was completely examined; for the title to make the leaſe being enquired into as a preſatory matter, they thereby collected who was the treſpaſſor; which was the direct point of diſcuſſion in this action.

THIS ſeems to have been the obvious, and was probably the firſt way in which a title to land was tried by ejectment. It was regular and ſimple, conſiſtent with the proceſs and proceeding in other actions; but the legal notion of treſpaſs and ejectment was of ſuch latitude, as to leave an opening for fraud and artifice to introduce ſome ſingular novelties into the proceeding by ejectment. If the tenant might be conſidered as a treſpaſſor by continuing in the poſſeſſion after the leaſe made to *A.* ſo might every one of his ſervants, and every ſtranger who *caſually* came on the land; and theſe, equally with him, might be made defendants, and put to ſhew by what authority they were there. The perſon claiming title would ſometimes take advantage of this, and get a friend to come on the premiſes juſt after *A.* had been put into poſſeſſion by ſealing the leaſe. This made him inſtantly, in law, a treſpaſſor and ejector. He was ſerved afterwards with a writ and declaration, upon which he would give the plaintiff judgment by default; and an *habere facias poſſeſſionem* iſſuing, the tenant in poſſeſſion was turned out, in order that the plaintiff might have full and clear poſſeſſion according to his judgment; the tenant being put to the neceſſity of bringing an ejectment, in his turn, to recover back the land.

A PRACTICE like this, ſo unfair and unjuſt, could not long ſubſiſt: the courts took it up, and, in order that the tenant might always be in a capacity to defend himſelf, made it a rule, that execution ſhould not iſſue, till the ejector, if a ſtranger, had given notice to the tenant that an action was commenced againſt him, ſubmitting to him whether he would defend it; upon which the tenant was allowed to defend it, in *his* place. However, not-

CHAP. XXVII.

HENRY VII.

withſtanding this rule took away all the advantage gained by theſe clandeſtine ejectments, the practice of proceeding firſt againſt ſome ſtranger, called ſince a *caſual ejector*, was ſtill kept on foot; for the judgment obtained in this manner remained ſtill good in law, notwithſtanding the tenant was admitted to try his right: it put him under the neceſſity of defending the action, leſt he ſhould be turned out; and, ſhould it be determined by a jury in favour of the plaintiff, execution would iſſue on that much ſooner than could be obtained by judgment on the verdict.

THUS did ejectments receive a new form, owing to circumſtances neceſſarily attending them, and to certain conſequences following from the legal properties of a treſpaſs. As there can be little doubt but an ejectment was conducted in the ſimple manner we have above ſuppoſed, when firſt made uſe of to this purpoſe; ſo there can be little doubt that it became, very ſoon after, the practice to make a caſual ejector, and to proceed as juſt related; the leſſee and caſual ejector being real perſons, as well as the entry and ejectment real facts. Such the practice continued till the end of queen Elizabeth's reign, and ſome years after, when the practicers got into the habit of ſhortening the proceſs very materially; and the judges endeavoured to expedite this uſeful action by ſome orders of court; ſo that, all together, it is now become a very ſingular and complicated proceeding.

THOUGH it had been adjudged that the term ſhould be recovered in ejectment, it cannot be ſuppoſed that damages were not, as formerly, recovered for the injury ſuſtained by loſing the intermediate profits; judgment therefore uſed to be as well for the meſne profits as the term. In after-times, when an ejectment came to be conſidered rather in the light of a real action, the plaintiff rarely prepared himſelf to prove the actual damages; upon the ejectment therefore he took only nominal damages, and

and afterwards brought a new action of treſpaſs for the meſne profits; of which action there is no mention till ſome time after the reign of queen Elizabeth.

As this action of ejectment, in the form of it, is for the treſpaſs, and not for the right; every freſh treſpaſs, which could eaſily be effected in the way above ſtated, is a freſh cauſe of action, and the right will every time be incidentally examined; very different from trying a right in ſome real action, where a judgment once given was either a final bar, or drove the party to a writ of a higher nature, very often more tedious in its proceſs. From hence it followed, that a title might be tried over and over again between the ſame parties, though they had each had verdicts againſt them. The gratification of trying a title more than once, together with the eaſe with which this action was conducted, contributed to make it a favourite both with our courts and with ſuitors. This innovation gave the laſt blow to real actions, which, from the period when ejectments came into practice, went into diſuſe: a revolution that at once conſigned to oblivion at leaſt one-third of the ancient learning of the law.

Whether this was a change for the better, has been doubted by lawyers of ſome knowledge and experience. On the one hand it has been ſaid, that real writs were in their nature ſo ſpecial, and in their application ſo unaccommodating, that they were very unmanageable inſtruments in the hands of the practicer. Some were to be brought in a particular court; ſome lay only between particular perſons; others, for and againſt thoſe who had only particular eſtates; with various other circumſtances that were requiſite, antecedent to the bringing of the action: all theſe were at once ſupplied by an ejectment, which requires nothing but a preſent poſſeſſion in the defendant, and a right to it in the plaintiff. On the other hand, the preciſion of the proceeding in real actions, where

the

CHAP. XXVII. HENRY VII.

the matter in queſtion was thoroughly canvaſſed in pleading, and reduced to a ſimple point before it was truſted to a jury, is thought to be ill changed for the preſent courſe, where the whole queſtion is at once ſent in the groſs to trial upon the general iſſue, without any previous attempt to ſimplify or decide it with leſs circuity and expence. As to the length of proceſs, and other delays in real action, they, it is ſaid, might have been eaſily corrected by act of parliament.

THOUGH the practice had begun of applying ejectments to this purpoſe [1], there are no queſtions ariſing upon ſuch actions in the Year-book of this reign. Many titles to real property are there debated in treſpaſs and replevin. But the remedies by real action continued ſtill to be the practice of the time, though deſtined to give place to this new-modelled remedy in the next and ſucceeding reigns. With real actions fell a great part of the buſineſs of the common-pleas; in them that court had poſſeſſed an excluſive right of judicature, which now began to be imparted to other courts. Land, as a ſubject of action, was now in the ſame predicament as other matters of contract, and might be decided upon, in an ejectment, in any court in Weſtminſter-Hall. The king's bench, which from a criminal juriſdiction had long before poſſeſſed itſelf of perſonal actions, by help of fiction and intendment, received its ſhare of this acceſſion; and from thence derived an addition to its civil buſineſs, which was greatly increaſing from other cauſes. This was another conſideration that contributed to bring this action into vogue. The practicers in the court of king's bench and exchequer ſaw a medium by which they might partake in the valuable practice of the common-pleas, and of courſe would give every credit to ſuch a contrivance.

[1] Raſt. Ent. 243, 244.

THE

THE opinions delivered in the reigns of Henry VI. and Edward IV. in favour of actions upon the caſe, for the non-performance of a promiſe, were confirmed by the train of deciſions in this reign. In 3 Hen. VII. an action was brought againſt a defendant, who, for a ſum of money, had undertaken to procure a leaſe for a perſon; but inſtead thereof, he obtained it for himſelf, in deceit of the plaintiff. When it was objected, upon the old notion, that nothing having been done, no action would lie; as there was no *miſ*-feaſance, but merely a *non*-feaſance; *Brian* demanded, whether if he promiſed, upon conſideration, to make a feoffment to one perſon, and afterwards made it to another, that would not be a great *miſ*-feaſance[k]? endeavouring in this manner to ſatisfy the ſcruples of ſuch as ſtill adhered to the ancient opinion; we are told that the court agreed with him. Conformably with this deciſion, it was declared in 21 Hen. VII. by the whole court, that an action upon the caſe would lie as well for a *non*-feaſance as for a *mal*-feaſance[l]; and this opinion was on another occaſion again recogniſed[m]; at which time it was ſaid, that if a man bargained that another ſhould have his land in fee for ſuch a ſum of money, and neglected making an eſtate accordingly, an action upon the caſe would lie without any need of ſuing a *ſubpœna* in chancery[n]. As the neceſſity of recurring to a court of equity to eſtabliſh ſuch agreements was not now ſo abſolute as before, there is no doubt but ſuits on ſuch queſtions fell back again into the old channel of the common law. The prodigious advantage of this common-law remedy, to ſubſtantiate promiſes and undertakings, was ſoon diſcerned by the legiſlature, which, on this account, as well as on account of the other applications that were made of this action, in this reign paſſed an act which gave to the action upon the caſe the ſame proceſs as was before in an action of debt.

Actions of *aſſumpſit*.

[k] 3 Hen. VII. 14.
[l] 21 Hen. VII. 30.
[m] 21 Hen. VII. 41.
[n] 21 Hen. VII. 41.

THERE

CHAP. XXVII.

HENRY VII.

THERE ſtill remained doubts in what particular caſes law-wager ſhould be allowed, and in what not. In the reign of Henry VI[o]. it was doubted by *Newton*, *Paſton*, and *Aſton*, juſtices, whether in an action of debt brought againſt an abbot for things ſold to his predeceſſor, with an averment that they came to the uſe of his houſe, the defendant ſhould be permitted to wage his law. This point was again agitated in the beginning of this reign, when *Brian* held, that law-wager would not lie; ſaying, that a defendant could never wage his law, unleſs where of neceſſity and by common preſumption he muſt have notice of the cauſe of action[p]. In the latter part of this reign, the ſame queſtion came before the court, in the prior of Dunſtable's caſe, when it was held by all the juſtices, except *Brian*, that law-wager would lie[q]. It was there urged, that a man might wage his law, in many caſes, on the contract of another. Thus, a lord, if found, on account with his bailiff, to have received more than was due, in debt by the bailiff to recover ſuch ſurplus, might wage his law, though a ſtranger to the contract, which in fact commenced with the auditors; the ſame if the bailiff had been found before auditors to have been in arrear: ſo in debt brought on a recovery in a court baron. In like manner, in the caſe at bar, tho' the prior was a ſtranger to the contract, yet he was charged by it. It was ſaid, that this is not like the caſe of executors, who, it is true, are not allowed their law-wager; but that is not for want of privity, but becauſe they are not liable to an action on a contract of the teſtator. The action againſt executors is in the *detinet*. This is in the *debet*; for he is not a ſtranger to the contract, which was made in favour of the houſe, of which he was the head, but rather a principal party; and if this

[o] 21 Hen. VI. 23.
[p] 1 Hen. VII. 25.
[q] 2 Hen. VII. 2.

debt

debt had ariſen *tempore vacationis*, it was a ſettled point that the new prior might wage his law[r]. In an action founded on a ſtatute, it was held, that a defendant ſhould not wage his law[s]; though this point of law ſeems ſomewhat queſtioned in another caſe towards the cloſe of this reign[t].

THE chancellor continued in the exerciſe of that equitable juriſdiction, which had been gradually aſſumed by his predeceſſors. Beſides queſtions upon uſes, the grand ſubject of diſcuſſion in that court, we find the following points were there conſidered.

THE firſt caſe we ſhall mention is more remarkable for the manner of the judge, than the matter of the inquiry. Two perſons were appointed executors, and one releaſed a debt due to the teſtator, without the aſſent of his companion. It was ſuggeſted in a bill in chancery, brought by the other executor, that the will could not on that account be performed; and therefore a *ſubpœna* was prayed againſt the executor, and the perſon to whom he had made the releaſe. It was there argued, that the plaintiff in equity was without remedy, for every executor has an entire power in himſelf; and as one could do that which his companion might, the releaſe was good. "But," ſaid the chancellor, "it is againſt reaſon, that one executor "ſhould have all the goods, and give a releaſe by himſelf. "I know very well that every law ſhould be conſiſtent "with the law of God, and that law forbids that an "executor ſhould indulge any diſpoſition he may have to "waſte the goods of the teſtator; and if he does (ſays "the chancellor with ſome emphaſis), and does not "make amends, if he is able, he ſhall be damned in "hell." But, upon the point of equity, he thought there ſhould be a remedy; "for the words of the teſta-

[r] 13 Hen. VII. 3.
[s] 19 Hen. VII. 18.
[t] 21 Hen. VII. 14.

"ment

CHAP. XXVII.

HENRY VII.

"ment are, *conſtituo tales eſſe executores meos, ut ipſi diſ-*
"*ponant, &c.* Their power is hereby joint, and not ſeveral;
"and therefore if one does an act without the other, he
"does it without a warrant. Again, it is *pro ſalute animæ*
"*meæ, &c.* and therefore if they diſpoſe it otherwiſe, they
"do what they have no authority for. At common law
"(ſays he), if a commiſſion of the peace iſſues, this gives
"no juriſdiction to try felons; and if a letter of attorney is
"given to make livery of one acre, a livery of two is with-
"out warrant, and void. Now, in this caſe, the teſta-
"ment is their warrant, and the laſt declaration of the
"teſtator's will; and ſhould they exceed that, there muſt
"be ſome remedy, as I conceive." Thus argued the chancellor; but the caſe ſtood over for further conſideration[x].

WHERE a cogniſee, in a ſtatute merchant, had extended the land, and the cogniſor ſold the land and ſuffered a recovery thereof, it was held, that as he could not falſify the recovery, there ſhould be a remedy by *ſubpœna* for the tenant. Again, where an obligation was paid without a releaſe, and where one was bound to *I. S.* to the uſe of *W. N.* and *I. S.* releaſed the debt, in both theſe caſes there was relief by *ſubpœna*[y]. Reſpecting the proceſs of the court, it was held, that the penal ſum in the *ſubpœna* was *in terrorem*; and if it was not obeyed, the chancellor might aſſeſs a fine upon the party. This aſſeſſment being a judgment, it was held a *ſcire facias* might iſſue upon it[z].

WE next proceed to ſome queſtions ariſing in our criminal law. Notwithſtanding this king's reign is marked by ſeveral ſtate-proſecutions, little is to be found in our books upon the law of treaſon: the caſe of *Humphrey Staffford* is the only one that is recorded. It was there re-

[x] 4 Hen. VII. 4. b.
[y] 7 Hen. VII. 11.
[z] 10 Hen. VII. 5. a.

ſolved,

ſolved, that privilege of ſanctuary could not be claimed in caſes of high-treaſon by preſcription, without an original charter before the time of memory, becauſe it ſo materially touched the king's prerogative; unlike a claim to have waifs, ſtrays, and wreck, which might be preſcribed for. In the ſame manner, where a perſon claimed the goods of felons, outlaws, and cogniſance of pleas, he was obliged to ſhew a royal charter, and allowance in eyre, after time of memory. On the ſame occaſion the judgment of high-treaſon was pronounced as follows: that he ſhould be carried back to the Tower of London, ſhould be put on a hurdle, and drawn thro' the middle of the city to Tyburn, and there hanged by the neck; before he was dead his heart ſhould be cut out, his head cut off, and his body divided into four parts, to be at the diſpoſal of the king, and *Deus miſereatur animæ ejus, &c.*[a].

THE nature of principal and acceſſory in treaſon does not ſeem to have been thoroughly underſtood, as it was afterwards ſettled. A man had been attainted of treaſon in counterfeiting the coin; and another was indicted, *quòd ſciens, &c. illum felonicè hoſpitavit, manutenuit, et comfortavit, &c.* and ſome doubt ariſing whether he could be feloniouſly acceſſory to the treaſon, the point was adjourned for the opinion of the court. It was then argued by *Brian*, one of the juſtices, that he might; for counterfeiting the coin was felony at common law, which felony was not done away by the ſtatute making it treaſon; and the proclamation on the exigent gave notice, that an outlawry impended both for treaſon and felony. In truth, every treaſon implied in it a felony; and therefore, ſaid he, it was clear law, that ſhould any one be attainted of treaſon on ſtat. 8 Hen. VI. c. 6.[b] for burning houſes, after ſending a threatening letter, a man might be indicted, *quòd felonicè illum hoſpitavit, &c.* becauſe burning houſes was a felony

[a] 1 Hen. VII. 24.

[b] Vid. ant. vol. III. 285.

before.

CHAP. XXVII. HENRY VII.

before. But *Huſſey*, the chief-juſtice, ſaid, that as this was now become treaſon, there could be no acceſſory *felonicè*; nor could there be ſuch a thing as acceſſory *proditoriè*; which ſeems to have been the better opinion [c].

THE diſtinction between lawful and unlawful acts, was always the governing conſideration in imputing guilt or innocence, when a death was occaſioned without the intention of the ſlayer. It was laid down by *Fineux*, chief-juſtice, that where two played together with ſword and buckler, or jouſted, and one killed the other, it ſhould be accounted felony; becauſe, though theſe diverſions were ſuffered by law, yet it was not lawful to uſe them but at the command of the king. It was clear law, that ſhould one man beat another, without any intention to kill him, and the man died, it was felony, on account of the firſt act being unlawful; which was a very different accident from that, where a man ſhooting at a bull, or throwing wood from a houſe, chanced to kill a man; this being homicide *per infortunium*, by our old law [d]. However, in the principal caſe, it ſeems that *Fineux* retracted the opinion abovementioned; and in the firſt year of the next reign laid it down to be felony to kill a man in jouſting, or other diverſion, notwithſtanding the king's command, for ſuch command was illegal [e]. It is obvious that the legal opinions on a queſtion like this muſt, in a great degree, be governed by political conſiderations, and the humour of the times.

WHEN it was thus poſitively laid down that the perſons ſo ſhooting, or throwing wood, were not guilty of felony, it ſeems reaſonable that thoſe paſſages ſhould not be conſtrued without ſome qualification, but ſhould be limited in the manner laid down by Bracton [f]; namely, if it was

[c] 3 Hen. VII. 10.
[d] 11 Hen. VII. 23. Vid. ant. vol. II. 10.
[e] Bro. Coron. 229.
[f] Vid. ant. vol. II. 10.

done

done in a place not publicly frequented, and the probability was that no danger could enſue: indeed it ſeems hardly otherwiſe to be a lawful act [g].

IT was no unuſual courſe at this time, in caſes of death, where the proſecutor thought it would not turn out to be felony, to lay the indictment as for homicide *ſe defendendo*, or otherwiſe, as the real caſe might be. On an indictment of this kind, and an application in chancery for the uſual pardon under the ſtatute of Glouceſter [h], ſome ſerjeants were of opinion, that there was no need of a pardon, becauſe the juſtices ought, they ſaid, to diſcharge the party without an arraignment; and it was only on an indictment for felony, and after the jury had found the defendant guilty *ſe defendendo*, that the above application was requiſite. But the juſtices thought otherwiſe; namely, that the indictment ſhould be tried, and on a conviction, a pardon ſhould be had to ſave the forfeiture [i].

THERE had been always great tenderneſs towards infants who had ſubjected themſelves to the penalties of the law by the commiſſion of crimes. The rule, however, that *malitia ſupplet ætatem*, ſeemed to be founded on a ſenſible diſtinction, and was univerſally adhered to in after-times. A boy of nine years old had killed another of the ſame age, and confeſſed the fact; but it was alſo found, that when he had committed the murder, he hid the body, and made an excuſe for the blood upon him, as if it had followed from ſome accident to himſelf. This ſeemed to come within the conſtruction of the above rule, and the juſtices were of opinion he ſhould be hanged [k]. In another caſe, where two boys were keeping ſheep, and one, being between ten and twelve years old, killed the other, and hid the body among the corn, and confeſſed the whole fact, the execution was reſpited for the opinion of the

[g] 21 Hen. VII. 29.
[h] Ch. 9. Vid. ant. vol. II. 153.
[i] 4 Hen. VII. 2.
[k] 3 Hen. VII. 1.

CHAP. XXVII. HENRY VII.

juſtices, greater part of whom thought he ſhould be hanged [m]. If a blow was given in one county, and the party died in another, an appeal might be brought in either, and the fact would be tried by a jury of both; but an indictment, in ſuch a caſe (notwithſtanding ſome *dictums* to the contrary [n]) would lie in neither county, as the jurors have authority only to inquire *pro corpore comitatûs*, and no more [o].

It has not fallen in our way to ſay any thing on the crime of arſon ſince the reign of Edward I [p]. It was then ſaid to conſiſt in burning the corn or houſe of another feloniouſly. After that there is an intire ſilence in our books as to the nature of this felony. We find, in this reign, that a man was indicted for that he feloniouſly in the night had burnt a *barn*; and becauſe the barn was adjoining to a houſe, this was held a felony at common law, and the offender was hanged [q].

Larceny.

Some queſtions of larceny, ſimilar to the famous one in the time of Edward IV. were again agitated in this reign [r]. It was propounded by *Huſſey*, who was then chief-juſtice, whether, if a ſhepherd took the ſheep, or a butler the plate, under his care, it could be called felony; he himſelf thought it was, and related the caſe of a butler who was hanged under ſuch circumſtances: to which a ſimilar caſe was added by *Haugh*, of a goldſmith, who had taken ſome things that were entruſted to his charge. In anſwer to theſe, *Brian* argued that it could not be felony, becauſe neither of theſe perſons could be ſaid to take the things *vi et armis*, while he had them under his care: and of this opinion were the juſtices [s]. This was giving a blow to the determination in the time of Edward IV. and expreſsly contradicted ſome caſes that were there taken for ſettled law,

[m] 3 Hen. VII. 12.
[n] 7 Hen. VII. 8.
[o] 4 Hen. VII. 18. 6 Hen. VII. 10.
[p] Vid. ant. vol. II. 274.
[q] 11 Hen. VII. 1.
[r] Vid. ant. vol. III. 410.
[s] 3 Hen. VII. 12.

and

and argued upon as ſuch; eſpecially that of the butler. However, we find this caſe of the butler was underſtood otherwiſe ſome years after, and a diſtinction was taken between the poſſeſſion a butler has while in the maſter's houſe, and the poſſeſſion of a ſervant entruſted out of the houſe. It was propounded by ſerjeant *Pigot*, in the court of king's bench, to ſerjeant *Cutler*, in this way: If I bail a bag of ſilver to my ſervant to keep, and he goes away with it, can this be felony? *Cutler* ſaid yes; for as long as he is in my houſe, or with me, that which I have delivered to him is adjudged in my poſſeſſion: thus if my butler, who has my plate in his cuſtody, runs away with it, this is felony; the ſame if a perſon having the care of my horſe goes off with it; becauſe in both theſe caſes the thing remained all along in my poſſeſſion. But if I deliver a horſe to my ſervant to ride to market, and he rides away with it, this is no felony; becauſe he came by the lawful poſſeſſion of the horſe, by delivery out of my cuſtody. The ſame if I give him a bag to carry to London, or to pay away to ſome one, or to purchaſe ſomething; if he goes away with theſe it would not be felony, becauſe they were out of my poſſeſſion, and he had lawful poſſeſſion of them himſelf. To this *Pigot* aſſented, adding that he might, in all theſe caſes, have an action of detinue or accompt *; which idea of *poſſeſſion* is conſonant to one of the principles laid down in the caſe ſo often alluded to. Another caſe of *property* and *poſſeſſion* was alſo conformable with an opinion delivered in the foregoing period; namely, that a man who retook his own goods in order to charge the bailée, was guilty of felony †.

It was common, in an appeal of mayhem, for the defendant to pray an inſpection of the mayhem aſſigned, either by proper ſurgeons, or by the juſtices; and the opinion given by either was peremptory, and finally determined

* 11 Hen. VII. 14. † 5 Hen. VII. 18.

CHAP. XXVII.

HENRY VII.

the cauſe [u]. It ſeems to have reſted with the juſtices, whether they would grant ſuch inſpection or not; and if upon examination a doubt aroſe whether it was a mayhem or not, the juſtices might compel the party to refer it to the country [x]. Upon the occaſion of a felon being taken out of the officers' hands as he was leading to execution, it was ſubmitted to the court of king's bench, whether the reſcuing a felon was felony or not; and it was held, that ſuch reſcuers were principal felons, and not acceſſories; and it was ſaid to have been ſo determined in the reign of Edward IV. Such reſcue muſt appear not upon the return of the ſheriff, but by an indictment [y].

THE queſtion which had been ſo long agitated, how far the acceſſory ſhould be favoured by the clergy or other privilege of the principal, was brought forward again in this reign. In the exchequer-chamber, before all the juſtices, it was debated what ſhould be done where the principal and acceſſory were arraigned, and both found guilty, and the principal demanded a book before judgment given. *Huſſey* was of opinion, that the acceſſory ſhould have no advantage of this; for if a principal was outlawed, the acceſſory ſhould be put to anſwer, tho' the principal was not attainted of the felony, but only of the contempt: but it was held by all the juſtices and ſerjeants, that in this caſe the acceſſory ſhould be diſmiſſed. To this the reporter adds, that where the principal confeſſed the fact, and demanded a book, the acceſſory ſhould not be arraigned, becauſe no *judgment* was paſſed againſt the principal [z]. Notwithſtanding this, we find in the ſame year that the common courſe was to arraign the acceſſory, and if he was found guilty, he was hanged [a]. This point, therefore, ſtill remained to be ſettled. It was the opinion of the juſtices of both benches, that an acceſſory *before* the fact,

[u] 11 Hen. VII. 33. On a former occaſion it was thought not to be peremptory. 6 Hen. VII. 1.

[x] Ibid. 40.

[y] 1 Hen. VII. 6.

[z] 3 Hen. VII. 1.

[a] Ibid. 12.

tho'

tho' acquitted, yet loſt his goods, if he fled, the ſame as the principal felon; but not the acceſſory *after* the fact [b].

It had formerly been made a queſtion [c], how far an heir of the appellant might have execution againſt an appellee, when once convicted at the ſuit of the appellant. There was ſtill a difference of opinion upon this point; ſome conſidering it as an anceſtral action, of which the heir could not, conſiſtently with the analogy of legal reaſoning, be deprived; others again looking on it as a remedy for a perſonal injury, which *moritur cum perſonâ*. Upon a doubt, as in a former caſe, whether a *ſcire facias* on ſuch a record would lie againſt the heir for allowing a pardon, a deciſion on the principal point was avoided, by determining that the pardon might be allowed without it [d]. The contrary opinions that had been ſtarted at different times, on the admitting a defendant to become a provor, after pleading not guilty, were ſettled upon the following diſtinction: that on an indictment he might be admitted, after not guilty, and before verdict, but not on an appeal [e].

An alteration took place in the practice of dealing with priſoners who challenged the number of thirty-ſix jurors. It was the courſe in the reign of Edward IV. to put ſuch perſons to the penance. The ſame was done in the third year of this king by conſent of all the juſtices, except *Keble*, who ſaid, this being an appeal, was not a caſe within the ſtatute of Weſtminſter [f], which only ſpeaks of the king's ſuit [g]. In the ſame year it was agreed by the juſtices of both benches, without any diſtinction between an appeal and indictment, that a man who challenged thirty-ſix jurors ſhould be hanged, and not put to the penance; and it was reſolved that this ſhould be obſerved as the practice in their circuits [h], notwithſtanding the contrary uſage in former reigns. It was at the ſame time agreed, that thoſe who

[b] 4 Hen. VII. 18. 110.
[c] Vid. ant. vol. III. 414.
[d] 9 Hen. VII. 5.
[e] 11 Hen. VII. 5.
[f] Vid. ant. vol. II. 134.
[g] 3 Hen. VII. 2.
[h] Ibid. 12.

CHAP. XXVII.

HENRY VII.

confeſſed a felony, or were outlawed or abjured, or became provors, ſhould not make their purgation before the ordinary.

Sanctuary.

We have before ſeen what the courts decided reſpecting ſanctuary in caſes of treaſon[i]. If an offender fled to ſanctuary, it was not enough to declare that he came there to ſave his life, but to add that he had committed felony; tho' it was not requiſite that he ſhould name the ſpecial nature of the felony till the coroner came[k]. If he did not make ſuch a general declaration, he might, without ceremony, be dragged from thence[l]. If he confeſſed the felony, he would be permitted to remain there forty days, according to the old law. But what is ſaid above ſeems to be confined to a man taking ſanctuary in a *church*: for there were two manner of ſanctuaries; private, as *Weſtminſter Knoll*, and the like; and general ſanctuaries, as every church. If a man fled to ſuch a ſanctuary as the *Weſtminſter Knoll*, he might remain undiſturbed for life; but if he choſe to abjure within the forty days, the coroner was to appoint him a day to do it. The law of ſanctuary is laid down in a *reading* of this period in the following manner: None ſhall take ſanctuary but *in periculo vitæ*, as for treaſon, felony, or the like, and not for debt; for a grant or preſcription to have ſanctuary for debt, was againſt law, and void. But the reading lays down a ſtrange quibble to evade this; for it admits, that if a man's body was in execution, and he eſcaped, and came to a ſanctuary ordained as a refuge and ſafeguard for a man's life, he ſhould have benefit thereof, *becauſe by long impriſonment his life might be in jeopardy*. If a church was ſuſpended for bloodſhed, he who took it as a ſanctuary for felony, ſhould ſtill enjoy it for forty days. It was held that abjuration for felony diſcharged all felonies done before the abjuration. A man could not abjure for petty larceny, but only for ſuch felonies as induced the pain of death[m].

[i] Vid. ant. 174, 175.
[k] 3 Hen. VII. 13.
[l] Bro. Sanct. 11.
[m] New Caſes, 79.

It

IT was the opinion of the judges, that if the ordinary would not permit a clerk to make his purgation, the king might command it by writ[n].

King and government.

HENRY is celebrated by his hiſtorian[o] for the many excellent laws he cauſed to be made. He was not leſs attentive to the regular execution of his laws when made. In the firſt year of his reign, at the cloſe of the parliament, he deviſed an oath, binding all perſons who took it to obſerve the execution of ſeveral ſtatutes. We are told, that not only thoſe of the houſhold, but thoſe of the houſe of commons, came before the king and lords, and took this oath. After theſe, the peers, both ſpiritual and temporal, were aſked by the chancellor, whether they were willing to take the oath; who all anſwering that they were ready, it was read to them; and every lord ſpiritual laying his right hand on his breaſt, and every temporal lord on the book of goſpels, ſwore to obſerve and perform the ſame. The ſubſtance of the oath was, not to harbour felons; not to retain any one by indenture or oath, contrary to the ſtatutes of liveries; not to encourage maintenance, nor embracery, nor riots, nor unlawful aſſemblies; not to prevent the execution of the king's writs; nor let to bail or mainprize any felons[p].

A PRECAUTION like this at once ſhews the king's ſolicitude for the due execution of juſtice, and the protection it needed in times when great men, inſtead of promoting, had been more uſed to defeat the effects of it by force and cabal.

IT is ſaid, that Henry being entertained at the earl of Oxford's with great ſtate, at his departure expreſſed aſtoniſhment at the number of ſervants in liveries and badges he ſaw waiting; but being informed by his hoſt that they were his retainers come to do him honour, he told

[n] 13 Hen VII. 9. [o] Lord Bacon. [p] Paul. Hiſt. vol. II. 419.

CHAP. XXVII. HENRY VII.

him he would not have his laws broke before his face, and that his attorney muſt ſpeak with him. It is ſaid the earl paid 15,000 marks as a compoſition for this offence. In every tranſaction of this king there is a regard ſhewn by him to the laws. Tho' no prince was more jealous of his prerogative, or took greater pains to gratify his love of money, than Henry; yet in all inſtances where theſe two grand intereſts were concerned, he ſtill proceeded under the ſanction of law.

In the ſeventh year of his reign he revived *benevolences*, invented firſt by Edward IV.; but, more wary than that prince, he did it by conſent of parliament, and raiſed great ſums in that way. He ſtrictly enforced all penal ſtatutes which would contribute any thing towards his exchequer: with the ſame view he cauſed proſecutions to be inſtituted on many old and forgotten laws. Theſe legal oppreſſions, if they may be ſo called, were carried to a great height in the latter part of his reign, which rendered him extremely unpopular, if not odious; and ſubjected his two agents in thoſe proſecutions, Empſon and Dudley, to a ſevere account in the ſubſequent reign.

The new-modelling of the ſtar-chamber fell in with Henry's whole plan. It at once ſerved to ſecure his prerogative, by enforcing among all ranks of people a ſtrict obedience to the laws; and became a ſource from whence he was always deriving pecuniary ſupplies. The penalties in that court uſed to run very high. It is related, that Sir William Capel, an alderman of London, was fined in 2743l. an immenſe ſum in thoſe days! and he was obliged to compound for 1615l. This is mentioned only as one inſtance of theſe proceedings. Where criminal proſecutions did not produce fines, the king uſed to make them turn to account, by remitting corporal pains for pecuniary compenſations to be paid to himſelf.

Notwithstanding the bad uſe ſometimes made of ſevere laws, it cannot be denied that the temper and deſigns

of Henry contributed to eſtabliſh the laws in their full force, and to render the adminiſtration of juſtice more regular and effectual. While this had a good influence on the order and peace of ſociety, it levelled all ranks of men under the ſame ſubmiſſion to lawful authority. The executive magiſtrate, in the perſon of Henry, increaſed in power and diſtinction; while the nobility ſunk below the relative importance they had formerly enjoyed; and the commons continued ſtill in their original imbecility: ſo that the prerogative of the crown had in this reign an opportunity of aggrandizing itſelf to a degree much exceeding what it had been in earlier times, though not equal to what it became in the ſucceeding princes of the line of Tudor.

THERE are no ſtate trials of this reign now extant; and of theſe occurrences the chroniclers of the time give very unſatisfactory accounts. It is very uncertain what was the charge againſt Sir William Stanley, who was executed for a conſpiracy, as it is related, againſt the king.

THE method introduced by Richard III. of attainting perſons by bill, was purſued by Henry VII. and became henceforward not unfrequently reſorted to, where it was thought the common law could not effectually reach an offender.

THE legal monuments of this reign are the ſtatutes, judicial records, and reports. The ſtatutes underwent no further alteration in the manner of forming them in parliament. The records are from this period, almoſt in a regular ſeries, kept with order, and in good preſervation; as may be ſeen in the repoſitories of the courts of king's bench and common-pleas, in Weſtminſter-Hall. The reports are the *Year-book*, with ſome caſes in the collectors *Jenkins* and *Benloe*; but more particularly in *Keilway*, who lived at this time, and took them himſelf. The Year-book of this reign, as it goes more into points of law, and ſuch matters of learning as have ſurvived the times

when

CHAP. XXVII.

HENRY VII.

when they were debated, is more deſerving attention than the preceding. We find the counſel and judges ſometimes quoting caſes; and Bracton is once or twice referred to[a]; but this was not common: their determinations were moſtly the reſult of argument and diſcuſſion, and theſe were made precedents for future ages.

THERE are no law-treatiſes of this reign in print. But there is a famous book, ſaid to be ſtill in manuſcript, written by *Marrow*, on the office of a juſtice of peace; a work which has been quoted by later writers, ſuch as Fitzherbert and Lambard, with great commendation, and ſeems to have been followed by them on the ſame ſubject. Tho' this reign was ſo barren in original works, they were not backward in putting to the preſs the productions of former times.

THE art of printing began to give further aſſiſtance to the ſtudy of the law, than it had in the former period. Caxton went off the ſtage in 1491: we hear no more of Lettou and Machlinia. Wynkyn de Worde took the lead till 1497; when Richard Pynſon entered into competition with him, as did Julian Notary in 1498, William Faques in 1504, and afterwards Henry Pepwell; though the career of the laſt three did not extend much beyond the preſent reign, as did that of Pynſon and de Worde. Faques, and afterwards Pynſon, had attained a diſtinction which Wynkyn de Worde ſeems never to have enjoyed; they were ſucceſſively (and as ſome think jointly) king's printers. But this appointment ſeems to have conferred no excluſive right of printing law-books, for the ſtatutes continued to be printed by Wynkyn de Worde, and other printers: this appointment is thought not to have been by patent, but by ſign-manual.

THE ſeveral ſtatutes paſſed in this reign were printed ſoon after they came out by de Worde, by Pynſon, and by Faques; and ſome were repeatedly reprinted by all of

[a] 1 Hen. VII. 6. b.

them.

them. We have before intimated, that ſome ſtatutes aſcribed to Caxton moſt probably belonged to a later period, and may perhaps have been printed in this reign. There appears a collection of the ſtatutes, under the title of *Nova Statuta*, beginning with 1 Ed. III. and ending with 12 Hen. VII. This is printed by Pynſon, and is aſcribed to the year 1497, juſt after the cloſe of that parliament: it is however certain, that it was printed before 19 Hen. VII. as it would otherwiſe have contained the ſtatutes of that ſeſſion [r].

It is remarkable, that the lateſt and moſt accurate inquirers into our typographical antiquities do not preciſely fix the printing of any Year-book to the reign of this king. We have before taken upon us to ſay, that certain years of Henry VI. were printed about the years 1480 and 1483. A writer [*] of ſome learning, but famous for miſrepreſentation, has advanced, that Wynkyn de Worde was the firſt who began to print the Year-books; and that he and Pynſon printed above forty of them, which were to be found among the *libri manuſcripti* in Lincoln's-inn library; but upon ſearch, none ſuch have been found. Mr. Ames, a more faithful inquirer, informs us, that he never met with any Year-book bearing the name of Wynkyn de Worde, either alone or in conjunction with Pynſon; but that he had ſeen two, being 17 and 18 Ed. III. without a printer's name or date, which he thought were printed with the ſame type as Fitzherbert's Abridgment, in 1516; and which he makes no queſtion were printed by de Worde in the ſubſequent reign. It is agreed that Pynſon printed many Year-books; but it is ſtill left to the probability of the thing, whether he, any more than de Worde, printed any during this reign [t]. It ſeems moſt probable, that twenty-four years would not be ſuffered to paſs without ſome

[r] Typog. Antiq. 141. 144. 204, 295. 218. 283.

[*] Pſalmanazar.

[t] Typog. Antiq. 235.

addi-

CHAP. XXVII. HENRY VII.

addition being made to the ſtock of Year-books, which we have before ſeen were printed in the time of Edward IV. or Richard III. In general, the time of printing the Year-books ſeems to be leſs aſcertained than that of moſt other of our early-printed books, owing to their being moſtly printed without a date.

WHATEVER doubt there may be about the time of printing our books of common law, there ſeems none about thoſe of the eccleſiaſtical law. The edition of Lyndwood's Provinciale, before-mentioned[t], is aſcribed to Wynkyn de Worde, and is thought to have been printed in 1496. The great demand for this authentic canoniſt requiring a further ſupply, the ſame printer gave another edition in 1499, in octavo; and we find two others in 1505[u]; one of them at Paris, ſuppoſed to be printed from an impreſſion made at Oxford.

Miſcellaneous facts.

WE find another increaſe in the judges ſalaries. Sir William Huſſey, appointed chief-juſtice of the court of king's bench in the 1 Hen. VII. had the yearly fee of one hundred and forty marks granted to him for his better ſupport: further, he had one hundred and ſix ſhillings and eleven-pence farthing and the ſixth part of a halfpenny (ſuch is the accuracy of our author and the ſtrangeneſs of the ſum) for his winter robes, and ſixty-ſix ſhillings and ſixpence for his robe at Whitſuntide [*].

AN act of the Iriſh parliament made in this reign, as it communicated to that kingdom a participation of our laws in a more full manner than it before enjoyed them, may be conſidered as an intereſting fact in the Hiſtory of the Engliſh Law. Amongſt other ſtatutes made under the government of ſir Edward Poynings in 10 Hen. VII. and therefore called Poynings' Laws, there is one which enacts[x], that all acts of parliament made in England be-

[t] Vid. ant. 119.
[u] Typog. Antiq. 125. 135. 312.
[*] Dugd. Orig. 110.
[x] Chap. 22. Iriſh Statutes.

fore

fore that period ſhall be in force within the realm of Ireland. The extending of the dominion of the Engliſh law by an act of that legiſlature, contributed to connect theſe two kingdoms in the ſtricteſt bonds of union; that of ſimilar laws, and a ſimilar conſtitution; the grounds and great outlines of which it was thought would ever be preſerved alike in both by the appeal which had long been made from the courts of that country to the courts here, notwithſtanding the differences that muſt by degrees ariſe from the regulations of a diſtinct parliament providing for the exigencies of a diſtinct people.

THERE was another proviſion of the Iriſh parliament, which ſeemed to promiſe, that the law of that country would not be permitted to deviate from the model communicated by the parent-ſtate. An act had been made by chap. 4. of the ſame ſtatute to the following effect: That before a parliament be ſummoned or holden, the chief governor of Ireland ſhould certify to the king, under the great ſeal of Ireland, the conſiderations and cauſes thereof, and the articles of the acts to be propoſed therein: That after the king in his Engliſh council ſhould have conſidered, approved, and altered the ſaid acts, and certified them back under the great ſeal of England, and given licence to ſummon and hold a parliament, then the ſame might be ſummoned and held; and therein the acts ſo certified, and no other, ſhould be propoſed and received, or rejected. This mode underwent further alteration in after-times.

CHAP.

CHAP. XXVIII.

HENRY VIII.

Of Judicature in Wales—and in Counties Palatine—Of Parliament—Of the Eccleſiaſtical Polity—Fees of Ordinaries—Reſidence and Pluralities—Submiſſion of the Clergy—Papal Authority aboliſhed—Marriage—Tythes—Of Precedents—The Poor Laws—Of Trade—Terms for Years—Leaſes of Tenant in Tail—Gifts to ſuperſtitious Uſes—Deviſe of Land—Statute of Uſes—Jointures—Statute of Wills—Statute of Bankrupts—Court of Wards and Liveries erected—Statute of Feoffail—Statute of Limitations—Trinity Term altered.

CHAP. XXVIII. HENRY VIII.

THE modifications made in our law during the reign of Henry VIII. attract our attention in a particular manner. The ſpirit of reformation which began to prevail at this time, was not confined to our religious worſhip; it ſpread to the eccleſiaſtical judicature, it reached the law of property, and the adminiſtration of civil and criminal juſtice. In every regulation of a juridical nature made in this reign, we perceive a deciſive hand. The parliament ſeemed determined at once to reſolve all doubts, and to root out all difficulties, which on former occaſions they had been content to ſoften and palliate according to the exigency of the preſent moment. Inſtead of continuing ſtill to aſcertain the boundary between the civil and ſpiritual judicature by new deſcriptions, proviſion was made by ſtatute for correcting ſeveral irregularities wholly of a clerical nature, and for an intire

reform

reform of the eccleſiaſtical law: inſtead of endeavouring to repreſs the luxuriancy of uſes, by freſh ſtatutes againſt the pernors of profits, it was intended to deſtroy the thing itſelf. The grand object of barring entails, which was accompliſhed at laſt by a recovery, was now ſubſtantiated by a parliamentary proviſion in favour of that mode of conveyance; and the conſtruction which had been entertained with difference of opinion reſpecting the like effect of the ſtatute of fines in the laſt reign, was now expreſsly eſtabliſhed by the ſame authority. The deviſe of lands, which hitherto had been practiſed under the cover of a uſe, and had been partially allowed by a late act, was now, by expreſs ſtatute, indulged to every one. The benefit of clergy, which had ſo long ſtood in the way of our criminal judicature, was now aboliſhed in the principal and moſt common felonies. All theſe were innovations upon the ancient law, which gave it a new turn, and brought theſe points under conſideration in a variety of new appearances. To theſe may be added, the protection and eſtabliſhment of leaſes for years, execution againſt the effects of bankrupts, the limitation of actions, the locality of trial in felonies.

Such were the principal regulations of this reign, which had a laſting influence upon our juriſprudence, and ſtand, even at this diſtance of time, among the foremoſt objects of legal diſcuſſion. Others are of leſs importance, becauſe of ſhorter duration: ſuch were the poor laws; many of the new courts erected by this king; new treaſons and new offences of various kinds, with new-fangled tribunals for their examination; all which were repealed or ſuperſeded by ſtatutes in the next or following reigns. Upon viewing the regulations of this active period, whether of the former or latter kind, it appears, that ſuch important changes had not been effected within the ſame ſpace of time, ſince the days of Edward I.

The

CHAP. XXVIII.

HENRY VIII.

THE ſtatutes which contain the multitude of objects above alluded to, muſt neceſſarily fill a conſiderable ſpace, and would unavoidably require a great portion of the ſubſequent Hiſtory. But a ſtile of compoſition in framing ſtatutes began now to obtain, which ſwelled their ſize beyond all example of former times. This conſiſted partly in the matter and ſubſtance of them, and partly in the manner and form. Every parliamentary regulation was accompanied by a minute detail of particulars, and an accumulation of proviſos, exceptions, and qualifications: theſe were conveyed in a diffuſe and redundant language, crouded with ſynonimous terms and tedious repetitions. A regulation which in the reign of Edward I. would have been comprized in a few lines, was now ſpun out into as many clauſes: ſo that the ſtatutes of this ſingle reign actually cover as much paper as all thoſe preceding it, up to *Magna Charta*. The ſame faſhion prevailing, thoſe of the two ſubſequent reigns increaſed in the like proportion [a].

WITH this proſpect before us, it becomes neceſſary to adopt ſome rule by which we may abridge and ſimplify our materials, without doing any injury to the ſubject of our Hiſtory. Many of theſe ſtatutes are directed to concerns not at all of a juridical kind, and may therefore, as it ſhould ſeem, be paſſed over in ſilence. Thoſe that were of ſhort duration, either becauſe they were ſoon repealed, or were at firſt but temporary, may be treated more or leſs at large, according as they ſeem to deſerve a place in our hiſtorical inveſtigation: the remainder are ſuch as had an extenſive and permanent effect, and therefore are intitled to be detailed with all the minuteneſs which the compaſs of this work will allow. But even theſe, for the reaſons abovementioned, muſt ſometimes, and may in general with great propriety, be ſomewhat curtailed. It will very

[a] In the edition of the ſtatutes that uſually goes under the name of Rattall,—the reign of Henry VII. ends at pa. 390; that of Henry VIII. at pa. 902; and that of Philip and Mary at pa. 1200.

often

often ſuffice for the purpoſe of this inquiry, to ſtate the ſubſtance and effect of a ſtatute, without following the identical words, or enumerating every proviſion it contains. By means of ſuch abbreviation, the legiſlative acts of this reign may be contracted into a narrative of moderate length, neither impeded nor embarraſſed with the irkſome formality of the materials from which it is collected. While the hiſtorian amuſes himſelf with the one, the other will be left for the more authentic information of the practicer.

UNDER the controul of the above method we ſhall now take a view of the ſtatutes of this king, in the following order. Thoſe claim our firſt notice which tend to give ſtrength to the political ſyſtem, and vigour to the ſovereign power; ſuch are thoſe for regulating the legal polity of Wales, and abrogating all franchiſes exerciſed independent of the crown. Next to theſe ſhould follow ſuch ſtatutes as affected the parliament. The next are ſuch as produced the abolition of papal uſurpations, and wrought a reformation in our eccleſiaſtical conſtitution: then the laws that concerned the civil ſtate: after theſe will naturally follow the laws relating to private property, and the adminiſtration of juſtice: and, laſtly, thoſe relating to our criminal law. This is the order in which we intend to ſpeak of parliamentary proviſions during this reign.

OF the firſt kind are the ſtatutes concerning Wales. At the time when the parliament came to the reſolution of introducing a more complete ſyſtem of laws and adminiſtration of juſtice into Wales, the judicial eſtabliſhment there ſeems to have been of the following kind: From the time of Edward I. the Engliſh law had prevailed to a certain degree, and had at length in general obtained the aſcendant, in the government of property and the puniſhment of offenders; but this was always mixed with their local cuſtoms: to theſe they adhered with great predilection; and they were encouraged in this partiality by the number of petty juriſdictions into which the country was

Of judicature in Wales.

CHAP. XXVIII. HENRY VIII.

divided. The adminiſtration of juſtice in a great part of Wales was in the hands of the lords marchers, each of whom exerciſed a kind of feudal ſovereignty within his diſtrict, and became accordingly, in the perſon of his ſteward, the judge, with a full enjoyment of all the caſualties of judicature; ſuch as fees, fines, amercements, and forfeitures. Theſe caſualties, probably, the lords poſſeſſed in a greater or leſs extent, according to the nature of their franchiſe; ſome being the king's lords marchers; others being lords marchers, in a manner, independent[a].

BESIDES the variety of laws and uſages, that muſt follow from ſo many diſtinct tribunals; they were likewiſe productive of diſorders in the police, from defects of juſtice, owing to neglect, colluſion, or the claſhing of different juriſdictions. It was to remedy this, and to ſtrengthen the royal authority over the principality, that *a preſident and council* had been lately appointed under a commiſſion from the king. Theſe conſtituted a court, and ſeem to have maintained a kind of pre-eminence and ſuperintendant authority over the other judicatures of the country; but the whole of their power and authority does not exactly appear. Another ſupport of the king's ſovereignty conſiſted in the juſtices by him appointed. There was, and had been in very early times, a juſtice of *Cheſter*[b], whoſe juriſdiction comprehended the county of *Flint*; there was alſo the king's juſtice of *North Wales*, whoſe juriſdiction included *Angleſey*, *Carnarvon*, and *Merioneth*; and the juſtice of *South Wales*, which included *Carmarthen*, *Pembroke*, *Cardigan*, and *Glamorgan*[c]; the remainder of Wales being then not divided into counties, but under the government of the lords marchers, as before mentioned. Where juſtice was adminiſtered by judges appointed from the king, it cannot be doubted

[a] Vid. ant. vol. II. 94, 95. and ſtat. 26 Hen. VIII. c. 6. ſect. 1.

[b] Vid. ant. vol. II. 96.

[c] Stat. 27 Hen. VIII. c. 5.

but

but the Engliſh law was pretty generally known and obſerved. The judicial arrangement in North Wales ſeems to have been tolerably well adjuſted; for in the courſe of the ſettlement now about to be made, That is always referred to as the model by which this inſtitution was to be framed, and the guide by which many of its operations were to be governed. Such was the ſtate of the legal polity in Wales in the 26th year of this king, when the firſt ſtatute was made for reforming it.

THE ſtatute of 26 Hen. VIII. c. 4. was made to prevent the friends and kindred of criminals from labouring, and ſuborning jurors. It is thereby directed, that the officer of the court for the due keeping of the jury ſhould not ſuffer them to eat or drink, or any one to ſpeak to them. There is a very remarkable clauſe in this act, which ordains, that if the jurors acquitted a felon, *contrary to good and pregnant evidence*, or otherwiſe miſbehaved themſelves, the judge might compel them, upon pain of impriſonment, to be bound by recognizance to appear before the preſident and council, and abide the deciſion of that tribunal on their conduct. The preſident and council might impriſon or fine them at their diſcretion; an authority which had been exerciſed by judges in England [d] without the ſanction of an act of parliament, but not without great murmuring; and it was not till long after this that a ſolemn determination was pronounced againſt the legality of ſuch procedure [e].

THIS is followed by an act, in the ſame ſeſſions [f], containing proviſions very ſimilar to thoſe made in the earlier times of our hiſtory; which ſhews the influence of laws at that time in Wales to have been much what they were in England in the reigns of Henry III. and the beginning of Edward I. After complaining of the great

[d] Vid. ant. vol. III. 105.
[e] In Charles II.'s reign.
[f] Chap. 6.

CHAP. XXVIII. HENRY VIII.

diſorders prevailing in the principality, owing to the diſobedience of the law, it directs all perſons, upon monition given, to be attendant at the courts of juſtice, under certain penalties and forfeitures; none were to appear within two miles of the ſeſſion or court with any kind of weapon or armour, upon pain of impriſonment and fine; and all courts were to be kept in the *moſt ſure and peaceable place* that could be choſen[g]. To give redreſs againſt the oppreſſions of lords marchers, they and their ſtewards or officers were made liable to be fined by the preſident and council, for unjuſt impriſonment of any one within their diſtrict. To be ſure of the execution of the law againſt the worſt offenders, it was enacted, that coining, murder, and other felonies, ſhould be tried in the next Engliſh county[h]; and an acquittal or *fine-making* in any lordſhip ſhould be no bar, if the proſecution in the Engliſh county was brought within two years[i]. But the juſtices might diſcharge ſuch offender, if convicted, upon his finding ſureties not to commit any felony, and to be of good behaviour: this was to be with the conſent of the preſident and council; it was to be only once, and then not without paying a fine. This cuſtom of *fine-making* had been very ancient in Wales, being the remains of the old juriſprudence of the country; and the parliament were tender in abrogating an indulgent law, which was ſupported by the prejudices of the people, when they thought it might be put under ſome wholeſome reſtriction.

In the ſame ſeſſions two laws were made for correcting diſorders in Wales[k]; one, to puniſh thoſe who aſſaulted and beat people, and then took refuge within the boundaries of neighbouring lordſhips; the[l] other, to introduce there the late regulations concerning clerks convict. In the following ſeſſions ſome proviſions were made of

[g] Sect. 4 and 6. [h] Sect. 6. [i] Sect. 7. [k] Ch. 11. [l] Ch. 12.

greater

greater importance than any of the preceding: theſe were by ſtat. 27 Hen. VIII. c. 5. 7. and 26. The firſt of theſe ſtatutes was deſigned to enforce obedience to the criminal law; and it authoriſed the chancellor to appoint juſtices of the peace, juſtices of the *quorum*, and juſtices of gaol-delivery in Cheſter and Flintſhire, and in the counties of North and South Wales, with the ſame power to execute the law, as the ſame magiſtrates had in England. The ſecond was occaſioned by ſome abuſes prevailing in foreſts in Wales; ſuch as a cuſtom for foreſters to exact fines, on various pretences, of perſons going through the foreſt, and other exactions of the like kind; all which were thereby aboliſhed.

BEFORE we take notice of the third act made in this ſeſſions concerning Wales, it will be proper to mention one which ſtands before it in the ſtatute-book, and which made a part of the ſame plan for rendering the proceſs of law more effectual, by placing every judicature in the kingdom in the hands of the king. This was the act for taking from counties palatine the prerogatives which had long been annexed to them, in derogation of the ſovereign authority of the king: it is ſtat. 27 Hen. VIII. c. 24. and is intitled, "An Act for recontinuing Liberties in the Crown;" importing, as the preamble ſtates, that "divers of the moſt ancient prerogatives and authorities of juſtice appertaining to the imperial crown of the realm had been ſevered from it by the gift of the king's progenitors, to the detriment of the royal eſtate, and the delay of juſtice." For reformation of this, it was thereby ordained, that, for the future, no perſon ſhall have authority to pardon offences committed in any part of the realm or in Wales, or the marches thereof; but that "the king ſhall have the whole and ſole power and authority thereof, united and knit to the imperial crown of this realm, as of good right and equity it appertaineth;" and none but he alone

Of counties palatine.

CHAP. XXVIII. HENRY VIII.

was ever after to appoint juſtices in eyre, of aſſiſe, of the peace, or of gaol-delivery, in all ſhires, counties palatine, and all other places in England, Wales, and the marches thereof.

ALL writs and indictments were for the future to alledge facts as done againſt the king's peace, and were to be in the king's name; only they were to be *teſted* in the name of the perſon who had the county palatine or franchiſe; and juſtices appointed in the county palatine of Lancaſter were to have their commiſſion under the ſeal of Lancaſter.

THERE was a proviſion in this act in favour of ſome of theſe liberties. The juſtice of *Cheſter* and *Flint* was excepted out of every alteration made by this ſtatute [n], and was therefore to exerciſe his authority according to the commiſſion he before received. The biſhop of Ely and his temporal ſteward of the iſle of Ely, the biſhop of Durham and his temporal chancellor of the county palatine of Durham, the archbiſhop of York and his temporal chancellor of the ſhire and liberty of Hexam, were to be juſtices of the peace within their ſeveral liberties, with all the authority annexed to the office of ſuch magiſtrates.

THUS were all the prerogatives enjoyed by theſe petty ſovereigns reſumed, and re-annexed to the crown; while the form of their judicial eſtabliſhment ſtill remains.

AFTER the regulations made by this act, a way was opened for a more complete reformation in the judicature of Wales; which was now undertaken on a larger ſcale, by chap. 26. of the ſame ſtatute. It is thereby, in the firſt place, ordained, that the dominion of Wales ſhould for ever be incorporated with, and annexed to, the

[n] Sect. 18.

realm

realm of England; that perſons born there ſhould enjoy all the privileges and laws of this kingdom, as natural-born ſubjects; that lands ſhould be inherited after the Engliſh tenure, without partition; and, finally, that all the laws, ordinances, and ſtatutes of England, and no other, ſhould be executed in Wales, in ſuch manner as directed by that act. To inſure the due adminiſtration of theſe new laws, it was enacted, that certain lordſhips marchers ſhould be annexed to certain Engliſh and Welch counties; and that the reſidue ſhould be divided into counties, under the names of *Monmouth*, *Brecknock*, *Radnor*, *Montgomery*, and *Denbigh*; the firſt to be taken as an Engliſh, the reſt as Welch counties[*]; and a commiſſion was to be appointed for dividing theſe new counties into hundreds, and for ſettling the diviſions of ſome others. It was further directed, that juſtice ſhould be adminiſtered in theſe new Welch counties, and in *Carmarthen*, *Pembroke*, *Cardigan*, and *Glamorgan*, according to the Engliſh law, by ſuch juſtices as the king ſhould appoint, and in ſuch form and faſhion as it then was and had been uſed in the three counties of North Wales (namely, Angleſea, Carnarvon, and Merioneth), which we have ſeen was an old eſtabliſhment, and was now the original, according to which the new arrangement was adjuſted.

It was further directed, that all courts ſhould be proclaimed and kept in the Engliſh tongue: all oaths, verdicts, and the like, were to be in Engliſh; and no perſon was to have any office who did not underſtand Engliſh. A ſaving was made of a moiety of forfeitures and fees to lords marchers, as well as all courts leet, barons, waifs, ſtrays, and other caſualties and fruits of ſeignory. There was a ſaving of uſages and cuſtoms then prevailing in North Wales; and notwithſtanding what had been declared to the contrary in the former part of the act, it

[*] Sect. 3.

CHAP. XXVIII. HENRY VIII.

was provided, that lands which had been by cuſtom time out of mind partible among the heirs, ſhould ſo continue [p]. To aſcertain what the cuſtoms and laws obtaining in Wales were, a commiſſion was to be appointed to make enquiry concerning them; and ſuch as ſhould be thought by the king and his council proper to be retained, were to be continued in full force and effect [q]. In aid of this proviſion, it was alſo declared, that the king ſhould have power for three years to ſuſpend, abrogate, or alter this act [r]; and for the next five years, to erect ſuch courts and appoint ſuch juſtices within the principality as he ſhould think fit: ſo that a final and perfect eſtabliſhment of the judicial polity of Wales was reſerved for ſome future ſettlement, which was then in contemplation.

THIS was accompliſhed by ſtat. 34 and 35 Hen. VIII. c. 26. which is intitled, "An Act for certain Ordinances in Wales;" and contains the whole conſtitution of the principality, its laws and judicature. The proviſions of this act are ſaid to have been granted at the humble ſuit and petition of the king's ſubjects in Wales. It declares, that Wales, conſiſtent with the late revolution effected there, ſhould conſiſt of twelve counties; the eight ancient counties, that is, *Glamorgan*, *Carmarthen*, *Pembroke*, *Cardigan*, *Flint*, *Carnarvon*, *Angleſea*, and *Merioneth*; and the four new ones, that is, *Radnor*, *Brecknock*, *Montgomery*, and *Denbigh*; and that the limitations of hundreds, as ſettled by the commiſſioners appointed according to the late act, ſhould be obſerved.

As to the judicature of the country, it directs, that there ſhould continue a preſident and council, as before; that a ſeſſions, to be called *The King's great ſeſſions in Wales*, ſhall be held twice a-year in every county [s]; that this court ſhall hold pleas of the crown in as ample manner as the king's bench; and pleas real, perſonal, and

[p] Sect. 35. [q] Ibid. 27. [r] Ibid. 36. [s] Ibid. 4, 5, 6, 7, 8, 9.

mixed,

mixed, as completely as the common-pleas in England[t]. The detail of regulations made by this act may be ſtated briefly, as follow: The ſeſſions is to laſt ſix days. Days are to be given from day to day, and from ſeſſions to ſeſſions, at the diſcretion of the juſtices. There is to be an original and judicial ſeal (for the different circuits), to ſeal all original and judicial writs and proceſs; the *teſte* of every bill and judicial proceſs to be under the names of the juſtices. All actions, real and mixed, are to be by original. Perſonal actions above forty ſhillings may be either by original or by bill; thoſe under are to be always by bill. Original bills are to be ſealed with the judicial ſeal. Fines of land with proclamations levied before juſtices there, are to be of the ſame force as fines in the common-pleas[u]. Errors of judgments before the great ſeſſions in pleas real and mixed, are to be brought by writ of error into the king's bench in England; in pleas perſonal, to be reformed by bills before the preſident and council[x]. No execution to be ſtayed by writ of falſe judgment; but in caſe the judgment is reverſed, reſtitution is to be made[y]. When there are many perſonal actions which cannot be tried at the great ſeſſions, it was ordained, that, for diſpatch, they may be heard at a petty ſeſſions before the deputy juſtices there; and further, that no ſuit ſhall be proſecuted by bill before the ſaid juſtices, under twenty ſhillings[z]. The fees of officers, for the execution of proceſs and drawing the proceedings, were fixed by the ſtatute, with authority, however, to the juſtices to alter them at their diſcretion.

Besides the ſuperior magiſtrates, the preſident and council, and the juſtices of ſeſſions, there were to be juſtices of the peace in every county[a]; their number and qualifications were ſet forth[b]; and direction was

[t] Sect. 12.
[u] Ibid. 33, 34, 35. 41.
[x] Ibid. 113.
[y] Ibid. 114.
[z] Sect. 94.
[a] Ibid. 53.
[b] Ibid. 55, 56.

given

CHAP. XXVIII. HENRY VIII.

given for the due holding of inferior tribunals, as the ſheriff's county court and tourn, with courts baron and other courts [c].

In addition to the appointment of magiſtrates, and preſcribing the bounds of their juriſdiction, ſeveral rules were laid down reſpecting the law of crimes and of property. It was ordained, that no felon ſhould be permitted to make fine (as they before had done, according to the uſage of the country, confirmed in ſome meaſure by the late act [d]), but ſhould ſuffer the law, unleſs repriеved by the judge [e]. The ſtat. 26 Hen. VIII. c. 6. concerning the trial of crimes and felons in the next Engliſh county, was confirmed; but by another clauſe of this act [f], it is declared, that if any murder or felony is committed, no one, upon pain of fine and impriſonment, ſhall make an end or agreement with the offender, unleſs he make the preſident or council, or one of the juſtices, privy thereto; a proviſion which evidently allowed a continuance of this practice.

It was ordained, that trials in the county, baron, and hundred courts, ſhould be by wager of law, or verdict of ſix men, at the pleaſure of the party who pleaded the plea [g]. In other courts, in actions perſonal, where nine of the jury were ſworn, the ſheriff may, upon default of the reſt, fill it up by a *tales de circumſtantibus* [h]. In foreign pleas triable in another Welch county, a tranſcript of the record is to be ſent thither; but if the matter of ſuch pleas is laid in an Engliſh county, it is, nevertheleſs, to be tried in Wales [i].

The following are the proviſions relating to property. It was now finally enacted, that lands ſhould not be partible among the heirs [k], as in *Gavelkind*; but ſhould deſcend, as in Engliſh tenures. No mortgage is to be allowed but

[c] Sect. 73. 75.
[d] Vid. ant. 196.
[e] Sect. 84.
[f] Ibid. 100.
[g] Sect. 84.
[h] Ibid. 103.
[i] Ibid. 88. 89.
[k] Ibid. 93.

according

according to the courſe of the Engliſh law [l]; all perſons may ſell and alien their lands, the ſame as in England [m]; and lands there are to be ſubject to ſtatutes ſtaple, and recognizances acknowledged in England [n]. No ſale of goods in any fair or market is to change the property [o]; nor is any perſon to buy live cattle, unleſs it is proved by witneſſes where it was bought; and this is to be obſerved under pain of a fine.

NOTWITHSTANDING ſo extenſive and complete a judicature was eſtabliſhed within the principality, there was a clauſe in this act which provided for the introduction of proceſs from the ſuperior courts, on certain occaſions. It was ordained, that, "for urgent and weighty cauſes," proceſs ſhould be made and directed into Wales by the ſpecial commandment of the chancellor, or any of the king's council, as had been uſed before [p]. There was a reſervation to the king of a power ſimilar to that given by a former ſtatute relating to the adminiſtration of juſtice in Wales, by which he was enabled, in writing under the great ſeal, to change, add, alter, order, diminiſh, and reform, all the beforementioned proviſions, as it ſhould ſeem convenient; and from time to time, at his pleaſure, to make laws for the government of Wales [q].

Of parliament.

THUS far of thoſe proviſions made by parliament for maintaining the political authority of the ſovereign. The legiſlature made ſome acts reſpecting its own conduct and conſtitution. The firſt of theſe was paſſed at the cloſe of a ſeſſion, with the neceſſity of ſuch a proviſion, no doubt, plainly before their eyes. It was enacted by ſtat. 6 Hen. VIII. c. 16. in conſideration of the many weighty matters which were often left to the end of a ſeſſion, that no member depart nor abſent himſelf till the parliament was fully finiſhed, ended, or prorogued, unleſs he had licence

[l] Sect. 92.
[m] Ibid. 93.
[n] Ibid. 94, 95.
[o] Sect. 104.
[p] Ibid. 115.
[q] Ibid. 119.

from

CHAP. XXVIII.

HENRY VIII.

from the ſpeaker and commons, which licence was to be entered on record in the book of the clerk of the parliament: if any did otherwiſe, he was to loſe his wages, and the inhabitants of the county, city, or borough, ſhould be diſcharged thereof.

In order to communicate to Wales all the privileges enjoyed by Engliſh ſubjects, it was ordained by ſtat. 27 Hen. VIII. c. 26. that two knights ſhould be choſen for the county, and one burgeſs for the town of Monmouth; that one knight ſhould be choſen for the county of Brecknock, Radnor, Montgomery, and Denbigh, and for every other county in Wales; and one burgeſs for every ſhire town, except Merioneth. Theſe elections were to be as in England, with the ſame fees and allowances.

The next ſtatute on this head was for imparting the privilege of being repreſented in parliament to the county palatine of Cheſter. The preamble of ſtat. 34 and 35 Hen. VIII. c. 13. ſtates, that the inhabitants of the county palatine complained of ſuffering in their property from ſevere laws, which they attributed to their bearing no part in the making of them. To ſatisfy the inhabitants, it was therefore enacted, that there ſhould be two knights for the county, and two burgeſſes for the city, to be elected by proceſs iſſued by the chancellor of England to the chamberlain of Cheſter, his lieutenant, or deputy, and from him to the ſheriff of the county; which elections and returns by the ſheriff were to be the ſame as thoſe in the county palatine of Lancaſter, and the reſt of England[r].

There was a ſtatute for better ordering the collection of the wages of knights and burgeſſes in Wales and

[r] There is another proviſion in this act, which, though relating to another ſubject, is worth notice. It was a practice in the county palatine for a perſon indebted to another to come to the exchequer there, and make oath that he would pay his creditors as ſoon as he was able; upon which the officers uſed, of their own authority, to iſſue a writ in nature of a protection, and to delay the creditors from making any demand of their debts. It was now ordained, that no ſuch writ ſhould iſſue without ſpecial warrant from the king.

Mon-

Monmouth. It ſeems that the wages of a knight was now four ſhillings a-day, that of a burgeſs two ſhillings, and it continued from their ſetting out to their return home, with the coſts of their writs, and other fees and charges. There were two writs; one, *de ſolutione fœdi militis parliamenti*; and another, *de ſolutione fœdi burgenſis parliamenti*. Theſe uſed to be ſued out by the member; and by this act the ſheriff, mayor, or other head-officer, was to make his payment within two months after ſuch writ delivered to him *.

Of the eccleſiaſtical polity.

THE laws relating to the national church, and the eccleſiaſtical polity, make the moſt remarkable part of the legiſlative acts during this reign. The attack upon the papal authority, and the reformation of abuſes among the clergy, was carried on by fits, as the king's humour directed him; and they fill, on that account, a multiplicity of ſtatutes. To arrange theſe in ſome order, and to preſerve, at the ſame time, a kind of hiſtory of this famous revolution in the church, will be attended with difficulties. Theſe acts are of different ſorts, and had different objects: ſome were deſigned to demoliſh the ancient fabric; and others to lay the foundation of a new one: ſome concerned the papal authority ſolely; others applied to matters of domeſtic regulation. It follows, that many of theſe ſtatutes being now *functa officio*, are ſunk into oblivion; while thoſe which furniſhed the baſis of our preſent eſtabliſhment in the church, are generally known. Perhaps the moſt ſatisfactory way of treating the one, would be to give alſo a detail of the other. We ſhall, therefore, take a view of the ſtatutes that relate, in any way whatever, to the church and eccleſiaſtical law, as nearly in the order in which they were made as the ſubject will permit. This will form a ſort of juridical narrative of the Reformation, interrupted ſometimes and retarded by the recital of regulations either directly or incidentally appertaining thereto, and which the nature of this work requires ſhould be ſomewhat fully enlarged upon.

* Stat. 35 Hen. VIII. c. 11.

AFTER

CHAP. XXVIII.

HENRY VIII.

AFTER the diſgrace of Cardinal Wolſey, and while the affair of the king's marriage was depending, in the 21ſt year of this reign[t], a parliament was called, when three bills were ſent up from the commons, levelled at ſome of the moſt exorbitant abuſes of the clergy: one was againſt unreaſonable exaction of fees for the probate of wills; another was for regulation of mortuaries; another was to reſtrain pluralities and non-reſidence, and to forbid the clergy taking farms.

Fees of ordinaries.

WE have before ſeen what proviſion had been made by parliament, and by provincial conſtitutions, for preventing extortion and impoſition in the article of fees for probate and adminiſtration. Abuſes, however, ſeem ſtill to have maintained their ground[u]. The ſtat. 21 Hen. VIII. c. 5. complains of the impoſitions practiſed by ordinaries, notwithſtanding two former ſtatutes made to aſcertain their fees, namely, ſtat. 31 Ed. III. ſtat. 1. c. 4. and ſtat. 3 Hen. V. c. 8.[v]; and it enacts, that nothing ſhall be taken for probate of a will, and making inventories, where the goods do not exceed five pounds, except 6d. to the clerk; where they do not exceed 40l. not more than 3s. 6d.; and where they exceed that, 5s. Thus far of teſtaments. It ordains, with more preciſion than the ſtatute of Edward III. who ſhall be intitled to the adminiſtration, in caſe of inteſtacy: it directs, that it ſhall be granted *to the widow of the deceaſed*, or *to the next of his kin*, or *to both*, as the ordinary in his diſcretion ſhall think good. The ſame rule is to be obſerved where executors refuſe to prove the will, and the execution of it is to be committed to the relations. The ordinary is alſo empowered to make his election between two or more who are of equal degree of kindred[x]; nor is any thing to be taken for ſuch adminiſtration by the ordinary, unleſs the goods amount to more

[t] An. 1529.
[u] Vid. ant. 67, 68.
[v] Vid. ant. vol. II. 386; and vol. III. 256.
[x] Sect. 3, 4.

than

than 5l.; and then if they do not exceed 40l. he is to take only 2s. 6d.

EXECUTORS and adminiſtrators are to give ſecurity for a due adminiſtration[r]; and, taking two of the legatees, or two creditors, or, in default of them, two of the next of kin, they are to make an inventory of the effects. All perſons offending are to forfeit as much as the money taken contrary to this act; and, beſides, 10l. half to the king, and half to the party aggrieved. The act further ordains, that lands being deviſed to be ſold, the money thence ariſing, or the profits of the lands, ſhall not be conſidered among the goods and chattels of the deceaſed. So that many perſons who had property of ſome value, might in thoſe days, when perſonalty was in general not large, come within the privileges above allowed to thoſe who had not 5l. in goods.

MORTUARIES, or *corſe-preſents*, were a cuſtomary due claimed by the parſon in many places upon the death of any-body. Stat. 21 Hen. VIII. c. 6. puts ſome reſtraint upon theſe demands; and ordains, that none ſhall be taken where the moveable goods of the deceaſed are under ten marks; and where they are under 30l. after all debts paid, not more than 3s. 4d. is to be taken, and in no caſe more than 10s. Mortuaries were hereafter not to be taken on the death of a way-faring man, feme-covert, child, or perſon not keeping houſe; and they were entirely aboliſhed in Wales.

THESE proviſions had a more general effect than thoſe that follow; for while they reſtrained the clergy from raiſing ſums on the people in certain fees and dues, the following act only confines the clergy to a due diſcharge of their function, by forbidding, under penalties, all other avocations. The ſtat. 21 Hen. VIII. c. 13. was made, as it ſays, among other reaſons, for "the increaſe of devotion and good opinion of the lay fee toward the ſpiritual

[r] Sect. 4.

perſons."

CHAP. XXVIII. HENRY VIII.

perſons." It accordingly ordains, in the firſt place, that no ſpiritual perſons ſhall take lands to farm under pain of forfeiting 10l. per month. This, however, does not extend to the farming of any temporalities during the vacation of biſhoprics, or collegiate or cathedral churches; and any perſons [a] not having ſufficient glebe, may rent lands for the mere expences of their houſhold. Moreover, no ſpiritual perſons are to buy or ſell for profit any kind of merchandize, upon pain of forfeiting the thing ſo bargained, and of the contract being void; with an exception where they ſell the overplus that remains of any corn, cattle, or the like, after the ſupply of their families. No ſpiritual perſon is to keep a tan or brewhouſe, under the penalty of forfeiting 10l. per month [b].

Reſidence and pluralities.

THESE regulations were deſigned to remove the clergy from mean and gainful occupations, and to fix their attention ſolely to their ſpiritual calling. That this might be diſcharged with faithfulneſs, the next ſtep was to put pluralities and non-reſidence under ſome reſtraint. Repeated proviſions had been made by councils, and by our own provincial ſynods, to prevent plurality of benefices; but the force of theſe had been weakened by the interpoſition of papal diſpenſations [c]. In confirmation of the deſign of ſuch proviſions, and to ſhorten the hand of the pope, it was now enacted, that if any one having a benefice with cure of 8l. per ann. or above, accept of another with cure, and be inſtituted and inducted, the firſt ſhall be adjudged vacant, and the patron intitled to preſent. All diſpenſations from Rome, or elſewhere, contrary to this act, are declared void, and the procurers thereof ſubjected to the penalty of 20l. Only ſuch ſpiritual men as are of the king's council may purchaſe a diſpenſation to hold three benefices; and the following perſons to hold two: the chaplains of the king, queen, prince, or princeſs, or any of the king's children,

[a] Sect. 7, 8.
[b] Ibid. 32.
[c] Lynd. lib. 3. tit. 5. c. 2. Ayl. Parerg. Jur. Can. 414.

brothers,

brothers, uncles, or aunts; of all lords ſpiritual and temporal, and peereſſes; the chaplains to the chancellor, treaſurer, and comptroller, ſecretary of ſtate, dean of the chapel, almoner, maſter of the rolls, the chief juſtice of the king's bench, the warden of the cinque ports; as alſo, the brothers and ſons of temporal lords and knights, doctors and batchelors of divinity and law, being admitted ſuch by the univerſity, and not by grace only.

THE papal canon law and our own conſtitutions had not been more ſtrict on the article of pluralities, than that of reſidence; but the interpoſition of the legiſlature was deemed as neceſſary in the latter caſe as in the former. The preſent ſtatute directs, that every one promoted to an archdeaconry, deanry, or dignity, in any cathedral or collegiate church, or beneficed with a parſonage or vicarage, ſhall be perſonally reſident on one of them at leaſt; and if he abſent himſelf for one month together, or two months at ſeveral times in one year, he ſhall forfeit 10l. for every default, with a penalty on thoſe who procured diſpenſations from Rome, as in the caſe of pluralities: a ſimilar exception was made in favour of the following perſons: thoſe in the king's ſervice beyond ſea; ſcholars reſiding at any univerſity for ſtudy; chaplains to the king or any of the royal family, and lords ſpiritual and temporal and peereſſes; the chaplain of the chancellor; treaſurer of England; the chamberlain and ſteward of the houſhold, treaſurer and comptroller; knights of the garter; chief juſtice of the king's bench (and by ſtat. 25 Hen. VIII. c. 16. all the judges of that court, and of the common-pleas, the chancellor and chief baron of the exchequer, and the attorney and ſolicitor-general; and by ſtat. 33 Hen. VIII. c. 28. the chancellor of the duchy of Lancaſter [d], and the groom of the ſtole); warden of the ports;

[d] By the ſame act this privilege was given to ſome great officers of the courts erected ſince the former acts, namely, the chancellor of the court of augmentations, the chancellor of the court of firſt-fruits and

CHAP. XXVIII. HENRY VIII.

maſter of the rolls; ſecretary; dean of the chapel; almoner; ſuch chaplains being attending and dwelling without fraud or covin in the houſholds of the above perſonages. The following perſons were alſo excepted, being in thoſe days uſually eccleſiaſtics: the maſter of the rolls; dean of the arches; the chancellor or commiſſary of any biſhop; ſuch of the twelve maſters in chancery, and twelve advocates of the arches, as were ſpiritual men. The king is permitted to give licence of non-reſidence to his chaplains; which ſeems to be only a confirmation of the common law; for the king's clerks were never bound to reſidence, and there was an old writ *de non reſidentiâ clerici regis*[e].

THERE was a clauſe that forbid a beneficed perſon taking a parſonage or vicarage in farm, or any profit or rent out of it, upon pain of forfeiting 40s. for every week, and ten times the value of the profit or rent; and the like penalty of 40s. for every week that he received any ſtipend or ſalary to ſing for a departed ſoul[f].

THE temporal lords were earneſt in paſſing theſe three bills, and the ſpiritualty as ſtrongly oppoſed them. It was ſaid, that complaints of abuſes and pretended reformations were ſet on foot only to diſgrace the clergy, and were the ordinary beginnings of hereſy. The clergy without doors were equally clamorous againſt them; while the acts were, on the other hand, ſecretly promoted by the king.

THO' the latter ſtatute affected the pope's authority in matter of pluralities, non-reſidence, and diſpenſations; yet this, and the whole of theſe three acts were rather regulations of a domeſtic nature, than ſuch as could be conſidered in the light of attacks on the papal juriſdiction. However, they

tenths; the maſter of the wards and liveries; each of the general ſurveyors of the king's lands; the treaſurer of the court of augmentations. The chaplains of perſons mentioned in this act were to go twice a-year to their benefice, and there reſide eight days, or forfeit forty ſhillings for every neglect.

[e] Vid. ant. vol. II. 293.

[f] Sect. 30.

ſhewed

ſhewed the pope what the king meant to do, if he went on to offend him, and how readily the parliament would give their concurrence. The clergy ſuffered a ſevere blow by theſe laws; for they not only felt an immediate reſtraint, and loſt a preſent profit, but a door was opened for the many mortifying regulations which ſoon followed[z].

THESE begun to appear in two years; for, after ſtat. 23 Hen. VIII. c. 9. which provided againſt citing any perſon out of the dioceſe where he reſided, except in caſes of prerogative-adminiſtration in the archbiſhop's court, and in caſes of hereſy, the foundation of the breach that afterwards followed with the ſee of Rome was laid, by an act for reſtraining the payment of firſt-fruits to that court, upon the acceſſion to any biſhoprick. This act is chap. 20. of the ſame ſtatute. It was thereby provided, that if any biſhop preſented to the pope was delayed on the above or any other account from his biſhoprick, he ſhould be conſecrated by the archbiſhop, and if an archbiſhop, by two biſhops, and then inſtalled, in the ſame manner and to the ſame effect as if the pope had concurred. That the court of Rome might have no juſt cauſe of complaint, in reſpect of making out bulls for ſuch biſhops and archbiſhops, they were allowed to pay for them 5l. in the hundred of the clear profits of their ſees.

THE king did not intend that things ſhould be hurried to extremities at once; and this bill was only deſigned as a temperate meaſure to bring the pope to terms. It did not therefore receive the royal aſſent; but was to be held forth as a proviſional regulation, till the king had compounded this claim of firſt-fruits with his holineſs, or prevailed upon him entirely to renounce it. In the mean time, the whole conduct and direction of this tranſaction was to be left to the king, who was empowered to declare, within a certain period, whether this bill ſhould be in force or not. Some

[z] Burn. Ref. vol. I. 80.

CHAP. XXVIII.

HENRY VIII.

months after, on the 9th of July, 1533, the act was finally ratified by letters patent.

THE breach with the ſee of Rome was much forwarded by ſtat. 24 Hen. VIII. c. 12. againſt appeals. It declares, in maintenance of the ancient law of the land, and the ſtatutes [b] often made to ſupport it, that all cauſes teſtamentary, cauſes of matrimony, divorces, rights of tithes, oblations, and obventions, ſhall be heard and finally determined within the king's juriſdiction and authority, and not elſewhere; notwithſtanding any inhibitions, appeals, or other proceſs, from the ſee of Rome, or elſewhere; and it is declared, that all ſacraments and religious ceremonies ſhall be performed, notwithſtanding any excommunication or interdict that might be iſſued [i]. The penalty of a *præmunire* was denounced on thoſe who ſued at Rome in defiance of the regulations of this act. The order of appeal was directed to be in the following manner: from the archdeacon or his official to the biſhop; from the biſhop or his commiſſary to the archbiſhop of the province; from the archdeacon of an archbiſhop to the court of arches or audience; and from thence to the archbiſhop himſelf: all theſe reſpective appeals were to be within fifteen days after judgment or ſentence, and ſuch as were before the archbiſhop, were to be determined without appeal. It was further added, that all cauſes of the above kind, in which the king had any intereſt, ſhould, if any appeal was brought by the party grieved, be finally determined by the ſpiritual prelates and other abbots and priors of the upper houſe, aſſembled by the king's writ in convocation: a proviſion which had a view to the king's divorce then depending. There is added, a ſaving of all prerogatives heretofore enjoyed by the archbiſhop of Canterbury in all caſes of appeal.

[b] Meaning the ſtatutes of Edward I. and III. thoſe of Rich. II. and Henry IV. againſt foreign juriſdiction. Vid. ant. vol. II. 157. 376. 379. and vol. III. 162. 164.

[i] Sect. 2.

AT

AT length, in the 25th year of this king[k], the pope's authority was totally deſtroyed by three ſtatutes, ch. 19, 20, 21.; for ch. 14. of this ſtatute, which repealed ſtat. 2 Hen. IV. c. 15. and confirmed ſtat. 5 Rich. II. ſtat. 2. c. 5. and 2 Hen. V. ſtat. 1. c. 7. concerning the puniſhing of heretics, had another object; except in one clauſe, which declares it ſhall not be hereſy to ſpeak againſt the ſee of Rome, as ſome ignorant people imagined it was. However, ſome reſtraint was by that act impoſed on the arbitrary proceedings of the ſpiritual courts in caſes of hereſy; and, as it ſo far put an effectual limitation on the eccleſiaſtical power, this act muſt be conſidered as favourable to the Reformation[l].

THE firſt of thoſe three laws abovementioned is the *ſubmiſſion of the clergy*, then ſitting in convocation; and it was now to be paſſed in parliament. The clergy thereby acknowledged, that all convocations had been, and ought to be, ſummoned by the king's writ; and they promiſed *in verbo ſacerdotii*, that they would never make nor execute any new canons or conſtitutions without the royal aſſent to them. As many canons had been received which were found prejudicial to the king's prerogative, contrary to the laws, and heavy to the ſubject; it was ordained, that a committee ſhould be appointed of thirty-two perſons, ſixteen of the two houſes, and as many of the clergy, to be named by the king, who ſhould make enquiry and have full power to abrogate and confirm ſuch canons as they thought it expedient, with the king's aſſent. Appeals to Rome were once more condemned by parliament; and all appeals are directed to be made according to ſtat. 24 Hen. VIII. c. 12. juſt mentioned; only an appeal is by this act given from the archbiſhop's court, and from places exempt, to the king in chancery; upon which a commiſſion is to be directed to ſuch perſons as the king ſhall name,

Submiſſion of the clergy.

[k] An. 1534. [l] Burn. Ref. vol. I. 141.

CHAP. XXVIII. HENRY VIII.

as in caſes of appeals from the admirals court. This court of appeal has been ſince called the *Court of Delegates*.

TILL the reformation of the eccleſiaſtical law was made, it was declared, that ſuch canons, conſtitutions, ordinances, and ſynodals provincial, being already made, and not repugnant to the laws, ſtatutes, and cuſtoms of the realm, nor to the hurt of the king's prerogative, ſhould be uſed and executed as before[m]: upon which ſaving, and the former uſage of the kingdom, depends the preſent practice of the eccleſiaſtical courts; as the deſigned reformation of that law has never been effected. We ſhall, however, have occaſion hereafter to make ſome obſervations on the ſteps taken for bringing about this reformation.

THE ſecond of theſe acts is chap. 20. which confirms the former ſtatute concerning the non-payment of firſt-fruits: and further enacts, that biſhops ſhall no longer be preſented to the ſee of Rome, nor ſhall ſue out any more bulls there; but that all biſhops ſhould be preſented to the archbiſhop, and an archbiſhop to the other archbiſhop, or to any four biſhops whom the king ſhould name. When any ſee is vacant, the king is to grant a licence, or *congé d'élire*, to the dean and chapter to proceed to a new election, and therewith to ſend a letter miſſive containing the name of the perſon whom they are to elect; and if they delay the election for twelve days, the king is to nominate by letters patent. The perſon elected or nominated is to ſwear fealty to the king, and a commiſſion is to iſſue for conſecrating and inveſting him; after this he is to do homage to the king, and to be put in poſſeſſion of the ſpiritualities and temporalities. The dean and chapter, or the biſhop or archbiſhop, neglecting for twenty days to perform their parts, as preſcribed by this act, are ſubjected to the penalty of a *præmunire*.

Papal authority aboliſhed.

NEXT follows the famous act for diſcharging the ſubject from all dependence on the papal ſee[n]. The preamble

[m] Sect. 7. [n] Chap. 21.

complains

complains of the intolerable exactions for Peter-pence, penſions, impoſitions, and bulls, which were contrary to the laws of the kingdom, and grounded on the uſurpations and abuſes of the pope in granting diſpenſations; whereas it ſtood, ſays the act, with natural equity and reaſon, that the king and parliament only ſhould have power to diſpenſe with laws, or to authorize ſome elect perſon to exerciſe that ſupreme authority. And foraſmuch as the Convocation had recognized the king as ſupreme head of the church of England, therefore it was enacted, that all payments made to the apoſtolic chamber, and all papal proviſions, bulls, and diſpenſations, ſhould from thenceforth ceaſe; and, for the future, all diſpenſations or licences for things not contrary to God's law, but only to the law of the land, ſhould be granted within the realm; that is, by the archbiſhop of Canterbury, who is to grant them, in ſuch caſes as had been formerly uſed: and further, all diſpenſations which uſed to be taxed at Rome at or above 4l. were to be confirmed under the great ſeal. When the archbiſhop refuſed to grant ſuch diſpenſations, the party might have a writ out of chancery for him to ſhew cauſe for his refuſal; upon which his reaſons were to be examined, and juſtice done in the caſe [o]. There is a clauſe in this act which declares, that it was not intended to decline from the catholic faith of Chriſtendom [p]. The exemptions of monaſteries was confirmed; and they were declared not to be ſubject to any viſitation from the archbiſhop; but they were brought under the king's juriſdiction, who might grant a commiſſion to viſit them. Power was given to the king and council to reform all indulgences and privileges which had been granted by the ſee of Rome. The offenders againſt this act were ſubjected to a *præmunire*.

THIS law, by cutting off the trade of indulgences about divine laws, which had been ſo gainful to the church, gave

[o] Sect. 17. [p] Ibid. 19.

CHAP. XXVIII. HENRY VIII.

great eaſe to the people. Not only the pope's power was hereby rooted out, but the religious houſes now ſaw themſelves within the king's power. This was aggrandized ſtill more by the authority this act gave him of abrogating all its proviſions by his letters patent, if he ſo pleaſed.

BUT the king's ſupremacy was not directly eſtabliſhed by parliament till the following year, when it was enacted by ſtat. 26 Hen. VIII. c. 1. that the king ſhall be taken as "the only ſupreme head in earth of the church of England, "called *Anglicana Eccleſia*; and ſhall have all authority "thereto annexed, to reform and correct all errors, hereſies, "and abuſes, which may be amended by any ſpiritual ju-"riſdiction whatſoever."

WHEN the king had been inveſted with this entire ſovereignty over the church, it ſeemed like bringing things only into their old courſe, to give to him the firſt-fruits and tenths, which had been ſo lately taken from the pope: this was done by ſtat. 26 Hen. VIII. c. 3. It was in order to promote the good government of the church, that the primitive inſtitution of ſuffragan biſhops was provided for by ſtat. 26 Hen. VIII. c. 14. Every biſhop was to preſent two perſons to the king, who was to nominate one to be ſuffragan. The towns to which ſuffragans were to be appointed, with their duty and privileges, are mentioned in the act[9].

HENRY may now be conſidered as having completed the whole of his plan againſt the biſhop of Rome; the remaining ſtatutes on this ſubject being rather in aid of thoſe already paſſed, than introductory of any thing entirely new. By ſtat. 27 Hen. VIII. c. 15. the commiſſion of thirty-two perſons to reviſe the canon law, was intended to be maintained. Ch. 28 of the ſame ſeſſions, for diſſolving the leſſer monaſteries, may be conſidered as a continuation of the ſcheme for humbling the clergy, and ſeems to have

[9] Vid. Burn: Ref. vol. I. 151.

been

been foreboded by the late acts; that againſt diſpenſations, and that to eſtabliſh the king's ſupremacy. The monaſteries diſſolved by this act, were thoſe of only 200l. per ann. and under.

AN amendment was made by ſtat. 28 Hen. VIII. c. 13. in the late law of non-reſidence. Many perſons had availed themſelves of the privilege allowed to ſtudents in the univerſities; and, under that character, lived there in idleneſs, inſtead of reſiding at their livings. This act declares, that perſons above forty years old ſhall not be intitled to the privilege of that exemption; unleſs they are ſome of the heads and governing part of the univerſity or colleges, or readers in divinity. Thoſe under forty years muſt be ſuch as attend at the ordinary lectures, diſputations, and exerciſes, of the place; unleſs they are readers in ſome of the liberal ſciences. The laſt ſtroke at the papal power ſeems to have been made by ſtat. 28 Hen. VIII. c. 16. which declares all bulls, briefs, faculties, and diſpenſations, of what kind ſoever, heretofore granted from the ſee of Rome, to be void, and of no effect. As this act was only levelled at the many juriſdictions, privileges, and exemptions, that were claimed in different parts of the kingdom under the ſanction of papal grants, it was neceſſary, in order to avoid much confuſion, to add proviſos to this ſweeping clauſe: there is accordingly a ſaving of all marriages, appointments of biſhops, ordinations, and the like; and further, of all ſuch caſes as might legally be diſpenſed with by the archbiſhop of Canterbury; which, however, were to be confirmed under the great ſeal: ſo that all theſe matters, inſtead of papal authority, would henceforth ſubſiſt only by virtue of this ſtatute.

THE remaining ſtatutes relating to the Reformation are the following, which may be paſſed over in a ſhort way, without any great loſs to the hiſtorical lawyer. By ſtat. 31 Hen. VIII. c. 9. the king was empowered to create biſhops by letters patent; by chap. 13. of the ſame ſeſſion, all the

remaining

CHAP. XXVIII. HENRY VIII.

remaining monaſteries were diſſolved; and by chap. 14. was paſſed the law of the ſix articles, which, being an ordinance of a very penal nature, will more properly be conſidered hereafter, as well as ſome other ſtatutes relating to heretics and offenders on the ſcore of religion. By ſtat. 32 Hen. VIII. c. 26. the king was empowered to appoint a commiſſion of biſhops and ſome clergy to agree on a form of religion, for the obſervance of the whole nation; and by ſtat. 34 and 35 Hen. VIII. c. 1. ſome proviſions were made about *Tindal*'s books; which alſo being of a penal nature, will come under that diviſion of the ſtatutes of this reign.

THUS have we traced the progreſs of thoſe meaſures by which this great revolution in our eccleſiaſtical polity was effected. The many ſtruggles between the ſpiritual and temporal juriſdiction, in former periods, had ended moſt commonly to the advantage of the clergy; but, in this reign, a new light was let in upon the nation, and the people, under the auſpices of this ſpirited prince, were at length delivered from the yoke of blind and implicit obedience. The church was declared an entire and perfect body within itſelf, with authority to decree and regulate all things without dependance on any foreign power; and the ſupremacy thereof was annexed to, and united with, the imperial crown of the realm; ſo that a way was opened for all that followed in the next reign, to complete the reformation of religion. In the mean time, the eccleſiaſtical courts continued to poſſeſs all the detail of juriſdiction which they exerciſed in former times, except that they now had before their eyes the injunction of the late ſtatute, to abſtain from ſuch doctrines as were repugnant to the law, ſtatutes, and cuſtoms of the realm, and the king's prerogative.

BEFORE we take leave of eccleſiaſtical matters, it will be proper to notice what alterations were made by parliament reſpecting ſome articles which were of a ſpiritual concern;

concern: theſe are, marriage, the collecting of firſt-fruits and tenths, and the payment of tythes.

IT had been the ancient cuſtom of the chancery, that the ſix clerks, curſitors, and all others, except the clerk of the crown, ſhould be unmarried, being originally all real clerks; and upon their marriage, they forfeited their places. This cuſtom had gone out of uſe as to all, except the ſix clerks, who were ſtill bound to the old rule. There was therefore an act made on purpoſe, namely, ſtat. 14 and 15 Hen. VIII. c. 8. to enable them to marry, without prejudice of forfeiture. The clergy, who had the entire government of the eccleſiaſtical courts till this reign, had preſerved the rule there inviolate, and they allowed no perſon who was lay or married to exerciſe any eccleſiaſtical juriſdiction: but now when all ſpiritual juriſdiction was declared to flow from the crown, as ſupreme head, and it was rather wiſhed that the adminiſtration of juſtice there ſhould not be in the hands of perſons entirely devoted to the church, it was enacted, by ſtat. 37 Hen. VIII. c. 17. that all perſons, as well lay as married, being doctors of the civil law, might be chancellor, vicar-general, commiſſary, official, ſcribe, or regiſter, and exerciſe all juriſdiction eccleſiaſtical, as any others, being ſpiritual perſons, might do.

THE other ſtatutes concerning marriage regard pre-contracts, and the degrees within which perſons might marry. When Henry had married Anna Boleyn, and the act of ſucceſſion, ſtat. 25 Hen. VIII. c. 22. was paſſed to ſettle the crown upon the deſcendants of this new union, it was thought prudent by every poſſible means to ſtigmatize the marriage with Catharine as unlawful. Accordingly, a clauſe was inſerted[r], which declared all marriages within the degrees there mentioned (all which were both Levitical and canonical, and that with a brother's wife is one) to be

[r] Sect. 3, 4.

unlawful,

CHAP. XXVIII. HENRY VIII.

unlawful, and that perſons ſo related might be ſeparated by the ſentence of the ordinary. When this act was repealed by the ſecond act of ſucceſſion, ſtat. 28 Hen. VIII. c. 7. and the crown ſettled in another manner, this ſame prohibition was re-enacted, as the law of God, which no human power could diſpenſe with. It was moreover declared, that the meaning of theſe prohibitions was, that if it chanced for any man to *know carnally* any woman, then all perſons related to ſuch woman within the above degrees, ſhould be adjudged within the prohibitions [t], which was a refinement of the canon law upon this ſubject, and has been mentioned in a former place [u].

THE legiſlature had in this caſe given parliamentary ſanction to the doctrines of the canon law, reſpecting ſome of the prohibitions to marriage from conſanguinity or affinity; but in ſtat. 32 Hen. VIII. c. 38. they took another courſe, and made a ſolemn declaration againſt the whole of the pontifical law upon this head, and alſo upon that of pre-contracts. The preamble of that act complains, that upon pretence of former contracts not conſummate by carnal copulation, marriages conſummated were diſſolved and children baſtardiſed: further, that marriage was prohibited by other impediments which had been invented only to be diſpenſed with; as kindred or affinity between couſins-german, and ſo to the fourth and fifth degree [x]; carnal knowledge of any of the ſame kin or

[t] Sect. 11, 12. The degrees of marriage prohibited by this act are theſe: "The ſon to marry his mother or ſtep mother carnally known by his father; the brother his ſiſter; the father his ſon's daughter or his daughter's daughter; the ſon to marry the daughter of his father procreated and born of his ſtepmother; the ſon to marry his aunt, being his father's or mother's ſiſter; to marry his uncle's wife, carnally known by his uncle; the father to marry his ſon's wife, carnally known by his ſon; the brother to marry his brother's wife, carnally known by his brother; any man married, and carnally knowing his wife, to marry his wife's daughter, or his wife's ſon's daughter, or his wife's daughter's daughter, or his wife's ſiſter."

[u] Vid. ant. 58.

[x] There ſeems to have been a variety in the canon law upon this point. By a conſtitution of archbiſhop

or affinity before in ſuch outward degrees: all which the act pronounces to be contrary to God's law, and tending to great ſcandal, as perſons were continually hunting after ſome pre-contract, kindred and alliance, or carnal knowledge, to make void a marriage that they were tired of. To correct this, it was now declared, by ſtat. 32 Hen. VIII. c. 38. that all marriages contracted between lawful perſons, that is, perſons not prohibited by God's law to marry, being ſolemnized in the face of the church, and conſummate with bodily knowledge, or fruit of children, ſhall be judged good and indiſſoluble, notwithſtanding any pre-contract not conſummate with bodily knowledge. It was moreover declared, that no prohibition, God's law excepted, ſhould impeach any marriage without the Levitical degrees. Conſidering what had paſſed before, the proviſion in this act againſt pre-contracts is very remarkable, and at that time gave occaſion to much cenſure upon the proceedings againſt Anna Boleyn; for that which was now ſo much condemned, was then made the pretence for diſſolving the marriage with her. Some endeavoured to reconcile this inconſiſtency by a wiſh in the king, indirectly to take away the impediment to the ſucceſſion of her daughter Elizabeth. The other branch of the ſtatute was to make way for the king's marriage with Catharine Howard, who was couſin-german to Anna Boleyn; this being one of the prohibited degrees by the canon law, but not by the Levitical degrees. The preamble ſtates, as a reaſon for the act, that "what ſparks "remained of the papal legiſlation might kindle hereafter

biſhop Lanfranc, none was to marry his own kin, or that of a deceaſed wife, or the widow of a deceaſed kinſman, within the ſeventh degree. He reſts this on a decree of Gregory the Great; but that pope, in his preſcript to St. Auguſtin, allowed marriage in any degree beyond the fourth. A decree of that pope, to the effect Lanfranc intimates, is to be found in the Decretum; but is by later canoniſts pronounced to be an error of Gratian [a]. There is a canon which allows thoſe in the fifth degree to marry, and forbids thoſe in the fourth to be ſeparated, if married: this canon is attributed to Theodore of Canterbury [b].

[a] Cauſ. 35. Queſt. II. and III. c. 16.; and Johnſon's Canons.
[b] Ibid. c. 20.; alſo vid. ant. 58.

"a great

CHAP. XXVIII. HENRY VIII.

"a great flame; and, at leaſt, while they remained, "might ſhew that the pope's power was not entirely "extinct."

When firſt-fruits and tenths of ſpiritual preferments were given to the crown, by ſtat. 26 Hen. VIII. c. 3. ſeveral regulations were made for the due payment and ordering of this new revenue. Theſe were ſucceeded by many other proviſions, as ch. 17. of the ſame ſtatute, ſtat. 27 Hen. VIII. c. 8. 28 Hen. VIII. c. 11. 32 Hen. VIII. c. 22. and 34, 35 Hen. VIII. c. 17. all which go into a particular detail of arrangement, much of which has been ſuperſeded by later ſtatutes, and on that account, as well as the minuteneſs of the ſubject, is little worthy of attention.

Tythes.

It was endeavoured to render the payment of tythes more regular, by aſſiſting the eccleſiaſtical proceſs. By ſtat. 27 Hen. VIII. c. 20. if any one diſobeyed the proceſs of the ſpiritual court, and the ordinary made application to one of the king's council, or to two juſtices of the peace, they have power to commit the party, till he find ſecurity to obey the ſentence of the court. It was again enacted, by ſtat. 32 Hen. VIII. c. 7. that all perſons ſhall duly ſet out their tythes and offerings; and if they omit, they may be convened in the ſpiritual court, and ordered to pay coſts; and two juſtices may, as in the former caſe, commit the party to gaol, till he give ſecurity to perform the definitive ſentence. As tythes, and other ſpiritual dues, ſince the diſſolution of monaſteries, had come more into lay hands than before, it was thought proper to give the like common-law remedies as were in uſe for lay fees. It was therefore ordained, that any parſonage, vicarage, portion, penſion, tythes, oblations, or other eccleſiaſtical or ſpiritual profits in lay hands, might become a ſubject of controverſy, in a *præcipe quòd reddat*, *aſſiſe of novel diſſeiſin*, *mortaunceſtor*, *quòd id deforceat*, writ of dower, and other writs original, as the caſe might require;

require; and that fines and other common-law aſſurances might be made of them. But it was provided, that ſuits for ſubtraction of tythes or offerings ſhould ſtill be in the eccleſiaſtical court, as before[7]. By ſtat. 37 Hen. VIII. c. 12. a number of regulations were deviſed reſpecting the payment of tythes in London. It ſeems a decree had been made by the archbiſhop of Canterbury, the chancellor Audley, and others of the council, to ſettle a courſe for the due payment of tythes in the city: upon this there iſſued letters-patent, and a proclamation directed to the citizens to enforce the execution of it; and by ſtat. 27 Hen. VIII. c. 21. all tythes and dues were directed to be paid in purſuance of this decree, until further order ſhould be made therein by the king and the thirty-two perſons who were to be employed in reforming the eccleſiaſtical law. After this, ſeveral diſputes aroſe on the conſtruction of this decree; and the parſons and citizens had agreed to ſubmit their differences to the archbiſhop, the chancellor Wryotheſley, and ſeveral others of the council: theſe parſons made another decree, which is inſerted in the preſent act, and is thereby required to be obſerved.

Such was the hiſtory of this famous revolution in our eccleſiaſtical polity. Having diſpoſed of this, we are at liberty to proceed to the proviſions which were made for the better ordering of the civil ſtate. Of theſe, the firſt regard is due to a regulation for marſhalling the higher ranks of ſociety according to their reſpective dignities. We have hitherto met with no example in our ſtatute-book of any direction upon this head. The firſt is by ſtat. 31 Hen. VIII. c. 10. "For placing of the lords." It was a part of the king's prerogative to give ſuch honour, reputation, and place to his councillors, and others, his ſubjects, as ſeemed beſt to his wiſdom; and ſuch prerogative is aſſerted in theſe very words in the preamble of this ſtatute; but

Precedence.

[7] Sect. 7.

the

CHAP. XXVIII.

HENRY VIII.

the king was content that order ſhould now be taken in his high court of parliament for aſcertaining the degrees of precedence. It was therefore enacted, that no perſon, except the king's children, ſhould ſit at any ſide of the cloth of ſtate in the parliament chamber, whether the king was preſent or not. And becauſe, ſays the act, the king is ſupreme head in earth of the church of England; and for the good exerciſe of the ſaid moſt royal dignity and office, he had appointed Thomas Lord Cromwell his vicegerent; he and all perſons having that office ſhould be placed on the right ſide of the parliament chamber, on the ſame form with the archbiſhop of Canterbury, and before him, and ſhould always have voice to aſſent or diſſent, as the lords of parliament [a]. Next to him was the archbiſhop of Canterbury, then York, then London, Durham, Wincheſter, and then the other biſhops; all on the ſame ſide, according to their ancienties, as had been accuſtomed. It ſeems that no order had before been made for aſſigning any place to the following officers in reſpect of their office; but they were now placed in this way: The lord chancellor, lord treaſurer, lord preſident of the king's council, and lord privy-ſeal, being of the degree of barons or above, were to ſit on the left ſide of the parliament chamber, on the higher part of the form, above all dukes, except ſuch as were the king's ſon, brother, uncle, nephew, or brother's or ſiſter's ſons: the great chamberlain, the conſtable, the marſhal, the lord admiral. The great maſter, or lord ſteward, and the king's chamberlain, were to ſit in this order: after the lord privy-ſeal, above all perſons of the ſame ſtate or degree; the king's chief ſecretary, being a baron, was to ſit above all barons; and if a biſhop, before all biſhops, not having any of the be-

[a] The appointment of Cromwell was intirely upon principles of canonical regulation. We have ſeen what was the office of *vicar-general*; and that he might be appointed by biſhops or popes. Conſidering the king's preſent title of Head of the Engliſh church, his vicar-general could not but be placed before the archbiſhop of Canterbury. Vid. ant. 5.

fore

foremèntioned offices. All dukes, not beforementioned, marquiſſes, earls, viſcounts, and barons, not having ſuch offices, were to be placed according to their ancienty, as had been accuſtomed. If the lord chancellor, lord treaſurer, lord preſident of the king's council, lord privy ſeal, or chief ſecretary, were under the degree of a baron, they were to be placed at the uppermoſt part of the ſacks, in the midſt of the parliament chamber, either there to ſit on one form, or upon the uppermoſt ſack, in the order beforementioned.

THIS order of precedence was to take place not only in the parliament chamber, but alſo in the trials of peers; and in the ſtar-chamber, and other aſſemblies of council, the chancellor, treaſurer, preſident, privy-ſeal, the great chamberlain, the conſtable, marſhal, lord admiral, grand maſter, or lord ſteward, the king's chamberlain and chief ſecretary were to obſerve the rank hereby given.

WE proceed now from the higheſt to the loweſt; from the different degrees of honour, to the various deſcriptions of poverty and wretchedneſs. We have ſeen what regulations had been made in former reigns for the ſuppreſſion of beggars and vagabonds [b]. The increaſe of theſe evils is evidenced by various ſtatutes made in this reign for the correction of them. It has been a favourite opinion, that the proviſion for the poor had never become an object of neceſſity, till the abolition of religious houſes had deprived many perſons of a ſupport from the donations there regularly made; but the firſt ſtatute we ſhall mention, was paſſed before that event, and is nothing more than a continuance of the policy which had been begun many years before. It was enacted, by ſtat. 22 Hen. VIII. c. 12. that juſtices of the peace, mayors, ſheriffs, bailiffs, and other officers of counties, cities and towns, ſhould divide themſelves, and make diligent ſearch within their diviſions, for all aged, poor, and impotent

The poor laws.

[b] Vid. ant. vol. III. 171.

CHAP. XXVIII.

HENRY VIII.

perſons, who were of neceſſity compelled to live by alms; and ſuch perſons they were to authorize to beg within a certain hundred, city, town, pariſh, or other limit, as it ſhould ſeem beſt to them in their diſcretion. The names of ſuch perſons were to be put in a roll, a copy to be certified to the juſtices in ſeſſions, and a letter was to be delivered to ſuch beggars, under ſeal, ſignifying they had authority to beg. Any perſon begging without ſuch licence, and beyond his limit, was to be whipped, or ſet in the ſtocks three days and three nights, during which he was to be kept on bread and water. This was to be by order of a juſtice or high conſtable, who was after that to limit him a place where he might beg, and give him a licence.

THUS far of impotent perſons. It was further provided, that if any perſon *being whole and mighty in body*, and able to labour, was taken begging, or vagrant, and could give no reckoning how he lawfully got his living, he might be brought before a juſtice of peace, high conſtable, mayor, or other officer of the place, who might direct him to be whipped out of the place at the end of a cart, till his body was bloody: and he was to take an oath to return to the place where he was born, or where he laſt dwelt before the puniſhment for the ſpace of three years, and there labour as a true man ought to do. He was to have a letter teſtifying the time and place of his puniſhment, whither he was going, and what time was limited for ſuch journey, within which time he was permitted to beg by the way. As often as he violated the terms of this letter he was to be whipped, till he arrived at the appointed place and betook himſelf to labour. If the perſon ſo whipped was idle, and no common beggar, he was to give ſecurity, ſhould the officer think proper, for repairing to his place of birth or reſidence as beforementioned.

TO ſecure the execution of this regulation, juſtices of the peace were, in their ſeſſion, to enquire of the defaults

of

of towns in ſuffering begging, and impoſe fines on the inhabitants.

BUT no proviſion was made for the treatment of vagrants when they arrived at the place of ſettlement, nor for charging the inhabitants with the maintenance of the poor and impotent, or ſetting to work the valiant vagabonds. To remedy this, it was ordained by ſtat. 27 Hen. VIII. c. 25. that the public officers of ſuch places ſhould take order for the reception and ſupport of ſuch as were unable to labour, and for the putting to work ſuch as were, under penalty of forty ſhillings for every month they ſhould neglect. For this purpoſe they were to gather alms with boxes every Sunday, holiday, and other feſtival, or otherwiſe among themſelves. All perſons paſſed away in the above manner were allowed at every ten miles to call on the conſtable of the place to provide them meat, drink, and lodging, for one night.

SUCH public officers were to take up all children in every pariſh within their limits under fourteen and above five years of age, that were found begging and in idleneſs, and appoint them to maſters of huſbandry, or other crafts or labours, to be taught, and ſo be enabled to get their living; and they were to give them ſome of the charitable contributions to equip them for ſuch ſervice. Such as refuſed to go to ſervice, or who departed from it without reaſonable cauſe, being above twelve and under ſixteen years, were to be publicly whipped.

ONCE in every month the above public officers were to cauſe privy ſearch to be made, by night or by day, as they thought proper, for vagabonds and ſuſpected perſons, and all perſons were to aſſiſt in ſuch ſearch. Thoſe found a ſecond time in a ſtate of vagrancy were not only to be whipped, but to have the upper part of the griſtle of the right ear clean cut off; which was to be performed by the conſtable, with the aſſiſtance of a ſubſtantial inhabitant of the pariſh. For a third offence he was to be commit-

CHAP. XXVIII. HENRY VIII.

ted to priſon by a juſtice, and then indicted for wandering and loitering; and if found guilty, he was to ſuffer death as a felon and enemy of the commonwealth.

ALL common doles were forbid, and no perſon was to give alms in that or any other way, but only to the common boxes and gatherings before directed to be made. Bodies corporate, who by their inſtitution were to diſtribute alms out of their revenue, were now required to give it, at the uſual times, in money to ſuch common boxes and gatherings. The churchwardens in every pariſh, calling to them ſix or four of their honeſt neighbours, had authority once a quarter to call ſuch collector before them to give an account of money collected, and in what manner it was employed: and if any was embezzled or miſapplied, he was to be committed to priſon by a juſtice, mayor, or other officer of the place, till he reſtored the ſaid ſum. An account of all ſuch receipts and diſburſements was to be kept yearly by the miniſter or ſome other honeſt man of the pariſh; the book to be in the cuſtody of the conſtables and churchwardens, two or three of them, or ſome other indifferent man, and not the miniſter. There was a penalty of twenty ſhillings upon pariſhes that neglected to promote public collections. The act contains ſeveral other clauſes, ſome of which were deſigned for turning the courſe of private charities, whether of monaſteries or well-diſpoſed perſons, to theſe public boxes and gatherings; ſome were to ſave mendicant friars from incurring the penalties inflicted on beggars, and religious perſons from any reſtraint on giving to poor almſmen eſtabliſhed in their houſes, or to caſual travellers, or to ſhipwrecked mariners, or other diſtreſſed objects; in ſhort, that they might give alms in ſuch manner as would not encourage common begging and vagrancy.

SUCH were the regulations made in the reign of this king for the diſpoſal of beggars and vagrants. Theſe ſeemed particularly to deſerve our attention, becauſe they contain the

the outline of the more enlarged ſyſtem for the government of the poor, which was ſo much improved in the next reigns, and finally ſettled in that of Elizabeth. The laws made in this reign relating to the other branches of the inferior orders of ſociety, the labouring part, ſuch as *journeymen*, *apprentices*, and *artificers*, need not engage ſo much of our time; becauſe moſt of them were not of a general import, but were calculated for particular trades and employments under particular circumſtances. The wages of ſervants in huſbandry, artificers, and labourers, were preſcribed by ſtat. 6 Hen. VIII. c. 3. a penalty was impoſed on thoſe who took more; the hours of work and of meals were alſo ſettled. No maſter was to compel his apprentice to engage by oath or bond not to open a ſhop. The exaction of high fees for the admiſſion of apprentices to their freedom was guarded againſt[b]. Theſe with various other proviſions of a more partial nature were made by parliament.

Of trade.

NUMBERLESS are the proviſions made in this king's reign for the protection and advancement of domeſtic trade and manufactures. Inſtead of encouraging foreigners, as heretofore, it was now endeavoured to collect all mercantile employment into the hands of natural-born ſubjects. Upon this principle various obſtructions were placed in the way of foreigners who carried on any trade; and regulations were deviſed for better qualifying the riſing generation. By ſtat. 14 and 15 Hen. VIII. c. 2. no ſtranger born out of the king's obedience, whether denizen or not, and uſing any handicraft, was to have any apprentice, nor more than two journeymen, unleſs natural-born ſubjects. Strangers and their wares were to be ſubject to the inſpection of the wardens and fellowſhips of handicrafts in the city. Upon a petition of the tradeſmen of London complaining of foreign artificers, a decree was made in the ſtar-chamber in 20 Hen. VIII. and was confirmed by ſtat. 21 Hen. VIII.

[b] Stat. 28 Hen. VIII. c. 5.

CHAP. XXVIII.

HENRY VIII.

c. 16. By this, among other things, it was directed, that no ſtranger artificer ſhould have more than two ſtranger ſervants; but being a houſholder, he might have as many Engliſh ſervants and apprentices as he pleaſed. Thoſe not being houſholders, nor keeping a ſhop at the time of the act, were forbid to keep any houſe, ſhop, or chamber, to exerciſe their craft or myſtery; which was only a revival of a regulation made in the reign of Rich. III[c]. This proviſion was again renewed by ſtat. 32 Hen. VIII. c. 16. which likewiſe makes void all leaſes of a dwelling-houſe or ſhop to any ſtranger artificer not being a denizen; nor was ſuch a perſon thenceforward to take any leaſe on pain of forfeiture; and both leſſor and leſſee was to pay 100 ſhillings. It is remarkable among thoſe jealous proviſions againſt ſtrangers, it was over and over ordained, that ſuch perſons, not being denizens, ſhould be bound by all the laws and ſtatutes of the realm. Among the laws reſpecting trade may be reckoned ſeveral ſtatutes for regulating the dreſs of all ranks of perſons: theſe were frequently repealed and new ones made, as experience ſucceſſively demonſtrated the difficulty of ſubjecting ſuch matters to parliamentary reſtrictions[d]. Many other ſtatutes were made for the conducting of different manufactures, of which, as well as of the other acts of this and the following reigns, it may be obſerved in general, that they had a tendency to give preferences to corporations and fraternities, and to encourage a ſpirit of monopoly.

THE policy ſet on foot in the laſt reign, of turning the attention of farmers from paſturage to agriculture, was promoted by ſeveral ſtatutes in this reign. If any one ſuffered a houſe of huſbandry to go to decay, or converted tillage into paſture, the immediate lord of the fee was intitled to ſeize a moiety of the offender's land till the offence was reformed[e].

[c] Stat. 1 Rich. III. c. 9.

[d] Stat. 6 Hen. VIII. c. 1. 7 Hen. VIII. c. 6. 24 Hen. VIII. c. 13.

[e] Stat. 7 Hen. VIII. c. 1. and vide ſtat. 25 Hen. VIII. c. 13.

BEFORE

Eſcheators.

BEFORE we enter upon the laws relating to private property, we ſhall briefly ſpeak of one or two proviſions that principally reſpected tenures. The abuſes, probably, introduced under the late adminiſtration of Empſon and Dudley, made it neceſſary to add to the number of thoſe acts that had already been paſſed for the taking of inquiſitions by eſcheators and commiſſioners [f]. The complaint now was, that ſometimes untrue offices were found, ſometimes offices were changed, and ſometimes ſuch were returned as had never been found. To remedy this it was enacted, in the firſt year of this reign [g], that no eſcheator or commiſſioner ſhould return an inquiſition or office concerning lands or hereditaments, unleſs found or preſented by twelve men under their ſeals and indented, under penalty of 100l. All eſcheators and commiſſioners were to have lands of forty marks per ann. Inquiſitions were to be taken in an open place, according to the ſtatutes, and every one was to be at liberty to give evidence openly before the inqueſt. The jurors were to have a qualification of eſtate of forty ſhillings annually. A counterpart of the inquiſition ſealed and indented was to remain with the foreman. The inquiſition, when found, muſt be received by the eſcheator; the clerk of the petty bag, or officer of the exchequer, if returnable there, was required to receive the return from him; and the clerk of the petty bag was to certify a tranſcript of all inquiſitions into the exchequer. No one was to be eſcheator for more than a year. All theſe qualifications were enforced with penalties.

THE time of traverſing an inquiſition, which was confined by a former ſtatute [h] to a month after the return, was enlarged to three months, and all grants made previous to that time were to be void [i]. By an act of the ſame ſeſſion, all inquiſitions found in the laſt reign by procurement of

[f] Vid. ant. vol. II. 373. and vol. III. 273.
[g] Stat. 1 Hen. VIII. c. 8.
[h] Stat. 8 Hen. VI. c. 10.
[i] Stat. 1 Hen. VIII. c. 10.

CHAP. XXVIII. HENRY VIII.

Empſon and Dudley, intitling the king to tenures *in capite*, were allowed to be traverſed, notwithſtanding the parties might have ſued livery; and it was declared ſuch livery ſhould not conclude them *.

THE law of private rights was affected by ſeveral ſtatutes during this reign, many of which were not leſs important than thoſe we have been relating. The ſtatutes upon this head either regard the properties and incidents of eſtates, or the modes by which they may be conveyed. Of theſe the former claim our firſt attention. We ſhall begin with ſome ſtatutes which ever ſince have had very extenſive influence upon leaſes of lands.

Terms for years.

IT was in conſequence of the new practice of ſuffering recoveries, that it was now thought neceſſary to enlarge a proviſion made in the reign of Edward I *. to protect termors. As that act ſpeaks of a leſſee having an action of covenant, it was concluded that no leſſees but thoſe by deed could be protected by it. The new ſtatute includes both leaſes by indenture, and thoſe without writing. As a leaſe for years was an intereſt iſſuing out of, and dependent on, the inheritance and freehold of the leſſor, it derived all its ſtrength from the goodneſs of that title, and by it muſt ſtand or fall. Thus a term lay at the mercy of the freeholder, who now had a method by which he could deſtroy his own eſtate, namely, by a fictitious recovery, and ſo deſtroy the intereſt of his leſſee. This device was often practiſed to get rid of tenants who had excited envy by the great improvements they had made, or had any way diſobliged their landlord. To prevent an injuſtice of this kind, and at once give ſtability to theſe contracts, and inſure to the cultivator of the ſoil the reward of his toil and expence, was an object worthy the attention of parliament. It was accordingly ordained, by ſtat. 21 Hen. VIII. c. 15. that all leſſees for years ſhould be enabled to falſify theſe re-

* Stat. 2 Hen. VIII. c. 12. * Vid. ant. vol. II. 150.

coveries,

coveries, and maintain their leaſes againſt the recoverors, as againſt their leſſors. It was further provided, that no ſtatute merchant, ſtatute ſtaple, nor execution by *elegit*, ſhould be made void by any feigned recovery.

AFTER this, a term for years became a permanent and certain intereſt; the value of which might be eſtimated by the period of time for which it was created, without calculating the contingency of an untimely diſſolution, to which it was before ſubject. Long terms, as they could now be purchaſed with ſafety, became more common. They were ſoon after this converted to the purpoſe of raiſing portions for children by mortgage, or otherwiſe, in family-ſettlements; and by the aid of the ſtatute of uſes, became the object of much of that artificial ſtile of conveyancing which began about this time to gain ground.

Leaſes of tenant in tail.

WHEN the intereſt of leſſees was protected againſt the feigned recovery of the freeholder, it was thought equally expedient to give them ſome ſecurity againſt the iſſue of a tenant in tail, who claiming by a title paramount the anceſtor, could avoid any leaſes made by him for longer term than his life. A like inconvenience was felt in other inſtances of leaſes made by perſons who had only a life-eſtate. To remedy all this, the following proviſion was made by ſtat. 32 Hen. VIII. c. 28.: All leaſes, ſays that ſtatute, made by indenture for years, or for life, by any perſon ſeiſed in fee, or in tail, in his own right, or in the right of his church or wife, or jointly with his wife, ſhall be good and effectual in law, the ſame as if the leſſor was ſeiſed in fee-ſimple, provided they are made under the following circumſtances; if they are not made to any leſſee having an old leaſe (unleſs the old leaſe be expired, or ſurrendered within a year next after the making of the new one); and if they are not made in reverſion. It was alſo required, that the land ſhould have been moſt commonly letten to farm, or occupied for the laſt twenty years; that the leaſe be not made without impeachment of waſte, nor be for

above

CHAP. XXVIII. HENRY VIII.

above twenty-one years, or three lives; and that there be reſerved yearly ſo much rent as had been moſt accuſtomably-paid for the laſt twenty years. Moreover, where the inheritance belongs to the wife, ſhe muſt be a party, and the rent reſerved to the huſband and wife and *her* heirs, according to the eſtate ſhe has; and the huſband is not in any caſe to alien ſuch rent any longer than during the coverture, otherwiſe than by fine[l]. No act of the huſband during the coverture ſhall cauſe a diſcontinuance, or be any wiſe prejudicial to the wife, or her heirs. It was provided[m], that this act ſhould not be conſtrued as giving a power to any parſon or vicar to make leaſes of his land, tythes, or other profits belonging to his church, otherwiſe than he could at common law.

THIS is the ſubſtance of what has ſince been called the *Enabling Statute*; becauſe it empowered certain perſons to make ſuch leaſes as they could not before make: and it is ſo called in contradiſtinction to ſome acts paſſed in the reign of queen Elizabeth, which impoſed certain reſtraints on church leaſes; and are thence called the *Reſtraining Statutes*.

THE intereſt of leſſors and leſſees came under the contemplation of the legiſlature in another point of view. This was occaſioned by the diſſolution of religious houſes; which gave riſe to a proviſion calculated not only to remove an inconvenience which was particularly felt at that time, but ſuch as would increaſe daily, while a diſpoſition and power to alien land prevailed. Covenants in leaſes, like other covenants, could only operate between the parties and their privies; that is, thoſe who were heirs or executors to the covenantors or the covenantees; ſo that grantees of reverſions of lands held of religious houſes, who were now a very conſiderable body among the landholders of the kingdom, could not avail themſelves of the

[l] Sect. 5. [m] Ibid. 4.

benefit of covenants in leaſes granted to their tenants; and tenants, on the other hand, were deprived of advantages ſtipulated by their former landlords. The firſt proviſion on this head was ſtat. 31 Hen. VIII. c. 13. which gave to the king all advantage, whether of covenants, conditions, or the like, as the leſſor would have had. By ſtat. 32 Hen. VIII. c. 34. this was extended to the grantees of the king; and further, to make this equitable remedy univerſal, mutual redreſs is given, in all caſes of landlord and tenant, where the former grants his reverſion to another.

A DEFECT of the old law reſpecting executors was ſupplied in the ſame ſeſſions by ſtat. 32 Hen. VIII. c. 37. The executors of perſons ſeiſed of rents could not, any more than their heirs, recover the arrearages which had accrued in the teſtator's life-time. This act provides, that the executors and adminiſtrators of any perſon ſeiſed in fee-ſimple, in tail, or for life, of rents or fee-farms, may have an action of debt, or diſtrain for all arrears due at the death of his teſtator, or inteſtate; as may a huſband, ſeiſed as aforeſaid in right of his wife, after the death of his wife, for the like rents or fee-farms due and unpaid in her life; and a perſon ſeiſed during the life of another, after the death of *ceſtui que vie*, and ſo may his executors or adminiſtrators.

AN alteration made reſpecting jointenancy and tenancy in common ſeems dictated by the neceſſities of a commercial people. The idea of property poſſeſſed by two or more perſons, where each has in him the *entire whole*, and *every parcel* of that whole, as joint tenants are ſaid to have, is a ſubtilty in juriſprudence which ſavours much of the age in which it was conceived. That every parcel of this undivided whole ſhould ſurvive to the longeſt liver, was, perhaps, no more than a conſequence of the original refinement. But this conſequence was found very prejudicial to credit; as property, that ſhould ſatisfy

demands

CHAP. XXVIII.

HENRY VIII.

demands on the eſtate of the deceaſed, was abſorbed by a ſtranger, whoſe only merit was the fortune of having ſurvived his joint owners. The unity of poſſeſſion between tenants in common, likewiſe, though not ſubject to the doctrine of ſurvivorſhip, had, however, its inconveniencies, to which a clear and ſeveral eſtate was not liable. Theſe eſtates we have ſeen were diviſible only by the conſent of the parties [a]; and it was now thought deſirable, that means ſhould be provided for compelling thoſe who might unreaſonably withhold their conſent. It was accordingly enacted, by ſtat. 31 Hen. VIII. c. 1. that joint tenants, and tenants in common, of any eſtate of inheritance, in their own right, or in right of their wives, may be compelled to make partition, by writ *de partitione faciendâ*, to be deviſed in the chancery, in like manner as coparcenors are compellable by the common law. As this act was confined to eſtates of inheritance, the proviſion of it is extended, by ſtat. 32 Hen. VIII. c. 32, to tenants for life and years; and alſo where one perſon has an eſtate for life or years jointly, or in common with another who has an eſtate of inheritance or freehold.

A PIECE of old law relating to entry on land, and the tolling of entry by a diſcent [b], underwent an alteration which has prevented ſome of the injuſtice which uſed to follow from that notion. It was hard that a diſſeiſor, becauſe he died ſeiſed, ſhould thereby intirely deprive the injured perſon from making his entry, and purſuing his legal remedy upon it; but oblige him to reſort to a more tedious proceeding. It was therefore enacted, by ſtat. 32 Hen. VIII. c. 33. that the dying ſeiſed of ſuch diſſeiſor ſhall not be deemed a diſcent in law, ſo as to toll the entry of the diſſeiſee, or his heirs, unleſs the diſſeiſor

[a] Vid. ant. vol. III. 349. [b] Vid. ant. vol. III. 19.

had

had been in peaceable poſſeſſion for five years after the diſſeiſin.

SOME changes were made in the law of eſtates, by the two following acts. By ſtat. 31 Hen. VIII. c. 3. it was ordained, that certan lands in Kent *, which deſcended according to the cuſtom of gavelkind, ſhould thenceforward be deſcendible as common-law eſtates; the other was, an act which put ſome further reſtraint upon gifts to ſuperſtitious uſes.

Gifts to ſuperſtitious uſes.

THERE were ſome gifts of land, which, not being within the ſtatutes of mortmain, had very much increaſed. It was thought expedient to reſtrain theſe alienations, as equally prejudicial to the community with thoſe in mortmain. This was done by ſtat. 23 Hen. VIII. c. 10. which makes void all diſpoſitions of land to the uſe of pariſh-churches, chapels, church-wardens, guilds, fraternities, commonalties, companies, or brotherhoods, erected for devotion, or by common aſſent, without incorporation; and alſo diſpoſitions to the intent to have *obits* perpetual, or ſervice of a prieſt for ever, or for ſixty or eighty years. As the age became enlightened, gifts of this kind were viewed with a leſs favourable eye. Theſe ſentiments concurring with the deſigns of the enterpriſing prince upon the throne, contributed towards the general attack which was ſoon after made on one branch of ſuch inſtitutions, the religious houſes. Theſe repoſitories, where ſo much wealth had been accumulating for ages, were broken open, in purſuance of ſtat. 27 Hen. VIII. c. and ſtat. 32 Hen. VIII. c. and, happily, their contents were once more permitted to mix in the national circulation.

NEXT to the laws reſpecting the nature and properties of eſtates, we proceed to thoſe which related to the conveyance of them. Several regulations were made for the confirmation of fines and recoveries, as aſſurances of

* Vid. ant. vol. II. 310.

land;

CHAP. XXVIII.

HENRY VIII.

land; and ſome of a very particular kind were made for the better ordering of uſes and wills.

Of common recoveries.

THE application which had lately been made of common recoveries, rendered them a very intereſting object of parliamentary notice. As they were become a common aſſurance of eſtates, they began to deſerve every ſupport which could be given them. It was common to ſuffer recoveries of land for the performance of wills, for ſurety of jointures, and other eſtates; and as ſuch recoveries were had by mere conſent and agreement, as a conveyance of the title, it was held, that as the recoverors came in merely under the eſtate of the recoverees, they had no power by law to compel the attornment of the tenants, nor could they obtain their rents and ſervices by diſtreſs or action; and where an advowſon was appendant, and an avoidance fell, they had no remedy for a diſturbance. They are therefore enabled by ſtat. 7 Hen. VIII. c. 4. to diſtrain, and make avowries for rents, ſervices, and cuſtoms, and bring a *quare impedit*, as thoſe perſons, againſt whom the recovery was had, might have done. This act was confined to diſtreſſes and avowries for rents, ſervices, and cuſtoms. As a recoverer could not, upon this ſtatute, have an action of debt againſt a leſſee for years, nor *waſte* againſt a tenant for life, or years, theſe defects are cured by ſtat. 21 Hen. VIII. c. 15. and ſuch actions are given in the ſame manner to the recoverer as the leſſor might have had them.

THIS proviſion as to avowries, was of uſe where the tenant was known; but it often happened, that, by ſecret conveyances to uſes, lords were at a loſs on whom to make their avowries; the ownerſhip of the land often paſſing without any notice, or ſign of alienation. It was for this reaſon enacted, by ſtat. 21 Hen. VIII. c. 19. that lords diſtraining *may* avow on the land, as in land within their fee, or ſeigniory, without naming or making

avowry

avowry on any perſon in certain. As the ſtatute uſes the word *may*, lords have their election to avow according to the ſtatute, or, as they before did, at common law [p].

To return to the proviſions made reſpecting common recoveries. It was declared by ſtat. 32 Hen. VIII. c. 31. that a recovery of land had by aſſent of parties againſt a tenant by curteſy, tenant in tail after poſſibility of iſſue extinct, or tenant for life, ſhould be void, with regard to thoſe in reverſion or remainder, unleſs it was by good title, or aſſent of thoſe in reverſion or remainder. In this manner, by obviating the abuſe of it, did the parliament tacitly acknowledge and ratify the application of a recovery as an aſſurance of land. So intirely were recoveries conſidered as a common aſſurance and conveyance, that where they were ſuffered of lands held of the king, a fine was required by a clauſe in the ſtatute of wills, ſtat. 32 Hen. VIII. c. 1. to be paid for the writ of entry in the chancery, the ſame as for alienation, by fine or feoffment.

Some doubts had ariſen, whether the indirect and general wording of the ſtatute of fines paſſed in the laſt reign, might not bear a conſtruction which would make a fine to be taken as a bar to an eſtate tail. In the 19th year of the king, this queſtion was ſolemnly argued at Serjeant's-inn; when it was held by three juſtices, that the iſſue were not barred; and by five, that they were [q]. The former inſiſted that the iſſue were aided by the ſecond ſaving clauſe; the iſſue being neither party nor privy, but as ſtrangers claiming by the donor. The latter denied this; holding the iſſue clearly to be privy to the fine levied by their anceſtor. However, if any doubt remained, an act was now made to remove it; and it was declared by ſtat. 32 Hen. VIII. c. 36. that a fine levied by a tenant in tail of full age, according to ſtat. 4 Hen. VII. ſhould be a ſufficient bar to

[p] 1 Inſt. 268. b. [q] 19 Hen. VIII. 6.; and alſo Dyer, 2. 1.

himſelf

CHAP. XXVIII. HENRY VIII.

himſelf and his heirs claiming by force of ſuch entail. There was in this act an exception in favour of the inheritance of a huſband, protected by ſtat. 11 Hen. VII. c. 20*. and of lands where the reverſion was in the king; ſo that a fine of ſuch land, levied by tenant in tail, remains intirely on the conſtruction of ſtat. 4 Hen. VII. The parliament took the ſame care of the king's intereſt in the caſe of recoveries, as in the caſe of fines; for it was declared by ſtat. 34 and 35 Hen. VIII. c. 20. that no reverſion in the king ſhould be barred by a recovery. This was not before the point had been agitated in court. In the 29th of the king, it had been held by the judges, that a recovery ſuffered by tenant in tail, though a bar to the iſſue, ſhould be no diſcontinuance of the tail, and ſo no bar of the king's reverſion; but *Shelley* doubted †. Among the proviſions for giving ſtability to theſe ſecurities, we may reckon ſtat. 37 Hen. VIII. c. 19. As none of the ſtatutes of fines extended to the county palatine of Lancaſter, it was thereby ordained, that fines levied before the juſtices of aſſiſe there, proclaimed three ſeveral days the ſeſſions they were ingroſſed, and three ſeveral days the two next ſeſſions, ſhould have the ſame force as fines levied in the court of common-pleas.

THE principal proviſions upon the nature of conveyances were ſuch as concerned uſes and wills; two ſubjects which were very intimately connected in their circumſtances, and now went hand in hand in the regulations the parliament thought proper to deviſe reſpecting them. We ſhall therefore, conformably with the idea that prevailed at the time, take a view of theſe ſtatutes together, whether they relate to uſes or wills, in the order in which they were made, as the moſt natural one for illuſtrating this important branch of our law of real property.

Deviſe of land.

IN the laſt reign ſome relaxation had been given to the general law which reſtrained a deviſe of lands. We have

* Vid. ant. 140. † 28 and 29 Hen. VIII. Dyer, 32. 1.

ſeen

ſeen what indulgence had been given to perſons in the king's wars to make feoffments to the uſe of their wills, without licence. Again, in this reign, by ſtat. 3 Hen. VIII. c. 4. a permiſſion was given to tenants *in capite* to alien without licence, and if they left a ſon within age, their executors, feoffees, or aſſigns, were to have the ward and marriage towards the performance of the will. By ſtat. 14 and 15 Hen. VIII. c. 14. thoſe in the king's ſervice, in the wars, might alien their lands for the performance of their wills, without a fine for alienation, with the ſame indulgence as to ward and marriage. Theſe were partial regulations, calculated for the benefit of perſons under very particular circumſtances.

A DISPOSITION to favour deviſes of land diſcovered itſelf afterwards in a more general way, in ſtat. 21 Hen. VIII. c. 4. Land deviſable by cuſtom was very often left for executors to ſell; and in ſuch caſe, if one of them refuſed to join in the ſale, the ſale could not be legally perfected by the others[s]. It was enacted by this act, that in ſuch circumſtances, where any of the executors refuſed to take upon them the burthen of the adminiſtration, a ſale by thoſe who did act, ſhould be good and valid. Though the letter of this act extends only to executors who have a *power to ſell*, yet, being a beneficial law, it has received a liberal conſtruction, and has been conſidered as taking in caſes where land is *deviſed to* executors to ſell; that is, where they have not barely a power, but a power coupled with an intereſt.

HITHERTO we ſee the power of deviſing land received ſome favour from the parliament; but this matter was taken up again in a very different way: the power of deviſing the uſe of lands, carried the general power of transferring property by will much further than was conſiſtent with the nature of tenures. It tended to deprive lords of their

[s] Vid. ant. vol. III.

CHAP. XXVIII.

HENRY VIII.

wards, marriages, and reliefs, and the king of his *primer ſeiſins* and livery, with other caſualties, which conſtituted a great part of the old revenue of the crown. We have ſeen in the former reign, that the ſtatutes which were made to protect the lord's claims upon a deſcent on the death of *ceſtui que uſe*, contained an exception of caſes where a will was declared[t]. This excited a great jealouſy, both in the king and other great landholders. The king, in the 22d year of his reign, cauſed a bill to be drawn, which was to moderate the conſequences of this innovation: it was intended by this bill, that every one ſhould have free liberty to diſpoſe of half of his lands, in the way of deviſe; and he told the parliament, if they would not take a reaſonable thing, when offered, he would ſeek out the extremity of the law, and would not offer ſo much again. This act paſſed the lords, but was rejected by the commons. The king, diſappointed by this failure, conſulted the judges and eminent lawyers, and the queſtion was ſolemnly argued in chancery, where, we are told, it was decided, that a man could not bequeath any part of his land in prejudice of his heir[u]; a propoſition, of which there could be little doubt, if it is to be underſtood of the deviſe of *land*, and which, notwithſtanding, left the queſtion, as to declarations of uſes, where it was. The only remedy was to deſtroy uſes entirely; and it was with that view that the ſtatute of uſes was procured ſome few years after.

Statute of uſes.

THE miſchiefs ariſing from uſes were not confined to the ſingle object of feudal claims on land, but infected almoſt every tranſaction concerning landed property. Theſe miſchiefs were not ſubdued by the remedies the legiſlature had already, at different times, applied. Indeed one of thoſe remedies, the ſtatute of Richard III. had ſomewhat increaſed the perplexity before complained of, that of divers claims to the ſame land. That ſtatute had enabled the

[t] Vid. ante. 139. [u] Burn. Ref. vol. I. 112.

ceſtui

ceſtui que uſe to make feoffments and other aſſurances of his land, while the feoffees ſtill continued their common-law right over it. The conſequence of this was, that the *ceſtui que uſe* might limit an eſtate for life, or in tail, or make a leaſe of the land; and the feoffee, perhaps, might do the ſame, having each an equal right.

THUS, purchaſers were never ſafe while two perſons had the diſpoſal of the ſame land. But the numerous other inconveniences attending uſes, as recited in the ſtatute, made it neceſſary to apply ſome fundamental remedy to theſe diſorders. This was meant to be effected by the famous ſtatute of uſes, 27 Hen. VIII. c. 10. What the opinion of that age was upon this ſubject, and what was the deſign and plan of that ſtatute, cannot be better collected than from the title and preamble of it. It is intitled, "An Act "concerning Uſes and Wills." And the preamble ſtates, that "Whereas, by the common laws of this realm, "lands, tenements, and hereditaments, be not deviſable "by teſtament, nor ought to be transferred from one to "another, but by ſolemn livery and ſeiſin, matter of re-"cord, writing ſufficient made *bonâ fide* without covin "or fraud; yet, nevertheleſs, divers and ſundry imagina-"tions, ſubtle inventions, and practices, have been uſed, "whereby the hereditaments of this realm have been con-"veyed from one to another by fraudulent feoffments, fines, "recoveries, and other aſſurances craftily made to ſecret "uſes, intents, and truſts; and alſo by wills and teſta-"ments, ſometime made by *nude parolx* and words, ſome-"time by ſigns and tokens, and ſometime by writing, and "for the moſt part made by ſuch perſons as be viſited by "ſickneſs, in their extreme agonies and pains, or at ſuch "time as they have ſcantly had any good memory or re-"membrance; at which times, they, being provoked by "greedy and covetous perſons lying in wait about them, "do many times diſpoſe indiſcreetly, and unadviſedly, "their lands and inheritances; by reaſon whereof, and by

CHAP. XXVIII. HENRY VIII.

"occaſion of which fraudulent feoffments, fines, recove-
"ries, and other like aſſurances to uſes, conſidences, and
"truſts, divers and many heirs have been unjuſtly, at ſun-
"dry times, diſherited, the lords have loſt their wards,
"marriages, reliefs, heriots, eſcheats, aids *pur faire fits*
"*chevalier & pur file marier*, and ſcantly any perſons can
"be certainly aſſured of any lands by them purchaſed, nor
"know ſurely againſt whom they ſhall uſe their actions or
"executions, for their rights, titles, and duties; alſo men
"married have loſt their tenancies by the courteſy,
"women their dower; manifeſt perjuries by trial of ſuch
"ſecret wills and uſes have been committed; the king's
"highneſs hath loſt the profits and advantages of lands of
"perſons attainted, and of the lands craftily put in feoff-
"ments to the uſes of aliens born, and alſo the profits of
"waſte for a year and a day of lands of felons attainted;
"and the lords their eſcheats thereof; and many other in-
"conveniences have happened, and daily do increaſe among
"the king's ſubjects, to their great trouble and inquietneſs,
"and to the utter ſubverſion of the antient common laws
"of this realm: for the extirping and extinguiſhment of
"all ſuch ſubtle practiſed feoffments, fines, recoveries,
"abuſes and errors," this act was made. Such is the pre-amble of the act uſually called *the ſtatute of uſes*; and in all pleadings and deeds, the ſtatute for *transferring uſes into poſſeſſion*, or the ſtatute for *conveying the poſſeſſion to the uſe*.

If one ſtatute of Richard III. had added to the former miſchiefs of uſes, another furniſhed a hint for the entire deſtruction of them. That monarch, while duke of Gloceſter, had been infeoffed to uſes, either jointly with others, or by himſelf. To obviate the notion of law, that the king cannot be ſeiſed to a uſe, and the manifeſt injuſtice of his holding ſuch lands diſcharged of the uſe; it was provided by that act, that where he was joint feoffee, the other feoffees ſhould ſtand ſeiſed to the uſes without him; and

where

where he was ſole ſeiſed, the land ſhould be veſted in the *ceſtui que uſe*, in the ſame manner as he had the uſe. In a ſimilar way, the ſtatute of uſes enacts, that, when any perſon ſhall be ſeiſed of lands, or other hereditaments, to the uſe, confidence, or truſt of any other perſon or body-politic, the perſon or corporation intitled to the uſe in fee-ſimple, fee-tail, for life or years, or otherwiſe, ſhall from thenceforth ſtand and be ſeiſed, or poſſeſſed of the land, of and in the like eſtate as they have in the uſe, truſt or confidence; and that the eſtate of the perſon ſo ſeiſed to the uſe, ſhall be deemed to be in them that have the uſe, in ſuch quality, manner, form, and condition, as they had before in the uſe. Thus the ſtatute executes the uſe, as it is termed; that is, transfers the uſe into poſſeſſion; by which means the *ceſtui que uſe* becomes completely poſſeſſed of the land in law, as he was before in equity.

No form of words could be imagined more ſimple, and, at the ſame time, more efficacious for the annihilation of uſes, than the purview of this act. By a kind of legal magic, the whole frame of landed property ſeemed on a ſudden to be changed; and every man, who before had only the uſe of his eſtate at the mercy (almoſt) of his feoffees, was made, in an inſtant, the complete and lawful owner of it. The parliament ſeem not to have foreſeen that any uſe could ſurvive the operation of this ſtatute, or any new one be created, except only on a bargain and ſale; and as ſoon as that was diſcerned, an act was made in the ſame ſeſſions [x] to put ſome guard to theſe tranſactions, by requiring them, when they concerned any freehold intereſt, to be by deed indented and inrolled. They deſigned, moſt certainly, that lands ſhould paſs no longer by limitation of uſe, but by formal livery on the land, matter of record, or ſome other common-law conveyance, as mentioned in the preamble of the ſtatute.

[x] Chap. 16.

CHAP. XXVIII. HENRY VIII.

THE courts of law, inſtead of ſending ſuitors to ſeek relief in chancery, began now to take cogniſance of uſes, which were become legal eſtates; and one would have thought the learning of landed property was, by this ſtatute, once more ſettled on the pure and ſimple principles of the common law: how far theſe expectations were anſwered, will be ſeen in the ſequel.

THERE are other material articles in this ſtatute. It is provided [y], that there ſhall be a ſaving to all feoffees of ſuch former right, title, entry, intereſt, poſſeſſion, rents, cuſtoms, ſervices, and actions, as they might have had at common law: upon which ſaving, much of the reaſoning concerning the condition of the feoffees was afterwards founded. Where [z] perſons have a uſe or intereſt in annual rents iſſuing out of lands, they are to be adjudged in poſſeſſion and ſeiſin of the rent in ſuch like eſtate, as they had in the uſe, in the ſame manner as if they had a conveyance from thoſe who were ſeiſed to the uſe.

Jointures.

THERE is another clauſe in this act, which deſerves a more particular notice; that is, the proviſion reſpecting *jointures*. When the ſtatute had ordained, that thoſe who had the uſe of land ſhould be thenceforward conſidered as *ſeiſed* of the freehold and inheritance, it was foreſeen that the following caſe might happen: that, immediately upon paſſing the act, as every man would become *ſeiſed*, there would accrue a title of dower to his wife, who, perhaps, had an eſtate in jointure made to her on her marriage, and ſo would now enjoy a double proviſion, namely, her dower and jointure both. It was thought expedient that this ſhould be prevented; and it was accordingly enacted, that where there are lands ſettled to a man and his wife and the heirs of the huſband, or to the huſband and wife and the heirs of their two bodies begotten, or the heirs of one of their bodies begotten; or to the huſband and wife for

[y] Sect. 3. [z] Ibid. 5.

their

their joint lives, or the life of the wife; or to any perſon to the uſe of the huſband and wife, or of the wife ſolely, for her jointure; that, in all theſe caſes, the wife ſhall not be intitled to dower. But[a], ſhould ſhe be evicted of all or any part of her jointure, by lawful entry, or action, or even by the diſcontinuance of her huſband, ſhe ſhall be recompenſed by a proportionate endowment out of the reſidue of his lands. It was alſo provided[b], that where ſuch jointure is made after marriage, the widow may refuſe it, and demand her dower. This is the only proviſion made by ſtatute on the ſubject of jointures; ſince which, it has at different times been diſcuſſed and reſolved, what are the requiſites to conſtitute a perfect jointure, and ſuch a one as will bar dower: the intention of all which ſeems to be this, that the eſtate given to the wife in jointure ſhould be equally beneficial with her dower, and that there might be no doubt but it was given in lieu of it.

ANOTHER equitable proviſion was made by the ſtatute of uſes, to prevent ſome untoward conſequences which would enſue from the revolution thereby effected. When the perſon who had the uſe became ſeiſed of the land, his power of deviſing was of courſe gone. Now it might happen, that many perſons were under covenants made on marriage, or otherwiſe, to give ſome eſtate by will; which, ſince the ſtatute, could not be performed. This would produce inconvenience, and often injuſtice; a ſaving clauſe was therefore added, to effectuate wills made before, and within a certain period after, paſſing the act.

INDEED, the effect that the ſtatute of uſes had on the power of deviſing, was one of the moſt material conſequences which followed it. The king's grand object of preventing the infringement his caſualties of tenure ſuffered by deviſes, was moſt effectually attained: Henry

[a] Sect. 7. [b] Sect. 9.

CHAP. XXVIII. HENRY VIII.

had made good the threat he had held out a few years before, which intimated a deſign to take away the power of deviſing entirely. When this reſtraint was wrought up to its higheſt pitch, the inconveniencies of it were felt too ſenſibly for it to endure long; and in a few years it was found neceſſary to allow, by expreſs ſtatute, the power of deviſing land, upon the footing that had been propoſed by the king ſome years before.

Statute of wills.

ACCORDINGLY, an act was paſſed in the thirty-ſecond year of the king [c], which, from the governing idea upon this ſubject, was intitled, *The act of wills, wards, and primer ſeiſins*, whereby a man may deviſe two parts of his land. The preamble intimates the grace and goodneſs of the king towards his ſubjects, in granting them every thing which he in his benevolence could confer; and ſtates, as a reaſon for making this act, that perſons of landed eſtates could not conveniently maintain hoſpitality, nor provide for their families, the education of their children, or payment of their debts, out of their goods and moveables. It ordains therefore, that all perſons having any manors, lands, tenements, or hereditaments, may give and diſpoſe of them, as well by laſt will, or teſtament in writing, as by any act executed in their life-time, in the following manner: If they held in ſocage, or of the nature of ſocage, and held none of the king by knight-ſervice, by ſocage in chief, nor of the nature of ſocage in chief, nor of any other perſon by knight-ſervice; or if they held of the king in ſocage, or of the nature of ſocage in chief, or of any other perſon, and none of the king or any other by knight-ſervice, they might deviſe the whole; with a ſaving to the king of his *primer ſeiſin*, and reliefs, and fines for alienation, and all other rights and dues belonging to ſocage-tenure. If they held of the king in chief by knight-ſervice, or of the nature of knight-

[c] Chap. 1.

ſervice

ſervice in chief, they might deviſe two parts, or as much as ſhould amount to the yearly value of two parts in three, in certainty, and by ſpecial diviſions, ſo as it might be known; ſaving to the king the cuſtody, wardſhip, and *primer ſeiſin*, of as much of the lands as amounted to the full yearly value of a third, without any diminution, dower, fraud, covin, or cheat, and alſo his fine for alienation. The ſame if they held of the king by knight-ſervice in chief, and had alſo other land of the king, or of any other by knight-ſervice, or otherwiſe, with the ſame ſaving of cuſtody, wardſhip, *primer ſeiſin*, and fines for alienation. If they held ſome lands by knight-ſervice, and ſome in ſocage, or of the nature of ſocage, of any common perſon, then they might deviſe two parts of thoſe held by knight-ſervice, and all thoſe held in ſocage, with the ſame ſaving. If they held only of the king by knight-ſervice, and not in chief; or held by knight-ſervice, and not in chief of the king; and alſo of another by knight-ſervice; and alſo of another held other lands in ſocage, or of the nature of ſocage; then they might deviſe two parts of thoſe held of the king, and two parts of thoſe held of the others by knight-ſervice, and the whole of thoſe held in ſocage; ſaving to the king and the other lords, their reſpective rights and caſualties, as beforementioned.

In all theſe caſes, if the part coming to the king did not amount to a full third, he might take into his hands as much of the other two parts as would make up a clear yearly value of the full third belonging to the king in title of wardſhip and *primer ſeiſin*, or the like; and the lord was to have a like advantage reſpecting his third part, for title of wardſhip: and all perſons were to ſue their liveries for poſſeſſions, reverſions, and remainders, and pay reliefs and heriots as before.

It was declared, that if two or more perſons held lands of the king by knight-ſervice, jointly to them and the heirs of one of them; and he who had the inheritance died,

CHAP. XXVIII. HENRY VIII.

died, leaving his heir within age, the king ſhould have the ward and marriage of the body, notwithſtanding the life of the freeholder. Laſtly, there was a ſaving of dower out of the two parts, and to the king his reverſion of tenants in jointure or dower, if they ſhould happen to die during the minority of the king's ward.

Such is the ſubſtance of the firſt ſtatute of wills. An innovation like this could not be made without giving occaſion to an abundance of queſtions which could not be foreſeen by the makers of it; and the preſent act does not ſeem to have been framed with all that circumſpection which is ſo manifeſt in moſt of the acts of this period. In the courſe of three years, many of theſe difficulties had time to make their appearance, and ſuggeſt their own remedies. We find in 34 and 35 Hen. VIII. an act paſſed for correcting ſuch defects, intitled, "The bill concerning the explanation of wills."

It is remarkable, that of the many clauſes in the former ſtatute which gave authority to different perſons to deviſe, only two of them required any particular deſcription of eſtate in the teſtator; and then the deſcription was ambiguous: theſe words were *of eſtate of inheritance*, and they were now declared to mean only an eſtate in fee-ſimple. The act goes on to ſupply the defect of the former act, and declares, that all perſons having a ſole eſtate in fee-ſimple, or being ſeiſed in fee-ſimple, in coparcenary or in common, of manors, lands, tenements, rents, or other hereditaments, in poſſeſſion, reverſion, or remainder, or rents, or ſervices, incident to any reverſion or remainder, and having no lands held of the king, or any other by knight-ſervice, might deviſe the whole. If they held them of the king in chief by knight-ſervice, or of the nature of knight-ſervice in chief, they might deviſe two parts. To explain a doubt which *Montague*, afterwards chief-juſtice, confeſſes he, among many, entertained, that

that a will of more than the two parts would [a] be void; it was declared, that a will ſhould be good at leaſt for two parts, although it was made of the whole, or of more than the two parts. The diviſion of the two parts, if not made by the teſtator, was to be made by commiſſion, granted out of the court of wards and liveries; a court which was newly erected, and will be mentioned hereafter. This was to be executed by the oaths of twelve men, and a return and certificate to be made to the maſter of the wards and liveries, who was to decide the matter.

If any held of the king by knight-ſervice, and not in chief, or held of any other by knight-ſervice (not being bodies politic and corporate), they might deviſe two parts; and any will ſhould be good for the two parts, though made for the whole, and for all other lands not held of the king, nor of any other, by knight-ſervice, nor in chief; the diviſion to be made, as in the former caſe, for as much of the lands as belonged to the king; and for as much as belonged to any other perſon, by commiſſion iſſuing out of chancery.

In explanation of the ſavings, made in the former act, of cuſtodies, *primer ſeiſins*, and the like, reſpecting the third part, it was declared to apply to ſuch lands and tenements as came by deſcent, as well in fee-tail as fee-ſimple, or in fee-tail only, to the heir of the teſtator, immediately after his death; and any will was to be good, notwithſtanding it deviſed all the fee-ſimple lands: and if ſuch lands deſcending either in fee-ſimple or fee-tail, amounted not to a third, the king, or other lord, was to have as much of the others as would make up the clear yearly value of the third, in reſpect of his title of wardſhip, *primer ſeiſin*, and the like. If the king, or other lord, was evicted of his third part, he was to have the deficiency made up to him out of the other two parts.

[a] Plowd.

As