the

the Annunciation; in others they were removed at the feaſt of All Souls, and continued till the feaſt of St. Philip and St. James; and the winter accordingly was ſaid to commence and finiſh at thoſe ſeveral periods [a].

It depended upon cuſtom what ſhould be paid for any particular tithe: but ſuch cuſtoms were always ſubject to this correction, that tithes being due, as the canoniſts held, *jure divino*, they could never be diminiſhed in value below the juſt tenth, by any cuſtom; though a cuſtom was eſteemed good which gave to the church more than the real tenth. If a cuſtom could not diminiſh the value of the tithe, much leſs would it be allowed to take away the whole tithe: a cuſtom, therefore, *de non decimando* was held to be bad [b].

Tithes were divided into *great* and *ſmall*, and into *prædial* and *perſonal*. Among ſmall tithes were reckoned wool, flax, milk, cheeſe, honey, wax, eggs, lambs, poultry, and the other productions of animals, the fruits of trees, and all the productions of gardens [c]: the reſt were conſidered as great tithes. Prædial tithe was that which aroſe from mills, piſcaries, hay, wool, bees, and the fruits and produce of the earth: it was ſo called becauſe it came from a certain place [d]. Perſonal tithes were ſuch as were paid rather in reſpect of the perſon than the ſoil, as from the profit of a man's labour and employment. Some articles were of a mixed nature, ariſing partly from the ſoil, and partly from the labour and employment of men; as lambs, wool, milk, and ſome other things; and it was a matter of argument among the canoniſts, whether theſe were properly prædial or perſonal tithes. But the better opinion ſeems to have been, that they were prædial. Yet the ſhepherd who had the cuſtody of the ſheep, was bound to pay alſo a perſonal tithe of his wages. It was material to aſcertain, whether a tithe was of the former or

[a] Lynd. 194. b. [b] Ibid. 199. r. n. [c] Ibid. 192. [d] Ibid. 192.

latter

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latter deſcription; becauſe prædial tithes were due to the church of the pariſh where the land on which they aroſe was ſituated; perſonal tithes to the church where the perſon paying them heard ſervice and received the ſacraments [e].

Compoſition for tithes.

It is put as a queſtion by Lyndwood, whether the parſon could enter into a permanent compoſition with his pariſhioners to receive leſs than a tenth; and he anſwers it in the negative. For though, ſays he, a compoſition for tithes might well be made between clerks, yet it would not hold between a clerk and a layman. But in this there was a diſtinction: ſuch a compoſition, if for tithes already due, was good; but for tithes to be paid, a compoſition with a layman was held not to be good, unleſs ſanctioned by judicial authority of the biſhop [f]. The compoſition therefore ſpoken of in theſe conſtitutions, muſt mean ſuch a one as was to have no binding force on the ſucceſſor, and was only to adjuſt payments that ought to have been made before. Compoſitions of both ſorts ſeem to have been very common for ſmall tithes.

Prædial and perſonal tithes might, by poſſibility, be due in conſideration of the ſame thing. This was the caſe with reſpect to fiſh. If fiſh were taken in an incloſed place, a prædial tithe was due to the church of the pariſh where they were taken; but if they were taken in a ſtream that paſſed from one place to another, then a perſonal tithe would be due to that pariſh-church at which the perſon taking them heard divine ſervice and received the ſacraments. This, however, was only where a perſon fiſhed without paying any thing for ſuch liberty; for where he paid any rent or price, then a tithe of ſuch rent or price was due to the church of the pariſh where the fiſh were taken: the ſame of the tithe of birds and beaſts. The tithe of fiſh caught in the ſea was conſidered by

[e] Lynd. 200. b. [f] Ibid. 192. s. 194.

ſome

ſome as prædial; though the better opinion was, that this was a perſonal tithe [g].

THE tithe of mills, according to the above conſtitution, conſiſted in the tenth of their produce; and this, ſays Lyndwood, could only be effected by paying the tenth meaſure of all the corn ground there, for the benefit of the lord or the miller. For it was not ſufficient to pay the tenth of the rent, that being not the true value, as the tenant was to gain ſomething beyond the rent; but if the lord payed a tithe of the rent, and the tenant of his gains, every thing that was due to the church would be paid; and if the parſon preferred it, the tithe might be paid in that way. The produce of a mill was to be tithed as a prædial tithe, without deducting the expences; but if the mill was ſold, then the expences would be deducted; and after that the reſiduum, which was the clear gains, would be tithed as a perſonal tithe. The expences were conſidered in three lights: thoſe *in re*, thoſe *circa rem*, and thoſe *extra rem*. Thus, ſuppoſe a mill was bought for 100*l*. this was of the firſt ſort of expence; 20*l*. was laid out upon repairs of it, this was of the ſecond; and 10*l*. in workmen, horſes, and the like, this was of the laſt ſort; in the whole 130*l*. If the mill was retained for ſix years, and yielded 10*l*. *per ann*. produce, one of that ten would be paid each year in name of tithe, without any deduction of the expences; but if the mill was to be ſold at the end of the ſix years for 150*l*. a perſonal tithe muſt be paid of the profit, after allowing all the expences. But ſome doctors, among whom is Lyndwood, thought that the expences *extra rem* ſhould not in this caſe be deducted; and therefore the profit to be tithed, according to them, would be 30*l*[h]. It was held, that where tithe was paid for milk, and cheeſe was made of the other nine parts, no tithe ſhould be paid for ſuch cheeſe; but if the cheeſe was ſold, a perſonal tithe

[g] Lynd. 195. q.

[h] Ibid. 195. c.

ſhould

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ſhould be paid for the gains made thereby[b]; ſo anxious were they that a tithe ſhould be paid upon every poſſible gain[i]. Perſonal tithes were due at the time when the gain on which they aroſe was received; but on account of the ſmallneſs of them, it is thought by Lyndwood, that they ſhould rather be paid at the end of the year. They were due only of the clear profit: if a thing therefore, inſtead of being ſold, was given away, or kept by the owner, it was not tithable, becauſe there was no profit; but according to the opinion of ſome doctors, if the money wherewith it was purchaſed had paid no tithe, the thing which came in its place ſhould be tithed[k].

THE perſonal tithe that was demandable of the profit on merchandiſe, was a very ſerious conſideration in towns and cities. In the city of London, there was a cuſtom to pay by way of offering one farthing upon every ten ſhillings rent of a houſe, on Sundays and certain feaſts in the year. It had been endeavoured to repreſent this as a payment in lieu of ſuch perſonal tithe as aroſe from profit in merchandiſe; but Lyndwood combats this opinion with great earneſtneſs. He contends, that if this is at all to be conſidered as a tithe, it is a prædial one, being paid in proportion to the rent, which is prædial; if ſo, how, ſays he, is the payment of a prædial tithe to be a reaſon for exempting a perſon from paying a perſonal tithe? But the ordinance of the city expreſsly calls this an offering, and therefore it cannot be in lieu of any tithe whatever. For theſe, among many other weighty reaſons, he concludes, that the tradeſmen, artificers, and merchants of London are not,

[b] Lynd. 194. p.

[i] The ſweeping words in the conſtitution are *de omnibus bonis* JUSTE *acquiſitis*; upon which expreſſion it is gravely laid down by Lyndwood, in conformity with ſome foreign doctors, that perſonal tithe was not demandable out of the gains of common proſtitutes, as long as they continued in a ſtate of impenitence; but when they became penitents, it might be accepted; and even before, provided the conſent of the diocеſan was obtained. Lynd. 195. o.

[k] Lynd. 195. y.

by

by reaſon of this offering, exempt from paying a perſonal tithe of their profit in merchandiſe and employments [l].

To ſecure the regular payment of theſe dues, all rectors, vicars, and chapellains, are enjoined by the above conſtitutions to admoniſh their pariſhioners of their duty in this reſpect to the church. If they diſregarded ſuch admonitions, they were to be ſuſpended *ob ingreſſu eccleſiæ*; and if they ſtill continued obſtinate, were to be proceeded againſt with eccleſiaſtical cenſures. And farther, if the rector, through fear or indolence, was negligent in demanding his tithes, this neglect of the church's rights was to be puniſhed with ſuſpenſion till he paid a fine to the archdeacon [m].

To this account of the law of tithes given by our canoniſt, it does not ſeem at all neceſſary to add any thing from our books of common law. It was ſo expreſsly laid down by the ſtatutes of *circumſpecte agatis*, and *articuli cleri* [n], in what caſes they were objects of ſpiritual or temporal juriſdiction, that there had rarely ariſen any controverſy upon that head. If they were not converted into lay chattels, or bound by any lay contract, or in particular caſes, as if they did not exceed a fourth part of the benefice, they were clearly within the cogniſance of the ſpiritual court. It muſt however be remarked, that there is a caſe in the time of Edward III. in the exchequer, where a king's debtor prayed proceſs againſt a perſon who had part of his goods, and ſo rendered him leſs able to ſatisfy the king's demand; upon which the party appeared, and claimed the goods as tithe; the other did the ſame as parſon; after this the perſon brought in by proceſs pleaded to the juriſdiction. This plea, we are told, was not allowed, but the queſtion was held to belong to the exchequer, becauſe it was the king's ſuit. The reporter expreſſes his ſurpriſe, and adds, that neither the king's

[l] Lynd. 201. d. [m] Ibid. 196, 197. [n] Vid. ant. vol. II. 216. 291.

bench

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bench nor common-pleas would in like manner entertain ſuits for tithes [o]. This caſe happened about twenty years after the proceeding for tithes by *ſcire facias* in the temporal courts had been taken away by ſtatute [p].

HAVING gone through the three points of moſt intricacy in the common courſe of clerical judicature, cauſes of matrimony, of teſtaments, and of tithes, we ſhall paſs on to thoſe which involve leſs diſcuſſion, and therefore, tho' of great importance in themſelves, require leſs attention in the ſtudent.

Spoliation.

THE title of benefices eccleſiaſtical, without touching the trial of the patronage, belonged to this court, and might be brought in queſtion in two ways, either upon the avoidance or ſpoliation of a benefice: the former are declared to belong to the ſpiritual judge, by ſtat. 25 Edward III. *pro clero*, ch. 8. They might depend either upon death, reſignation, deprivation, creation, or ceſſion. Whether a church was full or not, or the clerk properly qualified, was triable by this court [q]. The ſpoliation of a benefice was triable in this court, only where a clerk was in as an incumbent; for if he was in as an uſurper of the church, which was full, or as a treſpaſſer, the remedy was by action of treſpaſs, and not by ſuit for the ſpoliation [r]. If two incumbents were in, and they claimed by different patrons, no ſpoliation would lie, becauſe the right of advowſon came in queſtion; but where they both claimed by one, a ſuit for ſpoliation lay [s].

PENSIONS granted out of churches, mortuaries, and oblations, belonged to this court, both by ſtat. *circumſpecte agatis* [t], and by the common law [u]. A penſion might alſo be ſued for at common law, by writ of annuity; but

[o] 38 Aſſ. 20.

[p] Vid. ant. vol. II. 378. How matters of equity became cognizable in the exchequer, by reaſon of the ſuit of the king, vid. ant. vol. III. 218.

[q] 22 Ed. IV. 24.

[r] 44 Ed. III. 33.

[s] 38 Hen. VI. 19, 20. An Apologie, &c. 31.

[t] Vid. ant. vol. II. 216.

[u] Reg. 47.

if

if the claimant went upon a preſcription, and afterwards ſued for it as a penſion in this court, a prohibition would lie [x]. It was held, in the time of Edward III. in an aſſiſe, to be a good plea to the juriſdiction of the temporal court, to ſay that the land was a church-yard [y]: this was conformable with the law before laid down by Bracton [z]; and it was once held, that if a perſon took trees in a church-yard, the remedy was not by treſpaſs, but by ſuit in this court [a]. That a pariſh or hamlet claiming a right to have a curate to perform divine ſervice, might proceed to eſtabliſh ſuch right in this court, was conſidered as of long uſage; notwithſtanding, an action upon the caſe was held maintainable for ſuch neglect [b]. We find a ſuit for with-holding a chauntry was deemed good, upon conſultation; which being within the ſame reaſon, gives ſanction, as it ſhould ſeem, to the other caſe. That pariſhioners might be cited in a cauſe of *contribution* towards the reparation of the body of a church, is proved from the ſtatute *circumſpecte agatis* [c]; from the Regiſter [d]; and from authorities in the time of Henry VIII [e].

It ſeems unneceſſary to adduce any authorities from our ſtatutes or books of common law, to ſhew what countenance had been given to the judicature of this court, in the puniſhing of offences that ſavoured of impiety. If a court chriſtian has any juriſdiction at all, it is ſurely in matters of this nature; and the legiſlature, inſtead of making any ſpecial recognition of ſuch authority, has been content to paſs it over under the general deſcription of *meræ ſpiritualia*, or of crimes for which the puniſhment of penance uſed to be inflicted [f]. It is true, that of late years the legiſlature had been induced to point out certain new ſectaries as objects of particular animadverſion;

[x] Vide Goodall, &c.
[y] 44 Aſſ. 8.
[z] Vid. ant. vol. I. 454.
[a] Fitz. proh. 26.
[b] 22 Hen. VI. 52.
[c] Vid. ant. vol. II. 216.
[d] Reg. 45. 48.
[e] F. N. B. Conſult.
[f] Vid. ant. vol. II. 216.

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but they at the ſame time fully recogniſed the former authority of the biſhops [g].

PERJURY in an eccleſiaſtical cauſe, or matter, was an offence properly cogniſable in this court. Under the title of perjury we come to conſider the breach of a voluntary oath, whether taken privately, or publicly before an eccleſiaſtical judge, as was common in theſe days. This has been frequently before mentioned, under the term of *læſio fidei*, as a diſputed object of clerical judicature. The ſame doubt ſeems ſtill to have continued; for upon compariſon of ſome caſes, in this and the foregoing reigns, there is a contrariety that ſtands in need of ſome diſtinction to reconcile it. In the caſe of the vicar of Saltaſh, who had made an obligation, and had bound himſelf to the obſervance of it, by oath taken before the pope's collector, it was declared by *Hankford* juſtice, that no one ſhould be ſued before the ordinary for perjury, but where the principal matter on which the perjury aroſe was of a ſpiritual nature; for if it was otherwiſe, he might in that manner be compelled to perform lay contracts, which belonged only to the temporal courts [h]. A few years after, it was likewiſe held, that where a man had ſworn to make a feoffment, he ſhould not, for the above reaſon, be ſued for breach of his oath in the clerical court [i]. Theſe caſes happened in the reign of Henry IV. and the ſpirit of them was maintained in ſome opinions delivered in the two preſent reigns. In 38 Hen. VI. the ſame law was laid down by *Forteſcue*, in the exchequer-chamber, and was admitted by ſome others of the judges, and denied by none [k]. Again, in 20 Ed. IV. it was declared by *Brian*, that where faith was made concerning a ſpiritual matter, as to pay tithes or to marry, the breach thereof ſhould be puniſhed in the ſpiritual court; but not if it was upon a

Suits *de læſione fidei*.

[g] Stat. 2 Hen. IV. c. 15, and 2 Hen. V. c. 7. Vid. ant. vol. III. 235. 260.

[h] 2 Hen. IV. 15. Bro. Præm. 16.

[i] 11 Hen. IV. 88.

[k] 38 Hen. VI. 29.

temporal

temporal matter [l]. Again, in 22 Ed. IV. where an oath had been made for the payment of money, the ſame opinion was delivered; but the reaſon then given by *Brian* is, becauſe an action would lie for the money at common law [m]. Theſe opinions ſeem only to confirm what had long ſince been delivered by Bracton [n].

But notwithſtanding theſe declarations of the judges, it is beyond queſtion, that the courts eccleſiaſtical did *de facto* hold plea of breach of oath and of faith falſified, or *de fidei læſione*, as it was termed (which was conſidered by the canoniſts, in ſome reſpects, as the breach of a corporal oath) even when ſuch oath or faith, voluntarily taken, was for confirming of a matter temporal: and this appears not only from the teſtimony of canoniſts, but from deciſions in our courts of common law. It muſt be recollected, how poſitively this object of juriſdiction is aſſerted by the conſtitution of Boniface, in the reign of Henry III. in which it is claimed abſolutely, without any diſtinction whether the cauſe was ſpiritual or temporal [o], provided there was no mention of chattels. Such matters are alſo admitted to belong to the clerical judicature, by the ſtatute *circumſpectè agatis*, provided money was not demanded [p]. Conformably with this laſt idea, it was held, in the time of Edward III. that tho' the ordinary, in ſuch caſes, could not enjoin the party to pay the debt according to his oath, yet he might enjoin him corporal penance [q]; which opinion was confirmed by one in the 34 Henry VI. when it was held, that where a man bought a horſe, and ſwore upon the Evangeliſts to pay 10*l.* for it by ſuch a day, if he broke his faith, an action of debt might be had at common law, and alſo a ſuit *pro læſione fidei* in the ſpiritual court: and it was ſaid, this would be no prejudice

[l] 10 Ed. IV. 10.
[m] 22 Ed. IV. 20.
[n] Vid. ant. vol. I. 455.
[o] Vid. ant. vol. II. 79.
[p] Vid. ant. vol. II. 217.
[q] 22 Aſſ. 70. Fitz. Prohib. 2.

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to the ſpiritual court, becauſe the two proceedings were for different objects[r]. A new turn, however, was given to this doctrine by our courts of common law, in the latter end of Edward IV.; for it was then declared by *Brian* and *Littleton*, without any one contradicting them, that *in læſione fidei* ariſing upon a temporal matter, the ſpiritual court might puniſh *ex officio*, but not at the ſuit of the party. This latter opinion was adopted in the next reign[s], and is the lateſt opinion in our books of common law upon this famous queſtion. It is thought the temporal judges required the proceeding to be *ex officio* rather than at the ſuit of a party, becauſe it was preſumed that the party would not proſecute merely for the puniſhment of the ſin, but for pecuniary ſatisfaction for the injury[t].

LYNDWOOD, however, ſeems to entertain no ſuch diſtinction, but ſpeaks as if the proceeding might be either way; and he gives the form of a libel, which he thinks ſo drawn as not to be liable to a prohibition: this we ſhall give the reader at length, not only to illuſtrate the preſent point, but as a ſpecimen, and the only one, of pleadings in this court. The form of the libel is as follows: *A. proponit in judicio contra B. quòd idem B.* FIDEI SUÆ INTERPOSITIONE (or *juramento ſuo medio*) *promiſit et ſe aſtrinxit dicto A. decem libras tali die fideliter ſoluturum; quia tamen fidem,* (or *juramentum*) *idem B. dicto die adveniente promiſſum ſuum hujuſmodi non ſervando, ſed contrà illud temerè veniendo damnabiliter violavit, minùs canonicè prætendens ſe dictæ fidei ſuæ* (or *juramenti*) *interpoſitione hujuſmodi vinculo non ligari, cùm re verâ fidei interpoſitio* (or *juramentum*) *hujuſmodi ipſum ad præmiſſa fideliter ſervanda, ſecundum jus divinum, et inſtituta canonica, ſub pœnâ peccati mortalis effectualiter aſtrinxerit, et aſtringat. Quarè factâ fide, quæ requiritur in hâc parte, petit pars dicti A. per vos dominum judicem antedictum pronunciari, decerni, et decla-*

[r] 34 Hen. VI. 70.
[s] 12 Hen. VII. 22.
[t] See An Apologie, &c. Part I. 48 to 52.

rari

rari ſupradictum B. præfatæ ſuæ fidei interpoſitione (or *juramenti vinculo*) *ad ſervandum et implendum promiſſa de jure divino, et juxta canonica inſtituta effectualiter, et ſub pœnâ peccati mortalis aſtrictum et ligatum fuiſſe, et eſſe, nec non eundem B. fidem ſuam* (or *juramentum*) *hujuſmodi temerè violâſſe, ac pro violatione ipſâ canonicè puniendum fore, et puniri debere*[u].

THUS far of offences of the firſt claſs: next as to thoſe of the ſecond, concerning which there is abundance of common-law teſtimonies. As to uſury, we find it declared by ſtat. 15 Ed. III. c. 5. that the king ſhould have conuſance of uſurers dead, and the ordinaries of ſuch as were alive. This divided empire was noticed before from Glanville[x].

NOTWITHSTANDING defamation is mentioned in the ſtatutes of *circumſpectè agatis* and *articuli cleri* as an object of ſpiritual cogniſance, without adding any qualification as to the nature of the defamation[y], yet an exception had been lately introduced, ſimilar to that which governed in many other points of diſputed juriſdiction. It ſeems, from the tenor of *Hankford*'s argument in the caſe of the vicar of Saltaſh, before quoted, that if the defamation aroſe on a temporal cauſe, it was held not to be cogniſable in the eccleſiaſtical court[z]. So in the reign of Edward IV. it was ſaid, that where a perſon charged another with a robbery, the party diffamed could not ſue in the ſpiritual court, becauſe he might have an action at common law; and where an action of treſpaſs was brought for goods taken, and the defendant ſued in the ſpiritual court for defamation, a prohibition was granted[a]. There is alſo in the Regiſter a prohibition to a ſuit for defamation, where a perſon had been a witneſs on an inquiſition taken for the king, and the party affected revenged himſelf in

Defamation.

[u] Lynd. 315. o.
[x] Vid. ant. vol. I. 119.
[y] Vid. ant. vol. II. 217. 291.
[z] 2 Hen. IV. 15.
[a] 18 Ed. IV. 6.

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this manner for the loſs he thereby was likely to ſuſtain [b]. We have ſeen, that a ſtatute was made in the reign of Edward III. declaring, that a prohibition ſhould go to all ſuits for defamation againſt indictors [c].

THE laying of violent hands on a clerk, was an offence that was expreſsly aſſigned to the cogniſance of the ſpiritual court, by the ſtatutes of *circumſpecte agatis* and of *articuli cleri* [d], and it now reſted intirely upon the diſtinction there laid down; for it was held, in 22 Ed. IV. that if a man beat a clerk, and he ſued him in this court for his ſin of excommunication, he did well; but if he ſued there for amends, a prohibition would lie [e]. That ſacrilege was both a ſpiritual and temporal crime, appears by ſome caſes at common law of a very early date; where it is laid down, that in caſe of goods ſtolen out of a church or church-yard, the owner might ſue for them in this court: the ſame of trees growing in a church-yard [f]. According to Lyndwood, this was now deemed both a ſpiritual and temporal crime [g]. Dilapidations were an object of ſpiritual cenſure; for in the time of Henry IV. it was held by *Tirwhit*, that if an eccleſiaſtical perſon made waſte of a benefice, he ſhould be depoſed as a dilapidator of his church; and depoſition was an act of the ſpiritual judge [h]. We have the authority of Lyndwood for ſaying that inceſt, whoredom, and any incontinence, ſimony, uſury, hereſy, perjury, witchcraft, fortune-telling, drunkenneſs, and the like diſorders and immoralities were crimes puniſhable in the ſpiritual court [i].

Eccleſiaſtical courts.

SUCH was the mode of proceeding, and ſuch were the objects of juriſdiction in our eccleſiaſtical courts. It is next to be ſeen what courts theſe were, and who preſided in them. This, after what has already been ſaid, need not

[b] Reg. 42.
[c] Vid. ant. vol. II. 459. Vid. An Apologie, &c. 56.
[d] Vid. ant. vol. II. 215. 292.
[e] 22 Ed. IV.
[f] 4 Hen. III. and 17 Hen. III. Fitz. Prohib. 14. 26.
[g] Lynd. 315 q.
[h] 2 Hen. IV. 9.
[i] Lynd. 96. o.

detain

detain us long. An Engliſh biſhop, conſiſtent with the ſcheme we have juſt given from the canon law [k], had ſpiritual juriſdiction thro' his whole dioceſe. The perſon who executed all of this charge which did not belong to the biſhop by reaſon of his order, was called a chancellor; tho' it is remarkable that he is not ſo named in any of the commiſſions he holds, nor executes the proper duty of a chancellor. In early times, it is ſaid that biſhops had ſuch an officer, who kept their ſeals. The chancellor of a biſhop in this country uſually holds two offices, that of *vicar-general*, and that of *official principal*; both which have been mentioned as appointments known to the canon law [l]. The firſt was to exerciſe juriſdiction purely ſpiritual; as viſitation, correction of manners, granting inſtitution, and a general inſpection and ſuperintendance of things for the preſervation of diſcipline and good government in the church. The buſineſs of the latter (in which we are more particularly intereſted) was to hear cauſes. Though theſe two offices have been uſually granted together, yet there are inſtances of vicars-general being appointed ſeparately, upon occaſional abſence of the biſhop; which, indeed, was the original deſign of ſuch an eſtabliſhment.

THE authority of a chancellor, like that of his biſhop, is generally given ſo fully as to extend over the whole dioceſe to all matters and cauſes eccleſiaſtical. But a biſhop might create ſome exceptions to this general juriſdiction, by giving a limited one to a *commiſſary*. A commiſſary's authority was reſtricted to certain places, and to certain cauſes. Theſe officers correſpond with what the canoniſts called *officiales foranei* [m], as if reſtrained *cuidam foro* only of the dioceſe. Another exception to the juriſdiction of the chancellor was that of an archdeacon. In ſome archdeaconries, partly by grants from the biſhop, and partly by cuſtom, the archdeacon exerciſes both ſpiritual and ju-

[k] Vid. ant. 4. [l] Vid. ant. 5, 6. [m] Vid. ant. 6.

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dicial authority; and this, as to cauſes and things, is of more or leſs extent in different places; and in ſome is peculiar and exempt from the biſhop, in others only concurrent. But this limited juriſdiction of the archdeacon differs from that of the commiſſary, and alſo of the chancellor, inaſmuch as he does not receive it by delegation, but has it *jure ordinario*, as ordinary; and where he does not preſide himſelf, he appoints an official, who, from his reſtriction to certain places and cauſes, may be reſembled to the commiſſary of the biſhop. The title given to all ſpiritual courts was that of conſiſtory.

THUS there was in every dioceſe a court held before the official principal of the biſhop; and in ſome there was alſo one held by the biſhop's commiſſary, and by the official of ſome archdeacon. Beſides theſe, there were courts of the archbiſhops who had two juriſdictions; one dioceſan, like the other biſhops; the other was a ſuperintendance over the biſhops of their reſpective provinces. The archbiſhop of Canterbury was conſidered as *legatus natus* in England[n]. He had five courts; the court of arches, two courts of peculiars, the court of audience, and the prerogative court. The former was uſually held in Bow church, called *eccleſia ſanctæ Mariæ de arcubus*; and ſo from the church this court was called *curia de arcubus*; and it was held by the official principal of the archbiſhop, called *officialis de arcubus*. The court of peculiars was held by the dean of the peculiars, having juriſdiction over the thirteen pariſhes called the peculiars of the archbiſhop in London: the dean uſed alſo to hold his court in Bow church. The other court of peculiars was held by the ſame perſon by the title of *judge of the peculiars*, and he had juriſdiction over fifty-ſeven pariſhes lying in different dioceſes, and not ſubject to the biſhop or archdeacon, but to the archbiſhop. The *court of audience* uſed to be held in the archbiſhop's palace

[n] Vid. ant. 6.

before

before auditors, who heard ſuch matters, whether of contentions, or voluntary juriſdiction, as the archbiſhop thought fit to reſerve for his own determination: they prepared evidence and other materials to lay before the archbiſhop for his deciſion. This was afterwards removed from the archbiſhop's palace, and the juriſdiction of it exerciſed by the *maſter*, or *official of the audience*, who held his court in the conſiſtory place at St. Paul's. The great offices of official principal of the archbiſhop, dean, or judge of the peculiars, and official of the audience, have ſince been united in one perſon, under the general name of dean of the arches, who is alſo vicar-general of the archbiſhop [o]. Theſe courts are at preſent all held in Doctors Commons, as is alſo the prerogative court by the judge of the prerogative court. This court was for the cogniſance of all wills, where, the teſtator having *bona notabilia*, the proof and adminiſtration, according to Lyndwood, belonged to the archbiſhop by a ſpecial prerogative [p]. The *curia de arcubus* was known under that name long before the reign of Henry II.

All ſuits were to be commenced in the court of the official principal of the dioceſe, unleſs the place where the cauſe of ſuit aroſe was within a peculiar and exempt juriſdiction, whether of an archdeacon, or the archbiſhop; and then before the official of the former, or the dean or judge of the peculiars of the latter, as the caſe might be. There lay an appeal from the archdeacon or his official to the biſhop, that is, to his official principal; and from the official principal of the biſhop to the archbiſhop, that is, to his official principal; for the conſiſtory of the official principal being in effect only the court of the biſhop, the appeal, if to him, would be *ab eodem ad eundem*. From the archbiſhop the regular courſe of appeal was to the pope. No appeal could be carried *per ſaltum* from the archdeacon

[o] Johnſ. 254, 257. Gibſ. 1004. [p] Vid. ant. 77.

to

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to the archbiſhop; tho' a rule of the canon law, as we have ſeen, allowed ſuch premature appeal to the pope in any ſtage of the proceeding [r].

SUCH were the eccleſiaſtical courts, and ſuch their dependence on, and relation to, each other. Such they ſtill continue, with very little alteration, except in the point of papal reviſion and controul, which was taken away in the reign of Henry VIII.

Prohibitions.

THE common-law juriſdiction, by which the ſpiritual court was controuled and circumſcribed, ſeemed of late to be enlarging its powers of attack; for prohibitions, which hitherto had been confined to the chancery and king's bench, were now held by all the judges of the common pleas, upon view of former precedents, to belong alſo to that court. But they made the following diſtinction between this court and the others; that in this there muſt always be an original writ depending for the ſame matter, otherwiſe they had no authority to prohibit: inſtead, therefore, of granting a prohibition, as the king's bench, in the firſt inſtance, the courſe was to get an original writ of prohibition out of chancery, returnable in the common pleas, commanding the juſtices to make attachment. It was on the ſame occaſion agreed, that the common pleas had authority, in the like manner, to grant writs of conſultation [s].

Provincial conſtitutions.

THE reader has been detained ſo long with the detail of the juridical ſyſtem which prevailed in our eccleſiaſtical courts at this time, that he will probably be content with a ſlight notice of what was done by the clerical legiſlature. Our attention has not been drawn to the tranſactions of the provincial ſynods, ſince we mentioned the conſtitutions of archbiſhops Peckham and Winchelſey, in the reign of Edward I. From that period down to the preſent, the archbiſhops of Canterbury had held many

[r] Gibſ. 1036. [s] 38 Hen. VI. 14.

provincial

provincial ſynods, and made various conſtitutions therein. In 1322 a ſynod was held, and conſtitutions made by Walter Reynolds; in 1328, 1330, 1332, by Simon Mepham; in 1342, and 1343, by John Stratford; in 1351, 1359, and 1362, by Simon Iſlep; in 1367, by Simon Langham; in 1378, by Simon Sudbury; in 1391, by William Courtney; in 1398, by Roger Walden; in 1408, by Thomas Arundel; in 1415, 1416, 1430, 1434, and 1439, by Henry Chichley; in 1445, by John Stafford. While the province of Canterbury was thus regulated by the care and induſtry of ſucceſſive prelates, there appear no proviſions made for the like purpoſe by the archbiſhops of the other province, except the conſtitutions of William de la Zouche in 1350; thoſe of John Thorſby in 1363, which were partly a republication of thoſe of the former prelate; and thoſe of John Kemp in 1444, which were partly tranſcribed from ſome of Winchelſey's in 1305. This ſeemed a defect in the clerical polity; to remedy which, and to reduce the order, diſcipline, and judicature of the national church to ſome uniformity, it was provided in 1462, in a convocation of the clergy of York, held by William Booth, that the effect of the conſtitutions of the province of Canterbury, had, and obſerved, and being no wiſe repugnant or prejudicial to thoſe of York, ſhould be admitted into that province, but not otherwiſe, nor in any other manner; and for that purpoſe ſhould be inſerted and incorporated with them [t]. Thus was a body of national canons collected for the obſervance of the whole kingdom. As matters of diſcipline were firmly ſettled according to the Romiſh ſcheme, and the principal oppoſition to it, which had been raiſed by Wickliff's followers, was now ſilenced, the convocations had little of moment to engage their attention; and we accordingly find nothing of importance added to the above body

[t] Johnſon's Canons, vol. II. 1463.

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of conſtitutions. The whole of theſe, from the time of Lanfranc as far down as 1430, were digeſted and commented on by Lyndwood, and in that form preſented a valuable depoſitory of Engliſh eccleſiaſtical law.

The king and government.

THERE is no mention that the firſt of the kings whoſe reigns we have now been reviewing, took any perſonal concern in providing for the improvement of our law, or ſhewed any remarkable regard for it. The following facts related of Edward IV. place him in a different light. It is ſaid by the writer of the Hiſtory of Crowland Abbey, that this king went in perſon with the judges to try criminals in different parts of the kingdom; *nemini, etiamſi domeſtico ſuo, parcens, quò minùs laqueo penderet, ſi in furto vel latrocinio deprehenſus fuerit*[u]. We are told alſo, that in the ſecond year of his reign he ſat three days together, in Michaelmas term, in the court of king's bench; to which attendance he was excited by a ſtrong deſire, it is ſaid, to underſtand the law[x].

UPON the whole, the law was left to itſelf to maintain its ground as it could, amidſt the convulſions which the nation underwent during great part of this period. During the reign of Richard II. the dignity of the law, together with the honour of the kingdom, through the weakneſs of that prince, and the difficulties occurring in his government, ſeemed ſomewhat to decline[y]. When the law had taken this unfavourable turn, it required every encouragement from the ſettled ſtate of things in the reigns of Henry IV. and V. to recover itſelf. This it effectually did; and having gathered ſtrength, it began to flouriſh in a manner which enabled it to withſtand all ſhocks from the political world. In the latter part of the reign of Henry VI. while the nation was in arms, and the throne was overturned by ſucceſſive revolutions, the courts of law enjoyed an entire

[u] Gale, vol. I. 559. Bar. Stat. 419.
[x] Truſſ. Cont. of Dan. 184. Bar. Stat. 420.
[y] Hale's Hiſt. 174.

peace;

peace; and juſtice was adminiſtered with a preciſion, learning, and effect, that was not ſurpaſſed in any times before or ſince. Both theſe reigns abounded with eminent lawyers.

EDWARD IV. with all his regard to the laws was guilty of ſtraining the conſtruction of them to gratify his reſentments. It is a common ſtory of this king, that having killed a favourite deer of a Mr. Burdet, of Arrow in Warwickſhire, that gentleman vented his reſentment by wiſhing the horns of the deer in the belly of the man who had adviſed the king to that inſult upon him; for which the king ordered him to be proſecuted as for treaſon, and that unhappy gentleman was beheaded. This man is ſaid by others to have been proſecuted (no doubt under a fictitious charge) for poiſoning, ſorcery, and inchantment [*], and that he was attainted by parliament. Theſe ſupernatural gifts were conſidered as common, and the ſuppoſed exerciſe of them was puniſhed as a very heinous offence in thoſe times: one John Stacy was executed for a charge of that kind in this reign.

RICHARD II. raiſed money upon the ſubject without conſent of parliament; a ſtretch of prerogative which neither ry IV. V. nor VI. ever attempted. It is remarked of the houſe of Lancaſter, that its princes always paid a regard to the rights of the people; a policy to which they adhered probably to avoid exciting any ſpirit to queſtion their title to the throne. This temper in the crown contributed to raiſe the houſe of commons into great conſideration during theſe reigns: they became more jealous of their rank in the ſtate than ever, and particularly on this ſubject of taxation. It is to be attributed to this, that when Edward IV. invented a new method of raiſing money without aſſent of parliament, it was thought prudent to give it the gentle name of a *benevolence*.

THERE happened in 31 Hen. VI. a fact which greatly infringed the privileges of this riſing part of the legiſla-

[*] Stowe's Chron. 430.

ture.

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ture. Their ſpeaker, *Thomas Thorpe*, was taken in execution in an action of treſpaſs *de bonis aſportatis*, at the ſuit of the duke of York, then preſident of the parliament. The commons made a repreſentation of this to the king and lords, and they conſulted the judges; who were of opinion, that if a member of parliament was arreſted for any cauſe but treaſon, felony, or ſurety of the peace, or for a judgment had before parliament, it was uſual for ſuch perſon to be diſcharged from the arreſt. But, notwithſtanding this direct and expreſs opinion, the lords came to a reſolution, that the ſpeaker ſhould continue in cuſtody, notwithſtanding his privilege of member and ſpeaker [a]. The commons acquieſced in this reſolution, and choſe another ſpeaker in his place. This temper in the commons can only be accounted for from the prevailing prejudice in favour of that great pretender to the throne.

THERE ſeems to be the ſame irregularity in criminal proceedings as in the former periods. Even in a time of tranquillity, and under the adminiſtration of the good duke of Glouceſter, in the reign of Henry VI. a ſtate-criminal was ſentenced without any trial. Sir John Mortimer had been committed to priſon, and having eſcaped was indicted for that eſcape: the indictment was removed into the houſe of lords, where he was adjudged guilty, and was executed. However, here had been an examination by the jury at leaſt who found the bill; and we have ſeen that, in the early ages of our law, that was the utmoſt which a priſoner was entitled to [b].

IN 27 Henry VI. we find a very ſingular proceeding againſt the duke of Suffolk. This nobleman was impeached by the commons. The duke upon his knees denied the whole charge before the lords. At length the king ſent for all the lords ſpiritual and temporal then in town to his chamber. There the chancellor put the queſtion to the

[a] Cotton, 651. Parl. Hiſt. vol. II. 287. [b] Vid. ant. vol. II. 31, 32.

duke,

duke, which way he would be tried: to this the duke answered by referring to his former denial of the charge; and, proteſting his innocence, put himſelf intirely on the king's mercy and award. Then the chancellor, by the king's command, pronounced this ſentence: "That ſince "the duke did not put himſelf on his peerage, the king as "to the articles of treaſon was doubtful; and as to the "articles of miſpriſion, the king, *not as judge by the ad-* "*vice of the lords*, but as one to whoſe order the duke had "ſubmitted himſelf, did baniſh him the realm and other his "dominions for five years." After this, the lord high-conſtable ſtood up on behalf of the biſhops and lords, and required it to be enrolled, that the ſaid judgment was by the king's own rule, and not by their aſſent; and alſo required, that neither they nor their heirs ſhould by this example be barred of their peerage and privileges [c].

The ſtatutes.

THE memorials of the law during this period conſiſt in the ſtatutes, rolls of parliament, the year-books, and ſome law-treatiſes. Many inconveniences ſtill aroſe from the antient method of making the ſtatutes from the petition and anſwer on the parliament-roll. To remedy theſe, about the end of the reign of Henry VI. or beginning of Edward IV. the practice was introduced of putting the proviſions intended to be made, into the full and complete form of an act of parliament, in the firſt inſtance; which was the identical inſtrument that received the king's aſſent. To this they uſed to prefix this title: *Item quædam petitio exhibita fuit in hoc parliamento* FORMAM ACTUS *in ſe continens*; a title which imported in the terms of it a remembrance of the antient method of preferring a petition. This title is now diſuſed; but, excepting that circumſtance, this is the preſent way of paſſing acts of parliament. The language of the ſtatutes during the reigns of Henry VI. and Edward IV. was ſometimes Engliſh, but more uſually French.

[c] Parl. Hiſt. vol. II. 273.

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Reports.

Of the year-books of Henry VI. and his ſucceſſors it may be ſaid, that both the matter and ſtile of them are more ſuited to the reading of a modern lawyer than any of the former; ſo that they are much more worthy of notice than thoſe of the preceding reigns. They contain a fuller account of what paſſed in court; queſtions of law are more thoroughly debated, and the opinions of the judges given more at length. The ſecond part of Henry VI. and the whole of Edward IV. particularly the long *Quint*, as it is called, are full of excellent learning. The firſt part of Henry VI. is pronounced by a great lawyer to be more barren, ſpending itſelf in much learning of little moment, and long ſince out of uſe [d].

The other productions of the lawyers of this period which have come down to us, are ſome law-treatiſes. One of theſe is Forteſcue's book *De Laudibus Legum Angliæ*; the other is Littleton's *Tenures*; to which may be added *Statham*'s Abridgment.

Forteſcue.

Sir John Forteſcue, who had been ſome time chief-juſtice of the king's bench, is ſaid to have written this work, *De Laudibus Legum Angliæ*, while he was enduring an exile with the prince of Wales, and others of the Lancaſtrian party, in France. Sir John was then made chancellor; and in that character he ſuppoſes himſelf holding a converſation with the young prince on the nature and excellence of the laws of England compared with the civil law, and the laws of other countries. He conſiders at length the mode of trying matters of fact by jury, and ſhews how it excels that by witneſſes. He informs us, that ſome of our princes wiſhed to introduce the civil law merely for the ſake of governing [e] in the arbitrary way allowed by that law, which declares, *quod principi placuit, legis habet vigorem*. He then proceeds to examine ſome other points of difference between the civil and common law,

[d] Hale's Hiſt. 176. [e] Chap. 34, 35, 36.

always

always deciding in favour of our own, particularly in the following inſtances: the baſtardizing the iſſue born before wedlock[f], *partus non ſequitur ventrem*, SED SEQUITUR PATREM; guardianſhip committed to thoſe who could not by law ſucceed to the inheritance[g]; and in the puniſhment of theft no regard paid to a diſtinction between *furtum manifeſtum & non manifeſtum*[h]. He concludes his book with a ſhort account of the ſocieties where the law of England was ſtudied, the degrees and ranks in the profeſſion[i], with the manner in which they were conferred: to theſe are ſubjoined ſome ſhort remarks on the conduct and delay of ſuits. CHAP. XXV. HENRY VI. EDW. IV.

THIS treatiſe ſeems to be intended as an introduction to ſome more particular work on the Engliſh law; the object of it being rather to take off the diſcredit which ſome civilians had endeavoured to throw on it, and to promote a more general acquaintance with it among perſons who did not ſtudy it profeſſionally. It is written in a tolerable Latin, and diſplays ſentiments upon liberty and limited government, which one would hardly expect to find in a writer of this period. There runs through the whole an air of probity and piety, that conciliates the attention of the reader, in ſpite of the many ſcraps quoted from the Fathers, which are interſperſed profuſely, and often very much out of ſeaſon. This is the principal work of our author, to whom we are indebted for ſome others of leſs note.

LITTLETON was a judge of the common-pleas in the reign of Edward IV. and compoſed his book of *Tenures* for the uſe of his ſon, to whom it is addreſſed. It contains three books; the firſt, upon eſtates; the ſecond, upon tenures and ſervices; which two were deſigned to explain more at large the principal ſubject of the old book of tenures: the third diſcourſes of ſeveral incidents and conſe- Littleton.

[f] Chap. 40. [g] Chap. 44. [h] Chap. 48. [i] Chap. 42, 43, 44.

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quences of tenures and eſtates. This little treatiſe has acquired more notice than any other book in the law; which is to be aſcribed partly to the nature of the ſubject, partly to the manner in which it is treated, and partly to the great character of the writer when a judge.

THE learning of real property had in the reign of Edward III. been cultivated with a minute attention: the period which had elapſed from that reign to the time when our author wrote, had produced many additions and modifications of it, till this branch had grown into a very refined ſyſtem, conſtituting, in every reſpect, the moſt intricate part of our juriſprudence. Theſe later determinations had rendered the old treatiſes of the law in a great degree obſolete. Bracton, tho' more full than any of the reſt, being more antient, afforded no light in that ſort of queſtions which were now uſually canvaſſed, and many of which had originated intirely ſince his time: ſtill leſs was to be expected from Fleta, Britton, and The Mirroir, tho' of a later age. In this ſtate of things, it was an undertaking much to be wiſhed, that ſome one ſhould explain in a methodical way the new learning that had ariſen on the ſubject of tenures and eſtates. This our author has done, with a felicity which has placed him in a rank above all writers on the Engliſh law.

IF we enquire what is the excellence which has entitled this writer to ſo high a character, it will be found to be of a particular kind. It is not an accurate arrangement of his ſubject; not a remarkably apt diviſion of his matter; not a ſtrict adherence even to his own plan, by preſerving a cloſe connection between the matter and title of a chapter; in all which he is ſometimes more defective than writers of inferior note: the excellence of Littleton ſeems to conſiſt in the great depth of his learning, and ſimplicity of his manner; in a comprehenſive way of thinking, and a happy method of explaining; with a certain plainneſs yet ſignificance of ſtyle, that is always clear and expreſſive.

THIS

THIS author uſually quotes no authority for what he advances. In this, however, he does not differ much from his cotemporaries, who even in their arguments and opinions delivered in court, had not got into that practice of vouching authorities which has obtained ſo much ſince. Whenever he has a point to handle which is not thoroughly ſettled, he generally ſtates the different opinions on it, and then gives his own reaſons for differing or agreeing with either: and where he does not deliver an opinion declaredly his own, the laſt is ſuppoſed to be that which he is inclined to adopt. This open and candid way of diſcuſſing, added to the known abilities of the author, acquired him great confidence with poſterity: any thing out of Littleton has been uſually taken upon that authority alone. Thus, the want of references, which at firſt might ſeem a want of authenticity, has in the end adminiſtered to the fame of this writer; as opinions which otherwiſe might be vouched from an adjudged caſe, are now wholly reſted on the words of Littleton.

THE undiminiſhed reputation which this author ſtill poſſeſſes, is owing principally to the choice of his ſubject. The law of tenures and eſtates, as underſtood in the time of Littleton, is at this day the beſt introduction to the knowledge of real property; and though great part of this volume is not now law, yet ſo intimately was the whole of that ſyſtem connected, that what remains of tenures cannot be underſtood without a knowledge of what is aboliſhed; and therefore the parts of Littleton which are now obſolete, are ſtudied both with profit and pleaſure. We may ſtill ſay what the author pronounced of his work in another reſpect: "Though certain things which are "moved and ſpecified in the ſaid book, are not altogether "law, yet ſuch things ſhall make thee more apt and able "to underſtand and apprehend the arguments and reaſons "of the law[k]."

[k] Litt. Epilog.

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BESIDE this, the law of tenures and eſtates has always been thought the moſt natural entrance into the ſtudy of the law in general; this ſmall volume, therefore, became the firſt book which was put into the hands of the ſtudent; and while it was conſidered by practicers and the courts as a work of the higheſt authority, it was at the ſame time the inſtitute to Engliſh juriſprudence. Lawyers gave their earlieſt and lateſt application to the text of Littleton: every ſection and ſentence was weighed, and every propoſition conſidered in all its conſequences; it was tranſlated, commented, analyſed; every method was contrived to gain a complete knowledge of its contents. Perhaps no book, in any ſcience ſo confined as the municipal laws of any country muſt be, has more employed the labours of the learned and induſtrious. A writer, who was himſelf one of the greateſt ornaments of the law, and whoſe name never appears greater than when accompanied with that of our author, furniſhed the world with a very copious and minute commentary on this book; in which he has carried his attention to the import of every word ſo far, as to make intereſting remarks on his very *et cæteras*. The fame of Littleton has not been confined to this iſland. As the Norman lawyers made Glanville a model upon which to form their *couſtumier*, and give ſyſtem to their juriſprudence, a modern writer of that country has lately compoſed a comment on Littleton, as the beſt help towards illuſtrating the cuſtoms and laws of that Duchy[1].

[1] This commentator is M. Howard, advocate of the parliament of Normandy, whoſe edition of our older law tracts we have had occaſion to conſider in another place. Vid. ant. vol. II. 283. in the notes. It is unneceſſary to add any thing to what we there threw out with regard to this gentleman's qualifications to compoſe commentaries upon our laws. Upon the whole we are obliged to this foreigner; for if no Engliſh lawyer would write ſuch obſervations upon Littleton, none would be at the pains to give us a new edition of Fleta, Britton, and the Mirroir, with emendations of the numberleſs errors in their texts. The latter work will always be of uſe to the common lawyer, and the former is ſuch as will never miſlead him.

THE

THE learning of the law was thrown into a more methodical form than it had ever yet received, by *Statham*, who was a baron of the exchequer in the time of Edward IV. This was in his *Abridgement of the Law*; being a kind of digeſt, containing moſt titles of the law, arranged in alphabetical order, and compriſing under each head adjudged caſes, abridged from the year-books in a conciſe manner. The plan of this work was entirely new, and conceived with ſome judgment, though the execution was imperfect, and left open to improvement. The caſes are ſtrung together with reference to nothing but the time of their adjudication, without any regard to the connexion of their matter. With all its incompleteneſs, this muſt have been a very valuable work at the time it was compiled, when the helps to the law were few and confined. This Abridgement has ſerved as a model to others in later times; which, without the merit of originality, have ſurpaſſed their maſter's performance in method, preciſion, and extent. This work had the fate to be of leſs uſe than, perhaps, any performance that, in the nature of it, ſeemed to aim at ſuch general utility. It is very doubtful whether it was printed before Fitzherbert's Abridgement, which came out in 1514; and whether it was printed a little before or a little after, the need of it was intirely ſuperſeded by the latter work.

Lyndwode.

SOMEWHAT prior to theſe, a work of a more extenſive, certainly of a much more difficult and laborious, nature was produced on the ſubject of our eccleſiaſtical law. This was the *Provinciale* of William Lyndwode, official principal to archbiſhop Chicheley. The learned canoniſt has here digeſted under heads the ſubſtance of almoſt every conſtitution made in ſynods of the province of Canterbury, from the time of Stephen Langton down to archbiſhop Chicheley. The method he has taken is that of the decretals of Pope Gregory IX. ſo juſtly eſteemed the moſt ſyſtematic and valuable part of the canon law.

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To this digeſt he has added a very copious and minute comment, replete with every illuſtration that could be furniſhed from an intimate acquaintance with the writings of foreign canoniſts, and a long experience in our own eccleſiaſtical courts. The comprehenſiveneſs of this, as well as the merit of its execution, has contributed to place Lyndwode much above his predeceſſor *John de Athona*, who had led the way in this walk of ſtudy, by his gloſs on the legatine conſtitutions of Otto and Ottoboni. With this diſtinction in favour of Lyndwode, theſe two writers have obtained great authority with poſterity: they are regarded both in the ſpiritual and temporal courts, as containing undeniable evidence of the practice and law of their reſpective periods; and as they were inſtrumental in fixing both in after-times, their works are conſidered as the depoſitories of the common law of the church and of the eccleſiaſtical courts.

LYNDWODE, in following the arrangement of the decretals, has been thought to ſacrifice perſpicuity to method, for that the matter of our conſtitutions does not fall eaſily into the order into which he has endeavoured to force them. His ſtyle of commenting likewiſe is not leſs liable to exception. Surely no one was ſo apprehenſive as he appears, leſt a word of his text ſhould paſs without being thoroughly underſtood [m]. Every term has its comment; and rather than not ſay ſomething, he too often indulges himſelf in unneceſſary remarks and digreſſive details. This makes his gloſs extremely minute and deſultory; ſo that to read it at length is tedious, and to ſearch for information on a particular point, is generally a fruitleſs labour. Notwithſtanding theſe defects in Lyndwode, which too, perhaps, were the literary failings of the age in which he wrote, his labours have not been ſurpaſſed by any ſuperior ability or induſtry in later times. The pages

[m] Gibſ. Pref. 12.

of

of this old writer, and the ſtill older whom we have juſt mentioned, continued for many years the only teſtimonies of our eccleſiaſtical law. To methodiſe or illuſtrate the exiſting materials, or add to them by making public reports of adjudged caſes, are the two ways of promoting legal knowledge; in one of which the practicers in our eccleſiaſtical courts have done very little, and in the other nothing at all; ſo little did they improve the advantage given them by Lyndwode over the common-lawyers, who at that time had nothing of equal extent and utility on the practice of their courts [n].

Printing of law-books.

The art of printing being introduced into England by Caxton about the cloſe of this period, we are naturally led to enquire what uſe was made of it towards propagating a knowledge of our laws and conſtitution; but ſuch has been the careleſſneſs of that age, or the deſtruction of time, that nothing very authentic can be obtained on this ſubject. The firſt book known to be printed by Caxton, in England, was the *Recuyel of the Hiſtoryes of Troy*, in 1471. While his preſs was employed in multiplying copies of Reynard the Fox, the Death of King Arthur, the Hiſtory of Charles the Great, and other popular fables, and hiſtories worſe than fables, there is no proof that the profeſſion of the law were indebted to him for one printed book. There is a copy of Lyndwode's Provinciale, which having Caxton's mark, and Wynkyn de Worde's colophon, was certainly printed by the latter. The ſtatutes of Richard III. without name or date, tho' uſually attributed to Caxton, are equally doubtful. The ſame may be ſaid of the ſtat. 1, 2, and 3 Hen. VII [o]. The printers next in point of time were *Lettou* and *Machlinia*; who are ſuppoſed to have been Caxton's ſervants,

[n] This is ſaid upon a ſuppoſition, that by the lapſe of two hundred years, and the changes that had taken place in our law, Bracton had ceaſed to be of that uſe to practicers which he otherwiſe would have been.

[o] Typog. Antiq. pa. 98, 101, 104.

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and had begun to print for themſelves in partnerſhip, in the years 1480 and 1481. There is an edition of Littleton's Tenures printed by theſe printers, without a date; and this book is ſuppoſed to have been put to the preſs by the author himſelf, who died in 1481. There is a book intitled *Vieux Abridgement des Statutes*, which, from the types and marks, is ſuppoſed to have been printed at the ſame preſs and at the ſame time. Theſe may therefore be conſidered as the firſt printers of law; though they had no patent or ſpecial authority for ſo doing. Some books are found with *Machlinia*'s name ſingly, and others are thought to be his, from comparing the letter and work: of the former kind, is the year-book 34 Hen. VI.; of the latter is the 33d, 35th, and 36th years of the ſame king[p]. To theſe may be added the ſtatutes of the firſt year of Richard III[q]. About the ſame time ſome ſtatutes were printed under the title of *Nova Statuta*, containing the ſtatutes concerning the Deſpencers, thoſe of Edward III. Richard II. Henry V. Henry VI. and thoſe of Edward IV. down to the 22d year. All the foregoing books were in folio[r].

Miſcellaneous facts.

THE flouriſhing ſtate of the law during this period may be collected from a ſhort account of the law-ſocieties, and ſome circumſtances relating to their members. We are told, that in the reign of Henry VI. there were ten leſſer inns, which were called *inns of chancery*, each containing at leaſt one hundred ſtudents, and ſome a great many more. Theſe were deſigned as places for elementary ſtudies: here they learned the nature of original and judicial writs, which were then conſidered as the firſt principles of the law; and for this reaſon theſe inns were denominated from the chancery. When young men had made ſome progreſs here, and were more advanced in years, then they were admitted into the *inns of court*. Of theſe there were four in number, which we have before men-

[p] Typog. Antiq. 111, 112, 113. [q] Ibid. [r] Ibid. 114, 115.

tioned

tioned in the reigns of Edward II. and III *. The leaſt of theſe, it is ſaid, contained two hundred ſtudents [s].

We are informed by a writer of this time, that a ſtudent could not reſide in the inns of court for leſs than 28*l.* *per ann.* and proportionably more if he had a ſervant, as moſt of them had. For this reaſon, the ſtudents of the law were generally ſons of perſons of quality. Knights, barons, and the greateſt nobility of the kingdom, often placed their children here, not ſo much to make the laws their ſtudy, as to form their manners, and preſerve them from the contagion of vicious habits: for, ſays the ſame author, *all vice was there diſcountenanced and baniſhed, and every thing good and virtuous was taught there; muſic, dancing, ſinging, hiſtory ſacred and profane, and other accompliſhments* [t].

The degree of ſerjeant at law was conſidered in a very reſpectable light: none could be a judge in the king's bench or common-pleas, but one who had been firſt a ſerjeant; nor was a perſon to be called to the degree of ſerjeant, till he had been in the general ſtudy of the law abovementioned at leaſt for ſixteen years, which probably meant from his firſt entrance at an inn of chancery. The ceremony and expence attending a call of ſerjeants was at this time very great: in general, about ſeven or eight were called at a time; and on that occaſion, ſays our author, there were revels and feaſting for ſeven days together, *as at a coronation*. The expence each ſerjeant was at ſeldom fell ſhort of 260*l.* out of which one-ſixth was uſually expended on rings. Sir John Forteſcue, to whom we are obliged for all this information, ſays, that it coſt him 50*l.* in rings: we may conjecture from this what the profits of practice muſt have been [u]. They were generally called the *king*'s *ſerjeants*, becauſe they were

* Vid. ant. vol. II. 359; and vol. III. 152.

[s] Forteſc. de Laud. c. 49.

[t] Forteſc. de Laud. c. 49.

[u] Ibid. c. 50.

called

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called to this honour by the king's writ; and they had a ſalary from the crown, as well as the king's attorney.

It ſeems that learned apprentices were not always ambitious of the ſtate and degree of a ſerjeant; but, on the contrary, when called thereto, ſome of them had tried all ways to avoid it. There is an inſtance of this in the fifth year of Henry V. in John Martin, William Rabington, William Pole, William Weſtbury, John June, and Thomas Rolfe, ſix grave and famous apprentices, who having writs delivered to them to take the ſtate and degree of ſerjeant, returnable in Michaelmas term, and having in vain tried all means of evading the direction of the writ, upon the return thereof in chancery made an abſolute refuſal. Upon this they were called before the parliament, that was then ſitting, and there charged to take upon them the ſtate and degree of ſerjeants, which at length they conſented to do[x].

The king's attorney was the only law-officer of the crown of that kind till the reign of Edward IV. In the firſt year of that king we find *Richard Fowler* was made *ſolicitor* to the king[y], and in 11 Ed. IV. *William Huſee* was appointed *attorney-general* in England (the firſt mention we have of this title), *attornatus generalis in Angliâ, cum poteſtate deputandi clericos ac officiarios ſub ſe in quâlitercunque curiâ de recordo*[z]. This officer uſed to be appointed for life.

There were uſually in the court of common-pleas five judges, ſometimes ſix, but never more; in the king's bench there were ſometimes four, ſometimes five. It is ſaid that they did not ſit above three hours a day in court, and that was from eight in the morning to eleven. The courts were not open in the afternoon; but that time, ſays our author, was left unoccupied, for ſuitors to con-

[x] Rot. Parl. An. 5 Hen. V. 2 Init. 24.
[y] Dugd. Chro. Series, 67.
[z] Ibid. 71.

ſult

ſult with their counſel at home [a]. The ſame writer ſpeaks of the qualifications of a judge as not to be attained but *per viginti annorum lucubrationes.*

THE ſalaries of the judges in the time of Henry IV. were as follow: The chief baron and other barons had 40 marks *per ann.*; the chief of the king's bench and of the common-pleas 40*l. per ann.*; the other juſtices in either court 40 marks [b]. But the gains of the practicers had become ſo great, that they could hardly be tempted to accept a place on the bench with ſuch low ſalaries: therefore in 18 Hen. VI. the judges of all the courts at Weſtminſter, together with the king's attorney and ſerjeants, exhibited a petition in parliament concerning the regular payment of their ſalaries, and perquiſites of robes. The king aſſented to their requeſt, and order was taken for increaſing their income, which afterwards became larger, and more fixed: this conſiſted of a ſalary, and an allowance for robes. In 1 Ed. IV. Markham the chief juſtice of the king's bench had 170 marks *per ann.* penſion, 5*l.* 6*s.* 6*d.* for his winter robes, and the ſame for his Whitſuntide robes; *juxta formam* (ſays the record) *cujuſdam actûs in parliamento* 18 Hen. VI [c]. Moſt of the judges had the honour of knighthood; ſome of them were knights-banneret, and ſome had the order of the Bath [d].

THE following is the ſtate of the *Hoſpitia*, or Inns, for the reſidence of profeſſors of the law in the time of Henry VI.

PART of Serjeant's Inn, in Chancery-lane, was inhabited by ſome ſerjeants in the time of Henry IV. when it was called *Faryndon's Inn*: the inheritance of it belonged to the biſhops of Ely. In the reign of Henry V. the whole houſe was demiſed to the judges, and apprentices of the law, as appears by ſums accounted for to the biſhop. In 9 Henry VI. it obtained the name of *Hoſpitium*

[a] Forteſc. de Laud. c. 51.
[b] Dugd. Orig. 105.
[c] Dugd. Orig. 109.
[d] Ibid. 103.

Juſtitiariorum.

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Juſtitiariorum. In 2 Rich. III. there is a leaſe of it under the name of *Hoſpitium vocatum Serjeant's Inn*; this demiſe is at *4l. per annum.* It appears in 21 Hen. VI. that the ſerjeants then, if not before, held Serjeant's Inn, in Fleet-ſtreet, under a demiſe from the dean and chapter of York, at the rent of 10 marks *per annum*[e]. There was alſo *Scrope's Inn*, inhabited by ſerjeants, which was ſometimes called Serjeant's Inn. This was an inn during the reign of Richard III. and was next to Ely-houſe, oppoſite St. Andrew's church, in Holborn[f].

THE *inns of court* were the four which have already been mentioned[g]. The ten *inns of chancery* in the reign of Henry VI. were the following: *Clifford's Inn*, which was an inn of chancery as early as the reign of Henry V. and had the ſign of the black lion. *Clement's Inn* was a reſidence for ſtudents in the reign of Henry IV. if not before. *New Inn* had been a common inn for travellers, and, from the ſign of the Virgin Mary, it was ſometimes called Our Lady's Inn. This houſe was inhabited by the ſtudents who removed from an old inn of chancery, called *George's Inn*, near St. Sepulchre's church without Newgate. *The Strand Inn*, otherwiſe Cheſter Inn, from its neighbourhood to the biſhop of Cheſter's houſe. This inn, together with the church of St. Mary le Strand, was pulled down in Edward the VIth's time, to make room for building Somerſet-houſe. *Thavies Inn* we have ſeen was a reſidence for ſtudents in the reign of Edward III. It was granted in fee to the benchers of Lincoln's Inn in Edward the VIth's time. *Furnival's Inn*, which once belonged to the lords Furnival, was an inn of chancery in 9 Hen. IV. The ſtudents held it under a leaſe: in the time of Edward VI. the inheritance was in the then lord Shrewſbury, who ſold it to the ſociety of Lincoln's Inn, under whom the ſociety of Furnival's Inn were afterwards

[e] Dugd. Orig. 326. [f] Ibid. [g] Vid. ant. 121.

tenants,

tenants. *Staple Inn* was an inn of chancery in the time of Hen. V. The inheritance of it was granted in 20 Hen. VIII. to the ſociety of Gray's Inn.. *Barnard's Inn* was a law-ſociety in the time of Henry VI. The tenth was perhaps *George's Inn* beforementioned.

THESE inns of chancery became all of them appendages to one or other of the inns of court: of theſe, ſeven only are now ſubſiſting; Strand Inn being taken down in the reign of Edward VI.; George's Inn long before; and Thavies Inn within theſe few years.

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CHAP. XXVI.

EDWARD V. RICHARD III.

Ceſtui que uſe to make Eſtates—Benevolences aboliſhed—Bailing Felons by Juſtices—Fines—Private Acts.

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THE ſmall ſpace filled by theſe two kings did not paſs without leaving ſome remembrances of it on our juridical polity. The tranſient reign of the firſt gave no time for calling a parliament, but the proceedings of the courts went on at their ſtated ſeaſons, uninfluenced by the revolutions that now happened with a rapid ſucceſſion in political affairs; and there have been handed down caſes *de termino Trinitatis, anno primo Edward Quinti.*

HIS ſucceſſor ſummoned a parliament in the firſt year of his reign, in which ſeveral acts were paſſed; and there are reports of two terms, Michaelmas in the firſt and Michaelmas in the ſecond year of Richard III. In Richard's parliament ſome ſtatutes of no ſmall importance were enacted; that concerning *ceſtui que uſe* had an extenſive effect on uſes during the next reign, and great part of the ſucceeding; thoſe about bailing and fines were thought ſuch good regulations, that the policy of them was adopted in the next reign, and they were ſuperſeded by two improved ſtatutes made for the ſame purpoſe. The ſtatute againſt benevolences might be ranked with the ſtatute *de tallagio non concedendo*, and other ſecurities againſt levying money without parliament. We ſhall now conſider theſe acts more particularly. The firſt three acts of this king were, firſt, for enabling *ceſtui que uſe* to diſpoſe of the land;

land; secondly, to relieve the subject from benevolences; thirdly, for letting prisoners to bail.

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We have seen the expedients which had already been resorted to for correcting the difficulties that followed from conveying land to a use[a]. But the evil was still felt, and was complained of in the preamble of this act as existing in all its force. It was said, "that no man "buying lands, tenements, rents, services, or other here- "ditaments, nor women who had jointures, or dowers, nor "mens' last wills to be performed, nor leases for term of "life or of years, nor annuities granted for term of life or "otherwise, nor persons interested in any of these species "of property, could be in safety, because of privy and un- "known feoffments:" the meaning of which was, that after a feoffment or gift was made by the apparent owner of the estate, it would turn out that he was only *cestui que use*, and therefore not enabled by law to do any act which could charge the freehold. It was therefore, to remedy this, now enacted, that every feoffment, estate, gift, grant, release, confirmation, and leases of lands, tenements, rents, services, or hereditaments, made by any person of full age and at large, and all recoveries and executions so had or made, should be good and effectual against the feoffor and his heirs, and those claiming any interest to their use. Thus was the *cestui que use* empowered to dispose of the estate, in the same manner as the *feoffee to the use* might at common law. It will soon be seen, that this new expedient to remedy the inconvenience of uses, only produced the additional confusion which must naturally follow when two persons had an equal right to dispose of the same land.

Cestui que use to make estates

The second chapter of this act declares, that the *benevolences* heretofore enacted should not be drawn into example, but that exactions of that sort should no longer be

Benevolences abolished.

[a] Vid. ant. vol. III. 275.

levied.

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levied. These *benevolences* had been introduced by Edward IV. and the abolition of this mode of raising money was an attempt of Richard to conciliate to him the nobility and great men, who were the principal sufferers in these involuntary donations to the crown.

Bailing felons by justices.

THE third chapter of this act complains, that persons were daily arrested and imprisoned for felony, sometimes through malice, and sometimes on light suspicion, and so kept without bail or mainprise, to their great vexation and trouble. The old remedy in some of these cases was the writ *de odio et atiâ*; in others, they had no resource but the discretion of the sheriff, who acted under the authority of stat. Westm. 1 [b]. To furnish persons so oppressed with a more speedy and easy redress, it was now provided, that every justice of the peace should have authority by his discretion to let such persons to bail or mainprise, in the same manner as if they had been indicted before the justices at the sessions. Power was also given to the justices to enquire in their session of the escapes of all persons arrested and imprisoned for felony. It was further enacted, that no sheriff, under-sheriff, escheator, bailiff, or other person should seize the goods of one who was arrested or imprisoned for felonies, before conviction or attainder, upon pain of forfeiting, to the person grieved, double the value of the things so taken; which regulation was in confirmation of the law of former times [c]. The provision made by this statute about bailing, was re-considered in the next reign, when a new act was made.

Fines.

ANOTHER remarkable provision made during the short reign of this king was the statute of fines, which like the preceding served as a model for another act in the next reign on the same subject. This statute is chap. 7. of Richard III. It refers to the statute *de finibus*; and, to increase the great security and confidence reposed in fines,

[b] Vid. ant. vol. II. 131. [c] Vid. ant. vol. III. 141, and vol. II. 24.

it

it enacts, that, after the engroſſing, every fine ſhould be openly and ſolemnly read and proclaimed in court the ſame term, and the three next terms; during which ceremony all pleas ſhould ceaſe; and then a tranſcript ſhould be ſent from the juſtices to the juſtices of aſſiſe of the county where the lands lay, who were in like manner to cauſe it to be proclaimed in every one of their ſeſſions that year; the ſame of the juſtices of the peace; which proclamations were to be certified the ſecond return of the following term. After theſe proclamations and certificates, ſuch fine was to conclude as well privies as ſtrangers, except women covert not parties to the fine, perſons within age, in priſon, out of the realm, or not of whole memory; with a ſaving of the claims of all others having a title at the time of the fine being levied, ſo as they proſecuted their claim, by action or entry, in five years after the proclamation and certificate; and alſo ſaving the rights of thoſe upon whom a title deſcended after the fine, provided they purſued their right in five years after ſuch title came to them; or, if the perſons were under any diſabilities or defects, within five years after the removal thereof. The ſtatute has a clauſe enabling perſons to levy fines according to this act, or at the common law.

THE other acts of this reign that are at all of a juridical nature, are the following: one was to declare that wherever the king was co-feoffee of lands to the uſe of the feoffor, the land ſhould be in the co-feoffees; which was to prevent the concluſion of law that would give, in ſuch caſe, the whole to the king[p]: another required a certain qualification of property in jurors who ſerved in the ſheriff's tourn[q]. The remaining acts related principally to trade and commerce.

THE diſtinction between *private acts* (whoſe origin we have conſidered in the preceding period*) and *public*, was

[p] Ch. 5. [q] Ch. 4. * Vid. ant. vol. III. 379.

CHAP. XXVI. EDW. V. RICH. III. firſt made in the reign of Richard III. who applied this new invention to the purpoſe of deſtroying his enemies by parliamentary attainders. All Richard's ſtatutes are in Engliſh; and ſo they continued to be drawn in all ſubſequent periods. When the parliament of Richard is conſidered in all theſe lights, it becomes an object of ſome note in juridical hiſtory.

CHAP.

CHAP. XXVII.

HENRY VII.

Attending the King in his Wars—Vagrants—Corporations—Statute of Fines—Statutes of Pernors of Profits—Alienations of Jointreſſes made void—Suits in Formâ Pauperis—Attaints—Stealing Women—The Star-Chamber new-modelled—Informations at the Aſſiſes and Seſſions—Appeal of Murder—Bailing Felons by Juſtices of the Peace—Benefit of Clergy—Bargain and Sale—Of Uſes—Covenants to ſtand ſeiſed—Ejectione Firmæ—Actions of Aſſumpſit—The Chancery—Of Treaſon—Larceny—Sanctuary—King and Government—Printing of Law-Books—Miſcellaneous Facts.

CHAP. XXVII. HENRY VII.

THE reign of Henry VII. exhibits ſome remarkable inſtances of innovation upon the old law. The benefit of clergy was taken from offenders of a certain deſcription; and regulations were made for qualifying that ancient exemption, ſo as to promote a better adminiſtration of criminal juſtice. Among the deciſions of courts, there was one concerning the action of ejectment, which had the effect of bringing about a conſiderable change in the courſe of legal remedies for recovering land. Theſe were perfectly novel, and gave riſe to a new ſet of principles and ideas in the law of property and of crimes. Other productions of this reign, though only modifications of former eſtabliſhments, are not leſs famous in the hiſtory of our juriſprudence: ſuch is the ſtatute of fines, and that for new-modelling the ſtar-chamber.

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chamber. Many other points of great importance attracted the notice of parliament, or were agitated in the courts, which make the reign of this king a period well worthy the attention of the hiſtorical ſtudent.

In reviewing the legal tranſactions of this reign, we ſhall begin with the ſtatutes, as uſual; firſt noticing thoſe which relate to the king and the rights of perſons, and then proceeding to thoſe that affected the law of private rights. After the landing of Perkin Warbeck, in Kent, a law was made of a new impreſſion. Apprehenſive of the conſequence of ſuch attacks upon his title, Henry's friends prevailed on him to conſent to ſome ſecurity for them, in caſe of changes: this was done by ſtat. 2 Hen. VII. c. 1. which ordains, that no perſon who, in arms or otherwiſe, aſſiſts the king for the time being, ſhould afterwards be convicted or attainted thereof, as of an offence, by courſe of law, or by act of parliament; and all proceſs and acts of parliament to the contrary are declared void. This act is ſaid, by a learned and eminent writer *, to be rather juſt than legal, and more magnanimous than provident. It ſeems, however, to have been founded on principles of humanity and good ſenſe.

Attending the king in his wars.

To throw a ſplendor round the crown, Henry had reſolved, that all perſons bearing any relation to the king ſhould be about him in his expeditions; and we find two ſtatutes made for this purpoſe; the firſt was ſtat. 11 Hen. VII. c. 18. which required all thoſe who had any office, fee, or annuity, by grant from the crown (not having the king's licence to excuſe, or any infirmity to prevent them), to attend the king in perſon when he went to war; and if they failed, all ſuch grants were to be void. This was not to extend to any ſpiritual perſon, the maſter of the rolls, nor officers or clerks in chancery, or the juſtices of either bench; nor to the barons of the exchequer, or other officers of their courts; the king's attorney or

* Lord. Bacon.

ſolicitor,

ſolicitor, or his ſerjeants at law. This point was puſhed further a few years after by ſtat. 19 Hen. VII. c. 1. and extended to thoſe occupying honours, caſtles, lordſhips, manors, lands, tenements, or other poſſeſſions and hereditaments of the grant of the crown; who were thought to be bound by a ſtronger duty than thoſe of the former deſcription. By this act ſuch perſons are intitled to the king's wages from their ſetting out to their return. The exceptions, in this latter act, were extended to the clerk of the king's council, to perſons above ſixty and under twenty-one years, and to caſes where the patents mentioned the grant to be for a ſum of money[b].

PARTICULAR privileges had before this been granted by parliament to perſons in the king's ſervice. Perſons in the king's wages beyond or upon the ſea, were not to be prejudiced by any deſcent, and might make their attorney to enter lands deſcended, or to attorn. Thoſe with the king in his wars, might make feoffments to the uſe of their wills without licence; they were to have their own liveries, and they had authority to diſpoſe of the wardſhip of their lands[c]. While Henry was thus ſteady in exacting due attendance from the retainers of the crown, he was equally attentive to diminiſh the number of thoſe of great lords. He was very ſtrict in enforcing the ſtatutes of liveries. The parliament added two more to the number of theſe regulations for leſſening the influence and ſtrength of the nobility in the country[d].

THESE were all the parliamentary proviſions that ſeem to concern more particularly the king's perſon, and do not come under any of the heads under which the other acts of this reign will be arranged. Before we come to thoſe on private rights, we ſhall briefly notice cer-

[b] Theſe laws cannot but bring to our recollection ſome former paſſages in our Hiſtory. Vid. ant. vol. II. 104.

[c] Stat. 7 Hen. VII. c. 2, 3.

[d] Stat. 3 Hen. VII. c. 12. and ſtat. 19 Hen. VII. c. 14.

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tain laws that were made for better regulating the lower orders of the community, and one that reſpects bodies politic and corporate.

Vagrants.

IT is probable that the ceſſation of the late civil conteſts had left many unemployed perſons to become vagrants and infeſt the country; for we find two ſtatutes for the correction of this evil, which ſeem to treat it with much ſeverity. Vagabonds, idle and ſuſpected perſons, were to be ſet in the ſtocks three days and three nights, without any ſuſtenance but bread and water; after which they were to be put out of the town. It was enjoined, that no one ſhould give any thing elſe to ſuch idle perſon, under the penalty of forfeiting a ſhilling. Poor perſons not able to work were to reſort to the hundred where they laſt dwelt, were beſt known, or were born, and there remain, under the penalty of being puniſhed in the abovementioned way. To ſuppreſs the nurſeries of idleneſs and beggary, it was provided, that no artificer, labourer or ſervant, ſhould play at any unlawful games, except in Chriſtmas. The common ſelling of ale might be checked by two juſtices of the peace[e]. Several laws were made for the adjuſtment of trade and commerce, the employment of perſons in agriculture, the building of houſes of huſbandry, the regulating of the wages of artificers, the apprenticing of boys, and other objects of an œconomical kind; but theſe were moſtly experimental, and led to improvements of a more general nature, in the next and ſubſequent reigns[f].

THAT corporations might not carry the right they had to make bye-laws too far, it was ordained, by ſtat. 19 Hen. VII. c. 7. that all acts and ordinances made by the wardens, maſters, and fellowſhips of crafts and myſteries, and by rulers of guilds and fraternities, ſhall be

[e] Stat. 11 Hen. VII. c. 2. [f] Stat. 11 Hen. VII. c. 22. ſtat. 19 Hen. VII. c. 12. Vid. 4 Hen. VII. c. 19. ant. vol. III. 169. 223.

approved

approved by the chancellor, treaſurer, or chief juſtices of either bench, or three of them; or by the juſtices of aſſize in their circuit; and that otherwiſe they ſhould be void. It was further ordained, that no bye-law ſhould be made to reſtrain ſuits in the king's courts.

THE ſtatutes made in this reign upon the ſubject of private rights related intirely to the modes and circumſtances of alienation, whether in real or perſonal property. Of this nature were the ſtatute of fines, thoſe relating to the pernors of profits, and an act to prevent the alienations of jointreſſes. The only act reſpecting perſonalty which we ſhall have occaſion to notice, is that for preventing gifts of goods in order to defraud creditors. The moſt remarkable regulation in this reign on the ſubject of real property is the ſtatute of fines, 4 Hen. VII. c. 24. copied chiefly from that in the laſt reign. This act has been conſidered in two views; either as intended to make a fine a bar to an entail, or to give to this antient aſſurance the force and validity it poſſeſſed at common law before the ſtatute of non-claim.

Statute of fines.

THOSE who are of the former opinion argue in this way: Notwithſtanding, ſay they, the blow that was given to the ſtatute *de donis* by the determination in *Taltarum*'s caſe, the effects of entails were viewed with a jealous eye by this king. It ſhould ſeem, ſomething more was wiſhed than this reſolution to ſubſtantiate ſo bold and new a doctrine as that of barring entails, and virtually repealing an ancient ſtatute, upon which the landed property of the kingdom had been ſettled for years. Henry ſaw that the conſequence of a free power of alienation would be a gradual decline of the wealth and importance of the nobility, and a proportionate increaſe in that of the Crown; and knowing how much this concurred with his favourite ſcheme of aggrandizement, he procured the ſtatute of fines to be paſſed.

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THOSE who are of the latter opinion, deny that this ſtatute was dictated by political reaſons; and maintain, that conſiderations ariſing from the nature of a fine, as a common aſſurance of the realm, were the only motives for making it. By the ſtatute of *modus levandi fines*, 18 Ed. I. claim muſt be made within a year after the fine levied by the perſon next immediately having right, without permiſſion to thoſe in the ſubſequent remainders to claim on his default; ſo that if there was tenant for life, remainder for life, remainder in fee, and the firſt tenant for life aliened, and the next remainder-man for life made no claim, the remainder-man in fee was without remedy. This miſchief was one of the great cauſes of making ſtat. 34 Ed. III. c. 16[s]. by which non-claim was ouſted; that is, a perſon's right was no longer barred by his not making his claim within the year. An example of this kind had been given by the ſtatute *de donis*; the intereſt of the donor was there provided for by a clauſe much in the nature of this: it was ordained, that it ſhould not be neceſſary for the heirs in tail, or for thoſe in reverſion, to put in claim. Great cauſe of the ſtatute of non-claim was the interruption of foreign and domeſtic wars, which prevented people from attending to matters of property.

WHATEVER wiſdom may be aſcribed to the policy which dictated that ſtatute, it was found that this doctrine of non-claim had very miſchievous conſequences. Fines, as they thus lay open to be queſtioned, became of leſs validity and effect, and were virtually very little more than feoffments of record. To remedy the endleſs conteſts and litigation to which eſtates were now expoſed, and to reſtore fines to their former efficacy, were, as it ſhould ſeem, the principal objects of ſtat. 4 Hen. VII. The makers of this act appear only to have purſued the

[s] Vid. ant. vol. II. 401.

reaſon

reaſon of the common law, and to have intended merely to put fines into the ſame condition they were in before non-claim was ouſted.

SUCH are the reaſons and motives ſuggeſted by different perſons for making this famous act. It muſt be confeſſed, that if there was any intention of giving to a fine the efficacy of barring an entail, the ſtatute is couched in thoſe covert and indirect terms which indicated an apprehenſion of ſome remaining prejudices in favour of entails; for, without any apparent reference to entails, or the declaration of the ſtatute *de donis*, that fines, as againſt the iſſue, ſhould be void, it enacts generally, "that fines of land levied with proclamation ſhall conclude *as well privies as ſtrangers*." On the other hand, there is in the preamble mention made of the ſtat. 27 Ed. I. *de finibus*, and of the confuſion introduced by the ſtatute of non-claim, to remedy which it would intimate the preſent act was deſigned; and it was not till near forty years after, that a fine with proclamation was held to bar the iſſue, by conſtruction of this act [h]; and that was with ſuch difference of opinion, that an act was purpoſely made ſome years after [i] to declare ſuch a fine to be a bar to the iſſue. It may be added, that this act is only copied from one paſſed in the reign of Richard III. who had no leiſure to deviſe ſchemes for impoveriſhing or humbling the nobility. This republication, therefore, can hardly be attributed to any perſonal deſign originating with the preſent king.

FINES levied according to this ſtatute, and to have the effect here given them, were to be ſolemnly read and proclaimed in the three terms next following the ingroſſing, at four days in every term, during which proclamation all pleas were to ceaſe. There is a ſaving of the rights of ſuch as might not be in a condition to vindicate their claims; ſuch as femes covert (not being parties to the fine), perſons

[h] 19 Hen. VIII. 6. [i] Stat. 32 Hen. VIII. c. 36.

under

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under twenty-one years, perſons in priſon, out of the realm, or not of whole mind, at the time of the fine levied, not being parties to the fine; and a ſaving to every perſon and his heirs, other than the parties thereto, of ſuch right as he had at the time of the fine being ingroſſed, ſo as he purſue his title within five years next after the proclamation had; and ſaving to all perſons ſuch right as ſhall firſt grow, remain, or deſcend, or come, after the fine ingroſſed and proclaimed, by any gift in tail, or other cauſe, before the fine levied, ſo that they purſue their right within five years after it accrued to them; and then they and their heirs might have an action againſt the pernors of the profits of ſuch lands. But if at the time of ſuch right accruing they were covert baron, within age, in priſon, out of the land, or not of whole mind, then their right and action ſhould be reſerved to them and their heirs till they come to twenty-one years, be out of priſon, within this land, uncovert, and of whole mind, ſo that they or their heirs take their action or entry within five years after ſuch diſability removed, and purſue ſuch action or entry. All perſons having a right, and being under the above diſabilities at the time of a fine being levied and ingroſſed, ſhall take their action or entry within five years after ſuch diſability is removed, and purſue ſuch action and entry: if not, they and their heirs ſhall be barred for ever, as if they had been parties or privies. There was a ſaving to every one, not party or privy, to alledge in avoidance of a fine, that neither the parties, nor any to their uſe, had any thing in the lands or tenements compriſed in the fine at the time it was levied. Laſtly, it was provided, that fines, levied in the form uſed before this act, ſhould be as effectual as if this ſtatute had never been made; and all perſons ſhould be at liberty to follow that form, or the form preſcribed by this act.

SUCH are the proviſions of this famous ſtatute, which is one of thoſe inſtances where the old law, after ſome changes, was revived, and one of the principal aſſurances of

of eſtates placed upon its antient foundation. This ſtatute, whether conſidered as a regulation for quieting poſſeſſions, or for barring entails, became in after-times an object of very frequent and very ſerious diſcuſſion.

Statutes of pernors of profits.

THE inconveniences ariſing from the univerſal practice of conveying land to uſes, were felt more and more; and the legiſlature were frequently ſtruggling to remedy, if poſſible, the extreme difficulties under which creditors and purchaſers, lords, and thoſe who had title, laboured, from the ſecret and dormant claims to which land became thereby ſubjected. With a view to remedy theſe evils, the number of ſtatutes againſt pernors of profits was increaſed in this reign [k]. It was provided, by the very firſt ſtatute in this reign, that *ceſtui que uſe* ſhould anſwer to a formedon, and the ſuit be conducted in the ſame manner as if he was ſeiſed of the land. It has been doubted by ſome, whether a formedon did not lie before this ſtatute [l]. A like redreſs, ſimilar to that of the ſtatute of Marlbridge [m], was provided in favour of the lord; who was enabled, by ſtat. 4 Hen. VII. c. 17. to eſtabliſh his right to wardſhip and relief againſt the heir of *ceſtui que uſe*, if no will was declared, as if the heir were very tenant; and the heir, on the other hand, was furniſhed with means of redreſs againſt the lord for waſte committed, and was entitled to damages againſt him, if barred in a writ of ward. By ſtat. 19 Hen. VII. c. 15. the ſheriff is authorized to make execution of the lands, tenements, or hereditaments of *ceſtui que uſe*, the ſame as if he was ſeiſed thereof, for all judgments, ſtatutes and recogniſances. Lords of whom ſuch lands were held in ſocage, were on the death of *ceſtui que uſe*, and no will declared, to have their relief of heriot, and other dues. On the other hand, *ceſtui que uſe* was to have all advantage againſt the perſon ſuing the execution, as if he was ſeiſed of the land.

[k] Vid. ant. vol. III. 275.
[l] *Bro. Parr. de. Profit*, 14.
[m] Vid. ant. vol. II. 62.

If

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If a bondman purchaſed any land or tenement, and made an eſtate to others to his uſe, the lord was enabled to enter, the ſame as if the bondman was ſeiſed of the land.

Alienation of jointreſſes made void.

THERE was another ſtatute made concerning real property, which deſerves notice. It was found neceſſary to remedy an abuſe that had been practiſed by widows, while in poſſeſſion of their dower, or of what has ſince been called a jointure. They were in this manner ſeiſed of the freehold, and conſequently of all the privileges annexed to it; and could therefore exerciſe a right over it, which laid thoſe next in ſucceſſion quite at their mercy. To prevent this, it was enacted, by ſtat. 11 Hen. VII. c. 20. that if any woman, having an eſtate in dower, or for life, or in tail, jointly with her huſband, or ſolely to herſelf, of the inheritance or purchaſe of her huſband, or given by any of his anceſtors; if a woman, having ſuch eſtate, ſhould, either when ſole, or when married to a ſecond huſband, diſcontinue, alien, releaſe, or confirm with warranty, or by covin ſuffer a recovery, it ſhall be void; and the perſon next intitled, after the woman's death, may enter and enjoy the land the ſame as if ſuch woman was actually dead. There is a proviſion, that a woman may alien for her own life, and if the perſon next intitled agrees to it, ſhe may alien for any greater eſtate. However, the widow was prevented from making a property of that which had been allotted to her for an honourable proviſion during life; and the reverſion to the heirs of the huſband and his family was effectually ſecured.

THERE is only one ſtatute relating to the right of perſonal property, which much deſerves our notice; that is, ſtat. 3 Hen. VII. c. 4. which was made to prevent the frauds committed on creditors by perſons, who, having made deeds of gift of their effects, would fly to ſanctuary and other privileged places, and there live upon their property, in defiance of thoſe who had demands on them. It

was

was enacted by this ſtatute, that all deeds of gift of goods and chattels in truſt for and to the uſe of the perſon making them, ſhall be void.

We ſhall now ſpeak of ſuch ſtatutes as made any alteration in the courſe of adminiſtering juſtice. Theſe were not many; but yet, together, contributed either to render the means of obtaining juſtice more ready, or delays leſs incommodious. They related to writs of error, popular actions, ſuits *in formâ pauperis*, attaints, and the proceſs in actions upon the caſe.

It was intended by ſtat. 3 Hen. VII. c. 10. to prevent a litigious ſtay of execution by writ of error. It ordains, if a defendant or tenant brings a writ of error, and the judgment be affirmed, or the writ be diſcontinued, or the plaintiff in error nonſuited, he ſhall pay coſts and damages to the other party for the delay and wrongful vexation, by diſcretion of the court where the writ of error is depending.

The ſtat. 4 Hen. VII. c. 20. reſpecting popular actions, as it had a view to the emoluments of the exchequer, bore in it a ſtriking mark of the genius of this reign. It had become the practice of government to enforce with rigour ſuch penal laws as contributed to the increaſe of forfeitures and penalties; and every thing which prevented the full effect of ſuch laws, was to be removed. It was common for offenders to get a friendly action brought againſt them for the penalty they had incurred; or if an adverſe plaintiff had commenced a ſuit, they would get a friend to ſue them, and by this colluſion would confeſs a judgment to him, and plead that in bar of the other action. To prevent the effect of ſuch practices, it was provided by this ſtatute, that in the like caſes the plaintiff may reply covin, and have judgment and execution as if no other action had been brought; and where the colluſion is proved on the defendant, he is to ſuffer impriſonment. It was further provided, that no releaſe of any popular action by a private

perſon

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perſon ſhould be a bar to ſuch action or indictment. Colluſion was not to be replied, where the point of the action had been tried, and a verdict had.

Suits in *formâ pauperis.*

ALLOWING perſons to ſue *in formâ pauperis*, as was done by ſtat. 11 Hen. VII. c. 12. was a humane conſtitution, and reſembled more the legiſlation of an imaginary republic than the practice of actual governments. It was ordained, that every poor perſon ſhould have original writs and writs of *ſubpœna* without paying for the ſealing or writing thereof; and the chancellor was for that purpoſe to aſſign clerks, learned counſel, and attornies. If the writ was returnable before the juſtices of any court of record, they were alſo to aſſign counſel and attornies, to act without a fee. This indulgence may, however, be thought by ſome to be dangerous, and to need that caution and reſtriction which by a later act has been annexed to this privilege. To enable one to commence a litigation without expence, is tempting the reſentments of men with too eaſy a gratification; and the defendant in ſuch a ſuit is left in an unequal conteſt.

Attaints.

ATTAINTS, tho' in the nature of a criminal proceeding, may be mentioned in this place among the improvements made in civil proceſs; as they were deſigned for the purpoſe of rendering the trial by jury as incorrupt and effectual as the nature of it would allow. It was now endeavoured to put attaints upon a different footing than they had been on before. Attaints had become very dilatory, laſting ſometimes ten years [n], and were attended with great expence, as well as impediment, in the conduct of them. Theſe conſiderations, with that of the extreme rigour of the villainous judgment, induced perſons rather to endure the injury they received from a falſe verdict, than be at the trouble of redreſſing themſelves in this manner, or contribute towards inflicting ſo cruel a puniſhment. As a ſub-

[n] Stat. 11 Hen. VI. c. 4. Vid. ant. vol. III. 276.

ſtitute

ſtitute for the ancient ſeverity, a new order of proceeding and another penalty was contrived by ſtat. 11 Hen. VII. c. 24. which ordained a pecuniary mulct inſtead of the opprobrious judgment of the common-law. This ſtatute being intended as an experiment, was temporary, and after ſeveral continuances of it in this reign, expired with it: in the next, a new one was made on the ſame ſubject[o]. Another temporary law had been made at the ſame time againſt perjury, maintenance, embracery, and corruption of officers[p]; crimes of the like nature with the corruption of jurors, and puniſhed by numberleſs proviſions in our early laws *. A particular act was made to correct the evil of corrupt jurors in the city of London, who heretofore were not liable to an attaint. It was provided by this act, that jurors there ſhould have certain qualifications of property, and that, on a falſe verdict, a bill of attaint might be ſued in the huſtings: if the jurors were convicted, they were to be fined 20*l.* or more, at the diſcretion of the court[q]; ſo that all idea of the villainous was intirely abandoned.

As actions upon the caſe had of late very much increaſed, and had ſupplied the place of many ancient remedies, it was thought they ſhould no longer be ſubject to the delay which was incident to the old proceſs. It was therefore enacted by ſtat. 19 Hen. VII. c. 9. that the like proceſs ſhould be in actions upon the caſe, as in actions of treſpaſs and debt, when ſued in the king's bench or common-pleas; for thoſe only are mentioned in the ſtatute. It ſhould ſeem, that actions upon the caſe in other courts, not being affected by this ſtatute, muſt be proſecuted with the common-law proceſs of attachment and diſtreſs, as before †.

AMONG the proviſions for improving the adminiſtration of juſtice, we muſt reckon a ſtatute for correcting ſome

[o] Stat. 23 Hen. VIII. c. 3.
[p] 11 Hen. VII. 25.
* Vid. ant. vol. II. 212.
[q] Stat. 11 Hen. VII. c. 21.
† Vid. ant. vol. II. 437, &c.

abuſes

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abuſes in the ſheriff's court. There was great extortion and colluſion practiſed by under-ſheriffs and their clerks, and bailiffs; the principal of which was, the entering of plaints without the conſent of plaintiffs, and ſometimes where no ſuch perſons exiſted; after which they omitted to attach or ſummon the defendant, but left him to incur defaults, for which they made great levies upon him. To remedy this, no plaint was to be entered without pledges being found; a penalty of forty ſhillings was impoſed on the ſheriff if he entered more than one plaint for one treſpaſs or debt. The party grieved might complain to a juſtice of peace, who had authority to puniſh the ſheriff and his officers: ſeveral other directions were given for ſubmitting this miſchief to the correction of the juſtices of the peace[r].

THE alteration made in the law of crimes and puniſhments in this reign ſeems as remarkable, and of as extenſive conſequence, as any alteration reſpecting the law of property. The criminal code begun now to aſſume a ſanguinary appearance, which every reign ſince has been heightening.

THE changes made in our criminal law conſiſt either in the new crimes which the legiſlature created, or in ſuch regulations as were made for the adminiſtration of juſtice.

ONE treaſon was created in this reign. By ſtat. 4 Hen. VII. c. 18. it was made high-treaſon to counterfeit the coin of any foreign realm permitted to be current here. Another act was made to prevent the circulation of clipped and baſe coin; in which the exportation of bullion to Ireland, or the importation of gold or ſilver coin from thence, is puniſhed with impriſonment; that being the quarter from whence this commodity was moſt frequently conveyed to this kingdom[s].

THE hunting in parks with viſors and painted faces, was puniſhed by ſtat. 1 Hen. VII. c. 7. and if a warrant

[r] Stat. 11 Hen. VII. c. 15. [s] Stat. 19 Hen. VII. c. 5.

was

was iſſued againſt ſuch offender, and he wilfully concealed the offence, or reſiſted, or diſobeyed the warrant, he was guilty of felony.

Stealing women.

IT was made felony by ſtat. 3 Hen. VII. c. 2. to take away any woman againſt her will unlawfully, whether ſhe be maid, widow, or wife; and the takers, procurers, abettors, and thoſe who receive ſuch woman, are all made *principal* felons. A woman ſo taken muſt have ſubſtance in goods or lands, or be heir apparent, and muſt be married, or deflowered, to make the taking an offence under this act. There was a proviſo that this ſhould not extend to a perſon who took a woman claiming her as his ward, or bond-woman *.

THE laſt new felony we ſhall mention was inflicted by ſtat. 3 Hen. VII. c. 14. which made it felony for any ſervant of the king, being inrolled in the cheque-roll, to compaſs or imagine the death of the king, or of any lord, or privy-councillor, ſteward, treaſurer, or comptroller of the houſhold. This offence is to be enquired of by twelve perſons, inrolled in the cheque-roll, before the ſteward, treaſurer, and comptroller of the houſhold. The puniſhing the bare intention to murder a lord, without any overt act declaratory of ſuch intention, makes this a very remarkable proviſion; the ſecurity of theſe perſonages being put on the ſame footing with that of the king. The occaſion of this is ſtated in the ſtatute; that ſuch malevolent deſigns among the houſhold ſervants lead to attempts which endanger the king himſelf; and that a recent fact of that kind had induced the parliament to make this ſtatute.

SOME proviſions were made for the puniſhment of inferior offenders. A ſtatute was made for the ſuppreſſing of riots, and another for the better execution of former laws on that head †. The firſt penal law was now made againſt the canonical offence of uſury. Brokers of ſuch bargains were to be ſet in the pillory, impriſoned half

* Vid. ant. vol. III. 277.

† Stat. 11 Hen. VII. c. 7. and ſtat. 19 Hen. VII. c. 13.

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a-year, and fined twenty pounds [u]. Perſons lending money, or bargaining for lands, or goods, on uſury, were to forfeit half the value [x].

THE execution of penal laws was a ſubject much attended to by this prince. In order to accompliſh this end, the criminal juriſdiction of ſome antient courts was extended, and the courſe of proceeding was greatly facilitated. The moſt material changes of this ſort were made by ſtat. 3 Hen. VII. c. 1. and ſtat. 11 Hen. VII. c. 3. which, among proviſions of real and permanent utility, furniſhed ſome innovations that were afterwards diſapproved and abrogated.

THE firſt clauſe of ſtat. 3 Hen. VII. c. 1. made ſome alteration in the juriſdiction of the council, which had lately been more familiarly called the *ſtar-chamber*. The remaining part of that ſtatute is taken up with ſeveral proviſions relating to criminal juſtice, which we ſhall defer for the preſent.

The ſtar-chamber new-modelled.

THE criminal juriſdiction exerciſed by the king's council we have had occaſion to notice in the early periods of this Hiſtory; and it has been obſerved that they ſat in this capacity ſometimes *en la chambre des eſtoyers*, which had of late years become their moſt uſual place of ſitting; and therefore the council was now moſt commonly called the *ſtar-chamber* [y]. There are many inſtances where this tribunal had exerciſed its authority in the period immediately preceding the time of which we are now ſpeaking [z]. This judicature, in its original eſtabliſhment, was very extenſive, and comprehended a great variety of objects within its cogniſance. As the conſtitution of our legal polity became more ſettled, and the boundaries of juſtice more exactly defined, this extraordinary authority was in proportion circumſcribed. Several ſtatutes had been paſſed im-

[u] Stat. 3 Hen. VII. c. 6.
[x] Stat. 11 Hen. VII. c. 8.
[y] Vid. ant. 87. Lamb. Archeion, 149.
[z] Lamb Archeion, 149 to 154. Inſt. 60, 61.

poſing

poſing reſtrictions on the acceſs of complainants to this extraordinary judicature[a]. But, notwithſtanding this apparent jealouſy of the council, the parliament had, at other times, gradually reſtored to it ſome of its antient authority, by referring to that tribunal the cogniſance of many enormities which were before enquirable at common law, and which, as ſuch, were not to be examined by the council. Thus, compared with its original powers, the prerogative-judicature of the king in council was much reſtricted by poſitive conſtitutions; and from being, in ſome degree, above the law, had ſhrunk into a compaſs ſo ſmall, and had withal become ſo precarious in its foundation, that Henry, who meant to make much uſe of this court, thought it ſtood in need of ſome parliamentary ſanction to give it ſupport and authority. Theſe were the reaſons which probably led to enacting ſtat. 3 Hen. VII. c. 1. a ſtatute which did not erect, as ſome have imagined, but only *new-modelled* the court of *ſtar-chamber*. Indeed, the eſtabliſhment given to this court by the ſtatute of Henry, was partial, and confined to certain inſtances therein enumerated. The deſign, ſcope, and extent of this act will be beſt ſeen by a rehearſal of it.

The preamble ſtates, that "the king, remembering how by unlawful maintenances, giving of liveries, ſigns and tokens, and retainers by indentures, promiſes, oaths, writings, or otherwiſe, embraceries of his ſubjects, untrue demeanings of ſheriffs in making of pannels and other untrue returns, by taking of money by juries, by great riots and unlawful aſſemblies, the policy and good rule of this realm is almoſt ſubdued; and for the not puniſhing of theſe inconveniences, and by occaſion of the premiſes, little or nothing may be found by inquiry;" that is, by the ordinary proceeding by an inqueſt of jurors; "whereby the laws of the land in execution may take little effect, to

[a] Vid. ant. vol. III. 273.

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the increaſe of murders, robberies, perjuries, and unſureties of all men living," &c. for the reformation of which it was now ordained, that the chancellor, treaſurer, and privy-ſeal, or two of them, calling to them a biſhop and a temporal lord, being of the council, and the two chief juſtices, or, in their abſence, two other juſtices, upon bill or information put to the chancellor for the king, or any other, againſt any perſon for any miſbehaviour abovementioned, *have* authority to call before them by writ or privy-ſeal the offenders and others, as it ſhall ſeem fit, by whom the truth may be known; and to examine and puniſh after the form and effect of ſtatutes thereof made, in like manner as they ought to be puniſhed, if they were convict after the due order of the law.

THIS is the ſubſtance, and nearly the very words, of the ſtatute; which plainly point out the occaſion of this new regulation, the objects of cogniſance, the judges, the proceſs and proceedings, with the power of puniſhing; from which it is manifeſt, that the king's council derived from this ſtatute an enlargement of its judicial authority. There is nothing prohibitory of the former juriſdiction or mode of proceeding here; but that is, on the contrary, recognized, as it were, and affirmed by the very cautious manner in which the enacting part of this ſtatute is worded: for, inſtead of ſaying that thoſe great officers *ſhall* have authority, it barely declares that they *have* authority; thereby plainly intimating an apprehenſion of a pre-exiſtent authority, and only declaring more particularly the exerciſe of it in ſome certain caſes.

IT ſhould ſeem, that whereas, before this ſtatute, the king and council did not admit any complaint but ſuch only as carried with it, according to *Lambard*'s expreſſion, a reaſonable ſurmiſe of maintenance of their juriſdiction [b]; for proof alſo of which the complainant ought by ſtat. 15

[b] Lamb. Archeion, 167.

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Hen. VI. c. 4. to give ſureties; now, by this act, beſides that ancient authority, three only of the council, namely, the chancellor, treaſurer, and privy-ſeal (taking to their aſſiſtance others thereby appointed), were enabled to hear and determine ordinarily of thoſe eight offences abovementioned, and that without any manner of ſuch ſuggeſtion or ſurmiſe at all.

Some defects of this ſtatute were ſupplied by ſtat. 21 Hen. VIII. c. 20. by which the preſident of the council is added to the former three principal perſons. A doubt which aroſe upon this act, ſoon after the paſſing it[c], whether the biſhop, lord of the council, and juſtices, were only aſſiſtants, or had equal authority with the three great officers, was removed by this later act; which declares, that they were only there for their advice. Laſtly, the bill or information, which by the former act was to be exhibited to the chancellor, was by the later to be put in generally; that is, to the king, as formerly.

Thus by the operation of theſe two ſtatutes, the abovementioned eight offences, which before were moſtly cogniſable by indictment or action, might now be arraigned and tried without any inqueſt or jury, on the bare examination either of witneſſes or of the parties themſelves. This innovation was deviſed, ſays the ſtatute, becauſe the ordinary proceeding at common law was found unable to reach ſuch offenders. However, the puniſhment to be inflicted was ſuch as would have followed, had the proſecution been at common law.

The alteration made as to theſe offences by this act, conſiſts principally in the circumſtances of proceſs, judges, and trial; the nature of the crime and its puniſhment remaining as it was before. If, therefore, the council departed from the meaſure of the penalty, or in any conſider-

[c] 8 Hen. VII. 13.

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ation of the crime varied from the judgment of the common law, it muſt be underſtood, that they then acted under the former authority which they originally poſſeſſed as the council of the king, and not by virtue of theſe ſtatutes. For that authority ſtill remained; and the council, in the underſtanding of the law, and in the execution and practice of their authority, ſat and acted in both capacities, as appears by the books of entries during the reigns of Hen. VII. and Hen. VIII. which two princes did often ſit there in perſon, under each juriſdiction [4].

It is to this mixture of judicial power that the ſtar-chamber was indebted for the tremendous authority which it began to exerciſe ſoon after this time. While the ſtatute of Hen. VII. gave vigour and efficacy to its proceedings, the immeaſurable extent of its ancient judicature furniſhed an inexhauſtible ſource of crimes and puniſhments, to be called forth on all occaſions, and for every purpoſe. It became, on that account, the happieſt inſtrument of arbitrary power that ever fell under the management of an abſolute ſovereign; as may be ſeen in the hiſtory of the princes of the houſe of Tudor, who owed the maintenance of their high prerogatives principally to the aid of this tribunal. The ſtar-chamber exerciſed a criminal juriſdiction almoſt without limitation, and altogether without appeal; taking upon it to judge and animadvert upon every thing in which the government felt itſelf intereſted. It became, in truth, as much a court of ſtate, if the expreſſion may be allowed, as a court of law, by puniſhing all obnoxious perſons, who, tho' they had been guilty of no breach of the law, had, nevertheleſs, ſome way or other offended the prince or his miniſters. As the members of this tribunal were the confidential officers of the crown, there was no difficulty in thoſe times of procuring a ſentence againſt of-

[4] Lamb. Archeion, 168. 171, 172, 173.

fenders

fenders of that deſcription. The penalties inflicted by this court were ſo extravagantly ſevere, and the very deſign of its judicature ſo repugnant to the ſpirit of a free conſtitution, that it was always viewed with the greateſt abhorrence by the ſubject; and at length, when political liberty began to vindicate its claims with more boldneſs, was totally aboliſhed by parliament[e].

Informations at the aſſiſes and ſeſſions.

ANOTHER innovation upon the common law, and of a much more general nature than the former, was effected by ſtat. 11 Hen. VII. c. 3. The commencing of proſecutions by information had grown into common uſe in the reigns of Henry VI. and Edward IV. and were generally confined to penal ſtatutes, and likewiſe to the court of exchequer and king's bench. But the abovementioned ſtatute permitted juſtices of aſſiſe and of the peace, upon information, to hear and determine without a jury all offences (except treaſon, murder, or felony) committed againſt any ſtatute not repealed. This act was probably dictated by that prevailing inclination of Henry and his miniſters to enforce the obſervance of old penal ſtatutes, or rather to compel payment of ſuch penalties as were incurred by a breach of them. This ſcheme of filling his exchequer was unpopular, and therefore not fit to be truſted, in any part of it, to the verdict of common jurors. Whether this, or a general jealouſy of the trial by jury, was the reaſon of the law, it was a regulation not to be endured, and was repealed in the beginning of the next reign[f].

IT was by colour of this act that Empſon and Dudley were enabled to effect ſuch infinite oppreſſions and exactions upon the people. For this purpoſe, too, a new office was erected, and thoſe two perſons were made *maſters of the king's forfeitures*. The reaſon of repealing this act is ſtated to be, "for that by force thereof it was known ma-

[e] By ſtat. 16 CAR. I.

[f] By ſtat. 1 Hen. VIII. c. 6. c. 10.

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ny ſiniſter, crafty, feigned, and forged informations had been purſued againſt many of the king's ſubjects, to their great damage and vexation."

SUCH were the innovations made in the judicature of our criminal courts: we are now to notice what alterations were made in the courſe of proceeding and proſecution, which brings us back to the famous ſtat. 3 Hen. VII. c. 1. We have ſeen, in the laſt period, ſome parliamentary regulations regarding jurors, dictated by a ſuſpicion that they did not diſcharge their truſt with impartiality and truth [z]. Among Henry's ſchemes for a due execution of the law, one was to oblige inqueſts to be very ſtrict and regular in making their preſentments. In the clauſe of ſtat. 3 Hen. VII. c. 1. next after that for the inſtitution of the new form of the ſtar-chamber, it is ordained, that juſtices of the peace "may take by their diſcretions an in-"queſt to enquire of the concealments of other inqueſts;" and every perſon of ſuch inqueſt was to be puniſhed for the concealment by the diſcretion of the juſtices. This was a refinement upon the proceeding by inqueſt in criminal matters, and was in the nature of an attaint in civil cauſes.

Appeal of murder.

AN appeal of homicide ſtill continued a common mode of proſecution, notwithſtanding the frequency of indictments; and the genius of the times ſo diſpoſed perſons to favour this vindictive action, that no indictment of murder uſed to be tried till the year and day after the fact (the period limited by law for commencing an appeal), leſt the offender, being acquitted or convicted on the indictment, might plead ſuch acquittal or conviction in bar of the appeal. After this ſpace of time had elapſed, it often happened, either by the death of witneſſes, or the zeal for juſtice ſubſiding, that proſecutions were entirely dropped, and the delinquent eſcaped unpuniſhed. Again, an appellor

[z] Vid. ant. vol. III. 280. 286.

muſt ſue in perſon; and the ſuit being long and expenſive, he frequently became tired of the proſecution; ſo that, with all theſe impediments, juſtice was not regularly enforced againſt this kind of offenders. To remedy this in future, the following regulations were made by this act. It was enacted, that if any principal or acceſſary in murder be indicted, he may be arraigned and tried at the king's ſuit at any time within the year, and not tarry the year and day for the appeal; and ſhould he be acquitted, the juſtices are not to diſcharge him, but either remand him to priſon, or let him to bail, till the year and day is paſt; within which time the perſon ſo acquitted, or even if he ſhould be attainted (and not have the benefit of his clergy), the perſon ſo attainted may yet be appealed by the wife or next heir before the ſheriff and coroners, or in the king's-bench, or at the gaol-delivery. To facilitate likewiſe the proſecution of ſuch appeal, it was allowed, that where battail did [h] not lie, the appellor might ſue by attorney.

THE power of trying an offender a ſecond time for the ſame offence is confined to caſes where the party had not had his clergy, becauſe a clerk ſo delivered to the ordinary was to be ſubjected to canonical puniſhment, and was no longer within the juriſdiction of the temporal judge. This proviſion, though reaſonable when firſt made, has occaſioned, by the alteration that has ſince taken place in the diſpoſal of clerks, a very ſingular diſtinction; for it now happens, that though a man acquitted of an indictment for murder may afterwards be appealed, yet a perſon who is found guilty of what is at preſent conſidered as a leſs offence, under the name of manſlaughter, is not liable to be appealed under this ſtatute, becauſe his clergy has been allowed.

THE other parts of this act either enforce the obſervance of certain common-law proceedings in caſe of murder,

[h] Vid. ant. vol. III. 419.

or

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or direct ſome new methods to be followed on the like occaſion.

It was declared, in the ſpirit of our old law [j], that ſhould any one be murdered in the day-time, and the murderer eſcape, the townſhip ſhould be amerced; and that as well the coroner ſhould enquire thereof upon view of the body, as juſtices of the peace, who were to certify it into the king's bench. Coroners were to deliver their inquiſitions before the juſtices of the next gaol-delivery within the county; and if the murderer was in gaol, they were to proceed to the trial of him, or put the ſaid inquiſitions to the king's bench. For this trouble the coroner was to have a fee of thirteen ſhillings and fourpence for the inquiſition, to be paid by the townſhip if the murderer had no goods: a penalty was inflicted for neglect of duty. As a part of the ſame ſcheme for preventing public diſorders, and for keeping the police under good government, it was directed, that juſtices of the peace ſhould certify at the next ſeſſions all recogniſances of the peace, that the party bound might be called; and if he did not appear, the recogniſance, with the record of default, was to be certified into the chancery, king's bench, or exchequer.

Bailing felons by juſtices of the peace.

The authority of juſtices of the peace was further ſtrengthened by c. 3. of the ſame ſtatute. By ſtat. 1 Rich. III [k]. *every* juſtice of the peace was permitted to bail perſons arreſted for light ſuſpicion of felony; but this authority, as it was given to every ſingle juſtice, had been abuſed, and many heinous offenders, not mainpernable by law, had been let out upon the country; ſo that this ſtatute, which was deſigned only to alleviate the condition of felons before trial, had contributed to obſtruct the execution of juſtice. To obviate this, that ſtatute was now repealed; and it was further ordained, generally,

[j] Vid. ant. vol. II. 22.

[k] Vid. ant. 228.

that

that the juſtices of peace in every county, city, or town, *or two of them at leaſt*, ſhall have authority to let to bail perſons mainpernable by law, to the next general ſeſſions, or gaol-delivery; and one of them at leaſt was to certify the ſame to the ſeſſions or gaol-delivery, under the penalty of 10*l*. Sheriffs and keepers of gaols were to certify the names of their priſoners at the next gaol-delivery, to be kalendared before the juſtices of the deliverance of the gaol, under the penalty of 5*l*. In this manner was the article of bailing felons, and the delivery of gaols, begun to be put in the courſe it has continued in ever ſince. The ſure cuſtody of priſoners was provided for by a ſtatute, which declared all county gaols to be in the keeping of the ſheriff, and ordained ſeveral penalties upon him and his officers, if they ſuffered felons to eſcape[1].

In the next year a proviſion was made which it was thought would contribute to a due diſcharge of the important truſt repoſed in theſe magiſtrates. By ſtat. 4 Hen. VII. c. 12. a proclamation, therein ſet forth, is directed to be read at the ſeſſions four times a-year. This exhorted perſons who had cauſe of complaint againſt any juſtice, to ſtate their grievance to any of his fellow-juſtices in the neighbourhood; and if he gave them no redreſs, then to the juſtices of aſſiſe; and ſhould they ſtill think themſelves not redreſſed properly, to the king or his chancellor.

Benefit of clergy.

The benefit of clergy, that impolitic exemption, began now to be modelled by the legiſlature almoſt into a new form, and applied to the purpoſe of penal reſtriction with reaſon and effect. It became a diſtinction between offences, and not between perſons; and being taken away from offenders in ſome crimes, or ſome circumſtances of crimes, and not in others, it ſerved to proportion the

[1] Stat. 19. Hen. VII. c. 10.

degree

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degree of puniſhment according to the true meaſure of diſtributive juſtice, the heinouſneſs of the offence.

THIS privilege being deſigned at firſt only for the actual clergy, was, it has been ſeen, by degrees extended to all who could read, and ſo were *capable of becoming clerks*. Though the ſtat. *de clero*, 25 Ed. III. by ſpecifying the orders of clerks that ſhould be intitled to this privilege, excluded actual laymen from claiming clergy; yet the former latitude ſoon prevailed again, and a capacity to read became once more ſynonymous with clergy[m]: it had alſo been the uſage to allow it to all ſuch felons in every ſingle offence. This deviation from the original idea, which permitted every one who could read to commit any felony with impunity, though an enormous abuſe, did not ſo ſhock the underſtandings of men bigotted to an eccleſiaſtical tyranny, as to excite at once an entire reform. The legiſlature proceeded gradually and with reverence for the ancient privilege they were about to invade; and attacking firſt thoſe who had leaſt claim to indulgence, they ſacrificed all lay offenders to the demands of juſtice. By ſtat. 4 Hen. VII. c. 13. laymen are allowed their clergy only once; and (probably to prevent their impoſing on the court at a ſecond trial, and praying their clergy again) it is ordained, that every perſon ſo convicted ſhall, if it is for murder, be marked with an M upon the brawn of the left thumb, and if for any other felony with a T; which marks are to be made by the gaoler in open court in preſence of the judge, before the party is delivered to the ordinary. Thoſe who are actual clerks, are, upon a ſecond trial, if they have not ready their letters of orders, nor a certificate thereof from the ordinary, to have a day appointed by the juſtices to bring them in; and if they fail at the day, they are to loſe the benefit of their clergy, like thoſe who are not in orders.

[m] Vid. ant. vol. III. 421.

THUS

THUS was the ancient claim of clergy taken away from certain perſons, who were conſidered as not anſwering the deſcription of clerks properly intitled to that privilege. This was followed about three years after by another ſtatute, which related not to particular perſons, but to particular offenders, who were thereby deprived of this benefit. The ſtat. 7 Hen. VII. c. 1. having provided ſeveral penalties in caſes of deſertion from the army, enacts, that ſoldiers departing out of the king's ſervice without the licence of their captain, ſhall be deemed felons; and "foraſmuch (ſays the ſtatute) as this offence ſtretcheth "to the hurt and jeopardy of the king our ſovereign lord, "the nobles of the realm, and of all the common-weal "thereof," a perſon ſo offending ſhall not enjoy the benefit of his clergy. Such prevalent reaſons did the parliament think it neceſſary to ſtate for curtailing this privilege, which had been enjoyed by felons for ſeveral centuries.

SOME few years after, an accident happened, which brought the ſubject of clergy again under conſideration of the legiſlature. One *James Grame* had murdered his maſter, and a ſpecial act of parliament was made for the puniſhment of this heinous offence, which otherwiſe would have eſcaped under the exemption of clergy. It was therefore enacted by ſtat. 12 Hen. VII. c. 7. that this perſon ſhould be attainted of the murder, as a felon, in petit-treaſon; and ſhould be drawn and hanged, as perſons who are no clerks, notwithſtanding any privilege of clergy. It was alſo further ordained, that for the future, if any lay perſon prepenſedly murder his lord, maſter, or ſovereign immediate, he ſhall not be admitted to his clergy.

THUS far, and no farther, did the legiſlature venture to go, in taking away the privilege of clergy, during this reign. They confined themſelves to an inſtance where the ſafety of the kingdom was immediately intereſted, and

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to a crime which ſtood in the higheſt order of private offences, namely, petit-treaſon. When this way of heightening the ſeverity of our penal law was once pointed out, it will be ſeen in the next and ſucceeding reigns with what quick ſteps we have haſtened to encreaſe the number of thoſe caſes, in which the blood of our fellow-citizens may be ſhed by law. It will be proper in this place to obſerve, that we find in this reign a ſingular inſtance of the legiſlature interpoſing to give vigour and energy to the eccleſiaſtical court. By ſtat. 1 Hen. VII. c. 4. it is expreſsly declared to be lawful for biſhops and other ordinaries to puniſh prieſts, clerks, and religious men for incontinence; for which offence they may commit them to priſon at their diſcretion, and ſhall be liable to no action of falſe impriſonment for ſo doing.

THESE are all the alterations made in our law by ſtatute in this reign. From the deciſions of courts, we ſhall ſelect ſuch matter chiefly as relates to the new points that had lately been agitated there; to limitations of eſtates, to uſes, to actions of ejectment and upon the caſe, the proceedings in equity, to which we ſhall add ſome few points of criminal law. It is not for want of materials that our enquiry will be thus circumſcribed, but to avoid dwelling upon queſtions that have already engaged much of our attention, and that our Hiſtory may keep pace with the ſucceſſion of objects, and duly preſent them to view as they make their appearance, or undergo any change in their advancement. Allowing ourſelves to enlarge a little upon theſe topics, we ſhall be content to remark, in general, of the learning of this reign, that it is of a ſort with that of Henry VI. and Edward IV.; that queſtions are diſcuſſed with great preciſion, and much at large; that many points of doubt were ſettled; and that the Year-book of this king is as valuable, and perhaps, on the latter conſideration, more ſo than any other in the annals of our law.

WE

WE have before ſeen the opinion of Littleton upon a perpetuity created by judge Rithel, where his objections to ſuch kind of gifts are ſtated with great preciſion and earneſtneſs *. However, it ſeems to have been a prevailing opinion, that conditional reſtrictions, in ſome ſhape, might be impoſed on limitations in tail †. In 11 Hen. VII. a gift of land was made to a man in tail, with remainder to his right heirs in tail, upon condition, if the tenant in tail or his heirs aliened in fee, that the donor or his heirs might enter. This condition was held good by all the juſtices. However, it may be remarked, that this reſtriction ſo far differed from that againſt which Littleton argued, that in this the donor or his heirs were to take advantage of it by entry; there the benefit was to accrue to the next in limitation; whoſe entry, on account of forfeiture, was not analogous to the eſtabliſhed courſe and deſign of ſuch penal conditions, which were always reſerved to be taken advantage of by the maker: and Littleton himſelf, in another place, maintains ſuch condition to be good, when reſerved to the donor; and the reaſon he gives is, becauſe it was in aid and to ſupport the deſign of the ſtatute *de donis* ‡. It muſt at the ſame time be obſerved, that this reſolution was after recoveries had been allowed to bar eſtates tail; and a great partiality to entails muſt ſtill have ſubſiſted, for the judges to determine ſuch condition to be good, when the eſtate of the tenant in tail on which the condition was annexed might have been barred, with all claims and rights, whether by condition or otherwiſe. But by the opinion of the judges in this caſe, it ſhould ſeem, that a power to reſtrain the ſuffering a recovery was conſidered as reſiding in the donor; that being a ſpecies of alienation.

THE learning of uſes in this reign ran into great nicety and refinement. Beſide the progreſs they would of

Uſes.

* Vid. ant. vol. III. 314.
† 11 Hen. VII. 66.
‡ Sect. 364.

them-

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themſelves, as a ſubject of legal diſcuſſion, naturally make towards attaining a more artificial form, particularly as they were now connected with queſtions of entails, the ſtatute of Richard III. by giving a power to *ceſtui que uſe* concurrent with that of the feoffee to make common-law gifts and conveyances, gave riſe to perplexities of a new ſort.

THE following are inſtances of the ſort of argument which aroſe upon this ſtatute, and of the conſtruction it received in the courts. If *ceſtui que uſe* in tail made a feoffment in fee, this bound him and his feoffees during his life, by ſtat. 1 Rich. III. but after his death, his heir or the feoffees might enter, for it was only a grant of his own eſtate; the like of a tenant for life of a uſe; for his feoffment could not induce a forfeiture, a uſe not being ſuch property as could be forfeited[s]. It was held, that when *ceſtui que uſe* made a leaſe for life, the reverſion was in the feoffees who ſhould have the action of waſte, notwithſtanding there was no privity. It was held, that a reſervation of rent might be made on a grant under this ſtatute, though there is no mention of it in the ſtatute[t]; but it could not be made without deed. If *ceſtui que uſe* made a feoffment on condition, and entered for the condition broken, he might retain it abſolutely againſt his feoffees; for as the fee and right was intirely out of them by the feoffment, they could not by law enter upon him; though it was held in caſe of a man ſeiſed *in jure uxoris*, that he, upon his re-entry, ſhould be ſeiſed in the former right and not in his own[u].

CESTUI *que uſe* deſired in his will, that his executors might ſell his woods; and this was held to be warranted by ſtat. 1 Rich. III[x]. If a man deviſed his land to be ſold by his feoffees for payment of his debts, and the feoffees neglected to do it, the creditors might have a

[s] 4 Hen. VII. 18.
[t] 21 Hen. VII. 25.
[u] 5 Hen. VII. 5.
[x] 14 Hen. VII. 14.

ſubpœna.

ſubpœna. If the deviſe was general, it was agreed, that the executors, and not the feoffees, were the proper perſons to ſell [u]. Notwithſtanding this apparent liberality, yet ſo ſtrictly was *ceſtui que uſe* tied up to the words of the ſtat. 1 Rich. III. that all the juſtices held, he could not make livery by attorney, becauſe that power was not given by the act [x]. Again, it was holden by all the juſtices of the common-pleas, that the *ceſtui que uſe* could not take beaſts damage feaſant in his own name, as he had nothing but the occupation at the ſufferance of the feoffees, who might have the action, and ſo the treſpaſſer would be puniſhed twice; but thoſe to whom *ceſtui que uſe* conveyed any intereſt under the ſtatute, might juſtify in their own names: the ſtatute therefore ſeems wholly made in favour of the alienee [y].

In the ſeventh year of the king, it was agreed by the whole court, that execution of a ſtatute merchant or ſtaple, or a writ of *elegit*, might be had againſt the land of *ceſtui que uſe*; for tho' the word execution was not in the ſtatute, yet this ſort of execution was conſidered as within the equity of it, being in effect a ſort of *leaſe* [z]. Thus it appears, that ſtat. 19 Hen. VII. was ſo far only a declaration of the common law [a]. The power given to *ceſtui que uſe* by this ſtatute, was wholly unconnected with any intereſt; but this, ſuch as it was, together with the common-law power and intereſt of the feoffees, produced ſuch a complication of rights and titles, as muſt give riſe to many intricate queſtions of law.

As to conveyances to uſes, hitherto we have taken notice only of feoffments and fines to a uſe; but it appears in this reign that a new method had been practiſed, which, particularly ſince the ſtatute of Richard III. had entirely

[u] 15 Hen. VII. 11.
[x] 9 Hen. VII. 26.
[y] 15 Hen. VII. 2.
[z] 7 Hen. VII. 6.
[a] Vid. ant. 139.

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Bargain and ſale.

ſuperſeded the neceſſity of any common-law conveyance: this was *by bargain and ſale*. This was done two ways: either the *ceſtui que uſe* ſold to another the uſe, and the feoffee from that time ſtood ſeiſed to the uſe of the vendee; or, the bargainor being ſeiſed of the actual freehold, ſold the land to the vendee; in which caſe he ſtood ſeiſed to the uſe ſo ſold. This was tranſacted without even the formality of a deed, and was held good even in a court of common law, by virtue of the late ſtatute[b]. The validity and ſenſe of this conveyance depended upon the fairneſs of the contract. The vendee having paid the money, had done that which imported in itſelf a good conſideration; and as in the laſt of the two inſtances before ſtated, he could not have the land, there being no conveyance of it; and he had really contracted for the uſe in the former, which was the only thing reſiding in the *ceſtui que uſe*; it was reaſonable that he ſhould have a title to the profits; which might, even before the ſtatute of Richard III. be enforced in a court of equity.

THUS a bargain and ſale reſted upon the goodneſs of the conſideration. Indeed, in all caſes, ſo eſſential was a conſideration to give being to a uſe, that it grew to be a maxim, that where a feoffment was made without conſideration, the uſe reſulted back to the feoffor, and the feoffee was ſeiſed only to the uſe of the feoffor. The reaſon of which was this: The determination on the validity of uſes being left with the chancellor, who judged according to conſcience and equity, he thought that when a feoffment was made, and it remained doubtful whether it was in *uſe*, or in *purchaſe*; conſidering that purchaſes were notorious, and would generally prove themſelves; and that uſes were ſecret, and needed ſtrong reaſons to ſupport their exiſtence; he, perhaps, thought it more expedient to put a purchaſer to prove his conſideration, than the feoffor and his heirs to

[b] 11 Hen. VII. 6. b.

prove

prove the truſt; by which means the intendment was always in favour of the feoffor's uſe, and the purchaſer muſt produce proof of ſome conſideration to ſhew that it paſſed to him[c].

HENCE it was that a conſideration became the great point upon which thoſe deeds of conveyance turned, that were afterwards invented in order to raiſe and to convey uſes.

Covenants to ſtand ſeiſed.

ONE of theſe was by way of *covenant*; which had been attempted in this reign for the firſt time, but without ſucceſs. The following was a caſe of that kind: It was covenanted by a man and his wife and *B.* that *B.* ſhould have the land to him and the heirs of his body; and upon default of ſuch iſſue, that the land ſhould remain to the huſband and his wife in fee. This was held to be void. Another inſtance, where this new conveyance was again tried, was, where it was covenanted that the lands and tenements of one ſhould *deſcend*, revert, or remain, to his ſon and heir apparent in conſideration of marriage, and to the heirs of him and his wife. It was adjudged that this covenant did not change the uſe, for two reaſons: one was, that it was a matter *in futuro*, and not executed; the other, becauſe it was put in the alternative, and therefore was uncertain whether to remain *or* revert. It was accordingly held, that the parties had no remedy but by action ocovenant. When another covenant of marriage of the ſame nature was brought in queſtion, in 21 Hen. VII.[d] the ſame opinion was ſtill adhered to.

BUT altho' theſe deeds were rejected by the courts of law, which ſeemed determined not to allow that an uſe ſhould be raiſed by covenant, it cannot be doubted but ſuch conveyances met with favour in the court of chancery; which, conſidering the nature of an uſe as exiſting merely by contract and agreement, could hardly heſitate about decreeing the ſpecific performance of a deed ſo peculiarly

[c] Bacon's Tracts, 317. [d] 21 Hen. VII. 18, 19.

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adapted to the purpoſe for which it was formed. We are induced to think they really were ſupported in chancery, from the many precedents now extant [e] of ſuch covenants made in this reign: great eſtates were moſtly ſettled in this way; and in the next reign we ſhall ſee that theſe covenants were expreſsly adjudged legal by the courts of law.

THESE deeds were uſually made on the occaſion of marriage, in order to make a ſettlement of ſome part of the eſtate for the benefit of the widow and the iſſue. They were made ſometimes before, and ſometimes after, marriage; and were expreſſed to be made on that or ſome other conſideration. The diſpoſition thereby uſually made, was, an eſtate for life to the huſband and wife *jointly*, remainder to the iſſue of the marriage in tail, with remainders over. Theſe were again qualified with proviſos and conditions, upon which eſtates were to ceaſe or commence, and uſes were to ariſe or be revoked, in a ſtile and with a length unknown to the ſimplicity of the common law. Theſe novelties, however, were greatly multiplied by the fancies of conveyancers in the next and ſubſequent reigns.

THE joint eſtate for life to the huſband and wife was intended as a maintenance for the wife, if ſhe *ſurvived*, in lieu of her dower, of which ſhe was deprived where her huſband's eſtate was in uſe, and not in ſeiſin. This was now the caſe with much of the landed property of the kingdom; and therefore theſe *jointures*, as they were called, were become very common.

THE moſt important deciſion in this reign, was that which gave a new efficacy to ejectments, by adjudging a recovery of the term as well as damages; the conſequence of which was, that writs of aſſiſe of novel diſſeiſin, with writs of entry and of right, went out of uſe; and a title to land was, in the ſubſequent periods of our law, generally tried by ejectment.

[e] Vid. Mad. Form. Angl.

AN

Ejectione firmæ.

AN action *de ejectione firmæ*, or ejectment, we have ſeen was a remedy by which a leſſee being diſpoſſeſſed of his term in land, recovered damages againſt the wrong doer, for the treſpaſs in ejecting him. It had therefore a different object from the other remedies in ſuch caſes; one of which was a writ of covenant, the other a writ of *quare ejecit infra terminum*. The firſt lay only againſt the leſſor, and had long ceaſed to give the plaintiff any reſtitution, but merely damages for the ejectment: the ſecond lay only againſt the alienee of the ejector. The *ejectione firmæ* gave a remedy againſt the ejector, but it was only in damages; ſo that with all theſe forms of action, a termor for years might, notwithſtanding, be actually deprived of the poſſeſſion of his term, without reſtitution by the common law, if the land continued in the hands of the ejector. Leaſes for years had now grown to be of greater value, from the length to which it had become the practice to grant them: accordingly, the court of chancery began to take that cogniſance of them which the common law refuſed, but which they at preſent deſerved; and by a rule of redreſs, in which that court much delights, uſed to decree the ejector to make a ſpecific reſtitution of the land for the remainder of the term.

THE courts of law ſeemed lately to incline towards adopting this method of doing ſubſtantial juſtice. In the reign of Edward IV. we have ſeen it was declared by Fairfax [f], that a plaintiff in ejectment ſhould recover poſſeſſion of his term, as he would in a *quare ejecit infra terminum*; and it was accordingly ſo adjudged ſolemnly in 14 Hen. VII [g]. A copy of the record of this caſe is ſtill to be ſeen in Raſtall [h], where the judgment is, *quod recuperet terminum ſuum prædictum*; a judgment not warranted by the original writ, which goes only to damages for the treſpaſs, without any hint at reſtitution. Soon af-

[f] Vid. ant. vol. III. 390.
[g] Jenk. Cent. pa. 67.
[h] 14 Hen. VII. 24. b.

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ter this important reſolution, ejectments were applied to recovering poſſeſſion of land, and trying titles, as a remedy more ſimple, and leſs inconvenient and tedious, than the multifarious and complicated proceedings in the great variety of real actions.

THAT an ejectment in this manner might reſtore the poſſeſſion where a *bonâ fide* termor in lawful and permanent poſſeſſion was actually ejected, is obvious enough; but how the ſame proceeding could be applied to try titles, in all caſes, it is not perhaps ſo eaſy to imagine.

IT ſhould ſeem that the firſt way of bringing ejectments to try titles was plain and regular, differing nothing or very little from what this action was, when brought to redreſs a real treſpaſs, and to recover damages for it. Something was to be contrived in exact conformity with ſuch original object. As a term was to be recovered, a term muſt firſt be created, and an ejectment from that term muſt be effected, upon which the action was to be grounded. It is probable, then, that a perſon claiming title uſed to enter on the land, and there ſeal a leaſe to *A.* This tranſaction might or might not be known to the tenant in poſſeſſion. The conſtruction of law upon this would be, that, of the two tenants, he was the treſpaſſor who had no title to the poſſeſſion; and he barely by being there, without any other act, committed, in law, an ejectment of the other; an ejectment, like a diſſeiſin, being a wrong which a man might admit himſelf to have ſuffered, merely to take advantage of the remedy which the law in ſuch circumſtances would give him. *A.* the leſſee, would, for the preſent purpoſe, ſuppoſe the title to poſſeſſion to be in himſelf; and the two requiſites for this action being obtained, he would ſerve a writ of treſpaſs and ejectment againſt the tenant in poſſeſſion, declare, and go on to trial. Then the plaintiff *A.* produced the title of his leſſor, and the defendant the tenant produced that of his leſſor; and ſo the right