IT was a common practice to make a leaſe for term of years by fine. The courſe was, firſt for the leſſee to acknowledge the land to belong to the leſſor, *come ceo*, &c. and then for the leſſor to grant and render it to the leſſee [x]. The fine *ſur grant et rendre* was a uſeful aſſurance in theſe and many other caſes. Where it was covenanted, that *A.* ſhould make to *B.* his wife, daughter of *J. K.* a jointure by fine, it was contrived, on account of the infancy of *B.* that the writ of covenant ſhould be made between *J.* and *A.* by which *A.* acknowledged the land to be the right of *J. come ceo que*, &c. and *J.* granted and rendered it to *A.* for life, without impeachment of waſte, with remainder to *B.* his wife, for life, remainder to *A.* and his heirs [y]. What effect a fine had on an eſtate *in uſe*, will be mentioned in another place.

Manner of ſuffering recoveries.

THE modern method of ordering a recovery, ſo as to make it a complete bar to all ſecret intails, and to thoſe claiming in remainder, was not generally practiſed in this reign. They often contented themſelves with a ſingle voucher; and they brought the writ againſt the tenant whoſe eſtate was to be barred; both which were the preciſe circumſtances in *Taltarum*'s caſe: and though that deciſion ſeemed a ſufficient warning, they continued more commonly to ſuffer a recovery in that way, than in any other. In the twenty-third of the king we find a writ of entry brought againſt the huſband and wife of land, where the wife was tenant in tail, and they vouched over: this was held a bar to the iſſue in tail [z]. Yet it was ſaid, on another occaſion, that if the huſband ſurvived the wife, then as the recompence would go to the ſurvivor, this ſhould not bar the iſſue [a]. It was held, that where the writ was brought againſt the tenant for life, in order to bind the fee-ſimple, he ought to pray in aid of him in reverſion, and they were then to vouch together [b]. It was

[x] New Caſes, 142.
[y] 30 Hen. VIII. New Caſes, 139.
[z] 23 Hen. VIII. New Caſes, 250.
[a] 25 Hen. 8. New Caſes, 251.
[b] Ibid.

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held in 25 Hen. VIII. (which was before the ſtatute for declaring void recoveries ſuffered by tenant for life), that if a tenant for life vouched a ſtranger, and the demandant recovered, and the tenant over in value, that the land recovered in value would not go to the reverſioner after the death of the tenant for life; ſo that, in all reaſon, ſuch recovery ought not to be a bar to the perſon in reverſion [c].

In another caſe, about five years after, it was ſaid, that where there was tenant for life, and he was impleaded, and vouched him in remainder in tail, or for life, who vouched over one who had title of formedon, and ſo the recovery was had; there the iſſue of him who had title of formedon, might bring his formedon, and recover againſt the tenant for life; for the ſuppoſed recompence ſhould not go to the tenant for life, becauſe the anceſtor warranted only the remainder (ſays the report), and not the eſtate for term of life; and therefore, the tenant for life, who was not warranted by the anceſtor, could not bind him by the recovery. In ſuch caſe, it was recommended, that the tenant for life ſhould pray in aid of him in remainder, and they ſhould join and vouch him who had title of formedon; and if the recovery was paſſed in that manner, the recompence would go to both [d].

Where there was a tenant for life with remainder over, or tenant in tail, the remainder over, and he was impleaded, and vouched over a ſtranger, and the recovery was had in that manner; it was held by *Montague*, juſtice, and others, that this would bind the entail, for the recompence would go to him in remainder. It is remarked upon this caſe, by *Brooke*, that the law was determined to be otherwiſe, by all the juſtices, in the caſe of *Lord Zouch* and *Stowell* in chancery, and he thought the reaſon was this: That when he vouched a ſtranger, the

[c] 25 Hen. VIII. New Caſes, 251. [d] 30 Hen. VIII. New Caſes, 252.

recompence

recompence ſhould not go to him in remainder; though it would be otherwiſe, if he vouched the donor or his heir [e].

NOTWITHSTANDING theſe diſcordant opinions about the manner of ordering a recovery, it is evident, that ſome recoveries were ſuffered in the preciſe way we now ſee them; for ſo early as the twenty-third of this king it was laid down, that a recovery with ſingle voucher only gave the eſtate which the tenant in tail had at the time of the recovery; ſo that if he was in of another eſtate, then the entail would not be bound againſt the heir: it was therefore recommended to ſuffer the recovery with *double voucher* [f]. The way to effect this was, for the tenant in tail to diſcontinue his eſtate, by making a freehold to ſomebody againſt whom the *præcipe* might be brought; that perſon being tenant of the land, and alſo to the writ of *præcipe* would vouch the tenant in tail, who would vouch over ſome ſtranger, called the *common vouchee*, and ſo loſe the land. Here, as the tenant in tail vouched *generally*, and the ſtranger entered with the warranty *generally*, the recompence would be held to enſue the general warranty; in conſequence of which the tenant in tail, and all perſons claiming through him, under whatever eſtate, would be barred; it being in the power of none to ſay, the warranty was annexed to ſome other eſtate, and not to that which he claimed. Thus was a recovery ſettled upon the principle of *Taltarum*'s caſe, as a complete bar to all eſtates that the tenant could claim.

THE following queſtion aroſe upon a recovery. A writ of entry was brought againſt a tenant in tail; there was a voucher and recovery in value againſt the common vouchee; but before execution ſued, the tenant in tail died, and the iſſue entered: it was ſubmitted to the court, whether the recoveror might not enter; and it ſeemed to *Fitzherbert* and *Baldwin* that he might well enter; for the iſſue, on

[e] 27 Hen. VIII. New Caſes, 252. [f] 23 Hen. VIII. New Caſes, 270.

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account of the recovery over in value, could not falſify the recovery, as he might if there had been no recovery over in value. But *Shelley* thought the iſſue were remitted by the death of the tenant. After the delivery of theſe two opinions, the matter went off without a deciſion [g]; and ſo the queſtion remained, till it was ſolemnly ſettled in the reign of queen Elizabeth. Another queſtion of difficulty reſpecting a recovery, and alſo a fine, was put to the court of common-pleas, but received no deciſion. It was aſked, if a tenant in tail, the reverſion in the king, levied a fine or ſuffered a recovery, the heir would be barred. The court ſeemed to think that the heir would be barred, though it was no diſcontinuance of the entail, nor had any effect as againſt the king in reverſion. *Engleſield* ſaid, he had before met with ſuch a caſe, and, upon good advice, it had been thought a bar (by which it may be ſuppoſed he meant a bar to the king, for the report had before ſaid that they had *all* agreed upon its being a bar to the iſſue); but *Shelley* expreſſed a doubt of it. Whether it was one or the other, we have already ſeen, that this difficulty was removed about three years after by ſtatute [h].

Uſes.

THE law and doctrine of uſes conſtituted one of the principal ſubjects of diſcuſſion during the whole of this reign; and ſo unſettled were men's minds upon the nature and qualities of this new ſort of property, that queſtions of this kind were agitated with great difference of opinion. To convey to the reader an idea of this controverſy about uſes, it may perhaps be the beſt way to ſtate the caſes that appear on this head in our books, in the order in which they happened; as this will more readily exhibit the progreſs of opinions.

A CASE happened, in the 14th year of the king, where it was neceſſary to enter fully into the nature of uſes. The

[g] 29 Hen. VIII. Dyer 35. 28. [h] 28 and 29 Hen. VIII. Dyer 32. Vid. ant. 239.

feoffees

feoffees had granted a rent to a perſon who was appriſed of the uſe, and afterwards made a feoffment thereof, and the *ceſtui que uſe* releaſed all his right to the feoffee; the grantee diſtrained for the rent, and it became a queſtion, whether the rent ſhould be conſidered as to the uſe of the *ceſtui que uſe*, as the land was, or to the uſe of the grantee. It was maintained by *Pollard*, *Brooke*, and *Fitzherbert*, juſtices, that the rent ſhould be to the uſe of *ceſtui que uſe*, and then the releaſe of the *ceſtui que uſe* to the feoffee extinguiſhed it by ſtat. 1 Ric. III. which allows the releaſe of *ceſtui que uſe* to be good againſt him, his heirs, his feoffees and their heirs: they held likewiſe, where a feoffment to a uſe was made, that the heir of the feoffee, and his feoffee, and all perſons who were in in the *per*, without conſideration (or upon conſideration, if they had notice of the firſt uſe), ſhould be ſeiſed to the ſame uſe; but otherwiſe of thoſe who came in in the *poſt*. For it was ſaid by *Newdigate*, ſerjeant, if feoffees to a uſe die without heirs, and the lord enters by eſcheat, he ſhould be ſeiſed to his own uſe. Again, if the heir of the feoffee was within age, he ſhould be in ward to the lord, and the lord have the profits, and the feoffee's wife her dower to her own uſe; her's being an eſtate given her by law, though ſhe is ſaid to be in by her baron. The huſband of a woman ſeiſed to a uſe ſhould likewiſe be tenant by the curteſy, and be conſidered as in in the *poſt*, to his own uſe. Again, if the feoffee to a uſe was bound in a ſtatute-merchant, the land was liable to be taken in execution. The feoffees might grant offices, as that of a ſteward, bailiff, receivor, and the like.

But *Fitzherbert* ſaid, that if a man made a feoffment without conſideration, the feoffee ſhould be ſeiſed to the uſe of the feoffor, or to the ſame uſe to which the feoffor was ſeiſed; and if a feoffee was ſeiſed of a ſeignory to a uſe, and land eſcheated, he ſhould have the eſcheat to the ſame uſe as the ſeignory. Again, if the feoffee of a ſeignory recovered in value upon a voucher, it was to the firſt uſe. To

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this *Pollard* agreed, and *Brooke* admitting that the wife of the feoffee ſhould be endowed to her own, if ſhe took her dower at common law, thought it would be otherwiſe, if it was dower *ex aſſenſu patris*, or *ad oſtium eccleſiæ*; for in ſuch caſes ſhe would be in by the feoffee; but the other was in by the law, as well as *per le baron*, and indeed without any act of her own. If a feoffee made a gift in tail, without ſpecifying any uſe, he thought the donee ſhould be ſeiſed to his own uſe; for here was a conſideration, namely, a tenure between them, unleſs a uſe was ſpecially expreſſed at the time of the gift: ſo in a deviſe by will, the uſe would be to the deviſee, unleſs otherwiſe expreſſed, becauſe there was a conſideration implied: ſo a feoffment to a corporation or abbey would be to their own uſe, unleſs otherwiſe expreſſed. There ſeemed to be no doubt of what was laid down about conſiderations and notice; but they all agreed in it very fully, namely, that a feoffment by feoffees to a uſe without conſideration, was to the firſt uſe, if upon conſideration; if to one who had no notice of the uſe, the uſe was changed, and, of courſe, if with notice and conſideration, the firſt uſe remained. *Brudnell*, the chief juſtice, carried the rule about feoffments by feoffees ſtill further; for he ſaid, ſhould the feoffees make a leaſe for life, with remainder for life, remainder in fee, to perſons who had notice of the uſe, they ſhould be ſeiſed to the firſt uſe, notwithſtanding the diviſion of eſtates. All this was agreed in by the judges, as to the nature of uſes, and the eſtate and power of feoffees to a uſe; but upon the main queſtion they differed, all of them but *Brudnell* holding the rent void, becauſe a man could not have a uſe and a rent out of the ſame land[1].

When a feoffment was made to uſes that were declared by deed, this, like other grants, was not to be revoked; and any charge upon or diſpoſal of the land contrary to the tenor of ſuch uſes already declared, were utterly void. However, as a will differed ſo diametrically from a deed,

[1] 27 H. VIII. 4.

that

that every later was a legal abrogation of the former, ſo uſes declared by will might be revoked and changed as often as the teſtator pleaſed. It happened that a perſon made a feoffment to the uſe of his will, and added *prout in hoc ſcripto*, namely, to the uſe of *B.* for life, and ſo on; afterwards he made a leaſe for years, and died; and it being a queſtion whether this leaſe was good, it was held by the court, that, notwithſtanding the words *prout in hoc ſcripto*, this was clearly a feoffment to the uſe of the laſt will, which might be changed in part, or in the whole, and therefore the leaſe was a revocation *pro tanto*. They added, if a feoffment was made to the uſe of a ſchedule annexed, and that ſchedule was made in the form of a will, it might be altered as a will might [k].

A uſe in tail.

THE queſtion, whether *ceſtui que uſe* in tail had any power to alien under ſtat. 1 Rich. III. was again agitated [l], and was argued before all the judges in Serjeant's-inn. The queſtion was ſtated, whether if ſuch a perſon made a leaſe or feoffment, or ſuffered a recovery, the iſſue and the feoffees ſhould be bound by it after his death. The judges were divided in opinion: *Fitzjames*, *Norwiche*, *Fitzherbert*, *Liſter*, chief baron, and *Port*, held that it would not bind the feoffees; becauſe the ſtatute makes ſuch gifts and grants good againſt the grantor and his heir, claiming as heir to the grantor; but claiming as *heir of the body*, they ſaid, was different from claiming as *heir*. For if feoffees were ſeiſed to the uſe of *B.* for life, remainder to the uſe of *C.* and his heirs, and *C.* was heir-apparent to *B.* and afterwards *B.* made a feoffment, or ſuffered a recovery, this would not bind the feoffees after the death of *B.*; becauſe he claimed as purchaſor, and not as heir. They ſaid, every feoffee who claimed to a uſe in tail, did not claim to the uſe of the feoffor and his heirs, as the ſtatute of Rich. III. expreſsly required, but to the uſe of

[k] 19 Hen. VIII. 11.

[l] Vid. ant. 160.

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the iſſue in tail; and they vouched an authority in the laſt reign[l], which declared that the feoffment of *ceſtui que uſe* in tail did not bind the iſſue after his death. In the caſe of a feoffment to the uſe of an abbot, the feoffees were ſeiſed to the uſe of him and his ſucceſſors, and not to the uſe of him and his heirs, ſo that a feoffment by the abbot would not be good.

HOWEVER, *Englefield*, *Spelman*, and *Shelley*, were of a different opinion. They ſaid, that before the ſtatute *de donis* every tenant in tail *poſt prolem ſuſcitatam* had power to alien, in ſpite of the donor and his heirs, ſo that he had in effect a fee-ſimple; and all that this ſtatute did, was to reſtrain the donee and his heirs from aliening. But in the caſe in queſtion, there was no gift *of land* in tail; the land was given to the feoffees in fee-ſimple, and the uſe, though called a uſe in tail, was in truth no tail within the ſtatute, and was therefore at common law, as land *poſt prolem ſuſcitatam*; any alienation therefore by *ceſtui que uſe* in tail, after iſſue, ought to bind the feoffees. They argued, that the ſtat. of Rich. III. would become of no effect, if feoffees could invalidate ſuch grants after the death of *ceſtui que uſe*. It was, however, agreed by the majority, that a grant, feoffment, leaſe, or releaſe, by *ceſtui que uſe* in tail, could not bar the feoffees[m]; and they thought the ſame of a recovery.

HOWEVER people might acquieſce in the above deciſion, as far as it affected voluntary grants by deed, or acts *in pais*, they would not endure that a recovery, which had lately been recogniſed as a bar to an eſtate-tail in poſſeſſion, ſhould not be allowed the ſame force when applied to the like eſtate in uſe. This point was frequently agitated in this reign, both before and after the ſtatute of uſes, and with different ſucceſs. It appeared in two ſhapes; either

[l] 4 Hen. VII. 17. [m] 19 Hen. VIII. 13.

where

where the recovery was ſuffered by the tenant, or by the feoffees. The following caſe of this kind was after the ſtatute.

In the twenty-ninth year of the king it was held, that if the feoffees to the uſe of an eſtate-tail, or other uſe, ſuffered a recovery upon a bargain, this ſhould bind the feoffees and their heirs, and *ceſtui que uſe* and his heirs, where the buyer and recoveror had no notice of the firſt uſe. To this it was added by *Fitzherbert* (who had, as we have ſeen, concurred in diſallowing a recovery by tenant in tail himſelf) that it ſhould bind, though he had notice of the uſe; for the feoffees having the fee-ſimple, might by law ſuffer a recovery. It was at the ſame time held by many (among whom it cannot be ſuppoſed *Fitzherbert* was one), that if *ceſtui que uſe* in tail was vouched in a recovery, it ſhould bind the tail in uſe, both as to the tenant and his heirs; which opinion was founded, as *Brooke* thinks, upon the authority of ſtat. Rich. III.[n] and, moſt probably, upon the reaſoning of the diſſenting judges in the caſe beforementioned, in the nineteenth of the king. We find, in the next year, a doubt was entertained whether a recovery againſt *ceſtui que uſe* in tail would bind the iſſue; and it is ſaid by *Hales*, juſtice, that true it is, by ſuch recovery, the entry of the feoffees is taken away; but after the death of the tenant, the feoffees may have a writ of right, or writ of entry *ad terminum qui præteriit* in the *poſt*, or the like writ. It was queſtioned, in anſwer to the above reaſoning about the ſtatute *de donis*, whether a uſe might not be within the equity of that act; and they reaſoned upon the ſtatute of Rich. III. juſt in the way that the judges who concurred in the deciſion in the nineteenth of the king had treated it[o]. The ſame year another recovery of this kind came in queſtion; and this recovery, as we are told, had been adviſed by *Fitz*, ſerjeant. It does not appear whether that was *Fitzherbert*,

[n] 29 Hen. VIII. New Caſes, 129. [o] 30 Hen. VIII. New Caſes, 131.

who

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who we have ſeen thought, when upon the bench, ſuch recoveries void. It happened in this caſe, that the tenant in tail died without iſſue, and the brother claiming the eſtate in chancery, the recovery was held to be good no longer than the life of the recoveree [p]. Thus ſtood this queſtion at the cloſe of the reign of Henry VIII.

FITZHERBERT ſeems not to have been always governed by the ſame general principles upon this ſubject; for, notwithſtanding a fine levied by *ceſtui que uſe* in tail ſtands exactly upon the ſame grounds with a recovery, he gave a clear and explicit opinion in the twenty-ſeventh year of the king, that ſuch a fine was good. The caſe in which he delivered this opinion is worth mentioning for another reaſon: *ceſtui que uſe* to him and his wife, and the heirs of the body of the huſband, bargained and ſold his land for ſo much money, and then he and his wife levied a fine to a ſtranger. It was ſaid this fine was void, for at the time of levying it, the parties had nothing either in uſe or in poſſeſſion; for by the bargain and ſale, the uſe was in the bargainee, and nothing was either in the huſband, the wife, or the ſtranger, ſo that the fine could no way be valid. *Fitzherbert* obſerved upon this, that he would never buy land, unleſs the *ceſtui que uſe* made firſt a feoffment, and afterwards levied a fine [q]. In the thirtieth year of the king, it was rather thought, that a fine levied by *ceſtui que uſe*, though it bound him and his heirs, ſhould not bind him in reverſion, nor the feoffees, after the death of the conuſor; for under the ſtat. 1 Rich. III. only he and his heirs, and his feoffees, claiming to his uſe, were to be barred, which was not ſo here. This doubt, as to the iſſue in tail, was ſettled by ſtat. 32 Hen. VIII. c. 36. as we have before [r] related.

To return from recoveries and fines ſuffered by *ceſtui que uſe* in tail to the nature of uſes in general. In the

[p] 30 Hen. VIII. New Caſes, 135. [q] 27 Hen. VIII. 20. b. [r] Vid. ant. 239.

twenty-

twenty-fourth of the king, we find a caſe where a man had made a feoffment in fee to four perſons to his own uſe, and the feoffees made a gift in tail without conſideration to a ſtranger, who had no notice of the firſt uſe, *habendum* in tail to the uſe of *ceſtui que uſe* and his heirs. On a former occaſion we met with a *dictum* declaring ſuch eſtate in tail to be good; and it was now accordingly adjudged, by the concurring opinion of all the judges[1], that the tenant in tail ſhould not be ſeiſed to the firſt uſe, but to his own. They ſaid, that the ſtatute *de donis* ordains, *quòd voluntas donatoris in omnibus obſervetur*. Now no one can be ſeiſed to the uſe of another, but one who can execute an eſtate to the *ceſtui que uſe*, which tenant in tail cannot do; for if he was, the iſſue might have a formedon, to recover the eſtate according to the will of the donor. The ſame of an abbot, mayor and commonalty, and other corporations, as was before ſaid; for if an abbot executed an eſtate, his ſucceſſor might have a writ of entry *ſine aſſenſu capituli*. The ſame of ſuch as were in the *poſt*, as thoſe by eſcheat, mortmain, perquiſite of a villain, recovery, dower, tenant by the curteſy, and the like, who were always ſeiſed to their own uſe. They repeated what had been ſaid on a former occaſion, that there was a tenure between the donor and donee, which raiſed a conſideration, and therefore intitled the tenant in tail to be ſeiſed to his own uſe. The ſame, they ſaid, of a tenant for term of life and years; for where fealty was due, and a rent was reſerved, there, though an uſe was abſolutely expreſſed to the donor or leſſor, yet thoſe circumſtances were conſtrued to amount to ſuch a conſideration, that the donee or leſſee ſhould have the land to their own uſe. The ſame where a man ſold his lands for 20l. by indenture, and executed an eſtate to his own uſe, this would be a void uſe; for the law upon the conſideration of money conſtrues the land to be in the vendee.

[1] 27 Hen. VIII. 10.

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It is laid down by *Fitzherbert*, that ſhould the feoffees to the uſe of an eſtate-tail ſell the land to one who had notice of the uſe, the buyer ſhould be ſeiſed to his own uſe, and not to the uſe of the eſtate-tail; and this, becauſe of the conſideration of money; and becauſe the feoffees, having a fee-ſimple, could make a good common-law conveyance [1].

THE notion of tenure being a conſideration ſufficient to raiſe a uſe, they carried ſtill further. They ſaid, that uſes were at common law before the ſtatute *quia emptores*; for, before that act, upon every feoffment there was a tenure between the feoffor and feoffee, which was ſuch a conſideration as intitled the feoffee to be ſeiſed to his own uſe: but after that act, every feoffee was to hold *de capitali domino fœdi*; ſo that there was no conſideration between the feoffor and feoffee without money paid, or other ſpecial matter, in conſideration of which the feoffee might become intitled to be ſeiſed to his own uſe. For, according to the opinion of *Shelley*, when the father infeoffed the ſon and heir-apparent (as was common in the reign of Henry III. before ſtat. Marlb [9].) to defraud the lord of his ward, this feoffment was to the uſe of the father, who took the profits during his life. The ſame, in caſe of a feoffment made by a woman to a man to marry her; the woman took the profits after the eſpouſals; though this might be doubted, as *Brooke* thinks, becauſe there was an expreſs conſideration. Again, it was held by *Norwiche*, if a man delivered money to *T. S.* to buy land for him, but he bought the land to his own uſe; yet this would be conſtrued by law to be to the uſe of him who delivered the money [x].

AFTER all this debate upon the nature of uſes, and when they had been recogniſed both by parliament and the courts for many years, a very ſingular attack was

[1] New Caſes, 136. [9] Vid. ant. vol. II. 62. [x] 24 Hen. VIII. New Caſes, 126.

made

made upon them by the counſel of the crown. This was, no doubt, at the inſtigation of Henry VIII. who had frequently expreſſed his diſapprobation of uſes; and after long complaint of the loſs he ſuffered in wardſhips, and other caſualties of tenure, had propoſed plans for curtailing them, which had not yet ſucceeded. He ſeems, this year, to have attacked them both in Weſtminſter-hall and in parliament. The caſe alluded to aroſe upon the will of the lord Dacres; a family which, at this time, by one accident or other, gave occaſion to the diſcuſſion of ſeveral points of law. The ſtat. 4 Hen. VII. which was one of the ſtatutes of pernors of profits, and ſecured to lords the wardſhip of ſuch heirs as were ſeiſed only of the uſe, and not in poſſeſſion, had an exception in favour of appointments by the anceſtor's laſt will. The lord Dacres, by his will, had authorized his feoffees to pay his debts; after which he limited his eſtate to his ſon in tail, the remainder over in fee. An office was found, declaring all this, and ſuggeſting, that the will was made by covin and colluſion. This being returned into chancery, it was there litigated by the feoffees before the chancellor and all the judges of England. It was contended, in ſupport of the inquiſition, firſt, that a uſe was not at common law; ſecondly, that it was not teſtamentary; thirdly, that the preſent will was covinous. In ſupport of the firſt poſition, they ſeemed to adduce nothing to ſhew that this ſort of property was not at common law, but merely that there was no mention of it before the time of memory in 1 Richard I. and the following reigns. To this ſort of argument the other ſide anſwered, that common law did not mean ſuch antient uſage as the counſel for the king now called for, but only common reaſon; and it was reaſonable enough, that one man ſhould confide in another. In proof that the common law admitted ſuch a confidence, they recurred to the ſtatutes of pernors of profits, from the reign of Edward III. downward: in ſhort, they

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they declared it not a point to be diſputed. In ſupport of the ſecond poſition, they ſaid, that a uſe ſhould follow the nature of the land; and as it was partible, if of gavelkind, and deſcended to the youngeſt ſon, if of borough Engliſh, the ſame as the land, it was reaſonable it ſhould not be deviſable any more than other inheritances, unleſs by ſpecial cuſtom. To this it was anſwered, that a uſe might paſs by bargain and ſale by parol; and it would be ſtrange, if after that it ſhould not be deviſable by will; and that, at any rate, ſuch a deviſe was good by ſtat. 1 Rich. III.; and they quoted a determination in 20th year of the king, where, after ſome ſtruggle, it was ſo determined. The third point, which regarded covin, they ſeemed to found upon the ſtat. Marlb. made againſt covinous feoffments of an anceſtor to prevent the wardſhip of the heir; concluding, that every will which had the ſame effect, ſhould, by the equity of that act, be pronounced covinous. The anſwer to this was, that the preſent will carried no covin in it, being merely to ſettle the eſtate, and that it was within the ſaving of ſtat. 4 Hen. VII[1].

SUCH were the principal grounds upon which this caſe was argued on both ſides: what the deciſion was, does not appear. The aſperſions which were thrown upon uſes by the crown lawyers on this occaſion, and the bold manner in which they controverted ſuch eſtabliſhed poſitions of the common law, as the lawful exiſtence of uſes, and their being teſtamentary, ſhewed that the crown was ripe for giving the final blow to this ſpecies of property, which was at length intended by the ſtatute of uſes paſſed this ſame year.

THE ſtatute of uſes cauſed a great revolution in this title of the law. A uſe, from being an equitable eſtate, became now a legal one; and the right to the fruits and

[1] 27 Hen. VIII. 7. b.

profits

Operation of the ſtatute of uſes.

profits being converted into the actual ſeiſin of the land, no longer ſtood in need of the court of chancery to give it effect, but was cognizable in the courts of common law. The authority of the court of chancery over landed property was by theſe means much abridged and diminiſhed. This for a time had a ſenſible effect; but, when limitations of a new impreſſion were brought before courts of law, certain technical ſcruples aroſe, which the judges did not think themſelves at liberty to get over, and things in ſome meaſure began to fall back into their old channel. An opinion was delivered in the 36th year of this king, that though a feoffment "to a man for life, and after his "deceaſe that *I. N.* ſhall take the profits," be a clear uſe, and executed by the ſtatute; yet if it had been, that "after his death the feoffees ſhould receive the profits, and "pay them over to *I. N.*" as *I. N.* would receive nothing but through the hands of the feoffees, this would not be executed by the ſtatute. After this it was ſeen, that notwithſtanding the ſtat. 27 Hen. VIII. there muſt be recourſe to the aid of a court of equity for the execution of certain uſes, that were particularly circumſtanced.

THE queſtion on the ſtatute of uſes which created moſt doubt, was the condition of the feoffees; what intereſt, what power remained in them, when, at the inſtant of their appointment, the ſtatute transferred the poſſeſſion out of them to the *ceſtui que uſe*. Many of the opinions which had prevailed reſpecting feoffees after the ſtatute of Richard III. were argued upon after the ſtat. 27 Hen. VIII.; they were ſtill conſidered as ſeiſed in fee of the land, notwithſtanding the operation of the ſtatute, as appears from many of the caſes that have been before mentioned: ſo that, upon the whole, a ſubſiſting intereſt ſeemed to be attributed to them, as a kind of guardians and truſtees to the *ceſtui que uſe*; which intereſt, if at any

[a] 36 Hen. VIII. Bro. Feoff. al Uſe, 52.

time

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time partially diſplaced, could be again brought into being by ſuch an act of ownerſhip as that of entry, or at leaſt by action. According to this notion, the ſtate of the feoffees after the ſtatute of Henry VIII. continued the ſame as it was after the ſtatute of Richard III. when the concurrent rights of the feoffees and of the *ceſtui que uſe* occaſioned ſo much ſtrife. This is another ſtrong inſtance in which this ſtatute was diſappointed of its effect; and this circumſtance contributed to lay a foundation for much of the curious reaſoning that afterwards aroſe upon conveyances to uſes.

If the intention of the parliament was fruſtrated in theſe inſtances, ſo was it by the manner of conveying eſtates which ſoon followed. It was evidently a principal object of the makers of that act, that land ſhould thenceforward be transferred, as anciently, by feoffment, with livery of ſeiſin, and by other common-law aſſurances; whereby the notoriety of the alienation might add ſtability and quiet to every man's poſſeſſion and right: but it is remarkable, that this very ſtatute, on the contrary, contributed, in the end, to bring feoffments into entire diſuſe, and gave riſe to a ſecret mode of conveying land pregnant with all the inconveniencies and miſchiefs before complained of. They reaſoned in this manner: if he who is ſeiſed of the uſe becomes by force of the ſtatute ſeiſed of the land, then to give the uſe, is, in effect, to give the land; and the facility and privacy with which this may be tranſacted, renders it a deſirable way of effecting that purpoſe. Upon this principle, the conveyances before in practice were continued, legitimated as they now were by the operation of the ſtatute upon them; and others were ſoon invented of the like nature. A conveyance to uſes became, on many accounts, the commoneſt, and perhaps the ſureſt mode of transferring land. Theſe conveyances have continued in practice ever ſince; and to give effect to them, is now one of the principal operations of the ſtatute.

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THE parliament ſoon ſaw that this would be the conſequence of the ſtatute, in one inſtance; for, if the ſtatute executed every uſe that was raiſed, a perſon who wanted to part with his land had nothing to do but to raiſe a uſe by *bargain and ſale*, as was then commonly practiſed, and the ſtatute would confirm the *ceſtui que uſe* in the ſeiſin of the land as fully as if there had been a tranſmutation of poſſeſſion by feoffment, fine, or recovery. To prevent the miſchief of this in ſome degree, it was enacted by ſtat. 27 Hen. VIII. c. 16. that no bargain and ſale ſhould enure to paſs a freehold, unleſs the ſame be made by *indenture*, and be inrolled within ſix months in one of the courts at Weſtminſter, or with the *cuſtos rotulorum* of the county; after which proviſion, it was thought the conveyance of a uſe would be as notorious as the ancient common-law aſſurances. As to deeds to declare uſes, as they were only appendages to others which made a real transfer of the poſſeſſion, the allowing of them to continue as they were, it was imagined, would not have any very bad tendency.

COVENANTS to raiſe uſes were ſtill in practice, notwithſtanding they had been reprobated by judicial opinions of the courts of law in the laſt reign *. Uſes were originally a matter of invention; and they had not been ſo long canvaſſed in our courts as to preclude every private perſon from perſiſting in ſuch opinions as his fancy or judgment might have dictated, even in oppoſition to one or two declarations from the judges. With theſe ſentiments, many ſtill adviſed them as ſure conveyances; and as ſuch they were practiſed all thro' this reign, till they at length obtained a degree of legal recognition.

THE general queſtion as to the validity of a *covenant* to change property, was agitated in the great caſe of the *prior of St. John's*, in 27 Hen. VIII.; and it was there agreed, that if a man covenanted, that on the payment of ſo much money another ſhould have his leaſe of the manor of Dale, the other, upon payment, might enter immediately; for

* Vid. ant. 163.

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this bargain altered the poſſeſſion the ſame, ſays the book, as if it had been a bargain for money [a]. This was a deciſion which, it was thought, afforded a ground of law upon which the force of a covenant to change a uſe might be argued with great degree of probability.

IT was probably on ſuch foundation as this that the determination in 32 Hen. VIII. proceeded. It was there laid down, that where covenants and agreements, and not uſes, were contained in indentures; as if it was covenanted, that *A.* ſhould recover againſt *B.* his land in *D.* to the uſe of the recoveror and his heirs, *and to the uſes of the covenants and agreements in the indenture*; there, if he recovered, the recovery would be to the uſe of the recoveror and his heirs only, and *not* to the uſes of the covenants and agreements in the indentures. But, ſay they, if uſes were ſpecified in the indenture, and it was covenanted that *A.* ſhould recover to the uſe of *A.* and his heirs, *and to the uſes in the indenture*, there the recovery would go to ſuch uſe, and be executed by the ſtatute [b]. Here is a plain declaration that a uſe might be conveyed by covenant. Conformably with this general reſolution, we find two years afterwards an opinion of all the judges, after great deliberation, in favour of covenants to convey uſes. It was determined in *Mantell*'s caſe (who had been attainted with the *Lord Dacres*), that where he after the ſtatute of uſes had made a covenant for 100l. and in conſideration of marriage, that he and his heirs, and all perſons ſeiſed of his lands and tenements in Dale, ſhould be ſeiſed of them to the uſe of his wife for term of her life, and then to the heirs of his body begotten upon her, that this would change the uſe; and upon this deciſion the land was ſaved from forfeiture [c].

THUS was a covenant *executed* become a conveyance of the uſe; and, by the operation of the ſtatute upon it, it had

[a] 27 Hen. VIII. 16. b.
[b] 32 Hen. VIII. New Caſes, 133.
[c] 34 Hen. VIII. Bro. Feoff. al Uſe, 16.

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the effect of a conveyance of the freehold. In this manner was one of the difficulties in the reign of Hen. VII. as to this inſtrument removed; but the other ſtill remained: for as to covenants *executory*, that is, where it was covenanted, that after the covenantor's death his ſon, or ſome other perſon, ſhould have the uſe, there is no deciſion in this reign which goes farther than to ſhew, that the fee-ſimple was not in ſuch caſe taken out of the covenantor; and of courſe, that he was only liable to an action of covenant, if he exerciſed the full power of a tenant in fee, and diſappointed the future uſe [d].

WHEN it was agreed that covenants ſhould be permitted to raiſe uſes, it was expedient to preſcribe ſome rules for their government. The firſt object in this, as in all queſtions about conveying a uſe, was the conſideration. And it was laid down by *Hales*, in 36 Hen. VIII. that a uſe ſhall not be changed by covenant on a conſideration paſſed; as if one covenanted to be ſeiſed to the uſe of *T. S.* becauſe *T. S.* is his couſin; or becauſe *W. S.* before had given him 20l. unleſs it was given for the ſame land. But a conſideration, preſent or future, was held to be a good conſideration; as a conſideration of 100l. paid at the time of the covenant, or to be paid at a future day, or to marry one's daughter, or the like [e]. Covenants, and the conſideration on which they might be raiſed, were a new branch of the learning of uſes, and were much agitated in the following reigns.

BEFORE the queſtion of a covenant was ſettled in this way, and while men were indulging themſelves in every contrivance to maintain theſe ſecret methods of conveying their eſtates, the conveyance by *leaſe and releaſe* was deviſed by *ſerjeant Moore*. This is ſaid to have been framed by that ingenious lawyer for the ſatisfaction of the *Lord Norris*, who wanted to conceal from his family

A leaſe and releaſe.

[d] 34 and 35 Hen. VIII. Dyer, 55. 3. [e] 36 Hen. VIII. New Caſes, 135.

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the ſettlement of his eſtate; a matter that could have created no difficulty but in the interval between the ſtatute which enjoined the inrollment of a bargain and ſale, and this determination in favour of covenants to ſtand ſeiſed. This method of conveying was probably copied from the common-law aſſurance by a leaſe, and afterwards a releaſe, as practiſed in the time of Henry VI. and Edward IV[f]. The way of ordering a leaſe and releaſe was this: Firſt, a bargain and ſale was made of a term for years, which the ſtatute juſt mentioned not conſidering, we may ſuppoſe, of ſufficient importance, does not require ſhould be inrolled: the bargainee being thus poſſeſſed of the term, by force of the ſtatute, was in a capacity to receive a *releaſe* of the inheritance. The deed of releaſe contained the whole ſettlement of the eſtate ſo conveyed, to the various uſes and purpoſes intended to be provided for.

AFTER attempts to limit eſtates in perpetuity had been ſo often made, and ſo repeatedly diſcountenanced and defeated by our courts, theſe new conveyances to uſes were laid hold on as a mode for making a freſh experiment on this ſubject. Being a modern invention, and confeſſedly in defiance of the antient courſe of the common law, it was perhaps thought that ſuch eſtates as might not after former precedents be limited in poſſeſſion, might yet be declared in uſe. The nature of an uſe ſeemed to favour this inclination to convey and ſhift property by the limitations of a deed: it was a creation of the feoffor's, was wholly at his diſpoſal, and was cogniſable in a court where the dictates of general reaſon and equity were ſuppoſed to ſuperſede the rigid precedents of a partial and antiquated ſyſtem. It was probably owing to ideas like theſe, that many of the limitations of eſtates, which began to appear about this time, were made. In the thirty-eighth of

[f] Vid. ant. vol. III. 357.

Hen.

Hen. VIII. there is mention of a conveyance of this kind, which was contrived for the purpoſe of preventing all the perſons taking under it from breaking in upon the limitation thereby made. The grantor infeoffed two perſons to the uſe of himſelf for life, without impeachment of waſte; and after his death, to the uſe of his ſon and his heirs, until the ſon ſhould aſſent and conclude to alien the eſtate, or any part thereof, or to charge or incumber it; and after, and immediately upon ſuch aſſent and concluſion, to the uſe of *A.* and his heirs, with the ſame proviſo, and ſo on to others [g]. It appears that ſuch deviſes were now very common; but none of them coming into court, we know not the ſentiments of the judges upon them, and muſt wait till a ſubſequent period, when they underwent ſome diſcuſſion. Theſe are "the upſtart and wild proviſos and limitations" which are ſo reprobated by a great lawyer [h], in whoſe time they began to grow into great diſcredit, after the encouragement they had received by ſome adjudications in their favour [i].

THE introduction of uſes tended much to embrangle queſtions of real property, and the whole law of eſtates: theſe difficulties increaſed after the ſtat. of Rich. III. had given to *ceſtui que uſe* the ſame power over the land which the feoffees had before, and ſtill continued to retain. When the ſtat. 27 Hen. VIII. conveyed the poſſeſſion to the uſe, new perplexities aroſe of a ſimilar kind. Before we take leave of this ſubject, it will be proper to give the reader ſome inſtances of theſe complicated queſtions, which we ſhall now do, without entering minutely into the arguments in which they were canvaſſed.

IT has been before remarked, that the caſualty of wardſhip was intimately connected with uſes; and this fruit of tenure was the topic which moſt intereſted the king in the ſuppreſſion of this new ſpecies of conveyance. In our

[g] 38 Hen. VIII. New Caſes, 31. [h] Pref. 4 Rep. [i] Particularly by *Scholaſtica's caſe.*

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law-books, in various caſes, this connexion between uſes and wardſhip appears; and ſome of the moſt complicated queſtions relating to the latter aroſe from eſtates in uſe. A remarkable caſe of this kind was argued in the court of common-pleas, on a writ of ward brought by the abbot of Bury againſt *Elizabeth Bockenham*. Certain perſons being ſeiſed to the uſe of *Bockenham* in fee, infeoffed other feoffees to the uſe of Bockenham and Elizabeth his wife, for her life, with remainder to Bockenham in fee. Bockenham died, leaving a ſon under age. The lands being held of the abbot, he brought his writ; and it was a queſtion, whether the infant ſhould be in ward to the plaintiff. After frequent argument, the judges differed: *Shelley* and *Fitzherbert* holding that he ſhould not be in ward to the abbot; and *Baldwin*, that he ſhould. No judgment was given; but it is ſaid that the abbot had the ward by conſent; agreeably with the opinion which afterwards prevailed, namely, that the heir was not in of the new uſe, but of the old one; ſo that being in the old reverſion as heir to his father, and not in of the new remainder by purchaſe, he ſhould be in ward[k].

Two ſettlements made by the lord Burgh, (which have been already mentioned for another purpoſe) gave occaſion to a queſtion upon the wardſhip of his grandſon. In an indenture of covenant on his marriage, before the ſtat. 27 Hen. VIII. he declares the uſes of a recovery to his ſon and his wife, and the heirs of the body of his ſon; after the ſtatute, the ſon had iſſue and died, leaving the iſſue within age: the land was holden of the king, and it was a queſtion, whether the infant ſhould be in ward to the crown, or out of ward, during the life of the mother. This matter was heard in the new *Court of Wards and Liveries*; and it was held by the king's ſerjeant and attorney, by the attorney of wards, by *Brooke*, and others,

[k] 28 Hen. VIII. Dyer, 7. 11.

that

that the iſſue ſhould be out of ward during the life of the lord Burgh, who was ſtill the king's tenant; for having expreſſed no uſe of the fee, the antient uſe of the fee-ſimple remained in him; and ſo when the ſtatute paſſed, the poſſeſſion veſted in the ſon and his wife, as the uſe before did, and the fee-ſimple in the father, who was donor of the uſe. At the time of the ſame marriage, the lord Burgh ſettled other lands by covenant in this way; namely, "that his eldeſt ſon, immediately after his death, ſhould "have in poſſeſſion, or in uſe, all his lands," &c. In this, as in the former, the queſtion of wardſhip turned upon the fee-ſimple, whether it was out of the covenantor; and they held that it was not [1].

THE breaking into old ſettlements, and then reſettling the family-eſtate, as in one of the preceding inſtances, in a new way, furniſhed frequent queſtions of remitter. Theſe were always difficult points, and were rendered ſtill more complex by their connexion with uſes. This will be evident from the following inſtances. Tenant in tail made a feoffment before the ſtat. 27 Hen. VIII. to the uſe of his wife for life, remainder to his ſon and heir in fee; after this the ſtatute paſſed, then the feoffor died, and then the wife and the ſon entered; it was doubted, whether he ſhould be remitted to the entail. *Dyer* ſeems to think he ſhould not, becauſe the ſtatute executed the poſſeſſion in him in the ſame manner in which he had the uſe, and that was in fee; but he thought the iſſue would be remitted. Again, a woman tenant in tail took huſband, who made a feoffment before the ſtat. 27 Hen. VIII. to the uſe of himſelf and his heirs, and after having iſſue by his wife, he died: the wife died, the iſſue entered, and made a feoffment to the uſe of himſelf and his wife and his heirs, and then died, leaving an heir within age; then the ſtatute 27 Hen. VIII. was paſſed; afterwards the wife died, and a

[1] 34 and 35 Hen. VIII. Dyer, 54. 2.

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queſtion aroſe, whether he was remitted to the entail. No deciſion was made in either of theſe caſes; but in the following, which was of a feoffment in fee by a tenant in tail, who died his heir within age, after which the ſtatute paſſed; it was adjudged, in conformity with the opinion of *Dyer* before-mentioned, that the heir was not remitted[m]. The expectation in all theſe caſes was, that becauſe an eſtate was thrown upon the *ceſtui que uſe* by the ſtatute, it was within the common-law notion of a remitter, that he ſhould poſſeſs not in the form in which it was caſt upon him by the law, but in his better or more antient right, by remitter. But this reaſoning was done away by another which was equally technical and refined; for it was anſwered by *Baldwin*, the chief-juſtice, that the eſtate was not caſt upon the *ceſtui que uſe* by the law, but by *his own act*; namely, by an act of parliament, to which every man is a party[n]. The better reaſon however was, that the ſtatute gave the poſſeſſion and ſeiſin in no other way than the party had the uſe, and no ſeiſin could be conveyed to an uſe which he had not.

Of wills.

THE ſtatute of wills may be conſidered as having introduced a new ſpecies of conveyance. A deviſe became now a common aſſurance, which effected a complete transfer of the freehold. We have ſeen, that many points had already been determined on wills of land deviſable by cuſtom, from which the formal and effective parts of a will were tolerably well ſettled; but a new turn was now given to theſe inſtruments. The practice of deviſing *uſes*, where it was not the cuſtom to deviſe the *land*, had lately made wills much more frequent than they had been. Theſe, which were nothing more in effect than declarations of uſes, became precedents for wills after the ſtatute of wills: ſo that, in addition to the looſe wording which was allowed in wills of land at common law, and the liberal conſtruc-

[m] 34 Hen. VIII. Dyer, 54. 21, 22. [n] 28 Hen. VIII. Dyer, 23. 148.

tion

tion which they received, in order by all poſſible ways to give effect to the intention of the deceaſed, however untechnically expreſſed; in addition to theſe properties and circumſtances relating to wills of land, they were now to be conſidered, likewiſe, in the light of declarations of uſes, and as ſuch were to be interpreted with great indulgence and equity. Theſe conſiderations rendered the ſubject of wills of land ſomewhat curious and complicated; eſpecially when entangled in the diſtinctions and refinements with which entails and limitations abounded. The difficulty in all theſe caſes was, how to effectuate the intention of a teſtator, without intrenching on ſome rule of law.

In reviewing what was done by the courts in forming and modelling the law of deviſes, our attention is firſt caught by thoſe determinations which illuſtrate the remark we have juſt been making on the equity with which theſe inſtruments were conſtrued, and the contract which they, on that account, exhibited, when compared with grants. This conſtitutes the moſt intereſting topic in the law of deviſes, and will demand our attention in a particular manner, as deviſes were now authorized by parliament, and the occaſions for diſcuſſing them were more frequent.

Conſtruction of wills.

The firſt information upon this head preſents itſelf in the nineteenth of the king; when *Engleſield* ſtates it as an acknowledged point of law, upon which he might argue, that a deviſe to a man in fee, and if he dies without heirs, then to another, was void in law; for a fee-ſimple could not by law depend upon another[o]. This is an inſtance in which no indulgence was allowed to a gift by will, beyond that of deed. This queſtion was conſidered ſome few years afterwards, when a reaſon was given why the law would not ſuffer ſuch a deviſe. A man had given his land to a religious houſe, by the cuſtom of London,

[o] 19 Hen. VIII. 3.

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don, which allowed lands purchaſed to be given in mortmain; with this condition, *ita quòd reddant* ſo much money yearly to the dean and chapter of St. Paul's; and if they failed, that their eſtate ſhould ceaſe, and the dean and chapter and their ſucceſſors ſhould enter. Upon an entry being made, it was held clearly by *Baldwin* and *Fitzherbert*, that the condition was void; for, ſaid they, it could not remain after a gift of the fee-ſimple; the feoffor having determined his intereſt and right: beſides, a ſtranger could not enter for the condition broken, but only the heir [p]. It may be remembered, that the very reaſon given by Littleton why the limitations in *juſtice Richel's* will were void, was, becauſe the heir, and not a ſtranger, was the proper perſon to enter for a condition broken [q]. The diſtinction had not yet taken place between conditions and conditional limitations.

THE ſame ſcruples which the courts had in allowing a fee to be given after a fee by will, were entertained reſpecting the deviſe of a chattel intereſt: they were as jealous of theſe perpetuities as of the former, though they began to relax in this reign as to the latter. A man poſſeſſed of a term for forty years made his will, and deviſed it to his eldeſt daughter, and the heirs of her body; and if ſhe died without any, then to his ſecond daughter in tail. The eldeſt daughter married, and dying without iſſue within the term, the huſband ſold it; and it was doubted, whether the ſecond daughter had any remedy. It was there ſaid by *Baldwin* and *Shelley*, that ſhe had no remedy, the deviſe being againſt law; for a term could not be given in remainder any more than a chattel perſonal, as had been determined, they ſaid, in the reign of Henry VI. *Engleſield* thought the remainder was good, conſidering it was by will; and the intention of the teſtator was to be effected as well as it could. This was no more than, in

[p] 28, 29. Hen. 8. Dyer. 33. 12. [q] Vid. ant. vol. III. 324.

other

other words, that if the eldeſt daughter died without iſſue within the term, the ſecond ſhould have it. To this it was obſerved by *Baldwin*, that the caſes were different; for he approved of a deviſe of a term upon condition, and that if the deviſee died during the term, a ſtranger ſhould have it; for then the whole term and intereſt would not be given, but only ſo much as elapſed during his life. But here the teſtator made an abſolute unqualified gift to the eldeſt daughter. And he ſaid that he had been concerned, when a ſerjeant, in a caſe ſimilar to the preſent, and that was determined to be ill[r].

THE former was a deviſe of a term *in tail*: it was afterwards laid down for law, that where a term for years, or other chattel was deviſed *for life*, with remainder over; there, if the deviſee did not alien it, the perſon in remainder ſhould have it. But if he had diſpoſed of it, the remainder-man had been without remedy[s]. This was ſanctioning an abſolute gift of a chattel for life, with remainder over. In a ſubſequent caſe it was laid down ſo largely as apparently to warrant a remainder after an inheritance in tail, if the occupation and not the thing itſelf was given. For it is ſaid to have been agreed for law, that the *occupation* of a chattel might be deviſed by way of remainder; but if the thing itſelf were deviſed to be uſed, the remainder would be void: for a gift or deviſe of a chattel, if but for an hour, was the ſame as for ever; and the donee or deviſee might diſpoſe of it as he pleaſed[t]: an opinion that was not wholly novel*. Thus was the rigour of the old law gradually ſoftening, till theſe teſtamentary diſpoſitions were at length recogniſed by the courts, under the name of *executory deviſes*, which ought, in reaſon, to be ſupported and rendered effectual.

WHENEVER the judges could diſpenſe with the rigour of the old forms of conveying property, they were ready

[r] 28 Hen. VIII. Dyer, 7, 8.
[s] 33 Hen. VIII. New Caſes, 40.
[t] New Caſes, 83.
* Vid. ant. vol. III. 369.

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to give all aſſiſtance towards eſtabliſhing a deviſe. The following is a ſtrong inſtance of this favourable conſtruction. A man had deviſed, that *T. S.* ſhould have his land after the death of his wife: they held that, upon this deviſe, the wife ſhould have the land for her life, becauſe they thought it evident, from the manner of the gift, that the teſtator meant it ſo[t]. In the following caſe, a rule of law was made to give way to the great object of fulfilling the intention of a teſtator. Land had been deviſed to two, *et hæredibus eorum*; it was held by *Lord Audley*, then chancellor, that the ſurviving deviſee ſhould not take the entire eſtate by ſurvivor, but only a moiety[u]. Again, a deviſe to a man and his heirs male, was conſtrued by *Fitzherbert* and *Shelley* to be clearly an eſtate tail, without the word *body*; becauſe it appeared the intention of the teſtator that it ſhould be ſo[x]. Where a man willed that his feoffees ſhould make an eſtate to *I. N.* and the heirs of his body, this was ſupported as a complete deviſe, becauſe of the teſtator's intention[y]. If a deviſe was made to *I. N.* without adding any thing more, it would, like a gift or grant, be only for life; but this might be explained by circumſtances to mean a larger eſtate; as where it was ſaid, "paying 100l. to *A. B.*" this was held to give a fee-ſimple; and if the deviſee did not pay it himſelf, his heir or executor might[z].

No point in the law of deviſes had created more diſcuſſion than the power delegated to executors to ſell land. A ſtatute was made in this reign to remove one difficulty, but many ſtill remained. The following is an inſtance where a queſtion of this kind was argued with much difference of opinion. A man deviſed land to his ſon in tail; and if he died without iſſue, he willed that *A.* and *B.* his executors ſhould ſell it. *A.* died, *B.* ſurvived, and made *M.* his exe-

[t] 29 Hen. VIII. New Caſes, 80.
[u] 30 Hen. VIII. Ibid. 81.
[x] 27 Hen. VIII. 23.
[y] 38 Hen. VIII. New Caſes, 82.
[z] 29 Hen. VIII. New Caſes, 277.

cutor,

cutor, and died: then the ſon died without iſſue, and *M.* ſold the land; the queſtion was, whether this ſale was good. This caſe was argued in the exchequer-chamber before all the judges; when it was agreed by all, except *Norwiche*, *Fitzherbert*, and *Moore*, that the ſale was not good. The three diſſenting juſtices urged the old rule of law, that the will of the teſtator ſhould be ſupported by all intendments, though not expreſſed in clear words. Thus a deviſe *in perpetuum* was conſtrued a fee-ſimple. A deviſe "to give and to ſell as he pleaſes," had been conſtrued a fee-ſimple, becauſe the meaning of the teſtator in theſe two caſes appeared to be ſuch. So here the teſtator muſt have been aware, that the eſtate tail might laſt beyond the life of his two executors; and therefore he meant that the land ſhould be ſold by their repreſentatives, that being the only way in which the executors could ſell. Thus, they ſaid, if a man willed that his feoffees ſhould ſell; yet if it happened that the land had been paſſed by recovery or fine, and not by feoffment, then the recoverors or conuſees would have the power, becauſe it was the teſtator's intent that thoſe who had the land ſhould ſell it; and that was of more importance than the particular name under which they held it. If a will was, that after the expiration of an eſtate tail, the chief-juſtice of England ſhould ſell the land, it muſt mean the chief-juſtice for the time being, and not at the time of making the will.

On the other ſide it was ſaid, that this was not a teſtamentary donation, but a *power* to a particular perſon to do a certain act; and as that related to the diſpoſal of land, and ſo required more circumſtance than the diſpoſal of perſonal things, they thought it ſhould be conſtrued more ſtrictly on that account; for a perſon might give a verbal direction to diſpoſe of any chattel to another; but if he would give authority to make livery of ſeiſin, it muſt be in writing. The law ſo much favoured the inheritance in preference to the diſpoſition by will, that if there was any thing

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thing uncertain and doubtful, the land would go to the heir. Thus if a will was, that *H.* ſhould ſell land, and he died before he had ſold it, it ſhould not be ſold at all; for the heir of *H.* could not ſell under the words of the will, it being a truſt in *H.* which if he did not perform according to the will, the land would go to the heir of the teſtator. Again, if a teſtator directed that *B.* and *C.* ſhould ſell his land, *B.* could not alone ſell it, becauſe the truſt was joint. The ſame of a letter of attorney to two to make livery, one could not make it; and if to one, he could not transfer the truſt to another. If I deſire a perſon to ſeal an obligation for me, he could not authoriſe another to do it. So in the preſent caſe, the two executors could not, much leſs could the one who ſurvived, give the truſt to another, namely, to their executors.

As to the intent of the teſtator, they ſaid, that could be carried no further than his words would ſupport it; for every one muſt allow, that where a will authorized ſuch a prior or ſuch a mayor to ſell his land, and there was no ſuch mayor or prior, that the land could not be ſold, notwithſtanding it was the teſtator's intent that it ſhould. In many caſes a will failed of its intention, either on account of the uncertainty who was to execute it, or of the perſon who was to execute it failing; as if a teſtator had willed that his executors ſhould ſell his land, and afterwards forgot to name any, or willed that it ſhould be ſold, but did not ſay by whom; in all theſe caſes the will would be ſo far void. But if land was to be ſold by the heir of *B.* this was ſuch a general term as would include every heir to the twentieth degree, as well *ex parte matris*, as *ex parte patris*; but if *B.* died without heirs, or was attainted, the land could not be ſold.

THE teſtator, in the preſent caſe, being *ceſtui que uſe*, the juſtices took occaſion to conſider the deviſe in that light; and it was agreed by all of them, that before the ſtat. 1 Rich. III. a will of land made by him who had the uſe was not

not good, unleſs the feoffee would concur in ſubſtantiating it; and now, they ſaid, it was only by equity of that ſtatute that a will by *ceſtui que uſe* was good. They ſaid, that when this power was given to his executors, the term *executors* was a *deſcriptio perſonæ*, and did not mean all perſons who by law might become executors, as by ſtat. 25 Ed. III. c. 5. executors of executors; and they ſaid, in this caſe, if *A.* and *B.* had declined adminiſtering the effects, they, though not really executors, might ſtill ſell under the power [a].

SUCH were the arguments on both ſides of this queſtion. It was probably owing to this ample diſcuſſion that the parliament, about two years after, came to a reſolution to remedy the conſequences which followed from ſome of the opinions here delivered for law. It was declared by ſtat. 21 Hen. VIII. that when one or more of the executors refuſed to take upon them the adminiſtration, the others who had might ſell. This, however, left untouched almoſt every thing delivered above; which, after the agreement of ſo many judges, muſt be conſidered as the law of the time. It ſeems too as if this ſtatute had been conſtrued by equity ſo as to authorize certain acts which were not legal on the principles of the above reſolutions of the judges. In the thirtieth of the king, where land was to be ſold by the executors after the death of *J. S.* and the teſtator made four executors and died, and then two of the executors died, and then *J. S.* died; it was held by ſome, that the two ſurviving executors might ſell, becauſe the time for ſelling was but juſt then arrived [b]; and that was alſo the opinion of *Brooke* [c].

THE next object is the juriſdiction of courts. The alterations and innovations that were made in our judicial polity by parliament have already been related. Henry made others by his own authority. The natural courſe of events will always contribute to give a new turn to the

[a] 19 Hen. VIII. 9.
[b] 30 Hen. VIII. New Caſes, 82.
[c] 30 Hen. VIII. New Caſes, 81.

practice

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practice and proceedings of courts. We have ſeen how the king's bench had acquired an acceſſion of civil buſineſs; and in what manner that was increaſed by the diſuſe of real actions, and the increaſe of actions upon the caſe. But with reſpect to theſe, they made ſome diſtinction. Some of theſe were conſidered as not proper ſubjects of cogniſance here. It was held in this reign, that an action upon the caſe againſt an hoſtler, for a horſe ſtolen out of a common inn, would not lie in the king's bench; the ſame opinion prevailed where a perſon negligently kept his fire [a]; and in ſome other inſtances.

The court of chancery.

It is ſtated by a writer of this reign, that the court of chancery would give relief in covenants made without writings, if there were ſufficient witneſſes to prove them; and diſcovery of evidences might be obtained there, when the plaintiff knew not the certainty of them, or what they contained. A ſingular piece of equity was adminiſtered in the following inſtance, which is mentioned as a common courſe of relief in that court. A man bound in an obligation was ſued in a county where the deed was not executed: the obligor brought his bill, ſurmiſing, that by ſuch foreign ſuit he was ouſted of divers pleas which he might have had, if the action had been brought in the proper county: this was conceived a proper ſubject for relief in equity; which was, we may ſuppoſe, by injunction [b].

The juriſdiction of this court was greatly enlarged during the time that cardinal Wolſey preſided there. He choſe to exerciſe his equitable authority over every thing which could be a matter of judicial enquiry. At length, finding himſelf loaded with the number of petitions, often full of untrue ſurmiſes and frivolous complaints, he grew weary of attending to all theſe himſelf; and therefore, as well for his eaſe at all times, as to provide perſons to ſupply his place when abſent on political avocations, he cauſed

[a] Div. of Courts. [b] Ibid.

four

four courts to be erected by commiſſion from the king. One of theſe was held at Whitehall; another before the king's almoner, Dr. Stokeſby, afterwards biſhop of London; a third at the treaſury-chamber; the fourth at the rolls, before Cuthbert Tunſtall, who was then maſter of the rolls, and uſed, in conſequence of this appointment, to hear cauſes there in the afternoon [c].

THIS was the firſt inſtance of the maſter of the rolls hearing cauſes, he having before been only the principal of that council of maſters aſſigned for the chancellor's aſſiſtance; nor is there any notice of a perſon being authoriſed to hear cauſes in the chancellor's abſence till now, when not only the maſter of the rolls had this delegated juriſdiction, but alſo the ſeveral courts juſt mentioned.

THE cardinal maintained his equitable juriſdiction with a high hand; entertaining in one department or other complaints of almoſt every kind, and deciding with very little regard to the common law. This conduct in his judicial capacity furniſhed grounds of accuſation againſt him, when articles were exhibited containing an enumeration of all this great miniſter's offences. He was charged with having examined many matters in chancery after judgment given at common law, and obliging the parties to reſtore what was taken under execution of ſuch judgments [d]. He was accuſed of granting injunctions without any bill filed [e]; and when thoſe would not do, of ſending for the judges and reprimanding them [f]. There is no mention of theſe courts which he had procured to be eſtabliſhed; and which, probably, at that time were thought perfectly legal under the king's commiſſion. After all, notwithſtanding theſe complaints of the cardinal's adminiſtration of juſtice, he has the reputation of having acted with great ability in his office of chancellor; which lay heavier upon him than it had upon

[c] Hiſt. Chanc. 55.
[d] Articles againſt Wolſey, 20.
[e] Articles againſt Wolſey, 21.
[f] Ibid. 26. 4 Inſt. 92.

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any of his predeceſſors, owing to the too great eaſe with which he entertained ſuits, and the extraordinary influx of buſineſs which might be attributed to other cauſes.

THIS ceaſed with the removal of the chancellor; and the buſineſs there ſoon ſunk to its natural level, perhaps rather below it. It is ſaid, that ſir Thomas More, in 22 Hen. VIII. read all the bills himſelf; that on ſome of the days in term there was no cauſe nor motion; and that at one time he had actually diſmiſſed every cauſe in his court. The ſtatutes of wills and of uſes, in a courſe of time, ſupplied new materials, and furniſhed full employment for the chancellor, who again began to ſtand in need of aſſiſtance; which led to confirming the maſter of the rolls in his new judicial authority.

The chancery.

As the chancellor was to adminiſter juſtice according to the dictates of his conſcience, ſome perſons were curious to enquire to what duties in the diſcharge of his office the ſame obligation of conſcience ought to bind him. In this point they ſeem to have rigidly exacted a ſcrupulous exerciſe of his duty from this judge of equity. It is declared by an advocate for this new court, that if the chancellor granted a ſubpœna without taking ſurety, as required by ſtat. 15 Hen. VI. c. 4. and, the matter of the bill being found untrue, the plaintiff was unable to ſatisfy the damages the defendant had ſuſtained, the chancellor was bound in conſcience to yield them. Again, if a bill was brought after judgment paſſed in the king's court, and he took ſureties that were afterwards found inſufficient, and the bill was proved untrue, he would be bound to render the damages, becauſe it was enacted by ſtat. 4 Hen. IV. c. 23. that judgments in the king's courts ſhould not be examined in the chancery, parliament, or elſewhere. So if the chancellor gave judgment upon vehement conjecture, or other information without proof, and better information was offered him, he was held to be bound in conſcience either to amend his ſentence, or make reſtoration to the party

party of all he loſt by it. But if he proceeded upon proofs that turned out to be untrue, no redreſs need be made, becauſe he had reſorted to that trial which was appointed by law: for the better opinion ſeems to have been, that the chancellor was to determine *ſecundum allegata et probata*, and not according to his conjectures and ſurmiſes, as ſome held, under an idea of reaching the real truth of the caſe; and it was accordingly held, that if a perſon had no proof by witneſs, in writing, or otherwiſe, he could have no remedy in chancery. The chancellor, however, might ſo far exerciſe his diſcretion, as, upon a very ſpecial cauſe, and not otherwiſe, to admit a perſon, as well after publiſhing of witneſſes as before, to alledge any new matter that had recently come to his knowledge. For the like purpoſe, a great latitude in pleading was allowed. They held alſo, that he might ſuffer the parties to change their demurrer, which was not allowed in any other of the courts. Again, a double plea, or departure in pleading, or two pleas, where one went to the whole bill, were conſidered as no irregularity in chancery; for the truth was to be inveſtigated by any poſſible means, except ſurmiſe or conjecture.

SOME went ſo far as to make the chancellor liable in conſcience if he granted a ſubpœna on a matter cogniſable at common law; others made a diſtinction where the matter was apparent, and where it was doubtful; others would make him anſwerable for unneceſſary delays in ſuits. But all theſe were refinements that ended in mere ſpeculation; for the chancellor, being a judge of record, was not compellable by law to make amends to any one for errors of judgment, or for any judicial proceeding directed by him [t].

NOTWITHSTANDING the chancery was now long eſtabliſhed in poſſeſſion of its equity-juriſdiction, there were not wanting advocates for the ancient common law, who took upon them to controvert this novel practice by ſubpœna: this led to a diſcuſſion, in which the nature of this

[t] Harg. Tracts, vol. I. 348.

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juriſdiction was canvaſſed on both ſides very ſtrenuouſly, but with very different force and ſucceſs.

THOSE who queſtioned this new judicature contended, that it was unreaſonable for the chancellor to diſpenſe with the common law of the realm in favour of a particular perſon, who by ſome negligence or folly had diſabled himſelf from obtaining redreſs in the uſual courſe of proceeding: that what was ſo done in the chancery was contrary to the common law; and if it was right and lawful, the common law muſt needs be abrogated, for two contrary laws ought not to prevail at the ſame time. They marvelled how the chancellor dared to iſſue writs of ſubpœna to reſtrain perſons from obtaining redreſs at the common law, which the king himſelf could not do by law. The judges were ſworn to adminiſter the law indifferently, which the chancellor was not; the ſerjeants were ſworn to ſee the king's ſubjects juſtified by the law, determinable by the king's judges, but not by the chancellor; all which was contravened, if any man could be ſtopped from his ſuit by ſubpœna. Again, if the known law of the realm was to be over-ruled by the diſcretion of one man, what dependence could the ſubject have? conſcience, the great criterion of deciſion in this court, being too variable and unaſcertained to be a rule of judicial determination.

THEY attributed the great licence of chancellors to their being moſt commonly ſpiritual men, ignorant of the common law; who, truſting to their own ſagacity, thought they could correct with eaſe what appeared to them to be defective in the ancient law of the realm. And yet whoever looked into the *Natura Brevium* would find, that the common law had provided remedies for moſt of the injuries that could be ſuſtained, although there was no mention of any writ of ſubpœna; which, if authoriſed by the common law, would ſurely have been inſerted there for the inſtruction of ſtudents. Finally, they contended that the whole proceeding by ſubpœna was in direct violation of

ſtat.

ſtat. 20 Ed. III. by which neither the chancellor, nor any other, ought to ſend any writ or writing to any juſtices to prevent their proceeding according to the common law of the realm; for, ſaid they, it is the ſame miſchief to ſend ſuch writ to the party, as it was before that ſtatute to ſend it to the juſtices; and ſuch writ could not be juſtified any more in the one caſe than the other. In all theſe attacks upon the court of equity, they never failed to inveigh againſt uſes, as a crafty and illegal innovation [h].

On the other ſide it was alledged, that writs of ſubpœna had iſſued during the times of ſo many chancellors both ſpiritual and temporal, in the reigns of ſo many kings, that it muſt not be preſumed that they acted without good authority of the king and his council, and with the knowledge of the whole realm. That it appears from reports of years and terms, that the chancellors in matters of doubt had called in the advice of the judges, who had given their ſanction to the application of this writ. They alledged the ſtat. 17 Rich. II. giving damages, and ſtat. 15 Hen. VI. requiring ſureties of the plaintiff, which were parliamentary recognitions of the authority aſſumed by the chancellor. And as to ſtat. 2 Ed. III. c. and ſtat. 20 Ed. III. c. they ſaid, the ſubpœna was always directed to the party, and not to the juſtices; and therefore, when the party ſurceaſed to call upon the juſtices for further proceſs, they ſurceaſed to give it him; but if it was directed to them, they need not pay obedience to the writ.

As to the objection, that giving relief in chancery contrary to the common law was ſetting up two laws in the

[h] Theſe ſentiments are contained in a manuſcript tract of the time of Henry VIII. intitled, "A Repli-"cation of a Serjeant to certain "Points alledged by the Student "in St. Jermyn's Dialogue;" and thoſe which follow are contained in a manuſcript tract aſcribed to St. Jermyn, written in anſwer to the ſuppoſed Serjeant, and in ſupport of what had been alledged in favour of the court of chancery. Theſe two ancient pieces are printed in the firſt volume of Mr. Hargrave's Collection of Law Tracts.

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kingdom, they ſaid, that although a man ſhall not at common law plead payment of an obligation without writing, but in chancery he ſhall, yet the law in both courts, as to the right of the debt, was the ſame. The judges knew as well as the chancellor that a payment diſcharged the debt in reaſon and conſcience; but by the maxims and cuſtoms of the law of long time uſed, they could not admit payment only as a ſufficient plea, though they did not pretend that ſuch maxims and cuſtoms extended to all courts. In like manner, in an action on an obligation under forty ſhillings in the county, hundred, or court-baron, the defendant might wage his law; and in London he might confeſs the deed, and pray that it might be enquired what was due upon it. So the ſuperior courts had reſpectively different cuſtoms. Thus in the common-pleas an outlawry might in ſome caſes be reverſed without a writ of error, but never in the king's bench: in the former court, upon the firſt default on a *ſcire facias*, execution was awarded; but in the latter, an *alias* uſed to iſſue. Why, therefore, might not certain rules hold in chancery, that did not hold in the king's bench and common-pleas? Further, the chancery differs from itſelf in practice; for if an officer was to ſue there by privilege on an obligation, payment could not be pleaded, any more than in the king's bench or common-pleas, without writing; but the defendant muſt pray an injunction, and go on by bill and ſubpœna. It ſeemed, therefore, to them to be an advantage to the ſubject that the rule of law ſhould ſtill prevail in the courts of common law; but that the court of equity in chancery ſhould be at liberty to proceed without the reſtraint of it.

As to the chancellor preventing by this writ the progreſs of ſuits, which could not lawfully be done by the king, they ſaid, the king's oath was, that "he ſhall grant "to hold the laws and cuſtoms of the realm;" but if the laws and cuſtoms of the realm are, as well thoſe in chancery as thoſe at common law, as they were juſt ſhewn

to

to be, then the chancellor might adminiſter juſtice by ſubpœna. And though the chancellor was not bound by oath to do juſtice, yet he was bound by conſcience, and more deeply than the judges; for he muſt form his judgments according to the law of God or of reaſon, or the law of the realm, grounded upon thoſe laws. If he erred, therefore, there was greater fault in him than in the judges; for theſe grounds of deciſion were more evident than the general maxims and ſome cuſtoms of the realm. For the chancellor need not meddle with the general rules of the law, nor with writs, nor forms of pleading, which conſtituted the greateſt difficulties of the law. They thought the reaſon why no writ of error lay upon a judgment given on ſubpœna by the chancellor, might be, becauſe the law preſumed that no man could err contrary to laws ſo plain and evident; and if he did err, he was bound to reform it, or to make reſtitution, more ſo than the judges of the common law; for judges might ſometimes give judgment againſt their own knowledge, but the chancellor was never bound ſo to do; not being bound, as they were, to any ſpecial forms of trial or proceeding.

THEY contended, that no danger was to be apprehended from the diſcretion and conſcience of one man, when put in contraſt with the judgment of the common law; for the chancellor was always a perſon choſen by the king for his ſingular wiſdom and integrity, and he was to be governed by the law of God, of reaſon, and of the realm, not contrary to the two former laws; and by theſe rules he was to order his conſcience. Thus if, before the ſtatute of wills, a man deviſed his land in fee, the chancellor was bound to determine this will to be void in conſcience, becauſe it was void in law. So that it was not a ſcrupulous or capricious determination of the chancellor's mind, but a legal diſcretion dictated by the abovementioned conſiderations that was to govern him in his deciſions. They denied that the common law had provided ſufficient

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redreſs for all injuries in the common-law courts, without the aid of conſcience; and they ſaid it was no objection to the writ of ſubpœna, that it was not to be found in the *Natura Brevium*, that work being defective in many other particulars; not containing the action upon the caſe, writ of forcible entry, and many others, which were undeniably warranted by the common law [j].

We may cloſe what is here ſaid of the court of equity by a paſſage in the life of a very eminent chancellor, who has been before named. Sir Thomas More being informed that the judges had expreſſed their diſapprobation of the injunctions he had granted, cauſed a docket to be made of every injunction, and the cauſe of it, which he had granted while he was chancellor; and inviting all the judges to dine with him, in the council-chamber at Weſtminſter, he introduced the ſubject after dinner; when, upon full diſcuſſion of every one of them, the judges confeſſed that he could have acted no otherwiſe. He then offered, that if the judges of every court, to whom it more eſpecially belonged, from their office, to reform the rigour of the law, would, upon reaſonable conſideration, by their diſcretion, and, as he thought, they were in conſcience bound, mitigate and temper the rigour of the law, no more injunctions ſhould be granted by him. To this they would make no engagement; upon which he told them, that as they themſelves forced him of neceſſity to iſſue injunctions to relieve the people's injuries, they could no longer blame him. We are informed, that afterwards, in a confidential converſation, he accounted for the backwardneſs of the judges in the following manner: That they ſaw, how, by the verdict of a jury, they might transfer all difficulties and odium from themſelves to the jurors, which they conſidered as their great defence and ſecurity; whereas the chancellor was obliged to ſtand alone the aſſault of every malignant obſervation [k].

[j] Harg. Tracts, vol. I. 337-351. [k] Rooper's Life of Sir Tho. More, 58.

THE

Court of requests.

THE court of requeſts begun in this reign to be ſtrengthened by a particular commiſſion, and to riſe into greater conſideration than it had before enjoyed. When this new authority was added to it, is not eaſily aſcertained: it is not probable, that it was before the 21ſt year of this king; for this court had not then acquired ſo much notice as to be mentioned by the book *Of the Diverſity of Courts*, written in that year. It is not mentioned in the treatiſe of *St. Germin*, called "Doctor and Student," nor in any of the Reports of this reign: tho' we find that ſtat. 32 Hen. VIII. c. 9. puniſhes perjury committed there; and Lambard ſays, he had ſeen the Book of Entries belonging to this court, in a regular ſeries from the 8th of Henry VII [l].

THIS court was derived from that grand ſource of judicature which we have ſo often mentioned as reſiding in the king, to be exerciſed in ſuch caſes as were not provided for in the ordinary courſe of juſtice. As ſome of the complaints preferred to the king were referred to the council, ſome to the parliament, and ſome to the chancery; ſo others, particularly petitions offered by poor perſons and thoſe of the king's houſhold, were referred to ſome one or two of the council, with a biſhop, ſome doctors of the civil and canon law, and ſome common lawyers, who were called *Magiſtri à libellis Supplicum*, or, *Maſters of Requeſts*. Theſe perſons uſed to hear and determine them according to their beſt judgment and diſcretion. This ſpecies of cogniſance had now grown into a court of ſome conſequence, partaking of the nature of the chancery as to its meaſure of deciſion; but ſtill confined to the ſuits of poor perſons, and thoſe of the houſhold; which qualifications were uſually ſuggeſted in the bills of complaint [m]. In that character it ſubſiſted for many years, till it was aboliſhed, like others of a like equivocal nature, by parliament [n].

[l] Lam. Archeion, 228. [m] Ibid. 228. [n] Namely, by ſtat. 16 Car.

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Tho' Wolſey's courts fell with him, we find the king erecting ſeveral new judicatures in the like way. We have before ſeen, that Henry had eſtabliſhed a tribunal under the ſtile of *The Preſident and Council in Wales:* this was done by letters patent, without any authority from parliament. Henry erected another court by letters patent, called *The Preſident and Council of the North.* After the ſuppreſſion of the leſſer monaſteries, ſome diſturbances and inſurrections had broke out in Lincolnſhire and Lancaſhire, under pretence of vindicating the cauſe of the injured churchmen: upon which Henry, in order to prevent the like commotions upon the diſſolution of the remaining religious houſes, which he then had in contemplation, as well as to preſerve the general order and peace of the northern counties, eſtabliſhed, in the 31ſt year of his reign, this new juriſdiction. This court, as it was formed after the example of the king's own council, had, like that, a general authority, not well defined: it had two commiſſions; one of *oyer and terminer*; another, empowering them to hold plea of real and perſonal actions, where either of the parties were ſo poor as to be unable to purſue the common courſe of legal redreſs; and the judges were to give ſentence either according to the law and cuſtom of the realm, or in an equitable way, according to their wiſdom and diſcretion. This accommodation of a court to decide civil queſtions without the expence and tedioufneſs of the common law, was conceded in compliance with the earneſt requeſt of the rebels themſelves. What other authority the commiſſioners had, uſed to be ſet forth in the commiſſion, which generally gave them powers of ſuperintendance and enquiry as to the police and government of that part of the country. In after-times, the commiſſion uſed to be made in a general way, in order to conceal thoſe extraordinary powers with which they were to be armed; and contained a reference to ſecret inſtructions by which they were to be directed. Theſe concealed

Preſident and council of the North.

cealed inſtructions, as they carried in them ſomething ſuſpicious, excited much clamour at different times againſt the very being of this court, and at length contributed to its diſſolution[o]. There was a court called "the Preſident and Council" erected in the Weſt, by ſtat. 32 Hen. VIII. c. 50. with the ſame authority as this in the North, and that in Wales.

SUCH were the courts that were now employed in the adminiſtration of juſtice. We ſhall next make a few obſervations on the perſonal actions now in uſe, having enlarged ſufficiently on real remedies in the earlier parts of this Hiſtory. The effect of covenants and agreements was a ſource of endleſs debate in the courts of law; and as perſonal property increaſed in value, all contracts concerning it became more ſerious objects of litigation. The law upon this ſubject was now better underſtood, and more fully explained than in any of the foregoing periods. In pleading to an action founded on covenants, they had lately got into a conciſe way, which was not approved by ſome eminent judges. In 26th of the king, in an action of debt on a bond for performance of covenants in an indenture containing many covenants, the defendant had contented himſelf with rehearſing the condition and the indenture, and then ſaying generally that he had performed all the covenants. This general pleading was reprobated ſtrongly by *Engleſield*, *Shelley*, and *Fitzherbert*, who required, he ſhould anſwer ſpecially how he had performed every one. The latter judge ſaid this manner of pleading had obtained within the laſt two years; but it was a corrupt method, and he ſhewed himſelf reſolved to ſet his face againſt it[p].

Action of covenant.

A POINT of pleading was much agitated on the occaſion of another action on bond for performance of covenants. The defendant pleaded that the indenture contained two

[o] Namely, by ſtat. 16 Car. I.

[p] 26 Hen. VIII. 5.

covenants,

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covenants, which he ſet forth, and ſhewed how he had performed them; he ſaid there were other covenants, and he recited them; but he added, that he was an unlettered man, and only the firſt two covenants were read to him, which he had performed, as beforementioned, therefore he prayed *judgment of the action*. To this the plaintiff demurred; and the judges were equally divided upon the concluſion of the plea; *Fitzherbert* and *Brudnell* holding the concluſion to be good, while *Pollard* and *Brooke* maintained the contrary. The queſtion was conſidered as turning upon this point, whether the indenture was void in the whole or in part. Thoſe who thought it was void only in part, held the concluſion of the plea to be good; for having actually ſealed and delivered it, he could not plead *non eſt factum*, and at any rate it was his deed, as far as he aſſented to the contents. The other two judges ſaid, that as only part was read to him, the whole was void; and therefore, after ſtating in his plea the ſpecial circumſtances, he ought to have concluded, *iſſint non eſt factum*[q].

THE action upon the caſe had become ſo common, and it had been found ſo generally applicable, that it was laid down by one of the judges in this reign, that where no other remedy was provided by the law, an action upon the caſe would lie[r]. Some intereſting points aroſe upon theſe actions, whether they were founded on torts, or contracts. It was not yet ſettled that the *aſſumpſit* would lie againſt executors. A caſe of this kind happened in 12th of the king: the teſtator had agreed to pay for goods, if the purchaſor did not; upon this promiſe the goods were delivered, and now an action was brought againſt the executors upon the promiſe. The report ſays, it was held by all the juſtices, that the plaintiff ſhould recover, for two reaſons; firſt, becauſe he had no remedy at law but by this action; ſecondly, becauſe the plaintiff had delivered

Of *aſſumpſit* againſt executors.

[q] 14 Hen. VIII. 25. [r] 14 Hen. VIII. 31.

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the goods on the promiſe of the teſtator; and as there were ſufficient aſſets, *the teſtator's ſoul ſhould not be put in jeopardy* by the prejudice his promiſe had done the plaintiff. To this it was added by *Fineux*, chief-juſtice, that this did not come within the rule of *actio perſonalis moritur cum perſonâ*, which only applied to perſonal injuries. A quære is added by the reporter, whether, if the teſtator was living, this action would lie againſt him? or, whether he might wage his law in ſuch a caſe[s]?

THIS doubt prepares us for an obſervation made many years afterwards upon this deciſion. In the twenty-ſeventh of the king, it was demanded of *Fitzherbert*, whether a man might have an action upon the caſe againſt executors for a debt due by the teſtator; it ſeeming reaſonable, ſo long as they had aſſets, that they ſhould pay all the teſtator's debts. To this *Fitzherbert* anſwered, that he ſhould not have this action, nor any other; for, by the death of the teſtator, all debts due by ſimple contract died alſo. He ſaid, he was counſel for one Clement, in the twelfth year of the king, in an action upon the caſe againſt executors, (the ſame which we have juſt mentioned) and that *Fineux* and *Coningeſby* adjudged the action to be againſt the executors: But, ſays he, I take the law to lie clearly otherwiſe, and they did that without any advice, upon their own opinions merely. And when he was told that the caſe was reported in that year, he recommended it ſhould be expunged from the book, for it was certainly not law[t]. The learned judge does not give any reaſon for his opinion. An action of debt would not lie againſt executors for a ſimple contract debt, becauſe the teſtator might have waged his law; and the executors not having that privilege, it was thought reaſonable that they ſhould not be liable to any action. Perhaps he thought this new-fangled action ſhould not have greater efficacy than

[s] 12 Hen. VIII. c. 11. [t] 27 Hen. VIII. 23.

the

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the ancient remedy; and that the circumſtance of law-wager not lying in this action ſhould make no difference. Whatever were his reaſons, this opinion of *Fitzherbert* ſeems to have governed the courts in the remainder of this reign; for in the thirty-ſeventh year, it was agreed that this action would not lie againſt executors *.

THE nature of *aſſumpſit*, and the diſtinction between this action and an action of debt, is a little explained by the following caſe. A man had come to the wife of the keeper of the compter, and promiſed, if her huſband would let one *Tatam* out of priſon, he would pay the debt to her huſband on ſuch a day, if *Tatam* did not. She related this to her huſband, who agreed to it, and diſcharged *Tatam*; and upon the money not being paid, he brought an action of *aſſumpſit*, as of a promiſe to himſelf. This evidence was objected to, as not ſupporting the declaration; and it was argued in arreſt of judgment, that the action ſhould be debt and not aſſumpſit: but the whole court held the aſſumpſit to the wife to be ſufficient to charge the defendant to the huſband, and that the action was right. They ſaid, that the agreement of the wife in the abſence of the huſband was good till he diſagreed; like a feoffment to a wife, which would be good till the huſband diſagreed, and upon his agreement would be good for ever. Moſt acts of the wife might be thus ratified and made binding in law, by the huſband's confirmation. As to the action, tho' one of the juſtices thought that he might have either debt or aſſumpſit, yet the other three were of opinion that he could not have debt, but only this action. They ſaid, that debt would only lie where there was a contract; and in this caſe, as the defendant had not *quid pro quo*, the plaintiff could not have debt; but his claim was founded wholly on the *aſſumpſit*, which ſounds merely in covenant; ſo that if there had been a ſpecialty, he

* New Caſes, 7.

would

would have had a writ of covenant; but not having a ſpecialty, he could only have his action on the caſe. They recollected a caſe which had lately been adjudged, where a perſon came with a man to a baker, and deſired him to give the man ſome bread, and he would pay for it if the man did not; and a ſpecial action being brought upon this promiſe, it was adjudged, upon demurrer, that the action lay; and they ſaid that debt would not lie in ſuch caſe, becauſe there was no contract between the plaintiff and defendant[w].

An idea had prevailed, as has been juſt obſerved, that the action upon the caſe was a ſort of ſupplementary remedy to come in aid of ſuch perſons as could find no ſpecific remedy among the old writs. Conformably with that idea, it was argued by the counſel in this caſe, that as the plaintiff could have no action of debt, he ought by no means to be ſupported in this new writ: but the whole court denied this; and it was ſaid by one of the judges, that a perſon might chuſe which of two remedies he would rather purſue. Thus, if a perſon bailed goods to another, and they were deſtroyed, or ſpoiled, he might have his election between an action of detinue and one on the caſe. It ſhould ſeem from this reaſoning, as well as from the caſe juſt mentioned, that though this was a remedy peculiarly adapted to ſpecial caſes, grounded on *expreſs* promiſes, yet it had become the practice to bring this action for the recovery of ſimple contract debts, by ſtating the debt to ariſe upon a promiſe to pay, and then, when a debt was proved, conſtruing ſuch legal debt to *imply* a legal promiſe. When the validity of ſuch actions grounded only upon *implied* promiſes, was agitated in a ſubſequent reign, many records of this and an earlier period were produced, to ſhew that it was no new device;

[w] 27 Hen. VIII. 24.

but

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but theſe precedents all paſſed *ſub ſilentio*; for there is no mention made of any ſuch in our books, unleſs the following may be conſidered as ſuch: for in the thirty-third of Henry the eighth, in an action upon the caſe, on an aſſumpſit to pay 10l. the defendant pleaded that he had waged his law in an action of debt for the ſame ſum; and this was held a good bar[x]. We find another action on the caſe, for that the defendant promiſed to pay 10l. which he owed to him for a horſe and cow[y].

To return to ſpecial actions of aſſumpſit. We find in the thirty-fourth of the king, an action of aſſumpſit on an inſurance of a ſhip: the declaration was, that whereas the plaintiff was poſſeſſed of certain wine and other merchandize in a ſhip, the defendant promiſed for 10l. to ſatisfy the plaintiff in 100l. if the ſhip and goods did not arrive ſafe. Beſides the form of action, which is alone to our preſent purpoſe, it may be remarked, that this action laid the goods, &c. to be in the pariſh of St. Dunſtan's in the Eaſt in London; and though in truth the bargain was made beyond ſea, yet they held it well; for in ſuch an action as this, which was not local, the place was declared to be immaterial[z]. There appears an action on the caſe, for that the plaintiff had delivered goods to the defendant, and the defendant had *promiſed* for ten ſhillings to keep them ſafe, but did not[a]. This ſeems to be another novel action of *aſſumpſit*.

Among actions upon the caſe for torts, we find the following. In an action for a nuiſance in ſtopping a river, ſo as to make it riſe on the neighbouring grounds, it was objected, that the proper remedy was by aſſiſe of nuiſance, and not by this action; and the whole court laid down this diſtinction: That where a man's way is ſtopped entirely, ſo as no paſſage remains, there the remedy is

[x] New Caſes, 5. Vid. S. P. 2 Rich. III. fol. 14.
[y] 33 Hen. VIII. New Caſes, 5.
[z] 34 Hen. VIII. New Caſes, 7.
[a] 26 Hen. VIII. New Caſes, 4.

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by aſſiſe; but where only part is ſtopped, ſo that one may paſs with difficulty, there it is by action upon the caſe [b]. If a nuiſance was in the king's highway, and was therefore a public nuiſance, yet every one who received any particular damage therefrom, might ſtill have his action on the caſe [c]. Where an action was brought for words, in calling the plaintiff *heretic*, and one of *the new learning*, it was held clearly that it would not lie, being merely a ſpiritual matter; for if the defendant was diſpoſed to juſtify and ſhew in what reſpect the plaintiff was a heretic, the temporal court could not judge of it, and it was not like where the court had cogniſance of the principal matter, as where a man was called traitor, or felon. Again, if he had called him *adulterer*, this being a ſpiritual matter, an action would not lie for it. But *Fitzherbert* ſaid, that where things were of a mixt nature, as where a man was ſaid to keep a *bawdy-houſe*, he might elect whether he would have his action here or in the ſpiritual court. They added, that if an indictment of hereſy was found before any temporal judge, all he could do would be to certify it to the biſhop [d]. Though a defendant was allowed to juſtify, and ſay, that the charge was *true*, it was not enough to ſay, that it was the common report that he was a *thief* [e].

If there was any doubt, whether an action of *aſſumpſit* uſed at this time to be brought on *implied* promiſes, upon a buying and ſelling, inſtead of the action of debt; there is none, that an action had lately been framed to ſupply the place of that of *detinue*: for we find more than one inſtance of ſuch during this reign. Perhaps that juſt mentioned, where the defendant had promiſed for ten ſhillings to keep the plaintiff's goods ſafe, might be reckoned as one inſtance; for in the old law, that would have been a

Of trover.

[b] 14 Hen. VIII. 31.
[c] 27 Hen. VIII. 27.
[d] 27 Hen. VIII. 14.
[e] 26 Hen. VIII. 9. 27 Hen. VIII. 22.

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proper ſubject of detinue. But thoſe which ſeem to carry a ſtronger affinity to the action of detinue, were grounded not upon a *promiſe*, but a *tort*; and the declaration made much the ſame ſuggeſtion as that in detinue. Thus one of them charges, "that the defendant *found* the goods "of the plaintiff, and delivered them to perſons unknown:" another—"that whereas the plaintiff was poſſeſſed of cer-"tain goods, the defendant *found* them, and converted them "to his own uſe[f]." Another was, "that the goods of "the plaintiff came to the hands * of the defendant, "and he waſted them[g]." In this manner did the action upon the caſe, in one ſhape or other, ſpread itſelf over many of the old writs; and as it had now become applicable to the moſt uſual calls for legal enquiry, by being ſubſtituted in the place of debt and detinue, it grew every day more common.

THE ſtyle of pleading in actions upon the caſe continued much the ſame as in the former period. It was moſt uſual to deny that part of the declaration which *led* to the charge on the defendant; and ſometimes the plea ſtopped there; at other times, they would add a denial of the charge itſelf, by way of concluſion. This will appear from the following inſtances. Firſt, of *aſſumpſit*. In an action, which has been before mentioned, on the defendant's promiſe for ten ſhillings to keep ſafely goods delivered to him by the plaintiff, it was held by *Fitzherbert* and *Shelley*, that *non habuit ex deliberatione* was a good plea[h]. Again, in an action, for that the defendant promiſed to pay 10l. to the plaintiff, which he owed to him for a horſe that he bought of him; the plea might be, which ſum he hath paid to the plaintiff *abſq; hoc*, that he promiſed to pay 10l. which he owed to the plaintiff for a horſe; or *abſq; hoc*, that he *owed* 10l. to the plaintiff for a horſe[i]. This

[f] 33 Hen. VIII. New Caſes, 6.
* *Devenerunt ad manus.*
[g] 34 Hen. VIII. New Caſes, 6.
[h] 26 Hen. VIII. New Caſes, 4.
[i] 33 Hen. VIII. Ibid. 5.

latter

latter form of a traverſe confirms the idea, that they conſidered the *owing* and the *promiſing* to pay, as the ſame thing; and that where the *owing* was diſproved, the promiſe was likewiſe. In an action charging that the goods of the plaintiff came to the hands of the defendant, and he waſted them; the defendant pleaded, "that they did not "come to his hands;" and it was held good; upon which, the defendant gave in evidence, that they were not the plaintiff's goods [k].

In an action for ſhaving *eum novaculâ immundâ et inſalubri*, the defendant pleaded that he did not ſhave the plaintiff *eum novaculâ immundâ et inſalubri modo et formâ*. In another, for not taking care of a horſe, the defendant pleaded in the words of the declaration, that he did ſerve the horſe well and with care, *abſq; hoc*, that he ſerved it negligently and improvidently in the form the plaintiff had alledged. Again, for not curing a horſe, the farrier pleaded, that *non manucepit*, he did not undertake to cure it. For negligently keeping his fire, the defendant pleaded, *quòd ipſe ignem ſuum prædictum ſalvè et ſecurè cuſtodivit, abſq; hoc*, that he kept it ſo careleſsly and negligently, that his neighbour's houſe was burnt for want of his care [l].

Sometimes they would take the allegations of the declaration by proteſtation, and then conclude with a kind of general iſſue: as, in an action for deſtroying a bond intruſted to the defendant to re-deliver on requeſt; the defendant, *proteſting* that he re-delivered it unbroken and untorn, for plea ſaid, that he was in no wiſe guilty of the breaking and tearing of the writing obligatory [m]. Thus were pleas in caſe conceived upon the principle of a juſtification, in the way of a treſpaſs-pleading; and it was only by a traverſe, if ever, that the concluſion was pointed into ſomething like a full denial of the matter charged, and had

[k] 34 Hen. VIII. New Caſes, 6.
[l] Raſtell's Entries, 3. 26. 416. 8.
[m] Raſtell's Entries, 7.

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the effect of a general iſſue. It was an option in the defendant in moſt actions, whether he would plead the general iſſue of *not guilty*, or *non aſſumpſit*, as the caſe might be.

THE action of debt continued in its former ſtate, except that it was broke in upon, and ſuperſeded by the action of *aſſumpſit*, as has already been ſhewn. In the old law, this action had held a ſort of *diviſum imperium* over contracts with the action of accompt, which alſo in like manner with the former loſt ground in proportion as the *aſſumpſit* grew more into faſhion. The principal inducemen to recur to the *aſſumpſit* inſtead of theſe writs, was to preclude the defendant from his wager of law: when, therefore, a tranſaction was ſo circumſtanced, that the law would not allow this privilege, there was no reaſon for going out of the antient track; and if the caſe was ſuch as to be within the compaſs of thoſe remedies, it was ſtill uſual to bring debt and accompt.

Debt and accompt.

IT therefore ſometimes happened as formerly, that a queſtion would ariſe, whether debt or accompt was the proper remedy in the matter in queſtion? A caſe of this kind happened in the twenty-eighth of the king, which furniſhed ſuch topics as will give a very good idea of the diſtinction then made between theſe two actions. *A.* had ſigned and ſealed a *bill* acknowledging he had received a ſum of money to lay out at Roan in French pruens, and ſee them ſafely ſhipped. Upon this an action of debt was brought againſt the executors of *A.* alledging that the money was not laid out in pruens: a verdict was found againſt the defendant; and though it was alledged in arreſt of judgment, that the proper remedy was accompt, and not debt, yet judgment was given, and a writ of error being brought, the ſame point was argued in the King's Bench, when the judgment was affirmed with the concurrence of *Fitzjames*, *Portman*, and *Spilman*, againſt *Luke*. The reaſons upon which the diſſenting judge ſupported his opinion were theſe. He ſaid, that where money was bailed

for

for the buying of merchandize, it was clear if the money was not laid out that the action ſhould be accompt; both, for the money and the profit that had been, or might have been made by detaining the money; for he was a receiver and accountable, and no action of debt lay without a contract. Thus, ſays he, if I become debtor to you for the debt of *T. S.* this does not make me liable to an action of debt, for it is *nudum pactum*. So if I bail to you 20l. to bail to *B.*; here *B.* for the ſame reaſon, cannot have an action of debt againſt you. However, it might be queſtioned, whether the *bill* would change the nature of the accompt into a matter of debt; but he thought not; though he admitted the force of ſome common caſes: as where a horſe was ſold, and the vendee made an obligation for the money, there the nature of the contract was determined, becauſe he was bound to pay the money according to the *obligatory words* in the bond: or where a judgment was recovered; for there the contract was gone, being changed into a thing of a higher nature. He admitted all this; but he ſaid this was a different caſe; for there were in this *bill* no *obligatory words*, nor any thing that purported to be an obligation; but the bill was merely a proof and teſtimony of the accompt; and *non eſt factum* would be no plea, as the action was founded upon the receipt to render accompt, and not upon the bill. He quoted a ſimilar caſe in the time of Henry VI. where a man brought an action of debt upon a contract before the mayor and recorder of London: the defendant there tendered his law: the plaintiff ſaid it was the cuſtom of London, that if a man put his ſeal to a paper, teſtifying a contract, he ſhould be ouſted of his law-wager; upon which the defendant demurred, whether the plaintiff had not by this plea abated his own action; and it was adjudged by the whole court that this well-maintained the action, and did not alter the nature of the contract, but was only a proof and teſtimony of the contract. He admitted, in the caſe at bar, that if the bill had gone on and ſaid, "if I

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"fail in laying out the money, it ſhall be re-delivered to the "plaintiff;" the word "re-deliver" would have amounted to ſomething obligatory, as had been adjudged in the time of Edward IV. But he thought this bill, as it had no obligatory words, was only a proof of the contract, and did not change the nature of it from accompt to debt.

THE juſtices who were of a contrary opinion, argued in this way. They ſaid, that admitting there was no bill teſtifying the receipt, yet by the opinion of all the books, it was in the election of the bailor to have debt or accompt in ſuch caſe. They ſaid, it was ruled in the time of Edward III. that if money was bailed to another on condition that on the bailee making aſſurance of certain land by ſuch a day, he ſhould retain the money for ever; but on not doing ſo, he ſhould re-deliver it; if the condition was not performed, he was either accountable or a debtor, at the election of the bailor. It muſt be the ſame, if money was given to merchandiſe with, or to bail over, as to give in alms; the money in ſuch caſes is the bailor's, till it is given according to the truſt; and he may countermand the gift, and have debt for the money. But *Fitzjames* thought, in this caſe, the property of the money was in the bailee till it veſted in the bailor, by the non-performance of the truſt. They ſaid further, that if money was bailed to one to keep for the uſe of the bailor, and it was not contained in a bag or box, detinue would not lie, becauſe the money could not be diſtinguiſhed; but the party might have debt or accompt. They ſaid, if plate was bailed to a perſon, and he altered it, the bailor might have either detinue or an action upon the caſe. They mentioned this to have been decided in the time of Edward IV. And in the time of *Frowike*, chief-juſtice, they ſaid the following point was argued and ruled: A man bought twenty quarters of corn to be delivered at ſuch a time and place; the vendor did not perform the contract, ſo that the vendee being a brewer, was obliged to buy corn elſewhere at a greater price. It was ruled, that the vendee

vendee might have his action upon the caſe, and alſo debt, for the corn; but not detinue, becauſe the property could not be known: ſo that they thought, in the preſent caſe, it was very reaſonable that the plaintiff ſhould have his option of two actions.

As to the bill, and the form of it, they ſaid, that if it was in theſe words, "this bill witneſſeth that *A.* borrowed "10l. of *B.*" without any thing more, this would charge the executors the ſame as an obligation, and the teſtator would not have been permitted to wage his law againſt it. Any memorandum of owing money, or of an accompt or an acknowledgment of a balance due, if ſealed and delivered as a deed, would be a good obligation in law. Every man's deed was to be taken moſt ſtrongly againſt himſelf.

THEY thought that, in this caſe, the plaintiff could not have accompt againſt the executors, becauſe they were not privy to the tranſaction, and that debt was the proper remedy. They therefore affirmed the judgment; and an injunction which had been obtained in chancery was likewiſe diſſolved; ſo that this matter was, in one ſhape or other, determined in three courts [n].

WE have frequently obſerved, that in debt, detinue, and accompt, the defendant was allowed his law-wager in certain circumſtances, but not in others. How this ſtood at preſent, and the manner of pleading in theſe actions, is worthy of notice; becauſe we ſhall ſee afterwards that this conſideration had great influence in ſettling the method of pleading in the new actions upon the caſe that were ſubſtituted in their ſtead. It was laid down, almoſt in the ſame way as the law had been underſtood for ſeveral years, that in detinue on a bailment by the hands of another, the defendant might wage his law, *becauſe* he ſhall not anſwer to the bailment, but only to the detinue: the ſame in debt

[n] 28 Hen. VIII. Dyer, 20. 118.

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upon a contract by the hands of another; though it would * be otherwiſe in accompt by the hands of another: and the reaſon they admitted this difference in accompt was, becauſe the receipt might be traverſed; from which we are to collect, that it could not in the two former actions °. Again, *Fitzherbert* laid down this difference: where a man came to the poſſeſſion of goods by bailment, and where by *trover* or finding. In the firſt caſe, he was chargeable by force of the bailment only; and if he bailed them over, or they were taken from him, yet he was ſtill chargeable to his bailor by virtue of the bailment. But if he came to them by trover, he was only chargeable on his poſſeſſion; and if he was lawfully out of poſſeſſion of them before he who had right brought his action, he was not chargeable. For this reaſon, in detinue grounded upon a bailment, it would be a good plea for the defendant to ſay he found the goods and delivered them to *J. S.* before the action brought; and he might traverſe the bailment. Though *Shelley* did not quite aſſent to this concluſion, yet he agreed with him, that in many caſes the bailment was traverſable in detinue; and he added, that the *trover* alſo was traverſable in ſome caſes: but this was denied by *Fitzherbert* P. On another occaſion it was laid down by the ſame learned judge, that in accompt, on receipt by his own hands, even though a deed was ſhewn teſtifying the receipt, yet the defendant ſhould be admitted to wage his law: the ſame in detinue; for notwithſtanding the bailment was by deed, yet the detinue is the cauſe of action ⁹. To reconcile what is here ſaid of detinue with what was laid down by *Fitzherbert* before, he muſt be ſuppoſed to mean here a bailment by the hands of another; and that this, though proved by a deed, might yet be diſcharged by wager of law, becauſe he was, according to what is here ſaid, only to anſwer to the detinue. Theſe rules will be found to govern the

* Vid. ant. vol. III. 405.
° 18 Hen. VIII. 3.
P 27 Hen. VIII. 13.
⁹ 27 Hen. VIII. 22.

plead-

pleading in the new actions upon the caſe, which have juſt been mentioned as coming in the place of detinue and debt.

THE alterations made by ſtatute in the criminal law during this reign were very many and very important: the determinations of the courts may be compriſed in a ſmaller compaſs. There are ſome which are worthy of obſervation.

The criminal law.

THE principle which governed the parliament in the beginning of Edward III.'s reign[1], when they declared it unlawful to kill an outlaw, ſeems to have had no influence with that aſſembly in a ſimilar caſe at this time. In 24 Hen. VIII.[2] it was agreed in parliament, that it was not felony to kill a man attainted in a præmunire; for, ſays the report, ſuch a one is out of the king's protection, which is the ſame as if he was out of the realm and government of the king; though it would be otherwiſe of one attainted of felony.

Manſlaughter.

A MAN was arraigned upon an indictment for murder: upon the trial, the jury found him not guilty of the murder, but guilty of homicide or manſlaughter; and the judgment given in the king's bench was, that he ſhould be hanged. Another caſe of the ſame kind was determined in the ſame way by all the judges. The reaſon given by the report is, that manſlaughter is comprehended in murder[3]. From this one ſhould be led to conclude, that the preciſe meaning of murder, as diſtinguiſhed from other killing, was not yet defined; nor indeed did there ſeem to be any direction by which a line could be drawn, till ſtat. 23 Hen. VIII. had taken away clergy from *murder with malice prepenſe*; the form of which expreſſion ſeems to intimate that there might be a murder without malice prepenſe.[4] It is certain that, after this act, murder was more exactly defined as to its legal import; though the diſtinction plainly marked

[1] Vid. ant. vol. II. [2] Bro. Cor. 197. [3] Bro. Coron. 222.

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out by this ſtatute was not obſerved by the courts for ſome time, as we ſhall again ſee in the reign of queen Mary.

If many perſons were concerned in the commiſſion of an unlawful act, and a murder was committed by one, all were conſtrued to be principals in the fact. Thus, if twelve or more went to do a robbery, make a riot, affray, or the like, and one of them entered into a houſe and killed a man, the others were all principals in the murder. Such was the caſe of the Lord *Dacres*, who (together with *Mantel* and others) was executed, becauſe one of the company killed a man as they were hunting together[u]. It was held, that if a man was killed in jouſting, or in play with ſword and buckler, it was felony, notwithſtanding it had been at the command of the king [x].

It had been agreed by the juſtices of both benches, that in an appeal of murder the defendant ſhould not be permitted to plead that the deceaſed aſſaulted him, and that he killed him *ſe defendendo*; but ſhould plead not guilty, and give the ſpecial circumſtances in evidence; and if it appeared ſo to the jury, they ſhould acquit him. Nor was he allowed to have this plea, with a traverſe of the murder; for the matter of the plea was murder (ſays the book): murder could not be juſtified, and the traverſe could not ſtand when the inducement to it failed [y]. The way, therefore, was to plead the general iſſue. A queſtion had ariſen upon ſtat. 31 Hen. VIII. which made it high-treaſon to poiſon any one. A woman had poiſoned her huſband, and the heir brought an appeal of murder. It was contended, that the leſſer offence was merged in the greater, and therefore that an appeal would not lie; and ſo it was held by the court [z].

Some queſtions aroſe on the nature of larceny. In the eighteenth year of the king, it was propounded by the chancellor to all the juſtices, whether if a man took pea-

[u] Kelw. 160. 14 Hen. VIII. Bro. Cor. 172. [y] New Caſes, 21.
[x] Bro. Cor. 228. [z] 31 Hen. VIII. Dy. 50. 4.

cocks,

cocks, that were tame and domeſtic animals, it was felony. The opinion of *Fitzherbert* and *Englefield* was, that it was no felony; becauſe they were *feræ naturæ* as much as doves in a dove-houſe; and if the young of ſuch doves were taken, it was no felony. The ſame of herons taken out of the neſt; of ſwans, bucks, hinds, which were domeſticated; or hares taken out of a garden ſurrounded with a wall; the ſame of a maſtiff, hound, or ſpaniel; or goſhawk reclaimed; for they were more for pleaſure than profit; which was the caſe with a peacock. They agreed, that fruit taken from a tree, or the cutting of trees or corn, was not felony; though it would be different, if they were before ſevered. However, *Fitzjames* and the other judges were of opinion, that peacocks were of the ſame nature with hens, capons, geeſe, or ducks, of which the owner had property, they having *animum revertendi*, unlike fowls of warren, as pheaſants, partridges, and conies, of which it was clear no felony could be committed; ſo that it was at length agreed that felony might be committed of peacocks [a]. A queſtion aroſe upon the ſtat. 21 Hen. VIII. c. 7. concerning ſervants embezzling their maſters' goods. It was aſked, if a perſon delivered an obligation to his ſervant to receive the money due upon it, and the ſervant received and went away with it, converting it to his own uſe, whether this was within the meaning of the ſtatute; and it was thought not, becauſe no goods were delivered, an obligation not being a valuable thing, but a choſe in action. And *Englefield* ſaid, if a perſon delivered to his apprentice wares or merchandize to ſell, and he ſold them, and went away with the money, this was not within the ſtatute; becauſe he had the money by the delivery of his maſter, nor did he go away with the thing delivered to him. Yet if one of my ſervants delivers my goods to another of my ſervants, this ſhall be conſidered as my delivery; and if he goes off

[a] 13 Hen. VIII. 2.

with

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with them, it is within the ſtatute. And *Fitzherbert* ſeems to have doubted whether obligations might not be conſidered as goods within the act; for a gift of *omnia bona et catalla* would paſs all obligations [b].

IF the practice of juſtices of the peace was agreeable to what was laid down for law in our courts, they muſt have been of very little uſe in aſſiſting towards bringing offenders to juſtice. Upon a juſtification under the warrant of a juſtice, in 14th of the king, it was ſaid by *Fitzherbert*, that a juſtice of the peace could not make a warrant to take a man for felony, unleſs he was before indicted. *Brudnell*, the chief-juſtice, aſſented to this; but ſaid he might make a warrant for keeping the peace. *Brooke* ſaid, that the juſtice could not even take one for ſuſpicion of felony, unleſs upon a ſuſpicion of his own; much leſs could he make a warrant for that purpoſe. But they all agreed in holding the officer juſtified; for a juſtice being a judge of record, and having a ſeal of office, the bailiff was not to diſpute his authority, but give obedience to the command of the warrant, and execute it [c]. After all, it ſhould ſeem that a warrant for the peace, which the judges here pronounced to be lawful, might, without any ſtrained fiction, be iſſued againſt felons, and anſwer all the purpoſe of apprehending for felony.

Of trials in two counties.

THE old debate upon the locality of trial was not yet quieted. A man died in the county of Cambridge of a ſtroke he had received in another county, and the heir brought an appeal in the county of Cambridge. The court of king's bench were of opinion, that the jury ſhould come from both counties, according to a caſe in the time of Henry VII. Upon this, it was obſerved by the clerks, that if a man died in London of a ſtroke received in Middleſex, the trial, according to common practice, was by a jury of Middleſex. The court ſaid that

[b] 26 Hen. VIII. Dyer, 5. 2. [c] 14 Hen. VIII. 16.

was

was a different caſe, becauſe London and Middleſex could not join [d]. In theſe caſes no *niſi prius* uſed to be awarded, but the jurors of both counties were obliged to come up to the king's bench. A ſimilar queſtion had ariſen, a few years before, on an appeal for a robbery. The robbery was laid in Wiltſhire, and the procurement and abetting in London: the appeal was brought in Wiltſhire againſt the acceſſaries, and it was objected to for that reaſon. After much argument on both ſides, the opinion of the court was, that the appeal ſhould abate. They laid it down as an eſtabliſhed point of law, that where the tort commenced, there the action ſhould be brought. They admitted, that where goods were taken feloniouſly in one county, and carried into another, the appeal might be in either, becauſe the property was never diveſted out of the poſſeſſor; but it was otherwiſe where goods were ſo taken by a treſpaſſor, for there the property was in the treſpaſſor by the taking, and diveſted out of the owner; ſo that the action muſt be in the firſt county, where the treſpaſs was alone committed. They put the caſe of a ſtroke in one county, and the death in another; but ſaid, that in this caſe there could not be a trial in both counties, becauſe thoſe of London could not join with foreigners, as had been laid down in the former caſe [e]. The offence of the acceſſary was therefore conſidered ſo ſeparate and diſtinct from the other, that he was to be proceeded againſt where he committed his crime.

THE above were inſtances of joining juries of different counties, where an appeal was brought, and the iſſue was to be tried. But we find it laid down, generally, that not only an appeal, but an indictment, might be brought in either county, where the goods were ſtolen in one county, and carried into another [f], upon the ground of its being a felony in both counties. The above caſe of the acceſſary, where a difficulty certainly remained, and the other points

[d] 32 Hen. VIII. Dyer, 46. 8.
[e] 29 Hen. VIII. 38. 50.
[f] 34 Hen. VIII. New Caſes, p. 73.

of

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of ſtealing and killing in two counties, which were not ſettled to the mind of every lawyer, occaſioned an act in the next reign, which has directed how trials ſhould be had in ſuch caſes in future.

The eccleſiaſtical court.

WHILE the king and parliament were engaged in deſtroying the Pope's authority, the juriſdiction and practice of the eccleſiaſtical court was not leſs queſtioned by all ranks of perſons. The proceedings for hereſy were carried on with ſuch zeal as to be open to much odium, and the courſe in which thoſe matters were conducted, was thereby more expoſed to obſervation and cenſure. The branch of the eccleſiaſtical practice which was viewed with moſt jealouſy, was the proceeding *ex officio*. This method of proſecution was conſidered by the common-lawyers in no better light than an abuſe of all law and juſtice. It was, on the other hand, defended by the authority of preſcription, and upon grounds of expediency. Theſe topics were very fully diſcuſſed in print by perſons of ability and eminence. The chief of thoſe who entered into this controverſy, were St. Jermyn, and Sir Thomas More; the former carrying on the attack, whilſt the latter defended the eſtabliſhed order of proceeding.

ON the one hand, it was complained, that perſons were brought before the ſpiritual judge for hereſy, without knowing who had accuſed them; and were thereupon obliged, ſometimes to abjure, ſometimes to do penance, or pay great ſums for redemption thereof; all which grievances were aſcribed wholly to the judge and officers of the court, who were the only perſons viſible to the parties ſuffering. It was contended to be a heavy oppreſſion, that a perſon brought *ex officio* before the ordinary, under ſuſpicion of hereſy, ſhould be compelled to purge himſelf at the will of the ordinary, or be accurſed; which was, in a manner, inflicting a puniſhment without proof, or without an offence.

IN anſwer to this it was urged, that if convening heretics *ex officio* was no longer to be practiſed, and no courſe

was

was to be taken but that of a formal accuſation, it could not be expected that proſecutions ſhould ever be made for hereſy. Many, ſaid they, will give ſecret information to a judge, who would not dare to ſtand forth as parties to accuſe; and, if brought againſt their wills as witneſſes, would readily enough give evidence: this might be obſerved not only in hereſy, but in felonies, and other crimes. They adduced inſtances from the practice of the common law, equally hard on an innocent perſon, and ſimilar with this proceeding. How often, ſays Sir Thomas More, do the judges upon ſuſpicion award a writ to enquire of what fame and behaviour a man is in his country, who lies in the mean time in priſon till the return? If he be returned good, that is, if he be in a manner purged, then he is delivered on paying his fees; if he is returned naught, then he is bound to his good abearing. The fame where a man was indicted, and no evidence was given openly at the bar, as many times happened; for the indictors might have evidence given apart, or might have heard of the fact before they came there; and of whom they heard it, they were not bound to diſcloſe, but rather to conceal, being ſworn to keep the king's counſel, and their own. In ſuch caſe, who is to tell the priſoner the names of his accuſers, to intitle him to his writ of conſpiracy? It is in vain to ſay that the indictors were his accuſers, and them he knew, for he could have no redreſs againſt them for his undeſerved vexation. And if it was ſaid, that the proceeding of theſe twelve men, without open accuſers, was leſs liable to exception than that of a ſingle judge, the learned chancellor anſwers, that in his experience he never ſaw the day, but he would as well truſt the truth of one judge, as of two juries. He thought it therefore a right conduct in judges, without any open information, but merely on general rumour, or ſecret intimation, to bind, as they frequently did, a troubleſome man to his good abearing. And he ſays himſelf, that he, while

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while chancellor, had often put perſons out of the commiſſion of the peace on ſecret information.

UPON the whole, when it is conſidered that hereſy was the firſt offence given in charge at every ſeſſion of the peace and of gaol-delivery, and in every leet throughout the realm, and no proſecutions are there inſtituted, it ſeemed probable, that without ſome ſecret proceeding like that *ex officio*, the crime would go intirely without puniſhment[g].

SUCH were the arguments for and againſt this point of eccleſiaſtical juriſprudence, which, notwithſtanding all oppoſition and animadverſion, continued to maintain its ground.

King and government.

HENRY VIII. was a man of ſome learning, and diſcovered no ſmall degree of induſtry on ſubjects where he had much intereſted himſelf: this appears by his book againſt Luther, of which it is generally agreed he was the author. He gave ſome attention to buſineſs. The preamble and material parts of the bill for empowering him to erect the new biſhoprics, were drawn by the king himſelf; and the firſt draught of it is ſtill extant in his own hand. There are likewiſe ſome minutes of his relative to the biſhoprics he then had in contemplation to erect[h].

THRO' the whole of this prince's reign, he ſeems to have enjoyed the full gratification of his abſolute will and caprice. A concurrence of events had produced a ſtate of things which enabled him, beyond the example of any of his predeceſſors, to tyrannize over all ranks of men, and over the laws themſelves; or, when that was not ſafe, to cauſe ſuch laws to be made as would warrant and legitimate every act of power.

THO' the parliaments of this king were obedient to his commands in moſt points, yet in the article of taxation he ſometimes met with diſappointment. In conſideration,

[g] Sir Tho. More's Works, 907. 995. 1012. [h] Burn. Ref. vol. I. 250.

perhaps,

perhaps, of their numberleſs other compliances, the king endured this with patience; never failing to try all means of keeping on good terms with an aſſembly which he was generally able to make the inſtrument of his deſigns.

In the 14th year of his reign he iſſued privy-ſeals, demanding loans. He carried this ſcheme of arbitrary taxation ſtill further; he publiſhed an edict for a general tax, which, however, he ſtill called a loan; and under that pretence levied 5s. in the pound on the clergy, and 2s. on the laity. In the ſame year, when a parliament had been called, and they had made him a grant payable in four years, he would not content himſelf with the terms the legiſlature had preſcribed, but levied the whole in one year [i].

Not content with this, about two years after, he iſſued commiſſions into every county, for levying 4s. on the clergy, and 3s. 4d. on the laity. But finding ſome reſiſtance to this attempt, he thought it adviſable to ſend letters to every county, declaring that he meant no force by this impoſition, and that he would take nothing but by way of *benevolence*. Mean while the courtiers ventured to contend, that the ſtatute of Richard III. againſt benevolences, as it was made by an uſurper and a factious parliament, could not bind an abſolute monarch, who held his throne by hereditary right. The judges went ſo far as to affirm, that the king might exact by commiſſion any ſum he pleaſed [k].

When doctrines like theſe were propagated from authority, the king was encouraged in renewing at different times theſe arbitrary taxes. The houſe of commons were ſo far from remonſtrating, that they twice paſſed acts for the remiſſion of debts which the king had contracted by theſe loans; in the laſt of which they inſerted a clauſe, requiring that ſuch as had already obtained payment, in the whole or in part, ſhould refund to the exchequer [l].

[i] Hum. vol. IV. 46. 48. [k] Ibid. 61. [l] Ibid. 243.

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NOTWITHSTANDING this injuſtice, he ſucceeded the ſame year inſoliciting new loans. Beſides this, he enhanced the price of gold and ſilver, under pretence that it ſhould not be exported; he coined baſe money; and appointed commiſſioners to levy a benevolence, which was by no means unfruitful. An alderman of London, not contributing according to the expectations of the commiſſioners, was inrolled as a foot-ſoldier for the Scottiſh war; others were impriſoned: ſo that the king, by his prerogative, exerciſed an abſolute controul over the perſons and property of all his ſubjects[m].

ALL this was owing to the tameneſs or ignorance of parliament: overawed by the firmneſs of Henry, unacquainted with the extent of their privileges, and the principles of the conſtitution, they were unable to afford the people any protection. The following is an inſtance how little notion they had of a legal government. The duty of tonnage and poundage had been voted to former kings for life; but Henry levied it ſix years without any renewal of that grant to himſelf: and though four parliaments had ſat during that time, none of them complained of this as an infringement; on the contrary, when they paſſed ſtat. 6 Hen. VIII. c. 14. to give this tax to the king for life, they complain that he had ſuſtained loſſes by thoſe who had *defrauded* him of it[n].

IN the ſame way muſt we account for that extraordinary ſtatute, by which the parliament ordained, that the king's proclamations ſhould have the force of laws[o]. To ſecure the execution of this act, another[p] was afterwards made, appointing that any nine counſellors ſhould form a legal court for puniſhing all diſobedience to proclamations. By theſe two ſtatutes the king was, in effect, made abſolute, and maintained in his own perſon compleatly the legiſlative and executive power of the ſtate.

[m] Hom. vol. IV. 245.
[n] Ibid. 273.
[o] Stat. 31 Hen. VIII. c. 8.
[p] Stat. 34 Hen. VIII. c. 23.

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THE authority given by ſtat. 28 Hen. VIII. c. 17. may be reckoned among the ſingular aggrandizements of royal authority in this reign. That ſtatute enabled any one inheritable to the crown, as limited by Henry VIII. to repeal, after his age of twenty-four years, all ſtatutes to which he had conſented before that age.

THIS reign affords many inſtances of extraordinary power exerciſed as well by ſubjects as by the king. In the 9th year of his reign, the king procured from the Pope the legatine commiſſion for Wolſey, with the power of viſiting all the clergy and monaſteries, and that of ſuſpending all the laws of the church during a twelvemonth [9]. This was a great authority; and Wolſey, to ſecure the execution of it, eſtabliſhed an office, which he called the *Legatine Court*. This new court exerciſed certain cenſorial powers, not only over the clergy, but alſo over the laity. It enquired into matters of conſcience; into cauſes of public ſcandal; into conduct, which, though out of the reach of the law, was contrary to ſound morals. The cardinal went further, and aſſumed the juriſdiction of all the biſhops' courts, particularly that over wills and teſtaments; he alſo preſented to priories and benefices, diſregarding all rights, whether of election or patronage.

THE courts of law gave the firſt blow to theſe great powers. *Allen*, an inſtrument of the cardinal, who uſed to ſit as judge in this court, was convicted of malverſation; and the legate thenceforward thought proper to be more cautious in diſplaying his judicial authority.

THE new appointment of *Vicar-General*, conferred on Cromwell ſome years after, delegated to that officer the king's whole authority over the church, as ſupreme head thereof. This, tho' not ſo extenſive as that exerciſed by Wolſey, and in the hands too of a more diſcreet man, was yet a very eminent ſtation; and being created for the pur-

[9] Hum. vol. IV. 15.

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poſe of making rigorous inquiſition into the ſtate of the religious houſes, gave Cromwell an unlimited ſway. At one time he publiſhed, in the king's name, an ordinance, retrenching many gainful ſuperſtitions, abrogating many of the popiſh holidays, ordering incumbents of pariſh-churches to ſet apart a conſiderable portion of their incomes for repairs, for maintaining exhibitioners at the univerſity, and the poor [r]; all which he did without the ſanction of parliament or convocation.

As if every conſideration and every article of life was to depend on arbitrary will, the king had appointed a commiſſion, conſiſting of two archbiſhops, ſeveral biſhops, and ſome doctors of divinity, to chuſe, among the variety of tenets then promiſcuouſly held, a form of religion for the kingdom. Theſe commiſſioners had not made much progreſs in their undertaking, when the parliament, in 1541, made an act, ratifying all the opinions which they ſhould *thereafter agree upon with the king's aſſent*; provided only, that they eſtabliſhed nothing contrary to the laws and ſtatutes of the realm [s].

If Henry was regardleſs of law in elevating and maintaining his miniſters in extraordinary authority, he was equally void of juſtice in animadverting on them. Wolſey, by exerciſing his legatine authority, had incurred the ſtatute of *præmunire*. Tho' this was by the procurement of the king himſelf, and had been acquieſced in by the parliament and nation for ſome years, he did not ſcruple to ſuffer a ſentence of præmunire to paſs on the cardinal; but executed part of it very readily, almoſt in perſon, by taking poſſeſſion of his immenſe property in houſes, furniture, and other valuables [t]. The king went further: he pretended the whole church had incurred the ſame penalty, by ſubmitting to this papal authority; and the attorney-general had begun to proceed againſt them formally by indict-

[r] Hum. vol. IV. 170. [s] Ibid. 222. [t] Ibid. 94.

ment.

ment. To avert the king's reſentment, they voted him a great ſum of money, made *their humble ſubmiſſion* to him, acknowledged him to be the protector and ſupreme head of the church and clergy of England; and for theſe condeſcenſions obtained a pardon [w].

THE houſe of commons now grew apprehenſive that they alſo ſhould be obliged to purchaſe a pardon for their ſubmiſſion to the legatine authority. They therefore petitioned the king for a remiſſion of this offence to his lay ſubjects; and ſome time after a general pardon was iſſued for all the laity [x].

THUS did the king himſelf encourage and promote a breach of the law; and afterwards turn the delinquency of his ſubjects to his own emolument.

HENRY was not contented with this ſovereign dominion over law and juſtice; he attempted to govern impoſſibilities, and reconcile the plaineſt abſurdities, by means of the omnipotence of parliament. It being thought proper to make ſome alteration in the oath againſt the Pope's authority, certain oaths were deviſed, more comprehenſive and preciſe, to be taken in future; and by the ſame ſtat. 35 Hen. VIII. c. 1. it is provided, that they who have already ſworn the former oaths, or any of them, *ſhall take and eſteem it of the ſame effect and force* as tho' they had ſworn this: thus the taking of one oath is made by act of parliament equivalent to the taking of another. In the ſecond act of ſucceſſion, ſtat. 28 Hen. VIII. c. 7. ſect. 24. there is a repeal of the former act of ſucceſſion; and the oath taken under it was now to be diſpenſed with; the following words were therefore added to the new oath: "*And in caſe* "*any other oath be made, or hath been made by you to any* "*perſon, that then ye are to repute the ſame as vain and* "*annichilate.*" The like clauſe was added to the oath in which the Pope's authority was renounced, which was or-

[w] Hum. vol. IV. 106. [x] Ibid. 107.

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dained by ſtat. 28 Hen. VIII. c. 10. and the like was inſerted in the ſecond oath above alluded to, for renouncing the Pope's authority.

If we are to judge of the general adminiſtration of criminal law in this reign, from the trials that have come down to us of eminent perſons, it appears that the lives of the people were entirely in the hands of the crown. A trial ſeems to have been nothing more than a formal method of ſignifying the will of the prince, and of diſplaying his power to gratify it. The late new-invented treaſons, as they were large in their conception, and of an inſidious import, by giving a ſcope to the uncandid mode of enquiry then practiſed, enlarged the powers of oppreſſion beyond all bounds.

The caſe of Sir Thomas More is a ſtrong inſtance how little anxiety there was to eſtabliſh a capital charge by plauſible proofs, and the little probability there could be of eſcaping conviction. It had been made treaſon to endeavour to deprive the king of his titles: the title of Head of the Church had been conferred on him by parliament; ſo that a denial of that title was treaſon under the new ſtatute. After an impriſonment of near fifteen months, Sir Thomas was brought to a trial for this offence. The indictment was ſo long, and charged ſuch a variety of matter, he ſaid, he could not remember a third part of what was objected againſt him. They then proceeded to proofs. His examination in the Tower by certain lords, was conſidered as evidence ſufficient to ſupport the charge; tho' it amounted to nothing more than a refuſal to anſwer or diſcuſs ſuch queſtions as concerned the King's or Pope's ſupremacy: nor was it till after he had entered on his defence, that Mr. Rich (afterwards lord Rich) and ſome others were examined *vivâ voce*. Upon ſuch evidence he was convicted, to the entire ſatisfaction of the chancellor, who preſided; and who emphatically expreſſed his approbation

bation of the verdict in the words of the famous Jewiſh magiſtrate, *Quid adhuc deſideramus teſtimonium, reus eſt mortis*[y].

THE only charge againſt Anna Boleyn which was ſupported with the leaſt degree of proof, was, "that ſhe had "affirmed to her minions, that the king never had her "heart; and that ſhe had ſaid to each of them apart, "that ſhe loved him better than any perſon whatſoever." This was held *a ſlandering of the king's iſſue begotten between the king and her*; one of the new-made treaſons, and, what is very remarkable, deſigned originally for the protection of her own character, and of that of her progeny[z].

LORD Surrey was indicted of treaſon. We are ignorant what was the tenor of the indictment; but the evidence againſt him was, that he entertained ſome Italians in his houſe, who were *ſuſpected* to be ſpies; that a ſervant of his had made a viſit to cardinal Pole, in Italy; and that he had alſo quartered the arms of Edward the Confeſſor; one of which was thought ſufficient evidence of his keeping up a correſpondence with that obnoxious prelate; the other was judged an indication of his aſpiring to the crown; though he and his anceſtors, during the courſe of many years, had done the ſame, and were juſtified in it by the authority of the heralds. Such were the facts upon which this accompliſhed nobleman was convicted by a jury, and was accordingly executed[a].

IN the criminal proſecutions of theſe times, there are two things worthy of obſervation: firſt, the ſlight facts which were conſidered as proofs of a charge; ſecondly, the ſlight evidence which was allowed to eſtabliſh thoſe facts: an obſervation which may be made as well upon proceedings at common law, as upon the more deciſive way of condemning perſons in parliament.

THE favourite way of proceeding againſt ſtate criminals was by bill of attainder. This extraordinary judgment

Bills of attainder.

[y] Stat. Tri. vol. I. [z] Hom. vol. IV. 159. [a] Ibid. 214.

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was reſorted to according to the occaſion; either to confirm a ſentence already paſſed in ſome court of law, or to enſure the deſtruction of ſuch as might poſſibly eſcape by the openneſs of a common-law trial. Thus the ſentence againſt Empſon and Dudley, upon a flimſy charge of treaſon, was confirmed by bill of attainder; as was that againſt the marquis of Exeter, the lords Montacute, Darcy, Huſſy, and others, who had all been formally tried. Theſe, as they ſucceeded a regular trial and condemnation at law, were not ſo exceptionable as the attainders of Sir Thomas More and biſhop Fiſher for miſpriſion of treaſon; which, perhaps becauſe a caſe that did not extend to life, they ventured on without the examination of witneſſes, or hearing them in their defence. On the other hand, in a capital caſe, the Maid of Kent and her accomplices were all examined in the ſtar-chamber, though not in parliament, before the bill of attainder paſſed upon them [b]. This examination of witneſſes in the ſtar-chamber was probably in order to try the ſtrength of the evidence, and to determine in what way to proceed; though we do not find, that the reſult of ſuch examination was always laid before parliament to enable them to form a judgment on the propriety of that to which they were called upon to aſſent. The privy-counſellors had taken their reſolution; and if they were ſatisfied, the houſes ſeldom concerned themſelves as to any further enquiry.

THE attainders in parliament which we have hitherto mentioned, were carried through with moderation and juſtice, compared with thoſe which followed. In the 29th year of his reign, Henry introduced a new practice of attainting perſons. The counteſs of Saliſbury had become extremely obnoxious to him, on account of her ſon, cardinal Pole; and nothing was more deſired by Henry than to take her off. Various accuſations were framed againſt her; that ſhe hindered the reading of the new tran-

[b] Burn. Ref. vol. I. 146.

ſlation

ſtation among her tenants; that ſhe procured bulls from Rome, which were ſaid to be found in her houſe; and that ſhe kept up a treaſonable correſpondence with her ſon. Theſe charges, however, could not be ſufficiently proved, might be invalidated by her, or would not reach her life. This determined the king to procure her deſtruction in a more deciſive and ſummary way than had been hitherto uſed. For that purpoſe he ſent Cromwell to conſult the judges, whether the parliament could attaint perſons who were forthcoming, without trial, or citing them to appear and defend themſelves[c]. The judges anſwered, that it was a dangerous queſtion; that the high court of parliament ought to give the example to inferior courts of proceeding according to juſtice; no inferior court could act in that arbitrary manner, and they thought the parliament never would. But being required to give a more explicit anſwer, they ſaid, that if a perſon was attainted in that manner, the attainder could never afterwards be brought in queſtion, but muſt remain good in law. As Henry did not want his judges to determine how juſt, but only how effectual this proceeding, ſo conducted, would be; he was ſatisfied with their anſwer, and reſolved to avail himſelf of it againſt the counteſs.

A BILL was brought into the houſe of lords to attaint her of treaſon. The only thing like proof before the parliament was, that Cromwell ſhewed to the houſe a banner, on one ſide of which were embroidered the five wounds of Chriſt, the ſymbol choſen by the northern rebels; on the other ſide, the arms of England; which banner he ſaid was found in the houſe of the counteſs. This was conſidered as an evidence of her approving that rebellion.

FIFTEEN others were attainted in the ſame act; ſome of them, who were friars, for ſaying, "that venomous "ſerpent the biſhop of Rome was ſupreme head of the "church of England;" others for treaſon in general, no particular

[c] Hum. vol. IV. 198.

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particular fact being ſpecified. There is no appearance that witneſſes were examined againſt any of them; if they were, it probably paſſed in the ſtar-chamber, for none are mentioned in the Journals. The haſte with which this famous bill paſſed, is not, of all circumſtances attending it, the leaſt remarkable; it was brought in the 10th of May, was read that day the firſt and ſecond time, and the third next day. In the ſame year, the abbots of Reading, Colcheſter, and Glaſtonbury, were in like manner attainted of treaſon by bill [d].

AFTER the precedent had been introduced, they went on through the whole of this reign attainting perſons in a ſummary general way; the number of which attainders it would be tedious and diſguſting to recount [e]. The moſt ſtriking inſtance of theſe was, when this engine of tyranny was directed againſt the man who, from his devoted attachment to Henry, firſt brought it into uſe. Cromwell, in the next year, was attainted by bill, without trial, examination, or evidence. The duke of Norfolk was, in the latter end of this reign, attainted in the like manner.

NUMEROUS as were the attainders for treaſon, both by bill and by common-law proceedings, theſe did not ſhed ſo much blood as condemnations for hereſy. The kind of execution for this offence is in itſelf ſo horrible, and ſuch ſcenes were ſo often repeated, that it would be irkſome, as well as beſide the purpoſe of this work, to do any thing more than juſt allude to them. The ſtatutes lately made reſpecting religion and the king's ſupremacy, had laid ſo many ſnares both for proteſtants and Romaniſts, that death ſeemed to preſent itſelf on all ſides. The miſerable condition of the people can hardly be better deſcribed than in the obſervation of a foreigner at that time, who remarked, "that thoſe who were againſt the pope were burnt, and "thoſe who were for him were hanged."

[d] Burn. Ref. vol. I. 342. [e] Ibid. 343, where many are mentioned.

It is more to our purpoſe to obſerve, that among the pains inflicted on the unhappy ſufferers for religion, there are two remarkable inſtances where *torture* was uſed. We are told, that the elegant and good Sir Thomas More was ſo inflamed with religious bigotry, as to ſend for to his own houſe a Mr. Bainham, a gentleman of the Temple, who favoured the new opinions; and becauſe he refuſed to diſcover others who agreed with him in his religious ſentiments, the chancellor ordered him to be whipped in his preſence; he afterwards ſent him to the Tower, and there he himſelf ſaw him put to the torture [f]. Torture.

It is alſo related [g], that the chancellor Wriotheſley, having examined Anne Aſcue with regard to the patrons ſhe had at court, and ſhe refuſing to betray them, he ordered her to be put to the torture, which was executed in a very barbarous manner: he ſtood by while it was performing, and ordered the lieutenant of the Tower to ſtretch the rack farther: but he refuſed, notwithſtanding the chancellor's menaces; who, upon that, put his own hands to the rack, and ſtretched it ſo violently, that he almoſt drew her body aſunder [h].

Long and barbarous impriſonment was among the ſufferings of unhappy delinquents. We are told that the aged prelate biſhop Fiſher, being ſtripped of his biſhopric and every ſpecies of property, was confined in priſon above a twelvemonth, with ſcarcely rags enough to cover his nakedneſs [i].

We ſhall now conſider the legal documents of this reign; the firſt of which are the ſtatutes. The ſtatutes began in this reign to aſſume a different appearance from that which they had before borne, but ſuch as they have continued in ever ſince. This difference conſiſted as well in the language and ſtyle, as in the form of them. We have be- Of the ſtatutes.

[f] Hum. vol. IV. 132.
[g] Fox, vol. II. 578.
[h] Hum. vol. IV. 158.
[i] Ibid. 138.

fore

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fore ſeen, that all the acts of one ſeſſion were ſtrung together as chapters of one ſtatute, with one general title prefixed to the whole; but in the fifth year of this king it firſt became the cuſtom to put a diſtinct title to every particular chapter of the ſtatute [k].

A REMARKABLE circumſtance of the ſtatutes of Henry VIII. is, the prodigious length to which they run. The firſt of theſe long ſtatutes is ſtat. 21 Hen. VIII. c. 5. concerning the probate of wills; and from that period, the legiſlature ſeem invariably to have indulged themſelves in the ſame prolixity. To this they were perhaps tempted by the ſubjects which came under their conſideration, and which required very multifarious proviſions; ſuch as the reformation, the ſucceſſion, the poor laws, the revenue, and other matters. Whatever was the object of parliamentary regulation, was ſtill treated with the ſame abundance of proviſions and profuſion of words. The great motive to this new manner of drawing ſtatutes, ſeems to have been an extreme anxiety, that the meaning of the parliament ſhould be intelligible and clear, beyond all poſſibility of queſtion or cavil. To effect this, an act was ſtuffed with numerous clauſes; and the whole compaſs of language was ranſacked for expreſſions to define and fix the preciſe intention of each.

AN act was generally introduced with a long and emphatical preamble, opening the occaſion and object of it, by enumerating the evils and their propoſed remedies. Theſe preambles, though before in uſe, were now much fuller than formerly. The enacting clauſe was conceived with a view to cover every poſſible caſe; and by a ſeries of expreſſions, of a ſimilar or ſynonymous import, to obviate every pretence to elude it. Leſt this ſhould not completely attain the aim of the parliament, ſeveral proviſos, qualifi-

[k] Hum. vol. IV. 138.

cations,

cations, and exceptions were added, to mark out diſtinctly the direction the act ſhould take.

As this conſiderably encreaſed the length of ſtatutes, it alſo rendered them verboſe, perplexed, and tedious. The ſenſe, involved in repetitions, is purſued with pain, and almoſt eſcapes the reader; while he is retarded, and made giddy by a continual recurrence of the ſame form of words in the ſame endleſs period[l]. This ſolicitude to enſure their meaning has in ſome inſtances carried the parliament ſo far, as to heap one proviſo upon another, and ſometimes to inſert the ſame clauſe twice over[m]. Not content with the aid derived from a multiplicity of words, and from repetitions, to prevent miſconſtructions, the parliament in one ſtatute, upon a ſubject of a delicate nature, added the following remarkable clauſe: "And be it finally enacted, by the "authority aforeſaid, That the preſent act, and every "clauſe, article, and ſentence compriſed in the ſame, ſhall "be taken and accepted *according to the plain words and "ſentences therein contained*, and ſhall not be interpreted "nor expounded by colour of any pretence or cauſe, or by "any ſubtle arguments, inventions, or reaſons, to the hin-"drance, diſturbance, or derogation of this act, or any "part thereof; any thing or things, act or acts of parlia-"ment heretofore made, or hereafter to be had, done, or "made, to the contrary thereof, notwithſtanding: and that "every act, ſtatute, law, proviſion, thing and things, here-"tofore had or made, or hereafter to be had, done, or made, "contrary to the effect of this ſtatute, ſhall be void, and "of no value nor force[n]:" a clauſe, which is, at once, an inſtance of the concern and jealouſy felt by the parliament on this ſubject, and an example of that legiſlative language which we have been juſt remarking.

[l] Vid. a ſtrong inſtance of this in ſ. 17 of ſtat. 25 Hen. VIII. c. 21.

[m] Vid. ſect. 8 and 34 of ſtat. 21 Hen. VIII. c. 13. and ſect. 91 and 123 of ſtat. 34 and 35 Hen. VIII. c. 26.

[n] Stat. 28 Hen. VIII. c. 7. ſect. 28.

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THAT this wordy ſtile is of uſe in ſubjects which require legal preciſion, is evinced, from its being adopted much about the ſame time in deeds of conveyance; where we find the like tediouſneſs of phraſeology, and a ſimilar multiplicity of covenants and proviſos. The ſame peculiarity of language has continued ever ſince in both.

WITH all this preciſion in wording the contents of an act, they ſeemed to pay no attention to the title, but to abandon that to chance or ignorance to prefix; the title ſeldom conveying any idea of the deſign or contents of the ſtatute, and often being groſsly incorrect.

Of the Year-book.

THE Reports of this reign are contained in the *Year-Books*, and in *Dyer*; with ſome ſcattered caſes in *Keilway*, *Jenkins*, *Moore*, and *Benloe*; and towards the end of the reign in *Leonard*. The Year-Book is a very ſcanty one, compared with thoſe which went before; owing, probably, to perſons being no longer encouraged with a ſtated appointment to execute this taſk. It contains only the 12th, 13th, 14th, 18th, 19th, 26th, and 27th years; and there ends this famous collection of Reports called the Year-books.

PERHAPS, ſince a taſte for all kinds of learning had begun to prevail, the opinion of this eſtabliſhment of reporters was altered, and it was thought more adviſeable to truſt to the general inclination diſcovered in private perſons to take notes; who, probably, from a competition, would do more towards rendering this department perfect and uſeful, than any temptation from a fixed ſalary: whatever might be the reaſon, ſuch a ſtipend was no longer continued, and the undertaking dropped.

HOWEVER, we find no want of reporters. Theſe began now to multiply; and very ſoon, if not in this reign, furniſhed, all together, a greater variety of caſes than uſed to be taken on the former plan. As there would thenceforward have been no reports, if gentlemen in the profeſſion had not made them, either for their own uſe or with deſign

ſign to publiſh, a certain diligence and attention began to be paid to this new exerciſe of ability; and the buſineſs of reporting opened a new field to the ſtudious for the diſplay of accuracy, judgment, and learning. From this period, there will be ſeen to follow a train of writers of this kind, of various characters and merit, to whom we are obliged for carrying on the written annals of the law down to the preſent time. There is one thing common to all thoſe of this period, that they followed the language in which their predeceſſors had written, and publiſhed their reports in the Law-French.

THE law received great improvement from the many treatiſes and uſeful collections publiſhed in this reign. Theſe, by digeſting the learning of the law, at once gave a poliſh to the rude materials furniſhed by former ages, and rendered the knowledge of them more eaſily attainable. The publications of this reign may be divided into ſuch as were produced by writers of this period, and ſuch as were written in former reigns, and were now for the firſt time put to the preſs. We ſhall purſue theſe two claſſes of publications according to the courſe of time, that the progreſs made in improving the ſtock of legal learning may be diſtinctly perceived. Every addition in theſe times to the lawyer's library is an object of curioſity.

THE moſt diſtinguiſhed writer upon law in this reign, is *Anthony Fitzherbert*, firſt a ſerjeant, and ſome years after a judge of the common-pleas. The firſt book publiſhed by this learned author was his *Grand Abridgement*, printed in 1514 by Richard Pynſon *. So uſeful a work ſoon required another ſupply. In 1516 a ſecond edition was printed by Wynkyn de Worde, or perhaps this is one of the books that were printed for him abroad, where the Law- Fitzherbert.

* It is collected from John Raſtell's preface to the *Liber Aſſiſarum et Placitorum Coronæ*, that he had ſome hand in the publication of this Abridgement. It was printed in three volumes, in folio; and the price of it, and of the next edition in 1516, was forty ſhillings.

French

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French was better underſtood, and where, for that reaſon, many of our law-books uſed to be printed [p]. In 1534 he publiſhed his new *Natura Brevium*, which was reprinted in 1537 [q]. Several books were printed in this reign on the office and duty of a juſtice of peace. The firſt was in 1515, in which year we find two works printed by different printers under the title of *The Boke of Juſtices of Peas* [r]. In 1534 there appeared another work, intitled, "*The Boke for "a Juſtyce of Peace never ſo well and diligently ſet forth.*" All theſe were without any name. Afterwards, in 1541, we find "*The New Booke of Juſtyces of Peace, made by An-"thony Fitzherbert, Judge, lately tranſlated out of Frenche "into Engliſhe* [s]. Theſe are all the writings that are known to belong to Fitzherbert upon the law of England: ſeveral anonymous tracts, which will be mentioned in their proper places, have been attributed to him, though upon no ſufficient authority.

Saint Germain.

SAINT GERMAIN is an author who gained conſiderable note in this reign, by his famous book intitled, "*Doctor and "Student.*" The firſt dialogue of this work came out in 1518, in Latin, with the following title, *Dialogus de Fundamentis Legum Angliæ et de Conſcientiâ.* The ſecond dialogue was printed in Engliſh in 1530; and the next year there appeared a tranſlation of the firſt dialogue. Both afterwards paſſed ſeveral editions, under the title of *Doctor and Student* [t]. This author's writings upon the comparative rights of the eccleſiaſtical and temporal powers will be mentioned in another place.

OF the foregoing performances, the *Abridgement* and *Natura Brevium* of Fitzherbert, and the *Doctor and Student*, are the moſt diſtinguiſhed. The *Abridgement* is a work of ſingular learning and utility. If the date of Statham's

[p] Typog. Antiq. 260, 154.
[q] Ibid. 423. 429.
[r] Ibid. 151. 346.
[s] Typog. Antiq. 554.
[t] Ibid. 333. 379.

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publication could be aſcertained to be antecedent to this, many reflections might be founded on the comparative excellence of the preſent work: it might then be ſaid to be formed on that of Statham; that Statham's was the common-place book of the time, and as ſuch furniſhed a baſis, on which the ſuperſtructure of Fitzherbert's more enlarged and improved work was raiſed; that the experience of a few years pointed out the defects of the former, and enabled Fitzherbert to make the neceſſary corrections. The foundation for theſe obſervations being very uncertain, we can only remark, that the latter work is five times the ſize of the former; that it contains the caſes as low down as the time of its publication; that theſe are abſtracted more fully, and convey the ſenſe of the book more ſatisfactorily: otherwiſe, the order of Statham's work in the titles ſeems to be followed, and the caſes ſeem to be arranged with the ſame diſregard to method and connexion. This Abridgement was a valuable acquiſition to the lawyers of this period, but was ſuperſeded by the Abridgement of Sir Robert Brooke in after-times: the latter abridger had the advantage of his predeceſſor, in poſſeſſing many year-books which he had never ſeen. The original caſes, on the other hand, of the reigns of Richard II. Edward II. Edward I. and Henry III. which are to be found only in Fitzherbert, preſerve to this work a reputation entirely its own. Several in other reigns, and particularly about his own time, are not taken from any book we have; ſo that Fitzherbert's, tho' in general an abridgement, is alſo in many parts an original work.

FITZHERBERT's *Natura Brevium*, like his other performance, is an improvement of a more antient work of the ſame nature and title. It is remarkable, that this treatiſe on the nature and effect of the principal writs in the Regiſter, was publiſhed at a time when thoſe writs were, many of them, going into diſuſe, and ſoon afterwards became obſolete; ſo that hardly nine parts in ten of this work make a portion of our preſent law.

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THE form and ſtile of theſe two works have all the dryneſs of profeſſional treatiſes. The *Doctor and Student* is a production of a different caſt: it conſiſts of two dialogues between a doctor of divinity and a ſtudent of the common law. Theſe contain diſcuſſions on the grounds of our law; and where objections had been ſtated to ſome of its rules and maxims, it is endeavoured to reconcile them with reaſon and good conſcience. The whole is treated in a popular way, with the freedom and language of converſation, conveying, by means of objections, and their anſwers, not an unſatisfactory account of many principles and points of the common law.

Raſtell.

AMONG the law-writers of this reign are to be reckoned *John Raſtell*, the printer and lawyer, and his ſon *William Raſtell*, the lawyer and printer: the former was bred a printer, and though he did not take to the practice of the law, yet it evidently appears from his works, that he had been a diligent ſtudent; the latter, though educated for the bar, and a practicer, ſucceeded to his father's occupation, which he ſeems to have united with his profeſſion, till the honours of the latter at length called upon him to decline it altogether. John Raſtell tranſlated from the French the Abridgement of the Statutes prior to the time of Henry VII. mentioned before [a]. He alſo abridged thoſe of Henry VII. and down to the 23d and 24th of this reign, which were printed together by the ſon William in 1533. This was the firſt Abridgement in the Engliſh language; and it is introduced by the author with a long preface recommending the printing of law-books in Engliſh; and aſcribing great praiſe to Henry VII. for firſt directing the ſtatutes to be made in the mother-tongue. To this writer are aſcribed two other books, *Les Termes de la Ley*, and *The Tables to Fitzherbert's Abridgement*.

[a] Vid. ant. 110.

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The title of authorſhip has, however, been diſputed with reſpect to theſe two works, which have by ſome been given to the ſon William. As to *Les Termes de la Ley*, it was aſcribed to John by Bale; but it is omitted by *Pitts* in his account of him, and peremptorily denied to be his by Wood, who as poſitively attributes it to William: That was Lord Coke's opinion; but biſhop Tanner again reſtores it to John. Perhaps it may be giving to each his diſtinct merit, if we ſuppoſe that John compoſed the original work in French, and that William made the tranſlation, which was printed by him, and was never doubted to be his [y].

THE tables to Fitzherbert's Abridgement were firſt printed in 1517; the tranſlation of the Abridgement of the Statutes in 1519, and again in 1527; *Les Termes de la Ley* [z], in 1527 [a].

To William Raſtell is aſcribed a tract called *The Chartulary*, printed in 1534; but there ſeems no pretence for this ſuppoſition, and the work is no more than the tract which had before been printed under the title of *Carta Fœdi ſimplicis*. How far he was author of the *Termes de la Ley*, has juſt been conſidered. He made a table to Fitzherbert's *New Natura Brevium*, and another of the pleas of the crown. The tables to Fitzherbert's Abridgement, which are aſcribed by ſome to him, are the ſame probably that were before made by his father, and were reprinted by

[y] According to Wood, William was but nineteen years old, and only two years ſtanding in the univerſity, when this book was firſt printed. It is remarkable, that in the reprint of the proem prefixed to the tranſlation, William introduces a ſentence, that was not in the firſt edition, expreſſing that he firſt wrote that book in French, and then tranſlated it into Engliſh. If the above date is correct, the aſſertion of William may perhaps be ſuſpected. Typ. Antiq. 331.

[z] This was the title given to the work by William; but when firſt publiſhed by John, it bore the following title: *Expoſitiones Terminarum Legum Anglorum, et Natura Brevium, cum diverſis Caſibus, Regulis, et Fundamentis Legum tam de Libris Magiſtri Littletoni quam de aliis Legum Libris collectis, et breviter compilatis pro Juventutis valde neceſſariis*; but, though the title was in Latin, the work was in French. Typ. Antiq. 331. 474.

[a] Typ. Antiq. 326, &c.

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William. The performances, therefore, which moſt diſtinguiſh William Raſtell, belong to a later period than this reign: theſe are his *Collection of Engliſh Statutes*, printed in 1559; and his *Entries*, printed long after his death, in 1596 [b].

As valuable a performance as any, perhaps, of this reign, is Perkyns's *profitable boke* on the learning of conveyancing. This was firſt printed in 1532, with the following title: *Incipit perutilis Tractatus Magiſtri Jo. Parkins interioris Templi Socii, &c.* This book is in French [c].

Besides the writings of the above authors, ſeveral books made their appearance in this reign without a name, or any intimation to what name they belonged; though ſome of them have been aſcribed to certain of the writers already mentioned. The earlieſt of theſe anonymous publications is the *Intrationum Liber*, which was printed by Pynſon in 1510 [d]. In 1516 were publiſhed by the ſame printer, the book called *Modus tenendi Curiam Baronis cum Viſu Franciplegii*, the *Retorna Brevium*, the *Modus tenendi unum Hundredum, ſive Curiam de Recordo* [e]: in 1525, the *Diverſite de Courtz et lour Juriſdictiones et alia neceſſaria et utilia*, attributed by ſome to Fitzherbert; and the *Articuli ad Narrationes Novas partim formati*. In the year 1527 was printed the book uſually called *Carta Fœdi*: the title of it was, *Parvus Libellus continens Formam multarum Rerum*; and then, *Carta Fœdi ſimplicis cum Literâ attornatoriâ* is the head-title of the firſt article in the book, and ſo gave it afterwards that name. This is a book of precedents of feoffments, releaſes, and other conveyances, and was frequently reprinted in this reign, ſometimes under the title of *The*

[b] Typ. Antiq. 473, 474.

[c] Lord Coke has been very incorrect in aſſigning the date of ſeveral of the early printed works on our law; but he is unuſually ſo, when, ſpeaking of this, he ſays, "Perkins, "a little treatiſe of certain titles of "the common Laws, wittily and learnedly compoſed and publiſhed in the "reign of king Edward the Sixth." Pref. to 10 Rep. Typ. Antiq. 390.

[d] Typ. Antiq. 255.

[e] Ibid. 260.

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Chartulary, and by ſome is attributed to William Raſtell [f]. In 1540, there came out a book intitled, *The principal Laws and Cuſtoms and Statutes of England which be at this preſent day in uſe* [g]. In 1543, there appeared a book upon the office of ſheriffs, bailiffs of liberties, eſcheators, conſtables, and coroners [h]. At the cloſe of this reign, in 1546, there appeared *A Booke of Preſidentes, exactly written in maner of a Regiſter, and ſhewing howe to make al maner of Evydences and Inſtrumentes.*" And of the ſame date [i], another intitled, *Inſtitutions or principal Grounds of the Laws and Statutes of England* [k]: and another, in 1547, under the title of *The Attorney's Academy* [l].

Most of the foregoing works were repeatedly printed by different printers in the courſe of this reign, and many of them were tranſlated into Engliſh. Some of them were collected and publiſhed together. We find, in 1534, the following pieces were publiſhed by Raſtell, in one quarto volume: *Natura Brevium*, the Olde Tenures, Littleton's Tenures, the New Talys, the Articles upon the New Talys, Diverſitie of Courtes, Juſtice of Peace, the Chartulary, Court Baron, Court of Hundrede, *Retorna Brevium*, the Ordynaunce for takynge of Fees in the Exchequer. In his preface to this publication, addreſſed to the ſtudents of the law, he ſays, that perſons begun to ſtudy the law with reading *Natura Brevium*, the Old Tenures, and Littleton's Tenures [m].

In the year 1544 another collection was printed by Berthelet, containing, the boke for a Juſtice of Peace, the boke that teacheth to keepe a Court Baron or a Lete, the boke teaching to keep a Court Hundred, the boke called *Retorna Brevium*, the boke called *Carta Fœdi*, and the

[f] Typ. Antiq. 387, 388. 447. 481.
[g] Ibid. 408.
[h] Ibid. 555.
[i] Ibid. 521.
[k] Ibid. 708.
[l] Ibid. 874.

[m] His words are, "Lyke as a "chylde goynge to ſcole, fyrſte "learneth his letters out of the abc, "ſo they that entende the ſtudy of "the law do fyrſte ſtudy theſe." Typ. Antiq. 431.